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The 5th Circuit Agrees That Federal Officials Unconstitutionally 'Coerced' or 'Encouraged' Online Censorship

The appeals court narrowed a preliminary injunction against such meddling but confirmed the threat that it poses to freedom of speech.

JACOB SULLUM | 9.11.2023 2:25 PM



Surgeon General Vivek Murthy (CNP/AdMedia/Newscom)

A federal appeals court on Friday upheld key parts of a preliminary injunction against federal interference with content moderation on social media platforms. A three-judge panel of the U.S. Court of Appeals for the 5th Circuit unanimously agreed that the White House, Surgeon General Vivek Murthy, the Centers for Disease Control and Prevention (CDC), and the FBI had "coerced" or "significantly encouraged" the platforms, "in violation of the First Amendment," to suppress speech that federal officials viewed as dangerously inaccurate or misleading. But the 5th Circuit also said the injunction

that U.S. District Judge Terry Doughty issued in July was excessively broad and covered too many agencies.

During the last few years, the 5th Circuit notes in a *per curiam* opinion joined by Judges Edith Brown Clement, Jennifer Walker Elrod, and Don Willett, "a group of federal officials has been in regular contact with nearly every major American social-media company about the spread of 'misinformation' on their platforms. In their concern, those officials—hailing from the White House, the CDC, the FBI, and a few other agencies—urged the platforms to remove disfavored content and accounts from their sites."

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In response, the appeals court says, "the platforms seemingly complied. They gave the officials access to an expedited reporting system, downgraded or removed flagged posts, and deplatformed users. The platforms also changed their internal policies to capture more flagged content and sent steady reports on their moderation activities to the officials. That went on through the COVID-19 pandemic [and] the 2022 congressional election, and continues to this day."

The plaintiffs in this case, *Missouri v. Biden*, include five social media users, along with the states of Missouri and Louisiana. They argued that the Biden administration's public and private pressure on platforms such as Facebook, Twitter, and YouTube amounted to government-directed censorship. The 5th Circuit essentially agreed, endorsing much of Doughty's analysis. According to the appeals court, the administration's persistent demands that Facebook et al. do more to control

"misinformation"—which were coupled with implicit threats of punishment through heavier regulation, antitrust action, and increased civil liability for user-posted content—crossed the line between permissible government speech and impermissible intrusion on private decisions.

The 5th Circuit's opinion emphasizes both the tone and the volume of the government's requests. Although the administration claimed it was doing nothing more than urging the platforms to enforce their own rules, its "asks" frequently went further than that.

Publicly, President Joe Biden accused the platforms of "killing people" by failing to suppress speech that discouraged vaccination against COVID-19. Murthy likewise said that failure was "costing people their lives." White House Press Secretary Jen Psaki declared that social media companies "have a responsibility related to the health and safety of all Americans to stop amplifying untrustworthy content, disinformation, and misinformation, especially related to COVID-19, vaccinations, and elections." If they failed to meet that responsibility, Murthy said, "legal and regulatory measures" might be necessary. Psaki floated the possibility of new privacy regulations and threatened social media companies with "a robust anti-trust program." White House Communications Director Kate Bedingfield said the platforms "should be held accountable," which she suggested could include reducing their legal protection against civil claims based on users' posts.

Privately, administration officials pressed Facebook et al. to delete or downgrade specific posts and banish specific speakers, to take action against content even when it did not violate the platforms' rules, and to expand those rules so that any speech federal officials viewed as dangerous to public health could be deemed a violation. Their "requests" were sometimes phrased as demands.

As the 5th Circuit notes, Clarke Humphrey, digital director for the COVID-19 Response Team, told Twitter to remove an anti-vaccine post by Robert F. Kennedy Jr. "ASAP" and "instructed it to 'keep an eye out for tweets that fall in this same...genre' so that they could be removed, too." On another occasion, Deputy Assistant to the President Rob Flaherty, director of digital strategy at the White House, told Twitter to delete a parody account tied to one of Biden's grandchildren "immediately," saying he could not "stress [enough] the degree to which this needs to be resolved immediately."

Flaherty emphasized that he was acting on the president's behalf, that his concerns were "shared at the highest (and I mean highest) levels of the [White House]." White House officials invoked previous perceived failures at content moderation, which they said had been disastrous. "When Facebook did not take a prominent pundit's 'popular post[]' down," the 5th Circuit notes, senior White House COVID-19 adviser Andrew Slavitt "asked 'what good is' the reporting system, and signed off with 'last time we did this dance, it ended in an insurrection.'" In another exchange, Flaherty "demand[ed] 'assurances' that [Facebook] was taking action" and "likened the platform's alleged inaction to the 2020 election, which it 'helped increase skepticism in,'" adding that "an insurrection...was plotted, in large part, on your platform."

When social media companies failed to do what the administration wanted, White House officials reacted angrily. Flaherty noted that a flagged Facebook post was "still up," asking, "How does something like that happen?" Facebook was "hiding the ball," Flaherty complained. "Are you guys fucking serious?" he said in another email to Facebook. "I want an answer on what happened here and I want it today." Because Facebook was "not trying to solve the problem," Slavitt said, the White House was "considering our options on what to do about it."

