

First Amendment Background on PSI Subpoena Seeking Documents on Backpage.com Editorial Process

The Permanent Subcommittee on Investigations (“PSI”) is claiming it can enforce a blanket demand for all documents relating to an online publisher’s editorial policies without regard to limits imposed by the First Amendment. Although Congress has broad investigatory powers, case law forged during the dark days of the McCarthy era and afterward makes clear that Congress is subject to constitutional limits, as are all branches of government. The burden imposed by a blunderbuss demand for documents is especially acute for online publishers, who make millions of editorial decisions regarding content provided by third parties. This fact sheet outlines the historic context in which these issues arose for Backpage.com and other online intermediaries, and how they apply specifically to PSI’s extraordinary subpoena demand.

Online Intermediaries and the First Amendment

Online intermediaries, like Backpage.com, have been essential for the Internet to become and remain a vital medium of free expression for billions of users who exchange ideas and information all over the world. Platforms provided by these intermediaries take many forms, including search engines, social networks, advertising platforms, and content-hosting sites—all of which offer forums to post and/or access to user-generated content.

- The universal adoption and popularity of the Internet requires online intermediaries to deal with vast amounts of information. Facebook has nearly 1.8 billion users who make over three million posts per minute. Tens of millions of people use Google’s services every day. Similar numbers create and post advertisements each month on the classified advertising website Craigslist.
- Backpage.com is the second largest online classified advertising website in the U.S. Backpage.com’s users post millions of ads monthly in various categories, including real estate, buy/sell/trade, automotive, jobs, dating and adult.
- The Supreme Court has applied the highest level of First Amendment protection for online speech. *Reno v. ACLU*, 521 U.S. 844 (1997).
- Because of the vital role of online intermediaries in hosting third-party content, Congress adopted national policies in support of the First Amendment “to maintain the robust nature of Internet communication,” *Zeran v. AOL, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), and “to promote freedom of speech in the ‘new and burgeoning Internet medium.’” *Ben Ezra, Weinstein & Co., Inc. v. AOL, Inc.*, 206 F.3d 980, 985 n.3 (10th Cir. 2000).
- The editorial decisions protected by the First Amendment and federal law include “any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.” *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008) (*en banc*). This specifically protects “decisions relating to the monitoring, screening, and deletion of content.” *Doe v.*

MySpace, Inc., 528 F.3d 413, 420 (5th Cir. 2008).

- Editorial choices by online intermediaries – including whether to accept or reject a submission, how and where to display it, and how it should be edited – are fully protected by the First Amendment. *Jian Zhang v. Baidu.com, Inc.*, 10 F.Supp.3d 433, 438 (S.D.N.Y. 2014).

Direct Censorship Efforts Are Unconstitutional

Because the courts have recognized strong First Amendment and federal law protections for online speech, efforts to directly censor online classified advertising websites have been uniformly struck down.

- When the Sheriff of Cook County, Illinois, Thomas J. Dart, filed suit to force Craigslist to eliminate its adult category claiming it violated criminal laws against prostitution, the court dismissed the case. The court held that having an adult category “is not unlawful in itself nor does it necessarily call for unlawful content,” and websites “are not culpable for ‘aiding and abetting’ their customers who misuse their services.” *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967–69 (N.D. Ill. 2009).
- In 2012, legislatures in Washington, New Jersey, and Tennessee passed laws targeting Backpage, but federal courts enjoined each one as unconstitutional. The courts rejected arguments that the laws prohibited only ads for illegal transactions and instead found they violated the First Amendment. *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); *Backpage.com, LLC v. Hoffman*, No. 13–cv–03952, 2013 WL 4502097 (D.N.J. Aug. 20, 2013).

Pressure Tactics to Censor Online Speech

Because “blunt force” censorship attempts are almost always struck down, policymakers and other elected officials have sought to employ an assortment of creative means—legal and otherwise—to restrict disfavored speech. The sometimes overlapping efforts have taken the form of unconstitutional threats, repeated demands to terminate services, and harassing investigations.

- In 2008, forty-two state attorneys general (“AGs”) issued a joint statement negotiated with Craigslist that included various measures to purportedly help detect and prevent ads for illegal services in the website’s “erotic services” section. Although Craigslist took voluntary measures in response, seventeen of the AGs continued to demand that Craigslist remove its adult services section entirely.
- When various officials persisted in their demands, Craigslist eliminated its adult “category” in September 2010.
- After Craigslist “closed” its adult category in 2010, the National Association of Attorneys General (“NAAG”) demanded that Backpage drop its adult category as well.

