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Web of Deceit: How Internet Freedom Got the Federal Ax, And Why Corporate News Censored the Story

A BUZZFLASH GUEST CONTRIBUTION
by Elliot D. Cohen, Ph.D.

The days are now numbered for surfing an uncensored, open-access Internet, using your favorite search engine to search a bottomless cyber-sea of information in the grandest democratic forum ever conceived by humankind. Instead you can look forward to Googling about on a walled-off, carefully selected corpus of government propaganda and sanitized information "safe" for public consumption. Indoctrinated and sealed off from the outer world, you will inhabit a matrix where every ounce of creative, independent thinking that challenges government policies and values will be squelched. Just a wild conspiracy theory, you say? No longer can this be rationally maintained.

Federal government--from the Federal Communications Commission (FCC) to the White House--and corporate mainstream media have worked cooperatively to quietly block open access to cyberspace. Seizing its infrastructure, corporate mainstream media have censored and covered up its logistical moves—including lobbies in Congress and the FCC, the filing of suits in state and federal courts, and quid pro quo with the highest government officials--to commandeer, monopolize, and turn the Internet into an extension of itself. From Fox News to CNN, there has been dead silence as the greatest bastion of democracy in history is being torn down and resurrected in its own image. Now, as the corporate newsrooms remain mum, it has gotten the green light from the highest federal court in the land.

On June 27, 2005, in a 6 to 3 decision ([National Cable & Telecommunications Association vs. Brand X Internet Services](#)) the United States Supreme Court ruled that giant cable companies like Comcast and Verizon are not required to share their cables with other Internet service providers (ISPs). The Court opinion, written by Justice Clarence Thomas, was fashioned to serve corporate interests. Instead of taking up the question of whether corporate monopolies would destroy the open-access architecture of the Internet, it used sophistry and legally- suspect arguments to obscure its constitutional duty to protect media diversity, free speech, and the public interest.

The Court accepted the FCC's conclusion reached in 2002 that cable companies don't "offer" telecommunication services according to the meaning of the 1996 Telecommunication Act, which defines telecommunication purely in terms of transmission of information among or between users. According to the FCC, cable modem service is not a telecommunications offering because consumers always use

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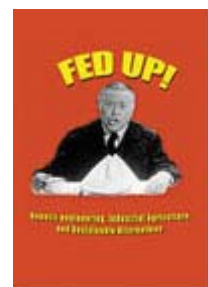
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high speed wire transmission as a necessary part of other services like browsing the web and sending and receiving e-mail messages. The FCC maintained that these offerings are information services, which manipulate and transform data instead of merely transmitting them. Since the Act only requires companies offering telecommunication services to share their lines with other ISPs (the so-called "common carriage" requirement), the FCC concluded that cable companies are exempt from this requirement.

However, the FCC's conceptual basis for classifying cable modem services as informational was groundless. Not even the FCC could deny that people use their cable modems to transmit information from one point to another over a wire, regardless of whatever else they use them for. The FCC's classification could not possibly have provided a reasonable interpretation of the 1996 Telecommunication Act since it was inconsistent with it. Section 706 (C) (1) of this Act defines "advanced telecommunications capability"

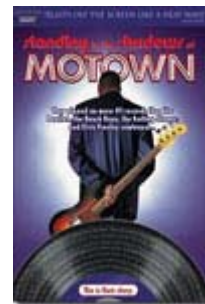
without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

Broadband cable Internet offers "advanced telecommunications capability" since it clearly fits this legal definition. Therefore, cable modem service must legally be regarded as telecommunications service.

To classify it as an information service is instead to treat high-speed broadband Internet as though it were similar to cable services such as Fox News and CNN. These networks send information down a one-way pipe unlike Internet transmissions, which, in contrast, are interactive, two-way exchanges resembling telephone conversations. The 9th Circuit Court of Appeals made this quite clear in its decision in *AT&T v. Portland*:

Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication and information exchange unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming. And unlike transmission of a cable television signal, communication with a Web site involves a series of connections involving two-way information exchange and storage, even when a user views seemingly static content. Thus, the communication concepts are distinct in both a practical and a technical sense. Surfing cable channels is one thing; surfing the Internet over a cable broadband connection is quite another.

