

# The Implications of Possible Changes to Section 230

By John C. Nagengast

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## *Introduction*

The 2020 U.S. presidential election has shed a national spotlight upon Section 230 of the 1996 Communications Decency Act and its role in determining how social media forums treat information about political parties. Section 230 (47 U.S.C. § 230) is widely interpreted to (1) provide legal immunity to internet service providers and other internet-related platforms for information sent or posted by third parties (their users or customers) over their networks or facilities and (2) give them the ability to remove user content they consider to be objectionable. When this section was signed into law by then president Clinton in 1996, the legislation was intended to promote competition, free use, and expansion of the internet as a means for exchanging information and ideas while minimizing the sharing of pornography and obscenity. It is certainly fair to say that the rise of social media forums as they exist today was not seriously anticipated when Section 230 was drafted in the mid-1990s. Facebook was not launched until February of 2004 while Mark Zuckerberg was an undergraduate student at Harvard. It was unforeseen that Section 230 would put large social media companies in the position of acting as a freelance internet censor or fact checker with, at least in some views, the potential ability to influence the outcome of elections or sway public opinion on a wide range of topics.

As pointed out in the recent CSIS blog post “[The Goldilocks Porridge Problem with Section 230](#),” published by Zhanna Malekos Smith, Section 230 presents a considerable paradox:

Put simply, we have a case where one presidential candidate claims Section 230 inhibits effective content moderation by Internet platforms (porridge is too cold), whereas the other candidate claims it allows for too much censorship (the porridge is too hot).

Given that both presidential candidates called for the revocation or revision of Section 230 (but from widely opposite viewpoints), it is highly probable that the new Congress will take some action in attempting at least a revision of the section, hopefully on a bipartisan basis, however unlikely that may seem given the events of January 6, 2021 and beyond.

## *A Wide Range of Viewpoints*

### **ELECTRONIC FRONTIER FOUNDATION**

The Electronic Frontier Foundation states on their website:

CDA 230 protects web services and social networks, such as Facebook, Twitter, and blogs, from being held responsible for hosting or facilitating online speech. Without it, service providers would become targets for individuals, governments, and corporations who want to limit free expression. Under CDA 230, service providers are categorically protected against most legal claims based on what their users say or do, which means they can't be forced to censor user content.

### **PRESIDENT TRUMP**

On May 28, 2020, then president Trump signed Executive Order (EO) 13925, "[Preventing Online Censorship](#)." It stated, inter alia:

In a country that has long cherished the freedom of expression, we cannot allow a limited number of online platforms to hand pick the speech that Americans may access and convey on the internet.

The EO directed several actions by the Department of Justice, Federal Trade Commission, Department of Commerce/National Telecommunications and Information Administration, and Federal Communications Commission, and other federal departments and agencies to address his concerns.

President Trump recently tweeted (9:45 PM, Dec. 1, 2020):

... Therefore, if the very dangerous & unfair Section 230 is not completely terminated as part of the National Defense Authorization Act (NDAA), I will be forced to unequivocally VETO the Bill when sent to the very beautiful Resolute desk.

After the passage of the NDAA by wide margins in both houses of Congress, President Trump made good on his threat and formally vetoed the bill on December 23, 2020. The veto was overridden by the House on December 28, 2020 and became law on January 1, 2021 as the Senate voted to override the veto, leaving Section 230 intact.

### **PRESIDENT BIDEN**

In a December 16, 2019 interview with the *New York Times* Editorial Board, in response to a question about Facebook and Mark Zuckerberg publishing items that then presidential candidate Joseph Biden found false and unfavorable to him concerning the Ukraine, he stated:

And you should know, from my perspective, I've been in the view that not only should we be worrying about the concentration of power, we should be worried about the lack of privacy and them being exempt, which you're not exempt. [The *New York Times*] can't write something you know to be false and be exempt from being sued, but he can.

In response to a further discussion about the revocation of Section 230, Mr. Biden stated:

That's right! Exactly right! And it should be revoked.

