Justice Department sends its Section 230 rewrite to Congress

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The Department of Justice today dropped a proposed "recalibration" of one of the most important laws governing the US Internet into Congress' lap and urged legislators to act to remove a liability protection on which nearly every website and app currently relies.

Attorney General Bill Barr sent the proposed legislation—an extension of his June wish list—to Speaker of the House Nancy Pelosi and Vice President Mike Pence (in his role as president of the Senate) this morning.

"For too long Section 230 has provided a shield for online platforms to operate with impunity," Barr said in a written statement. "Ensuring that the Internet is a safe, but also vibrant, open, and competitive environment is vitally important to America," he added. "We therefore urge Congress to make these necessary reforms to Section 230 and begin to hold online platforms accountable both when they unlawfully censor speech and when they knowingly facilitate criminal activity online."

What is Section 230?

“Section 230” is the nickname for a very short part of the law under which Internet companies have been regulated since 1996. The key part of § 230 of the Communications Decency Act currently reads:

> *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.*

Those 26 words are included under the subheading, “Protection for ‘Good Samaritan’ blocking and screening of offensive material,” which allows Internet platforms to moderate user content shared on those platforms more or less however they wish—heavily, moderately, or not at all. Broadly speaking, it means that if you use an Internet service to say something obscene or unlawful, then you, not the Internet service, are the one responsible for having said the thing, and the Internet service has legal immunity from whatever you said. (That’s the short version. For the long version, give Ars’ own Tim Lee’s explanation of the law and its history a read.)

What does the DOJ propose changing?

While the proposal (PDF) leaves the core principle of Section 230 unaltered, it immediately applies a big honking qualifier.

That qualifier says that the existing law won’t apply “to any decision, agreement, or action by a provider or user” of an Internet service “to restrict access to or availability of material provided by another information content provider.” That seems to mean that a service such as Twitter or Facebook would not be permitted to block users from sharing URLs to, for example, hate sites.

The proposed new bill legislation also adds several explicit

carve-outs to the law. The first is a “bad Samaritan” carve-out, exempting a platform from qualifying for section 230 immunity if it “acted purposefully with the conscious object to promote, solicit, or facilitate material or activity… that the service provider knew or had reason to believe would violate Federal criminal law.”

“Criminal material” also has an explicit carve-out that would require platforms to remove or restrict access to that material and report it to law enforcement as soon as they received notice of it—a mechanism seemingly inspired by the way copyright takedown requests work today.

The last carve-out applies to “judicial decisions.” If a court rules that any content posted to a service is “Defamatory under state law or unlawful in any respect,” platforms would have to remove that content as well.

The last page of the proposed legislation adds a list of “good faith” requirements. In order to be considered to be acting in good faith, a platform must have a publicly available terms of service that includes its moderation rules; must moderate content “consistent with” those terms of use; must *not* block content on “deceptive or pretextual grounds”; and must supply the entity being moderated with “reasonable factual basis for the restriction of access and a meaningful opportunity to respond.”

“A platform that chooses not to host certain types of content would not be required to do so,” is how Barr described it to Pelosi and Pence, “but it must act in good faith and abide by its own terms of service and public representations. Platforms that fail to do those things should not enjoy the benefits of Section 230 immunity.”

Companies are already required to adhere to the terms of service they provide to customers, for what it’s worth. The FTC is responsible for enforcing consequences against

companies it finds to have used misleading or deceptive terms of service, including, in 2011, both Facebook and Twitter.

Why now?

Barr's line about platforms "unlawfully censoring" speech is the true crux of the issue: the Trump administration has for several years claimed that social media platforms such as Facebook and Twitter have an anti-conservative bias and unlawfully stifle right-wing content. The administration has been seeking ways to alleviate the alleged "bias" by changing the laws that apply to the social media sector, including Section 230.

