

How Biden's FCC could fix America's internet

The FCC can bring back net neutrality and help Americans stay connected during the pandemic — if everything goes its way now.

[Sara Morrison](#) Nov 12, 2020, 4:00pm EST



President Biden's FCC could help more Americans than ever access and afford the internet.

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When Joe Biden is inaugurated as president on January 20, he stands to oversee a Federal Communications Commission (FCC) that could do

remarkable things. Among other things, the new FCC could [bridge the digital divide](#), ensuring all Americans have access to the internet. But even though Biden's victory is assured, the future of the FCC hangs in the balance.

The Trump administration's FCC has had a particular agenda. Under the leadership of Chairman Ajit Pai, the agency has pushed to deregulate the industries under its purview and, in turn, to create a business-friendly environment with few rules, little accountability, and minimal oversight for some of the biggest and most powerful companies in the world. In the months and years to come, the FCC is likely to reverse some of those policies, especially Pai's most controversial decision: repealing net neutrality, a policy that required internet service providers to [treat all types of internet traffic the same](#). But getting broadband internet in as many homes as possible during the pandemic is many Democrats' most urgent goal, and one they feel the Trump administration failed to accomplish.

"Because the Trump FCC failed to meaningfully address the digital divide, tens of millions of Americans still lack high-speed internet," Rep. Anna Eshoo (D-CA) told Recode. "This worsens the impacts of the pandemic, and the Biden administration has to take this head-on."

She added: "Every person in our country must have high-speed internet. Period. We've failed for too long to expand access to rural and tribal areas, and too many urban communities can't afford broadband."

The Biden administration's FCC can and likely will aid this effort by making the internet more affordable and accessible. This could involve providing more subsidies to lower-income people, continuing its work increasing broadband access, and opening up more radio frequency bands for high-speed 5G networks in order to bring the United States to [the level of its peers](#). The agency is also poised [to restore](#) net neutrality and reclassify

broadband internet as a Title II service, which would give the FCC more authority over carriers. Under the Biden administration, the agency will also probably let Trump's anti-social media Section 230 rulemaking mission die.

With these goals in mind, Biden will get to pick a new FCC chair, who will do much to set the agency's agenda. Beyond that, we don't yet know who that chair will be, how many of the five commissioner seats will be available to be filled, or which party will have control of the Senate. A Republican-majority Senate may well make it much more difficult to confirm new commissioner appointments or refuse to vote on laws that could provide funding needed for Democrat-chaired FCC initiatives.

Experts and FCC insiders told Recode they foresee a Biden FCC that goes back to trying to govern and reclaims some of the authority it ceded under Trump. And the FCC's glass ceiling may finally break with the first chairwoman in its 86-year history.

Where the FCC is now

The legacy of Pai's FCC will be a "light-touch" approach and mass scale deregulation. [Proponents say this encourages](#) investment and innovation, and opponents argue that it favors businesses at the expense of consumers. While Pai's FCC has made an effort to bring [broadband internet to rural and tribal communities](#) — which overwhelmingly benefits red states — it hasn't done much to make those services affordable to lower-income people.

"We still don't really know what the results of [Pai's] multi-billions of dollars to rural internet service providers will be," Gigi Sohn, a distinguished fellow at the Georgetown Institute for Technology & Law Policy who was a staff member of the FCC during the Obama administration, told Recode. "I hope it results in a lot more people being connected, but that's the smallest part of

the digital divide. The biggest part of the digital divide is affordability. He never talks about that."

Much to the consternation of many Democrats, including the FCC's Democratic commissioners Jessica Rosenworcel and Geoffrey Starks, the agency has dragged its feet on updating programs like [E-Rate](#) and [Lifeline](#) that could help people afford increasingly necessary internet services in their homes.

Pai will perhaps best be remembered for repealing the Obama-era's net neutrality decision, which he vehemently opposed as a minority party commissioner. When Trump took office and promoted Pai to chair, he immediately set about [undoing that decision](#). Under Chairman Tom Wheeler, the Obama FCC had classified broadband internet as a Title II service, subjecting it to increased oversight and establishing internet service as a necessary utility for Americans. This meant internet access would no longer be treated as a luxury, like cable television, but rather protected and ensured like telephone service. Pai's FCC reclassified broadband as a Title I service which was largely under the purview of the Federal Trade Commission.

This was perhaps one of the most controversial decisions in the FCC's history, seen by its opponents as a gift to internet service providers that could now charge consumers more for accessing certain sites or using different internet services. Pai [framed it](#) as "restoring internet freedom" and encouraging internet service providers to pour more money into extending their reach across the country without having to worry about burdensome regulations that would cut into their bottom line. Pai's order was protested by [millions](#) of Americans, [in person](#) and [online](#). Meanwhile, millions of comments supporting the end of net neutrality were [determined to be fake](#).



One of the many protests against the Trump FCC's net neutrality repeal.

