

# Viewpoint

## ACCESS

# FCC Should Learn Its Limits

**A HALLMARK OF THE EXPLOSIVE** growth of the Internet over the past two decades has been the lack of federal regulation. Last fall, the Federal Communications Commission (FCC) announced its intent to begin regulating broadband Internet access service — in essence, to become the nation's Internet traffic cop.

Since then the FCC has been searching unsuccessfully for a source of statutory authority to pass its so-called “net neutrality” rules. The stakes are enormous for the FCC, as well as for Internet service providers.

In April the U.S. Court of Appeals for the D.C. Circuit in the Comcast case shot down the FCC's attempt to assert so-called “ancillary jurisdiction” over broadband Internet access under Title I of the Communications Act. The court found the agency's efforts “flatly inconsistent” with existing Supreme Court precedent and with Congress's own intent in several respects.

Instead of accepting *Comcast*, the FCC has doubled down on its efforts to regulate broadband Internet access. The chairman's



**GREGORY GARRE**  
EX-SOLICITOR GEN.

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new plan is to attempt to reclassify Internet service providers as common carriers and regulate Internet access under Title II of the Communications Act, which authorizes public utility-style regulation, in addition to continuing to assert ancillary jurisdiction over such services under Title I.

Far from shoring up the FCC's authority to regulate the Internet, the chairman's new plan

only raises new problems.

Less than five years ago in the Brand X case, the FCC successfully defended, all the way to the Supreme Court, its interpretation that Internet service providers are “information service providers” — and not common carriers subject to regulation under Title II of the Act. And that's consistent with the fact that the FCC has never classified any kind of Internet access service as a telecommunications service subject to full-blown Title II regulation.

In making its case, the FCC told the Supreme Court that a contrary regime “would lead to a dramatic expansion of the scope of Title II's common carrier regulations,” and that this would be

“impossible to square with the deregulatory purposes of the Telecommunications Act of 1996.” The agency also explained that broadband Internet services “thrived” under the FCC's “hands-off” regulatory approach and that the regulatory burdens that associated with common-carrier status would result in higher prices and discourage investment in infrastructure.

While broad, agency discretion is not

net access as a common-carrier service — just like the phone lines under Ma Bell — the FCC will have to account for its prior findings on why Internet service providers are not common carriers.

The courts ought to greet the FCC's newfound assertion of authority over Internet access under Title II with no less skepticism than they did its unbounded assertion of ancillary jurisdiction under Title I. Indeed, given that the FCC's recent Title II about-face has been proposed as a transparent attempt to side-step the Comcast decision, the courts should be especially reluctant to embrace the agency's latest Internet power grab.

Instead of tying itself into knots trying to conceive a jurisdictional basis for regulating broadband Internet access, the FCC would do well to recognize its own inherent limits. The constitution vests “all” legislative authority in the Congress, and all administrative agencies have only the rule-making authority that is delegated to them by the Congress.

The problem for the FCC is that Congress has not authorized the FCC to regulate broadband Internet access. Several bills have been introduced to give the agency that authority. But none has passed. Instead, Congress has repeatedly sought to ensure a free market for Internet services “unfettered by federal or state regulation.”

As the FCC itself often touts, the Internet has transformed American life and the nation's economy. Especially given the interests at stake, it is not too much to demand that the FCC ask Congress for express authority to regulate broadband Internet access.

Of course the problem with asking for permission is that you don't always get it. But in the Supreme Court's words, an agency “literally has no power to act — unless and until Congress confers power upon it.” ■

*Gregory Garre is the chair of the Supreme Court and appellate practice at Latham & Watkins LLP. In 2008-2009, he served as the 44th Solicitor General of the United States.*

unbounded. As the Supreme Court recognized last year, when an agency changes course it cannot simply disregard its prior statements or findings. Important reliance interests are at stake, especially given the investment in the infrastructure necessary for broadband Internet access.

In attempting to regulate broadband Inter-