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Why This Section 230 Case?

The U.S. Supreme Court is taking on the Gonzalez v. Google case. Let's hope the current court keeps Justice Holmes's admonition in mind when considering any limits to Section 230 protections.

BY BRUCE HEIMAN

The Supreme Court has decided in the context of national security to consider the parameters of, and possible limits to, "Section 230" liability protections for social media companies. Specifically, the court in *Gonzalez v. Google* will consider whether Google, through its YouTube service, should be held responsible for "aiding and abetting" terrorism because its algorithm recommended a terrorist group's videos to other users. The court also agreed to hear a related case involving Google, Twitter and Facebook in which posts allegedly played a role in another terrorist attack.

Courtesy photo

Bruce Heiman is a partner at global law firm K&L Gates and is a member of the Public Policy and Law Group.

Section 230 of the Telecommunications Act of 1996 immunizes social media companies from liability for what third parties post to their websites and online platforms. Section 230, sometimes called 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." Section 230 also protects social media companies from actions taken in good faith to take down or limit the availability of material they find objectionable.

In recent years Section 230 has become very controversial and has been under attack from both sides of the political spectrum. Democrats criticize the companies for not doing enough to moderate or remove content deemed racist, hurtful or deceitful. Republicans complain that

social media companies censor conservative content and speakers. Congress has struggled with how to reconcile these critiques and with what reforms, if any, to make to Section 230.

The question is why did the Supreme Court decide to take up the *Gonzalez* case? After all, the Justices clearly could envision requests to review other cases. For example, courts have split on the validity of recent Florida and Texas laws prohibiting platforms from "censoring" posts by government officials, candidates, news organizations or even just the state's residents.

Instead the court has decided to accept a case that, while sounding narrow and technical, actually goes to the heart of how many Internet platforms operate—algorithmic targeted content recommendations.

Unfortunately, the government often invokes alleged threats to national security as a basis for significant policy changes. This is certainly not the first time that alleged concerns about national security have been the basis to challenge fundamental elements of the Internet.

In 2016, the FBI sought to force Apple to provide the FBI with a way to access the phone used by alleged terrorist Farooq, who with his wife killed 14 people in San Bernardino the previous year. Apple resisted arguing that it would set a horrible precedent and that the government was asking it to specifically design and provide software to weaken the security of its product – if not creating a back door then at least taking the hinges off the front door! The case became moot when the FBI found "another way" to access the phone without Apple's assistance.

And throughout the 1990s, the FBI and NSA fought industry attempts to include strong encryption in the products and services that make the Internet, e-commerce and remote working possible, because they claimed that terrorist and criminals could hide their plans.

An often repeated law school adage, attributed to Supreme Court Justice Oliver Wendell Holmes, is that "hard cases make bad law." The import of that expression is that when applied to many other situations, the results can be calamitous. Let's hope the current court keeps Justice Holmes's admonition in mind when considering any limits to Section 230 protections.

Bruce Heiman *is a partner at global law firm K&L Gates and is a member of the Public Policy and Law Group, which is celebrating its 50th anniversary this summer. He has helped to promote and protect the Internet by working to permit the use of encryption, ensure the telecommunications regulatory regime did not apply, and maintain the multistakeholder model of governance over the domain name system.*