



MEMORANDUM

3/25/2023

To: Members, Subcommittee on Communications and Technology
From: Majority Staff
Re: Communications and Technology Subcommittee Hearing

I. INTRODUCTION

On Tuesday, March 28, 2023, at 10:30 a.m., the Subcommittee on Communications and Technology will hold a hearing in 2322 Rayburn House Office Building titled “Preserving Free Speech and Reining in Big Tech Censorship.” The following witnesses are expected to testify:

II. WITNESSES

- Mr. Seth Dillon, CEO, The Babylon Bee
- Dr. Jay Bhattacharya, M.D., Ph.D., Professor of Health Policy, Stanford University
- Mr. Michael Shellenberger, Founder and President of Environmental Progress
- Spencer Overton, Patricia Roberts Harris Research Professor, George Washington University Law School; President, The Joint Center for Political and Economic Studies

III. BACKGROUND

Social media has transformed how we communicate with friends, family, and businesses. While social media platforms vary in size and nature, Big Tech companies like Twitter, Meta, and Google have become staples of everyday life. They are powerful forums for sharing information and staying connected with one another. Unfortunately, Big Tech companies have abused their power to censor certain viewpoints and content on their platforms.

Censorship is the suppression of information, ideas, or expressions of political, social, or moral content.¹ Big Tech censorship is especially dangerous given the size and power of these companies. These companies have the reach, and therefore the power to manipulate what content society sees and to influence the way society thinks. Under the guise of content moderation, Big Tech has censored and removed a sitting United States President from its platforms and suppressed factual news stories.² This censorship has damaging effects on democracy and free speech.³

¹ <https://www.pbs.org/wgbh/cultureshock/whodecides/definitions.html>

² <https://www.cnn.com/2021/01/08/tech/trump-twitter-ban/index.html>; <https://nypost.com/2022/11/21/cbs-confirms-hunter-biden-laptop-is-real-769-days-after-post-broke-story/>

³ <https://nypost.com/2023/03/17/private-federal-censorship-machine-targeted-true-misinformation/>

The American public has raised concerns with Big Tech censorship.⁴ The Cato Institute's 2021 Speech and Social Media National Survey found that seventy-five percent of Americans do not trust social media companies to make fair content moderation decisions.⁵ The survey found that conservatives are more likely than liberals to have content or an account penalized by social media companies for the content they have posted to their accounts.⁶ Seventy-five percent of Americans believe that employees at social media companies allow their own political opinions to influence how they write and enforce rules on what users can say and share on their platforms.⁷ These numbers underscore the need to hold Big Tech accountable for its content-moderation practices.

IV. Big Tech Censorship

A. Twitter files

Following the sale of Twitter in October 2021, new-CEO Elon Musk granted journalists unprecedented access to records of Twitter's internal communications leading to the release of the "Twitter Files."⁸ Internal Twitter messages revealed Twitter employees were unilaterally shadow banning conservative users and censoring views that countered the narrative of mainstream media.⁹ The Twitter Files exposed the bias and control Big Tech companies and their employees have over content moderation, as well as their close relationship with government bureaucrats.¹⁰ Twitter and other Big Tech platforms established a coordinated, formal system for taking in moderation requests from the Federal Bureau of Investigation (FBI), Department of Homeland Security (DHS), the Department of Health and Human Services (HHS), and other agencies.¹¹ Additionally, unelected government officials requested the removal of content that was contrary to their viewpoint.¹² The communications showed the close relationship Twitter had with the FBI and other intelligence agencies. According to Matt Taibbi's reports, the government requested Twitter take action to restrict accounts the FBI deemed as misinformation.¹³

The Twitter Files also demonstrate the disconnect between Twitter's public statements on its content moderation policies and their enforcement of these policies with respect to different viewpoints.¹⁴

⁴ <https://www.cato.org/survey-reports/poll-75-dont-trust-social-media-make-fair-content-moderation-decisions-60-want-more#58-say-social-media-has-been-bad-society-52-strong-liberals-believe-it-has-been-good-them-personally>

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ <https://www.nbcnews.com/tech/tech-news/elon-musk-promotes-release-internal-twitter-documents-rehashing-platfo-rcna59897>

⁹ https://twitter.com/bariweiss/status/1601007575633305600?s=20&t=zhnKAVOt7W_GZGsn5T2LJQ

