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Considering Section 230 Revisions, Rationally

by

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As almost everyone reading this already will know, Section 230 of the Communications Decency Act provides immunity from civil liability to online services for third-party content posted on their websites and for the removal of certain categories of content.

The debate over Section 230's fate – whether it should be revised, repealed, or left untouched – is intensifying weekly, if not daily. Given the immense reach and influence of the major web platforms such as Twitter, Google, Facebook, and so forth, that the debate is intensifying is not surprising.

In my view, with which you are free to disagree, there is considerable evidence that leading online services, such as Twitter, Google, and Facebook, whether intentionally or not, exhibit a political and philosophical bias against speech that is conservative or right-leaning in connection with their decisions to refuse to post, remove, or flag certain content. That said, I wish to make clear that I do not favor repeal, or any willy-nilly wholesale revision, of Section 230's grant of immunity from liability based on my view that a bias exists regarding content moderation decisions. And I have serious questions about the wisdom and legality of several aspects of President Trump's recently promulgated Executive Order on Preventing Online Censorship.

But this does not mean that it is inappropriate or inherently troublesome for Congress to review and possibly revise Section 230's provisions, or for the Department of Justice to recommend revisions for Congress's consideration, as it did on June 17. After all, the last time I checked, Section 230, or even more narrowly the so-called "Twenty Six Words That Created the Internet," were not handed down from on high at Mt. Sinai along with the Ten Commandments. Rather, the provision was formulated on a mere hill – Capitol Hill, that is – by a Congress whose works not infrequently are in need of periodic review and revision.

In the context of what is sure to be a vigorous – and, hopefully, civil – debate regarding Section 230's immunity grant, I want to set forth here certain fundamental propositions that, in my view, ought to be largely incontestable and that are pertinent.

First, the legal immunity granted online platforms by Section 230 played a significant role in the development of the robust Internet ecosystem which we know today, especially in the years closer to the law's enactment in 1996.

Second, when private sector online websites like Twitter, Facebook, and Google remove postings or other content from their websites, they do not violate the First Amendment free speech rights of the sites' users. This is because the First Amendment's free speech guarantee prevents the government from censoring or stifling speech, not non-government private actors.

Third, the First Amendment certainly did not compel Congress to grant immunity from civil liability to online services like Twitter, Facebook, and Google for actions taken which censor or stifle the speech of individuals or entities who wish to use their platforms. Nor does the First Amendment compel Congress to maintain such immunity from liability, once having granted it. Like publishers of newspapers or magazines, or purveyors of other media, the online providers remain perfectly free, absent a grant of immunity, to exercise their own First Amendment rights to engage in content moderation.

Fourth, to the extent online services like Google, Twitter, and Facebook promulgate terms of service which specify their policies and practices regarding moderation of postings and removal of content from their sites, the Federal Trade Commission, pursuant to its consumer protection authority, may have a legitimate role in considering complaints that such publicly-promulgated terms of service have been violated and imposing sanctions for such violations. In order for the FTC's role to be legitimate, the agency should be required to carefully limit its consideration of complaints to deciding whether convincing evidence supports a finding that an online service acted inconsistently with its explicit terms of service. In and of itself, such FTC enforcement does not necessarily implicate Section 230 immunity. But it is possible that revisions to the law could mean that certain findings of a violation pursuant to an FTC enforcement action could lead the online service to lose the civil immunity it presently enjoys, at least to some extent.

With these propositions in mind, it seems wrong to suggest, as some do, that it is inappropriate, or somehow even invidious, for Congress to review Section 230 and consider

possible revisions, including those contained in the Department of Justice's recommendations. Several of the DOJ recommendations appear to be narrowly framed carve-outs which should not be controversial. For example, DOJ proposes clarifying the law to make clear that the immunity provided by Section 230 does not apply to civil enforcement actions brought by the federal government and clarifying that immunity does not apply to a specific case where a website has actual knowledge or notice that particular third-party content violates federal criminal law.

Other DOJ recommendations may generate more controversy. For example, Section 230(c)(2)(A) grants immunity to websites for any action, "taken in good faith," restricting access to material that online providers consider "to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." DOJ suggests replacing what it calls the vague catch-all "otherwise objectionable" with "unlawful" and "promotes terrorism." And it suggests tying the "good faith" defense to content moderation actions carried out in accordance with plain and particular terms of service and accompanied by a reasonable explanation.

I am not here endorsing any particular course of action for Congress or recommending any particular revisions to Section 230, although it is possible I may do so in the future. Rather, my main purpose here is to refute the notion that Section 230, as it stands now, is so sacrosanct that, as a matter of policy or law, revisions should not be considered.

To me, that position, which often rests heavily on invocations of scary "slippery slopes" and "end of the Internet as we know it" scenarios does not seem, well, rational or reasonable.

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