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Internet Cop

President Obama's top man at the Federal Communications Commission tries to regulate the Net.

Peter Suderman from the March 2011 issue

Robert McDowell becomes effusive when talking about the World Wide Web. "The beauty of the Internet is that it has been somewhat lawless," says the Republican, one of five appointees who run the Federal Communications Commission (FCC). The lack of government mandates, McDowell says, has made the Net "the greatest deregulatory success story of all time," a "sort of libertarian heaven."

Is that heaven about to crash down to earth? Julius Genachowski, the man hand-picked by President Barack Obama to chair the FCC, insists not. "I've been clear repeatedly that we're not going to regulate the Internet," he told *The Wall Street Journal* in February 2010. But his actions suggest otherwise. Since taking office in June 2009, Genachowski, a tech entrepreneur and former FCC counsel, has led the commission on an unprecedented quest for power over the Web's network infrastructure, sparking a thunderous, confusing lobbying battle over who gets to control the Net.

"If the government starts to get involved with regulation of Internet network management," McDowell warns, "you'll start to see the politicization of decisions in that realm." At this point, there's no *if* about it: From his first major speech to a hurried and secretive rulemaking

procedure in the final weeks of 2010, Genachowski has made it his mission to plant the seeds of government control within the core of the Internet—all under the guise of "preserving Internet freedom."

They Call It Net Neutrality

Like so many political slogans, Internet freedom sounds great. But what does it mean in practice? For Genachowski and the rest of the Obama administration, "Internet freedom" is a feel-good euphemism for the techie idea known as "net neutrality."

At its most basic, net neutrality is the belief that all bits and bytes that travel over the Internet should be treated equally: no discrimination, no paid prioritization, just first-come-first-served access for everyone all the time. As an egalitarian approach to the Web, it is more a pre-technical philosophy than a clear guide to managing network infrastructure. The applied theory of net neutrality is that routers—the traffic management devices that send packets of information from one computer or server to the next—should treat each piece of information like every other piece, be it an email message, a video, a game, or 3D porn. This is not a bad idea; indeed, it is largely how the Internet works already. But net neutrality advocates warn that without federal intervention, corporate giants won't leave it this way for long; they will begin setting up pricey, priority-traffic toll roads across the Web.

The neutrality concept is a direct descendant of "common carrier" regulation of phone companies. When wire-based phone networks ruled the earth, they were treated as public utilities. The feds forced them to share their infrastructure with their competitors at regulated rates, a restriction on their property rights that was enforced under the pleasant-sounding banner of "equal access."

It didn't take long for politicians to start fretting about equal access on the Web. In a 1994 speech, Vice President Al Gore pondered this loaded question: "How can government ensure that the [emerging Internet] will permit everyone to be able to compete with everyone else for the opportunity to provide any service to all willing customers? Next, how can we ensure that this new marketplace reaches the entire nation?" Access, opportunity, competition—how would these goals ever be achieved without the government's involvement?

Answer: easily. Internet access exploded throughout the late 1990s and the following decade —no federal broadband regulation required. By 1999 more than 30 million people could dial in from their homes. The Net's success in the absence of regulation was so apparent that even Democratic bureaucrats preached the gospel of nonintervention: In 1999 FCC Chairman William Kennard declared in a speech that "if we've learned anything about the Internet in

government over the last 15 years, it's that it thrived quite nicely without the intervention of government." In the same speech, Kennard made the case for what he called a "high-tech Hippocratic Oath" for regulators: First, do no harm.

It worked. During the following decade, online activity exploded. Between 2001 and 2008, online commercial activity—which for all practical purposes did not exist the decade before—became big business, rising from about $8 billion a year to about $42 billion, according to the U.S. Department of Commerce. Simultaneously, broadband Internet access rapidly blazed a path from high-tech luxury service to mass-market must-have. In 2000 just 3 percent of homes had broadband access. By 2010 the figure had climbed to 66 percent, according to a report from the Pew Research Center's Internet & American Life Project.

