



*Perspectives from FSF Scholars*  
*November 4, 2020*  
*Vol. 15, No. 57*

**Section 230 Legal Issues: The FCC's Authority and the First Amendment**

by

**Randolph J. May \***

[The Federalist Society Blog](#)

November 3, 2020

Nowadays you only need to shorthand “Section 230,” and most lawyers know what you’re talking about – or think they do. That’s [Section 230 of the Communications Decency Act](#), which was incorporated into the Communications Act of 1934 by the Telecommunications Act of 1996.

In the last two weeks, debates over Section 230 have become even more relevant. Twitter blocked all links to a *New York Post* story on Hunter Biden’s business dealings in China, and Facebook limited the spread of the same *New York Post* article on its platform. Many observers considered these actions by the powerful tech companies to be an example of why Section 230, nearly a quarter-century after enactment, no longer represents sound policy. There’s plenty of information available about Twitter’s and Facebook’s actions for those who wish to know more, but here I will steer clear of these and similar incidents.

My purpose is to contribute to the ongoing Section 230 debate by focusing on two legal points relevant to the current discussions about whether to eliminate Section 230: first, the Federal Communications Commission (FCC) does have rulemaking authority to clarify the meaning of

---

**The Free State Foundation**  
**P.O. Box 60680, Potomac, MD 20859**  
**[info@freestatefoundation.org](mailto:info@freestatefoundation.org)**  
**[www.freestatefoundation.org](http://www.freestatefoundation.org)**

Section 230, though Congress is the more appropriate venue for revising Section 230 in any way that effects substantive changes in its terms; and second, narrowing Section 230 is not necessarily a First Amendment violation.

For a deeper dive than what follows, please refer to the Free State Foundation's (FSF) [comments](#) and [reply comments](#) at the FCC in its proceeding to consider a petition filed by the National Telecommunications and Information Administration (NTIA), a unit of the Department of Commerce.

### *Section 230 in a Nutshell*

Section 230 has the effect of conferring broad immunity from liability upon internet content providers like Google, Facebook, Twitter, and thousands of others; it does this in two ways. First, Section 230(c)(1) provides that “interactive computer services” – the internet platforms – are not to be treated as publishers or speakers with respect to any information provided by another information content provider. Second, Section 230(c)(2) provides immunity from liability for internet platforms with regard to actions taken in “good faith” to restrict the availability of material that they consider “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”

### *The FCC's Authority to Entertain NTIA's Petition*

In brief, [NTIA's petition](#) requests that the FCC “clarify ambiguities in section 230 so as to make its interpretation appropriate to the current internet marketplace and provide clearer guidance to courts, platforms and users.” This includes, for example, clarifying the relationship between subsections (c)(1) and (c)(2) so that they are not read in a manner that renders (c)(2) superfluous and providing clarification as to the meaning of the terms “good faith” and “otherwise objectionable.”

Many commenters contend the FCC lacks authority to consider NTIA's petition and take any action at all, even to provide an interpretation regarding the meaning of Section 230's terms. In the main, their argument relies most heavily on the fact that Section 230 itself says nothing at all about the Commission's authority to take any action or refrain from taking any action.

[In my view](#), the FCC “likely possesses authority to interpret and clarify the meaning of Section 230's terms,” as opposed to issuing rules mandating that internet content providers “publish or not publish, or censor or not censor, any particular speech.” As Seth Cooper and I explained in our [filed comments](#), this Commission authority is premised most directly on Section 201(b) of the Communications Act, which delegates to the Commission the power to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”

Section 230 was placed by the 1996 Telecom Act in the same Title II of the Communications Act as Section 201(b). But even when Section 201(b) has been invoked as a source of authority for the issuance of agency rules or declaratory orders regarding provisions in other titles of the Communications Act, the U.S. Supreme Court has acknowledged the breadth of Section 201(b)'s reach. The Court's decision in [City of Arlington v. FCC](#) is one example worth noting in this

regard. There, the Court relied on Section 201(b) in holding that the FCC possesses the power to issue a declaratory ruling clarifying the meaning of a certain wireless siting provision in Section 332(c)(7)(B) of the Communications Act – a provision that contains no explicit delegation of authority to the agency and which is located in a separate title of the act.

On October 21, FCC General Counsel Thomas Johnson issued an [opinion](#) essentially agreeing with the position set forth in FSF’s comments regarding the Commission’s authority to consider NTIA’s petition and to clarify ambiguous terms contained in Section 230. His opinion, which relies on Section 201(b), contains a more extensive discussion of the Section 201(b) authorities than presented here, so it is worth reviewing.

