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The Coming Fifth Amendment Challenge to Net Neutrality Regulation

by

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The Federal Communications Commission continues to press ahead in its effort to impose net neutrality restrictions on broadband providers. Since President Obama's election and the subsequent appointment of Chairman Julius Genachowski to head the agency, the Commission has moved inexorably toward a policy that would limit the discretion of broadband providers such as Verizon and Comcast to regulate the terms under which Internet content providers such as Google and Hulu may access their networks. At stake is control over what Chairman Genachowski calls the "onramp to the Internet," the network of wires through which information flows from the Internet to end-user consumers.

Earlier this year, the D.C. Circuit invalidated the Commission's first attempt to regulate a broadband provider's network management practices and admonished the Commission to "act only pursuant to authority delegated to [it] by Congress."[1] Undeterred, the Commission now seeks comment, under the rubric of a proposed "Third Way" regulatory regime, on whether it should reclassify broadband Internet service as a "telecommunications service" subject to common carriage obligations under Title II of the Communications Act, rather than as an "information service" subject to minimal regulation under Title I.[2] The consequence—indeed, the explicit goal—of this proposed

reclassification would be to overturn the court's decision and impose binding nondiscrimination obligations on broadband Internet providers.

The economic and other policy difficulties presented by net neutrality have been well-canvassed in the literature, including in previous editions of Free State Foundation *Perspectives*. Opponents have also argued that such restrictions violate broadband providers' First Amendment speech rights.[3] But there is an additional constitutional implication of net neutrality that has not yet been sufficiently addressed in this debate: the Takings Clause.

Under the Supreme Court's Takings Clause jurisprudence, the Commission's proposed actions effect a permanent physical occupation of private broadband networks and therefore take broadband network providers' property without just compensation. In essence, net neutrality would grant content and application providers a permanent virtual easement across privately-owned broadband networks. It thus would deprive broadband providers of the right to exclude others from their networks—a right that the Supreme Court has repeatedly dubbed "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[4]

At the very least, the Takings Clause issue raises a serious constitutional question regarding the Commission's authority to adopt net neutrality regulations without clear authority from Congress. These doubts, coupled with all the other legal and policy concerns which have been raised regarding net neutrality mandates, should cause the FCC to pull back from its current course.

Permanent Physical Occupation Takings

Over 85 years ago, the Court recognized that a regulation that goes "too far" can constitute a taking for which just compensation is owed, even if the owner retains title and some use rights in its property.[5] These "regulatory takings" are usually governed by the three-part *Penn Central* test, named for a Supreme Court case involving the regulation of air rights over New York's Grand Central Terminal. The *Penn Central* test balances (1) the economic impact of the regulation and (2) its interference with the owner's reasonable investment-backed expectations against (3) the nature of the government's action.[6] The government typically wins these *Penn Central* cases, because courts usually accord the government's interest far greater weight than that of the private landowner. As the Supreme Court has explained, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[7]

But in *Loretto v. Teleprompter Manhattan CATV Corporation*,[8] the Supreme Court created a *per se* exemption from the *Penn Central* test. *Loretto* involved a New York regulation that required landlords to grant cable companies to place equipment on their properties, without charging more than a nominal fee. In Loretto's case, the cable company permanently installed a box on the rooftop of Loretto's building and a cable that ran down the side of the building. The Court found that the regulation constituted a permanent physical occupation of the owner's property. Justice Thurgood Marshall,

who was not generally known as a proponent of either bright-line rules or strong property rights, nonetheless wrote for the majority that "[s]uch an appropriation is perhaps the most serious form of invasion of an owner's property interests."[9] As a result, he explained, such a regulation constitutes "a taking without regard to the public interests that it may serve."[10] In other words, such an occupation is a taking without having to balance the owner's loss against the government's interest.

Loretto thus draws a constitutional distinction between compelled permanent physical occupation cases and more traditional regulations on an owner's use rights. As one commentator notes, "[t]he operative fact in such cases is that the government is *appropriating* the use of the property for the benefit of *the public*."[11] The Supreme Court later explained that the line separating a typical regulation from a *Loretto* taking is "unambiguous distinction between a commercial lessee and an interloper with a government license."[12] When a regulation grants the government or a third-party a permanent access right to private property over the objection of the owner, the Fifth Amendment demands that compensation be paid.