Chip Somodevilla/Getty Images

So that's how Pai's FCC began. Here's how it's going: Pai's reign will likely end, ironically enough, with an attempt to introduce more regulation through [Section 230](#), a 25-year-old law that lets websites moderate third party content as they see fit without being liable for that content (with a few exceptions). Simply put, you can sue a Twitter user if they tweet something defamatory about you, but you can't sue Twitter. This is what allows websites that rely on user-generated content to exist. Trump hoped to weaponize the FCC, a supposedly independent agency that has become [increasingly partisan](#) in recent years, against social media companies that he believes censor conservative speech by making rules that could remove their Section 230 protections.

Repealing or significantly changing Section 230 has become Trump and his surrogates' rallying cry in the latter half of his one-term presidency. But Republican lawmakers' bills that would change Section 230 to force platforms to be "politically neutral" in their moderation or make their moderation rules more transparent and clear to users have so far come to nothing. An [executive order](#) Trump issued in late May attempted to circumvent the legislative process by asking the FCC to "clarify" what content platforms can and cannot moderate if they want to keep their Section 230 protections. Some [scoffed at](#) this authority, arguing that it was both wrong and in direct conflict with Pai's reasoning behind [repealing the Obama-era's net neutrality](#) rules. In effect, Pai's willingness to accede to Trump's demands over Section 230 means his tenure, once defined by the desire to impose as few rules as possible on private businesses, will likely end with a failed attempt to introduce more rules on some of the biggest companies in the world.

Rosenworcel and Starks have publicly stated that they do not think the FCC should play a role in Section 230, and this opinion seems to be shared by Democratic lawmakers. While Biden expressed a desire to revoke Section 230 [to the New York Times](#) in January — an opinion that a campaign spokesperson told Recode he hasn't changed — he has yet to follow that up with any proposed action to do so, and Section 230 is not likely to be a major priority for the administration anytime soon.

The Trump FCC could still try to get something done with Section 230 before the administration changes hands. But the agency almost certainly doesn't have enough time since it still needs [to confirm a new commissioner](#) in order to get the majority it would need to do anything meaningful. House Democrats [have also asked](#) the FCC to stop any work on controversial items. This request was made of the Obama FCC when Trump won the election, and it was followed. At the time, then-commissioner Pai [issued a statement](#)

supporting the pause, so it would be hypocritical for him to forge ahead with the controversial Section 230 business.

Wheeler, who was the FCC chair during Obama's second term, said he would be disappointed in Pai if he refused to honor the Democrats' request but not necessarily surprised: "It wouldn't be beyond the way that the Trump administration has been operating: 'It's all about us.'"

Pai has yet to publicly acknowledge that Biden won the election at all. When Recode asked about his plans during the transition period, he did not respond.

Who will be on the FCC when Biden takes office

The FCC can only have three commissioners from the same political party and currently has a 3-2 majority of Republicans. But it won't have the same lineup when Biden takes office. Michael O'Rielly, a Republican commissioner nominated by Obama, finished his first full term in July 2019. But Trump rescinded his renomination after [O'Rielly stated](#) that he didn't think the FCC should regulate Section 230. Trump [then nominated](#) National Telecommunications and Information Administration (NTIA) senior adviser Nathan Simington, who assisted in carrying out Trump's anti-Section 230 executive order and is seen as a Trump loyalist.

But Simington is not a sure thing to be confirmed before Biden takes office. Republicans likely feel that they have more important things to address before they lose the executive branch in January, and they may want to go with a commissioner they pick instead of the outgoing president's choice, which was largely based on his personal vendetta against social media companies.

At his confirmation hearing before the Senate Commerce Committee on

Tuesday, Simington wouldn't commit to supporting Democratic initiatives like expanding the E-Rate program, which provides discounted internet access to schools and libraries, into homes that have become classrooms during the pandemic. Perhaps in an attempt to demonstrate how much work is now being done in alternate spaces, Sen. Ed Markey (D-MA) asked Simington about E-Rate via video chat from the backseat of his car. He did not seem to like Simington's answers. Meanwhile, Sen. Richard Blumenthal (D-CT) threatened to place a hold on Simington's confirmation because of his association with Trump's Section 230 executive order. A spokesperson for Blumenthal told Recode that the senator has "significant concerns" about Simington's independence, integrity, and judgment.

And then there's Pai's future. Biden will get to appoint his own chair when he takes office, and chairs traditionally leave the agency when a new administration comes in. But Pai won't have to do that — he can stay on as a commissioner until his term expires, which could be as late as 2023. It's hard to see Pai wanting to stay at the FCC in a lesser role, but Republicans may ask him to stay to have a 2-2 split if Simington is not confirmed. The most likely outcome, however, is that Pai packs up [his trademark giant mug](#) and goes.



A large mug, and outgoing FCC chairman Ajit Pai.

