FEDERAL JUDGE LIKENS GOVERNMENT EFFORTS DURING THE PANDEMIC TO CURB DISINFORMATION TO AN "ORWELLIAN MINISTRY OF TRUTH" AND ENJOINS CONTACT WITH SOCIAL MEDIA PLATFORMS

One could not make this up. A sweeping preliminary injunction issued on July 4th by a federal judge in a lawsuit brought by, among others, attorneys general in Louisiana and Missouri could have far-reaching First Amendment implications and could severely impair the ability of the government to address the scourge of online disinformation amplified on social media platforms. The case alleges that the federal government colluded with social media platforms[1] to suppress free speech, a vast effort they characterize as a "massive, sprawling Censorship Enterprise" involving dozens of federal officials across at least 11 federal agencies and components.

The injunction bars a broad swath of agencies, and their officials and employees, from communicating with social media platforms in respect of content moderation. In effect, the government is barred from working with the platforms to curtail the spread of disinformation. And, while the focus of the underlying case was largely on pandemic measures, the reach is intended to be far broader.[2]

To grant an injunction, a court must conclude there is a reasonable likelihood of success on the merits, which the US District Court Judge Terry Doughty, in his 155-page ruling, found. The judge wrote that "If the allegations made by Plaintiffs are true, the present case arguably involves the most massive attack against free speech in United States' history. In their attempts to suppress alleged disinformation, the Federal Government, and particularly the Defendants named here, are alleged to have blatantly ignored the First Amendment's right to free speech." The judge continued, "What is really telling is that virtually all of the free speech suppressed was "conservative" free speech. Using the 2016 election and the COVID-19 pandemic, the Government apparently engaged in a massive effort to suppress disfavored conservative speech."

Worryingly, the judge concludes his ruling with a quote from Harry Truman in a message to Congress delivered in 1950, "Once a government is committed to the principle of silencing the voice of opposition, it has only one place to go, and this down the path of increasingly repressive measures, until it becomes the source of terror to all its citizens and creates a country where everyone lives in fear."

The Department of Justice ("DoJ") notified the court on Wednesday that it intends to appeal the preliminary injunction to the Fifth Circuit Court of Appeals, arguably the most conservative appellate court in the country. In its filing with the court on Thursday, the DoJ cited "irreparable harm with each day the injunction remains in effect, as the injunction's broad scope and ambiguous terms (including a lack of clarity with respect to

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1 The order defines social media platforms as including: "Facebook/Meta, Twitter, YouTube/Google, WhatsApp, Instagram, WeChat, TikTok, Sina Weibo, QQ, Telegram, Snapchat, Kuaishou, Qzone, Pinterest, Reddit, LinkedIn, Quora, Discord, Twitch, Tumblr, Mastodon, and like companies."

2 The Memorandum Ruling is available here.

what the injunction does not prohibit) may be read to prevent the Government from engaging in a vast range of lawful and responsible conduct—including speaking on matters of public concern and working with social media companies on initiatives to prevent grave harm to the American people and our democratic processes."

The timing could not be more inauspicious. For some time, government, academic and civil society experts have been warning that American voters will be targeted by waves of domestic- and foreign-sourced disinformation in the run-up to the 2024 elections.

The Context

The lawsuit must be seen in the context of a multipronged effort by conservatives to undercut content moderation aimed at curbing disinformation. Rather than sue the platforms, whose terms of reference and activities are not subject to the First Amendment and, in fact, enjoy First Amendment protection, the plaintiffs sued the government. In essence, the plaintiffs are recharacterizing interactions between the government and the platforms (meetings, conversations and emails) as coercion, and by extension a violation of First Amendment rights of free speech. In effect, the plaintiffs are saying that the federal government is using private companies (the platforms) to do what it cannot do directly, censor conservative speech.

As for the broader effort, as attention focused over the past few years on the role of social media platforms in amplifying disinformation and hate,[3] inevitably battle lines were drawn and inevitably the focus in Congress would fall on Section 230 of the Communications Decency Act of 1996.

Efforts to regulate social media platforms have fallen victim to the culture wars, with Democrats broadly arguing, for example, that Section 230 allows platforms to host harmful hate speech, disinformation and other malign content with impunity, warranting modification of the blanket immunity to prompt greater responsibility to remove that content. Republicans broadly argue that platform content moderation policies have been misused to suppress free speech, amounting to censorship with a bias against conservatives. Democrats generally have introduced legislation to reduce the Section 230 protections in specified instances, while Republicans generally have introduced legislation to force platform moderation policies to be "neutral." To date, Congress has failed to act.

