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## NET NEUTRALITY: INDIVIDUAL PRIVACY AT RISK

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### ❖ NOTE ❖

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#### I. INTRODUCTION

Under President Obama's administration, the Federal Communications Commission (FCC) imposed regulations on internet service providers (ISPs) to prevent practices that harmed the open internet.<sup>1</sup> Following the change in regulations, ISPs sued in federal courts and lost with the courts holding that the FCC acted reasonably in the reclassification.<sup>2</sup> In March 2017, Congress used the Congressional Review Act and reversed Obama-era internet protections.<sup>3</sup> This change allows the FCC to reclassify ISPs and changes the

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<sup>1</sup> Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601 (2015).

<sup>2</sup> U.S. Telecomms. Ass'n v. Fed. Comm'n's Comm'n, 825 F.3d 674 (D.C. Cir. 2016).

<sup>3</sup> S.J. Res. 34, 115th Cong. (2017).

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way they are regulated.<sup>4</sup> ISPs may be allowed to sell customer data and charge companies for equal bandwidth on their networks. This is the latest development of the net neutrality debate that has been of concern for over a decade. The issue is whether internet customers should be provided unrestricted access to the internet and be allowed to safely browse without their data being sold.

Part II of this Note provides a history of net neutrality and how the debate has carried on since the formation of the internet. This includes a history of how data is viewed under the U.S. Constitution and how the government has regulated ISPs. Part III analyzes why internet customers sought regulation of ISPs, what the regulations were intended to do, and what the internet will look like now that the protections have been rolled back. Finally, Part IV of this Note provides recommendations as to why ISPs should be regulated and what the regulations should impose.

## II. BACKGROUND

Courts have ruled that speech on the internet is protected under the First Amendment.<sup>5</sup> The First Amendment states that Congress can pass no law abridging the freedom of speech.<sup>6</sup> However, data is not necessarily speech and has not been afforded the same protections.<sup>7</sup> The United States District Court for the Western District of Washington has ruled it is a violation of the First Amendment for the U.S. government to ask internet retailers for customer information.<sup>8</sup> In 2010, Amazon.com filed a suit against the North Carolina Department of Revenue for requesting data for all customer sales in North Carolina.<sup>9</sup> The United States District Court for the Western District of Washington held there must be a compelling reason to justify the government's request for customer data from retailers.<sup>10</sup> It also held that the First Amendment protects online customers from having the content of purchases disclosed to the government.<sup>11</sup>

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<sup>4</sup> *What is Net Neutrality*, ACLU (June 2017), <https://www.aclu.org/feature/what-net-neutrality>.

<sup>5</sup> Josh Blackman, *What Happens if Data is Speech?* 16 U. Pa J. CONST. L. HEIGHTENED SCRUTINY 25 (2014).

<sup>6</sup> U.S. CONST. amend, I.

<sup>7</sup> Blackman, *supra* note 5, at 25.

<sup>8</sup> *Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154 (W.D. Wash. 2010).

<sup>9</sup> *Id.* at 1159.

<sup>10</sup> *Id.* at 1154.

<sup>11</sup> *Id.* at 1167.

Courts have generally found no expectation of privacy in internet communications.<sup>12</sup> Similar to a letter, an email is out of the sender's control once it is sent.<sup>13</sup> The email can be forwarded and the sender cannot have an expectation that the communication will be private.<sup>14</sup> But there is more data available that can be collected through cookies. Cookies contain information about what a person views online and are passed from web servers to browsers during visits to websites.<sup>15</sup> Through cookies, internet users leave a trail of websites they have accessed.<sup>16</sup> These cookies are used to create personalized visits to websites including personalized ads.<sup>17</sup>

Originally, ISPs were not treated as utilities or common carriers.<sup>18</sup> This allowed ISPs to operate free from the rules by which other utilities must abide.<sup>19</sup> The chairman of the FCC during President Clinton's administration, William Kennard, wanted to keep the internet free from government regulation.<sup>20</sup> In 2002, the FCC solidified that ISPs would not be treated as utilities and classified them under Title I of the Communications Act of 1934.<sup>21</sup>

