

**Testimony of Mr. Gary M. Lawkowski
Senior Fellow, the Council to Modernize Governance**

***“Censorship Laundering Part II:
Preventing the Department of Homeland Security’s Silencing of Dissent”***
**United States House of Representatives
Committee on Homeland Security
Subcommittee on Oversight, Investigations, and Accountability**

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Mr. Chairman, Mr. Ranking Member, and Members of the Committee, thank you for this opportunity to testify today.

I. Introduction¹

For about the past two years, I have had the distinct pleasure of dating a lovely woman. But there is a catch: I live in the great Commonwealth of Virginia, while she lives across the river and up the road in Baltimore, Maryland. This means I have spent a lot of time over the past two years going up and down the Baltimore-Washington Parkway, I-295, and I-395.

I started driving in high school. I have been doing it for a while. I think I have become pretty good at it. But something seems to happen as soon as I cross the river on the highway. If you have had the opportunity to make this trip a few times, you may have seen it as well. There are all these maniacs on the road. If they are not zipping past me at unsafe speeds on the right, they are plodding along blocking traffic on the left.

But here is the amazing thing: I suspect if you tracked down those other drivers, sat them in this chair, and swore them to tell the truth, they would tell you that they are not the problem. It is everyone else, maybe even me, that guy with the Virginia tags.

I apologize if you have heard this one before,² but to me, “disinformation” is a lot like driving. We all think we are good at identifying what is true, that the problem is everyone else, and that things would be so much better if we could just make them see that. But, in the words of

¹ Portions of this testimony are adopted from the Council to Modernize Governance report, *Restoring Online Free Speech and Shutting Down the Censorship Industrial Complex*, which is attached hereto. See Curtis Schube & Gary Lawkowski, *Restoring Online Free Speech and Shutting Down the Censorship Industrial Complex*, The Council to Modernize Governance (Dec. 2023).

² See Testimony of Mr. Gary M. Lawkowski, Senior Fellow, the Institute for Free Speech to the United States House of Representatives Committee on House Administration, Subcommittee on Elections (June 22, 2022), <https://docs.house.gov/meetings/HA/HA08/20220622/114910/HHRG-117-HA08-Wstate-LawkowskiG-20220622.pdf>

Time Magazine’s illustrious person of the year, it may be that “it’s me, hi, I’m the problem, it’s me”³—we all may well be the maniac on the road.

The result is that it is imperative to approach questions of truth with a healthy dose of humility. Whether it is done directly or indirectly, censorship or seeking to suppress perceived “dis-,” “mis-,” or “malinformation” takes the opposite approach.

Unfortunately, over the past few years, government officials have assumed increasingly assertive roles in attempting to police truth and falsity in public discourse, particularly online. The search for truth and the basic imperatives of self-government require breathing space in a free and open marketplace of ideas.⁴ This is completely incompatible with constant “content moderation” to strangle purported “misinformation.”

Preserving and protecting this marketplace of ideas requires going beyond just the four corners of the First Amendment and restoring institutional respect for the values it protects. This involves actions in the courts, but it also requires administrative and legislative action to ensure government—including domestic facing agencies like the Department of Homeland Security and Federal Bureau of Investigation—respect proper limits on their actions.

II. Why Free Expression

“Disinformation” and “misinformation” are real. There are bad actors who want to intentionally spread false information to serve their own ends. There are also people who honestly believe things that just are not true. Moreover, whether intentional or not, this false information can have real, negative consequences: from luring speakers into minor faux pas to potentially starting wars.

In light of these threats, why do we value and prioritize the free expression of ideas—especially ideas that seem like they are wrong?

First and foremost, free expression—including and perhaps especially the expression of ideas that many people believe are wrong—is necessary in the search for truth. Knowledge is not static. People and institutions constantly learn new information or make mistakes in how they analyze old information. Pursuing truth requires correcting errors in prevailing narratives, which in turn means people must be free to challenge prevailing orthodoxy and beliefs.

I grew up and went to school in the 1990s. When I was in school, we were taught about the food pyramid, the paragon of guidance for healthy eating. Considering the primacy placed on the food pyramid as “settled science”—at least for us elementary schoolers—it came as quite a surprise for me to learn that the U.S. Department of Agriculture has changed its recommended

³Taylor Swift & Jack Antonoff, *Anti-Hero*, Republic (Oct. 21, 2022), <https://www.youtube.com/watch?v=b1kbLwvqugk>.

⁴ See generally *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (Recognizing “[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” (quoting *N.A.A.C.P. v. Button*, 371 U. S. 415, 433 (1963))).

guidance graphic at least twice since the early 1990s, each time altering its guidance for healthy eating.⁵ Even after these changes, the current recommendations are still contentious and hotly debated. For example, the Harvard T.H. Chan School of Public Health almost immediately launched its own “Healthy Eating Plate” as an alternative to the Department of Agriculture’s revised recommendations.⁶

Eating food is one of the basic building blocks of life. Humans have been doing it since they first appeared on the Earth. Yet, we still do not fully understand or agree on what type of diet is best and how to describe it. Even in a field so basic and longstanding, the “science” is not so “settled” as to be beyond debate. There is every reason to believe that questions that have arisen much more recently and that are much less elemental to the human experience can also benefit from a continued airing of debate and contrasting views.

Second, free expression lowers the stakes for political contests. Our Constitution was drafted in 1787. The framers were well aware of the recent history of approximately 200 years of European wars of religion and, particularly, the history of the English Civil War, which ended a little over a century before. While there were many factors influencing each conflict, one recurring theme was the steadfast idea that one side knew the truth and was right, while the other side did not and was wrong.

The settlement, reflected in the ideals of the founders’ age, was to accept that one side could be wrong without needing to change their mind at the point of a sword. This is a principle that is being increasingly devalued in our political culture and it is one we disregard at our own peril. Recognizing the right to be wrong lowers the stakes of our political disputes. It allows the losing side in today’s political debate to accept defeat gracefully, rather than viewing any setback as an existential threat.

Third, free expression provides a window into what people believe. People do not necessarily stop believing the “wrong” things just because they are not able to express them. They simply get more careful about when and with whom they choose to express their true views. Thus, “bad” ideas do not go away; they go underground. This is not a healthy state of affairs.

III. The Problem with Regulating Dis-, Mis-, and Malinformation—Who Decides?

The problem with regulating purported “mis-,” “dis-,” or “malinformation” boils down to a simple question: who decides? Regulating these categories of speech requires someone to first determine what is and what is not true. This is an incredibly consequential power.

In a free society, where government derives its authority from the consent of the governed, the answer to this question cannot be the government. Government—especially the federal government—is an 800-pound gorilla. It wields vast power over individuals, companies, and the

⁵ See William Neuman, *Nutrition Plate Unveiled, Replacing Food Pyramid*, N.Y. Times (June 2, 2011), <https://www.nytimes.com/2011/06/03/business/03plate.html>.

⁶ See *Harvard researchers launch Healthy Eating Plate*, Harvard T.H. Chan School of Public Health (Sept. 14, 2011), <https://www.hsph.harvard.edu/news/press-releases/healthy-eating-plate/>.

economy more broadly. If my neighbor thinks I am wrong, I can ignore his views. If the government thinks I am wrong and has the authority to impose its view of truth, I do not have the same luxury.

Moreover, government is ultimately a human institution. Even though the majority of government employees are dedicated to their work and want to do the right thing, they are still susceptible to the same flaws, cognitive biases, and self-interested behavior as any other people. Whether out of a well-meaning but misguided belief or self-interested desires to hide inconvenient or embarrassing narratives, government officials can be—and often are—wrong about things.

