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"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. Introduction[1]

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 paus 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

[3]Taylor 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

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[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.

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[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

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[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-eleccritical#:~: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]

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[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 participate—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.

THE COUNCIL TO MODERNIZE GOVERNANCE

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 review[4] 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.

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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.

[3]House 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 a.*, 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 paus 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 report[6] 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:tr171zs0069/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]

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[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

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[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]

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[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=ESR9k0BtmXY); *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]

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[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

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[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.

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[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, 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.

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[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.

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[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, 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://misinforeview.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.

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Written Testimony

of

Iranga Kahangama

Assistant Secretary for Cyber, Infrastructure, Risk, and Resilience

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and

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U.S. Department of Homeland Security

Before

Subcommittee on Oversight, Investigations, and Accountability

Committee on Homeland Security

United States House of Representatives

Official Title: "Censorship Laundering Part II: Preventing the Department of Homeland Security's Silencing of Dissent"

December 13, 2023

Introduction:

Chairman Bishop, Ranking Member Ivey, and members of the subcommittee, we appreciate the opportunity to appear before you today to discuss the Department of Homeland Security's (DHS or the Department) efforts to counter the impacts of foreign influence operations and disinformation impacting homeland security.

First and foremost, at the core of the Department's mission is a commitment to safeguard the American people, our homeland, and our values. We are committed to carrying out this mission in a manner that protects the privacy, civil rights, and civil liberties, including the freedom of speech, of all Americans. These rights are fundamental to our freedom and to who we are as a nation. The Department works every day to ensure that all our activities are carried out in a manner that protects these values.

In its Homeland Threat Assessment for 2024, the Department's Intelligence Enterprise assesses Russia, China, and Iran likely see the upcoming election season in 2024 as an opportunity to conduct overt and covert influence campaigns aimed at shaping favorable U.S. policy outcomes and undermining U.S. stability, and they will likely ramp up these efforts in advance of the election. These adversarial states are likely to use generative artificial intelligence (AI) enabled technologies to improve the quality, scope, and scale of their influence operations targeting U.S. audiences.

Further, nation-state adversaries likely will continue to conduct influence operations aimed at undermining trust in government institutions, our social cohesion, and democratic processes. The proliferation and accessibility of emergent cyber and AI tools probably will help these actors bolster their malign information campaigns by enabling the creation of low-cost, synthetic text-, image-, and audio-based content with higher quality. Russia, China, and Iran continue to develop the most sophisticated malign influence campaigns online. Many of the tactics these adversaries use to influence U.S. audiences will likely be used in the lead-up to the 2024 election.

This risk is not new. In its 2023 Annual Threat Assessment, the U.S. Intelligence Community noted that China largely concentrates its U.S.-focused influence efforts on shaping U.S. policy and the U.S. public's perception of the People's Republic of China (PRC) in a positive direction but has shown a willingness to meddle in select election races that involved perceived anti-PRC politicians. For example, Beijing's growing efforts to actively exploit perceived U.S. societal divisions using its online personas move it closer to Moscow's playbook for influence operations.

Russia presents one of the most serious foreign influence threats to the United States because it uses its intelligence services, proxies, and wide-ranging influence tools to try to sow discord inside the United States. Moscow views U.S. elections as opportunities for malign influence as part of its larger foreign policy strategy. Moscow has conducted influence operations against U.S. elections for decades, including as recently as the U.S. midterm elections in 2022. Russia's influence actors have adapted their efforts to increasingly hide their hand, laundering their preferred messaging through a vast ecosystem of Russian proxy websites, individuals, and organizations that appear to be independent sources.

Election Infrastructure Mission:

In 2017, the Secretary of Homeland Security established election infrastructure as a critical infrastructure subsector. To manage risks to the nation's election infrastructure on behalf of the Department, the Cybersecurity and Infrastructure Security Agency (CISA) works collaboratively with state and local governments, election officials, federal partners, and private sector partners. The collaboration includes working in a nonpartisan, voluntary manner with state and local election officials, who are the trusted and expert voices within their communities, to hold secure elections in their jurisdictions and to equip the American public with accurate information about the conduct and security of elections.

CISA provides publicly available resources on election security for both the public and election officials in its efforts to protect America's election infrastructure against new and evolving threats. For example, CISA recently publicly released the No Downtime in Elections Guide to Mitigating Risks of Denial of Service. Moreover, CISA has partnered with the Federal Bureau of Investigation to publish election security-related Public Service Advisories; and CISA has compiled a toolkit of free services and tools intended to help state and local government officials, election officials, and vendors enhance the cybersecurity and cyber resilience of U.S. election infrastructure.

CISA also provides numerous voluntary and no-cost election security services, such as cybersecurity assessments, cyber threat hunting, cyber incident response, training, and exercises to state and local government officials and private sector election infrastructure partners. In addition, CISA reduces risk to U.S. critical infrastructure by building resilience to foreign influence operations and disinformation intended to impact critical infrastructure.

Through these efforts, DHS helps the American people understand the scope and scale of activities targeting election infrastructure and enables them to take action to mitigate associated risks. The Department's efforts include an emphasis on transparency with respect to sharing accurate information about election infrastructure security, as well as increasing awareness about the threat posed by foreign influence operations and disinformation.

Foreign Influence Operations and Disinformation:

DHS is charged with safeguarding the United States against threats to its security. In recent years, many of those threats have been exacerbated by disinformation. As part of its mission, DHS has worked across multiple administrations to address and mitigate different forms of disinformation that threaten the authorized missions of the Department. Countering disinformation that threatens the homeland and providing the public with accurate information in response are critical to fulfilling DHS's congressionally-mandated missions. DHS efforts are limited to combating disinformation that threatens the homeland and homeland security missions, such as border security, emergency response, and infrastructure security. Examples of such efforts include working to combat human smuggling, protecting critical infrastructure, and responding to malign foreign influence efforts.

CISA's work on foreign influence operations and disinformation targeting election infrastructure is of limited scope and focuses predominantly on its impact to public confidence in election infrastructure security. Out of CISA's $2.9 billion budget, less than 0.07% is spent on these efforts. CISA's work has been transparent, briefed to Congress many times, and is available to the public on its website at cisa.gov.

In support of these efforts, CISA has developed voluntary resources to help individuals identify and mitigate the threats of foreign influence and disinformation operations. Recently, CISA has released guides that highlight tactics, such as manipulating content service providers or defacing public websites, used by foreign actors engaged in disinformation campaigns that seek to negatively impact U.S. critical infrastructure and disrupt American life. Such public products help Americans understand how automated programs like social media bots simulate human behavior on social media platforms and how foreign malign actors use them to spread false or misleading information, shut down opposition, and elevate their own platforms for further manipulation.

