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# The Implications of Trump's Executive Order and Section 230 of the Communications Decency Act

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VIEWPOINT TOPICS

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Last week, President Trump signed an Executive Order targeting social media companies and the liability protections afforded to them under Section 230 of the Communications Decency Act (**Section 230**). The Order directs the National Telecommunications and Information Administration (NTIA) to file a petition for rulemaking with the Federal Communications Commission (FCC) to clarify the scope of Section 230. The Order further directs federal agencies to assess their spending on advertising and marketing on online platforms, as well as directs the Federal Trade Commission (FTC) to consider enforcement actions against social media companies for possible violations of **Section 5** of the Federal Trade Commission Act (FTC Act).

President Trump's Executive Order was reportedly under consideration last August, and re-emerged last week in a reaction to Twitter's recent decision to flag as "potentially misleading" two of his tweets on mail-in ballots – which claimed such ballots would be "substantially fraudulent" and would lead to a "rigged election". In the Order, the President states: "Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician's tweet." As evidence, the Order then cites Twitter's decision not to flag a tweet by Rep. Adam Schiff (D-CA) on "the long-disproved Russian Collusion Hoax".

The Communications Decency Act was enacted as part of the Telecommunications Act of 1996, and sought chiefly to address dissemination of obscene and indecent online material to minors. The aim of Section 230 was to address concerns over the law's potential chilling effect on the distribution of user-generated content by online platforms. Specifically, Section 230(c)(1) states that online platforms shall not be "treated as the publisher or speaker of any information provided by another information content provider", thus providing them with liability protections for problematic content posted by users of their platforms. Furthermore, Section 230(c)(2) states that online platforms cannot be held liable when they act "in good faith" to restrict access to or the availability of such problematic content. The net legal effect provides online platforms – not just social media platforms, but any online service providing a forum for comments – with the ability to both disseminate the speech of their users, and freely remove objectionable digital content, without the risk of liability.

Proponents of the law assert that Section 230 is the bedrock of free speech on the Internet. Critics contend that it provides too much insulation from accountability for their content moderation policies and decisions.

In the petition for rulemaking, the Executive Order directs the NTIA to request that the FCC "expeditiously propose regulations to clarify" the implications and scope of Section 230. Specifically, the FCC will be asked to clarify how restricting content under Section 230(c)(2) could affect an online platform's liability shield under Section 230(c)(1). The Order further seeks to codify in regulations the conditions under which an online platform's actions do not constitute "good faith". With regard to the FTC, the Executive Order directs the Commission to "consider taking action" against online platforms "that restrict speech in ways that do not align with those entities' public representations about those practices". The Order states that such practices may be in violation of Section 5 of the FTC Act and its broad prohibition against "unfair or deceptive acts or practices". (It is worth noting that both the FCC and FTC are independent agencies created by Congress and are not part of the Administration.)

Reaction to the President's Executive Order in Washington has been mixed. Republican FCC Commissioner Brendan Carr has **expressed public support** for the President's Executive Order, while Democratic Commissioner Jessica Rosenworcel stated (on Twitter) that "an Executive Order that would turn the FCC into the President's speech police is not the answer". FCC Chairman Ajit Pai, a Republican, was measured in his response by saying (as reported in The Verge), "The Federal Communications Commission will carefully review any petition for rulemaking filed by the Department of Commerce" under which the NTIA resides. Commissioners on the FTC have not publicly commented on the matter.

On Tuesday, the non-profit Center for Democracy and Technology (CDT) filed a **complaint** in the Federal District Court for the District of Columbia, alleging that President Trump's Executive Order violated the First Amendment. Specifically, the complaint alleges that the Order "is plainly retaliatory" attacking "a private company, Twitter, for exercising its First Amendment right to comment on the President's statements" and that such retaliation seeks "to curtail or chill… constitutionally protected speech".

On Capitol Hill, Members have varied in their responses. In the Senate, both Republicans and Democrats have publicly expressed opposition to the Executive Order. For instance, Senator Ron Wyden (D-OR), who was an original author of Section 230, characterized the Order as “plainly illegal”, and Senator Mike Lee (R-UT), one of the most conservative members of Congress, characterized it as a “terrible precedent” on Fox News Radio (as reported by The Hill). On the other side, Senator Ted Cruz (R-TX), a vocal critic of social media companies, has **publicly supported** the Order. In the House, Rep. Frank Pallone (D-NJ), Chairman of the House Energy & Commerce Committee (which has jurisdiction over Section 230) tweeted “Trump is threatening to revoke Section 230… as part of a political retribution scheme against Twitter and others. He can’t change the law without Congress.”

On that note, opposition to the President’s Executive Order does not necessarily translate into opposition to changing the law. Before the recent controversy surrounding the President’s Twitter account, Congress had already been debating the merits of Section 230. Many Democratic Members of Congress have long complained that social media companies have insufficiently policed their platforms to cull disinformation and hate speech. Speaker Nancy Pelosi (D-CA) has **expressed openness** to changing the law, as has former Vice President and presidential candidate, Joe Biden, who told the *New York Times* editorial board in January that “Section 230 should be revoked, immediately”. On the other side, many Republican Members have expressed suspicions that social media companies are biased and suppress conservative viewpoints. Senator Josh Hawley (R-MO) has introduced a bill, **S. 1914**, the Ending Support for Internet Censorship Act, which would lift the immunity afforded to large online platforms when they “moderate information… in a manner that is biased against a political party, political candidate, or political viewpoint.” And Rep. Paul Gosar (R-AZ) has introduced **H.R. 4027**, the Stop the Censorship Act, which would amend Section 230 to provide liability protection to online platforms only for removing “unlawful material” and not content that is deemed objectionable by the platform.

While there is bipartisan support for amending Section 230, reaching a workable compromise to overcome opposition to any changes to the law will likely be challenging given the differing policy motivations behind such an effort. As Congress continues to deliberate on this matter, Members will have to find common ground on a social problem in order to forge a legislative path forward.

## Authors



**Christopher Harvie**

**Christian Tamotsu Fjeld**, Senior Vice President

Christian Tamotsu Fjeld draws on two decades of Capitol Hill experience to support clients in building relationships, shaping policy, and engaging effectively with the federal government. His experience working with Congress and his insights help clients anticipate federal developments and advance their priorities with clarity and confidence.