Alex Wong/Getty Images

"It really is a fascinating situation here," Wheeler said. "If Ajit sticks with precedent, then it's 2-1 [with a Democratic majority]. If he doesn't, then he can stymie any action until the Republicans in the Senate decide it's time to approve somebody."

There is also the question of who Biden will select as the FCC's new chair, if he does indeed get the opportunity. Many believe that Biden will appoint a woman here, as the FCC has never had a chairwoman in its 86-year history (unless you count Mignon Clyburn's acting chairwomanship for several months in 2013). Clyburn and Rosenworcel have been circulated as likely choices here. Both have FCC experience and both have championed broadband affordability and expanding the Lifeline program, which

subsidizes phone bills for low-income people, to include broadband internet.

But Clyburn seems to have moved on from her time at the FCC, which ended in 2018. She joined the boards of [Lionsgate](#) in July and [RingCentral](#), a cloud communications provider, in November. The Senate would also have to confirm Clyburn, and with a Republican majority it may well refuse to do so. That could be a point in Rosenworcel's favor, since she doesn't have to be confirmed. Rosenworcel [has long advocated](#) for FCC measures to close what she calls the "homework gap" between students who have access to reliable high-speed internet to do their schoolwork at home and students who don't. That gap has never been more apparent or destructive than during the pandemic.

"Commissioner Jessica Rosenworcel is brilliant and effective, and possesses a broad and deep knowledge of all things FCC," Rep. Eshoo said in an email. "Hands down, she's my #1 choice for Chairwoman of the FCC. She would hit the ground running from Day One."

Of course, it's also entirely possible that Biden nominates someone else — perhaps even someone completely unexpected — to head up the FCC. Clinton-era FCC chair Reed Hundt, for example, was unknown and had very little to no telecommunications experience before he was appointed. He was, however, [Vice President Al Gore's college roommate](#).

"I know that a whole bunch of people want it," Wheeler said. "The fact of the matter is that Joe Biden's been around this town for 47 years. He knows a lot of people, and it doesn't have to be the usual suspects."



Former FCC Chairman Tom Wheeler with then-commissioner Mignon Clyburn (left) and Jessica Rosenworcel (right) in 2015. Both women are rumored to be likely picks as the next FCC chair.

Mark Wilson/Getty Images

What the FCC will do

Having a Democratic majority will make it significantly easier for whoever becomes the new FCC chair to accomplish their vision. But even without that advantage, there are ways to get things done.

"There's still a lot you can do because the chair controls the bureau and the offices," Harold Feld, senior vice president at open internet advocacy group Public Knowledge, told Recode. "And you can do a lot on what's called delegated authority. ... The chairman is not toothless in terms of the ability to use the power of the FCC."

What's pretty clear is that a Biden FCC will want to do as much as possible to address the digital divide. Broadband affordability is a major part of this. Along with expanding E-Rate and Lifeline programs and continuing work to increase access in rural and tribal areas, expect a Biden FCC to reverse the net neutrality repeal and reclassify broadband internet as a Title II service under the Communications Act. This would subject broadband internet carriers to the same increased oversight and rate regulations that phone companies have. So, where Pai [had to ask](#) companies not to cut off homes or businesses from the internet if they couldn't pay their bills during the pandemic and to expand their low-income programs, an FCC that classified broadband as a Title II carrier would have more leverage to require it.

There is also one possible privacy benefit if internet service providers become Title II carriers, as Wheeler pointed out. Under Title II, the FCC was able to [establish the authority](#) to require ISPs to get consumers' permission before sharing certain information about their internet lives, including browsing history, location, and email contents. This was seen as a big win for data privacy, and Wheeler hopes that the new FCC will find a way to restore those privacy protections.

The Biden FCC will also have to help facilitate [the spread of 5G](#) across the country and will be responsible for freeing up more bands in the spectrum to provide it. Increased 5G access would give more Americans access to higher internet speeds in more places, which has become a priority during the pandemic. While the current FCC is already working on this effort, some think the Biden administration will promote the inter-agency cooperation necessary to do it quickly. During the Trump administration, [different agencies fought over](#) spectrum, which [held back](#) efforts to open up more bands and expand 5G's potential.

"The way that Trump ran things was to set everybody against each other,"

Feld explained. "It has become much more of a problem in that federal agencies have now just increasingly said 'no' to the FCC. ... It's critically important that a Biden administration takes steps to smooth this over."

All this said, it's hard to say with certainty just what the Biden administration can do, especially when it comes to this already atypical transition process. The uncertainty regarding the new FCC even extends now to when and if the Biden transition team will get access to the FCC, or if the Trump administration will hold out for as long as possible just to make life difficult for the Biden team. Given the issues on the table — bridging the digital divide, restoring net neutrality, and expanding 5G — any delay in getting the new FCC running would ultimately be to the detriment of the American people. But there will be a new FCC eventually.

"It's gonna be interesting," Wheeler said. "This will be a great time to be chairman of the FCC."

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