The Communications Act of 1934 gave the FCC the power to regulate telephone companies.<sup>22</sup> Under Title I of the Communications Act, the FCC does not have the power to regulate consumer devices intended for the receipt of radio communications when the devices are not engaged in the process of radio transmission.<sup>23</sup> Interpreting the Communications Act, in 2005, the United States Supreme Court held that ISPs were information carriers and not subject to the common carrier rules.<sup>24</sup> This same holding affirmed the Telecommunications Act of 1996, which exempts ISPs from common carrier regulation by the FCC.<sup>25</sup>

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<sup>12</sup> Mitchell Waldman, *Expectation of Privacy in Internet Communications*, 92 A.L.R. 5th 15 (2001).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> IND. U. KNOWLEDGE BASE, <https://kb.iu.edu/d/agwm> (last visited June 19, 2017).

<sup>16</sup> *Online Tracking*, F.T.C., <https://www.consumer.ftc.gov/articles/0042-online-tracking> (last visited June 18, 2017).

<sup>17</sup> *Id.*

<sup>18</sup> Marguerite Reardon, *Net Neutrality: How We Got From There to Here*, CNET (Feb. 24, 2015, 4:00 AM), <https://www.cnet.com/news/net-neutrality-from-there-to-here/>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> 74 AM. JUR. 2D *Telecomms.* § 12 (2017).

<sup>23</sup> *Id.*

<sup>24</sup> *National Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

<sup>25</sup> *Id.*

In 2015, under President Obama, the FCC released the Open Internet Order.<sup>26</sup> This order set up the rule that ISPs are treated as common carriers and subject to Title II of the Communications Act.<sup>27</sup> This granted the FCC broad authority to regulate ISPs in the same way they regulate other telephone utilities.<sup>28</sup> These rules for ISPs were intended to increase customers' privacy protection as they imposed restrictions on how their data could be used.<sup>29</sup> Under these rules, consumer data has been used by companies like Google and Facebook to target ads based on a person's browsing history.<sup>30</sup> Under the rules proposed in 2015, ISPs would be required to have customers' consent to track and sell browsing data.<sup>31</sup>

In 2017, under President Trump, Congress voted to roll back the Obama-era protections for consumers.<sup>32</sup> Congress used the Congressional Review Act to undo the regulations that were created under President Obama.<sup>33</sup> These protections prevented ISPs from gathering, storing and selling customers browsing data, app usage, location and more.<sup>34</sup> The language of the joint resolution is summarized as follows:

This joint resolution nullifies the rule submitted by the Federal Communications Commission entitled "Protecting the Privacy

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<sup>26</sup> Thomas B. Norton, *Internet Privacy Enforcement After Net Neutrality*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 225, 227.

<sup>27</sup> In the matter of Protecting & Promoting the Open Internet 30 F.C.C. Rcd. 5601 (2015).

<sup>28</sup> Elizabeth D. Lauzon, *Construction and Application of Communications Act of 1934 and Telecommunications Act of 1996 – United States Supreme Court Cases*, 32 A.L.R. Fed 2d 125 (2008).

<sup>29</sup> Mike Snider, *ISPs Can Now Collect and Sell Your Data: What to Know About Internet Privacy Rules*, USA TODAY (Apr. 4, 2017, 9:19 AM), <https://www.usatoday.com/story/tech/news/2017/04/04/isps-can-now-collect-and-sell-your-data-what-know-internet-privacy/100015356/>.

<sup>30</sup> *Id.*

<sup>31</sup> Brian Feldman, 'Sorry, ISPs Are Trying to Do What?' *What to Know About Congress's New Internet-Privacy Rollback*, NYMAG.COM (Mar. 28, 2017, 5:55 PM), <http://nymag.com/selectall/2017/03/why-congress-is-dismantling-the-fccs-internet-privacy-rules.html>.

<sup>32</sup> S.J. Res. 34, 115th Cong. (2017).

<sup>33</sup> Richard S. Beth *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, CONG. RES. SERV. (Oct. 10, 2001), <https://www.senate.gov/CRSpubs/316e2dc1-fc69-43cc-979a-dfc24d784c08.pdf>.

