The Question Not Presented: Government and Social Media Corruption After *Murthy v. Missouri*

Richard W. Painter*

ABSTRACT

The Supreme Court in *Murthy v. Missouri* in 2024 dismissed a suit by multiple plaintiffs alleging that the Biden Administration's efforts to persuade social media platforms to monitor content violated the First Amendment. Although the Court did not directly decide the constitutionality of the government policy, the Court imposed a high bar for plaintiffs other than social media platforms to show standing to challenge the constitutionality of government pressure on the platforms.

But the coercion problem is not the only troubling aspect of this government policy. The question not presented to the Court was the corruption problem. What happens when powerful politicians pressure social media platforms to do what they want for their own political advantage and then suggest that government regulation of the platforms will be impacted by "voluntary" adherence to content moderation norms? Politicians could seek more moderation or less moderation of platform content depending on their political objectives. Is this a proper use of government power, and will more of it be encouraged by the Court's decision in *Murthy v. Missouri*?

This Article addresses the heightened risk of *quid pro quo* relationships between public officials and social media platforms after the *Murthy* holding made it difficult for plaintiffs to sue the federal government for pressuring social media on content moderation. Government pressure on social media platforms exerted with corrupt intent presumably will be outside the reach of the courts when most affected platform users don't have standing to sue.

Consider, for example, an express or implied understanding that the executive branch will stand down from unfavorable regulation of a social media platform in exchange for the platform helping the president's

* S. Walter Richey Professor of Corporate Law, University of Minnesota. Former Associate Counsel to the President and chief White House ethics lawyer 2005–07.

campaign for reelection or candidates of the president's political party. In this context "soft pressure" on social media platforms can evolve into *quid pro quo*.

This Article explains why bribery laws are insufficient to deal with this corruption problem. A case study is presented by an October 2019 meeting between Facebook CEO Mark Zuckerberg and President Donald Trump and his son-in-law Jared Kushner at the White House. A deal allegedly was discussed that may have been agreed upon: the Trump Administration would not support regulation that disadvantaged Facebook in exchange for Facebook not fact-checking political statements posted by its users, including Trump and his campaign, before the 2020 election. This alleged deal may be linked to Facebook's failure to censor Trump and his supporters up through January 6, 2021. This Article explains why criminal bribery statutes would be difficult to apply in a situation such as this even if such a *quid pro quo* probably would meet the broader definition of bribery contemplated in the impeachment clause of the Constitution.

President Trump, as a candidate for president, had a close relationships with titans of the social media industry, including Elon Musk, owner of X. Trump also is the controlling shareholder of his own social media platform, Truth Social. The potential for *quid pro quo* between politicians and social media now is stronger than ever.

This Article also addresses legislative and regulatory solutions to this problem. One is amending federal bribery laws or other criminal statutes to prohibit certain types of *quid pro quo* understandings between federal officials and social media platforms. Another is strengthening the political independence of the Federal Communications Commission (FCC) and prohibiting federal officials outside the FCC, particularly presidents, and their political appointees, from seeking to influence content decisions of social media platforms—in effect outlawing by statute much of the Biden Administration's conduct at issue in *Murthy v. Missouri* unless routed through the FCC or another independent agency. Yet another approach would be a statute giving state attorneys general standing to sue in federal court over federal interference with social media content moderation, so suits like *Murthy v. Missouri* could at least be decided on the merits. Finally, this Article observes that reducing industry concentration in social media would likely decrease the risk that *quid pro quo* corruption leads to de facto government control of the most often used media platforms in the United States of America.

Table of Contents

I. INTRODUCTION

The Supreme Court, in *Murthy v. Missouri*,[1] did not stop the Biden Administration from using soft pressure to persuade social media companies to remove harmful and misleading content. By imposing a high bar on plaintiffs to establish standing to sue under the First Amendment, the Court opened the door for the federal government to use measures falling short of mandates to persuade social media companies to revise content moderation policies.

Some states are also pushing up against the First Amendment in regulating social media platforms, although in the opposite direction. The

1. *See* Murthy v. Missouri, 603 U.S. 43, 76 (2024).

Supreme Court in *Moody v. NetChoice, LLC*, punted on First Amendment challenges to Florida and Texas anti-censorship laws that punish social media platforms for retaliating against users who post content that the platforms deem harmful or misleading. The Justices ruled unanimously that the lower courts had not properly evaluated the underlying First Amendment issues and remanded the cases for further consideration.[2] The Court did, however, say that tech platforms exercise their First Amendment rights in content moderation decisions and deciding how to display content on their platforms.[3]

What kind of content moderation might powerful politicians want from social media companies? That, of course, depends on their partisan political objectives. Some might want stricter content moderation, pushing in the same direction as the Biden administration. Others want less content moderation, pushing in the direction of Florida and Texas, and as discussed later in this Article, the Trump administration.

While the constitutionality of mandates like those in Texas and Florida is dubious after *Moody v. NetChoice*, government actors appear to have broad latitude to apply soft pressure on social media platforms after *Murthy v. Missouri* held that few platform users have standing to challenge the government under the First Amendment.

The only questions presented to the Court were the First Amendment questions, which the Court mostly avoided, in *Murthy v. Missouri* by denying plaintiffs standing and in *Moody v. NetChoice* by remanding the case for further legal analysis. But there is also a conflict-of-interest question: should politicians with a vested interest in content moderation policies of social media companies regulate them with mandates—as did Florida and Texas—or with persuasion—as did the Biden administration? Because plaintiffs are much more likely to have standing to sue in cases involving mandates and because First Amendment scrutiny in those cases is likely to be more exacting, this Article puts federal or state mandates aside and focuses on the softer means of persuasion that appear to have been permitted, at least for the time being, in *Murthy v. Missouri*.

---

2. *See* Moody v. NetChoice, LLC, 603 U.S. 707, 743–44 (2024) (vacated and remanded because neither the Fifth Circuit nor the Eleventh Circuit in the companion cases conducted proper constitutional analysis). Florida's statute sanctioned companies that willfully "deplatform" political candidates or other media outlets. FLA STAT. § 501.2041 (2024). Texas's statute, HB 20, prohibited social media platforms from censoring users based on their "viewpoints" or "censor[ing]" a "user's expression" based on the "viewpoint" it contains. TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002(a)(2) (West 2024).

3. *See Moody*, 603 U.S. at 740 ("When the platforms use their Standards and Guidelines to decide which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices. And because that is true, they receive First Amendment protection.").

The argument in this Article is that, regardless of how the First Amendment analysis turns out, the *Murthy* Court's refusal to block the Biden administration's soft pressure campaign could pave the way for corrupt relations between social media companies and politicians desperately interested in content moderation policies.

At least since 2016, social media has been a powerful force in deciding elections. Most of Special Counsel Robert Mueller's investigation of Russian interference in the 2016 election focused on Facebook, Twitter, and other social media platforms.[4] Before and after the 2020 election, including the events leading up to January 6, 2021, social media was a facilitator of Donald Trump's plan to remain president.[5]

The U.S. House January 6 Committee staff compiled a detailed memo on the role of social media platforms in the post-election chaos,[6] but the Committee declined to include it in its final report.[7] Social media companies appear to have bent over backwards in their content moderation policies to accommodate extremist groups.[8] At Facebook, for example, sharing hate speech by Alex Jones was not forbidden because it was part of "political discourse," a distinction Facebook made after personal intervention by Mark Zuckerberg.[9]

---

4. *See* 1 ROBERT MUELLER, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 14–35 (2019) (discussing the Russian Internet Research Agency, which controlled Facebook, Twitter and other social media accounts and used false pretenses, impersonation, and similar strategies to spread disinformation before the 2016 election).

5. *See* Cat Zakrzewski et al., *What the Jan. 6 Probe Found Out About Social Media, but Didn't Report*, WASH. POST (Jan. 17, 2023, 6:00 AM), https://perma.cc/6P5S-DTHF.

6. *See generally* U.S. House Select Comm., Social Media & the January 6 Attack on the U.S. Capitol (unpublished manuscript), https://perma.cc/KZ4Y-H4PD (last visited Nov. 3, 2024).

7. *See* Zakrzewski et al., *supra* note 5. As reported in the *Washington Post*:

> The Jan. 6 committee spent months gathering stunning new details on how social media companies failed to address the online extremism and calls for violence that preceded the Capitol riot . . . . But in the end, committee leaders declined to delve into those topics in detail in their final report, reluctant to dig into the roots of domestic extremism . . . and concerned about the risks of a public battle with powerful tech companies . . . .

Id.

8. *See* U.S. House Select Comm., *supra* note 6, at 30. As stated in the Committee report:

> On many occasions since at least 2018, [Facebook/Meta] leadership bent over backward to make policy exceptions for right-leaning outlets and individuals. More so than any profit-seeking pursuit of greater user engagement, this trend led to the company's failure to control activity on its service that ultimately contributed to the events of January 6th.

Id.

9. *See* Ryan Mac & Craig Silverman, *"Mark Changed the Rules": How Facebook Went Easy on Alex Jones and Other Right-Wing Figures*, BUZZFEED NEWS, https://perma.cc/4JR6-4997 (Feb. 22, 2021, 1:14 PM). As reported in *Buzzfeed News*:

> But Zuckerberg didn't consider [Alex Jones] to be a hate figure, according to a person familiar with the decision, so he overruled his own internal experts and opened a gaping loophole: Facebook would permanently ban Jones and his company — but would not touch

President Trump's power as head of the executive branch, an important regulator of social media platforms, may have had something to do with that. Indeed, at a 2019 private meeting between Trump and Zuckerberg, the subject of Part IV of this Article, government regulation of social media platforms probably was discussed.[10]

By 2024 Zuckerberg was out with Trump and his social media archrival Elon Musk was in. Musk emerged at one of Donald Trump's most powerful backers, aggressively using the X platform for partisan posts in the election and organizing on the ground to register voters and turn out the vote in swing states such as Pennsylvania.[11] Musk is also expected to play a role in the new Administration although as of this writing it is unclear whether he will join the government or undertake an informal advisory role outside of it.

This Article addresses the president's use of his official position as regulator-in-chief to induce political accommodation from social media platforms. The focus here is on whether *quid quo pro* understandings between presidents and social media companies can rise to the level of bribery or be constrained by other existing law. This Article explains why the law of bribery, as presently constituted, will not restrain collusion between the president and the social media industry.

This concern arises with all politicians who use government power to induce or coerce cooperation from social media platforms. The president, however, as head of the executive branch has more power. Members of Congress collectively enact or repeal statutes regulating social media companies and may seek political accommodations from social media companies in return, but at least no single person controls the legislative process. Most, but not all, examples discussed in this Article thus involve abuses of presidential power.

Can presidents and other powerful politicians effectively and legally establish a *quid pro quo* relationship with privately owned media platforms to gain an upper hand in elections? If the law of bribery will not restrain them, what will?

---

posts of praise and support for them from other Facebook users. This meant that Jones' legions of followers could continue to share his lies across the world's largest social network. 'Mark personally didn't like the punishment, so he changed the rules,' a former policy employee told BuzzFeed News, noting that the original rule had already been in use and represented the product of untold hours of work between multiple teams and experts. *Id.*

10. *See infra* Part IV (describing alleged details of a 2019 meeting between Donald Trump and Mark Zuckerberg).

11. *See, e.g.*, Pennsylvania *ex rel.* Krasner v. Musk, No. CV 24-5823, 2024 WL 4655418, at *1 (E.D. Pa. Nov. 1, 2024) (Philadelphia District Attorney alleging that Musk's America PAC by virtue of awarding registered voters $1 million in return for signing a petition supporting the First and Second Amendments, violated Pennsylvania's lottery laws, unfair trade practices laws and consumer protection laws).

These questions about the relationship between the state and media are essential to the longevity of a republic. In a dictatorship, the head of state controls the media. Democracy, by contrast, is founded on independent media. Yet First Amendment protections of freedom of the press and freedom of speech are weak if presidents and other politicians can induce or coerce social media platforms into supporting or accommodating them and their political supporters.

The problem addressed in this Article is an express or implied understanding between a president or other powerful politician and a social media company that the government will take or refrain from official action, usually a regulatory action, in exchange for the media organization making policy decisions that favor the politician. Such favors would include allowing the politician's supporters unrestricted access to a platform on preferential terms, allowing misinformation on the platform, selectively enforcing content moderation, and boosting posts to broaden dissemination among users of the platform.

We saw the power of social media in the past three presidential elections. The impact of social media will be even more pronounced with the spread of artificial intelligence (AI) and other technology that enables misinformation embedded in Deepfake videos, recordings, and other depictions of candidates.[12] Also, there are important differences between social media and traditional forms of media—newspapers, radio, TV, etc.—that make social media more prone to abuse. Social media content is shaped in the first instance by users and then molded by the platform, which monitors content and disseminates it through the user community. A powerful politician's supporters can utilize a platform on a massive scale without the platform expressly aligning with the politician. Traditional media support for candidates is usually transparent (e.g., Fox News supports conservatives, and MSNBC supports liberals). Social media platforms, by contrast, often purport to be neutral. But social media platforms can favor some user generated content over others and can apply content moderation policies to advantage one political candidate over another.

The political power of social media platforms, however, can be redirected as politicians see fit when they use the regulatory power of the government. This regulation includes the Federal Communications Commission (FCC) interpretation of Section 230 of the Communications

12. *See* Richard W. Painter, *Deepfake 2024: Will Citizens United and Artificial Intelligence Together Destroy Representative Democracy?*, 14 J. NAT'L SEC. L. & POL'Y 121, 124 (2023).

Decency Act exempting platforms from defamation suits,[13] antitrust enforcement, and other areas of regulation. Protecting children from harmful content is another hot-button issue. In January of 2024, at Senate hearings investigating harmful content posted online, powerful social media moguls, including Mark Zuckerberg, apologized profusely to Members of Congress and the public.[14] Regulation is likely to follow.[15] The implication is clear: politicians want to show the titans of social media who is boss. Protecting children from harmful content or other policy objectives may not be the only motivation.

Congress passes laws, but it is the executive branch that enforces them. The more the government regulates social media companies, the more potential there will be for *quid pro quo* involving social media companies and the president. And it is there, within the concentrated power of the executive branch, that the danger of corruption is most acute.

And that much more so when the president himself has a controlling interest in a publicly held social media company Trump Media & Technology Group Corp. (DJT) and one of his strongest supporters, Elon Musk privately owns another (X, formerly known as Twitter). Musk's X could even merge with Donald Trump's Truth Social, either by taking the publicly held DJT private or merging X into DJT.[16] Trump and Musk together would hold the overwhelming majority of the combined entity's shares. Alternatively, the two platforms could coordinate to monitor and promote content, favoring some users over others, with few regulatory constraints.

As President, Trump will control the supposedly independent FCC, which among other things, regulates media concentration through rules and policies that promote competition. He will also control the Department of Justice (DOJ) and the Federal Trade Commission (FTC), which are supposed to enforce the antitrust laws.[17] Zuckerberg's Meta, the other

13. *See* 47 U.S.C. § 230. This provision, discussed more extensively in Part IV of this Article, gives social media planforms immunity from defamation suits over content posted on their platforms.

14. *See Meta Boss Mark Zuckerberg Apologizes to Families in Fiery US Senate Hearing*, BBC (Feb. 1, 2024), https://perma.cc/VZR6-39T2.

