Executive Authority and Free Speech:

An Analysis on the Restraints of Presidential Power

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Abstract

This analysis examines the implications of social media platforms in connection to free speech and presidential power. Specifically, this study will be drawing on a precedent legal case, Knight First Amendment Inst. v. Trump (2019) along with other cases that are relevant to this paper. This research is contributing to the literature by exploring the topic of how developing technology is influencing political communication. Results support the idea that the definition of public forum needs to be expanded and updated to include social media. Theoretical consequences for the role of social media in connection to executive authority and First Amendment are discussed.

Introduction

Author E.L. Doctorow once wrote, “One cannot consider the U.S. Constitution without getting into an argument with it” (Doctorow, 1987, p. 214). In the recent events of President Trump’s election, as well as during his campaign, there were several arguments brought to the forefront that dealt with the First Amendment. Trump has been applauded by his supporters for his open and uncensored speech. At the same time, people are looking at the critical amount of falsehoods spread by the president (Cillizza, 2019). The location that this uncensored speech is communicated from and is most frequently used by President Trump is his Twitter account. Some would say that his use of this platform has reshaped the presidency (Shear, et al., 2019). With the rising tide of social media, there are new avenues for authorities, not just the president, to communicate with citizens. As technology advances, the public needs to look at “free

expression theory and practice, but it must go beyond the law to view social change in an increasingly technological world." (Lipschultz, 2018, p. 206).

Questions arise on the First Amendment relating to political officials. What are the limits of free speech that face the President of the United States? The purpose of this research paper is to analyze executive authority and what exactly are the restraints of presidential power. The precedent of this limitation is found in the case, Knight First Amendment Inst. v. Trump (2019) as it deals with how the President conducts his Twitter account @realDonaldTrump. There will be a particular focus on the ideas of viewpoint discrimination and public forum relating to this case. The research will include a brief legal history of these issues before investigating the precedent case regarding this topic of executive authority.

Brief Legal History

When discussing the First Amendment in tandem with executive authority it brings up a long history of legal cases. The discussion of presidential power spans further back than the use of the Internet and Twitter. One example that illuminates this topic is New York Times Co. v. United States (1971). The Pentagon Papers case shows the impact of governmental prior restraint (Helle, 2018, p. 57). The United States government engaged in a manipulative public relations campaign that concealed information of the Vietnam War and endangered soldiers. The case decided that the newspaper could continue with the series outlining the content in the classified documents. The Supreme Court decided that the prior restraint was unjustified, with three judges having dissenting opinions. Justice Hugo Black wrote that "free speech does involve risks, but the framers of the First Amendment, who fully appreciated what it took to defend a nation, nevertheless understood that free speech provided the only real security" (p. 63). This topic of

prior restraint of newspapers mirrors the exclusion of citizens from the public forum of President Trump's Twitter account, that will further be explained in the recent case law.

Continuing with the idea of public forum, the landmark case, New York Times v. Sullivan (1964) helped create the ideology that free expression has a value for society, not just individuals. The Supreme Court unanimously decided that when a statement concerns a public figure, it is not enough to that it is false for the press to be liable for libel. Instead, it must be shown that the statement was made with the knowledge or reckless disregard for its falsity, or "actual malice." This case connects back to free speech and how it's necessary that public concerns should we available for conversation. In the opinion, Justice Brennan wrote that a libel suit against a newspaper must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open" (p. 271).

The previous cases provided dealt with newspapers, as technology has advanced, we have found new formats to communicate from. Social media platforms have created a substantial shift in the working of public speech and engagement. This shift continues into the political sphere, and conflicts of free speech have arisen because of this development. In a social media suit, Davison v. Randall (2019) found that Phyllis Randall, Chair of the Loudoun County, Virginia, Board of Supervisors violated the First Amendment rights of one of her constituents, Brian Davison, when she banned him from the "Chair Phyllis J. Randall" Facebook page she administered. The U.S. Court of Appeals for the Fourth Circuit affirmed that by engaging in viewpoint discrimination on her Facebook page, the Chair violated the Plaintiff's freedom of speech rights under the First Amendment and was not entitled to block any citizens from commenting on her Facebook page. This case brought light to the failings to recognize the

serious problems that social media presents to the First Amendment. Judge Milano-Keenan, called on the Supreme Court to consider the reach of the First Amendment in the context of social media and to consider the scope of authority for public officials. Milano-Keenan noted that there is no precedent establishing that any or all individual public officials "serving in a legislative capacity to qualify as a unit of government or a government entity for purposes" of creating a public forum (p. 692).

