Can The Government Pressure Private Companies To Stifle Speech?

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[00:00:00.0] Jeffrey Rosen: On March 18th, the Supreme Court heard oral arguments in Murthy versus Missouri and NRA versus Vullo, two cases in which government officials allegedly pressured private companies to target disfavored speech about COVID and guns.

[00:00:18.9] Jeffrey Rosen: Hello, friends, I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this week's episode, we'll explore the line between government efforts to coerce and persuade companies to take down content or avoid conduct that allegedly causes harm. Joining me to guide this discussion are two of America's leading free speech scholars. Alex Abdo is the inaugural litigation director of the Knight First Amendment Institute at Columbia University. He previously worked at the ACLU, where he was at the forefront of litigation about NSA surveillance, anonymous speech, and government transparency. Alex filed a brief in support of neither party in Murthy versus Missouri. Alex, it's wonderful to welcome you back to We the People.

[00:01:12.4] Alex Abdo: Thanks so much for having me, Jeff.

[00:01:14.3] Jeffrey Rosen: And David Greene is a senior staff attorney and civil liberties director at the Electronic Frontier Foundation. He's also an adjunct professor at the University of San Francisco School of Law. David filed a brief in support of neither party in Murthy versus Missouri. David, it's wonderful to have you back on We the People.

[00:01:30.5] David Greene: Great to be here. Thanks for having me.

[00:01:32.6] Jeffrey Rosen: Alex, what are the main issues in Murthy versus Missouri, and how did the Supreme Court on Monday begin to take them up?

[00:01:41.6] Alex Abdo: Well, the main question in the case is whether the Biden and Trump administrations violated the First Amendment by pressuring the social media platforms to take down what the administrations consider to be disinformation, whether about the COVID-19 pandemic and the vaccines or the 2020 elections. And the Supreme Court, as you said, heard oral

argument on Monday. And just at a very high level, I was actually quite encouraged by the argument, because while some people have been worried that the court might radically remake First Amendment doctrine in responding to the allegations made by the plaintiffs in this case, who are Missouri and a handful of other plaintiffs. I thought the court was quite sensitive to the various interests at stake, not only the interest in making sure that the government doesn't unconstitutionally threaten speech intermediaries into engaging in censorship. But also in leaving space for the government to participate in public discourse and to try to steer public attention to the important issues happening in our country at the moment. So I was encouraged and I'm very curious to hear what David's reaction was to the argument.

[00:03:00.8] Jeffrey Rosen: Thank you so much. David, what is your reaction? And remind us about some of the facts in the case, they involved statements by President Biden that misinformation was killing people and other less dramatic statements. But what's going on?

[00:03:14.6] David Greene: Yeah, well, I think overlying this whole case, I've called it the 20,000 page elephant in the courtroom. Is the evidentiary record in this case that the various plaintiffs submitted of a series of communications between various governmental officials, a lot of different executive branch officials representing different agencies. And the social media platforms from a range of topics, as Alex said, a big chunk of them about COVID vaccine hesitancy. And there you really saw a lot of communications between the president's social media director, who depending on whom you talk to is either a person with great authority or someone who is performing a perfunctory role and has no authority. The Surgeon General's office, the CDC, the Fauci's Infectious Disease Agency. So there's that category. There is, as Alex said, that the category that sort of deals with mostly with election interference and particularly a concern for foreign election interference. And this involved communication. Again, the allegations about communications from the FBI, from the State Department, and then also communications not to the platforms directly, but from CISA, the cybersecurity agency to the FBI. So there was that category.

[00:04:50.7] David Greene: Then there's some other ones as well that deal with alleged effort to suppress stories about Hunter Biden's laptop, there's a few in there as well. And some of these communications really run the range from things that seem to be appropriate government communications to things that also seem to be more heated conversations that I think get much closer to inappropriate and berating. And something where you could see the platforms feeling that they really did not have a choice whether to comply. It really will be interesting to see whether how much the court engages with this evidentiary record, or if it looks for an easier way out, and that way out would be understood.

[00:05:45.5] Jeffrey Rosen: There was an exchange between Justice Kavanaugh and Mr. Fletcher, and Kavanaugh said, “Just so I understand your key legal argument. I think, but correct me if I'm wrong, that coercion does not encompass significant encouragement or entanglement, and that it would be a mistake to so conclude, because traditional everyday communications would suddenly be deemed problematic.”

