STATEMENT
OF
THE HON. ROBERT M. MCDOWELL
SENIOR FELLOW
HUDSON INSTITUTE

"LEGISLATING TO SAFEGUARD THE FREE AND OPEN INTERNET"

BEFORE THE
U.S. HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 12, 2019

HUDSON INSTITUTE
1201 PENNSYLVANIA AVENUE, N.W.
SUITE 400
WASHINGTON, DC 20004

EXECUTIVE SUMMARY

The debate over the best way to keep the Internet open and freedom-enhancing has raged for 15 years. While the national political pendulum has swung back and forth during that time, the American Internet ecosphere has blossomed as the most powerful explosion of entrepreneurial brilliance in human history. A quarter century ago, at the time of the Internet's privatization, the Clinton-Gore Administration made a wise choice to insulate the Internet ecosphere from the heavy-handed regulation of Title II of the 1934 Act. Light-touch regulation not only allowed the Internet's "edge" to flourish, but provided the certainty and stability needed for the capital markets to invest more than $1.6 trillion in private risk capital in broadband infrastructure since the mid-1990s.

Needless to say, the political and public policy atmosphere has changed a few times since then. The FCC has attempted to regulate broadband services in various ways over the past eleven years, including by classifying broadband as a Title II communications service for the first time in early 2015. And, most recently, it acted in December of 2017 to restore the pre-2015 legal framework that was proven to work so well.

While I do not think that additional legislation is needed to protect consumers, start-ups or broadband investment, the effect of constantly-changing rules cannot be ignored. For instance, anticipating the uncertainty in 2015 surrounding Title II classification, capital markets appeared to have slowed their investment in broadband infrastructure. After the Restoring Internet Freedom order of 2018, investment in broadband has rebounded.

The time has come for Congress to provide clarity and certainty by enacting new legislation. The 116th Congress has the power to craft new bipartisan legislation that could last for decades and serve as a beacon for an open and freedom-enhancing Internet across the globe. The principles laid out by FCC Chairman Michael Powell in 2005 are a good starting point for this effort.

***

INTRODUCTION

Chairman Doyle, Ranking Member Latta and distinguished Members of the Subcommittee, thank you for having me testify before you today. My name is Robert McDowell. I served as a commissioner of the Federal Communications Commission (FCC) from June 1, 2006, to May 17, 2013. I am a partner at Cooley LLP as well as co-leader of its global communications practice. I am also a Senior Fellow at the Hudson Institute. I testify today only in my own capacity. The views expressed today are purely my own.

DISCUSSION

The debate over the best way to keep the Internet open and freedom-enhancing has raged for about 15 years. While the national political pendulum has swung back and forth during that time, the American Internet ecosphere has blossomed as the most powerful explosion of entrepreneurial brilliance in human history. The legal and regulatory framework that provided the necessary certainty and protections for the phenomenon that became the Internet was rooted in consumer protection, pro-competition and antitrust statutes such as: the Federal Trade Commission Act,[1] the Clayton Act,[2] the Sherman Act,[3] as well as tort and contract common law, among others. Furthermore, a fundamental ingredient in this successful public policy recipe was Title I of the Communications Act of 1934. A quarter century ago, at the time of the Internet's privatization, the Clinton-Gore Administration made a wise choice to insulate the Internet ecosphere from the heavy-handed regulation of Title II of the 1934 Act.[4] This monumental

[1] 15 U.S.C. §§ 41-58.

[2] 15 U.S.C. § 15.

[3] 15 U.S.C. § 1.

[4] "Turning specifically to the matter of Internet access, we note that classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are

decision, made at a crucial tipping point in the historical arc of the Net, enjoyed not only bipartisan and nearly unanimous support here in the U.S., but internationally as well.

