

Net Neutrality and the Public Interest: An Interview With Gene Kimmelman, President and CEO of Public Knowledge

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President and CEO of Public Knowledge Gene Kimmelman discusses the role of public interest advocacy in the fight for net neutrality, and offers his views on effective strategies for activism, lobbying, and reform in charged political climates gleaned from decades of working for social justice in Washington, DC.

Keywords: media policy, Internet policy, network neutrality, citizen activism, policy history, Federal Communications Commission, media reform

Introduction by Guest Editors Becky Lentz and Allison Perlman

One of our goals in producing this special section was to contextualize the net neutrality decision in a range of ways that foreground the work required to intervene on behalf of the public interest. To give us an insider's view, we asked media industries scholar Jennifer Holt to interview a seasoned citizen and consumer advocate in the field of U.S. telecommunications policy about the labors of public interest advocacy. Gene Kimmelman's decades of public service and advocacy work on behalf of media reform and social justice have given him a uniquely historical perspective on this dynamic process. He was able to address questions about the labor of advocacy with knowledge gained from working on all sides of public interest issues throughout his extensive career in Washington, DC. Holt (2011, 2013), for her part, has written about the complexities of policy and politics that shape the media industries. Having hosted the "Dirty, Sexy Policy Conference" at the University of California, Santa Barbara and presented at the Federal Communications Commission (FCC), she has become increasingly committed to expanding the space for humanities scholarship in the policy arena, and bringing more diverse constituencies together to debate the core issues for media policy in the digital era. Holt and Kimmelman spoke on September 25, 2015, in the Washington, DC, offices of Public Knowledge.

Introduction by Jennifer Holt

Gene Kimmelman is the president and CEO of [Public Knowledge](#) in Washington, DC. Public Knowledge is a nonprofit public interest group that focuses on freedom of expression, affordable access to essential communications, Internet policy, and consumer protection. In policy advocacy, Public Knowledge works "inside the Beltway," so to speak, connected to a broad network of nongovernmental organizations and advocacy groups working on U.S. domestic policy and related global issues. Its experts are well

positioned at the intersection of copyright, telecommunications, and Internet law. Public Knowledge also has been instrumental in advocating for the American consumer/citizen in the fights over data caps, copyright and spectrum reform, retransmission consent, digital transition, data security, universal service, and, for many years, net neutrality.

Kimmelman himself is no stranger to "Beltway" politics or consumer advocacy. He worked at the wide-ranging [Consumer Federation of America](#) during the 1980s, as chief counsel of the Senate Antitrust Subcommittee in the 1990s, at the [Consumers Union](#) for 14 years (1995–2009), and then at the Department of Justice for three years during the Obama administration. A college year abroad in Denmark during the Vietnam war and a return trip on a Fulbright scholarship exposed him to the Scandinavian-style "welfare state," which sparked an interest in alternative political systems. After law school, he worked for the lobbying branch of Ralph Nader's Public Citizen Congress Watch in 1981 and gained valuable experiences working to preserve the food stamps program, defending the Foreign Corrupt Practices Act, and ultimately representing the public interest in the Department of Justice's case over the breakup of AT&T. He went to work staffing for Senator Howard Metzenbaum (D-OH) in 1993, focusing on various social justice issues such as the Brady handgun control bill and assault weapons ban. For Kimmelman, however, this work was instructive for his advocacy career as it also "revealed other factors and forces at play that impacted how you could or couldn't push particular issues forward," he explained. In many ways, Kimmelman's diverse set of experiences represents the realities of the longstanding cultural interconnections between media policy, social justice, and political reform.¹

Kimmelman has dealt with a wide variety of issues in Washington, all of which intersect with different parts of the political process, different stakeholders, different interest groups, and different committees in Congress. He is able to see issues in shades of gray and embraces multiple perspectives when developing an advocacy strategy. During his time at the Antitrust Division at the Department of Justice, Kimmelman was privy to yet another vantage point in the system. "Seeing senators behind the scenes negotiating with each other, and seeing interest groups making their case either do it well or do it poorly," he said, "I saw a lot of things that, even from my own community, I thought were quite deficient in how they presented to policymakers." Kimmelman has built his career on being able to work with many contentious groups, including those on the same side of an issue. All activist communities have varying and often divergent viewpoints; the spectrum of ideologies involved, as well as the range of strategies employed, result in multiple factions, visions, and approaches to the issues at stake.² Media activists are no different in this regard, and they compose a rather diverse constituency for Kimmelman to represent in Washington with his work at Public Knowledge.

