



Net Neutrality Redux

FCC Resurrects its 2015 Open Internet Rules

**CONTINUING LEGAL EDUCATION
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West LegalEdcenter

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Sapronov & Associates, P.C.

5555 Glenridge Connector, Suite 200

Atlanta, Georgia 30342

www.wstelecomlaw.com

(770) 399-9100 (O)

(770) 309-0462 (M)

Introduction and Overview

FCC Authority

- The Communications Act - 47 U.S.C. §§151 et. seq.
 - Title I (Ancillary Jurisdiction)
 - Title II (Common Carrier) – Telephone Utility type regulation
 - Telecommunications Carriers
 - Rate, Entry, Complaint Procedures
 - Title III (Wireless)
 - Broadcast
 - Commercial Mobile Service (CMRS)
 - Regulated Mobile Carrier Service
 - CMRS providers Also Subject to Title II
 - Title VI
 - Cable Companies

Introduction and Overview

Historically:

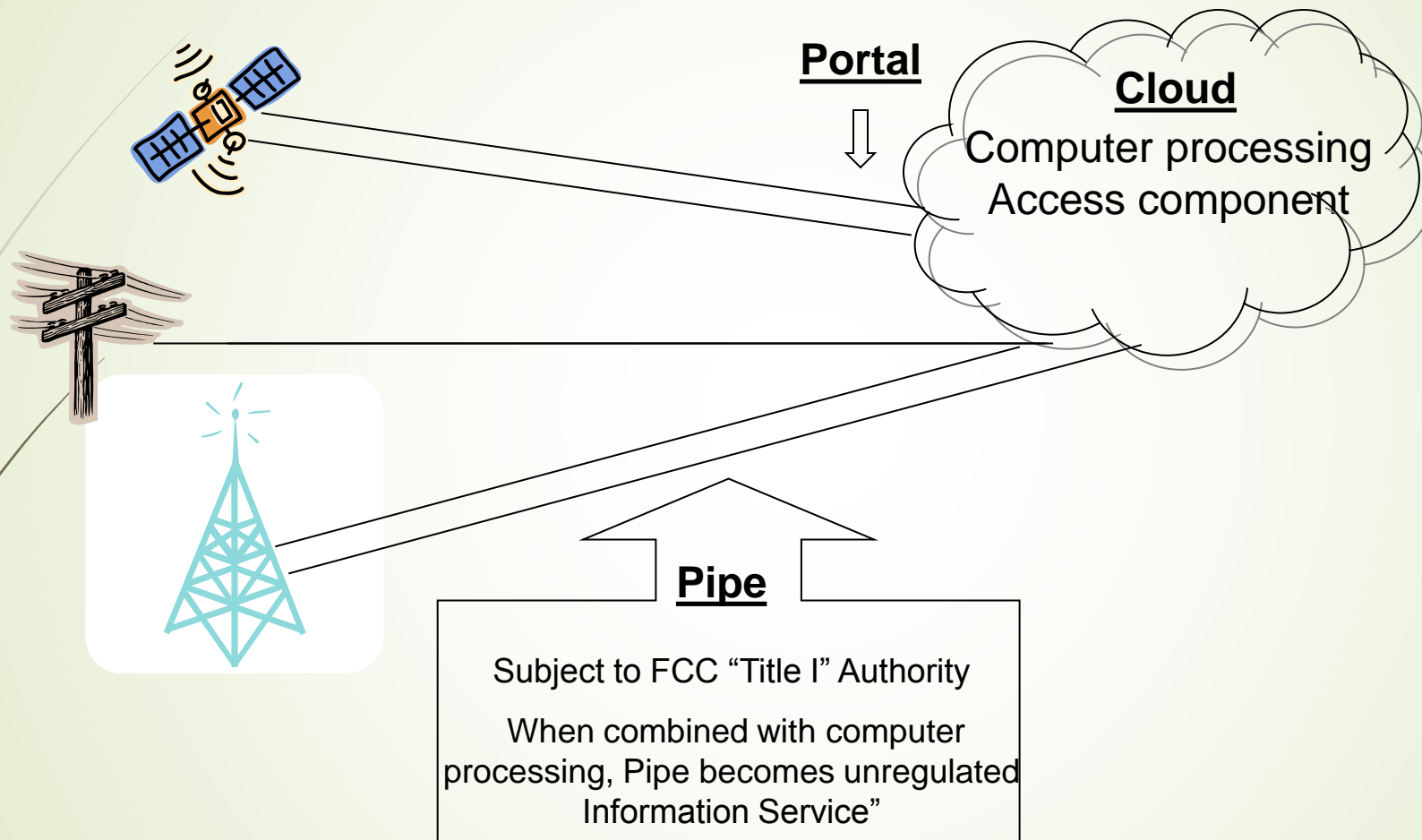
- ▶ Federal Communications Commission (FCC)
 - ▶ Has asserted regulatory authority over:
 - ▶ Telecommunications
 - ▶ Wireless
 - ▶ Cable
 - ▶ BUT NOT OVER:
 - ▶ Information Services
 - ▶ Although subject to FCC “Title I” (Ancillary Jurisdiction) (see below)
 - ▶ What about Internet?

