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Eugene Volokh
Thomas M. Siebel Senior Fellow
volokh@stanford.edu
(650) 721-5092

Senate Committee on Commerce, Science, and Transportation

Re: Hearing on "Shut Your App: How Uncle Sam Jawboned Big Tech Into Silencing Americans"

October 8, 2025

Dear Chairman and Members of the Committee:

Thank you for asking me to testify on the important First Amendment issues raised by government jawboning, a subject that I have been studying for several years. I will try to offer a big picture view of the matter, rather than focusing on the particular factual details related to, for instance, the various interactions between CISA (the Cybersecurity and Infrastructure Security Agency) and social media platforms.

"To jawbone" has been defined as "to attempt to persuade or pressure by the force of one's position of authority,"[1] especially when done by the government. That in turn reflects two possible meanings:

(1) government officials trying to *persuade* through the force of their reasoning, though strengthened by their authoritativeness and resulting credibility and influence;

(2) government officials trying to *coerce* through the explicit or implicit threat of retaliation stemming from their position of authority, e.g., through the threat of enforcement or regulation.

As a practical matter, the two meanings are closely intertwined, especially since it may be hard to tell whether there is an implicit "or else" behind a request. As a legal matter, though, there may be a substantial distinction, at least when it comes to the government trying to pressure entities into shutting down third parties' speech.

[1] *See, e.g.*, COLLINS DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/jawboning (quoting Irwin Stelzer, *GM Has Riled the Jawboner-in-Chief*, Times (London), Dec. 2, 2018).

I. GOVERNMENT COERCION: GENERALLY UNCONSTITUTIONAL

Say the government doesn't like some speech, though the speech is constitutionally protected against direct punishment (*i.e.*, the speech doesn't fit into one of the narrow First Amendment exceptions, for example the exception for true threats of criminal conduct). The government therefore demands that a private entity that has the private power to control such speech—say, a social media platform, a bookstore, a financial intermediary—suppress the speech, or else face some coercive government action. That generally violates the First Amendment. "[A] government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf."[2]

The long-standing Supreme Court precedent addressing that issue is *Bantam Books, Inc. v. Sullivan* (1963), in which a state commission threatened to prosecute stores that sold books it deemed pornographic, including books that were protected by the First Amendment.[3] Likewise, in *NRA v. Vullo* (2024), the Court held that the NRA could sue New York financial regulators under the First Amendment for allegedly coercing banks and insurance companies "to cut their ties with the NRA in order to stifle the NRA's gun-promotion advocacy."[4] Under these precedents, FCC Chairman Brendan Carr's statements about Jimmy Kimmel may likewise have threatened retaliation in a way that would violate the First Amendment.[5]

Lower court cases have found that there could be impermissible coercion even absent express threat of prosecution or regulatory action, so long as the threat is sufficiently implicit. Consider two cases that were favorably cited by the Supreme Court in *NRA v. Vullo*:

1. The president of the Borough of Staten Island sent a letter to a billboard company urging it to take down an antihomosexuality billboard. The letter closed with:

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[2] NRA v. Vullo, 602 U.S. 175, 190 (2024).

[3] 372 U.S. 58 (1963).

[4] 602 U.S. at 197. Note that I was one of the NRA's lawyers in this case.

[5] The statements on the Benny Johnson podcast, https://x.com/bennyjohnson/status/1968359685045838041, were:

> Broadcasters . . . have a license granted by us at the FCC, and that comes with it an obligation to operate in the public interest. . . .
>
> We can do this the easy way or the hard way. These companies can find ways to change conduct, to take action, frankly, on Kimmel or there is going to be additional work for the FCC ahead. . . .
>
> There's calls for Kimmel to be fired. I think you could certainly see a path forward for suspension over this.

The FCC has a rule that prohibits "broadcast news distortion," https://www.fcc.gov/broadcast-news-distortion, and it's possible that—given the lower First Amendment protection given to broadcasting than to, say, newspapers or the Internet—the FCC might be able to impose a modest fine for Kimmel's statement or even just issue an admonition. But there appears to be no justification for the government's demanding outright suspension of the Kimmel show based on one false statement, nor does there appear to be any precedent in the past four decades for anything more than a token punishment in such a situation.

