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# THE FREE STATE FOUNDATION

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## ***Perspectives from FSF Scholars*** ***June 8, 2018*** ***Vol. 13, No. 22***

### **The Congressional Review Act and the Toxic Politics of Net Neutrality**

by

**Daniel A. Lyons \***

#### **I. Introduction and Summary**

In just a few days, the Federal Communications Commission's *Restoring Internet Freedom Order*<sup>1</sup> ("RIF Order") will take effect, repealing the 2015 net neutrality rules<sup>2</sup> and restoring the light-touch regulatory framework that has historically governed most broadband providers. But supporters of the Obama-era common carriage rules are not going down without a fight. On May 16, the Senate passed a Congressional Review Act resolution that would disapprove and block the *Restoring Internet Freedom Order*.<sup>3</sup> The passage was a victory for its author, Senator Ed Markey, and has been hailed by advocates as the "first step toward restoring net neutrality."<sup>4</sup>

Fortunately for consumers, the Senate bill resembles not so much new life breathed into the 2015 rules, but rather its last dying gasps. To become effective, the resolution now must pass the House and either receive the president's signature or survive his veto, which is unlikely to happen. And this is good, as the resolution would harm both broadband Internet providers and the consumers they serve.

This *Perspectives* provides an overview of the Congressional Review Act and its application to the net neutrality debate. It also analyzes the likely effects of the CRA resolution if enacted into law. Because of the high hurdles to adoption, my sense is that this Congressional Review Act

effort is primarily political theater, designed to keep the issue in the headlines as the congressional midterm elections approach later this year. But this grandstanding comes at a cost: it delays the long-overdue legislative reform of the Communications Act for the Internet age.

Indeed, while the FCC's *Restoring Internet Freedom Order* certainly is preferable to the 2015 *Open Internet* regulations, bipartisan legislative reform is the only lasting solution to the net neutrality debate. So, unless net neutrality proponents are content to let the issue fester, it is imperative to stop the politicization of this issue that is poisoning the bipartisan well.

The focus should be on trying to adopt compromise legislation. On net neutrality, consumers need solutions, not slogans.

## II. The Congressional Review Act: Overview

In theory, the Congressional Review Act facilitates legislative oversight of agency rulemaking. It was designed to restore some of the control that Congress lost when the Supreme Court invalidated the legislative veto in *INS v. Chadha*.<sup>5</sup> Prior to *Chadha*, hundreds of agency statutes contained legislative vetoes, which allowed one branch of Congress to invalidate particular agency action. Through the legislative veto, Congress kept some strings attached to the increasing number of decisions that it delegated to the growing administrative state. But the Court held that the veto constituted legislation, which had to go through bicameralism and presentment to be constitutional. So Congress passed the Congressional Review Act to re-create the legislative veto in a way that satisfied bicameralism and presentment, in accordance with *Chadha*.

In practice, however, satisfying bicameralism and presentment is difficult to achieve. Absent a veto-proof majority, passage requires the agreement of the president, who is unlikely to invalidate one of his own agencies' initiatives. For this reason, almost all successful Congressional Review Act resolutions have come during presidential transitions: once in 2001, when Congress repealed a Labor Department ergonomics rule passed in the twilight moments of the Clinton Administration shortly before George W. Bush took office,<sup>6</sup> and an astonishing fifteen in 2017, during Donald Trump's first year, to invalidate regulations adopted in the final months of the Obama Administration.<sup>7</sup> The final two involved invalidation of rules enacted by the Consumer Financial Protection Bureau (an independent agency) during the Trump administration but while the bureau was headed by a holdover Obama appointee.<sup>8</sup>

But savvy politicians have discovered that even unsuccessful Congressional Review Act resolutions can be deployed for political purposes. For example, a congressional chamber in the hands of the president's opponents can pass a resolution to register its discontent with the administration. During the Obama administration, the Republican-held Congress passed five joint resolutions that President Obama vetoed. The act also contains abbreviated review procedures that allow a minority of Senators to sidestep the power that Senate leadership typically exercises over the flow of legislation through the chamber,<sup>9</sup> as happened in 2005 when Democratic Senator Patrick Leahy forced the Republican-led Senate to vote on an EPA rule protecting coal and oil-fired power plants (a vote that failed to garner a Senate majority). While these votes are symbolic, they can be embarrassing for the administration and can force members

of Congress to take a position on a controversial agency action that they might otherwise prefer to avoid.