### **FACEBOOK**

On October 28, 2020, in his prepared testimony before the Senate Committee on Commerce, Science and Transportation (Commerce Committee) on Section 230, Mark Zuckerberg stated:

From our perspective, Section 230 does two basic things. First, it encourages free expression, which is fundamentally important, . . . Second, it allows platforms to moderate content. Without 230, platforms could face liability for basic moderation.

In a blog update on December 3, 2020 at 6:00 AM PT by Kang-Xing Jin, Facebook’s head of health, Facebook announced that:

Given the recent news that COVID-19 vaccines will soon be rolling out around the world, over the coming weeks we will start removing false claims about these vaccines that have been debunked by public health experts on Facebook and Instagram. This is another way we are applying our policy to remove misinformation about the virus that would lead to imminent physical harm.

There are several interesting aspects to this statement which will be discussed later in this analysis. While the blog statement does not reference Section 230, it is obvious that Facebook believes it is legally enabled (in accordance with their “policy”) to remove what may be lawful and credible statements from its platforms, based on an arbitrary assessment by persons of unknown qualifications.

#### **ALPHABET**

On October 28, 2020, before the Senate Commerce Committee, Sundar Pichai, the CEO of Alphabet, stated in his prepared testimony:

Section 230 protects the freedom to create and share content while supporting the ability of platforms and services of all sizes to responsibly address harmful content.

We appreciate that this Committee has put great thought into how platforms should address content, and we look forward to having these conversations.

#### **TWITTER**

In his prepared testimony before the Senate Commerce Committee on October 28, 2020, Jack Dorsey, CEO of Twitter, stated:

As we consider developing new legislative frameworks, or committing to self-regulation models for content moderation, we should remember that Section 230 has enabled new companies – small ones seeded with an idea – to build and compete with established companies globally. Eroding the foundation of Section 230 could collapse how we communicate on the Internet, leaving only a small number of giant and well-funded technology companies.

#### **DEPARTMENT OF JUSTICE**

On September 23, 2020, the Department of Justice announced they had sent proposed draft legislation to Congress revising Section 230, after a year-long development process involving a variety of stakeholders. The draft’s two stated goals were:

First, the draft legislation has a series of reforms to promote transparency and open discourse and ensure that platforms are fairer to the public when removing lawful speech from their services.

The second category of amendments is aimed at incentivizing platforms to address the growing amount of illicit content online, while preserving the core of Section 230’s immunity for defamation claims.

On October 27, 2020, the Department of Justice's Office of Legislative Affairs sent a letter to the leaders of the House and Senate Judiciary Committees, the House Committee on Energy and Commerce, and the Senate Committee on Commerce, Science, and Transportation expressing its views on the need for legislative reform on Section 230. While reiterating many of its previous arguments on the need for revision of Section 230, the letter also stated:

The Department rejects the view, suggested by some commentators, that Section 230 must be left alone for fear that any change to the law will cripple the tech industry. While Section 230 has helped build today's internet by enabling innovation and new business models, the internet itself has drastically changed since 1996. Online platforms are no longer nascent companies but have become titans of industry. Platforms have also changed how they operate, functioning not as simple forums for posting third-party content but rather employing sophisticated algorithms to suggest and promote content and connect users.

#### **ASSOCIATE JUSTICE CLARENCE THOMAS**

On October 13, 2020, in the case of *Malewarebytes, Inc. v. Enigma Software Group USA, LLC*, the U.S. Supreme Court denied the petition for writ of certiorari in a legal dispute between the two companies, which involved claimed anticompetitive behavior and the interpretation of Section 230 by the Ninth Circuit Court. In his accompanying statement, Justice Thomas wrote:

I agree with the Court's decision not to take up the case. I write to explain why, in an appropriate case we should consider the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms.

Justice Thomas continued with an exposition of the widely varying interpretations of Section 230 by various courts over the years in numerous matters and concluded:

Without the benefit of briefing on the merits, we need not decide today the correct interpretation of §230. But in an appropriate case, it behooves us to do so.

#### **FEDERAL COMMUNICATIONS COMMISSION**

On October 15, 2020, then FCC chairman Ajit Pai announced in a formal statement that the FCC would initiate a rulemaking to clarify the meaning of Section 230. He stated:

Members of all three branches of the federal government have expressed serious concerns about the prevailing interpretation of the immunity set forth in the Section 230 of the Communications Act. There is bipartisan support in Congress to reform the law. The U.S. Department of Commerce has petitioned the Commission to 'clarify ambiguities in Section 230.'