We have vividly seen these processes play out in many facets of life over just the past few years. For example, ideas that were initially suppressed in debates over Covid-19, such as concerns that Covid-19 may have leaked from a lab, have gained traction and greater acceptance.⁷ Similarly, the Hunter Biden laptop was initially dismissed as “disinformation” before being generally accepted as authentic.⁸ Likewise, in 2021, there was a lot of public controversy around accusations that U.S. Border Patrol agents whipped migrants at the Mexican border with the reins of their horses. Even the President of the United States weighed in, claiming “people [were] being strapped” and stating “[i]t’s outrageous. I promise you those people will pay.”⁹ But it turned out not to be true. As Customs and Border Protection found following an intensive investigation, “[t]he investigation found no evidence that agents struck any person with horse reins.”¹⁰

Finally, the federal government—particularly the executive branch, acting alone—attempting to arbitrate truth in public discourse is incompatible with self-government. The three most important words in the U.S. Constitution are the first three: “We the people.” With this simple introduction, the framers of our constitution set out a radical approach to government, one where the American people ultimately set the agenda for the government and government is supposed to be responsive to the American people. Involving the federal government in regulating “mis-,” “dis-,” and “malinformation” undermines this relationship. It allows the government to effectively set its own agenda, independent of the will of the American people. This is not and cannot be correct.

⁷ See generally Christiano Lima, *Facebook no longer treating ‘man-made’ Covid as a crackpot idea*, Politico (May 26, 2021), <https://www.politico.com/news/2021/05/26/facebook-ban-covid-man-made-491053>.

Michael R. Gordon & Warren P. Strobel, *Lab Leak Most Likely Origin of Covid-19 Pandemic, Energy Department Now Says*, Wall St. J. (Feb. 26, 2023), <https://www.wsj.com/articles/covid-origin-china-lab-leak-807b7b0a>.

⁸ See generally Craig Timberg, Matt Viser and Tom Hamburger, *Here’s How The Post Analyzed Hunter Biden’s Laptop*, Wash. Post (Mar. 30, 2022), <https://www.washingtonpost.com/technology/2022/03/30/hunter-biden-laptop-data-examined/>.

⁹ *Remarks by President Biden on the COVID-19 Response and the Vaccination Program*, The White House (Sept. 24, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/24/remarks-by-president-biden-on-the-covid-19-response-and-the-vaccination-program-8/>.

¹⁰ *CBP Releases Findings of Investigation of Horse Patrol Activity in Del Rio, Texas*, U.S. Customs and Boarder Protection (Jul. 8, 2022), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-findings-investigation-horse-patrol-activity-del-rio>.

IV. Government Efforts to Regulate Disinformation

Unfortunately, we have seen a creeping erosion of time-honored lines protecting free expression from government intrusion, particularly on social media.

The internet is a tool and, like any tool, there is the potential for it to be misused for illegal purposes. The Supreme Court has recognized a “few” categories of speech “long familiar to the bar” where the government can impose content-based restrictions, such as incitement to imminent lawless action, speech integral to criminal conduct, or child pornography.¹¹ The government can and does have a role in protecting the American people from actual criminal conduct, even when it occurs online. But this can be fulfilled clearly and transparently through traditional law enforcement channels.

That is not analogous to what has occurred over the past few years. What we have seen is a subtle but distinct shift from targeting nefarious actions to targeting disfavored ideas. The shift from concern about direct foreign attacks on election infrastructure, such as voting machines and voter rolls, to concerns about ill-advised memes illustrates this slippery slope.

In early 2017, Homeland Security Secretary Jeh Johnson designated election infrastructure as a “critical infrastructure subsector,” giving the Department of Homeland Security the duty to protect it. Secretary Johnson clearly defined election infrastructure as physical facilities and systems used for elections: “By ‘election infrastructure,’ we mean storage facilities, polling places, and centralized vote tabulation locations used to support the election process, and information and communications technology to include voter registration databases, voting machines, and other systems to manage the election process and report and display results on behalf of state and local governments.”¹²

However, by 2019, a subtle shift occurred. While the Department still sought to protect “election infrastructure,” the perceived threat morphed from physical facilities and systems to protecting against “foreign disinformation.”¹³ This shift put the Department squarely in the business of monitoring and seeking to influence what people think and say.

By July 2020, the Department was actively meeting with outside groups seeking to suppress purported misinformation, including the collection of groups known as the “Election

¹¹ *United States v. Alvarez*, 567 U.S. 709, 717 (2012).

¹² *Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector*, Department of Homeland Security (Jan. 6, 2017), <https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-elecritical#:~:text=Statement%20by%20Secretary%20Jeh%20Johnson,as%20a%20Critical%20Infrastructure%20Subsector&text=I%20have%20determined%20that%20election,Government%20Facilities%20critical%20infrastructure%20sector>.

¹³ *Homeland Security Advisory Council Interim Report of The Countering Foreign Influence Subcommittee*, Department of Homeland Security (May 21, 2019), https://www.dhs.gov/sites/default/files/publications/ope/hsac/19_0521_final-interim-report-of-countering-foreign-influence-subcommittee.pdf.

Integrity Project” (“EIP”).¹⁴ By its own claim, EIP was formed “in consultation with [the Cybersecurity and Infrastructure Security Agency] and other stakeholders” and identified the problem it was seeking to address as “election disinformation that originates from within the United States, which would likely be excluded from law enforcement action under the First Amendment and not appropriate for study by intelligence agencies restricted from operating inside the United States.”¹⁵

Analysis of the EIP’s 2021 post-election report and the ticketing system that flagged various online speech offers the following data points:

- 72% of “tickets” for flagged speech was “categorized as delegitimization,” which appears to apply regardless of if the information was true or false;¹⁶
- 49% of tickets involved an “exaggerated issue;”¹⁷
- 26% of tickets involved an electoral process issue incorrectly framed as partisan;¹⁸
- 18% of tickets featured content taken out of context from other places or times to create false impressions of an election issue;¹⁹
- 17% of tickets involved unverifiable claims, such as friend-of-friend narratives.²⁰

The claims presented in these “tickets” may have been true or they may have been false. What they largely appear not to be, however, is speech that would fall outside of traditional First Amendment protections.

As a coda on the Election Integrity Project, following the 2020 election the same four institutions primarily responsible for the EIP did not disband. Instead, they effectively rebranded with other partner organizations as the Virality Project to continue their censorship of online speech. This time they targeted narratives relating to Covid-19 vaccines instead of focusing on election delegitimization.²¹

¹⁴ See *The Long Fuse: Misinformation and the 2020 Election* at 21, Election Integrity Project (June 15, 2021) <https://stacks.stanford.edu/file/druid:tr171zs0069/EIP-Final-Report.pdf> (EIP Post-election Report).

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 31.

¹⁷ *Id.* at 33.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ “Virality Project,” accessed Dec. 11, 2023, <https://www.viralityproject.org/home>.

The story of the Department of Homeland Security’s descent into domestic censorship illustrates several key features of what has been called the “censorship industrial complex,” including:

- The use of a foreign threat to justify expansion into censorship;
- The redefinition of terms, such as critical infrastructure, with little or no public debate;
- The shift from purely foreign threats to domestic concerns;
- The use of partnerships with ostensibly nongovernmental organizations—often funded in part through government grants—to act in places where First Amendment concerns would limit the government’s ability to act indirectly; and
- The evolving nature of the targets of domestic censorship efforts, with efforts begun to address one discrete concern—such as foreign election interference—being repurposed for others.

V. Finding Solutions: Six Principles and Proposals for Reform

Working with my colleague Curtis Schube and the Council to Modernize Governance, we have developed a set of six areas for improvement that can help arrest the growth of the censorship industrial complex. These ideas are listed and expanded upon further in our report, *Restoring Online Free Speech and Shutting Down the Censorship Industrial Complex*, which is attached to this testimony:

First, we recommend returning to first principles. The federal government—particularly the executive branch, acting on its own accord, should not be the arbiter of truth. Where there is “bad” speech, the government should respond by presenting its own views and evidence—not seeking to suppress disfavored ideas.

Second, there should be bright lines preventing the federal government from interfering with constitutionally protected speech. In the limited circumstances where there is a legitimate legal basis to suppress online speech—such as preventing the dissemination of child pornography—the involvement of federal officials in identifying, flagging, or otherwise contributing to the removal should be clear, should be performed only by law enforcement, and should be open to both public and judicial scrutiny.