Introduction and Overview

- ▶ Internet Backbone (Peering and Transit), Storage and Content (the “Cloud”)
 - ▶ Historically treated as an unregulated service
- ▶ Internet Access (the “Broadband Pipes”)
 - ▶ Classification not so clear
 - ▶ Broadband Cable, DSL, Wireless
 - ▶ DSL was originally a regulated (“Title II”) service
 - ▶ But other broadband access pipes unclear
 - ▶ And when combined with Internet Content
 - ▶ They Create an Information Service
 - ▶ (U.S. Supreme Court “Brand X” Decision)

Current Internet Regulation

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Net Neutrality Basics

- Neutral and open public network (the “Internet”)
- No restrictions on equipment or modes of communication
- No discrimination, either in pricing or access, of the type, quantity, content, sites, or applications
 - “All bits are equal”
 - But must balance against provider’s reasonable network management practices
 - Except for “Paid Prioritization” – See below

Net Neutrality Basics (*cont'd*)

FCC Policy Statement

- ▶ Consumers are entitled to:
 - ▶ Access the lawful Internet content of their choice;
 - ▶ Run applications and services of their choice - subject to law enforcement needs;
 - ▶ Connect to their choice of legal devices that do not harm the network; and
 - ▶ Enjoy benefits of competition among network, application, service, and content providers

FCC OPEN INTERNET RULES - 2015

- FCC 2015 Open Internet Rules: 47 C.F.R. Part 8
 - “Bright Line” Rules
 - Transparency (public disclosure of network management, performance, commercial terms, etc.)
 - To enable consumers to make “informed” purchase and use choices
 - Via “publicly available, easily accessible website”
 - No Blocking (subject to reasonable network management exception)
 - No Throttling (same exception)
 - No Paid Prioritization (no exceptions)
 - General Conduct Rule
 - No Discrimination
 - Broadband Internet Access (BIAS) - fixed and mobile
 - Recharacterized as Title II (common carrier) and Title III (CMRS) Service, respectively
 - Mobile BIAS subject to BOTH Title II and Title III

RESTORING INTERNET FREEDOM ORDER

Dismantled the 2015 Open Internet Rules

- “Bright Line” Rules mostly eliminated
 - Transparency (Only rule that remains in effect)
 - No Blocking - Removed
 - No Throttling - Removed
 - No Paid Prioritization - Removed
 - General Conduct Rule - Removed
- Broadband Internet Access - both fixed and mobile
 - Recharacterized as “Title I” Unregulated Information Service

FCC RESURRECTS THE 2015 OPEN INTERNET RULES 2023

- Notice of Proposed Rulemaking (“NPRM”) Released October 19, 2023
 - Comments were due December 14, 2023
 - Reply Comments due January 17, 2024
- Seeks to Reinstate the “Bright Line” and General Conduct Rules
 - BIAS reclassified as Title II (Regulated) Service
 - Transparency
 - No Blocking
 - No Throttling
 - No Paid Prioritization (no exceptions)
 - General Conduct Rule
 - Mobile BIAS reclassified as Title II and Title III (CMRS) – not Private Mobile Service

FCC RESURRECTS THE 2015 OPEN INTERNET RULES 2023 (*cont'd*)