At his office in Dupont Circle, we discussed the net neutrality victory that happened early in 2015 when the FCC adopted Open Internet rules that officially (re)classified broadband services as a "telecommunications service" under Title II of the [Communications Act](#) (as opposed to an "information service" under Title I). Reclassifying broadband under Title II was the most politically challenging path, but it also afforded the strongest protections against discriminatory practices by Internet providers, as

¹ For two excellent historical accounts of these connections, see Perlman (2016) and Pickard (2015).

² See, for example, Dunbar-Hester (2014).

telecommunications services have the important distinction of being *common carriers*. Common carriers are viewed as essential infrastructure for the national economy and public welfare, and are therefore subject to stricter regulations that promote and preserve public accessibility. Net neutrality, which in essence functions as common carriage principles for the Internet, became a reality with the Title II reclassification.

In addition to this policy history, we also discussed Kimmelman's vision of power and politics and the framework he has developed over the past 30+ years of on-the-job training that guide his approach to public interest advocacy. He shared his views on what is effective advocacy (in the net neutrality fight and beyond) and his strategies for sustaining hard-won victories in challenging political climates.

Interview With Gene Kimmelman

Holt:

Since we are talking about the impact of labor as it relates to net neutrality, it would be great if you could start with a little bit about your own career trajectory since you have such a long history in the consumer advocacy space. What have you learned that has stuck with you over time?

Kimmelman:

My study-abroad experience was not just formative for me, but it was a framework for thinking about political power: comparing welfare states and what worked and what didn't work, and then asking the question, "Well, why can Sweden and Denmark do it, and the U.S. can't?" or "What would it take for the U.S. to be able to do this?" It was a deep exercise for me in learning about the factors of culture, political power, the strength of labor unions. This was all swimming around in my head as I was fighting for affordable access to telephone service or preserving food stamps, and thinking, "What is incremental change that is meaningful? What is incremental change that is sustainable? How would you sustain it?" I built up my own framework, from all of these experiences, of how to do day-to-day policy work. That framework was the power-less (effectively) against the power-full, because I was fighting for consumers, I was fighting for low-income people, I was fighting for pretty much underserved communities, and trying to figure out how to bootstrap more power than one naturally would have.

Holt:

How do you see the difference between doing advocacy work well and doing it poorly? What does that difference look like to you in practice?

Kimmelman:

It all really relates to the political framework. You can't really just say what is good advocacy or bad advocacy without understanding your context. I mean, what kind of power do you have, and where does it come from? It's very different if you're from a grassroots movement with a huge membership base and you have the power of numbers. That's one form. In the work that I was doing during most of my career, I was working on issues where there was very limited grassroots support; there were very few groups involved, and they were not very organized. I was trying to be the voice of people all around the country who might respond to an issue or galvanize around it, but had no established way of organizing. A lot of

this was pre-Internet time, so there was a specific set of tools that mattered for me in the work that I did. It was critical to have credibility. You claim to represent consumers, but which consumers? How many consumers? When I was at the Consumer Federation, we had 200 organizations that were members, but it was clear that it's not *everyone*—it's a particular value set of consumer interests presented by an advocacy group. You need legitimacy to be listened to. And that's why I say in grassroots, you have legitimacy automatically if you have the numbers because that is a form of power.

The power I was looking for was legitimacy, but where does that come from? What I found over time is that it comes from having the facts right, never embellishing to the point of being dishonest or inaccurate, being consistent, being available, and being able to adapt to whatever [your target] thought was important and find ways to make your issue a part of that. So, it's not just coming in with a narrow agenda; it's thinking more holistically about what are the changes that we're looking for, what are the end results that we want, and how do we make the pieces come together? And there's not just one way to do it, so it's being creative and being quick on your feet to be able to adjust to people's orientations.

A whole lot of this is about people's interactions. Policymakers are people. They come with their own value sets and their own beliefs, but then they represent a certain constituency—and you should know what that constituency cares about, what the people of Indiana really care about if you are going to an Indiana senator—and then you are also trying to figure out what is personally motivating a policymaker. This could be a staff person as much as a member of Congress or a regulator because they help make decisions.

You also want to do this with media. The media is one of the most important tools that public interest groups can use to amplify their message. You could be the fifth quote in an article because the reporter wants different points of view, or you can be a major source for journalists about how to think about an issue and the political factors at play. When the other side argues X,Y, and Z, what are the weaknesses in that argument? So, it's not just the one side versus another side in clashes; it's helping journalists understand issues beyond just a particular article, so that in the long run, they incorporate the knowledge that you think is essential to understanding the political and policy framework that makes your point of view so persuasive. It may be that you don't influence the headline, appear in the lead paragraph, or in the article at all, but you help the journalist perceive the impact on economic justice or social inequality—and that's what you want: that *framing of the issue*.

