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Why We Need Net Neutrality Legislation, and What It Should Look Like

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There is ample room for a bipartisan compromise that would simultaneously lock in noncontroversial bright-line protections, end the absurd back-and-forth on FCC jurisdiction, and secure funding to help close the digital divide.

A key reason for the contentious fight over net neutrality regulation, and the source of its partisan strife, is that the way we classify broadband Internet access for legal purposes could have weighty long-term implications: Do we want a broadband system more like a public utility under Title II of the Communications Act, or do we want to rely on private companies to drive the evolution of broadband, with relatively light oversight from the Federal Trade Commission (FTC)? But this is a false dilemma predicated on outdated law, and it has resulted in a ping-ponging of broadband regulations. Congress can and should act to end this "long national nightmare" that is the net neutrality war. There is ample room for a bipartisan compromise on net neutrality that would not only lock in noncontroversial ex ante protections and finally end the absurd back-and-forth on Federal Communications Commission (FCC) jurisdiction, but also secure funding to help close the digital divide with programs that promote digital literacy and broadband adoption—while also accelerating deployment in rural areas.

With the Restoring Internet Freedom Order having hit the Federal Register, broadband Internet access will once again be considered an "information service" under the law—just as it was from 1998 to 2016. With it comes a host of implications, the most important of which is the FCC in effect deciding Congress has not given it the authority to act as the primary regulator of broadband —while in the same process repealing the 2016 net neutrality rules grounded in common carriage.

A subset of net neutrality stalwarts has worked hard to tie its preferred legal authority over implementing net neutrality—Title II of the Communications Act—to net neutrality rules themselves. This notion of Title II being necessary to achieve "real" net neutrality is fiction, especially when it comes to legislation. Congress can craft FCC authority as narrow or broad as it sees fit. Same goes for net neutrality proper: Congress can create its own specific regime, or leave it to the FCC to develop specific rules.

Net neutrality litigation to date has focused, with minor exception, on statutory interpretation of the FCC's authority to create particular kinds of rules, and are not limited by constitutional concerns. Congress is free to address both the question of authority and the substance of those rules, free from the constraints of the old FCC Title I and Title II silos—silos designed during and for an era of fax machines, circuit-switched telephony, and CompuServe email.

A Congressional Resolution of Disapproval (under the Congressional Review Act, or CRA) to stop the FCC is highly unlikely to prove fruitful. It instead serves primarily as a political messaging tool for Democrats. It also makes little sense to wait for the various legal challenges to wind their way through the courts. The Supreme Court and the D.C. Circuit Court of Appeals have made it clear that the statute is ambiguous and the FCC has broad authority to interpret it as it wishes—it is highly unlikely an appeal of the Restoring Internet Freedom Order will see Title II regulations restored. As such, the only real hope advocates of Title II-grounded net neutrality rules have is a Democrat in the White House in 2021—and presumably in perpetuity after that if they want to avoid a repeat of the 2017 repeal.

Instead of relying on near-impossible mechanisms (or risky political bets) to restore deeply flawed rules, policymakers should be negotiating in earnest to end the debate on net neutrality, and in the process make serious advances to close the digital divide—ultimately making both political parties and, more importantly, U.S. residents and businesses, much better off.

The deal proposed here is relatively simple: Instead of focusing narrowly on net neutrality issues, expand the scope of legislation to include funding for broadband adoption and digital-literacy programs, while at the same time establishing baseline rules to protect and promote the open Internet.

Harvard Law scholars Roger Fisher and William Ury are famous for the principled negotiation strategy they encapsulated in their bestseller Getting to Yes. One of the key principles they espouse for successful win-win negotiations is inventing options for mutual gain—expanding the number of bargaining chips available to find opportunities where one side benefits while the other gives up little.

This "Negotiation 101" principle means legislation to solve glaring deficiencies in the Communications Act should not be narrowly focused on issues where there is significant daylight between the two political parties—namely paid prioritization and the scope of FCC authority. Instead, other policy objectives that broaden the potential benefits for either side should be explored.

There is a good deal of flexibility for a potential deal that would end the back and forth on net neutrality inherent to changes in administration. The proposed outline that follows basically pairs relatively constrained FCC oversight of light-touch but effective net neutrality rules with expanded programs for broadband adoption and digital literacy, as well as funding for rural broadband to best promote an innovative Internet ecosystem going forward. This is a deal both parties should be proud to claim victory from.

Clarify that broadband Internet access service is not a "telecommunications service" under Title II of the Communications Act. Congress should first and foremost remove Title II from the broadband picture, and add a new section to the Communications Act to cover broadband with rules that are properly tailored to the dynamic, competition-driven communications network that is the Internet—not to old-fashioned telephone service.

Put widely agreed upon open Internet protections, including no-blocking, no throttling, and transparency requirements, on firm legal ground. These bright-line rules are low-hanging fruit that can, if implemented properly, do most of the heavy lifting of protecting the open Internet without negatively impacting innovation or investment in the network—while also giving application-layer services certainty to invest.

Allow pro-competitive traffic differentiation for applications that require it, while preventing anticompetitive abuses of prioritization. Legislation should allow clear flexibility for traffic differentiation for applications that require it, avoiding an overbroad flat ban on prioritization, while clearly prohibiting anticompetitive conduct. Legislation should put some restrictions on paid prioritization to limit the potential for abuse, such as a simple ban on exclusive dealing or a requirement
to offer similar terms to all customers.

Give the FCC reasonable, but bounded, jurisdiction to enforce open Internet rules. Specifically, a new broadband title of the Communications Act should find a compromise regarding the scope of the FCC's jurisdiction, but focus narrowly on open Internet rules and bridging the digital divide—leaving a broader update to the Communications Act for another day.

Expand the scope and funding of existing digital-literacy and broadband-adoption programs. Legislation should expand support for existing adoption programs, such as NTIA's Broadband Adoption Toolkit, the ConnectHome initiative, and expansion of the FCC's Lifeline program, while also establishing a national clearinghouse to support local digital-literacy and adoption initiatives. Authorizing real funding for demand-side broadband adoption and digital literacy would greatly help in closing the digital divide.

While these proposals represent a potentially fruitful starting point, there is certainly potential for other policy priorities that cannot lawfully be achieved under the current Communications Act to broaden the scope of negotiations. These include prison-phonerate reform, E-Rate-funded middle-

mile access reform, solidifying and modernizing the Lifeline program, etc. There are numerous policy objectives in both parties that could be achieved through legislation that are not allowed under current law (regardless of how broadband is classified).

The opportunity to turn what appears to be an intractable partisan debate into a win for both parties, and more importantly, make U.S. consumers and businesses significantly better off, is at hand. Taking the FCC off the seesaw of over- and under-regulation by removing the constraint of outdated legal classifications can be done. It will require combining balanced, even-handed net neutrality rules that allow for innovation while cutting off the potential for abuse; reasonably constrained, but not non-existent FCC authority; and significant programs and real spending to address the digital divide and need for greater rural broadband infrastructure. The current trench warfare that is the net neutrality debate is helping no one other than the most entrenched advocates who benefit from constant conflict. It is time for détente. Congress, in taking up a net neutrality compromise, has an opportunity to demonstrate to the American public that it can move beyond partisan stalemates. Advocacy-group extremists may not like it, but the American people will certainly benefit from it, should a solution come to pass.