- Forbearance from Other Title II Regulations
 - But not Privacy
 - CPNI (Statutory 47 U.S.C. § 222 only) compliance required
 - Although not with CPNI Rules [go figure]
 - Forbearance from Rate Regulation
 - Specifically from § 203 (ex ante regulation)
 - But not from § 201 and § 202 (possible post hoc rate regulation)
- USF / Pole Attachment / Other – No forbearance
- Premise Operator Exemption remains (but comments sought)
- Appeal Expected Based on “Major Questions” Doctrine
 - Now favored by U.S. Supreme Court over “Chevron Deference”

Litigation Considerations

Thomas M. Johnson, Jr.
Wiley Rein LLP
2050 M Street NW
Washington, DC 20036
202.719.4550
tmjohnson@wiley.law



Introduction

- Overview of Title I versus Title II classification
- History of broadband classification
- Previous net neutrality litigation
- The rise of the major questions doctrine

Title I Versus Title II

- “Telecommunications service”
 - “Transmission” between points without changing information (e.g., traditional telephone). 47 U.S.C. § 153(50)
 - Heavily regulated as common carriers
- “Information service”
 - “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications” 47 U.S.C. § 153(24)
 - Light-touch regulation
- Mirrors pre-1996 distinction between “basic” and “enhanced” services

History Of Broadband Classification

- **Pre-1996:** Internet services generally classified as “enhanced”
- **1998:** Internet access classified as “information service”; last mile DSL is “telecommunications”
- **2002:** Cable modem service classified as “information service”
- **2005:** Transmission component of DSL reclassified as “information service”

History of Broadband Classification (cont'd)

- **2010:** D.C. Circuit rejects FCC's regulation of Comcast's Internet service, while classified as an information service. (*Comcast v. FCC*)
- **2014:** D.C. Circuit rejects FCC's common-carrier regulation of broadband, while classified as an information service. (*Verizon v. FCC*)
- **2015:** FCC reclassifies broadband as a "telecommunications service" and survives legal challenge. (*USTelecom v. FCC*)
- **2018:** FCC reclassifies broadband as an "information service" and survives legal challenge. (*Mozilla v. FCC*)

The Supreme Court's Brand X Decision

- Affirmed a 2002 FCC order reclassifying cable modem service as an information service
- The actual classification decision was “unchallenged”
- Question was whether cable modem providers also “offered” a separate standalone telecommunications service
- Court held that “offer” was ambiguous; it was reasonable to find that “transmission component” was “sufficiently integrated”



Major Questions Doctrine – Justice Kavanaugh’s Opinion in *USTelecom*

- It is “indisputable” that the FCC’s 2015 rule was “a major rule.”
 - The rule’s economic and political impact was “staggering;” it “fundamentally transform[ed] the Internet.”
 - Its “financial impact” in terms of “the portion of the economy affected” and “the impact on investment in infrastructure, content, and business” was enormous.
 - The public has “focused intensely on the net neutrality debate.”
 - “Congress has been studying and debating net neutrality for years.”
 - The FCC “claim[ed] to discover in a long-extant statute” an “unheralded power to regulate a significant portion of the American economy.”



Major Questions Doctrine – Justice Kavanaugh’s Opinion in *USTelecom* (cont’d)

- The FCC recognized that the Communications Act “did not clearly resolve the question of how broadband should be classified,” and that is “the end of the game” under the major-questions doctrine.
- *Brand X* “did not have to—and did not—consider whether classifying Internet service as a telecommunications service and imposing common-carrier regulation on the Internet would be consistent with the major rules doctrine.”
- *Brand X* at most found that the statute is ambiguous about Title II classification, and that “torpedoes” Title II classification under the major-questions doctrine.

Major Questions Doctrine – Recent Supreme Court Developments

- *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2486 (2021) (CDC eviction moratorium).
- *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (EPA Clean Air Act) (Kavanaugh *USTelecom* opinion cited by majority).
- *NFIB v. OSHA*, 595 U.S. 109 (2022) (vaccine mandate) (Kavanaugh *USTelecom* opinion cited by Gorsuch concurrence).
- *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (student-loan forgiveness) (Kavanaugh *USTelecom* opinion cited by Barrett concurrence).

