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Missouri v. Biden: Governmental Efforts to Suppress Free Expression

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Abstract: The development of the internet, along with the creations of social media platforms, has created a unique opportunity for governmental officials to control freedom of expression. This article examines how the Biden Administration requested, encouraged, pressured and even threatened social media platforms to censor certain types of speech, and even to ban certain individuals from their platforms, and it analyses the Biden Administration's actions in light of U.S. free speech principles.

Keywords: internet, social media, governmental censorship, governmental repression, threats

1. Introduction

Throughout history, governments have gone to great lengths to control freedom of expression (Weaver & Hancock, 2023). In response to Gutenberg's invention of the printing press (Weaver, 2024, pp. 12–20), most governments responded with repression (see Mayton, 1984, pp. 97–98; Rosenberg, 1986; Kaplan, 1997).[1] While medieval kings might have been happy to have the printing press available for their own use, they were not necessarily keen to allow their subjects to use this new technology.[2] In an effort to stifle use, governments restricted the number of printing presses that could exist, and allocated licences only to those who were regarded as favourable to the government

[1] See *First National Bank of Boston v. Belotti,* 435 U.S. 765, 800–801 (1978) ("Soon after the invention of the printing press, English and continental monarchs, fearful of the power implicit in its use and the threat to Establishment thought and order-political and religious-devised restraints, such as licensing, censors, indices of prohibited books, and prosecutions for seditious libel, which generally were unknown in the pre-printing press era. Official restrictions were the official response to the new, disquieting idea that this invention would provide a means for mass communication.")

[2] See *First National Bank of Boston v. Belotte,* 435 U.S. 765, 800–801 (1978).

(Weaver & Hancock, 2023, p. 6). Governments also imposed content-licensing requirements which required those who wished to publish books or other documents to submit their manuscripts to governmental censors, and prohibited publication absent the approval of those censors (Weaver & Hancock, 2023, pp. 5–6).[3] Perhaps the most draconian restriction on printing involved the British Star Chamber's 1606 decision in *de Libellis Famosis*.[4] That decision created the crime of seditious libel, which made it a crime to criticise the government or governmental officials (and, at one point, the clergy as well) (Mayton, 1982, p. 248). The crime, which involved the ridicule of high clergy in *de Libellis Famosis,* was enforced by threats of punishment, litigation costs and stigma, (Mayton, 1982) and was justified by the notion that criticism of the government "inculcated a disrespect for public authority" (Mayton, 1984, p. 103; see O'Laughlin, 2002, pp. 720–721). "Since maintaining a proper regard for government was the goal of this new offense, it followed that truth was just as reprehensible as falsehood." Truth, therefore, was not a defense (Mayton, 1984, p. 103; see Glendon, 1996, p. 48). Indeed, truthful criticisms were punished more severely than false criticisms because it was assumed that true criticisms were potentially more damaging to the government (Krauss, 1998, p. 184 n. 290; see Glendon, 1996, p. 48).

Although the U.S. free speech tradition developed slowly over the centuries, it resulted in a consensus that the government should have very limited authority to censor speech.[5] During the Middle Ages, some kings claimed to rule by Divine Right – the notion that the King was placed on his throne by God, was carrying out God's will, and therefore could do no wrong.[6] Under Divine Right, free speech was not valued or protected. After all, if the King was God's representative on earth, why would society allow ordinary people to criticise what God was doing or had done? In the United States, the Declaration of Independence implicitly rejected the idea of Divine Right, and flatly declared that the power to govern derives from the consent of the governed.[7] The U.S. Constitution reinforced the Declaration by establishing a representative democracy.[8] Under that system, "speech concerning public affairs is more than self-expression; it is the essence of

[3] See *Lovell v. City of Griffin,* 303 U.S. 444 (1938).

[4] 77 Eng. Rep. 250 (Star Chamber 1606).

[5] See *United States v. Alvarez,* 567 U.S. 709 (2012); *Brown v. Entertainment Merchants Association,* 564 U.S. 786 (2011); see also *New York Times Company v. United States,* 403 U.S. 713 (1971); *Near v. State of Minnesota,* 283 U.S. 697 (1931).

[6] See *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 96 (1996) ("centuries ago the belief that the monarch served by divine right made it appropriate to assume that redress for wrongs committed by the sovereign should be the exclusive province of still higher authority"); *Employees of the Department of Public Health and Welfare, Missouri v. Department of Public Health and Welfare,* 411 U.S. 279, 323 (1973) ("our discomfort with sovereign immunity, born of systems of divine right that the Framers abhorred, is thus entirely natural"); *Ex Parte Milligan,* 71 U.S. 2, 73 (1866) (referring to "the divine right of kings and other rulers to govern as they please"); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge,* 36 U.S. 420, 602 (1837) (noting that the divine right of kings was based upon "a sense of their exalted dignity and pre-eminence over all subjects, and upon the notion, that they are entitled to peculiar favor, for the protection of their kingly rights and office").

[7] U.S. Declaration of Independence (July 4, 1776).