Third, domestic-facing agencies, such as the Department of Homeland Security and the Federal Bureau of Investigation, should be prohibited from engaging in activities to restrict “mis,” “dis-,” and “malinformation.” This is not to absolve other ostensibly foreign-facing agencies from scrutiny. Rather, it is a recognition that reform needs to start somewhere, and domestic facing entities are clearly inappropriate vehicles for activities with significant implications for domestic free expression, particularly when the *raison d’etre* is to counter foreign disinformation.

Fourth, the slippery slope in definitional changes that has allowed accepted missions, such as protecting “critical infrastructure,” to be stretched beyond any common understanding must be reined in. Significant changes to organizational missions must be presented to the public and properly debated before being implemented.

Fifth, the federal government should cut federal funding for anti-disinformation programs that seek to flag and/or censor First Amendment-protected speech. The field of mis- and disinformation does not merely seek to correct inaccurate information through counter speech. It seeks to suppress what it views as untrue information. Accordingly, it functions as a high-tech inquisition that is irreconcilable with basic principles of free expression. The least that can be done is to close the spigot of taxpayer dollars being used to censor the American people.

Sixth, there must be avenues for personal accountability for federal officials who misuse their positions to censor American speech. The right to free speech is central to the proper functioning of a democratic society. Systematic violations of this right by government officials wielding the power to regulate or shut down private actors presents tremendous danger to the future of political discourse. Whether it is conservative speech today or progressive speech tomorrow, it is wholly inappropriate for federal officials to abuse their authority toward this end. However, as is clear in other areas, without the opportunity for personal accountability, the likelihood of preventing future abuse is low. Accordingly, there must be both employment consequences and potential liability for the most egregious cases, for repeated or blatant First Amendment violations.

None of these proposals leaves the federal government helpless in the face of actual foreign disinformation campaigns. The solution to “bad” speech today is the same as it has always been: more “good” speech. The government can still engage in the marketplace of ideas as a participant—not a moderator—and seek to convince the American people that it is correct based on the persuasive force of its evidence and arguments.

VI. Conclusion

President Reagan warned “Freedom is a fragile thing and it's never more than one generation away from extinction. It is not ours by way of inheritance; it must be fought for and defended constantly by each generation, for it comes only once to a people. And those in world history who have known freedom and then lost it have never known it again.”²²

We are, unfortunately, at an inflection point. Our core commitment to free expression is being challenged and assailed from many directions in new and unique ways. We must not be the generation that allows free expression, unmoderated by government, to pass away quietly. We have the opportunity to preserve the free expression that has served our nation well for the past 247 years. We must take it and resolve to approach questions of truth with proper humility, recognizing that the settled narrative today may be proven wrong tomorrow.

²² Ronald Reagan, *Inaugural Address*, Ronald Reagan Presidential Library and Museum (Jan. 5, 1967), <https://www.reaganlibrary.gov/archives/speech/january-5-1967-inaugural-address-public-ceremony>.

Thank you very much for the opportunity to discuss these issues. I greatly appreciate your time and consideration.

Additional Resources

- Curtis Schube & Gary Lawkowski, *Restoring Online Free Speech and Shutting Down the Censorship Industrial Complex*, The Council to Modernize Governance (Dec. 2023).

DECEMBER 2023

RESTORING ONLINE FREE SPEECH AND SHUTTING DOWN THE CENSORSHIP INDUSTRIAL COMPLEX



Curtis M. Schube, J.D.
Gary Lawkowski, J.D.

Executive Summary

The emergence of social media platforms has offered an unprecedented shift in modern American speech and debate regarding sensitive political and social topics to the internet. While platforms such as Facebook and Twitter (now “X”) give everyday Americans an opportunity to publicly share and debate their opinions on hot-button issues online, until recently little was known about how these platforms moderated content. Information revealed by lawsuits, public information, and Congressional investigations requests has made it increasingly apparent that federal actors have overstepped their bounds in pressuring tech platforms to censor Americans online.

Watchdog organizations, independent journalists, congressional committees, and legal challenges have uncovered internal conversations, thinly veiled threats to social media companies, and similar records that reveal the federal government’s far-reaching effort to censor American speech online. Notably, after Elon Musk acquired Twitter in October 2022, journalists Bari Weiss, Matt Taibbi, and Michael Shellenberger were granted access to internal documents from previous Twitter executives detailing content moderation decisions. Since then, the journalists have released a multi-part series on Twitter called the “Twitter Files” exposing conversations between Twitter executives and federal actors that led to outright bans, de-amplification of accounts and narratives, and other efforts to censor or suppress the speech of American citizens.¹

Watchdog groups like the Foundation for Freedom Online, America First Legal, and Protect the Public’s Trust, as well as several congressional committees, have dug further into the censorship industrial complex. This intricate network involves government agencies utilizing taxpayer funds and repurposing existing programs to spearhead a censorship industry. The resulting collaboration to censor Americans, deputized by the federal government, involves universities, private firms, and think tanks working closely with federal actors to threaten, pressure, and cajole major tech platforms (Twitter, Facebook, Reddit, YouTube) to suppress narratives that dissent from the official narratives advanced by the government.

Multiple congressional committees have delved into various components of the censorship industrial complex, notably probing the Department of Homeland Security’s (DHS) Cybersecurity & Infrastructure Security Agency (CISA), which has been most closely linked with outsourcing to seemingly nongovernmental entities of the dubious task of censorship. The House Homeland Security Subcommittee on Oversight, Investigations, and Accountability, led by Chairman Dan Bishop has been instrumental in this effort to expose censorship laundering efforts. During a May 11, 2023, hearing, the Subcommittee drew upon research uncovered by the Foundation for Freedom Online to scrutinize CISA organizing private firms for censorship activities and monitoring purported domestic “disinformation.”² Subsequently, on June 26, 2023, the

¹ Aimee Picchi, “Twitter Files: What They Are and Why They Matter,” CBS News, last updated Dec. 14, 2022, <https://www.cbsnews.com/news/twitter-files-matt-taibbi-bari-weiss-michael-shellenberger-elon-musk/>.

² Homeland Security Republicans, “Bishop to Hold Subcommittee Hearing on DHS Mis-, Dis-, Malinformation Monitoring,” Press Release, May 10, 2023,

House Judiciary Committee’s Select Subcommittee on the Weaponization of the Federal Government exposed CISA’s attempts to conceal their censorship practices.³

From a legal and policy standpoint, the most important blows to the censorship industrial complex have come via the State of Missouri’s lawsuit against the Biden administration. *Missouri v. Biden* has revealed that the censorship problem has spread across the federal government and has outed, among others, several high-level White House officials as expressly using their official authority to suppress lawful and constitutionally protected speech of American citizens. Recently, the Supreme Court agreed to review⁴ an injunction issued against CISA, the CDC, the Surgeon General, the FBI, and the White House limiting their ability to demand social media companies censor American speech.⁵

The rise of the domestic censorship industry in recent years carries with it the potential for a systematic elimination of dissenting political opinions and narratives if genuine reform efforts are not enacted. As additional layers of the government-approved censorship onion are peeled back, it becomes crucial to reflect upon how to best preserve the fundamental principles of free speech and democracy in America. This report identifies six policy changes that, if implemented, could start to dismantle the censorship industrial complex and restore the ability of American citizens to exercise their First Amendment rights to free speech online.

<https://homeland.house.gov/2023/05/10/tomorrow-at-2-pm-bishop-to-hold-subcommittee-hearing-on-dhs-mis-dis-malinformation-monitoring/#:~:text=WASHINGTON%2C%20D.C.%20%E2%80%93%20Tomorrow%2C%20May,could%20be%20used%20to%20monitor>.

³House of Representatives Judiciary Committee, “New Report Reveals CISA Tried to Cover Up Censorship Practices,” Press Release, June 26, 2023, <https://judiciary.house.gov/media/press-releases/new-report-reveals-cisa-tried-cover-censorship-practices>.

⁴ *Murthy, et al. v. Missouri, et al.*, Case No. 23A243 (23-411) (Oct. 20, 2023).

⁵ *Missouri v. Biden*, Case No. 23-30445, 2023 WL 6425697 (5th Cir. Oct. 3, 2023).

