



Insight

Tech Policy and the 2020 Election, Part 2: Online Speech, Net Neutrality, and Data Privacy

JENNIFER HUDDLESTON | AUGUST 18, 2020

Executive Summary

- The United States has largely had a hands-off approach to internet policy, yet recently policymakers, including both presidential candidates, have indicated that they may be considering regulation regarding issues such as liability for online content, data privacy, and net neutrality.
- Both candidates appear to support modifying Section 230 protections and enacting data privacy regulation, although the reasons for and shapes of such regulations differ; the candidates disagree on the need for net neutrality regulation.
- The next president should consider a federal framework for these internet policy issues that does not overly burden innovation but prevents the potential balkanization of the internet that is currently occurring at a state level.

Introduction

The United States has historically taken a “hands-off” approach to regulating technology, allowing innovators to create products with minimal government interference. This approach is part of what has enabled numerous services, from search engines to social media to online payment processors, to develop here in the United States. This innovation has been a tremendous force for economic growth as well as a critical platform for speech and entrepreneurship. But recently, policymakers on both sides of the aisle have been questioning if there is a need for greater regulation.

[Part 1](#) of this series analyzed the policy proposals of the 2020 presidential candidates, President Donald Trump and former Vice President Joe Biden, related to internet infrastructure. This part of the series will analyze how the candidates are approaching internet policy issues, including calls for regulation related to online content moderation, data privacy, and net neutrality.

Section 230 and Online Content Moderation

Section 230 of the Communications Decency Act limits the legal liability of online intermediaries that host or publish speech that their users post, while allowing platforms to engage in moderation of this user-generated content. This law has been incredibly important to the growth of a wide range of online platforms, from social media and review sites to less obvious examples such as Wikipedia and blog comments. Unfortunately, both candidates have been critical of this law, which allows new opportunities for speech and keeps barriers to entry low for new online platforms.

On the right, critics of Section 230 allege it allows social media platforms to take biased actions that [silence conservatives](#)

. President Trump's criticisms and approach to Section 230 are best seen in his May 2020 executive order on social media. He has been vocal about what he perceives as bias against himself and other conservatives by various social media platform and called for changes to Section 230 that would require viewpoint neutrality in moderation, among other changes. Section 230 has allowed many voices, including conservative voices, to flourish online, however. [Such a change](#) would effectively create a new Fairness Doctrine for the internet that would likely limit the reach of the voices it claims to protect. The old fairness doctrine was a Federal Communications Commission (FCC) rule that had required radio and television stations to provide time and access for opposing viewpoints on editorial commentary on news and politics to maintain their license. It also could result in a chilling effect and increased moderation that could silence many online voices (including conservatives), particularly on controversial topics.

Critics on the left assert that Section 230 has resulted in platforms not acting quickly enough to remove harmful content such as [hate speech](#) or [allowing the spread of misinformation](#). While former Vice-President Biden was critical of President Trump's executive order, he too has [called to revoke](#) Section 230 protections. Revoking Section 230 would make many of the concerns about content moderation worse by placing platforms back in a dilemma where they must choose between over-zealous content moderation and aggressive takedowns (silencing legitimate speech in the process) or no moderation whatsoever (creating an internet most of us would not want to be on). User-generated content protected by Section 230 has allowed for powerful movements and discussions such as [#metoo](#) and [Black Lives Matter](#). Without this protection, platforms might be more hesitant to carry such content, and these movements would not have had the same reach and impact.

Content moderation is a difficult task, but Section 230 allows companies to find the right balance for their consumers and to provide consumers with a wide range of choices. As University of Arizona law professor [Derek Bambauer argues](#), Section 230 helps companies that are now dealing with the problem of content moderation at scale and the increasing costs large companies would have to expend, especially given the possibility of bad-faith reports. Section 230 is also [critical to small platforms](#) and those far beyond social media such as review sites and even Wikipedia that might face company-ending liability and legal costs even if they were successfully vindicated in court. Additionally, proposals for Section 230 reform raise questions about potential First Amendment violations by inserting government regulators into decisions about what speech a platform must allow or disallow.

While the criticisms extend from different reasons, the fact that both candidates are critical of Section 230 means this debate is unlikely to subside after the election.

Data Privacy

Both candidates appear to support a federal law to deal with data privacy concerns, but their policy proposals would likely be very different and could impact many industries beyond the technology sector.