But the net's success only made activists more vehement that it must be "preserved" through regulation. That's where net neutrality came in. In 2005, under the leadership of Republican Chairman Kevin Martin, the FCC adopted four "policy statements" outlining the principles that should govern Internet use and operation. Users, the commission asserted, are entitled to access their choice of lawful content, to use applications and services as they wish, to connect legal devices to the network provided they do no harm, and to enjoy the effects of competition among providers and networks. But these statements of principle were not regulations, and thus of dubious enforceability.

At first, the push for net neutrality was targeted at wire-line carriers—cable companies, DSL providers, and others who delivered Internet connections to fixed locations using expensive-to-install conduits. But by 2007, calls for net neutrality expanded to the growing wireless Internet, bringing mobile data networks like those operated by AT&T and Verizon into the crosshairs. Net neutrality gave online Democratic activists—the "netroots"—an issue in which "equality" was on one side and discriminatory corporations on the other. The sin of these corporate villains? Denying network access to those unwilling to pay for it.

"Network giants believe they should be able to charge Web site operators, application providers and device manufacturers for the right to use the network," the progressive media activists at Free Press warned in their online guide to the issue. "Those who don't make a deal and pay up will experience discrimination: Their sites won't load as quickly, and their applications and devices won't work as well."

The issue never really caught on with the broader public, but it did become a partisan rallying cry. In 2008 presidential candidate Barack Obama made net neutrality a campaign promise, vowing to achieve it through the FCC. The promise was politically smart. Although regulating Internet traffic was barely raising eyebrows among average voters—most of whom were busy

enjoying easy access to the Internet—the idea was much loved by two groups important to Obama: the digitally savvy army of online activists whose fund raising and organizing helped put the president in office, and a collection of high-flying, Democrat-supporting Silicon Valley companies. Netroots powerhouses such as Moveon.org got an issue to motivate and deliver their progressive base, while content-delivery behemoths such as Google (whose CEO, Eric Schmidt, took a week off to campaign for Obama) got a policy wedge against the Net's infrastructure gatekeepers. Both camps expected a payoff in exchange for their support.

Obama's Basketball Buddy

After Obama was elected, it fell to Julius Genachowski to make good on the campaign promise. The president didn't just assure supporters that his administration would pursue net neutrality through the FCC; he named a close personal friend and a net neutrality true believer as the commission's chairman to get the job done right. (Genachowski's office declined a request for an interview.)

Genachowski has been friends with Obama for decades. The two were classmates at Harvard Law School, where they worked together on the *Harvard Law Review* and, according to *The New York Times*, were "basketball buddies." Genachowski, who has spent much of his professional career zig-zagging through Silicon Valley, served Obama's campaign as chairman of the Technology, Media, and Telecommunications Policy Working Group.

The two men have remained tight since Obama took office: Between January 31 and August 31, 2009, official records show that Genachowski visited the White House 47 times, more than any other agency head. (Sixteen of those visits came before Genachowski had even assumed office.) The next most frequent visitor among agency chiefs was Treasury Secretary Timothy Geithner, who dropped by just five times during the same period.

The FCC chairman's private-sector background includes stints at the sort of content companies that tend to favor neutrality rules. Genachowski helped launch Rock Creek Ventures, which funds and consults for "digital media and commerce companies," and he has served as a director for a number of large Web portals, including Web.com and Beliefnet. According to his fellow FCC commissioner, Meredith Baker, "The chairman's starting point is at the edge, application side of the [Internet] ecosystem. I don't think that's to the exclusion of the networks and their important role, but he starts in Silicon Valley."

The outline of Genachowski's ideas for neutrality regulation was unveiled at his first major address as the nation's top communication regulator, a September 2009 speech at the center-left Brookings Institution. Genachowski reiterated at nine separate points the Obama

administration's promise to ensure that the Web would remain "free and open." The phrase even appeared in the title of his talk: "Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, Prosperity."