In short, reliance on this time-tested legal construct created an environment where ideas hatched in dorm rooms or garages could become some of the most successful companies in the world in just a handful of years. Light-touch regulation not only allowed the Internet's "edge" to flourish, but it also provided the certainty and stability needed for the capital markets to take the leap to invest more than $1.6 trillion in private risk capital in broadband infrastructure since the mid-1990s.[5] Furthermore, it was not that long ago that the FCC itself issued unanimous and bipartisan orders classifying broadband Internet access service across all platforms as an information service.[6] I supported such efforts in concert with my Democratic colleagues as

---

appropriately applied to it." Federal-State Joint Board on Universal Service, *Report to Congress,* 13 FCC Rcd 11501, 11540 (1998)

[5] USTelecom, *Broadband Capital Expenditures Once Again on Upward Trajectory* (Oct. 18, 2018) at https://www.ustelecom.org/ustelecom-broadband-capital-expenditures-once-again-on-upward-trajectory/ (last visited March 11, 2019).

[6] Several times, the FCC voted, in a unanimous and bipartisan fashion, to classify broadband Internet access as a Title I information service. Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, *Declaratory Ruling*, 17 FCC Rcd 4798 (2002) *aff'd Brand X Internet v. FCC,* ; Appropriate Framework for BroadbandAccess to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (Commissioner Copps concurring). Additionally, in 2007, the Federal Trade Commission issued a report, with the unanimous and bipartisan support of all FTC commissioners, outlining how competition law, rather than common carrier regulation, best suited the evolution of the Internet and related consumer protection. Broadband Competition Policy, Staff Report, Federal Trade Commission, June, 2007, at https://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf (last visited March 11, 2019). It also warned against the unintended negative consequences of regulating the Internet as common carriage under Title II of the Communications Act of 1934:

> The other ground for proceeding with caution in evaluating calls for network neutrality regulation is the potentially adverse and unintended effects of regulation 160 generally – whether it is enacted in the area of broadband Internet access or any other area. Industry-wide regulatory schemes – particularly those imposing general, one-size-fits-all restraints on business conduct – may well have adverse effects on consumer welfare, despite the good intentions of their proponents. Even if regulation does not have adverse effects on consumer welfare in the short term, it may nonetheless be welfare reducing in the long term, particularly in terms of product and service innovation. For example, prohibitions of certain business conduct, such as vertical integration into content and applications or the offering of prioritization services by broadband providers, may not have immediate effects on consumer welfare, but could result in a long-term decline in investment and innovation in broadband networks. Broadband providers that cannot differentiate their products or gain new revenue streams may have reduced incentives to upgrade their infrastructure.
>
> Further, broad regulatory schemes almost certainly will have unintended consequences, some of which may not be known until far into the future. After all, even the most carefully considered legislation is

recently as 2007.[7]

Needless to say, the political and public policy atmosphere has changed a few times since then. The FCC has attempted to regulate broadband services in various ways over the past eleven years, including by classifying broadband as a Title II telecommunications service for the first time in early 2015.[8] And, most recently, it acted in December of 2017 to restore the pre-2015 legal framework that was proven to work so well.

To be clear, I do not think that additional legislation is needed to protect consumers, start-ups or broadband investment. The proof is in the pudding of the Internet's brief but brilliant history. Nonetheless, the public policy pendulum that has been swinging back and forth above the heads of Internet entrepreneurs like the sword of Damocles has created uncertainty that is counterproductive. For instance, anticipating the uncertainty in 2015 surrounding Title II

> likely to have unforeseen effects. In the broadband Internet context, regulation that nominally seeks to protect innovation in content and applications by prohibiting broadband providers from charging for prioritized delivery over their networks actually could erect barriers to new content and applications that require higher-quality data transmission. A new entrant in the streaming video market, for example, might prefer to purchase a certain quality of service from broadband providers, rather than investing in the server capacity and other resources necessary to provide that level of service on its own. Once a regulatory regime is in place, moreover, it may be difficult or impossible to undo its effects.

Id. at 159-60.

[7] Petition of ACS of Anchorage, Inc., *Memorandum Opinion and Order,* 22 FCC Rcd 16304 (2007).

