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Remedies for "Disinformation"

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Remedies for “Disinformation”

Russell L. Weaver*

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In drafting the U.S. Declaration of Independence, Thomas Jefferson implicitly rejected monarchy and the concept of hereditary succession in favor of a democratically elected government: “Governments are instituted among Men, deriving their just powers from the consent of the governed.”¹ In construing the U.S. Constitution, the U.S. Supreme Court continues to emphasize democratic values and recognize that freedom of expression and freedom of the press are the essential building blocks of democratic societies.² Indeed, the Court has stated that “speech concerning public affairs is more than self-expression; it is the essence of self-government”³ and “as fashioned to assure [an] unfettered interchange of ideas for the bringing about of political and social changes desired by the people” so that “changes may be obtained by lawful means.”⁴

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¹ U.S. DECLARATION OF INDEPENDENCE (July 4, 1776).

² See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 968 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 906 (1963); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 248 (1961); RUSSELL L. WEAVER & CATHERINE HANCOCK, *THE FIRST AMENDMENT: CASES, MATERIALS AND PROBLEMS* (Carolina Academic Press, 7th ed. 2023).

³ *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)); see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Blackmun, J., concurring) (“[C]ore political speech occupies the highest, most protected position.”); see also *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

⁴ *New York Times, Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Stromberg v. California*, 283 U.S. 359);

Disinformation, referred to by some as “fake news” or “misinformation,” is problematic because it has the potential to undermine the democratic process by deluding the electorate with inaccurate information.⁵ Indeed, as one commentator asked, “how can the people be well informed in a world where misinformation is intentionally circulated?”⁶ And misinformation can have real world consequences: “coordinated disinformation campaigns threaten to exacerbate public health emergencies, stoke ethnic and racial divisions and even undermine democracy itself.”⁷

But, in a free society, where people are guaranteed the right to express themselves, are there effective remedies for disinformation? This article explores the problem of disinformation and the possible remedies. It begins by examining the scope of the problem. Second, it explores possible remedies that can be imposed in a democratic society.

I. DISINFORMATION THROUGH THE AGES

Although some suggest that disinformation is a problem of the internet era and the rise of social media,⁸ the reality is that “disinformation” is hardly a new phenomenon. Following Gutenberg’s development of the printing press in the 1400s, fictitious stories were circulated depicting Jews as drinking the blood of Christian children.⁹ In the sixteenth and seventeenth centuries, disinformation was widely distributed in both France and Italy.¹⁰ In the eighteenth century, a fake letter (falsely attributed to George Washington himself) suggested Washington was “miserable” during the Revolutionary War and believed that the war was a “mistake.”¹¹ In 1782, Benjamin Franklin purportedly created a counterfeit issue of

see Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 339–41 (2010) (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people...The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a pre-condition to enlightened self-government and a necessary means to protect it. The First Amendment “has its fullest and most urgent application” to speech uttered during a campaign for political office ...’ [I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”); Virginia v. Black, 538 U.S. 343, 365 (2003) (“Political speech [is] at the core of what the First Amendment is designed to protect.”).

⁵ See Alan K. Chen, *Free Speech, Rational Deliberation and Some Truth About Lies*, 62 WM. & MARY L. REV. 357 (2020); Amy Kristin Sanders, Rachel L. Jones & Xiran Liu, *Stemming the Tide of Fake News: A Global Study of Decisions to Regulate*, 8 J. INT’L MEDIA & ENT. L. 203, 206 (2019–2020); Andrew J. Schuyler, *Regulating Facts: A Procedural Framework for Identifying, Excluding and Deterring the Intentional or Knowing Proliferation of Fake News Online*, 2019 U. ILL. J.L. TECH. POL’Y. 211, 213 (2019).

⁶ Schuyler, *supra* note 5, at 212.

⁷ Steven Lee Myers & Eileen Sullivan, *Disinformation Has Become Another Untouchable Problem in Washington*, N.Y. TIMES 1 (July 8, 2022), <https://www.nytimes.com/2022/07/06/business/disinformation-board-de.html> (on file with the *University of the Pacific Law Review*).

⁸ See Kevin Roose, *Facebook Had a Good Election, But It Can’t Let Up on Vigilance*, N.Y. TIMES (Nov. 8, 2018) (“[D]igging up large-scale misinformation on Facebook was as easy as finding baby photos or birthday greetings.”).

⁹ See Sanders, Jones & Liu, *supra* note 5, at 205 (citing a Politico report: Jacob Soll, *The Long and Brutal History of Fake News*, POLITICO (Dec. 18, 2016), <https://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535>(on file with the *University of the Pacific Law Review*).

¹⁰ *Id.*

¹¹ See Carol A. Watson, *Information Literacy in a Fake/False News World: An Overview of the Characteristics of Fakes News and Its Historical Developments*, 46 INT’L J. LEGAL INFO. 93, 95 (2018).

his newspaper, which included false stories about “Indians mercilessly scalping the family members of colonists.”¹²

Undoubtedly, the internet has exacerbated the problem of disinformation. For most of human history, ordinary people lacked the ability to mass communicate. Information passed between people by word of mouth, or by handwritten methods.¹³ Not until the fifteenth century, when Johannes Gutenberg invented the printing press,¹⁴ did it become possible to easily create multiple copies of documents.¹⁵ Although the printing press did not increase the speed at which information could move, it allowed information to spread more broadly and led to a flowering of knowledge, information, and ideas.¹⁶ But the printing press, like the more advanced technologies that came later (e.g., radio, television, satellite, and cable) was under the control of “gatekeepers” that controlled how they could be used.¹⁷ The Gutenberg printing press was relatively expensive to obtain, requiring as it did not only the purchase of a printing press, but also the purchase of lead type, ink, and other essential components, meaning that only a few individuals could afford to own or operate it.¹⁸ Subsequent technologies, including radio,¹⁹ television,²⁰ and satellite communications,²¹ all came with their own gatekeepers.²² All required substantial technological investments, and some (e.g., broadcast communications, like radio and television) also required an operating license, which limited who could own and operate them. Those who controlled communications technologies had the power to decide who could use them, as well as the messages that were communicated.²³

And there is ample evidence that those who own and control media outlets can and do attempt to skew political debates. For example, William Randolph Hearst aggressively used his newspapers to campaign for causes that he supported,²⁴ as well as to promote his preferred views and positions.²⁵ Prior to the American Revolution, there is evidence that printers used their presses to affect

¹² *Id.* at 95.

¹³ *See generally id.* at xi-xii. Of course, over the centuries, there were attempts to move information more quickly than people could move. *Id.* at xii. Information could move faster than people could move through the use of carrier pigeons. However, although pigeons could discreetly communicate a particular piece of information relatively quickly, they were not suited to mass communication in the sense of the modern radio, television or internet.

¹⁴ Weaver, Russell L., *Social Media, Section 230, and Free Expression*, 73 *MERCER L. REV.* (2022), https://digitalcommons.law.mercer.edu/jour_mlr/vol73/iss2/8.

¹⁵ *See id.* at 94.

¹⁶ *Id.*

¹⁷ *Id.* at 3–35.

¹⁸ *Id.* at 7–8.

¹⁹ *See* DAVID CROWLEY & PAUL HEYER, *COMMUNICATION IN HISTORY: TECHNOLOGY, CULTURE, SOCIETY* 204 (5th ed. 2007).

²⁰ *Id.* at 243.

²¹ *See* Rush Schwartz, *The Social Shape of Electronics*, in *COMMUNICATIONS IN HISTORY*, *supra* note 19, at 313.

²² *See* RUSSELL L. WEAVER, *FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY* 47–60 (Carolina Academic Press, 2nd ed. 2019).

²³ *Id.* at 3–35.

²⁴ *See* Documentary: Citizen Hearst (Public Broadcasting Service 2022) (on file with the *University of the Pacific Law Review*).

²⁵ *See* Jerome A. Barron, *Access to the Media – 1967 to 2007 and Beyond: A Symposium Honoring Jerome A. Barron’s Path-Breaking Article “Access Reconsidered,”* 76 *GEO. W. L. REV.* 826, 832 (2008).

and attempt to control public debates. For example, there are stories about James Franklin (Benjamin Franklin’s brother) and his opposition to positions taken by prominent Bostonian Cotton Mather who (to James) represented the Boston “establishment.”²⁶ When Mather advocated for mass inoculations against smallpox,²⁷ Franklin opposed Mather even though he “knew next to nothing of the etiology of smallpox.”²⁸ He did know that “he despised Mather for what James judged the eminent minister’s smugness and his inordinate influence over the life of Boston. If Mather advocated inoculation, the *Courant* [James Franklin’s newspaper] must oppose it—and did.”²⁹

The internet transformed communication because it was the first technology that allowed ordinary individuals to communicate on a mass scale,³⁰ and allowed them to avoid the traditional media which had historically served as the principal gatekeeper and filter of communication and information.³¹ This broadening of communicative capacity has had a profound impact on modern societies, enabling mass communication on a scale never seen before, and resulting in profound societal changes.³² However, the great strength of the internet—the enabling of mass communication by ordinary individuals—has also proven to be its greatest weakness.³³ As the internet has enabled mass communication by virtually everyone, it has created the potential for mischief. Using media such as X (formerly Twitter) and Facebook (now Meta), individuals can easily distribute information, both real and fake. Moreover, because the internet is global in nature, individuals have the capacity to distribute information across international borders. As a result, during the 2016 U.S. presidential election, some believe that Russian operatives attempted to influence the outcome of the election in favor of Donald Trump.³⁴

The internet has also led to a flood of disinformation. As one commentator noted, “digging up large-scale misinformation on Facebook was as easy as finding baby photos or birthday greetings.”³⁵ Indeed, Twitter accounts are being routinely used to spew propaganda and misinformation.³⁶ In addition, “bots” have become

²⁶ See THE LIFE AND TIMES OF BENJAMIN FRANKLIN, *supra* note 37, at 25.