Understanding the personal relationships you need to develop, how to message to people is critical. One of the biggest mistakes people make going in to Congress is saying, "Hi, I'm so-and-so, and I'm here to talk about net neutrality, and here are the five reasons you should be for Title II," and just go through them one by one. I think the proper way to do that is to say, "I'm here to talk about these issues. What's your take on them? What would interest you to know about why we care about this?" Try to draw out what matters to a policymaker instead of coming in with your five analytical hammers that you think will make someone decide to be on your side. Try to find out first how they make decisions. What matters to them? And it may make you adjust and present your argument in a different way, a new way that is more likely to receive a positive response, or to be better understood. These are things I just learned by doing and by then being on the inside—watching someone come and present and thinking, "Well, that was just a

half an hour wasted because that person doesn't even know what matters to me. None of that is anything I care about."

Another thing that's important to remember here is that in the American political system where money and politics are so intertwined, those who have money have access a zillion times greater than those without money. Public interest groups usually have very little. You try to set up meetings, but you also look for ways to have access that are cheap ways to do it. So, hearings on issues: You want to be a witness, but you don't even have to be the witness. During hearings, there are recesses, people are going off to vote, and you can grab them and actually engage. And then there are enormous feedback loops that come once you're out there and you're known. If you have the credibility, you're called back. If the press sees that you're taken seriously by members of Congress, they call you. Or you're in *The New York Times* and the *Wall Street Journal*, or you're online, on social media, and people are coming to you and taking to your way of presenting thinking . . . you're more likely to be invited in by the policymakers. It means you're easily identifiable, and you're influential. And then you start getting calls from editorial writers, and you build those relationships.

The Fight for Net Neutrality and the Title II Path

Holt:

Can you take us through the fight for net neutrality and talk about the important moments as you saw them: where you see it starting and ending, and the crucial moments that you see change occurring, what your targets were for your work, and if your goals changed throughout the process?

Kimmelman:

The fight has been going on for decades with different names and different forms. Having cut my teeth on the breakup of AT&T and having to deal with a competitive structure for telecommunications in the U.S., from the very get-go the fundamental issues were (1) unfair and unreasonable discrimination in a market where you had a bottleneck, some kind of monopoly, and (2) the competitive process was inadequate to open up nondiscriminatory options for vendors and consumers. And that has been a conundrum since the mid-1980s. A lot of fights went on to preserve nondiscrimination principles, through the Computer Inquiries, legislation in Congress, ultimately going through the 1996 Telecommunications Act. So, on some level, net neutrality is simply a part of a continuum, and this has actually informed my way of thinking about strategy in the last decade around this issue.

Having experienced a lot of Title II common carriage disputes during that period of time, I learned in the process not just how the case law was developing, or how the regulatory rules were developing, but also how these were getting fought out in the marketplace and how it wasn't always a precise term in law or in regulation. Nothing was ever definitively determined even when you won (or lost) a regulatory ruling. It was an ongoing dispute because the natural political and economic forces were driving toward friction, despite what the baseline legal standard was. That was extremely informative to me because I saw that the big dominant firms, even when they were losing, they were fundamentally winning. Even when they didn't get their definition in law and regulation, the enormous legal fight and economic fight around discrimination was always favoring the dominant transport companies. However, whatever the rules were

still limited their ability to abuse and discriminate, so there was this friction back and forth. That's important because as everybody lined up for the last two rounds of the net neutrality fight [2010 and 2014] during the Obama administration, it was over precise words and precise powers in law and how they would be interpreted. My experience demonstrated that you want to get the strongest legal structure, but most importantly, what you want is to build a coalition that is sustainable over a long period of time because even if you win, the fight will go on. It's not just about appeals in court; it's the day-to-day disputes about what is discriminatory and how discriminatory does it have to be in order to violate the rules, and on and on.

What we believed was most important to do for this vision was to build a broad coalition that would include as many companies as possible and a diverse set of political forces. Some organizations doing similar work with us were focused on Internet startups and the new players in the Internet ecosystem. I was doing a power analysis around Congress where I have more experience. I felt like we needed companies that had pull in rural America because in the current political alignment, we have inordinate conservative antigovernment power in the House of Representatives, which is a majoritarian body, and we were never going to win in the long run there (the long run being more than a couple years, less than 10). The Senate was my focus, and it's a place where you need a supermajority to do anything like overturn a regulation or push back against a president, and the Senate is heavily weighted toward rural America by virtue of there being two senators for every state regardless of population. So, our strategy was to build a coalition that would look a little bit more at rural issues and small business issues that would be influential. There was a set of companies that we brought in; we tried to bring in more rural grassroots groups, and everyone took a rowing oar.

Holt:

That strategy of appealing to rural America during this fight has not been widely discussed, has it?

