The Federal Communications Commission's Net Neutrality Pendulum: Bipartisan Congressional Legislation Can Stop It

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Abstract

In his July 2021 Executive Order, President Biden urged the Federal Communications Commission (FCC) "to restore net neutrality rules undone by the prior administration." Net neutrality, a term coined by Professor Tim Wu at Columbia Law School in 2002, is the network design principle that all traffic on the internet should be treated the same so that the users of a network, not the operator of the network, decide what the network is used for. The FCC's approach to net neutrality, however, has swung back and forth as the partisan makeup of FCC leadership changes according to the presidential party. In this article, I delve into what net neutrality is, how the FCC has oscillated on net neutrality rules under different administrations in the past two decades, and how bipartisan Congressional legislation can bring this net neutrality pendulum to rest for the best interests of consumers, internet service providers, and the entire internet ecosystem.

Introduction

On July 9, 2021, President Joe Biden signed an Executive Order on Promoting Competition in the American Economy, in which he urged the Federal Communications Commission (FCC) "to restore net neutrality rules undone by the prior administration."[1] The FCC's approach to net neutrality has swung back and forth as presidential parties have switched continually. In 2015, during the Obama administration, the FCC, led by Chairman Tom Wheeler, issued the Open Internet Order, which required internet service providers (ISPs), such as AT&T, Comcast, and Verizon, to practice net neutrality.[2] However, in 2018, during the Trump administration, the FCC, led by Chairman Ajit Pai, issued the Restoring Internet Freedom Order, which revoked net neutrality rules.[3] As President Biden nominated two strong net neutrality supporters to serve on FCC senior leadership, Jessica Rosenworcel as chairwoman and Gigi Sohn as one of five commissioners, the stage is now almost set for the net neutrality pendulum to swing once again.[4] In this article, I delve into what net neutrality is, how net neutrality rules and regulations have swung back and forth between different FCC leaderships, and how Congress can bring this net neutrality pendulum to rest.

Net Neutrality

The net neutrality debate began in the early 2000s, when high-speed broadband started replacing dial-up internet connection. While dial-up ISPs, such as America Online (AOL) and CompuServe, use existing telephone lines, broadband ISPs employ digital subscriber line (DSL)

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[1] White House, "FACT SHEET: Executive Order on Promoting Competition in the American Economy," July 9, 2021.
[2] Federal Communications Commission, "FCC Releases Open Internet Order," March 12, 2015.
[3] Federal Communications Commission, "FCC Releases Restoring Internet Freedom Order," January 4, 2018.
[4] Marguerite Reardon, "Biden's FCC Nominees, If Confirmed, Could Lead to the Return of Net Neutrality Rules," *CNET*, October 26, 2021.

or cable modem technologies, enabling transmission of a larger bandwidth of data. As broadband internet was becoming essential infrastructure for people and the economy, just like roads, electric grids, and telephones, Professor Tim Wu of Columbia Law School proposed "net neutrality" as a network design principle: "The idea is that a maximally useful public information network aspires to treat all content, sites, and platforms equally. This allows the network to carry every form of information and support every kind of application."[5] That is, all traffic on the internet should be treated the same so that the users of a network, not the operator of the network, decide what the network is used for.[6] In practice, this means that ISPs "should neither control how consumers use their networks nor discriminate among the content providers that use their networks."[7]

Wu translated net neutrality into legal guidelines that prevent ISPs from behaving discriminatorily. For instance, an ISP can block or slow down users' access to internet content it disfavors while speeding up access to content it favors. According to Wu, net neutrality "is essentially the application of the idea of common carriage to a twenty-first-century industry."[8] The concept of a common carrier originates from sixteenth-century English common law, and its original meaning is "a private entity that performs a public function."[9] Wu explained, "At the heart of common carriage is the idea that certain businesses are either so intimately connected, even essential, to the public good, or so inherently powerful—imagine the water or electric utilities—that they must be compelled to conduct their affairs in a nondiscriminatory way."[10] Four industries—telecommunications, banking, energy, and transportation—are considered

