How Senator Mark Warner Coerced Big Tech

Leo Goldstein 2022-9-27

Senator Mark Warner (D) has been pressuring Big Tech to censor Republicans since 2018, at least. After the **Demsurrection** of January 6, 2021, Senator Warner also pressured Big Tech, mainly Facebook, to retain personal and private communication of its users, related to the **J6** events. Facebook complied, and provided troves of its users' private data to DC prosecutors to cherry pick from.

Recent discovery of emails, in which the Biden-Harris administration tells Facebook what speech to censor on its platform, has caused a scandal. Both BHA and Big Tech are going to deny the coercion. But such coercion was in plain view since 2018. Democrat legislators, Attorneys General, and other government officials have coerced Big Tech to censor opponents of Democrat agendas, by threats of adverse legislation and/or regulation.

By the way, the Obama administration hand-picked some of the tech winners. Democrats have been showering Big Tech with gifts since 2009 and started threatening them since 2016.

Democrats have been pressuring Big Tech into silencing Trump supporters for years, cloaking this intent with neutral wording, such as "election integrity" and "fair marketplace". Some of their legislative proposals were or appeared good and gained support from Republicans. Republicans were naïve to think that these proposals were honest and bipartisan. While criticism of Big Tech was bipartisan, Democrats were making one-sided covert deals with Big Tech.

State Actors

It is well known that the Supreme Court has found state action when the government officials, legislators, or regulators influence private companies by mere threat of legislation or regulation.[1] Also, state action is found when government provides significant encouragement to a private party (i.e., *Blum v. Yaretsky, 457 US 991 - Supreme Court 1982*)[2] and some other situations (*Brentwood Academy v. Tennessee Secondary School Athletic Assn., 531 US 288 - Supreme Court 2001*).[3] State actions of this kind are unconstitutional. State actors are bound by constitutional restrictions just like federal and state governments.

Thus, Democrat government officials and Big Tech have been acting covertly, as much as possible, to hide their collusion and state action. Of course, covert threats, encouragement, and collusion are as illegal as overt ones.

Sen. Mark Warner's Draft Proposal

Potential Policy Proposals for Regulation of Social Media and Technology Firms,[4] July 2018, by Sen. Mark Warner (D) is just one example of the threats of legislation and regulation, used by Democrats to pressure Big Tech. It is still relevant, because the legislative and regulatory options listed can still be used today. This legislative draft was "leaked" in July 2018, but the Democrats likely familiarized Big Tech with at least its parts beforehand.

Notice the following:

a) Nowhere does Sen. Warner consider the idea that big social media & tech firms are First Amendment speakers.

b) Many concerns and suggestions in this document are just and reasonable, so some of these anti-BigTech proposals were likely to pass even in the Republican controlled Congress.

c) None of the proposed measures became a law or regulation, even in the Democrat controlled Congress. That means that Democrats successfully coerced Big Tech to help them in the 2018 and 2020 elections and achieving other goals. In exchange, Democrats abandoned all legislative and regulatory proposals that might weaken Big Tech or empower its consumers and/or competitors.

In the following quotes, emphasis is mine, except for the first phrase in each paragraph.

General Threat of adverse legislation and/or regulation

"*Social media and wider digital communications technologies have changed our world in innumerable ways... The American companies behind these products and services* – ***Facebook, Google, Twitter, Amazon, and Apple, among others*** *– have been some of the most successful and innovative in the world… As their collective influence has grown, however,* ***these tech giants now also deserve increased scrutiny***." – names some of the targeted companies.

"The size and reach of these platforms demand that we ensure proper oversight, transparency and effective management of technologies that in large measure undergird our social lives, our economy, and our politics. ***Numerous opportunities exist to work with these companies****, other stakeholders, and policymakers to make sure that we are adopting appropriate safeguards to ensure that this ecosystem no longer exists as the 'Wild West' – unmanaged and not accountable ..."* – let us keep in mind this offer "*to work with*" as an alternative to harsh laws proposed below.

"The purpose of this document is to explore a suite of options Congress may consider to achieve these objectives. In many cases there may be flaws in each proposal that may undercut the goal the proposal is trying achieve, or pose a political problem that simply can't be overcome at this time."

The "*suite of options Congress may consider*" is a threat of legislation. The "*flaws in each proposal*" might be interpreted as a threat that the legislation would destroy the targeted companies. The "*political problem that simply can't be overcome at this time*" probably threatens with future retribution.