Net Neutrality As a Permanent Physical Occupation Taking

Even the most straightforward telecommunications regulation can be a study in opaque, jargon-laden decisionmaking. But once stripped of its technical façade and reduced to more conventional property terms, net neutrality becomes little more than an effort by the Commission to transform "commercial licensees" into "interlopers with a government license." Net neutrality would allow content providers such as Google or Hulu to transmit material across privately-owned broadband networks from the Internet to individual end-users, with or without the network owner's consent. Chairman Genachowski often describes these broadband networks as the "onramp to the Internet." But it is perhaps more accurate to describe them as the Internet's "offramp", as the focus is on the flow of information not from the consumer to the Internet, but from the Internet to the consumer. In essence, a content provider that has uploaded information to the Internet would receive an unlimited, continuous right of access to use those privately-owned network "offramps" to deliver that information to consumers. This access allows content providers to physically invade these "offramps" with their electronic signals and to permanently occupy space on those networks, all without having to pay the network owner for access. The effect is to appropriate the use of these private networks for the public's benefit, in the form of unfettered and nondiscriminatory access to the content and applications of the consumer's choosing, without a process for requiring the payment of just compensation.

To draw a parallel to real property law, content providers would receive the equivalent of a virtual easement to traverse broadband providers' networks. In *Nollan v. California Coastal Commission*,[13] the Supreme Court explained that the imposition of an easement across a privately-held beach would unquestionably constitute a *Loretto* taking, even though it meant that different members of the public might occupy different parts of the property at any given time. "'[P]ermanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be

traversed, even though no particular individual is permitted to station himself permanently upon the premises."[14]

Some may object that the "property" in question is an electronic network rather than land or a building, but this distinction is irrelevant. As an initial matter, *Loretto* has never been limited to real property. For example, when Congress forced Richard Nixon to grant the public access to his presidential papers, the courts did not hesitate to hold that a *Loretto* taking had occurred.[15] Similarly, when the Federal Communications Commission forced public utilities to allow cable companies to install lines on their telephone poles, the Eleventh Circuit held that *Loretto* required compensation.[16]

But more importantly, as a factual matter, the transmission of content over broadband networks is not some metaphysical act. It takes place in a real physical space: the fiber-optic and copper wires, and associated electronics, that comprise the broadband network. Transmission of Internet content primarily involves the movement of electrons (which are physical particles) that occupy rivalrous limited space on telecommunications wires en route from the Internet to the end-user consumer. While the electrons are invisible to the naked eye and travel very quickly within a sheathed wire, the physical act of transmission is nothing more than a microscopic version of vehicles traveling along a highway—or pedestrians traversing an easement. In other words, the mandatory transmissions do physically occupy the service providers' property.

Distinguishing Common Carriage

Proponents may also argue that the proposed rules are simply a species of common carriage obligations, which generally have withstood Fifth Amendment scrutiny. The Supreme Court has explained that a regulatory takings claim would not lie if the regulation at issue stems from the background norms that the common law has traditionally placed on property. In such a case, no taking can occur because the law has not "taken" anything from the property owner. Rather, if the common law never recognized the right at issue, then it was never the owner's to begin with.

But upon closer examination, in this instance, this defense collapses. To avail itself of this safe harbor, the Commission must show that net neutrality "do[es] no more than duplicate the result that could have been achieved in the courts" under a common law property claim, or otherwise make explicit a limitation implied in the owner's title by "existing rules or understandings."[17] Net neutrality goes far beyond whatever limitations common carriage norms placed upon network providers at common law.

First, it is not clear that broadband providers are the kind of service providers that would have been subjected to common carriage obligations at common law. At common law, common carriage was usually (though not always) imposed on companies that had market power and had the incentive and ability to abuse it, such as railroads or the AT&T telephone monopoly. By comparison, the Commission has repeatedly found that the marketplace for broadband services is competitive: eight out of ten households are in areas with at least two (and sometimes three or more) wireline broadband

providers to choose from.[18] When one adds the promise of high-speed wireless broadband, which today's smart phones hint is just around the corner, it is difficult to see why competitive forces and traditional antitrust law are insufficient to prevent anticompetitive behavior.

But even assuming that broadband providers satisfied the traditional definition of a common carrier, the proposed net neutrality regulations would fail because they impose a far greater burden on these providers than traditional common carriage would. The essence of common carriage is to provide service to all comers at just and reasonable rates. A traditional common carrier cannot unreasonably refuse to serve a customer. But it may charge different rates for different levels of service, a practice known as "tiering", as long as it offers similar choices at similar rates to similarly-situated customers. For example, the U.S. Postal Service, which is perhaps the quintessential common carrier, must carry virtually all mail but may charge different rates for bulk mail, first-class mail, and priority or express services.