Major Questions Doctrine – Analysis From Former Solicitors General

- Donald B. Verrilli, Jr. & Ian Heath Gershengorn
- “[T]he Supreme Court has not hesitated to invalidate agency actions that lower courts have upheld under Chevron when the Court concludes that agency’s course of action cannot be reconciled with the most straightforward reading of the relevant statute.”

Major Questions Doctrine – Analysis From Former Solicitors General (cont'd)

- The Commission would “not in any real sense be implementing a policy choice by Congress” but rather would be “using statutory forbearance authority to create a bespoke regulatory framework from scratch.”
- While the Commission professes that it will not enforce all of Title II against broadband providers, “classifying broadband internet access service as a Title II services would indisputably give the Commission the power to impose the full range of common-carrier regulations should it choose to do so.”



Net Neutrality – A tale full of sound and fury, signifying...?

Martyn Roetter, D.Phil (Oxon)

MFRConsulting
144 Beacon Street
Boston, MA 02116
mroetter@gmail.com
+1 617 216 1988

Net Neutrality – Why Now (Again)?

- An FCC with 5 Commissioners and a 3-2 Democratic majority was installed in September 2023 after a period of 32 months with a 2-2 deadlock on any politically controversial issue
- Net Neutrality (NN) is a highly political issue in which commonsense and reality play no or only a small role – desire to reintroduce NN rules ahead of the 2024 Presidential election
- Net neutrality means different things depending on whom you ask and in which country, and has never been a settled topic in the US
- Significant events and developments have occurred since 2018, when the 2015 move to classify broadband service providers as common carriers was undone
 - The Covid-19 pandemic which exacerbated the consequences of inequality of access to the broadband internet
 - Rising awareness of and concerns about the power and behavior of social media

Net Neutrality – Competing Doomsday Scenarios

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- ❖ Net Neutrality Rules Stifle Innovation And Competition
 - ❑ They inhibit investments in networks and deter innovations in pricing, partnerships, applications, and offers to customers

- ❖ Absent Net Neutrality Rules, ISPs Are Internet Gatekeepers With Unchallengeable Asymmetric Power
 - ❑ They squeeze out innovative start-ups while customers are at their mercy to decide what services and applications are accessible and affordable – self regulation does not work

Net Neutrality – Have There Been Violations?

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- **Examples of violations** in the early 2000s were cited in Tim Wu’s seminal 2003 paper which coined the term “network neutrality” -
http://www.jthtl.org/content/articles/V2I1/JTHTLv2i1_Wu.PDF
- **In 2009 Apple blocked iPhone users from using Skype**, at AT&T’s request
- **Zero Rating** - data traffic associated with a particular application or class of applications is priced at zero and does not count towards any data cap in place on the Internet access service
 - *In March 2021 AT&T responded to California’s Net Neutrality Law by discontinuing exemption of its DirecTV and AT&T streaming services from its wireless customers' tiered data plans.*

Net Neutrality – Global Broadband Comparisons

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For Prices: See as one example:

<https://www.cable.co.uk/broadband/pricing/worldwide-comparison/>

For Speeds: See as one example:

<https://www.cable.co.uk/broadband/speed/worldwide-speed-league/>

Does the evidence justify a conclusion that with and/or without Net Neutrality consumers are benefitting from effective competition in US broadband markets (fixed and mobile)?

Net Neutrality – What are the Critical Issues?

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- Availability and Affordability of Broadband Access for All
 - *Disputes about Broadband Cost Recovery and Impact on Investment*
- Online safety and fraud, amplified by deepfake technologies
- Antitrust implications of the market power of platform and social media companies, notably Amazon, Apple, Alphabet, Meta and Microsoft
- Opacity and impact of algorithms used by X (formerly Twitter), TikTok, Instagram, Snapchat, Triller, Byte...

Net Neutrality – What Comes Next?

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- If Net Neutrality is reinstated, will broadband price regulation and/or open access mandates follow?
 - *FCC recently adopted rules to prevent “digital discrimination” for communities with poor internet access*
- If Republicans win the White House in 2024, will Net Neutrality be reversed again if enacted by the current FCC?
- Will Congress pass legislation to stop the yo-yo process on this issue depending on who occupies the White House?