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[5] Tim Wu, "Network Neutrality FAQ."
[6] Tim Wu, "How the FCC's Net Neutrality Plan Breaks with 50 Years of History," *Wired*, December 6, 2017.
[7] Chris D. Linebaugh, "Net Neutrality Law: An Overview," *Congressional Research Service Report (R46973)*, May 27, 2022, 1.
[8] Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (New York: Alfred A. Knopf, 2010), 311–12.
[9] Wu, "Network Neutrality FAQ."
[10] Wu, *The Master Switch*, 58.

common carriers with public callings.[11] Wu asserted that the internet should also be regulated like a public utility in order to keep it open to all and that net neutrality should be protected by laws and regulations.

The FCC and Telecommunications Law in the U.S.

The FCC formulates its regulatory policy toward ISPs and net neutrality under the Communications Act of 1934 (hereinafter the 1934 Act), as amended by the Telecommunications Act of 1996 (hereinafter the 1996 Act). In fact, the FCC was established under the 1934 Act, signed by President Franklin D. Roosevelt, to oversee and regulate telephone, telegraph, and radio communications so that all Americans could enjoy basic communication services. Title II of the 1934 Act established these communication technologies as common carriers, which follow non-discrimination rules:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.[12]

This common carrier regulation ensured that the general public retained access to fundamental communication services.

As the internet emerged in the 1990s, the 1934 Act was overhauled by a bipartisan Congress with the 1996 Act, "watershed legislation that marked the end of the telephone age and the beginning of the Internet age from a policy perspective."[13] In the 1996 Act, signed by

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[11] Ibid.
[12] 47 U.S. Code § 202.
[13] Ev Ehrlich, "A Brief History of Internet Regulation," The Progressive Policy Institute, March 13, 2014, 1.

President Bill Clinton, Congress codified the distinction between the traditional world of telecommunications services and the emerging world of information services, with common carrier rules limited only to the former. However, the statutory definitions of "telecommunications service" and "information service" in the 1996 Act are ambiguous:

> The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.[14]

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[15]

Furthermore, although the 1996 Act stated that it is the policy of the U.S. "to preserve the vibrant and competitive free market that presently exists for the Internet"[16] and "to promote the continued development of the Internet,"[17] it barely mentioned "broadband," failing to foresee the challenge of broadband internet connection.

With the rise of broadband, the FCC has been left with discretion to interpret and decide whether broadband internet access service (BIAS) is a telecommunications service or an information service, as evidenced by the *Chevron* deference applied in the 2005 U.S. Supreme Court case *National Cable & Telecommunications Association v. Brand X Internet Services* (hereinafter *Brand X*).[18] The court explained:

> *Chevron* requires a federal court to defer to an agency's construction, even if it differs from what the court believes to be the best interpretation, if the particular

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[14] 47 U.S. Code § 153(53).
[15] 47 U.S. Code § 153(24).
[16] 47 U.S. Code § 230(2).
[17] 47 U.S. Code § 230(1).
[18] *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

> statute is within the agency's jurisdiction to administer, the statute is ambiguous on the point at issue, and the agency's construction is reasonable.[19]

The regulatory classification that the FCC gives BIAS, either a telecommunications service or an information service, matters greatly since it is tied to the FCC's ability to adopt net neutrality rules. That is, while the FCC has affirmative authority to regulate providers of telecommunications services as public utility-like common carriers under Title II, providers of information services under Title I are subject only to so-called light-touch regulation.

The FCC's Net Neutrality Pendulum

The FCC is directed by the senior leadership of five commissioners—two Democrats, two Republicans, and a chairperson from the party that controls the presidency. As the partisan makeup of FCC leadership changes according to the presidential party, the FCC has alternated between classifying BIAS as either 1) a heavily-regulated telecommunications service or 2) a lightly-regulated information service. The FCC has defended its ever-changing regulatory policy toward BIAS and net neutrality before courts, but has had mixed success.