In 2021, Republican-controlled states tried to end-run around the paralysis at the federal level. Florida passed SB 7072, designed to prevent platforms from banning (de-platforming) politicians. The target, according to Gov. Ron DeSantis, was discrimination against "freedom of speech as conservatives" in favor of "Silicon Valley ideology." A federal judge blocked the law, and an appeal is pending before the Supreme Court. A similar effort in Texas, HB 20, is also in legal limbo. These bills were in part a reaction to de-platforming of former President Trump following the January 6th insurrection and were challenged by two trade groups on First Amendment grounds.

[3] *See* my previous briefing note, Mitigating the Spread of Disinformation.

See generally my previous briefing note, Data Privacy and Platform Transparency: Keeping Track of the Moving Pieces.

In the House, Rep. Jim Jordan's Select Committee on the Weaponization of Government has been hosting hearings aimed at exposing alleged campaigns to stifle free speech, coordinated by the federal government and the platforms. The focus unsurprisingly is alleged censorship of speech that challenged the efficacy of COVID 19 vaccines and lockdown policies and that promoted the conspiracy theories that the 2020 presidential election was stolen. At a hearing in March, one of the witnesses was the Louisiana Attorney General.

The Plaintiffs' Claims

The two Republican attorneys general and fellow plaintiffs allege that the Administration's efforts in support of platform content moderation are tantamount to censorship, a suppression of free speech in violation of the First Amendment. Specifically the plaintiffs allege suppression of "conservative-leaning free speech," including: the Hunter Biden laptop story prior to the 2020 presidential election; the lab-leak theory of COVID-19's origin; the efficiency of masks and COVID-19 lockdowns; the efficiency of COVID-19 vaccines; election integrity in the 2020 presidential election; the security of voting by mail; parody content about the Administration; negative posts about the economy; and negative posts about President Biden.

Other plaintiffs include infectious disease epidemiologists that criticized lockdown policies. Another plaintiff had advocated against the use by children of masks. Other plaintiffs had challenged COVID-19 vaccinations.

The Defendants

Defendants include:

- President Biden;
- the Department of Health and Human Services and the National Institute of Allergy and Infectious Diseases, and the secretary/director and various employees of each;
- the Centers for Disease Control and Prevention and various employees thereof;
- the US Census Bureau and various employees thereof;
- the Federal Bureau of Investigation ("FBI") and various employees thereof;
- the DoJ and the secretary, director, and various administrators and employees thereof;
- the Surgeon General;
- a host of Executive Branch employees;
- the Cybersecurity and Infrastructure Security Agency and the director and various employees thereof;
- the Department of Homeland Security ("DHS") and the director and various employees thereof; and
- the State Department and various employees thereof.

The plaintiffs had also included the Disinformation Governance Board ("DGB") and its director, even though the Board had been disbanded after three weeks in existence following a rightwing outcry that its mandate was to censor conservative speech. The motion for preliminary injunction was denied as to these two defendants and various other agencies and employees.

Banned Contacts

In his ruling, Judge Doughty wrote that, "Although this case is still relatively young, and at this stage the Court is only examining it in terms of Plaintiffs' likelihood of success on the merits, the evidence produced thus far depicts an almost dystopian scenario. During the COVID-19 pandemic, a period perhaps best characterized by widespread doubt and uncertainty, the United States Government seems to have assumed a role similar to an Orwellian 'Ministry of Truth.'" (Incidentally, this would have also covered the Trump administration, but that was conveniently ignored.)

Defendants are enjoined from a broad range of interactions, so broad, in fact, that I set out the particulars in full:

- meeting with social-media companies for the purpose of urging, encouraging, pressuring, or inducing in any manner the removal, deletion, suppression, or reduction of content containing protected free speech posted on social-media platforms;
- specifically flagging content or posts on social-media platforms and/or forwarding such to social-media companies urging, encouraging, pressuring, or inducing in any manner for removal, deletion, suppression, or reduction of content containing protected free speech;
- urging, encouraging, pressuring, or inducing in any manner social-media companies to change their guidelines for removing, deleting, suppressing, or reducing content containing protected free speech;
- emailing, calling, sending letters, texting, or engaging in any communication of any kind with social-media companies urging, encouraging, pressuring, or inducing in any manner for removal, deletion, suppression, or reduction of content containing protected free speech;
- collaborating, coordinating, partnering, switch-boarding, and/or jointly working with the Election Integrity Partnership, the Virality Project, the Stanford Internet Observatory [academic research groups that track online disinformation], or any like project or group for the purpose of urging, encouraging, pressuring, or inducing in any manner removal, deletion, suppression, or reduction of content posted with social-media companies containing protected free speech;
- threatening, pressuring, or coercing social-media companies in any manner to remove, delete, suppress, or reduce posted content of postings containing protected free speech;
- taking any action such as urging, encouraging, pressuring, or inducing in any manner social-media companies to remove, delete, suppress, or reduce posted content protected by the Free Speech Clause of the First Amendment to the United States Constitution;

- following up with social-media companies to determine whether the social-media companies removed, deleted, suppressed, or reduced previous social-media postings containing protected free speech;
- requesting content reports from social-media companies detailing actions taken to remove, delete, suppress, or reduce content containing protected free speech; and
- notifying social-media companies to "Be on The Lookout" for postings containing protected free speech.