The Supreme Court had to strain to find some alleged legal basis to defer to the FCC's classification of high-speed Internet as an information service. So it put the entire weight of its argument on the FCC's claim that cable companies do not "offer" the telecommunication aspects of its services to consumers. Instead, it "offers end users information-service capabilities inextricably intertwined with data transport." Justice Scalia, writing the minority opinion in *Brand X*, analogized, you might as well say that a pizza service doesn't deliver pizzas because it also bakes them! Countering with its own analogy, the majority rationalized that you might as well say that a car dealership "offers" engines to consumers because it offers them cars. According to the majority's perspective, since the finished product is the car and not the engine, it makes more sense to say they offer consumers cars rather than engines. Similarly, it



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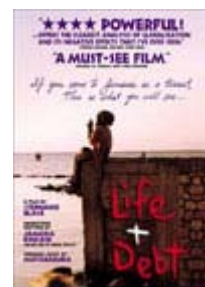
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argued, the finished product that cable modem customers seek is Internet services such as being able to surf the net, not simply a transmission over a wire.

The Court's claim is makeshift and oversimplified. It obscures the scope of consumer motivation by assuming that consumers have just one broad perspective that defines what a company "offers" them. Realistically, consumers are also interested in the quality of the engines they get when they purchase cars (whether it's a V-8, V-6, 3.8 liter, 2.0 liter, etc). From *this* consumer perspective, the car dealer is indeed "offering" engines to consumers (and bucket seats, antilock breaks, dual air bags and all other components that determine the car's drivability, safety, comfort, design, durability, speed, and so forth). Similarly, from the perspective of average cable Internet consumers who care about how reliable and fast the cable connection they purchase is, the cable company can, in a very practical sense, be said to be "offering" a telecommunication service. The FCC's distinction that cable modem data transmission service is inextricably bound up with information services--just as an engine is inextricably bound up with a car—is, in this instance, a distinction without a difference.

In the end, the Court retreated to the claim that the Telecommunication Act was ambiguous. So why did it side with the FCC's interpretation even though there was clear, prior legal precedent for classifying cable modem services as telecommunication offerings (*AT&T Corporation vs. Portland*)?

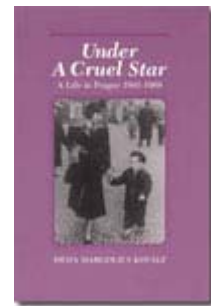
Citing its own decision in *Chevron U.S.A. Inc v. Natural Resources Defense Council*, the Court maintained that "if a statute is ambiguous, and if the implementing agency's construction is reasonable, ... a federal court [is required] to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." Therefore, it argued, since the FCC's construction is reasonable it should determine what counts as "offering" telecommunication services.

In the first place, the Court provided no legitimate legal, moral or conceptual basis to think the FCC's construction was reasonable. If it really cared about what consumers wanted, it would have determined what was reasonable *for purposes of regulating competition of an Internet that was designed to provide free, unfettered access to information in a democratic society*. Instead, the Court rested its substantive case on a specious argument advanced by the FCC:

The Commission concluded that ...broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.... This, the Commission reasoned, warranted treating cable companies unlike the facilities-based enhanced-service providers of the past....We find nothing arbitrary about the Commission's providing a fresh analysis of the problem as applied to the cable industry, which it has never subjected to these rules. This is adequate rational justification for the Commission's conclusions.

What "rational justification" is the Court talking about? The FCC made an unsupported claim that giving cable companies monopolies on broadband Internet cable service, thereby doing away with open access, will spawn more competition. Where is the empirical evidence that would justify the claim? In reality, such deregulation portends less competition, not more, from independent service providers.

Even if giving giant cable corporations monopolies on cable modem service could encourage more investment in relevant technologies, not all "innovations" are worth having and some may be grotesquely anti-democratic, for example, using innovative filtering technologies to build a wall around the Internet, and increasing the speed and efficiency by which government propaganda reaches consumers. The Court's decision simply covered up the fact that there was in fact *no* justified defense given by the FCC for its construction. The more *plausible* explanation (not at all a justification) is this: by giving big cable business what it wants (namely, big money), big government will get what *it* wants in return: control



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over what people are permitted to know.

By deferring to the FCC instead of exercising its own judicial discretion in determining what really was reasonable, the Court mooted the point of having an independent, ultimate court of appeals in the first place. This is to provide checks and balances on the activities of the other two branches of government, and to settle controversial, politically significant cases with far-reaching social consequences. Instead, it abandoned its constitutional charge to protect the First Amendment right of all Americans to freedom of speech in cyberspace from encroachment by big business acting in tandem with federal government.

In the second place, the Court's appeal to *Chevron* may not have been lawful by its own admission. Said the Court:

A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. This principle follows from *Chevron* itself.

