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The Brookings Cafeteria Podcast

Net Neutrality: The War is over

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DEWS: Welcome to the Brookings cafeteria, a podcast about ideas and the experts who have them. I'm Fred Dews. In today's episode I dive deep into the waters of net neutrality with a top expert on telecommunications law and policy.

Stuart Brotman is a nonresident senior fellow at the Center for Technology Innovation at Brookings and is on the faculty at the University of Tennessee Knoxville, where he is the Howard distinguished endowed professor of media management and law and also the Beaman professor of communication and information. He's also a faculty member at Harvard Law School's Institute for Global Law and Policy. Stay tuned during the interview for an update on what's happening in Congress with Molly Reynolds. Keep up to date with the Brookings Podcast Network on Twitter at policy podcasts. And now on with the interview Stewart welcome to the Brookings cafeteria. So we're talking about net neutrality can you first explain for our listeners - what is net neutrality?

BROTMAN: Let's go back to the beginning. It's actually 14 years ago a professor at the University of Virginia named Timothy Wu, who is currently at the Columbia University Law School, wrote essentially an academic paper, and in that paper he introduced the concept of net neutrality and that has been a phrase which has continued over time its meaning has changed over time. But the original meaning, as Professor Wu indicated, was essentially a nondiscrimination policy that Internet service providers should have. That means that when an Internet service provider is connected to an end user they shouldn't be able to discriminate on the basis of the content that they own or are affiliated with versus all the other content that they might not be affiliated with. And so it's a pretty simple concept of nondiscrimination. In fact, Professor Wu actually says in that seminal piece that Net Neutrality equals non-discrimination.

DEWS: And so when it comes down to the customer level, the household level, how does that play out for the individual consumer?

BROTMAN: Well we all have the experience obviously of being online and I think every consumer who is connected to the Internet expects that they will be able to receive anything coming over the Internet without having the provider impede what's being said. So there are two actions that are typically associated with net neutrality. The first is called blocking, and that's pretty obvious that an internet service provider would decide to block a particular Web site because they would be competing with that Web site or may have some commercial interests for blocking it. And the second, which is something that a number of people have experienced, is something called throttling and throttling is essentially when certain Web sites are delivered at much slower speeds or they seem to be frozen in time. And so the notion there is that the consumer might essentially not get the full experience of the Internet if either blocking or throttling takes place. So over the last few years of the Obama administration, in particular, we heard a lot about net neutrality. It was in the courts and it was in the regulatory process and the Federal Communications Commission Chairman Tom Wheeler took a lot of actions regarding net neutrality.

DEWS: Can you bring us up to speed on the situation regarding net neutrality by the end of the Obama Administration.

BROTMAN: Let's start at the beginning and then work our way toward the end of the Obama administration. What the FCC did originally, a number of years ago, was to establish principles of net neutrality. And these were based essentially on the principles that Professor Wu had articulated in that original article including the notion that ISP

Internet service providers could not block or throttle. Those were principles in the regulatory parlance. Those are not enforceable regulations or rules. They are essentially stated ideals that the Commission would like everyone to follow.

But they have no enforcement mechanism. We started there and then we moved to the process of the commission actually formulating rules in this area and at the beginning the FCC formulated rules under its general statutory authority under the Communications Act in 1934 as amended. And that was challenged in court in the United States Court of Appeals for the District of Columbia Circuit and the court essentially overturned the FCC jurisdiction the FCC ability to enact actual regulations and they did that because they said that the FCC really couldn't use its general statutory authority to enact it. So Step two: the FCC went back to the drawing boards and initiated a proceeding to essentially write the rules in a way that might be sustained by the courts. It decided to take a provision from the Telecommunications Act of 1996 which is actually a big Amendment of the original Communications Act and that provision is called Section 7 6 which gives power to the FCC to oversee the expansion and implementation of broadband throughout the United States. So the FCC decided to use that as a basis for establishing net neutrality regulations. That was also challenged in the courts. And so we are in a second piece of major appellate litigation.

DEWS: And let me ask - it's challenged in the courts by which part?

