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**BEFORE THE
SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY, INNOVATION, & THE
INTERNET
COMMITTEE ON COMMERCE, SCIENCE, & TRANSPORTATION
UNITED STATES SENATE**

**THE PACT ACT AND SECTION 230: THE IMPACT OF THE LAW THAT HELPED
CREATE THE INTERNET AND AN EXAMINATION OF PROPOSED REFORMS FOR
TODAY'S ONLINE WORLD**

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Chairman Thune, Ranking Member Schatz, and Members of the Subcommittee, thank you for providing me with the opportunity to testify about the history and purpose of Section 230 of the Communications Decency Act of 1996.

I am an assistant professor in the Cyber Science Department of the United States Naval Academy. My testimony today reflects only my personal views, and does not represent the Naval Academy, Department of Navy, Department of Defense, or any other party.

It is difficult to overstate the importance of the subject of this hearing. Last year, I published a history of Section 230, titled *The Twenty-Six Words That Created the Internet*. The Internet's protocols and technology were developed long before 1996. But Section 230 is responsible, more than any other law, for the open Internet that Americans know, love, and hate. By shielding online platforms from liability for a great deal of third-party content, Section 230 has paved the way for Yelp, Wikipedia, Facebook, Twitter, YouTube, and so many other online services. These have primarily based their business models on content created by individuals rather than corporations. Section 230 also has protected a wide range of companies of all sizes that operate websites with user comments.

When I began writing a book about Section 230 in 2016, few people outside of technology law and policy circles knew much about what the law does and why Congress passed it in 1996. Much has changed in those four years, as large platforms are under unprecedented scrutiny for their handling of user-generated content. Suddenly, Section 230 has moved from obscure legal discussions to the headlines of major media organizations. Many are calling for you to repeal or amend Section 230. Indeed, there are many legislative proposals, including a thoughtful one from the Chairman and Ranking Member of this subcommittee.

I am not here today to advocate for or against any particular legislation. Rather, my goal is to help expand the public understanding of Section 230, first by providing an overview of its history and purpose, and then by suggesting principles that could guide Congress as it considers Section 230's future.

I. The History of Section 230

To understand why we have Section 230 and what it does, we need to look at how platform liability worked before it was passed. This requires an examination of the liability standards for bookstores and other distributors of content produced by third parties.

The foundations for distributor liability standards come from *Smith v. California*,¹ a 1959 Supreme Court opinion. In that case, the Court reversed the conviction of a Los Angeles bookstore owner whose store sold an obscene book. The ordinance under which he was convicted imposed criminal liability on bookstore operators regardless of their scienter or state of

¹ *Smith v. California*, 361 U.S. 147 (1959).

mind; in other words, the ordinance was one of strict liability on any distributor of obscene content, regardless of their intention or even awareness. Writing for the majority, Justice Brennan recognized that obscenity is not protected by the First Amendment, but he concluded that imposing strict liability on booksellers nonetheless *did* violate the First Amendment because such a rule would chill non-obscene speech.

“By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter,” Justice Brennan wrote. “For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.”²

The Court in *Smith* refrained from articulating the precise mental state necessary to impose liability on distributors of third-party content, only saying that strict liability is unacceptable.³ The Supreme Court would provide a bit more guidance. For instance, in 1968, the Court upheld a New York law that imposed criminal liability on a newsstand that sold pornographic magazines to minors.⁴ The statute applied to stores that have “general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry” of both the character and content of material that is “reasonably susceptible of examination by the defendant” as well as the minor’s age.⁵ Writing for the majority, Brennan concluded that this level of awareness satisfies the concerns that he articulated in *Smith*, though he again refrained from setting a precise minimum standard for all distributor cases.⁶

Following *Smith v. California* – but prior to the passage of Section 230 -- lower courts generally adopted a rule, rooted in the common law and the First Amendment, that distributors cannot be liable for content created by others unless the distributors knew or had reason to know of the illegal content. This rule applies not only to criminal obscenity cases, but also to civil claims such as defamation.⁷

This common law rule was first applied to an online service in 1991, in a defamation action against CompuServe, one of the earliest national online dial-up services. The suit arose from statements in an online newsletter that CompuServe distributed. The district court dismissed the lawsuit, concluding that CompuServe was “in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications.”⁸ In other words, CompuServe was a distributor, and

² *Id.* at 153.