In 1999, before the FCC rendered its construction in 2002, the U.S. 9th Circuit Court of Appeals, in *AT&T v. Portland*, held that its construction of the 1996 Telecommunication Act followed from the unambiguous terms of the statute:

Under the Communications Act, this principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL, "regardless of the facilities used." 47 U.S.C. S 153(46). The Internet's protocols themselves manifest a related principle called "end-to-end": control lies at the ends of the network where the users are, leaving a simple network that is neutral with respect to the data it transmits, like any common carrier. On this rule of the Internet, the codes of the legislator and the programmer agree.

Here the 9th Circuit Court was quite clear that there was no ambiguity about whether cable broadband must be regarded as a telecommunications service and hence subject to common carriage. It stated that "the codes of legislator and the programmer agree." The only one who claimed any ambiguity was the Court.

According to *Chevron*, agencies' constructions are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." As you can see, the FCC's construction is all of these things. As a result, giant cable companies can now enjoy a monopoly on high-speed, cable Internet. Not only are these monoliths poised to noncompetitively control the price of their services, thereby preventing poorer citizens from broadband access, they are now able to monitor and control the content of information that can be accessed by millions of American through these pipes.

The main alternative to high speed Internet (broadband) via cable is presently slower modem connectivity via Digital Subscriber Line (DSL) service over telephone lines. Telephone companies have traditionally been required by government to share their lines with other ISPs, thereby assuring greater competition and diversity in content. But the Court has now given the FCC the right to abandon this common carriage requirement to render it consistent with the broadband cable industry; and, as FCC Chair Kevin Martin has already given the nod to the telephone companies, it should only be a matter of time before the telephone lines are also deregulated and alternative, independent commercial ISPs are banished altogether from cyberspace.

Broadband and DSL are therefore on their way to becoming extensions of corporate mainstream media. In fact, the companies that have taken control of the Internet are themselves part of an intricate web of corporate media ownership. For example, Time Warner and Comcast, have recently purchased Adelphia. Moreover, companies such as Google are in a strategic position to become front men for mainstream corporate Internet. This financially prosperous dot com, which now rivals Time Warner in net worth, has advertising relations with Verizon and partnerships with companies such as News Corp. There have also been a number of documented instances in which Google has engaged in [questionable censorship practices](#). It is therefore no stretch to imagine this company taking

its place as gatekeeper of a government-friendly mainstream corporate Internet.

The logistics of this well organized assault on American democracy by corporate mainstream media can be summed up in this one simple principle: **Whoever controls the conduit controls the content.** Media broadcast corporations like CBS, ABC, and NBC control the spectrum that carries their broadcasts; they are therefore able to determine the content of their programming. Cable TV news networks like News Corp's Fox News and Time-Warner's CNN own the cables that carry their news shows, and therefore can control what passes as "news." Gigantic radio empires like Clear Channel and Infinity have crowded out the smaller broadcasters and now determine the content of mainstream radio. The Corporation for Public Broadcasting, now on a campaign to restrict "liberal" programming, controls National Public Radio (NPR) and the Public Broadcasting System (PBS). Colossal media corporations like Time Warner, which also own mainstream movie distribution companies, also control the content of the movies most Americans watch. Publishers of books are also part of this intricate corporate media web. For example, News Corp. owns Harper-Collins.

All of these companies have interconnected corporate boards with a [relatively small number of officers](#). And they have well entrenched [business relationships with the government](#), for example, dependence on government officialdom for the content of their news reports; enormous financial incentives to receive government contracts (for example, General Electric's NBC has interests in military contracts to produce jet engines); interests in government deregulation of media ownership caps and cross-market ownership, and lucrative tax incentives. As a result of this intricate web of quid pro quo, the mainstream media is to America what Pravda used to be for the now defunct Soviet Union: disseminators of an array of government-friendly, self-censored, whitewashed propaganda.

When the *London Times* leaked the so called "[Downing Street Memo](#)," the Internet buzzed with how Americans were deceived and lied to about the Bush Administration's reasons for going to war in Iraq. While at first, the mainstream media gave scant attention to this memo, the shockwaves sent out from the Internet were simply too strong to be ignored indefinitely. Even so, the mainstream broadcast media, from [NBC's Chris Matthews](#) to Fox's O'Reilly, still ignored the substance of the memo (namely that "the facts" about the threat to U.S. security posed by Saddam Hussein were being "fixed" to fit a policy of preemptive war). Instead, it focused on peripheral issues (such as whether the Bush Administration had an exit plan) and it largely dismissed the memo as "nothing new."

