



Net Neutrality: A Libertarian View

Guest: Berin Szoka

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WOODS: I've had so many requests for a show on net neutrality. It's a topic that so many people are interested in hearing discussed because, well, they don't know what to make of it. It's a techy sort of subject, it's complicated, and yet it's a subject on which not only is everyone expected to have an opinion but everyone is expected to have a particular opinion. So I would like to get a dissenting voice here, and you seem like the perfect person to do that. But let's not get ahead of ourselves. Let's start off with what exactly is net neutrality. What is the problem that people who favor net neutrality say they are trying to solve?

SZOKA: Well, it depends who you ask. They say they are trying to solve a few different problems, but normally the way that this is framed is in terms of Internet freedom, the openness of the Internet, freedom online, is all put in terms of net neutrality. And the basic idea for the folks who have been advocating for regulation for the last decade essentially is that unless the government does something the broadband companies are going to shut down the open, free Internet and replace it with a closed, controlled one. So they've captured the language of freedom and set this debate up as being on over censorship, and they all allege a number of different harms. Sometime it's anti-competitive harms—Comcast potentially trying to slow Netflix. Sometimes it's news media—a censorship of dissenting voices. Sometimes it's additional redlining. It's an allegation that most companies are just waiting to squelch minority voices. So the harms are alleged to be many, but the evidence is really quite sparse.

So we've had ten years in which there really hasn't been an enforceable, legal regime except for a very brief period after 2010, and the SEC just lost on that, and the Internet is doing just fine. People will say that they couldn't have started companies like Reddit, but they did. And they didn't have enforceable net neutrality rules. So we can get into what they did have, but from my perspective the first thing to understand here is that the record for harms is exceedingly thin. The FCC alleges essentially four incidents, only one or two of which would even be dealt with by their rules, and what I and others have said for many years is that there are other, smarter ways to deal with potential harms if they arise, and that most of the harms that are

alleged are really about potential anti-competitive conduct, and we already have laws to deal with that. There might be a way to craft a more sensible legal framework here to deal with some of the reasonable or plausible concerns. But that's not what's being proposed, and the people who are driving the train here are really driving the FCC off a cliff.

WOODS: All right, there's an awful lot here to talk about, but I first want to know what kinds of policies are the people you are talking about advocating, and if I may play devil's advocate for a moment, wouldn't these policies essentially be harmless anyway if they did restrict the freedom of action of some of these big companies? What's the real big deal after all? Why should we be crying tears over the rights of these big companies? Who really cares? Right? The freedom of the Internet will be maintained thereby.

SZOKA: Well, there's some truth to that, so I will explain what the three rules are, and the short version is actually most of them are not that controversial, and if you asked broadband companies, you would actually get agreement, but on the margins there is important disagreement, and so that's number one, and number two is the legal precedent, the legal approach here really matters. It's just one of those issues that you can't simply reduce to what's the right answer. You really have to think very carefully about the legal framework that you put in place and what it means for the rest of the Internet. So let me explain the three rules. Then we can talk about the broader context and implications here.

At its core net neutrality as the FCC tried to impose it the last six years is really about three rules. One is a transparency mandate that says that broadband providers have to disclose their network management practice. Do they block or slow certain traffic? How do they run their networks? And in principle there's not a lot of disagreement about that. Most people would agree, even the companies, if you put this up to a vote in Congress, I think it would be pretty easy to get legislative agreement on that that there's going to be some degree of transparency. There's now arguments over exactly what it should look like, and those are not unimportant, but that's not really the core of the debate. It's the second two rules that the FCC lost on back in January, and we'll talk about that history, but those are number one, the no blocking rule, which says that broadband providers may not block legal content or devices from their networks, and that's in response to the concerns about censorship, and the second is a non-discrimination rule, and the question there is what exactly does that rule look like and how does it work in practice? And just to start, we already have some version of that with antitrust law. If you have market power, and you discriminate against your rivals in a way that harms consumers ultimately, that's already potentially illegal, so the question for that rule is, how do you structure it? And the short version is it was created in 2010 as essentially a ban, de facto ban. No, the FCC didn't exactly say this on allowing broadband providers to return to arrangements with a particular content provider to prioritize their traffic to give them premium delivery within the network. So that's really where the debate is. How should that rule be structured?

WOODS: Is there a reason from the point of view of the public welfare that, leaving aside private property and the rules of the free market, from the point of view of the public welfare is there a reason that we should favor allowing companies to make these kinds of deals with other institutions?