[8] United States Constitution (September 17, 1787).

self-government",[9] and "self-government suffers when those in power suppress competing views on public issues from diverse and antagonistic sources".[10]

One might have thought that the right to free expression was secure in the United States. After all, it is enshrined in the First Amendment to the U.S. Constitution.[11] In addition, the U.S. Supreme Court has rendered a number of speech protective decisions,[12] and has generally treated free speech as a "preferred right" vis-à-vis other rights.[13] Despite the U.S. free speech tradition, the trial court decision in *Missouri v. Biden*[14] provided a chilling examination into the Biden Administration's aggressive efforts to control and suppress free speech. Purportedly, in an effort to combat "disinformation", the White House (and other Biden Administration officials) pressured and threatened social media platforms regarding their content-moderation decisions. The *Boston Globe* analogised the government's actions to those of working "the refs [the content moderators of social media platforms] like an aggressive football coach, hectoring and goading [social media platform] executives into exercising ever-stricter control over what users are permitted to say" (Bray, 2023). Moreover, as we shall see, some of the speech that the White House tried to suppress was not disinformation at all, but simply information that the government wanted to suppress. This article examines the evidence in the *Biden* case in light of the U.S. free speech tradition.

2. The U.S. free speech tradition: Placing the *Biden* decision in context

The U.S. free speech tradition generally precludes government from censoring or prohibiting speech simply because the government dislikes or objects to the message being conveyed. Indeed, the U.S. Supreme Court has consistently held that governmental attempts to "license" or "censor" speech are presumptively unconstitutional. For example, in *Lovell v. City of Griffin,*[15] the Court held that "content licensing" schemes, under which someone must submit content to a governmental censor for approval before publishing or distributing it, are "prior restraints" and therefore are presumptively unconstitutional.[16] In *Lovell,* the Court held that licensing schemes strike "at the very foundation of the freedom of the press by subjecting it to license and censorship".[17]

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[9] *First National Bank of Boston v. Belotte,* 43 U.S. 765, 812 n. 12 (1978); see also *Garrison v. Louisiana,* 379 U.S. 64, 74–75 (1964).

[10] *Associated Press v. United States,* 326 U.S. 1, 20 (1945), quoted in *New York Times Co. v. Sullivan,* 376 U.S. 254, 266 (1964).

[11] U.S. Constitution, Amdt. I.

[12] See *Snyder v. Phelps,* 562 U.S. 443 (2011); *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992); *Hustler Magazine v. Falwell,* 485 U.S. 46 (1988).

[13] See *Snyder v. Phelps,* 562 U.S. 443 (2011); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

[14] See *Missouri v. Biden,* 680 F. Supp. 3d 630 (W.D. La. 2023), *injunction aff'd in part, rev'd in part, vacated in part, and modified in part,* 83 F. 4th 350 (5th Cir. 2023), *rev'd and remanded sub nom. Murthy v. Missouri,* 603 U.S. 43 (2024).

[15] 303 U.S. 444 (1938).

[16] See also *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750 (1988) (invalidating permit requirement for the placement of newsracks). There are limited exceptions to this rule. For example, the government may impose "content-neutral time, place and manner restrictions" on parades and other public events. See *Cox v. New Hampshire,* 312 U.S. 569 (1941). In addition, the Court has treated films differently. See *Freedman v. Maryland,* 380 U.S. 51 (1965).

[17] 303 U.S. 452 (1938).

The Court has also prohibited the government from enjoining or prohibiting speech. In *Near v. Minnesota,*[18] a Minnesota trial court enjoined a newspaper from publishing because it was deemed to have published "malicious, scandalous and defamatory" material. The newspaper had alleged that the local police chief, the county attorney and others officials were guilty of "gross neglect of duty, illicit relations with gangsters, and participation in graft".[19] In striking down the injunction and the local ordinance that had authorised its issuance, the Court held that the injunction involved an unconstitutional prior restraint, noting that "the struggle in England, directed against the power of the licensor, resulted in renunciation of the censorship of the press".[20] Likewise, in *New York Times Co. v. United States,*[21] the Court overturned an injunction that was allegedly designed to protect "national security". The Court held that an injunction against speech, even one based on national security grounds, comes to the Court "bearing a heavy presumption against its constitutional validity".[22]

Thus, the people generally are free to express their opinions. As the U.S. Supreme Court recognised in *Ashcroft v. American Civil Liberties Union,*[23] as "a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content".[24] Likewise, in *Cohen v. California,*[25] the Court flatly recognised that the "constitutional right of free expression [...] is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests". *Cohen* went on to state that it would not "indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views", and therefore the government "carries a heavy burden of showing justification for the imposition of such a restraint.[26] The Court held that the government could not satisfy that burden.[27]

Even though the U.S. does not provide absolute and unqualified legal protection for free speech, only very limited categories of speech are denied constitutional protection. Prohibitable speech includes child pornography,[28] true threats,[29] fighting words[30] and