Additionally, CISA provides context to common disinformation narratives and themes that relate to the security of election infrastructure through our Election Security Rumor vs. Reality website. Lastly, CISA seeks to combat foreign disinformation by amplifying accurate election security-related information shared by state and local officials with the public.

Conclusion:

DHS is committed to continuing to build resilience to foreign influence operations and disinformation, in close coordination with our interagency partners. In these efforts, DHS will continue operating within our authority and in accordance with all legal requirements, and with respect for the Constitutional rights and civil liberties of all Americans.

Thank you again for the opportunity to appear before you today, and we look forward to continuing to work closely with you to keep our homeland safe and secure.

Testimony of Alex Abdo
Litigation Director of the
Knight First Amendment Institute at Columbia University

Before the House Committee on Homeland Security
Subcommittee on Oversight, Investigations, and Accountability

Hearing on "Censorship Laundering Part II:
Preventing the Department of Homeland Security's Silencing of Dissent"

December 13, 2023

Chairman Bishop, Ranking Member Ivey, and Members of the Subcommittee, thank you for inviting me to testify today. My name is Alex Abdo, and I am the litigation director of the Knight First Amendment Institute at Columbia University.

The topic that this Subcommittee has been exploring on the relationship between the government and social media platforms is an important one—in large part because it implicates many competing First Amendment interests. I'd like to offer several observations to clarify the constitutional principles that should guide this Subcommittee's work.

First, as the Supreme Court held sixty years ago in *Bantam Books v. Sullivan*, the First Amendment forbids the government from coercing private actors into silencing disfavored speech.[1]

That decision was correct because coercion, by definition, overrides the ability of people to decide for themselves what to say, what to listen to, and what communities to join. This rule is important not only in protecting individuals, but also in protecting the social media platforms, which now play a vital role in hosting and curating the speech of millions of people. The communities they create reflect their own expressive decisions as well as the expressive and associational preferences of their users. Outside of very narrow exceptions, it would be inconsistent with the principle of self-government to allow officials to dictate the speech individuals may create and consume in these online communities, whether directly through official sanction or indirectly through official coercion.

[1] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71 (1963).

Second, while the First Amendment forbids the government from coercing private actors into suppressing speech, it does not preclude the government from trying to *persuade* private actors to embrace its views.

A democratically elected government must have the power to govern, and an indispensable tool in governing is attempting to galvanize public opinion. As the Supreme Court reaffirmed just a few years ago, governing "necessarily [involves] tak[ing] a particular viewpoint and reject[ing] others."[2] "[I]t is not easy to imagine," the Court wrote, "how government could function"[3] if it could not express its views.

The public also has a strong interest in hearing what its government has to say. Hearing the government's views helps ordinary citizens evaluate the government's decisions and hold government officials accountable for them. In addition, private actors often rely on the government's expertise in making decisions about their own speech. In the years after 9/11, for example, news organizations welcomed the input of the government in deciding whether to publish classified information that had been leaked to them.[4]

That's not to say, of course, that anyone should defer to the government's views, knowledge, or expertise. The government often gets things wrong.[5] But a rule requiring the government to stand silent on matters of public policy "would be paralyzing," as the Supreme Court has said.[6]

Third—and this is a point I really want to emphasize today—the First Amendment protects the right of researchers to study social media platforms, and to share their findings with the public, the platforms, and the government.

It should not need to be said that when researchers study the social media platforms, they are exercising rights protected by the First Amendment. When they criticize the platforms' content-moderation policies and practices, the First

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[2] *Matal v. Tam*, 582 U.S. 218, 234 (2017); *see also Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015) ("But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.").

[3] *Matal*, 582 U.S. at 234 (internal quotation marks omitted) (quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009)).

[4] *See, e.g.*, James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html ("After meeting with senior administration officials to hear their concerns, the newspaper delayed publication for a year to conduct additional reporting. Some information that administration officials argued could be useful to terrorists has been omitted.").

[5] *See, e.g.*, *'Group Think' Led to Iraq WMD Assessment*, Fox News (July 11, 2004), https://www.foxnews.com/story/group-think-led-to-iraq-wmd-assessment; Zeynep Tufekci, *Why Telling People They Don't Need Masks Backfired*, N.Y. Times (Mar. 17, 2020), https://www.nytimes.com/2020/03/17/opinion/coronavirus-face-masks.html.

[6] *Matal*, 582 U.S. at 234; *see also Bantam Books*, 372 U.S. at 72.

Amendment protects them. When they press the platforms to take down speech, the First Amendment protects them. And yes, even when you and I disagree with their research findings and proposals, the First Amendment protects them.

For these reasons, I think it's crucial for the Subcommittee to tread carefully in this area. It's legitimate to investigate the executive branch, to see whether it has coerced or conspired with researchers to suppress protected speech. But investigations of and lawsuits against private researchers who acted independently of the government are not a defense of the First Amendment; they are a grave threat to it.

Finally, let me conclude by acknowledging what I hope is a common concern—the concentration of private power over public discourse is a threat to free speech.

The First Amendment does not forbid the social media companies from assuming gatekeeper control over public discourse. Nor does it insulate them from careful regulation that would loosen that control.

Congress can, and should, pass legislation that would do just that. It should require the platforms to design their systems to be "interoperable," so that users can switch to competing services without losing their social networks. It should enact a privacy law that gives users greater control over their personal data, making it easier for users to switch between competing services and harder for platforms to obtain and monopolize access to the data that drives their profitability. And Congress should enact transparency laws that make it easier to study the platforms and the effects they're having on public discourse.

Carefully drafted laws of this kind would address some of the legitimate concerns with the platforms, consistently with the First Amendment.

* * *

Thank you, again, for the opportunity to testify today.

ENVIRONMENTAL PROGRESS

NATURE, PEACE & FREEDOM FOR ALL

Censorship Laundering By The U.S. Department Of Homeland Security

Testimony by Michael Shellenberger to Homeland Security Subcommittee for Oversight, Investigations, and Accountability

For a hearing on:

"Censorship Laundering Part II: Preventing the Department of Homeland Security's Silencing of Dissent"

December 13, 2023

Chairman Green, Chairman Bishop, Chairman Ivey, and members of the Subcommittee, thank you for inviting my testimony.

Researchers asked by the U.S. Department of Homeland Security (DHS) to flag election and Covid misinformation to social media platforms in 2020 and 2021 say that they didn't break the law. According to the leaders of the Stanford Internet Observatory, and the other groups, they simply alerted social media platforms to potential violations of their Terms of Service. What the platforms chose to do after that was up to them.

But during the two years that these DHS-empowered researchers were asking social media platforms to take down, throttle, or otherwise censor social media posts, the President of the United States was accusing Big Tech of "killing people," his then-press secretary said publicly that the administration was "flagging violative posts for Facebook," members of Congress threatened to strip social media platforms of their legal right to operate because, they said, the platforms weren't censoring enough, and many supposedly disinterested researchers were aggressively demanding that the platforms change their Terms of Service.