Recent Case Law

In Knight First Amendment Inst. v. Trump (2019), the appellate court reviewed the First Amendment against the use of President Trump's personal Twitter account. In a 3-0 decision, the U.S. Court of Appeals for the Second Circuit affirmed the district court's holding that President Trump's practice of blocking critics from his Twitter account violates the First Amendment. This case brought up several legal issues including, freedom of speech, viewpoint discrimination, public forums, and speech on the internet. Plaintiffs Buckwalter, Cohen, Figueroa, Gu, Neely, Papp, and Pappas are social media users who were blocked from accessing and interacting with the Twitter account of President Donald Trump because they expressed views he disliked. The Knight First Amendment Institute at Columbia University is an organization that declares the right to hear the speech that the Individual Plaintiffs would have expressed had they not been blocked. The plaintiffs sued President Trump along with other White House officials, contending that the blocking violated the First Amendment. The President states that he has used Twitter since 2009 and it is a platform for his "own private expression" (p. 237). Since the Account is private, he argues, First Amendment issues are not implicated as it is not a public forum. This case first took place at the United States District Court for the Southern District of New York before being appealed to the Second Circuit.

This Court affirmed that in blocking the Individual Plaintiffs the President engaged in prohibited viewpoint discrimination. Viewpoint discrimination is the term the Supreme Court has used to identify government laws, rules, or decisions that favor or disfavor one or more opinions on a particular controversy. The President engaged in unconstitutional conduct in blocking users after he chose the account platform and intentionally opened it for public discussion. His account was a public forum, the retweets, replies, and likes of other users were government speech. The lawsuit also claims that the White House was violating the plaintiffs' right to petition their government. The ability to petition the government is one of the fundamental freedoms that the First Amendment protects. Blocking these plaintiffs deprived those who remained in the public forum the opportunity to hear critical voices. Judge Barrington D. Parker wrote, "In resolving this appeal, we remind the litigants and the public that if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less" (p. 300).

After being elected, the President no longer uses his Twitter account privately. Instead he uses it, "to announce, describe, and defend his policies; to promote his Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; [and] to challenge media organizations whose coverage of his Administration he believes to be unfair" (p. 235). The President's tweets are viewed as official records, the Presidential Records Act of 1978 established public ownership of the President's official records. President Trump chose to use his personal account to communicate rather than the government official @POTUS account. Because the @realDonaldTrump account is used for government functions, it serves as a public forum. The President excluded the Individual Plaintiffs from government-controlled property when he used the blocking function of the

account. Excluding disfavored voices from a public forum is something the First Amendment prohibits. A public forum, as the Supreme Court has made clear, need not be “spatial or geographic” and “the same principles are applicable” to a metaphysical form (p. 239).

With the topic of executive authority, the Knight Institute decision incorporated a few other previous cases. One of the cases has already been discussed, Davison v. Randall (2019) when an elected official blocked a constituent from her Facebook page. Another case cited was Robinson v. Hunt County (2019). Robinson sued Defendants Hunt County’s Sheriff Randy Meeks, and several employees of the Sheriff’s Office. Robinson claimed there was an unconstitutional violation of censorship on the sheriff's official Facebook page because it deleted "inappropriate" comments critical of the office and banned her from the site. Since the sheriff was the final policymaker with regard to the page, and the citizen sufficiently pled an official policy of viewpoint discrimination. All of these cases tie back to the person with authority preventing other people to critique the position of power or government.

Law Review Analyses

In a recent law review, Hidy (2019) examines the application of the First Amendment on President Trump’s Twitter account. The author raises several questions about the Knight First Amendment Inst. v. Trump (2019) case. Is the @realDonaldTrump account owned by the government? Is the account a public forum? Did the blocking of Twitter users from @realDonaldTrump constitute unconstitutional viewpoint discrimination?

In Knight First Amendment Inst. at Columbia Univ. v. Trump (2019), the court decided that the President engaged in unconstitutional conduct in blocking users on Twitter after he chose the account platform and intentionally opened it for public discussion. His account was a public forum, the retweets, replies, and the likes of other users are considered government speech (p.

230). The article argued that since the Court understood that the Twitter account was once private, however, it's no longer considered private since it is used by a government official to convey messages to citizens. Whether the government has historically used the speech in question to "convey state messages," whether that speech is "often closely identified in the public mind" with the government, and the extent to which government "maintains direct control over the messages conveyed…" (p. 1066). Since these messages are shared through Trump's account it is now considered a public forum. Now that the account is considered a public forum, Trump committed viewpoint discrimination through blocking people on that social media platform.