Threatening Legislation and Regulation Ideas for Big Tech

"***Make platforms liable for state-law torts (defamation, false light, public disclosure of private facts)*** *for failure to take down deep fake or other manipulated audio/video content …*" – this would be a kiss of death for all big social media companies and Google.

"***Duty to determine origin of posts and/or accounts*** *– … **forcing the platform companies** to determine and/or authenticate the origin of accounts or posts would go far in limiting the influence of bad actors outside the United States.*" – this would be prohibitively costly for platform companies, and a large part of their users would quit.

"*Duty to identify inauthentic accounts* *– … **A law could be crafted imposing an affirmative, ongoing duty on platforms** to identify and curtail inauthentic accounts, **with an SEC reporting duty** to disclose to the public (and advertisers) the number of identified inauthentic accounts and the percentage of the platform's user base that represented. **Legislation could also direct the FTC to investigate lapses** in addressing inauthentic accounts under its authority to address unfair and deceptive trade practices. Failure to appropriately address inauthentic account activity – or misrepresentation of the extent of the problem – could be considered a **violation of both SEC disclosure rules and/or Section 5 of the FTC Act**."* – this is a more invasive version of the previous proposal. It would be even more expensive and cost the platforms large part of their users. Notice the phrase "*a law could be crafted*", hinting at the corrupt intent behind the proposal.

"*Lastly, the rise of a few dominant platforms poses key problems for long-term competition and innovation across multiple markets, including digital advertising markets (which support much of the Internet economy), future markets driven by machine-learning and artificial intelligence, and communications technology markets.* *User data is increasingly the single most important economic input in information markets … Unlike many other assets, which tend to illustrate declining marginal utility, the value of any piece of data increases in combination with additional data… firms with large preexisting data sets have potentially insuperable competitive advantages over new entrants and nascent firms*." – This is right. The anti-trust actions against Big Tech were already long overdue and required no new legislation. But remember those "*numerous opportunities exist to work with these companies*".

"***Algorithmic auditability/fairness*** *– **The federal government could set mandatory standards for algorithms to be auditable – both so that the outputs of algorithms are evaluated for efficacy/fairness … as well as for potential hidden bias**. … A first step towards this (something that could, for instance, **be inserted into the annual National Defense Authorization Act**) would be to require that any algorithmic decision-making product the government buys must satisfy algorithmic auditability standards delegated to NIST to develop.*" – the effect of this proposal would be that the Big Tech companies would be able to develop algorithms only at the speed of the government and subject to the whims of the government.

"*Data Transparency Bill* *– The opacity of the platforms' collection and use of personal data serves as a major obstacle to* ***agencies like the FTC addressing competitive (or consumer) harms****. … One of the major problems identified among dominant platforms, for instance, is that* ***the terms of the bargain – free services in exchange for access to consumer data – continue to be amended in favor of the platform.*** *…* ***Legislation could require companies to more granularly (and continuously) alert consumers*** *to the ways in which their data was being used… Lastly,* ***data transparency would also assist antitrust enforcement agencies like the FTC and DOJ*** *…*" – this pushes the Big Tech into the crosshairs of the FTC, DOJ, and other enforcement agencies, with the consequences known from other industries.

Hints of what Mark Warner wanted to accomplish with this draft

"Just as we're trying to sort through the disinformation playbook used in the 2016 election and ***as we prepare for additional attacks in 2018****, a new set of tools is being developed that are poised to exacerbate these problems."* – a reference to the Russia hoax of 2016 and a hint that Big Tech owes a debt to Democrat party, in the 2018 midterm elections.

If Russia interfered in the 2016 elections, the interference was in favor of Hillary Clinton. For example, this is what RT wrote about Donald Trump in May 2016: "*Donald Trump: More Caligula than Augustus … America's answer to Mussolini, and just like the Italian fascist dictator*".

"***Disclosure Requirements for Online Political Advertisements*** *…* ***The Honest Ads Act (S.1989) is one potential path, but there are other reasonable ways to increase disclosure requirements in this space.***"

"***Public Interest Data Access Bill*** *–****we could propose legislation*** *that guarantees that platforms above a certain size provide independent, public interest researchers with access to anonymized activity data … helping generate data and analysis that could help inform* ***actions by regulators or Congress****.*" – another threat of legislation and regulation.