... As elected officials consider whether to change the law, the question remains: What does Section 230 currently mean? ... I intend to move forward with a rulemaking to clarify its meaning."

... Social media companies have a First Amendment right to free speech. But they do not have a right to a special immunity denied to other media outlets such as newspapers and broadcasters.

The future of this initiative at the FCC is somewhat uncertain at this point, as Chairman Pai submitted his resignation to the president effective January 20, 2021. Also, there are varying opinions as to how far the FCC can go in clarifying through regulation what Section 230 means with respect to social media companies and their platforms.

## *The Legislative History and Intent of Section 230*

What is commonly referred to as Section 230 of the Communications Decency Act started out in Congress as an effort to resolve liability issues affecting what were then emerging internet information sharing platforms in the early 1990s. At that time there was no legislative guidance on the liability of companies setting up a platform for the exchange of information that was posted by a third party that some other third party found damaging or libelous to them. Various courts had made widely varying decisions on cases being brought. For example, in 1991, in *Cubby, Inc. v. CompuServe, Inc.*, the Federal District Court for the Southern District of New York held that CompuServe was not liable for a statement posted on a bulletin board by a third party, since they had no duty to moderate such content and were only acting as a distributor. At the time, CompuServe had a stated policy that they would not moderate third-party content. In 1995, however, in *Stratton Oakmont Inc. v. Prodigy Services Co.*, the Supreme Court of Nassau County, New York, found Prodigy liable for a third-party posted statement, as they had a Prodigy employee acting as a moderator of the bulletin board, and thus were acting as a publisher.

Congress decided that the legal questions involved needed clarification to facilitate these platforms to grow and innovate, without the uncertainty that they could be sued for content posted by one of their customers over which they had no control or for failing to moderate what some other third party might find objectionable. Along a parallel track, Congress was also concerned about the exchange of indecent material being facilitated by the availability of these platforms and wanted to impose restrictions on that exchange, as well as update other aspects of the Communications Act of 1934. These two efforts came together in Title V of the Telecommunications Act of 1996, commonly referred to as the Communications Decency Act of 1996. Section 230 was formally codified as part of the Communications Act of 1934 at 47 U.S.C. § 230. In a later decision, the Supreme Court ruled that some of the portions of the Communications Decency Act dealing with indecent or obscene material were unconstitutional but left 47 U.S.C. § 230 intact.

The key provisions of Section 230 include:

(c) Protection for “Good Samaritan” Blocking and Screening of Offensive Material.

(1) Treatment of Publisher or Speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil Liability

No provider or user of an interactive computer service shall be held liable on account of-

- (a) any action voluntarily taken in good faith to restrict access to or availability of any material that a provider considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether such material is constitutionally protected; or
- (b) any action taken to enable or to make available to information content providers or others the technical means to restrict access to material described in paragraph (1). (sic)

The intent of Congress in passing this then widely supported legislation was both to foster the growth of the internet through limiting the liability of tech companies to lawsuits concerning material posted on their platforms by third parties, as well as to promote removal of material which was considered

pornographic or obscene, and particularly to limit the access by minors to such material. These were articulated in the legislation as:

(c) Policy

It is the policy of the United States -

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by State or Federal regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the internet and other active computer services;
- (4) to remove the disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

While certainly well intentioned, no one at the time envisioned how the roles of tech companies and social media platforms would grow and evolve in the twenty-first century or their power and ability to influence public opinion on a broad range of topics.

### *Some Fundamental Considerations for Reform*

The internet was certainly a vastly different place in the early 1990s. Originally the province of academic researchers, universities, and the military (the ARPAnet sponsored by DARPA is generally considered the first instantiation of what evolved into the internet), it basically turned the corner on commercialization around 1990, with the emergence of the World Wide Web and the attendant information services. The “big three” tech companies were then CompuServe, AOL, and Prodigy, with AOL having about 3 million active users in 1995, accessing their email via phone lines and dial-up modems—by contrast, Facebook has an estimated 2.5 billion online users today. In 1996, most of the online platform services were much simpler than those that exist today, consisting of mainly of email, chat rooms, bulletin boards, and rudimentary (by today's standards) electronic games.