[00:06:13.7] Jeffrey Rosen: And Fletcher said that's exactly right and said the lower courts have gone much further and say that we're gonna risk turning the platforms and lots of other entities that are interacting with the government into state actors and restricting their editorial choices. Alex, what was that exchange about and how is the key issue in the case being framed?

[00:06:31.4] Alex Abdo: Well, so that exchange was about what the right First Amendment standard is for evaluating claims that the government unconstitutionally pressured private speech intermediaries into suppressing speech. And most First Amendment scholars and advocates will point to a 1963 case called Bantam Books as setting out the relevant standard. And in Bantam Books, the Supreme Court said that it violates the First Amendment for the government to coerce, in that case, book distributors into taking supposedly objectionable books off their shelves. And lower courts since that case have understood Bantam Books to draw a line between coercion on the one hand, which is unconstitutional, and persuasion on the other hand, which the courts have held is permissible for the government to engage in. But some lower courts have instead asked whether, in these kinds of cases, in cases alleging unconstitutional pressure. They've asked instead whether the government has either so coerce or so significantly encouraged private actors as to render the private action a state action for which the government can be held accountable. And the state action doctrine, might have some relevance to these kinds of jawboning claims in narrow circumstances.

[00:07:52.7] Alex Abdo: But one thing we argued in our brief, and I should say that, I at least personally was very motivated my thinking here by a lot of the writing that EFF has done, and David in particular, on the question of the relationship between Bantam Books and the State Action Doctrine. But one thing we argued in our brief was that, generally speaking, if a plaintiff is alleging that the government exerted too much pressure on a private actor to suppress speech, the right standard is Bantam Books. Which again draws the line between coercion and persuasion. And that the State Action Doctrine is a bit of a blunt instrument when it comes to evaluating these kinds of claims, blunt, I think, in two respects. One is that the State Action Doctrine actually generally erects too high a barrier for First Amendment claims. The test that the Fifth Circuit pointed to and that the plaintiffs in the Murthy case point to comes from Blum versus Yaretsky. Which said you can hold the government liable for private action when the government, again, has either so significantly encouraged or coerced the conduct as to render the choice in law to be that of the state. Which is a very high standard and it should be a high standard when you're talking about state action, but I think it's actually too high a standard for vindicating First Amendment rights, where we ought to care about coercion that doesn't reach this very, very high level of coercion that was set out in the Blum case.

[00:09:25.3] Alex Abdo: The other reason why I think it's a blunt instrument is that, and this is a point that David and EFF have argued persuasively in amicus briefs in a series of blog posts before, long before the Murthy case got to the Supreme Court. Which is that it doesn't make sense to hold that the private actor 'cause one consequence of a finding of state action is that the private actor themselves can be held to constitutional limitations. Which means that a plaintiff could actually seek an injunction and damages against the private actor for engaging in unconstitutional state action, which is a very strange remedy, at least as far as the First

Amendment is concerned. When you think about the fact that it might entail an injunction against a platform for having been the victim of coercion or damages finding against a platform for having been the victim of coercion. So it may be that state action has a role to play in this area, but if so, it needs to be tweaked to account for the significant First Amendment interests at stake when you are considering the possibility of legal remedies against a private actor for their own editorial decisions.

[00:10:43.0] Jeffrey Rosen: Congratulations on the numerous shout outs for your Knight brief in the oral argument in that exchange with Justice Kavanaugh said the Knight brief talks about examples where it's probably not uncommon for government officials to protest an upcoming story on surveillance or detention policy and say, if you run that it's gonna harm the war effort and put Americans at risk.

[00:11:11.6] Jeffrey Rosen: David, as Alex said, the EFF brief was influential and you both agree about the importance of the Bantam standard and not a high state action standard. What's the stakes of adopting the high standard? And Justices Kavanaugh and Kagan talked in oral argument that it's really common for government officials to call up newspapers and jawbone them and say you got it wrong and so forth. Why are they concerned that the Fifth Circuit standard would chill a lot of that kind of legitimate activity?

[00:11:41.4] David Greene: Yeah, that exchange by both Justice Kavanaugh and Justice Kagan, who were responding to a statement that Justice Alito made.

[00:11:50.8] Justice Alito: Wow. I cannot imagine federal officials taking that approach to the print media, our representatives over there.