15. *See id.* ("Legislation is currently going through Congress which aims to hold social media companies to account for material posted on their platforms."); *see also* Rebecca Klar, *Hundreds of Families Urge Schumer to Pass Children's Online Safety Bill*, HILL (Feb. 8, 2024, 5:00 AM), https://perma.cc/9T6A-JQV3. *See generally* Kids Online Safety Act, S. 1409, 118th Congress (2023) (Introduced 05/02/2023).

16. *See* Mandy Taheri, *Will Donald Trump's Truth Social Merge with Elon Musk's X? Rumors Swirl*, NEWSWEEK (Nov. 8, 2024, 2:59 PM), https://perma.cc/9M9R-XJPV.

17. *See* Trump v. United States, 603 U.S. 593, 641–43 (2024) (holding that the president is immune from criminal prosecution for exercising his control over the Justice Department); Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 238 (2020) (upholding the president's Article II power to remove the head of a federal agency); *see also* Section VII.D *infra* (discussing whether the Supreme Court now enamored of the

major player in social media, could come under increasing pressure from government regulators, and perhaps even DOJ prosecutors, to exit the industry or sell out to the Trump-Musk duopoly.

Content oriented "soft pressure" on social media companies, the issue in *Murthy v. Missouri*, also could expand greatly in the new Administration. The comparatively gentle prodding of social media platforms by the Biden administration could harshen significantly, potentially becoming an "offer you can't refuse" of the sort *The Godfather* movie made famous.[18] The Supreme Court had an opportunity to constrain at least some of this abuse of government power in *Murthy v. Missouri* as a violation of the First Amendment, but declined to do so.

Complicating matters further, the personal social media account of a president, cabinet member or other high ranking official, can be used to communicate about government policy to such an extent that it becomes an official account. This means that, among other things, the platform could be a "designated public forum" for purposes of the First Amendment,[19] although First Amendment protections assuring public access to such platforms might just be ignored. In the case of an appointed official, but not a president, the Hatch Act also would prohibit mingling of official communications with partisan messaging intended to influence elections.[20] But the Office of Special Counsel (OSC) investigates Hatch Act violations and the Director of the OSC, like the heads of other federal agencies can be removed by the president.[21] The Hatch Act, like other laws, might simply be ignored.

Already in early 2025 there are ominous signs that the power of the presidency will be used to fundamentally reshape the social media industry. In the weeks before Trump took office the White House policy of cajoling social media companies that the Biden administration defended in *Murthy v. Missouri*, was taking hold on the industry with a vengeance, going in the opposite direction than the Biden administration had intended.

"unitary executive theory" will overturn its ruling ninety years ago in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), that Congress can prevent the president from firing the commissioners of an independent commission such as the Federal Trade Commission).

18. THE GODFATHER (Paramount Pictures 1972).

19. *See* Knight First Amendment v. Trump, 928 F.3d 226, 237 (2d. Cir. 2019) (holding, after President Trump turned his private platform into a public forum that required open access, that the @realDonaldTrump Twitter account is "a presidential account as opposed to a personal account", and blocking people from it violates their rights to participate in a "designated . . . public forum.").

20. *See* U.S. OFF. OF SPECIAL COUNS., OSC FILE NOS. HA-19-0631 & HA-19-3395 (KELLYANNE CONWAY), REPORT OF PROHIBITED POLITICAL ACTIVITY UNDER THE HATCH ACT 2 (2019) ("OSC's investigation determined that Ms. Conway violated the Hatch Act during media appearances and by engaging in both official and political activity on her Twitter account, '@KellyannePolls.'").

21. *See, e.g.*, *Seila Law*, 591 U.S. at 238.

Mark Zuckerberg, who already was warming up to Trump before the 2024 election,[22] quickly pivoted toward Trump afterward. Conservative Trump supporters were added to Meta's Board,[23] and Meta donated $1 million to the 2025 presidential inaugural fund for Trump.[24] Zuckerberg was invited to sit with Musk, and next to Jeff Bezos, owner of the *Washington Post*, at the inauguration[25]—a clear signal that Trump had the support of billionaires who control a large swath of social media as well as the same newspaper that had brought down Richard Nixon in the 1970s.[26] Zuckerberg also co-hosted a reception for Republican billionaires at the inauguration.[27]

But Zuckerberg's most significant concession to Trump was to abolish fact checking at Meta,[28] a bone of contention going back to his 2019 meeting with Trump when the President urged that Facebook not moderate content posted by his supporters.[29] Zuckerberg in January 2025 went so far as to blame Meta's own fact checkers, agreeing with Trump that they were politically biased.[30]

22. After the assassination attempt on Trump in July 2024, Zuckerberg said that Trump's response with a raised fist was "one of the most badass things I've ever seen in my life." Victoria Feng, *Mark Zuckerberg Praises Trump's Response to Assassination Attempt*, NBC NEWS (July 19, 2024, 5:32 PM), https://perma.cc/T43Y-V5YB.

23. *See* Kelvin Chan, *Meta's New Board Includes UFC Boss Dana White, a Familiar Figure in Trump's Orbit*, AP NEWS (Jan. 7, 2025), https://perma.cc/8XH3-E23M.

24. *See* Liv McMahon, *Mark Zuckerberg's Meta Donates $1m to Trump Fund*, BBC (Dec. 12, 2024), https://perma.cc/Q6GC-2SUD.

25. *See* Jake Traylor and David Ingram, *Elon Musk, Jeff Bezos and Mark Zuckerberg to Attend Trump's Inauguration: The Three Will Be Seated Together on the Inauguration Platform with Other Prominent Guests*, NBC NEWS (Jan. 14, 2025, 12:57 PM), https://perma.cc/ET6B-S7AB.

26. *See Watergate Break-in, 50th Anniversary*, NAT'L ARCHIVES (June 14, 2022), https://perma.cc/3FJE-ZA68 (describing how two reporters for the *Washington Post* were first to break the story of the Watergate robbery that ultimately led to Nixon's resignation). Even before the election Bezos was cozying up to Trump by preventing the *Post*'s editorial board from endorsing Vice President Harris in the election. *See* Dan Mangan, *Jeff Bezos Killed Washington Post Endorsement of Kamala Harris, Paper Reports*, CNBC (Oct. 25, 2024, 1:44 PM), https://perma.cc/3H9A-FDY3.

27. *See Mark Zuckerberg Will Cohost Reception with Republican Billionaires for Trump Inauguration*, U.S. NEWS (Jan. 14, 2025), https://perma.cc/YG26-FP6K.

28. *See* Huo Jingnan et al., *Meta Says it Will End Fact Checking as Silicon Valley Prepares for Trump*, NPR (Jan. 7, 2025, 5:03 PM), https://perma.cc/K7PZ-UPKK.

29. *See infra* text accompanying notes 79–81 (discussing the 2019 Trump Zuckerberg meeting).

30. *See* Stuart A. Thompson, *Meta Says Fact-Checkers Were the Problem. Fact-Checkers Rule That False*, N.Y. TIMES (Jan. 7, 2025), https://perma.cc/SF2S-QT2Z (stating that Zuckerberg criticized the Meta factcheckers for political bias); *see also* Max Zahn, *Here's Why Meta Ended Fact-Checking, According to Experts*, ABC NEWS (Jan. 7, 2025, 6:31 PM), https://perma.cc/M8E6-QGN5 (stating that Trump similarly criticized Meta for political bias).

Shortly after the 2024 election, Zuckerberg met with Trump at Mar-a-Lago,[31] a sharp reversal of their strained relations only a year earlier when Trump was threatening Zuckerberg with life in prison if he "interfered" in the election.[32] We do not know what was said at this meeting or any subsequent meetings or phone calls between Trump and Zuckerberg. What was said at their 2019 meeting discussed later in this Article is reported second hand. But it is likely that the means of persuasion the Biden administration deployed with social media platforms paled in comparison with the means of persuasion the Trump administration could deploy.

Moreover, the social media industry may become even more concentrated in the hands of Trump's supporters after the Supreme Court in January 2025 refused to strike down a statute requiring divestiture of TikTok's U.S. platform from Chinese ownership.[33] After going dark for a few hours on January 19, 2025, a day before Inauguration Day, TikTok restored service to American users after getting assurance from Trump that he will delay enforcement of the statute while the Chinese parent company ByteDance Ltd. finds a buyer in the United States. The buyer very likely will be one of Trump's many billionaire supporters.

Then there is the threat of defamation litigation. Even conventional media is getting the message that accommodating Trump is the path of least resistance. In December 2024 ABC's parent company, Disney Corporation, agreed to pay $15 million to Trump's presidential library to settle a defamation suit Trump had brought after anchor George Stephanopoulos asserted on-air that Trump had been found civilly liable for rape.[34] Defamation suits would be an even bigger fear for the social media industry, but for a liability shield provided by Congress under Section 230 of the Communications Decency Act, discussed later in this Article.[35] The problem is that the President, with a politically aligned Congress, can amend Section 230, and even acting alone the executive branch could try to influence the way Section 230 is interpreted by the courts. As also discussed later in this Article,[36] the prospect of losing Section 230 may have been the fear that brought Zuckerberg to the table

31. *See* Tom Gerken, *Mark Zuckerberg Dines with Donald Trump at Mar-a-Lago*, BBC (Nov. 28, 2024), https://perma.cc/S7G3-DNKE.

32. *Id.*

33. *See* TikTok Inc. v. Merrick B. Garland, Nos. 24-656 to 24-657, slip op. at 19–20 (U.S. Jan. 17, 2025).

34. *See* Michael R. Sisak, *ABC Agrees to Give $15 Million to Donald Trump's Presidential Library to Settle Defamation Lawsuit*, AP NEWS (Dec. 14, 2024, 9:23 PM), https://perma.cc/P65B-E2DU.

35. *See infra* text accompanying notes 86–88.

36. *See infra* text accompanying notes 86–88.

to meet with Trump in 2019, and it is probably an even more salient worry for the industry today.

In sum, the United States faces the very real prospect of combined corporate-state control of social media, arguably the most important source of news and political commentary for young voters. Government content-based pressure on social media platforms that do not conform, or that pose a competitive threat to dominant platforms under the patronage of the president, would only be a part of a plan to consolidate such control, but it is an important part and the subject of this Article.

Part II of this Article summarizes the *Missouri v. Murthy* case and the Court's refusal to enjoin the Biden administration's soft pressure campaign to persuade social media companies to moderate content. The main point here is that soft pressure strategies could lead to corrupt *quid pro quo* understandings between government and social media platforms subject to government regulation. Part III examines the definition of bribery under federal criminal law and the broader definition of bribery under the Constitution and explains why neither is likely to be an effective safeguard against the type of *quid pro quo* involving social media platforms discussed in this Article. Part III also examines related laws, such as extortion laws and laws prohibiting theft of honest services and explains why these laws also are not likely to curb presidents and other politicians from abusing their power over social media platforms. Yet another problem is the Court's 2024 holding in *Trump v United States*,[37] that the president has absolute immunity, or at least a presumption of immunity, from criminal prosecution for official acts, which will make the prosecution of bribery cases involving the president even more difficult.

Part IV describes alleged details of a 2019 meeting between Donald Trump and Mark Zuckerberg that may have influenced the way Facebook responded to the use of its platform by Trump supporters before and after the 2020 election and why the legal rules discussed in Part III were ineffective in deterring an alleged *quid pro quo*. Part V discusses other social media platforms, many of which are under the control of just three billionaires (Zuckerberg, Elon Musk, and Larry Ellison), and the fact that Donald Trump, as a leading presidential candidate and now as President, controls his own social media platform (Truth Social). The focus here is the potential for future *quid pro quo* collusion between the president and social media companies. Part V also discusses how the Biden Administration's effort to stop dissemination of false information on social media platforms, upheld for the time being by the Court in *Murthy*, establishes a worrisome precedent, and why we should be concerned even

37. *See* Trump v. United States, 603 U.S. 593, 642 (2024).

if Biden was not using presidential power to induce social media platforms to accommodate his political supporters.

Part VI of this Article briefly examines an indictment in Israel of Prime Minister Benjamin Netanyahu for what appears to be a *quid pro quo* with a traditional Israeli print media conglomerate that, in some respects, is like the alleged understanding between Trump and Zuckerberg described in Part IV. A crucial component of the Netanyahu indictment is a definition of bribery that is broader than that used in the United States. Such a definition of bribery might or might not be an effective response to *quid pro quo* if adopted in U.S. laws and might pose constitutional problems in the United States. Part VII explores other solutions to the *quid pro quo* problem, going outside changes to the criminal laws. The most important reform will be limiting federal regulation of social media platforms to a federal agency that is independent of political pressure from the president, although as explained further in Part VII that could be difficult because the Court has insisted on enforcing the president's unitary executive control over federal agencies.[38] Reduction of concentration in the social media industry also could alleviate the corruption problem, although that also may be an elusive objective.

II. MURTHY V. MISSOURI

In the aftermath of the upheaval of January 6, 2021, the Biden administration directly contacted social media platforms—including Twitter, Facebook, Instagram, and YouTube—to urge them to take down content that is misleading or incites violence. Lies and incitements of violence are dangerous for democracy. Government regulation of speech, however, is perhaps even more dangerous for democracy. The Biden administration chose an apparent middle ground of encouraging, but not requiring, social media platforms to take down dangerous content.

This type of soft regulation seeks to encourage private actors—or as Richard Thaler and Cass Sunstein have written, "nudge"[39] them—toward doing something the government wants them to do, without imposing a government mandate. The problem is that the government has power to impose mandates in other areas. This power can be used as bargaining chip to induce private actors to comply with government "suggestions" that if framed as mandates likely would violate the First Amendment. The

38. *See, e.g.*, *Seila Law*, 591 U.S. at 238 (striking down a statute limiting the president's ability to remove the Director of the CFPB). This case is cited and discussed in *Trump v. United States*, 603 U.S. 593 *passim* (2024) (holding that the president is entitled to a presumption of immunity from criminal prosecution for official acts).

39. *See generally* RICHARD THALER & CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009) (analyzing ways in which regulatory regimes can incentivize socially beneficial conduct without mandating it).

constitutional question then is whether this type of indirect pressure also violates the First Amendment.

One of the many potential bargaining chips the government could use to induce "voluntary" compliance with its content moderation suggestions is social media companies' broad protection from defamation suits under Section 230 of the Communications Decency Act. A person defamed on social media can sue the poster of defamatory material but, under Section 230 cannot sue the platform the way a plaintiff could sue a newspaper that publishes a defamatory letter to the editor.[40] It might be reasonable for the government to ask for voluntary compliance with platform content moderation norms in return for platform immunity from defamation suits, although Section 230 itself does not condition immunity on voluntary content moderation of any kind.[41]

The Biden administration's efforts to induce voluntary content moderation do not expressly link interpretation of Section 230 with voluntary content moderation, and there is a limited amount any administration can do to change Section 230 without new legislation by Congress. Nonetheless, an Administration's interpretation of Section 230 could influence application of the statute by courts. Section 230 also could be repealed or amended. The president and Members of Congress have considerable sway over social media platforms that want Section 230 immunity to remain intact.

Similar issues arose during the Trump Administration, and the possibility that Section 230 might have been mentioned during a meeting Trump had with Mark Zuckerberg is discussed in Part IV of this Article. As discussed in Part IV, the Trump Administration sought to "nudge" Facebook toward less self-censorship of online content, whereas the Biden administration sought more self-censorship of content that is misleading and potentially harmful.

The problem is that such government nudging of social media, whether framed in terms of incentives or simply a request, still has the potential to become coercive. Regardless of the intent behind these interactions—which the Biden administration says is to combat misinformation on social media—the danger is that government

40. 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer shall be treated as the publisher or speaker of any information provided by another information content provider.").