¹⁰ <https://www.newsweek.com/fbi-colluded-twitter-suppress-free-speech-where-outrage-opinion-1768801>

¹¹ <https://twitter.com/mtaibbi/status/1606701397109796866>

¹² *Id.*

¹³ <https://twitter.com/mtaibbi/status/1603857534737072128>

¹⁴ <https://nypost.com/2022/12/08/suppression-of-right-wing-users-exposed-in-latest-twitter-files/>

B. COVID-19 Suppression

The Twitter Files also uncovered overwhelming censorship of Covid-19 information.¹⁵ Government officials worked with Big Tech companies to censor information about Covid-19 regulations and vaccines.¹⁶ Platforms used the “Covid-19 misinformation” banner to label any post that was “misleading,” and suspended users who were speaking against the pandemic narrative set by the Biden administration and mainstream news media.¹⁷ Respected scientists and doctors were suspended or “blacklisted” for posting accurate and verified information about the pandemic.¹⁸ Indeed, in one of the more egregious examples of Big Tech censorship, platforms once removed posts suggesting that Covid-19 began as a lab leak,¹⁹ a theory that has now been acknowledged by the Department of Energy and the Federal Bureau of Investigation as likely.²⁰

In his latest Twitter Files release, Matt Taibbi exposed Stanford University’s Virality Project, an effort to “detect and mitigate the impact of false and misleading narratives related to COVID-19 vaccines.” The Virality Project, which partnered with federal contractors, sent weekly “anti-vax disinformation” reports to Big Tech companies and recommended the suppression of “stories of true vaccine side effects.”²¹

C. Algorithms

Big Tech platforms run on sophisticated algorithms—computer codes that can learn from a user’s activity and tell a computer how to act.²² These algorithms also directly influence the content and viewpoints that users of the platform experience. The opacity over how algorithms are designed raises concerns over their use and have led to calls for disclosure, transparency, and accountability.²³ As Big Tech algorithms evolve, they are poised to influence what we see, learn, and buy. Before algorithms, platforms displayed posts in chronological order, but today, algorithms order and recommend content based on what a user has watched, interacted with, and searched for in the past.²⁴ As a result, algorithmic design inevitably influences the spread of culture and shapes the digital society in a certain way: it decides what content gets prioritized in

¹⁵ <https://twitter.com/mtaibbi/status/1636729166631432195>

¹⁶ <https://twitter.com/davidzweig/status/1607378386338340867>

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ <https://nypost.com/2021/05/28/twitter-wont-confirm-users-can-post-about-covid-lab-leak-theory/>; <https://about.fb.com/news/2020/04/covid-19-misinfo-update/#removing-more-false-claims>; *but see*

<https://www.wsj.com/articles/facebook-ends-ban-on-posts-asserting-covid-19-was-man-made-11622094890>

²⁰ <https://www.wsj.com/articles/covid-origin-china-lab-leak-807b7b0a> (stating that “[t]he Energy Department’s conclusion is the result of new intelligence and is significant because the agency has considerable scientific expertise and oversees a network of U.S. national laboratories, some of which conduct advanced biological research. The Energy Department made its judgment with “low confidence,” according to people who have read the classified report. The FBI previously came to the conclusion that the pandemic was likely the result of a lab leak in 2021 with “moderate confidence” and still holds to this view.”)

²¹ <https://twitter.com/mtaibbi/status/1636729166631432195>

²² <https://rankingdigitalights.org/index2020/spotlights/unaccountable-algorithms>

²³ <https://www.wsj.com/articles/unite-against-big-tech-abuses-social-media-privacy-competition-antitrust-children-algorithm-11673439411>

²⁴ <https://sproutsocial.com/insights/social-media-algorithms/>

each user's feed, and which artists, content creators, or brands deserve to gain more visibility.²⁵ Before algorithms, platforms displayed posts in chronological order, but today, algorithms order and recommend content based on what a user has watched, interacted with, and searched for in the past.²⁶ As a result, algorithmic design inevitably influences the spread of culture and shapes the digital society in a certain way: it decides what content gets prioritized in each user's feed, and which artists, content creators, or brands deserve to gain more visibility.²⁷

Platforms not only use algorithms to determine what content a user sees, they also use algorithms to determine what a user does not see. Big Tech companies often rely on algorithms for content moderation given the volume of content on their platforms.²⁸ This raises concerns over censorship, as platforms are not transparent about how the algorithms flag or remove content.