Under the Clinton Administration: Telecommunications Service

> In the 1996 Act, the then-emerging "broadband" was mentioned only once as below:
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> The term "advanced telecommunications capability" is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.[20]

Thus, the question of how to classify BIAS was left to the FCC, led by Chairman William Kennard. There are two kinds of BIAS: (1) DSL service, which uses high-speed telephone lines

[19] *Brand X*, 545 U.S. at 980 (2005).
[20] 47 U.S. Code § 1302(d)(1).

owned by local telephone companies, and (2) cable modem service, which uses the network of cable television lines owned by cable companies. As telephone companies have long been regulated as common carriers, the FCC concluded in 1998 that DSL service, which runs over telephone lines, was best classified as a telecommunications service and that telephone companies providing DSL service should be regulated as common carriers under Title II.[21] However, the status of cable companies providing BIAS remained unclear.[22]

Under the Bush Administration: Information Service

A few years later, in 2002, the FCC, led by Chairman Michael Powell, took a different approach toward cable BIAS.[23] The FCC determined that cable BIAS was an information service rather than a telecommunications service. The FCC's regulatory classification of cable BIAS was upheld by the U.S. Supreme Court in *Brand X*.[24] Brand X, a small ISP in California, argued that the FCC should classify cable BIAS as a telecommunications service and that cable ISPs, subject to common carrier regulation, should open their networks to rival ISPs, such as Brand X. However, applying the *Chevron* deference, the court affirmed that the FCC reasonably classified cable BIAS as an information service subject to light-touch regulation and, therefore, cable ISPs were not required to open their networks to other ISPs. In the wake of the *Brand X* ruling, the FCC, led by Chairman Kevin Martin, reclassified DSL service and unified its treatment of all kinds of BIAS as information services.[25]

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[21] In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd. 24012 (1998).
[22] Tim Wu, "A Brief History of American Telecommunications Regulation," in *Oxford International Encyclopedia of Legal History, Vol. 5*, ed. Stanley N. Katz (Oxford: Oxford University Press, 2009), 95.
[23] Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 FCC Rcd. 4798 (2002).
[24] *Brand X*, 545 U.S. 967 (2005).
[25] In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14853 (2005).

At the same time, the FCC commissioners voted unanimously to adopt an internet policy statement that expressed the FCC's support for net neutrality. The statement was based on the "Net Freedom" principles that Chairman Powell laid out in his speech at the 2004 Silicon Flatirons Conference in Boulder, Colorado. Powell urged the broadband network industry to adopt these voluntary principles, which stated that users of the internet should have the freedom to access content, use applications, attach personal devices, and obtain service plan information.[26] In its internet policy statement, the FCC endorsed four principles: consumers are entitled (1) to lawful internet content of their choice, (2) to run applications and use services of their choice, (3) to connect their choices of legal devices, and (4) to competition among network providers, application and service providers, and content providers.[27] The FCC noted that "the Commission did not adopt rules in this regard," but that it would rather "incorporate these principles into its ongoing policymaking activities."[28]

The FCC's effort to enforce its internet policy statement against the BIAS provider Comcast was overturned by the U.S. Court of Appeals for the District of Columbia Circuit (hereinafter the D.C. Circuit).[29] In 2007, as Comcast subscribers began to have trouble using BitTorrent and similar peer-to-peer (P2P) file sharing applications over their Comcast broadband connections, the press, most notably the Associated Press, conducted several experiments and discovered that Comcast was intermittently blocking or throttling BitTorrent traffic on its network. In 2008, after conducting its own investigation, three FCC commissioners—Republican Chairman Martin siding with two Democrats—voted in favor of ordering Comcast to end its discriminatory network management practices, which significantly impeded consumers' ability

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[26] Federal Communications Commission, "Powell Urges Industry to Adopt "Net Freedom" Principles," February 9, 2004.
[27] In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14886 (2005).
[28] Federal Communications Commission, "FCC Adopts Policy Statement," August 5, 2005.
[29] *Comcast Corporation v. Federal Communications Commission*, 600 F.3d 642 (2010).