[18] 283 U.S. 697 (1931).
[19] 283 U.S. 704 (1931).
[20] 283 U.S. 713 (1931).
[21] 403 U.S. 713 (1971) (a/k/a, the *Pentagon Papers* case).
[22] 403 U.S. 714 (1971).
[23] 535 U.S. 564, 573 (2002).
[24] See also *United States v. Alvarez,* 567 U.S. 709 (2012); *Brown v. Entertainment Merchants Ass'n,* 564 U.S. 756 (2011).
[25] 403 U.S. 15, 24 (1971).
[26] 403 U.S. 26 (1971).
[27] 403 U.S. 26 (1971).
[28] See *New York v. Ferber,* 458 U.S. 747 (1982).
[29] See *Virginia v. Black,* 538 U.S. 343 (2003).
[30] See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

obscenity.[31] While commercial speech may receive a lesser level of protection,[32] most other speech is constitutionally protected. Thus, even speech that may be regarded as "offensive" is constitutionally protected (unless it involves such things as a true threat or fighting words).[33] The First Amendment also protects so-called "hate speech",[34] speech that causes mental and emotional distress,[35] and pornography that purportedly "degrades women".[36]

The Court has also held that the government may not coerce or threaten individuals in an effort to inhibit or suppress their speech. In *Bantam Books, Inc. v. Sullivan,*[37] the Rhode Island Commission to Encourage Morality in Youth was charged with educating the public "concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth, and to investigate and recommend the prosecution of all violations".[38] The Commission had a practice of sending letters on its official stationery to distributors informing them that certain books had been reviewed by the Commission and had been found to be objectionable for sale, distribution or display to youths under the age of 18. The notice reminded distributors of the Commission's obligation to recommend prosecution of purveyors of obscenity. The Court treated the Commission's actions as a prior restraint on speech which "come to this Court bearing a heavy presumption against its constitutional validity": "What Rhode Island has done has been to subject the distribution of publications to a system of prior administrative restraints, since the Commission is not a judicial body and its decisions do not follow judicial determinations that such publications may lawfully be banned."[39]

3. The unique context in which the *Biden* decision arose

The *Biden* case arose in the unique context of the internet. For most of human history, ordinary people lacked the ability to mass communicate. Information passed between people by word of mouth, or by handwritten documents.[40] Not until the fifteenth century, when Johannes Gutenberg introduced the printing press to the Western world, did it become possible to easily create multiple copies of documents. Although the printing press did not increase the speed at which information could move, it allowed information to spread more broadly, and led to a flowering of knowledge, information and ideas. But the printing press, like the more advanced technologies that came later (e.g. radio,

[31] See *Miller v. California,* 413 U.S. 15 (1973).
[32] See *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001).
[33] See *Cohen v. California,* 403 U.S. 15 (1971).
[34] See *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992).
[35] See *Snyder v. Phelps,* 562 U.S. 443 (2011); *Hustler Magazine v. Falwell,* 485 U.S. 46 (1988).
[36] See *American Booksellers Association, Inc. v. Hudnut,* 771 F.2d 323 (7th Cir. 1985).
[37] 372 U.S. 58 (1963).
[38] 372 U.S. 633 (1963).
[39] 372 U.S. 639 (1963).
[40] See Weaver, 2024, pp. 3–4. Of course, over the centuries, there were attempts to move information more quickly than people could move. Information could move faster than people could move through the use of carrier pigeons. However, although pigeons could discreetly communicate a particular piece of information relatively quickly, they were not suited to mass communication in the sense of the modern radio, television or internet.

television, satellite and cable) was under the control of "gatekeepers" – individuals who controlled how the technology could be used. The Gutenberg printing press was relatively expensive to obtain, requiring not only the purchase of a printing press, but also the purchase of lead type, ink and other essential components, meaning that only a few individuals could afford to own and operate a press, and those few could exercise "gatekeeper" power over the technology. In other words, they had the power to control who could use print technology. Subsequent technologies, including radio (Crowley & Heyer, 2010, p. 204), television (Crowley & Heyer, 2010, p. 243) and satellite communications (Weaver, 2024, pp. 75–94), all came with their own gatekeepers (Weaver, 2024, pp. 47–60). All required substantial technological investments, and some (e.g. broadcast communications like radio and television) also required an operating licence, which meant that only a small number of people (or corporations) could own and operate them. Those who controlled communications technologies had the power to decide who could use them, as well as to control the messages that were communicated (Weaver, 2024, pp. 3–35).

The internet transformed communication because it was the first technology that allowed ordinary individuals to communicate on a mass scale (Weaver, 2024, pp. 37–47), and allowed them to avoid the traditional media which had historically served as the principal gatekeeper and filter of communication and information (Weaver, 2024, pp. 49–72). This broadening of communicative capacity had a profound impact on modern societies, enabling mass communication on a scale never seen before, and resulting in profound societal changes (Weaver, 2024, pp. 73–142). However, the great strength of the internet – the enabling of mass communication by ordinary individuals – also proved to be its greatest weakness (Weaver, 2024, pp. 37–47). As the internet enabled mass communication by virtually everyone, it created the potential for mischief. Using devices such as Twitter (now X), WhatsApp and Facebook (now Meta), or a variety of other social media platforms, individuals could easily distribute information, both truthful information as well as disinformation.