SZOKA: Yeah, that's a great question. That's really at the heart of this debate. I will say that there hasn't been a great demand for that in the past, but I think you're starting to see more services where that's likely to be relevant. So one of the things that people get confused about in these debates is they think that when we talk about making some form of prioritization legal, then suddenly the Internet is going to fundamentally change, and that there is going to be prioritization of lots of services and other services are going to be in the slow lane. I don't think that's ever been realistic. I think what we're talking about here is on the margins. Certain kinds of services that are very bandwidth intensive like Netflix, which right now takes 30 to 40% of peak traffic on the Internet in the U.S., or certain services that require premium delivery—doing telemedicine, VoIP, talking on the phone. There are certain kinds of services that are fundamentally different from browsing the Internet, and so the issue is some of those providers might very well want to pay for premium delivery of their content, and to answer your question, I think that's actually very much for the good that, in particular, although this debate often gets set up as a debate over broadband companies trying to kill small, so-called "edge" providers of content services, in reality it's the smaller providers that actually probably stand to benefit more from being able to pay for prioritization because that can help them level the playing field against well-established, large content providers that already have built through the expenditure of billions of dollars—the delivery networks that get you your Google, and your Facebook, and Netflix. So there are actually good reasons to think that prioritization can allow for innovative business arrangements here as in the rest of the economy, and then on the whole, that those are going to be good for consumers, and we should presume that they are lawful, and that the burden should be upon the government or private plaintiffs to assert why a particular arrangement might actually harm consumers. That's how antitrust law works, and that's how reasonable regulation of net neutrality might work, but that's not really what the SEC has been trying to do until now.

WOODS: What's the deal with Comcast and Netflix then? I know that the Internet was not initially designed for large-scale video streaming, and yet that's an overwhelming proportion of what—or at least it's a very substantial portion of the type of activity that goes on over the Internet. How is that related to why Comcast might want to slow down Netflix? What interest would it have in doing this?

SZOKA: Well, from my perspective Comcast has never been trying to slow down Netflix. The debate, framed properly, is whether Comcast should be allowed to prioritize certain services whether Netflix or, more importantly, the competitors of Netflix, should be able to strike a deal with Comcast to pay for premium delivery within Comcast network, but what Netflix has done has been very politically smart. They really, more than anyone else, they have so demonized

this issue that they have caused the FCC to potentially change course a little bit by conflating net neutrality which is what happens inside the Comcast network. Remember the Internet is a network of networks. So the Internet is not Comcast, it's all the networks that connect. I get Comcast. You're on Verizon. There's a bunch of stuff in between, a bunch of companies out there like Netflix. Net neutrality is about my connection to Comcast, the so-called last mile, and Netflix has really managed to conflate that issue with what you might think of as the first mile. How does Netflix get their content to the Comcast network? And essentially Netflix has always had to pay for doing that. In the past they paid other companies. There were a bunch of companies that deliver traffic in [inaudible] relationships. And Netflix decided that they might be able to save money by striking a deal directly with Comcast, which they did. But why not try to get it for free? So they have been claiming that they shouldn't have to pay anything at all.

WOODS: I see.

SZOKA: And that essentially would mean that other users of the Internet, people who are not Netflix subscribers or who are only light Netflix subscribers, that they would have to subsidize Netflix users or heavy Netflix users. So that's not a net neutrality issue, but it's gotten confused with net neutrality.

WOODS: And it also confuses all kinds of important concepts, because it sounds as if what we're talking about is the free flow of information and the free flow—the transmission of video, and this all sounds in the abstract like something very important and something that's fundamentally libertarian, but of course, it has to take place in an atmosphere of mutual respect and mutual consent. It can't just be one firm badgering another into interacting with it on its own terms. Both of these institutions have terms on which they'd like to interact with each other. Now, normally on the free market when there is some firm that behaves in a way that offends consumers—let's say you had some institution that was blocking independent voices that consumers wanted to hear. Well, consumers have ways of making these institutions pay. They have ways of making them feel pain. Do consumers have any way, in case these nightmare scenarios that net neutrality proponents are describing should actually come to pass, on their own to bring pressure to bear, or would this have to be resolved by government?

SZOKA: Well, first, you're absolutely right that this issue has confused people who care about freedom more than any other I can think of, because it's been [portrayed as] regulation means freedom. To answer your question, some those people will say, okay, well if we had 10, 12, broadband providers, then maybe we could just let the market work. Competition would take care of things. But we don't. So it's not going to work. So the government has to protect us. And they do have a certain point, which is that we are talking about a uniquely capital intensive industry. So the cost structure here for broadband is unlike just about anything else in the economy—maybe similar to building streets, but unlike streets, we don't just have one. It's not what some economists would call a natural monopoly. We have at least two broadband providers out there, and in many markets we're starting to get a third.