41. Section 230(c)(2) separately provides that a social media platform shall not be held liable on account of any action "voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." 47 U.S.C. § 230(c)(2). Such content moderation, however, is not a precondition for the immunity from defamation suits provided for in subsection (c)(1).

suggesting changes to content moderation on social media is a form of censorship.

On July 4, 2023, U.S. District Judge Terry Doughty in Louisiana entered a preliminary injunction against the Department of Health and Human Services, the FBI, and dozens of other government agencies and officials from contacting social media companies[42] for the purpose of "encouraging, pressuring, or inducing in any manner the removal, deletion, suppression, or reduction of content containing protected free speech."[43] The Fifth Circuit Court of Appeals in New Orleans modified

42. Missouri v. Biden, 680 F. Supp. 3d 630, 641 (W.D. La. 2023) ("Plaintiffs allege that Defendants, through public pressure campaigns, private meetings, and other forms of direct communication, regarding what Defendants described as 'disinformation,' 'misinformation,' and 'malinformation,' have colluded with and/or coerced social-media platforms to suppress disfavored speakers, viewpoints, and content on social-media platforms."). In the Judge's order, "social-media companies" are defined to include "Facebook/Meta, Twitter, YouTube/Google, WhatsApp, Instagram, WeChat, TikTok, Sina Weibo, QQ, Telegram, Snapchat, Kuaishou, Qzone, Pinterest, Reddit, LinkedIn, Quora, Discord, Twitch, Tumblr, Mastodon, and like companies." Judgment at 3 n.2, *Biden*, 680 F. Supp. 3d 630 (No. 3:22-CV-01213).

43. *Id.* at 4. The Court enjoined dozens of high ranking officials in the Biden Administration who were named as defendants in this lawsuit, their agents, officers, employees, contractors, and all acting in concert with them from taking the following actions as to social-media companies:

(1) meeting with social-media companies for the purpose of urging, encouraging, pressuring, or inducing in any manner the removal, deletion, suppression, or reduction of content containing protected free speech posted on social-media platforms; (2) specifically flagging content or posts on social-media platforms and/or forwarding such to social-media companies urging, encouraging, pressuring, or inducing in any manner for removal, deletion, suppression, or reduction of content containing protected free speech; (3) urging, encouraging, pressuring, or inducing in any manner social-media companies to change their guidelines for removing, deleting, suppressing, or reducing content containing protected free speech; (4) emailing, calling, sending letters, texting, or engaging in any communication of any kind with social-media companies urging, encouraging, pressuring, or inducing in any manner for removal, deletion, suppression, or reduction of content containing protected free speech; (5) collaborating, coordinating, partnering, switchboarding, and/or jointly working with the Election Integrity Partnership, the Virality Project, the Stanford Internet Observatory, or any like project or group for the purpose of urging, encouraging, pressuring, or inducing in any manner removal, deletion, suppression, or reduction of content posted with social-media companies containing protected free speech; (6) threatening, pressuring, or coercing social-media companies in any manner to remove, delete, suppress, or reduce posted content of postings containing protected free speech; (7) taking any action such as urging, encouraging, pressuring, or inducing in any manner social-media companies to remove, delete, suppress, or reduce posted content protected by the Free Speech Clause of the First Amendment to the United States Constitution; (8) following up with social-media companies to determine whether the social-media companies removed, deleted, suppressed, or reduced previous social-media postings containing protected free speech; (9) requesting content reports from social-media companies detailing actions taken to remove, delete, suppress, or reduce content containing protected free speech; and (10) notifying social-media companies to Be on The Lookout ("BOLO") for postings containing protected free speech.

Id. at 4–5.

the preliminary injunction pending appeal.[44] The preliminary injunction issued by the District Court, as modified by the Fifth Circuit on October 3, 2023, was stayed by the Supreme Court on October 20, 2023. Three justices—Alito, Thomas, and Gorsuch—would not have stayed the order.[45]

The Supreme Court reversed in 2024.[46] The Court did not decide the case on the merits, holding the Biden administration policy constitutional or unconstitutional, but avoided deciding that issue by denying the plaintiffs standing to sue. The standing requirements imposed by the Court, however, make it very unlikely that future plaintiffs will successfully sue over these or similar federal interventions with social media platforms over content moderation policies. As the Court observed with respect to standing:

> To establish standing, the plaintiffs must demonstrate a substantial risk that, in the near future, they will suffer an injury that is traceable to a Government defendant and redressable by the injunction they seek. Because no plaintiff has carried that burden, none has standing to seek a preliminary injunction.[47]
>
> We begin—and end—with standing. At this stage, neither the individual nor the state plaintiffs have established standing to seek an injunction against any defendant. We therefore lack jurisdiction to reach the merits of the dispute.[48]
>
> The plaintiffs claim standing based on the 'direct censorship' of their own speech as well as their "right to listen" to others who faced social-media censorship. Notably, both theories depend on the *platform's* actions—yet the plaintiffs do not seek to enjoin the platforms from restricting any posts or accounts. They seek to enjoin *Government agencies and officials* from pressuring or encouraging the platforms to suppress protected speech in the future.[49]
>
> . . . *First*, it is a bedrock principle that a federal court cannot redress 'injury that results from the independent action of some third party not before the court . . . ' *Second*, because the plaintiffs request forward-looking relief, they must face 'a real and immediate threat of repeated injury . . . .' Putting these requirements together, the plaintiffs must show a substantial risk that, in the near future, at least one platform will restrict the speech of at least one plaintiff in response to the actions

44. *See* Missouri v. Biden, 83 F.4th 350, 359 (5th Cir. 2023).
45. *See* Murthy v. Missouri, 144 S. Ct. 7, 7 (2023).
46. *See* Murthy v. Missouri, 603 U.S. 43, 76 (2024).
47. *Id*. at 49–50.
48. *Id*. at 56.
49. *Id*. at 57.

> of at least one Government defendant. On this record, that is a tall order.[50]

The Court concludes:

> The plaintiffs, without any concrete link between their injuries and the defendants' conduct, ask us to conduct a review of the years-long communications between dozens of federal officials, across different agencies, with different social-media platforms, about different topics. This Court's standing doctrine prevents us from 'exercis[ing such] general legal oversight' of the other branches of Government. We therefore reverse the judgment of the Fifth Circuit and remand the case for further proceedings consistent with this opinion.[51]

In other words, the plaintiff has no standing to sue without a clear showing that the government pressured the social media platforms before they suppressed the plaintiff's speech, that there is other evidence of a causal link between the actions of the government and the suppression of the plaintiffs' speech, and that the platforms would stop suppressing the plaintiff's speech in the absence of continued government coercion.

This Article is not about whether the Court's approach to standing in *Murthy v. Missouri* is too strict, although it appears that the First Amendment issues may not be adjudicated on the merits for a long time. This Article accepts the Court's decision as a *fait accompli* and assumes that the Court for the foreseeable future will permit soft pressure from government on social media companies to adjust their content moderation policies to the liking of powerful politicians, particularly the president. The concern addressed here is whether changes to government regulation of social media platforms might be offered in return.

Consider the following possibilities:

- The White House suggests that a social media platform should consider modifying its content moderation policies to censure or mute posts by the president's opponents. This suggestion is made in the context of allegations by the government that some posts are potentially misleading and/or pose a danger to the public. Executives of the same social media platform have at the same time asked the White House for support in deflecting congressional investigations of platform content alleged to be harmful to children and opposing proposed legislation that would force social media platforms to remove harmful content.
- The White House suggests that a social media platform should consider modifying its content moderation policies to

50. *Id*. at 57–58.
51. *Id*. at 76.

allow or even magnify posts by the president's supporters, even if those posts contain misinformation. Executives of the same social media platform have at the same time asked the White House for support in defeating legislation in Congress that would diminish social media platforms' immunity under Section 230.

- Same as above, but the social media platform's executives have asked the White House for support of a proposed merger with another social media platform that the DOJ and FCC are currently reviewing for antitrust concerns.

And the list goes on. Once executive branch officials are allowed to "nudge" social media platforms toward a desired content moderation policy while at the same time other executive branch officials make regulatory decisions that have a substantial impact on social media platforms, the risk of *quid pro quo* exists. The more government "nudging" there is on the one hand, and the more potential regulatory changes on the other, the more *quid pro quo* is likely. And it is that risk—the corruption question not presented to the Supreme Court in *Murthy v. Missouri*—that is the concern of this Article.

III. CONSTITUTIONAL AND CRIMINAL DEFINITIONS OF BRIBERY

In the United States, there are two standards for defining bribery: one, broader standard can be used for removing a federal officer through impeachment, and another, narrower standard for criminal liability. A broader concept of bribery might cover a president or member of Congress who sought politically advantageous content moderation accommodation from a social media platform in exchange for an official act sought by the social media platform. A criminal bribery case on the same facts would be less likely. If, for example, the reporting on the Trump-Zuckerberg meeting discussed in Part IV of this Article is accurate, the proposal discussed at the meeting might have met the constitutional concept of bribery among the "high crimes and misdemeanors" justifying impeachment and removal from office. For reasons explained in Part IV, a criminal case under federal bribery statutes would have been more difficult.

The Constitution does not have a definition of bribery, so the understanding of the meaning of the word "bribery" at the time of the drafting and ratification of the Constitution guides constitutional interpretation. As Judge John T. Noonan, Jr. observed in his book *Bribes*, bribery is an ancient problem, and the law deals with it in various ways.[52]

52. *See generally* JOHN T. NOONAN, JR., BRIBES: THE INTELLECTUAL HISTORY OF A MORAL IDEA (Univ. of Cal. Press, 1987).

In England, Star Chamber bribery cases date back to the mid-1550s.[53] Our standards of what constitutes bribery have evolved since then. A related offense is extortion. While there is considerable overlap between the two offenses,[54] extortion cases involve an element of coercion by the public official abusing the power of his office to extract favors.

The most infamous bribery case at the time was the 1788 impeachment in the House of Lords of Warren Hastings, Governor General of India. In some ways, the Warren Hastings impeachment trial was really an extortion case.[55] Hastings was accused of using the power of his office to extract personal favors for himself and the East India Company from local officials in India. Despite overwhelming evidence of corruption, Hastings was acquitted by the House of Lords after months of testimony and deliberation.[56]

A. Bribery in the Constitution

Article II, Section 4 of the Constitution provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[57]

The Framers were familiar with a legal precedent considerably broader than the bribery definition in the federal criminal code today. As public corruption law experts Ben Berwick, Justin Florence, and John Langford point out, the word "bribery" as used in the Constitution very likely was "derived from English law, under which bribery was understood as an officeholder's abuse of the power of an office to obtain a private benefit rather than for the public interest."[58]

William Hawkins's *A Treatise of the Pleas of the Crown* in 1716 described bribery as follows:

> Bribery in a large sense is sometimes taken for the receiving or offering of any undue reward, by or to any person whatsoever, whose ordinary profession or business relates to the administration of publick justice, in order to incline him to do a thing against the known rules of

53. *See id.* at 315.

54. *See* James Lindgren, *The Theory, History and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695–96 (1993).

55. *See id.* at 1731 n.90.

56. *See id.*

57. U.S. CONST. art. II, § 4. For an excellent discussion of the constitutional definition of bribery, compared with the definition in the federal criminal code, see Ben Berwick et al., *The Constitution Says 'Bribery' is Impeachable. What Does that Mean?*, LAWFARE (Oct. 3, 2019, 8:00 AM), https://perma.cc/CT5E-WRBB (discussing the constitutional definition of bribery, compared with the definition in the federal criminal code).

58. *See* Berwick et al., *supra* note 57.

> honesty and integrity . . . [this type of corruption] deserves the severest of punishments.[59]

This definition of bribery encompasses all favors that may influence a public official to act against her honesty and integrity. It is a definition that is echoed in other publications, such as *Russell on Crimes*, published in 1819.[60]

Applying this broad constitutional definition of bribery makes sense when one focuses on the standard for removing public officials compared with the standard for imposition of criminal penalty. In common law, only some instances of bribery resulted in criminal prosecution, but the principal focus in most instances was removal from public office and preventing the corrupt official from holding future office. It makes sense that the threshold for such measures to protect the public from corruption would be lower than that required for imposing imprisonment or another severe criminal penalty. Removal from office is also the focus of the Constitution's impeachment clause.

Legal scholar Zephyr Teachout explains that in the eighteenth and early nineteenth centuries in England, common law bribery and extortion were considered "high" misdemeanors—"high" meaning that persons guilty of those crimes were barred from public office or public service.[61] The U.S. Constitution refers to bribery and also refers to "high crimes and misdemeanors" and then specifies that an impeached and removed public official can be tried separately in criminal court.[62] But the criminal case for bribery is a different proceeding and different law applies.

This leaves open the question of what to do about former officeholders guilty of bribery or some other crime and whether the House should impeach them to prevent them from holding future office. Trump's second impeachment trial on charges related to the January 6 insurrection occurred in the Senate after he left office, but he had been impeached by the House before he left office. Nothing in the Constitution precludes impeaching a former president after he has left office, but the Senate's handling of the February 2021 impeachment trial, including refusal to call

---

59. *Id.* (quoting WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (1716)).

60. *Id.* (quoting WILLIAM OLDNALL RUSSELL, TREATISE ON CRIMES AND MISDEMEANOURS (1819)).

61. *See* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 110–11 (Harvard Univ. Press, 2016).

62. U.S. CONST. art. I, § 3, cls. 6–7. The full text of Clause 7 states as follows:

> Judgement in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgement and Punishment, according to Law.

Id. art I, § 3, cl. 7.

witnesses,[63] shows that there is little appetite in Congress for following through with impeachment of a former president. Whether a senior White House official—for example, Jared Kushner who was alleged to have participated in the Trump-Zuckerberg meeting described in Part IV—is a "civil officer" within the meaning of the Constitution's impeachment clause, and thus also liable for impeachment is a more difficult legal question,[64] but here also it appears that Congress would not be interested in pursuing the impeachment alternative of an administration official who has left office. Unfortunately, that leaves legal accountability for *quid pro quo* to the criminal law where proving an offense is more difficult.

B. Bribery in Criminal Statutes

There was no federal bribery statute until 1853.[65] Zephyr Teachout in *Corruption in America* explains that the statutory definition of bribery in the United States has become narrower since then. Today, to be criminally prosecuted for bribery, a specific *quid pro quo* must be proven, though this standard only developed in the late twentieth century.[66]

The current federal criminal code, 18 U.S.C. § 201(b), provides that the crime of bribery occurs whenever anyone "directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . with intent to influence any official act."[67] 18 U.S.C. § 201(c) prohibits "gratuities," which is the acceptance of a reward after an official act even if there was no corrupt intent before the official act.[68]

Unlike the impeachment proceeding, which focuses only on the public official, the criminal bribery statute covers *both* the public official and the giver or offeror of the bribe. Both can be prosecuted if the elements of the criminal statute are met. It is understandable that for this reason, the

63. *See* Claire O. Finkelstein & Richard W. Painter, *Senate Witnesses in Trump's Impeachment Trial Could Give Republicans Causal Proof*, NBC NEWS THINK (Feb. 13, 2021, 4:30 AM), https://perma.cc/42CK-K8TV.

64. *See* Ryan Goodman, *Can Jared Kushner be Impeached?*, JUST SEC. (July 24, 2017), https://perma.cc/XR84-B233.

65. *See* Berwick et al., *supra* note 57.

66. *See* Berwick et al., *supra* note 57 (quoting TEACHOUT, *supra* note 61).

67. 18 U.S.C. § 201.