Because of the internet's global nature, individuals have an unprecedented capacity to distribute disinformation. As one commentator noted, "digging up large-scale misinformation on Facebook was as easy as finding baby photos or birthday greetings" (Roose, 2018). In 2018, there "were doctored photos of Latin American migrants headed towards the United States border. There were easily disprovable lies about the woman who accused Justice Brett M. Kavanaugh of sexual assault, cooked up by partisans with bad faith agendas" (Roose, 2018). Indeed, "every time major political events dominated the news cycle, Facebook was overrun by hoaxers and conspiracy theorists, who used the platform to sow discord, spin falsehoods and stir up tribal anger" (Roose, 2018).

Much of the public discourse on these issues has occurred on social media platforms like X, Meta, WhatsApp (and a multitude of other platforms). These platforms have the ability to serve as "gatekeepers" in the sense that they can control what people say on their platforms, and can remove (take down) social media posts, or take other actions. Thus, just as the publishers of newspapers (or, for that matter, radio and television stations) could control what was published in their papers (or on their stations), those who own or control social media platforms can regulate and control what is posted on their platforms. Indeed,

social media platforms have generally been regarded as private entities and therefore are not subject to the First Amendment (which only restricts governmental action). Freed from the constraints of the First Amendment, platforms possess broad authority to censor content on their platforms.

The censorial authority of social media platforms is reinforced by Section 230 of the Communications Decency Act of 1996 (CDA)[41] which gives social media platforms broad protections against civil liability for information posted on their platforms by others.[42] In addition, the CDA contains a "Good Samaritan" defence which specifically gives social media companies the power to censor information posted on their platforms without the risk of civil liability.[43] That defence states that:

> No provider or user of an interactive computer service shall be held liable on account of – (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Section 230 is unique. If the government had tried to restrict the types of speech that Section 230 allows social media companies to prohibit, the governmental restrictions would undoubtedly have been struck down as unconstitutional. Section 230 allows social media companies to remove material that is "excessively violent, harassing, or otherwise objectionable". Undoubtedly, such language suffers from an unconstitutional level of vagueness (Weaver & Hancock, 2023, pp. 427–441) and overbreadth (see Weaver & Hancock, 2023 for a discussion of the overbreadth doctrine). Moreover, it is doubtful whether speech that is regarded as "lascivious" or "filthy" would be treated as "unprotected speech" unless it is obscene or involves child pornography.[44] Although there are several categories of unprotected speech,[45] there is no unprotected category that covers "otherwise objectionable" speech (Weaver & Hancock, 2023, pp. 21–28). That is presumably why the CDA explicitly allows social media companies to censor speech "whether or not such material is constitutionally protected" (Weaver & Hancock, 2023).

While everyone recognises that problems with "disinformation" and "misinformation" have been magnified on social media, the Section 230 standards are staggeringly broad. They allow platforms to censor not only unprotected speech (e.g. child pornography, obscenity, true threats), but any speech that they consider to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable", and social media platforms are empowered to censor "whether or not such material is constitutionally

[41] 47 U.S.C. § 230.
[42] 47 U.S.C. § 230.
[43] 47 U.S.C. § 230.
[44] See *Brown v. Entertainment Merchants Association,* 564 U.S. 786 (2011).
[45] See *Ferber v. New York,* 458 U.S. 747 (1982); *Miller v. California,* 413 U.S. 15 (1973).

protected".[46] Thus, even speech that would be fully protected if the U.S. Government tried to restrict it, can be censored and removed from social media platforms.

4. Working the refs: White House efforts to censor expression

The nature of social media platforms gives the government a unique opportunity to try to control (and, indeed, suppress) freedom of expression. Since social media platforms can easily control or remove posts on their platforms, government can pressure platforms to suppress speech to which the government objects or disagrees. The *Biden* decision offers startling insights into governmental efforts to stifle speech on social media platforms. The decision reveals that there were ongoing and constant communications between Biden Administration officials (and other governmental officials) and social media platforms regarding censorship of speech, and that officials in the Biden Administration sought to pressure, coerce and threaten social media platforms into exercising their censorial powers in ways approved by the Biden Administration.

It would be one thing if social media platforms were making their own independent decisions about what to censor. However, the evidence reveals that the U.S. Government was quite active in terms of pressuring, encouraging and even threatening social media platforms regarding their content moderation decisions. For example, the Biden Administration promulgated a regulation requiring social media platforms to provide it with information about their content moderation decisions.[47] The Biden Administration also pressured social media platforms to curb what it regarded as disinformation, including going so far as to flag information that it wished to have censored, and even encouraging platforms to suspend and de-platform users.[48] The government's actions *might* have been justifiable had they involved an imminent health emergency and the dissemination of disinformation regarding that emergency. But the government sought censorship of both health-related and non-health-related issues, including a range of hot button issues such as Hunter Biden's laptop (which will be discussed more fully below),[49] Covid-19,[50] Covid

[46] See 47 U.S.C. § 230.

