Insight

The Right Legislation for Net Neutrality

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Executive Summary

Using the Congressional Review Act to overturn the Federal Communications Commission's recent network neutrality order goes against the spirit of the law since Congress never passed legislation that could have been contorted by the agency's interpretation in the first place. Indeed, the only path forward is for Congress to pass a bill.

Introduction

A Senate effort to overturn the recent Federal Communications Commission's (FCC) order on network neutrality is a missed opportunity to reclaim congressional prerogatives. Supporters want to use the Congressional Review Act (CRA) to overturn the FCC's recent order, returning the Internet to the utility-style regime of the Obama era. But the original intent of the CRA was not to ratify overreach by the executive branch. Instead, it is intended to overturn rules that were "surprisingly different from the expectations of Congress." Since Congress has never passed a bill on network neutrality, the current effort is strange and misguided. Instead of using the CRA to reinstate rules that were never authorized by Congress, policymakers should focus on crafting a long-term solution to network neutrality.

History

In March of 1996, President Clinton signed into law the Congressional Review Act. The CRA, which enjoyed bipartisan support, was a means of "reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency," according to its legislative sponsors. The authors of the bill freely admitted that federal agencies had been given wide latitude in implementing and interpreting congressional enactments. As a result, parts of Congress's legislative functions,

as written in the Constitution, had effectively been ceded to the executive branch. The CRA was one tool Congress had for regaining some of its legislative prerogative and reigning in the onerous regulatory state. Instead of either simply accepting new rules or having to legislate in extreme detail, Congress could disapprove regulatory rules issued by federal agencies through a joint resolution of disapproval.

Misusing the Congressional Review Act

Using the CRA in the context of network neutrality misuses the CRA and undercuts its original purpose. To begin, Congress has never passed a network neutrality bill. Former Vice President Al Gore's proposed Title VII, which was an early version of network neutrality, was not included in the 1996 Telecommunication Act. The Communications Opportunity, Promotion and Enhancement Bill of 2006, known as COPE, passed the House, but stalled in the Senate. The Internet Freedom Preservation Act failed to pick up steam in 2007, just as Senator Thune's draft proposal failed to pass in 2015. Given the *lack* of a legislative history, there isn't a congressional enactment on net neutrality the CRA would need to defend against FCC misinterpretation and expansion.

Second, if the CRA bill was passed, the Internet would be put into a regulatory regime that was specifically rejected by Congress. In order to apply net-neutrality regulations, in 2015 the FCC reclassified the Internet as a Title II service, which meant that the service was regulated as a telecommunication operator. (See AAF's filing on Title II.) Still, in the decades prior to 2015, the Internet was considered a Title I regime and was lightly regulated instead.

Further, Congress has already answered the question of where the Internet fits into the broader regulatory regime, be it Title I or Title II. Almost immediately after the passage of the 1996 Telecommunications Act, members of Congress wondered if the law was clear enough on the classification of new Internet service. In response, the Stevens Report (named after Alaska Senator Ted Stevens) focused on the definitions and the intent of the Telecommunications Act's drafters, and was meant to solve this issue when it was released in 1998. This report confirmed what had been a long history of regulatory separation between Internet services on the one hand and telephone-based services, stretching back to 1976. Internet providers and other related services would be under light-touch regulation in a separate regulatory silo from telecommunications.

In that report, a number of senators even emphasized that "[n]othing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services." Indeed, changes were made to the bill before it became law

because managers seem to have been concerned that the original language might lead courts to interpret “telecommunications service” too broadly, and inappropriately classify cable systems and broadcasters as telecommunications carriers.

Employing the CRA for network neutrality is a strange misuse, given that the lack of network neutrality legislation and the history of the 1996 Telecommunication Act. As AAF has noted before, there are countless methods available to keep the Internet open and free. Still, the only long-term solution to this decades-long battle is for Congress to step in, compromise, and pass a bill.