[8] Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601 (2015) ("2015 Open Internet Order"*), aff'd United States Telecom Ass'n v. FCC,* 825 F3d 674 (D.C. Cir. 2016), *reh'g en banc denied*, No. 15-1063, 2017 WL 1541517, at *1 (D.C. Cir. May 1, 2017), *cert. denied,* Nos. 17-498 *et al.* (Nov. 5, 2018); Preserving the Open Internet, *Report and Order,* 25 FCC Rcd 17905 (2010) ("2010 Open Internet Order"); Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," *Memorandum Opinion and Order,* 23 FCC Rcd 13028 (2008) ("Comcast BitTorrent Order") (enforcing 2005 Internet Policy Statement against Comcast), *reversed Comcast v. FCC,* [600 F.3d 642 (D.C. Cir. 2010); Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Second Report and Order,* 22 FCC Rcd 15289 (2007) (imposing network neutrality requirements on C Block in 700 MHz auction; McDowell dissenting in part, the only dissenting vote on this order and my first dissent of any kind as an FCC Commissioner); AT&T Inc. and BellSouth Corp. Application for Transfer of Control, *Memorandum Opinion and Order,* 22 FCC Rcd 5662, 5663 (2007) (imposing network neutrality requirements as a merger condition); *see also* Statement of Robert M. McDowell, Application for Transfer of Control Filed by AT&T and BellSouth Corporation, *Memorandum Opinion and Order,* WC Docket No. 06-74 (Dec. 18, 2006) at https://transition.fcc.gov/commissioners/mcdowell/mcdowell_att_bellsouth_statement.pdf (last visited Mar. 11, 2019)).

classification, capital markets slowed their investment in broadband infrastructure. After the Restoring Internet Freedom order of 2018, investment in broadband has rebounded.[9]

The time has come, however, for Congress to provide clarity and certainty by enacting new legislation. Such an effort could end this era of bitter and vitriolic zero sum advocacy where, in order for one faction to "win," others must lose. The 116th Congress serves during a unique period in the Internet's history, and it has the power to forge a reasonable majority to craft new bipartisan legislation that could last for decades and serve as a beacon for an open and freedom-enhancing Internet across the globe. Any bill passed by this House must have a reasonable chance to garner 60 votes in the Senate if there is to be any hope of it becoming law. The only path to that goal of meaningful, positive and constructive public policy for the Internet – a law that will last beyond election cycles of two to four to eight years – is through finding that reasonable majority that offers a win-win-win scenario for all who build and are affected by the Internet. Without a large bipartisan majority, any legislative effort is largely symbolic. A hopeful starting point, however, could begin with the principles laid out by FCC Chairman Michael Powell in 2005, some of which were echoed by Chairman Julius Genachowski in 2010, such as: no anticompetitive throttling, blocking or prioritization.

This Congress has a rare opportunity to create a lasting legacy for the Internet ecosphere, and I look forward to helping you achieve it.

[9] Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd 211 (2018) ("Restoring Internet Freedom Order"). USTelecom reports that capital expenditures for broadband services were $76.0 billion in 2013, $78.0 billion in 2014, $77.5 billion in 2015, $74.8 billion in 2016, and $76.3 billion in 2017. USTelecom, *Historical Broadband Provider Capex* (2018) at https://ustelecom.org/wp-content/uploads/2018/12/Broadband-Investment-Historical-Broadband-Provider-Capex.pdf (last visited March 11, 2019).

BACKGROUND

THE HISTORY OF OPEN INTERNET POLICIES

The regulatory history of the principle of an open Internet begins with the Broadband Policy Statement, adopted in a bipartisan and unanimous fashion by the FCC in 2005.[10] The Broadband Policy Statement embraced four principles intended to "ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers":

- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to access the lawful Internet content of their choice.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to connect their choice of legal devices that do not harm the network.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to competition among network providers, application and service providers, and content providers.[11]

This was a simple, direct approach – the entire policy statement was three pages long.