to access content and use applications of their choice, violating the FCC's 2005 internet policy statement. The FCC argued that Comcast selectively targeted P2P applications, which had "become a competitive threat to cable operators such as Comcast because Internet users have the opportunity to view high-quality video with BitTorrent that they might otherwise watch (and pay for) on cable television."[30] Comcast maintained that its actions were reasonable network management and appealed the FCC's decision to the D.C. Circuit. In *Comcast Corporation v. FCC* in 2010 (hereinafter *Comcast*), the court ruled that without any grant of statutory authority, the FCC could not base ancillary authority to regulate ISPs upon broad policy goals and statements alone and that the FCC did not have jurisdiction over Comcast's network management practices.[31]

Under the Obama Administration: Telecommunications Service

A few months after the *Comcast* ruling, the FCC, led by Chairman Julius Genachowski, took a step further by adopting a binding order on internet openness.[32] The 2010 Open Internet Order imposed three basic rules on BIAS providers: (1) a transparency rule requiring them to disclose their network management practices, performance, and commercial terms, (2) an anti-blocking rule prohibiting them from blocking lawful content, applications, services, or non-harmful devices, and (3) an anti-discrimination rule prohibiting them from unreasonably discriminating in transmitting lawful internet traffic. However, the FCC still classified BIAS as an information service under Title I. Genachowski announced, "[the FCC] would not reclassify broadband as a Title II telecommunications service. I am satisfied that we have a sound legal

[30] In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028 (2008).
[31] *Comcast*, 600 F.3d 642 (2010).
[32] In the Matter of Preserving the Open Internet, 25 FCC Rcd. 17905 (2010).

basis for this approach."[33] But, in *Verizon Communications Inc. v. FCC* in 2014 (hereinafter *Verizon*), the D.C. Circuit vacated the anti-blocking and anti-discrimination rules, leaving only the transparency rule intact.[34] The anti-blocking and anti-discrimination rules, which required BIAS providers to offer service indiscriminately, amounted to *per se* common carrier regulation. The court explained:

> Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such.[35]

The court ruled that the FCC could not regulate BIAS providers, which the FCC classified as information service carriers, as common carriers.

In the wake of the *Verizon* ruling, President Barack Obama issued a statement on net neutrality, urging the FCC to reverse its long-standing interpretation of the 1934 Act, as amended by the 1996 Act, and reclassify BIAS as a telecommunications service under Title II, subject to common carrier regulation.[36] The following year, the FCC, led by Chairman Tom Wheeler, adopted a new order that reclassified BIAS as a telecommunications service under Title II (hereinafter the 2015 Title II Order).[37] The 2015 Title II Order imposed three bright-line rules on BIAS providers: (1) an anti-blocking rule prohibiting them from blocking lawful content, applications, services, or non-harmful devices, (2) an anti-throttling rule prohibiting them from impairing or degrading lawful internet traffic on the basis of content, applications, services, or non-harmful devices, and (3) an anti-paid prioritization rule prohibiting them from

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[33] Federal Communications Commission, "Chairman Julius Genachowski Remarks on Preserving Internet Freedom and Openness," December 1, 2010.
[34] *Verizon Communications Inc. v. Federal Communications Commission*, 740 F. 3d 623 (D.C. Cir. 2014).
[35] *Verizon*, 740 F. 3d at 628 (D.C. Cir. 2014).
[36] White House, "Statement by the President on Net Neutrality," November 10, 2014.
[37] In the Matter of Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015).

favoring some internet traffic over others in exchange for consideration. The 2015 Title II Order also adopted a general conduct standard that prohibited BIAS providers from unreasonably interfering or unreasonably disadvantaging consumers or edge providers (e.g. Google, Netflix) and gave the FCC the authority to address questionable practices on a case-by-case basis. In *United States Telecom Association v. FCC* in 2016 (hereinafter *USTA*), the D.C. Circuit concluded that the FCC's reclassification of BIAS was permissible under the *Chevron* deference and upheld the 2015 Title II Order in its entirety, providing a solid legal foundation for the FCC's net neutrality regulations.[38]