> Both you and the sponsor of this message should be aware that many members of the Staten Island community, myself included, find this message unnecessarily confrontational and offensive. As Borough President of Staten Island, I want to inform you that this message conveys an atmosphere of intolerance which is not welcome in our Borough.
>
> P.N.E. Media owns a number of billboards on Staten Island and derives substantial economic benefits from them. I call on you as a responsible member of the business community to please contact Daniel L. Master, my legal counsel and Chair of my Anti-Bias Task Force . . . to discuss further the issues I have raised in this letter.

Potentially unconstitutional, the Second Circuit held in *Okwedy v. Molinari* (2003):

> [A] jury could find that Molinari's letter contained an implicit threat of retaliation if PNE failed to accede to Molinari's requests. In his letter, Molinari invoked his official authority as "Borough President of Staten Island" and pointed out that he was aware that "P.N.E. Media owns a number of billboards on Staten Island and derives substantial economic benefits from them." He then "call[ed] on" PNE to contact Daniel L. Master, whom he identified as his "legal counsel and Chair of my Anti-Bias Task Force."
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> Based on this letter, PNE could reasonably have believed that Molinari intended to use his official power to retaliate against it if it did not respond positively to his entreaties. Even though Molinari lacked direct regulatory control over billboards, PNE could reasonably have feared that Molinari would use whatever authority he does have, as Borough President, to interfere with the "substantial economic benefits" PNE derived from its billboards in Staten Island.[6]

2. The Sheriff of Cook County in Illinois sent letters to Mastercard and Visa saying, "As the Sheriff of Cook County, a father and a caring citizen, I write to request that your institution immediately cease and desist from allowing your credit cards to be used to place ads on websites like Backpage.com [which hosted ads for sex-related services]." Potentially unconstitutional, the Seventh Circuit held in *Backpage.com, LLC v. Dart* (2015). The court went through the Sheriff's letter in detail and concluded:

> And here's the kicker: "Within the next week, please provide me with contact information for an individual within your organization that I can work with [harass, pester] on this issue." The "I" is Sheriff Dart, not private citizen Dart—the letter was signed by "Thomas Dart, Cook County Sheriff."
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> And the letter was not merely an expression of Sheriff Dart's opinion. It was designed to compel the credit card companies to act by inserting Dart into the discussion; he'll be chatting them up.
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> Further insight into the purpose and likely effect of such a letter is provided by a strategy memo written by a member of the sheriff's staff in advance of the letter. The memo suggested approaching the credit card companies (whether by phone, mail, email, or a visit in person) with threats in the form of "reminders" of "their own potential liability for allowing suspected illegal transactions to continue to take place" and their potential susceptibility to "money laundering prosecutions . . . and/or hefty fines." Allusion to that "susceptibility" was the culminating and most ominous threat in the letter.[7]

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[6] 333 F.3d 339, 341, 342, 344 (2d Cir. 2003).

[7] 807 F.3d 229, 231–32 (7th Cir. 2015). The bracketed words, "harass, pester," were added by the court, presumably as an indication of how the court interpreted "work with." See Complaint Exh. B at 7, Backpage.com, LLC v. Dart, No. 1:15-cv-06340 (N.D. Ill. July 21, 2015).

3. Finally, consider a third example: The Biden administration's attempting to persuade social media platforms to block or remove posts on various topics, including "the COVID-19 lab-leak theory, pandemic lockdowns, vaccine side-effects, election fraud, and the Hunter Biden laptop story." The Fifth Circuit concluded in *Missouri v. Biden* (2023) that some of the government's actions were likely unconstitutionally coercive:

> On multiple occasions, the officials coerced the platforms into direct action via urgent, uncompromising demands to moderate content. . . . And, more importantly, the officials threatened—both expressly and implicitly—to retaliate against inaction. Officials threw out the prospect of legal reforms and enforcement actions while subtly insinuating it would be in the platforms' best interests to comply. As one official put it, "removing bad information" is "one of the easy, low-bar things you guys [can] do to make people like me"—that is, White House officials—"think you're taking action." . . . When the officials' demands were not met, the platforms received promises of legal regime changes, enforcement actions, and other unspoken threats. That was likely coercive. . . .
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> [M]any of the officials' asks were "phrased virtually as orders," like requests to remove content "ASAP" or "immediately." The threatening "tone" of the officials' commands, as well as of their "overall interaction" with the platforms, is made all the more evident when we consider the persistent nature of their messages. . . . [T]here is [also] plenty of evidence—both direct and circumstantial, considering the platforms' contemporaneous actions—that the platforms were influenced by the officials' demands. . . .
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> [And] the speaker [had] "authority over the recipient." . . . [The White House] enforces the laws of our country, and—as the head of the executive branch—directs an army of federal agencies that create, modify, and enforce federal regulations. . . . At the very least, as agents of the executive branch, the officials' powers track somewhere closer to those of the commission in *Bantam Books*—they were legislatively given the power to "investigate violations and recommend prosecutions."
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> [T]he officials made express threats and, at the very least, leaned into the inherent authority of the President's office. . . . But, beyond express threats, there was *always* an "unspoken 'or else.'" . . . [W]hen the platforms faltered, the officials warned them that they were "[i]nternally . . . considering our options on what to do," their "concern[s] [were] shared at the highest (and I mean highest) levels of the [White House]," and the "President has long been concerned about the power of large social media platforms."[8]