Introduction

There are three main categories used by the censors to distinguish between different speech violations on social media: dis-, mis-, and mal- information. Disinformation is deliberately created to mislead, harm, or manipulate. Misinformation is factually false, but not created or shared with the intent to cause harm. Malinformation is defined as factually correct speech that has been taken out of or presented without context.

“Disinformation” and “misinformation” are real. There are bad actors who want to intentionally spread false information to serve their own ends. There are also people who honestly believe things that just are not true. Moreover, whether intentional or not, this false information can have real, negative consequences: from luring speakers into minor faux pas to potentially starting wars.

The problem with regulating these categories of speech boils down to a simple question: who decides? Regulating “dis-” or “misinformation” requires someone to first determine what is and what is not true, then seek to impose that determination on other people. Regulating “malinformation” is even more Orwellian—it begins with the premise that what is being said is actually true, but that the speaker’s *interpretation* or *conclusion* is wrong or that the speaker presents the information in a way that it could lead listeners to the “wrong” interpretation or conclusion.

This is a dangerous line of thinking that is ultimately irreconcilable with a free society. Giving power to any one source to decide and enforce its view of what is true and what is not creates great risk of an abuse of that power.

In a free society, where government derives its authority from the consent of the governed, the answer to the question “who decides” cannot be the government.

First, it risks inverting the relationship between the people—who are supposed to provide direction to the government—and the government—that is supposed to serve the people.

Second, the government is really bad at it. Government is ultimately a human institution. As such, it is susceptible to the same flaws, cognitive biases, and self-interested behavior as individuals. In short, government can—and often is—wrong about things. The search for truth requires people to be able to question government pronouncements and narratives.

And third, its power makes it a particularly bad entity to rely upon. If my neighbor thinks I am wrong, I can ignore his views. If the government thinks I am wrong and has the authority to impose its view of truth, it could bankrupt or even imprison me if the current trend is taken to its logical conclusion. That is, unless the people check that power.

Government can have a role to play in the marketplace of ideas. But it is through engagement in that marketplace, providing its own evidence, and letting the American people make their own decisions—not through coercion.

In sum, we must return to first principles: the government should not be the arbiter of truth, Americans' First Amendment rights are not mere suggestions, and the way out of a perceived disinformation war continues to be more speech, not less.

Section 1: The Government Should No Longer Be the Arbiter of Truth

Background

The mis-, dis-, and mal-information designations used by censors may serve a useful purpose for law enforcement or national security officials. But the three categories ultimately represent different entry ways for the government to act as the arbiter of truth, likely in violation of the rights of the public to participate in a free and open dialogue in the arena of ideas.

Analysis

As explored more below, the federal government's foray into identifying and seeking to suppress online speech largely centered around stopping the dissemination of purportedly false and intentionally harmful information from hostile foreign actors. Unsurprisingly, public support for the government's role in fighting real foreign disinformation has often been strong despite the weak legal ground supporting their engagement. Yet evidence suggests that government has fallen down a slippery slope leading from combating purported foreign "disinformation" to targeting truthful domestic speech that reaches disfavored conclusions. While this fact appears to be evident from what we know about reported or tagged social media posts, the data is difficult to gather. This appears to be a feature not a bug since the government and its partners have avoided formal classification by information type altogether.

Analysis of the Election Integrity Partnership's (EIP) 2021 post-election report⁶ and the ticketing system that flagged various online speech offers the following data points:

- 72% of "tickets" for flagged speech was "categorized as delegitimization," which appears to apply regardless of if the information was true or false;⁷
- 49% of tickets involved an "exaggerated issue;"⁸
- 26% of tickets involved an electoral process issue incorrectly framed as partisan;

⁶ See Election Integrity Project, "The Long Fuse: Misinformation and the 2020 Election," Stanford, last updated June 15, 2021, 3, <https://stacks.stanford.edu/file/druid:tr171zso069/EIP-Final-Report.pdf#page=21>. (EIP Post-election Report).

⁷ Ibid. 31.

⁸ Ibid. 33.

- 18% of tickets featured content taken out of context from other places or times to create false impressions of an election issue;
- 17% of tickets involved unverifiable claims, such as friend-of-friend narratives.

These numbers undermine any semblance of good faith attempts to protect and avoid censorship of lawful and constitutionally protected speech by Americans. The situation is made worse when you consider that agencies such as DHS and their partners' attempts to avoid proper classification – and hence any transparency into or accountability for apparent free speech violations.⁹

Whether the censorship is politically motivated – as many suspect given the apparent heavily partisan inclinations, public statements, and resumes of those involved – or simply causing a clear disparate impact on conservative or counter-culture viewpoints, is largely beside the point. The federal government's efforts to target malinformation (and with it, mis- and disinformation) are fraught with legal, ethical, and constitutional challenges that have yet to be properly addressed or remedied.

Fighting so-called MDM provided the basis for public health authorities, including at the White House, the Centers for Disease Control and Prevention, and the Surgeon General's Office to censor credentialed doctors, researchers, and academics expressing opinions during the COVID pandemic that in many cases proved both factually accurate and peer reviewed. Even public disclaimers, guided by medical doctors' expertise, on the potential dangers of Covid-19 vaccines appeared to have crossed the line of what certain federal officials deemed permissible speech.

For instance, discovery from the blockbuster *Missouri v. Biden* case exposed how the Surgeon General's Office and the CDC collaborated with the Virality Project to suppress factually true claims about potential side effects of COVID vaccines.¹⁰ In one email uncovered in the Twitter Files series, the Virality Project recommended to tech platforms that they act against “stories of true vaccine side effects” and “true posts which could fuel hesitancy.”¹¹

⁹ Mike Benz, “DHS Encouraged Children To Report Family To Facebook For Challenging US Government Covid Claims,” Foundation for Freedom Online (Aug. 28, 2022) (“While the nuance of these distinctions is intended to promote to the outside world that DHS exercises restraint, nuance and precision, **in practice DHS deliberately folds virtually all of its targets into ‘disinformation.’**...[In a 2020 election disinformation conference hosted by DHS, their partner] the Harvard Belfer Center, [] taught election officials **not** to distinguish between ‘misinformation’ and ‘disinformation’, because intent does not matter if a social media post influences voter opinions....Other tricks [] involve DHS partners labeling virtually all social media users posting favorable opinions about a narrative as automatically therefore being part of a ‘campaign’ or ‘influence operation.’”].

¹⁰ James Bovard, “Private-federal censorship machine targeted TRUE ‘misinformation’”, New York Post, March 17, 2023, <https://nypost.com/2023/03/17/private-federal-censorship-machine-targeted-true-misinformation/#>.

¹¹ Matt Taibbi, “Twitter Files”, X (Formerly Twitter), March 9, 2023, <https://twitter.com/mtaibbi/status/1633830108321677315>.

Even assuming federal officials believed that vaccine uptake was an unabashed good, they should have made their affirmative case and trusted the American people. Hiding true information or promoting “noble lies” only serves to foster an atmosphere of distrust. Yet, too often, that appears to be what federal officials did. Federal partners spanning multiple agencies and their ostensibly nongovernmental counterparts worked to actively suppress any speech that shed negative light on COVID vaccines, even in instances when the speech was factually correct and legally protected under the First Amendment.

Solution

The First Amendment protects free speech and generally prohibits the federal government from practicing viewpoint discrimination. Whether the viewpoint is politically or ideologically oriented or emanates from one’s professional expertise, the federal government cannot and should not act to censor or suppress that speech. Online speech should be treated similarly. Targeting factually true speech on controversial public policy topics on the grounds that the public might draw a disfavored conclusion flies in the face of decades of legally recognized Constitutional protections and should be a clear no-go zone for federal officials.

We again return to first principles – “bad” speech (whoever is defining it) should be countered with more, not less, speech. The government must not be allowed to be the arbiter of truth. Malinformation (and by extension, MDM writ large) is the perfect embodiment of this principle. When allowed to police speech, government actors have taken an inch and run a mile to go after speech that even they acknowledge is factually correct. For this reason, efforts to restrict malinformation have become the poster child for why government must be removed from the business of determining (and approving) what is considered to be permissible truth.

