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Power to Persuade: The FCC's Authority to Interpret Section 230 Post-Loper Bright

by

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In a November 21 FedSoc Blog post, the Phoenix Center's Lawrence J. Spiwak convincingly argued that the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* (2024) eliminated the FCC's power to make binding authoritative legal interpretations of federal statutes. However, Mr. Spiwak appears to overstate the case when he writes that *Loper Bright* "encompass[es] any effort by the FCC to interpret Section 230" of the Communications Decency Act.

Loper Bright recognized that agencies retain the power to interpret the meaning of statutes within their jurisdiction and that, pursuant to *Skidmore v. Swift & Co.* (1944), courts still should consider agency views for their "power to persuade, if lacking power to control." The FCC can, under Section 201(b) of the Communications Act exercise the power to interpret Section 230 through policy statements, declaratory rulings, or published reports.

Section 230(c)(1) provides immunity from civil liability to "interactive computer services" by preventing them from being "treated as the publisher or speaker" of third-party content posted on their websites. Section 230(c)(2) provides immunity, subject to certain limits, for provider actions "taken in good faith" to restrict access to material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." Social media platforms rely on Section 230 to avoid legal responsibility for third-party user content posted on their websites and for their moderation decisions that restrict access to certain content.

Concerns with perceived bias in content moderation by online platforms and lower court decisions that may have misconstrued Section 230's terms or conflicted with each other prompted the Trump National Telecommunications and Information Administration (NTIA) to petition the FCC for a rulemaking to clarify the meaning or application of the statute. The Trump NTIA's July 2020 petition requested that the FCC add rules to the Code of Federal Regulations to provide clearer guidance to courts, platforms, and users on matters such as the relationship between Section 230(c)(1) and (c)(2), the meaning of "good faith" and "otherwise objectionable," how the meaning of "interactive computer service" should apply to Section 230(c)(1), and the meaning of "treated as a speaker or publisher."

An October 2020 legal opinion by then-FCC General Counsel Thomas Johnson determined that the FCC had "authoritative" power to interpret Section 230 based on Section 201(b) and the Chevron doctrine. Applying *Chevron*, the Supreme Court had explained in *Brand X Services v. NCTA* (2005) that "a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative," and that instead "the agency remains the authoritative interpreter." The Trump FCC never acted on the NTIA's petition, and Mr. Johnson's legal theory was never tested.

The Supreme Court's 2024 decision in *Loper Bright* reasserted the final authority of courts under the Administrative Procedure Act (APA) to determine the best reading of federal statutes. *Loper Bright*'s overruling of the "*Chevron* doctrine" means that federal agency interpretations of statutes no longer bind courts or overrule prior judicial interpretations. Mr. Spiwak correctly writes that "*Loper Bright*, in plain terms, put the kibosh on Johnson's argument that it is the FCC's job 'to determine whether courts have appropriately interpreted its proper scope.'" *Loper Bright*'s overruling of the *Chevron* doctrine apparently forecloses any prospective attempt by the FCC to impose prescriptive regulatory controls over content moderation by social media platforms.

However, Mr. Spiwak appears to overstate the effect of *Loper Bright* when he writes that "the Court made it crystal clear that it is the exclusive role of the *courts*—and not the administrative state—to interpret statutes" and that the message to the FCC from the Court's decision is that "interpreting Section 230 is not your job." Those are overstatements because the Supreme Court in *Loper Bright* recognized *Skidmore*'s continuing vitality.

Under *Skidmore*, an interpretation of the law made by a relevant agency is entitled to weight proportional to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Thus, consistent with *Loper Bright*, the FCC still

possesses authority to make interpretations of Section 230, and courts should consider their persuasiveness according to the *Skidmore* factors—though courts should not *defer* to those interpretations as they did under *Chevron*.

Importantly, the Trump NTIA's petition based the FCC's power to interpret Section 230 on Section 201(b) and related case law without reliance on *Chevron*. That core legal position holds up today. Under Section 201(b) of the Communications Act of 1934, the FCC has the power to "prescribe such rules and regulations as may be necessary in the public interest to carry out this chapter" (title 47 U.S.C. Chapter 5). The Telecommunications Act of 1996 incorporated Section 230 into the Communications Act. In *AT&T Corp. v. Iowa Utilities Board* (1999), the Court determined that "§ 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies," and it thus upheld the Commission's authority to implement sections 251 and 252. Furthermore, under *City of Arlington, Texas v. FCC* (2013), "that rulemaking authority extends to the subsequently added portions of the Act." There, the Court upheld an FCC declaratory ruling based on Section 201(b) to interpret the term "reasonable period of time" in Section 332(c)(7)(B)(ii). Moreover, the FCC possesses power under Section 554(e) of the APA to "issue a declaratory order to terminate a controversy or remove uncertainty."

Formal rules may not be the most fitting vehicle for the FCC to offer interpretations of Section 230, given *Loper Bright*'s elimination of agency power to interpret statutes authoritatively. However, a Trump 2.0 FCC possesses the power to issue a policy statement, declaratory ruling, and/or published report offering its interpretation of Section 230's provisions, such as the meaning of "good faith," as a source of guidance for courts. At that point, it's up to the courts to consider the persuasiveness of the Commission's reasoning.

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