Yet most versions of net neutrality would, as a practical matter, prohibit the tiering of Internet service. Networks have a limited amount of bandwidth, as anyone who has experienced network congestion can attest. Adding bandwidth not only takes time; it is an expensive proposition. Broadband providers argue that, in the event of network congestion, they should be permitted to enter into agreements with Internet content providers that would grant priority access to the network to those who are willing to pay. In other words, they should be permitted to sell "priority" or "express" delivery guarantees over their networks. To certain application providers, such as those who provide telemedicine or real-time video conferencing over the Internet, network congestion can be tremendously disruptive. Such providers therefore may be willing to pay a premium to guarantee a higher level of service than competitors whose products are less sensitive to network congestion. Yet net neutrality would prohibit these agreements, even if broadband providers offered tiered access to all comers willing to pay the premium rate. Because net neutrality restricts broadband providers far more than the common law would, the Fifth Amendment would bar such restrictions without compensation even if one considers broadband providers to be common carriers.

The Need to Avoid A Serious Constitutional Question

Of course, under sound principles of administrative law, broadband providers need not have an airtight Takings Clause claim to stop the Commission from pushing forward with its agenda unilaterally. Because the issue presents a serious constitutional question, the Commission should reconsider its decision to promulgate net neutrality restrictions without a clear mandate from Congress. As a general matter, the deference that courts normally grant to agencies is inapplicable where the agency's action raises serious constitutional issues. As the Supreme Court has explained,

> Where an administrative interpretation of a statute invokes the outer limits of Congress'[s] power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that

> Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.[19]

This canon of constitutional avoidance carries particular importance in the context of the Takings Clause, because a successful claim would require the payment of just compensation and thus would raise separation-of-powers concerns. Only Congress may appropriate funds from the Treasury. The Commission, of course, is not an extension of Congress. It is an independent agency whose governing board is appointed by the Executive Branch. As the D.C. Circuit has explained, granting "deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen."[20] Where, as here, "administrative interpretation of a statute creates such a class, use of a narrowing construction prevents executive encroachment on Congress's exclusive powers to raise revenue and to appropriate funds."[21]

At the very least, *Loretto* presents a "serious constitutional question" for the Commission and other net neutrality proponents. When coupled with the First Amendment implications discussed by others and the D.C. Circuit's ongoing express concern about the limits of the Commission's authority, the Commission would be better served to seek explicit congressional approval before carrying the net neutrality project forward. A congressional debate on net neutrality would invite a much broader dialogue on the issue and would place the ultimate decision in the hands of politically-accountable representatives from across the country rather than five Commissioners who are largely insulated from the political process.

A legislative stamp of approval would assuage any separation-of-powers concerns should the government ultimately be required to pay just compensation for taking broadband providers' property: Congress would have clearly decided that this policy is important enough to stake part of the treasury on it if required. Equally importantly, it would alleviate the D.C. Circuit's concerns that the Commission "act only pursuant to authority delegated to [it] by Congress." Without such authority, the court is likely to continue viewing the Commission's efforts with skepticism, while the serious constitutional question presented by the Fifth Amendment could prove fatal to the initiative on judicial review.

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[1] Comcast Corp. v. FCC*,* 600 F.3d 642, 654 (D.C. Cir. 2010) (citation omitted).

[2] See *Framework for Broadband Internet Service,* Notice of Inquiry, FCC GN Docket No. 10-127 (June 17, 2010).

[3] See, e.g, Randolph J. May, *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*, 3 I/S: A JOURNAL OF LAW AND POLICY FOR THE INFORMATION SOCIETY 197 (2007); Lawrence H. Tribe and Thomas C. Goldstein, *Proposed "Net Neutrality" Mandates Could Be Counterproductive and Violate the First Amendment*, attached as Exhibit A to Comments of Time Warner Cable, Inc., GN Docket No. 09-191, WC Docket No. 07-52, January 14, 2010.
[4] Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).
[5] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
[6] Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
[7] *Id.* (quoting *Pennsylvania Coal*, 260 U.S. at 413).
[8] 458 U.S. 419 (1982).
[9] *Id.* at 434.
[10] *Id.* at 426.
[11] William P. Barr, Henry Weissmann, and John P. Frantz, *The Gild That is Killing the Lily: How Confusion Over Regulatory Takings Doctrine is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429, 485 (2005) (emphasis added).
[12] F.C.C. v. Florida Power Corp., 480 U.S. 245, 252-53 (1987).
[13] 483 U.S. 825 (1987).
[14] *Id.* at 831.
[15] See Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992).
[16] See Gulf Power Co. v. United States, 187 F.3d 1324, 1328 (11th Cir. 1999).
[17] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029-30 (1992).
[18] See, e.g., Federal Communications Commission, *Connecting America: The National Broadband Plan* 37 (2010).
[19] Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 172-73 (2001).
[20] Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994).
[21] *Id.* (citation omitted).