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Misusing the Congressional Review Act to Re-Regulate the Internet

by Tom Giovanetti

The U.S. Senate will shortly face an attempt to misuse the Congressional Review Act (CRA) to re-impose Title II regulations on the internet. This approach is ill-considered at best, and is likely to backfire on its proponents. Besides, for proponents of net neutrality, there is a far superior option.

What is the Congressional Review Act?

Frustrated at federal agencies that promulgate regulations in excess or in contradiction of Congressional intent, Republicans led by Newt Gingrich and Dick Armey made the Congressional Review Act part of their 1994 "Contract with America" commitment to voters. The goal was to restore some of Congress's power over policy and to rein in "rogue" regulatory agencies, which had come to function (and still do today) as an unelected "fourth branch of government."

After the historic 1994 election, in which Republicans gained control of the House of Representatives for the first time in 42 years, the Congressional Review Act became law, but in the 20 or so years after its passage, the CRA was used to overturn only a single regulation. However, after the 2016 Presidential election, the Republican majority used the CRA to overturn 14 regulations promulgated in the later days of the Obama administration, which only added to Democrat's frustration over their 2016 loss.

The propensity of outgoing administrations to "ram through" regulations is a perfect example of the need for the CRA. And, of course, the power to make law belongs exclusively to the legislature in the first place, so it is squarely within Congress's prerogative to overturn regulations.

However, it IS possible for Congress to misuse the CRA, and the first such example may be upon us.

Misusing the CRA to Re-regulate the Internet

It is clear from the legislative history of the CRA that the intent of the law was to give Congress an opportunity to overturn "new rules," not to restore them. But Senate Democrats intend to try to re-impose regulations on the internet by using the CRA to overturn the FCC's December 14, 2017 "Restoring Internet Freedom Order." In other words, they want to use the CRA to review a review and repeal a repeal.

Such misuse of the CRA would be contrary to the spirit of the law, because the FCC's 2017 action was itself a review and repeal of the FCC's 2015 "Open Internet Order." And it would be contrary to the letter of the law, in that the CRA can only be used to overturn rules, not orders, which are legally differentiated under the Administrative Procedures Act.

What the FCC Got Wrong in 2015 and Right in 2017

Under the 2015 Open Internet Order, an ideological FCC broke from decades of consistent regulatory policy and imposed a draconian, common carrier regulatory structure upon internet service providers.[1] The 2015 Order was pushed through by the Obama administration after a disappointing mid-term election, and represented a dramatic shift in regulatory policy. The 2015 Order also, arbitrarily, left so-called "edge providers" free from the burden of the new regulations.

For these and other reasons, it was not surprising that, after the 2016 election, a Republican majority FCC overturned the Open Internet Order and restored the successful policies of the previous 20 years with the 2017 Restoring Internet Freedom Order. The Restoring Internet Freedom Order also had the virtue of restoring FTC regulatory authority over consumer privacy, and eliminating regulations that discriminated against internet service providers (ISPs) but left other major players like Netflix, Google, Facebook and Twitter untouched.

Why did the FCC Reverse Itself?

Not only was the FCC's 2015 Open Internet Order a controversial departure from a previously successful regime, but it was also harmful to the economy. Just as many economists predicted, investment among internet providers declined steeply after the imposition of Title II regulations.

Investment in networks fell by $2.7 billion in the first six months of 2016 compared to the same time period in 2014, the year before the Open Internet Order, according to Economists Incorporated principal Hal Singer.[2] The decline was seen in cable, telecom and wireless providers—the industries primarily affected by the new regulations.

Such a decline in investment among ISPs is significant because ISPs are among the largest investors in the U.S. economy,

according to the Progressive Policy Institute (PPI).[3] In recent years, ISPs dominate the top 20 investors, with AT&T and Verizon usually in the top two spots.[4]

Any federal regulation that caused a precipitous decline in investment by top investors in a growing and critical infrastructure industry but privileged other internet sectors was highly unwise and a smart target for reversal.