### **III. The Congressional Review Act Case Study: Net Neutrality**

Senator Ed Markey's effort to repeal the *Restoring Internet Freedom Order* illustrates both the mechanics and the limitations of the Congressional Review Act. The act requires agencies to report any rule to Congress before the rule can take effect.<sup>10</sup> Major rules (those likely to have at least \$100 million annual effect on the economy, or would otherwise have significant adverse effects on cost, prices, or competition),<sup>11</sup> may not take effect until 60 days after this report or after publication in the *Federal Register*, whichever comes last.<sup>12</sup> The *Federal Register* published the *RIF Order* on February 22, 2018.<sup>13</sup> The FCC announced the order would take effect on June 11, 2018, following a required review by the Office of Management and Budget.<sup>14</sup>

#### **A. Saga in the Senate**

Senator Markey took advantage of the Act's expedited Senate procedures to force a vote on a disapproval resolution. He introduced a CRA-complaint joint resolution of disapproval on February 27, 2018,<sup>15</sup> which starts a 60-legislative-day shot clock to pass the resolution.<sup>16</sup> Markey's resolution was referred to committee, where legislation disfavored by leadership often languishes. But the CRA provides that after 20 days, a CRA disapproval resolution can be discharged from committee upon petition by 30 senators.<sup>17</sup> Senator Markey and 29 colleagues filed this petition on May 9. The CRA mandates that following a successful discharge petition, the joint resolution shall be placed on the calendar and a motion to proceed to consideration is in order at any time. Debate is limited to 10 hours (5 hours for each side), and the act prohibits amendments or filibusters, which could otherwise be used to prevent a final vote.<sup>18</sup>

Although 30 senators could thus force a vote on the resolution, they cannot guarantee passage. Markey quickly secured the support of all 49 Democrats and one Republican, Maine Senator Susan Collins.<sup>19</sup> But if all senators voted, this left him one vote shy of a majority. Throughout early 2018, Markey and net neutrality supporters campaigned under the hashtag #onemorevote to shine a spotlight on the resolution and encourage people to call their senators. Ultimately this proved unnecessary, as Senator John McCain's ongoing treatment for brain cancer made passage inevitable. During his absence from the Senate, 50 votes were sufficient to form a majority.<sup>20</sup> With passage a mathematical certainty, the pressure came off Senate Republicans to hold opposition together. In the end, two additional Republicans (Senators John Kennedy and Lisa Murkowski) crossed party lines, and the bill passed 52-47.

#### **B. Implications of Passage**

Senator Markey's surprising victory has prompted some speculation about what effect the resolution would have if enacted into law. DC think tank TechFreedom argues that because the Congressional Review Act by its terms applies only to "rules," Markey's resolution cannot repeal the reclassification portion of the order, which is a Declaratory Ruling.<sup>21</sup> It's a clever argument, one that turns on the definition of "rule": "an agency statement of general or particular applicability and future effect."<sup>22</sup> But this definition, incorporated from the Administrative

Procedure Act,<sup>23</sup> is notoriously vague, leading then-Professor Antonin Scalia to explain that “it is generally acknowledged that the only responsible judicial attitude toward this central APA definition is one of benign disregard.”<sup>24</sup>

