



SECTION 230 PROTECTIONS AND BIG TECH

The 26 words that created the Internet state, “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.”
– Section 230 of the Communications Decency Act

Social media platforms have repeatedly canceled and censored political candidates and popular political commentators whose opinions reflect the views of millions of Americans. President Trump’s Twitter and Facebook ban in 2021 represent the most high-profile examples of such de-platforming.¹ Moreover, Twitter and Facebook repeatedly engaged in censorship by displaying so-called “fact-check” warnings and removing posts from users that challenged mainstream media narratives regarding the origin of COVID-19, Hunter Biden, the election, among other issues.² Facebook only stopped censoring certain COVID-related posts once the Biden Administration announced it would launch an investigation into the origins of COVID-19 in May 2021.³ Since then, the White House admitted to working with Facebook to censor posts it views as “problematic.”⁴ Similarly, under the new ownership of Elon Musk, some of Twitter’s previous censorship actions were uncovered, which detailed how Twitter worked with several federal law enforcement agencies to moderate information on its site.⁵

These actions have prompted calls for Congress to hold Big Tech accountable, with options ranging from critical reforms or investigations to an outright repeal of Section 230 of the Communications Decency Act (CDA) of 1996. While Section 230 shields online service providers from certain liability regarding content posted to their platforms by users, this protection is widely misunderstood.

BACKGROUND

Prior to Section 230, federal courts regularly recognized that distributors were not liable for content created by third parties unless they had reason to know the content was illegal.⁶ The 1995 *Stratton Oakmont Inc. v. Prodigy Services Co.* case strayed from this norm and set the precedent for Section 230 standards.⁷ In this case, the New York Supreme Court ruled the defendant, Prodigy, was a publisher and not a distributor after a third-party user posted defamatory content on its platform, even though Prodigy was unaware of the content. The New York Supreme Court found this circumstance was different from similar previous cases because the company moderated user content more than its competitors, which Prodigy engaged in to provide a family-friendly service in accordance with its company values.⁸

At the time, there was bipartisan support in Congress for content moderation, particularly regarding Prodigy’s decency-based moderation of objectionable user content. Following the outcome of the Prodigy case, the sponsors of Section 230 sought to ensure that platforms were not disincentivized from moderating content due to the fear of being held liable for all content on their platform.⁹ Beyond the Prodigy case, researchers have argued that courts had already narrowed liability for publishers and distributors during the years leading up to the passage of Section 230, and that Section 230 just accelerated that process and enshrined the precedent that already existed in common law trends.¹⁰

WHAT IS SECTION 230?

In 1996, Congress established “Good Samaritan” protections for internet platforms under Section 230. Within Section 230, there are two main liability provisions. The first provision, Section 230(c)(1), states that “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.”¹¹ This text is credited as “the 26 words that created the internet,” and represents the centerpiece of Section 230.¹² An example of this is if a user posted defamatory language on Facebook, Facebook would not be liable for it. Although this provision protects the platform when it refrains from censoring content, it does not protect the user from being sued. This protection is where the vast majority of litigation benefits fall for internet platforms and was the centerpiece of the bill.¹³

The second provision, Section(c)(2), states that internet platforms will not be held liable for removing or restricting material posted by a user if in “good faith” the provider finds the material “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”¹⁴ For example, this protection allows platforms to create technology allowing parents to filter content their children can view on the internet.¹⁵ Some critics argue this provision allows platforms to moderate too much content. Despite this provision’s intended protection for user content, courts have ruled in favor of platforms, as the Free Speech Clause of the First Amendment applies to government, not private companies.¹⁶ Furthermore, courts have ruled that the First Amendment protects content moderation by private companies, a right that extends to digital media and websites, as well as newspapers and broadcast media.¹⁷

OPTIONS FOR CONGRESSIONAL REFORM

The following list includes the major reforms to Section 230 that have been introduced in Congress:

