

FCC cites Title II in defense of helping Trump's attack on social media



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The Federal Communications Commission's top lawyer today explained the FCC's theory of why it can grant President Donald Trump's request for a new interpretation of a law that provides legal protection to social media platforms like Twitter and Facebook.

Critics of FCC Chairman Ajit Pai's plan from both the left and right say the FCC has no authority to reinterpret Section 230 of the Communications Decency Act, which gives legal immunity to online platforms that block or modify content posted by

users. FCC General Counsel Thomas Johnson said those critics are wrong in a blog post published on the FCC website today.

Johnson noted that the Communications Decency Act was passed by Congress as part of the Telecommunications Act of 1996, which was an update to the Communications Act of 1934 that established the FCC and provided it with regulatory authority. Johnson also pointed to Section 201(b) of the Communications Act, which gave the FCC power to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”

Johnson then explained why he believes this means the FCC can reinterpret Section 230:

The Supreme Court has twice considered whether the FCC’s general rulemaking authority under Section 201(b), adopted in 1938, extends to the 1996 amendments to the Act. Both times, the Court held that it does. Writing for the Court in Iowa Utilities Board, and employing his trademark textualist method, Justice Scalia wrote that this provision “means what it says: The FCC has rulemaking authority to carry out the ‘provisions of [the 1934] Act.’” The Court explained that “the clear fact that the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence part of, [the 1934] Act” shows that Congress intended the Commission to have rulemaking authority over all its provisions. Likewise, in the later City of Arlington case, the Court confirmed that the Commission’s rulemaking authority “[o]f course... extends to the subsequently added portions of the Act.” From these authorities, a simple conclusion follows: Because Section 230 is among the “subsequently added portions of the Act,” it is subject to the FCC’s Section 201(b) rulemaking authority.

FCC still wrong, critics say

One problem with citing Section 201—which is part of the Communications Act’s well-known Title II—is that the section applies to common carriers. The Pai FCC in 2017 justified its repeal of net neutrality rules by claiming that the commission has no authority to regulate broadband providers as common carriers under Title II—even though courts had specifically ruled the FCC does have such authority. Now, the FCC is citing Title II to claim some authority over social media platforms, which have not been classified as common carriers.

But John Bergmayer, legal director at consumer-advocacy group Public Knowledge, disagrees. Today he told Ars, “201 is concerned with common carriers, not information services. Of course the 1996 Amendments are part of the [Communications] Act. But 201(a) and (b) are both directly addressed to the duties of common carriers.”

Johnson argued in his blog post that “the general grant of rulemaking authority at the end of Section 201(b) contains no reference to common carriers; it simply empowers the Commission to make rules that are ‘necessary in the public interest to carry out the provisions of this Act,’ without qualification.”

However, common-carrier regulation is the topic of all of the text in the single-paragraph Section 201(b) leading up to the statement cited by Johnson. Here’s what the statute looks like on the FCC website:

TITLE II--COMMON CARRIERS

PART I--COMMON CARRIER REGULATION

SEC. 201. [47 U.S.C. 201] SERVICE AND CHARGES.

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service

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Communications Act of 1934

upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: *Provided*, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commissioner may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

Enlarge / Section 201 of the Communications Act.

Still, Johnson provided another citation to back the FCC's case on the point. The US Court of Appeals for the 6th Circuit in 2008 "held that Section 201(b) gave the Commission

authority to interpret ambiguous provisions in the Cable Television Consumer Protection and Competition Act of 1992,” Johnson wrote. “Notably, that Act by its terms applies to cable operators, not common carriers. The Court reasoned... that it was sufficient that the 1992 law amended the Communications Act and incorporated the relevant provisions therein. The same reasoning applies to Section 230.”

FCC claims law is ambiguous

Even if the FCC does have authority to interpret Section 230, Bergmayer argued that “there is nothing for the agency to do here. The statute is self-executing and interpreted by the courts, and the FCC’s ‘help’ has never been needed before.”

Section 230 says that providers and users of interactive computer services shall not be held 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.”

Johnson argued in his blog post that “Section 230 contains ambiguous terms” such as “voluntarily taken in good faith” and “otherwise objectionable.” He added that the FCC “has the authority to clarify these ambiguities in Section 230.” But Public Knowledge wrote in comments to the FCC last month that the terms “otherwise objectionable” and “good faith” are not ambiguous in the context of the statute.

“‘Otherwise objectionable’ is a subjective term, not an ambiguous one,” Public Knowledge wrote. “The fact that one platform might find content objectionable, and others might not, does not mean that the FCC (or even federal courts) can substitute their own judgment for the editorial, content moderation decisions of platforms. In fact, different

platforms having different views as to what is and is not 'objectionable' is exactly what is intended by Section 230, which seeks to foster 'a true diversity of political discourse' on the Internet as a whole across a multiplicity of forums... It is a fundamental error to confuse a subjective standard with an 'ambiguous' one.

"Good faith" in this context "is not an ambiguous technical term, either—it is a common law term of art that state and federal courts are accustomed to applying in a great variety of contexts," Public Knowledge wrote. "Article 3 federal courts are not crying out to the FCC for help in determining what 'good faith' means in the context of litigation between private parties, which... is what Section 230 addresses."

"There's no ambiguity to resolve"

Johnson's blog post likely won't end any disputes over Pai's plan. House Democrats this week accused Pai of turning the FCC into "a political appendage of President Trump's campaign" by aiding Trump's battle against social media websites.

Lawsuits against the FCC are likely if the commission finalizes a reinterpretation of Section 230. Matt Wood, VP of policy and general counsel at media-advocacy group Free Press, told Ars today:

The FCC lawyers' latest sleight-of-hand is a clever distraction, but still not good enough to save the Commission's pending foray into speech codes and Internet regulation. The agency claims that it's not going to make rules, it's merely going to interpret the supposed ambiguities in the language of Section 230 and let courts apply that interpretation. But there's no ambiguity to resolve, nor any reason for courts to follow the FCC's interpretation. And there's no hiding the fact that the FCC's pretense of interpretation without the effect of substantive rules is a ruse and nothing better.

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