The chairman's speech didn't answer the obvious question that has long nagged net neutrality skeptics: preserving it from *what*? But his remarks did address the question of how: The FCC, Genachowski said, must be "a smart cop on the [Internet] beat." To fulfill that role, the commission would both beef up its authority and grant itself wide discretion in how to use it. "I will propose that the FCC evaluate alleged violations of the non-discrimination principle as they arise, on a case-by-case basis," the chairman promised. Clear and straightforward rules were out. Regulators' whims were in.

Genachowski proposed taking his predecessor Kevin Martin's four principles—access to legal content, unrestricted use of services, device interoperability, and provider competition—and codifying them into law. He also wanted to add two more.

The first, and more controversial, of his additions would prohibit broadband providers from discriminating against "particular Internet content or applications." In theory, the nondiscrimination provision would mean that the FCC could prohibit service providers from, say, blocking access to certain websites, or prioritizing the traffic to a particular company's service (for instance, giving priority to videos from corporate partners over those from competing services). But the case-by-case standard would provide the agency with considerable leeway to decide when to step in.

The second new principle would require ISPs to be "transparent about their network management practices." Basically, if service providers selectively slowed traffic for a particular application—say, the peer-to-peer service BitTorrent, which is frequently used to share movies, TV shows, and other large files—or capped a user's total bandwidth for a given pay period, they'd have to notify consumers in plain English. Genachowski also hoped to extend the rules to wireless data networks such as those used by iPhones and Blackberries.

Genachowski's speech was couched in the rhetoric of choice, innovation, and openness. But in framing his proposal as an attempt to preserve the Internet's existing virtues, he masked the fact that it would represent an unprecedented expansion of federal control over the nation's information infrastructure. And although no one knew it at the time, his plan presaged a sweeping attempt to subject broadband providers to an entirely different, and far more restrictive, regulatory classification.

A Solution in Search of a Problem

Genachowski's speech targeted discriminatory practices by ISPs. But it did not cite any specific examples of such behavior, perhaps because neither Genachowski nor any other net neutrality supporter has ever identified more than a handful of instances in which the Internet's openness has actually been violated. Indeed, it is hard to get a handle on what, exactly, strict neutrality rules are intended to prevent.

In October 2010, the American Civil Liberties Union (ACLU) released a list of 10 alleged net neutrality violations. But as horror shows go, it wasn't very scary. For starters, the list included two actions taken by ISPs in Canada, which suggests how far advocates have had to stretch to find real-world examples. It also included AT&T's 2007 decision to excise Pearl Jam singer Eddie Vedder's attacks on President George W. Bush during a live stream of a concert. But that decision wasn't made by AT&T in its role as a network provider; it was made at the broadcast level by the team in charge of running the show, in the same way that an MTV video crew might bleep a curse word from a live awards ceremony. Also on the list: an allegation that BellSouth censored MySpace by denying access to some users—despite the fact BellSouth says the event was merely a glitch, an explanation no evidence has yet contradicted.

The ACLU also listed Verizon's 2007 refusal to send a mass text message from the abortion rights group NARAL Pro-Choice America. Verizon maintained that it had the right to block "controversial" content of any kind—essentially, that it needed to be sensitive to bulk messages that it agreed to send over its network. Julian Sanchez, a research fellow at the libertarian Cato Institute (and former **reason** staffer), describes it as "a case where the company is partnering with the provider in a way that goes beyond carriage, because they're also effectively acting as a payment processor. That means they'll have an interest in vetting partners in a way you wouldn't expect a mere carrier to vet every content provider on the network." Regardless, after a loud public outcry, Verizon reversed the decision within one day.