Section 2: Draw Bright Lines for Federal Involvement that Protect First Amendment Activity

Background

Increasing revelations about the federal government’s role in censoring American speech on social media exposed a concerning trend. Federal actors leverage their power to pressure social media companies both directly and by using ostensibly non-governmental third-parties. Private firms, nonprofit organizations, and university centers engage in the active flagging of disfavored online political speech for removal or deamplification by social media platforms. These third-party intermediaries are guided by federal officials behind closed doors to engage in actions that would otherwise be illegal, or legally questionable, for government officials to directly do themselves. This organizational structure blurs the boundary between direct federal government involvement and truly independent third-party actions of non-governmental entities and social media platforms. This complex web of domestic censorship warrants serious attention.

Analysis

Like any tool, there is the potential for the internet and social media to be misused for illegal purposes. The Supreme Court has recognized “few” categories of speech “long familiar to the bar” where the government can impose content-based restrictions, such as incitement to imminent lawless action, speech integral to criminal conduct, or child pornography.¹² The government can and does have a role in protecting the American people from actual criminal conduct, even when it occurs online. But this can be fulfilled clearly and transparently through traditional law enforcement channels.

That is not analogous to what has occurred over the past few years. More recent domestic efforts have taken aim at Americans who simply espouse their views on sensitive social and political topics, including election processes, government policies in response to COVID-19, and a range of other hot-button topics. The targeted content consists of views disfavored by some in government that does not fall within the scope of the highly limited, well-established exceptions to First Amendment protections. This effort appears to have been done largely behind closed doors, often through third party intermediaries rather than through direct law enforcement intervention, likely specifically to attempt to circumvent constitutional limitations on what the government can do.

One example is the EIP, which by its own claim, was formed “in consultation with CISA and other stakeholders” and identified the problem it was seeking to address as “election disinformation that originates from within the United States, which would likely be excluded from law enforcement action under the First Amendment and not appropriate for study by intelligence agencies restricted from operating inside the United States.”¹³ The EIP consisted of Graphika, the Atlantic Council’s Digital Forensic Research (DFR) Lab, the Stanford Internet Observatory (SIO), and the University of Washington (UW) Center for an Informed Public.¹⁴ After the 2020 elections, the same EIP firms merely rebranded as the Virality Project to continue their censorship of online speech. This time they targeted narratives relating to Covid-19 vaccines instead of focusing on election processes.¹⁵

According to their post-2020 wrap-up report, the EIP collaborated with CISA to begin their operation to counter “disinformation” narratives and actors on social media.¹⁶ During the 2020 elections, the overwhelming majority of narratives throttled by the EIP were right-wing populist narratives relating to election processes. Every

¹² *United States v. Alvarez*, 567 U.S. 709, 717 (2012).

¹³ EIP Post-Election Report at 2.

¹⁴ “The 2020 Election Integrity Partnership,” Election Integrity Partnership, accessed Nov. 10, 2023, <https://www.eipartnership.net/2020>.

¹⁵ “Virality Project,” accessed Nov. 2, 2023, <https://www.viralityproject.org/home>.

¹⁶ In the EIP’s post-2020 report, their operational timeline reads “Meeting with CISA to present EIP concept” on July 9, 2020, indicating that they pitched the concept of their very existence to the federal government before beginning their domestic censorship operations. Less than 3 weeks later July 27, the EIP launched its website. EIP Post-election Report at 3.

single one of the 17 Twitter profiles targeted as “repeat spreaders of election misinformation” by the EIP during the 2020 elections was a conservative account.¹⁷

The EIP nongovernmental entities regularly communicated over a shared messaging platform known as Jira in what looks to be a backdoor collaboration with federal government officials. The leader of the EIP himself, former Facebook executive Alex Stamos, admitted on video that the whole reason he organized the EIP to fight so-called “mis,” “dis,” and “mal”-information, was because CISA lacked “the funding and the legal authorizations” to do so itself. Stamos said that he was able to quickly organize the four nongovernmental institutions “to try to fill the gap of the things that the government could not do themselves.”¹⁸

EIP executives also boasted on video about inventing terms of service violation policy—called “delegitimization”—that had the effect of banning online speech that questioned or “delegitimized” election processes, such as mail-in ballots. In the video, EIP representatives explain how the coalition successfully pressured every single tech platform to adopt this election speech censorship policy in time for the 2020 elections under the threat of “huge regulatory pressure.”¹⁹ From there, bans could be imposed under the guise of terms of service violations rather than direct speech censorship.

Since its inception, the key organs of the censorship industrial complex have become a revolving door between federal government, nongovernmental organizations, and tech companies. For instance, Stamos is a former Facebook executive who served on CISA’s “Cyber Hygiene” advisory subcommittee. He founded a consulting firm with former CISA director Chris Krebs after the pair organized their public-private (CISA-EIP) censorship partnership during the 2020 elections.²⁰ The Stanford Internet Observatory’s Renee DiResta worked in the CIA before her counter-disinformation role at Stanford and gave lectures at CISA disinformation summits.²¹ And the UW Center for an Informed Public Director, Kate Starbird, headed CISA’s disinformation advisor subcommittee until it was ultimately disbanded.²²

¹⁷ Ibid. 188.

¹⁸ See “Testimony by Michael Shellenberger to The House Select Committee on the Weaponization of the Federal Government,” Mar. 9, 2023, <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/shellenberger-testimony.pdf> (citing FFOSourceClips, “EIP and CISA - Unclear Legal Authorities,” Rumble video, Sept. 16, 2022, <https://rumble.com/v1kp8r9-eip-and-cisa-unclear-legal-authorities.html>).

¹⁹ FFOSourceClips, “EIP-Bragging That They Pushed The Envelope on Censorship Policies; Threat of Regulation,” Rumble, Sept. 29, 2022, <https://rumble.com/v1lzhvy-eip-bragging-that-they-pushed-the-envelope-on-censorship-policies-threat-of.html>.

²⁰ “Krebs Stamos Group,” accessed Nov. 2, 2023, <https://www.ks.group/>.

²¹ See “Testimony by Michael Shellenberger to The House Select Committee on the Weaponization of the Federal Government,” Mar. 9, 2023, <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/shellenberger-testimony.pdf> (citing Alex Stamos, “Securing Our Cyber Future: Innovative Approaches to Digital Threats” (lecture, Stanford Internet Observatory, Stanford University, Palo Alto, CA, June 19, 2019), YouTube video, Oct 27, 2021, 18:00-18:20, <https://www.youtube.com/watch?v=ESR9koBtmXY>); see also Rennee Diresta, “Responding to Mis-, Dis-, and Malinformation,” Youtube-CISA, accessed Nov. 2, 2023, <https://www.youtube.com/watch?v=yNe4MJ351wU>).

²² “CISA Cybersecurity Advisor Comm.,” imgur, accessed Nov. 2, 2023, <https://imgur.com/a/oHzY7d6>.

The public-private partnership that has funded and armed many of these non-governmental entities with resources and leverage to censor Americans under the imprimatur or direct threat of government regulation is a dangerous proposition for a society founded upon free speech.

Solution

Government should not be involved in suppressing constitutionally protected speech. In the “few” circumstances where there is a legitimate legal basis to suppress online speech—such as preventing the dissemination of child pornography—the involvement of federal officials in identifying, flagging, or otherwise contributing to the removal should be clear, should be performed only by law enforcement, and should be open to both public and judicial scrutiny. This way, any action taken can be recognized for what it is rather than what it pretends not to be. And, if performed exclusively by law enforcement, the blurred line between private companies and government would become more defined.

Section 3: Prohibit MDM Activities Among All Agencies with Domestic Jurisdiction

Background

The public justification, right or wrong, for the federal government’s foray into identifying and seeking to suppress online speech largely centered around stopping the dissemination of false and intentionally harmful information from hostile foreign actors. However, efforts to fight “MDM” quickly morphed away from countering purely foreign threats to addressing inaccurate or inconvenient domestic speech. As a result, there is a dissonance between how counter-“MDM” efforts were justified and what they actually have been doing.