So what if the Internet blogs were themselves walled off and thereby prevented from sounding the alarm in the first place? No American would then have even been aware of the memo's existence! And the Bush Administration would have avoided being placed in the position of answering to the American people. Without a free Internet, Americans are therefore vulnerable with no defense against media and government propaganda. The government is protected against the people instead of conversely. Walled off from a free Internet, America is walled off from the truth, and there is no longer freedom in America.

The mainstream media have systematically played down the Supreme Court's decision to deregulate broadband cable Internet just as it has ignored the Downing Street Memo. The decision was not even mentioned by cable TV networks like Fox and CNN. *The New York Times* covered it only on the bottom of C1 of the business section while the details of the BTK killer got front page press along with other decisions handed down by the Supreme Court on June 27 (including the Grokster file sharing case). *The Palm Beach Post*, which is published by Cox--another mainstream media company in the cable business--didn't cover it at all. Censoring stories that have potential to subvert corporate and government interests has already become the rule in this brave new world of corporate media coverage. And with open-access Internet now on its last leg, things promise to get even worse. **Unless we are prepared to do something about it before it's too late!**

What can we, the people, do to save the Internet from becoming the latest casualty of the corporate mainstream media?

Americans can no longer afford to sit back and permit others to defend freedom of speech for them. We are all the victims of the same concerted effort by the corporate political establishment to amass power and wealth for the few at the expense of the many. We can no longer afford to wait until all of our outlets of free speech have been shut down. The collective American voice can be a powerful one. There is great strength in numbers.

This power can be harnessed if we all take the time to write letters to our congress persons, letting them know our opposition to corporate monopolistic control of the Internet. History has shown that these protests can produce change. In 2003, when it was deluged with millions of letters from constituents protesting the FCC's deregulation of corporate media ownership rules, Congress responded by legislatively reducing the FCC's proposed market ownership cap. Now, with the demise of open-access Internet hanging in the balance, this problem of media consolidation is more crucial than ever. By our collective efforts, we can make a difference.

You should also send e-mail messages, including chain messages, to friends and associates alerting and educating them about the attack on the free architecture of the Internet. You can also join organized efforts such as the [Center for Digital Democracy's Digital Destiny Campaign](#), a grass roots effort to protect Internet freedom and diversity. Other organizations like the [Free Press](#) have well organized and successful outlets for making your voice heard in Washington.

While they last, you should support diversity in search engines by using [alternative independent, search engines](#). Google is not the only comprehensive search engine, and by supporting alternatives, we make it harder for one search engine to usurp the authority of others. Given that there are biases internal to the selection criteria of search engines, reliance on one engine to the exclusion of all others renders us more vulnerable to organized attempts at censorship, propagandizing, and control over what we can know.

You should also contact your federal, state and municipal leaders and let them know that you are concerned about the effects of corporate media consolidation of the Internet and that you would like to see municipal Internet service ensuring access for all residents of your community. Dominant cable and telephone companies have successfully lobbied state legislatures to forbid such competition and there have been at least fourteen states that have already banned or restricted municipal telecommunications utilities, and bills are presently being introduced in other states outlawing the offering of free or discounted access to Internet service by municipalities. A bill has also been introduced in the House that would prohibit such community and municipal services. You can join the [Free Press initiative](#) against it. On the other hand, the [Community Broadband Act](#) has been introduced in the Senate that would protect the right of communities to offer affordable broadband access.

Defenders of deregulation of corporate media have always pointed to alternative technologies in order to justify further deregulation. Before the present deregulation of Internet, the FCC pointed to the Internet to justify further deregulation of commercial broadcast TV and radio. Now the friends of deregulation, including the Supreme Court itself in the Brand X decision, are claiming that there are other platforms like wireless terrestrial and satellite as well as municipal Internet. But if the future resembles the past, these too will fall under corporate control with the help of the federal government. To see this you need only consider who now owns the satellites and controls the spectrum for wireless Internet and how vigilant mainstream corporate media have been in attempting to thwart the development of municipal and community Internet. It is therefore essential that we stand firm in our conviction and not fall for the old line. Affordable, uncensored Internet for all Americans is presently in danger of becoming a pipe dream. Unless we act now, the outlook for survival of democracy in cyberspace is dismal, and it grows dimmer with each successive conquest by mainstream corporate media.

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Elliot D. Cohen is a media ethicist and author of many books and articles on the media and other areas of applied ethics. His most recent book on the dangers of corporate media is [News Incorporated: Corporate Media Ownership and Its Threat to Democracy](#) (Prometheus Books, March 2005).

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