- Repeal Section 230 entirely.
 - As exhibited in the Prodigy case, providers would have incentive to remove and censor even more if Section 230 were to be repealed, as they would be held liable for content posted by third-party users.
 - Repeal would increase litigation and compliance costs for all companies, not just the large, incumbent ones, who have far more resources to comply with the change. Therefore, this would disproportionately target smaller companies.
 - Even if Section 230 were to be repealed, many critics argue private companies may retain their ability to remove user content due to First Amendment protections.¹⁸
- Narrow Section 230’s liability shield, such as by defining or clarifying the terms “good faith,” “otherwise objectionable,” or “internet content provider” in the law.¹⁹
- Remove Section 230 liability protections for more types of content, such as speech that violates civil rights or cyberstalking laws.²⁰ In doing so, Congress should clearly define what speech violates such standards.
 - Courts have held online providers liable for third-party user content in circumstances when content involved inducing illegal content, breach of contract, failure to warn users about illegal activity, or failure to act in good faith.²¹ In such cases, the courts decided Section 230 protections did not apply.
 - In June 2021, the Texas Supreme Court ruled that Facebook was liable for sex trafficking recruitment on its platform under the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), a Section 230 carve out President Trump signed into law in 2018.²²
- Require increased transparency from platforms regarding their content moderation policies to keep Section 230 protections.²³
- Establish different conditional liability standards ranging from when a platform is not moderating in a politically neutral manner to when a platform is not removing or stopping illegal content or activity on its service after being notified of such content.²⁴

¹ Nick Clegg. In Response to Oversight Board, Trump Suspended for Two Years; Will Only Be Reinstated if Conditions Permit. Facebook. June 4, 2021. <https://about.fb.com/news/2021/06/facebook-response-to-oversight-board-recommendations-trump/>

² Taking Action Against People Who Repeatedly Share Misinformation. Facebook. May 2021. https://about.fb.com/news/2021/05/taking-action-against-people-who-repeatedly-share-misinformation/amp/?__twitter_impression=true and Facebook no longer treating ‘man-made’ Covid as a crackpot idea. Politico. May 26, 2021. <https://www.politico.com/news/2021/05/26/facebook-ban-covid-man-made-491053>

³ Statement by President Joe Biden on the Investigation into the Origins of COVID-19. The White House. May 26, 2021. <https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/26/statement-by-president-joe-biden-on-the-investigation-into-the-origins-of-covid-19/> and The Editorial Board. Facebook’s Lab Leak About-Face. Wall Street Journal. May 27, 2021.

<https://www.wsj.com/articles/facebooks-lab-leak-about-face-11622154198>

⁴ Joe Concha. Hypocritical Psaki leads chilling effort to flag ‘misinformation.’ The Hill. July 18, 2021. <https://thehill.com/opinion/white-house/563547-hypocritical-psaki-leads-chilling-effort-to-flag-misinformation>

⁵ <https://www.foxnews.com/politics/fbi-may-violated-first-amendment-twitter-moderation-requests-experts-warn>

⁶ The Pact Act and Section 230: U.S. Senate Committee on Commerce, Science, & Transportation and U.S. Senate Subcommittee on Communications, Technology, Innovation, & the Internet, 116th Cong. (2020) (Testimony of Jeff Kosseff) <https://www.commerce.senate.gov/services/files/444EFF87-84E3-46DB-B8DB-24DC9A424869>

⁷ Valerie C. Brannon. Liability for Content Hosts: An Overview of the Communication Decency Act’s Section 230. Congressional Research Service. June 6, 2019. <https://fas.org/sgp/crs/misc/LSB10306.pdf>

⁸ The Pact Act and Section 230: U.S. Senate Committee on Commerce, Science, & Transportation and U.S. Senate Subcommittee on Communications, Technology, Innovation, & the Internet, 116th Cong. (2020) (Testimony of Jeff Kosseff) <https://www.commerce.senate.gov/services/files/444EFF87-84E3-46DB-B8DB-24DC9A424869>

⁹ Valerie C. Brannon. Liability for Content Hosts: An Overview of the Communication Decency Act’s Section 230. Congressional Research Service. June 6, 2019. <https://fas.org/sgp/crs/misc/LSB10306.pdf>

¹⁰ Brent Skorup and Jennifer Huddleston. The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation. Mercatus Center at George Mason University. July 11, 2019. <https://www.mercatus.org/publications/regulation/erosion-publisher-liability-american-law-section-230-and-future-online> and Andrea O’Sullivan. Section 230 Isn’t an Aberration, it’s Distillation of Common Law Trends. Mercatus Center at George Mason University. July 16, 2019. <https://www.mercatus.org/bridge/commentary/section-230-isnt-aberration-its-distillation-common-law-trends>

¹¹ 47 U.S.C. § 230 (1996).

