

Is Free Speech a Relic in America?

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*Is the First Amendment becoming a historic relic? On July 4, 2023, federal judge **Terry Doughty** condemned the Biden administration for potentially "the most massive attack against free speech in United States history." That verdict was ratified by a federal appeals court decision in September 2023 that concluded that Biden administration "officials have engaged in a broad pressure campaign designed to coerce social-media companies into suppressing speakers, viewpoints, and content disfavored by the government."*

In earlier times in America, such policies would have faced sweeping condemnation from across the political spectrum. But major media outlets like the *Washington Post* have rushed to the barricades to defend the Biden war on "misinformation." Almost half of Democrats surveyed in September 2023 affirmed that free speech should be legal "only under certain circumstances." Fifty-five percent of American adults support government suppression of "false information" — even though only 20 percent trust the government.

Biden's War on Free Speech

The broad support for federal censorship is perplexing considering that courts have vividly laid out the government's First Amendment violations. Doughty delivered 155 pages of damning details of federal browbeating, jawboning, and coercion of social-media companies. Doughty ruled that federal agencies and the White House "engaged in coercion of social media companies" to delete Americans' comments on Afghanistan, Ukraine, election procedures, and other subjects. He issued an injunction blocking the feds from "encouraging, pressuring, or inducing in any manner the removal, deletion, suppression, or reduction of content containing protected free speech."

Censors reigned from the start of the Biden era. Barely two weeks after Biden's inauguration, White House Digital Director **Rob Flaherty** demanded that Twitter "immediately" remove a parody account of Biden's relatives. Twitter officials suspended the

account within 45 minutes but complained they were already “bombarded” by White House censorship requests at that point.

Biden White House officials ordered Facebook to delete humorous memes, including a parody of a future television ad: “Did you or a loved one take the COVID vaccine? You may be entitled....” The White House continually denounced Facebook for failing to suppress more posts and videos that could inspire “vaccine hesitancy” — even if the posts were true. Facebook decided that the word “liberty” was too hazardous in the Biden era; to placate the White House, the company suppressed posts “discussing the choice to vaccinate in terms of personal or civil liberties.”

Flaherty was still unsatisfied and raged at Facebook officials in a July 15, 2021, email: “Are you guys f-king serious?” The following day, President Biden accused social-media companies of “killing people” by failing to suppress all criticism of COVID vaccines.

Federal Censorship

Censorship multiplied thanks to an epic bureaucratic bait-and-switch. After allegations of Russian interference in the 2016 election, the Cybersecurity and Infrastructure Security Act was created to protect against foreign meddling. Prior to Biden taking office, CISA had a “Countering Foreign Influence Task Force.” In 2021, that was renamed the “Mis-, Dis- and Mal-information Team (‘MDM Team’).”

But almost all the targets of federal censorship during the Biden era have been Americans. Federal censorship tainted the 2020 and 2022 elections, spurring the suppression of millions of social-media posts (almost all from conservatives). During the 2020 election, CISA targeted for suppression assertions such as “mail-in voting is insecure” — despite the long history of absentee ballot fraud.

CISA aims to control Americans’ minds: A CISA advisory committee last year issued a report that “broadened” what it targeted to include “the spread of false and misleading information because it poses a significant risk to critical function, like elections, public health, financial services and emergency responses.” Thus, any idea that government officials label as “misleading” is a “significant risk” that can be suppressed.

Where did CISA find the absolute truths it used to censor American citizens? CISA simply asked government officials and “apparently always assumed the government official was a reliable source,” the court decision noted. Any assertion by officialdom was close enough to a Delphic oracle to use to “debunk postings” by private citizens. Judge Doughty observed that the free-speech clause was enacted to prohibit agencies like CISA from picking “what is true and what is false.”

COVID-inspired Censorship

“Government = truth” is the premise for the Biden censorship regime. In June 2022, Flaherty declared that he “wanted to monitor Facebook’s suppression of COVID-19 misinformation ‘as we start to ramp up [vaccines for children under the age of 5].’” The FDA had almost zero safety data on COVID vaccines for infants and toddlers. But Biden announced the vaccines were safe for those target groups, so any assertion to the contrary automatically became false or misleading.

Biden policymakers presumed that Americans are idiots who believe whatever they see on

Facebook. In an April 5, 2021, phone call with Facebook staffers, White House Strategy Communication chief Courtney Rowe said, “If someone in rural Arkansas sees something on FB [Facebook], it’s the truth.”

In the same call, a Facebook official mentioned nose bleeds as an example of a feared COVID vaccine side effect. Flaherty wanted Facebook to intervene in purportedly private conversations on vaccines and “Direct them to CDC.” A Facebook employee told Flaherty that “an immediate generated message about nose bleeds might give users ‘the Big Brother feel.’” At least the Biden White House didn’t compel Facebook to send form notices every 90 seconds to any private discussion on COVID: “The Department of Homeland Security wishes to remind you that there is no surveillance. Have a nice day.” Flaherty also called for Facebook to crackdown on WhatsApp exchanges (private messages) between individuals.

Federal agencies responded to legal challenges by portraying themselves as the same “pitiful, helpless giants” that President Richard Nixon invoked to describe the U.S. government when he started bombing Cambodia. Judge Doughty wrote that federal agencies “blame the Russians, COVID-19 and capitalism for any suppression of free speech by social-media companies.” But that defense fails the laugh test.

Federal agencies pirouetted as a “Ministry of Truth,” according to the court rulings, strong-arming Twitter to arbitrarily suspend 400,000 accounts, including journalists and diplomats.