68. The Supreme Court recently explained the difference in *Synder v. United States*, 603 U.S. 1 (2024):

Importantly, because bribery can corrupt the official act, Congress treats bribery as a far more serious offense than gratuities. For example, if a federal official accepts a bribe, federal bribery law provides for a 15-year maximum prison sentence. *See* 18 U.S.C. § 201(b). By contrast, if a federal official accepts a prohibited gratuity, federal gratuities law sets a 2-year maximum prison sentence. *See* § 201(c).

Id. at 1953. In *Synder*, the Court ruled that a separate federal criminal statute applicable to state and local officials, 18 U.S.C. § 666(a)(1)(B), only prohibits bribes and not gratuities, which are left to regulation under state laws. *Snyder*, 603 U.S. at 19–20.

statute is more precise and narrowly focused than the constitutional standard applied only to remove a corrupt public official.

The phrase "anything of value" in the bribery statute is not defined. It is not limited to cash contributions. Other special considerations or services given to an office holder or to the office holder's re-election campaign could qualify.

There are some things helpful to a political campaign that would not fit within this statutory definition of "value." For example, a candidate might be endorsed by a labor union in exchange for the candidate's support for a bill raising the minimum wage. A newspaper chain or cable news network might endorse the reelection of an official who opposes media concentration regulations and might even threaten to revoke the endorsement if the officeholder changes their mind on media concentration regulations. That alone does not violate the bribery statute. However, for the newspaper chain or cable news network to go a step further and offer free campaign advertising to the office holder in exchange for official action on media concentration regulations probably would be something "of value" and a violation of the bribery statute.[69]

The Federal Election Commission offers useful guidance on federal campaign finance.[70] This guidance states that "anything of value" includes all "in-kind contributions," defined as "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services."[71] Under this definition, the endorsement would not be a "thing of value" but the free advertising would be.

The question critical for the issues raised in this Article is whether changing or leaving in place a particular policy of a social media company is a "thing of value" for a politician under the bribery statute. Is the social media company favoring one candidate over another in platform content moderation a "thing of value"? Is facially neutral content moderation a thing of value if the supporters of one candidate are spreading more disinformation on social media than the supporters of another? For example, assume Deepfake videos are circulating falsely depicting one candidate with potentially devastating effects on an election, while there are few, if any, damaging Deepfake videos depicting the opposing candidate. Does a social media company provide a "thing of value" if the company decides to allow Deepfake in exchange for the president or other

69. This distinction between endorsement by a media company and free advertising is murky in an age when cable news networks and on-line media continuously broadcast for or against candidates for public office.

70. *See generally* FED. ELECTION COMM'N, THE LAW OF A 'THING OF VALUE' (2019), https://perma.cc/JG5Z-X22V.

71. *Id.* at 1 (quoting 11 C.F.R. § 100.52(d)(1)).

powerful office holder agreeing to a regulatory accommodation long sought by the company?

Arguably yes, but in a defense against a criminal charge under the bribery statute, lawyers for the company and the candidate/officeholder will argue that both the company and the president decided their policy positions independently, considering what the other side would do as one of many factors in making a decision. Regulatory law is full of examples of companies voluntarily agreeing to certain internal policy changes in exchange for regulatory accommodation or deferred enforcement from the government, and none of these arrangements are considered bribery. What makes this *quid pro quo* between the president and the social media company different? Is the fact that the president's campaign will likely benefit from the media company's policy change sufficient to make it a "thing of value?"

At this point it should be clear that without amendment of the bribery statute or enactment of another statute to explicitly address and prohibit this type of *quid pro quo* between a politician and a social media company, criminal prosecution will be very difficult.

A federal crime related to bribery, and sometimes used to prosecute bribery of state and local officials as well as corporate officers, among others, is theft of honest services. This is a crime under the mail and wire fraud statutes that cover any "scheme or artifice to deprive another of the intangible right of honest services."[72] Unlike the bribery statute, honest services fraud technically does not depend upon a showing of an express *quid pro quo* but instead encompasses any illicit scheme to deprive another of honest services. In the case of a public official, it is the official's constituents who are deprived of honest services if the official does an official act for a corrupt reason, such as to receive a personal benefit.[73] The Supreme Court, however, has limited the reach of the honest services fraud statute to bribery and kickback schemes, not other types of self-dealing and conflicts of interest for which the language of the statute could be unconstitutionally vague.[74] This takes the analysis right back to the elements of the crime of bribery. In the case of a federal official the honest services fraud statute thus does not have a wider reach than the bribery statute itself.

For all these crimes, an added complication arises in the case of a criminal prosecution of a president. The Supreme Court in *Trump v.*

72. 18 U.S.C. § 1346 ("For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.").

73. *See* Barbara McQuade, *Trump's Call to Ukraine May Constitute 'Honest Services Fraud'—a Core Crime of Public Corruption*, JUST SEC. (Sept. 25, 2019), https://perma.cc/SZJ5-JTJZ.

74. *See* Skilling v. United States, 561 U.S. 358, 412 (2010).

United States ruled that a president is absolutely immune from criminal prosecution for acts within the core constitutional powers of the president and entitled to a presumption of immunity for other official acts.[75] Although a strong argument can be made that taking a bribe is not an official act at all, rather an illegal personal benefit subject to prosecution, the Court also ruled that evidence of the motivation behind an official act of a president is inadmissible even in a criminal trial of the president for personal capacity crimes. The majority opinion addresses the prosecution of a bribery case in a footnote:

> Justice Barrett disagrees, arguing that in a bribery prosecution, for instance, excluding 'any mention' of the official act associated with the bribe 'would hamstring the prosecution.' But of course, the prosecutor may point to the public record to show the fact that the President performed the official act. And the prosecutor may admit evidence of what the President allegedly demanded, received, accepted, or agreed to receive or accept in return for being influenced in the performance of the act. See 18 U. S. C. §201(b)(2). What the prosecutor may not do, however, is admit testimony or private records of the President or his advisers probing the official act itself. Allowing that sort of evidence would invite the jury to inspect the President's motivations for his official actions and to second-guess their propriety. As we have explained, such inspection would be 'highly intrusive' and would 'seriously cripple' the President's exercise of his official duties. And such second-guessing would "threaten the independence or effectiveness of the Executive."[76]

What the majority does not recognize in *Trump v. United States* is that prosecution of a bribery case without evidence of the motive for the official act makes it difficult to prove a necessary element of bribery, *quid pro quo*—i.e. that the official act was done in exchange for the bribe instead of for some other reason. That other reason for the official act, of course, would be the reason most likely reflected in the public record, a record prepared at the direction of the president, and which the Court says is the only evidence admissible. As should become clear in the discussion of the Trump-Zuckerberg meeting in the next Part of this Article, excluding testimony or private records of the President or his advisers probing the official act itself would very likely make it impossible to prosecute a bribery case even if a president were to agree to perform an official act impacting social media platforms in exchange for receiving a thing of value from one of them.

75. *See* Trump v. United States, 603 US 593, 642 (2024).
76. *Id*. at 3 (citations omitted).

IV. A CASE STUDY IN *QUID PRO QUO*: THE TRUMP-ZUCKERBERG MEETING

Mark Zuckerberg and President Donald Trump were at odds up through most of 2024. Trump claimed that Zuckerberg plotted against him in the 2020 election[77] and was threatening to throw Zuckerberg in prison.[78]

Relations between the two men have improved in 2025, and indeed were not so bad before the 2020 election. Trump wanted Zuckerberg's cooperation in connection with the 2020 election and Zuckerberg was at least willing to listen. An account of a 2019 meeting between Trump and Zuckerberg, if true, presents an interesting case study of whether existing bribery laws could prohibit a *quid pro quo* understanding between a sitting president and a social media platform. And it is to that meeting that this discussion now turns.

A. The Meeting

In October 2019, Zuckerberg had dinner with Trump and his son-in-law Jared Kushner at the White House. Facebook quickly released a statement saying that the dinner was "no big deal."[79]

We later learned from Max Chafkin's book, *The Contrarian: Peter Thiel and Silicon Valley's Pursuit of Power*, that billionaire Peter Thiel arranged the dinner,[80] and that a deal was discussed at the dinner that may have been agreed upon: the Trump administration would not support regulation that disadvantaged Facebook in exchange for Facebook not fact-checking political statements posted by its users including Trump, his campaign, and his supporters. This alleged deal may be linked to Facebook's failure to censor Trump, his campaign, and his supporters in the 2020 election cycle.[81]

There is no evidence that money or anything exchangeable for money changed hands. This *quid pro quo*, if it was agreed to, involved official government action, an adjustment in the Trump administration's regulatory stance toward Facebook, in exchange for Facebook changing

77. *See* Alex Isenstadt, *Trump Claims Zuckerberg Plotted Against Him During the 2020 Election in Soon-to-be Released Book: The Meta CEO Earlier this Week Asserted that Biden Administration Tried to "Pressure" the Company to Downplay Content about Covid*, POLITICO (Aug. 28, 2024, 4:57 PM), https://perma.cc/64KQ-SJ3J.

78. *See* Bess Levin, *In New Coffee-Table Book, Trump Threatens to Send Mark Zuckerberg to Prison for "the Rest of His Life"*, VANITY FAIR (Aug. 29, 2024), https://perma.cc/KV6F-5TYJ.

79. Stan Schroeder, *Mark Zuckerberg Had Dinner with Trump, but Facebook Wants You to Know It's No Biggie*, MASHABLE (Nov. 21, 2019), https://perma.cc/C9JR-U4AL.

80. *See generally* MAX CHAFKIN, THE CONTRARIAN: PETER THIEL AND SILICON VALLEY'S PURSUIT OF POWER (2021).

81. *See* Tom McCarthy, *Zuckerberg Says Facebook Won't Be 'Arbiters of Truth' After Trump Threat*, GUARDIAN (May 28, 2020, 11:28 AM), https://perma.cc/LFL3-X3VH.

its own internal policies in a way that would advantage Trump's presidential campaign in the 2020 election.

Assuming this is what was agreed upon at the dinner, is such a deal bribery? This question comes in two parts. Is such a deal bribery under federal criminal statutes? Also, is it bribery under the Constitution, which relies upon the common law understanding of bribery, and then specifically mentions bribery in the impeachment clause? As explained in the previous Part of this Article, these two standards are different so Trump arguably could have been impeached for such a *quid pro quo* as common law bribery even if a criminal case under modern bribery statutes would have been hard to prove. In fact, Trump was impeached in late 2019, and acquitted by the Senate in early 2020 for a different proposed *quid pro quo* when he sought to induce a Ukrainian investigation of Joe Biden in exchange for Trump's official act of releasing Congressionally approved U.S. military aid to Ukraine.[82] The alleged Trump-Zuckerberg deal, if Trump proposed it or agreed to it, also probably would be bribery as defined in the Constitution, meaning it would be yet another offense for which Trump could have been impeached and, if convicted, disqualified from holding future public office (the Constitution provides no automatic disqualification for public officials who take bribes, but the Senate can vote to disqualify them under the impeachment clause).[83]

However, even if the alleged deal with Zuckerberg was reached, it would be difficult to prove bribery as a criminal offense without sufficient evidence of a specific *quid pro quo* of an official act being performed in exchange for a thing of value.

A complicating factor was the apparent middleman: Jared Kushner. If the deal discussed was principally between Zuckerberg and Kushner, would that have been enough to give Trump plausible deniability? The related questions that arise are whether Kushner, as a federal official, violated bribery laws or other law prohibiting corruption of federal officials.

A note of caution: we do not know precisely what was said, much less what was agreed to at that dinner. The DOJ has not publicly said that it is investigating any of this, and it has been over five years since it occurred. While Trump allegedly sought an advantage for his presidential campaign in his discussion with Zuckerberg, there is no transcript or recording of the meeting. Only a thorough investigation would reveal what happened, and to date there is no news that such an investigation has occurred.

---

82. *See* H.R. Res. 755, 116th Cong. (2019) (enacted). On February 5, 2020, the Senate adjudged that Trump was not guilty as charged in the articles of Impeachment. *See* S. Res. 871, 116th Cong. (2020) (enacted).

83. *See* U.S. CONST. art. II, § 4.

Still, it is important to consider what might have happened at that dinner, not so much for the purposes of prosecuting Trump or anyone else at this point, but to understand the potential for *quid pro quo* between social media companies whose platforms are integral to our elections and elected officials, particularly presidents, who have the power to regulate social media companies. If what some people think happened at that dinner did happen, or could have happened, what prevents another president from similarly offering regulatory leniency in exchange for a social media platform adopting policies favorable to his campaign? Would such a president also escape prosecution, impeachment, and even investigation, for what could amount to a bribe?

The alleged *quid pro quo* discussed at the Trump-Zuckerberg dinner also is concerning entirely apart from any legal definition of bribery. The most powerful officeholder in the world met with the CEO of the most powerful social media company in the world and allegedly discussed in private that the U.S. government would stand down from unfavorable regulation of the company in exchange for the company helping his campaign for reelection. Such a deal would be an alarming abuse of the power that government regulators have over social media, showing the fragility of social media independence from the government, and from the president in particular.

In its extreme form, this is the type of government-media collusion and intimidation that is characteristic of dictatorships and countries moving toward authoritarian rule,[84] not a healthy democracy. First Amendment rights to freedom of speech and freedom of the press ring hollow if the president can, by threatening federal regulation or offering regulatory concessions, dictate what a social media company with enormous market power will allow the president's supporters and opponents to say on its platform.

B. What Each Side Wanted Before the Meeting

By 2019, both Trump and Zuckerberg knew what they wanted from each other. Trump had won in the 2016 election with the help of misinformation spread on Facebook and other social media platforms by his supporters, including the Russian agents named in the 2018 Mueller indictments.[85] Trump wanted uncensored social media for the 2020

84. *See Turkey Demands 11 Years Behind Bars for Senior Journalist*, REUTERS (Jan. 11, 2022, 12:52 PM), https://perma.cc/RU3J-GUFH. ("A Turkish prosecutor's office demanded 11 years in jail for a prominent journalist on charges of insulting President Tayyip Erdogan and two ministers in his cabinet.").

85. The indictments recited many instances involving criminal use of the Facebook platform by Russian agents to violate federal election laws that prohibit foreign nationals from contributing to federal election campaigns as well as violation of the Foreign Agents Registration Act. "The "[d]efendants and their coconspirators created thematic group pages

election as well. That meant Facebook agreeing not to clamp down on the spread of misinformation on its platform.

Zuckerberg was concerned about federal regulation of content on Facebook and the preservation of Facebook's dominant market position. Zuckerberg was also concerned that Facebook might not retain its immunity from libel suits for online content posted by its users.[86] Congress had provided social media companies with such immunity in Section 230 of the Communications Decency Act,[87] but the provision is interpreted by courts with deference to the views of the executive branch, which then was under the control of Trump.[88]

Other issues were on the table as well. Zuckerberg was not against all federal regulation and, indeed, had called upon Congress to pass laws that would regulate Facebook and its competitors.[89] The new laws he endorsed covered subjects such as postings with harmful content, election protection, privacy and data protection issues, and data portability (users' ability to move data from one platform to another). As the *New York Times* pointed out, Zuckerberg favored the federal regulation of Facebook and competing platforms that would benefit Facebook at the expense of its competitors.[90]

In 2019, Zuckerberg went to Washington, D.C. for a congressional hearing and accepted an invitation to join Trump for dinner at the White

---

on social media sites, particularly on the social media platforms Facebook and Instagram." Indictment ¶ 34, United States v. Internet Rsch. Agency LLC, No. 1:18-CR-00032 (D.C. Dist. Ct. 2018). The defendants purchased advertisements from Facebook promoting a post stating "Hillary Clinton has already committed voter fraud during the Democrat Iowa caucus." *Id.* ¶ 47. In June 2016 the defendants and their co-conspirators allegedly used a Facebook group called "United Muslims of America" to promote a pro-Hillary rally where a U.S. person was paid to hold a sign with a picture of Hillary and promoting Sharia law as "a powerful new direction of freedom." *Id.* ¶ 53.