- NAAG also issued a long list of information requests “in lieu of a subpoena” concerning Backpage’s posting policies, content screening, cooperation with law enforcement, and other topics (similar to PSI’s subpoena).
- Sheriff Dart of Chicago also “focused on Backpage.com as the new battleground” after the demise of the adult “category” on Craigslist, notwithstanding the federal court ruling barring him from bringing suit to close down such websites.
- In January 2014, Dart sent Backpage a letter styled as a “Request for Information and Site Modification,” that sought detailed information about Backpage’s business, finances, personnel, site policies, and moderation practices, and it made demands for how Backpage should operate, including that it should “[r]equire User to pay fees with major credit card.”
- In 2015, Sheriff Dart “embarked on a campaign intended to crush Backpage’s adult section – crush Backpage, period, it seems – by demanding that firms such as Visa and MasterCard prohibit the use of their credit cards to purchase any ads on Backpage.” The campaign resulted from a strategy devised by the Sheriff and his staff “to take down Backpage.com,” “legally or otherwise.”
- Backpage challenged Dart’s actions as unconstitutional. The U.S. Court of Appeals for the Seventh Circuit issued a preliminary injunction against Dart in November 2015 after finding his actions violated the First Amendment. *Backpage.com LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015).
- Judge Richard Posner’s opinion for the court explained that the use of “coercive state power to stifle protected speech violates a plaintiff’s First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or misuse) of the defendant’s direct regulatory or decisionmaking authority . . . or in some less-direct form.”
- Describing Sheriff Dart’s actions as “a campaign of suffocation” designed to “crush Backpage,” Judge Posner wrote that “[t]he First Amendment forbids a public official to attempt to suppress the protected speech of private persons by threatening that legal sanctions will at his urging be imposed unless there is compliance with his demands.”
- In 2014, Mississippi Attorney General Jim Hood threatened to prosecute Google and served extensive document subpoenas after demanding that Google “take down entire websites that possibly contain illegal or dangerous content and, in his opinion, facilitate illegal activity,” including prescription or illicit drug sales, credit card leaks, fraudulent identification documents, copyright infringement, and human trafficking.
- Hood’s subpoena included very broad requests that would require massive document production, seeking, for example, “all documents concerning any actions considered, taken, or not taken to remove videos . . . that appear to be promoting, offering for sale, disseminating, engaging in or facilitating Dangerous or Illegal Content/Conduct.”

- Google challenged Hood’s subpoena, and the court found that the investigation violated the First Amendment because it involved “threats of legal action and an unduly burdensome subpoena.” *Google, Inc. v. Hood*, 96 F.Supp.3d 584, 598 (S.D. Miss. 2015). On appeal, the Fifth Circuit agreed that the subpoena raised an important First Amendment issue, but reversed the district court only because enforcement was not imminent. *Google, Inc. v. Hood*, 822 F.3d 212, 220, 228 (5th Cir. 2016).
- On May 10, 2016, the Senate Committee on Commerce, Science, and Transportation launched an investigation about Facebook’s “Trending Topics” section, based on press accounts that Facebook had selectively chosen not to feature content concerning conservative views. The committee demanded that Facebook provide information on its editorial policies.
- Legal scholars and the press called the Senate investigation an infringement of Facebook’s First Amendment rights. See, e.g. *Senator Demands Answers From Facebook on Claims of ‘Trending’ List Bias*, NEW YORK TIMES, May 10, 2016 (citing First Amendment lawyer Floyd Abrams that “[t]he notion of Congress looking into or investigating how a medium of communication decides what to say threatens on its face First Amendment rights”).
- Facebook changed its editorial policies in response to the investigation even though its “data analysis indicated that conservative and liberal topics are approved as trending topics at virtually identical rates.” Jessica Guynn, *Facebook Makes Changes to ‘Trending Topics’ After Bias Investigation*, USA TODAY.COM, May 24, 2016.

Congressional Demands

As it has been with state AGs and local authorities, various members of Congress have made demands targeting Backpage.com.

