

**REMARKS OF
COMMISSIONER GEOFFREY STARKS
AT INFORMATION TECHNOLOGY & INNOVATION FOUNDATION'S
WEBINAR ON THE FCC'S ROLE IN REFORMING SECTION 230**

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Thank you for that introduction, Daniel, and thank you to everyone at ITIF for organizing this event. Earlier this year, ITIF hosted me for a conversation in Puerto Rico where we had a chance to talk about, among many interesting topics, communications resiliency. Preparing our communications networks to withstand all kinds of emergencies—a critical topic for Puerto Rico—has been on my mind lately with hurricane season approaching and the COVID-19 pandemic continuing to create unprecedented demand. Now more than ever, the FCC must stay focused on closing the digital divide as its top priority. And it is not even close. Our long-standing digital divide has morphed into a monstrous COVID-19 divide. Internet inequality has always magnified and deepened other inequities in our society, and this pandemic has made lack of access to online work, school, and healthcare even more unacceptable. We need both emergency and long-term solutions to make sure every American can access high-quality, affordable broadband.

With such a big challenge in front of the FCC, you might ask why we're talking today about content moderation in social media. That's a very good question! In my remarks and in conversation with Daniel today, I'm going to talk about how issues around Section 230 arrived at the FCC's doorstep and what we should do about it.

Debates about the liability shield embodied in Section 230 have been hotly contested for years. Section 230 reflects Congress's deliberate balancing of free speech, privacy, innovation, and security concerns—it's no surprise that some stakeholders would strike that balance differently. But direct Presidential intervention in that debate is new, and on May 28, President Trump signed an Executive Order that takes, let's call it, a novel approach.

For those who haven't read it in detail, here's the short version. The Executive Order does three things. First, it directs the executive agencies to report to OMB within 30 days what funds they spend on marketing on online platforms—presumably so the President can direct them to stop spending money on platforms he deems to be “problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices.” Second, it also directs the White House to forward complaints about online platforms censoring political viewpoints to the Federal Trade Commission and the Department of Justice for enforcement and reporting, and it directs the Attorney General to work with state AGs on potential enforcement against unfair and deceptive practices. Third, and most relevant to our conversation, the Executive Order directs NTIA to file a petition within 60 days asking the FCC to make rules clarifying the relationship between Section 230's broad liability shield and its protections for “good faith” blocking and removal of user content and defining conditions when an ICS provider's moderation is not “taken in good faith.”

It is worth noting that the Executive Order gets one thing right: the President cannot instruct the FCC to do this—or anything. None of the Commission’s rules require that we start a rulemaking proceeding simply because NTIA asks us to. This decision is ours alone, and there are good reasons for the FCC to stay out of this debate.

Today, I first want to talk about process and why the FCC needs to keep it from dragging out. Second, I want to move on to the question of the FCC’s rulemaking authority here. And finally, I want to raise some key questions around the substance of the Executive Order.

First, and without delay, I want to address the FCC’s process and timeline for handling the rulemaking the Executive Order envisions. Given the role Section 230 has played in shaping American life online, we have to get this right. And we need to act quickly. For better or worse, the social media companies targeted in the Executive Order play a vital role in our elections. R. Kelly Garrett, a professor at Ohio State, found that in 2016 “more Americans named Facebook as the site they most often used for political information in the month leading up to Election Day 2016 than named any other site, including those of high-profile news organizations such as Fox News, CNN, and major national newspapers.” That describes a sea change in how Americans learn about the world. In 2012, only 40 percent of Americans “reported using social media for political purposes.”

Whatever you think of its merits, the Executive Order represents the President’s clear intention to influence how social media companies operate at a time when their decisions are heavily implicated in his own electoral future. Many commentators have noted that, if the FCC is not unusually expeditious in its work, NTIA’s petition will likely be hanging around through Election Day. The President gave NTIA until the end of July to send us the Petition. If we take the usual few weeks to process it and seek comment in mid-August, we could easily end up with comment deadlines in early October. From there, the schedule is exclusively at the Chairman’s discretion—and he may deem it best that the Commission wait months before taking any additional next steps in the rulemaking process. With a timeline initiated so late and subject to such discretion, it seems inevitable that the dark cloud over online free speech the Executive Order represents will cast its lingering shadow over our elections.

So what should the FCC do to avert this looming burden on the democratic process? I believe we should make a decision and move on, as quickly as possible. At its core, the Executive Order is an attempt to work the refs, and more than that, get them to swallow the whistle. Clearly, delay itself in resolving a pending rulemaking in this politically fraught context risks producing a chilling effect construed to make social media companies less willing to flag misinformation.

To help ensure that this Executive Order doesn’t interfere with our elections in the fall, we should press NTIA to send the Petition as quickly as possible. I see no reason they should need more than 30 days from the Executive Order so that we can review it and vote. If, as I suspect it will, the Petition fails at the threshold legal question of authority, we should say so loud and clear, close the book on this unfortunate detour, and get back to the important work of closing the digital divide.

