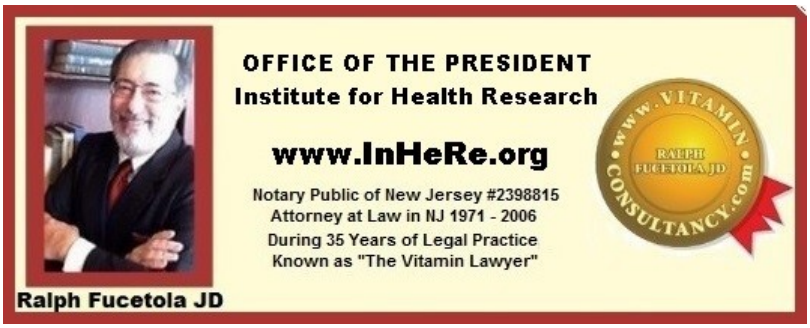

FCC SHOULD PROTECT THE INTERNET PUBLIC COMMONS

Comments submitted on 7 August 2020 by Ralph Fucetola JD with reference to the Department of Commerce's Federal Communications Commission Petition #11862 of 27 July 2020 seeking clarification of provisions of 47 U.S.C § 230.

Acknowledging the recent actions of Twitter and Facebook to ban speech by President Trump allegedly determined to be "false" by "third party fact checkers" I am submitting these comments as a retired attorney at law with 36 years of practice.

I am concerned with the actions of various social media companies in "banning" [a term that reminds me of the evils of Apartheid] various persons, including President Trump, for political speech.

The apparent coordinated "bannings" of various speakers, including, for example Alex Jones (who was banned by several social media companies during one 24 hour period in late September, 2018) suggests unlawful conspiracy by the companies in their use of the Internet Public Utility or Public Commons.

I assert that the evidence does support the theory that these major corporate actors are acting in concert and that their actions violate the Racketeer Influenced and Corrupt Organizations Act (RICO) [1] and the 14th Amendment [2].

I think anyone so “banned” by the Deep State Social Media Crony Corporations has good grounds under the First Amendment to petition agencies of the Government (including the Federal Communications Commission) for Redress.

We are told that the “bannings” were not unlawful censorship since the banning entities are all "private companies", not subject to the First Amendment’s injunction, “Congress shall make no law … abridging the freedom of speech…” I disagree and urge the Commission to consider several points of law.

The First Point of Law to note is that the Supreme Court has applied the language of the First Amendment to not just Acts of Congress, but to any actions of the Federal Government, and, through the 14th Amendment, to the States as well.[3]

The Second Point of Law to note is that access is protected under the First Amendment. In the 2017 case of *Packingham v North Carolina* the Supreme Court held that “a fundamental principle of the First Amendment is that all persons have access to places where they can speak…”[4]

The Third Point of Law to note is that the 14th Amendment provides that States may not make or enforce any law that abridges the rights of US citizens. This includes, of course, a State granting the corporate franchise to private companies such that they may act in violation of our Fundamental Rights.

The Internet was initially established by the US Government and remains our information commons, a "public utility," although used by private persons to communicate and by publicly registered and traded companies to profit from our communications.

The social media corporations are in law "creatures of the state" existing by virtue of the grant of the corporate franchise which permits such entities privileges that are not applicable to purely private persons, including the limited liability privilege and the privilege of selling shares to the public as joint stock companies, to profit from the use of the Internet Public Utility. Under Federal Law they have the further privilege of the Section 230 exemption from liability for the content of Speech expressed on their platforms.

While these companies appear, to some degree, as "private" businesses, they act over the Internet Public Utility. They act n the commons "under color of law" and are therefore more akin to government agencies than to private actors.

That these entities engage in substantial commerce with the government, receiving tax funds for certain contracts including the providing of data about users to government agencies such as the National Security Agency and Department of Homeland Security [5], and benefiting from the use of the Internet Public Utility further substantiates their status as agents of government power acting under "color of law".

As such, these quasi-public actors must be bound by the restrictions of the First Amendment and cannot discriminate among their users on the basis of the content of the Speech which the users express over the Internet Public Utility.

When several of these quasi-private companies act in apparent concert to ban the Speech of a particular user over the Internet Public Utility they do so "under color of law" and in violation of the Freedom of Speech of both the speaker and those who seek to receive the communication.

Both Freedom of Speech and Freedom of Association are restricted through the exercise of authority depending on government. This is unlawful.

The effect of the unlawful actions of the companies is to tortuously interfere with valuable commercial relationships, between the speaker and hearer, causing substantial financial harm and damages. BTW, I note, currently, Facebook still accepts ads from certain "banned" companies. But not from others.

