

Arrogant Overreach: FCC Chairman Ajit Pai's Plan to Totally Destroy Net Neutrality May Doom Him in Court

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If Trump FCC chairman Ajit Pai had confined his attack on Net Neutrality to merely rolling back the 2015 Title II rules, he might have gotten away with it; but like the Republican plan to kill Obamacare, the Republican plan to rob the middle class to enrich billionaires, and, well, every other Republican plan in this administration, Pai's plan is so grotesque, so overreaching, so nakedly corrupt that it is likely to collapse under its own weight.

That's because the Supreme Court has held that a federal agency contemplating a significant change in policy must "examine the relevant data and articulate a satisfactory explanation for its action." But there are no new facts in evidence since the first Net Neutrality rules were enacted in 2004 to justify a change. We don't know what evidence Pai will bring to court when it comes time to fight his plans, but the cards he's played so far are hilariously weak: for example, he claims that the 2015 Title II rule led to a decrease in infrastructure investment by telcos. In fact, the telcos' own filings and investor calls reveal that the reverse is true (Pai is entitled to his own opinions, but not his own fact).

US democracy has many structural deficits, but it also has strengths, and Pai has blundered into them. The first is that the administrative branch is composed of "expert agencies" like the FCC and they are legally required to provide strong evidentiary backing for their actions. As Tim Wu — the competition and internet legal scholar who coined the term "Network Neutrality" — writes in the New York Times, "A mere change in F.C.C. ideology isn't enough."

The other structural strength of the US system is the independent courts who act on a well-litigated Constitution whose jurisprudence is voluminous, and who have the power to overturn both the administrative branch and Congress. Again, these are far from perfect, but they are an important check on the abuse of political power, and they are much more readily available to the public than the other two branches. To saw Congress, you have to buy a majority of Congressjerks with campaign contributions; to capture a regulator, you must represent an industry that can offer them lucrative employment after they leave government life; to use the court to neutralize these other branches, you need only convince three appeals court judges or five Supremes that the Constitution supports your position.

While the courts are packed with Republican appointees (thanks to GOP Senate dirty tricks in refusing to approve judicial appointments under Obama, all the way up to a vacant Supreme Court seat that Trump stole), there is a well-established moderating effect of

judicial service on long-serving judges, because working your way up through the federal courts requires a showing of adherence to the Constitution, which, overall, favors policies at odds with the right-wing agenda.

This means that when Pai's plan gets to the courts, it stands a good chance of being struck down — and in any event, the court battle may last until 2020 and serve as a good argument to spur voters to vote against Trump and thus change the FCC leadership, mooting the whole point.

But Mr. Pai faces a more serious legal problem. Because he is killing net neutrality outright, not merely weakening it, he will have to explain to a court not just the shift from 2015 but also his reasoning for destroying the basic bans on blocking and throttling, which have been in effect since 2005 and have been relied on extensively by the entire internet ecosystem.

This will be a difficult task. What has changed since 2004 that now makes the blocking or throttling of competitors not a problem? The evidence points strongly in the opposite direction: There is a long history of anticompetitive throttling and blocking — often concealed — that the F.C.C. has had to stop to preserve the health of the internet economy. Examples include AT&T's efforts to keep Skype off iPhones and the blocking of Google Wallet by Verizon. Services like Skype and Netflix would have met an early death without basic net neutrality protections. Mr. Pai needs to explain why we no longer have to worry about this sort of threat — and "You can trust your cable company" will not suffice.

Moreover, the F.C.C. is acting contrary to public sentiment, which may embolden the judiciary to oppose Mr. Pai. Telecommunications policy does not always attract public attention, but net neutrality does, and polls indicate that 76 percent of Americans support it. The F.C.C., in short, is on the wrong side of the democratic majority.

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