

Carr Agrees With President Obama’s Lawyers On Internet Regulation

Utility Regulation of the Internet “Would be Struck Down” and a “Serious Mistake,” They Say

WASHINGTON, DC, September 26, 2023—FCC Commissioner Carr issued the following statement:

Last week, amid reports that the FCC may soon head down the path of applying vast and expansive utility-style controls to the Internet (as part of a Biden Administration [plan](#) for imposing “net neutrality” rules under Title II of the Communications Act), former Obama Administration Solicitors General, Donald B. Verrilli, Jr. and Ian Heath Gershengorn, published an important [legal analysis](#) of the plan.

The two respected lawyers—who represented the federal government before the Supreme Court during the Obama Administration—expressly lauded the goals of net neutrality. Nonetheless, they concluded that Title II regulation of the Internet “would be struck down” and “would be a serious mistake.”

I agree with President Obama’s lawyers.

First, the two senior Obama Administration alums are correct that, in their words, an FCC decision “classifying broadband internet access service as Title II telecommunications service would ‘bring about an enormous and transformative expansion in [the agency’s] regulatory authority . . . over the national economy.’”¹ Continuing, they rightly state that regulating the Internet as a Title II utility service “would vastly expand the Commission’s authority and would transform the way a federal agency regulates a vitally important element of our economy and the personal and social lives of hundreds of millions of Americans.”²

Second, President Obama’s lawyers are correct in stating that any decision by the FCC to apply Title II, utility-style regulations to the Internet “would be struck down by the Supreme Court” under the major questions doctrine, as *West Virginia v. EPA* makes clear. Indeed, as the two appellate lawyers succinctly put it last week, the legal question “is an easy one:”

“A Commission decision reclassifying broadband as a Title II telecommunications service will not survive a Supreme Court encounter with the major questions doctrine. It would be folly for the Commission and Congress to assume otherwise.”³

Third, the former Obama Administration officials rightly point out that an FCC decision to launch a doomed Title II rulemaking proceeding would represent a “massive waste of resources for the government, industry, and the public, as well as the lost opportunity to pursue more pressing policy goals such as deploying robust broadband service to all Americans.”⁴ “Given that legal reality,” they added, Title II regulation “would be a serious mistake.”⁵

As a former General Counsel of the FCC myself, I would encourage my Commission colleagues to heed the judicious guidance offered by these top lawyers from the Obama Administration and focus the FCC’s work on the numerous, important subjects that Congress has authorized the Commission to address—from rural broadband and public safety to spectrum and national security—rather than pursuing the Biden Administration’s unnecessary and unlawful plan for exerting government control over the Internet.

Heading down the path to Title II would not only push vital FCC matters onto the back burner, it would knock many of them off the stove altogether.

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¹ Donald B. Verrilli, Jr. and Ian Heath Gershengorn, Title II “Net Neutrality” Broadband Rules Would Breach Major Questions Doctrine at 12 (Sept. 20, 2023) (quoting *Utility Air Regulatory Group v. EPA*, quoting 573 U.S. 302, 324 (2014)), <https://aboutblaw.com/bazq>.

² *Id.* at 15.

³ *Id.* at 2, 10.

⁴ *Id.* at 17.

⁵ *Id.* at 2.