- In March 2012, nineteen senators wrote Village Voice Media (then Backpage.com’s parent company) demanding that it remove the adult section of Backpage.com.
- In October 2012, six senators wrote the company that acquired Village Voice’s print operations, threatening to continue to hold it “accountable” until “shutting down Backpage’s ‘adult entertainment’ section ... has been achieved.”
- House Resolution 649 targeted Backpage and “called on all Internet media providers to immediately eliminate ‘adult entertainment’ sections and [similar] classified advertising,” and Senate Resolution 439 demanded “eliminat[ion] of the ‘adult entertainment’ section of the classified advertising website Backpage.com.”

PSI’s Investigation of Backpage.com

Although PSI has claimed its investigation is routine legislative fact-finding, it has been a punitive exercise targeting Backpage.com. The Subcommittee’s claims that Backpage.com and its officers have not cooperated in the investigation are false, as are the assertion that no serious

First Amendment issues are implicated. PSI's actions violate the basic rule that "[i]nvestigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Watkins v. United States*, 354 U.S. 178, 187 (1957).

- PSI's document demand is expansive and burdensome, and its investigation specifically targeted Backpage.com.
 - On July 7, 2015, the Subcommittee, after consulting with Sheriff Dart, issued to Backpage.com a document subpoena for 41 categories of documents seeking information on all aspects of Backpage's business, terms of use, and editorial policies. Counting the multiple sub-parts for each category, the subpoena sought documents on approximately 120 subjects. The request drew directly from Sheriff Dart's January 2014 "Request for Information and Site Modification."
 - On July 16, 2015, Backpage.com counsel met with Subcommittee staff to raise concerns about the scope of the document subpoena, the First Amendment issues it posed, and the extent to which the Subcommittee's inquiry appeared to be part of the larger governmental effort targeting the website. Backpage.com submitted written objections on August 6, 2015 and requested the subpoena's withdrawal.
 - The Subcommittee's reaction was twofold. It issued deposition subpoenas to Backpage.com employees but at the same time denied there was any intent to single out Backpage.com.
 - Objecting to the breadth of the request and to the subpoenas issued to employees, Backpage.com asked the Subcommittee to submit the matter for judicial consideration pursuant to 28 U.S.C. § 1365. Backpage.com again expressed concern that "the Senate's inquiry is related to—and indeed connected with—recent explicit efforts by other government actors to halt Backpage.com's legitimate, legal, and First Amendment-protected business operations."
 - On August 28, 2015, the Subcommittee rejected the request that it withdraw the subpoenas issued to Backpage.com employees, as well as the claim that the subpoenas raised any First Amendment issues. The Subcommittee also called suggestions that the investigation was related to explicit efforts by other governmental actors to halt Backpage.com's business "unfounded and irresponsible."
 - Backpage.com counsel met with Subcommittee staff on September 14, 2015 to discuss the serious constitutional concerns raised by the inquiry and to again urge the Subcommittee to initiate the judicial process under 28 U.S.C. § 1365. During this meeting, Subcommittee staff again insisted that the inquiry was unrelated to any other enforcement and harassment efforts against Backpage.com.
 - On October 1, 2015, the Subcommittee wrote to Backpage.com and reiterated its position that Backpage.com's First Amendment concerns were without merit. It specifically disputed any suggestion that "the Subcommittee's investigation is part of a concerted effort, with other unrelated government actors, to engage in harassment."

- Despite PSI's repeated denials in face-to-face meetings, correspondence, and court filings, internal emails revealed that PSI staff coordinated with Sheriff Dart's office and drew its document demands from information provided by Dart. Subcommittee Counsel also wrote the Sheriff's office regarding the success of their "cease and desist" letters insisting that Visa and MasterCard terminate all dealings with Backpage, exclaiming "What a development!" Subcommittee Counsel asked to schedule a call with Sheriff Dart's staff "to get the story about how it all went down." He told the Sheriff that the Subcommittee's investigation "is rapidly progressing down a parallel track."
- On July 6, 2015, Subcommittee Counsel wrote Sheriff Dart's staff to request copies of the document requests that the Sheriff's office had sent to Backpage.com. With Sheriff Dart's document demands in hand, the Subcommittee issued its initial document subpoena the next day, seeking 41 categories of documents, including a number of detailed demands drawn from Dart's January 2014 "request."
- On October 1, 2015, the Subcommittee withdrew the July 7 subpoena and in its place issued the new Subpoena to Mr. Ferrer with eight enumerated requests covering what it called "the core of the Subcommittee's investigation."
- The new requests did not narrow PSI's document demand, but just reframed the Subpoena in broader terms. The demand corresponded to the general categories the Subcommittee had described as "seven specific topics" that were covered by the 41 requests in the July 7 subpoena.
- PSI also expanded its investigation further by issuing subpoenas to other entities and individuals that are or were affiliated with Backpage.com.
- Counsel for Backpage.com again expressed its concerns regarding the constitutional infirmities of the investigation but agreed to determine what information could be produced without infringing upon the company's constitutional rights.
- PSI has routinely claimed that Backpage had refused to cooperate and had simply failed to produce or even "look for" documents in response to the Subpoena. This is false.
 - Backpage.com formally responded to the subpoena on October 23, 2015. It provided a number of documents that included various moderation guidelines the company had used and/or considered and a list of terms used in the moderation process.
 - Backpage.com also informed the Subcommittee that it was compiling records for production regarding its cooperation with law enforcement agencies in instances of suspected human trafficking.
 - On November 5, 2015, Backpage.com indicated its willingness to provide additional documents with the Subcommittee, and provided a software license and hosting agreement with a third-party vendor.
 - On November 13, 2015, Backpage.com submitted more than 16,000 pages of