³ *Id.* at 154-55.

⁴ *Ginsberg v. New York*, 390 U.S. 629 (1968).

⁵ *Id.* at 646.

⁶ *Id.* at 644-45.

⁷ *See, e.g., Dworkin v. Hustler Magazine*, 611 F. Supp. 781 (D. Wyo. 1985); *Osmond v. Ewap*, 153 Cal. App. 3d 842 (Cal. Ct. App. 1984).

⁸ *Cubby v. CompuServe*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

therefore deserved the same liability standards to which newsstands were held.⁹ Because the plaintiff had not demonstrated that it knew or had reason to know of the alleged libel in the newsletter, the court dismissed the case.

CompuServe's main competitor at the time was Prodigy, which sought to distinguish itself from CompuServe by offering more family-friendly services. Prodigy employed contract moderators and implemented detailed user conduct rules. When Prodigy was sued due to comments made on a Prodigy financial bulletin board, the company attempted to claim the same distributor liability standard to which CompuServe was held. In May 1995, a New York state trial court judge rejected Prodigy's attempt, finding that Prodigy is not a distributor, but rather a publisher that is liable regardless of whether it knew or had reason to know of the allegedly defamatory content. Even though, by 1995, Prodigy had loosened its user content policies, the Court focused on the fact that Prodigy had at one point exercised substantial control over user content. "It is Prodigy's own policies, technology and staffing decisions which have altered the scenario and mandated the finding that it is a publisher," the judge wrote. "Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice."¹⁰

The *Stratton Oakmont v. Prodigy* case received significant media attention. Although it did not create binding precedent, it strongly suggested that online services could reduce their exposure to liability by taking a hands-off approach to user content. If, like Prodigy, a platform exercised significant control over user content, a court might conclude that it does not receive the same "distributor" liability standards as a bookstore or newsstand. I believe the ruling was flawed because it ignored the fact that even the more hands-off CompuServe could choose not to carry a publication in its electronic version of a newsstand. And even if a platform received the liability standard of a "distributor," it still could face liability if it knew of, or had reason to know of, illegal content, creating another disincentive to moderation.

When Reps. Chris Cox and Ron Wyden learned about the *Prodigy* case, they agreed that it made little sense. Why subject an online service to more liability simply because it took steps to moderate objectionable content? This disincentive was particularly concerning as schools and homes increasingly connected computers to the Internet. If the legal system discouraged online services from moderation, the result could be the exposure of children to pornography and other objectionable material. A bill in the Senate, the Communications Decency Act of 1995, sought to address this problem by imposing criminal liability for the transmission of indecent content.

⁹ *Id.* Crucially, the court acknowledged that even a distributor such as CompuServe could have some control over the content that it distributed. *See id.* ("While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe.").

¹⁰ *Stratton Oakmont v. Prodigy Service Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. May 24, 1995).

The Senate attached this decency proposal to its massive overhaul of U.S. telecommunications law.

Cox and Wyden believed that the online services – which are accountable to their users – are better positioned than the government to set user content policies. They saw the potential for the Internet to be an engine for job growth. They did not want to stifle this burgeoning new technology with regulation and litigation. Nor did they want to impose a duty of pre-screening user content before it was posted.

On June 30, 1995, Cox and Wyden introduced the Internet Freedom and Family Empowerment Act, most of which would later become Section 230. To address the prospect of government regulation, the bill initially stated that the Federal Communications Commission does not have authority “with respect to economic or content regulation of the Internet or other interactive computer services.”¹¹

The centerpiece of the bill, however, focused on the liability of online platforms for user content, and the need to eliminate any disincentive to moderation. The provision that contains what I believe are the 26 words that created the Internet states: “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.”¹² The bill also prevents interactive computer service providers and users from being liable for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected”¹³ or providing the technical means to restrict access.¹⁴

Cox and Wyden included exceptions for the enforcement of federal criminal law,¹⁵ intellectual property law,¹⁶ and federal and state electronic communications privacy laws.¹⁷ The bill was partly based on a theory of user empowerment: the belief that users, with tools provided by their platforms, should determine what content should be available to them and their children.

To clarify their intentions, Cox and Wyden included findings at the start of their bill. Among their findings: “These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.”¹⁸

Cox and Wyden also wrote that the “Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development,

¹¹ This provision would not remain in Section 230 as signed into law.