These assertions of bias are not supported by any evidence to date. A cursory look at the evidence, in fact, tends to support the opposite conclusion. President Donald Trump himself has more than 86 million followers on Twitter—not the most-followed account, but comfortably within the top 10. Over on Facebook, the top 10 highest-traffic posts on any given day are almost all from conservative sources. Facebook itself tried to identify anti-conservative bias on its platform but did not find any. Stories from several organizations, including a recent Bloomberg cover story, find exactly the opposite, reporting that Facebook has instead worked to accommodate the Trump campaign and conservative outlets.

Nonetheless, Trump signed an executive order in May targeting online platforms. That order has a three-pronged approach, asking the Federal Communications Commission, Federal Trade Commission, and Department of Justice each to undertake some part of the enforcement.

Is the proposed law… legal?

If Congress were to pass the law, it would almost certainly face near-immediate legal challenge.

The proposal is not far off the FCC's "must-carry" rules for broadcasters, said Gautam Hans, a professor of law at Vanderbilt University and director of the Stanton Foundation First Amendment Clinic.

"My biggest concern is that it seems to be proscribing the platform's ability to take down content," Hans added. "In effect, this is attempting to create 'must carry' obligations for certain kinds of speech." Hans added that the proposal amounts to "hypocrisy" on the part of conservatives, as compared to the Fairness Doctrine getting axed during the Reagan administration.

"There is much to criticize about Section 230, how platforms have responded to its framework, and the way it has played out in the courts—but this is hardly the path forward we should take," Hans concluded. "I suspect that the platforms would have some good First Amendment arguments if this legislation went into effect."

Consumer-advocacy group Free Press also had a withering take on the proposal. "The draft legislation from the Department of Justice is a naked attempt to silence anyone who attempts to correct or criticize Trump, his allies, and fellow travelers," Free Press senior policy counsel Gaurav Laroia said. "It would incentivize platforms to host content created by racists, sexists, propagandists, and trolls. This legislation would also open the door to those who want to drown the Internet in an ocean of disinformation and toxicity."

Aside from the content, the proposed recalibration also may not be a particularly well-crafted piece of legislation. Blake Reid, a professor of technology and telecom law at the University of Colorado at Boulder observed in a series of tweets that the proposal, as structured, doesn't particularly hold together as a legal argument. "I have no idea how courts would interpret this because it just doesn't make any sense," Reid wrote. "This is not a long statute. But after trying to

parse this proposal for half an hour I'm left with major questions about what it's even trying to accomplish."

Still just a wish list

Now, the House and Senate can take the draft legislation under consideration and probably do exactly nothing with it, just as Congress has done with the last several tech-related bills. This particular proposed bill has the weight of the White House behind it, but the chances of it becoming law at this time are slim at best.

The administration's proposed text is, in fact, similar to a bill that Sens. Roger Wicker (R-Miss.), Lindsey Graham (R-S.C.), and Martha Blackburn (R-Tenn.) introduced earlier this month in the Senate. Their version (PDF), called the Online Freedom and Viewpoint Diversity Act, is shorter but more directly targets Internet companies' ability to moderate content on their platforms.

"The contentious nature of current conversations provides perverse incentive for these companies to manipulate the online experience in favor of the loudest voices in the room," Blackburn said about that bill at the time. "There exists no meaningful alternative to these powerful platforms, which means there will be no accountability for the devastating effects of this ingrained ideological bias until Congress steps in and brings liability protections into the modern era."

That bill is now sitting with the Senate Commerce Committee, where it is likely to languish until the current session of Congress expires in January. That, too, is almost certainly the fate of Barr's proposal. As little appetite as both the House and Senate seemed to have for moving on tech legislation in 2019, the extraordinary maelstrom of circumstances created in 2020 by the confluence of the COVID-19 pandemic, the impending presidential election, and the recent passing of

Supreme Court Justice Ruth Bader Ginsburg make lawmakers even *less* likely to take up any such bill in the immediate term.

That said, however: Section 230 is now almost 25 years old, and the Internet has changed significantly since its adoption. The DOJ's proposal is not the first attempt to amend it, and it will not be the last.

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