

“Faith Based” Technology Policy

Lawrence Lessig*

On August 14th, just 82 days before the general election, John McCain released his technology platform, an extraordinarily important document, if only because of the extraordinary importance technology has to the Nation’s economy.

This platform touted John McCain’s experience. It described him as the former chairman of the Senate Committee on Commerce, Science and Transportation, a committee that plays a major role in the development of technology policy. And indeed for much of the last decade, John McCain has led the most important committee in Congress dealing with Internet and technology matters.

But that experience, in my view, brings with it a certain responsibility. For the single most important fact about the Internet’s development over the last decade has been the extraordinary decline the United States has faced compared to our competitors. We started the Bush administration at #5 in world ranking for broadband penetration. We will end at #22. And the question we should be asking about Internet policy is, Why we did so poorly? and What change there might be to reverse that decline?

In particular, in evaluating John McCain’s technology platform, we should be asking whether in his platform, there is something new or something different from what he has been espousing to date. Something that might actually reverse the consequences of the policies that he himself has been supporting.

As I evaluate his policy in light of this question, I just don’t see it. I don’t see what in his policy will effect a reverse in this decline.

For example, he begins the platform by describing policies to “encourage investment in innovation,” essentially tax cuts, something we are very familiar with in the presidency of George Bush. He ends the platform by describing policies to “ensure America is a

* Professor of Law, and an Obama supporter, but not from the Obama Campaign. This is a transcript (with slight editing) of a video available at lessig.blip.tv.

connected Nation,” but these again are simply policies to transfer money to corporations.

He describes, for example, a “People Connect Program” that will reward companies offering high speed Internet access service to low income customers, by allowing these companies to “offset their tax liability for the cost of the service” — subsidizing these companies to provide this service, a subsidy that former FCC Chairman Reed Hunt estimates will cost the government at least eight billion dollars for the top two providers of Internet service alone.

All of these proposals simply drive money to the largest companies in this sector, rather than driving what this sector desperately needs: competition. Competition to drive them to provide better, cheaper service.

For the single defining feature of the last eight years has been the collapse in Internet service provider competition. We began the Bush administration with literally thousands of ISPs, both narrowband and broadband ISPs. We will end the administration with essentially two, if you are lucky, in any particular district.

This change is because of changes in government policy, changes that increasingly facilitated the consolidation of this market such that we don’t have effective competition anymore. Governments that didn’t adopt this change in policy — governments that stuck to the policy that was our policy in the 1990s — achieved a very different reality for broadband penetration. France, for example, now offers Triple Play packages of 100 megabits per second plus telephone plus television for about 45 dollars a month. In San Francisco, to get the exact same service, you have to pay twice that amount, and you get one tenth the speed for Internet service.

The reality is of a failure in these last eight years in broadband policy — on John McCain’s watch. Yet there is nothing in his proposals that will reverse this decline.

One place John McCain’s technology policy is quite explicit, though, is with the question of network neutrality and his criticism of network neutrality.

What is network neutrality?

Network neutrality is basically the question whether the network owners get to pick and choose the applications and content that you as a user can have access to or use.

If you think about these computer networks in the way that you might think about a cable television network, you probably think, “Sure, why shouldn’t they have that right, just like a cable television network has the right to choose what programs will play across their television network.”

But if you think about the Internet in the way we traditionally thought about telephone networks, then you would say, “Of course, no way should the network owner have the right to choose with whom I connect or what I say.”

That’s essentially the battle brewing around the question of the future of the Internet. Will the Internet increasingly look like cable television networks, where the owners of the network get to pick and choose the applications and content that run on that network? Or will the future of the Internet stay with the tradition of telephones, where it is the user that gets to pick with whom and what he says on that network?

The network operators here have a very clear view of this question. They want the network to look like cable television. They say “it is our pipes,” or “tubes” as they call it in Washington. They say, “we get to control which content and which applications get to run on those pipes.”

But network neutrality stands for a very different principle: That it is the consumer what should have the right to choose. So, just as with the telephone network, you get (1) to call anyone, (2) say anything (so long as it is legal), (3) connect whatever you want to that network (at least so long as it is not harmful), and (4) rely upon important competition to keep the price low and the quality high, so too for the future of the Internet, we should have the right (1) to access anyone, (2) use any application (that’s legal), (3) attach whatever devices we want to this network (so long as it is not harmful), and (4) depend upon a context of competition to guarantee the prices remain low and quality remains high.

John McCain’s technology policy initially makes it sound as if he supports these freedoms. He says he will “preserve” consumer

freedoms and identifies the freedom to access the content consumers choose, to use the applications and services that consumers choose, to attach the devices that consumers choose, and to choose among broadband service providers, presumably in a context of competition to keep prices low and quality high.

These are, in fact, the four freedoms that were originally articulated by former FCC Chairman Michael Powell, the man said to have authored the technology platform that John McCain is now selling.

But Michael Powell didn't intend these principles to be enforceable. Instead, he had faith that the companies providing access to the Internet would offer access with these four freedoms.

That faith was tested for Michael Powell — first, by a company called Madison River, a company that provided DSL service, but then decided to block voice-over IP applications on their DSL service, requiring the FCC to step in and tell them to stop.

That faith was tested again when Pearl Jam, through its lead singer Eddie Vedder, criticized the President on an AT&T webcast, and then found that AT&T had turned down the volume while Eddie Vedder criticized the President, again because AT&T believed it was their platform, and they therefore had the right to control the content on that platform.