²⁷ *Id.* (“The occasion of the attack [by James Franklin against Mather] was an epidemic of smallpox, the first in nearly two decades, which hiatus was a primary cause of the virulence of this outbreak, in that an unexposed generation had little or no resistance to the disease. For all his obsession with the supernatural, Mather had maintained his youthful interest in the natural, and he advocated the novel technique of inoculation to combat the contagion.”).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 37–47.

³¹ *Id.* at 49–72.

³² *Id.* at 73–142.

³³ *Id.* at 37–47.

³⁴ See Stephen Budiansky, *The Coming War for Cyberspace*, WALL STREET J. (July 15–16, 2017) (“An army of Russia-based human and automated attackers (“robo-trolls”) deluged the United States with pro-Trump disinformation . . .”).

³⁵ See Roose, *supra* note 8.

³⁶ See Farhad Manjoo, *How Twitter Is Being Gamed to Feed Misinformation*, N.Y. TIMES (May 31, 2017), <https://nyti.ms/2rqcCG3> (on file with *University of the Pacific Law Review*) (explaining that “the biggest problem with Twitter’s place in the news is its role in the production and dissemination of propaganda and misinformation”

increasingly commonplace on the internet in what one commentator described as a Cambrian explosion of robotic technologies,³⁷ with millions of bot accounts and messages.³⁸ One estimate suggests that there are as many as 48 million Twitter accounts that are run by bots rather than human beings, and which account for as much as twenty-five percent of all tweets in the 2016 presidential election.³⁹ A second estimate concluded that there are as many as 91 million fake accounts on Facebook and 24 million bots on Instagram.⁴⁰ A Pew Research Center study suggested that nearly two-thirds of all tweeted links were shared by bots and had links to news and current events.⁴¹ At one point, “YouTube had as much traffic from bots masquerading as people as it did from real human visitors.”⁴² And, of course, bots can easily spread both disinformation and offensive speech.

Perhaps the poster child for fake news on the internet is an incident that occurred at a pizzeria, Comet Ping Pong, during which a man fired a rifle.⁴³ The incident was preceded by a slew of “fake” online allegations, suggesting that former presidential candidate Hillary Clinton and her campaign manager were operating a child sex ring out of the restaurant.⁴⁴ These allegations included online posts, purportedly depicting pictures of children who were alleged “victims” of the sex ring.⁴⁵ Even though the allegations were untrue, the pizzeria received thirty to forty threatening phone calls in a single weekend, and the man entered the pizzeria and fired a rifle, believing he was acting to protect the children.⁴⁶

and offering a conspiracy theory suggesting that the murder of a Democratic National Committee staffer was linked to the leak of Clinton campaign emails).

³⁷ See *id.* at 295; Kelly Hill, *SoftBank's Son: "Cambrian Explosion" in IoT Is Coming*, RCR WIRELESS NEWS (Oct. 26, 2016), <https://www.rcrwireless.com/20161026/internet-of-things/softbank-ceo-cambrian-explosion-in-iot-is-coming-tag6-2>.

³⁸ See Ashley Fox, *Automated Political Speech: Regulating Social Media Bots in the Political Sphere*, 18 FIRST AMEND. L. REV. 114, 117 (2020); Michael Newberg, *As Many As 48 Million Twitter Accounts Aren't People, Says Study*, CNBC (Mar. 10, 2017), <https://www.cnbc.com/2017/03/10/nearly-48-million-twitter-accounts-could-be-bots-says-study.html> (on file with *University of the Pacific Law Review*); see also Jack Nicas, *Does Facebook Really Know How Many Fake Accounts It Has?*, N.Y. TIMES (Jan. 30, 2019), <https://www.nytimes.com/2019/01/30/technology/facebook-fake-accounts.html>.

³⁹ See Fox, *supra* note 38, at 117.

⁴⁰ *Id.*

⁴¹ See Stefan Wojcik, *5 Things to Know About Bots on Twitter*, PEW RSCH. CTR. (Apr. 9, 2018), <https://www.pewresearch.org/short-reads/2018/04/09/5-things-to-know-about-bots-on-twitter/> (on file with *University of the Pacific Law Review*).

⁴² See Michael H. Keller, *The Flourishing Business of Fake YouTube Views*, N.Y. TIMES (Aug. 12, 2018), <https://web.archive.org/web/20230809115344/https://www.nytimes.com/interactive/2018/08/11/technology/youtube-fake-view-sellers.html> (on file with *University of the Pacific Law Review*).

⁴³ See Jennifer Ludden, *Armed Man Threatens D.C. Pizzeria Targeted by Fake News Stories*, NAT'L PUB. RADIO (Dec. 5, 2016), <https://www.npr.org/2016/12/05/504467162/armed-man-threatens-d-c-pizzeria-targeted-by-fake-news-stories> (on file with *University of the Pacific Law Review*).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

II. POLITICIANS AND DISINFORMATION

If society is going to try to tackle the problem of disinformation so the citizenry and democracy will not be deluded in their electoral decisions, it is necessary to recognize disinformation runs far deeper than the internet. For example, it is not at all uncommon for politicians and governmental officials to lie to the public. Following Edward Snowden’s revelation that the U.S. government was running a massive cybersurveillance operation, then National Security Agency (NSA) Director James Clapper was asked about the program.⁴⁷ In response to a direct question regarding whether the NSA was collecting “any type of data at all on millions or hundreds of millions of Americans,” he flatly stated, “No, sir. Not wittingly.”⁴⁸ Clapper later admitted that he had lied and tried to explain it away by stating that it was the “most truthful” or “least untruthful” thing that he could say at the time.⁴⁹ About the same time, then President Barack Obama assured the U.S. public that the NSA’s cybersurveillance program was not focused on ordinary U.S. citizens, but rather only on individuals who pose a terrorist threat to the United States and on communications of “foreign intelligence information”⁵⁰ and foreign intelligence targets.⁵¹ That turned out to be a lie as well. The U.S. government was in fact collecting large amounts of data about virtually everyone.⁵² And these lies are significant. If the U.S. people are going to exercise oversight and supervisory control over governmental activities like the cybersurveillance operation, they must first know that it exists.

Clapper and Obama are hardly the only politicians who have lied to the American public. Former President Donald Trump may be the all-time champion

⁴⁷ See Editorial Board, *Edward Snowden, Whistle Blower*, N.Y. TIMES (Jan. 2, 2014), <https://web.archive.org/web/20230730073947/https://www.nytimes.com/2014/01/02/opinion/edward-snowden-whistle-blower.html> (on file with *University of the Pacific Law Review*) (“[Snowden’s] leaks revealed that James Clapper Jr., the director of national intelligence, lied to Congress when testifying in March that the N.S.A. was not collecting data on millions of Americans. (There has been no discussion of punishment for that lie.)”); Andrew Rosenthal, *Clapper and Carney Get Slippery on Surveillance*, N.Y. TIMES (Oct. 24, 2013), <https://archive.nytimes.com/takingnote.blogs.nytimes.com/2013/10/24/clapper-and-carney-get-slippery-on-surveillance/> (on file with *University of the Pacific Law Review*); Charlie Savage & Scott Shane, *N.S.A. Leaker Denies Giving Secrets to China*, N.Y. TIMES (June 18, 2013), <https://www.nytimes.com/2013/06/18/world/asia/nsa-leaker-denies-giving-classified-data-to-china.html> (on file with the *University of the Pacific Law Review*) (suggesting that Snowden decided to go public because Director Clapper had lied to the American public regarding the NSA data collection program).

⁴⁸ See Savage & Shane, *supra* note 42.

⁴⁹ See Rosenthal, *supra* note 47.

⁵⁰ See Scott Shane, *Documents Detail Restrictions on N.S.A. Surveillance*, N.Y. TIMES (June 21, 2014), <https://www.nytimes.com/2013/06/21/us/politics/documents-detail-nsa-surveillance-rules.html> (on file with the *University of the Pacific Law Review*).

⁵¹ *Id.*

⁵² See Scott Shane, *No Morsel Too Minuscule for All-Consuming NSA: From Spying on Leader of U.N. to Tracking Drug Deals, on Ethos of ‘Why Not?’*, N.Y. TIMES (Nov. 13, 2013), <https://www.nytimes.com/2013/11/03/world/no-morsel-too-minuscule-for-all-consuming-nsa.html> (on file with the *University of the Pacific Law Review*); Doug Stanglin, *Snowden Says NSA Can Tap Email Chats*, *The Courier-Journal*, USA TODAY (July 31, 2013), <https://www.usatoday.com/story/news/nation/2013/07/31/edward-snowden-guardian-nsa-facebook-tap-email-documents/2602519/> (on file with the *University of the Pacific Law Review*).

of disinformation and has been widely denounced as a compulsive “liar.”⁵³ “The Big Lie”—Trump’s claim that the 2020 presidential election was stolen—is the example that comes most readily to mind.⁵⁴ But presidential lying goes well beyond Trump. President Joe Biden is hardly a paragon of virtue when it comes to telling the truth. For example, following the disastrous withdrawal of U.S. troops from Afghanistan, when the media asked President Biden why he did not keep more U.S. troops in the country to help with the withdrawal, Biden flatly stated that his senior military advisors had advised him not to do so.⁵⁵ Both Gen. Mark Milley, chairman of the Joint Chiefs of Staff, and Gen. Kenneth McKenzie Jr., head of U.S. Central Command, subsequently disputed Biden’s claims in sworn testimony.⁵⁶ Secretary of Defense Lloyd Austin flatly agreed with Milley and McKenzie, stating that Biden’s military advisers “were in lock step in recommending that about 3,000 to 4,500 [U.S.] troops stay in Afghanistan.”⁵⁷ So either Biden lied, or the three officials all perjured themselves under oath.

