Insight

The Congressional Review Act Might Not Fully Restore Net Neutrality, Leaving It A Zombie Regulation

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Executive Summary

Some have pinned their hopes of restoring Obama-era Title II network neutrality rules on the Congressional Review Act (CRA). The CRA allows Congress, through passage of a congressional resolution by a simple majority vote, to overturn a rule issued by a federal agency. Even if a resolution restoring network neutrality was passed in both houses and signed by the President, which seems unlikely, it is far from certain that it would achieve the desired result.

To begin, the CRA only applies to rules. The most important part of the Restoring Internet Freedom (RIF) Order is considered an adjudication, which is defined separately from an order, and there is no guarantee it could be overturned. Regardless, the CRA *would* clearly overturn the current transparency rule, with the result that both the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC) would be hindered from policing bad actors. Last, the CRA is generally understood to shoot down rules, not resuscitate old rules.

The cumulative effect of the CRA would be a zombie regulation, half alive and half dead. The transparency rule, which garnered wide support, would be dead. Simultaneously, the reclassification of Internet service back to its pre-net-neutrality Title I designation would likely survive. Even if the CRA could revive the Title II regulations, which some want, the legal authority for them wouldn't be there. The limitations of the CRA point to only one long-term solution: congressional action.

A Short History of the CRA

The CRA, which enjoyed bipartisan support when Congress enacted it in 1996, was understood then as a way of "reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency." Over the decades, Congress had steadily granted federal agencies more and more power in implementing and interpreting legislation. The result, as the authors of the bill recognized, was that Congress had effectively ceded the legislative function granted it in the Constitution. The CRA was thus a tool to claw back some of this legislative prerogative after Congress lost the power of a legislative veto in a 1983 Supreme Court case. Congress wouldn't have to detail the exact regulations but could more easily disapprove agency rules through a joint resolution of disapproval which would then have to be signed by the president.

Rules and Adjudications

The CRA gives Congress the ability to disapprove a rule, which is defined in Title 5 of U.S Federal Code Subsection 551. In that section, a distinction is made between a rule on one hand and an order on the other. An order is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing."[1] This distinction matters for the current effort.

In 2015 under Chairman Tom Wheeler, the FCC reclassified Internet service from its longstanding Title I designation and made it a Title II service, which meant it was considered a telecommunication utility. At the same time, it issued three rules, limiting an Internet service provider's ability to block content, throttle content, and offer paid prioritization for data. Another rule requiring Internet service providers (ISP) to be transparent about their network practices was reaffirmed.

When the FCC under Chairman Ajit Pai reclassified the Internet and put it back into Title I via the Restoring Internet Freedom (RIF) Order, the three rules were nixed using a declaratory ruling and order. (In addition, the FCC laid out a modified transparency rule, which will be discussed below.) Indeed, a strong case could be made to describe the RIF Order as a dual proceeding with both a rulemaking component and an adjudication. Practically then, the RIF Order could be legally separated into two parts. The transparency rule could face repeal while the reclassification, as an adjudication, would stand. As attorney Bennett Ross noted, "That the FCC conducted a dual proceeding that involved both a rulemaking and an adjudication is neither a new nor novel approach." In previous cases, the D.C. Circuit Court explicitly said there is "nothing in the Administrative Procedure Act or Communications Act that bars such a bifurcation."

Here is the rub: The RIF Order that overturned the three rules and reclassified the Internet under Title I was a declaratory ruling. Courts often interpret FCC declaratory rulings to be adjudications. An adjudication most obviously falls under the category of "order" and not a "rule," as defined in the Federal Code. So, it is not clear the CRA could undo the reclassification of the Internet back to a Title I service.

Deprecated Transparency

Even if the RIF Order is purely an adjudication, and this outside the purview of the CRA, the transparency rule would still fall under the CRA effort—and thus Congress could strike this rule down. The FCC would then be barred from issuing anything "substantially similar," as is laid out in the CRA. So, the FCC couldn't issue any new rules on ISP transparency until Congress gave it explicit authority to do so.

This outcome would hurt efforts to police the internet. By repealing the transparency rule, the CRA would repeal a rule that courts, successive FCC administrations, and advocates of all stripes agree is lawful and beneficial to help root out nefarious actions in the Internet ecosystem.

Zombie Regulations

Will the CRA resuscitate the Title II Order? If the CRA passes and the RIF is "treated as though such rule had never taken effect," to quote the CRA's text, the effect would be a zombie regulation, half alive and half dead. The transparency rule would be gone but the reclassification back to Title I might stand. So, the older rules limiting an Internet service provider's ability to block content, throttle content, and offer paid prioritization for data might be revived, but the Title II reclassification which gives the FCC underlying legal power would be dead. Given the structure of the CRA, to reinstate the Title II Order, Congress would need to pass legislation under regular order.

All of these problems lead to one conclusion: While there are countless methods available to keep the Internet open and free (as AAF has explained) the best long-term solution will require legislation from Congress.

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[1] I would like to thank Bennett Ross at Wiley Rein for bringing these issues to my attention.