Verizon had the same view when it decided to block pro-choice Text Messaging because it didn't believe that message was "appropriate" for its platform and thus exercised the power it believed it had to block content it didn't like.

And then BitTorrent found that Comcast was blocking consumers' use of BitTorrent on its network, because, again, Comcast believed that this was not an application that was appropriate for that network.

All of these providers interfering with consumer choice eventually led the FCC to say "faith is not enough." And just last month, the FCC Chairman now in place, Republican Chairman Kevin Martin, took the very brave step of turning these four principles into an enforceable rule of law.

The rule these four principles now establish — the principle of network neutrality — now guarantees that people have access to the content and applications they want to choose, not the content and applications that the network provider chooses for them.

Now apparently, John McCain wants to return to a faith-based technology policy. Apparently, he believes that these enforceable rules of consumer choice are not appropriate in the Internet context.

For as his platform says, he does not believe “in prescriptive regulation like network neutrality.”

This is, first, extraordinarily disappointing, because it signals that the McCain campaign is rejecting the advice of extremely important advisors like Meg Whitman, the former head of eBay. Just about two years ago, Meg Whitman led the fight in Silicon Valley to get Silicon Valley companies and users to support network neutrality regulation. As she described in a letter to users

right now the telephone and cable companies in control of Internet access are trying to use their enormous political muscle to dramatically change the Internet. It might be hard to believe, but law makers in Washington are seriously debating whether consumers should be free to use the Internet as they want in the future.

Indeed, those law makers are debating it. And John McCain has now embraced it — the idea that “they” should be free to use the Internet as “they” want, where “they” means the companies, not the consumers.

Instead of supporting the consumers, the campaign of John McCain is now supporting the lobbyists who now work for his campaign — Rick Davis, Charles Black, and Tim McKone — all of whom have worked for these varied telecom and cable companies to fight any requirement that they let the consumers use the Internet as consumers want.

But, second, this criticism of network neutrality is very deceiving. For network neutrality is not rightly described as “prescriptive regulation.” Network neutrality is instead the heart of how the Internet was designed. As I described in testimony I gave in 2002

to John McCain's Senate Commerce Committee, — the first testimony before Congress, I believe, to refer to this concept of “network neutrality,” neutrality was at the very core of what the Internet originally stood for. “Neutrality” meaning that the Internet itself would not discriminate against applications and content, but instead that the applications and content that succeeded were the applications and content that consumers or users of the Internet enjoyed.

That neutrality is what produced the incentive for the extraordinary growth that we saw in Internet usage and innovation. And it is that growth that defined the success of the original Internet.

Thus, neutrality is what the Internet was. The question we now face is whether neutrality is what the Internet will be.

Defending that neutrality is to defend a tradition of competition that created the original Internet, to defend it against the work of lobbyists who increasingly want to see the power shift from the consumers to the network owners. They want to see the Internet in the model of cable television, owned and controlled and thereby weakened. And the product of that weakening is partly what we have seen over the last eight years.

John McCain has now picked sides in this debate. He has picked sides against the Internet — or as they call it down in Washington, “the Internets.”

In the end, what a technology platform needed to do was to explain how we can make technology work for us and for our Nation.

This is what to me was most exciting about Obama's technology policy. For in addition to outlining important principles about access and network neutrality, Barack Obama's policy advanced ideas about how we can use technology differently.

So, for example, he advances the idea of “open source government,” which commits not to making every agency in the government have a webpage, but instead to making sure that agencies charged with releasing data do so in a standard, open-format way. So that people and institutions who want to check and hold the

government responsible can get access efficiently to that data, and make sure that the government is doing the job it set out to do.

Or in the context of transparency, proposals about how government data be made available, so that we can understand influences in policy and trace those influences back to those responsible for these changes in policy.

Or particularly geeky, a proposal that I find extraordinarily important: the idea of a CTO, a person not charged with the job of making sure that the servers run quickly and efficiently, but a person charged with making sure that the principles and values embedded in the technology reflect the values of our Nation: Someone charged with making sure that privacy, transparency, accountability and efficiency are built into how technology in government works.

These ideas are ideas about how we can use technology to do something different and better in government. This is what the Obama campaign has advanced, but that is no where in McCain's technology platform.

But what was needed as well, in my view, was a recognition of something fundamental about the last eight years. That recognition, again, is captured in this single graph [showing the decline in America's standing in broadband penetration]: a recognition that the last eight years have not been focused on advancing technology policy and that we must return to that commitment, alive and well during the last Clinton administration.

This is a more general point that seems to have been lost in this election.

The last eight years have been marked with profound mistakes of judgment. This is the picture of one such mistake [graph of broadband decline]. This is the picture of another [photograph of Iraq].

When we face mistakes in judgment, we need people to stand and say "We made a mistake." Or when responsible, to stand up and say, "I made a mistake and I take responsibility."

Yet this is something we have not seen in this election so far. And whatever you think about this mistake [photograph of Iraq], we should not be continuing this mistake [graph of broad-

band decline]. We need people to recognize the last eight years as a mistake and to signal the change in policy that they will implement.

John McCain doesn't see the last eight years as manifesting a mistake. Instead, he continues to serve as a cheerleader for the mistakes of President George Bush's administration.

We need a change in this. The Net needs a change in this — if we are going to realize the potential of this extraordinary infrastructure, to create both jobs and economic growth, and the potential to make government work better.

This is Lawrence Lessig. Barack Obama had nothing to do with this message.