[00:12:01.0] David Greene: "And complain to them about something they'd written, I can't imagine that would ever happen." And then you had Justice Kavanaugh sort of huff a bit and say, "Well, I did that all the time." And then Kagan later said the same thing, and both Justices Kavanaugh and Kagan had worked in the White House, Justice Alito had also, but I guess he didn't have the same experience. And so it was very interesting. And frankly, as I was sitting in the courtroom, I wasn't sure whether to be heartened by that or actually very, very concerned about how routine they thought it was. I actually was concerned that they were not fully appreciating the gravity of jawboning and what a bad practice it can be as well. I do think they said it as more of a response to Justice Alito just to say that we're not making a special rule about internet, that what the executive branch here did was not completely exceptional. And by the end of the argument, I wasn't concerned that they would give the government too much protection. It certainly happens with legacy newspapers all the time, especially in the national security branch. And this it's a fairly common practice for newspapers before they'll publish either classified information that's been leaked to them or even a controversial take to run this by the government.

[00:13:33.8] David Greene: And again, not to get permission to publish it, but sometimes to get comment. And there will be times when the government will ask that publication either be delayed or not happen at all. And then the key point, though, is whether that decision remains ultimately with the publisher or whether the government is essentially not giving them a choice. And that's the same question that they're trying to answer here. And the difficulty is in trying to

figure out what do you consider and how do you know whether someone actually has the choice or not. And the coercion doctrine really tries to answer that question, and it unfortunately does it in a bit of a clumsy way, and that's, I think, why we have this case and why it's so challenging. Because of these concerns where we want to allow, preserve a productive role for government to inform publishers, both social media companies and otherwise about things that are important to government. And especially things where government actually might have a lot of expertise to offer, and public health is one of those areas. But we do want to define the appropriate role for government to do so. And I am very uncomfortable with government telling a publisher not to publish something.

[00:15:01.6] David Greene: I don't think that's per se wrong, but I do think it needs to be done very, very carefully. And this came up a bit in the argument that the Missouri side was saying, and this was by the Louisiana Solicitor General, where he at one point said, that the rule he would propose would be they could inform, but they couldn't make any ask. And once at the point they made a specific ask to remove material that crossed the constitutional line, I don't think that had, that got a lot of traction with Alito. And that again led back to this colloquy again where Justice Kagan, Justice Kavanaugh talked about the many, many, many, many times they had asked publishers not to publish things.

[00:15:45.0] Jeffrey Rosen: David, tell us about those examples. Mr. Fletcher, again, gave a bunch of examples of legitimate engagement by the government on behalf of public policy, including childhood mental health, anti-Semitic speech, Islamic phobic speech online, the national security space and domestic law enforcement. And suggested, as well as election integrity, false statements about elections and so forth. How would the Louisiana's test make those kind of legitimate interactions impossible, and where did you see the Justice's converting?

[00:16:20.4] David Greene: At the argument, the test that Mr. Aguiñaga, the Louisiana Solicitor General, offered, he at first offered, and I think this is where he might have gotten into some trouble. He at first offered a test that he at first offered a test that they could inform, but that any specific request would cross the line. So you could say something, for example, where we have found you can inform them that we have found information we believe to be false election information, but you could not say, and we think you should remove it. And the court really asked him questions, really seeking a limiting principle to that, seemed to be saying that if you could make the specific request, as long as it was clear that the choice remained with the social media company, whether to do it. And it was unclear what the state's position was with respect to that, he seemed to say, "Well, yes, there probably is something in the middle." But I never got the sense that either from their papers or from the argument exactly what that middle ground was. There was a point where several of the Justices, or maybe only, I think this was in an exchange with Justice Gorsuch, wondered whether the subject matter should be a factor in the test, whether there was some type of public interest component that should be considered in the test.

[00:17:50.0] David Greene: That is if the subject matter was something that was important for the government to be heard on, then that would factor into whether or not it was a constitutional communication. I believe that was only Justice Gorsuch who picked up on that. I'd actually be a bit concerned about that, I do think it would prioritize things like national security. And again, I actually think it would end up prioritizing national security, almost to the exclusion of anything else in such communications. So that was the test that Louisiana offered, and it's really, it was very difficult for me to understand what they were saying. If the court was not going to accept the you couldn't make any request at all, what they're going to be saying. On the other hand, you had the Solicitor General's initial test was we can do anything but directly threaten a penalty for noncompliance. And similarly, the court seemed to want to draw the line in a way that would include more speech as being improper. And similarly, I didn't hear Mr. Fletcher actually offer something that seemed appealing either. One of the things I think will be interesting to watch is to what extent collaboration and coordination will factor in the court's opinion.