¹² 47 U.S.C. § 230(c)(1). As initially introduced, this provision actually contained 25 words because it stated: “No provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider.”

¹³ 47 U.S.C. § 230(c)(2)(A).

¹⁴ 47 U.S.C. § 230(c)(2)(B).

¹⁵ 47 U.S.C. § 230(e)(1).

¹⁶ 47 U.S.C. § 230(e)(2).

¹⁷ 47 U.S.C. § 230(e)(4).

¹⁸ 47 U.S.C. § 230(a)(2).

and myriad avenues for intellectual activity.”¹⁹ The Internet has “flourished, to the benefit of all Americans” they wrote, “with a minimum of government regulation.”²⁰

They also included statements of policy, including “to promote the continued development of the Internet and other interactive computer services and other interactive media”²¹ and “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.”²² They also wrote that it is U.S. policy “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”²³

On Aug. 4, 1995, the House debated whether to add the Cox-Wyden proposal to its version of what would become the 1996 telecommunications overhaul. The House members almost uniformly welcomed the proposal as an alternative to the Senate’s indecency proposal, which many viewed as unconstitutional. “Really it is like saying that the mailman is going to be liable when he delivers a plain brown envelope for what is inside it,” Rep. Zoe Lofgren said of the Senate proposal. “It will not work.”²⁴

Rep. Robert Goodlatte spoke of the need to fix the perverse incentive created by the Prodigy opinion. “The Cox-Wyden amendment removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut from their systems,” Goodlatte said. “It also encourages the online services industry to develop new technology, such as blocking software, to empower parents to monitor and control the information their kids can access.”²⁵

Cox spoke about the need to avoid federal regulation of the Internet. The bill, he said, “will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government.”²⁶

The House voted 420-4 to attach Cox and Wyden’s amendment to its version of the Telecommunications Act. As a compromise, the conference committee included both the Senate’s Communications Decency Act and the House’s amendment in the same Title of the telecommunications law. Hence, the Cox-Wyden provision became known as “Section 230 of the Communications Decency Act,” even though it had not been introduced under with that title. Section 230 appeared largely as Cox and Wyden proposed it, though it no longer contained the provision that banned FCC regulation of Internet content. The final version also added an

¹⁹ 47 U.S.C. § 230(a)(3).

²⁰ 47 U.S.C. § 230(a)(4).

²¹ 47 U.S.C. § 230(b)(1).

²² 47 U.S.C. § 230(b)(3).

²³ 47 U.S.C. § 230(b)(2).

²⁴ 141 Cong. Rec. H8471 (1995).

²⁵ 141 Cong. Rec. H8471-72 (1995).

²⁶ 141 Cong. Rec. H8470 (1995).

explicit statement that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”²⁷

From the relatively sparse legislative history, it is clear that Section 230’s drafters had two primary goals. First, they wanted to ensure that the nascent commercial Internet was unburdened from regulation and litigation. Second, they wanted to encourage online providers to moderate as they (and their users) saw fit. In the short discussion of Section 230 in the conference report for the Telecommunications Act, the conferees wrote that they intended to overrule the *Stratton Oakmont v. Prodigy* decision, and that “such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.”²⁸

On the day that President Clinton signed the Telecommunications Act into law, civil liberties groups challenged the Senate’s indecency provisions, and the next year the Supreme Court would strike them down as unconstitutional.²⁹ The Supreme Court’s ruling did not affect Section 230. In fact, the civil liberties groups that challenged the Communications Decency Act took care to not include Section 230 in their litigation, recognizing the need to preserve Section 230.

Section 230 received little attention in the months after it was passed. This was in part because it was unclear how broadly courts would interpret the 26 words. It was possible to read Section 230 as merely conferring distributor liability standards to all interactive computer service providers; in other words, a platform still could be liable if it knew or had reason to know of the illegal user content. A second, broader reading, would bar the platform from having any liability for content provided entirely by third parties, unless an exception applied.

This uncertainty ended on Nov. 12, 1997, when the United States Court of Appeals for the Fourth Circuit adopted the latter, broad reading of Section 230 in *Zeran v. America Online*. Distributor liability, Judge J. Harvie Wilkinson wrote, “is merely a subset, or a species, of publisher liability.”³⁰ Thus, Wilkinson concluded, when Section 230 states that an interactive computer service provider shall not be “treated as the publisher or speaker” of information provided by a third party, the statute also bars distributor liability. “Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum,” Judge Wilkinson wrote.³¹

Wilkinson recognized that subjecting an online service such as America Online to notice-based liability likely would cause these services to remove user content upon notice, even if the content was not defamatory. “Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information’s defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing

²⁷ 47 U.S.C. § 230(e)(3).

