EDITOR'S NOTE

Welcome to the first Issue of Volume 71 of the *Federal Communications Law Journal* ("*Journal*"), the official journal of the Federal Communications Bar Association (FCBA). Over the summer, the *Journal* added 30 talented editors to our membership ranks. FCLJ's incoming editorial board, associates, and members have worked diligently in their new roles to compose a topically diverse introduction to the new volume.

We are honored to publish two practitioner articles in this Issue. The first is written by Doctor Joel Timmer, a professor at Texas Christian University. In his article, Doctor Timmer explores whether the First Amendment is implicated by the previous net neutrality regulations imposed in the *2015 Open Internet Order*. Doctor Timmer asserts that although it is likely not implicated, reinstated net neutrality rules would not violate the First Amendment because they serve an important government interest in deterring Internet service providers from acting as content "gatekeepers".

The second practitioner article is penned by Lawrence J. Spiwak, President of the Phoenix Center for Advanced Legal and Economic Public Policy Studies and co-chair of the FCBA Editorial Advisory Board. While most of the net neutrality debate to date has focused on the statutory definitional question of whether broadband internet access should be classified as a "information" service under Title I or a common carrier" telecommunications" service under Title II, Mr. Spiwak's article focuses on the more substantive (yet notably neglected) legal problem: the FCC's actual implementation of Title II in its *2015 Open Internet Order*. As Mr. Spiwak argues, the FCC violated almost every standard of basic ratemaking in promulgating its *2015 Rules*, raising significant due process concerns under the Fifth Amendment. Yet, because the D.C. Circuit's broad extension of *Chevron* deference in *USTelecom* condoned this behavior, Mr. Spiwak contends that the D.C. Circuit has established a troubling precedent of administrative law that will likely haunt us for years to come.

Additionally, the *Journal* is excited to feature three timely student Notes. In the first Note, Katherine Krems examines the problem of the 22 million fraudulent comments filed in the FCC's *Restoring Internet Freedom* proceeding, and proposes that the FCC identify and remove such comments in order to preserve public faith in the FCC rulemaking process. The second Note is written by Laura Nowell, who argues that the Supreme Court should adopt the Fourth Amendment standard held by the Fourth and Ninth Circuits for digital searches at the border. The third Note is penned by John Roberts who discusses the prevalence of "fake news" on media platforms, and asserts that the Federal Trade Commission should use its authority under the Federal Trade Commission Act to regulate the circulation of such misinformation.

The editorial board is appreciative of the FCBA, GW Law, and the outgoing board for the continuous support that played a substantial role in the successful publication of this Issue. This fall, GW Law has generously added Michael Beder as an adjunct professor to guide our members in drafting their Notes.

We welcome your feedback or questions to fclj@law.gwu.edu, and please direct submissions for publication consideration to fcljarticles@law.gwu.edu. This Issue and our archive will be available at www.fclj.org.

Stephen Conley
Editor-in-Chief

Federal Communications Law Journal

The *Federal Communications Law Journal* is published jointly by the Federal Communications Bar Association and The George Washington University Law School. The *Journal* publishes three issues per year and features articles, student notes, essays, and book reviews on issues in telecommunications, the First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, privacy, communications and information policymaking, and other related fields.

As the official journal of the Federal Communications Bar Association, the *Journal* is distributed to over 2,500 subscribers, including Association members as well as legal practitioners, industry experts, government officials and academics. The *Journal* is also distributed by Westlaw, Lexis, William S. Hein, and Bloomberg Law and is available on the Internet at http://www.fclj.org.

The *Journal* is managed by a student Editorial Board, in cooperation with the Editorial Advisory Board of the FCBA and two Faculty Advisors.

Federal Communications Bar Association

The Federal Communications Bar Association (FCBA) is a volunteer organization of attorneys, engineers, consultants, economists, government officials and law students involved in the study, development, interpretation and practice of communications and information technology law and policy. From broadband deployment to broadcast content, from emerging wireless technologies to emergency communications, from spectrum allocations to satellite broadcasting, the FCBA has something to offer nearly everyone involved in the communications industry. That is why the FCBA, more than two thousand members strong, has been the leading organization for communications lawyers and other professionals since 1936.

Through its many professional, social, and educational activities, the FCBA offers its members unique opportunities to interact with their peers and decision-makers in the communications and information technology field, and to keep abreast of significant developments relating to legal, engineering, and policy issues. Through its work with other specialized associations, the FCBA also affords its members opportunities to associate with a broad and diverse cross-section of other professionals in related fields. Although the majority of FCBA members practice in the metropolitan Washington, D.C., area, the FCBA has ten active regional chapters: Atlanta, Carolina, Florida, Midwest, New England, New York, Northern California, Pacific Northwest, Rocky Mountain, and Texas. The FCBA has members from across the United States, its territories, and several other countries.

The George Washington University Law School

Established in 1865, The George Washington University Law School is the oldest law school in Washington, DC. The school is accredited by the American Bar Association and is a charter member of the Association of American Law Schools. The Law School is located on the GW campus in the downtown neighborhood familiarly known as Foggy Bottom.