[47] 47 U.S.C. § 230, 18: On 3 March 2022, the Office of the Surgeon General issued a formal Request for Information ("RFI"), published in the Federal Register, seeking information from social media platforms and others about the spread of misinformation. The RFI indicated that the Office of the Surgeon General was expanding attempts to control the spread of misinformation on social media and other technology platforms. The RFI also sought information about censorship policies, how they were enforced, and information about disfavoured speakers. The RFI was sent to Facebook, Google/YouTube, LinkedIn, Twitter, and Microsoft by Max Lesko ("Lesko"), Murthy's Chief of Staff, requesting responses from these social media platforms. Murthy again restated social media platforms' responsibility to reduce the spread of misinformation in an interview with GQ Magazine. Murthy also specifically called upon Spotify to censor health information.

[48] 47 U.S.C. § 230.

[49] *Biden,* 2023 WL 5841935, 5.

[50] *Biden,* 2023 WL 5841935, 5.

vaccines,[51] Covid lockdowns,[52] climate change,[53] abortion,[54] gender discussions,[55] as well as health[56] and economic policy.[57] Moreover, even the discussions of Covid or health issues did not necessarily involve disinformation (e.g. the Biden Administration sought to squelch a medical doctor's discussion of acknowledged health risks regarding the Johnson & Johnson Covid vaccine).

The evidence shows that Biden Administration officials constantly interacted with social media platforms through email, private portals and meetings.[58] During these interactions, White House officials "made it very clear to social-media companies what they wanted suppressed and what they wanted amplified".[59] For example, the day after the White House Press Secretary made remarks about removing the antitrust exemption from social media companies, White House officials sent emails demanding to know what the social media companies were doing about alleged disinformation.[60] In a few instances, these communications were both aggressive and hostile.[61]

The communications were so frequent that the platforms and Biden Administration officials began to refer to themselves as "partners" and as being "on the same team".[62] Indeed, Twitter went so far as to create a "partner portal" for Biden Administration communications.[63] These communications led social media platforms to aggressively suppress information, even information that did not violate the platforms' terms of use policies, but which the government simply wanted suppressed.[64] Governmental officials routinely "'flagged' for Facebook and other social media platforms posts the White House Defendants considered misinformation."[65] White House officials followed up by demanding updates and reports from the platforms regarding their handling of the

[51] *Biden,* 2023 WL 5841935, 5.
[52] *Biden,* 2023 WL 5841935, 5.
[53] *Biden,* 2023 WL 5841935, 36.
[54] *Biden,* 2023 WL 5841935, 36.
[55] *Biden,* 2023 WL 5841935, 36.
[56] *Biden,* 2023 WL 5841935, 36.
[57] *Biden,* 2023 WL 5841935, 36.
[58] *Biden,* 2023 WL 5841935, 12–19.
[59] *Biden,* 2023 WL 5841935, 12–19.
[60] *Biden,* 2023 WL 5841935, 31–32: The next day, Flaherty followed up with another email to Facebook and chastised Facebook for not catching various Covid-19 misinformation. Flaherty demanded more information about Facebook's efforts to demote borderline content, stating: "Not to sound like a broken record, but how much content is being demoted, and how effective are you at mitigating reach, and how quicky?" Flaherty also criticised Facebook's efforts to censor the "Disinformation Dozen": "Seems like your dedicated vaccine hesitancy policy isn't stopping the disinfo-dozen – they're being deemed as not dedicated – so it feels like that problem likely coming over to groups."
[61] *Biden,* 2023 WL 5841935, 32 ("Things apparently became tense between the White House and Facebook after that, culminating in Flaherty's 15 July 2021 email to Facebook, in which Flaherty stated: 'Are you guys fucking serious? I want an answer on what happened here and I want it today.'")
[62] *Biden,* 2023 WL 5841935, 31 ("The White House Defendants used emails, private portals, meetings, and other means to involve itself as 'partners' with social-media platforms.")
[63] *Biden,* 2023 WL 5841935, 31 (referring to "emails, private portals, meetings").
[64] *Biden,* 2023 WL 5841935, 31.
[65] *Biden,* 2023 WL 5841935, 31.

alleged disinformation, and the social media companies usually complied with these demands for updates.[66]