It's true that social media platforms are private companies technically free to censor content as they see fit and are under no clearly stated obligation to obey demands by the US government or its authorized "researchers" at Stanford or anywhere else.

But the First Amendment of the U.S. Constitution states clearly that the government should take no action that would limit free speech, and the record shows that the US government, in general, and the DHS in particular, did just that.

DHS supported, created, and participated in the 2020 Cyber Threat Intelligence League, or CTIL; the 2020 Election Integrity Partnership, or EIP; and the 2021 Virality Project, or VP. In the case of the EIP and VP, four think tanks led by Stanford Internet Observatory, or SIO, and reporting to CISA, demanded and achieved mass censorship of the American people in direct violation of the First Amendment and the prohibition on government agencies from interfering in an election.

A longtime US Navy officer and a UK military contractor created the so-called anti-disinformation wing of the CTIL in 2020. In so doing, they pioneered the misdescription of censorship laundering as "cyber-security." They used CTIL as a front group to demand censorship and demanded that "cognitive security" be viewed as their responsibility, in addition to physical security and cyber-security.

CTIL created a handbook full of tactics, including demanding social media platforms change their terms of service. Another explains that while such activities overseas are "typically" done by "the CIA and NSA and the Department of Defense,"

censorship efforts "against Americans" have to be done using private partners because the government doesn't have the "legal authority."

DHS publicly blessed this project, and its staff helped create CTIL's "anti-disinformation" efforts.

The CTI League aimed to implement something called "AMITT," which stood for "Adversarial Misinformation and Influence Tactics and Techniques." AMITT was a disinformation framework that included many offensive actions, including working to influence government policy, discrediting alternative media, using bots and sock puppets, pre-bunking, and pushing counter-messaging. The specific "counters" to "disinformation" in AMITT and its successor framework, DISARM, included the following:

- "Create policy that makes social media police disinformation"
- "Strong dialogue between the federal government and private sector to encourage better reporting"
- "Marginalize and discredit extremists"
- "Name and Shame influencers"
- "Simulate misinformation and disinformation campaigns, and responses to them, before campaigns happen"
- "Use banking to cut off access"
- "Inoculate populations through media literacy training"

The explanations and justifications by the creators and leaders of the EIP and VP have shifted over the last nine months. At first, an SIO executive claimed in a video for DHS that the idea for EIP came from SIO's interns, who happened to be working at DHS. More recently, another SIO executive claimed that the idea was his.

Then, last month, this committee released documents establishing that the DHS-authorized groups believed the idea had come from DHS. "We just set up an election integrity partnership at the request of DHS/CISA," said an Atlantic Council senior executive, Graham Brookie, in an email sent on July 21, 2020.

After Matt Taibbi and I testified before Congress in March, an SIO spokesperson says it "did not censor or ask social media platforms to remove any social media content regarding coronavirus vaccine side effects."

That turned out not to be true, as internal messages from its operation, released publicly by this committee last month, proved.

- Consider the language that these DHS-authorized individuals used:
- "Hi Facebook, Reddit, and Twitter . . . we recommend it be removed from your platforms."
- "We repeat our recommendation that this account be suspended…."
- "We recommend labeling…."

- "We recommend that you all flag as false, or remove the posts below."

Under the guise of a research project, EIP was enmeshed with the federal government leading up to the 2020 election. Four students involved with EIP were even employed by CISA. One Stanford student, for example, worked as a DHS intern "inside the EIP network."

It is clear from the emails released by this committee that the supposedly independent Election Integrity Partnership (EIP) and CISA were working together and interacted. One email from a Colorado official was addressed to "EI-ISAC, CISA and Stanford partners," directly referring to EIP. The CISA-funded non-profit, Center for Internet Security (CIS), also sent alleged misinformation to social media companies.

CIS had previously claimed that its definition of election mis- and disinformation did not include "content that is polarizing, biased, partisan or contains viewpoints expressed about elections or politics," "inaccurate statements about an elected or appointed official, candidate, or political party," or "broad, non-specific statements about the integrity of elections or civic processes that do not reference a specific current election administration activity."

But the DHS emails reveal that CISA and CIS did, in fact, consider such content to be subject to censorship. The emails show that CISA and its non-profit partners reported political speech to social media companies, including jokes, hyperbole, and the types of "viewpoints" and "non-specific statements" that CIS once claimed it would not censor. Using the pretext of "election security," DHS sought to censor politically inconvenient speech about election legitimacy.

Messages one year later also showed VP researchers urging censorship of "general anti-vaccination" posts, of the CDC's own data, of accurate claims of natural immunity, of accurate information from the journal Lancet, of anti-lockdown protests, and even of someone's entire Google Drive.

In 2020, Department of Homeland officials and personnel from EIP were often on emails together, and CISA's personnel had access to EIP's tickets through an internal messaging system, Jira, which EIP used to flag and report social media posts to Twitter, Facebook, and other platforms. And CISA included a threatening disclaimer in its email. It stated that "information may also be shared with law enforcement or intelligence agencies."

CISA was not supposed to have involvement in EIP's flagging activities, but, notes the House Judiciary, numerous Jira tickets mention CISA, and CISA referenced EIP Jira codes when switchboarding. Stanford's legal counsel insisted that EIP and SIO "did not provide any government agency… access to the Jira database," but in one November 2020 email, SIO Director Alex Stamos told a Reddit employee, "It would be great if we could get somebody from Reddit on JIRA, just like Facebook,

Google, Twitter, TikTok, Instagram, CISA, EI-ISAC…" Stamos's statement indicated that CISA had access to EIP's Jira system.

In communications with social media platforms, the House report states, Stamos made it clear "that the EIP's true purpose was to act as a censorship conduit for the federal government." In an email to Nextdoor, Stamos wrote that EIP would "provide a one-stop shop for local election officials, DHS, and voter protection organizations to report potential disinformation for us to investigate and to refer to the appropriate platforms if necessary."