The Supreme Court reversed the Fifth Circuit's decision on procedural grounds, so that decision is no longer binding precedent.[9] The Court's opinion also cast doubt on the factual findings that the Fifth Circuit relied on.[10] Nonetheless, the Fifth Circuit's analysis is a good illustration of how courts sometimes evaluate such allegations of coercion.

II. Government Persuasion

A. Often Constitutional

Now say the government simply tries to persuade various intermediaries—whether today's social media platforms or, as was the case in the recent past, bookstores, billboards, or payment processors—

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[8] 83 F.4th 350, 382 (5th Cir. 2023).

[9] 603 U.S. 43 (2024).

[10] *Id.* at 60 n.4.

to stop carrying certain speech, *without* an express or implied threat of retaliation. Generally speaking, courts of appeals have said that this does not violate the First Amendment. To offer a few examples:

1. In 1980, a New York City official sent a letter urging department stores not to carry "a board game titled 'Public Assistance—Why Bother Working for a Living.'" The letter said the game "does a grave injustice to taxpayers and welfare clients alike," and closes with, "Your cooperation in keeping this game off the shelves of your stores would be a genuine public service." Not unconstitutional, said the Second Circuit in *Hammerhead Enterprises, Inc. v. Brezenoff* (1983):

> [T]he record indicates that Brezenoff's request to New York department stores to refrain from carrying Public Assistance was nothing more than a well-reasoned and sincere entreaty in support of his own political perspective. . . . Where comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request, a valid claim can be stated. . . . [But] appellants cannot establish that this case involves either of these troubling situations.[11]

Note, though, that Brezenoff was the administrator of New York City's Human Resources Administration, with no enforcement authority against the department stores. How might the matter have looked had he been the sheriff or the head of some civil enforcement agency?

2. Not long after, the U.S. Attorney General's Commission on Pornography sent letters to various corporations (such as 7-Eleven) urging them not to sell pornographic magazines:

> The Attorney General's Commission on Pornography has held six hearings across the United States during the past seven months on issues related to pornography. During the hearing in Los Angeles, in October 1985, the Commission received testimony alleging that your company is involved in the sale or distribution of pornography. The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on identified distributors.
>
> You will find a copy of the relevant testimony enclosed herewith. Please review the allegations and advise the Commission on or before March 3, 1986, if you disagree with the statements enclosed. Failure to respond will necessarily be accepted as an indication of no objection.
>
> Please call Ms. Genny McSweeney, Attorney, at (202) 724-7837 if you have any questions. Thank you for your assistance.

Not unconstitutional, said the D.C. Circuit in *Penthouse International, Ltd. v. Meese* (1991):

> [T]he Advisory Commission had no . . . tie to prosecutorial power nor authority to censor publications. The letter it sent contained no threat to prosecute, nor intimation of intent to proscribe the distribution of the publications. . . .
>
> We do not see why government officials may not vigorously criticize a publication for any reason they wish. As part of the duties of their office, these officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate. If the First Amendment were thought to be violated any time a private citizen's speech or writings were criticized by a government official, those officials might be virtually immobilized.[12]

3. In the late 1990s, a New York state legislator and a New York congressman accused X-Men Security—a security organization connected to the Nation of Islam—of various conspiracies, "asked

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[11] 707 F.2d 33, 34, 37, 38–39 (2d Cir. 1983).