After the FCC attempted to enforce these principles in a 2008 order, over my dissent,[12] the D.C. Circuit largely agreed with my dissent by holding that the principles could not be enforced because they were not binding rules.[13] The FCC attempted to address that issue in its 2010 Open Internet Order, which adopted rules by relying aggressively on Title I and Section 706 to prohibit blocking and unreasonable discrimination while adding a transparency rule

[10] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al., *Policy Statement*, 20 FCC Rcd 14986 (2005).

[11] *Id.*

[12] Comcast BitTorrent Order, 23 FCC Rcd at 13028, 13088 (Dissent of Robert McDowell).

[13] *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

requiring disclosure of key terms of service.[14] I again dissented, concluding that the order exceeded the authority granted to the FCC by Congress and that such rules were not needed in the first place. That order also was appealed, with the court striking down all but the transparency rule.[15] The FCC tried again in a 2015 order, which justified the exercise of jurisdiction by reclassifying broadband as a common carrier service for the first time in the Internet's history.[16] That order did survive appeal, but early last year the current FCC adopted its Restoring Internet Freedom Order, reversing the Title II classification, eliminating all of the requirements other than the transparency rule, and returning enforcement authority over information service providers, such as ISPs, to the FTC.[17] That order is subject to an appeal that was heard by the D.C. Circuit on February 1, but has not yet been decided.

While all of this activity was going on at the FCC and in the courts, broadband companies continued to build the modern Internet we enjoy today, investing tens of billions of dollars a year, and more than 1.6 trillion in all.[18] The amounts of investment varied from year to year, possibly affected by the uncertainty about what rules would apply – USTelecom has found that capital expenditures for broadband services were $76.0 billion in 2013, $78.0 billion in 2014, $77.5 billion in 2015, $74.8 billion in 2016, and $76.3 billion in 2017.[19] Along the way, wired and wireless ISPs have steadily improved the availability and speed of the service they

[14] Preserving the Open Internet, *Report and Order*, 25 FCC Rcd 17905 (2010).

[15] *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014)

[16] 2015 Open Internet Order.

[17] Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd 211 (2018).

[18] USTelecom, *Historical Broadband Provider Capex* (2018), *at* https://ustelecom.org/wp-content/uploads/2018/12/Broadband-Investment-Historical-Broadband-Provider-Capex.pdf (last visited March 8, 2019); USTelecom, *Broadband Investment in 2018 Continues Upswing* (2019) *at* https://www.ustelecom.org/broadband-investment-in-2018-continues-on-upswing/ (last visited March 8, 2019).

[19] USTelecom, *Historical Broadband Provider Capex* (2018) at https://ustelecom.org/wp-content/uploads/2018/12/Broadband-Investment-Historical-Broadband-Provider-Capex.pdf (last visited March 11, 2019).

offer. According to the FCC and Ookla, which tracks actual Internet speeds, average wired download speeds in the U.S. went from 11.9 Mbps in 2011 to 96.25 Mbps late last year, and average wireless download speeds went from 12.6 Mbps in 2014 to 22.69 Mbps last year.[20]

WHERE WE STAND TODAY

As I mentioned a few moments ago, today the state of open Internet obligations remains unsettled as the FCC waits for the D.C. Circuit to issue what will be the fourth open Internet decision since 2010. Even when the court rules, uncertainty will remain, because the current FCC's decision will not be the final word – just as the 2018 order reversed the 2015 order, there would be nothing to prevent a future FCC from reaching a different conclusion. So nearly 14 years after the original open Internet principles were adopted, we are no closer to a final resolution of what rules should govern Internet service providers, or others, on a permanent basis.