<sup>34</sup> Brian Fung, *What to Expect Now That Internet Providers Can Collect and Sell Your Web Browser History*, WASH. POST: THE SWITCH (Mar. 29, 2017), [https://www.washingtonpost.com/news/the-switch/wp/2017/03/29/what-to-expect-now-that-internet-providers-can-collect-and-sell-your-web-browser-history/?utm\\_term=.24ebae52efa0](https://www.washingtonpost.com/news/the-switch/wp/2017/03/29/what-to-expect-now-that-internet-providers-can-collect-and-sell-your-web-browser-history/?utm_term=.24ebae52efa0).

of Customers of Broadband and Other Telecommunications Services." The rule published on December 2, 2016: (1) applies the customer privacy requirements of the Communications Act of 1934 to broadband Internet access service and other telecommunications services, (2) requires telecommunications carriers to inform customers about rights to opt in or opt out of the use or the sharing of their confidential information, (3) adopts data security and breach notification requirements, (4) prohibits broadband service offerings that are contingent on surrendering privacy rights, and (5) requires disclosures and affirmative consent when a broadband provider offers customers financial incentives in exchange for the provider's right to use a customer's confidential information.<sup>35</sup>

This change now gives the ISPs, themselves, the ability to sell user data.<sup>36</sup> For customers, this is significant since they pay the ISPs for access to the internet.<sup>37</sup> Under these new regulations, customers are unable to access the internet without having their data sold unless the ISP chooses not to sell customer data.<sup>38</sup>

### III. ANALYSIS

The vote to repeal Obama-era net neutrality rules favors ISPs, and the companies purchasing customer data, but not the American people, or any other users of the internet. This decision also removes the FCC's power to regulate ISPs as they are no longer classified as common carriers under Title II of the Communications Act.<sup>39</sup> Now ISPs can sell customer browsing data without consent.<sup>40</sup> This is different from Facebook or Google collecting and selling your data.<sup>41</sup> Prior to the new FCC rules, a customer could choose to avoid certain websites that they believed tracked browsing data or sold

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<sup>35</sup> S.J. Res. 34.

<sup>36</sup> Snider, *supra* note 29.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Reardon, *supra* note 18.

<sup>40</sup> Thomas Fox-Brewster, *Now Those Privacy Rules Are Gone, This Is How ISPs Will Actually Sell Your Personal Data*, FORBES (Mar. 30, 2017 9:40 AM), <https://www.forbes.com/sites/thomasbrewster/2017/03/30/fcc-privacy-rules-how-isps-will-actually-sell-your-data/#4b73ca2a21d1>.

<sup>41</sup> Snider, *supra* note 29.

customer data. Now, all customer data is for sale since it is the internet providers who can collect and sell data.<sup>42</sup>

Part A analyzes why ISPs want to operate without regulations. Part B explores why regulations were created under the Obama administration. Part C concludes with why these regulations were recently rolled back and what this means for internet customers and the ISPs.

#### A. Why ISPs Want in on Data Sales

Prior to ISPs' classification to Title II under the Communications Act, they could not be regulated as common carriers by the FCC.<sup>43</sup> Originally, ISPs could choose how customers accessed the internet and the download speed of certain websites.<sup>44</sup> Many early network neutrality activists pushed for an open internet that would allow users to determine how the internet would be used.<sup>45</sup> However, ISPs were free to block users from accessing competitors' websites.<sup>46</sup> They were not governed by the same anti-monopoly rules by which traditional telephone companies are governed.<sup>47</sup> ISPs were also not regulated as to what they could do with customer data.<sup>48</sup> During the early days of the internet, online data was not treated as private by the courts; the internet was still in its infancy and the level of personal information online was less significant.<sup>49</sup>

In the 2000's, the debate of net neutrality showed why ISPs wanted to avoid the higher regulations that accompany a Title II classification under the Communications Act. In 2005, the CEO of AT&T, Ed Whitacre, said that Google was freeloading on his company's infrastructure.<sup>50</sup> This is directly against what net neutrality activists at the time desired. For AT&T to want to charge a company to have access to its customers would make the internet a restricted place. But for ISPs who have a duty to shareholders to make a profit, they have an enormous interest in avoiding any net neutrality rule: not because net neutrality would not create jobs, but because ISPs would be allowing other companies to access their customers. This type of mentality does little for ISPs' customers as they will likely want access to whatever websites customers choose

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<sup>42</sup> *Id.*

<sup>43</sup> 47 U.S.C §§ 151 et seq.

<sup>44</sup> Reardon, *supra* note 18.

<sup>45</sup> Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003).