86. *See* Christiano Lima, *Zuckerberg Meets with Trump, Republican Senators*, POLITICO (Sept. 19, 2019, 10:33 PM), https://perma.cc/PJ7F-NKWK. As reported in *Politico*:

Sen. Mike Lee (R-Utah), too, pressed Zuckerberg on 'bias against conservatives on Facebook's platform,' according to a Lee spokesperson. Their discussion spanned government regulation, antitrust enforcement, privacy issues and Section 230 of the Communications Decency Act, a law that shields websites like Facebook from liability over content posted by users, the spokesperson said.

Id.

87. *See* 47 U.S.C. § 230.

88. Going forward there will be less judicial deference to the executive branch interpretation of statutes after the Supreme Court in 2024 overturned the four decades old *Chevron* doctrine. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct 2244, 2273 (2024) (overturning judicial deference to administrative agencies established in *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)).

89. *See* Mike Isaac, *Mark Zuckerberg's Call to Regulate Facebook, Explained*, N.Y. TIMES (Mar. 30, 2019), https://perma.cc/DJ8Z-PPRE.

90. *See id.*

House.[91] Facebook released a statement: "[a]s is normal for a CEO of a major U.S. company, Mark accepted an invitation to have dinner with the President and First Lady at the White House."[92]

Also attending the dinner were Jared Kushner and venture capitalist Peter Thiel, then a strong supporter of Trump, who years earlier had provided Zuckerberg with the seed capital to start Facebook. Their spouses reportedly were also in attendance.[93] As Max Chafkin, author of the biography of Thiel, reports:

> The specifics of the discussion were secret—but, as I report in my book, Thiel later told a confidant that Zuckerberg came to an understanding with Kushner during the meal. Facebook, he promised, would continue to avoid fact-checking political speech—thus allowing the Trump campaign to claim whatever it wanted. If the company followed through on that promise, the Trump administration would lay off on any heavy-handed regulations.[94]

Facebook appears to have kept at least part of this alleged bargain. Facebook decided that statements by Trump in 2020 should not be taken down or labelled with a disclaimer, even if they were determined to be false.[95] After the 2020 election, Facebook also allowed the growth of Facebook groups falsely claiming that the election was "stolen"—a movement that ended with the insurrection at the Capitol on January 6, 2021.As Max Chafkin also explains:

> After the dinner, Zuckerberg took a hands-off approach to conservative sites. In late October, after he detailed the policy in a speech at Georgetown, Facebook launched a news app that showcased what the company called 'deeply reported and well-sourced' outlets. Among the list of recommended publications was *Breitbart*, Steve Bannon's site, even though it had promoted itself as allied with the alt-right and had once included a section dedicated to 'Black crime.' Facebook also seemed to go out of its way to help the *Daily Wire*, a younger, hipper version of *Breitbart* that would become one of the biggest publishers on the platform. Facebook had long seen itself as a government unto itself; now, thanks to the understanding brokered by

91. *See* Matt Binder, *Facebook Promised Trump it Would Fact-check Political Speech, According to a New Book*, MASHABLE (Sept. 20, 2021), https://perma.cc/DSC2-5E2P.

92. Dylan Byers & Ben Collins, *Trump Hosted Zuckerberg for Undisclosed Dinner at the White House in October*, NBC NEWS (Nov. 20, 2019, 11:32 PM), https://perma.cc/9X53-EN9W.

93. *See* Ben Smith, *What's Facebook's Deal with Donald Trump?*, N.Y. TIMES, https://perma.cc/H5A7-QKXD (Oct. 22, 2020).

94. Max Chafkin, *Peter Thiel's Origin Story*, N.Y. MAG.: INTELLIGENCER (Sept. 20, 2021), https://perma.cc/ZFA8-R5RT.

95. *See* McCarthy, *supra* note 81.

> Thiel, the site would push what the Thiel confidant called 'state-sanctioned conservatism.'
>
> . . . During Black Lives Matter protests, Twitter hid a post by the president that seemed to condone violence: 'When the looting starts, the shooting starts'; Facebook allowed it. In the days leading up to the January 6 insurrection at the U.S. Capitol, Facebook mostly ignored calls to limit the spread of 'Stop the Steal' groups, which claimed that Trump had actually won the election.[96]

Throughout 2020, it appeared that Facebook was rewriting its rules to accommodate Trump.[97]

After the January 6 insurrection, Facebook documents were disclosed to the U.S. Securities and Exchange Commission (SEC) by whistleblower Frances Haugen, a former employee of Facebook. These documents were also provided to Congress. The documents showed that Facebook analyzed the impact of the January 6 riot on its platforms and that there was a seven-fold increase in complaints about posts on Facebook and Instagram inciting violence that day. [98] Other documents showed that a range of restrictions had been implemented earlier but then rolled back before January 6, including freezing commenting on some group posts or preventing group names from including terms that delegitimized the election result.[99]

It is unclear what specific government regulations Zuckerberg feared, although Trump did confront the social media industry on an issue that was important to his reelection campaign: his claim that social media companies were removing misleading content unfairly and discriminating against him and his supporters.

C. Trump's Executive Order After the Meeting

On May 28, 2020, President Trump signed an Executive Order on Preventing Online Censorship, articulating his Administration's interpretation of Section 230 of the Communications Decency Act,[100] which shields online content providers such as Facebook, from liability for content posted by users. Trump's executive order instructed the

96. *Id.* (citing Craig Silverman et al., *Facebook Knows It Was Used to Help Incite the Capitol Insurrection*, BUZZFEED NEWS (Apr. 22, 2021, 10:38 AM), https://perma.cc/RPX2-G9HZ).

97. *See* Elizabeth Dwoskin et al., *Zuckerberg Once Wanted to Sanction Trump. Then Facebook Wrote Rules That Accommodated Him.*, WASH. POST (June 28, 2020, 6:25 PM), https://perma.cc/W9CJ-RGYG.

98. *See* Chris Looft & Lavla Ferris, *Facebook Whistleblower Documents Offer New Revelations About Jan. 6 Response*, ABC NEWS (Oct. 25, 2021, 12:01 AM), https://perma.cc/QZ9W-8AWA.

99. *See id.*

100. *See* 47 U.S.C. § 230.

Department of Commerce, the FCC, the FTC, and the DOJ to implement an understanding that Section 230 immunity does *not* extend to platforms that "engage in deceptive or pretextual actions" to censor "certain viewpoints."[101] Although Section 230 immunity from defamation lawsuits for online content is a separate issue from the question of whether social media companies, even if immune, should refuse to allow posting of certain content, Trump used the threat of withholding the Section 230 liability shield as a cudgel to coerce social media platforms. This included Facebook and Twitter, which Trump wanted to follow a "hands-off" approach to screening out content they thought was misleading or that might promote violence and extremism.

Trump's 2020 executive order was premised on a strained connection between the Section 230 liability shield from defamation suits and self-censorship by social media companies. (Indeed, it might make sense to condition the Section 230 liability shield on there being *more* censorship by platform providers which would demonstrate a good faith effort to remove defamatory content; instead, Trump was asking for *less* censorship). Trump's executive order trying to narrow Section 230 protection embodied what may also have been Trump's veiled threat to Zuckerberg: don't censor our campaign or its supporters on Facebook or I will do everything I can to allow other people to sue you for libel even though Section 230 says they can't.

D. Applying the Constitutional Definition of Bribery to the Meeting

If this account of what happened at the 2019 dinner is correct, under the constitutional definition of bribery, Trump or Kushner (it is not clear who said what at the dinner) appears to have proposed a bribe—the use of an official position for personal gain—to Facebook. Unless Zuckerberg was a willing participant in this *quid pro quo*, Trump may have extorted Facebook, as he was accused of extorting Ukraine when he was impeached later that same year.

Trump allegedly wanted a "private benefit" or "undue reward" from Facebook, namely Facebook allowing Trump and his supporters to spread false information before the 2020 election without removal or other censure by Facebook. To get that benefit, Trump is reported to have offered to allow Facebook to influence his actions in office, to incline him to act contrary to rules of honesty and integrity. Namely, Trump would stand down on taking regulatory positions contrary to the interests of Facebook.

101. Anshu Siripurapu, *Trump and Section 230: What to Know*, COUNCIL ON FOREIGN RELS., https://perma.cc/P7GF-SQVC (Dec. 2, 2020, 7:00 AM).

It is not clear from reports of the conversation what regulation Trump had in mind, but as discussed above it was probably connected with Section 230 of the Communications Decency Act. Indeed, Trump's executive order interpreting Section 230 on social media companies' immunity from defamation suits was issued only months after the Zuckerberg dinner, and the order specifically mentioned the *censorship* by social media platforms that Trump wanted to stop.

E. Applying the Statutory Definition of Bribery to the Meeting

The public officials involved in the Trump-Zuckerberg dinner were Donald Trump and Jared Kushner. The recipient of the "thing of value" for purposes of the bribery statute would have been Trump and the Trump campaign. The offeror of the thing of value would have been Zuckerberg. Alternatively, Zuckerberg could have offered nothing, but instead could have been solicited to offer a thing of value but refused. In that case, Zuckerberg would be innocent of bribery, but whoever asked him for it is potentially guilty.

Prosecution of anyone on these alleged facts, however, would have faced considerable hurdles.

As discussed in Part III, the phrase "anything of value" in the bribery statute is not defined. It is not limited to cash contributions to a political campaign. Other special considerations or services given to a political campaign would qualify.

But there is no legal precedent applying the bribery statute to the type of agreement alleged at the Trump-Zuckerberg dinner. A social media company changing its platform access policies might be a "thing of value" for purposes of the bribery statute if the change gives preferential access to the officeholder's campaign. If the social media company changes its access policies more uniformly in a way that applies to everybody, and to all political campaigns, the "thing of value" for one officeholder is harder to identify.

Even if the proposal in the Trump-Zuckerberg conversation had been that Facebook would offer a special accommodation to Trump supporters not afforded to other Facebook users, there would probably need to be a tighter connection with the Trump campaign for the bribery statute to apply. For example, there likely would be something of value for the campaign if Facebook agreed to be more lenient with posts by the Trump campaign or if Zuckerberg had promised Trump that Facebook would not de-platform or otherwise censor Trump himself. But leniency by Facebook toward Trump supporters in general, most of whom don't work for the campaign, might not be a thing of value for the campaign.

What was agreed to at the dinner is unclear, but Facebook made little effort to censor Trump before the 2020 election, although Facebook and

Twitter applied warning labels to Trump's misleading posts about the election results afterward.[102] Still, it is not certain that the Trump-Zuckerberg conversation got to a sufficient level of detail to prove a "thing of value" sufficient to satisfy the bribery statute.

On the other side of the bribery equation is the official act exchanged for the thing of value. Here, the U.S. Supreme Court has considerably narrowed to scope of the statute. In *McDonnell v. United States* (2016),[103] the Court unanimously held that an "official act" is an action that involves a "formal exercise of formal governmental power."[104] Arranging a meeting, contacting another official, or hosting an event alone is insufficient to be an "official act" for the purpose of the statute.

Applying this test to the Trump-Zuckerberg meeting, if all they talked about was setting up future meetings with Trump administration officials to discuss Zuckerberg's concerns about federal regulation of Facebook, this *quid pro quo* would not meet the federal definition of an "official act" under *McDonnell*.[105] If, on the other hand, Trump or Zuckerberg proposed that a particular federal regulatory accommodation be exchanged for Facebook accommodating Trump's wishes, the definition of an "official act" likely would be met.

The statute states that "'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."[106] Changing the Administration's interpretation of Section 230 very likely would be an official act within the meaning of the statute. The question of fact is whether the Trump-Zuckerberg conversation got that far or instead was so general that an "official act" for purposes of the statutory language and the *McDonnell* test was not proposed by either side of the discussion. Once again, without a transcript of the conversation, it would be difficult to tell.

---

102. *See* Catherine Sanz, *Twitter and Facebook Slap Labels on Trump's "Misleading" Election Posts*, ABC NEWS (Nov. 4, 2020, 5:22 PM), https://perma.cc/EA75-5BJ4.

103. 579 U.S. 550 (2016). The McDonnell holding, even if by a unanimous court, is controversial and bills have been introduced in Congress to amend the definition of an "official act" in the federal bribery statute. See, e.g., H.R. 7689, 118th Cong. (2024). These bills might apply the bribery statute for example to a situation where a president promised a social media platform owner a meeting with the FCC chair or other senior official to discuss regulation of the platform or Section 230 immunity from libel litigation. Such amendments have not been passed, however. A broader definition of "official act" -- particularly if coupled with a reasonably broad definition of a "thing of value" on the other side of the equation would help the criminal law deter such "quid pro quo" discussions in the future. But we aren't there yet.

104. *McDonnell*, 579 U.S. at 568.

105. *Id.* at 567.

106. 18 U.S.C. § 201.

Putting aside what President Trump said at his dinner with Zuckerberg, Jared Kushner might have had a role in discussing a *quid pro quo* that exposed him to criminal liability for bribery, although for him also the narrow focus of the bribery statute on an "official act" could make criminal prosecution difficult. According to Max Chafkin's book, "Thiel later told a confidant that Zuckerberg came to an understanding with Kushner during the meal." Kushner himself was a public official subject to the bribery statute, regardless of what his father-in-law Trump had agreed to. Depending upon what was said at the dinner, and who did the talking, it is conceivable that Kushner could have crossed the line into soliciting a bribe, even if Trump did not.

Finally, we have the problem that will arise for any bribery prosecutions of a president after *Trump v. United States*.[107] Even if a president could be prosecuted for personal capacity receipt of a "thing of value" in exchange for an official act, the Court held that evidence concerning the motive for the official act is inadmissible, and this includes evidence not just from the president directly but from his advisors.[108]

It is not clear who in the White House had official capacity involvement in the matters that concerned Facebook, including the Administration's interpretation of Section 230's immunity provision. If Kushner was involved in these matters, particularly after the dinner with Zuckerberg, his White House communications might reveal what he may have said or done with respect to Trump's part of any alleged agreement with Zuckerberg. These communications are all presidential records. But that will not help because any change in the president's policy position toward Section 230 is presumably an official act, and these records under *Trump v. United States* are presumptively inadmissible.

F. Mark Zuckerberg and Facebook (Meta)

Another avenue for law enforcement is corporate accountability. Whether Zuckerberg was a participant in a bribery scheme, a victim of an extortion scheme, or neither, his dinner conversation with Trump raised serious concerns about the governance of Facebook. Could shareholders in Facebook, now Meta, or perhaps the Securities Exchange Commission require the company to at least disclose what happened?

Internal communications at Facebook before or after the dinner might shed more light on these matters. If there was an understanding between Zuckerberg and Trump that Facebook would relax its "censorship" of misleading posts by Trump supporters in exchange for favorable regulatory treatment of any kind, this is an arrangement that a public

107. *See* Trump v. United States, 603 US 593, 632 n.3 (2024).
108. *See id.*

company such as Facebook (Meta) cannot keep secret for long. Facebook's directors were entitled—and indeed obligated—to find out the relevant information and decide how to respond. A related issue is Facebook's disclosure to shareholders. There has been no disclosure other than the public statements by Facebook that the Zuckerberg-Trump meeting occurred.