[12] 939 F.2d 1011, 1013, 1015–1016 (D.C. Cir. 1991).

government agencies to conduct investigations into its operations, questioned X-Men's eligibility for an award of a contract supported by public funds, and advocated that X-Men not be retained." X-Men lost certain security contracts as a result. Also not unconstitutional, ruled the Second Circuit in *X-Men Security, Inc. v. Pataki* (1999):

> [J]ust as the First Amendment protects a legislator's right to communicate with administrative officials to provide assistance in securing a publicly funded contract, so too does it protect the legislator's right to state publicly his criticism of the granting of such a contract to a given entity and to urge to the administrators that such an award would contravene public policy. We see no basis on which X-Men could properly be found to have a constitutional right to prevent the legislators from exercising their own rights to speak.[13]

And it does appear that at least some such persuasion ought to be constitutionally acceptable. After all, government officials have a strong interest in conveying their views, including their views about what speech is harmful and should not be published. It's not clear whether they have a personal First Amendment *right* to do so in their official capacities.[14] But there may still be real value to public discourse, and to their listeners, in their being able to do so—and thus it might not be a First Amendment *violation* in their asking intermediaries to sometimes choose to block certain speech.

For instance, national security officials might sometimes tell a news outlet, "Look, we can't force you to do anything, but if you run this story it will lead to deaths of intelligence sources/damage to national security. Could you not run the story, or fuzz over some details, or delay it?" The news outlet might find that to be valuable information. Reporters and editors might want to avoid causing deaths or harming national security, especially if the bulk of the story can still be reported with a bit of delay or slight modification.

Likewise, law enforcement officials might reasonably and permissibly tell a newspaper or broadcaster, "If you run this story right now, you'll tip off the criminals we're investigating/jeopardize witnesses. Don't you want us to fight crime effectively?" The newspaper might say yes or no, assuming there's no context to make the statement coercive. I doubt such a request would violate the First Amendment.

Or say that a newspaper is about to run an op-ed that alleges governmental misconduct. A government official learns of this—perhaps the editors call him to get his side of the story—and says, "That's nonsense, and here's the evidence to prove that." Or he says, "The allegations are so slanted as to be deceptive or unfair; here's the context that shows it." And then adds, "Please don't run such an unfair story; it would be bad for us if you did, but it would also be bad for your reputation, when the truth comes out, and it would be bad for your readers, who would be misled."

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[13] 196 F.3d 56, 68, 70 (2d Cir. 1999).

[14] *Compare* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (concluding that government officials generally don't have First Amendment rights when exercising their official duties); and David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637 (2006) (discussing uncertainty about when state officials may have First Amendment rights vis-à-vis the federal government).

That is a call for an intermediary (the newspaper) to block the publication of a third-party item (the op-ed). However, it is unlikely to be unconstitutional. Indeed, the newspaper may be quite pleased to learn the full story and thereby avoid publishing an op-ed that would make the newspaper look bad.

B. Potential Limits: Subtle Coercion

At the same time, there may be limits on such persuasion. The first comes from the reality that the coercion/persuasion line is often hazy. One concern about government persuasion of intermediaries is that when the government *asks*, people who are subject to regulation by the government may hear this as *demanding*. As it happens, this concern has arisen in at least one other First Amendment context, and the reasoning in that context might be applicable here as well.

That context is labor law. Since the 1940s—early in the Court's modern First Amendment jurisprudence—the Court has recognized that "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guarantee" but not when "to this persuasion other things are added which bring about coercion, or give it that character."[15] In *NLRB v. Gissel Packing Co.* (1969), the Court made clear that the employer's power over employees should be considered in deciding whether the speech is likely to coerce:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. . . . [A]ny balancing of [the employer's and employee's] rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.[16]

Similar logic, I think, may apply when high-level executive officials, or those who speak for them, address intermediaries who are regulated by those officials or the officials' appointees:

> [A]ny balancing of [government speakers' and intermediaries'] rights must take into account the economic dependence of the [intermediaries] on their [regulators], and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

This analogy would still leave government officials able to make requests in certain ways, just as employers remain able to speak in certain ways to employees about the possible consequences of unionization. But the officials would have to be more careful to make clear that the request carries no threat of retaliation.

What sort of statement by the government would make clear that there is no such threat? That would doubtless turn on many factors. Thus, for instance, with regard to the requests sent to the social media platforms by CISA, the Fifth Circuit in *Missouri v. Biden* found sufficient evidence only that

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[15] Thomas v. Collins, 323 U.S. 516, 537 (1945) (treating the matter as having been settled by *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941)); *Virginia Electric & Power*, 314 U.S. at 477 ("The employer in this case is as free now as ever to take any side it may choose on this controversial issue. But, certainly, conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act").