Flaherty, the 5th Circuit notes, "demanded more details and data on Facebook's internal policies at least twelve times," asking "what was being done to curtail 'dubious' or 'sensational' content, what 'interventions' were being taken, what 'measurable impact' the platforms' moderation policies had, 'how much content [was] being demoted,' and what 'misinformation' was not being downgraded." He "lamented that flagging did not 'historically mean...that [a post] was removed.'" Flaherty told Facebook he had "been asking...pretty directly, over a series of conversations...what actions" the platform had "been taking to mitigate" vaccine hesitancy and to stop its "shell game." He said the White House was "gravely concerned" that Facebook was "one of the top drivers of vaccine hesitancy."

By and large, especially after Biden and Murthy accused social media companies of killing people, the platforms did what the White House wanted. They were eager to appease the president, repeatedly asking how they could work together to address his concerns. In this context, the 5th Circuit says, it is likely that the pressure campaign amounted to "coercion" and that the White House unconstitutionally shaped moderation decisions.

The appeals court reached a similar conclusion regarding the FBI, whose officials "regularly met with the platforms," alerting them to "misinformation trends in the lead-up to federal elections." They warned social media companies about "Russian troll farms" and "hack and dump" operations by "state-sponsored actors," a category that some national security

experts claimed included accurate information from Hunter Biden's abandoned laptop. The platforms "apparently changed their moderation policies in response to the FBI's debriefs," the 5th Circuit says. "For example, some platforms changed their 'terms of service' to be able to tackle content that was tied to hacking operations."

The FBI's efforts "were not limited to purely foreign threats," the appeals court notes. "The officials also targeted domestically sourced 'disinformation' like posts that stated incorrect poll hours or mail-in voting procedures." Platforms removed FBI-flagged posts about 50 percent of the time. Especially given its authority as the leading federal law enforcement agency, the 5th Circuit says, the FBI probably "coerced the platforms into moderating content" and "encouraged them to do so by effecting changes to their moderation policies"—"both in violation of the First Amendment."

By contrast, the 5th Circuit found that the CDC's conduct was "not plainly coercive," especially since it had no direct authority over social media companies. But the court concluded that the intimate collaboration between the CDC and the platforms, which practically begged the agency to tell them which content qualified as "misinformation," amounted to "significant encouragement" of censorship.

"The platforms came to *heavily rely* on the CDC," the 5th Circuit says. "They adopted rule changes meant to implement the CDC's guidance." In many cases, social media companies made moderation decisions "based entirely on the CDC's say-so." In one email, for example, a Facebook official said "there are several claims that we will be able to remove as soon as the CDC debunks them" but "until then, we are unable to remove them."

The 5th Circuit agreed that the White House, Murthy's office, the FBI, and the CDC were appropriate targets of Doughty's injunction. But it found that Doughty had erred by including the State Department, the National Institute of Allergy and Infectious Diseases (NIAID), and the the Cybersecurity and Infrastructure Security Agency (CISA).

"Generally speaking, the NIAID did not have regular contact with the platforms or flag content," the appeals court says. And although the State Department "communicated directly with the platforms," its officials "did not flag content, suggest policy changes, or reciprocally receive data during those meetings."

CISA "did flag content," the 5th Circuit says, and its communications "apparently led to content being removed or demoted by the recipient platforms." But "its conduct falls on the 'attempts to convince,' not 'attempts to coerce,' side of the line," the court says, because "there is not sufficient evidence that CISA made threats of adverse consequences—explicit or implicit—to the platforms for refusing to act on the content it flagged." Nor is there "any indication CISA had power over the platforms in any capacity, or that [its] requests were threatening in tone or manner." As for "significant encouragement," the court says, CISA's efforts, judging from the existing record, did "not equate to meaningful control," since "there is no plain evidence that content was actually moderated per CISA's requests or that any such moderation was done subject to non-independent standards."

The 5th Circuit also concluded that the terms of Doughty's injunction, which included "ten prohibitions," were too sweeping and vague, potentially encompassing permissible government speech. The court winnowed down the prohibitions to this order:

Defendants, and their employees and agents, shall take no actions, formal or informal, directly or indirectly, to coerce or significantly encourage social-media companies to remove, delete, suppress, or reduce, including through altering their algorithms, posted social-media content containing protected free speech. That includes, but is not limited to, compelling the platforms to act, such as by intimating that some form of punishment will follow a failure to comply with any request, or supervising, directing, or otherwise meaningfully controlling the social-media companies' decision-making processes.

Notwithstanding the 5th Circuit's modification of Doughty's injunction, the court's decision amounts to a sharp rebuke of the Biden administration's heavy-handed attempts to suppress online "misinformation." It is also a rebuke of commentators who either minimized or ignored the threat that the government's badgering and threats posed to freedom of speech.


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