



Bullying Backpage Contradicts the First Amendment

Ilya Shapiro

January 10, 2017

Here we go again. History repeats itself with classified-ad website [Backpage.com](#)'s [announcement](#) that it's shuttering its "adult" section after years of unrelenting pressure from public officials at all levels of government.

Most recently, the [Senate's Permanent Subcommittee on Investigations \(PSI\)](#) hauled several Backpage.com officials before it for a public shaming without bothering to wait for a ruling on the legality of its "investigation."

In California, just before Christmas, then-attorney general (now U.S. Senator) [Kamala Harris](#) refiled criminal charges against Backpage's CEO and its former owners in the face of a December 9 ruling throwing her initial charges out.

These tactics represent a marked escalation since September 2010, when [Craigslist caved](#) in to pressure from a group of 17 state attorneys general and shut down its "adult advertisements" section.

As a federal court had already ruled at that time—and numerous courts have held since—the government cannot assume that ads that mention sex are advertising illegal transactions, much less coercive sex-trafficking. Laws censoring such websites have been roundly and repeatedly held to violate the First Amendment.

But the law is one thing, and less direct pressure tactics are quite another. It's harder to hold government accountable when it tries to hide what it's up to with public letters, demands and investigations, even if meritless.

For years, Backpage has been the target (after Craigslist) of the same state AGs, members of Congress and even local officials like Chicago's vigilante-with-a-badge, [Cook County Sheriff Thomas Dart](#). Backpage has fought these First Amendment battles and won almost all of them.

Cato filed an [amicus brief](#) (along with [DKT Liberty Project](#) and the [Reason Foundation](#)) in its case against Sheriff Dart, who was running his own personal [Operation Chokepoint](#) to force the credit-card companies to sever ties with Backpage.

Dart claimed he had written to the card companies only as "a father and a caring citizen," but Seventh Circuit Judge Richard Posner saw through the ruse. He enjoined Dart's campaign as a government organized boycott and a prior restraint. If not checked, Judge Posner wrote, such

pressure tactics constitute “a formula for permitting unauthorized, unregulated, foolproof, lawless government coercion.”

And that’s what’s happening with the PSI investigation, which was styled as an inquiry into human trafficking but has resulted in onerous subpoenas targeting Backpage’s editorial practices.

Congress has broad investigatory authority that can be misused, as it was by Senator Joseph McCarthy when he chaired PSI. Honest investigations are perfectly salutary, but congressional subpoena power is particularly circumscribed when the First Amendment rights of the subpoena recipient are at issue, as they are here.

That’s why Cato again teamed up with DKT and Reason Foundation on an amicus brief in the D.C. Circuit, opposing PSI’s subpoena of Backpage CEO Carl Ferrer. Our brief showed that the PSI was improperly engaging in an effort to punish Ferrer and Backpage for running a website that publishes third-party content that the subcommittee finds offensive.

Although the subcommittee has repeatedly denied any ties to Dart, a trail of emails between PSI staff and the sheriff’s office suggests otherwise. Before the PSI served its first subpoena on Backpage, subcommittee counsel corresponded with Dart’s staff, praising the sheriff and assuring him that their investigation was “rapidly progressing down a parallel track.”

When PSI issued its initial document subpoena, with five sets of demands that were *identical* to those served by Sheriff Dart.

The punitive rather than legislative nature of PSI’s investigation is further evidenced by the statements made by subcommittee members and other senators after Ferrer’s recent arrest on charges that also collide with Ferrer’s constitutional rights (and which were thrown out by a California court).

Senators Rob Portman (R-OH) and Claire McCaskill (D-MO), the PSI’s chairman and ranking member, issued a joint statement in which they heralded the subcommittee’s specific role in bringing about the arrest.

Senator Mark Kirk was even more explicit, saying,

This arrest means we are one step closer to holding Backpage accountable for underage internet sex trafficking through their site and stopping these illegal activities.

It could hardly be more evident that the subpoena was issued pursuant to the punitive aim of “holding Backpage accountable,” rather than a desire to study the issue of human trafficking or any other specific *legislative* need.

PSI’s subpoena to Carl Ferrer plainly fails the standards set forth for a valid exercise of the congressional subpoena power. The subcommittee did not identify a specific legislative need for the information; it did not show a compelling interest in obtaining the information nor a strong nexus between the information sought and the interest asserted; and it wielded the subpoena as a tool for punishing Ferrer for his operation of Backpage because it disfavored the content of the speech on Backpage.

PSI's overreach is emblematic of a disturbing pattern by legislative committees and state attorneys general of brandishing their subpoena power as a weapon to attack individuals and entities that engage in disfavored speech or conduct.

For example, the New York and Massachusetts attorneys general recently issued a civil investigative demand requiring ExxonMobil to produce all of its climate-change research analysis, its internal communications regarding climate change, and its communications with a dozen conservative and libertarian non-profits.

Piggybacking on that investigation, the Virgin Islands attorney general issued a subpoena to the Competitive Enterprise Institute demanding that CEI turn over its research, communications, emails, statements and drafts (over nearly a decade) regarding climate change and energy policy. Only after CEI moved for sanctions under the D.C. Anti-SLAPP Act did the attorney general withdraw the subpoena.

Given such awesome investigative power, it's easy to see how the targets of investigations can be brought to heel by a government that disregards constitutional limits. It is sad, but understandable, that Backpage, like Craigslist before it, chose to shutter its entire "adult" section.

Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review.