Kimmelman:

A lot of this is behind the scenes. You see Public Knowledge doing a lot of work with a group called [CompTel](#) (now called INCOMPAS)—small telecommunications firms that actually serve more small business than consumer. They are not the powerhouses like AT&T, Verizon, and Comcast, but they have sway to some extent and some more rural sway and smaller state sway because the big companies gravitate toward the larger metropolitan markets and the big money. We were looking for every avenue we could to build a broader coalition. But the fundamentals of net neutrality were the same as every one of the issues I was referring to before: You have to have credibility, so you have to have the analytics, you have to have the law, you have to be consistent, you have to demonstrate that you're trustworthy, et cetera.

On an issue like net neutrality where the forces are so powerful, it's clear you need a huge grassroots base; you need a broad apparatus that deals with the media, mobilization, and playing on "the inside." There are some natural friction points because the arguments that are going to be powerful with grassroots are often simplified about "the end of the Internet." But the groups that walked into Congressional offices to make that pitch could be persuasive with only a small portion of members of Congress who are more progressive. That was a very important base, but that was not ultimately going to be decisive with the FCC decision makers. These decision makers would have to be able to protect the

rules in Congress and not be overturned. The rules would also have to be supportable by the White House so that they could stand firm and go out there very far and not face a huge defeat in Congress pushing back against them. We had to get broader support than the core progressives. In order to do that, you have to be more nuanced; that's part of the credibility process. That's where there's some friction and some distrust, unfortunately. Some groups may wonder, "Are the insiders selling out the grassroots? Or the base? Are they compromising the fundamental principles?" Of course, that could happen: Someone could make a bad deal or come up with a horrible compromise, but it's a fundamental part of the process that in order to get to majority, or even supermajority that you sometimes need, you have to adapt your message to what interests people.

One of the things that isn't known that well: When we did Senate counts on who was supporting Title II going up through September of 2014, we never had more than 20 senators.

Holt:

Yes, it seemed very surprising that Title II was the ultimate route chosen by Chairman Wheeler, given the history of pushback and resistance in the FCC, the courts, and Congress. Did you also find it surprising? Or did you see that path?

Kimmelman:

It wasn't obvious. We could not get traction on Title II. The chairman of the FCC was resistant to going that far because even though he understood the argument of how Title II could or should work, he was hoping there was another path that was milder, less regulatory. He kept experimenting with different versions because he was concerned about appearing very regulatory. He was aware there might be political pushback—that Congress might overturn him. When people want to understand where a decision is being made at the regulatory agency, it's important to appreciate that regulatory agencies are creatures of Congress, they are created by Congress, their funding is dependent on the Congress. Nothing is ever isolated at a regulatory agency.

Congress was always critical. The chairman of the FCC was asking, "Do I have the votes? If I really go that far, would I have the votes?" And he didn't believe it because we couldn't deliver it. With the millions of e-mails, all of them in by that period of time, we were not getting more than 20 senators committed to Title II.

So, you ask what happened? Well, there were millions of signatures, grassroots activism, and the push of startups, and everybody coming in and doing their arguments to the White House technology people, but all that wasn't necessarily enough by itself until close to the end of October 2014: The White House realized they were about to lose their majority in the Senate. They had already lost it in the House two years earlier, and that was going to fundamentally change the political environment that they functioned in. They were going to go into the last two years of their eight years in office hoping to make a legacy with a totally hostile Congress. There had been internal discussions in the administration over a number of years about the need to use executive orders and use your agency actions as a more powerful tool to effectuate their policy—it wasn't always listened to in the Oval Office, but in late October 2014, it resonated dramatically.

If you look at what was going on then, and in the month afterwards, there was an executive order on immigration, the election happened, Democrats lost, and then that hit. There was immediate movement by the [Environmental Protection Agency] to clamp down on pollution and regulate more forcefully, and it is the climate change initiative. There were other executive orders such as relations with Cuba, and they looked for everything they could have their agencies do.

In the White House, there had been this ongoing process on net neutrality with high-level officials that accelerated in October, with three options: (1) Title II, (2) very light-handed regulation, or (3) something in between. The natural default almost always in this White House is "something in between," and that was what the FCC was working really aggressively on. The activist community kept saying "Title II, Title II, Title II" and was pushing back. Everything we did publicly was for Title II, but from my own experiences, I knew that Title II was not necessarily going to deliver everything that people were hoping to get out of this, certainly not automatically. You were going to have to have fight after fight over every claim of discrimination, of new service or not, and it was going to be the same powerful forces that we were up against. Were we going to be able to sustain a grassroots uprising through every service offering by every company as it came forward? My impression was that this mobilization was going to die down, and unless there was some really discriminatory practice that would galvanize people again, there would be a lot of things that could fly below the radar because people aren't mobilized every day to fight these things. So, I was looking for whether there were ways to keep the shadow and the fear of "going too far" hanging over the dominant ISPs [Internet service providers]. To me, that didn't always necessarily require the precise language of Title II; there were other ways of doing that "that would be just as strong." I had seen it being done for the better part of 20 years with things that were not exactly Title II language.