The Fifth Circuit has held that a Declaratory Ruling can be rulemaking or adjudication, depending on how the agency itself characterized the action and the ultimate product of that action.<sup>25</sup> In a similar context, the Ninth Circuit has explained that rulemaking “affects the rights of broad classes of unspecified individuals” and is “prospective.”<sup>26</sup> Here, the agency described the order as a “final rule” and adopted it via rulemaking’s notice-and-comment procedure. The order is also broad, affecting all broadband providers and their customers. On the other hand, the power to issue declaratory rulings resides in Section 554(e) of the Administrative Procedure Act, which governs adjudication rather than rulemaking. TechFreedom’s argument is further complicated by the Congressional Review Act’s judicial review provision, which states that “[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review.”<sup>27</sup> Because of the dearth of successful repeal resolutions, the scope of this provision has not been tested. But it could preclude a challenge that the order in question is not, in fact, a rule.

More likely, successful passage of the Markey resolution would invalidate the *Restoring Internet Freedom Order* and reinstate the 2015 *Open Internet* rules.<sup>28</sup> While the current Commission is unlikely to enforce the reinstated rules vigorously, their reinstatement could harm consumers by dampening innovation in broadband and edge markets.<sup>29</sup> Moreover, as Free State Foundation President Randolph May has noted,<sup>30</sup> reinstatement would strip consumers of privacy protections. By classifying broadband providers as common carriers, the 2015 *Open Internet Order* stripped the Federal Trade Commission of jurisdiction to regulate these companies’ privacy practices, the way it regulates privacy everywhere else in the Internet ecosystem. The FCC attempted to fill in this gap with a heavy-handed opt-in privacy regime that Congress repealed in 2016 – via the Congressional Review Act. This means that the FCC is barred from enacting a new privacy rule “substantially similar to” the disapproved rules, leaving consumers unprotected. Like the judicial review provision, the scope of this restriction has not been judicially tested. It likely leaves room for the FCC to issue rules mirroring the FTC’s opt-out rules, though such rules likely would take at least several months to adopt. It seems counterproductive for Congress to remove privacy protections just as the Cambridge Analytica scandal has heightened consumer awareness of this issue.

### **C. (Un)likelihood of Passage**

But, of course, these concerns are largely academic, as it is unlikely that the Markey resolution will be enacted into law. To satisfy the Congressional Review Act, the resolution must be passed by the House and either signed by the president or sustained against a presidential veto. But the Act contains few of the fast-track procedures regarding House of Representatives consideration that Senator Markey took advantage of to secure a Senate vote. Because the discharge petition passed the Senate, the Congressional Review Act provides that the resolution will be referred to the whole House rather than a committee.<sup>31</sup> But otherwise “the procedure in that House shall be the same as if no joint resolution had been received” from the Senate, meaning Democrats alone cannot force a vote.<sup>32</sup> This has proven to be the death knell of several disapproval procedures over the years, including Democratic Senator Byron Dorgan’s 2003 resolution disapproving the

FCC's broadcast ownership rules<sup>33</sup> and Democratic Senator Kent Conrad's 2005 resolution disapproving mad cow quarantine rules,<sup>34</sup> both of which passed the Senate but neither of which came up for a vote in the Republican-controlled House. To survive a House vote, the resolution would need at least 22 Republicans to support the measure – and that's assuming all House Democrats vote for the resolution, which is not guaranteed.<sup>35</sup> Moreover, although President Trump has not spoken much about net neutrality, it is highly unlikely that he would join Democrats to repeal an initiative of his own FCC chairman.

#### **IV. The Congressional Review Act as Political Theater**

But why spend such significant time and effort on a resolution that has virtually no chance of being enacted into law? While I do not doubt that Senator Markey and his supporters sincerely want to repeal the *Restoring Internet Freedom Order*, my sense is that the CRA effort is as much about politics as policy. Numerous pundits surmise that the Democratic Party has made net neutrality a key part of their strategy during the midterm elections. Senator Brian Schatz explained that “for millions of motivated and infrequent voters, this is a top issue.”<sup>36</sup> And it resonates particularly strongly with younger citizens. Perhaps equally importantly, the issue may drive political contributions: Reuters notes that even as early as December of last year, “[s]everal Democratic candidates are sending fundraising appeals citing net neutrality.”<sup>37</sup> The Congressional Review Act effort is key to this strategy, as it keeps the issue in the headlines, allowing Democratic lawmakers to, in one pundit's words, “make political hay of the battle over net neutrality” throughout the campaign season.<sup>38</sup>