Afghanistan is hardly the only instance in which Biden has lied. When inflation was raging in 2022, and the midterm elections were on the horizon, Biden tried to tell the American people that the inflation was due to the Ukrainian War,⁵⁸ and he frequently referred to inflation as the “Putin price hike.”⁵⁹ In fact, inflation was raging well before Russia invaded Ukraine.⁶⁰ However, Biden wasn’t about to let the truth get in the way of a good political argument. Likewise, when it was discovered that former President Trump had classified documents at Mar-a-Lago, Biden denounced it as “totally irresponsible.”⁶¹ While he may have forgotten that

⁵³ See Roger Cohen, *Robert Mueller in the Age of the Unicorn*, N.Y. TIMES (Apr. 22, 2019), <https://www.nytimes.com/2019/04/19/opinion/mueller-trump-russia-report.html> (on file with the *University of the Pacific Law Review*) (suggesting that White House Counsel Donald McGahn, “wants a contemporaneous record of the truth to protect himself and — God knows — the Republic against Trump’s lies.”); Thomas Friedland, *America Dodged an Arrow*, N.Y. TIMES (Nov. 11, 2022), <https://www.nytimes.com/2022/11/09/opinion/midterms-election-america-arrow.html> (on file with the *University of the Pacific Law Review*) (referring to the “lies and fantasies of Donald Trump”); Mara Liasson, *Democrats and Some Republicans Fear How Trump’s Election Lies May Affect Democracy*, NAT’L PUB. RADIO (Nov. 5, 2021), <https://www.npr.org/2021/11/05/1052968081/democrats-and-some-republicans-fear-how-trumps-election-lies-may-affect-democrac> (on file with the *University of the Pacific Law Review*).

⁵⁴ See Tovia Smith, *Why Is the “Big Lie” Proving So Hard to Dispel?*, NAT’L PUB. RADIO (Jan. 4, 2022), <https://www.npr.org/2022/01/04/1070337968/why-is-the-big-lie-proving-so-hard-to-dispel>; see also Danny Hakim & Alexandra Berzon, *A Big Lie in a New Package*, N.Y. TIMES 11 (June 9, 2022), <https://www.nytimes.com/2022/05/29/us/politics/2000-mules-trump-conspiracy-theory.html> (on file with the *University of the Pacific Law Review*).

⁵⁵ See Bret Stephens, *An Ethically Challenged Presidency*, N.Y. TIMES 21 (Oct. 7, 2021), <https://www.nytimes.com/2021/10/05/opinion/biden-ethics-son.html> (on file with the *University of the Pacific Law Review*).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Zolan Kanno-Young & Jeanna Smalalek, *White House Struggles to Talk About the “Problem from Hell,”* N.Y. TIMES (June 8, 2022), <https://www.nytimes.com/2022/06/08/business/economy/inflation-biden-administration.html> (on file with *University of the Pacific Law Review*).

⁵⁹ *Id.*

⁶⁰ Jeanna Smalalek, *Democrats Blast Corporate Profits as Inflation Surges*, N.Y. TIMES (Jan. 5, 2022), <https://www.nytimes.com/2022/01/03/business/economy/inflation-democrats-corporations.html> (on file with the *University of the Pacific Law Review*).

⁶¹ See Joseph A. Wulfsohn, *Biden Shamed ‘Irresponsible’ Trump for Having Classified Socs Before WH Admitted*

he had also taken classified documents to unauthorized places (including his garage!), he might also have lied.⁶² In denouncing Trump’s actions, perhaps Biden simply “forgot” that he had unauthorized possession of classified documents, but he might have lied as well. Moreover, even though it was not technically a “lie,” Biden concealed this information from the public for sixty-eight days.⁶³

There are plenty of other examples of political disinformation. The Wall Street Journal labeled California Congressman Adam Schiff as “disinformation man.”⁶⁴ According to the report, Intelligence Committee Chairman Devin Nunes tried in 2018 to inform the public about the FBI’s alleged abuse of the FISA warrant process in regard to its investigation into Trump’s alleged collusion with Russia.⁶⁵ In rebuttal, Congressman Schiff, who had full access to all of the intelligence information, made a variety of false statements designed to undercut the Nunes report.⁶⁶ Schiff’s statements caused the media to denounce the Nunes report as a “joke.”⁶⁷ The validity of the Nunes report was later confirmed by Justice Department Inspector General Michael Horowitz.⁶⁸ In other words, Schiff lied.

Not only does the government tamper with and control the information available on social media, there are allegations that the government affirmatively uses social media to propagandize.⁶⁹ Indeed, the U.S. purportedly has used fake Twitter accounts to disseminate propaganda regarding Russia, China, and other adversaries.⁷⁰ There are also allegations that U.S. officials posed as Iraqis to allege on Twitter that Iran was smuggling drugs into Iraq.⁷¹ While Twitter eventually shut down these accounts, it waited two years before doing so.⁷²

He Had Sensitive VP Records, FOXNEWS (Jan. 10, 2023), <https://www.foxnews.com/media/biden-shamed-irresponsible-trump-classified-docs-before-wh-admitted-sensitive-vp-records> (on file with the *University of the Pacific Law Review*).

⁶² See Mariah Espada, *President Biden, His Corvette, and the Latest Stash of Classified Documents*, TIME (Jan. 12, 2023), <https://time.com/6246994/biden-classified-documents-delaware-corvette/> (on file with the *University of the Pacific Law Review*).

⁶³ See Michael D. Shear, Peter Baker & Katie Rogers, *68 Days of Silence: Why the White House Stayed Mum on Classified Documents*, N.Y. TIMES (Jan. 20, 2023), <https://www.nytimes.com/2023/01/20/us/politics/biden-classified-documents.html> (on file with the *University of the Pacific Law Review*).

⁶⁴ See Adam Schiff, *Disinformation Man*, WALL STREET J. (Jan. 21, 2023), <https://www.wsj.com/articles/adam-schiff-disinformation-man-house-intelligence-committee-russia-devin-nunes-memo-twitter-files-matt-taibbi-11674166043> (on file with the *University of the Pacific Law Review*).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Hiawatha Bray, *We Ignore Musk’s “Twitter Files” at Our Peril*, BOSTON GLOBE (Jan. 20, 2023), <https://web.archive.org/web/20230208001042/https://www.bostonglobe.com/2023/01/19/business/we-ignore-musks-twitter-fi-les-our-peril/> (on file with the *University of the Pacific Law Review*) (“Another discovery: There’s no evidence of any “deep state” conspiracy behind Twitter’s decision to suppress the New York Post’s October 2020 story about the contents of a laptop belonging to President Biden’s son Hunter. Twitter executives screwed up that decision all by themselves. They chose to believe a false allegation that the data had been stolen by hackers.”).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

III. MEDIA BIAS AND AN INFORMED ELECTORATE

But, if we are concerned about disinformation, and its impact on the ability of the American people to make educated decisions, should we also be concerned about the media? Just as “fake news” can undercut the democratic process, media bias has the potential to mislead the public with limited or deceptive information. For example, there are suggestions that disinformation is widespread on AM radio.

When discussions of media bias occur, commentators often focus on Fox News, contending that it has a right-wing bias and that it skews the news in favor of that bias.⁷³ And, indeed, there is evidence indicating Fox News deliberately disseminated disinformation regarding the 2020 election outcome.⁷⁴ Some argue that other media outlets suffer from far less bias.⁷⁵

The difficulty is that the evidence shows that other media outlets suffer from bias as well. For example, there have been allegations that National Public Radio (NPR) has a decidedly left-wing bias.⁷⁶ Indeed, NPR’s then-fundraiser, Mr. Ron Schiller, was videotaped making disparaging remarks about conservatives.⁷⁷ If NPR’s biases were limited to its fundraisers, that would not necessarily be a problem. However, the evidence suggests that NPR’s left-wing bias goes well beyond its fundraisers. Perhaps the most obvious evidence of left-wing bias at NPR is revealed by the reporting of NPR Morning Edition commentator Steve Inskeep. When the nation was debating whether to enact health care legislation in 2009, Inskeep conducted an aggressive, hostile, and rude interview with Republican National Committee Chairman Michael Steele, during which Inskeep frequently interrupted Steele (who was arguing against the legislation),⁷⁸ making it difficult

⁷³ See Frank James, *Jon Stewart 'Defends' Mainstream Media Against Fox News, Sort Of*, NAT’L PUB. RADIO (June 20, 2011), <https://www.npr.org/sections/itsallpolitics/2011/06/20/137298761/jon-stewart-defends-mainstream-media-against-fox-news-sort-of> (on file with the *University of the Pacific Law Review*).

⁷⁴ *Id.*; David Folkenflik, *Off the Air, Fox News Stars Blasted the Election Fraud Claims They Peddled*, NPR (Feb. 16, 2023), <https://www.npr.org/2023/02/16/1157558299/fox-news-stars-false-claims-trump-election-2020>.

⁷⁵ *Id.* (“‘The bias of the mainstream media is towards sensationalism, conflict and laziness,’ said [Comedian Jon] Stewart as he spelled out what, at least to his mind, differentiated other major news outlets from Fox News, an operation Stewart has repeatedly targeted in his comedy as on an ideological mission.”).