In July 2018, officials for [the Trump Administration stated](#) they were working on a federal consumer data privacy policy to become legislation. While relevant agencies have held various workshops on this issue, no proposal has emerged. In the meantime, several states, most notably California, have passed consumer data privacy laws that create a potentially disruptive and burdensome [patchwork](#) of regulatory environments. Most Republican legislative proposals have included federal preemption of state regulation, which would help resolve this concern. It is unclear what exact principles in such legislation the Trump Administration supports, but most Republican proposals recognize the potential problems with a state-level approach to internet policy and call for preemption in favor of a federal standard.

Former Vice President Biden also does not have a complete proposal on data privacy, but has [stated](#) that he supports an approach similar to the Europeans. The General Data Protection Regulation (GDPR) that is in effect in Europe shows the consequences of a more regulatory approach to the issue. In light of the GDPR, several companies, [including American newspapers](#), chose to withdraw from the European market rather than face the burdensome and costly compliance. In other cases, the GDPR's assumption that privacy is always of the highest value can create other problems when data usage would be beneficial. For example, it is more difficult to develop [GDPR-compliant contact tracing apps](#) during the COVID-19 pandemic.

In addition to general consumer data privacy regulation, the Unity Taskforce proposal for the Democratic Party's policy platform also [includes heightened regulation of the use of biometrics](#) technology such as facial recognition and fingerprint scans. Biometric technology can be beneficial for applications ranging from searching for missing children to tagging photos, but there has been an increasing amount of debate over whether there needs to be regulation on the private or governmental use of these technologies. Some states already have their own laws regulating biometric privacy. Notably, the Illinois Biometric Information Privacy Act (BIPA) has led to products being unavailable in that state and an increasing amount of litigation. If there is to be federal regulation in this area, policymakers should avoid the costly and innovation-limiting [burdens of these current state laws](#) such as overly broad application and private rights of action.

For now, progress on a federal law appears to have stalled, but state laws on both specific technologies and more general consumer data privacy continue to go into effect. Hopefully, meaningful progress on a federal law can be made again to avoid [constitutional](#) issues and the disruption to innovation of a state-level approach.

Net Neutrality

Net neutrality remains a topic of intense debate and one on which the candidates clearly diverge.

The FCC during the Trump Administration repealed net neutrality in the Restoring Internet Freedom Order. [Despite many apocalyptic predictions](#), the internet did not cease to exist or load one word at a time, and consumers are still able to stream Yankees games and Netflix without additional lags. While there is [still debate](#) about whether the full benefits of increased investment and innovation have been realized since this repeal, it is clear that the doomsday predictions have not come true.

Biden has been [clear that he supports net neutrality](#). Restoring these rules would place more regulatory barriers on internet service providers that might make it more difficult to expand service and innovate. Such a rulemaking would certainly be subject to further legal scrutiny, as both the Restoring Internet Freedom Order and the original net neutrality rules faced court challenges. If such requirements were to be a truly desired policy, they would most likely need to be pursued by legislation and not just administrative rulemaking. Even then, such policies might face a high burden to show they are needed in the courts, especially given the potential First Amendment implications. As the [Mercatus Center's Brent Skorup noted](#) during the prior net neutrality debates, there are questions of whether the original net neutrality regulation's requirements might have violated the First Amendment by allowing some services (such as family-focused providers) to block content but did not allow other services similar discretion in content prioritization.

This difference of viewpoint regarding the benefits of net neutrality also impact the way each administration would pursue cases regarding state-level net neutrality laws. The Trump Administration's Department of Justice has [filed suit against California's state net neutrality law](#) to block its enforcement. Such state-level laws raise concerns about splintering the internet and creating roadblocks to expanding internet service if providers face

additional restrictions at state and local levels. As a result, American Enterprise Institute Visiting Fellow and Boston College law professor Daniel Lyons has noted that such laws could raise [constitutional concerns under the Dormant Commerce Clause](#). A Biden Administration likely would not pursue such action against states on this issue.

Conclusion

Increasing regulation on the internet will impact the future of online speech and the continued innovation of platforms. Both presidential candidates have suggested new regulatory approaches for online content moderation, but for different reasons. The next president will need to consider what appropriate federal frameworks should look like on issues such as data privacy and net neutrality in order to prevent a potentially disruptive patchwork of state laws.