V. SECTION 230

Section 230 was enacted as part of the Communications and Decency Act of 1996 (CDA).²⁹ Congress originally enacted this statute to regulate obscenity and indecency on the Internet, but today Section 230 is seen as an essential underpinning of the modern Internet and critical to the explosive growth of websites that facilitate user-generated content. Section 230 protects Internet platforms from (1) liability for content created by users of their services and (2) for their decisions to moderate or remove user-generated content. Specifically:

- Section 230(c)(1) states that providers and users of an interactive computer service shall not be treated as a publisher or speaker of any information provided by another information content provider.³⁰
- Section 230(c)(2) states that interactive service providers and users are not liable for any good faith actions to restrict or remove access to material that is “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”³¹

This dual liability protection is often referred to as the “sword” and the “shield.” The “sword” being the ability to moderate and remove content and the “shield” being the liability protection for content posted by users.³²

In 2017, Congress amended the scope of Section 230 immunity for the first time as part of the Allow States and Victims to Fight Online Sex Trafficking Act (SESTA/FOSTA).³³ The change allows victims to file private civil suits against persons or organizations that promote or facilitate

²⁵ <https://www.internetjustsociety.org/algorithms-in-social-media-platforms#:~:text=Why%20do%20algorithms%20exist%3F,is%20available%20on%20each%20platform.>

²⁶ <https://sproutsocial.com/insights/social-media-algorithms/>

²⁷ <https://www.internetjustsociety.org/algorithms-in-social-media-platforms#:~:text=Why%20do%20algorithms%20exist%3F,is%20available%20on%20each%20platform.>

²⁸ <https://www.facebook.com/help/1584908458516247>

²⁹ Pub. L. 104-104, Title V, Subtitle A. <https://www.congress.gov/104/plaws/publ104/PLAW-104publ104.pdf>

³⁰ 47 U.S.C. § 230(c)(1).

³¹ 47 U.S.C. § 230(c)(2).

³² <https://www.wsj.com/articles/section-230-what-it-is-and-why-politicians-want-to-change-it-11616664601>

³³ Pub. L. 115-164, 132 Stat.1253. <https://www.congress.gov/115/plaws/publ164/PLAW-115publ164.pdf>

prostitution or sex trafficking and established criminal penalties for those who promote or facilitate prostitution and sex trafficking through their ownership, management, or operation of online platforms.

Despite Section 230's success in contributing to the growth of the Internet, there is bipartisan concern that the law has had unintended consequences, such as enabling terrorist activity and recruitment, promoting the exploitation of minors, and allowing discrimination and harassment. There is also concern over how the websites moderate content, with some arguing that platforms moderate content too much, while others arguing that platforms do not moderate content enough.

VI. SECTION 230 IN THE COURTS

Although the Supreme Court struck down much of the Communications Decency Act in 1997,³⁴ Section 230 remains intact. Federal courts, beginning with the Fourth Circuit in *Zeran v. America Online, Inc.*,³⁵ have applied Section 230's liability protection broadly in a myriad of circumstances and activities conducted by social media platforms. Courts have granted platforms immunity for selecting,³⁶ editing,³⁷ and recommending content.³⁸ Some courts have even granted immunity to platforms for their design.³⁹ And some courts have collapsed Section 230(c)(1) and (c)(2), granting immunity for removal decisions regardless of whether the content was objectionable or removed in good faith.⁴⁰ Courts today generally apply a three-part test to determine whether Section 230 immunity applies: (1) the platform must be a "provider or user of an interactive computer service," (2) which the plaintiff is treating as a "publisher or speaker" of (3) content "provided by another information content provider."⁴¹

A. *Google v Gonzalez*

On February 21, the Supreme Court considered *Gonzalez v. Google LLC* to determine whether Section 230 immunizes online platforms from being held liable for algorithmically recommending third-party content to users.⁴² In 2015, Nohemi Gonzalez, a U.S. citizen, was one of 130 people killed by a terrorist attack in Paris, France. The day after, ISIS claimed responsibility by issuing a written statement and releasing a YouTube video. Gonzalez's father

³⁴ *Reno v. ACLU*, 521 U.S. 844 (1997).