⁷⁶ See Brett Zongker, *NPR Was Looking for Reasons to Fire Him*, NAT’L PUB. RADIO (Oct. 22, 2010), <https://www.mprnews.org/story/2010/10/22/npr-juan-williams> (on file with the *University of the Pacific Law Review*).

⁷⁷ See Associated Press, *NPR Chief Executive Quits Over Hidden Camera Video*, NAT’L PUB. RADIO (Mar. 9, 2011), <http://www.npr.org/blogs/thetwo-way/2011/03/10/134388981/npr-ceo-vivian-schiller-resigns> (on file with the *University of the Pacific Law Review*); David Folkenflik, *N.P.R. V.P. Resigns, CEO Rebuked Over Williams' Firing*, NAT’L PUB. RADIO, (Jan. 7, 2011), <http://www.npr.org/2011/01/07/132726894/npr-v-p-resigns-ceo-rebuked-over-williams-firing> (on file with the *University of the Pacific Law Review*); Mark Memmott, *In Video: NPR Exec Slams Tea Party, Questions Need for Federal Funds*, NAT’L PUB. RADIO (Mar. 8, 2011), <http://www.npr.org/blogs/thetwo-way/2011/03/09/134358398/in-video-npr-exec-slams-tea-party-questions-need-for-federal-funds> (on file with the *University of the Pacific Law Review*); Mark Memmott, *NPR CEO Vivian Schiller Resigns After Board Decides She Should Go*, NAT’L PUB. RADIO (Mar. 9, 2011), <http://www.npr.org/blogs/thetwo-way/2011/03/10/134388981/npr-ceo-vivian-schiller-resigns> (on file with the *University of the Pacific Law Review*); David Folkenflik, *NPR Exec: NPR Would Be Better Off Without Federal Support*, NAT’L PUB. RADIO (Mar. 8, 2011), <http://www.npr.org/2011/03/08/134371393/NPR-Exec-NPR-Would-Be-Better-Off-Without-Fed-Support> (on file with the *University of the Pacific Law Review*).

⁷⁸ See Steve Inskeep, *Steele: Don't Raid Medicare to Fund Health Changes*, NAT’L PUB. RADIO (Aug. 27, 2009), <http://www.npr.org/templates/story/story.php?storyId=112281170> (on file with the *University of the Pacific Law Review*).

for Steele to articulate his position.⁷⁹ About that same time, in an interesting contrast, NPR host Lianne Hanson lobbed softballs to an advocate for providing illegal immigrants with health care benefits.⁸⁰ Hanson made absolutely no effort to ask the interviewee any tough questions about whether the public might object to extending public benefits to illegal immigrants. The contrast between the two interviews was striking.

With Inskip, there are lots of other examples of biased interviewing. In 2018, he conducted an extremely biased interview with Senator Marco Rubio. During that interview, Inskip was absolutely determined to focus on whether President Trump should be removed from office under the Twenty-Fifth Amendment to the U.S. Constitution for mental unfitness.⁸¹ Early in the interview, Rubio flatly rejected the suggestion, stating “that’s a stretch.”⁸² Even though Rubio had flatly dismissed the factual basis for the suggestion,⁸³ Inskip doggedly pursued the line of questioning, asking the same question in different ways.⁸⁴ Inskip, apparently committed to the idea that Trump was unfit and should be removed from office, was simply unwilling to take “no” for an answer.⁸⁵ A few days later, in an interview with Ken Starr about Starr’s conduct of the Clinton special counsel investigation, Inskip tried repeatedly to shift the focus away from Clinton to Trump.⁸⁶ Thus, even though Starr was on the program to talk about the Clinton investigation, and even though Starr repeatedly rejected Inskip’s comparison of Trump to Clinton, Inskip doggedly pursued the line of questioning, spending the last half of the interview focused almost entirely on

⁷⁹ *Id.*

⁸⁰ See Lianne Hanson, *The Intersection of Health Care and Immigration*, NAT’L PUB. RADIO (Sept. 30, 2009), <http://www.npr.org/templates/story/story.php?storyId=113005541> (on file with the *University of the Pacific Law Review*).

⁸¹ See Steve Inskip, *Rubio: Congress Should Constrain President, Not “Anonymous” Staffer*, NAT’L PUB. RADIO (Sept. 7, 2018), <https://www.npr.org/2018/09/07/645459797/rubio-congress-should-constrain-president-not-anonymous-staffer> (on file with the *University of the Pacific Law Review*) (“INSKEEP: This op-ed writer describes a president who’s so erratic that there were quote ‘whispers in the cabinet about applying the 25th Amendment,’ which is a way to remove a president who seems unable to perform his duties. Late in the presidency of Ronald Reagan, his then-chief of staff, Howard Baker—it’s a matter of history—conducted an examination, even talking to the president himself to try to determine, is there a 25th Amendment problem here? Should John Kelly be doing that?”).

⁸² *Id.* (“Oh, that’s a stretch.”).

⁸³ *Id.* (“RUBIO: We’re talking here more about a behavioral issue in terms of what some people claim anonymously. They don’t like temperament. And that’s a very different situation. I’ve never heard John Kelly or, frankly, anyone in the administration come to me and said (sic) any of the things that have been reported in the last 72 hours.”).

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ See Steve Inskip, *2 Decades Later, Starr Writes Memoir “Contempt” on Clinton Impeachment*, NAT’L PUB. RADIO (Sept. 10, 2018), <https://www.npr.org/2018/09/10/646213925/2-decades-later-starr-writes-memoir-contempt-on-clinton-impeachment> (on file with the *University of the Pacific Law Review*) (“INSKEEP: . . . What have you thought about, now that Republicans—the same party—have become overwhelmingly supportive of a president who’s been documented making thousands of false statements? STARR: (Laughter) . . . But here’s a key distinction. At least as far as we know, Donald Trump has not lied under oath. As far as we know, he’s not intimidated witnesses. As far as we know, in my view, he has not obstructed justice. So . . .”).

Trump.⁸⁷ Again, Inskip was determined to make his points rather than to listen to the interviewee.

If such hard-hitting questioning were the norm at NPR, one could perhaps dismiss Inskip's interviewing of Steele, Rubio, and Starr as simply a reflection of his style. However, when it serves left-wing interests, NPR conveniently ignores even the most basic questions that one might expect a moderately competent journalist to ask. For example, during the confirmation proceedings of Judge Brett Kavanaugh to the U.S. Supreme Court, questions arose regarding whether Kavanaugh (an admittedly conservative jurist) had committed sexual assault against women. These allegations were extremely important to our society and to our democratic system. If Kavanaugh had engaged in such conduct, he simply should not have been confirmed to the nation's highest court. On the other hand, if he was innocent of the alleged conduct, and the allegations were simply part of a Democrat-led smear campaign, NPR had an ethical and journalistic obligation to expose that fact. NPR failed miserably in its reporting on the issue.

Some of the allegations were made by Dr. Christine Blasey-Ford. Following her congressional hearing, questions were raised regarding whether Dr. Blasey-Ford testified truthfully that she does not know much about polygraph tests, or how to game them. Afterwards, a former boyfriend alleged that she (Blasey) had helped prepare a friend to take a polygraph exam.⁸⁸ The claims were later denied by the friend.⁸⁹ On the day that the allegations about the polygraph exam broke, there was no mention of them on NPR. Instead, NPR aired a segment on someone who knew Kavanaugh in college, and who wanted to give a statement to the FBI, but who was never interviewed.⁹⁰ There was no mention of the polygraph allegations the following morning on NPR's Morning Edition either.⁹¹

At one point, *The New Yorker* magazine published explosive allegations from a second woman (Ramirez) who charged Kavanaugh with sexual assault for

⁸⁷ See *id.* ("INSKEEP: You described the Clintons as fundamentally dishonest. Is our current president fundamentally dishonest? . . . I noticed in the book you were upset at Janet Reno, the attorney general at the time, because she failed to publicly support your work. She didn't trash your work, so far as I know. But she didn't speak up. And you found that to be cowardly, which does make me wonder—what do you think now that President Trump publicly calls the investigation surrounding him a witch hunt, regularly calls it that on a regular basis? . . . Why do you think large majorities of Republicans, at least, think it's fine? They approve of the President's performance at least. . . Isn't that kind of dissembling, though, Mr. Starr, because that is the heart of his presidency, is what he says publicly and the attitude he strikes?").

⁸⁸ See Gregg Re & John Roberts, *Christine Blasey Ford Ex-boyfriend Says She Helped Friend Prep for Potential Polygraph; Grassley Sounds Alarm*, FOX NEWS (Oct. 3, 2018), <https://www.foxnews.com/politics/christine-blasey-ford-ex-boyfriend-says-she-helped-friend-prep-for-potential-polygraph-grassley-sounds-alarm> (on file with the *University of the Pacific Law Review*).

⁸⁹ See Brooke Singman, *Christine Ford's Friend Denies Being Helped on Polygraph, Fires Back at New Claims*, FOX NEWS (Oct. 4, 2018), <https://www.foxnews.com/politics/christine-fords-friend-denies-being-helped-on-polygraph-fires-back-at-new-claims> (on file with the *University of the Pacific Law Review*).

⁹⁰ See Mary Louise Kelly, *What Happened When A College Friend Of Kavanaugh Tried To Talk To The FBI*, NAT'L PUB. RADIO (Oct. 4, 2018), <https://www.npr.org/2018/10/04/654518406/what-happened-when-a-college-friend-of-kavanaugh-tried-to-talk-to-the-fbi> (on file with the *University of the Pacific Law Review*).