BROTMAN: the second case was challenged by Frye's. That particular case focused on the FCC ability to formulate net neutrality regulations based on that provision in the Telecommunications Act of 1996 which is an amendment of the original Communications Act of 1934. In the Telecommunications Act of 1996 there's a provision

called Section 7 0 6 which gives the FCC very broad authority to oversee the implementation of broadband expansion throughout the United States. When the FCC went back to the drawing board and net neutrality it decided because the previous court had said you can't rely on General statutory authority that it would have a specific reference to Section 7 6 and it rewrote its rules to comply with said Section 7 0 6 with the notion that it could be sustained by the court when it was appealed to the United States Court of Appeal for the D.C. Circuit the D.C. Circuit in part agreed with the FCC. They said section 76 is a very good provision for some of the net neutrality rules that you've developed but not for others. And the reason is because the FCC previously had characterized Internet service providers as information services and under the Communications Act and the FCC regulations can mean information service providers are essentially not regulated. And as long as the FCC maintain the notion that an ISP was an information service provider it could not essentially have rules that extended beyond what Section 7 0 6 might permit. As a result for example commercial contracts between ISP IIS and back haul carriers that's a process called peering. So if you're a particular carrier that wants to make sure that you get prioritization in the line as your information is sent to the ISP essentially can sign a contract with the ISP and obviously it's a commercial transaction so money will exchange hands. The FCC and its net neutrality rules decided that it would prohibit that. The court found that the FCC essentially had overstepped its legal boundaries because that was not really part of what Section 7 0 6 allowed. Interestingly enough there had been a prior case a number of years earlier where the FCC has authority to characterize espies as either an information service provider or telecommunications provider was challenged that went to the United States Supreme

Court and, in that case, there was a very interesting dissent by the late Justice Scalia, who essentially said that the FCC has the ability over time to change the characterization of Internet service providers from an information service provider unregulated to a telecommunications provider regulated. The FCC in formulating the new net neutrality rules decided to look at the dissent of Justice Scalia. They use that as a roadmap for saying after the two appeals essentially limited their authority they decided to re characterize Internet service provision away from being an information service into being a telecommunications service telecommunications service under the Communications Act of 1934 is regulated under Title to the common carrier provisions of the act. And so that was the major change that was formulated under Chairman Wheeler former chairman wheeler and enacted and upheld in round three of the net neutrality battle. And that was done by the D.C. Circuit last year.

DEWS: All right. Thank you for that thorough explanation. And now we seem to be in perhaps round for the new Trump administration and also a new FCC chairman agit Kai who was called net neutrality quote a mistake. Where are we now in terms of the net neutrality issue?

BROTMAN: Well yes we are to some extent in round four under the new chairmanship of Oggi pi the FCC has released something called a notice of proposed rule-making that essentially is a public comment period where the FCC indicates what it would like to be doing in that public and interested parties respond to that. And based on that proceeding the FCC will then issue a final decision and that final decision may be ultimately appealed to the courts once again. What's happening now though is that net neutrality the war is over. The essential aspect of net neutrality, I think, has taken hold as

a corporate matter and as a general principle I don't think there's any fundamental disagreement whether it's with the regulators or with Internet service providers or with the so-called edge providers. That there should not be any throttling or blocking taking place. And in fact we have a number of underlying agreements that some of the major IACP already have by virtue of acquiring companies. For example, when Comcast acquired NBC Universal it was required to stipulate that it would enforce net neutrality as a condition for that acquisition. We have the same situation with AT&T, which last year acquired DirecTV and as a condition there they are required to do. So we have both a general principle that I think everyone accepts and in fact we do have some existing legal obligations for major ISP. So really since the war is over what are we talking about. So what are we talking about now is this issue of title to regulation whether or not the FCC can take this basket of net neutrality obligations and keep them in the title to framework that was initiated and ultimately upheld by the United States Court of Appeals for the D.C. circuit during the Obama administration based on the third round which was initiated by former chairman wheeler.

DEWS: Again that's Title 2 of the 1934 Communications Act as amended so we're talking about an 83 year old law. In this day and age that's kind of stunning.

BROTMAN: Well I think it's important to focus on those two words as amended because the act itself is not actually 83 years old. It's a little bit like building a house and then over the years you have new rooms added you have it remodeled you have an updated. In fact we have the Telecommunications Act of 1996 which was a major revision of the Communications Act of 1934 and we've had a series of other amendments over the years. So when we talk about the Communications Act 1934 that as amended that

really represents the entire house with remodeled rooms. So I think when you look at it in that context the age of the house is not necessarily as relevant as how it's been modernized over time. That doesn't mean that potentially it still may be modernized further and may include some focus on that neutrality provisions if Congress decided that it wanted to step in and do something here.

DEWS: So insofar as the principle of net neutrality is accepted, the war is over. Why is chairman Pai issuing a notice of proposed rule-making again on the matter?

