

# SAMMY ALITO MAKES A GREAT CASE TRUMP CENSORED FOX NEWS' ACCURATE 2020 ELECTION REPORTING

As Rayne noted, today a 6-Justice majority rejected the right wing conspiracy theory ginned up by Missouri and Louisiana's since promoted Attorneys General claiming that the Federal government was making social media companies censor right wing speech.

Amy Coney Barrett's majority opinion is worth reading for her footnotes attacking the Fifth Circuit's credulous adoption of Judge Terry Doughty's credulous adoption of conspiracy theories spawned by the likes of Matt Taibbi and Jim Jordan.

4The Fifth Circuit relied on the District Court's factual findings, many of which unfortunately appear to be clearly erroneous. The District Court found that the defendants and the platforms had an "efficient report-and-censor relationship." *Missouri v. Biden*, 680 F. Supp. 3d 630, 715 (WD La. 2023). But much of its evidence is inapposite. For instance, the court says that Twitter set up a "streamlined process for censorship requests" after the White House "bombarded" it with such requests. *Ibid.*, n. 662 (internal quotation marks omitted). The record it cites says nothing about "censorship requests." See App. 639–642. Rather, in response to a White House official asking Twitter to remove an impersonation account of President Biden's granddaughter, Twitter told the official about a portal that he could use to flag similar issues. *Ibid.* This has nothing to do with COVID–19

misinformation. The court also found that “[a] drastic increase in censorship . . . directly coincided with Defendants’ public calls for censorship and private demands for censorship.” 680 F. Supp. 3d, at 715. As to the “calls for censorship,” the court’s proof included statements from Members of Congress, who are not parties to this suit. *Ibid.*, and n. 658. Some of the evidence of the “increase in censorship” reveals that Facebook worked with the CDC to update its list of removable false claims, but these examples do not suggest that the agency “demand[ed]” that it do so. *Ibid.* Finally, the court, echoing the plaintiffs’ proposed statement of facts, erroneously stated that Facebook agreed to censor content that did not violate its policies. *Id.*, at 714, n. 655. Instead, on several occasions, Facebook explained that certain content did not qualify for removal under its policies but did qualify for other forms of moderation.

I may come back to this.

For now, though, what I’m interested in is Sammy Alito’s apparent presumption that he should measure a media outlet – even a social media company!! – based on its apparent subservience to government actors.

To support his indirect argument that one of the plaintiffs, activist Jill Hines, has been injured, Alito first tries to lay out a case whereby Facebook has been cowed by the United States government, so he can later make a correlative argument that the Hines’ injury that, as ACB noted, “started [] before almost all of its communications [between Facebook and] the White House and the CDC,” was instead caused by it.

Alito really really wants to make this argument, because if he doesn’t he’s got nothing to show

for this partisan effort! ACB even invokes a 7th Circuit quip about Alito's efforts to go *make* this case for Hines: "[j]udges are not like pigs, hunting for truffles buried [in the record]."

Alito attempts this feat, in part, by arguing that social media companies are *more* susceptible to government pressure than other media companies. He claims that Presidents cannot put particular newspapers that cross him out of business, and then lays out ways that social media companies – Section 230, anti-trust, and (!?!?! ) EU regulation – are more susceptible.

Second, internet platforms, although rich and powerful, are at the same time far more vulnerable to Government pressure than other news sources. If a President dislikes a particular newspaper, he (fortunately) lacks the ability to put the paper out of business. But for Facebook and many other social media platforms, the situation is fundamentally different. They are critically dependent on the protection provided by §230 of the Communications Decency Act of 1996, 47 U. S. C. §230, which shields them from civil liability for content they spread. They are vulnerable to antitrust actions; indeed, Facebook CEO Mark Zuckerberg has described a potential antitrust lawsuit as an "existential" threat to his company.<sup>4</sup> And because their substantial overseas operations may be subjected to tough regulation in the European Union and other foreign jurisdictions, they rely on the Federal Government's diplomatic efforts to protect their interests.

His first examples have merit. This last one?

A matter that may well have been prominent in Facebook's thinking during the period in question in this case was

a dispute between the United States and the European Union over international data transfers. In 2020, the Court of Justice of the European Union invalidated the mechanism for transferring data between the European Union and United States because it did not sufficiently protect EU citizens from Federal Government surveillance. *Data Protection Comm'r v. Facebook Ireland Limited*, Case C-311/18 (2020). The EU-U. S. conflict over data privacy hindered Facebook's international operations, but Facebook could not "resolve [the conflict] on its own." N. Clegg & J. Newstead, *Our Response to the Decision on Facebook's EU-US Data Transfers*, Meta (May 22, 2023).<sup>23</sup> Rather, the platform relied on the White House to negotiate an agreement that would preserve its ability to maintain its trans-Atlantic operations. K. Mackrael, *EU Approves Data-Transfer Deal With U. S., Averting Potential Halt in Flows*, *Wall Street Journal*, July 10, 2023.<sup>24</sup>

It doesn't make sense. What he's talking about is driven by Executive Branch surveillance equities – largely, the Section 702 program made better known by Edward Snowden. In the case of surveillance, Facebook is the one that has leverage over the US, because the government wants to keep its surveillance visibility, and so Facebook can and has demanded that the government set up special provisions for European citizens, so Facebook can keep operating seamlessly.

Having laid out his argument that Facebook, with its service to half the global population base, is *more* susceptible to pressure than other media companies, Alito then cites individual communications to opine that poor Facebook was bullied into subservience by Executive branch demands.