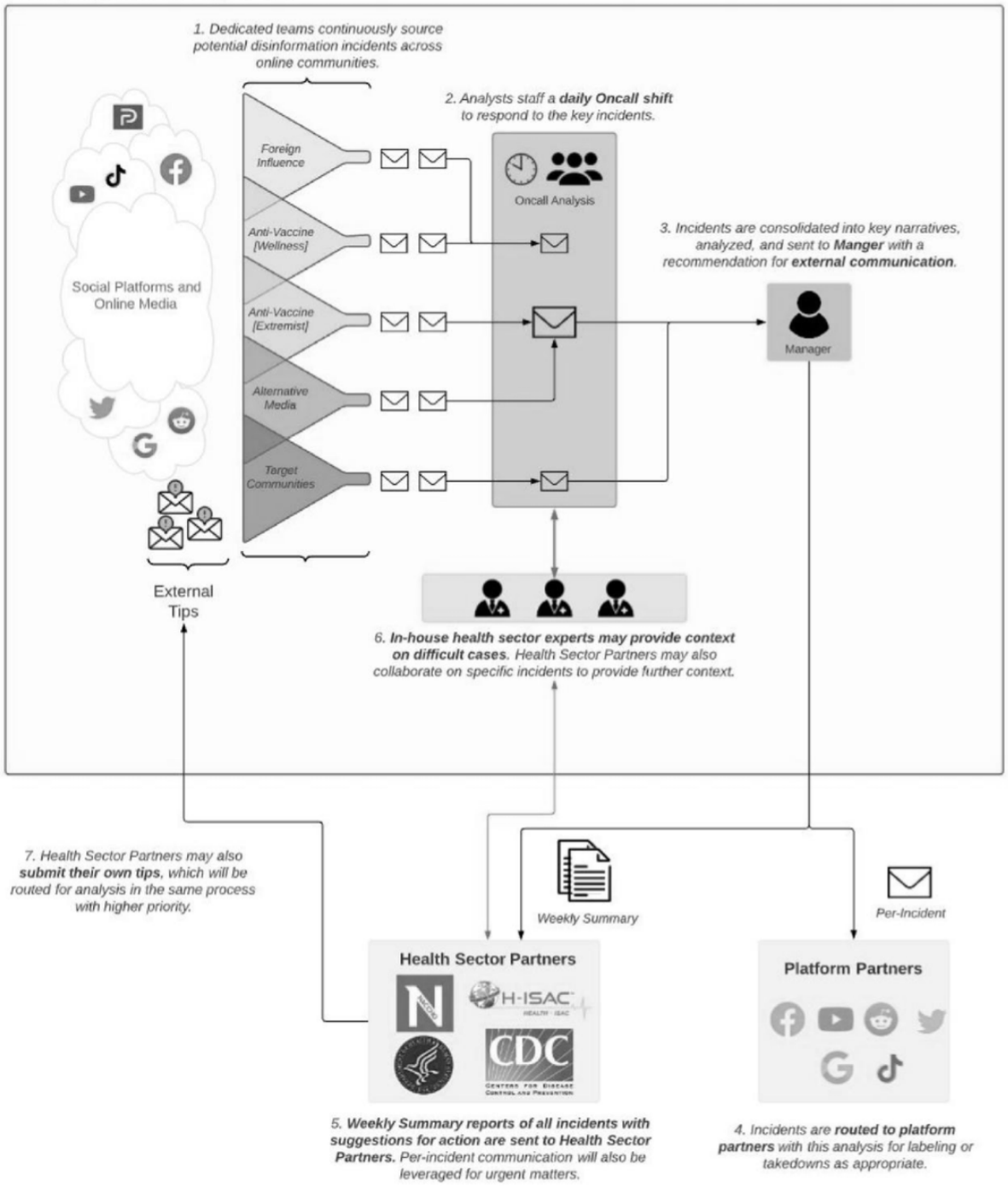
Anyone who doubts that the DHS-authorized organizations, SIO chief among them, need only look at the "Internal Workflow" graphic in a VP proposal obtained earlier this week through a FOIA request by Taibbi. It shows how disinformation "Incidents are routed to platform partners... for... takedowns."

Exhibit: Internal Workflow (Link)

Core Virality Project Partners

FIRST DRAFT · Stanford Internet Observatory Cyber Policy Center · CENTER FOR AN INFORMED PUBLIC UNIVERSITY of WASHINGTON · CSMaP

Virality Project Internal Organization



"Psychological and influence operations have long been used to secure military objectives," noted my colleague Alex Gutentag last week. "We now have clear evidence that, with the creation of CTIL and its partnership with CISA, [the censorship leaders] pioneered the use of psychological strategies to combat populism at home by censoring information and narratives associated with populist discontent."

Today, the Defense Department and its contractors openly discuss the importance of "cognitive warfare," not just "security," aimed at the American people.

While I believe all of the above is transparently unconstitutional, there is the possibility that The Supreme Court will not rule against it after it hears the Missouri v Biden censorship lawsuit next year. Some justices may conclude that somehow the First Amendment does not cover the Internet, or that governments outsourcing censorship to third-party "cut-outs" or front groups is justified even though the Supreme Court has called it "axiomatic" that the government cannot facilitate private parties violating the Constitution on its behalf. Still other justices may claim that the First Amendment requires a very high bar for government coercion of private actors, even though the First Amendment prohibits government limitations on freedom of speech broadly, not just through coercion

As such, the importance of this DHS oversight committee in protecting our freedom of speech is essential.

Setting aside the clear and present threat that DHS poses to our first and most fundamental freedom, there is another problem related to DHS's censorship activities, and that's the ways in which it distracts from and thus undermines our nation's cybersecurity.

As this committee knows well, the Internet is more essential than any other piece of America's infrastructure because every major aspect of civilization depends upon it, including our electrical grids, our transportation networks, and our policing and security systems. If cyber-attacks take down or undermine the Internet, the consequences could be catastrophic.

Given that, does this committee believe it makes sense for the head of the DHS's so-called "Cybersecurity and Information Security Agency," CISA, to be involved in policing what people say, hear, and think?

Set aside for a moment the Orwellian aspects of CISA's efforts at mind control. What do we think the consequences could be of CISA taking its eye off the cybersecurity ball so that it can crusade with Stanford interns against wrongthink? Should we be able to sleep soundly at night knowing that CISA is focused on the problem of people being wrong on the Internet rather than on China, Russia, Iran, and other malicious actors seeking to harm American businesses, government agencies, and our citizens?

Over the last 100 years, the Supreme Court created a tiny number of exceptions to the radical commitment to freedom of speech enshrined in our constitution. Nobody questions the need for governments to fight fraud, child exploitation, and the *immediate* incitement of violence.

What's at stake here is our fundamental freedom to express our views on controversial social and political issues without fear of government censorship. CISA drifted so far from its mission that it slid down the slipperiest slope in American political life.

I believe this dramatic situation requires the abolition of CISA. If it is doing good cybersecurity work, then it should be placed under the supervision of different leadership at a different agency free from the awful and unlawful behaviors of the last three years.

However, I am also a realist and recognize that guardrails may be all that can be imposed. If that is the direction in which this committee chooses to go, then I would encourage very bright lines between cyber security and "cognitive security." While censorship advocates have tried to blur that line, it is, in reality, quite clear to everyone what constitutes security and what constitutes censorship.