[16] 395 U.S. 575, 617 (1969).

CISA "significantly encouraged the platforms' content-moderation decisions"—the court didn't state that there was sufficient evidence that CISA was coercing the platforms, though the court did find sufficient evidence of coercion by some other government agencies.[17]

I think, though, that if there were some serious concern about coercion, dispelling such concern would require considerably more than the disclaimer that CISA included in its e-mails:

> CISA affirms that it neither has nor seeks the ability to remove or edit what information is made available on social media platforms. CISA makes no recommendations about how the information it is sharing should be handled or used by social media companies. Additionally, CISA will not take any action, favorable or unfavorable, toward social media companies based on decisions about how or whether to use this information.[18]

Of course the social media companies' likely worry wouldn't have been that "*CISA*"—an agency that itself lacks regulatory power over the companies—"will take ... action ... toward" them. Rather, the worry would have been that *some other*, much more powerful, federal government actors would take "adverse government action," such as "antitrust enforcement and legal reforms"[19] or possibly law enforcement action of the sort that the FBI can engage in.[20] In light of this, a disclaimer pointedly limited to retaliation by CISA was unlikely to do much good.

C. Potential Limits: Merger of Government and Private Power

There is also reason to think that at least sometimes the Constitution does constrain the merging of government and private power, at least when the government tries to use that merger to bypass the usual constraints on its powers—even in the absence of coercion. And even if the Constitution itself doesn't render such merging of power unconstitutional, there may be good reason to try to constrain such merging by statute.

To begin, let's consider an analogy, three Amendments down: the Fourth Amendment. Say you rummage through a roommate's papers, find evidence that he's committing a crime, and send it to the police. Because you're a private actor, you haven't violated the Fourth Amendment. (Whether you committed some tort or crime is a separate question.)[21] Because they didn't perform the search, the police haven't violated the Fourth Amendment either, and the evidence from this "private search" can be used against the roommate.

But if the police *ask* you to rummage through the roommate's papers, that rummaging may constitute a search governed by the Fourth Amendment. "[I]f a state officer requests a private person to search a particular place or thing, and if that private person acts because of and within the scope of the

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[17] *See* 83 F.4th at 391; *cf. id.* at 389 (stating, as to the FBI, that "the platforms' decisions were significantly encouraged *and coerced* by the FBI" (emphasis added)).

[18] *See The Mechanics of Government Censorship* 14 (2025).

[19] 83 F.4th at 373.

[20] *Id.* at 388–89.

[21] *See* United States v. Phillips, 32 F.4th 865, 867 (9th Cir. 2022); Burdeau v. McDowell, 256 U.S. 465, 475–476 (1921).

state officer's request," then the search would be subject to the constitutional constraints applicable to government searches.[22] "Police officers may not avoid the requirements of the Fourth Amendment by inducing, coercing, promoting, or encouraging private parties to perform searches they would not otherwise perform."[23] Coercion is only one way a private search may become subject to the Fourth Amendment; inducement, promotion, or encouragement can also suffice.

Indeed, in *Skinner v. Railway Labor Executives' Association* (1989), the Supreme Court held that drug tests of railway employees that were authorized but not required by federal regulations were subject to Fourth Amendment scrutiny:

> The Government has removed all legal barriers to the testing authorized by Subpart D, and indeed has made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions. In addition, it has mandated that the railroads not bargain away the authority to perform tests granted by Subpart D. These are clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment.[24]

Considering the extensive regulation of railroads by the government, the railway companies might have felt special pressure to view the government's "encouragement" and "endorsement" as a command. Yet the Court did not rely on the theory that the government had indeed coerced the railroads to perform the tests. It appeared to be enough that it "encourage[d], endorse[d], and participat[ed]" in the tests. The same may apply to social media platforms, especially (but perhaps not only) in a political environment where there is talk of possible regulation, such as through antitrust law or by modifying Section 230 immunity.[25]

Likewise, "In the Fifth Amendment context, courts have held that the government might violate a defendant's rights by coercing *or encouraging* a private party to extract a confession from a criminal defendant."[26] More broadly, the Supreme Court held in *Blum v. Yaretsky* (1982), a Due Process Clause

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[22] State v. Tucker, 330 Or. 85, 90 (2000) (applying the Oregon Constitution's Fourth Amendment analog; police request to tow truck driver to search items in car being towed), followed by State v. Lien, 364 Or. 750, 778 (2019) (police request to trash company to pick up a person's trash in a particular way that would facilitate its being searched). *See also* United States v. Gregory, 497 F. Supp. 3d 243 (E.D. Ky. 2020) (similar fact pattern to *Lien*).