Holt:

How exactly could you do that—instill fear in ISPs without that specific language?

Kimmelman:

Legal risk and some ambiguity around what practices will be deemed "unreasonably discriminatory" have been effective tools to instill fear for the last 20 years. Often, the fear of regulation can be as powerful as the exertion of regulatory authority. Sometimes even more powerful. The unknown of where the FCC might land on open Internet regulations, even when the existing ones were weak, was an enormous check on abuses among ISPs because they were worried that any business practice they had that would immediately make them money but could lead to stronger regulation would backfire on them. So, while there were abuses, I would say they were not nearly as severe as one might expect in a low regulatory environment because there was a viable threat of regulation coming.

One of the ironies is that even if you get the result you want, your opponent doesn't just give up. They go back and say, "How do I whittle away at this? What are the weaknesses? What are the exceptions? Where can I get around it?" Consequently, sometimes the follow-up portion can be much more difficult, even with strong regulation in place, because one side is highly motivated to find loopholes and exceptions (the ISPs in this case) and the other side thinks they have won the battle and they are on to the next fight. So, sometimes after the fact, regulations start unraveling or the implementation is not as strong as you had

hoped. But the side that has the most money at risk, that usually has the upper hand at that moment to continue the unraveling.

I have seen it in other contexts. The example I'll use is cable when it was reregulated in 1992. It was an enormous uphill battle to regulate the industry. But we won everything from rate regulations to limitations on the programming cable companies could own, bars on discrimination against programmers, requirements for placement of independent programming on cable systems—very powerful tools given to programmers, competitors, and the public by Congress and the FCC. The moment the law was passed, a number of us went into implementation mode, and we were quickly overwhelmed by an industry whose most important issue was to unravel that law because it was losing them money. So, all cable operators were fighting like crazy after 1992. Now, granted it was an era that was pre-Internet, pre-online advocacy, difficult to organize consumers, but now we could face similar problems now of how to—once you've won—get the team back together if things start going through individual case-by-case services, proposals, and exceptions. It is very, very difficult, after the fact, to try to put that back together.

This is also where there is some difference between grassroots statements and insider play. There was never in U.S. law a flat ban on discrimination under Title II. There was always a ban under Title II common carriage on *unreasonable* discrimination. So, what's reasonable and what is unreasonable? It was never all or nothing. The kinds of arguments that could be made in this kind of a grassroots uprising to push for regulations, it would be very hard to make with every single service offering put out there. To me, it was about highlighting: What are the real dangers that you're wanting to prevent? Mostly about not driving small companies out of business and about preserving freedom of expression. I was willing to talk to the FCC and the White House about different ways to do this that would still be a huge victory for net neutrality. There was a bit of a danger in some of the grassroots back and forth (and fortunately we never got to this) that some people were saying the Left would oppose anything less than Title II. There were a lot of people posturing that way—that anything different from Title II would be a sham. That might be great rhetoric if you are trying to pressure policymakers or galvanize the grassroots, but if people had actually followed through on the threat to oppose anything short of "full Title II," I think it would have been calamitous because we never were going to get a "Title II regulation" that absolutely bans all forms of discrimination. It's never been the law, and it can't be the law under Title II. It's a misreading of the law.

In that environment of losing control of the Congress, the White House tilted towards what would be a clean fight to have, a clean victory for us to show that we are standing up for our principles—and all of a sudden, it wasn't just environmental protection, it wasn't just immigrants' rights, it wasn't just Cuba; net neutrality fit perfectly into the president's agenda. So, of the three options, Title II was a cleaner, simpler, and a bigger political win. I think it was a total perfect storm event.

One of the ways that I think is most important to do your analysis of how well you did, and why things went the way they did is to always use a counterfactual. What if something else had happened? So, here is one simple counterfactual for net neutrality.

Imagine that this came up, that the FCC was about to move forward with a proposal, at the same time the president was about to go and defend his decision to cut a deal with Iran on nuclear weapons controls and was desperately trying to get 40 votes to defend his deal. The conversation in the White House might have been, "Our top priority is defending what we just worked out with global leaders all around the world and not make ourselves look like idiots. Oh, and we have this other issue here—should we push the FCC to go far left, or just do something in the middle?" The question would be, "Are any of the senators we are killing ourselves to get on the nuclear deal going to be upset if we also are pushing them on net neutrality?" I don't know the exact numbers of problem senators across these two issues, but there would have at least been a few. So, the question would have been, "Do we have to have two enormous fights at once?" The gravitational pull would have been to avoid two battles at once. Just let the FCC do what they are going to do. Everything is timing and context, even with four million e-mails and massive grassroots activism. I fear that some people will take the wrong message out of the victory, which is "If we just do this every time, then we will win." I don't think that's true.