What these events show is that top federal officials continuously and persistently hectored Facebook to crack down on what the officials saw as unhelpful social media posts, including not only posts that they thought were false or misleading but also stories that they did not claim to be literally false but nevertheless wanted obscured. See, e.g., 30 id., at 9361, 9365, 9369, 9385–9388. And Facebook’s reactions to these efforts were not what one would expect from an independent news source or a journalistic entity dedicated to holding the Government accountable for its actions. **Instead, Facebook’s responses resembled that of a subservient entity determined to stay in the good graces of a powerful taskmaster.** Facebook told White House officials that it would “work . . . to gain your trust.” Id., at 9365. When criticized, Facebook representatives whimpered that they “thought we were doing a better job” but promised to do more going forward. Id., at 9371. They pleaded to know how they could “get back to a good place” with the White House. Id., at 9403. And when denounced as “killing people,” Facebook responded by expressing a desire to “work together collaboratively” with its accuser. 9 id., at 2713; 78 id., at 25174. The picture is clear.

[snip]

**Internal Facebook emails paint a clear picture of subservience.** The platform quickly realized that its “handling of [COVID] misinformation” was “importan[t]” to the White House, so it looked for ways “to be viewed as a trusted, transparent partner” and “avoid . . . public spat[s].” [my emphasis]

Facebook’s efforts to retain good relations with

the Biden White House, media critic Sammy Alito says, “were not what one would expect from an independent news source or a journalistic entity dedicated to holding the Government accountable for its actions.”

That’s mighty interesting, because when I read his description depicting *Facebook* as subservient to a President, all I could think of were the filings Dominion submitted to get Fox News to settle its lawsuit.

I’ve never seen subservience like that depicted in Fox News communications as they faced the possibility that Trump would cut them off for telling the truth about the 2020 election.

Immediately after Fox News called Arizona for Biden, Trump’s team called to complain.

Within minutes of the 11:20 pm Arizona call, FoxNews SVP and ManagingEditorofthe Washington Bureau Bill Sammon received an angry text from a member of Trump’s team claiming itwas WAY too soon to be calling Arizona. Ex.192 Ex.140, Sammon 107:8-108:11. Minutes later Sammon received a similarly angry phone call from White House Chief of Staff Mark Meadows. Ex.140, Sammon 108:12-110:4.

As pressure built in response, top personalities talked about reckless demagogues attacking the network for their factual call.

Carlson wrote his producer Alex Pfeiffer on November 5: We worked really hard to build what we have. Those fuckers are destroying our credibility. It enrages me.” Ex.199 at FNN035\_03890623 . He added that he had spoken with Laura and [Sean a minute ago and they are highly upset. at FNN035\_03890624. Carlson noted: At this point we’re getting hurt no matter what. Id. at FNN035\_03890625 . Pfeiffer responded: It’s a hard needle to thread, but I really think many on our side are being *reckless demagogues*

right now Tucker replied: Of course they are. We're not going to follow them. And he added: What [Trump]'s good at is destroying things . He's the undisputed world champion of that. He could easily destroy us if we play it wrong. at FNN035 03890626

Tucker Carlson acknowledged that Trump could destroy Fox news.

And so, in response, Fox started censoring factual news about Joe Biden's win and instead choosing to report false claims of election fraud.

Sammy Alito may believe that a President can't take out a newspaper who crosses him.

But Donald Trump responded to Fox News' accurate call of Arizona for him by demonstrating to Fox that he could take out the cable station, effectively replacing them in the media economy with NewsMax. And that threat from the sitting President of the United States, the threat to replace Fox News with Newsmax, led Fox News to censor themselves, even censoring Jacqui Heinrich specifically.

Meanwhile, later that night of November 12, Ingraham was still texting with Hannity and Carlson . In their group text thread, Carlson pointed Hannity to a tweet by Fox reporter Jacqui Heinrich. Ex.230 at FNN035\_03890511 . Heinrich was fact checking a tweet by Trump that mentioned Dominion and specifically mentioned Hannity's and Dobbs broadcasts that evening discussing Dominion . Ex.232; Ex.231. Heinrich correctly fact-checked the tweet, pointing out that top election infrastructure officials said that There is no evidence that any voting system deleted or lost votes , changed votes , or was in any way compromised Id Ex.232 .

Carlson told Hannity : Please get her

fired. Seriously What the fuck ?  
actually shocked *It needs to stop immediately , like tonight. It's measurably hurting the company. The stock price is down. Not a joke.*

Sammy Alito got it wrong when he said a President can't take out a media outlet who crosses him. Donald Trump proved that in 2020, after Fox called Arizona for Biden. And Sammy Alito's very psyche likely has been altered as a result, as Fox News continues to feed the propaganda Trump demands.

The irony of all this is that Alito repeatedly complains that the Biden White House raised Facebook's role, as a platform, in fostering Trump's insurrection.

To emphasize his urgency, Flaherty likened COVID-19 misinformation to misinformation that led to the January 6 attack on the Capitol. Ibid. Facebook, he charged, had helped to "increase skepticism" of the 2020 election, and he claimed that "an insurrection . . . was plotted, in large part, on your platform."

[snip]

Facebook informed the White House that the video did not "qualify for removal under our policies" and thus would be demoted instead, *ibid.*, but that answer did not please Flaherty. "How was this not violative?" he queried, and "[w]hat exactly is the rule for removal vs demoting?" *Id.*, at 9387. Then, for the second time in a week, he invoked the January 6 attack: "Not for nothing, but last time we did this dance, it ended in an insurrection." *Id.*, at 9388. When Facebook did not respond promptly, he made his demand more explicit: "These questions weren't rhetorical."



But his description of a subservient media outlet far better describes Fox News, which was recruited to help sow insurrection by what, according to Alito's measure, was Presidential censorship.

Sammy Alito says that if the President demands that a media outlet censor true content to publish favored content, that is impermissible censorship.

He makes a great case that Donald Trump unlawfully dictated Fox News' coverage during the 2020 transition.