²⁸ H. Rep. 104-458 at 194.

²⁹ *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

³⁰ *Zeran v. America Online*, 129 F.3d 327, 332 (4th Cir. 1997).

³¹ *Id.* at 330.

the continued publication of that information,” he wrote. “Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.”³²

Because Judge Wilkinson was the first federal appellate judge to interpret Section 230, judges nationwide adopted his ruling in *Zeran v. America Online*, and the broad reading of Section 230 became the law of the land. Cox and Wyden – the authors of Section 230 – told me as I was researching my book that they agreed with Wilkinson’s interpretation. But it is possible to see how another judge might have concluded that Section 230’s scope is more limited.

The *Zeran* reading of Section 230 eliminates the *Stratton Oakmont v. Prodigy* problem by preventing platforms from becoming liable for user content they are unaware of simply because they have moderated some other content. But it goes much further than that; it also allows platforms to decide whether to keep up or take down content that they *are* aware of without facing potential liability for that content. And that is how Section 230 has created the legal framework for the Internet that we know today.

Imagine how a social media site might behave had Judge Wilkinson determined that Section 230 only means that all platforms be held to a distributor liability standard. The site could face liability if it knew or had reason to know of defamatory or otherwise actionable user content. Such a liability regime might discourage the social media site from actively moderating user content, as it might face liability for content that it learned about but failed to remove. A social media site with millions or billions of users is in no position to investigate every user post and determine whether it is defamatory or otherwise illegal. Section 230, as Judge Wilkinson interpreted it, removes that disincentive to moderation.

Thanks to Judge Wilkinson’s interpretation, Section 230 has protected a wide range of platforms from many different types of claims. As I detail in *The Twenty-Six Words That Created the Internet*, this sweeping protection has been vital for consumer review sites,³³ Wikipedia,³⁴ social media,³⁵ search engines,³⁶ and countless other sites that have built their business models around user-generated content.

Yet Section 230 also has shielded platforms in some cases in which the plaintiffs have suffered serious harms. Among the lawsuits in which courts held that Section 230 applies is one that involved a dating app that was used to impersonate a man. The advertisements, posted by his ex-boyfriend, claimed that the man wanted to engage in rape fantasies or role play. This caused about 1,100 men to respond to the ads, receiving the man’s home and workplace locations via the app’s geolocation function. Many men visited his home and work, demanding sex and drugs. The man said he contacted the app about 100 times, and only received an automated response.³⁷

³² *Id.* at 333.

³³ *Kimzey v. Yelp! Inc.*, 836 F. 3d 1263 (9th Cir. 2016)

³⁴ *Bauer v. Glatzer*, Docket No. L-1169-07 (Superior Court of N.J., Monmouth County, 2008)

³⁵ *Doe v. MySpace*, 528 F.3d 413 (5th Cir. 2008).

³⁶ *Fakhrian v. Google*, No. B260705 (Cal. Ct. App. April 25, 2016)

³⁷ *Herrick v. Grindr*, 306 F. Supp. 3d 579, 585 (S.D.N.Y. 2018).

He sued the app under a number of theories of liability, including negligence, infliction of emotional distress, products liability, and negligent design, but the district court dismissed the claims on Section 230 grounds, and the Second Circuit affirmed the dismissal.³⁸ The district court also refused to extend an earlier state court temporary restraining order that required the app to “immediately disable” profiles that impersonated the plaintiff. Section 230 has protected a gossip website that encourages users to submit “the dirt” and selects which submissions to post and highlight.³⁹ And it has protected social media platforms used by terrorists, even when the platform’s algorithms helped make that user content visible.⁴⁰ As long as the website operator has not taken part in the creation of the user content and an exception does not apply, Section 230 will protect the website from liability arising from the display and moderation of content created by others. Section 230 does not block a plaintiff from suing the person who created the harmful content, but there are a number of reasons why that might not be practical, including the inability to track down the poster and fear of retaliation.

