
TECH POLICY IN PRESIDENT BIDEN'S FIRST 100 DAYS

*Eric Goldman**

President Biden has not emphasized tech policy in his first 100 days. Understandably, his focus has been elsewhere. His immediate priorities have been dealing with the pandemic shutdown, the rollout of COVID-19 vaccines, and the shutdown-associated economic distress throughout the country. He has also spent some “honeymoon” capital on tough projects such as a massive infrastructure bill and winding down the military presence in Afghanistan. He also has been busy cleaning house of Trump’s appointees and installing his own team.

To date, Pres. Biden’s personnel moves have been his most significant tech policy accomplishments, but only because of what they predict for the future. The appointments of Columbia Law professors Tim Wu to the National Economic Council and Lina Khan to the Federal Trade Commission (FTC) suggest that more vigorous antitrust enforcement may be coming, especially against “Big Tech.” Also, Pres. Biden has elevated the White House Office of Science and Technology Policy (OSTP) to cabinet-level status—a significant upgrade of the office’s profile compared to the Trump administration, which had functionally shuttered the office.

Pres. Biden’s focus on issues other than tech policy has created a partial vacuum in federal tech policy. Other entities have sought to fill it.

First, Congress has introduced about a dozen bills targeting a foundational Internet law, 47 U.S.C. § 230 (Section 230), with more to come. Section 230 says that websites typically aren’t liable for third-party content.¹ As a candidate, Pres. Biden said he favored repealing Section 230, though his administration hasn’t publicly pursued that issue.

Congress has proceeded anyways, with proposals such as the SAFE TECH Act and the PACT Act, both of which are complex “omnibus” reform to Section 230 that will almost certainly have dramatic and unintended consequences for the Internet. Those kinds of Section 230 policy miscalibrations could undermine the Internet sector, which has been one of our economy’s brightest spots at a time

* Associate Dean for Research, Professor of Law, and Co-Director of the High Tech Law Institute, Santa Clara University School of Law. Email: egoldman@gmail.com. Website: <http://www.ericgoldman.org>. Thanks to Jess Miers for her comments.

1. Eric Goldman, *An Overview of the United States’ Section 230 Internet Immunity*, in THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY 155 (Giancarlo Frosio ed. 2020).

when we need more jobs, not fewer. By reconsidering his pre-election stance, Pres. Biden could help Congress to properly diligence and consider the effects of any Section 230 reform.² Otherwise, Congress will almost certainly pass some version of Section 230 reform regardless of any deleterious effects.

Second, states have been busy on tech policy matters, even on topics that require a uniform national solution.

In Spring 2021, Virginia became the second state to enact a comprehensive consumer data privacy law, joining California (which enacted a law in 2018 and expanded it by ballot vote in 2020). Despite the significance of Virginia's law, few celebrated its passage. Some privacy advocates felt like it provided less privacy protection for consumers than the California law. Meanwhile, some businesses lamented Virginia's lack of harmonization with California's law, which will impose additional compliance costs without any corresponding benefit to consumers.

Other states are poised to enact comprehensive consumer data privacy laws that do not replicate the laws in either California or Virginia. Those additional statutes will exponentially increase the complexity and cost of compliance, with the resulting disadvantages for both consumers and businesses.

Congress should alleviate this problem by passing a single comprehensive federal consumer data privacy law that preempts the state laws. For that reason, a wide range of constituencies now broadly support a federal law, but Congress hasn't moved forward yet. Congress would benefit from White House leadership to break through the partisanship/turf battles and feel a greater sense of urgency. So far, it hasn't materialized.

In parallel with Congress' consideration of Section 230, state legislatures have pursued a dizzying array of laws to regulate "Big Tech." The Utah legislature is illustrative. In March 2021, it passed a bill (S.B. 228) that sought to regulate how Internet companies do content moderation and require transparency into their content moderation operations. The governor vetoed that bill. The Utah legislature also passed a bill (H.B. 72) that requires tablet and cellphone manufacturers to pre-install mandatory "porn filters." The governor signed this bill, but it will not take effect until five other states enact analogous laws (which may never happen).

Both Utah bills clearly violate the First Amendment, and both laws likely violate the dormant Commerce Clause. State legislatures don't care. All too frequently, they take a spray-and-pray approach to tech policy. State legislatures are systemically deficient at developing smart tech policy for multiple reasons, include:

- State legislators and their staff routinely do not have enough expertise about tech issues.

2. Eric Goldman, *Dear President Biden: You Should Save, Not Revoke, Section 230*, BULL. OF THE ATOMIC SCIENTISTS (Jan. 12, 2021), <https://thebulletin.org/premium/2021-01/dear-president-biden-you-should-save-not-revoke-section-230/> [<https://perma.cc/X5JN-5XTP>].

- A single misguided legislator can sometimes push terrible legislation to passage.
- States often copy another state's recently enacted laws before it's clear if those new laws are good policy.
- Parochial state legislatures don't care about any problems their rules create outside state borders, so they are unrestrained about regulating entities or industries with limited exposure to the state.
- Between the stretched staff and sponsoring member turnover (accelerated by term limits), states do a poor job of superintending laws once passed.

Thus, the Biden administration's slow start on tech policy has the unfortunate downside of letting Congress and state legislators define tech policy. It's understandable why Pres. Biden deferred these topics during his first 100 days, but ultimately we need active and tech-friendly leadership from the White House to discourage Congress and the states from proliferating bad tech policy for the country.