

Dear President Biden: You Should Save, Not Revoke, Section 230

By Eric Goldman*

In 1996, Congress enacted an extraordinary law, 47 U.S.C. § 230 (“Section 230”). Section 230 says that websites usually aren’t legally liable for third-party content (subject to some statutory exclusions).¹

This simple proposition has had profound implications. Section 230 has facilitated the emergence of Web 2.0—a universe of Internet services that help us communicate and engage with each other in powerful and novel ways.² Many of the top Internet services depend on Section 230, and we rely on Section 230-enabled services hourly.

Section 230 played a crucial role during the COVID-related shutdowns. Major institutions, including businesses, schools, and governments, continued to serve their communities by immediately switching over to Section 230-protected Internet technologies, including videoconferencing software like Zoom,³ online marketplaces like Amazon Marketplace,⁴ and gig services like Instacart. Had our country not pivoted online as quickly as it did, the death toll and economic damage from COVID would have been dramatically worse.⁵ Section 230 literally helped save lives—and our country.

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¹ For a fuller explanation of Section 230, see Eric Goldman, *An Overview of the United States’ Section 230 Internet Immunity*, THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY 155 (Giancarlo Frosio, ed. 2020); see also JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019).

² Eric Goldman, *Internet Immunity and the Freedom to Code*, 62 COMM. OF THE ACM 22, Sept. 2019.

³ Shoshana Weissmann, *Jeffrey Toobin Should Be Liable For His Big Reveal, Not Zoom*, WASH. EXAMINER, Oct. 20, 2020, <https://www.washingtonexaminer.com/opinion/jeffrey-toobin-should-be-liable-for-his-big-reveal-not-zoom>.

⁴ *Should Amazon Be Responsible When Its Vendors’ Products Turn Out to Be Unsafe?*, WALL ST. J., Feb 28, 2020, <https://www.wsj.com/articles/should-amazon-be-responsible-when-its-vendors-products-turn-out-to-be-unsafe-11582898971>.

⁵ Eric Goldman, *People Who Understand Section 230 Actually Love It*, SAN JOSE MERCURY-NEWS, Jan. 10, 2021, at A12.

Despite Section 230's vital benefits to our country, Section 230 has emerged as a top target of the broader techlash movement. In fact, in January 2020, you said: "Section 230 should be revoked, immediately should be revoked, number one."⁶

Congress will try to honor your request. Even during the pandemic and the associated economic distress, Congress made time to introduce a tsunami of Section 230 reform bills.⁷ Despite those extensive Congressional efforts, the path forward on Section 230 reform isn't clear. In general, the Democrats want Internet services to remove more content; the Republicans want Internet services to remove less content. This partisan split might lead to gridlock and paralysis, or it could make strange bedfellows and awful backroom deals.

As president, your leadership can transcend the partisanship of Section 230 reform. These four principles can guide your leadership:

#1: Set the Right Factual Baseline. People are terrible to each other, both online and off. The Internet sometimes makes this bad behavior easier to observe, but often that just mirrors broader systemic problems. Because of this, it's unfair and unrealistic to expect Internet services to eliminate all anti-social behavior online. Instead, we should compare their success against the levels of anti-social behavior offline.⁸

If the Internet accelerates anti-social behavior *compared to offline activity*, we might consider if regulatory interventions could redress that acceleration. However, Internet services are constantly rolling out new and effective deceleration techniques;⁹ and eventually, Internet services should reduce anti-social online activities *below* the offline baseline. Section 230

⁶ Joe Biden, N.Y. TIMES, Jan. 17, 2020, <https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html>.

⁷ Eric Goldman, *While Our Country Is Engulfed By Urgent Must-Solve Problems, Congress Is Working Hard to Burn Down Section 230*, TECH. & MKTG. L. BLOG, Aug. 4, 2020, <https://blog.ericgoldman.org/archives/2020/08/while-our-country-is-engulfed-by-urgent-must-solve-problems-congress-is-working-hard-to-burn-down-section-230.htm>.

⁸ Eric Goldman & Jess Miers, *Why Can't Internet Companies Stop Awful Content?*, ARS TECHNICA, Nov. 27, 2019.

⁹ *Id.*

provides the essential legal safety net that lets Internet services experiment with and iterate these pro-social interventions.¹⁰

#2: Set the Right Legal Baseline. Section 230 and the First Amendment provide overlapping protection for some categories of speech, including hate speech and political parody. In those circumstances, the First Amendment will “gap-fill” any reductions in Section 230’s coverage—meaning that Section 230 reforms won’t change those substantive outcomes. Instead, the reforms would hurt the Internet by stripping away Section 230’s valuable procedural benefits.¹¹ In other words, where Section 230 and the First Amendment overlap, reducing Section 230 raises everyone’s costs without any corresponding substantive benefit. To avoid that outcome, any Section 230 reform must be carefully evaluated against the First Amendment legal baseline.