In October 2021, Facebook, Zuckerberg, and Facebook's Chief Financial Officer, David Wehner, were sued in a class action by shareholders alleging that they withheld from investors information uncovered by the Facebook whistleblower.[109] The investors alleged that they were not told about the ways in which Facebook secretly accommodated high-profile users, including Trump and some of his supporters, with a more lenient set of rules than the "rough justice" often meted out by Facebook to ordinary users. The case later settled.

The SEC also could open an investigation into whether Facebook (Meta) followed the Sarbanes-Oxley Act internal controls provisions,[110] and other securities laws requiring truthful annual reports to the SEC. Making knowing false statements to federal regulators is a crime,[111] as is knowing misrepresentation of material facts to investors who are purchasing and selling securities.[112]

Corporate and securities law thus provide another avenue for exposing wrongdoing in a potentially corrupt relationship between a public company and the government. In future cases, this avenue of accountably may need to be explored more aggressively. At the same time, it is important to remember that one of the most powerful social media companies, X, formerly Twitter, is privately held by Elon Musk. This means that corporate and securities law likely will not require that any relationship he or the company has with Trump, or any other powerful politician be disclosed. As discussed in the next Part, Musk, not Zuckerberg, is now Trump's favorite.

---

109. *See generally* Complaint, Ngian v. Facebook, Inc., No. 1:21-CV-05976 (E.D.N.Y. filed Oct. 27, 2021). This suit was brought on behalf of all persons and entities who purchased the publicly traded securities of Facebook between November 3, 2016 and October 4, 2021 for alleged material misrepresentations and omissions by Facebook in violation of §§10(b) and 20(a) of the Exchange Act (15 U.S.C. §78j(b) and §78t(a)) and Rule 10b-5 promulgated thereunder by the SEC (17 C.F.R. §240.10b-5).

110. *See* Sarbanes-Oxley Act §404(b), 15 U.S.C § 7262.

111. *See* 18 U.S.C. § 1001 (providing criminal penalties for knowingly false statements in connection with any matter within the jurisdiction of any branch of the federal government).

112. *See* 1934 Securities Exchange Act §10(b), 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b) (making it illegal for any person in connection with the purchase or sale of any security to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.").

V. MUSK AND MORE: WILL SOCIAL MEDIA PLATFORMS BE BEHOLDEN TO THE PRESIDENT?

This Part addresses the risk of *quid pro quo* between presidents and social media platforms going beyond what was alleged to have transpired at the 2019 Trump-Zuckerberg meeting. In advance of the 2024 election, controlling shareholders of the largest social media platforms aligned themselves for or against the two leading presidential candidates. Many of the dangers to our democracy from such alliances are beyond the scope of this Article, but the questions this Article does ask are what social media moguls want in return for accommodating candidates and supporters on their platforms, how they might get what they want from the president, and why bribery laws will not stop them.

One of the largest social media platforms—X, formerly Twitter—is owned by Elon Musk, who is now aligned politically with Trump, the winner of the 2024 presidential election. Zuckerberg still controls the voting stock of Meta—formerly Facebook—and is now is repairing his relationship with Trump. With Meta's competitors likely aligned with Trump, and the federal government able to shape the competitive landscape in social media, the second Trump presidency could put Zuckerberg back in a position of having to meet with Trump again and perhaps listen to whatever demands he might have.

Alternatively, if Kamala Harris were to have won the election, liberal Democrats might have pushed for a breakup or stricter regulation of large social media companies. Some industry leaders would have perhaps been eager to meet with the Administration to stave off heavy-handed government regulation. Indeed, the Biden administration already opened the door for dialogue by soliciting "voluntary" compliance by social media companies with content moderation, giving rise to constitutional challenges that underlie the *Murthy* case.

But Trump won the election, so now the question is how far he could go with the "soft pressure" exerted on social media platforms by the Biden administration, and how this strategy would affect a social media industry already controlled in substantial part by the President and his political allies.

A. Elon Musk and X

Musk, the owner of X has embraced the "billionaire populism" of Trump.[113] After DOJ Special Prosecutor Jack Smith obtained a warrant to search Trump's Twitter account from the time of the January 6 insurrection, X dragged its feet turning over the data. In February 2023,

113. Tim Higgins, *How Elon Musk Is Fully Embracing Donald Trump's Billionaire Populism*, WALL ST. J. (Jan. 13, 2024, 5:30 AM), https://perma.cc/FU9P-C8V7.

United States District Judge Beryl Howell asked if X (Twitter at the time) was trying to "cozy up" to Trump by refusing to hand over data from his account.[114] "Twitter has had quite some time to comply with the warrant and have everything prepared to turn over, so I am a little bit concerned about where we are, [Judge] Howell said."[115] On February 9, 2023, X finally sent Smith the data concerning Trump's Twitter account but was fined $350,000 for contempt because of the delay.[116]

In July 2024, it became public that Musk had committed $45 million a month to a new pro-Trump Super-PAC.[117] Musk had previously met with Trump in March 2024, although it is not known what was said at the meeting other than financial support for Trump's campaign.[118]

Musk also has a role in the second Trump administration, probably not as a presidential appointee (the federal financial conflict of interest statute would be difficult to work around if he refused to divest his business holdings) but instead as head of the Department of Government Efficiency (DOGE), a private sector commission advising the Administration on increasing government efficiency. Although DOGE will be required to comply with the transparency requirements of the Federal Advisory Committee Act,[119] it is not clear that it will do so.[120]

Could this relationship between Trump and Musk also involve, in addition to Musk's massive Super-PAC expenditures and leadership of DOGE, an agreement about content moderation—or lack of content moderation—on X during Trump's term as president? Is there an arrangement similar to that alleged to have been offered to Zuckerberg in 2019? Nobody knows.

B. Zuckerberg and Meta

Zuckerberg and Trump were out of sorts after Zuckerberg opposed Trump's effort to overturn the 2020 election.[121] But, in April 2023, Trump

114. Jonathan Vanian, *Federal Judge Asks if Elon Musk Was Trying to 'Cozy Up' to Trump During Criminal Probe*, CNBC (Aug. 16, 2023, 4:13 PM), https://perma.cc/G4MT-7X9K.

115. *Id.*

116. *See id.*

117. *See* Dana Mattioli et al., *Elon Musk Has Said He Is Committing Around $45 Million a Month to a New Pro-Trump Super Pac*, WALL ST. J. (July 16, 2024, 10:44 AM), https://perma.cc/UL52-7VD7.

118. *See* Maggie Haberman et al., *Donald Trump, Seeking Cash Infusion, Meets with Elon Musk*, N.Y. TIMES (Mar. 5, 2024), https://perma.cc/8K3F-RP3R.

119. *See* Pub. L. No. 92-463, §1, 86 Stat. 770 (1972).

120. *See* Richard W. Painter, *Will Musk and Ramaswamy Be Part of the Government or Not?*, MINN. STAR TRIB. (Nov. 20, 2024, 6:31 PM), https://perma.cc/TC7S-CMLG.

121. *See* James Gordon, *'Why Isn't He Being Prosecuted?' Trump Rages at Mark Zuckerberg amid Claims Group Linked to Facebook Boss Gave $2 Million to Georgia Elections Board - And Says Democrats Are 'Trying to Steal a Second Election,'* DAILY MAIL (Feb. 27, 2023, 1:51 PM), https://perma.cc/R4RL-G77U.

returned to Meta-owned Instagram for the first time since the January 6, 2021, attacks on the Capitol.[122] Trump was also back on Facebook for the 2024 presidential campaign.

In July 2024, Zuckerberg's hostility to Trump softened, with Zuckerberg saying Trump's response to the July 13 assassination attempt was "badass[.]"[123] At the same time, Zuckerberg endorsed neither candidate in the 2024 election.[124] Trump's threats to put Zuckerberg in prison[125] may really have been aimed at intimidating Zuckerberg into not censoring Trump's followers on Facebook in the months leading up to the 2024 election. Now the question is what Trump will want to do with Zuckerberg during his presidency and how Zuckerberg will choose to respond.

What Zuckerberg will do with respect to content moderation on Facebook is unknown but as discussed in the Introduction of the Article it appears that he will accommodate Trump. What, if anything, he has promised Trump or anyone else he will do also is unknown.

Also influential is Meta's new platform, Threads, which directly competes with X. Biden and Harris began using Threads after harshly criticizing Musk for allowing antisemitic content on X.[126] In addition to Facebook, Instagram, and Threads, Meta owns WhatsApp. WhatsApp can be used for online messaging even if interaction is more limited than with other social media platforms. Because WhatsApp messages are linked to users' cell phone numbers, messages disseminated close to elections, perhaps to voters on the way to the polls, could have a powerful influence on American politics. For now, WhatsApp restricts mass messaging and the use of its platform by political candidates and parties,[127] but that could change.

The big question is whether Trump and Musk could combine the market power of their social media platforms with the power of the presidency to induce, perhaps even compel, Zuckerberg fully or partially

122. *See* Martin Pengelly, *Donald Trump Returns to Instagram for First Time Since Capitol Attack*, GUARDIAN (Apr. 18, 2023, 3:41 PM), https://perma.cc/Y4E9-8RNF.

123. Emily Chang & Kurt Wagner, *Zuckerberg Calls Trump's Response to Shooting 'Badass*,*'* BLOOMBERG (July 19, 2024, 7:00 AM), https://perma.cc/EJ3S-KAN8.

124. *See id.*

125. *See supra* text accompanying notes 22–36.

126. *See Biden, Harris Join Mark Zuckerberg's Threads, Days After White House Slams Elon Musk*, N.Y. POST (Nov. 20, 2023, 7:16 PM), https://perma.cc/BJ8W-VURC.

127. *See About WhatsApp and Elections*, WHATSAPP, https://perma.cc/595X-MHMG (last visited Nov. 3, 2024). As stated on the website:

Political Parties or Political Candidates that use automation or send WhatsApp messages to users without permission can have their accounts banned. Currently, political candidates and political campaigns are not permitted to use the WhatsApp Business Platform. In many countries, WhatsApp engages with political entities ahead of major elections to emphasize our approach to safety.

Id.

to exit the social media industry by selling one or more of Meta's platforms to another buyer or perhaps even to Trump and Musk themselves. The very kind of government soft pressure for content moderation permitted by the *Murthy* decision could, for example, be brought to bear on Facebook, Threads, Instagram or WhatsApp among Meta's platforms. The clear message to Zuckerberg could be that if the platforms did not comply, or sell out to another buyer more closely aligned with the President, unfavorable regulatory action from a federal agency could ensue.

C. TikTok

A 2022 Pew study showed that for teenagers, "TikTok has rocketed in popularity" and is now "a top social media platform for teens among the platforms[.]"[128] This makes TikTok key to reaching younger voters. Congress, in 2024, passed a law that would require China-based ByteDance Ltd. to sell the TikTok video-sharing app or face a ban in the United States.

On January 19 Tik Tok went dark for a few hours but went back up on line when President Elect Donald Trump promised to keep the platform alive despite the Congressional ban. TikTok CEO Shou Chew was expected to attend the inauguration the next day.[129]

The push for a change of control over TikTok has been several years in the making. TikTok, in 2020, sought to placate critics by having Oracle administer TikTok's U.S. platform to protect the privacy of U.S. users and moderate harmful content. At a White House news briefing in 2020, Trump said that he was not ready to approve a deal for Oracle to oversee TikTok's U.S. platform.[130] It is not clear what he wanted to approve the deal. Oracle then won the deal, being referred to as "one of Donald Trump's favorite companies."[131] Oracle is controlled by Larry Ellison, a Trump supporter who joined a November 2020 call with Sean Hannity and Lindsey Graham to discuss contesting the presidential election results.[132] By 2023, the Oracle deal was implemented,[133] but Congress then passed the 2024 law requiring a total divestiture.

---

128. EMILY A. VOGELS ET AL., PEW RSCH. CTR., TEENS, SOCIAL MEDIA AND TECHNOLOGY 2022, at 3 (2022), https://perma.cc/H7H8-MR7R.

129. *See* Meredith Lee Hill & Rachael Bade, *Trump Could Sign TikTok Order in the Rotunda*, POLITICO (Jan. 19, 2025, 11:02 PM), https://perma.cc/8PJU-W8VY.

130. *See Trump Says He Isn't Prepared to Sign off on Tik Tok Deal*, WALL ST. J. (Sept. 16, 2020), https://perma.cc/QBK8-AU8V.

131. Timothy B. Lee, *Oracle, One of Donald Trump's Favorite Companies, Wins TikTok Deal*, ARSTECHNICA (Sept. 13, 2020, 10:40 PM), https://perma.cc/7SSF-7UPP.

132. *See* Isaac Stanley-Becker & Shawn Boburg, *Oracle's Larry Ellison Joined Nov. 2020 Call About Contesting Trump's Loss*, WASH. POST (May 20, 2022, 3:04 PM), https://perma.cc/3F2N-MF7C.

133. *See* Zheping Huang & Caroline Hyde, *Tik Tok CEO Says Oracle Has Begun Reviewing Its Source Code*, TIME (May 23, 2023, 8:28 AM), https://perma.cc/ES8G-6JXS.

This means TikTok needs to find a buyer, and predictably, billionaires have stepped up to consider a deal.[134] The person or company that buys TikTok will have potentially enormous power to influence younger voters in upcoming elections even if they missed the election of 2024. Once again, one wonders who that buyer will be, and what that buyer will want TikTok to do to shape elections. President Trump likely will have a big say in who gets to buy Tik Tok, and after the deal is done the question is what he will want in return.

D. Truth Social

Trump Media & Technology Group (TMTG) is the parent company of Truth Social, which made its debut in 2022.[135] Truth Social apparently has blocked content on issues such as the January 6 attack,[136] abortion, and even some conservative content.[137] Truth Social also has banned users who make fun of Truth Social itself or its executives.[138] A special purposes acquisition company (SPAC) called Digital World Acquisition Corporation was formed to raise capital for a merger with Truth Social. The merger was delayed by a Securities and Exchange Commission investigation of the SPAC's initial public offering in 2021. Digital World then agreed to pay an $18 million penalty to the SEC and revise some of its corporate filings.[139] Shares in Digital World jumped 88% the day after Governor Ron DeSantis dropped out of the GOP presidential primary.[140] In this instance, the economic value of a social media platform and the results of a presidential election were inextricably linked.

The merger deal closed in March 2024. After an initial drop in the stock price, the price seems to have stabilized around $35 a share.

Trump's control of Truth Social raises a different issue than the typical arm's length *quid pro quo* between a president and a social media company. In this instance, the President has his own social media

134. *See, e.g.*, Emily Dattilo, *This Real Estate Mogul Wants to Retool TikTok. He Is Organizing a Group to Buy It*, BARRONS (May 15, 2024, 8:37 AM), https://perma.cc/H487-ZWN3 ("The clock is ticking on TikTok, and billionaire Frank McCourt has stepped into the ring.").

135. *See* Nell Clark, *Trump's Social Media Site Hits the App Store a Year After He Was Banned from Twitter*, NPR (Feb. 22, 2022, 12:20 AM), https://perma.cc/5FBC-Z2HJ.

136. *See* Todd Spangler, *Trump's Truth Social Is Banning Users Who Post About Jan. 6 Hearings, According to Reports*, VARIETY (June 15, 2022, 9:47 AM), https://perma.cc/J8WC-H72S.

