

# Government Tweets, Government Speech: The First Amendment Implications of Government Trolling

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## INTRODUCTION

In July 2018, U.S. President Donald Trump held a summit in Finland with Russian President Vladimir Putin.<sup>1</sup> During a news conference following the leaders' meeting, President Trump was asked if he believed the U.S. intelligence community's assessment that Russia had interfered in the 2016 U.S. presidential election.<sup>2</sup> President Trump responded by saying President Putin "says it's not Russia . . . I don't see any reason why it would be."<sup>3</sup> Various politicians and former government officials responded to President Trump's comment. Senators John McCain and Lindsey Graham respectively called President Trump's performance at the news conference "disgraceful" and a "missed opportunity . . . to firmly hold Russia accountable for 2016 meddling."<sup>4</sup> The Speaker of the House of Representatives Paul Ryan was quoted as saying there was "no question" Russia had interfered in the 2016 election.<sup>5</sup> Former CIA director John Brennan took to Twitter to lambast the President. He referred to the President's performance at the news conference as "treasonous" and "imbecilic."<sup>6</sup>

Reports began to surface that President Trump and his Administration were considering revoking the security clearances of six

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1. Julie Hirschfeld Davis, *Trump, at Putin's Side, Questions U.S. Intelligence on 2016 Election*, N.Y. TIMES (July 16, 2018), <https://www.nytimes.com/2018/07/16/world/europe/trump-putin-election-intelligence.html> [<https://perma.cc/5QRL-27XF>].

2. *Id.*

3. *Id.*

4. *Trump Sides with Russia Against FBI at Helsinki Summit*, BBC NEWS (July 16, 2018), <https://www.bbc.com/news/world-europe-44852812> [<https://perma.cc/S5L6-724H>].

5. Lauren Fox, *Top Republicans in Congress Break with Trump over Putin Comments*, CNN (July 16, 2018), <https://www.cnn.com/2018/07/16/politics/congress-reaction-trump-putin-comments/index.html> [<https://perma.cc/D65C-BQQ9>].

6. John O. Brennan (@JohnBrennan), TWITTER (July 16, 2018, 8:52 AM), <https://twitter.com/JohnBrennan/status/1018885971104985093>.

former government officials who had been critical of the President, including John Brennan. When asked about the reports at a White House Daily Briefing, White House Press Secretary Sarah Huckabee Sanders confirmed that the President was exploring ways to remove the security clearances and, in a seeming reference to Director Brennan's "treason" comment, explained that the Administration was exploring the available "options."<sup>7</sup> That same day, Speaker Paul Ryan was also asked about the President's reported desire to revoke the security clearances.<sup>8</sup> "I think he's just trolling people, honestly," said Speaker Ryan with a laugh.<sup>9</sup>

Speaker Ryan's comment—even if blithe—distilled a modern phenomenon that connected the lexicon of social media with government action. By characterizing President Trump's overtures as "trolling," Speaker Ryan seemed to suggest the President was announcing the possibility that the government would take adverse action against detractors in an effort to cow them. President Trump had not, at the time, suggested a revocation of security clearances through his Twitter account. Nevertheless, Speaker Ryan described the President's purported intent within the context of a concept most often associated with social media—the form of communication for which the President has become most well-known. In framing the President's aim within the social media phenomenon of trolling, Speaker Ryan's comment presented First Amendment concerns.

Many people are active on social media platforms and use them to frequently communicate their ideas. In this way, President Trump's prolific use of Twitter to communicate his ideas is perhaps unremarkable. However, as the President of the United States, the ascription and effect of President Trump's tweets differ in kind. Prior to his election, President Trump used his @realDonaldTrump Twitter account to communicate a variety of ideas, first as a celebrity and, eventually, as a presidential candidate. Once elected, President Trump continued to use @realDonaldTrump. However, after having assumed his new role, President Trump and a handpicked government official used @realDonaldTrump to announce U.S. government policy, government personnel decisions, and Executive Branch plans. The @realDonaldTrump Twitter handle communicates relevant, government-related information often enough that it has become closely identified with

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7. Sarah Sanders, *White House Daily Briefing* (July 23, 2018), <https://www.c-span.org/video/?448872-1/white-house-revoking-obama-bush-officials-security-clearance&start=810> [https://perma.cc/2P56-MNCE] (minutes 12:13 to 13:56).