In short, Section 230 has fostered an Internet in the United States that faces less regulatory and litigation burden than in other countries, including other western democracies. This open Internet has created many social benefits, but others have suffered real and serious harms. For a broad perspective about the benefits and costs of the Internet as governed by Section 230, I encourage you to read *Hate Crimes in Cyberspace* by Danielle Citron, *The Cult of the Constitution* by Mary Anne Franks, *The Splinters of Our Discontent* by Mike Godwin, and *Nobody’s Victim* by Carrie Goldberg.

II. Principles for Evaluating the Future of Section 230

Over the past year, Section 230 has been in the news more than any other time in its nearly 25-year history. Often, the news is not positive. Some critics argue that platforms have not adequately moderated harmful content and have failed to achieve Congress’s goal of establishing content moderation systems that meet the needs of their users. Other critics argue that some existing moderation policies and procedures result in blocking certain political viewpoints.

Both criticisms have driven a number of proposals to change Section 230. I am not here today to endorse or propose any particular change to Section 230. Rather, I hope to set forth some principles to guide your evaluation of Section 230’s future. I derive these principles from my research into Section 230’s history, and the impacts of courts’ interpretation of Section 230 over nearly a quarter century.

A. *Not All Problems on the Internet Are Section 230 Problems*

I recognize that this principle may sound odd coming from a professor who asserts that Section 230 created the Internet. I maintain that Section 230 provided the legal framework that allowed platforms to structure their business models around user-generated content. But that does not mean that every flaw in the current system is attributable to Section 230. There is a lot to love

³⁸ *Herrick v. Grindr*, No. 18-396 (2d Cir. Mar. 27, 2019) (not precedential).

³⁹ *Jones v. Dirty World Entertainment Recordings*, 755 F.3d 398 (6th Cir. 2014).

⁴⁰ *Force v. Facebook*, 934 F.3d 53 (2d Cir. 2019).

about the Internet, but there also is a lot not to love about the Internet. Some content is vile. Some ruins lives. Some does lasting damage to society and our institutions. But before placing all of the blame for this content on Section 230, it is important to first examine whether a cause of action exists for that harm. If a cause of action does not exist, then there is nothing for Section 230 to block.

For instance, a big headline on the cover of the *New York Times* business section last August proclaimed: “Why Hate Speech on the Internet is a Never-Ending Problem.” Below the headline were the key 26 words from Section 230, followed by: “Because this law shields it.” The Times later appended the following dramatic correction to the story: “An earlier version of this article incorrectly described the law that protects hate speech on the internet. The First Amendment, not Section 230 of the Communications Decency Act, protects it.” Despite the correction, later that month, a federal judge cited this article while describing the debate over “Section 230’s grant of immunity for speech-based harms such as hate speech or libel.”⁴¹ To be sure, online hate speech is a serious problem, but the reality is that the First Amendment protects hate speech, regardless of Section 230. Of course, the Supreme Court’s First Amendment jurisprudence could evolve to treat hate speech differently – and some believe it should. And even now, if that hate speech also is illegal for some other reason (for example, because it is a true threat or defamatory), then it could fall outside the scope of First Amendment protection. But hate speech, standing alone, is constitutionally protected. Changing Section 230 would not change platforms’ legal obligations in this area.

Many defamation claims that courts dismiss on Section 230 grounds would also, if fully litigated, not survive common law and First Amendment protections. These include the requirement for falsity, the opinion privilege, and the actual malice bar for public officials and figures. Because Section 230 provides strong procedural protections, defamation lawsuits against platforms often are decided in the early stages, eliminating the need for the parties to engage in extensive discovery and for courts to decide fact-intensive questions about defamation law. Additionally, as seen in the 1950s bookseller cases, the First Amendment and common law provide some protection to distributors of content created by others. As I describe in the next subsection, there is uncertainty as to how extensive that protection is.

In addition to hate speech concerns, large companies – including big technology platforms – have been rightly criticized for their privacy and data security practices. These are serious problems that I hope Congress will address with comprehensive and effective laws that set tough national standards for privacy and cybersecurity. Section 230, however, is not at the root of these problems. Section 230 only protects platforms from liability for third-party content; it does not affect their liability after a data breach or generally shield their data collection practices.