[00:19:04.9] David Greene: I thought if there was one part of the argument that seemed like the government might be in trouble, it might be in the series of communications where regarding COVID vaccine, rollouts and vaccine hesitancy, there was an email exchange in which the government referred to, and I believe this was Facebook as being partners, and that they were on the same team on this one. And that seemed to be causing several of the Justices some concern that there would be some level of collaboration and coordination that, again, might cross the line. Now, whether that's considered under coercion or considered under a separate state action doctrine of joint action, I think is less clear.

[00:19:56.2] Jeffrey Rosen: You wrote a blog post on March 15th with this headline, Lawmakers: Ban TikTok to stop election misinformation! Same lawmakers: Restrict how government addresses election misinformation! A really thoughtful post. Tell us about why you think that the position of some lawmakers in the Murthy case is inconsistent with that in the TikTok ban, and how you think those two cases should be reconciled.

[00:20:26.8] David Greene: Yeah. And this was just the magic of timing is that the week before the argument, I think as many of us were rereading the briefs and preparing for the oral argument, that The House also with tremendous speed introduced a pass through committee and then passed a bill that would either force the sale of TikTok, or have it shut down. I think in any way, what it did would force TikTok as it currently exists to not exist, there would be a change in that. I should back up and say previous efforts to ban TikTok, the government always said, this is not about the content on TikTok. This is about a concern for US user privacy and how the national security threats that come with a foreign adversary such as the Chinese government having troves and troves of data from US users.

[00:21:23.7] David Greene: This time when this bill passed, there was a lot more talk, in fact, it's even in The House report about how that national security concern is at least in large part due to the speech that either the Chinese government itself pushes out on TikTok or that the algorithm, the TikTok algorithm feeds to American users, which is societally divisive, which is Chinese propaganda and misinformation and disinformation. And so there was much more concern that there was a national security threat because of the nature of the speeds it was being

fed to US users. So, the point what these members of Congress was making was that this is such an important threat that it justifies this fairly extreme action, which is to shut down an internet service. And so that was the basis of passing the TikTok bill.

[00:22:23.4] David Greene: There also had been a group of house members that had filed an amicus brief in the Murthy case in support of the states that essentially said that the government's concern for national security based on speech that appeared on social media platforms did not justify the government's involvement, the government actually asking those sites to take the information down. And so, the post I wrote, and I think it's a point worth considering is, it was the inconsistency in that position. If misinformation and propaganda can justify shutting down a whole company, once that company is now sold, if it does get sold to US Interest, is the government now powerless to do anything where they can't even send nice notes to the company's saying, please take this down. And that seemed to be the position that the government was taking. The through line between the TikTok bill and the Murthy case being a government concern for misinformation, propaganda, bad information on the internet. And again, in one case, does it justify shutting down a whole platform? But in the other, are the platforms really unable to actually do very little about those concerns? As long as the social media platform is not owned by a foreign adversary, and I thought there was some inconsistency there.

[00:23:54.4] Jeffrey Rosen: You conclude in that blog post, the close cases should go against the government and you urge the court to recognize the government may in some cases should appropriately inform platforms a problematic user post, but it's the government's responsibility to make sure that its communication with the platforms are reasonably perceived as being merely informative and not coercive. Alex, you've also written about the TikTok ban, how would you resolve it and reconcile it with your position in Murthy?

[00:24:23.2] Alex Abdo: Yeah, so anytime the government is proposing to ban a communications platform used by tens of millions of Americans I think it should cause people concern, and especially when the justification that many lawmakers are pointing to are the ones that David pointed out, a concern over Chinese propaganda or algorithmic ranking that they think of as problematic. Because those kinds of content concerns we think of as generally the better approach, at least domestically, is to have more speech, not less speech. And it's true that this is a foreign owned communications platform. But Americans, the tens of millions who use it have a constitutional right to access that platform. And even to hear from, if it really is Chinese propaganda, which there is as, at least as I understand it, no actual evidence to support, but supposing that it is, Americans have a right to hear that propaganda if they want to.