In addition to communicating with social media platforms, Biden Administration officials threatened social media platforms in order to ensure compliance. In particular, officials threatened to remove Section 230 liability protections from the platforms if they did not do more to censor "misinformation" and "disinformation".[67] These threats were reinforced by "emails, meetings, press conferences, and intense pressure by the White House, as well as the Surgeon General Defendants".[68] While threats were made under the Trump Administration, the level of threats increased significantly under the Biden Administration.[69] The Biden Administration's efforts worked: "Paired with the public threats and tense relations between the Biden Administration and social-media companies, seemingly resulted in an efficient report-and-censor relationship between Defendants and social-media companies."[70] The threats were reinforced by public statements made by the President's press secretary regarding potential antitrust actions against the major social media platforms if they did not act to curb disinformation.[71] Mark Zuckerberg (of Meta) flatly declared that he regarded "the threat of antitrust enforcement is 'an existential threat' to his platform".[72] Also, "the White House National Climate Advisor Gina McCarthy ("McCarthy") blamed social-media companies for allowing misinformation and disinformation about climate change to spread and explicitly tied these censorship demands with threats of adverse legislation regarding the Communications Decency Act".[73] Finally, the White House issued a memorandum about disinformation which specifically threatened the platforms with sanctions if they did not do enough to curb disinformation.[74] The U.S. Government's efforts were backed up by implied and

[66] *Biden,* 2023 WL 5841935, 31.

[67] *Biden,* 2023 WL 5841935, 12.

[68] *Biden,* 2023 WL 5841935, 130.

[69] *Biden,* 2023 WL 5841935, 176 ("Government officials began publicly threatening social-media companies with adverse legislation as early as 2018. In the wake of Covid-19 and the 2020 election, the threats intensified and became more direct.")

[70] *Biden,* 2023 WL 5841935, 176.

[71] *Biden,* 2023 WL 5841935, 31: At a White House Press Conference, Psaki publicly reminded Facebook and other social media platforms of the threat of "legal consequences" if they do not censor misinformation more aggressively. Psaki further stated: "The President's view is that the major platforms have a responsibility related to the health and safety of all Americans to stop amplifying untrustworthy content, disinformation, and misinformation, especially related to Covid-19 vaccinations and elections." Psaki linked the threat of a "robust anti-trust program" with the White House's censorship demand. "He also supports better privacy protections and a robust anti-trust program. So, his view is that there's more that needs to be done to ensure that this type of misinformation; disinformation; damaging, sometime life-threatening information, is not going out to the American public."

[72] *Biden,* 2023 WL 5841935, 31.

[73] *Biden,* 2023 WL 5841935, 13.

[74] *Biden,* 2023 WL 5841935, 13: On 16 June 2022, the White House announced a new task force to target "general misinformation" and disinformation campaigns targeted at women and LBGTQI individuals who are public and political figures, government and civic leaders, activists and journalists. The 16 June 2022 Memorandum discussed the creation of a task force to reel in "online harassment and abuse" and to develop programs targeting such disinformation campaigns. The Memorandum also called for the Task Force to confer with technology experts and again threatened social media platforms with adverse legal consequences if the platforms did not censor aggressively enough.

explicit threats to take action against social media platforms that were not compliant with its wishes.

It would be one thing if the U.S. Government were seeking to censor unprotected speech, such as obscenity or child pornography, or to censor fraudulent commercial speech. As previously discussed, none of that speech is entitled to First Amendment protection,[75] and can be prohibited and the disseminator might even be subjected to criminal prosecution.[76] However, the speech involved in the *Biden* case did not necessarily involve prohibited speech. On the contrary, it involved such topics as climate change,[77] Covid-19,[78] the efficacy and safety of Covid-19 vaccines[79] and the Hunter Biden laptop story.[80] While some of the statements on those topics might be regarded as "inaccurate" or "disinformation", some could not, and none of the topics fell within one of the categories of unprotected speech. Thus, the statements were not otherwise prohibitable.

Regarding disinformation, false speech is not necessarily prohibitable under the First Amendment. *United States v. Alvarez*[81] involved an individual's false assertion that he had won the Congressional Medal of Honor. While the *Alvarez* decision recognised that individuals can be prosecuted for false speech in limited and defined circumstances (e.g. perjury in a judicial proceeding or making false statements to a governmental official or agency),[82] the Court held that Alvarez could not be convicted for making a false statement to the effect that he had won the medal. Of course, if an individual disseminates false and defamatory information about another person, it is theoretically possible to recover for defamation (Weaver et al., 2006). However, it is extremely difficult for public officials to recover for defamation,[83] as well as for public figures to do so,[84] and (until recently) defamation litigation was relatively uncommon in the United States (Weaver et al., 2006, p. 85). In addition, courts are rarely permitted to enjoin false speech except false commercial speech.[85] So, generally, the First Amendment prohibits the government from censoring speech simply because it regards that speech as disinformation.[86] Indeed, the U.S. does not have "truth commissions" or "censorship boards" which are allowed to dictate which ideas and which facts are permissible, and which are not. On the contrary, the U.S. Supreme Court has been wary of governmental attempts to control the flow of information, and has generally regarded both content-based and viewpoint-based restrictions on speech as presumptively unconstitutional.[87] Ultimately, it is not for the government to dictate what people should believe, but rather for the people to decide for themselves. If the legitimacy of our governmental system depends on the consent of