⁹¹ See *Morning Edition*, NAT'L PUB. RADIO (Oct. 5, 2018), <https://www.npr.org/programs/morning-edition/2018/10/05/654659772/morning-edition-for-october-5-2018> (on file with the *University of the Pacific Law Review*).

sticking his penis in her face.⁹² There were lots of reasons for skepticism regarding the validity of the accuser’s story. For one thing, she admitted that she was really drunk at the party where the assault allegedly occurred, and that she was initially unsure whether Kavanaugh was the perpetrator or whether someone else had done it.⁹³ Ms. Ramirez also admitted that she later contacted former Yale classmates to ask whether they recalled the incident, and told some of them that she simply could not remember whether Kavanaugh was the one who had exposed himself, and inquired whether they remembered.⁹⁴ Only after six days of discussions with lawyers and former classmates was she able to definitely identify Kavanaugh as the perpetrator.⁹⁵ In the meantime, those who she identified as being at the party (who purportedly witnessed the alleged events) denied that the incident had occurred at all.⁹⁶ Because of these problems with the Ramirez allegations, *The New York Times* initially refused to publish the allegations. *The Times* interviewed several dozen people over the prior week in an attempt to corroborate her story but found no one with firsthand knowledge who would state the event actually happened. Ramirez also made clear that she is a Democrat who worked for social justice, and opposed Kavanaugh’s nomination.⁹⁷ In other words, her sudden ability to identify Kavanaugh may have had more to do with her political leanings than with the truth of the matter.

From listening to NPR, it would have been difficult to learn most of these extremely important details.⁹⁸ The NPR Morning Edition conducted an interview with the authors of the original piece (detailing Ramirez’s allegations), who were largely sympathetic to the allegations, stating they believed the allegations were true, there was one confirmatory witness, and there should be an investigation. They emphasized that Ramirez was “calling for an FBI investigation,” which they believed was appropriate and necessary.⁹⁹ NPR never bothered to conduct an in-depth examination of the serious deficiencies in Ramirez’s allegations. Although NPR’s *All Things Considered* talked about the story later that same day, it did not mention the deficiencies either. Apparently, NPR’s commitment to consider “all things” did not extend to consideration of the problems with the woman’s allegations. Instead, NPR emphasized that this claim involved a second woman making claims against Kavanaugh, and suggested that the evidence was mounting against Kavanaugh, but that Republicans nonetheless seemed determined to push ahead with the Kavanaugh nomination.¹⁰⁰ The following day, rather than discuss

⁹² See Aaron Blake, *Breaking Down the New Brett Kavanaugh Sexual Assault Allegation*, WASH. POST (Sept. 24, 2018), <https://www.washingtonpost.com/politics/2018/09/24/breaking-down-new-brett-kavanaugh-sexual-misconduct-allegation/> (on file with the *University of the Pacific Law Review*).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Rachel Martin, “*New Yorker*” Publishes Another Sexual Misconduct Allegation Against Kavanaugh, NAT’L PUB. RADIO (Sept. 24, 2018), <https://www.npr.org/2018/09/24/651030769/new-yorker-publishes-another-sexual-misconduct-allegation-against-kavanaugh> (on file with the *University of the Pacific Law Review*).

⁹⁹ *Id.*

¹⁰⁰ See Scott Detrow, *Lawmakers Debate Next Steps For Kavanaugh As Second Woman Comes Forward*, NAT’L

the deficiencies in the second woman's allegations, NPR aired stories about a woman who previously supported Kavanaugh but whose opinion was changing,¹⁰¹ and about Professor Anita Hill's belief that the Judiciary Committee was proceeding unfairly with the Kavanaugh nomination.¹⁰² By contrast, when *The New York Times* finally decided to publish something regarding the allegations, it included a discussion of the flaws in the allegations.¹⁰³ When a third woman came forward with claims against Kavanaugh, NPR reiterated Ramirez's allegations again without bothering to mention the concerns about those allegations.¹⁰⁴ Even on Thursday, the day on which the Judiciary Committee hearing was held, NPR was still referring to three accusers, continuing to suggest that the evidence against Kavanaugh was mounting, but still not providing essential details.

Of course, NPR's concealment of the facts is very troubling. A *Washington Post* journalist, who commented on *The New Yorker* story, argued that the believability of journalists depends on their credibility.¹⁰⁵ The writer noted that she was originally of the opinion that, if a second accuser came forward, the Kavanaugh nomination should not go forward. However, after reading the Ramirez allegations, she reached the opposite conclusion: that she must "discard my prewritten thesis and start fresh."¹⁰⁶ After recounting all the problems with Ramirez's allegations, she concluded that "given the thinness of the evidence, I'm frankly surprised the *New Yorker* ran the article."¹⁰⁷ So, instead of demanding Kavanaugh withdraw, on the basis that "a second allegation would be stronger, not weaker, than the first," she found herself making "a sudden shift toward the view that Republicans must take the matter at least through a hearing. Otherwise,

PUB. RADIO (Sept. 24, 2018), <https://www.npr.org/2018/09/24/651221310/lawmakers-debate-next-steps-for-kavanaugh-as-second-woman-comes-forward> (on file with the *University of the Pacific Law Review*).

¹⁰¹ See Audie Cornish, *Kavanaugh Supporter Now Has Second Thoughts*, NAT'L PUB. RADIO (Sept. 25, 2018), <https://www.npr.org/2018/09/25/651571233/kavanaugh-supporter-now-has-second-thoughts> (on file with the *University of the Pacific Law Review*).

¹⁰² See Merit Kennedy & Bill Chappell, *Anita Hill Says Kavanaugh Hearing Cannot "Be Fair,"* NAT'L PUB. RADIO (Sept. 25, 2018), <https://www.npr.org/2018/09/25/651489805/anita-hill-says-kavanaugh-accuser-hearing-cannot-be-fair> (on file with the *University of the Pacific Law Review*).

¹⁰³ See Stephanie Saul, Robin Pogrebin, Mike McIntire & Ben Protess, *In a Culture of Privilege and Alcohol at Yale, Her World Converged with Kavanaugh's*, N.Y. TIMES (Sept. 25, 2018), <https://www.nytimes.com/2018/09/25/us/politics/deborah-ramirez-brett-kavanaugh-allegations.html> (on file with the *University of the Pacific Law Review*) ("Ms. Ramirez initially told friends she had memory gaps and was not certain that Judge Kavanaugh was the person who exposed himself, as she related to Mr. Roche and some other old classmates last week. But, after six days of assessing her memories, *The New Yorker* reported, she said she was confident that Judge Kavanaugh was the man who had humiliated her.").

¹⁰⁴ See Scott Detrow, *Third Woman Comes Forward With Allegations of Sexual Misconduct Against Kavanaugh*, NAT'L PUB. RADIO (Sept. 26, 2018), <https://www.npr.org/2018/09/26/651918647/third-woman-comes-forward-with-allegations-of-sexual-misconduct-against-kavanaugh> (on file with the *University of the Pacific Law Review*); Ryan Lucas, *Judiciary Committee Reviews New Sexual Misconduct Allegations Against Kavanaugh*, NAT'L PUB. RADIO (Sept. 26, 2018), <https://www.npr.org/2018/09/26/651797758/judiciary-committee-review-new-sexual-misconduct-allegations-against-kavanaugh> (on file with the *University of the Pacific Law Review*).

¹⁰⁵ See Megan McArdle, *Me Too Depends on the Credibility of the Journalists Who Report It*, WASH. POST (Sept. 25, 2018), https://www.washingtonpost.com/opinions/metoo-depends-on-the-credibility-of-the-journalists-who-report-on-it/2018/09/25/02ddc35c-c104-11e8-9005-5104e9616c21_story.html (on file with the *University of the Pacific Law Review*).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

nominee after nominee would go down to a string of unverifiable allegations.”¹⁰⁸ To her, the Ramirez allegations reminded her of another journalistic fiasco: “When Rolling Stone failed to check allegations about gang rape at the University of Virginia, the magazine both smeared innocent young men and caused other victims to be treated more skeptically.” She concluded that “when a weak story breaks into an already raging political conflagration, it not only creates skepticism under which future abusers can shelter but also threatens to turn #MeToo into yet another divide in the culture wars.”¹⁰⁹ Of course, the journalism she was criticizing in the Ramirez case was *The New Yorker’s* decision to air the allegations at all. By contrast to NPR, *The New Yorker* at least had the journalistic integrity to explain the main flaws in Ramirez’s allegations. NPR’s Morning Edition made only vague references to the flaws in her contentions. On the morning of the Judiciary Committee hearing, NPR did not even mention the concerns about Ramirez’s allegations.¹¹⁰

If the Ramirez reporting were an isolated incident, it would be one thing. The difficulty is that NPR followed its reporting about the Ramirez allegations with shoddy reporting about the third accuser’s allegations.¹¹¹ In that accusation, a woman by the name of Julie Swetnick claimed that she had attended many parties during a two-year period at which she saw women purportedly drugged and gang raped (with guys being lined up to rape them), in which she alleged Kavanaugh participated.¹¹² In those interviews, NPR again failed to ask some of the most basic questions that one might have expected even a minimally competent journalist to have asked. For example, if the woman was aware that women were being drugged and gang raped at these parties, why in the world would she have attended them at all, much less many of them? Moreover, if she knew that women were routinely being gang raped, why did she not notify the police? Since the allegations were being made against a conservative, NPR again decided to play soft ball with its reporting.

