

Section 230 precedent is Trojan Horse tech-tort reform not Congress' intent.

By [Scott Cleland](#)

America and Americans have been badly deceived and cheated for a quarter century.

Section 230's U.S. Fourth Circuit Court of Appeals precedent, [Zeran v. AOL](#), adopted by most federal circuit courts to [justify](#) denying online victims/plaintiffs access to justice, turns out to be a **modern-day, tragic Trojan Horse trick**.

When *Zeran v. AOL* misrepresented Section 230's intent in 1997, it was assumed and heralded to be a legitimate representation of Congress' intent and scope for Section 230 and a faithful defense of the Constitution. The evidence indicates it is not, but is **de facto judge-made, absolutist, tech-tort reform law**, e.g., "...Congress' desire to promote unfettered speech on the Internet must supersede conflicting common law causes of action."

As it turns out, [Zeran v. AOL](#) has de facto unconstitutionally legislated: a bogus absolutist problem that common law justice threatens free speech online; a bogus purpose of ensuring absolutist "unfettered speech" online;" the bogus absolutist "immediate comprehensive effect" and scope of Section 230 online, and the bogus task of imposing absolutist tech-tort reform.

This autocratic abuse of power, denial of democracy, corruption of the Constitution, and deception of the people it governs, **calls for a rethink of Section 230, and its purpose, problems, and solutions** by each branch of the U.S. Government, the trial bar, and the public.

This misrepresentation and power grab, strengthens [the case for repeal](#) of Section 230 and its suspect precedent progeny, and it encourages court challenges of *Zeran v. AOL* from all quarters.

It is no coincidence or surprise that the [inputs](#) of such extremes, fraud, and half-truths have yielded the [outputs](#) of an [Internet rife](#) with so many extremes, fraud, lies, and mistrust. Fraud in is fraud out.

This piece and its evidence will shed light on how *Zeran v. AOL* has been and is a misrepresentation of Congress' Section 230 intent and a corruption of the Constitution's separation of powers and checks and balances.

Why is this tragic trick critically relevant today?

- **Congress is struggling** to [legislate accountability](#) for Big-Tech/social media problems caused by judge-made, absolutist, tech-tort reform that it never considered, wrote, passed, or intended.
- **The Supreme Court is struggling** in [serially punting](#) ruling on the scope of Section 230 since no entity has yet to challenge the legitimacy or constitutionality of *Zeran v. AOL* precedent.
- **The Judiciary is struggling** to ensure citizens' [constitutional right](#) to a jury trial because judge-made, absolutist, tech-tort reform [broadly impedes](#) online victims' access to justice.
- **The Executive Branch is struggling** to clean up the Big-Tech/social-media unaccountability mess caused by absolutist [executive](#) and [judicial](#) activism and Congress' legislative inaction.
- **People are struggling** from [mass-victimizations](#) of online harms without protection or recourse.
- **Plaintiff Trial lawyers are struggling** to beat Section 230's "[Big-tech get-out-of-court-free card](#)," because they have yet to challenge the legitimacy and constitutionality of [Zeran v. AOL](#).

How is Zeran v. AOL precedent not Congress' intent?

1. Congress' statutory intent *in text* is not anything like what *Zeran v. AOL* represents it to be.

Section 230: In 1996, Congress named its intent: “*Protection for ‘Good Samaritan’ blocking and screening of offensive material.*”

The Communications Decency Act as passed was: “*To protect the public from the misuse of the telecommunications network and telecommunications devices and facilities.*”

The Telecommunications Act of 1996: intent was: “*To promote competition and reduce regulation ... and encourage rapid deployment of new telecommunications technologies.*”

Zeran v. AOL: imagined Congress' Section 230's intent to be: “*Congress' desire to promote unfettered speech on the Internet must supersede conflicting common law causes of action.*”
 “...“*The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, [is] simply another form of intrusive government regulation of speech.*”

2. By self-acclamation, Zeran v. AOL misdirects Congress' intent ~20 times:

“Congress clearly expressed its intent...” (2 times) “Congress immunized...” “Congress acted...” “Congress recognized...” (2 times) “Congress further stated...” “Congress made a policy choice...” “Congress' purpose...” “Congress considered...” (2 times) “Congress enacted Section 230 to...” “Congress enacted § 230's broad immunity...” “Congress intended...” “Congress speaks directly to the issue ...” “Congress has indeed spoken directly...” “Congress allowed for...” “Congress' desire to promote...” “Congress has ‘unmistakably ordained...’ “Congress' command is explicitly stated...” (2 times) “Congress has expressly prescribed...” “Congress' intent that...” “Congress decided...”