[75] See *New York v. Ferber,* 458 U.S. 747 (1982); *Miller v. California,* 413 U.S. 15 (1973).
[76] *New York v. Ferber,* 458 U.S. 747 (1982); *Miller v. California,* 413 U.S. 15 (1973).
[77] See *Biden,* 2023 WL 5841935, 36.
[78] See *Biden,* 2023 WL 5841935, 5.
[79] *Biden,* 2023 WL 5841935, 5.
[80] *Biden,* 2023 WL 5841935, 5.
[81] 567 U.S. 709 (2012).
[82] 567 U.S. 709 (2012).
[83] See *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).
[84] See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).
[85] See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).
[86] See *Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
[87] See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

the governed, it is inconsistent with that system to give government the power to control, limit and suppress the range of ideas that the people can hear or consider.[88]

The *Biden* case is particularly disturbing because the government's efforts to squelch disinformation sometimes resulted in the dissemination of disinformation, and the Biden Administration effectively coerced social media platforms into collaborating with its efforts to dissemble. Consider, for example, the Hunter Biden laptop story. Before the story broke, social media platforms were warned that Russia was about to disseminate disinformation.[89] After the laptop story broke, 51 former intelligence officials came forward to brand the story as "Russian disinformation" (Broadwater, 2023; Simon, 2022). "The FBI likely misled social-media companies into believing the Hunter Biden laptop story was Russian disinformation" because, even though it had control of the laptop and knew that the allegations were true, it suggested that the story was false.[90] Worse, "the FBI was included in industry meetings and bilateral meetings, and it received and forwarded alleged misinformation to social-media companies, and actually mislead social-media companies regarding the story".[91]

The governmental efforts were successful. After the story was released, most reputable news organisations denounced the allegations as "fake news", and refused to report the story even though there were allegations of corruption by the Bidens.[92] For example, NPR, in a segment issued just a couple of weeks before the presidential election, dismissed the laptop story as "questionable" (Folkenflik, 2020), and suggested that the allegations were part of a conspiracy theory pushed by then President Trump and his allies (Folkenflik, 2020). ("The story fits snugly into a narrative from President Trump and his allies that Hunter Biden's zealous pursuit of business ties abroad also compromised the former vice president.") The Public Broadcasting Service (PBS) similarly dismissed the allegations, suggesting that Trump's allies were pushing "Russian disinformation" (Woodruff, 2020), and the *New York Times* suggested that Trump was colluding with the Russians and dismissed the story stating that "Giuliani's dirty tricks are the scandal, not Hunter Biden's hard drive" (Goldberg, 2020).

On social media networks, including Facebook and Twitter, the story was essentially purged due, in large part, to the government's suppression efforts (Simon, 2022). Not only did Twitter squelch the story,[93] it blocked users from sharing links to the *New York Post* story and prevented users who had previously sent tweets sharing the story from sending new tweets until they had deleted any prior tweets (Goldberg, 2020). Further, Facebook

[88] See *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002).

[89] *Biden,* 2023 WL 5841935, 28 ("Before the Hunter Biden Laptop story breaking prior to the 2020 election on October 14, 2020, the FBI and other federal officials repeatedly warned industry participants to be alert for 'hack and dump' or 'hack and leak' operations.")

[90] *Biden,* 2023 WL 5841935, 144.

[91] *Biden,* 2023 WL 5841935, 142.

[92] *Biden,* 2023 WL 5841935, 142.

[93] See Goldberg, 2020. ("First, let's acknowledge social media's role. A number of platforms tamped down on sharing of the Post's story. In the case of Twitter, not only did they try to block sharing of it, they suspended The New York Post's actual Twitter account for sharing its own article. That was a wild overreach, and even Twitter had to acknowledge that" quoting David Folkenflik.)

began reducing the story's distribution on its platform pending a third-party fact-check (Goldberg, 2020).

Today, reputable news organisations recognise that the Hunter Biden laptop story was not "disinformation", "fake news" or "Russian propaganda". A *New York Times* article, citing reporting by a staff member at Politico, stated that "the most explosive emails from Hunter Biden's purported laptop were entirely genuine" and were not simply Russian-planted disinformation (Stephens, 2021). Even National Public Radio has recognised that there was some validity to the allegations regarding the laptop: "Much of the mainstream media dismissed a story about Hunter Biden's business dealings. Now emails supporting the story have been authenticated" (Simon, 2022) and the *Boston Globe* questioned the decision to suppress the story (Bray, 2023). If the government had tried to suppress the story, it would have been regarded as imposing an unconstitutional "prior restraint" on speech.