The program *On the Media* (OTM), produced by WNYC, provides perhaps the most obvious and pristine example of left-wing bias; the program will sometimes make almost no pretense of being neutral and objective. The producers of OTM air programs talk about the “myth” of individuals pulling themselves up by their bootstraps, hammer away at their perception of racism, and rarely approach hot button issues with any sort of objectivity or balance. Following the Kavanaugh judiciary hearing involving Professor Blasey-Ford, OTM commentator Brooke Gladstone showed outright venom towards Kavanaugh and Trump, mounting a full-scale attack against Kavanaugh (and, to a lesser extent, Trump) in that program.¹¹³ Even in her introduction, Gladstone clearly displayed bias by

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See *Morning Edition*, NAT’L PUB. RADIO (Sept. 26, 2018), <https://www.npr.org/programs/morning-edition/2018/09/26/651707416?showDate=2018-09-26> (on file with the *University of the Pacific Law Review*).

¹¹¹ See *Third Woman Comes Forward*, *supra* note 104.

¹¹² *Id.*

¹¹³ See Brooke Gladstone, *Having It Both Ways With Kavanaugh*, ON THE MEDIA (Sept. 28, 2018), <https://www.wnycstudios.org/story/having-it-both-ways-kavanaugh?tab=summary> (on file with the *University of the Pacific Law Review*).

posing the following questions: “How long since naked id has been displayed so brazenly to a nation’s people, and embraced as rectitude by its most powerful men? How long since a country’s professed values, its principles, even its deodorizing pieties and hypocrisies, have been so swiftly repealed?”¹¹⁴ Throughout, Gladstone did not display even a pretense of journalistic objectivity.¹¹⁵

OTM’s blatant bias is in other instances as well. During the uproar over bias at NPR, rather than interviewing any of NPR’s critics, OTM did a lengthy interview with an NPR personality about whether he perceived that NPR is biased.¹¹⁶ Amazingly enough, the NPR personality did not perceive that NPR is biased!¹¹⁷ Apparently, OPM did not believe that it was necessary or worthwhile to interview any of NPR’s critics.¹¹⁸

So, if we are concerned about disinformation, should we also be concerned about lying politicians or media bias?

IV. SOCIAL MEDIA PLATFORMS AS THE “ARBITERS OF TRUTH”

Even if we were inclined to do something about disinformation, because of its tendency to undercut the democratic process, the question is whether there are effective solutions to the problem. Social media platforms (as private entities) are generally regarded as private platforms that have the power and censor speech on their platforms.¹¹⁹ Indeed, in the U.S., Section 230 of the Communications Decency Act explicitly authorizes social media platforms to regulate and censor information posted on their platforms,¹²⁰ and social media platforms have frequently exercised that authority.¹²¹

However, it is not clear that social media platforms should be treated as private actors under the First Amendment. For years, congressional committees have called the heads of social media platforms before them and pressured those companies to engage in more censorship. Whether such pressure is enough to transform the actions of social media companies into state actors is unclear, but there is much more governmental involvement in social media platform censorship, including pressure from the White House.¹²² According to information released by Twitter, “the Trump Administration asked for help in restricting messages that might encourage panic-buying by consumers at the start of the pandemic, while Biden’s people called for Twitter to silence speakers who

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *See* Brooke Gladstone, *The Bias Bias*, NAT’L PUB. RADIO (Mar. 11, 2011), <http://www.onthemedial.org/2011/mar/11/the-bias-bias/transcript/> (on file with the *University of the Pacific Law Review*) (interviewing NPR commentator Ira Glass).

¹¹⁷ *See id.* (quoting NPR commentator Ira Glass: “As somebody who works in public radio, it is killing me that people on the right are going around trying to basically rebrand us, saying that it’s biased news, it’s - it’s, you know, it’s left wing news, when I feel like anybody who listens to the shows knows that it’s not. And we are not fighting back.”).

¹¹⁸ *Id.*

¹¹⁹ *See* Russell L. Weaver, *Social Media, Section 230, and Free Expression*, 73 *MERCER L. REV.* 615, 619 (2022).

¹²⁰ 47 U.S.C. § 230.

¹²¹ *See Social Media, Section 230, and Free Expression*, *supra* note 117, at 620–22; Bray, *supra* note 69.

¹²² *See* Bray, *supra* note 69.

dissented from the official government line.”¹²³ Moreover, there is evidence of constant communication between the FBI and Twitter officials responsible for content moderation.¹²⁴ In *Missouri v. Biden*,¹²⁵ a federal district court concluded that governmental officials tried to coerce social media companies into censoring content and held that content decisions should be treated as state action (rather than private action).

Although Twitter sometimes refused the FBI's censorship requests, “the company was paid \$3,415,323 to cover the cost of working with the feds.” While Twitter’s compensation was not unethical, the size of the payment suggests a high level of government influence over content decisions.¹²⁶ Moreover, there is plenty of evidence showing that the federal government worked the refs like an aggressive football coach, hectoring and goading the company's executives into exercising ever-stricter control over what users are permitted to say.¹²⁷ This was true for not only the FBI, but also the White House.¹²⁸ “Since the US government has the power to make things very unpleasant for companies that resist, the temptation to comply may prove irresistible.”¹²⁹

Even if one could argue that social media platforms could or should ban “disinformation,” it is not clear that they have the capacity to make good decisions regarding what constitutes “disinformation.” Purportedly, Facebook receives more than 6.5 million reports a week regarding allegations of fake or improper accounts,¹³⁰ and Facebook’s moderators are sometimes forced to make decisions regarding the permissibility of content in as little as 10 seconds.¹³¹ The time pressures inevitably result in bad decisions. For a while, Facebook banned all claims that COVID-19 was man-made,¹³² but it eventually decided to allow such claims.¹³³ In addition, Facebook purportedly banned references to certain Bible passages, as well as links to Biblehub.com.¹³⁴ After investigating, Facebook confirmed that links to Biblehub.com had been banned, eventually admitted that it

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Missouri v. Biden*, No. 3:22-CV-01213, 2023 WL 4335270 (W.D. La. July 4, 2023).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See Jenin Younes & Arno Kheriaty, *The White House Covid Censorship Machine*, WALL STREET J. (Jan. 9, 2023), <https://www.wsj.com/articles/white-house-covid-censorship-machine-social-media-facebook-meta-executive-rob-flaherty-free-speech-google-11673203704> (on file with the *University of the Pacific Law Review*) (“Newly released documents show that the White House played a major role in censoring Americans on social media.”).

¹²⁹ See Bray, *supra* note 64.

¹³⁰ Nick Hopkins, *Revealed: Facebook's Internal Rulebook on Sex, Terrorism and Violence*, GUARDIAN (May 21, 2017), <https://www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence> (on file with the *University of the Pacific Law Review*).

¹³¹ *Id.*

¹³² See Thomas Barrabi, *Facebook Ends Ban on Posts Claiming COVID-19 Is Man-Made: Facebook Had Previously Insisted the Claim Had Been 'Debunked'*, FOX BUS. (May 26, 2021), <https://www.foxbusiness.com/technology/facebook-ends-ban-posts-claiming-covid-19-man-made> (on file with the *University of the Pacific Law Review*).

¹³³ *Id.*

¹³⁴ See Julia Marnin, *Fact Check: Is Facebook Banning Bible Passages?*, NEWSWEEK (Jan. 28, 2021), <https://www.newsweek.com/fact-check-facebook-banning-bible-passages-1565190> (on file with the *University of the Pacific Law Review*).

had acted in error, and purportedly rectified the problem.¹³⁵ Facebook even went so far as to ban academics researching ad transparency and the spread of misinformation on Facebook.¹³⁶

Indeed, the entire process of seeking out and purging disinformation is fraught with peril. For example, there was considerable controversy when media released the story regarding Hunter Biden's laptop. Initially, reputable news organizations denounced allegations regarding the story as "fake news," and Twitter quashed the story. About the same time, a variety of former governmental officials came forward to brand the story as "Russian misinformation."¹³⁷ As a result, most reputable news organizations dismissed the allegations, and refused to report the story even though there were allegations of corruption by the Bidens and even though an election was imminent.¹³⁸ For example, NPR, in a segment issued just a couple of weeks before the presidential election, dismissed the laptop story as "questionable,"¹³⁹ and suggested that the allegations were part of a conspiracy theory pushed by then President Trump and his allies.¹⁴⁰ The Public Broadcasting Service (PBS) similarly dismissed the allegations, suggesting Trump's allies were pushing "Russian misinformation."¹⁴¹ The *New York Times* suggested Trump was colluding with the Russians and dismissed the story, stating "Giuliani's dirty tricks are the scandal, not Hunter Biden's hard drive."¹⁴² Twitter squelched the story.¹⁴³

Today, reputable news organizations recognize that the Hunter Biden laptop story was not "disinformation," "fake news," or "Russian propaganda." A *New York Times* article, citing reporting by a staff member at Politico, stated that "the most explosive emails from Hunter Biden's purported laptop were entirely

¹³⁵ *Id.*

¹³⁶ See James Vincent, *Facebook Bans Academics Who Researched Ad Transparency and Misinformation on Facebook: The Researchers Say Their Work Is Being Silenced*, VERGE (Aug. 4, 2021), <https://www.theverge.com/2021/8/4/22609020/facebook-bans-academic-researchers-ad-transparency-misinformation-nyu-ad-observatory-plugin> (on file with the *University of the Pacific Law Review*); Stephens, *supra* note 55.

¹³⁷ See Scott Simon, *More Details Emerge in Federal Investigation into Hunter Biden*, NAT'L PUB. RADIO (Apr. 9, 2022), <https://www.npr.org/2022/04/09/1091859822/more-details-emerge-in-federal-investigation-into-hunter-biden> (on file with the *University of the Pacific Law Review*) ("And then there was this cohort of paid pundits—50 former national security officials, many of them appearing frequently in mainstream media outlets—who came together for a statement saying that this surfacing of the laptop bore all the hallmarks of a Russian misinformation campaign.") (quoting David Folkenflik).