Analysis

The government’s initial nose in the tent for shaping “information infrastructure”—*i.e.*, ideas and narratives—was justified in the name of targeting “foreign disinformation” and interference in elections.²³ However, involvement in policing the flow of ideas and narratives was quickly re-directed towards “domestic disinformation.”²⁴

²³ Department of Homeland Security, “Foreign Interference Taxonomy,” CISA.gov, July 2018, https://www.cisa.gov/sites/default/files/publications/19_0717_cisa_foreign-influence-taxonomy.pdf.

²⁴ See House of Representatives Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government, “The weaponization of CISA: How a ‘Cybersecurity’ Agency Colluded with Big Tech and ‘Disinformation’ Partners to Censor Americans,” judiciary.house.gov, June 26, 2023, <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/cisa-staff-report6-26-23.pdf> (finding “CISA expanded its mission from “cybersecurity” to monitor foreign ‘disinformation’ to eventually monitor all ‘disinformation,’ including Americans’ speech. In one e-mail exchange obtained by the Committee and Select Subcommittee, the agency’s rapid mission creep surprised even a non-profit focused on foreign ‘disinformation.’”).

CISA's switch from a foreign to domestic focus as is seen in the statements of key stakeholders involved in the anti-disinformation effort. Below is an excerpt of comments made by EIP director Alex Stamos during CISA's 3rd Annual National Cybersecurity Summit on October 8, 2020. Stamos was organizing his consortium of non-governmental entities to collaborate with the federal government to flag speech and pressure tech platforms to censor entire narratives related to the upcoming elections:

I think we talk way too much about foreign influence. I'm gonna be honest, I think we talk way too much about it because it's sexy and it's fun and it's a little bit cold war-y, but the truth is that the vast majority of these problems, the problems within our information environment are domestic problems. They're problems in how we interact with each other, of the norms that we've created about online political speech, about amplification issues, about how now politicians are utilizing platforms, and so I think we have like an 80-20 breakdown of 80% we talk about foreign and 20% domestic, I think that needs to be flipped.²⁵

Stamos' advice appears to have been heeded. Just days into the Biden administration in January 2021, the DHS's "Countering Foreign Influence Task Force" was renamed the "Mis-, Dis- and Malinformation" ("MDM") team to target a wide range of domestic political speech online.²⁶ The fact that the DHS later purged its MDM website to remove all references to domestic censorship references in March 2023 makes it more apparent that government actors were aware of the problematic nature of their domestic speech censorship. At the time, public outrage and congressional investigations were intensifying over revelations of the government's quiet switch from focusing on countering hostile foreign "disinformation" to policing lawful domestic political speech under the banner of stopping "malinformation."²⁷

Public records obtained by government watchdogs and congressional committees demonstrate that the non-governmental actors and consultants appointed to CISA's MDM Subcommittee understood the dangers of the exercising their authority against domestic actors and speech. In documents produced to the House Judiciary Committee

²⁵ FFOSourceClips, "DHS's Foreign-To-Domestic Disinformation Switcheroo," Rumble, Aug. 22, 2022, <https://rumble.com/v1gx8h7-dhss-foreign-to-domestic-disinformation-switcheroo.html>.

²⁶ See CSC White Paper #6: Countering Disinformation in the United States at 14, U.S. Cybersecurity Solarium Commission (Dec. 2021), <https://www.hsdl.org/c/view?docid=863779> ("The Countering Foreign Influence Task Force, established in 2018 within CISA's predecessor agency, became in 2021 the Mis-, Dis-, and Malinformation (MDM) team, which 'work[s] in close coordination with interagency and private sector partners, social media companies, academia, and international partners on a variety of projects to build resilience against malicious information activities.'").

²⁷ House of Representatives Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government, "The weaponization of CISA: How a 'Cybersecurity' Agency Colluded with Big Tech and 'Disinformation' Partners to Censor Americans" at 32, judiciary.house.gov, June 26, 2023, <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/cisa-staff-report6-26-23.pdf> ("Following increased public awareness of CISA's role in government-induced censorship and the Committee's issuance of subpoenas to Alphabet, Amazon, Apple, Microsoft, and Meta in February 2023, CISA scrubbed its website of references to domestic MDM.").

and Select Subcommittee on Weaponization, former CIA legal advisor Suzanne Spaulding urged Dr. Kate Starbird, MDM Subcommittee member and Director of the UW Center for an Informed Public, “to focus solely on addressing foreign threats.” During an August 8, 2022, meeting, feedback from the National Association of State Election Directors (NASED) and the National Association of Secretaries of State (NASS) given to CISA cautioned that CISA “should not be involved in this mission space, except when a foreign adversary is at play.” Twitter’s Chief Legal Officer and MDM subcommittee member Vijaye Gadde responded with doubt that this distinction between foreign and domestic can be made by CISA because “it is difficult to determine whether a foreign adversary is involved.”²⁸

Yet, records also showed that these same influential outside advisors continually sought to push the boundaries of their mission to target all types of perceived mis-, dis-, or malinformation, whether or not it had a foreign nexus, even in the face of public backlash. For instance, the post-2020 report from the EIP affirms this fact reporting that less than 1% of tickets pertained to foreign interference.²⁹ In addition to the domestic-oriented nature of the censorship, the relatively small reach and significance of the targeted posts also undermines the threat level held up by the government as the basis for their action. A recent expose based on documents obtained by the House Committee on Homeland Security and covered by Real Clear Investigations revealed that “of the 330 tickets in which EIP analysts measured the virality of the offending comment, nearly half were less-than-viral, per EIP’s definition of 1,001 or less engagements.”³⁰ This is hardly the sort of pervasive threat it has been made out to be to justify infringing on Americans’ rights to free speech online.

Solution

The solution to “bad” speech is more speech, not less. This is even true when foreign speech is at issue.

Attempting to suppress “foreign disinformation” is a short, slippery slope to attempting to manage and control domestic speech and narratives. Distinguishing between “foreign” and domestic speech online is inherently difficult in the first instance. It becomes impossible as ideas that originate in one place are spread by citizens domestically, including citizens who may have organically come to the same conclusion as a foreign source.

²⁸ House of Representatives Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government, “The weaponization of CISA: How a ‘Cybersecurity’ Agency Colluded with Big Tech and ‘Disinformation’ Partners to Censor Americans,” [judiciary.house.gov](https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/cisa-staff-report6-26-23.pdf), June 26, 2023, <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/cisa-staff-report6-26-23.pdf>.

²⁹ Ben Weingarten, “Documents Shed New Light on Feds’ Collusion with Private Actors to Police Speech on Social Media,” Real Clear Investigations, Nov. 6, 2023, https://www.realclearinvestigations.com/articles/2023/11/06/documents_shed_new_light_on_feds_collusion_with_private_actors_to_police_speech_on_social_media_990672.html.

³⁰ Ibid.

Moreover, attempting to suppress foreign “disinformation” is irreconcilable with the search for truth in an open marketplace of ideas. While there are good reasons to be skeptical of claims originating with certain bad or hostile actors, just because information originates or is reported overseas does not mean it is false, even when it contradicts the U.S. government’s official position. As with all efforts to police “MDM” through censorship, policing foreign “disinformation” is inherently patronizing to the American people.

A better solution is to counter “bad” speech with “good” speech or in more neutral terms, more speech. Rather than seeking to suppress or throttle perceived disinformation, government and civil society organizations can and should seek to persuade with their own information.

A good first step for moving back to this proper role is to restrict the authority of domestic-facing agencies like DHS and the FBI from engaging in MDM activities altogether. Documented evidence shows this authority is too prone to abuse, without accountability, to be properly endowed. This is not to legitimize all efforts by other ostensibly foreign-facing organizations, such as the State Department’s Global Engagement Center. These efforts can also be deeply problematic and in need of reform, particularly when they move from countering foreign disinformation with government speech in the marketplace of ideas to suppressing disfavored narratives. Rather, it is a recognition that reform needs to start somewhere, and domestic facing entities are clearly inappropriate vehicles for “MDM” activities that were justified by a purported need to counter foreign disinformation.