Nor does Section 230 have any link to copyright infringement. From the beginning, Section 230 has had an exception for intellectual property law. Platforms and content creators have long been engaged in a spirited debate over the notice-and-takedown system established by an entirely different law, the Digital Millennium Copyright Act. Unfortunately, recent media reports have

⁴¹ *Papataros v. Amazon.com*, Civ. No. 17-9836 (D. N.J. Aug. 26, 2019).

conflated Section 230 and the DMCA. Likewise, Section 230 always has had an exception for the enforcement of federal criminal law, so user content that constitutes a federal crime is not covered by the statute's protections.

B. We Don't Know How Platforms Would React to a Repeal or Significant Contraction of Section 230

Although there are not any legislative proposals to repeal Section 230, repeal has been publicly suggested in the media, and it is important to examine what the Internet might look like without Section 230. Moreover, eliminating Section 230 protections for a particular type of content might have a similar impact on some platforms.

Because Section 230 has been on the books since 1996, it is difficult to know with certainty what the Internet would look like without it. This uncertainty stems from the lack of caselaw that extrapolates common law liability standards to modern online platforms. We can only look at cases involving bookstores, and the few non-binding opinions involving Prodigy and CompuServe that were decided before Section 230's passage.

If courts were to adopt the *Stratton Oakmont v. Prodigy* line of thinking, platforms would fear being dubbed "publishers," who are subject to the same liability for user content as the authors, rather than "distributors," who are liable only if they knew or had reason to know of the illegal content. I believe that the judge in this case got the law wrong, drawing an artificial line between a publisher that exercises "editorial control" and distributor, when all distributors exercise some degree of editorial control (for instance, a bookstore could refuse to sell a certain book). Still, there is no guarantee that courts would disagree with the *Stratton Oakmont* decision. If it were widely adopted, this reasoning likely would discourage platforms from engaging in any moderation, lest they be dubbed common-law "publishers."

If courts were to reject the *Stratton Oakmont v. Prodigy* holding (as I hope they would), online platforms could face liability if they knew or had reason to know of the illegal content. This might result in a system in which anyone could complain to a platform about user content, regardless of the merit of their complaints, at which point a platform that did not take down the content would risk being forced to defend it in court. Platforms also might avoid moderation, fearing that once they encounter potentially defamatory or otherwise actionable content, they would become liable for it. Complicating matters, it is unclear when a platform would have a "reason to know" of illegal content, as there is very little caselaw that articulates when a distributor has "reason to know." For instance, this might expose a platform to liability if it generally knew that users posted defamatory material, but had not seen the particular post in question.

In the landmark *Zeran* case, Judge Wilkinson warned that it was "impossible" to expect platforms to screen user content. "Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted," he wrote. "Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive

effect.”⁴² Indeed, it is conceivable that some platforms might reduce or entirely eliminate user content in a world without Section 230’s protections.

A change to Section 230 – even short of full repeal – may have significant impacts on platforms’ operations. For instance, when Congress amended Section 230 in 2018 to create an exception for certain civil actions and state criminal cases involving sex trafficking, Craigslist removed the personals section it had hosted for years. “Any tool or service can be misused,” Craigslist wrote. “We can’t take such risk without jeopardizing all our other services, so we have regretfully taken craigslist personals offline.”

C. Section 230 is Designed to Encourage – Not Discourage – Moderation of User Content

In my decade writing about Section 230 and practicing Internet law, I have encountered far too many lawyers who advise website operators that if they moderate user content, they will lose their Section 230 protections. I fear that this has caused websites to take a hands-off approach to user content that they otherwise would have blocked.

This advice is simply incorrect. Section 230’s protections do not disappear merely because a platform has engaged in content moderation. As Section 230’s legislative history makes clear, one of the main purposes of Section 230 was to encourage online service providers to moderate. Indeed, the title of the most important section of the statute is “Protection for ‘Good Samaritan’ Blocking and Screening of Offensive Material.”

To be sure, Section 230 does not *require* moderation. Rather, the law leaves it up to the providers to determine what moderation – and moderation tools – to provide to their users. Section 230 is very much a market-based law, based on the assumption that user demands will dictate platforms’ moderation approaches.

Of course, Congress can and should determine whether the market-based system continues to meet users’ expectations in 2020, when a handful of platforms have market capitalizations that are greater than those of automakers. We are in a very different world than 1996, when 40 million people worldwide had Internet access, and being suspended from Prodigy was unlikely to have significant consequences to one’s livelihood. Suspension from a large social media platform in 2020, on the other hand, has a much greater impact.