5. Donald Trump's executive order

The nightmare with the Biden Administration's speech repression has now come to an end. For one thing, President Biden left office on 20 January 2025, and was replaced by President Donald Trump who issued an executive order prohibiting government officials from engaging in similar types of speech repression.[94] The order begins by emphasising that the First Amendment "enshrines the right of the American people to speak freely in the public square without Government interference, and expressed concern regarding the fact that the Biden Administration purportedly "trampled free speech rights by censoring Americans' speech on online platforms, often by exerting substantial coercive pressure on third parties, such as social media companies, to moderate, deplatform, or otherwise suppress speech that the Federal Government did not approve."[95] While the order recognised that the Biden Administration may have had the goal of combating "misinformation", "disinformation" and "malinformation", the order concludes that Biden's actions "infringed on the constitutionally protected speech rights of American citizens across the United States in a manner that advanced the Government's preferred narrative about significant matters of public debate".[96] The order concluded that "Government censorship of speech is intolerable in a free society".[97]

The order then declares that it is the policy of the United States to: a) secure the right of the American people to engage in constitutionally protected speech; b) ensure that no Federal Government officer, employee, or agent engages in or facilitates any conduct that would unconstitutionally abridge the free speech of any American citizen; c) ensure that no taxpayer resources are used to engage in or facilitate any conduct that would unconstitutionally abridge the free speech of any American citizen; and d) identify and

[94] Executive Order 14146 (Restoring Freedom of Speech and Ending Federal Censorship) (January 20, 2025).
[95] Executive Order 14146.
[96] Executive Order 14146.
[97] Executive Order 14146.

take appropriate action to correct past misconduct by the Federal Government related to censorship of protected speech.[98]

The order then sets forth two action items. First, it provided that "no Federal department, agency, entity, officer, employee, or agent may act or use any Federal resources in a manner contrary to section 2 of this order".[99] Second, the order required the "Attorney General, in consultation with the heads of executive departments and agencies, shall investigate the activities of the Federal Government over the last 4 years that are inconsistent with the purposes and policies of this order and prepare a report to be submitted to the President, through the Deputy Chief of Staff for Policy, with recommendations for appropriate remedial actions to be taken based on the findings of the report".[100]

6. Conclusion

Missouri v. Biden offers a chilling example of a governmental attempt to censor free expression. In some respects, the Biden Administration's efforts were like medieval attempts to censor speech. Just as medieval monarchies went to great lengths to limit free expression with licensing requirements, seditious libel prosecutions, and other restrictions, the Biden Administration tried to bully social media platforms into submission. However, the objective was the same: to limit and control what people could say.

The Biden Administration's actions are particularly troubling given the history of the United States. Although the founders of the U.S. governmental system embraced democratic principles in the U.S. Declaration of Independence when they declared that the power to govern derives from the consent of the governed,[101] many were fearful and distrustful of governmental power – even a democratically-elected government (Ketcham, 1986, p. xv). Illustrative were the views of a contemporary writer, Thomas Paine (1997, p. 3), who argued that "society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one". As a result, when the U.S. Constitution was drafted, the Framers went to great lengths to limit and control the scope of federal power. One way they sought to achieve that objective was by providing the federal government with only limited and enumerated powers.[102] In addition, the Framers embraced the ideas of Baron de Montesquieu, who is credited with articulating the doctrine of separation of powers, and incorporated those ideas into the structure of the Constitution (Montesquieu, 2011, pp. 151–152). Believing that their creation of a federal of government of limited powers, and that their inclusion of separation of powers principles would sufficiently protect the people of the United States against governmental overreaching, they

[98] Executive Order 14146.
[99] Executive Order 14146.
[100] Executive Order 14146.
[101] U.S. Declaration of Independence (July 4, 1776).
[102] See U.S. Constitution, Art. I, § 8.

decided to omit a bill of rights from the Constitution as unnecessary.[103] This decision was met by opposition from the people who demanded a bill of rights[104] as a way of avoiding the "potential for tyranny".[105] In order to gain ratification of proposed Constitution, it was agreed that it would be ratified "as is" (in other words without a bill of rights), but that the first Congress would draft one.[106] As a result, the Bill of Rights entered the Constitution as the first ten amendments to the U.S. Constitution.[107] It included protections for freedom of expression in the very first Amendment.[108]

Even though the Framers went to great lengths to protect individual liberty, including freedom of expression, their efforts were insufficient to protect the people against the Biden Administration's efforts at suppression. In the *Biden* case, the trial court took the unusual step of prohibiting the government from communicating with, or pressuring, social media platforms regarding their content moderation decisions. When the case reached the U.S. Supreme Court, as *Murthy v. Missouri,*[109] the Court vacated that order and dismissed the case, concluding that the plaintiffs did not have standing to pursue the litigation. Thus, if a future presidential administration chooses to engage in a similar level of repression, there is nothing to stop it from doing so.

President Trump's Executive Order offers some hope for the future. However, an executive order can be overridden by a future administration with the stroke of a pen. Moreover, it remains to be seen whether President Trump will honour his own order. In other words, if it serves his interests, will he engage in Biden-like repression of speech?

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[103] See *Wallace v. Jaffree,* 472 U.S. 78, 92 (1985) (White, J., dissenting).
[104] See *McDonald v. City of Chicago,* 561 U.S. 742 (2010).
[105] See *Wallace v. Jaffree*, 472 U.S. 78, 92 (1985) (White, J., dissenting).
[106] See *McDonald v. City of Chicago,* 561 U.S. 742 (2010).
[107] U.S. Constitution, Amdt. I–X.
[108] U.S. Constitution, Amdt. I.
[109] 603 U.S. 43 (2024).

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