Section 4: Restore the Definition of Critical Infrastructure to Mean Tangible Structures and Systems

Background

In recent years, the definition of “critical infrastructure” has become increasingly untethered from its original meaning encompassing vital physical structures and systems under DHS protection. Traditionally, infrastructure included obvious, easily understood, and identifiable elements like dams, power plants, government buildings, and transportation systems. However, over the past few years, agencies such as CISA have claimed for themselves the power to police the flow of information and narratives by redefining public discourse as “cognitive infrastructure.”

Analysis

On January 6, 2017, outgoing Obama-era DHS Secretary Jeh Johnson designated election infrastructure as a critical infrastructure subsector the DHS had the duty to protect. Johnson clearly defined election infrastructure as physical facilities and systems used for elections: “By ‘election infrastructure,’ we mean storage facilities, polling places, and centralized vote tabulation locations used to support the election process, and information and communications technology to include voter registration databases, voting machines, and other systems to manage the election process and

report and display results on behalf of state and local governments.”³¹ Thus, Secretary Johnson’s guidelines provided clearly defined and easily understood structures and networks that comport with widely-understood concepts of “infrastructure.”

However, by 2019, after the creation of CISA and as narratives concerning direct foreign interference with election structures and networks in the 2016 election ebbed, DHS refocused on “cognitive infrastructure.” “Foreign disinformation” on social media became increasingly framed as a threat to election infrastructure, which DHS seized upon to begin monitoring online speech relating to electoral processes.³² This framework of interpreting speech on social media as a threat to election infrastructure was subsequently turned inward on domestic speech.

In the wake of the 2020 elections and after former CISA Director Chris Krebs was fired by then-President Donald Trump, Jen Easterly was appointed by President Biden to become Director of CISA. She continued to enact concerning definitional changes to critical infrastructure. Under Ms. Easterly CISA expanded the definition of critical infrastructure from easily identifiable, tangible things to obscure, meta-physical frameworks, proclaiming that “the most critical infrastructure is our cognitive infrastructure, so building that resilience to misinformation and disinformation, I think, is incredibly important.”³³ “Cognitive infrastructure,” i.e., the thoughts and personal opinions formed in the minds of everyday American citizens, has suddenly been designated as critical infrastructure. Under this Orwellian framework, created out of whole cloth, CISA seemingly believes that it has a duty to interfere with the individual beliefs, opinions, and identities of all individuals, American citizens not excepted. CISA implemented this fundamental change without any serious public debate.

The changes in definitions to critical infrastructure have consistently been initiated by individual actors without any public comment or clear boundaries, resulting in a vague and confusing situation. The vagueness and complexity of this amorphous blob, once clearly defined and easily identified infrastructure, creates a framework for federal employees and insiders at government-linked institutions to act against views and beliefs that they personally believe to be wrong or problematic. Everyday Americans are left to face the repercussions, as their hard-earned tax dollars may be utilized to infringe upon their personal freedoms of speech and right to formulate an opinion.

³¹ Department of Homeland Security, “Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector,” Press Release, Jan. 6, 2017, <https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical#:~:text=Statement%20by%20Secretary%20Jeh%20Johnson,as%20a%20Critical%20Infrastructure%20Subsector&text=I%20have%20determined%20that%20election,Government%20Facilities%20critical%20infrastructure%20sector>.

³² Department of Homeland Security, “Homeland Security Advisory Council Interim Report of The Countering Foreign Influence Subcommittee,” dhs.gov, May 21, 2019, https://www.dhs.gov/sites/default/files/publications/ope/hsac/19_0521_final-interim-report-of-countering-foreign-influence-subcommittee.pdf.

³³ Maggie Miller, “Cyber Agency Beefing Up Disinformation, Misinformation Team,” The Hill, Nov. 10, 2021, <https://thehill.com/policy/cybersecurity/580990-cyber-agency-beefing-up-disinformation-misinformation-team/>.

Solution

“Cognitive infrastructure” is not infrastructure in any traditional sense of the term. The definition of critical infrastructure must be restored to well understood and identifiable tangible structures and systems. No single actor or group of actors within a federal agency should be able to simply invent arbitrary definitional changes to critical infrastructure to obscure or expand the boundaries within which the agency operates. Any alterations to key definitions—such as redefining critical infrastructure—should come from Congress, after appropriate public debate. And even then, they should not include regulating Americans’ “cognitive infrastructure.”

Section 5: Remove the Government as Financier for the Censorship Industry

Background

The complex network of private censorship firms, nonprofit organizations, and universities working in tandem with the federal government to suppress speech has created a censorship industrial complex that was kickstarted and sustained by federal grants and awards. Using taxpayer funding, the federal government has effectively bankrolled a new industry entirely dedicated to fighting purported “misinformation” (and all its various iterations) online. As a result, American taxpayer dollars are effectively subsidizing the censorship of constitutionally protected speech.

Analysis

The four original entities involved in the EIP all ran on vast amounts of federal funding. The Atlantic Council receives taxpayer dollars from the State Department, USAID, the Department of Defense, the Department of Energy, and more.³⁴ Private censorship firm Graphika was awarded grants from the Defense Department’s Minerva Initiative and DARPA.³⁵

Following the EIP’s 2020 election efforts, federal support increased dramatically and moved to what was contemporaneously one of the most controversial public policy debates in the country: COVID-19. This included discussion around vaccines, masks, school closures, mandates surrounding each of those issues, various treatments such as Ivermectin and hydrochloroquine, and so on. The disinformation labs at the University of Washington and Stanford had not received direct federal funding prior to the 2020 elections. However, that changed in early 2021. Both universities’ disinformation labs received a \$3 million joint grant for “rapid response research of mis- and

³⁴ The Atlantic Council, “2022 Honor Roll of Contributors,” Atlantic Council, May 10, 2023, <https://www.atlanticcouncil.org/in-depth-research-reports/report/2022-honor-roll-of-contributors/>.

³⁵ The United States House Select Committee on the Weaponization of the Federal Government, “The Censorship Industrial Complex,” judiciary.house.gov, March 9, 2023, 11, <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/shellenberger-testimony.pdf>.

disinformation” from the National Science Foundation.³⁶ Graphika also received nearly \$5 million in grants from the Department of Defense shortly after the Biden administration took office.³⁷

Since that time, the federal government has increased its funding of ostensibly nongovernmental organizations engaged in “misinformation” research. For example, Senate “Commerce Committee Republican staff has identified over 105 grants [by the National Science Foundation (“NSF”)] between 2021 and 2023 – totaling over \$66 million in taxpayer funding – to so-called ‘misinformation’ research, directly funding organizations that work with online platforms to censor Americans.”³⁸ Grants by the NSF include programs explicitly targeted at “populist” messages.³⁹ Another grant seeks to “extend our use of computational means to detect misinformation, using multimodal signal detection of linguistic and visual features surrounding issues such as vaccine hesitancy and electoral skepticism, coupled with network analytic methods to pinpoint key misinformation diffusers and consumers” with a goals including “strategically correct[ing] misinformation within the flow of where it is most prevalent online.”⁴⁰ As public and congressional backlash emerged, the Harvard Misinformation Review, a journal created and dedicated to the advancement of the counter-disinformation space of academia, declared that “The field of mis- and disinformation” is “here to stay” and “too big to fail.”⁴¹

In a globalized world where technological competition with foreign adversaries is intense, the public is right to expect that the government’s focus is on scientific advancement and military operations that advance the interests and security of the American people. Yet the revelations around how governmental organizations are funding programs that appear aimed at “correct[ing]” disfavored views suggest some elements of government are more focused on research that has disturbing potential to infringe upon the freedoms of the American people.

³⁶ Center for an Informed Public, “\$2.25 Million in National Science Foundation Funding Will Support Center for an Informed Public’s Rapid-Response Research of Mis- and Disinformation,” University of Washington, Aug. 15, 2021, <https://www.cip.uw.edu/2021/08/15/national-science-foundation-uw-cip-misinformation-rapid-response-research/>.