This is perhaps unsurprising. The term itself has a surface-level appeal – who could be against neutrality? – and the issue creates almost a perfect storm of political opponents in the Trump administration side-by-side with cable companies, two targets that some people, reflexively, consider fair game. As Democratic strategist Jesse Ferguson explained, “Net neutrality is the latest data point for voters that the administration is more interested in doing what big companies want them to do, than what people think is in their interest... That's a narrative that is politically toxic for Republicans.”<sup>39</sup>

In a sense, I believe this use of a disapproval resolution as a political tool is largely consistent with the two-decade history of the Congressional Review Act, at least prior to the Trump administration. Disapproval resolutions rarely overturn agency action. Instead, they often were used to draw attention to politically volatile topics and to force members of Congress to state their positions by voting for or against the resolution. Senator Chuck Schumer alluded to this political rationale on the eve of the Senate's vote, stating: “We're now one step away from allowing the American public to see where their elected officials stand on protecting their internet service.”<sup>40</sup> While this strategic vote-setting was perhaps not Congress's intent when passing the Act, it demonstrates that the Act may have unintended consequences.

#### **V. Conclusion**

Aside from the Congressional Review Act's general import in other instances, the politicization of net neutrality in particular can have unintended consequences. The questions of what constitutes reasonable network management practices for Internet service providers, and when

vertical agreements are likely to enhance versus harm consumer welfare, are deeply nuanced questions that require technocratic expertise to solve. The reality is that broadband Internet networks are not neutral – and they never have been. Different applications have different susceptibility to congestion, and broadband providers need to manage traffic to enhance the overall user experience. The price mechanism can be a useful signal by app providers as to the relative susceptibility of a particular program to congestion. It can also create incentives for anticompetitive harm. These issues are not easily reducible to a sound bite or Twitter hashtag – and efforts to do so are likely to be misleading, as when a screenshot went viral at the height of the net neutrality debate purporting to show the balkanization of the Internet by Portuguese ISPs absent net neutrality protection. In fact, it showed nothing of the sort (particularly since Portugal *has* net neutrality rules in place).<sup>41</sup>

The larger tragedy is that the effort to “make political hay” by politicizing net neutrality delays progress toward real, lasting solutions to important questions of American Internet policy. The bottom line is that the Communications Act says almost nothing clearly about how America’s primary communications regulator should regulate America’s primary communications networks. The Act was last amended significantly in 1996 and is long overdue for an overhaul – and to bring stability to this issue, that overhaul must be bipartisan. But keeping the issue alive through the midterms is inconsistent with finding compromise solutions. Last week, Republican Senator John Thune introduced a net neutrality bill that included a ban on blocking, throttling, and paid prioritization – the protections that lie at the core of the net neutrality movement. But Senate Democrats blocked the bill from coming to the floor, reportedly because they are wary of striking a hasty net neutrality deal.<sup>42</sup>

Bipartisan legislative reform is the only lasting solution to the net neutrality debate. Even if the Democrats win majorities in the House and the Senate this fall, my sense is that it is unlikely they will be able to codify the rules in their entirety, for the same reason they almost certainly will not pass the Markey resolution: because President Trump will not sign it. So, unless net neutrality proponents are content to let the issue fester and gamble on the 2020 presidential election, it is time to stop the politicization of this issue so that compromise becomes possible.

On net neutrality, consumers need solutions, not slogans.

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<sup>1</sup> Restoring Internet Freedom, 83 Fed. Reg. 7852 (2018).

<sup>2</sup> Protecting and Promoting the Open Internet, 80 Fed. Reg. 19738 (2015).