BROTMAN: Chairman Pai was a commissioner before he was chairman and he was in the minority under the Democratic majority that Tom Wheeler represented. When the new net neutrality rules were affirmed by the FCC it was by a three to two vote. The three Democratic commissioners were in favor of the two Republican commissioners opposed to one of those was Oggi. He was very firm in his dissent. He believed that there was no basis for taking net neutrality and moving it into this title to basket. And so he's been on record well before he became chairman that he did not think that this was the appropriate legal mechanism for having the Commission Act in this area. Now that he's chairman one of his first actions was essentially to reopen this area and have a new rule making to advance the notion that title 2 is not the appropriate regulatory mechanism.

DEWS: It's the new rule making process continues apace. I mean how long does such a process take to play out for the FCC to, say, issue a new rule for the status quo to change everything takes time and particularly because we are in a legal framework here.

BROTMAN: Typically what happens is that the FCC has a period relatively short, about three months, to have public comments then it has a reply period which is where

interested parties and the others can reply to the initial comments. And it has no legal obligation when it then needs to issue a final rule and in fact may decide it never wants to issue a final rule and so the status quo would stay in place if the commission does issue a final rule. Essentially the gun goes off for a new starting gate. And what happens there is that parties can then petition the FCC to reconsider that. And there's a whole period of reconsideration. Again there's no real timeframe for when it takes place. If we went through that process then we go into the appellate process. And so parties may decide to appeal this decision. And I would expect given the controversy involved here we have fairly firm positions on a number of different parties and interest groups and that probably would result in another appeal of a final order by the FCC to the United States Court of Appeals for the District of Columbia circuit. At that point we're then in a judicial docket situation so there's no time timeframe for when the court will hear the case. If the court hears the case it would typically be done by a three judge panel. And there is a procedure in the court. Once that decision is released there could be a review by the full panel of the D.C. circuit all of the judges which again may take time and ultimately depending on that decision that could be appealed to the Supreme Court. That may take another year or so if you add up all of these aspects I've just indicated we could be talking several years over the past few months as this issue has resurfaced under the new chairman of the FCC.

DEWS: It sounds like, when you listen to the arguments and the reactions of the pro net neutrality side that utility is literally about to be killed and that the ISP is not going to start charging customers a lot more for you know streaming certain kinds of things and they’re going to be blocking. It sounds like it’s a crisis right now but is it really a crisis?

BROTMAN: No I don't think there's any crisis right now. Obviously we are at high decibel levels in the political environment and clearly we have a number of different partisan interests here. But I think at the end of the day going back to what I said initially, the war is essentially over. I think everyone virtually everyone agrees that net neutrality is a good principle. The principle of nondiscrimination and I think every understands that when you sit in front of a computer when you have a mobile device you do not want to have particular content blocked on that device and you certainly don't want companies deciding that they are going to slow down the speed based on whether or not they have an affiliation with that particular content. I don't think there's any fundamental disagreement obviously from a political symbolism and advocacy standpoint if we call this a battle over Title II I think everyone would be rushing to get coffee because that would put a lot of people to sleep. It doesn't really, galvanized people to fight for a particular regulatory provision. And the communications act of 1934 as amended. So I think as long as it's kept at the political level of net neutrality it can be essentially argued out in the political sphere as well as in the regulatory battleground.

DEWS: Well, so speaking of the political sphere in Congress involved in this at all? Is so, how?

BROTMAN: Well, Congress may be involved. Obviously Congress oversees the FCC and Congress wrote the Communications Act so Congress has the full authority to either rewrite the legislation or to overrule the FCC if it decided to or to take what the FCC did and essentially incorporated into the Communications Act through an amendment. So Congress has a lot of opportunities here. I think one of the major legislative aspects now that is different than during the Obama administration is that we have full control by one

party of both Congress and the White House. So during the Obama administration there was some talk of having that neutrality addressed in legislation. But President Obama indicated very strongly that if that legislation reached his desk he would veto it. And there were not enough votes to override that veto so essentially it would have been a stalemate. I think politically now we're in the situation. If Congress did decide to act and obviously we have control of the House and Senate by the Republicans the strong presumption is that President Trump a Republican would not veto that act and essentially would sign it.

DEWS: One other issue that I've seen come up in the regulatory space is to do with the FCC jurisdiction versus the FTC the Federal Trade Commission jurisdiction. Can you discuss what that issue is all about?