¹³⁸ *Id.*

¹³⁹ See David Folkenflik, *Analysis: Questionable 'N.Y. Post' Scoop Driven by Ex-Hannity Producer And Giuliani*, NAT'L PUB. RADIO (Oct. 17, 2020), <https://www.npr.org/2020/10/17/924506867/analysis-questionable-n-y-post-scoop-driven-by-ex-hannity-producer-giuliani> (on file with the *University of the Pacific Law Review*).

¹⁴⁰ *Id.* ("The story fits snugly into a narrative from President Trump and his allies that Hunter Biden's zealous pursuit of business ties abroad also compromised the former vice president.")

¹⁴¹ See Judy Woodruff, *Are Trump Allies Sharing Russian Disinformation About Biden?*, PBS NEWSHOUR (Oct. 16, 2020), <https://www.pbs.org/video/warning-signs-1602880956/> (on file with the *University of the Pacific Law Review*).

¹⁴² See Michelle Goldberg, *Is the Trump Campaign Colluding with Russia Again?*, N.Y. TIMES 26 (Oct. 21, 2020), <https://www.nytimes.com/2020/10/19/opinion/trump-campaign-rudy-giuliani.html> (on file with the *University of the Pacific Law Review*).

¹⁴³ See Simon, *supra* note 135 ("First, let's acknowledge social media's role. A number of platforms tamped down on sharing of the Post's story. In the case of Twitter, not only did they try to block sharing of it, they suspended The New York Post's actual Twitter account for sharing its own article. That was a wild overreach, and even Twitter had to acknowledge that.") (quoting David Folkenflik); see Stephens, *supra* note 55.

genuine” and were not simply Russian-planted disinformation.¹⁴⁴ Even National Public Radio recognized that there was some validity to the allegations regarding the laptop: “much of the mainstream media dismissed a story about Hunter Biden’s business dealings. Now emails supporting the story have been authenticated,”¹⁴⁵ and the *Boston Globe* questioned the decision to suppress the story.¹⁴⁶ If the government had tried to suppress the story, it would have been regarded as imposing an unconstitutional “prior restraint” on speech. The bottom line is that it isn’t clear that anyone (or any social media platform) should set itself up as an arbiter of “truth.”

Moreover, there is a very real risk that governmental officials will try to unduly influence the censorship decisions of social media platforms. The Twitter files reveal that the U.S. government interfered with Twitter in an effort to encourage Twitter to suppress content.¹⁴⁷ For example, the Twitter Files suggest that the FBI warned Twitter “to expect a flood of fake news out of Russia just in time for the election.”¹⁴⁸ Indeed, there were approximately 150 emails between Yoel Roth, Twitter’s chief in charge of weeding out inappropriate content, and FBI officials over a two year period.¹⁴⁹ Roth admitted that these emails played a role in his decision to quash the Hunter Biden story.¹⁵⁰ The FBI even went so far as to give Twitter officials temporary security clearances, so they could receive classified briefings prior to the 2020 election.¹⁵¹ In addition, the FBI notified Twitter regarding tweets that it regarded as “suspicious,” and suggested that the tweets should be suppressed.¹⁵² If governmental pressure is involved, social media platform censorship may be politically rather than objectively based.

V. FLAGGING POTENTIAL DISINFORMATION

One potential solution to the problem of disinformation is to “flag” it as constituting “disinformation,” and then perhaps direct the viewer to sources that contain accurate information. This approach would be less objectionable than outright information suppression because the media could distribute the information but counter-speech would attempt to correct the record.

In some respects, efforts to flag or question disinformation might prove to be an effective remedy. For example, in the case of “fake news” on the internet, the reader could be referred to more accurate information. The remedy could also work for false statements by politicians. For example, when President Biden lied about his military advisers’ recommendations regarding the Afghanistan

¹⁴⁴ See Stephens, *supra* note 55.

¹⁴⁵ See Simon, *supra* note 135.

¹⁴⁶ See Bray, *supra* note 69 (“Another discovery: There’s no evidence of any “deep state” conspiracy behind Twitter’s decision to suppress the New York Post’s October 2020 story about the contents of a laptop belonging to President Biden’s son Hunter. Twitter executives screwed up that decision all by themselves. They chose to believe a false allegation that the data had been stolen by hackers.”).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

withdrawal, the Biden comments (to the extent they are reported online) would be linked to verbatim transcripts of the contrary testimony by his military advisers.¹⁵³ The situation might also work to combat media bias. For example, if NPR's reported about Kavanaughonline, the flag could refer the reader to the *N.Y. Times* analysis of the allegations or the *Washington Post* article questioning the allegations. In the case of the OPM program on whether NPR is biased, the listener or reader (for someone who read the article online) could be referred to some of the criticisms of NPR.

However, there is always the risk that the flag will involve disinformation and point the reader to inaccurate information. In the case of the Hunter Biden laptop story, the media got it wrong. Thus, an attempt to link the laptop story to articles questioning its validity would itself constitute disinformation. Likewise, if the Nunes intelligence report were linked to the Schiff denunciation of that report, the responsive speech might again involve the promotion of disinformation.

VI. IS A DISINFORMATION BOARD THE SOLUTION?

One possible way to control fake news is to establish systems designed to regulate and control fake news.¹⁵⁴ For example, the Department of Homeland Security (DHS), proposed the creation of a Disinformation Board to respond to false information.¹⁵⁵ In theory, the Board was designed to create a set of standardized practices that could be used by federal agencies to respond to violent threats against the nation.¹⁵⁶ However, the Board halted this effort when it was met with a firestorm of criticism, which led to a suspension of the Board.¹⁵⁷

Should there be a federal Disinformation Board to deal with disinformation in society? In fact, such a board runs directly counter to our free speech tradition, which generally denies government the ability to regulate the content of speech (except in limited situations). Even if society could agree that we should create and maintain a "Disinformation Board," it would face questions regarding the scope of the board's authority and jurisdiction. Should the board police disinformation on the internet? On AM radio? Should it intervene and check false statements by public officials like Clapper, Trump, Obama, and Biden? Should it also police media bias and "call it out"?

¹⁵³ See Bret Stephens, *An Ethically Challenged Presidency*, N.Y. TIMES 21 (Oct. 7, 2021), <https://www.nytimes.com/2021/10/05/opinion/biden-ethics-son.html> (on file with the *University of the Pacific Law Review*).

¹⁵⁴ See Michael P. Goodyear, *Priam's Folly: United States v. Alvarez and the Fake News Trojan Horse*, 73 STANFORD L. REV. 194, 207 (2021) (suggesting that courts apply a lower standard of review, and that certain public health initiatives be subject to fake news regulation); Schuyler, *supra* note 5, at 240 (suggesting that fake news should be controlled through a notice-and-correction-or-exclusion procedure).

¹⁵⁵ See Deepa Shivaram, *DHS Pauses a Board Created to Combat Disinformation Amid a Campaign to Discredit It*, NAT'L PUB. RADIO (May 18, 2022), <https://www.npr.org/2022/05/18/1099848240/dhs-disinformation-group-pause> (on file with the *University of the Pacific Law Review*).

¹⁵⁶ See Nicole Seganga, *What Is DHS' Disinformation Governance Board and Why Is Everyone So Mad About It?*, CBS NEWS (May 6, 2022), <https://www.cbsnews.com/news/what-is-dhs-disinformation-governance-board-and-why-is-everyone-so-mad-about-it/> (on file with the *University of the Pacific Law Review*).

¹⁵⁷ See Shivaram, *supra* note 152.

Of course, the more critical question is whether a Disinformation Board should be given the power to prohibit, criminalize, sanction, or enjoin the dissemination of disinformation. Presumably, any attempt to prohibit the dissemination of disinformation would be treated as a “prior restraint” on speech and therefore would be presumptively unconstitutional.¹⁵⁸ And it seems unlikely that the courts would allow the government to criminalize speech which does not involve fraud, perjury, or some other objective basis for suppression.

Even if we could agree that a Disinformation Board should exist, would the American people trust the government to determine what speech is false, and to prohibit it? As a general rule, governments do not have the power to ban speech simply because it is false. Moreover, any assertion of authority of this nature would run counter to the idea that false speech is protected. *United States v. Alvarez*¹⁵⁹ involved an individual’s false assertion that he won the Congressional Medal of Honor. Alvarez recognized that individuals can be prosecuted for false speech in limited and defined circumstances (e.g., perjury in a judicial proceeding or making false statements to a governmental official or agency).¹⁶⁰ However, he could not be convicted for making a false statement to the effect that he won the medal.

Alvarez is consistent with the Court’s general free speech jurisprudence. If the legitimacy of our governmental system depends on the consent of the governed, it is inconsistent with that system to give government the power to control, limit, and suppress the range of ideas that the people can hear or consider. As the U.S. Supreme Court recognized in *Ashcroft v. American Civil Liberties Union*,¹⁶¹ as “a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹⁶² Likewise, in *Cohen v. California*,¹⁶³ the Court flatly recognized that the “constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.” *Cohen* went on to state that it would not “indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”¹⁶⁴

Of course, the modern aversion to governmental control of speech has deep roots. Following Johannes Gutenberg’s invention of the printing press in the fifteenth century, many kings feared that widespread use of the press might

¹⁵⁸ See *Near v. Minnesota*, 283 U.S. 697 (1931).

¹⁵⁹ *United States v. Alvarez*, 567 U.S. 709 (2012).

¹⁶⁰ *Id.*

¹⁶¹ *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 573 (2002).

¹⁶² See *United States v. Alvarez*, 567 U.S. 709 (2012); *Brown v. Ent. Merchants Ass’n*, 564 U.S. 756 (2011).