Consumer agitation also played a role in resolving the most notorious net neutrality violation. In 2007, the press began to report that Comcast was secretly slowing some users' access to BitTorrent. The company said it was merely attempting to prevent network congestion—and thus keep overall access and user speeds up—by slowing applications that were suspected of hogging bandwidth. By spring 2008, Comcast, under intense customer pressure, adjusted its network management practices so that specific applications such as BitTorrent would not be targeted. Consumer agitation had solved the problem, but the Bush FCC later censured the company anyway.

The punishment was largely symbolic, but was intended to send the message that the FCC would take official action to ensure net neutrality. "We are saying that network operators can't block people from getting access to any content and any applications," then-chairman

Kevin Martin told *The New York Times* in August 2008. Comcast challenged the decision in court.

This lack of clearly defined violations has never stopped net neutrality advocates from using Comcast and other big broadband providers as convenient corporate villains. On the campaign trail, Barack Obama warned that without net neutrality, "mom and pop sites" could suffer at the hands of greedy network behemoths.

But the net neutrality debate doesn't really pit the Goliaths against the Davids. It's a battle between the edge of the Internet and the center, with application and content providers (the edge) fighting for control against infrastructure owners (the center). Large business interests dominate both sides of the debate. Google, for example, has long favored some form of net neutrality, as have Facebook, Amazon, Twitter, and a smattering of other big content providers, who prefer a Web in which the network acts essentially as a "dumb pipe" to carry their content. Mom-and-pop sites aren't the issue.

Google makes its support sound as simple and earnest as its corporate motto of "don't be evil." Much like Genachowski, it defines net neutrality as "the concept that the Internet should remain free and open to all comers." But the freedom and openness that Google claims to prize bear a distinct resemblance to regulatory protection. An Internet in which ISPs can freely discriminate between services, prioritizing some data in order to offer enhanced services to more customers, is an Internet in which content providers may have to pay more to reach their customers. Under Google and Genachowski's net neutrality regime, ISPs may own the network, but the FCC will have a say in how those networks are run, with a bias toward restrictions that favor content providers.

Battle Lines

Yet for many of net neutrality's most vocal supporters, Genachowski's proposal didn't go far enough. In November 2009, Columbia law professor Timothy Wu, who popularized the term *net neutrality* in a 2002 paper, co-signed a letter with other left-leaning academics warning that an early draft of the FCC plan was too vague and might not sufficiently restrict ISP behavior. Building on that letter, the "media reform" group Free Press warned that the ambiguity "would undermine the future of Internet freedom."

Free Press serves as the nexus for the netroots' net neutrality efforts. Founded by Josh Silver, who'd previously helped run a state-based campaign for publicly funded elections, and the leftist media theorist Robert McChesney, the group touts a radical, anti-corporate vision of government control over the media. In 2002, the year Free Press was founded, McChesney

co-wrote a book, *Our Media, Not Theirs: The Democratic Struggle Against Corporate Media*, which declared "the need to promote an understanding of the urgency to assert public control over the media."

Despite its relative newness and its radical ideas, Free Press has had an outsized influence on the net neutrality debate. It has a former staffer in the FCC chairman's office: In June 2009, Jen Howard left her job as press director for Free Press to become Genachowski's press secretary. The group also benefited from its longstanding alliance with MoveOn.org, a netroots giant with massive influence on progressive politics.

Free Press has used its influence to push the FCC toward the strictest regulations possible. By opposing Genachowski's initial rule proposal as too lax, the coalition made it clear that only the heaviest regulatory burden would do. And Free Press hasn't been afraid to turn its fire on the chairman. In July the group created a mocked-up "Wanted" poster using a photo of Genachowski's face and encouraged activists to post it "all over Chicago" during an FCC meeting there. FCC insiders say the group's influence is strongly felt. According to Commissioner Baker, the chairman "is under tremendous pressure from the netroots base not to compromise on net neutrality."