#3: Ensure Evidence-Based Policy-Making. Section 230 reform should be supported by credible evidence demonstrating the reform’s likely efficacy. Without that evidence, Section 230 reform could lead to avoidably bad outcomes.

For example, in 2018, Congress passed FOSTA, which created several new Section 230 exceptions for promotions for sex trafficking and commercial sex.¹² FOSTA sought to reduce online channels for marketing sex trafficking victims—a laudable goal. Unfortunately, FOSTA’s outcomes were anything but laudable. The law counterproductively reduced law enforcement efforts to rescue sex trafficking victims, wreaked havoc on commercial sex workers, and eliminated some valuable speech on the Internet.¹³ FOSTA appears to have hurt many communities without countervailing benefits.

Frustratingly, many experts warned Congress exactly how FOSTA would fail.¹⁴ Congress disregarded the extensive evidence presented to it.

¹⁰ Eric Goldman, *Internet Immunity and the Freedom to Code*, 62 COMM. OF THE ACM 22, Sept. 2019.

¹¹ Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 34 (2019).

¹² Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMENDMENT L. REV. 279 (2019).

¹³ Eric Goldman, *Who Benefited from FOSTA? (Spoiler: Probably No One)*, TECH. & MKTG. L. BLOG, Jan. 29, 2019, <https://blog.ericgoldman.org/archives/2019/01/who-benefited-from-fosta-spoiler-probably-no-one.htm>.

¹⁴ E.g., Eric Goldman, *Balancing Section 230 and Anti-Sex Trafficking Initiatives*, Dec. 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3079193 (based on written testimony to the U.S. House of

The stakes for Section 230 reform are too high to make a FOSTA-like error again. Another Section 230 reform mistake could have drastic consequences for our economy, our key institutions, and our society. You should require Congress to gather credible evidence showing how Section 230 reform would actually solve a specific problem¹⁵—and take seriously the evidence indicating potential adverse consequences.

#4: Restore the U.S. as the World’s Free Speech Leader. For decades, the United States was a global leader on free speech issues. That leadership took a substantial hit during Trump’s administration—with one crucial exception. In 2020, Pres. Trump signed the United States-Mexico-Canada Agreement (the USMCA, also called NAFTA 2.0), which requires Canada and Mexico to adopt Section 230-like protections.¹⁶ This USMCA provision represented an unprecedented effort to export the Section 230’s free speech norms.¹⁷ Your administration should continue to proliferate Section 230 throughout the globe.

Of course, it would be disingenuous for the United States to tout its global free speech leadership if we are simultaneously reducing Section 230’s protections. The world is watching our moves on speech regulation, especially in light of how our moral leadership on the topic eroded in the Trump era. Our moves should promote free speech online, not seek to circumscribe it.

Your presidency is a time to rebuild our country.¹⁸ It would be a tragic misstep if your presidency instead tore down one of Congress’ most significant technology policy

Representatives Committee on Energy & Commerce, Subcommittee on Communications and Technology); Eric Goldman, *Sex Trafficking Exceptions to Section 230*, Sept. 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3038632 (based on written testimony to the Senate Committee on Commerce, Science and Transportation).

¹⁵ Jeff Kosseff, *Understand the Internet’s Most Important Law Before Changing It*, REG. REV., Oct. 10, 2019, <https://www.theregreview.org/2019/10/10/kosseff-understand-internets-most-important-law-before-changing-it/>.

¹⁶ Eric Goldman, *Good News! USMCA (a/k/a NAFTA 2.0) Embraces Section 230-Like Internet Immunity*, TECH. & MKTG. L. BLOG, Oct. 3, 2018, <https://blog.ericgoldman.org/archives/2018/10/good-news-usmca-a-k-a-nafta-2-0-embraces-section-230-like-internet-immunity.htm>.

¹⁷ *Id.*

¹⁸ Indeed, your inauguration theme is “America United.” Alexandra Jaffe, *AP Exclusive: Biden inauguration theme: ‘America United’*, ASSOCIATED PRESS, Jan. 11, 2021, <https://apnews.com/article/joe-biden-inaugurations-george-w-bush-bill-clinton-capitol-siege-b6a74809de2ed6dff2602fa586d07897>.

accomplishments. The Internet is one of our most cherished institutions, and I hope you will fight to preserve what makes it great.