BROTMAN: Sure, it gets a little complicated so let me try to peel the onion a little bit. The Federal Trade Commission is governed by an entirely different piece of law called the Federal Trade Commission Act which goes back again to the New Deal in 1930s and the Federal Communications Commission is governed by the Communications Act in 1934. Two totally different pieces of legislation two totally different agencies. The FTC the Federal Trade Commission has very broad authority as a consumer protection agency. That means if for example you are a consumer or group of consumers who found that an internet service provider was throttling or blocking your service you might go to the FCC or the FTC might initiate on its own a complaint against that ISP and has full enforcement authorities. What's happened in this title to discussion and implementation is that under the Federal Trade Commission Act the FTC is prohibited from overseeing or regulating common carriers. And now that all of the ISP laws are in this common carrier titled to buck bucket essentially that prohibits the FTC from being involved. So we have a major aspect

of consumer protection which has been actually removed through this process of having net neutrality go under Title 2 and that's very controversial certainly. The FTC would like to see its full authority restored they would like to be able to investigate and prosecute some of these potential areas of throttling blocking. But at this point it's unresolved whether or not it has that power there currently is a case in the United States Court of Appeal for the Ninth Circuit where the FTC essentially tried to enforce a throttling situation with AT&T Mobility and AT&T Mobility went to court and said you can't do that because essentially you have no authority given that we're governed by Title 2. And the appellate court upheld that. They said we said we agree with that. That case has now gone to what's called in and bang proceeding which means that all of the judges on the Ninth Circuit will now hear that case we are a little bit in limbo but at least where we are today and for the foreseeable future is that the FTC has limited or no authority to be a consumer protection agency over espies in this area.

DEWS: Let me expand the focus somewhat to another issue that I think is related and that has to do with what we call the digital divide. And also ISP is expanding or not. There are services until less served communities in rural communities, for example, does net neutrality make that expansion less likely.

BROTMAN: I think this is a case of absolute apples and oranges, they are two different worlds. Obviously they both relate to the internet but I have not seen any empirical or other data which indicates any relationship between net neutrality and expansion of broadband service. So for example if you're in a rural area the fact that you have title to regulations probably would not create any more or less. Now some of the ISP have argued that in fact under this new title to regulatory regime they have less incentive

to invest. And if you accept that as a premise there may be a relationship on that and some of the data is out there but I think it’s relatively controversial as to what the data shows over what period of time and particularly whether the decision to invest is directly related to the title to implementation or whether it has some other implications.

DEWS: A similar argument that people have made in response to attempts to regulate under Title 2 has been that I espies would be less likely to innovate whatever that means. Can you address that concept?

BROTMAN: Well innovation is a very broad term and can mean a lot of different things to a lot of people. I think if we take it as a notion that ISP should have full technical and commercial capability to come up with different business models different ways of relating. So let me give you a quick example of innovation. We’ve been talking for many years about telemedicine, the idea that you could have remote diagnostic from major medical centers and that would help particularly areas of the country like rural areas that dont have that service. Let's say you're the Mayo Clinic and you want to have a telemedicine service where you can diagnose various ailments based on digital data that is being sent from a rural facility. You would need a speed and assurance that when you download that back to the rural hospital that essentially has the same fidelity. That means you may have a much higher speed than another content provider. And under the existing title to regulations you're not allowed to contract for that. So the Mayo Clinic would not be able to do it that may have some real impact on innovation. And so I think that argument may play out over time particularly as we come up with these specialized applications that require much higher speeds and that certainly have a great public good.

DEWS: As long as I'm here in the studio with one of the top experts on telecommunications law and policy I'd like to ask you to comment on any other major issues in your field that you think are super important that Americans the global community ought to be paying attention to.

BROTMAN: Well we still have a national broadband plan and many people forget that the National Broadband Plan was acted based on a congressional mandate in the year 2000 9 which essentially said that the United States needs to have a national broadband plan and obviously that broadband plan has been implemented and continues to be implemented I think it would be interesting for many people to focus on where are we with respect to the National Broadband Plan. Some of the issues you raise with respect to the digital divide and the expansion of broadband are very important. Obviously the notion of greater competition so it's not just the availability of broadband but that you have competitive forces so that consumers essentially have choices that's all enormously important. We also have a major initiative right now the FCC to take a large portion of our broadcast spectrum and to reallocate that broadcast spectrum for new digital wireless services. I think all the data shows that we're moving very rapidly into a wireless mobile world. And so there is great demand for that.

And the FCC will have a critical technical role to play here in terms of how that transition takes place. I think the third area that's important is the area of media ownership the FCC has gone back and forth over a series of court challenges in recent years as to what its authority should be in regulating various aspects of media ownership and in particular what evidence the FCC is looking at in evaluating it. There are a number of different restrictions. I think one to really focus on now is the prohibition of local newspaper

companies from owning broadcast operations. As you know, a number of print operations newspaper companies are in very severe financial shape. A number of them have gone under in the process of going under and it would be very helpful if they could potentially merge with a local radio or a local television station to have more efficient operations to generate greater revenues through the broadcast operation. They are prohibited from doing that right now. And so one of the questions larger public policy questions are what are we going to do as a country to help preserve newspapers in print. We do have another piece of legislation which has been in force for many years called the newspaper Preservation Act and that act essentially allows two newspapers in a particular market to merge with each other and we've seen that in a number of cities. But what we have now is a continuing prohibition of that same activity for a local newspaper to merge or to acquire or to be part of a local broadcast operation whether it's a radio station or a television station. And so the question I think over time is are we as a country going to have a uniform policy that essentially favors the preservation of newspapers. And if so should it be applied to electronic media as it is to print media?