<sup>46</sup> *Id.*

<sup>47</sup> 47 U.S.C §§ 151 et seq.

<sup>48</sup> Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601 (2015).

<sup>49</sup> Reardon, *supra* note 18.

<sup>50</sup> *Id.*

to access. Customers however have little choice into the ISP they can use, and they have little ability to shop for a better ISP.<sup>51</sup> In many markets, customers have access to one or two ISPs.<sup>52</sup> If an ISP chooses to restrict the websites their customers can access, the customers can do little other than complain.

#### B. Why Obama-Era Protections Upset ISPs

ISPs want to have the same ability to sell customer data as Facebook, Google, and other internet companies. Facebook has a large interest in selling customer data as it generates a large profit.<sup>53</sup> There is a large difference in how these companies collect customer data from how ISPs collect customer data. Customers choose to use websites such as Facebook and Google. Customers do not have to use these websites if they disagree with how they use their data. However, ISPs collect significantly more data than a single internet company can collect. ISPs are collecting data on everything their customers do while online and customers pay for this ability. Customers do not have a choice to give them data unless they choose to not access the internet.

During the Obama administration, the FCC enacted regulations that would protect internet users and allow the FCC to impose more restrictions on ISPs.<sup>54</sup> There were also proposed regulations that would force ISPs to receive consent from customers in order to sell customer data.<sup>55</sup> All of the regulations that were proposed under the Obama administration took the power to sell customer data away from the ISPs. This left the customer data market exclusive to the websites that customers chose to visit. Another part of the regulations was to affirm ISPs' classification under Title II of the Communications Act. The United States Court of Appeals, District of Columbia Circuit affirmed that the FCC acted reasonably in the reclassification of ISPs.<sup>56</sup> Congress's use of the Congressional Review Act allows the FCC to reclassify ISPs under Title I and remove regulations.<sup>57</sup>

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<sup>51</sup> Jon Brodtkin, *US Broadband: Still No ISP Choice for Many, Especially at Higher Speeds*, ARS TECHNICA (Aug. 10, 2016, 10:43 AM), <https://arstechnica.com/information-technology/2016/08/us-broadband-still-no-isp-choice-for-many-especially-at-higher-speeds/>.

<sup>52</sup> *Id.*

<sup>53</sup> Alex Hern, *Facebook Is Making More and More Money From You. Should You be Paid For It?*, THE GUARDIAN (Sep. 25, 2015 5:29 AM), <https://www.theguardian.com/technology/2015/sep/25/facebook-money-advertising-revenue-should-you-be-paid>.

<sup>54</sup> Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601 (2015).

<sup>55</sup> *Id.*

<sup>56</sup> *U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674 (D.C. Cir. 2016).

<sup>57</sup> Feldman, *supra* note 31.

### C. What Trump's Changes Mean for ISPs and Customer Data

ISPs are incentivized to sell customer data for revenue. As Congress and the FCC choose to roll back protections that were created under the Obama administration, it reduces the regulation of ISPs. Now companies no longer have to treat customer data with the privacy restrictions of the Communications Act as the FCC no longer is required to regulate telecommunication companies as common carriers.<sup>58</sup>

The new chairman of the FCC, Ajit Pai, was a former corporate counsel for Verizon.<sup>59</sup> He worked for Verizon during a time when it was not subject to the regulations created under the Obama administration. Since taking over as chairman of the FCC, Ajit Pai has expressed an interest in abolishing the net neutrality rules and would like to see ISPs voluntarily commit to net neutrality.<sup>60</sup> This is likely why President Trump appointed him as chairman of the FCC as he fits the President's commitment to empowering business and reducing overall regulations.<sup>61</sup>

President Trump expressed a focus on being pro-business and reducing regulations in the United States.<sup>62</sup> He is committed to bringing jobs to the United States.<sup>63</sup> This is why President Trump is in favor of rolling back these protections as he has said it will allow ISPs to invest more in their infrastructure.<sup>64</sup> However, according to an interview with Verizon's current general counsel, Verizon was never slowing its investment in infrastructure under the stricter Obama regulations.<sup>65</sup>

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<sup>58</sup> S.J. Res. 34, 115th Cong. (2017).

<sup>59</sup> FCC, <https://www.fcc.gov/about/leadership/ajit-pai> (last visited June 18, 2017).