[00:25:32.9] Alex Abdo: And there's actually a case from the Supreme Court, Lamont v. Postmaster General, which recognize the right of Americans to receive communist propaganda if they want, as against a law that required the postmaster to have Americans register for that propaganda. And the Supreme Court said, no, you can't do that because that places too high a burden on Americans' right to receive this information. So, that being said, I think there are a lot of things to be concerned about when it comes to TikTok and other platforms, including maybe most significantly privacy. And if legislators are genuinely motivated by the privacy implications of a company or a foreign government having access to all this sensitive information, I think the

best first approach is to pass a comprehensive privacy bill, because it's not just TikTok that has access to this enormously sensitive information.

[00:26:29.1] Alex Abdo: It's every major social media platform. And we ought to be concerned with the sheer volume of sensitive data these companies have about most people inside the country. It's also worth pointing out that it's not at all clear that banning TikTok or forcing its divestiture would address any of the privacy concerns that legislators have raised because there is an enormous amount of private data about all of us available for sale on the open market, sale by data brokers and data aggregators. And this bill would do nothing to address the availability of that data. And China could, if it wanted to just buy that data on the open market. And that makes it clear that this is not just an effort addressing privacy that falls short, but it's not even effective at accomplishing one of the main goals that some people have set out for it.

[00:27:23.8] Alex Abdo: So, I think we all should be concerned about the authority the US government is potentially claiming to ban a communications platform and insist that the government come up with a very, very good justification that goes beyond the content on the site, that goes beyond that. Because anytime the government is proposing to ban speech because of its content, generally we think of that as triggering the highest form of First Amendment scrutiny. And if it's not, it's just about the content, if it's something like speech, then we should insist that the government consider other alternatives that would not eliminate this important forum for discourse while still addressing the concerns over privacy, which are, like I said, I think are legitimate ones to have.

[00:28:12.5] Jeffrey Rosen: David, you conclude your thoughtful blog post by saying that you believe there is an appropriate role for the government to play within the bounds of the First Amendment when it truly believes there are posts post designed to interfere with US elections or undermine US security on any social media platform, it's a far more appropriate role than banning a platform altogether. Bring us home on Murthy, do you think the court in Murthy will adopt a rule that allows those appropriate efforts by the government to respond to election misinformation? And how do you think the court will come out in Murthy?

[00:28:46.0] David Greene: Well, I hope the court will do that, and I actually think it has a decent example in front of it in the record if it chooses to do so. While we were writing our brief, one of my colleagues went through the whole record. We certainly didn't have enough pages to talk about every single communication that was alleged to be improper. But we went to at least have some examples we could give of some communications we thought were improper and some that we thought were proper. And I really took a special look at the FBI's communications 'cause I am very concerned about law enforcement communications with social media platforms, and not just on the executive branch level, but actually on all levels of government. And you could even have a powerful large municipal law enforcement agency that could have, that could be able to exert a lot of pressure, coercive pressure on a platform.

[00:29:41.0] David Greene: It wouldn't just be looking at the FBI. But in this case, we did have FBI examples. I actually, to my surprise, found that the FBI's communications about election, about what the FBI suspected to be foreign election interference were actually seemed to be quite

appropriate in tone. They were forwarding the social media platforms, I believe in the example in the record was Facebook in particular, forwarding them reports that they had detected inauthentic accounts and that they suspected these of being foreign election misinformation. It was not, there was no even specific ask to take these things down. And then there was some follow-up communications after the election when the FBI followed up and asked whether those reports were helpful. And, in some ways, this would not even cross the line of a specific take down request that Mr. Aguiñaga said would be his line.

[00:30:49.1] David Greene: But in their briefs, they said that they think that any law enforcement communication is inherently coercive, and so even if it did not have a specific ask. But I actually, and while I'm really sympathetic to the inherent coercive nature of law enforcement communications, I do think the FBI's communications in this case, again, to my surprise, are a good model for how government may communicate with social media platforms within the bounds of the law in terms of informing them about their concerns, following up and asking whether that was helpful without the type of pressure, whether the language used or repeated communications or indicating or subtle hints at some penalty. I actually thought that those were good examples of how government could fulfill its role of informing platforms of concerns while staying very clear of the line of coercion.

[00:31:56.8] David Greene: So the court has those examples there in the record if it wants to use it. If I'm making predictions, I don't usually predict Supreme Court outcomes based on the arguments. I think the court is going to be very tempted here to decide this case on standing and not tell us more about the Bantam Book standard. And I think that will be a shame. I think that what the court realizes, and this is what I meant when I talked about the 20,000 page elephant in the room, is that if it is going to revise the standard and say that the Fifth Circuit applied the wrong test and that the Fifth Circuit's test was too restrictive on the government, and that this is what coercion or even if they rely on state action, this is what it actually means, this is what such impression means, it's going to have to go into the record and decide whether things cross the line.