GW Law has one of the largest curricula of any law school in the nation with more than 250 elective courses covering every aspect of legal study. GW Law's home institution, The George Washington University, is a private, nonsectarian institution founded in 1821 by charter of Congress.

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Single and Back Issues: Each issue of the current volume can be purchased for $15 (domestic, Canada and Mexico) or $20 (international), paid in U.S. dollars. Please send all requests for single or back issues to fcljsubscribe@law.gwu.edu.

Manuscripts: The *Journal* invites the submission of unsolicited articles, comments, essays, and book reviews mailed to the office or emailed to fcljarticles@law.gwu.edu. Manuscripts cannot be returned unless a self-addressed, postage-paid envelope is submitted with the manuscript.

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ARTICLES

Net neutrality regulations were intended, in part, to promote free speech on the Internet. But do those regulations also infringe on the First Amendment rights of Internet service providers ("ISPs" or "broadband providers") subject to their restrictions? Examining the First Amendment issues with net neutrality regulation, this article first considers whether ISPs engage in speech when providing Internet access. While this is unlikely, there is support for the opposite conclusion. Thus, the First Amendment standard to which net neutrality would be subjected is considered. As net neutrality is a content-neutral regulation of online speech, intermediate scrutiny would be applied. Key to the regulation's survival of that standard is the FCC's 2015 determination that ISPs can act as gatekeepers, restricting or blocking the flow of online content to their subscribers. While the elimination of the rules also eliminates any First Amendment issues, the widespread interest in reinstating them means the First Amendment concerns remain relevant.

In 2015, the Federal Communications Commission made the controversial decision to reclassify broadband Internet access as a common carrier "telecommunications" service under Title II of the Communications Act. While much of the debate has focused on the legality of reclassification, little attention has been paid to actual implementation. As detailed in this article, a proper implementation of Title II precluded the Commission's approach in the *2015 Open Internet Order*, forcing the Commission to ignore the "vast majority of rules adopted under Title II" and "tailor[] [Title II] for the 21st Century." The D.C. Circuit found in *United States Telecom Association v. FCC* that the Commission had wide latitude to interpret the Communications Act and upheld not only the Commission's decision to reclassify but also, surprisingly and indirectly, its gross distortion of Title II. In so doing, the D.C. Circuit has extended *Chevron* deference beyond any reasonable limit, greatly expanding the Commission's authority well beyond its statutory mandate. This Article first presents several examples of how the *2015 Open Internet Order* ignores both the plain language of Title II and the extensive case law to achieve select political objectives and then discusses the D.C. Circuit's acceptance of such legal perversions. To provide an example of the troubling precedent set

by *USTelecom,* this Article then demonstrates how former FCC Chairman Tom Wheeler attempted (but, due to the clock running out by the Presidential election in 2016, ultimately did not succeed) to use the same theory of the case found in *USTelecom* to regulate the prices of Business Data Services. Conclusions and policy recommendations are at the end.

NOTES

Crowdsourcing, Kind Of

During the recent net neutrality notice-and-comment period, the Federal Communications Commission received nearly 22 million comments, but an astonishing number of these comments were fake. When fake comments flood agency dockets and remain on the record, it puts the democratic nature of the public comment process in jeopardy. Leaving these comments unaddressed skews the record and impedes agencies' abilities to comply with the Administrative Procedure Act's requirement that they consider relevant comments in rulemaking procedures. The FCC should act to investigate comments sent during the net neutrality notice-and-comment period and remove those that are clearly fake from the record, protecting the legitimacy of the process and setting a precedent for future proceedings. The contentious nature of the net neutrality debate has drawn widespread attention to probable fake comments on the record, and much has been written about the issue. But there has not yet been a comprehensive analysis of the record with suggestions for the removal of comments that were not submitted by real people under their own names, and the FCC has not acted to remove fake comments from the record.

This Note will analyze comments submitted to FCC through the net neutrality docket and argue that the Commission and other agencies in similar situations must, to adhere to their legal obligation to consider significant comments, remove illegitimate comments from the record. While agencies will have to invest time and resources to do this, the work will be well worth the investment; for leaving fake comments in the record will lessen what little faith the public has left in our government.

Privacy at the Border: Applying the Border Search Exception to Digital Searches at the United States Border

Should digital and physical searches be considered inherently different and therefore treated differently under the Fourth Amendment under all circumstances? This Note argues that despite the inherent differences between physical and digital searches, that the border search exception to the Fourth Amendment established by the Supreme Court should apply to digital searches at the border in the same manner applied for physical searches at the border. The Supreme Court should not apply its decision in *Riley v. California*, where the Court held that manual and digital searches require different standards of suspicion for a search incident to lawful arrest, to digital searches conducted under the border search exception because the Court's holding in *Riley* does not address border searches. Instead the Supreme Court should adopt the Ninth and Fourth Circuits' approach for determining the standard of suspicion