³⁵ 129 F.3d 327 (4th Cir. 1997).

³⁶ See, e.g., *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 403 (6th Cir. 2014) (granting immunity to a platform that selected and commented on content submitted third parties that it chose to post).

³⁷ See, e.g., *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (granting immunity to a platform that edited portions of an email before posting that email on its website and listserv).

³⁸ See, e.g., *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019) (granting immunity to Facebook for recommending content by terrorists).

³⁹ See, e.g., *Herrick v. Grindr LLC*, 765 Fed. Appx. 586, 591 (2d Cir. 2019) (granting immunity to a platform for a claim that it designed its application without safety features to prevent harassment and impersonation); *Lemmon v. Snap, Inc.*, 440 F. Supp. 3d 1103, 1107, 1113 (C.D. Cal. 2020) (granting immunity to a platform for a claim that its product encouraged reckless driving).

⁴⁰ See, e.g., *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 Fed. Appx. 526 (9th Cir. 2017) (affirming a lower court's grant of immunity that said "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune" under §230(c)(1)").

⁴¹ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009).

⁴² *Gonzalez v. Google LLC*, 21-1333.

filed an action against Google claiming the company aided and abetted international terrorism by allowing ISIS to use YouTube “to recruit members, plan terrorist attacks, issue terrorist threats, instill fear, and intimidate civilian populations.”⁴³ Specifically, the action alleges that Google assists ISIS in spreading its message because it uses computer algorithms that suggest content. Gonzalez argued that Section 230 should not apply to these recommendations. Some news reports believe the Court seemed skeptical of reinterpreting Section 230.⁴⁴ A decision is expected by the end of June.

B. Twitter v Taamneh

On February 22, the Supreme Court considered *Twitter Inc. v. Taamneh*, to determine whether social media platforms can be held liable for aiding and abetting terrorism for failing to remove content and accounts promoting it.⁴⁵ In 2017, Jordanian citizen Nawras Alassaf died in the attack on the Reina nightclub in Istanbul where a gunman affiliated with ISIS killed 39 people. His relatives sued Twitter for aiding and abetting ISIS by failing to remove terrorist content on its platform and promoting its circulation. The lower courts barred this claim, citing Section 230. In 2017, Jordanian citizen Nawras Alassaf died in the attack on the Reina nightclub in Istanbul where a gunman affiliated with ISIS killed 39 people.

VII. Related Legislation

In July 2021, Chairs McMorris Rogers (R-WA) and Jordan (R-OH) released [discussion draft](#) legislation to narrow Section 230 protections for Big Tech companies.⁴⁶ This draft would subject certain Big Tech platforms to liability and accountability for the suppression of constitutionally protected speech while retaining existing Section 230 protections for new entrants and small businesses. The text would promote more speech by:

- Narrowing liability protections for companies who censor constitutionally protected speech;
- Making certain Big Tech platforms responsible for content they promote, amplify, or edit;
- Requiring quarterly filings detailing certain Big Tech platforms’ censorship decisions;
- Sunsetting the new liability protections to ensure Congress keeps pace with technology and provide a mechanism to consistently review Big Tech’s behavior;
- Removing protections from companies that censor content based on political viewpoints;
- Requiring appeals processes for Americans if censored;
- Requiring transparency for content enforcement decisions; and
- Strengthening antitrust review and enforcement by expediting appeals process and empowering State Attorneys General.

VIII. KEY QUESTIONS

⁴³ <https://www.law.cornell.edu/supct/cert/21-1333>

⁴⁴ <https://www.cnn.com/business/live-news/supreme-court-gonzalez-v-google-2-21-23/index.html>

⁴⁵ *Twitter, Inc. v. Taamneh*, 21-1496.

⁴⁶ <https://d1dth6e84htgma.cloudfront.net/legacy/uploads/2021/07/1-CMR-Censorship.pdf>

- What is the effect of Big Tech censorship on freedom of expression in America?
- What role does Section 230 play in facilitating censorship by Big Tech?
- What is Big Tech's role in upholding the spirit of the First Amendment?

IX. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Kate O'Connor or Giulia Leganski of the Committee Staff at (202) 225-3641.