[00:33:07.4] David Greene: I don't know that this court wants to remand back to the Fifth Circuit or even back to the district court when there seemed to be some concern that neither of those courts actually engage with the facts in a productive way. And there were a lot of questions during argument about if we decide this on standing, can we decide based on clear error? And that would allow the court, even the Justices that seemed very much more inclined to the government's position sked a lot of questions about could we apply the clear error standard where they would only have to look at clear errors in the record instead of doing independent review of the record. And then there was also a lot of questions to the states about, what's your best example for standing?

[00:33:57.0] David Greene: And to me, that was setting up a situation where the court could say, okay, they told us here, these were their two best examples. We think there was clear error in finding standard that the injuries that these two individuals suffered were not traceable to the government's communications, that the timing did not match up. There was a two month lag between the government communications with the platforms. And when one of the plaintiffs,

Ms. Hines, who was given as I think the best example of having standing when her communications came down, and the court seemed to count to five votes for finding a lack of traceability between the government's communications and the plaintiff's injuries. And so I would not be surprised if the court, in order to avoid having to really pick apart the record decided this on standing.

[00:34:57.9] David Greene: I think that would be really unfortunate for two reasons. One, is I think we're really desperately, not desperately, but I think we very much would benefit from having more clarity in the Bantam Book standard and understanding the relationship between Bantam Books and Blum, whether they are two completely different standards, or whether they're just two ways of getting to the same question, I think we would all benefit from knowing whether coercion requires a direct threat of penalty, to what extent collaboration or coordination might matter within a Bantam Book's test. But I fear that we might not get there. And I also am concerned that we'll get a very, very narrow result about standing, which I think is a big problem as well as someone who frequently brings cases to vindicate rights, and have the standing doctrine in the US, that makes it very, very hard. And I'm concerned that we'll get a very narrow view of standing in First Amendment cases as well, particularly with respect to the state's basis for standing is that their citizens have a right to receive information. And I actually think that should be a strong basis for standing. But I do fear that we might end up there and leave the Bantam Books decision to another case.

[00:36:18.9] Jeffrey Rosen: Well, let's turn now to NRA v. Vullo. Here's a case where David Cole for the ACLU was arguing on behalf of the NRA and he started his argument by saying government officials are free to urge people not to support political groups they oppose, What they cannot do is use their regulatory might to add or else to that request. What's going on in NRA and what was David Cole arguing for?

[00:36:50.5] David Greene: Yeah, sure. So the argument that the NRA makes is that New York's Department of Financial Services violated the First Amendment by pressuring financial institutions to sever ties with the NRA. And it's slightly complicated, in fact not all that complicated. Basically what happened is that New York was investigating what so-called affinity insurance products that were being offered by the NRA and insurance providers to NRA members for alleged violations of New York insurance law. And New York was engaged in conversations with the insurance and financial institutions over these products. And they resulted in actually settlement agreements between the state of New York and these financial institutions acknowledging that the products violated New York law. And the NRA argues that New York overstepped though in promising leniency to some of these financial institutions in exchange for these institutions severing their ties with the NRA on the basis of its political advocacy. And so they brought a First Amendment case. The Second Circuit actually ruled against the NRA finding that none of the conduct that it pointed to amounted to unconstitutional coercion, in part because a lot of it took place in the context of legitimate law enforcement or regulatory. I should say regulatory enforcement proceedings, not law enforcement proceedings, but regulatory enforcement proceedings.

[00:38:29.9] David Greene: And if I remember correctly, the ACLU actually had filed an amicus brief in support of the NRA in the Second Circuit. And the Supreme Court then took the case and the ACLU then switched from amicus to representing the NRA and argued the case on Monday during the same hearing as the Murthy versus Missouri case. And I think here, unlike the Murthy versus Missouri case, there seemed to be pretty clear consensus on the court. And I generally also take David's path and not trying to predict outcomes in the Supreme Court but here it was a lot easier to count to five and maybe even nine for the NRA at least on the basis of some of the allegations the NRA made, one of the allegations the NRA made, I find to be very, very strong.