Exceptions are provided, among other reasons, for national security, criminal activity and foreign interference in elections.

Analysis

Leah Litman and Laurence H. Tribe, in a scathing critique of the decision (Restricting the Government from Speaking to Tech Companies will Spread Disinformation and Harm Democracy), cited a number of legal errors, including improper standing, misapplication of the First Amendment and the grant of an overly broad injunction ("breathtaking [in] scope").

They note that "While there are, in theory, interesting questions about when and how the government can try to jawbone private entities to remove speech from their platforms, this decision doesn't grapple with any of them." The "absurdity" of different arguments advanced by the judge should not obscure the impact of the decision. "Invoking the First Amendment, a single district court judge effectively issued a prior restraint on swaths of speech, cutting short an essential dialogue between the government and social media companies about online speech and potentially lethal misinformation." It is ironic that a lawsuit brought to protect free speech has, as its first casualty, communications intended to protect the country and democracy.

They conclude that "There is no shortage of errors in this opinion, which is trying to make the infamous 'Twitter files' into constitutional law."

The most striking defect in the lawsuit and the order is that the myriad forms of consultation between the government and the platforms arguably cannot realistically be viewed as coercion. Without the coercion, there is no case. As Yoel Roth, the former director of Trust and Safety at Twitter, tweeted, " the most glaring bit is the theory that tech companies were somehow "coerced" to take action simply by virtue of having a meeting. That's just… not how any of this works." As the Washington Post reported, "Roth's work at Twitter has come under the glare of Republican politicians. He has said during testimony before Congress that Twitter independently made decisions to remove content its staffers believed violated its rules. He said the U.S. government 'took extraordinary efforts' to ensure it did not even hint at demanding the company remove posts."

Consequences

Nina Jankowicz, originally named as a defendant but excluded from the order as the unit she headed, the DGB, had a three-week shelf life, characterized the use of legal process to shut down government efforts to counter online conspiracy theories and other disinformation as a "weaponization of the court system." This she said, could "devastate" the fight against the spread of misinformation and disinformation in the run-up to the

2024 elections. Litman and Tribe sounded a similar alarm – the order, by preventing the government from speaking with the platforms about content moderation "deals a huge blow to the vital government efforts to harden the US democracy against threats of disinformation."

Already, the Washington Post is reporting that the State Department cancelled its regular meeting with Facebook officials to discuss 2024 election preparations and hacking threats and advised that all future meetings, which had been held monthly, have been "canceled pending further guidance."

The injunction covers direct interaction by much of the federal government with the platforms, but also indirectly impacts the many academic research groups and civil society groups that work with the federal government. As Jankowicz notes, the inclusion of these non-governmental groups will likely increase the harassment and threats these groups already face, and civil servants are likely to self-censor. Like the potential receipt of subpoenas from the Weaponization of Government subcommittee, the prospect of being named as a defendant in similar lawsuits can only have a chilling effect on critical work combatting disinformation and the weaponization of hate.

Similarly, while not directly targeted in the lawsuit for the reasons outlined above, the platforms themselves may also be downgrading content moderation efforts.

Concluding Thoughts

Among those in the "democracy" space who specialize in tracking, analyzing and countering disinformation, the platforms have been a significant focal point since the days of the Cambridge Analytica revelations. Many remain dissatisfied with the breadth and efficacy of content moderations policies, procedures and implementation, believing that a combination of self-regulation and regulation is far preferable. But the paralysis in Congress means that self-regulation is the best we can do at the moment. Obviously too there are longer-term strategies, including increased awareness, and more sustained media focus.

However, left to their own devices, the platforms only go so far, and content moderation across platforms has been highly inconsistent. That inconsistency has been exacerbated following the takeover of Twitter by Elon Musk. That is why the efforts of the Biden Administration as well as the NGOs and academic institutions that regularly interact with DHS, the FBI, the National Security Council, the State Department and other agencies remain critical in the fight against disinformation and, in particular, disinformation designed to destroy trust in election infrastructure and election results.

Consider the paradox: at a time when the whereabouts and fate of the man behind the Internet Research Agency's assault on the 2016 election dominated the headlines, a federal judge singlehandedly has significantly imperiled the country's ability to defend against election interference, not to mention a range of other threats emanating from right wing sources. These are delivered, and amplified at scale, by social media platforms. While the malign efforts in 2016 may have been the inspiration for 2020 disinformation, the clearest threat to democracy has been the Big Lie, and many of its proponents show little interest in backing off.

If the bedrock of democracy is the rule of law, it is sad that the judicial system is being weaponized to undermine it.

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