The Biden administration rushed to sway the appeals court to postpone enforcement of the injunction and then sought to redefine all its closed-door shenanigans as public service. In its briefs to the court, the Justice Department declared, “There is a categorical, well-settled distinction between persuasion and coercion,” and castigated Judge Doughty for having “equated legitimate efforts at persuasion with illicit efforts to coerce.”

Biden’s Justice Department denied that federal agencies bullied social-media companies to suppress any information. Instead, there were simply requests for “content moderation,” especially regarding COVID. Actually, there were tens of thousands of “requests” that resulted in the suppression of millions of posts and comments by Americans.

Team Biden champions a “no corpse, no delicta” definition of censorship. Since federal SWAT teams did not assail the headquarters of social-media firms, the feds are blameless. Or, as Justice Department lawyer Daniel Tenny told the judges, “There was a back and forth. Sometimes it was more friendly, sometimes people got more testy. There were circumstances in which everyone saw eye to eye, there were circumstances in which they disagreed.”

It’s irrelevant that President Joe Biden publicly accused social-media companies of murder for not censoring far more material and that Biden appointees publicly threatened to destroy the companies via legislation or prosecution. Nope: It was just neighborly discussions between good folks.

The Courts Strike Back

At the appeals court hearing, Judge Don Willett, one of the most principled and penetrating judges in the nation, had no problem with federal agencies publicly criticizing what they judged false or dangerous ideas. But that wasn’t how Team Biden compelled submission: “Here you have government in secret, in private, out of the public eye, relying on ... subtle

strong-arming and veiled or not-so-veiled threats.” Willett vivified how the feds played the game: “That’s a really nice social-media platform you’ve got there, it would be a shame if something happened to it.”

Judge Jennifer Elrod compared the Biden censorship regime to the Mafia: “We see with the mob ... they have these ongoing relationships. They never actually say, ‘Go do this or else you’re going to have this consequence.’ But everybody just knows.”

Yet the Biden administration was supposedly innocent because the feds never explicitly spelled out “or else,” according to the Justice Department lawyer. This is on par with redefining armed robbery as a consensual activity unless the robber specifically points his gun at the victim’s head. As economist Joseph Schumpeter aptly observed, “Power wins, not by being used, but by being there.”

In its September decision, the appeals court concluded that the White House, FBI, Centers for Disease Control and Prevention (CDC), and the U.S. Surgeon General’s office trampled the First Amendment by coercing social media companies and likely “had the intended result of suppressing millions of protected free speech postings by American citizens.”

The court unanimously declared that federal

officials made express threats.... But, beyond express threats, there was always [italic in original] an “unspoken or else.” The officials made clear that the platforms would [italic in original] suffer adverse consequences if they failed to comply, through express or implied threats, and thus the requests were not optional.

The appeals court also took a “real world” view of the nation’s most feared law enforcement agency: “Although the FBI’s communications did not plainly reference adverse consequences, an actor need not express a threat aloud so long as, given the circumstances, the message intimates that some form of punishment will follow noncompliance.” The federal appeals court upheld part of the injunction while excluding some federal agencies from anticensorship restrictions. The Biden administration quickly appealed the partial injunction to the Supreme Court, telling the court: “Of course, the government cannot punish people for expressing different views.... But there is a fundamental distinction between persuasion and coercion. And courts must take care to maintain that distinction because of the drastic consequences resulting from a finding of coercion.”

The Biden brief bewailed that the appeals court found that “officials from the White House, the Surgeon General’s office and the FBI coerced social-media platforms to remove content despite the absence of even a single instance in which an official paired a request to remove content with a threat of adverse action.” But both the federal district court and the appeals court decisions offered plenty of examples of federal threats.

The New Civil Liberties Alliance, one of the plaintiffs, scoffed: “The Government argues that the injunction interferes with the government’s ability to speak. The Government has a wide latitude to speak on matters of public concern, but it cannot stifle the protected speech of ordinary Americans.” And the injunction impedes federal officials from secretly coercing private companies to satisfy White House demands.

As the Biden administration pressured the Supreme Court, the anticensorship lawyers on

September 25 secured an en banc rehearing of their case, which consists of a panel of all 17 active Fifth Circuit judges. The plaintiffs were especially concerned that the Cybersecurity and Infrastructure Security Act was excluded from the injunction. CISA and its array of federal censorship contractors have sowed far too much mischief in recent years. The appeals court modified the injunction to put a leash on CISA.

Censorship could cast the deciding vote in the 2024 presidential election. Judge Doughty issued his injunction in part because federal agencies “could use their power over millions of people to suppress alternative views or moderate content they do not agree with in the upcoming 2024 national election.”

Much of the mainstream media is horrified at the prospect of reduced federal censorship. The *Washington Post* article on Doughty’s decision fretted, “For more than a decade, the federal government has attempted to work with social media companies to address criminal activity, including child sexual abuse images and terrorism.” The Post did not mention the Biden crusade to banish cynicism from the Internet. Journalist Glenn Greenwald scoffed, “The most surreal fact of U.S. political life is that the leading advocates for unified state/corporate censorship are large media corporations.”

Fifty years ago, philosopher Hannah Arendt wrote of the “most essential political freedom, the right to unmanipulated factual information without which all freedom of opinion becomes a cruel hoax.” The battle over federal censorship will determine whether Americans can have more than a passing whiff of that political freedom. Ohio Attorney General Dave Yost joined the lawsuit against censorship and commented in September: “The federal government doesn’t get to play referee on the field of public discourse. If you let them decide what speech is OK, one day yours might not be.”

On October 20, the Supreme Court announced that it would rule on this case, with a decision expected within a few months. Stay tuned for plenty of legal fireworks and maybe even good news for freedom.

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