There is a good case to be made that there should be no new rules. The Internet has thrived since the 2018 decision, and some of the concerns that drove the 2015 rules either never materialized or are being addressed in the marketplace. For instance, while there were concerns about ISPs using personal data sent via the Internet, nearly 75% of all Internet traffic was being encrypted at the end of the third quarter of 2018, and 91% of all U.S. ISP traffic to Google is encrypted, which largely eliminates that hypothetical risk.[21] More prudent public policy would

[20] Ookla, *United States Fixed Broadband Speed Report* (Dec. 12, 2018) *at* https://www.speedtest.net/reports/united-states/2018/fixed/ (last visited March 8, 2019); Ookla, *United States Mobile Broadband Speed Report* (July 18, 2018) *at* https://www.speedtest.net/reports/united-states/2018/mobile/ (last visited March 8, 2019); International Comparison Requirements Pursuant to the Broadband Data Improvement Act, *Third Report*, 27 FCC Rcd 9884 (2012), at Appendix, Table 6; International Comparison Requirements Pursuant to the Broadband Data Improvement Act, *Sixth Report*, 33 FCC Rcd 978 (2018), at Appendix B, Table 8.

[21] Fortinet, *Quarterly Threat Landscape Report* (2018) at 7, *at* https://www.fortinet.com/content/dam/fortinet/assets/threat-reports/threat-report-q3-2018.pdf (last visited March 8, 2019); Google, *HTTPS encryption on the web* (2019) *at* https://transparencyreport.google.com/https/overview?hl=en (last visited March 8, 2019).

be produced if America had simple, understandable, permanent rules. Such a construct makes better sense than for consumers, ISPs, and edge providers to have to toggle back and forth between new rules and old rules again and again over time.

In addition, there are remedies for anticompetitive behavior under existing federal law. The Department of Justice and Federal Trade Commission have at their disposal the full panoply of U.S. antitrust and consumer protection laws to address market failures in the broadband industry should they arise. Specifically, the Sherman Act and the Clayton Act would prohibit Internet service providers from engaging in behavior that harms competition or consumers. Section 1 of the Sherman Act prohibits contracts "in restraint of trade."[22] Section 2 of that Act prohibits "attempt[s] to monopolize" and "monopolization."[23] While Section 3 of the Clayton Act prohibits exclusivity arrangements that may "substantially lessen competition" or "tend to create a monopoly."[24] Both of those provisions can be used to protect against hypothetical bad behavior by ISPs and "edge" providers alike.

But if there are to be specific rules for broadband service providers, the 2005 principles – and specifically the first four principles – with their view toward a freedom-enhancing, open Internet, provide an appropriate blueprint for any legislation. They created a framework that ISPs and consumers alike could understand and that would not deter innovation or investment, either in the core Internet or by application and content providers at the edge.

Furthermore, what the 2005 principles did not do was impose the 19th century construct of common carriage on the 21st century Internet. By focusing on what mattered to ensuring an open Internet, the 2005 principles avoided treating Internet providers like the railroads and

[22] 15 U.S.C. § 1.
[23] *Id.* at § 2.
[24] *Id.* at § 15.

telegraph operators of yore, and instead recognized that their businesses and technologies are different. It was light-touch regulation, appropriate for the lightning-fast dynamism of the Net, rather than the strict oversight imposed on state-granted monopolies, that produced the abundant Internet ecosphere the world enjoys today.

One other potential benefit of federal open Internet legislation is that a national framework is well suited to interstate commerce such as providing broadband Internet access services. Federal legislation could ensure that every participant in the ecosphere would play by the same rules everywhere, which makes compliance easier. Uniform and simple federal rules would also give consumers more certainty and clarity.

Finally, it is important that any open Internet legislation be bipartisan in nature. There is broad agreement on the basic principles of an open Internet, but there is not agreement on imposing Title II common carrier regulation on the Internet. Simple, clear and clean legislation, limited to the essential 2005 elements, has the best chance of success of passing both the House and the Senate, being signed into law by the President and lasting for decades.

CONCLUSION

Since the FCC adopted its original open Internet principles in 2005, the chief result has been uncertainty about whether those principles would remain in place or be enforceable. This uncertainty undermines ISPs, consumers, and providers of content and applications who use the Internet to reach their customers. The best way to resolve that uncertainty is with simple, clear, focused and bipartisan legislation that will create a stable environment that will spur investment and innovation in a freedom enhancing open Internet ecosphere.

Thank you again for inviting me to appear before you today, and I look forward to your questions.