Net Neutrality – Broadband Cost Recovery

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- European telecom groups are demanding that firms such as Alphabet and Netflix pay them to compensate for the large (“outsized”) portion of bandwidth they take up on their networks – “sender pays” principle
 - *This idea has political support in some EU countries, and sympathy for broadband operators’ complaints; however, not all regulators view this demand favorably, and the consequences of network access fees for consumers and startups are disputed.*
- The South Korean government’s approach to cost recovery is that market actors should negotiate outcomes with minimal government intervention
 - Network usage fee litigation between SK broadband and Netflix was recently settled after 3 years, by agreement to a service partnership (specifics undisclosed)
- In the U.S., a bipartisan bill was filed in the Senate in mid-November to authorize the FCC to require contributions to the USF (Universal Services Fund) from firms such as Alphabet, etc.
- In India network operators argue in favor of usage fees to be paid by major sources of broadband traffic, an issue raised by the regulator TRAI

The Politics of Net Neutrality

Nathan Leamer

Fixed Gear Strategies

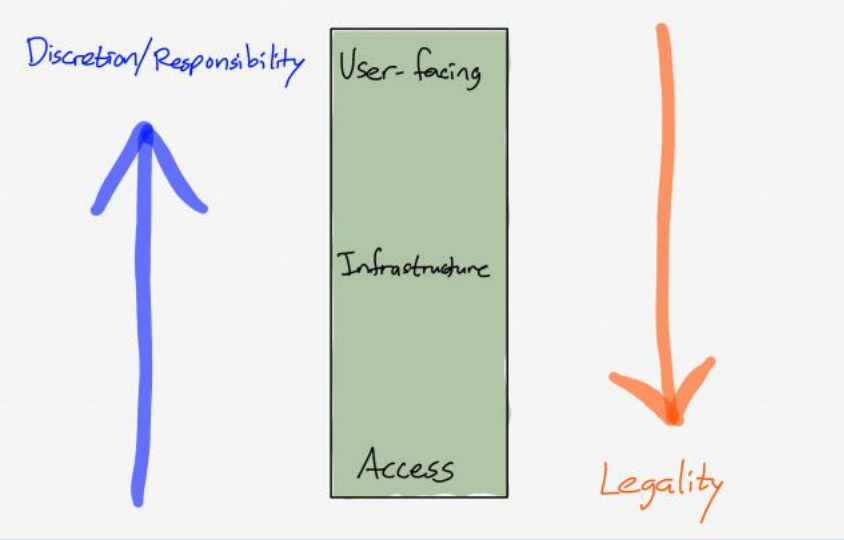
@nathanleamerDC

nathan@fixedgearstrategies.com

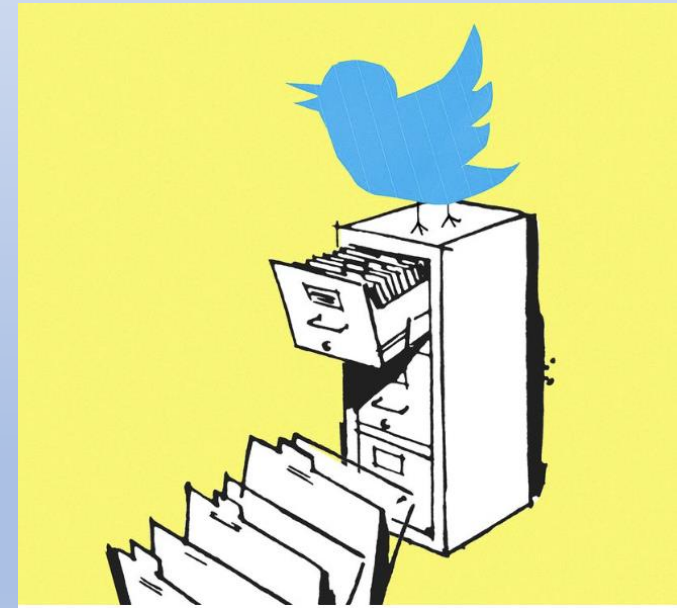


- Through 2018 #netneutrality was a rallying cry for Internet activists.
- Each FCC proceeding generated millions of comments
- Late night hosts, Internet personalities, celebrities, and even fast food chains created content to promote the hashtag to their audiences

Net Neutrality and Big Tech's Speech Hypocrisy



Over past five years there is a larger discussion about other Internet gatekeepers beyond ISPs.



Do People Still Care?