[23] George v. Edholm, 752 F.3d 1206, 1215 (9th Cir. 2014) (police request to doctor to do a rectal search). *See also* United States v. Ziegler, 474 F.3d 1184, 1190 (9th Cir. 2007) (police request to employer to search employee's work computer); United States v. Rosenow, 50 F.4th 715, 733 (9th Cir. 2022) (recognizing that, even when a private party's search would normally be entirely legal, the government's "encouragement" of such a search may constitute "state action").

[24] Skinner v. Railway Labor Executives Assn', 489 U.S. 602, 615–16 (1989).

[25] *See Murthy*, 603 U.S. at 80–81 (Alito, J., dissenting) (reasoning that "internet platforms, although rich and powerful, are at the same time far more vulnerable to Government pressure than other news sources" because "[t]hey are critically dependent on the protection provided by § 230 of the Communications Decency Act of 1996," which Congress might threaten to withdraw; "[t]hey are vulnerable to antitrust actions"; and, "because their substantial overseas operations may be subjected to tough regulation in the European Union and other foreign jurisdictions, they rely on the Federal Government's diplomatic efforts to protect their interests").

[26] United States v. Folad, 877 F.3d 250, 253 (6th Cir. 2017) (emphasis added). *See also* United States v. Garlock, 19 F.3d 441, 443–444 (8th Cir. 1994).

case, that "a State normally can be held responsible for a private decision only when it has exercised coercive power *or has provided such significant encouragement*, either overt or covert, that the choice must in law be deemed to be that of the State."[27] And in *Norwood v. Harrison* (1973), an Equal Protection Clause case, the Court viewed it as "axiomatic that a state may not *induce, encourage or promote* private persons to accomplish what it is constitutionally forbidden to accomplish."[28]

D. Potential Limits: Systemic Cooperation

Might there be a difference between occasional one-off conversations and systematic programs? To be sure, when it comes to coercive threats aimed at suppressing speech, both the ad hoc and systematic demands are unconstitutional.[29] Likewise, the cases involving government encouragement of searches by private parties find even ad hoc demands unconstitutional.[30]

But if courts do conclude that ad hoc requests to remove or block speech are constitutional, perhaps some line should still be drawn between those requests and systematic encouragement of such removing or blocking. This appears to be what the Fifth Circuit concluded in *Missouri v. Biden*, when it found that the government's speech was impermissible "significant encouragement" of speech restriction by platforms, even apart from the coercion argument:

> The officials had consistent and consequential interaction with the platforms and constantly monitored their moderation activities. In doing so, they repeatedly communicated their concerns, thoughts, and desires to the platforms. The platforms responded with cooperation—they invited the officials to meetings, roundups, and policy discussions. And, more importantly, they complied with the officials' requests, including making changes to their policies. . . .
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> When the platforms' policies were not performing to the officials' liking, they pressed for more, persistently asking what "interventions" were being taken, "how much content [was] being demoted," and why certain posts were not being removed. Eventually, the officials pressed for outright change to the platforms' moderation policies. . . . Beyond that, they relentlessly asked the platforms to remove content, even giving reasons as to why such content should be taken down. They also followed up to ensure compliance and, when met with a response, asked how the internal decision was made. . . .
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> Consequently, it is apparent that the officials exercised meaningful control—via changes to the platforms' independent processes—over the platforms' moderation decisions. By pushing changes to the platforms' policies through their expansive relationship with and informal oversight over the platforms, the officials imparted a lasting influence on the platforms' moderation decisions without the need for any further input. In doing so, the officials ensured that any moderation decisions were not made in accordance with independent judgments guided by independent standards. Instead, they were encouraged by the officials' imposed standards.

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[27] 457 U.S. 991, 1004 (1982). *See also* Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986) (emphasis added).

[28] 413 U.S. 455, 465 (1973) (emphasis added).

[29] See Fagundes, *supra* note 14, at Part II.B.

[30] See id. at Part IV.A.