137. *See* Cheyenne Hunt-Majer, *Truth Can't Handle the Truth: Censorship on Truth Social*, PUB. CITIZEN (Aug. 2, 2022), https://perma.cc/Q7HN-EWWW.

138. *See* Matt Binder, *Truth Social Already Censoring Content, Bans User Who Made Fun of Trump Media CEO*, MASHABLE (Feb. 24, 2022), https://perma.cc/M3D3-V5K4.

139. *See id.*

140. *See, e.g.*, Matthew Goldstein, *Digital World Shares Surge as Republican Primary Field Narrows*, N.Y. TIMES (Jan. 22, 2024), https://perma.cc/WWQ6-JGLH.

company, which is a publicly held company with billions of dollars of market capitalization. Now that Trump has been elected president again, he will be the first president to control his own social media outlet, indeed any nationwide media outlet (President Lyndon Johnson's wife, Lady Bird Johnson, owned a single television station in Austin, Texas, which caused considerable controversy at the time[141]). The broad regulatory reach of the FCC and other federal regulators over the social media industry could be used to favor Truth Social over competitors. A merger of a competitor into Truth Social also is possible.

Do government ethics rules prohibit a president from owning a social media company and then influencing federal regulation of social media at the same time? No. The president can do this because the president and vice president are not bound by the financial conflict-of-interest statute, 18 U.S.C. § 208, a criminal law that applies to every other executive branch official and prohibits participation in government matters having a direct and predictable effect on one's own financial interest. Members of Congress also are exempt from this conflict-of-interest statute, which perhaps explains why Congress also exempted the president. In any event, a president can legally own a social media platform and oversee the regulation of social media platforms at the same time. The president cannot engage in bribery, but helping one's own financial interest is not bribery. Furthermore, as discussed above in this Article, violation of criminal bribery statutes is very difficult to prove. The president's interactions with other social media companies—and any *quid pro quo* that results—will be difficult to prove, or to prevent.

In sum, a sitting president can legally own one social media platform and then, through persuasion or coercion, legally or illegally use the power of his office to induce other social media platforms to do his bidding. The Biden administration's effort to expand federal influence over social media platforms set an ominous precedent. Putting all this together, we have a problematic entanglement of the social media industry with presidential candidates and with the White House that existing ethics laws and criminal statutes will not solve.

E. Murthy v. Missouri and the Corruption Risks of Government Social Media Intervention

As discussed in Part II of this Article, *Murthy* could have a profound effect on the ability of any federal agency to influence content on any of these social media platforms. The Court addressed and largely dismissed the First Amendment concerns about what the Biden administration was

141. *See* Louis M. Kohlmeier, *The Johnson Wealth: How President's Wife Built $17,500 Into Big Fortune in Television*, WALL ST. J., Mar. 23, 1964, at 1.

doing. A different concern, and the focus of this Article, is the *corruption risk* of government collaboration with social media companies regarding content moderation.

This is the risk of legitimizing a *quid pro quo* relationship between the government and social media companies. Social media companies may be sufficiently concerned about government regulation, or changes in federal law that they could agree to do whatever the president, or any other powerful politician, wants them to do. The Court in *Murthy*, of course, did not explicitly legitimize any *quid pro quo* relationship between presidents, or any other politicians, and social media companies, but it opened the door for the type of soft pressure that could lead to just that. As discussed above, in the case of the president, we have the added complication that under *Trump v. United States*, evidence of the motives behind official acts of the president is inadmissible in a criminal case against the president and probably also against the president's advisors.[142] What Trump as a candidate said about future official acts to benefit Elon Musk, either in exchange for Musk's Super-PAC spending or for adjustments to content moderation policies on X, might still be admissible in a criminal case, but anything President Trump or his advisors say about their official acts would be inadmissible.

On balance, the Biden administration's effort to discourage the dissemination of false information on social media involves risks of collateral corruption that likely outweigh the potential benefits. When federal officials contact social media platforms about the content of their platforms it is all too easy for suggestions to become requests or even demands. If these federal officials or their agencies have regulatory oversight over the social media platforms or their parent companies, it is all too easy to slip into the kind of *quid pro quo* alleged to have transpired at the 2019 Trump-Zuckerberg meeting. The potential for corruption is acute when the president and White House staff are involved in nudging social media platforms about content while having their own political as well as policy objectives in mind.

As this author has written in response to the escalating problem of Deepfake videos posted on social media before elections,[143] the better approach may be public education about misleading social media content rather than efforts to control it. Federal regulators, including the FEC and public health agencies, can educate the public about the potential abuse of social media platforms by persons intentionally spreading disinformation. Direct contact between government officials and social media companies

142. *See* Trump v. United States, 603 U.S. 593, 632 n.3 (2024).

143. *See generally* Richard W. Painter, *Deepfake 2024: Will Citizens United and Artificial Intelligence Together Destroy Representative Democracy*, 14 J. NAT'L SEC. L. & POL'Y 121 (2023).

is not the only way to address this problem and potentially may be the most corrupt.

In sum, the interaction between federal agencies and social media companies that the Biden administration is defending in *Missouri v. Biden* could be an invitation to the type of *quid pro quo* that allegedly occurred in the Trump-Zuckerberg meeting and could occur elsewhere. The Biden administration's perhaps good faith intention to fight dangerous disinformation on social media could backfire. A future president with different motivations could travel along the same path toward *quid pro quo*, not for the public benefit but for a personal or political favor. Pulling government officials, and in particular political appointees of the president, back from informal discussions with social media platforms about content may be necessary to mitigate that risk.

VI. THE NETANYAHU INDICTMENT

Quid pro quo between politicians and media organizations is not a problem in the United States alone. This Part briefly summarizes the interactions between media moguls and Israeli Prime Minister Benjamin Netanyahu that led to his criminal indictment. Prosecution of the indictment has been stayed during the present war, which began October 7, 2023, but the allegations therein present an interesting case study of how another legal system approaches *quid pro quo* between politicians and the media.

Netanyahu, according to Israeli prosecutors, agreed to support regulatory changes requested by businessmen controlling Israeli media companies in exchange for favorable political coverage.[144] These were traditional media companies, not social media companies, but the legal problem is much the same.

In 2019, Israel's Attorney General Avichai Mandelblit filed "Case 2000," an indictment alleging that between 2008 and 2014, Netanyahu had three series of meetings with Arnon Mozes, controlling shareholder of the Yedioth Ahronoth media group, which publishes a prominent Israeli newspaper.[145] Mozes allegedly sought legislation limiting the circulation and advertising of a rival newspaper Israel Hayom, controlled by

144. As of early 2025, this criminal trial is still ongoing and Netanyahu is once again Prime Minister.

145. *See Full Text: Ag's Announcement of Decision to Indict Prime Minister Netanyahu*, TIMES ISR. (Nov. 22, 2019, 1:40 PM), https://perma.cc/6GWN-FJ9Q; *see also* Rahel Jaskow, *The Criminal Allegations Against Netanyahu, As Set Out by Israel's AG*, TIMES ISR. (May 18, 2019, 2:48 PM), https://perma.cc/2CAF-68FG (demonstrating how "[c]ase 2000 involves accusations that Netanyahu agreed with Yedioth Ahronoth newspaper publisher Arnon Mozes to weaken a rival daily in return for more favorable coverage from Yedioth.").

American casino mogul Sheldon Adelson. According to the Attorney General's indictment summary,

> During each of these series of meetings, Mr. Netanyahu and Mr. Mozes engaged in discussions regarding the promotion of their common interests: improving the coverage that Mr. Netanyahu received in the Yedioth Ahronoth media group; and the imposition of restrictions on the Israel Hayom newspaper, which was of significant economic importance for Mr. Mozes himself and the Yedioth Ahronoth group.[146]

Mozes was charged with bribery[147] while Netanyahu—apparently because he had never concluded the deal with Mozes—was not charged with bribery but was charged with fraud and breach of trust.

In another corruption charge, Case 4000, Netanyahu is accused of granting regulatory favors to the Bezeq telecommunications company, controlled by Shaul and Iris Elovitch, in return for positive media coverage in Walla, a Bezeq news outlet. According to the indictment, this agreement was an illegal *quid pro quo*. Netanyahu was charged with bribery, fraud, and breach of trust.[148] This arrangement is somewhat similar to the alleged 2019 Trump-Zuckerberg arrangement, although there are also differences. The latter did not involve positive coverage of Trump by Facebook *per se*, but rather Facebook allowing its platform to be used to disseminate positive coverage of Trump, and attacks on his opponents, even if that information was false.

Section 284 of Israel's Penal Law makes it a crime for a "public servant" to commit "fraud or a breach of trust that injures the public."[149] While this is not as serious a charge as bribery, this law gives the prosecutors another option for charging in situations where the agreement to a *quid pro quo* may not be sufficiently clear to convict a defendant of bribery itself. There is no counterpart to this statute in American criminal law.

---

146. *Benjamin Netanyahu: What Are the Corruption Charges*, BBC (May 22, 2020), https://perma.cc/B54C-Z796.

147. Bribery is governed by Israel's Penal Law. *See* §§ 291A, 293, 294, Penal Law, 5737-1977 (1977–78), as amended (Isr.) Other prominent Israeli politicians have been charged for bribery, including former prime minister Ehud Olmert, who in 2015 was found guilty of receiving bribes and sentenced to prison. *See Israeli Ex-PM Ehud Olmert Begins 19-Month Prison Sentence*, GUARDIAN (Feb. 15, 2016, 4:46 AM), https://perma.cc/92BU-EBZL.

148. *See Yedioth Ahronoth Publisher Mozes Seeking Plea Deal in Netanyahu Case – Report*, TIMES ISR. (June 5, 2021, 2:03 PM), https://perma.cc/GPG7-C45G*; see also* Jaskow, *supra* note 145 ("Case 4000 widely seen as the most serious against the premier, involves accusations that Netanyahu advanced regulatory decisions that benefited Shaul Elovitch, the controlling shareholder in the Bezeq telecom giant, to the tune of hundreds of millions of dollars, in exchange for positive coverage from its Walla news site.").

149. § 284, Penal Law, 5737-1977 (1977–78), as amended (Isr.).

Even under Israel's more flexible definition of corruption and "breach of trust,"[150] these charges against Netanyahu may be difficult to prove. The criminal proceedings against him have lasted for years, with no resolution in sight. According to the *Times of Israel* in July 2023:

> The judges presiding over the criminal trial of Prime Minister Benjamin Netanyahu have told prosecutors in the case that the bribery charge against the premier will be difficult to prove, Hebrew media outlets reported Thursday.
>
> According to Walla and Channel 13, the judges convened with state prosecutors and Netanyahu's defense team in their chambers in order to discuss the complexities involved in substantiating the bribery charge against the prime minister in Case 4000, the most significant of the three cases against Netanyahu that make up the trial.[151]

If the United States had a criminal statute covering "fraud or breach of trust that injures the public" like Israel's Section 284, the Trump-Zuckerberg meeting might have been covered.[152] Prosecutors would still have to show a demonstrable "breach of trust" when Trump or Kushner, on behalf of Trump, proposed changing the federal regulatory stance toward Facebook if Facebook relaxed censorship of Trump's political supporters on its platform. While this might be a difficult showing, it would probably be easier to show than the *quid pro quo* exchange of an official act for a "thing of value" that is an essential element of the American bribery statute.

American criminal statutes, however, are not so broad and do not encompass the term "breach of trust." The theft of honest services statute is the closest U.S. criminal law comes to such a concept, but as discussed in Part III above, the Supreme Court has limited its reach to bribery and kickback schemes.[153]

One lesson from the Netanyahu indictment is that countries that are willing to broaden public corruption laws to encompass breach of trust and other fiduciary concepts may be more successful in deterring the types of corrupt bargains discussed in this Article. Such criminal law could reach collusion between politicians, including presidents, and media moguls that falls short of the provable *quid pro quo* needed to prosecute public officials and others under American bribery statutes. The ambiguity inherent in

150. Under § 284 of Israel's Penal Law, "[a] public servant who commits an act of fraud or breach of trust that harms the public, even if the act was not an offense if it was committed against an individual, shall be liable to imprisonment for a term of three years." *Id.*

151. *See Reports: Judges in Netanyahu Trial Tell Prosecution Bribery Charge Has Little Chance*, TIMES ISR. (June 22, 2023, 10:35 PM), https://perma.cc/9RW7-73WK.

152. § 284, Penal Law, 5737-1977 (1977–78), as amended (Isr.).

153. *See* Skilling v. United States, 561 U.S. 358, 412 (2010).

such a broader standard has its risks, however, including politicized prosecutions as well as giving truly corrupt officials an excuse to claim they are being politically prosecuted even if they are not. The outcome of the Netanyahu case will be an example of how such a standard works in Israel and whether it would work (or even be constitutional) in the United States.

VII. SOLUTIONS

We have a serious problem when presidents with the power to regulate social media companies can arrange private meetings with the heads of those companies to talk about what each side can do to accommodate the other. The vital role of social media in electoral politics makes the potential for *quid pro quo* a serious threat to democracy.

What to do about it is the more difficult question. The principal point of this Article is that existing bribery laws won't work well to prevent this type of corrupt bargaining, no matter how obvious the *quid pro quo* might be. The "thing of value" that a social media company provides to a president or to the president's re-election campaign is likely too amorphous to pin down with the certainty required for a criminal conviction under the bribery statute. Furthermore, after *Trump v. United States*, inquiry into the motivation for an official act of a president is likely to be very limited and evidence of motivation inadmissible.[154] Impeachment under the broader definition of bribery embodied in the Constitution is a possibility, but conviction in the Senate is virtually impossible.

This Part discusses ways to mitigate the risk of *quid pro quo* collusion between the president, senior executive branch officials, and social media platforms. Although the focus here is on the president, the risk of corrupt influence involving other powerful politicians is a concern as well, and an effective solution to the *quid pro quo* problem will address that also.

A. Amend the Bribery Statute?

Congress could amend the bribery statute to facilitate prosecution of a *quid pro quo* like that alleged to have been proposed in the Trump-Zuckerberg meeting. A social media platform enforcing its content moderation rules differently for a public official, or for his political campaign, than for other platform users is best characterized as a "thing of value" for purposes of the bribery statute, and thus a bribe if given in exchange for an official act. Perhaps, however, a new statute needs to be enacted to make that point clear.

154. *See supra* text accompanying note 75.

A more difficult question is whether a social media platform changing its rules or enforcement policies for all users of its platform should also fit the definition of a "thing of value" if a public official requests that change because he would disproportionately benefit from it. One approach might be to supplement the existing bribery statute with another statute specifically prohibiting any change in a social media company's decisions about content that is made in exchange for any official act of a government official. Such a prohibition might be too broad in prohibiting socially desirable understandings between federal regulators and social media platforms, for example, to remove or limit access to content harmful to children, so a better alternative would probably be to prohibit such arrangements between regulators and social media platforms unless they are fully and publicly disclosed.

Another approach would be expanding the scope of the honest services fraud statute to include conduct beyond bribery and kickbacks, such as breach of trust, self-dealing, and conflicts of interest. Such a law would resemble the approach in Section 284 of Israel's Penal Law[155] allowing prosecution of a public official for "breach of trust." However, a statute like that could be ruled unconstitutionally vague in the United States.[156]

Amendments to criminal statutes will only go so far. As discussed above, after *Trump v. United States*, the president has a constitutional presumption of immunity from criminal prosecution for official acts, and evidence of motivation for official acts is inadmissible even in a criminal trial of the president for personal conduct such as receipt of a bribe.[157] Close advisors to the president also might be able to avail themselves of such immunity or, in a criminal trial, exclude evidence of the president's motivations for an official act.