³⁷ “Award Profile Grant Summary-Department of Defense (DOD),” [usaspending.gov](https://www.usaspending.gov/award/ASST_NON_N000142112106_1700), accessed Nov. 2, 2023, https://www.usaspending.gov/award/ASST_NON_N000142112106_1700.

³⁸ Press Release, “Sen. Cruz Demands Answers on Taxpayer-Funded Censorship,” Oct. 31, 2023, <https://www.commerce.senate.gov/2023/10/sen-cruz-demands-answers-on-taxpayer-funded-censorship>.

³⁹ See Project Grant FAIN 2223914, last accessed Nov. 11, 2023, https://www.usaspending.gov/award/ASST_NON_2223914_4900 (“This project uses several methods to study how populist politicians distorted COVID-19 pandemic health communication to encourage polarized attitudes and distrust among citizens, thus making them more vulnerable to misinformation generally. It also studies how to best counter these populist narratives and develop more effective communication channels.”).

⁴⁰ Award Abstract # 2230692: NSF Convergence Accelerator Track F: Course Correct: Precision Guidance Against Misinformation, NSF, last accessed Nov. 11, 2023, https://www.nsf.gov/awardsearch/showAward?AWD_ID=2230692&HistoricalAwards=false

⁴¹ Chico Q. Carmargo & Felix M. Simon, “Mis- and disinformation studies are too big to fail: Six suggestions for the field’s future,” Harvard Kennedy School Misinformation Review, Sept. 20, 2022, <https://misinfreview.hks.harvard.edu/article/mis-and-disinformation-studies-are-too-big-to-fail-six-suggestions-for-the-fields-future/>.

Solution

The “field of mis- and disinformation” does not merely seek to correct inaccurate information through counter speech. It seeks to suppress what it views as untrue information. Accordingly, it functions as a high-tech inquisition that can and must fail. The federal government should no longer be allowed to fund entities involved in anti-disinformation studies, research, or technologies that seek to suppress political speech, dissent, or narratives that do not toe the government line. The unspoken mission of many of the entities that have received funding to date is to target speech based on political ideology (*i.e.*, almost always conservative-leaning and/or anti-establishment). Perhaps the most pernicious aspect is that it provides federal officials with a sense of deniability that they are not the ones directing the censorship. This should end if public trust in the government’s defense of free speech is to be regained.

Section 6: Impose Accountability on Free Speech Violators

Background

The issue of sovereign or qualified immunity has become a major topic of discussion in recent years, often as a result of local police actions that are alleged to abuse civil rights of citizens. The discussion has since extended to federal officials’ liability as a result of the perceived weaponization of law enforcement, in some cases for the purpose of advancing a political cause. As discovery in litigation and congressional oversight investigations have revealed individual cases of government officials using their authority to suppress American’s First Amendment rights to free speech, the case for a modified approach to those individuals’ personal liability has become much stronger.

Analysis

Between the *Missouri v. Biden* litigation, other free speech lawsuits, and the revelations coming from the release of the Twitter Files, it is clear that several government officials personally had a hand in censoring the lawful speech of American citizens.

Missouri may provide the clearest examples to date. The lawsuit details how just days after the Biden administration took office, the Digital Director for the COVID-19 Response Team emailed Twitter and requested the removal of an anti-COVID-19 vaccine tweet by Robert F. Kennedy Jr. On February 6, 2021, the former Deputy Assistant to the President and Director of Digital Strategy, asked Twitter to remove a parody account linked to Hunter Biden’s daughter, demonstrating the intimate relationship between the White House official and the social media company. The account was suspended within 45 minutes of the official’s request.

The White House also had the same direct line of communication with Meta (formerly Facebook) for the purposes of removing posts and accounts that the White House characterized as threatening public health that coincidentally criticized aspects of

their controversial pandemic response at the time. For instance, from May 28, 2021, to July 10, 2021, a senior Meta executive reportedly copied a former White House Senior COVID-19 advisor on an email detailing how Meta was censoring COVID-19 misinformation in accordance with “requests from the White House.”⁴² No distinction was made regarding the national origin of the account, the speaker’s legal or constitutional rights to express the statement in question or the authority of the federal official to request a private actor suppress particular speech.

Third-party intermediaries appear to be government officials’ preferred vehicle for suppressing online speech it would otherwise be unlawful for these federal officials to censor themselves. Several actors within the Biden administration and working at the White House took a more direct route with little concern for subsequent accountability. Accountability must be created to deter these back-door methods.

Solution

The right to free speech is central to the proper functioning of a democratic society. Systematic violations of this right by government officials wielding the power to regulate or shut down private actors presents tremendous danger to the future of political discourse. Whether it is conservative speech today or progressive speech tomorrow, it is wholly inappropriate for federal officials to abuse their authority toward this end. However, as is clear in other areas, without the opportunity for personal accountability, the likelihood of preventing future abuse is low. The weaponization of government must not be allowed to become so ingrained and consequence-free that it becomes an accepted downside of losing elections or criticizing incumbents. Accordingly, there must be both employment consequences and potential civil liability, possibly even criminal liability for the most egregious cases, for repeated or blatant First Amendment violations.

⁴² *Missouri v. Biden*, “Memorandum Ruling on Request or Preliminary Injunction,” 3:22-cv-01213-TAD-KDM, (W.D. LA July 4, 2023), available at <https://ago.mo.gov/wp-content/uploads/missouri-v-biden-ruling.pdf>.

Conclusion

We must approach questions of purported “dis-,” “mis-,” or “malinformation” with a healthy dose of humility that acknowledges what we believe today may be shown to be incorrect tomorrow. The censorship industrial complex approaches these questions with a haughty arrogance and self-righteousness that would make Javert blush. Accordingly, the censorship industrial complex poses a significant threat to the fundamental principles of democracy and free speech upon which the United States was founded. The abuse of taxpayer resources and government authority to curtail speech under the pretext of countering disinformation or protecting critical infrastructure demands immediate reform. The proposals outlined in this report provide a framework to address these issues and safeguard the rights of American citizens.

While the problem will likely require several rounds of reform, there are at least six notable reforms to guide the first effort.

- 1) Federal actors have no business being the arbiters of truth. Malinformation represents the furthest reaches of the government’s abuse of their perceived legal mandate to perform this role. In practice, their efforts across mis-, dis-, and malinformation represent viewpoint discrimination that run in direct opposition to rights protected under the Constitution.
- 2) The federal government’s involvement in removing or suppressing online speech should be evidenced in a clear and direct role that can identify a well-defined law enforcement or national security predicate that places speech outside traditional constitutional protections.
- 3) MDM activities by federal agencies present irreconcilable legal challenges; domestic-facing agencies should be prohibited from participating in these activities while exercising their domestic jurisdiction.
- 4) The slippery slope in definitional changes that has allowed accepted missions to defend “critical infrastructure” to now extend to Orwellian concepts like “cognitive infrastructure” must be reined in.
- 5) Taxpayer dollars to seemingly experimental domestic censorship endeavors must be cut off immediately, and any attempts to use taxpayer funds to enhance technological tools used for domestic censorship or promote the development of organizational structures that are used to curtail domestic political narratives must be identified and swiftly eliminated.
- 6) Finally, accountability must be upheld at all levels of government. Federal officials using their positions to pressure tech platforms to censor or de-amplify American speech and narratives and infringe upon protected free speech should face repercussions. Holding the actors who purposefully involved themselves in organizing the censorship of Americans will reinforce and preserve the fundamental freedoms of speech and expression upon which the nation stands.

By dismantling the censorship industrial complex and enacting these reforms, the nation can move forward in the internet age and embrace a society where diverse perspectives thrive, and democratic ideals survive.

The Council to Modernize Governance was formed to educate the public on the need for the bureaucracy to be accountable to the American people and inform government officials of common-sense ways to improve outcomes and reduce unneeded regulatory burdens that do not improve lives.

Curtis Schube is the Executive Director for Council to Modernize Governance, a think tank committed to making the administration of government more efficient, representative, and restrained. He is formerly a constitutional and administrative law attorney.

Gary Lawkowski is a senior fellow for the Council to Modernize Governance.