[00:39:19.6] David Greene: We did not submit an amicus brief in the case, but to my mind, at least this allegation satisfies the NRA's pleading obligation to allege unconstitutional coercion. And that's the closed door meeting that allegedly happened between Maria Vullo, who was the head of the department of financial services and Lloyd's of London in which she allegedly told Lloyd's, "I'm willing to excuse some of your technical regulatory infractions if you sever your ties with the NRA," and if that actually happened, then of course it'd be the NRA's obligation to demonstrate that it did, if the NRA makes it to discovery.

[00:40:02.5] David Greene: But if that happened, that seems to me like a clear, a clear case of unconstitutional coercion, is a very explicit threat or explicit inducement, I should say, to try to go after the NRA's political advocacy, but that's the case. And I think I agree with what David was saying earlier that even if we don't get much clarity from the Supreme court in the Murthy case on how the Bantam Books standards should apply today, 61 years after the Supreme court last said anything about the line between coercion and persuasion, we might get some more clarity from the Supreme court in NRA versus Vullo because a clear majority of the court seemed to think that the NRA had satisfied the first amendment requirement in pleading unconstitutional coercion.

[00:41:00.3] Jeffrey Rosen: Alex, Neal Katyal on behalf of respondent started by saying the key fact in the NRA case: Key fact in this case is the conceded illegal conduct. As Justice Sotomayor said, the three insurers and the NRA broke the law. They were selling intentional criminal act insurance.

[00:41:16.9] Jeffrey Rosen: That's why Bantam Books is miles away from this case and why the court below found qualified immunity protects below, say more about Neal Katyal's argument and how it fared before the court.

[00:41:25.1] Alex Abdo: Yeah. And this is an area where I think New York has a point to make, which is it's hard to think exactly through how Bantam Books should apply where the conversations at issue are essentially at least as Neal Katyal argued settlement conversations between the government and somebody who has concededly violated state law. And that is a different fact pattern than Bantam Books, but I don't think that should take away from the core of the NRA's allegation, which is that New York allegedly exploited that settlement conversation to extract a penalty against the NRA for its political advocacy. And I think anyone of all political stripes should be troubled by that possible power. The government shouldn't be able to go after

advocacy groups based on their advocacy just because it has found one conceded violation of law it should of course be able to enforce against that violation of law, but it shouldn't be able to extract a penalty directed at the advocacy organization on the basis of its advocacy. That would be a slight extension of Bantam, I suppose beyond its original facts, but it seems to be like a warranted one and an important one.

[00:42:46.2] Jeffrey Rosen: David, what is your take on the NRA case? Do you agree that the court seemed skeptical of the NRA's position and where do you think it's going to draw the line?

[00:42:57.0] David Greene: I agree with Alex. I think as much as the court was finding the Murthy case to be a difficult one on the facts, it was finding the NRA case to be a very easy one on the facts. And I do think it will reach the Bantam Books issue in NRA. And I agree there seem to be maybe even nine votes for doing so and for finding that Commissioner Vullo and the state went too far. I think what's interesting is that both sides, to the extent we want to know a little bit more about what Bantam Books means and what factors are relevant, both sides, both the state and the NRA agreed that the four factor test that the Second Circuit applied in Vullo, which is also similar to a test that the Ninth Circuit has since applied as well, was the correct test for analyzing the Bantam Books line. And so there seemed to be some agreement from that.

[00:44:00.5] David Greene: And so if we do get a contribution to Bantam Books jurisprudence, we do get some clarity as to what it means. It may be those four factors are that we'll have the Supreme Court saying this are the things that courts should look at, whether they say these are these aren't exclusive factors, right? These are just some things they consider. I don't think we'll get a complete list, but we might know more. We might just have the Supreme Court saying, yes, these tests that the Second Circuit have used in the Ninth and even it was really, really what the fifth circuit used below in Murthy might be the proper doctrinal framework for looking at a Bantam Books case.

[00:44:44.0] Jeffrey Rosen: Well, it's time for closing thoughts in this great discussion. There was a point in the NRA case where Justice Barrett asked David Cole, "Are you asking the court to break any new ground in this case?" And David Cole said, "Absolutely not. This is a square corners of Bantam book case," as you can imagine. Alex, as you think of the connections between the Murthy and NRA and TikTok cases, is this a case of simply applying the Bantam Books framework in all cases or do you expect the court to break new ground?