While Free Press was busy trying to save the Internet from vaguely defined ISP threats, opposition to Internet interference began to coalesce. In September 2009, the free market telecommunication scholars Adam Thierer and Berin Szoka, then employed by the Progress & Freedom Foundation, wrote in *Forbes* that "the presumption of online liberty is giving way to a presumption of regulation." They warned that despite efforts to make the net neutrality proposal seem harmless, it would inevitably lead to a massive increase in federal regulation of the nation's information infrastructure. "Real Internet Freedom," they wrote, "is about to start dying a death by a thousand regulatory cuts."

Broadband providers, naturally, worried too. "In the '90s," says Hank Hultquist, a vice president in AT&T's federal regulatory division, "the FCC decided that it was not going to regulate the Internet in the way that we regulate phone service." But despite an initial bipartisan consensus against regulating the Net, there was always dissent. As the Web matured, that dissent grew, and when the Obama administration took power, it gave dissenters the keys to the regulatory command post.

Following Genachowski's Brookings Institution speech, Commissioners Baker and McDowell went public with their skepticism about the regulatory push. Nevertheless, in the months immediately afterward, Genachowski began the lengthy process of writing and reviewing his rule proposal. The plan that emerged closely resembled the structure that Genachowski had

proposed in his speech. At the end of October, when the commission voted on the proposal and published it, both Baker and McDowell dissented from the "factual and legal predicates" underlying the report. But they were in the minority.

'An Unbridled, Roving Commission'

Yet the FCC still did not have clearly enforceable rules governing net neutrality. Martin's principles were the only clear statements on the books. And even as the bureaucratic process rolled forward, the agency's authority to oversee broadband traffic—and thus to regulate net neutrality—was being challenged in federal court as a result of the 2008 BitTorrent decision.

Comcast owned up to slowing some users' connections when they were using BitTorrent. But it maintained that the agency's philosophical statements about Internet openness, which the FCC had relied on for its censure, were merely guidelines and therefore legally unenforceable. The FCC responded that it could enforce them under the doctrine of "ancillary jurisdiction," a legal concept under which an agency claims the authority to issue regulations necessary to meet its statutory responsibilities. To uphold its net neutrality policy statements, the FCC argued, it needed to oversee broadband traffic management practices such as Comcast's treatment of BitTorrent.

Because the policy statements weren't codified, the FCC had a tough time convincing D.C. Circuit Judge A. Raymond Randolph that it had a statutory responsibility to uphold them. In January 2010, Randolph signaled during oral arguments that he might take Comcast's side. "You have yet to identify a specific statute" that gives the FCC clear authority to regulate, he told the agency's lawyers. He seemed exasperated, saying vague statements of principle are no replacement for concrete rules. "You can't get an unbridled, roving commission to go about doing good," he said.

In April, Randolph laid down the law: "Policy statements are just that—statements of policy," he wrote. "They are not delegations of regulatory authority." The decision wreaked havoc with the net neutrality rulemaking process. Codifying the policy statements into new rules would do little to ensure the FCC's authority to regulate because those rules would still lack a statutory basis. Congress had never given the agency a clear directive to enforce neutrality. Without statutory authority to regulate broadband data management, what could the FCC do?

A few options quickly became apparent. First, the agency could drop its pursuit of net neutrality. But given the fact that the policy was an explicit campaign promise, and given the political pressure from groups like Free Press, that seemed unlikely. Second, the FCC could wait for Congress to give it explicit statutory authority. But with the health care battle

recently ended, and with Democrats headed for what promised to be a sizable loss in the November elections, there was little appetite for a controversial new regulatory initiative—especially one that would make congressional supporters vulnerable to accusations that they wanted to control the Internet.

The Trouble With Title II

And then there was the most extreme option. Instead of pursuing net neutrality through ancillary jurisdiction, as it had already attempted, the commission could move broadband service into the same regulatory category as telephone lines. Rather than regulating broadband providers under Title I of the Communications Act, as information services, it could regulate them under Title II, as telecommunication services. After Randolph's decision, Democratic Commissioner Michael Copps immediately signaled that he favored this route.