Effective solutions to the problem of *quid pro quo* between presidents, as well as other politicians, and social media platforms are for the most part likely to be found outside the realm of criminal law.

B. Enforce the Political Coercion Statute to Protect Federal Agencies Regulating Social Media

Another partial solution to this problem is to more vigorously enforce the political coercion statute 18 U.S.C. § 610, under which it is a crime

155. *See* § 284, Penal Law 5737-1977 (1977–78), as amended (Isr.).

156. To withstand constitutional scrutiny in the United States, such a statute would have to be more precise in describing the prohibited acts. A statute like Section 284 of Israel's Criminal Law allowing prosecution for "breach of trust" would probably be held to be unconstitutionally vague under the approach used by the U.S. Supreme Court. *See Skilling*, 561 U.S. at 412.

157. *See supra* text accompanying notes 74–75.

"for any person to intimidate, threaten, command, or coerce . . . any employee of the Federal Government . . . to engage in, or not to engage in, any political activity."[158] While the definition of coerced political activity in the statute may be ambiguous, it could cover an attempt to coerce officials of the FCC into regulating social media platforms in a manner intended to assist a political campaign. This statute also could be amended to expressly state that prohibited acts include any attempt to intimidate, threaten, command, or coerce a federal agency such as the FCC to change its policy on social media content moderation concerning communications related to an election.

This approach has its limitations, however. First, official acts of the president may be immune from prosecution under any criminal statute, including this one, after *Trump v. United States*, although purely political acts aimed at coercing federal officials to engage in partisan activity presumably could still be prosecuted. Second, the political objectives of the president's campaign all too easily can be filtered through White House staff to become official policy positions of the president. For example, it might be illegal political coercion for the president's campaign to coerce the FCC to pressure social media companies to relax moderation of online content before an election, but this same stance can easily be recharacterized as a free speech policy position of the White House that is then communicated to the FCC as the appropriate stance it should take as a regulator. And, after *Trump v. United States*, in a criminal trial of the president, and probably also his senior advisors, evidence of the president's motivations for an official act would likely be inadmissible.

Again, solutions to the problem of coercion and *quid pro quo* are, for the most part, likely to be found outside the realm of criminal law.

C. Protect Social Media Platforms from Government Pressure

Just because government pressure on social media platforms may pass First Amendment scrutiny, or under *Murthy v. Missouri* a plaintiff lacks standing to sue, does not mean the government should do it. Presumably, Congress could prohibit government officials from exerting undue pressure on social media platforms to change their content moderation policies except as expressly permitted by statute. For example, government officials could be permitted to request or even require removal from social media platforms of child pornography, threats of violence, fraudulent solicitations, and certain categories of communications not likely to have First Amendment protection but could be prohibited by statute from pressuring social media platforms about their content

158. 18 U.S.C. § 610.

moderation pertaining to other subject matter that does not pose a similar threat to public safety.

A federal statute also could provide that it is illegal for federal officials themselves, or through others, to state or imply that the substance, interpretation, or enforcement of federal regulation of a media outlet is conditioned on or affected by how the media outlet moderates or disseminates content related to a federal election, a candidate for federal office, or a political party. In addition to providing criminal or civil penalties for violators, the statute could provide that actions taken by federal officials who violate this provision are null and void.

Such statutes would raise separation of powers questions if used to constrict or invalidate an official act of the president, but at least could be effective in distancing political appointees of the president from some coercive or corrupt interactions with social media platforms. By way of analogy, the Hatch Act prohibits federal employees from using their official position to influence the outcome of a partisan election, [159] and applies to all executive branch officials other than the president and vice president. Presumably, Congress could enact similar restrictions on official capacity communications by government officials with social media platforms about their content moderation policies.

While many Democrats in Congress supported the Biden administration's social media policies, and many Republicans opposed those policies and backed the plaintiffs in *Murthy v. Missouri*, the White House changing hands should bring a change in perspective. A bipartisan coalition in Congress could agree to pass legislation codifying much of the original injunction issued against the Biden administration by the federal district court in Louisiana,[160] and with future control of the White House uncertain, Trump himself might be persuaded to sign it into law.

D. Bolster FCC Independence

Presidents probably should not oversee regulating social media platforms or the companies that control them, particularly if presidents simultaneously make known their preferences for content moderation. If there is government regulation of social media content—a big "if" given the First Amendment issues involved—it should come from Congress and from an independent federal agency, probably the FCC, implementing statutes, as well as federal judges interpreting statutes in specific cases. Presidents, as candidates and as heads of their political party, have a strong

159. *See* 5 U.S.C. § 7323.

160. *See supra* note 43 (setting forth in part the text of the original injunction in *Murthy v. Missouri*).

personal interest in the content moderation policies of social media companies and should stand down from regulating them at the same time.

Getting federal regulation of social media platforms away from the president, however, is difficult. Recusing the president from federal regulation runs against the constitutional prerogative of the president to control the executive branch, including the unitary executive theory giving the president wide latitude to shape policy by appointing and removing superior federal officers.[161]

The FCC is an independent federal agency. The five commissioners are appointed by the president with the advice and consent of the Senate for five-year terms.[162] The president can remove the FCC chairman at any time. Firing one of the commissioners, including removing the chairman from the FCC altogether, would be more difficult. While ordinarily, a president can remove a presidentially appointed officer in the executive branch for any reason, the Supreme Court in 1935 held that Congress can constitutionally restrict the president's right to remove a member of a multimember commission.[163] Two justices of the current Supreme Court, however, have called that ruling into question in a 2020 case upholding the president's constitutional right to fire the head of the Consumer Finance Protection Bureau.[164] The FCC could be the next federal agency where the Court says the president has unlimited power to remove a commissioner, or indeed all five.

Another problem is that, like other federal regulators, even without the president removing the chairman or trying to fire a commissioner, the FCC is under informal pressure from Members of Congress and from the president. The FCC may be even more vulnerable to external influence

161. *See* Aditya Bamzai & Saikrishna Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1761 (2023) (defending the view that the "executive power" encompassed authority to remove executive officials at pleasure). *But see* Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404, 406 (2023) (response arguing Bamzai and Prakash do not address powerful counterarguments that the Constitution does not preclude Congress from limiting presidential removal power in executive branch agencies).

162. *See* 47 U.S.C. § 154(a) ("The Federal Communications Commission (in this Act referred to as the "Commission") shall be composed of five commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman.").

163. *See* Humphrey's Executor v. FTC, 295 U.S. 602, 631–32 (1935).

164. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 239 (2020) (Thomas, J., concurring in part and dissenting in part). As Justice Thomas articulated:

The decision in *Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people. The Court concludes that it is not strictly necessary for us to overrule that decision . . . But with today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*. In a future case, I would repudiate what is left of this erroneous precedent.

Id.

than other agencies because powerful politicians have a keen interest in the media, including social media.

For example, Senator Bob Menendez (D NJ)—who in an unrelated case in 2023 was indicted, and in 2024 convicted, on multiple counts of bribery—flexed his muscles to try to force the FCC to approve a cable TV merger opposed by many of his fellow Democrats. Although Menendez claimed to be championing ethnic diversity in media ownership when embracing the acquisition bid by a Korean American billionaire,[165] Menendez's history of corruption suggests his motivations might be otherwise. Although this matter involves cable TV, not social media, this is an example of how a corrupt member of Congress can pressure the FCC to accommodate his political wishes or, here, the interests of a billionaire businessman.

The FCC is supposed to be an independent agency, but it is still highly political. Commissioners of the president's political party are likely to communicate with the White House about policy matters before the FCC unless laws or regulations specifically prohibit it. Other FCC commissioners may have private conversations with Members of Congress and their political supporters, which include persons in the social media industry itself.

Arguably, contacts between the president, vice president, or White House staff, as well as Members of Congress and their staff, and individual FCC commissioners about official business should be restricted unless all five of the commissioners are present. The FCC could itself adopt such a policy, or Congress could impose it by statute. The White House might strenuously object, arguing that this goes too far in the direction of FCC independence and unduly constricts the president's power as head of the executive branch. But, for the reasons discussed in this Article, regulating social media is an exercise of executive power that, in the hands of a corrupt president, can too easily be abused.

Achieving FCC independence from the president and from individual members of Congress, is important if the FCC is going to regulate social media. Arguably no federal regulation at all is better than regulation hashed out in private meetings between the president, or members of Congress, and billionaire social media moguls bargaining over what they want and what they will do for each other in return.

165. *See* Josh Kosman, *Democrat Sen. Bob Menendez Rips FCC 'Inaction' on Tegna Deal, Threatens to Derail Key Confirmation: Sources*, N.Y. POST (Apr. 27, 2023), https://perma.cc/6JM6-ZL57.

E. Reduce Social Media Industry Concentration

Another broader issue is the danger to democracy when the extreme concentration of economic power in social media interfaces with the extreme concentration of executive power in the presidency. Three billionaires—Mark Zuckerberg, Elon Musk, and Larry Ellison—have voting control of companies that, in turn, control the largest social media platforms—Facebook, Instagram, Threads, WhatsApp, X, and the U.S. platforms for TikTok. All three of these billionaires appear to be taking sides in the dispute over the 2020 election as well as the 2024 election. All three may aspire to be the "Citizen Kane"[166] of 21st century social media.

A president, also a billionaire (or former billionaire) controls his own social media platform, Truth Social. Truth Social might propose mergers or business combinations with other social media companies. In this scenario, the president could end up personally controlling large swaths of the social media industry coupled with control of executive branch regulatory oversight of the remaining competitors (if any).

What to do about the concentration of power in social media—whether to break up the largest social media conglomerates or impose another solution—is a complex topic beyond the scope of this Article. Platforms such as X and Facebook are in some respects natural monopolies, and while competition is beneficial in social media, users ultimately will choose their preferred platform. Whether conglomerates such as Meta should control multiple social media platforms is a separate question, and Congress, by statute, could require these companies to be separated so they are not under the control of a single person.

An important first step would be for Congress and the FCC to evaluate the market share of the largest social media platforms and the companies that control them (Zuckerberg alone controls Facebook, Instagram, Threads, and WhatsApp). Congress and the FCC, since its inception, have been concerned with media concentration, and social media should be no exception.

Congress has investigated the market power of Facebook and other social media platforms[167] but has thus far done little about it. The European

166. *See* CITIZEN KANE (RKO Radio Pictures 1941). *Citizen Kane* is the famous 1941 movie, directed by Orson Welles, depicting the political ambitions of a powerful newspaper baron, a character based on William Randolph Hearst who controlled many of the nation's newspapers and contemplated a run for president. *See Hearst for 20 Years Has Sought Power*, N.Y. TIMES, Sept. 27, 1906, at 4, https://perma.cc/7YUN-YMF2 ("His political ambition has ranged from a seat in the House of Representatives to the Presidency of the United States, with the Mayoralty of Greater New York and the Governorship of the State thrown in as incidentals.").

167. *See generally, e.g.*, Letter from Facebook, Inc., to David Cicilline, Chairman, & Jim Sensenbrenner, Ranking Member, U.S. House of Reps., Comm. on the Judiciary (Oct. 11, 2019), https://perma.cc/YE96-BXR6.

Union is more aggressive in pursuing antitrust investigations of social media companies but is mostly focusing on data collection and privacy,[168] mergers,[169] advertising monopolies and related issues, not the potential for abuse of market power for political influence.

Antitrust laws aren't just about economic efficiency and pricing (such is a myth about antitrust law promoted by law and economics scholars decades ago, but inconsistent with the legislative history[170]). Antitrust law is also about the consolidation of economic power and the political power that comes with it. With many voters, particularly younger voters, getting news through social media, industry concentration in social media should be a grave concern in a democracy.

F. Decouple Content Moderation from Corporate Control

An alternative would be to allow control of social media platforms and their parent companies to remain intact while decoupling aspects of their operations most prone to abuse and political pressure. Content moderation, for example, could be delegated to an entity outside the company, perhaps one controlled by users themselves (a content moderation entity controlled by or influenced by the government is an invitation to just the type of abuses this Article seeks to avoid). It would be a lot harder for a president to meet with a social media platform content moderation committee to discuss a potential *quid pro quo* than it would be for the president to meet privately with the platform's owner or controlling shareholder.

Meta recently delegated content moderation on Facebook to an Oversight Board, but Meta still appoints the board, and it's not clear how much the Board focuses on specific cases while Meta still decides overall content moderation policy.[171] The latter may be sufficient to invite external influence on Meta, including presidential pressure, if overall content moderation policy can be shaped to favor one candidate or another in an election. It won't matter that cases involving individual users are resolved by the Board if Meta's generally applicable rules could be established at

168. *See* Adam Satariano, *Facebook Loses Antitrust Decision in Germany Over Data Collection*, N.Y. TIMES (June 23, 2020), https://perma.cc/NRR8-LVE8.

169. *See* Press Release, Eur. Comm'n, Mergers: Commission Fines Facebook 110 Million for Providing Misleading Information About WhatsApp Takeover (May 17, 2017), https://perma.cc/B9FL-LEFE.

170. *See* Ariel Katz, *The Chicago School and the Forgotten Political Dimension of Antitrust Law*, 87 U. CHI. L. REV. 413, 457 (2020) (stating antitrust law "was always concerned not only with narrowly defined economic aspects of competition but also with the connection between market competition and a set of classic liberal political values" and, further, that it "recognized that unchecked private economic power may be as injurious to individual freedom and other liberal values as unchecked political power, and that the two may be mutually constitutive").

171. *See* OVERSIGHT BD., https://perma.cc/6MYK-TX6V (last visited Dec. 3, 2024).

another Trump-Zuckerberg meeting, a Biden-Zuckerberg meeting, or a similar scenario. A truly independent Board would be chosen by someone other than the company itself and would have the authority to address broad categories of content moderation issues and overall policy.

This Article does not explore further the pros and cons of decentralizing control of social media companies or content moderation on platforms. However, it is important to recognize that putting extraordinary power over content moderation in the hands of a few billionaires is dangerous for democracy. The *quid pro quo* corruption of presidents and other public officials discussed in this Article is one of the risks.

VIII. CONCLUSION

Government soft pressure on social media platforms is not just a First Amendment issue. It is also a corruption issue. The types of tactics allowed after *Murthy v. Missouri* can all too easily be abused and all too quickly evolve into a *quid pro quo* relationship between social media platforms and politicians, particularly presidents.

Both the DOJ and Congress should have investigated the Trump-Zuckerberg dinner in 2019 to find out what was proposed by Trump, Kushner, or Zuckerberg and what was agreed to. There was an alleged *quid pro quo* between one of the most powerful social media companies in the world and the most powerful head of state in the world. It should not simply have been forgotten.

More importantly, Congress needs to address the potential for future collaboration and *quid pro quo* arrangements between social media moguls and the White House, as well as candidates for president. With consolidated control over social media platforms in the hands of a few billionaires, future *quid pro quo* corrupt bargains with presidents and other powerful politicians could be proposed and even agreed to. The impact on our elections could be substantial.

If existing bribery statutes are not sufficient to address this type of *quid pro quo*, we need new laws that will. Other solutions summarized in this Article also should be considered. A free country requires that the media, including social media, be independent of government control. Presidents and other high-ranking government officials cannot be allowed to use their official position to coerce or to induce accommodation for themselves, their campaigns, or political supporters on social media platforms. In a democracy that depends on independent media, such is corruption of the most dangerous kind.