

WRITTEN TESTIMONY - MISSOURI ATTORNEY GENERAL ANDREW BAILEY

HEARING BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES

Committee on Oversight and Accountability
Select Subcommittee on the Coronavirus Pandemic

June 21, 2023

I. Introduction

Chairman Wenstrup, Ranking Member Ruiz, and distinguished members of the Subcommittee, thank you for the opportunity to appear before you this morning.

In May of last year, Missouri filed a landmark lawsuit against dozens of officials in the federal government to stop the biggest violation of the First Amendment in the history of this nation. Louisiana and several private plaintiffs are partnering with us in this lawsuit. Never before has this country seen such a systematic, organized attempt to suppress the speech of tens of millions of Americans.

After successfully obtaining a court order compelling the federal government to produce documents, my office obtained more than 20,000 pages of evidence detailing extraordinary censorship efforts by a variety of officials within the federal government. My office also deposed key witnesses including Dr. Anthony Fauci and officials from the FBI, the State Department, the Department of Homeland Security, the Office of the Surgeon General, and the CDC. These documents reveal specific incidents of federal officials unlawfully pressuring Big Tech companies to take down constitutionally protected speech: Backed by overt and implicit threats of legal retribution, officials in the White House have hurled abusive invectives at employees of Big Tech companies, pushing them to suppress information even when said information is protected by both the Constitution and the companies' own terms of service. These same officials have also unconstitutionally pressured these companies into changing their policies so that government officials can more easily induce the companies to remove constitutionally protected speech in the future.

The evidence we've uncovered merely scratches the surface. Already, this evidence paints a picture of a vast federal censorship enterprise—an enterprise in which the President himself is personally involved. And yet, my office's lawsuit is still in its preliminary stages. We so far have obtained documents pertaining only to a handful of individuals. Yet dozens more are known to be involved. As *Missouri v. Biden* progresses, my office will receive much more information that will reveal the entire scope of this censorship enterprise.

As a combat veteran in the United States Army, I took an oath to protect and defend the Constitution against the enemies of freedom. I will never abandon that oath, yet, I never envisioned that the federal government of the country I served to protect would systematically violate the constitutional rights of millions of its citizens. But I am forced to conclude, from the strength of the evidence of thousands of pages of documents, that this is exactly what has occurred. Men and women in uniform have given what President Lincoln called the “last full measure of devotion.” They did not give their lives so that our constitutional rights could be violated with such brazen impunity.

Ultimately, the lawsuit my office has brought is about obtaining truth and accountability. Last month, a federal judge heard oral argument over my office's motion for a preliminary injunction. The judge expressed skepticism over many of the federal government's answers. Indeed, the federal government has already described the Department of Homeland Security as the “nerve center” of federal suppression efforts. The Department of Homeland Security should focus on threats to our homeland, like terrorism, not domestic political speech. My office's lawsuit seeks to restore the Department of Homeland Security—and other agencies—to their lawful role and to stop their involvement in unconstitutional suppression of speech.

II. The federal government is openly censoring the free speech of American citizens

Concerns over the federal government's suppression of speech have been noted by the United States Supreme Court. Justice Gorsuch recently expressed concern that “federal officials may have pressured social-media companies to suppress information about pandemic policies

with which they disagreed.” *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1315 (2023) (statement respecting vacatur). The 20,000-plus pages of documents my office has uncovered reveal that Justice Gorsuch’s suspicions are in fact a sobering reality.

While federal officials can of course express their opinions on policy issues, the documents my office has obtained provide compelling evidence that federal officials all the way to the highest levels of the White House (by their own admission) are doing much more than that. The strategy is threefold. First, federal officials attempt to harm Big Tech companies by either threatening to remove their legal protections or by issuing statements deeply harmful to a company’s public image. For example, President Biden has accused Big Tech companies of “killing people” for not censoring more speech related to COVID-19. And federal officials have threatened to narrow or remove lucrative protections that Big Tech companies enjoy under Section 230 of the Communications Decency Act. Second, backed by the previous threats, federal officials communicate behind closed doors with Big Tech companies, flagging specific speech that the federal officials dislike and badgering the companies to suppress the speech. For example, Jen Psaki, then the White House Press Secretary, publicly admitted from the White House podium that the White House is “in regular touch with these social media platforms” and is “flagging problematic posts,” thereby pressuring the companies to suppress content. Additional emails reveal White House officials hurling abusive language at employees of social media companies, demanding that the companies take down disfavored content. Third, once the federal officials have threatened Big Tech companies and flagged specific content, the implicit promise arrives: If Big Tech companies censor content, federal officials will back down from their public statements to harm the companies. As Psaki has boasted, “they certainly understand what our asks are.”

Make no mistake: this censorship network pervades the federal government. The evidence suggests that the President himself is involved. For example, one email from the President’s Deputy Assistant Rob Flaherty confirms that the censorship activities are demanded by “the highest (and I mean the highest) levels of the White House.” And the censorship activities have grown so widespread that the Department of Homeland Security last year worked to create a “Disinformation Governance Board” to coordinate the efforts of censorship between government agencies. Following these efforts, a federal judge characterized the Department of Homeland Security as the “‘nerve center’ of federally directed censorship”, as we saw in the coordination between officials at DHS and the FBI in their attempts to silence the Hunter Biden laptop story in the weeks leading up to the 2020 election.