It sounds like a small change, but in fact it would be enormous. Title II was designed for legacy phone networks and was written before broadband existed. If the FCC could pull off this shift, it would have far greater power than before. The Net's core would effectively be transformed into a public utility subject to the whims of regulators.

But this approach was sure to provoke a drawn-out legal battle. As an executive branch agency, the FCC does not have the power to define its own governing statutes. That's Congress' job. And nowhere in the commission's governing statutes did Congress bestow upon it the power to reclassify broadband providers as telecommunication services. If the FCC pursued the Title II strategy, several ISPs warned in a joint statement in February 2010, the industry would be wracked by "years of litigation and regulatory chaos." That wasn't just a prediction; it was a threat.

The legal complexities of reclassifying broadband service were only part of the problem. Broadband providers warned repeatedly that strict net neutrality rules would derail capital investment, an argument seconded by telecommunication labor unions. In July the Communications Workers of America released a statement declaring that "the 'reclassification path' will lead to years of litigation and regulatory uncertainty that will reduce broadband investment and jobs." That promised to put the policy in conflict with one of the agency's other top priorities.

At the same time the FCC has been pursuing net neutrality, it has been putting together a National Broadband Plan meant to spark broadband investment and deployment in underserved regions, a plan the Obama administration has persisted with despite surveys showing that most Americans don't want the government involved in promoting broadband.

The FCC's own estimates put the cost of this plan at $350 billion, the bulk of which is presumed to come from investment within the industry. Rules that make such investment less lucrative make the broadband plan tougher to implement.

It was enough to make even the most determined regulator anxious. Which may be why, in May 2010, Genachowski announced that the FCC would take a step toward reclassifying broadband—but only a tentative one. Rather than release rules, the agency would issue a notice of inquiry asking for input about the possibility of switching broadband to Title II—the bureaucratic equivalent of winking at your friend and asking, "Hypothetically, what if we were to do this?" In a further sign of Genachowski's anxiety, the FCC's notice did not propose applying the full regulatory power of Title II to broadband providers. Instead, it suggested what Genachowski called the "Third Way," under which the agency would give up some of its potential Title II authority in the hope of erecting "meaningful boundaries to guard against regulatory overreach."

But the few boundaries to regulation the FCC proposed were not very meaningful. Larry Downes, a fellow at the Stanford Law School Center for Internet & Society, argues that regulating broadband providers like old-style telephone services could have a host of unintended effects, such as adding new consumer fees, giving local governments greater authority to impose a patchwork of confusing and contradictory regulations, and even giving the federal government greater leeway to wiretap electronic communications.

The difference, Downes says, is plain to see when you compare the evolution of Title I broadband service to the evolution of Title II phone carriers. "Under Title I, we've had the Internet revolution," he wrote on his eponymous website in March. By contrast, under Title II, "we've had the decline and fall of basic wireline phone service…and the continued corruption of local licensing authorities."

Even advocates of the switch seemed to admit that the move would open up the regulatory floodgates: According to a January 2010 FCC filing by Public Knowledge, one of the most active pro-neutrality groups, "Reclassification would…expand the range of opportunities for more aggressive regulatory steps."

The idea also faced opposition from Congress, particularly in the House, where a majority of members—including 72 Democrats—expressed disapproval of the plan in letters sent last May. And behind the scenes, sources say, the White House economic team expressed concern that the FCC's pursuit of strict, investment-killing net neutrality rules was a distraction that would be bad for growth in the telecommunications sector.

Fear of Compromise

Free Press was having none of it. The group mounted a months-long campaign pushing Genachowski to formally declare his intention to proceed with a Title II reclassification. In November Free Press urged its members to sign and email the chairman a prewritten letter urging him to reclassify broadband so that the FCC "can keep the Internet open and free of corporate gatekeepers." By the end of November, Genachowski looked stuck.