Federal Communications Commission

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Filings 29,215 Results (157.536ms)

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Free Press @freepress

We are winning back #NetNeutrality.

The @FCC officially took the first step to bring back Title II Net Neutrality protections!

With allies @fightforthefttr & @publicknowledge, our position is clear: A vote to reinstate the FCC's authority is a vote to put people first.

Evan Greer, Director of Fight for the Future

AND TOWARD AN INTERNET WHERE WE HAVE REAL CHOICE

0:02 / 0:45

12:21 PM · Oct 23, 2023 · 698 Views

Posted by u/fuzzydunloblaw 2 months ago

41 News **Net neutrality may soon be revived**

[cnbc.com/2023/10/23/fcc-net-neutrality.html](https://www.cnbc.com/2023/10/23/fcc-net-neutrality.html)

0 Comments Share Save ...

All of this is very complicated ...

**BUT... DO REMEMBER:
WHEN IN DOUBT – ASK YOUR LAWYER!**

**Sapronov & Associates, P.C.
5555 Glenridge Connector
Suite 200
Atlanta, Georgia 30342**

770-399-9100

info@wstelecomlaw.com

www.wstelecomlaw.com

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Round Table Discussion

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Thank you for Attending

Walt Saprnov

770.399.9100

wsaprnov@wstelecomlaw.com



Walt Saprnov has represented corporate clients in telecom transactions, regulation and privacy for over thirty years. He has been named in Georgia Super Lawyers and in the International Who's Who of Telecom Lawyers. Together with his affiliates, Saprnov & Associates with offices in the U.S. and Eastern Europe, represent clients in complex commercial transactions, cross-border finance, and international dispute resolution.

For more information, please visit:

www.wstelecomlaw.com

James Kevin Wholey

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Mr. Wholey has broad experience at the intersection of federal government, national security and international business. His specific focus is on the legislative, policy and compliance issues involved in international investment, trade and business development. Through his international business and federal government relations practice, he assists clients with transnational compliance matters (Foreign Corrupt Practices Act, EAR, ITAR, export licensing and involvement with various sanctions regimes) and works frequently with the Administration and Capitol Hill. He spent more than a decade as a senior staff member for several U.S. senators, including three years as chief of staff to then-Senate Leader Bob Dole (R-KS), for whom he also handled trade and telecommunications issues.



jwholey@phillipslytle.com
202.617.2714

Martyn Roetter

Martyn has had a long career as a technology and management consultant working for public sector clients on policy and regulatory issues, and for private sector clients on the interactions between business strategy and technology as well as regulation in the telecommunications and information technology sectors in North and South America, Europe, the Middle East, Africa, Asia and Australasia. He is a Life member of the IEEE and IEEE Communications Society.



mroetter@gmail.com

617-216-1988

Thomas M. Johnson, Jr.

202.719.4550

tmjohnson@wiley.law



Tom has over 15 years' experience in private practice and public service at the federal and state levels representing clients in high-stakes appellate and regulatory litigation matters. Tom has argued appeals in the Fourth, Fifth, Ninth, D.C. and Federal Circuits, and the West Virginia Supreme Court of Appeals.

Prior to joining Wiley, Tom was the General Counsel at the Federal Communications Commission (FCC), where he served as the agency's chief legal officer and briefed dozens of appeals – personally arguing two – in the federal courts of appeals in constitutional and administrative law challenges to the FCC's orders. Tom managed a team of over 70 attorneys and staff and provided consultation and advice on a wide range of practice areas relating to the FCC's work, including administrative law, appellate and trial litigation, bankruptcy, ethics, fiscal law, fraud, labor and employment, and public records requests. He has spent his career advising clients on all stages of federal agency rulemaking, adjudication, and litigation, in fields ranging from communications to environmental law to securities to labor and employment. He frequently speaks and writes on legal issues and his articles have appeared in the *Wall Street Journal*, *Washington Post*, *National Review*, *Forbes*, and *Newark Star-Ledger*.



Nathan Leamer

Nathan Leamer is currently CEO of Fixed Gear Strategies and Executive Director of the Digital First Project. Previously he worked as Vice President of Public Affairs at Targeted Victory and served as Policy Advisor to FCC Chairman Ajit Pai.



nathan@fixedgearstrategies.com
202-213-5772