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Net Neutrality: Time for Congress to Act

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Should the FCC be allowed to regulate the Internet? That's the question facing Congress as it reviews the "net neutrality" rule recently adopted by the Federal Communications Commission (FCC). The House Commerce Committee is expected to vote soon on a "resolution of disapproval" to void the regulation.

Even if such a resolution is not ultimately adopted—presidential approval is required—the debate will be an important test of Congress's resolve to protect the Internet from harmful regulation and to assert its role in regulatory policymaking.

What Is "Net Neutrality"? The general principle of "net neutrality" is that networks providing access to the Internet should be passive, or "dumb," conduits of information and should not filter or prioritize content being sent through them in any way. The idea originated as an engineering concept in the early days of the Internet; the FCC rules would, for the first time, make the principle a binding legal requirement. The regulations adopted by the FCC, approved on a 3–2 vote in December, forbid "unreasonable" discrimination, leaving the exact practices to be banned to be decided on a case-by-case basis.¹

Interestingly, many hard-core supporters of regulation, such as Senator Al Franken (D–MN), are disappointed with the rule because it does not ban discrimination outright. That would be dangerous, as there are many reasons that differentiation among different types of content could make economic sense or even be critical to managing a network. With increasing demands on the Inter-

net, certain types of prioritization common in other industries—such as selling premium or discount access to content providers—could be beneficial to users. More immediately, growing use of the Web is making active management of that traffic (such as controlling bandwidth-hogging) critical.

While the FCC plan would not bar all discrimination in this way, it would vest vast discretion in the FCC to determine what is allowed and what is not. What, after all, is "unreasonable" discrimination? The rules provide only circular and vague guidance, such as: "Reasonable network management shall not constitute unreasonable discrimination." As a result, critical decisions as to what is permitted will be left to the subjective judgment of five FCC members.

Could a provider take steps to limit "bandwidth hogs" who are consuming vast amounts of available capacity? Could it offer "priority service" to willing content providers for a fee? These questions are left for the commission to handle at its discretion. Not only is such discretion dangerous, but it is hardly likely to create the consistent regulatory atmosphere necessary to encourage needed investment in the Internet.

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Moreover, the approach would no doubt encourage gamesmanship by businesses of all sorts. That was shown earlier this week in a dispute between communications provider Level 3 and Comcast over how much Level 3 would pay Comcast (if anything) for Comcast to handle traffic from Level 3's network.² Such negotiations are common among networks, and the longstanding system of private interconnection agreements has worked quite well. Yet Level 3 now claims that Comcast's request for payment to carry Level 3's traffic violates net neutrality rules. The argument is hogwash, but it is typical of how the neutrality rules are likely to be used in practice.

The overall result would be bad news not just for Web surfers but also for the economy as a whole. Investment in broadband today is one of the few bright spots of the economy, with providers expected to invest some \$30 billion per year in private capital into their networks annually for the next five years, creating hundreds of thousands of jobs. It is also bad news for free speech as FCC regulators are inevitably drawn into debates as to what Web content is treated in what way.

Questionable Authority. At the same time, the FCC's statutory authority to adopt such sweeping rules on the Internet is doubtful. No provision of any statute explicitly gives the FCC authority to impose such rules on the Internet. And while the agency claims that the Communications Act provides implicit authority to regulate the Internet, such claims have been rejected in the past by the courts and are expected to be rejected again.³ Several lawsuits challenging the rule have already been filed.

Congress, however, need not wait for the courts to block this ill-considered rule from taking effect. Most directly, under the 1995 Congressional Review Act, Congress can "disapprove" rules adopted by regulatory agencies. Once a resolution expressing such disapproval is signed by the President, the rule is nullified.

Such a resolution—H. J. Res. 37, by Representative Greg Walden (R-OR)—is expected to be voted on soon by the House Commerce Committee. This is a critical step in a process that will allow Congress to express its view on the FCC's agenda. By itself, the resolution process is not likely to succeed, since presidential approval is required to adopt any such measure.⁴ The resolution, however, is only one of many avenues—including appropriations riders denying funds to enforce the rule—being explored by opponents. Such steps are more likely to succeed, especially if they are included in larger legislation unlikely to be vetoed by the President.

An Early Test for Congress

The FCC's net neutrality vote in many ways represents exactly the sort of regulatory overreach and disregard for legal norms that voters rejected so forcefully last November. Legislators' response to the new rules will be an early challenge for the new Congress, testing whether government's growth will be stemmed or business as usual will continue. Americans will be watching closely for the answer.

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1. See James L. Gattuso, "Red Tape Under the Tree: FCC Plans Internet Regulation for Christmas," Heritage Foundation *WebMemo* No. 3086, December 17, 2010, at <http://www.heritage.org/Research/Reports/2010/12/Red-Tape-Under-the-Tree-FCC-Plans-Internet-Regulation-for-Christmas>.
2. Todd Spangler, "Level 3 Plays Politics in Internet Peering Spat with Comcast," Multichannel News, November 30, 2010, at http://www.multichannel.com/blog/BIT_RATE/31830-Level_3_Plays_Politics_In_Internet_Peering_Spat_With_Comcast.php (March 1, 2011).
3. See James Gattuso, "Net Neutrality and the Courts: The FCC's Shaky Legal Case for Internet Regulation," Heritage Foundation *Commentary*, February 10, 2011, at <http://www.heritage.org/research/commentary/2011/02/net-neutrality-and-the-courts-the-fccs-shaky-legal-case-for-internet-regulation>.
4. Representative Geoff Davis (R-KY) and Senator Rand Paul (R-KY) have proposed legislation (H.R. 10, S. 299) that would require Congress to approve major regulations before they can take effect. This would both strengthen Congress's power to legislate policy and force Members of Congress to take explicit responsibility for that policy.