Free Press has declared that only the strictest approach to Internet regulation is acceptable. Yet the voting public appears unmoved by the neutrality agenda. Every single one of the 95 congressional candidates who signed a petition pledging to support neutrality lost in the 2010 elections. Meanwhile, Congress wasn't being supportive, and industry players on both sides of the issue were increasingly seeking compromise. In August, for example, Google and Verizon proposed a joint policy framework—essentially a loosely defined model regulatory structure—that would impose some restrictions on wire-line providers but would leave wireless data networks, widely believed to be the future of the Net, largely untouched.

A similar proposal made its way into legislative form at the end of September, when Rep. Henry Waxman (D-Calif.), chairman of the House Energy and Commerce Committee, released a short proposal subjecting wire-line providers to basic nondiscrimination rules but strictly forbidding the FCC from pursuing any form of Title II reclassification. The legislation appeared right before Congress was scheduled to end its session, and Republicans, citing the short time frame, declined to support it. But AT&T, which has long opposed any sort of neutrality regulations, was enthusiastic, and conservative activist groups quietly urged their members and contacts to push Republicans to vote for the proposal. Republicans clearly wanted to wait until after the November elections to act, but the interest from both industry and conservative activists suggests that something like the Waxman bill could eventually garner bipartisan support.

As 2010 progressed, Genachowski faced the unpleasant choice of either risking the wrath of MoveOn.org or giving in to Free Press' demands, despite their mounting unpopularity and the years-long legal battle that would result from trying to satisfy them. Initially, he opted to wait.

In September, Genachowski decided the FCC would delay any Title II decision until after the elections, implicitly acknowledging the messy politics of the situation. The day after the elections, he announced that neutrality would not be on the agenda for the commission's November 30 meeting, buying him time to take the temperature of the new Congress and see what might be done during the upcoming lame-duck session.

At the beginning of December, Genachowski finally made his move, announcing that the FCC would vote on a net neutrality proposal within a few weeks. The proposal would be based roughly on the Waxman bill and anchored firmly under Title I, broadband's current regulatory category. Never mind that a court had already declared the FCC's previous justifications for Internet regulation insufficient, making a legal challenge inevitable. When the lawsuit arrived, the FCC would come up with a new justification, ancillary to some currently untapped statutory provision. Conveniently, says Larry Downes, "the D.C. Circuit opinion left some wiggle room, suggesting that even though the commission had failed to find a provision in the law that its adjudication was 'ancillary' to, there might be some that weren't advanced."

Meanwhile, the time for comments on the neutrality proposal was limited to less than three weeks—far shorter than the comment period granted for the initial rule and the Notice of Inquiry. Normally the short comment period would have been the biggest cause of commotion surrounding the proceedings. But in this case, there was very little of substance for anyone to get excited about. In a highly unusual move, Genachowski decided to keep the text of the proposal secret until *after* it passed. The gist, though, was made plain enough by Genachowski's remarks at vote: The FCC would finally have a rule prohibiting "unreasonable discrimination" on the major wired networks. And who would be in charge of determining what sort of network management practices were "unreasonable?" Why, none other than the FCC.

The remnants of a once firmly held bipartisan consensus that the Internet operates best when the government leaves it alone were strong enough to block the most radical elements of the Left's net neutrality wish list, at least temporarily. And the rules will be challenged in court as well as Congress, where congressional Republicans were already threatening to use their new found oversight powers to make Genachowski's life difficult.

But Genachowski has finally managed to plant regulatory roots within the Net. On December 21, 2010, the agency voted 3-2 to pass a major regulatory order that no one outside the FCC had been allowed to see. Genachowski's power grab had been accomplished in haste and secrecy as a lame-duck Congress prepared for Christmas, but he had successfully fulfilled the president's promise and asserted federal control over the sprawling core of the Net. Commissioner McDowell's "greatest deregulatory success story of all time" has given way to empowered regulators. The Internet, after luxuriating in lawless freedom, finally has its own cop.

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