Under the Trump Administration: Information Service

In January 2017, shortly after his inauguration, President Donald Trump appointed Ajit Pai as FCC chairman. Pai, an FCC commissioner since 2012, had been opposed to the adoption of the 2015 Title II Order. In his dissenting statement, then-commissioner Pai argued that "President Obama's plan to regulate the Internet isn't the solution to a problem. His plan is the problem."[39] He further maintained:

> I am optimistic that we will look back on today's vote as an aberration, a temporary deviation from the bipartisan path that has served us so well. I don't know whether this plan will be vacated by a court, reversed by Congress, or overturned by a future Commission. But I do believe that its days are numbered.[40]

As chairman, Pai led the FCC in its repeal of the 2015 Title II Order. In December 2017, the FCC adopted the Restoring Internet Freedom Order, in which the FCC reclassified BIAS as an information service and removed the bright-line rules (no blocking, no throttling, and no paid prioritization) and the general conduct standard (no unreasonably interfering or unreasonably

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[38] *United States Telecom Association v. Federal Communications Commission*, 825 F. 3d 674 (2016).
[39] Ajit Pai, "Dissenting Statement of Commissioner Ajit Pai Re: Protecting and Promoting the Open Internet," March 12, 2015, 1.
[40] Pai, "Dissenting Statement," 67.

disadvantaging consumers or edge providers). The FCC left in place only a transparency rule that requires BIAS providers to publicly disclose their network management practices, including any blocking, throttling, and paid prioritization practices, and restored the Federal Trade Commission (FTC)'s jurisdiction over BIAS providers to police for anticompetitive behavior or unfair and deceptive practices.

The FCC reasoned that the 2015 Title II Order's net neutrality rules were unnecessary since the transparency requirements, combined with existing antitrust laws and consumer protection laws enforced by the FTC, would achieve comparable benefits at a lower cost. The FCC also argued that this new light-touch regulation of BIAS is more likely to promote broadband investment and innovation than the heavy-handed utility-style regulation under Title II. In *Mozilla Corporation v. FCC* in 2019, the D.C. Circuit upheld the classification of BIAS as an information service subject to Title I under the *Chevron* deference[41]:

> We uphold this classification as reasonable under *Chevron*. As we said in *USTA* (and as the Title II Order and Petitioners recognize), the Commission has compelling policy grounds to ensure consistent treatment of the two varieties of broadband Internet access, fixed and mobile, subjecting both, or neither, to Title II.[42]

The D.C. Circuit upheld most of the other provisions in the Restoring Internet Freedom Order as well.

Under the Biden Administration (2021 – Present)

As Pai resigned as FCC chairman shortly after the start of the Biden administration, President Biden appointed one of the Democratic commissioners, Jessica Rosenworcel, as acting chairwoman in the interim in January 2021 and later as permanent chairwoman in October 2021.

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[41] *Mozilla Corporation v. Federal Communications Commission,* 940 F.3d 1 (D.C. Cir. 2019).
[42] *Mozilla,* 940 F.3d at 35 (D.C. Cir. 2019).

Rosenworcel, an FCC commissioner during both the Obama and Trump administrations, consistently remained a strong supporter of net neutrality during its rise and fall at the FCC. She pushed for the adoption of the 2015 Title II Order and resisted the Restoring Internet Freedom Order. Then-commissioner Rosenworcel wrote in her dissenting statement:

> I dissent from this rash decision to roll back net neutrality rules. I dissent from the corrupt process that has brought us to this point. And I dissent from the contempt this agency has shown our citizens in pursuing this path today. This decision puts the Federal Communications Commission on the wrong side of history, the wrong side of the law and the wrong side of the American public.[43]

President Biden also nominated telecom lawyer Gigi Sohn, who has long been an advocate of net neutrality, to fill the vacant fifth commissioner seat. Although Sohn's confirmation by the Senate has been delayed since October 2021, once it is complete, the FCC will be fully staffed with five commissioners, three Democrats and two Republicans, ready to bring net neutrality back.