In the debate over “neutrality” of platforms, I see a few different questions. First: Does Section 230 currently require neutrality? Second: Should Section 230 require neutrality?

The answer to the first question, as explained above, is “no.” The answer to the second question is up to you, as Congress is free to amend Section 230 as it sees fit. If Congress were to attempt to impose a neutrality requirement, I would ask what such a requirement would look like, and how it would be implemented. Moderation often requires difficult judgments about content being transmitted at a furious pace. Could a platform block *any* content while still remaining “neutral?” Would a “neutral” Internet full of legal pornography, threats, bullying, or encouragement of anorexia be an improvement? Even if this neutrality requirement were limited

⁴² *Zeran v. America Online*, 129 F.3d 327, 331 (4th Cir. 1997).

to political speech, some political debates can border on hate speech. If a platform were to moderate a political discussion for violating its hate speech policies, would that violate a neutrality requirement? These questions are tough to answer in the abstract, and even more difficult when presented with the torrent of choices that platforms must make every minute.

D. The Section 230 Debate Needs More Transparency

I am thrilled to see Section 230 suddenly receiving much-deserved attention, as it is one of the most important technology-related laws in the United States. Unfortunately, some of this attention has lacked precision and accuracy. This is due to a number of problems, including the nuances of Internet liability law and what I imagine is a substantial amount of lobbying efforts on all sides.

But the debate also is muddled because the general public has little insight into the possibilities – and challenges – of content moderation at scale. Until recently, many large tech companies were not terribly transparent about their policies and practices, though the recent Section 230 debates have had the positive impact of shining a bit of sunlight on content moderation. We need far more. Platforms should continue to provide more information about how and why they moderate content, and the possibilities and limits of human-based and automated moderation. If platforms are not transparent, Congress should consider whether to require or provide incentives for better transparency.

Before we can develop new policies regarding intermediary liability and content moderation, we need a more robust factual record. Section 230 is too important to overhaul in the dark. Last October, I suggested the creation of a congressionally chartered commission to gather facts and recommend a path forward.⁴³ The commission would have a wide range of stakeholders, including civil liberties groups, victims' advocates, law enforcement, and technology companies and their counsel. The Cyberspace Solarium Commission provides a good model for a bipartisan group of experts who gather facts and develop well-reasoned proposals.

A commission also could help to better identify the goals of Section 230 reform and sort through the many current calls for reform, some of which conflict with one another. The criticisms of platforms vary widely, with some arguing that platforms do not moderate enough, and others arguing that they moderate too much, at least for certain political viewpoints. It is difficult to reconcile these criticisms, let alone modify Section 230 in a manner that satisfies of them. Before we identify a solution, we must agree on a problem.

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I commend the Chairman and Ranking Member for the thoughtful solutions that you propose in the Platform Accountability and Consumer Transparency Act. The legislation addresses the need for more transparency in content moderation policies and procedures, and begins the process of identifying the most tailored and reasonable rules for providing that transparency.

⁴³ Jeff Kosseff, *Understand the Internet's Most Important Law Before Changing It*, REGULATORY REVIEW (Oct. 10, 2019).

The bill also provides people with a mechanism to take down material that has been adjudicated to be defamatory or illegal under federal criminal or civil law. In my experience, plaintiffs who are the victims of the most harmful defamation campaigns are most interested in having the material removed rather than recovering damages, and this legislation provides them with an avenue. We must ensure that a take-down provision is not abused – for example, via the falsification of court orders – but it also is important to allow for the removal of material that is adjudicated to be illegal.

As I routinely remind technology companies, Section 230 is not set in stone, and can be repealed or significantly amended as easily as it was passed. Congress may determine that it is in the public interest to curtail some or all of Section 230's protections. I urge you to make any such decisions with great care.

You likely will hear from many sides of the Section 230 debate about the consequences of your action or inaction. They likely will inform you of these consequences with great certainty. As I have outlined today, there are many reasons to be uncertain about the precise impacts of changes to Section 230. The best that we can do is identify the problems, gather as much information as possible, and address these problems in a focused and tailored manner.

Our online ecosystem relies on these 26 words. As I write in my book, our modern Internet is a house that is “built on the foundation of Section 230.” It is difficult to imagine how some of Silicon Valley's largest companies could have emerged – at least in their current forms -- without Section 230. The challenge for all of us is to determine how we want the Internet to look over the next 25 years and what it takes to get it.