Holt:

Why don't you think that would hold true?

Kimmelman:

Because if the FCC had done something half way, would all of those people have said, "Death to net neutrality, this is a scam, get rid of it immediately" when the response might have been, "OK, then you get nothing"? Would they have really done that? I don't think so. Maybe some purists. Maybe 10 senators would have said, "We've given it away, this is horrible." But would they have upended it? And would the White House have taken some hits? Yes. For how long? Not very. And then they would have been on to the next fights—police brutality and the Iran deal and the rest of it. In the political world, you need to be at the right place at the right time and take full advantage of opportunities. That's not to say that you flip a coin or roll the dice. It means you have to do everything right, but you're still not in control.

Competitive Analyses and Power Levers**Holt:**

What about CDNs [content delivery networks], identity services, and other categories of providers and players that are able to evade regulations? How will they affect the efforts to sustain this recent victory?

Kimmelman:

There is a lot of abuse in the marketplace. The question is, what do you think of as the most important ones to go after, and is it related to the fundamental transmission bottleneck or other dangers to content dissemination? In a lot of competitive analysis, it's about market power: Are you able to control the market? Are you tipping the market? Is Google too big? Is Facebook too big? Are they blocking entry and competition? Some of this analysis does not involve net neutrality issues but requires other policy tools. The other thing that's tricky is that while a lot of companies support net neutrality, many of those same companies make payments to ISPs in other countries in order to get preferential treatment or in order to get their traffic out from Google across the network, and our community knows that, the companies all know that. Is it hypocrisy? Well, it's opportunism, but you can win a political fight, you get an advantage,

and then lo and behold, some of your own allies go out on the basis of that and monetize the benefit to cut a sweetheart deal with your erstwhile opponent! Is it plausible that Facebook or Google or Microsoft would work with a Verizon or a Comcast to offer a suite of services? I put it in the model of: it's a capitalist economy; we know where the power levers are; these forces are very strong; they may be allies today and enemies tomorrow. So, you want a framework that both achieves your goals, and allows you to galvanize a lot of support going forward to defend those goals. That's why I wasn't sure that the precise words of Title II mattered as much as being able to keep the thematic and messaging around this focused on particular kinds of discrimination that you want to keep worrying about.

Holt:

How do you deal with companies like Google, Verizon, AT&T, Comcast—how does your work intersect with them?

Kimmelman:

Another tenet of advocacy that I think is critical is that you have to do this as a job, not just as a belief system. Most people don't make much money in public interest advocacy; they are believers, and that's why they are doing it, but that's not enough. You've got to do it as a job. If you want to catapult beyond your natural power, you need allies, coalitions, you need to take advantage of the power of others to boost your work and that invariably means working with businesses—and they have a different philosophy, they have a different goal, they have a profit motive—and a lot of people in public interest advocacy are uncomfortable working with them and that's unfortunate because we need to figure out where people who are self-interested happen to want the same goal that we want. So, we do a lot of that—and whether it's Google or Verizon or AT&T, we look for places where we actually can agree with them, where we see that where they want to get for their profit goal actually coincides with something else that we want for our policy goals, and we look to create those alliances around those issues, because they are all ephemeral.

We try to figure out in any one context: Who can be our allies? Who can we work with? Who can we trust? Not because we like them, but because their incentive structure coincides with our goals. Generally, the ISPs have been opponents on the discrimination issues, but because we don't try to make arguments that are blanket arguments or absolutes, and we say there needs to be some balancing, they'll tend to talk with us and work with us as opposed to those who say all or nothing. We're trying to be sensitive to how the market actually works and how the law has been interpreted because that's the framework all business works in. They're not fighting ideology; they're looking for what are they going to be allowed to do, and how can they make money doing it. We're very pragmatic that way.

The Historical View of Advocacy Labor

Holt:

Pulling back to a larger view, I am interested in what it was like to work with different FCC chairmen. Can you say a little bit about how you had to adjust your own work based on who was in that office?

Kimmelman:

They are all different personalities. It goes back to my comment about how this is all about people. What are they really like? Not just their ideology or their philosophy, but also what kind of leaders they are: Will they get out front and lead? Are they consensus builders? Do they relish conflict and take it on because they believe in something or are they scared to death of conflict? We've had both kinds at the FCC. For each one, you have to devise a strategy that will be most influential in pushing them. I think the community had the hardest time with Julius Genachowski, who was more of a consensus builder and more of a conflict avoider. This is a natural tension in Democratic administrations in the U.S. on the Left, progressive groups, they often don't want to attack the party they align most with, the people who are closest to their political views. Sometimes that makes a lot of sense: If you weren't going to get precise Title II, but you were going to get "pretty good," would you attack it? I don't think so because pretty good might be good enough. But sometimes you get fluff. And sometimes groups have a hard time attacking their own friends. And particularly in the beginning of the Obama administration, there was so much idealism and there had been so many statements about net neutrality by the president and by the new chairman of the FCC, people were caught off guard by his lack of willingness to fight for it. It was a lost moment, it was a moment when the Democrats had a supermajority—but even when they had a supermajority, and this is what people who are doing the fight today seem to forget, we couldn't get the majority of Democrats on the Hill pushing hard for Title II.

