The 26 Words That Created the Internet
47 USC Section 230(c)(1)

by Gary Wolfstone

In 1996, Congress passed **Section 230** of the Communications Decency Act, a twenty-six-word law that immunized early internet companies from civil immunity arising from hosted, third-party content.

In Zeran v. America Online, Inc., the Fourth Circuit held that Section 230 immunized AOL from a defamation suit that sought to impose liability for third-party content despite the company knowing the content was defamatory. 129 F.3d 328, 333. Zeran's holding ultimately charted the course for the statute's interpretation for the better part of

the next three decades. Facebook also successfully invoked a Section 230 defense when it failed to remove Hamas pages after Hamas used the platform to encourage murder and other acts of terrorism in Israel. Force v. Facebook, Inc., 934 F.3d 33 (2nd Cir. 2019)

The political left blames Section 230 for rampant misinformation and extremist speech, whereas, the political right blames it for censorship of conservative viewpoints.

The legal protection of Section 230 was perhaps necessary in 1996 to allow fledging companies to innovate without fear of bankruptcy-inducing lawsuits and ultimately helped to create the internet as we know it. This civil immunity has contributed to and enabled the vast technological advances over the past three decades.

However, Section 230 is now the target of numerous legal challenges, with plaintiffs arguing that its protection has gone too far and courts signaling their agreement. At the same time, government efforts to regulate

large internet companies conflict with First Amendment rights.

Truth be told, the internet has changed since 1996, and Section 230 has been relied upon to protect companies in a wide variety of circumstances that its original drafters could not have imagined.

Two recent U.S. Supreme Court cases dealing with Section 230 problems (**Gonzales** and **Twitter**) are viewed as a healthy exercise of **judicial minimalism**. While many commentators have been quick to celebrate Twitter/Gonzales as a protection of free speech and as an effort to preserve the internet, it is also true that Twitter/Gonzales is a cavalier postponement of the Section 230 question. Clearly, Twitter/Gonzales demonstrates judicial self-restraint but also misses an opportunity to clarify a pressing area of internet law and issues of platform liability.

According to Harvard Law Professor, Cass Sunstein, **judicial minimalism** is the

principle that judges should say no more than necessary to justify an outcome. Sunstein discusses two axes: breadth and depth. Thus, minimalist judges should decide a case both narrowly and shallowly, meaning, respectively, that they should address only the facts of the case without theorizing about fundamental principles. Narrow decisions reduce the cost of adjudication and mistaken judgments. Shallow decisions allow political actors to resolve the deeper disputes.

Twitter and Gonzales illustrate this point: Twitter is narrow and Gonzales is shallow. These cases are prudent and cautious in declining to deal with Section 230 immunity. Indeed, Justice Kagan famously remarked, the Justices are "not like the nine greatest experts on the Internet." Transcripts of Oral Arguments at 45, Gonzales, 143 S. Ct. 1191 (No. 21-1333).

While society does benefit when we immunize the sins, errors and omissions on the internet, it is nonetheless true that government regulation would tame the chaos.

The modern internet is both a curse and a blessing. We need to reinforce the benefits that Section 230 confers upon society but also face the detrimental challenges.

Equally significant, we should not permit the high-tech wizards to employ busloads of expert witnesses trained in software coding to intimidate judges and juries with their sophisticated high tech vocabularies. Quite frankly, an expert witness in a trial is nothing more than a guy from out of town with a briefcase! High tech obfuscation has its limits in the temple of justice.

For example, Van Buren v. United States, 141 S.Ct. 1648 (2021) illustrates that judges and justices do not need degrees in computer science to undertake the task of **statutory construction**. In that case, the Court tackled the technical question of interpreting what it means to have "authorized access" to a computer under the Computer Fraud and Abuse Act of 1986, relying on nonscientific tool of textualism (See Van Buren, 141 S.Ct. at 1654-58). Authentication methods like multi

factor authentication were not used widely until the 2000's. Thus, statutory construction still carries the day, and the computer coding experts can cool their heels while the lawyers and judges do their job! Alogrithms are no substitute for the trial lawyer's wisdom and passion.

Attribution:

See JEFF KOSSEFF, THE 26 WORDS THAT CREATED THE INTERNET (2019)

Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997)

Force v. Facebook, Inc., 934 F.3d 33 (2nd Cir. 2019)

Twitter, Inc. v. Taamneh, 598 U.S. 471 (2023) (143 S. Ct. 1206)

Gonzales v. Google, LLC, 143 S. Ct. 1191 (2023)(per curiam), Gonzalez v. Google

LLC, 2 F.4th 871 (9th Cir. 2021), cert. granted, No. 21-1333, 2022 WL 4651229 (U.S. Oct. 3, 2022), sub nom. Twitter, Inc. v. Taamneh, No. 21-1496,2022 WL 4651263

Cass R. Sunstein, The Supreme Court, 1995 Term. Forward-Leaving Things Undecided, 110 HARV.L.REV. 4, 6 (1996).

Van Buren v. United States, 593 U.S. 374 (2021), 141 S.Ct. 1648 (2021)

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