Now, quick further points on the authority issue. First, while not mentioned by the FCC General Counsel or any others, I believe that Section 554(e) of the Administrative Procedure Act may be another independent source of FCC authority. It provides that an agency “in its sound discretion, may issue a declaratory order to . . . remove uncertainty.” A [2015 Recommendation of the Administrative Conference of the United States](#) on “Declaratory Orders” appears to support this view. Referring to Section 554(e), the Recommendation states: “An agency may properly use a declaratory order for a wide variety of purposes, including to: (1) interpret the agency’s governing statute or own regulations; (2) define terms of art; (3) clarify whether a matter falls within federal regulatory authority. . . .” The report contains citations to various court decisions that have relied on Section 554(e).

The FCC itself has adopted a [regulation](#) which states: “The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.” On its face, this regulation does not invoke any source of authority other than the APA.

Finally, while asserting the FCC possesses authority to issue a ruling clarifying the terms of Section 230, I want to again affirm, as I did in the Free State Foundation’s comments to the FCC, that I have “no hesitancy in saying that Congress is the more appropriate venue” for reviewing Section 230 with an eye to determining whether it should be revised.

### *Narrowing Section 230’s Immunity Doesn’t Necessarily Violate the First Amendment*

Many opponents of the NTIA petition wrongly equate *any* action regarding Section 230 that may have the effect of narrowing the scope of immunity currently provided to internet platforms like Twitter or Facebook with government compulsion or censorship of speech. This, they claim, violates the First Amendment.

And these opponents take this position even with respect to a Commission ruling which, as I have suggested, would merely interpret certain terms of Section 230 relating to the scope of the immunity conferred upon internet platforms, rather than compelling the platforms to take any action regarding any content published on their platforms. For example, [in its FCC comments](#), Americans for Prosperity (AFP) claims that NTIA’s petition “would violate the First Amendment by compelling individuals to engage in or host speech that they otherwise find objectionable.” In other words, AFP and [others](#) who similarly refer to “compelled speech created

through a mandated access provision,” don’t acknowledge that there is a difference, for purposes of First Amendment analysis, between an agency interpreting a statutory provision and the government affirmatively exercising statutory authority to compel or mandate speech or censorship. This is true even if the agency’s interpretation receives substantial deference by a reviewing court.

Here is the [nub of the matter](#) regarding the First Amendment:

[P]utting aside whether or not any such congressional or FCC action represents sound policy, altering the scope of immunity from liability does not necessarily *compel* the websites which presently enjoy such immunity to say anything they do not wish to say or to censor anything that they do not wish to censor. It may just mean they have additional incentives to be more transparent and accountable to the public for their actions and/or that they must defend themselves in court for claims that they have acted unlawfully.

I do not deny that any narrowing of Section 230’s current broad immunity from liability may lead to increased litigation and burdens for internet platforms like Facebook and Twitter. And these impacts may be relevant to First Amendment considerations; for example, they possibly could be shown to have a “chilling effect” on the free speech rights of the platforms. But in my view, any narrowing constructions, whether the result of FCC interpretations or congressional revision, are unlikely to constitute “facial” violations of the First Amendment, although they possibly *could* be “as applied” violations if considered in a specific context based on an evidentiary record.

\* \* \*

Two important points in conclusion. Facebook, Google, Twitter, and all other internet content providers, large and small, have a First Amendment right, as speakers or publishers, to carry or not carry, and to censor or not censor, whatever material they wish. And I have often defended their right under the First Amendment to do so, even when, or especially when, I have disagreed with their decisions.

But the issue here is immunity. No one contends that the First Amendment required that the internet content providers be accorded immunity from liability in 1996, and I think it is unlikely that any action which has the effect of narrowing such immunity in 2020 constitutes a First Amendment violation.

I take no position here on whether, as a matter of policy, Section 230 should be revised in any particular way. Rather my purpose is to contribute to the understanding of the legal issues raised by the FCC’s consideration of NTIA’s petition and issues claimed to arise under the First Amendment. As previously mentioned, for a more in-depth discussion of these issues, please see the Free State Foundation [comments](#) and [reply comments](#) submitted to the FCC.

\* Randolph May is President of the Free State Foundation, a free market-oriented think tank in Rockville, MD. *Section 230 Legal Issues: The FCC’s Authority and the First Amendment* was published in The Federalist Society *That’s Debatable* blog on November 3, 2020.