



Online Content Moderation and Government Coercion

May 13, 2022

In recent years, there has been growing concern about the power of social media companies to control online speech. Some users have [tried to assert](#) that online platforms violated users' constitutional free speech rights by removing users' content or otherwise restricting their ability to post on these platforms. Lower courts have [rejected](#) these claims, citing the well-established principle that private companies are not bound by the First Amendment's Free Speech Clause and therefore holding that the Constitution does not limit their ability to restrict user content. More [recent lawsuits](#), however, have alleged that the government itself has been involved in restricting certain types of content, creating government encouragement or coercion that does implicate constitutional free speech concerns.

One high-profile example is a group of lawsuits from former President Trump, initially filed almost a year ago, alleging that [Facebook](#), [Twitter](#), and [YouTube](#) violated his First Amendment rights by banning him from their online platforms. He claimed that the companies were motivated to act based on fear of government regulation, implicating the First Amendment. On May 6, 2022, a trial court disagreed and dismissed his lawsuit against Twitter. (The other two suits remain pending.) While lawsuits bringing similar claims have largely been dismissed, they nonetheless illustrate an ongoing concern about government involvement in private content moderation. This Legal Sidebar explores this issue, explaining the relevant legal background and the significance of recent lawsuits.

State Action Requirement and Government Coercion or Encouragement

The U.S. Constitution's [First Amendment](#) provides that "Congress shall make no law . . . abridging the freedom of speech." The Supreme Court has [long applied](#) this provision beyond the legislative branch to bar actions by the other branches of the federal government, and it [applies to states](#) by operation of the Fourteenth Amendment. Thus, the First Amendment limits the *government's* ability to restrict protected speech and [generally](#) does not limit the actions of private parties.

There are limited circumstances in which private parties may meet this "[state action](#)" requirement. For instance, the Supreme Court has [said](#) that a private party may be subject to the First Amendment if it exercises "powers traditionally exclusively reserved to the State"—although the Court has further [held](#) that providing a "forum for speech" does not qualify as a traditional public function under this doctrine. Private parties may also qualify as state actors subject to constitutional limitations if they act as

Congressional Research Service

<https://crsreports.congress.gov>

LSB10742

government agents or if other factors demonstrate a sufficiently close relationship between the government and the private party's speech-restrictive action.

One way to meet the state action requirement is to show that governmental pressure coerced the private entity to take the challenged action. In certain cases, a government official may violate the First Amendment by encouraging a private party to suppress speech in a manner that “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.” Courts have distinguished this type of potentially impermissible coercion from government officials' right to speak out and “convince” others of their opinion.

In some contexts, attempts by government actors to influence private action by threat of future regulation can be considered coercive. Some scholars have used the term “jawboning” to refer to informal pressure or persuasion by regulators, including Members of Congress, to influence or encourage self-regulation by private entities. Jawboning techniques may present constitutional issues when the government's informal attempts to encourage or threaten regulation involve matters concerning speech. Specifically, jawboning or other government pressure may convert a private party's conduct into state action subject to the First Amendment if the pressure is so significant that the private party's act is no longer considered an “independent decision.”

The U.S. Court of Appeals for the Ninth Circuit considered government jawboning of private media companies in *Writers Guild of America, West, Inc. v. American Broadcasting Co., Inc.* In that case, the Federal Communications Commission (FCC) chairman had attempted to pressure broadcast networks into adopting a “family viewing policy” intended to reduce sex and violence in television programming. The chairman attempted to encourage the networks to adopt such a policy without formal FCC action, as the policy itself was likely to pose First Amendment issues if implemented by the government. The chairman's jawboning techniques included meetings with industry representatives to discuss policy proposals, telephone conversations with network executives, and—important to the analysis—public speeches in which the chairman “exhorted the industry to undertake its own action but indicated that unless some action were taken, the government might well be forced to become formally involved with the problem.” A trial court held that the private television broadcast networks violated the First Amendment by implementing the “family viewing policy” under this substantial government pressure. The court said that the broadcasters would not have been subject to the First Amendment if they had arrived at their decision independently, but that under the circumstances the networks had essentially served in a “surrogate role in achieving the implementation of government policy.” On appeal, the Ninth Circuit reversed this decision on other grounds. Although the appeals court did not reach the merits of the First Amendment issue, it mentioned that the jawboning techniques used by the FCC chairman presented “serious issues involving the Constitution.”

The presence of actual government regulation encouraging a certain course of action—as opposed to threatened regulation—can also create state action even if the regulation does not expressly require the disputed action. The mere fact that a private company is heavily regulated is not, in itself, sufficient to transform the company into a state actor. However, in *Skinner v. Railway Labor Executives' Association*, discussed in more detail in another Legal Sidebar, the Supreme Court said that certain statutory schemes can provide sufficiently “clear indices of the Government's encouragement, endorsement, and participation” in private action to implicate the Constitution. Specifically, in that case, the Supreme Court concluded that private railroads would be acting as government agents when they tested employees for drugs and alcohol. Although federal regulations did not mandate the tests, the Court explained that they “made plain” the government's “strong preference for testing” by preempting state regulation on the issue, providing that railroads could not divest themselves of testing authority, requiring railway employees to submit to tests if the railroads decided to institute them under specified conditions, and entitling the government to receive certain testing results. According to the Court, these clear signs of government encouragement, endorsement, and participation sufficed to implicate the Constitution.