Yet Senate Democrats now propose to "reverse the reversal" through a use of the CRA that scorns the entire purpose of the Congressional Review Act. Because Democrats control neither the Senate nor the House of Representatives, they're most likely doing it for political theatre, but they're also hoping for a few Republicans to help them succeed.

Why Would Congress Re-impose Internet Regulation?

Apparently, some members of Congress (and their constituents) still think the FCC's 2015 Order created net neutrality, which somehow protects consumers from greedy ISPs who seek to distort and diminish their internet experience—as if that were somehow in the interests of the ISPs to do in the first place. But they are incorrect.

Far too many proponents of internet regulation fail to process the fact that the internet came into existence and quickly became the tremendous social and economic powerhouse that it is today without net neutrality regulation. So it's impossible to demonstrate that such regulation is necessary for the internet to thrive.

And the 2015 Open Internet Order did not impose "net neutrality" anyway—it went far beyond net neutrality and subjected internet providers to the same 1940s-era common carrier regulations that were written to regulate the old AT&T telephone monopoly. This Title II reclassification gave the FCC almost unlimited regulatory power over the internet, including over both wholesale and retail pricing.

There's a reason no one ever thought of the old telecom monopoly as innovative, and Title II regulations were at least one reason. So it never made any sense to impose monopoly-era regulations on a highly competitive, dynamic system like the internet.

Plenty of enlightened technologists understand the difference, and support some flavor of net neutrality but not Title II reclassification.[5] In fact, it's likely that only by reversing the FCC's ill-considered 2015 Open Internet Order can any lasting consensus be reached about net neutrality, since only policy made through the legislative process can be said to reflect a consensus of the governed.[6]

What Would Be the Result of the Title II CRA?

Were Senate Democrats successful in taking advantage of Sen. John McCain's absence and the naiveté of several Republican senators to overturn the FCC's 2017 Restoring Internet Freedom Order through the CRA, it's still unlikely that a similar action would pass the House. But such a vote succeeding in a Republican-controlled Senate would undermine support for the FCC's 2017 Restoring Internet Freedom Order, and would further the misunderstanding of the 2015 and 2017 Orders.

But there's a much more interesting possibility: Use of the CRA against the Restoring Internet Freedom Order could backfire on its supporters. That's because the 2017 Order is composed of both an order and a transparency rule, and while the CRA proponents dislike the order, they like the rule. Here's the rub: A strict reading of the CRA legislation says that it can only be used to overturn a rule, not an adjudicated order.[7] That means courts would likely find that the Order itself would survive a CRA challenge, but the rule would not. And because the CRA precludes "substantially similar" future rules, a successful CRA challenge of the 2017 Order would make future transparency rules more difficult.

But even if the CRA somehow succeeded in re-imposing Title II internet regulation, the result would not only be reduced infrastructure investment, but also a counterintuitive exemption of edge companies like Netflix, Facebook and Twitter from regulation, even while such edge companies regularly make the news with incidents of privacy violation, viewpoint discrimination and other consumer harms.

What's the Right Path for Net Neutrality?

If the American people think their internet experience requires some change in policy, it should be done through legislation, not regulatory fiat. Not only is legislation more likely to reflect the consensus of the governed; legislation is the only policy change likely to last. Any FCC can reverse the actions of its predecessor, which results in harmful uncertainty for companies considering long-term infrastructure investments. Congress should spare the economy such regulatory whiplash by resisting the political theatre of a Title II CRA and crafting legislation that protects consumers from harm while preserving internet certainty and stability.

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Endnotes

1. http://www.insidesources.com/former-fcc-chief-economists-say-wheeler-has-left-economics-behind/
2. http://www.insidesources.com/investment-down-among-internet-providers-since-net-neutrality-economist-says/
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5. https://stratechery.com/2017/pro-neutrality-anti-title-ii/
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