

Over the past several years, lawyers, investigative journalists, and individual Americans have uncovered a vast federal censorship enterprise that targets Americans' speech on social media. In the words of a White House staffer named Rob Flaherty, this enterprise stems from "the highest" levels of the White House and involves the efforts of at least a dozen federal agencies, if not more. Government officials, including President Biden himself, have attempted to portray these efforts as laudable attempts to fight "misinformation," "disinformation," and "malinformation" on social media. Of course, what constitutes misinformation, disinformation, and malinformation are determinations made by the censors, and the terms are often used to describe information that conflicts with the political agenda of those in power.

Government actors have used threats, coercion, pressure and influence on private social media companies to accomplish their censorious aims; that conduct is the subject of a case that is now under consideration in the Supreme Court, *Murthy v. Missouri*. In other cases, the government has outsourced censorship programs to private industry in attempts to circumvent First Amendment strictures. That is the issue at hand today.

The State Department, through its Global Engagement Center (GEC), has funded the development, marketing, and promotion of hundreds of tools and technologies designed to combat "misinformation" and "disinformation" online. Two of these entities, Newsguard and the Global Disinformation Index, operate by rating news outlets as reliable or unreliable. They then distribute their ratings lists to advertisers and social media companies with the purpose of depriving our clients and other disfavored media outlets of revenue and visibility, thereby diminishing their reach on social media and elsewhere. Our clients, Daily Wire and the Federalist, were severely impacted, along with hundreds of other small, independent, and conservative-leaning news outlets and journalists.

Why is this a problem?

First Congress created GEC within the State Department to counter foreign “propaganda and disinformation efforts aimed at undermining United States national security interests.” The statute contains the following spending limitation: “None of the funds authorized to be appropriated or otherwise made available to carry out this section shall be used for purposes other than countering foreign propaganda and misinformation that threatens United States national security.” *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, Section 1287, 130 Stat. at 2458 (2016). Yet GEC is intricately involved in the development of technologies that are intended to—and do—result in the suppression of *American* speech. This use of funds to stifle domestic speech constitutes an unlawful misappropriation of funds. GEC’s censorship program also constitutes *ultra vires* action, because GEC’s mandate is to counter *foreign* propaganda that seeks to undermine United States national security interests, not domestic speech—whether deemed true or false by government actors—that the current Administration or agency head perceives as a threat to a certain political agenda.

In a particularly outrageous example, during the spring of 2020, GEC sponsored a Covid “misinformation and disinformation” tech challenge. The winners were Newsguard and two other companies called Peak Metrics and Omelas. The State Department paid \$25,000 in prizes via its alter-ego, known as Disinfo Cloud, through which it channeled its unconstitutional activities.

This challenge did not even purport to be about targeting foreign mis- or disinformation that threatened United States national security. It was about covid, a matter of domestic concern, and the technology targeted American speech. It’s also worth noting that Covid is a topic on which our government has been wrong time and again—whether with respect to the efficacy of masks, the ability of the vaccines to stop transmission, the harms of school closures to children, and the

origins of the coronavirus. The government's blatant fallibility illustrates the reason the Framers eschewed a system putting government in charge of policing speech and deciding which views may be heard and which are to be silenced. It also goes to show that GEC has strayed far from its congressionally mandated mission into censoring protected speech of Americans.

This brings me to the second reason the facts of this case show that the State Department is in violation of the United States Constitution. Even if Congress wanted to, it could not constitutionally give GEC the authority to fund, market, and promote companies like Newsguard and GEC because this activity violates the First Amendment. As Supreme Court jurisprudence makes clear, the government cannot use private industry to accomplish what our Constitution prohibits it from doing directly. In a case called *Norwood v. Harrison*, 413 U.S. 455 (1973) from the civil rights era, the Court said it is "axiomatic" that the Government may not "induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish." This principle is a logical imperative, for if the government could simply outsource constitutionally forbidden conduct to private industry, there would be no purpose in having a Constitution.

Another indication that this program is not, and never was, about protecting Americans' national security interests is that companies such as Newsguard and GDI targeted primarily, if not exclusively, conservative speech, which should strike any fair-minded person as suspect. This is viewpoint discrimination, and it is anathema to the First Amendment, which does not tolerate the government silencing the views of political adversaries.

I am not a political conservative or a Republican. I would describe myself as independent and left-leaning on many matters, especially foreign policy and social issues. I disagree with much of the speech that has been the subject of GEC's censorship program. But I recognize that it is extremely

dangerous to put government in charge of deciding who and what should be heard and who and what should be silenced. Indeed, that's precisely what the Framers of the Constitution eschewed when they included the First Amendment in the Bill of Rights. They understood that government actors are just people too, and in no better a position than I or any American to decide what is true and what is false. The First Amendment implicitly recognizes our dignity as individuals: we are not inferior beings who need to be told who or what to believe by a monarch. We are capable of evaluating competing claims in light of our individual experiences and perspectives and forming our own opinions.

Some say that the plethora of information that social media allows to be put forth at a rapid pace requires governmental interference, once again to protect people from bad or false ideas. But social media doesn't change the fundamental premise underpinning the First Amendment: the best way to address problematic or false ideas is through counter speech, *not* censorship. Censorship does not make bad ideas or lies go away. It only drives them underground where they fester, uncontested. As the saying goes, sunlight is the best disinfectant. And the rapidity with which information may be posted on social media also means that lies, hate speech, or other problematic speech can be combatted that much more quickly.

Those who think there is nothing wrong with the government's censorship regimes as exposed through this case, as well as *Murthy v. Missouri*, should think long and hard about what this will mean when power changes hands. Do you want President Trump's administration funding tools and technologies designed to censor speech *he* disfavors? It is time that all Americans recognized the danger we face not from misinformation, disinformation, or malinformation, but from our government deeming itself arbiter of the truth, and inserting itself into the marketplace of ideas so to silence those that it disfavors.