Today's platforms are much more sophisticated and complex, with new services emerging at a rapid pace. Further, in 1996, there was little concern about misinformation, and few foresaw social media platforms having the ability to shape public opinion. In many instances, the social network platforms of today are largely indistinguishable from online news services. Prominent users of Twitter (e.g., @realDonaldTrump) frequently develop large followings, and many journalists, reporters, and political pundits use Twitter to convey breaking stories to their followers or base news reports on the tweets of those they follow. Facebook provides a variety of services beyond the simple “Home Page” where individual users post information about themselves of interest to friends and colleagues, including the “News Feed” that presents items of interest to the individual users. While this is largely based on user preference or selected topics, Facebook uses sophisticated algorithms to decide which information should or should not be presented to its users. Though



Google is primarily known as a search platform, many users obtain their news on a regular basis through Google Search. In fact, in a [blog post](#) on September 12, 2019, Richard Gingras, vice president of news at Google, stated:

Google Search was built to provide anyone access to information on the web – and with tens of thousands of web pages, hundreds of hours of video, thousands of tweets and news stories every minute of the day, our job is to sift through that content and find the most helpful results possible.

The calls by both former president Trump and now president Biden to revoke Section 230 highlight that while there is consensus over the need to change it, determining what and how are completely different issues. While then president-elect Biden was extremely critical of Facebook for publishing material about him and his family, which he stated was false and believed was damaging to his campaign (i.e., failing to censor), then president Trump objected to the repression of material which he claimed was true and believed was damaging to Biden's campaign (i.e., censoring).

The changes that make the social media platforms what they are today require a better definition of their roles, responsibilities, and limitations in performing content moderation. The leaders of the tech industry seem to agree with this, albeit with an understandable degree of caution about the unintended consequences. In his written testimony before the Senate Commerce Committee on October 28, 2020, Mark Zuckerberg of Facebook stated:

However, the debate about Section 230 shows that people of all political persuasions are unhappy with the status quo. People want to know that companies are taking responsibility for combatting harmful content – especially illegal activity – on their platforms. They want to know that when platforms remove content, they are doing it fairly and transparently. And they want to know that platforms are held accountable.

In his written testimony before the Senate Commerce Committee that same day, Jack Dorsey of Twitter stated:

I want to focus on solving the problem of how services like Twitter earn trust. And I also want to discuss how we ensure more choice in the marketplace if we do not. During my testimony, I want to share our approach to earn trust with people who use Twitter. I believe these principles can be applied broadly to our industry and build upon the foundational framework of Section 230 for how to moderate content online.

In the close of his written testimony before the Senate Commerce Committee, Alphabet's Sundar Pichai stated:

At the end of the day, we all share the same goal: free access to information for everyone and responsible protections for people and their data. We support legal frameworks that achieve these goals, and I look forward to engaging with you today about these important issues and answering these questions.

So, the question to consider now is how to achieve a reasonable balance in content moderation. Who gets to decide what is "misinformation" and what the social media platforms can and should do about it? Who gets to be the fact-checker and decide what the "truth" is? Do we want the social media platforms, large and small, to have a role in moderating free speech or deciding what is true or false? The current state of curation practice of the social media platforms appears to have evolved quite a bit beyond what Congress originally envisioned or intended with Section 230 and its stated focus on pornography or obscenity.

## *Legislative and Regulatory Options*

There is no lack of proposals on how to revise or reform Section 230. Indeed, besides the revisions formally proposed by the Department of Justice to Congress in October 2020, a variety of other revisions have been developed, focusing on limiting liability protection, the differentiation between political speech, falsified or illegal content, or the transparency of platform providers with users on their content policies. It will certainly take considerable time and effort to sort out some of these aspects through the legislative process.