<sup>60</sup> Jon Brodtkin, "Unenforceable": How voluntary Net Neutrality Lets ISPs Call the Shots, ARS TECHNICA (Apr. 11, 2017), <https://arstechnica.com/tech-policy/2017/04/unenforceable-how-voluntary-net-neutrality-lets-isps-call-the-shots/>.

<sup>61</sup> See Klint Finley, *Trump's FCC Pick Doesn't Bode Well for Net Neutrality*, WIRED (Jan. 23, 2017, 5:16 PM), <https://www.wired.com/2017/01/trumps-fcc-pick-signals-end-net-neutrality-efforts/>.

<sup>62</sup> Andrew Soergel, *CEOs Bullish on Trump's Pro-Business Agenda*, U.S. NEWS (Mar. 14, 2017, 2:11 PM), <https://www.usnews.com/news/articles/2017-03-14/ceos-bullish-on-trumps-pro-business-agenda>.

<sup>63</sup> *Id.*

<sup>64</sup> Ted Johnson, *President Trump Touts New Charter Investments, Including Commitments Made Last Year*, VARIETY (Mar. 24, 2017, 11:22 AM), <http://variety.com/2017/biz/news/donald-trump-charter-communications-new-hires-1202015535/>.

<sup>65</sup> Jon Brodtkin, *Title II Hasn't Hurt Network Investment According to the ISPs Themselves*, ARS TECHNICA (May 16, 2017), <https://arstechnica.com/information->



## IV. RECOMMENDATION

People have a right to free speech protected by the First Amendment of the Constitution.<sup>66</sup> This protection should extend to the information regarding a user's browsing history and their digital footprint. When ISPs are able to sell user data without restriction, customers are left with no way to access the internet without fear of being followed. Internet customers have little-to-no choice of how they can access the internet. When customers pay for access to the internet and then have their trail of clicks, searches and websites visited sold by their ISP, they are essentially paying to have their information sold. If ISPs are allowed to sell data, internet consumers can no longer choose to avoid websites that will sell browsing data. Even the most security conscious consumer cannot avoid the sale of their browsing data, except through extreme measures such as an offshore VPN that blocks ISPs from tracking data. The internet has become a utility just as phone lines were when the Communications Act was passed in 1934. Telecommunication companies can intrude on customer privacy if left unregulated.

The FCC should not reverse the Obama-era rules of internet privacy. Internet activists have urged individuals to comment against the FCC's proposed deregulation.<sup>67</sup> While President Trump may have an interest in giving businesses access to consumer data, it is not in the best interest of the people. By empowering the major telecommunication companies, Congress has limited the power of small businesses to enter the marketplace. When the large companies are allowed to limit what online content is accessible and allowed to sell browsing data, Congress and the FCC have allowed the creation of a privately managed Big Brother. People should have a right to use the internet without it being controlled by the ISPs from whom they purchase access. People should not be forced to use certain websites just because they are owned by the service providers.

Removing protections that ensured an open internet will also limit open competition and limit choices to just what an ISP offers to customers. ISPs have little incentive to provide full speed access to companies like Netflix or Hulu when they offer similar content through their services. If the FCC roles back net neutrality protections now that Congress has repealed the law requiring the protections to be in place, internet customers will have little or

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technology/2017/05/title-ii-hasnt-hurt-network-investment-according-to-the-isps-themselves/.

<sup>66</sup> U.S. CONST. amend, I.

<sup>67</sup> INTERNET-WIDE DAY OF ACTION TO SAVE NET NEUTRALITY, <https://www.battleforthenet.com/july12/> (last visited July 29, 2017).

no choice when it comes to how they can access a tool that was meant to empower them to access more data.

#### V. CONCLUSION

It is unfortunate that the regulations that were proposed by the FCC under President Obama have been rolled back before they were allowed to go into effect. Internet consumers should be treated the same way as telephone users and other communications utilities. Using the internet should neither force people to give away their right to privacy, nor should it allow ISPs to choose what websites their customers can access. The new direction of the FCC, under chairman Ajit Pai, is dangerous to individual privacy. The FCC wants to reduce regulations and empower ISPs to sell customer data and potentially restrict access to the internet. ISPs should be considered common carriers and people's access to the internet is at risk if the FCC continues to reduce net neutrality protections.