Holt:

So, is the fight more challenging when the terrain looks a bit easier?

Kimmelman:

You have to put it in the context of the dominant forces in American politics, which are money and power, money being a form of power, and Democrats needing to be reelected and not wanting to appear antibusiness. You can't look at it in a microcosm of "what are they going to do on net neutrality?" It's what are the 15 most important things that they have to vote on that their constituents are going to care about, or people who give them money are going to care about, and where does your issue fit with all of that? In the beginning of the Obama administration, the Democrats were being asked to vote for the Affordable Care Act and the Dodd Frank Bill to deal with the financial mess [in 2008]. So, there were a number of things where they were taking on the moneyed interests —the health care industry, the banks—tactically it was a question of could you do net neutrality and get away with it? I think the temperament of the then-chair of the FCC was too cautious. He could have done more. But you can see that there are other factors at play that make it less than obvious that you can just go for broke and win.

Holt:

How do you divide up your various activities, be it lobbying Congress or reaching out to the public or other strategies and tools on most issues?

Kimmelman:

Each issue is different, but generically I have hardly ever found a regulatory issue where I don't need some power of Congress behind me. It may not be a huge percentage of our time doing that, but we have to be able to put a stake down and show that you can do something regulatorily that will not be

overturned by Congress. Sometimes that takes a lot of work, sometimes it's a little bit, but it's an essential portion. That goes for the White House, too: They will always look to see what Congress will fight them on. On an issue that you really think you have a natural appeal to the public, you spend much more time going out there trying to sell the public because it's so much easier to connect. Now, nondiscrimination in the transmission platform that makes up the fundamental infrastructure of the information economy is not a no-brainer. If I talked about cutting your cable bill in half, I would get a lot more traction than talking about the precise words of nondiscrimination. So, it matters what your message is and how it connects with people.

Holt:

Yes, it is all in the framing, because in the end it is really about money and power.

Kimmelman:

We have to make it about what people care about, what matters to them. I think we have gotten much better at that, but I do think there is a bit of a risk if you are thinking about playing the long game and knowing that these fights never end, I do worry that if the grassroots movement that was successful in the net neutrality fight partially because the messaging was so forceful around the message that "this set of rules makes the Internet everything you need—affordable, accessible, you can build a business, nobody can block you, nobody will interfere with you." I worry a little bit about undermining ourselves with our own natural constituency by exaggerating. A lot of things that people were attributing to Title II and net neutrality I do not believe are legally protected by the Communications Act, nor are they achievable in the Communications Act. I'd love to see a more far-reaching law protect diversity of voices and players in the marketplace and put an end to all anticompetitive practices. But that requires much more than Title II and the Communications Act.

Holt:

What else beyond Title II would it require . . . language articulating acceptable levels of competition? Or specifically laying out categories of protected services?

Kimmelman:

We really need to think about the idea that every startup can be entirely protected and can do whatever Google does and whatever Facebook does. In a market economy, that's never going to be true. And net neutrality was never about the same price for everybody regardless of speed, regardless of where you live—people were building in attributes to this that were beyond the Communications Act. It's not the savior of everything in progressive policy and egalitarian principles. This is the tension between what it takes to rouse the grassroots versus what it takes to sustain something long term in Congress and the courts. If it's the women's movement or the environmental movement, you might have certain pillars (e.g., *Roe v Wade*) that are really concrete, clear cut, and absolute. In trying to build a movement around communications rights and access, it's very hard to find those absolute pillars. And you can see people trying to do it and again; it might be part of what was successful in this one instance, but I do worry in the long term, it's dangerous if it doesn't have a solid foundation. If the law that you're claiming to want to protect or the rules that you want to protect don't deliver that, people are going to say, "Why was I supposed to fight for this? Why does it matter?" So, I do worry about it somewhat unraveling. Another

approach would be to galvanize around fighting some kinds of discrimination that we know we really never want to see happen in our communications network. I can see that being more sustainable over time, and I can see that drawing more business constituency and grassroots and startups and so on to help sustain the effort in the long run.