¹⁶³ *Cohen v. California*, 403 U.S. 15, 24 (1971).

¹⁶⁴ *Id.* at 26.

undermine their power and therefore sought to control and limit its use.¹⁶⁵ For example, the English government used the decision in *de Libellis Famosis*,¹⁶⁶ to criminally prosecute those who criticized the Crown or religious officials of high station, and it did so in an effort to prosecute, intimidate, and silence governmental critics.¹⁶⁷ Moreover, under English law, a defendant could not rely on the defense of truth; indeed, truth was treated as an aggravating factor.¹⁶⁸ “Since maintaining a proper regard for government was the goal of this new offense, it followed that truth was just as reprehensible as falsehood and was eliminated as a defense.”¹⁶⁹ Similar restrictions were imposed in the American colonies where the British prosecuted “criticism directed against the government or public officials” because it was considered to be “a threat against public order and a criminal offense,” and again truth was not a defense.¹⁷⁰

In general, the Court’s decisions have suggested that government should have limited authority to control either thought or speech. As the Court stated in *Ashcroft v. Free Speech Coalition*, “First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”¹⁷¹ Likewise, in *Virginia v. Black*,¹⁷² the Court stated that the “hallmark of the protection of free speech is to allow free trade in ideas—even ideas that the overwhelming majority of people might find distasteful or discomforting.” Professor Emerson argued that the “only justification for suppressing an opinion is that those who seek to suppress it are infallible in their judgment of the truth. But no individual or group can be infallible, particularly in a constantly changing world.”¹⁷³ As a result, through “the acquisition of new knowledge, the toleration of new ideas, the testing of opinion in open competition, the discipline of rethinking its assumptions, a society will be better able to reach common decisions that will meet the needs and aspirations of its members.”¹⁷⁴

Any attempt to regulate fake news might lead to a number of thorny questions regarding the proper role of government in our constitutional system. If Congress decides to create a Disinformation Board to regulate fake news, would U.S. society feel comfortable giving the Disinformation Board the power to determine which ideas and facts are “true,” and which are “false,” and to prosecute those who espouse ideas and facts that the Board regards as completely false? Would we feel comfortable giving the Disinformation Board the power to license

¹⁶⁵ See RUSSELL L. WEAVER, CATHERINE HANCOCK & JOHN C. KNECHTLE, *THE FIRST AMENDMENT: CASES, PROBLEMS & MATERIALS* 5 (Carolina Academic Press, 7th ed. 2023).

¹⁶⁶ The Case *De Libellis Famosis*, or of Scandalous Libels 77 Eng. Rep. 250 (Star Chamber 1606).

¹⁶⁷ See William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See Lawrence W. Crispo, Jill M. Slansky & Geanene M. Yriarte, *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 7 (1997).

¹⁷¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002).

¹⁷² *Virginia v. Black*, 538 U.S. 343, 358 (2003).

¹⁷³ Emerson, *supra* note 2, at 882.

¹⁷⁴ *Id.*

news, based on its truth or falsity, and the power to prohibit false facts and ideas? Would it also be allowed to censor the speech of politicians or media organizations? My guess is no.

If the Disinformation Board were given such authority, how would it go about determining what qualifies as “fake news?” To qualify as false, must something be “completely false,” or could something be regarded as “fake news” if it is simply biased or slanted in favor of one side of a debate? Many might fear the government would not exercise such power impartially. For example, suppose that during the Obama Administration, the Disinformation Board decided climate change was a “fact,” and climate change denial was fake news. Could the Disinformation Board have criminally prosecuted those who argued that climate change was a hoax? Would the Board have been free to redefine the truth regarding climate change when Donald Trump came to power? In other words, could the Board have changed its definition of the “truth,” dismissed all charges against climate change deniers, and criminally prosecuted those who were arguing that climate change is a real phenomenon? Would we, as a society, feel comfortable giving the government the power to declare that facts like these are undeniably true, and subject to criminal sanctions anyone who refuses to accept them? Given that the last three administrations have lied to the American people at various times, would we be comfortable giving them the power to censor disinformation?

Of course, the Disinformation Board might be given the power to prohibit not only “completely false” ideas or facts, but also to prohibit slanted, biased, or partially false statements. In other words, the Disinformation Board might be given the power to impose the equivalent of the Federal Communication Commission’s “fairness doctrine,”¹⁷⁵ but extend that doctrine beyond broadcasting to all communications, including newspapers, cable television, internet, and satellite communications. If the Board were given the power to prosecute for bias or lack of “fairness,” it might have lots to prosecute on both sides of the political spectrum (as the prior examples illustrate). Those on the left might argue that Fox News and other right-wing commentators should be criminally prosecuted for their biased views and statements. At the same time, those on the right who believe the media has a left-wing bias, might argue for prosecution of a wide swath of left-wing journalists. Although I would personally find it offensive to prosecute anyone for simply expressing their ideas, no matter how biased or slanted, if I were forced (at gun point on threat of death) to name a news personality who exhibits extreme bias and lack of objectivity, I would name a particular National Public Radio program host; someone whose work I often find highly offensive because it is so biased and slanted. Would the Disinformation Board be free to criminally prosecute the NPR host for bias and slanted news coverage? Would the host have a defense if there is *some truth* to his statements of fact and articulated ideas? I’m not confident that any of this would be a good idea.

In the final analysis, even though we realize that disinformation can distort the democratic process, the Court made clear in decisions like *New York Times*,

¹⁷⁵ See *Red Lion Broad. Co. v. Fed. Commc’ns Comm’n*, 395 U.S. 367, 369 (1969) (The “Fairness Doctrine” required that broadcasters’ discussion of public issues give fair coverage to both sides of those issues.).

Inc. v. Sullivan,¹⁷⁶ and *Near v. Minnesota*,¹⁷⁷ that information should not be withheld from the public even though it may contain an element of untruth. In the case of Hunter Biden's laptop, the American people were denied accurate information, during an election, because it was regarded as misinformation. Not only the media, but also social media platforms, sought to suppress the Hunter Biden story.

VII. CONCLUSION

Disinformation is nothing new and is present in modern U.S. society. The problem of disinformation is undoubtedly heightened by the internet, and the fact that the internet enables virtually everyone to engage in widespread communication. However, the evidence clearly shows that our presidents and various governmental officials have not been shy about spreading disinformation. Moreover, there is the problem of media bias which presents the public with limited and incomplete information regarding issues of public importance.

The more difficult problem is how to deal with the problem of disinformation. The concept of a "Disinformation Board" seems to be inconsistent with the American tradition. In addition, it is doubtful whether social media platforms can be trusted to weed out disinformation. For one thing, it is not clear that they have the capacity or competency to determine what is disinformation. Secondly, there is ample evidence of governmental attempts to manipulate and control social media companies' censorial decisions.

Without question, fake speech can be subjected to counter speech that attempts to set the record straight and helps inform the public regarding the truth. Whether this remedy will be effective is far from unclear, but there may be no better alternative. The more interesting question is how friction between the U.S. and Europe will be resolved. Europe is moving towards mandating content moderation on social media networks. Much of this moderation would probably be unconstitutional in the U.S. if mandated by the government.¹⁷⁸

Of course, there are some remedies for disinformation. Although the U.S. Supreme Court has held that even false speech may be entitled to First Amendment protection,¹⁷⁹ the government may prohibit certain limited classes of false speech (e.g., perjury in judicial proceedings).¹⁸⁰ In addition, if an individual disseminates false and defamatory information about another person, it is theoretically possible to recover for defamation.¹⁸¹ However, it is extremely difficult for public officials to recover for defamation,¹⁸² as well as for public figures to do so,¹⁸³ and

¹⁷⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

¹⁷⁷ *Near v. Minnesota*, 283 U.S. 697 (1931).

¹⁷⁸ See generally *EU Plans Stricter Consumer Protection Laws for Social Media*, SOFIA NEWS AGENCY, 2018 WLNR 9032846 (MARCH 23, 2018).

¹⁷⁹ See *United States v. Alvarez*, 567 U.S. 709 (2012).

¹⁸⁰ *Id.*

¹⁸¹ See *THE RIGHT TO SPEAK ILL*, *supra* note 2.

¹⁸² See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁸³ See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

defamation litigation is relatively uncommon in the United States.¹⁸⁴ In addition, courts are rarely permitted to enjoin false commercial speech.¹⁸⁵ However, generally the First Amendment prohibits government from censoring speech simply because it regards that speech as untruthful (or, for that matter, “offensive” or “distasteful”).¹⁸⁶ On balance, the U.S. Supreme Court is wary of governmental attempts to control the information flow and has generally regarded both content-based and viewpoint-based restrictions on speech as presumptively unconstitutional.¹⁸⁷ It is not for government to dictate what people should believe, but rather for the people to decide for themselves.

Two quotes come to mind. One commentator noted that government is moving to protect us from “fake news,” but then asked, “when our political leaders set the terms of permissible debate, how will we protect ourselves from them?”¹⁸⁸ Ultimately, there may be no effective remedy for disinformation, despite the challenges it presents to our democratic system. As the U.S. Supreme Court has recognized, the press has lots of faults and flaws; the only thing worse than a free press is the alternative.¹⁸⁹ Perhaps the only thing worse than disinformation is governmental (or social media platforms’) attempts to control information.

¹⁸⁴ See THE RIGHT TO SPEAK ILL, *supra* note 2, at 85.

¹⁸⁵ See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).

¹⁸⁶ See *Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹⁸⁷ See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

¹⁸⁸ See *Bray*, *supra* note 69.

¹⁸⁹ See *Near v. Minnesota*, 283 U.S. 697, 718 (1931) (“Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness?”).