[00:45:17.6] Alex Abdo: Well, I think David was right that the NRA case fits pretty squarely within the Bantam precedent with maybe a possible extension to account for the fact that some of the conversations that the NRA points to as evidence of coercion took place in the context of regulatory enforcement actions. But I think the much more important question of how Bantam applies arises in the Murthy case because that's a suit claiming that the government pressured social media platforms, which didn't exist 60 years ago when Bantam was decided and have become important, extraordinarily important to public discourse, but are also very susceptible to government pressure because these are enormously large companies that generally care very little about whether any particular post or any particular user is allowed to remain on its platform.

[00:46:21.7] Alex Abdo: They mostly just want to continue selling ads, which turns out to be a very lucrative business, and that means that they're generally going to be motivated to maintain a really good relationship with the government. And this leads to a phenomenon that Daphne Keller at Stanford has referred to as anticipatory obedience, where it's not at all surprising that we would expect these platforms to more or less fall in line with their would-be regulators so that they don't lose what has up to now been a very favorable regulatory environment, whether it's through Section 230 of the Communications Decency Act, which immunizes them for the speech of their users, or through the lengths the US government has gone to help protect these companies from foreign competition and gain entry into foreign markets.

[00:47:14.2] Alex Abdo: So how Bantam applies in that context I think is really, really important because there's an instinct, which I understand, to lower the Bantam standard to account for more subtle forms of pressure because the platforms are these really attractive single points of a failure for jawboning, for unconstitutional efforts by the government to coerce. But you have to balance that against the risks of a watered-down Bantam standard, which would make it more difficult for the government to do what I think most people would think is constitutional, which is to state its views publicly and vociferously and to help inform the platforms over what kinds of speech they're carrying, how it might be socially harmful or costly.

[00:48:10.5] Alex Abdo: So it's a very delicate balance, and I think it'll be important for the court, even if it ends up fulfilling David's prediction of kicking out the case on standing grounds, I think it'd be important for the court to say at least something about how Bantam applies in that context. And my hope is that even if they do kick it out on standing grounds, they'll be able to say, maybe required to say, here's the legal framework that applies in this context and here's why none of the plaintiffs has actually demonstrated an adequate injury under this framework. So that's my hope, but like David, I'm not going to predict how the court will actually rule and presumably will know within the next three months.

[00:48:55.4] Jeffrey Rosen: Last word in this great discussion to you Alex mentioned Section 230. Justice Alito asked whether the government could threaten the loss of Section 230 immunity in exchange for jawboning. And both of you have noted that Justices Alito and Thomas and perhaps Gorsuch have a different view about social media platform regulation than the rest of the court. Do you expect any of them to break new ground in the Murthy and NRA cases, or do you expect to see an application of the existing legal framework?

[00:49:29.9] David Greene: Well, as Alex said, I do hope they break new ground. I do hope we get some explanation of how Bantam Books applies to social media. And if there's anything in particular about social media that justifies some additional factors that we may not have considered in other cases and that aren't an issue in the Vullo case, 'cause that's not a social media case. With respect to Section 230, I fully expect that the Justices who always like to write about or express their dislike for Section 230 in various opinions where it's not an issue will take advantage of that again here. I do think it's possible for the threat of losing Section 230 immunity.

[00:50:21.9] David Greene: I do think that's a lever that a government could use to coerce a platform. And so it could possibly come up, even though the executive branch, isn't the legislative branch, doesn't have the power to change 230. That's something the legislature would do. I do think that a statement by the executive, or even a push by the executive branch for some type of reformation there would be influential. So I do hope we learn more about Bantam Books and its specific application to social media. So I do hope we get there. I hope my prediction is wrong that we won't.

[00:51:02.7] Jeffrey Rosen: Thank you so much, Alex Abdo and David Greene, for a thoughtful, wide-ranging, and illuminating discussion of three fascinating cases involving social media, government, jawboning, and the future of free speech. Alex, David, thank you so much for joining.

[00:51:22.5] Alex Abdo: Thank you so much for having us.

[00:51:24.8] David Greene: Yes, thank you.

[00:51:28.6] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Bill Pollock, and Samson Mostashari. It was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper-Smith, and Yara Daraiseh. Friends, my new book, The Pursuit of Happiness, How Classical Writers on Virtue Inspire the Lives of the Founders and Define America, is out. Thank you so much for your notes, and thanks to those of you who are writing in requesting signed book plates. I would be honored to send you one if you'd like one. And please write to me, jrosen@constitutioncenter.org, if you would like a book plate. And if you've read the book, let me know what you think.

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