Reasonable Proposals Ignored and Opposed after Dems got what they wanted

"***… consumer protection in the digital age***" – long overdue

"***Duty to clearly and conspicuously label bots***" – not a bad idea

"***Privacy rulemaking authority at FTC***"

*"****Comprehensive (GDPR-like) data protection legislation****"*

"***Data Portability Bill*** *– As platforms grow in size and scope, network effects and lock-in effects increase; consumers face diminished incentives to contract with new providers... The goal of data portability is to reduce consumer switching costs between digital services … facilitating competitive switching by customers.*" – new providers and competitive switching are threats to Big Tech.

"***Interoperability*** *–* ***Imposing an interoperability requirement on dominant platforms*** *to blunt their ability to leverage their dominance … could be a powerful catalyst of competition in digital markets.*" – this adds to the data portability idea. The effect of a legislation reflecting these proposals would be the

loss of the locked-in benefits that Big Tech platforms enjoy, commoditization of their service, and a sharp drop in their revenues.

"***Essential Facilities Determinations*** – *Certain technologies serve as critical, enabling inputs to wider technology ecosystems, such that control over them can be leveraged by a dominant provider to extract unfair terms from, or otherwise disadvantage, third parties. For instance, Google Maps maintains a dominant position in digital mapping …* ***Legislation*** *could define thresholds … beyond which certain core functions/platforms/apps would constitute 'essential facilities',* ***requiring a platform to provide third party access on fair, reasonable and non-discriminatory (FRAND) terms and preventing platforms from engaging in self-dealing or preferential conduct****. … Examples of this kind of condition are rife in areas such as telecommunication regulation…*" – a very reasonable and moderate proposal.

Democrats and Big Tech elected "to work" with each other

None of the reasonable and useful laws or regulations have been passed. Sen. Warner's proposals have only served to motivate Big Tech into toting the Democrat party line.

The pot of anti-trust action is still being stirred, but on a very slow fire.

Endnotes

[1] ***Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 - Dist. Court, CD California 1976***
"As discussed, in section II, however, it is clear that the adoption of the family viewing policy was caused substantially by government pressure. The adoption of the policy was not the kind of independent decision required by the First Amendment. Instead the networks served in a surrogate role in achieving the implementation of government policy."
"Here the [FCC] Chairman threatened the networks at the very least with actions that would impose severe economic risks and burdens. By indicating that a policy statement might be issued on the matter, the Chairman impliedly threatened the networks with the burden of a full-fledged administrative proceeding together with necessary appeals therefrom. Moreover since a policy statement would outline responsibilities of licensees, the networks' fifteen stations could be held accountable in the licensing process for their adherence to the policy. In addition, the Chairman's use of the "public interest" standard as the rubric with which to clothe his proposals and his continual references to the "public trustee" status of the broadcasters again subtly but unmistakably indicated that the FCC could employ formal regulatory mechanisms to burden the networks if they did not go along."

[2] ***Blum v. Yaretsky, 457 US 991 - Supreme Court 1982***
"a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Flagg Bros., Inc. v. Brooks, supra, at 166; Jackson v. Metropolitan Edison Co., supra, at 357; Moose Lodge No. 107 v. Irvis, supra, at 173; Adickes v. S. H. Kress & Co., supra, at 170. "

[3] ***Brentwood Academy v. Tennessee Secondary School Athletic Assn., 531 US 288 - Supreme Court 2001***
"Our cases have identified a host of facts that can bear on the fairness of such an attribution. We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," Blum, 457 U. S., at 1004, when the State provides "significant encouragement, either overt or covert," ibid., or when a private actor operates as a "willful participant in joint activity with the State or its agents," Lugar, supra, at 941 (internal quotation marks omitted). We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," Pennsylvania v. Board of Directors of City Trusts of Philadelphia, 353 U. S. 230, 231 (1957) (per curiam), when it has been delegated a public function by the State, cf., e. g., West v. Atkins, supra, at 56; Edmonson v. Leesville Concrete Co., 500 U. S. 614, 627-628 (1991), when it is "entwined with governmental policies," or when government is "entwined in [its] management or control," Evans v. Newton, 382 U. S. 296, 299, 301 (1966)."

[4] https://www.warner.senate.gov/public/_cache/files/d/3/d32c2f17-cc76-4e11-8aa9-897eb3c90d16/65A7C5D983F899DAAE5AA21F57BAD944.social-media-regulation-proposals.pdf