documents to start what it intended to be a rolling production to the Subcommittee. The production included presentations and guides Backpage.com created to assist law enforcement officials, correspondence with law enforcement entities regarding potential human trafficking or similar potentially illegal activity, and an initial portion of the company's files on law enforcement requests for information regarding potential illegal activity.

- Following the initial submission, Backpage.com's counsel informed Subcommittee staff that it was preparing millions more pages for production documenting its cooperation with law enforcement agencies in combatting human trafficking. But the following day, PSI instructed Backpage to cease producing documents.
- Of the Subpoena's eight requests, Backpage declined to provide information and documents responsive to only one, pertaining to detailed revenue and profit numbers for various portions of its business for the past five years.
- Despite Backpage.com's efforts to comply, PSI gave the Subpoena the broadest possible reading. It insisted on production of any and all documents that touched on editorial decisions for a six-year period. In particular, the Subcommittee staff expressed dismay that Backpage had not also turned over its employee moderators' internal emails.
- On November 19, 2015, the Subcommittee held a public hearing that focused almost exclusively on Backpage.com. The hearing was not called to gather evidence about the issue of human trafficking, but was convened to bolster the Subcommittee's demand to compel information from Backpage.com.
 - PSI has falsely claimed that Backpage.com's CEO "refused" to appear at the hearing. PSI was informed that Mr. Ferrer was traveling outside the country on the hearing date and refused to consider an offer that he appears on other dates.
 - The Subcommittee heard testimony from two witnesses who had filed amicus briefs in separate legal actions against Backpage.com, and who testified that the Subpoena to Backpage would assist in their other legal efforts.
 - It has been falsely reported that Backpage.com's CEO was held in contempt for not appearing at the November 19, 2015 hearing. Rather, PSI voted to seek enforcement of the Subpoena under 28 U.S.C. § 1365 – the same process Backpage.com had urged the Subcommittee to follow since its initial contacts.
 - On February 29, 2016, the Subcommittee presented a resolution to the Senate Committee on Homeland Security and Governmental Affairs that directed Senate Legal Counsel to bring a civil action to enforce three of the eight paragraphs in the October 1, 2015 Subpoena.
 - Notably, the resolution *excluded* the one request for documents regarding human trafficking, the ostensible purpose of the investigation.

- The District Court issued an order to enforce the Subpoena on August 5, 2016. That decision is currently on appeal to the United States Court of Appeals for the D.C. Circuit.

The Burdens Imposed by Subpoena Enforcement

As the Subpoena's validity is being litigated, Backpage.com's CEO has had to comply with the District Court's order. The result is every bit as burdensome as it was predicted to be.

- More than three terabytes of data were collected from more than 100 custodians and data sources, 10.7 million individual documents were processed and searched, from which Backpage.com's counsel reviewed 1,466,840 individual documents.
- Production required 300 attorney reviewers who spent in total over 40,000 hours reviewing data (with non-attorneys spending another 224 hours), at a total cost to Backpage.com of almost \$3 million.
- Production to PSI has totaled more than 224,000 documents, encompassing over 550,000 pages.
- The Center for Democracy and Technology and the Electronic Frontier Foundation informed the D.C. Circuit that PSI's "invasive, burdensome inquiry into Backpage.com's editorial practices creates an intense chilling effect, not only for Backpage but for any website operator seeking to define their own editorial viewpoint and moderation procedures for the third-party content they host."