A. *Zeran v. AOL* misrepresents Congress thinks common law threatens free speech.

“Congress recognized **the threat that tort-based lawsuits pose to freedom of speech** in the new and burgeoning Internet medium.”

“**The specter of tort liability** in an area of such prolific speech would have an obvious chilling effect.”

“**The imposition of tort liability**... is “another form of intrusive government regulation of speech.”

“Congress made a policy choice, however, not to deter harmful online speech through the separate route of **imposing tort liability** on companies that serve as intermediaries for other parties' potentially injurious messages.”

B. *Zeran v. AOL*'s hijacks Congress' intent to protect people from offensive material.

*"...Congress' desire to promote **unfettered speech** on the Internet must supersede conflicting common law causes of action."*

C. Court misrepresented congress wanted "*immediate comprehensive effect*," & scope.

*"Here, Congress decided that free speech on the Internet and self-regulation of offensive speech were so important that **Section 230 should be given immediate, comprehensive effect.**"*

"Congress enacted Section 230's broad immunity."

D. Court made up a rationale for absolutist tech tort reform – absolutist free speech.

*"...Congress' desire to promote **unfettered speech** on the Internet must supersede conflicting common law causes of action."*

*"The purpose of this **statutory immunity** is not difficult to discern."*

*"**Section 230 creates a federal immunity to any cause of action** that would make service providers liable for information originating with a third-party user of the service."*

*"... **Specifically, Section 230 precludes courts from entertaining claims** that would place a computer service provider in a publisher's role."*

*"**Congress clearly expressed its intent that Section 230 apply to lawsuits.**"*

*"... **Thus, lawsuits** seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — **are barred.**"*

3. If *Zeran v. AOL* truly represents Congress' intent and not the courts intent...

Why did Congress in the Telecom Act, CDA, or Section 230 never use these terms!

"speech," "freedom," "freedom of speech," "freedom of expression," "First Amendment," "Internet speech," "immunity," "immunize," "intermediary," "tort," "tort liability," "[tort reform](#)," "lawsuit," "common law," or "self-regulation."

Why did *Zeran v. AOL* use these terms repeatedly when Congress did not use them!

"speech" 17 times, "immunity" 8 times, "immunize" 4 times, "tort" 13 times, "lawsuits" 5 times, "common law" 6 times, "self-regulated" 4 times, "freedom of Internet speech" once, and "unfettered speech" once.

The obvious answer is *Zeran v. AOL* is judge-made law not Congress' intent.

4. **If Congress intended Section 230 to be tort reform**, it would have said so in the law like it did in the [Telecommunications Act of 1996](#): “*Cable Act reform*” and “*Regulatory reform.*” It did not.
5. **If Congress’ aim was to “*promote unfettered speech on the Internet*” Why does 230 fetter it?**

Why does a central provision of [Section 230](#) that encourages ‘*Good Samaritan*’ *blocking and screening of offensive material*,” Section 230(c)(2)(A), encourage the fettering of “*obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable*” material online when *Zeran v. AOL*’s purpose is to “*promote unfettered speech on the Internet?*”

6. **If Congress’ true purpose is to promote unfettered speech, why did the CDA fetter speech?**

The provision of the Communications Decency Act (CDA) that directly precedes Section 230 in [the law as passed](#) is “*Section 508 Coercion and Enticement of Minors,*” which rules that “*Whoever... knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years to engage in prostitution or any sexual act for which any person may be criminally prosecuted, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.*” This CDA speech-relevant provision survived the Supreme Court’s 1997 precedent [Reno v. ACLU](#) and it remains law in [18 USC 2422](#).

Congress intended in Section 230 that some speech like speech integral to criminal conduct is fettered because in Section 230 it made it U.S. policy “*to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.*” The Supreme Court [made](#) obscenity unprotected speech in 1973.