Sustaining the Victory

I was also able to briefly follow up with Kimmelman after our conversation, and just weeks after [the FCC was back in court in December 2015](#) to defend the [Open Internet rules](#) (and [supported by Public Knowledge, among others](#)). This was the first of what will [undoubtedly be a long string of legal challenges](#) by ISPs, telcos, and cable companies, and potentially even state governments. In addition to lawsuits, the regulatory community is also faced with new services being introduced by major providers that have adopted “zero rating” plans, which “exempt particular data from counting against a user’s data cap, or from accruing any excess usage charges” (Malcolm, McSherry, & Walsh, 2016). These plans remain a regulatory gray area; yet, they clearly give special treatment to content from big providers that can afford to pay for the privilege. When we talked, I asked him whether he was surprised by such new developments and how things had gone in the ensuing months since the rules were adopted, given his recent experiences in court.

Kimmelman:

No, not really. Some of the proposals to get around the rules are starting to bubble up. If you look out there, you’ll see there’s not a galvanized opposition. I’m not sure all of them are net neutrality violations. I think we’re starting to see a little bit of the balkanization that is inevitable once you get past an endpoint of a policy fight.

The hard part now is going to be sustaining the core elements of Title II. Not just in the courts, but it’s going to go back to service-by-service assessments. For example, is Facebook’s new free service [Free Basics] a net neutrality violation? There are two new T-Mobile services [Binge On, Music Freedom] and people are wondering, “[Are they net neutrality violations?](#)”³ There’s a [Comcast service](#) [Stream TV], there’s [something that has been floated that Verizon may do](#) as an 800-type service, and a number of free services that differentiate based on a variety of factors including who gets them and under what conditions. This victory will be hard to sustain because now it goes into an interpretation phase and a set up of services, and a lot of it will be reviewed case-by-case by the FCC. Who will be there to fight against things that are anticompetitive, and will it be possible to put together as broad a coalition of supporters if the FCC seems to be wavering on certain things?

Another possibility is a change of administrations to one that totally interprets Title II differently. Many in the community may be surprised, but the interpretation that was made by the Wheeler administration at

³ These services are usually zero rated, by virtue of having “data partners” or “sponsored data” or another company-specific name for paid prioritization. The result is discriminatory practices among providers, less choice for consumers, and unfair competitive advantages for certain services. See van Schewick (2016).

the FCC could be very different than a new chairman of the FCC or a new majority of the FCC using the very same terms in Title II. So, it will be an ongoing struggle to sustain this victory.

Holt:

What do you think will be the key to sustaining this victory, strategically speaking?

Kimmelman:

The strategy of going in to get the strongest rules is exactly the strategy that I would use for sustaining it, which is to build as broad a coalition as possible, including rural interests, small business interests, and as many of the industry players who will care about discrimination—but be mindful of the fact that someone who is on your side this time, a large company that doesn't want to pay, could turn around in two years and cut a sweetheart deal with an Internet service provider to get favorable treatment and go their merry way. To me, the critical element is a diversity of stakeholders, if there were different ways, different elements of Title II or other powers under the FCC that could be used to support nondiscrimination, I was very open to that if that was what would bring in a broader, sustainable coalition over not just the fight for rules, but over the long haul of sustaining them. So, now we have Title II, and we will do the best we can to sustain it, but it is going to take that broader coalition support in the long run, including rural interests, given the nature of political power in the Senate being very much weighted towards rural states.

Holt:

So, essentially you see your strategy moving forward the same way as you did to win this fight in the first place.

Kimmelman:

Exactly. And this is critical: My strategy was based on not just what gets you part way there or what gets you over the finish line in the first instance; it was then secondarily, which a lot of people also had, "How do you sustain it in court?" But then also beyond that, how do you sustain it within a push on individual fights over services with companies that are very powerful in the Washington policymaking community, particularly in the Congress, and what will it take to bolster the FCC and then defend them in doing the right thing? From the get-go, it was important to have the broadest possible coalition that is likely to have parallel interests in the long run.

My concern during the fight was constantly: What will sustain us in the long run and how different is the Title II result from some variant? And this is where I felt a lot of the focus on a simple message for grassroots, which was important, was overwhelming other important strategic logic, which is that some of the variants would not yield a very different result, and could be very workable, and were potentially a viable alternative if Title II couldn't be completely accomplished. I was worried that people were undervaluing some of the alternatives because they wanted to be clean, and simple, and just Title II or nothing. That concerned me then—we were fortunate to not have to deal with those variants—but it concerns me going forward, too, because of new service offerings [such as those offered by T-Mobile and Comcast] and it has [been implied by some](#) that "if the FCC doesn't block these, then it will undermine what it just did." Well, that's exactly what I cringe at. I might agree on one of them but not another.

Those are judgment calls. But it's that mindset of black or white, all or nothing, that worries me as much going forward as it did during the debate over the regulations.

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