This paper noted earlier the FCC chairman's stated proposal to provide clarity to the interpretation of Section 230 via the regulatory process, but the pending change of administrations and the resignation of the chairman cast some doubt as to the future of this initiative. Regarding the possibility of legal interpretation by the courts, Justice Thomas has stated that the Supreme Court should take on a future case to clarify Section 230. It will likely take some considerable time before a suitable case is presented before the Supreme Court, and while that might provide some clarity on the legal interpretation of the existing statute, it would not resolve the larger policy questions of what role social media platforms can and should play in the modulation of the internet and misinformation. Thus, it appears that a congressional bipartisan legislative initiative to address the questions around Section 230 and set a future direction would certainly be the preferred option.

## *Recommendations*

To make meaningful progress toward a bipartisan consensus approach to revising Section 230 that appropriately addresses the concerns with the current language while supporting the fundamental objectives of promoting innovation, competition, free speech, and the open exchange of ideas, the following principles could be adopted as a basic starting point and guide:

- **Free Speech:** The free exchange of lawful, constitutionally protected speech should be encouraged and should not be restricted or censored by social media platforms. Only material that is illegal, such as child pornography, threats of violence, terrorist activity, defamatory or libelous statements, or other material determined by a court of law to be illegal should be restricted or censored by the platform providers.
- **Innovation and Competition:** Providers of social media platforms should not use their market power and scope of influence to inhibit market competition or provider preference in any way. Liability protection provided to social media platforms should be independent of the technology or application. Any changes to Section 230 should neither favor nor disadvantage market competitors of any size, from start-up to tech giant.
- **Transparent Curation Policy:** Social media platforms should have a publicly stated policy clearly describing their curation criteria, functions, and processes across all their media and applications, including the qualifications of the people (such as Kang-Xing Jin, the head of health at Facebook who announced they would be removing false claims about Covid-19 vaccines, as cited above) involved in making curation decisions. This should include the criteria they use to remove a customer or user from their platform for violation of their policy. They should regularly publish comprehensive statistics on all curation actions and the basis for that action.
- **Political Views:** There should be no curation regarding political views or candidate preferences expressed on their platforms by their customers or users, so long as their statements are lawful.
- **Inherent Liability:** Social media platform providers should be liable for civil action for violation of any of the above.



- **Support to Law Enforcement:** Social media platforms should not interfere with any enforcement actions by duly-authorized federal, state, tribal, and local authorities concerning potential unlawful activity on their platforms.

Further, it does not appear that merely repealing Section 230 is a desirable option, as proposed by both Trump and Biden, since that would return us to the days of the early 1990s, when there were basically no rules of the road for internet liability with respect to material posted by third parties or removed by the social media platform providers. Given the current state of evolution of social media platforms, that would only create chaos throughout the legal system without addressing the basic issue of what role (if any) social media platforms should play in regulating misinformation on the internet and what the criteria for that regulation should be. The questions being raised about Section 230 are serious ones that require careful consideration and a consensus about what the rules of the internet should be and how they are articulated and implemented. A more sophisticated approach is obviously needed. Congress should take a multi-stakeholder approach to addressing these questions

The proposed legislation revising Section 230 from the Department of Justice, which was developed through a bipartisan, multi-stakeholder process, should be the starting point for deliberation by Congress through the Committees of Jurisdiction in both the House and Senate. These deliberations should also include and address the other proposals for revisions drafted by the various members of the House and Senate or other bodies. The first step in the deliberations should be to build an agreement upon the basic principles to be followed, as outlined above, and then work toward convergence on the legislative language, building on the existing and readily available proposals.

One of the beauties of Section 230 at the time it was written was its brevity and simplicity; it also can be argued that brevity and simplicity was its shortcoming over time, since it gave a great degree of latitude to the platform providers to block or censor virtually any content. As mentioned earlier, in the mid-1990s, no one could envision how the internet would evolve or the rise of powerful social media platforms with broad influence. Certainly, protecting social media platforms from liability for material posted by third parties over which they have no control is a worthy objective and should be preserved. Giving social media platforms liability protection while acting as gatekeepers of free speech is certainly more nuanced. Under the current language of Section 230 and the way it has been interpreted, they can decide that anything they choose to designate as harmful or objectionable, even political statements they choose to disagree with, can be moderated. This was not what the original legislation was designed to accomplish and should be the focus of any legislative revisions. ■

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