And although Big Tech companies—in an about-face from their promises a decade ago—have shown themselves eager to censor in recent years, it is also clear from the evidence that much of the speech affected would not have been removed but for the federal government’s express involvement. For example, emails show Big Tech companies admitting that they are suppressing content at the behest of the federal government even though the content is “often true” and does not violate the companies’ terms of service. All told, our preliminary evidence shows a pattern of egregious First Amendment violations affecting nearly every American—either by suppressing their ability to create content or by suppressing content they would otherwise be able to read.

III. Section 230 makes the problem worse

One particular factor that has made it so easy for the federal government to create its vast censorship network is Section 230. As originally understood, Section 230 accomplished something modest: It reaffirmed the promise of the common law. By the early 1990s, the doctrine had settled that a company is not liable for the content of another person’s communication simply because the company transmits that communication from one person to another. When one court tried to erase that protection with respect to internet services, Congress reaffirmed the traditional principle. But courts, at the urging of tech companies, have since misconstrued Section 230 to give Big Tech companies wholesale immunity never contemplated by Congress. As Justice Thomas put it, “courts have relied on policy and purpose arguments to grant sweeping protection to Internet platforms.” *Malwarebytes, Inc. v. Enigma Software Group USA, L.L.C.*, 592 U.S. ___ (2020) (slip op., at 4).

The judicially misconstrued Section 230 has made it much easier for the federal government to create a vast censorship network permeating every fabric of our society. By granting certain companies far more protection than Congress ever contemplated, the incorrectly interpreted Section 230 has enabled social media companies to consolidate control of social media into the hands of a few enormously powerful actors. This consolidation reduces the pressure *not* to censor that would otherwise exist in a competitive market, while simultaneously making it much easier for federal officials to exercise pressure over the vast majority of the social media field. All they have to do is contact a handful of companies.

IV. To evade detection and accountability, the federal government creates pseudo-private organizations to help carry out the federal government’s censorship mission

The federal government has not hesitated to pressure Big Tech companies directly. But the federal government itself has recognized the legal problems with its actions. In an attempt to make it harder to detect the federal government's blatant legal violations, federal officials have begun outsourcing their federal censorship activities to pseudo-private organizations.

One of these organizations is the Election Integrity Project, a nonprofit which flags disfavored speech and then directs Big Tech companies to take down that speech. The Election Integrity Project is branded as a private organization, but its ties with the federal government are pervasive. It receives funding from the federal government. It was the brainchild of individuals in the federal government. And it even has overlapping individuals. Some members of the EIP have jointly served in positions within the federal government.

Emails obtained from federal defendants reveal that the federal officials believe this structure will help them evade liability under the First Amendment. But any federal attempt to censor activities is still unconstitutional even if it is indirect. Government cannot do by indirect means what it would be prohibited from doing directly. It is "axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973).

V. Federal officials target speakers who are conservative

The evidence also shows that the federal censorship enterprise targets conservative voices. Last month, lawyers for the federal government conceded in open court that nearly all content suppressed by the federal government is conservative. (The only example of suppressed liberal content the lawyers for the federal government could identify was content expressed by the President's chief political opponent in the Democratic Party.) Remarkably, the lawyers tried to justify this enormous disparity by arguing that conservatives are far more likely than liberals to spread false speech.

That statement was remarkable not only for the prejudice it displayed, but also because the federal government has repeatedly been wrong when assessing whether speech is factually correct. To take just two examples, federal officials induced Big Tech companies to censor the Hunter Biden laptop story and to censor arguments that COVID-19 leaked from a lab. The Hunter Biden laptop story has since been substantiated, and the lab-leak theory is currently the leading theory for the origins of COVID.

The Government wants us to believe that a clear, overt, and pervasive pattern of censorship from the highest levels of the White House, targeted at conservative speakers is just happenstance. Yet, there is no doubt that the federal government is operating a vast censorship “enterprise” that is content-based and targeted at individuals who hold views that federal officials dislike. This is not about truth; to them, it has always been about power.

VI. Freedom of speech is the bedrock of American liberty

Perhaps most troubling, lawyers for the federal government recently shared with a federal judge that they have no plans to discontinue this censorship network. They told the judge that they think there is nothing wrong with what they are doing, and so they plan to continue. That precise admission makes this case one of the most important First Amendment cases in our nation’s history.

The freedom of speech enshrined in the First Amendment is the bedrock of this great nation. It is one of the fundamental rights guaranteed to every American, so crucial that I was willing to defend it in the deserts of Iraq.

With this lawsuit, we are fighting to protect our liberties from all government interference. No government official has the right to tell us what to think, what to say or even what to hear. We have no desire for a national “nanny state” to protect us from hearing others’ opinions—even ones Washington labels “misinformation” or “disinformation.” As the Supreme Court famously held, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

This is why *Missouri v. Biden* is so important. The question of our time is whether Americans will enjoy the legacy of free speech handed down to us by the founding generation and protected by subsequent generations, or whether federal officials will control what we say, what we hear, and how we debate the veracity of claims and arguments. We are locked in a pitched battle for the very character of our nation. If we do not prevail over government officials who seek to control the speech of millions of Americans, we will be left with, in the words of Justice Gorsuch, “a shell of a democracy and civil liberties just as hollow.” *Arizona v. Mayorkas*, 143 S. Ct. at 1316.