<sup>3</sup> See S. J. Res. 52 (2018) (“Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Federal Communications Commission relating to “Restoring Internet Freedom” (83 Fed. Reg. 7852 (February 22, 2018)), and such rule shall have no force or effect.”).

<sup>4</sup> See Karl Bode, “Senate Votes 52-47 in First Step Toward Restoring Net Neutrality,” available at <https://www.dslreports.com/shownews/Senate-Votes-5247-In-First-Step-Toward-Restoring-Net-Neutrality-141848>.

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<sup>5</sup> 462 U.S. 919 (1983).

<sup>6</sup> Pub. L. 107-5 (March 20, 2001).

<sup>7</sup> Pub. L. 115-4 (Feb. 14, 2017) (disapproving SEC disclosure rule); Pub. L. 115-5 (Feb. 16, 2017) (disapproving DOI stream protection rule); Pub. L. 115-8 (Feb. 28, 2017) (disapproving SSA rule); Pub. L. 115-11 (Mar. 27, 2017) (disapproving federal procurement rule); Pub. L. 115-12 (Mar. 27, 2017) (disapproving DOI land use rule); Pub. L. 115-13 (Mar. 27, 2017) (disapproving Department of Education accountability rule); Pub. L. 115-14 (Mar. 27, 2017) (disapproving Department of Education teacher preparation rule); Pub. L. 115-17 (Mar. 31, 2017) (disapproving Labor Department unemployment drug testing rule); Pub. L. 115-20 (Apr. 3, 2017) (disapproving DOI rule regarding Alaskan National Wildlife Refuges); Pub. L. 115-21 (Apr. 3, 2017) (disapproving Department of Labor injury reporting rule); Pub. L. 115-22 (Apr. 3, 2017) (disapproving FCC broadband privacy rule); Pub. L. 115-23 (Apr. 13, 2017) (disapproving HHS compliance rule); Pub. L. 115-24 (Apr. 13, 2017) (disapproving Department of Labor savings rule for qualified state political subdivisions); Pub. L. 115-35 (May 17, 2017) (disapproving Department of Labor savings rule for states).

<sup>8</sup> Pub. L. 115-74 (Nov. 1, 2017) (disapproving CFPB arbitration agreement rule); Pub. L. 115-172 (May 21, 2018) (disapproving CFPB lending disclosure rule).

<sup>9</sup> 5 U.S.C. § 802.

<sup>10</sup> 5 U.S.C. § 801(a)(1)(A).

<sup>11</sup> *Id.* § 804(2). Note that the act exempts rules passed under the Telecommunications Act of 1996 from designation as a “major rule,” which could include the Restoring Internet Freedom Order. The difference is immaterial, however, as the OMB delay prevented the rule from taking effect for more than 60 days after publication in the Federal Register.

<sup>12</sup> *Id.* § 801(a)(3).

<sup>13</sup> Restoring Internet Freedom, 83 Fed. Reg. 7852 (2018).

<sup>14</sup> See Press Release, Chairman Pai on Restoring Internet Freedom Order Taking Effect (May 10, 2018), available at <https://www.fcc.gov/document/chairman-pai-restoring-internet-freedom-order-taking-effect>.

<sup>15</sup> S.J. Res. 52 (2018).

<sup>16</sup> 5 U.S.C. § 801.

<sup>17</sup> 5 U.S.C. § 802(c).

<sup>18</sup> *Id.* § 802(d).

<sup>19</sup> See Brian Fung, Democrats Say 50 Senators Endorse Resolution to Restore FCC Net Neutrality Regulations, Washington Post, Jan. 15, 2018.

<sup>20</sup> It is worth noting that Senator McCain gave no indication of how he would have voted on the resolution.

<sup>21</sup> See Letter from TechFreedom to Mitch McConnell et al., May 14, 2018, available at [http://docs.techfreedom.org/Letter\\_Net\\_Neutrality\\_CRA\\_Legal\\_Analysis\\_May\\_2018.pdf](http://docs.techfreedom.org/Letter_Net_Neutrality_CRA_Legal_Analysis_May_2018.pdf).