Nonetheless, something must be done to make clear, in DHS-CISA's mandate, that the agency recognizes the distinction and will never again transgress its mandate in violation of our Constitution.

The turning against the American people of counterterrorism tactics once reserved for foreign enemies should terrify all of us and inspire a clear statement that never again shall our military, intelligence, and law enforcement guardians engage in such a recklessly ideological and partisan "warfare" against civilians.

Censorship Laundering Part II:

Preventing the Department of Homeland Security's Silencing of Dissent

Testimony by Mark Chenoweth
President and General Counsel of the New Civil Liberties Alliance to the
Oversight, Investigations, and Accountability Subcommittee of the
House Committee on Homeland Security

December 13, 2023

Chairman Bishop, Ranking Member Ivey, and members of the Subcommittee, thank you for inviting my testimony.

Introduction

The New Civil Liberties Alliance is a nonpartisan, nonprofit civil rights organization founded by prominent legal scholar Philip Hamburger, the Maurice and Hilda Friedman Professor of Law at Columbia Law School in New York City, to protect constitutional freedoms from violations by the Administrative State. Professor Hamburger is among the nation's foremost First Amendment scholars, and his brilliant scholarship informs the cases that NCLA pursues and the arguments that NCLA makes in those cases on behalf of our clients. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights. NCLA views the administrative state as an especially serious threat to constitutional freedoms. No other development in contemporary American law denies more rights to more Americans.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as freedom of speech, jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies, and even sometimes the courts have neglected them for so long. NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern. NCLA urges Americans to recognize the administrative threat and join our civil liberties movement against it.

From the outset of the Covid-19 pandemic, the New Civil Liberties Alliance has been dismayed at the widespread and brazen violation of Americans' civil liberties by all levels of government in the United States. It's as though officials

think the U.S. Constitution does not apply in times of emergency when, in fact, it is during such times of crisis that the Constitution's protections for individual rights are of paramount importance. NCLA's litigators have been at the forefront of the battles against illegal lockdowns, the unlawful nationwide eviction moratorium, and unconscionable vaccine mandates for university employees and students, federal employees, federal contractors, and others. Particularly with reference to vaccine mandates, NCLA adopted the position that natural immunity to Covid-19 is a real phenomenon and that vaccines are not necessarily appropriate—and certainly should not be mandated—for individuals who have recovered from Covid-19 and have antibodies against the virus, which can be measured through antibody testing. NCLA has also argued that federal law prohibits forcing anyone outside the military (and then only when ordered by the Commander-in-Chief) to take a vaccine that has only been approved under Emergency Use Authorization. We have also argued that it is a fundamental violation of personal liberty to be forced to accept an experimental vaccine as a condition of maintaining employment, especially public employment by a state or federal agency or state university.

In contrast, the federal government peddled the falsehoods that natural immunity does not exist to Covid-19, that vaccine immunity is superior to natural immunity, that lockdowns were an effective mitigation strategy, that everyone needs the vaccine, that the Covid-19 vaccines would stop transmission of the virus, that masks are effective in preventing transmission of the virus, that people hospitalized with Covid-19 need to be intubated, that EUA vaccines can be mandated for federal employees, that the Wuhan lab was not the origin of the Covid-19 virus, and so forth. Eventually, the federal government came to its collective senses and backed away from propagating most of these falsehoods. It was forced to abandon some of them after courts ruled against the government. Some of them persist today. However, thanks in part to NCLA's efforts, at least the government now admits that natural immunity to Covid-19 exists for some period of time among those who have recovered from the virus.

To make matters worse, not only did the federal government peddle falsehoods during the pandemic, but it also suppressed dissenting voices in the public square on Twitter, Facebook, and elsewhere, who dared to express rational and scientifically accurate views about the Covid-19 virus and the vaccines

authorized for emergency use in response to it. And it did so in blatant violation of the First Amendment. That is how NCLA first became aware of the vast and shocking censorship problem infecting the federal government today: our clients were censored for their views about Covid-19 and related issues.

We can come back to that, but first let's explore the legal principles at stake here and the scope of the problem as it pertains to the Department of Homeland Security.

Legal Principles

NCLA's most prominent role to date in fighting against unlawful federal censorship has been through our participation representing the individual plaintiffs in the Missouri v. Biden case, now pending at the U.S. Supreme Court under the name Murthy v. Missouri. The U.S. District Court for the Western District of Louisiana, which had the opportunity to look at all of the (admittedly still limited) discovery in this case before ruling, pronounced on the Fourth of July this year that "the present case arguably involves the most massive attack against free speech in United States' history." "Although this case is still relatively young, and at this stage the Court is only examining it in terms of Plaintiffs' likelihood of success on the merits, the evidence produced thus far depicts an almost dystopian scenario. During the COVID-19 pandemic, a period perhaps best characterized by widespread doubt and uncertainty, the United States Government seems to have assumed a role similar to an Orwellian 'Ministry of Truth.'"

On expedited appeal of that decision, the U.S. Court of Appeals for the Fifth Circuit, after noting that the U.S. Supreme Court has been reluctant to expand state-action doctrine, said: "[W]e do not take our decision today lightly. But, the Supreme Court has rarely been faced with a coordinated campaign of this magnitude orchestrated by federal officials that jeopardized a fundamental aspect of American life. Therefore, the district court was correct in its assessment – 'unrelenting pressure' from certain government officials likely "had the intended result of suppressing millions of protected free speech postings by American citizens."

As a reminder to this body, the First Amendment says, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Under the First Amendment, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU,* 535 U.S. 564, 573 (2002). This "profound" commitment to free speech is *even more necessary* when the debate may include critical or sharp attacks on government or its policies. *See NY Times v. Sullivan*, 376 U.S. 254, 270 (1964). And, of course, it is "axiomatic" that the Government may not "induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 431 U.S. 455, 465 (1973). So, just as the Fourth Amendment does not permit a police officer to ask a landlord to conduct an unconstitutional search on behalf of that officer, so too the First Amendment does not permit government officials to use third-party companies or platforms to censor lawful free speech indirectly that the government itself would be prohibited from regulating directly. If anything, given the 'abridging' language, the First Amendment protects against such machinations even more than the Fourth Amendment.

Again, the government cannot do indirectly through third parties what it cannot do directly. Congress must hold to that line. Otherwise, free speech is a dead letter, because the Executive Branch has countless ways of influencing private parties to suppress their speech—as we have seen in Missouri v. Biden. Indeed, this kind of soft power exercised through third parties may be worse in the sense that it is harder to fight, harder to prove, and easier for the government to get away with. Indeed, I daresay there are some in this room—on both sides of the aisle—who brush away the monumental efforts of the Biden Administration to squelch speech on Twitter, Facebook, LinkedIn and other social media sites as merely the actions of private companies. Not so. When the government coerces or pressures a company with inducements or threats and the company responds by crushing private individuals, that is state action, and the First Amendment forbids it. Or when the government has entangled its practices with a private company to where the company is relying on the government to identify individuals and accounts to be censored, the First Amendment forbids that too. Or, if the government writes and tests software to effectively monitor and shut

down speech that the government does not like and then turns that over to private operators to run the software program and execute the censorship it identifies, that is still state action.