So the debate really comes down to this: how much competition do you think is enough? And my point has been that there is no cable monopoly. That's a myth. It's true that the FCC and the federal government for a long time made it hard for telephone companies to compete with cable companies. They were actually barred from doing that for a long time. And it's also true that companies like Google Fiber, which are trying to deploy a third type, have had a hard time mainly because of local governments. But those barriers to entry are primarily government created. They are primarily actually streets that most of this comes down to getting the right way to put your fiber, or cable, or whatever, under the public street. So there are some smart ways that you could deal with that problem if you think about it. But the only thing that's truly a natural monopoly here is the conduit under the street, and so there are cities, and the federal government has talked about doing this that have had a dig once policy where they put in an empty tube that anybody can rent space in, and then you can deploy your broadband system there, and that lower broadband deployment costs by about 90%, and it decreases the cost of the road project by about 1%. So if we were serious about promoting competition, we would be talking about things like that, and Google Fiber has been great because they've gone out and actually done this, and they have demonstrated that it's really cities, cities like Baltimore, that basically made it so hard for Verizon to deploy its fiber network that they gave up.

So government could get out of the way, and we could have more competition here, but it's never going to be enough for people who think about competition in simple, lemonade-stand economics. They have to recognize that this is going to be a market where you might have two or three players, but you're not going to have 10. So that's the first level of this for people who care about markets, to be realistic about what competition actually looks like. And then to ask, well, what happens in so-called "duopolies"? Is that really enough? And we have a lot of good data that Verizon is causing cable companies to significantly upgrade their speeds. Google Fiber has prompted both cable companies and Verizon to up their speeds. So I actually think the market's already working. I think that the people who are claiming that it won't—that consumers couldn't switch if there were a net neutrality violation—are probably wrong in that net neutrality is a lot more durable as an idea than most people give it credit for. To the extent that we want net neutrality, it's probably going to happen in the market anyway, and to the extent that there's going to be deviation from that it's going to be on the margins, and it's generally going to be a way that doesn't hurt consumers, and we just need a way to figure out how to regulate those instances where it might.

WOODS: Berin, I am looking at an article of yours, co-authored from earlier this year, with an intriguing title: "The Feds Lost on Net Neutrality but Won Control of the Internet." Can you tell us about the second half of that equation?

SZOKA: Yep, so briefly, net neutrality term was coined in 2002. The Republican chairmen at the FCC, two of them, created this monster in a way. The first chairman talked about the four freedoms. The second chairman, Kevin Martin, talked about enforcing them. The FCC in 2008 tried to enforce that policy statement. There's no legal, binding rule against Comcast for

slowing down BitTorrent traffic because it was copyright infringement, and in 2010, the D.C. Circuit said the FCC can't do that. They have to have formal rules, and we're not sure what their authority is. So in 2010 the FCC issued its rules for the first time, and they cited a bunch of provisions in the Telecommunications Act that they claimed allowed them to regulate, and earlier this year, in January, the FCC lost again at the D.C. Circuit. So the first part of that article title was that most people heard the headline as "FCC loses," and as I said the FCC did lose on the no blocking and the no discrimination rule, and the transparency rule was upheld, and this is the really important and subtle thing.

So the reason that the court upheld one of the rules and didn't just strike everything down was that they accepted the SEC's claim that this previously obscure section of the Telecommunications Act of 1996, Section 706, which says that the FCC should promote broadband deployment—the FCC claimed in 2010 after they lost in that First D.C. Circuit decision that that allowed them to regulate net neutrality as well as anything else. Basically, anything in any way that they think will promote broadband deployment so long as they don't violate some provision of the Communications Act. And so in that case the D.C. Circuit said, yep, FCC gets to regulate whatever it wants provided they don't violate some provision of the Communications Act. Here we find that these two rules, the no blocking and non-discrimination rules, are illegal because the Communications Act says you can't make a common carrier, like a public utility, you can't impose public utility-style regulations on lightly regulated information services under Title I.