> In sum, we find that the White House officials, in conjunction with the Surgeon General's office, coerced and significantly encouraged the platforms to moderate content. As a result, the platforms' actions "must in law be deemed to be that of the State."[31]

Indeed, when it came to requests for removal made by the Centers for Disease Control and Prevention, the Fifth Circuit concluded that the requests were not coercive, but still constituted unconstitutional significant encouragement:

> [T]he CDC was entangled in the platforms' decision-making processes. The CDC's relationship with the platforms began by defining—in "Be On the Lookout" meetings—what was (and was not) "misinformation" for the platforms. Specifically, CDC officials issued "advisories" to the platforms warning them about misinformation "hot topics" to be wary of. From there, CDC officials instructed the platforms to label disfavored posts with "contextual information," and asked for "amplification" of approved content. That led to CDC officials becoming intimately involved in the various platforms' day-to-day moderation decisions. For example, they communicated about how a platform's "moderation team" reached a certain decision, how it was "approach[ing] adding labels" to particular content, and how it was deploying manpower. Consequently, the CDC garnered an extensive relationship with the platforms.
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> From that relationship, the CDC, through authoritative guidance, directed changes to the platforms' moderation policies. . . . [The platforms] adopted rule changes meant to implement the CDC's guidance. . . . Thus, the resulting content moderation, "while not compelled by the state, was so significantly encouraged, both overtly and covertly" by CDC officials that those decisions "must in law be deemed to be that of the state."[32]

And the court held the same as to CISA requests.[33]

As noted above, the Supreme Court reversed this Fifth Circuit decision on procedural grounds and cast some doubt on the factual findings on which the Fifth Circuit relied.[34] But the Fifth Circuit's legal analysis as to substantial encouragement and systematic entanglement may still offer a persuasive precedent.

Of course, distinguishing "consistent and consequential interaction" from mere occasional interaction—such as the examples of constitutionally permissible requests given above—can be difficult. Still, constitutional law does sometimes draw such distinctions between occasional action and systemic action. One analogy, though distant, might be how the law sometimes treats administrative searches.

Courts have upheld various kinds of searches—even ones that lack a warrant, probable cause, or both—on the grounds that they are targeted at specific public safety concerns rather than at broad law enforcement. Airport searches of luggage, aimed at detecting weapons, are one example, as the Ninth Circuit discussed in detail in *United States v. $124,570 U.S. Currency* (1989).[35]

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[31] 83 F.4th 350, 387 (5th Cir. 2023).

[32] *Id.* at 390.

[33] *Id.* at 391.

[34] *See* 603 U.S. at 60 n.4.

[35] 873 F.2d 1240, 1244–45 (9th Cir. 1989).

Now say that Transportation Security Administration agents, U.S. government employees following their normal duty to search for weapons, spot a suspicious amount of cash or drugs. They then alert the police who use this information as part of the probable cause needed to justify a search. That is constitutional.[36] TSA agents are free to "report information pertaining to criminal activity, as would any citizen."[37]

So far, so good. But say that the Drug Enforcement Administration comes up with a systematic program to encourage TSA agents to search not just for weapons, the rationale that led airport searches to be upheld in the first place, but also for drugs or cash. The Ninth Circuit held that this would be going too far:

> We see the matter as materially different where the communication [about the drugs or money that the TSA agent found] is undertaken pursuant to an established relationship, fostered by official policy, even more so where the communication is nurtured by payment of monetary rewards.[38]

Even if ad hoc reporting by TSA agents to the police of things other than weapons is permissible under the Fourth Amendment, a system set up to encourage such reporting is not. "The line we draw is a fine one but, we believe, one that has constitutional significance."[39]

Or consider sobriety checkpoints. The Court has upheld them as permissible administrative seizures because they are aimed at protecting safety on the very roads that are being temporarily blocked.[40] Yet the Court has held that the government may not set up drug trafficking checkpoints aimed at finding drug dealers.[41] The difference in these cases, the Court held, stems from the "difference in the Fourth Amendment significance of highway safety interests and the general interest in crime control."[42]

Now, if officers conducting sobriety checkpoints happen to see evidence of crime in plain sight—blood on the seat, an illegally carried gun, or, for that matter, drugs—they are free to keep detaining the driver and search further, based on this newly discovered probable cause.[43] But say that the checkpoint is deliberately set up as a systematic way of searching for drugs or for other contraband. That would trigger additional Fourth Amendment scrutiny: ad hoc observation of evidence of crime, in the course of a valid administrative seizure (valid because the seizure is part of a drunk driving checkpoint,

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[36] *See id.* at 1247 n.7 (approvingly describing United States v. Canada, 527 F.2d 1374, 1376, 1378–79 (9th Cir. 1975)).