7. **[Zeran v. AOL](#) offends the U.S. Constitution’s separation of powers & checks and balances.**

Abuse of power. The U.S. Constitution’s first sentence makes it clear congress legislates not the judiciary. “*All legislative powers herein granted shall be vested in a Congress of the United States.*”

There is much evidence above that indicates that *Zeran v. AOL*, the judicial precedent that most affects the Internet that everyone uses to do everything everywhere for life, work, and play, is constitutionally suspect precedent and judge-made law affecting everyone’s speech and conduct. This gross abuse of power has helped disrupt and corrupt [much](#) of American government, business, work, and life.

A judge autocratically legislating, doing what 535 members of congress do under the constitution, deny democracy and violate the Constitution’s separation of powers.

Sweeping subversion of the Seventh Amendment. *Zeran v. AOL* does one thing near universally, it is obeyed by most courts to [routinely deny](#) complaints in summary judgment before discovery. This assaults and offends the Seventh Amendment by denying American Citizens’ Constitutional right to trial by jury.

Seventh Amendment Text: *“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”*

Sweeping subversion of “the rules of common law” respected in the 7th Amendment.

Zeran v. AOL’s judge-made, absolutist, tech-tort reform corrupts the rules of common law by making everything online “unfettered speech” which generally ignores and condones vast swaths of illegal conduct online.

Subversion of Supreme Court’s authority. *Zeran v. AOL*’s operative precedent for most things Internet is de facto promoting and enforcing “unfettered speech” which broadly subverts rule of law, law and order, and justice, in confusing everyone about whether *Zeran v. AOL* is the last word on online speech or are SCOTUS precedents on protected and unprotected speech the last word?

In touting and enforcing the promotion of “unfettered speech,” throughout the Federal and State judicial systems it muddies, confuses, and subverts the Supreme Court’s precedents that make some types of speech unprotected by the First Amendment.

It is no coincidence that much of the worst conduct and disruptive behaviors, like the ones directly below routinely occur on the Internet because people think there is no accountability online, encouraged, and advanced by *Zeran v. AOL*’s “promotion of *unfettered speech*” via judicial absolutist activism.

Consider the eight types of speech the Supreme Court has ruled in precedents that are unprotected speech, i.e., not free speech: [obscenity](#), [defamation](#), [fraud](#), [incitement](#), [fighting words](#), [true threats](#), [speech integral to criminal conduct](#), and [child pornography](#).

How could this happen?

Context matters.

Chief Judge J. Harvie Wilkinson III of the Fourth Circuit Court of Appeals wrote the 1997 *Zeran v. AOL* opinion, in which Judge Russell and Chief Judge Boyle joined. This Federal Appeals court is headquartered in Richmond Virginia. [Chief Judge Wilkerson](#), a Reagan appointee, was raised in Richmond and was Chief Judge from 1996-2003. He was Editorial page editor, Norfolk Virginian-Pilot, 1978-1981.

Nationally, and especially locally in Richmond, tort reform was a very big issue in 1997 given that the national [tobacco settlement](#) was being negotiated in 1997 and was settled in 1998 for [\\$206 billion dollars](#) over 20 years. Then Richmond was known as the Tobacco Capital of the United States, as it was the headquarters for the top four tobacco companies.

In 1997 the U.S. Chamber of Commerce was [launching](#) a \$40m national public relations, media, and lobbying campaign to demonize plaintiff trial lawyers for high lawyer fees, and to call for major tort reforms, especially concerning product liability.

The campaign was strongly backed and funded by two powerful groups, the [tobacco companies](#) based in Richmond and [TechNet/Silicon Valley interests](#).

Conclusion:

The evidence here has exposed Section 230's domineering precedent, [Zeran v. AOL](#), as **de facto judge-made, absolutist, tech-tort reform law** that subverted Congress' intent in 1996 and still subverts congress' bipartisan intent for delivering Big-Tech/social-media accountability, rule of law, and duty of care today.

This audacious autocratic abuse of power, corruption of the Constitution, denial of democracy, and deception of Americans, **calls for a rethink of Section 230, and its purpose, problems, and solutions** by each branch of the U.S. Government, the trial bar, and the public.

This unfettered fraud strengthens [the case for repeal](#) of Section 230 and its corrupted precedents, and it encourages court challenges of [Zeran v. AOL](#) from all quarters.

The Supreme Court, after neglecting to oversee/review Section 230 cases from 1997-2022, and after punting on two cases that implicate Section 230's scope in 2023, the Supreme Court must step up and decide if [Zeran v. AOL](#) meets their "Equal Justice Under Law" standard or not.

Forewarned is forearmed.

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