In another review, Briggs (2018), stated that in recent years, American presidents and other government actors have moved much of their communications with the general public online, through their use of social media. Briggs noted that President Donald Trump is particularly known for his use of Twitter and his extensive communications via his account, @realDonaldTrump. Social media usage by government figures has gone unchecked by the courts until the Knight Institute brought a suit against the president for blocking users on @realDonaldTrump. Briggs agrees with the previously stated article's conclusion that the President deserved this ruling, however, this article focuses on the use of Twitter as a public forum. Briggs also outlines different ways to reclassify the definitions of public forum for a modern era.

One option is to consider social media under the classification of designated public forum. As seen in the Knight Institute case, there is a strong argument of how social media accounts serve as a modern public forum. However, Briggs points out that these accounts are not necessarily public, as they are owned by private companies. Government actors could potentially put up designated rules during the page's inception to help balance debates without having to

commit viewpoint discrimination. Another option is to classify social media as a non-public forum. Briggs admits this is a weaker option but cites military bases and jails as examples. Government social media pages may not fall into this category, but if they were classified as non-public, then many of the strategies government actors could implement in order to retain policing powers over their pages may mirror the strategies suggested in the designated public forum scenario (p. 33).

This litigation against Trump is an example of why First Amendment analysis must extend to government social media pages, however, it raises new challenges. There are obvious reasons why these officials may want to exert certain controls over their social media pages. However, these controls could potentially run against the First Amendment. Briggs concludes that, in the modern digital age, it is of the "utmost importance" that courts are willing to identify public forums that do not fit the traditional mold (p. 38). "Americans live on the Internet, and if their speech is not protected by the First Amendment -- particularly in the context of government social media pages, where not only freedom of speech but also the freedom to petition the government for a redress of grievances is implicated -- then it is a slippery slope to censorship," (p. 38).

Conclusion

The limitations of this research include the lack of recent Supreme Court cases involving executive authority and free speech. While researching this topic, I was unable to find information or legal cases on this subject regarding the previous Obama administration. The comparison between Obama and Trump's presidency would have provided proper context to this topic. These two presidents have both used Twitter, however in very contrasting ways. Twitter has never before been used by presidents prior to the platform's creation in 2006, nor has there

been prevalent usage of social media in a U.S. presidency of this magnitude. The rapid expanse of people on social media makes it an effective tool to reach the public to discuss issues. This includes smaller areas of government, not just the presidency. The lack of Supreme Court cases contributed to the inability to further illustrate this point.

Another limitation was finding cases that related directly to Trump and the First Amendment that actually went through legal proceedings. When analyzing different legal cases posed against Trump, I found one that came from PEN America, an organization that sued Trump over attacking the press and revoking White House press passes (Masnick, 2018). However, that case was dismissed. The restriction and hostility of the Trump administration towards the press is an entirely different subject that could be elaborated on. Another dismissed case was Clifford v. Trump (2018). Clifford, otherwise known as Stormy Daniels, sued Trump for defamation after he tweeted about her. This case could have benefited this paper by providing addition information about the limitations of free speech and the President's Twitter use.

Further research could include looking at the exercise of presidential power that reaches beyond the boundaries of the First Amendment. What percentage of tweets on @realDonaldTrump relate to government issues compared to personal matters? Which of the recent presidents have used the most executive orders? Does the President's public approval correlate with these numbers of executive orders in any way? Which president has been sued the most, and why? As the Trump presidency continues there still remains more potential to analyze his use of Twitter as a public forum and how he exercises executive authority. There is a possibility that other cases could surface. One area that could be of interest, which is timely, involves the articles of impeachment and how they reflect on the President.

In conclusion, the interpretations of the First Amendment concluded that in the case of Knight First Amendment Institute v. Trump (2019), President Trump's Twitter account was a designated public forum, so blocking accounts that were critical of him was unconstitutional viewpoint discrimination. The limitations of the executive authority, whether the elected official is a board member or the President of the United States, is clearly found in viewpoint discrimination. Social media, regarding public officials, is considered a public forum. There needs to be updates to the definition of public forum to provide better clarification. Blocking or banning citizens from a public forum prevents them from participating in the democratic process. The restraints of presidential power should occur when that power is used to silence other opinions and prohibit robust public debate. Cases like the Knight Institute help create precedents that future cases can rely upon. This creates the hope that free expression can, “go beyond the law to view social change in an increasingly technological world” (Lipschultz, 2018, p. 206).

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