[37] Id.

[38] *Id.*

[39] *Id.*

[40] *Michigan v. Sitz*, 496 U.S. 444 (1990).

[41] *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

[42] *Id.* at 40.

[43] *See* Texas v. Brown, 460 U.S. 730, 744 (1983) (plurality opinion); *id.* at 746 (Powell, J., concurring in the judgment); People v. Edwards, 101 A.D.3d 1643, 1644 (2012).

rather than a drug checkpoint or a general law enforcement checkpoint), may become unconstitutional if it happens in the course of a systematic program of search for evidence of crime.[44]

I should stress again that these analogies are imperfect. Among other differences, they involve the Fourth Amendment and not the First, and concern attempts to systematically encourage certain action by government employees and not by private parties.

But my point here is that they offer some support for the view that even if some actions are not subject to constitutional scrutiny when done on a one-off basis, they may become unconstitutional when done systematically. In the Fourth Amendment context, systematizing permissible ad hoc searches into "an established relationship, fostered by official policy" increases the threat of undue government intrusion on privacy, enough to change the Fourth Amendment analysis. Perhaps systematizing permissible ad hoc requests not to publish something (or to block or remove users' publications) into a similar official established relationship may likewise increase the threat of undue government interference with public debate to the point that First Amendment scrutiny would be required.

III. Reason for Congressional Action

To be sure, courts may be reluctant to try to draw lines between permissible persuasion and excessively systematized persuasion. They might conclude that government attempts to persuade entities to restrict speech just aren't First Amendment violations, so long as they fall short of coercion.

At the same time, even if the merger of government and social media platform power aimed at setting up a system for blocking, deleting, or otherwise deplatforming user posts isn't *unconstitutional*, it may be bad for democracy. At least, it may be the sort of thing that ought to be done with public scrutiny, rather than behind closed doors.

And Congress may be able to draw lines that courts might be reluctant to draw. Indeed, the Committee's proposals seem to be promising ideas:

- Create transparency around federal agency communication with private entities on issues that may affect American speech.
- Produce guidelines that clearly restrict government officials from influencing social media platforms' content moderation decisions of constitutionally protected speech.
- Establish a reporting mechanism to allow platforms to report if they think they may be experiencing government jawboning efforts of censorship or content moderation.
- Before contemplating new Federal regulation, enact guardrails that preclude existing Federal AI programs, such as the NAIRR and the Center for AI Standards and Innovation (CAISI) (formerly known as the AI Safety Institute) from curtailing speech in the name of addressing harms.[45]

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[44] I borrow this from *United States v. Soyland*, 3 F.3d 1312, 1317 (9th Cir. 1993).

[45] *See The Mechanics of Government Censorship* 35 (2025).

Any such proposals would of course have to be carefully crafted, and would need to be attentive to how, for instance, we may want to expect different things from AI platforms than from social media platforms. But it's good that the Committee is considering what Congress can do here, rather than just relying entirely on courts.

Indeed, such new statutes would be like other federal statutes in which Congress has provided more protection for constitutional values than the courts have expressly held is required. For instance, Congress has chosen to provide extra protection for religious freedom through the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. It has chosen to provide extra protection for free press through the Privacy Protection Act of 1980, which limits searches and seizures of journalists' notes and work product. It has chosen to provide extra protection for Fourth Amendment values through statutes such as the Stored Communications Act and the Electronic Communications Privacy Act. Likewise, Congress may wisely choose to provide extra protection against government jawboning for ordinary citizens' free speech and free press interests as well.

The internet has democratized speech, restricted the power of one set of intermediaries (traditional media), and empowered a new set (social media platforms). In the process, it has made the latter tempting targets both for government coercion and government persuasion. Congress should turn its attention to whether government jawboning, even when constitutionally permissible, unduly risks increasing government power and undermining public debate.

Sincerely,

Eugene Volokh

Thomas M. Siebel Senior Fellow, Hoover Institution, Stanford University;

Gary T. Schwartz Distinguished Professor of Law Emeritus, UCLA School of Law