In his July 2021 Executive Order, President Biden has already urged the FCC to consider adopting net neutrality rules similar to those in the 2015 Title II Order.[44] Furthermore, earlier, in March 2021, President Biden appointed Professor Wu, who coined the term net neutrality, to the National Economic Council of the White House as special assistant to the president for technology and competition policy.[45] If the FCC indeed revives the 2015 Title II Order, it would mark the fourth reclassification of BIAS in less than two decades, with the fifth inexorably following if the partisan makeup of FCC leadership should change again after the next presidential election. This unstable and uncertain regulatory policy toward BIAS cannot be good for consumers, ISPs, or the entire internet ecosystem. It is time for Congress to intervene and put

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[43] Jessica Rosenworcel, "Dissenting Statement of Commissioner Jessica Rosenworcel Re: Restoring Internet Freedom," December 14, 2017, 1.
[44] White House, "Executive Order on Promoting Competition in the American Economy," July 9, 2021.
[45] White House, "White House Announces Additional Policy Staff," March 5, 2021.

an end to the back-and-forth of the net neutrality pendulum that has taken place between different FCC leaderships.

Toward Bipartisan Congressional Legislation

Clear Congressional legislation can bring a more permanent solution to the net neutrality pendulum swinging every time there is a change in administration. The FCC has discretionary authority to classify and reclassify BIAS as a telecommunications service or an information service under the *Chevron* deference. *Chevron* comes into play only when there are ambiguities in statutes, as the Supreme Court explained in *Brand X*: "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion."[46] As Congress has legislated ambiguously as to the status of BIAS in the 1996 Act, Congress can and should make necessary changes to clarify ambiguities in the outdated 1996 Act.

During the Trump administration, Congress pursued legislation, the Save the Internet Act of 2019, that would codify net neutrality rules in the 2015 Title II Order, while repealing the Restoring Internet Freedom Order.[47] The Act, if passed, would classify BIAS as a telecommunications service under Title II subject to the FCC's common carrier regulation, restore net neutrality regulations, including those that prohibit blocking, throttling, and paid prioritization, and establish a general conduct standard. Congress, however, was divided. Although the House of Representatives, where Democrats had a majority, passed the Act by a vote of 232 to 190 on April 10, 2019, the Republican majority leader of the Senate, Mitch McConnell, declared the Act to be "dead on arrival in the Senate."[48] The Executive Office of the

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[46] *Brand X*, 545 US 967 (2005).
[47] H.R. 1644 – Save the Internet Act of 2019, 116th Cong. (2019).
[48] Jordain Carney, "McConnell: Net Neutrality Bill 'Dead on Arrival' in Senate," *The Hill*, April 9, 2019.

President also issued a statement that "[t]he Administration strongly opposes House passage of H.R. 1644 [the Save the Internet Act of 2019]. […] If H.R. 1644 were presented to the President, his advisors would recommend that he veto it."[49]

Simply trying to legislate a net neutrality law under the current framework of an information service under Title I and a telecommunications service under Title II only reignites a partisan battle. Rather, all members of Congress, regardless of party affiliation, should work together to enact legislation that would move beyond the old classification enshrined in the outdated 1996 Act to appropriately address today's dynamic internet, while protecting consumers and promoting network investment and innovation. It is paramount that bipartisan Congressional legislation swiftly put an end to the instability and uncertainty of net neutrality policy in the U.S. for the best interests of consumers, ISPs, and the entire internet ecosystem.

[49] White House, "Executive Office of the President, Statement of Administration Policy: H.R. 1644 – Save the Internet Act of 2019," April 8, 2019.