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Supreme Court Holds That Internet Companies Did Not "Aid and Abet" ISIS Terrorist Attacks, but Dodges Question Concerning Scope of Section 230 Immunity

On May 18, 2023, the Supreme Court issued rulings in *Twitter* v. *Taamneh* and *Gonzalez* v. *Google*, a pair of cases that concern the potential liability of internet companies for terrorist acts committed by users of those companies' platforms. In both cases, the Court ruled in favor of the internet companies, narrowing the possibility that such companies will be found liable for similar attacks or other actions of third parties.

In *Twitter*, the Court provided a detailed elaboration of the legal standards that govern aiding-and-abetting liability generally, and such liability under antiterrorism statutes in particular. In *Google*, by contrast, the Court issued only a brief opinion, noting that *Twitter* largely resolved the underlying claims. Of particular note, the Court declined to address the scope of Section 230 of the Communications Decency Act of 1996 (CDA), a statute that protects "provider[s] or user[s] of an interactive computer service" from being treated "as the publisher or speaker of any information provided by another information content provider" for purposes of tort liability."

Background

Section 2333 of the 1990 Antiterrorism Act (ATA) authorizes United States nationals or their "estate, survivors, or heirs" to bring civil lawsuits when "injured in [their] person, property, or business by reason of an act of international terrorism." A 2016 amendment to the ATA provides that plaintiffs can sue not only those directly responsible for the terrorist acts, but also anyone "who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism."

In *Twitter*, family members of an American murdered in a 2017 ISIS terrorist attack on a nightclub in Istanbul sued Facebook, Google, and Twitter under the theory that they had "aided and abetted" ISIS by allowing ISIS to recruit, fundraise, and spread propaganda on their platforms. According to the plaintiffs, the defendant companies have known about ISIS' use of their platforms for years, but failed to detect and remove a substantial number of ISIS-related accounts, posts, and videos. Moreover, the companies allegedly continued using algorithms and revenue-sharing systems that allegedly promote and reward ISIS material. Although the district court dismissed the complaint, the Ninth Circuit reversed, holding that the plaintiffs had adequately alleged an aiding-and-abetting theory.

In *Google*, family members of an American murdered in a 2015 ISIS terrorist attack in Paris brought suit against Google under a similar theory, alleging that Google aided and abetted ISIS through its management of YouTube. The district court dismissed plaintiffs' suit for failure to state a claim, and the Ninth Circuit affirmed, reasoning that most of the claims were barred by Section 230 of the CDA. The *Google* plaintiffs petitioned for certiorari, and the Court granted review to address the applicability of Section 230.

The Supreme Court's Decisions

In *Twitter*, in a unanimous decision by Justice Clarence Thomas, the Supreme Court reversed the Ninth Circuit and held that the plaintiffs had failed to state a claim for aiding-and-abetting liability. The Court began by reviewing the D.C. Circuit's decision on aiding-and-abetting liability in *Halberstam* v. *Welch*, 705 F.2d 472 (1983), which had been incorporated into the ATA, and clarified the law of aiding-and-abetting liability generally. The Court explained that *Halberstam* reflected and distilled preexisting common-law principles. Accordingly, the Court explained, courts applying that precedent should not—as the Ninth Circuit did here—"too rigidly" focus on *Halberstam*'s precise facts or phraseology.

Based on *Halberstam* and underlying common-law principles, the Court then explained that aiding-and-abetting liability requires more than "tangential assistance," especially if such assistance takes the form of "mere omissions, inactions, or nonfeasance." Instead, to be liable for aiding and abetting, a defendant must take an "'affirmative act" "with the intent of facilitating the offense's commission." The Court also explained that in assessing whether assistance is sufficient to create liability, courts must assess whether the assistance was "knowing" and "substantial," with those factors working "in tandem," such that "a lesser showing of one demand[s] a greater showing of the other."

Next, the Court turned to the text of the ATA. The parties had disputed whether that statute imposes liability only when a defendant aids and abets the *particular* "act of international terrorism" at issue, or rather whenever a defendant aids or abets "*the person*" who commits such acts. The Court rejected both approaches, instead holding that the statute imposes liability on those who aid and abet a person *in the commission of* acts of international terrorism generally (even if they lacked knowledge of the specific attack at issue).

The Court then applied those principles to the *Twitter* plaintiffs' particular allegations. The Court concluded that defendants' only "affirmative" conduct was the creation of their platforms, and that the defendants' algorithms did not "go beyond passive aid and constitute active, substantial assistance." In light of defendants' mostly passive role, the Court explained that plaintiffs would have had to make an especially "strong showing of assistance and scienter" with respect to acts of terrorism to establish liability.

The Court determined, however, that plaintiffs' allegations pointed only to a "highly attenuated" relationship between defendants and ISIS that was "arm's length, passive, and largely indifferent." And plaintiffs' allegations likewise provided no "very good reason to think that defendants were consciously trying to help or otherwise 'participate in' the [particular] attack," but instead depicted defendants as "bystanders, watching passively as ISIS carried out its nefarious schemes." The Court thus concluded that plaintiffs' complaint failed to state claims under the ATS, reversing the judgment of the Ninth Circuit. The Court cautioned, however, that it could not "rule out the possibility that some future set of allegations" against similar providers of routine services might successfully state ATS claims, particularly if the aid they provide is more "direct, active, and substantial" than that alleged here. Justice Ketanji Brown Jackson also filed a short concurring opinion to emphasize that point.

Finally, in a brief unsigned opinion in *Google*, the Court explained that the aiding and abetting allegations at issue in that case were "materially identical to those at issue in *Twitter*," and therefore failed to state a claim. Although the *Google* plaintiffs also raised direct-liability claims, the Court declined to address those claims or the applicability of Section 230 of the CDA in light of its *Twitter* decision. The Court thus remanded the case to the Ninth Circuit for reconsideration.

Implications

The Court's *Twitter* decision provides a useful summary and clarification of the federal law of aiding and abetting generally, and it is likely to be widely cited in both criminal and civil contexts. The decision also resolves the specific standard for such liability under the ATA, providing much-needed clarity to communications, internet, and financial-services companies. The decision will benefit such companies in defeating legal challenges based only on their passive—or even algorithmic—provision of generally available, "routine services."

The brief opinion in *Google*, by contrast, reflects the Court's ongoing hesitation to wade into complex, and potentially far-reaching, questions of internet governance and liability. Given the ubiquity of speech on the internet and tort claims based on such speech, however, Section 230 may return to the Court soon.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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