<sup>22</sup> *Id.* § 551(4).

<sup>23</sup> 5 U.S.C. § 804(3).

<sup>24</sup> Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 383.

<sup>25</sup> *City of Arlington v. FCC*, 668 F.3d 229, 240 (5<sup>th</sup> Cir. 2012), *aff'd in part*, 569 U.S. 290 (2013).

<sup>26</sup> *Yesler Terrace Comm’y Council v. Cisneros*, 37 F.3d 442, 448 (9<sup>th</sup> Cir. 1994).

<sup>27</sup> 5 U.S.C. § 805.

<sup>28</sup> See 5 U.S.C. § 801(f) (“Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.”).

<sup>29</sup> See, e.g., Daniel A. Lyons, *Revisiting Net Neutrality*, Free State Foundation Perspectives Vol. 12, No. 40 (2017), available at [http://www.freestatefoundation.org/images/Revisiting\\_Net\\_Neutrality\\_110917.pdf](http://www.freestatefoundation.org/images/Revisiting_Net_Neutrality_110917.pdf).

<sup>30</sup> Randolph May, The Net Neutrality CRA Would Remove FTC Privacy Protections, Washington Examiner, May 9, 2018, available at [http://www.freestatefoundation.org/images/The\\_Net\\_Neutrality\\_CRA\\_Would\\_Remove\\_FTC\\_Privacy\\_Protections\\_050918.pdf](http://www.freestatefoundation.org/images/The_Net_Neutrality_CRA_Would_Remove_FTC_Privacy_Protections_050918.pdf).

<sup>31</sup> 5 U.S.C. § 802(f).

<sup>32</sup> *Id.*

<sup>33</sup> S.J. Res. 17 (2003).

<sup>34</sup> S.J. Res. 4 (2005).



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<sup>35</sup> The House is currently split 235-193, with 7 vacancies. Note there are also several informal rules that guide House floor votes, such as the Hastert Rule, under which the Speaker will not schedule a vote on a bill that does not have the support of a majority of the members of the majority party.

<sup>36</sup> Todd Shields, FCC Chair Defends Weakening Net Neutrality Despite Senate Vote, Bloomberg, May 16, 2018, available at <https://www.bloomberg.com/news/articles/2018-05-16/democrats-win-on-net-neutrality-vote-in-senate-with-gop-converts>.

<sup>37</sup> David Shepardson and Ginger Gibson, Net Neutrality Repeal Gives Democrats Fresh Way to Reach Millennials, Reuters, Dec. 14, 2017, available at <https://www.reuters.com/article/us-usa-internet-election-analysis/net-neutrality-repeal-gives-democrats-fresh-way-to-reach-millennials-idUSKBN1E901R>.

<sup>38</sup> David McCabe, Democrats Bet on Net Neutrality Voters in 2018, Axios, May 16, 2018, available at <https://www.axios.com/net-neutrality-repeal-democrats-2018-midterms-1526416080-66d6df00-8b43-4ff2-bc16-9238a3f9b187.html>.

<sup>39</sup> Shepardson & Gibson, *supra* note 37.

<sup>40</sup> Jim Puzzanghera, Senate Democrats Believe Net Neutrality is a Political Winner as They Try to Reinstate Regulations, Los Angeles Times, May 9, 2018, available at <http://www.latimes.com/business/la-fi-net-neutrality-democrats-20180509-story.html>.

<sup>41</sup> See Allen Gibby, Portugal Isn't a Horseman of the Net Neutrality Apocalypse, Truth on the Market, Nov. 22, 2017, available at <https://truthonthemarket.com/2017/11/22/portugal-isnt-a-horseman-of-the-net-neutrality-apocalypse/>.

<sup>42</sup> John Hendel, Senate Democrats Score Net Neutrality Win in Bid for Midterm Momentum, Politico, May 16, 2018, available at <https://www.politico.com/story/2018/05/16/senate-democrats-net-neutrality-539275>.