Is every person who was ever canceled on social media a victim of state action? Maybe not, but without discovery into the government's unprecedented practices, NCLA and our co-counsel would never have uncovered how widespread this practice has been and how far up the chain of command it goes. We know the background level of censorship these companies engaged in before January 2021, especially Twitter given the disclosures of the Twitter files. And we know what they did in response to government pressure in terms of ramping up the amount of censorship they were doing. So, there is plenty of evidence here to ascertain that this censorship was not conducted as independent, private action.

But even the Fifth Circuit's test for government action here is flawed. We don't need and should not invent a judicial standard for adjudging infringements on free speech. The Constitution already provides the standard. The only question for the courts is whether the government's conduct has led to the "abridging" of speech. That is what the First Amendment's text proscribes. Not coercion. Not pressure. Not entanglement. Abridgment. And that is a very low bar. The First Amendment prohibits government from "abridging" freedom of speech (contrasted with prohibited in the context of religion)

The Bill of Rights' evolution demonstrates that the Framers purposefully decided to use the term "abridging" which is a different term than "prohibiting" which is used in the Free Exercise Clause. This was not a mere attempt to create linguistic variety. *See* Hamburger, *Courting Censorship*, __ COLUMBIA L. J at 39. An earlier draft of what would become the First Amendment separated the guarantees to free exercise of religion and free speech into two adjacent paragraphs, using the term "infringe" to designate unlawful government conduct in both contexts. *Id.* (citing House Committee Report (July 28, 1789), CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, 30 ed., Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford (Baltimore: Johns Hopkins Univ. Press 1991)). The two paragraphs were combined in a subsequent iteration, which used "prohibit" in the context of proscribed government conduct with respect to free exercise of religion, and "abridge" for speech. *Id.*

As Professor Hamburger writes: "This contrast is revealing. An action prohibiting is one that involves coercion—in the sense of government force or at least the threat of it. So, when the First Amendment distinguishes *abridging* and *prohibiting*, it tells us something important. A law can abridge the freedom of speech, or the press, without prohibiting or otherwise coercively assaulting it." *See* Hamburger, *Courting Censorship*, __ COLUMBIA L. J at 39. In other words, the Framers' conscious choice to use the terms "abridging" in the speech context and "prohibiting" in the religion context establishes that they sought to prevent Government from *diminishing* free speech to any extent. That means any action that the Government takes to impede free speech violates the First Amendment. By contrast, when it comes to religion, the Government's conduct must effectively "forbid" the free exercise, a much more severe action and a higher bar to clear.

Finally, in terms of legal principles, recognize that the Supreme Court has held that even "false statements, as a general rule" are not "beyond constitutional protection." United States v. Alvarez, 567 U.S. 709, 718 (2012). Thus, merely labeling disfavored speech as "disinformation," "misinformation," or "mal-information" does not strip it of First Amendment protection. Of course even under the government's own definitions, misinformation, disinformation, and malinformation are not necessarily false speech—often just inconvenient or unpleasant truthful speech.

But the court has explained that "… some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." Id. (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)). "Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech … it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." Id. at 723.

"The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" Id. at 728 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). "The First Amendment itself ensures the right to respond to speech

we do not like, and for good reason. Freedom of Speech and thought flows [sic] not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates." Id. at 728.

Background on CISA and DHS

Founded in 2018, CISA, a component of DHS, was initially created to protect "critical infrastructure" (information technology, telecommunications, chemical, transportation systems, emergency services, postal and shipping) from cybersecurity threats.[1] It rapidly expanded its mission to combat foreign "disinformation." *See, e.g.*, CYBERSECURITY AND INFRASTRUCTURE SEC. AGENCY, #PROTECT2020 STRATEGIC PLAN, at 20 (2020), https://www.cisa.gov/sites/default/files/publications/ESI_Strategic_Plan_FINAL_2-7-20_508.pdf. That soon morphed into an attempt to control "cognitive infrastructure" in the context of elections, a term coined by Jen Easterly, former

[1] *See* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/cisa-staff-report6-26-23.pdf at 5 (citing 6 U.S. Code § 652).

42 U.S.C. 5195c(e): Defines "critical infrastructure" to mean "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." CISA https://www.cisa.gov/topics/critical-infrastructure-security-and-resilience

6 U.S.C. § 650 Defines: "cybersecurity risk" to mean threats to and vulnerabilities of information or information systems and any related consequences caused by or resulting from unauthorized access, use, disclosure, degradation, disruption, modification, or destruction of such information or information systems, including such related consequences caused by an act of terrorism;

And defines "cybersecurity threat" as "an action, *not protected by the First Amendment to the Constitution of the United States*, on or through an information system that may result in an unauthorized effort to adversely impact the security, availability, confidentiality, or integrity of an information system or information that is stored on, processed by, or transiting an information system" (emphasis added).

CISA director. *See* Maggie Miller, *Cyber agency beefing up disinformation, misinformation team*, THE HILL (Nov. 10, 2021).

Easterly's "cognitive infrastructure" spin conflicts with the definition of "election infrastructure" the then-DHS Secretary Jeh Johnson adopted in January of 2017 when he designated election infrastructure as "a critical infrastructure subsector:" "By 'election infrastructure,' we mean storage facilities, polling places, and centralized vote tabulations 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. https://toresays.com/wp-content/uploads/2022/08/JohnsonStatement-ElectionInfrastructure.pdf

So, originally the term meant policing "misinformation" on social media, first about elections, but that soon crept into other areas too, including Covid (Easterly said, quoted in *Hill* article above: "One could argue we're in the business of critical infrastructure, and the most critical infrastructure is our cognitive infrastructure, so building that resilience to misinformation and disinformation, I think, is incredibly important[.]").

In June of 2021, DHS created the CISA Cybersecurity Advisory Committee, which in turn established the "MDM [misinformation/disinformation/malinformation] subcommittee]."[2] *See, e.g.*, CISA Cybersecurity Advisory Committee, Dec. 6, 2022 Meeting Summary Closed Session at 3. This Committee (since disbanded) brought together government, big tech, and academic "misinformation" experts, including Kate Starbird from the University of Washington and Renee DiResta from Stanford. One of the Committee's recommendations was that "CISA should approach the [misinformation and disinformation] problem with the entire information ecosystem in view. This includes social media platforms of all sizes, mainstream media, cable news, hyperpartisan media, talk radio, and other online resources."

