U.S. SUPREME COURT

Chemerinsky: Social media and internet companies likely face more free speech challenges at the Supreme Court

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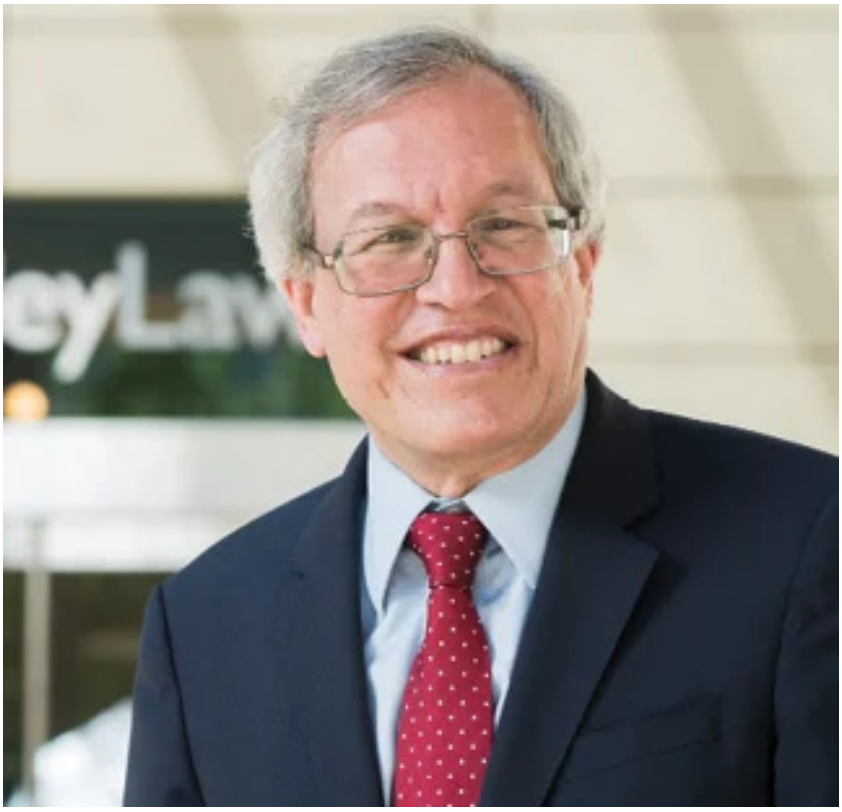
JUNE 6, 2023, 8:57 AM CDT

Sometimes there is great significance in what the U.S Supreme Court doesn't do, and that was definitely so for two cases it handed down May 18 about the internet and social media.

In *Twitter v. Taamneh* and *Gonzalez v. Google*, the court unanimously rejected holding internet and social media companies liable for aiding and abetting terrorist activities for what was posted on their platforms. A contrary ruling would have engendered a huge amount of litigation and changed how the internet functions.

Although many questions remain open, these rulings reflect justices who understandably want to be cautious as to the judicial role in setting policy for the internet and social media.



Erwin Chemerinsky. Photo by Jim Block.

Twitter v. Taamneh

The issue in *Twitter v. Taamneh* was whether social media platforms can be held liable for aiding and abetting terrorist activity for what is posted. In an opinion by Justice Clarence Thomas, the court emphatically rejected such liability.

The case arose from a terrorist attack on the Reina nightclub in Istanbul early on New Year's Day 2017. The attack was carried out by Abdulkadir Masharipov on behalf of the Islamic State of Iraq and Syria. Masharipov entered the nightclub and fired over 120 rounds into a crowd of more than 700 people, killing 39 and injuring 69 others.

The family of Nawras Alassaf, who was killed in the attack, sued Facebook, Inc., Google, Inc., and Twitter, Inc., claiming they aided and abetted ISIS and thus were liable for the Reina nightclub attack. The plaintiffs claimed ISIS and its adherents use these platforms as tools for recruiting, fundraising and spreading their propaganda. The plaintiffs alleged these platforms have been crucial to ISIS spreading its message of terror and gaining new members. The plaintiffs claimed these social media companies have known of ISIS using their platforms, and therefore have aided and abetted terrorist activity.