The worst-case scenario, one that burdens the proper functioning of our democracy, would be to allow our laxity to bestow any credibility upon an Executive Order that raises a threatening new regulatory regime upon internet services with no credible legal support. If this is as important as the highest office of the land suggests, then let's prioritize it and reach a decision as expeditiously as possible for the sake of our democracy. While the Chairman and I may disagree on the legal merits here I would hope he would agree that the American public deserves our answer this summer and that we should not let this linger during the height of our 2020 elections.

Second, while I remain open-minded about any forthcoming petition from the Department of Commerce, based on my review, I am skeptical that there's any role for the Commission here. As a "creature of Congress," the FCC only has the authority given to it by statute. We get the power to act when Congress expressly tell us to do something or when it leaves an interpretive "gap" for the FCC to fill. Neither has happened here. On its face, the statute does not direct the FCC—or anyone—to make rules. Given its historical context, that makes sense. Section 230 was adopted in response to court cases that considered whether early interactive computer services—in those days, mainly CompuServe and Prodigy—could be liable for content posted by their users. Some of those cases made liability contingent on the platform's decision to moderate content instead of acting as a merely passive platform. As the statute itself explains, Section 230's authors wanted platforms to remove offensive content and create family friendly corners of the Internet—and they worried that these early cases incentivized platforms not to.

NTIA and others might argue that Congress left a gap for the FCC to fill by not defining "good faith." That phrase might be vague in some contexts. Here, however, there are strong arguments that no gap-filling was intended. Section 230 provides a self-enforcing rule for courts to apply in private litigation and does not give the FCC an enforcement or administrative role. That's instructive. Because "good faith" or the lack thereof is such a commonly litigated issue in contract cases, it seems entirely ordinary that Congress would have intended a court to undertake that analysis when evaluating a Section 230 defense. Moreover, as I read the subsection, "good faith" here plays a similar role to its frequent use in contracts—limiting what would otherwise be an entirely subjective assessment of what an ICS provider "considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."

Third, if the Commission does proceed with a rulemaking, we will have to confront challenging substantive questions. Perhaps most importantly, the Executive Order's approach raises serious First Amendment concerns. In focusing on Section 230, we shouldn't lose sight of the fact that the Constitution—not just a statute—protects private actors' right to label, moderate, and otherwise control speech on their platforms. The First Amendment allows social media companies to censor content freely, in ways the government never could, and it prohibits the government from retaliating against them for their speech. That so much of what the President proposes seems inconsistent with those core principles makes an FCC rulemaking even less desirable.

We will also need to address how Section 230 rules would fit in with the Commission's larger regulatory framework—particularly in a world without the Open Internet rules. There are plenty of things about that status quo that I would change, and I want to be clear that I think content discrimination by ISPs raises questions that are wholly inapplicable to social media companies.

But for supporters of the Restoring Internet Freedom Order, there will be difficult questions about how to square their previous reliance on Section 230(b) policy statements as a justification for divesting the Commission of authority with the President's approach. They will also need to consider that ISPs are also "interactive computer services" subject to Section 230 and the President's proposed rules. Those pieces don't fit neatly together. You can't pretend to have a light-touch regulatory framework when you're regulating content with a heavy hand.

Finally, we have to be mindful of how broad the consequences of FCC action could be. Consider the ten most popular websites in the United States as of 2018. As Professor Jeff Kosseff noted in his book on Section 230, six of those primarily rely on videos, social media posts, and other user content: YouTube, Facebook, Reddit, Wikipedia, Twitter, and e-Bay. If the liability shield under Section 230 were pierced, these platforms and business models would have to fundamentally change. Congress created section 230 because it *wanted* those places to offer something less than a user-generated free-for-all. A world where interactive computer services risk liability for removing offensive content would radically alter those sites. The FCC would need to be extraordinarily careful about upsetting the balance Congress created.

That's not to say there is no room for change here. The broader debate about Section 230 long predates President Trump's conflict with Twitter, and there are many smart people who believe the law should be updated. I share the concern that Section 230 has at times been used to immunize criminal behavior and left victims of stalking, harassment and worse without an effective remedy. Moreover, particularly as a parent of young children, I share the desire to maintain strong incentives for companies to keep some places online safe for kids. These are valid concerns that deserve robust examination and debate.

But that debate ultimately belongs to Congress. Congress laid out the original scope of the Section 230 liability shield, and Congress should decide whether to change it. That the President might find it more expedient to influence a five-member Commission than a 538-member Congress is not a sufficient reason, much less a good one, to circumvent the constitutional function of our democratically elected representatives.

Unlike many of the spectrum issues NTIA handles, this is not a complicated technical issue. I call on NTIA and the Chairman to bring this issue before us now. Let us be clear with the American public about what, if any, real-world impact the Executive Order has, and let us avoid an upcoming election season in which the government can use a pending proceeding to intimidate private parties.