[2] Definitions: "misinformation" means false information that the disseminator thinks is true; "disinformation" is false information that the disseminator knows is false; and "malinformation" is true information that "lacks context."

CISA's mission expanded even further outside its original purview: internal documents providing updates say, for example, that CISA is "bringing on staff to address MDM related to the pandemic."[3] By 2022, the CISA apparently believed its mission was "to strengthen the security and resilience of the nation's critical functions," or at least CISA's CSAC (Cybersecurity Advisory Committee) claimed that was CISA's mission.[4]

And believing CISA had a mandate to "strengthen the security and resilience of the nation's critical functions," CISA CSAC proposed CISA focus on "MD that risks undermining critical functions of American society including: (i) MD that suppresses election participation or falsely undermines confidence in election procedures and outcomes; (ii) MD that undermines critical functions carried out by other key democratic institutions, such as the courts, or by other sectors such as the financial system, or public health measures; (iii) MD that promotes or provokes violence against key infrastructure or the public; and (iv) MD that undermines effective responses to mass emergencies or disaster events."[5] Any attempt to limit CISA's purview to foreign actors by now had evaporated—the agency was explicit that it was involved in identifying domestic actors.[6]

CISA's Work with Third Parties[7]

CISA worked with third parties on a frequent basis, laundering the censorship through those third parties such as the Election Integrity Partnership (EIP) and the Virality Project (VP). Federal officials at CISA and GEC, and state officials through CISA funded EI-ISAC, work in close collaboration with the Stanford Internet Observatory (DiResta's organization) and other nonprofits.[8]

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[3] *See* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/cisa-staff-report6-26-23.pdf at 16.

[4] https://www.cisa.gov/sites/default/files/publications/June%202022%20CSAC%20Recommendations%20%E2%80%93%20MDM_0.pdf

[5] https://www.cisa.gov/sites/default/files/publications/June%202022%20CSAC%20Recommendations%20%E2%80%93%20MDM_0.pdf

[6] *See* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/cisa-staff-report6-26-23.pdf at 13.

[7] Note: the Fifth Circuit reversed the district court's injunction that covered these third parties. NCLA is asking the Supreme Court to reverse the Fifth Circuit on this point.

[8] *See* Proposed Findings of Fact at 285, Dkt. 212-3, *Missouri v. Biden*, (No. 3:22-cv-1213) (W.D. La 2023).

Moreover, it has recently come to light that DHS/CISA set up the EIP.[9]

CISA engaged in "switchboarding": CISA officials forwarded content flagged by third parties, especially local election officials, to the social media companies, either explicitly asking that such material be removed, or implying that it should be.[10] The Surgeon General's Office and other federal officials likewise collaborated closely with the Stanford Internet Observatory's Virality Project. *Id.*

The Stanford Internet Observatory and others had portal systems, through which they would report to social media companies posts that they thought contained "misinformation." The companies didn't *always* remove posts that SIO and other third-party groups flagged, but there was a high compliance rate. As an example, Virality Project flagged one of NCLA client Martin Kulldorff's tweets (which stated: "Thinking that everyone must be vaccinated is as scientifically flawed as thinking that nobody should. COVID vaccines are important for older high-risk people, and their care-takers. Those with prior natural infection do not need it. Nor children."). This tweet was censored, and Kulldorff's account was flagged as one that should be watched.

The Virality Project also wrote a report in which another NCLA client, Brianne Dressen, was identified as a purveyor of "misinformation" for discussing the adverse effects she suffered from the Astra Zeneca vaccine (following her participation in a vaccine trial) even though the NIH itself had diagnosed her as vaccine injured.

The U.S. Court of Appeals for the Fifth Circuit's Findings in *Missouri v. Biden* with Respect to CISA's Involvement in Social Media Censorship[11]

The Fifth Circuit held that the evidence showed "CISA's role went beyond mere information sharing. Like the CDC for Covid-related claims, CISA told the platforms whether certain election-related claims were true or false. CISA's

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[9] *See* Alex Gutentag and Michael Shellenberger, *New Documents Reveal US Department of Homeland Security Conspiracy to Violate First Amendment and Interfere in Elections* (Nov. 7, 2023), https://public.substack.com/p/new-documents-reveal-us-department

[10] *See* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/cisa-staff-report6-26-23.pdf at 12.

[11] Whether or not CISA appeared to have violated the First Amendment was the main issue upon which we requested reconsideration in the Fifth Circuit, and upon which the Fifth Circuit granted and extended the injunction to CISA.

actions apparently led to moderation policies being altered and content being removed or demoted by the recipient platforms." *Missouri v. Biden*, 83 F.4th 350, 365 (5th Cir. 2023) (decision after reconsideration). "CISA also likely violated the First Amendment." *Id.* at 391. CISA was a "primary facilitator" of the FBI's interactions with the social media platforms and worked in close coordination with the FBI to push the platforms to change their moderation policies to cover "hack and leak" content.

CISA's switchboarding operations were more than merely relaying information—it used frequent interactions with social media platforms to push them to adopt more restrictive policies on censoring election-related speech. CISA told the platforms whether the content they had switchboarded was true or false—the platforms' censorship decisions "were made under policies that CISA has pressured them into adopting and based on CISA's determination of the veracity of the flagged information."

NCLA's Clients

The Questions Presented in the Murthy v. Missouri case are:
(1) Whether respondents have Article III standing;
(2) Whether the government's challenged conduct transformed private social-media companies' content-moderation decisions into state action and violated respondents' First Am. rights; and
(3) Whether the terms and breadth of the preliminary injunction are proper.

NCLA's clients in the Missouri v. Biden litigation are Dr. Jay Bhattacharya, Dr. Martin Kulldorff, Dr. Aaron Kheriaty, and Ms. Jill Hines. Their speech has revolved around the extent to which the government's public health and public policy advice about Covid 19 is sound. Drs. Bhattacharya and Kulldorff were co-authors and signatories to the Great Barrington Declaration. They opposed lockdowns. Other speech included efforts to say that natural immunity is real, efforts to say that not every category of the populace needs the vaccine, efforts to oppose forced vaccination, efforts to say that natural immunity provides equal or greater protection than the vaccine.

Note that several examples of suppressed speech were neither misinformation, disinformation, nor even malinformation. Indeed, the government now admits that natural immunity exists and is effective against

reinfection with Covid-19 for at least as long as the vaccine, though the government still wants those folks vaccinated, saying that there is some marginal benefit to them. Note as well that several of the government's false narratives were allowed to propagate widely on social media unrefuted. For example, the narrative against natural immunity and the narrative refuting that the Wuhan Institute of Virology was the source of the virus (via a leak from the lab) persisted.