Federal law, 18 U.S.C. Section 2333, allows United States nationals who have been "injured … by reason of an act of international terrorism" to sue for damages. The law imposes civil liability on "any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." Under this provision, victims of terrorist acts may seek to recover from those who aided and abetted the terrorist act that injured them.

The Supreme Court said the concept of "aiding and abetting" long has existed in the law and must be cabined to limit who can be held liable. Justice Thomas explained, "To keep aiding-and-abetting liability grounded in culpable misconduct, criminal law thus requires that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed before

he could be held liable.'" There must be some "culpable conduct" by the defendant, an "affirmative act with the intent of facilitating the offense's commission." The court observed: "Notably, plaintiffs never allege that ISIS used defendants' platforms to plan or coordinate the Reina attack; in fact, they do not allege that Masharipov himself ever used Facebook, YouTube or Twitter."

The court applied this standard to conclude that the social media platforms could not be held liable for the terrorist attack that occurred in Turkey. The court explained that in no way did these platforms "associate" themselves with the shooting. The court observed, "Notably, plaintiffs never allege that ISIS used defendants' platforms to plan or coordinate the Reina attack; in fact, they do not allege that Masharipov himself ever used Facebook, YouTube or Twitter." The relationship between the social media platforms and the terrorist attack was "too attenuated." In the court's eyes, allowing liability would be no different from holding cellphone companies liable because of crimes plotted over cellphones.

The court left open the possibility that there might be situations in which social media platforms were more involved in criminal activity and could be held liable: "There may be, for example, situations where the provider of routine services does so in an unusual way or provides such dangerous wares that selling those goods to a terrorist group could constitute aiding and abetting a foreseeable terror attack." This would require "aid that is more direct, active and substantial." Put another way, merely being the place where material is posted is not enough to be a basis for aiding and abetting liability.

Gonzalez v. Google

The factual context of *Gonzalez v. Google* was similar to that in *Twitter v. Taamneh*, but the legal issue was different. A 2015 ISIS attack in Paris killed 130 people, including Nohemi Gonzalez. Her parents sued Google under the federal statute creating liability for aiding and abetting terrorist activity. Google raised a defense under 47 U.S.C. Section 230, which protects internet and social media companies from liability for content posted to their platforms by users and the platforms' decisions to remove (or not remove) that content.

Section 230 has been widely regarded as crucial for the development of the internet and social media. Jeff Kosseff, in the title of his 2019 book, described these as "the twenty-six words that created the internet." It is hard to see how the internet and social media could function if platforms were held liable for what was posted or what was taken down.

The issue in *Gonzalez v. Google* was whether a social media platform loses its Section 230 protection because it uses algorithms to direct users' attention to particular content. As some of the justices expressed during oral argument, allowing such liability would open the door to a tremendous amount of litigation. The implications for the functioning of the internet and social media would be enormous because inevitably algorithms are used by social media companies in ordering and directing material.

The court, in a per curiam opinion, ruled in favor of Google but without addressing the meaning of Section 230. The court explained that under its holding in *Twitter v. Taamneh*, the allegations in the complaint were not sufficient to create a plausible claim for aiding and abetting liability. Therefore, there was no need to decide whether a defense was available under Section 230. The court concluded, "We therefore decline to address the application of § 230 to a complaint that appears to state little, if any, plausible claim for relief."

Implications

The court's decisions in these cases are significant because of what the court did not do. It did not create liability for social media companies for what is posted on their platforms. Billions of things are posted on social media platforms every day. Allowing liability based on aiding and abetting liability would have engendered a huge change in how the internet and social media operate. The Supreme Court was not willing to open that door based on the facts of these cases.

But these decisions are just the beginning of the court having to consider how social media companies can be held accountable, whether via suits for money damages or by government regulation. There are petitions for certiorari pending in two cases likely to be heard next year —*Attorney General, Florida v. NetChoice* and *NetChoice v. Paxton*—that involve the constitutionality of state laws that prevent social media companies from engaging in content moderation. And down the road are cases now pending in the lower courts that involve challenges to state laws requiring more content moderation by social media platforms and that restrict access to them by minors. These cases, unlike *Twitter v. Taamneh* and *Gonzalez v. Google*, are likely to shape speech on the internet and social media for years to come.

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