Lawsuits Challenging Online Content Moderation

For decades, users of online platforms have brought lawsuits to challenge online platforms' decisions to remove or restrict access to their content. Among other legal claims, some plaintiffs have argued that these private platforms violated their First Amendment rights when they restricted their speech. Courts have often held that these lawsuits were barred either by Section 230 of the Communications Act of 1934—enacted as part of the Communications Decency Act of 1996 to provide immunity for internet service providers' publishing activities—or by the First Amendment, which lower courts have said also provides some protection for platforms' editorial decisions. However, the courts that have reached the merits of these plaintiffs' constitutional claims have rejected them, concluding that as private companies operating without government involvement, these online platforms were not subject to the constraints of the First Amendment.

Some more recent lawsuits have alleged that social media companies are subject to the First Amendment because they were motivated to restrict or remove the plaintiffs' content based on government coercion. For example, President Trump's lawsuit against Twitter highlighted a variety of statements from Democratic Members of Congress that allegedly demonstrated that the Members wanted Twitter to remove him. Further, he claimed that statements from various Members in favor of regulating Twitter and other social media companies created a coercive effect leading the company to suspend his account. Somewhat similarly, plaintiffs in other lawsuits have sued Facebook and YouTube for removing their vaccine- and coronavirus-related content, alleging that the social media companies acted in response to pressure from Members of Congress to take down "misinformation" on these topics.

Trial courts ultimately dismissed these lawsuits and others raising similar allegations for failing to state plausible claims. For example, one district court held that President Trump's complaint against Twitter failed to demonstrate state action. President Trump cited a number of circuit and Supreme Court decisions to support his position that government coercion or pressure of private entities may convert private conduct into state action. The court, however, concluded that the cited cases were "strikingly different" from the allegations set forth in the complaint. The court explained that each of the cited cases identified "concrete and specific government action, or threatened action," while President Trump had only offered "ambiguous and open-ended statements" from Members of Congress. That kind of statement, the court held, did not rise to the same level as actual or threatened government action and could not cause private conduct to be reasonably attributed to the state. The court instead compared President Trump's allegations to cases in which state action was not found, as past courts have drawn lines between the government's allowable "attempts to convince" private parties and potentially problematic "attempts to coerce." The court explained that much of what President Trump claimed was coercive conduct was actually "within the normal boundaries of a congressional investigation, as opposed to threats of punitive state action."

President Trump also raised a facial constitutional challenge to Section 230, the federal immunity provision described above. He claimed that Twitter would not have suspended him but for this immunity provision. In language similar to *Skinner*, he claimed that Section 230 violated the First Amendment because it was "deliberately enacted by Congress to induce, encourage, and promote social media companies to" censor constitutionally protected speech. (Other plaintiffs have explicitly cited *Skinner* to claim that Section 230 contains sufficient indicia of government encouragement of censorship to create state action.) However, the trial court in *Trump v. Twitter* rejected this claim on procedural grounds, concluding that the President had failed to demonstrate that Section 230 did in fact motivate Twitter's actions. This decision was in line with the rulings of other federal trial courts that have concluded that Section 230 does not compel any specific actions and lacks the coercive features present in *Skinner*.

Considerations for Congress

These lawsuits could be seen as part of the broader debate surrounding social media companies and online content moderation. More specifically, Congress should be aware that plaintiffs have cited Members' statements as evidence of governmental coercion violating the First Amendment.

Although the plaintiffs in the lawsuits discussed above were attempting to sue private parties based on alleged government encouragement or coercion, [other plaintiffs](#) have attempted to [directly sue](#) the government, or even [individual Members of Congress](#), based on alleged coercion of Twitter or other social media platforms. So far, these lawsuits have been dismissed on similar grounds to the claims discussed above—for example, on procedural grounds or for a failure to prove joint action. The Supreme Court, however, has not stated a clear test for determining when governmental encouragement or pressure tips over the line into unconstitutional coercion. The lower courts' inquiry has been relatively fact-specific, so lawsuits with facts showing more evidence of state action might survive motions to dismiss.

There are other barriers to suits directly against Members of Congress: Members' own free speech rights and the Constitution's [Speech or Debate Clause](#). When expressing views on [matters of public concern](#), elected officials, [including legislators](#), generally share the same First Amendment rights as members of the public do. The Supreme Court has recognized that legislators have an "[obligation](#)" to express their positions on topics so that constituents can be fully informed and can better assess their qualifications for office. The First Amendment therefore protects legislators' right to express their views so long as they are "[convincing](#)" rather than "coercing." Similarly, the Speech or Debate Clause, discussed in length in [this CRS Report](#), provides Members with general immunity from liability for conduct and speech that is "[within the sphere of legislative activity](#)."

President Trump's separate lawsuits against Facebook and YouTube are still pending. The complaints in those cases raised factual allegations relatively similar to the dismissed lawsuit against Twitter. The outcomes remain to be seen. Other lawsuits involving similar legal issues are undergoing appeals. These legal issues will likely remain an area with further development in the immediate future.

Author Information

Valerie C. Brannon
Legislative Attorney

Whitney K. Novak
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.