We have only been able to obtain limited discovery in the Murthy v. Missouri case because we are still at the preliminary injunction phase of litigation. The Supreme Court may or may not decide that we have enough discovery to establish connections to the extent its precedents will demand. That is in part because the Court might demand a coercion or significant encouragement standard that is higher than the "abridging" standard set by the First Amendment itself. Such a standard would not be consistent with either the text of the First Amendment or jurisprudence in the area, and it would have disastrous, broad implications for Americans' First Amendment speech rights.

If these plaintiffs are unable to succeed, it is hard to envision how future litigants will do so. Consider first that in this case there was a district court judge who was willing to order a modicum of pre-injunction discovery. Second, we were able to turn up a fair bit of good discovery and identify at least some of the correct government officials to seek information from—though the government lied to us about the scope and identity of relevant officials. Third, we discovered this dishonesty because we also obtained third-party discovery from Facebook, which turned over dozens more emails and similar communications with government officials that the government's initial response to discovery had omitted. Fourth, we also were able to rely on the Twitter Files to some extent to find examples of censorship. That material only became available because Elon Musk bought Twitter and for no other reason. Fifth, we were able to rely on the investigative journalism work of Michael Shellenberger, Matt Taibbi, and others, who combed through the Twitter files and made some relevant information public. Finally, Congress used its oversight capacity to issue subpoenas that turned up some additional information. This came rather late in the game, so it has not been as beneficial as it would have been if it had come earlier, but it is still useful to have.

To see how difficult these cases are to bring and win, consider that NCLA already lost a very similar case at the circuit court level, which we are still appealing. In the Sixth Circuit, we filed suit on behalf of three clients—Mark Changizi, Michael Senger, and Daniel Kotzin—whose messages were taken down from Twitter and in one instance our client was kicked off Twitter entirely. But the panel ruled against our clients on standing, saying that they could not trace their harm to government conduct. In other words, the complaint supposedly did not state enough facts to meet the bare minimum necessary to allege government wrongdoing.

The district court in that case had denied us any discovery. The Court of Appeals then limited itself to the facts in the complaint, even though many more facts had come out by the time of the briefing on appeal and the oral argument. The Sixth Circuit, without reaching the merits of the First Amendment issues in the case, held that we had not met the minimum pleading standards to even survive a motion to dismiss.

The court also said that our allegations against the government were—and I quote—"not phantasmagoric" which is a funny thing to say since all of our allegations were facts provable and proved from discovery obtained (albeit later) in the Missouri v. Biden litigation. Yet that was not enough for a panel in the Sixth circuit to even allow our clients to survive a motion to dismiss. Under such circumstances, where courts are willing to put blinders on to well-established facts, it is hard to see how other plaintiffs will be able to make any headway against government censorship. Under this standard, most people being censored would never be able to plead their allegations with the degree of specificity apparently required to survive a motion to dismiss.

Several of the modes of censorship used against our clients are surreptitious; that is, our clients did not even know they were being censored in some cases or on some platforms for a long time. They certainly were unaware of the government's insidious involvement in their censorship, which for the most part was conducted via backdoor channels, behind closed doors. Thus, the government has been able to evade democratic accountability for federal conduct that violates core First Amendment-protected activity. You may wonder how extensive this censorship has really been. If so, recognize that information taken

down has included: (1) known and open parody accounts; (2) information posted by experts from the nation's top medical schools and universities; (3) In our Dressen v. Flaherty case, the government stooped so low as to shut down support groups for vaccine-injured individuals. These are the equivalent of cancer support groups, private online groups where people can go for emotional support. Some people kicked off of these platforms have committed suicide and/or failed to get assistance (or failed to learn of better medical protocols) that could have led to better outcomes for them sooner. The government wants people's personal reports of their own symptoms and experience, the most personal of truths, taken down. This is essentially private speech among people who want to engage in consensual speech with each other (i.e., conversation), and it is speech occurring among already vaccinated people who in reality had no chance of promoting vaccine hesitancy to the general public because the speech occurred in private forums. And yet even that was taken down. This is censorship to the nth degree.

Recommendations

In considering solutions to the federal censorship conduct problems at DHS, CISA, and across the federal government, Congress needs to realize that there is very little recognition among the offending officials that they are blatantly violating the First Amendment. About the only recognition comes in those places where officials (mistakenly) seem to think that orchestrating censorship through third parties somehow insulates it from violating the First Amendment. Keeping that in mind, Congress should demand better education of front-line executive branch officials about their constitutional obligations and responsibilities. These officials who requested the takedown of lawful speech had an independent duty to uphold the First Amendment, which they ignored.

(1) If this censorship were being done by state officials, censorship victims could sue under Sec. 1983 for deprivation of their civil rights. Congress could create a federal cause of action akin to Sec. 1983 for victims of censorship to sue federal officials who violate their First Amendment rights.
(2) Congress should outright forbid anyone in the Executive Branch or Legislative Branch from ever requesting lawful speech to be taken down.
(3) Where the federal government decides to request speech to be taken down, because it is unlawful speech—and NOT just because it violates a

platform's internal policies—those requests should only be made where they are transparent, immediately public, and made by a named individual in the federal government who can be held responsible for that decision by Congress and the censored individual(s).

Conclusion

The censorship discussed here involved many topics, including election-related speech like the Hunter Biden laptop and climate change-related speech. The last of these was not part of the preliminary injunction as discovery was not taken at the preliminary injunction stage to support the complaint's claims on that topic. Still, the debate over nearly all things related to Covid-19 provides a perfect case study for Americans to realize the danger that exists when the government pushes for the censorship of dissenting views. Without the government's participation, it is doubtful that the media would have uniformly censored those stories, and the censorship gravely injured Americans' ability to make important decisions regarding their health and the health of their families. We have evidence, in the form of email exchanges, that the social media companies were caving to pressure from government when they censored certain topics. For instance, as the Facebook Files demonstrated, the lab leak theory was censored on social media due to pressure from the White House. Meta Head of Global Affairs, Nick Clegg, asked a colleague in charge of content policy why the story had been censored, and the colleague responded, "Because we were under pressure from the [Biden] Administration and others to do more" and that "we shouldn't have done it." Meta acknowledged changing its policies regarding content discussing adverse events of the vaccine to avoid retaliation from the White House.

This is conduct that violates the First Amendment rights of censored Americans—as well as the rights of every other American to listen to and learn from those censored perspectives to draw their own conclusions about the truth. As Justice Robert Jackson famously said in the West Virginia v. Barnette case: "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 or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

Less famously, as Justice Jackson noted two years later in Thomas v. Collins, "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech and religion. In this field, every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." Today's federal government has strayed far from this wise and constitutionally required path. I hope that this Committee will ensure that the Executive Branch corrects course.