Such unlawful acts, and the unlawful combination to engage in such acts, may violate the provisions of RICO. The companies that are the most egregious banners include PayPal, Google, Facebook, Twitter and YouTube.

Some of these same companies are "making pacts with the devil" by developing special government-censored versions of their services for Communist-controlled China, enabling that tyrannical regime to impose its social control system on the world's most populous country.

In the United States, the targeting of individuals because of the content of the Speech they seek to express over the Internet Public Utility can be seen as a type of commercial extortion forbidden under RICO. Conspiracies to do so may provide the second "act of racketeering activity" to invoke RICO. The claim to rely on "third party fact checkers" is an act in furtherance of the unlawful purpose.

The Federal Communications Commission has authority to protect the Internet Public Utility from abuse by its users. In the case of the government-chartered quasi-private service providers such abuse includes seeking to control the Speech of persons using the services.

Section 230 contemplated neutral service providers that would not interfere with the Speech of the users; in return the providers would not be responsible for the content of the Speech expressed by the users. This requirement of fairness by the providers needs to be clarified so that violations of RICO and of Free Speech and Association will no longer occur. The Commission is obligated, as part of the Executive Branch, to see to it that the laws be faithfully executed.

While various authoritarian states make no effort to hide direct censorship of speech, the "advanced democracies" are more subtle. Germany, with no absolute constitutional protection for Free Speech, is contemplating empowering Internet Service Providers to refuse service to "hate groups."

At the same time the large international corporate controllers of the Internet, such as YouTube, Facebook and Google, are already escalating content controls to enforce "political correctness" – if you do not follow the Party Line, you cannot be heard.

> First they came after the Neo-Nazis and banned them from Youtube and Facebook. No one protested.
> Then they came after Alex Jones and banned him from Twitter, YouTube and Facebook. No one protested.
> Then they came after the President of the United States...
> You know the rest… and then they came for you and me, and no one was left to protest.

These supposed private Social Media Companies are actually exercising government authority -- just as much as if they had been the "private" Tax Farmers of Ancient Rome. In this case they are exercising government authority to censor Speech -- an authority that no part government under our Constitution may legitimately and constitutionally exercise.

They are the privatized agents of Deep State control and censorship. They exercise this control on several levels. Each of these mega-corporations is, in fact and in law, "a creature of the state." It is created by registration with government that gives it authorities (such as limited liability to third parties, provided also under Section 230) which it could not exercise as a truly private association.

If the same Rule of Law that applies to truly private actors applied to government and its crony corporations, "content control" efforts would be understood to be exactly what they are: unlawful censorship.

Real free market competition and technological progress would rapidly make the near-monopoly power of Twitter, YouTube, Google and Facebook irrelevant.

If the same Rule of Law that ought to apply to Government Censorship – that there can be no such censorship – applied to Government's crony corporations, YouTube, Facebook etc., "private" censorship could not remain.

The FCC is uniquely positioned to respond to the Petition for Redress by asserting that corporations profiting from our Internet Public Utility must respect Freedom of Speech, and especially when that speech is political in nature, under Section 230.

The August 6th banning of paid advertising from a particular Political Action Group by Facebook [6] for ninety days, with that period of time extending through the National Election Day, shows the serious threat to free, fair and open elections that the government-granted market power of the internet service providers poses. No one will believe the presidential election is fair if the current situation continues.

The FCC must act quickly to protect Speech and fair elections by immediately enjoining all efforts by the Social Media Companies to interfere in the election through censoring Speech.

Ralph Fucetola JD
President
Institute for Health Research
www.InHeRe.org

[1] https://en.wikipedia.org/wiki/Racketeer_Influenced_and_Corrupt_Organizations_Act

[2] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" – 14th Amendment

[3] "Beginning with *Gitlow v. New York* (1925), the Supreme Court applied the First Amendment to states—a process known as incorporation—through the Due Process Clause of the Fourteenth Amendment." https://en.wikipedia.org/wiki/First_Amendment_to_the_United_States_Constitution

[4] Ibid. "In *Packingham v.North Carolina* (2017), the Supreme Court held that a North Carolina law prohibiting registered sex offenders from accessing various websites impermissibly restricted lawful speech in violation of the First Amendment. The Court held that 'a fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.'"

[5] https://www.brennancenter.org/our-work/analysis-opinion/government-expanding-its-social-media-surveillance-capabilities

[6] https://www.washingtonexaminer.com/news/facebook-levels-90-day-ad-ban-on-pro-trump-super-pac