And so now the debate is the SEC is considering new net neutrality rules, and the details are still to be worked out. They have two avenues for doing it. They can either use Section 706, which allows them to regulate, as I said, pretty much anything, but they can't go all the way to common carriers. They can't force you to treat all companies that come to you asking for service equally. That doesn't sit very well with the net neutrality hardliners, because they say that's not enough, and commercially reasonable terms could still mean prioritization and fast lane.

So they don't like that option, and so they want the SEC to take broadband out of Title I, which is the lightly regulated information services that the Clinton Administration first started putting broadband into and put into Title II, which is the regulatory system that was designed for the monopoly phone network. So the debate that we're having right now in Washington is both about net neutrality and about this fundamental question of how the SEC regulates communications in general and whether they should apply this regulatory framework that basically is from the 1930s but actually really is from the railroad era. It's 1870s-era regulation for what were natural monopolies. My short legal analysis is, I don't think that either one of those is going to work. I don't think the Title II reclassification is feasible, for reasons I can explain, but I also think that ultimately the Supreme Court will find that the D.C. Circuit, now that there's another court that just ruled the same way, that they were wrong to give this vast deference to the FCC, and that the agencies in general really shouldn't be able to interpret

ambiguous statutes in such a way as to rewrite the entire statute to allow themselves to regulate anything they want. That basically leaves me with saying to people who think there's a problem here that if you want the FCC to do something that's legally sustainable, you need to tell the FCC that they need to ask Congress for a new communications act, which I think just about everybody in this field would agree is necessary, because the 1996 Telecommunications Act really wasn't even written with the Internet in mind. The world looks nothing like the way that the Telecommunication Act actually works.

WOODS: Berin, I'd like to back up actually to something you said at the beginning, that one of the scare tactics that apparently we sometimes encounter from the net neutrality folks is that a site like Reddit supposedly couldn't have been started, and yet, it was started. So I don't understand why they would say that. What would be the perceived obstacles to the starting of a Reddit, and how did Reddit get started in spite of those obstacles?

SZOKA: Well, this is why the history here is important. The people who say that essentially are claiming that we've had net neutrality in place since 2005, but as I explained, it wasn't until 2010 that the FCC actually issued regulations, and those were challenged immediately and were struck down. So on the one hand almost everyone in Silicon Valley has convinced themselves that we used to live in this world where we had net neutrality, legally enforceable, and then in January we lost that. Now we have to get it back. And that's just not true. We never really had enforceable rules except for that period from 2010 to January, and those, again, were subject to legal challenge, so it's not even clear that would really change conduct. But what they're concerned about, again, as I said at the outset here, is they imagined that somehow without net neutrality that a site like Reddit would have to pay broadband companies to get carriage, but less if they were a cable channel, or to be noticed, or that somehow as soon as Reddit started that Comcast would have said, oh, we don't like Reddit. We're going to launch our own version of Reddit. We're going to kill Reddit because our version of Reddit will load faster. Well, frankly that's just not a realistic scenario for normal web browsing. If you're talking about video delivery services, that premium delivery really does matter.

So in other words, for infrastructure-intensive businesses like YouTube, this potentially matters. For websites this really doesn't make a difference. It's not feasible to think that somehow by not paying for premium service, it's going to harm me. But if you're really concerned about that, what the FCC is proposing now in its proposed rules, it's actually a pretty reasonable way to deal with the problem, which is to do essentially what the broadband companies seem to want to do anyway, which is to say something like, we're going to get everyone a basic, best-efforts network level of service, and if you want to pay for something more than that, you can. So that's where prioritization can come in, but that's only going to be used on the margins. That's not, I think, going to affect a site like Reddit anyway. But you see, those people have in their minds that the ability to have fast lanes means that everyone else is in a slow lane, and so they are jumping up and down right now about any prioritization on the Internet, and they have also convinced themselves that if only the FCC would reclassify broadband as a Title II

public utility, common carrier, well then it could ban prioritization, but that's just not true. That's not even how common carriage is. Common carriage, like with railroads, means you can charge different rates. You just have to publish a schedule of prices, submit them to the government, and then charge the same rates to similarly situated providers. So there's just a lot of ignorance of not only telecom law but basic law around businesses and public utilities here that's really driving this debate to a frenzied level.

WOODS: Berin, I know you have to run, so I will just ask: if people want to follow your work is TechFreedom.org the place to go?

SZOKA: It is, and let me give you a briefly a sense of what's going to happen here. The comments here are due July 15, and then the reply comments are due September 10, so we're going to be filing in both of those, and we'll explain in more detail what we think should happen here, and our short answer is this should be the impetus for a new communications act, and that's really the better way to govern the Internet going forward.