DEWS: Well these are a lot of very fascinating and important issues for us to follow. And I think Stewart for sharing your time and expertise today.

BROTMAN: Thanks so much, Fred. Great to be here.

DEWS: You can learn more about Stuart Brotman and his work on our Web site Brookings or to use slash tech innovation and follow him on Twitter at Stewart in Brotman. Now let's find out what's happening in Congress with Molly Reynolds.

REYNOLDS: I'm Molly Reynolds and I'm a fellow in the governance studies program here at the Brookings Institution. Most of the attention on Capitol Hill recently has focused on Republican efforts to pass a health care bill in the Senate thanks in part to a self-imposed target. Senate Republicans have set a deadline for themselves of the July 4th recess in the shadow of the health care fight another set of issues with actual deadlines. The budget process has become typical. Congress finds itself substantially behind schedule in completing its budgetary work. The budget resolution, which sets a broad framework for revenue in spending for the next fiscal year is supposed to be done by April 15th. What we should expect the process to get off to an early start. In years when a new precedent has come into office as Congress especially one controlled by the same party as the White House wants to get some input on the executives budget priorities this year is slow even in comparison to recent transition years. In 2001 Congress managed to finish the budget resolution by early May and in 2009 it was done by late April. So why the delay this year? In part the decision to use the unfinished budget process from last year to run on the health care bill has reduced the incentive to work hard on next year's budget resolution. In addition, the persistent divides among House Republicans have also made it difficult to come to an agreement on what a budget resolution would look like. In particular, disagreements about defense spending, the proposed discretionary cuts, and President Trump's budget and whether to use the reconciliation process to cut social programs like Temporary Assistance for Needy Families and Supplemental Nutrition Assistance Program have any agreement elusive. The budget resolution is meant to lay the groundwork for the annual appropriations process whereby Congress decides how much to spend on discretionary programs and

the federal budget like defense education and scientific research. Here again Congress is behind schedule with just one bill approved by the House Appropriations Committee. In 2001 there were four appropriations bills approved by the Appropriations Committee for consideration in the house before the Fourth of July recess. Their counterparts had finished one in 2009. The House panel had finished work on seven.

The Senate committee had completed four while Congress could complete additional work between now and when they leave town. There are no additional full committee markups in either chamber scheduled between now and the recess. It's likely then that Congress heads out for recess with substantially less work done than in other comparable years. It's virtually certain that Congress will need to turn to a continuing resolution a single large omnibus spending bill or some combination to keep the government running come October 1st. But the calendar is not the only thing to blame. A two year agreement adopted in 2015 to relax the limits on discretionary spending that were imposed in 2011 expires this year and decision about whether and how to use those caps which are separately in place for defense and defense spending has that been made. Several ideas for getting the appropriations process going in the next few weeks are reportedly under consideration in the house including doing one bill that combines various security related programs or simply sending the Senate a single package covering everything in advance of the August recess that per se proponents would buy the leadership some goodwill by giving the House a chance to adopt a measure that reflects conservative Republican priorities. Even knowing that it would fail in the Senate it's unclear though if a symbolic move now would ease ultimate resolution of the issue. Later former speaker of the House John Boehner repeatedly gave his conference chances to

vote on Mark stream bills that the Senate would ultimately pass for bringing a final deal to House members only to see frustration with him build over time as the appropriations process gets underway. One additional major issue looms in the background the debt limit. Current projections put the date at which the federal government would not be able to meet its obligations sometime between September and November. But some in Congress and the Treasury Department have begun to discuss the possibility of a July vote on the increased employment especially in the Senate whether and how the debt limit vote gets linked to other fiscal decisions remains to be seen. The bottom line is this. There's a lot of work to be done and not much time to do it and that's what's happening in Congress.

DEWS: To learn more about what's been happening in the Senate on the health care bill you can listen to Molly Reynolds on our recent 5 on 45 episode.

Hey listeners, want to as an expert a question? You can by sending an e-mail to me at BCP@brookings.edu if you attach an audio file. I'll play in on the air and I'll get an expert to answer and include it on the air in an upcoming episode.. Thanks to all of you who have sent in questions already.

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