¹² Stephen Engelberg. Twenty-Six Words Created the Internet. What Will It Take to Save It? ProPublica. February 9, 2021. <https://www.propublica.org/article/nsu-section-230>

¹³ James Pethokoukis. In Defense of Section 230: My long read Q&A with Jeff Kosseff. AEIdeas. January 1, 2021. <https://www.aei.org/economics/in-defense-of-section-230-my-long-read-qa-with-jeff-kosseff/> and The Pact Act and Section 230: U.S. Senate Committee on Commerce, Science, & Transportation and U.S. Senate Subcommittee on Communications, Technology, Innovation, & the Internet, 116th Cong. (2020) (Testimony of Jeff Kosseff) <https://www.commerce.senate.gov/services/files/444EFF87-84E3-46DB-B8DB-24DC9A424869>

¹⁴ 47 U.S.C. § 230 (1996).

¹⁵ The Pact Act and Section 230: U.S. Senate Committee on Commerce, Science, & Transportation and U.S. Senate Subcommittee on Communications, Technology, Innovation, & the Internet, 116th Cong. (2020) (Testimony of Jeff Kosseff) <https://www.commerce.senate.gov/services/files/444EFF87-84E3-46DB-B8DB-24DC9A424869>

¹⁶ *Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30 (D.D.C. 2019) <https://www.courthousenews.com/wp-content/uploads/2020/05/freedom-google.pdf> and *Prager Univ. v. Google LLC*, 951 F.3d 991, 994 (9th Cir. 2020). <https://casetext.com/case/prager-univ-v-google-llc-1>

¹⁷ Berin Szóka and Ari Cohn. The Wall Street Journal Misreads Section 230 and The First Amendment. Lawfare. February 3, 2021. <https://www.lawfareblog.com/wall-street-journal-misreads-section-230-and-first-amendment>

¹⁸ James Pethokoukis. In Defense of Section 230: My long read Q&A with Jeff Kosseff. AEIdeas. January 1, 2021. <https://www.aei.org/economics/in-defense-of-section-230-my-long-read-qa-with-jeff-kosseff/>

¹⁹ Kevin McCarthy. Framework to Stop the Bias and Check Big Tech. June 27, 2021. <https://www.republicanleader.gov/framework-to-stop-the-bias-and-check-big-tech/> and Protect Speech Act, H.R. 8517, 116th Cong. (2020). <https://www.congress.gov/bill/116th-congress/house-bill/8517> and Stop the Censorship Act of 2020, H.R. 4027, 116th Cong. (2020) <https://www.congress.gov/bill/116th-congress/house-bill/4027>

²⁰ Stop Shielding Culpable Platforms Act, H.R. 2000, 117th Cong. (2021). <https://www.congress.gov/bill/117th-congress/house-bill/2000/text?q=%7B%22search%22%3A%5B%22jim+banks%22%5D%7D&r=4&s=5> and CASE-IT Act, H.R. 8719, 116th Cong. (2020). <https://www.congress.gov/bill/116th-congress/house-bill/8719> and PACT Act, S. 797, 117th Cong. (2021).

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²¹ Ashley Johnson and Daniel Castro. The Exceptions to Section 230: How Have the Courts Interpreted Section 230? Information Technology & Innovation Foundation. February 22, 2021. <https://itif.org/publications/2021/02/22/exceptions-section-230-how-have-courts-interpreted->

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²² Adi Robertson. Internet Sex Trafficking Law FOSTA-SESTA is almost never used, says government report. The Verge. June 24, 2021. <https://www.theverge.com/2021/6/24/22546984/fosta-sesta-section-230-carveout-gao-report-prosecutions> and Sex Trafficking Online

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²³ Kevin McCarthy. Framework to Stop the Bias and Check Big Tech. June 27, 2021. <https://www.republicanleader.gov/framework-to-stop-the-bias-and-check-big-tech/> and PACT Act, S. 797, 117th Cong. (2021). <https://www.congress.gov/bill/117th-congress/senate-bill/797/text>

²⁴ Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019). <https://www.congress.gov/bill/116th-congress/senate-bill/1914> and Pact Act, S. 797, 117th Cong. (2021). <https://www.congress.gov/bill/117th-congress/senate-bill/797?q=%7B%22search%22%3A%22pact+act%22%7D&s=2&r=4> and S. 2448, 117th Cong. (2021).

<https://www.congress.gov/bill/117th-congress/senate-bill/2448?s=1&r=1>