

THE DISPATCH

House Democrats Go Fox Hunting

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There is no 'fake news' exception to the First Amendment.

When elected officials browbeat the executives of regulated telecom, video, and app companies trying to get them to drop the main news channel of the political opposition—which also happens to be the most popular channel in its market—you may think you're living in an arbitrary strong-arm regime. But it's happening this week in Washington, D.C.

On Monday, Reps. Anna Eshoo and Jerry McNerney, both California Democrats, sent a letter on congressional letterhead to top executives of various cable, satellite, and communications companies, including Alphabet, the parent of Google, which distributes video via its YouTube TV streaming service and Google Play app.

The letter denounces Fox News, as well as newer competitors to its right such as Newsmax and One America News Network, as purveyors of misinformation and extremism. And it gets directly to the point with its demands: “Are you planning to continue carrying Fox News [and the others] ... both now and beyond any contract renewal date? If so, why?”

The tone of threat is not idle. Both Eshoo and McNerney are majority members of the House Energy and Commerce Committee, which draws up legislation and oversees regulation relevant to cable and telecom providers and technology firms generally. (Fox News and the others mentioned generally do not broadcast over publicly shared airwaves, the scarcity of which was the original rationale for federal broadcast regulation.)

Eshoo and McNerney observe that misinformation and extremism is rife these days, and that it is particularly dangerous when applied to matters underlying democratic legitimacy—such as the integrity of elections—and to the menace of the COVID-19 pandemic.

I actually agree with the two on that. Misinformation (and outright lying) is indeed a real problem, it seems to have gotten worse lately, and it is especially dangerous on the two topics mentioned. I would go further, though, and not limit my concern about the problem to one side only, or to “purported news outlets” (their phrasing) alone. Indeed, it is easy enough to find misinformation and extremism coming from the halls of Congress itself, from members of both parties, relayed to us all by floor cameras.

And I know for sure that I don't want the determination of what is outright misinformation, and what merely forgivable exaggeration and speculation, to fall into the hands of people wielding the coercive power of government.

It's true that Republicans are not in an ideal position to complain. Many have themselves threatened social media platforms with hostile regulation unless they agree to give up their independent discretion about what to carry and what not—in this case, the idea being to guarantee carriage for certain controversial right-wing accounts. And many sat by, or worse, when Donald Trump rumbled in 2018 about revoking NBC's licenses as punishment for journalism he found unwelcome.

Trump, of course, lacked any direct power over NBC's licenses, which are a matter for the Federal Communications Commission. The former chair of that commission, Ajit Pai, made clear that no such license revocation was to be had.

Similarly, reporting on the new letters, *New York Times* reporter Rachel Abrams acknowledges that the lawmakers cannot directly or immediately force companies like Verizon, Cox, and Comcast “to drop networks that have spread misinformation. And unlike broadcast stations, cable channels do not have licenses that are regulated by the Federal Communications Commission.”

But the threat is no less real for being indirect. Law professor Gus Hurwitz rightly describes what the lawmakers are up to as “chilling.” Brendan Carr, an FCC commissioner quoted in the *Times*, correctly diagnoses an attack on “free speech rights.”

As attorney Hans Bader points out, some courts have found that government actors potentially violate the First Amendment when they employ official channels, letterhead included, to demand that private businesses cut off someone's speech. The federal appeals court in New York has ruled that way in cases in which a borough president in New York City asked a billboard company to take down a sign with an obnoxious message, and in which a village official wrote to a local chamber of commerce protesting an ad critical of town government. In both cases the court recognized that the threat of retaliatory regulation need not be spelled out specifically, and that the danger can be present in situations in which the official could not unilaterally order relevant retaliation.

Despite what both Trump and Eshoo/McNerney might have you think, the Supreme Court recognizes no “fake news” or “disinformation” exception to the First Amendment. Some speech that is false may lack First Amendment protection for other reasons, such as when it is defamatory or genuinely threatening to a target or advances a scheme of commercial fraud. But even very sinister and very false speech of a political tenor ordinarily remains protected: that is the case, for example, with most speech that causes people to distrust the legitimacy of the democratic process, medicine, or science. There is no First Amendment exception for ideological lying or fraudulent chatter about current events.

The letters have the hallmarks of one tactic in a wider campaign. On Wednesday, the full Energy and Commerce majority has scheduled a hearing titled “Fanning the Flames: Disinformation and Extremism in the Media,” seemingly aimed at going after the companies for carrying the BadSpeak channels. If they don't want this bullying campaign to be seen as representing their party, other Democrats on the Hill need to dissociate themselves from it—and fast.

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