8. Jill Colvin & Lisa Mascaró, *Ryan Says Trump Just 'Trolling' with Threat to Pull Clearances*, BLOOMBERG (July 24, 2018), <https://www.bloomberg.com/news/articles/2018-07-24/trump-considering-pulling-security-clearances-of-critics> [https://perma.cc/AN73-58CE].

9. *Id.*

the government by media outlets and the public. For these reasons, @realDonaldTrump has transformed into government speech.

With that transformation, the impact of @realDonaldTrump takes on a constitutional dimension. A tweet from @realDonaldTrump that is intended to troll a detractor no longer remains a dispute between private individuals. Instead, it implicates the First Amendment. While the Supreme Court has determined that the First Amendment does not impose viewpoint neutrality upon the government when it speaks, the Court has suggested there are some constitutional limits on the government's freedom to say what it will.<sup>10</sup> The Free Speech Clause is one of those limits. It prohibits the government from speech that interferes with an individual's First Amendment rights. As a result, a tweet from @realDonaldTrump that discourages critics from engaging in their own expressive activity exceeds the government's authority to choose its own message and violates the First Amendment.

This Article has four parts. Part I details the substantive change in President Trump's use of @realDonaldTrump, from his tweets as a private citizen to President. Part II explores the Supreme Court's government speech doctrine. It identifies both the inception of the doctrine and its fundamental principles. Part II also posits that while the Court has found that the First Amendment does not limit the government's authority to choose what viewpoint it expresses, it has nonetheless recognized that the Constitution limits the government's speech in other ways. Part III asserts that President Trump's use of @realDonaldTrump constitutes government speech. Finally, Part IV argues that where @realDonaldTrump is used to troll, or dissuade government critics from speaking, it violates the First Amendment.

#### I. TWEETING FROM @REALDONALDTRUMP: A TRANSITION FROM CELEBRITY TO PRESIDENT OF THE UNITED STATES

It is axiomatic that President Donald Trump uses social media like no other president before him. While other elected leaders use social media to communicate with their constituents, President Trump's use of Twitter surpasses other politicians in both kind and number. The impact of his tweets, whether historical, social, or normative, are more akin to President Roosevelt's fireside chats or President Kennedy's televised press conferences. They have not only defined his presidency, but they have challenged the status quo for how a president communicates with the

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10. See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015); see *infra* Section II.B.

public. Indeed, President Trump's tweets often drive the media's, the public's, and other politicians' discussion of matters of public concern.

President Trump began posting tweets through the Twitter handle @realDonaldTrump in 2009, seven years before he was elected President.<sup>11</sup> While he initially used the platform for self-promotion, in 2011 he posted his first tweet suggesting he may run for president at which time his tweets became more political.<sup>12</sup> While campaigning for the Republican party's nomination, he used his @realDonaldTrump account to assert his ability to fix various political and social ills he suggested were facing the U.S. from infrastructure, to unemployment, to terrorism.<sup>13</sup> After winning the nomination in the general election, he continued to use Twitter for political purposes asserting he would be the best candidate to deal with national security,<sup>14</sup> job creation,<sup>15</sup> and illegal immigration.<sup>16</sup> It was during this same time that his Twitter follower count dramatically increased.

From his first tweet in 2009 through 2012, President Trump's Twitter followers increased from 12,470 to just under 2 million followers.<sup>17</sup> Over the next two years, his followers increased by just over 800,000.<sup>18</sup> It was not until 2015, when he announced he was running for President, that his Twitter followers began to dramatically increase.<sup>19</sup> By the end of 2015, the number of President Trump's followers doubled from the previous year.<sup>20</sup> By the end of 2016, by which time he had secured the Republican party's nomination and won the presidential election,<sup>21</sup> his followers more than

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11. Douglas B. McKechnie, @POTUS: *Rethinking Presidential Immunity in the Time of Twitter*, 72 U. MIAMI L. REV. 1, 8 (2017).

12. *Id.* at 8–9.

13. Donald J. Trump (@realDonaldTrump), TWITTER (May 12, 2015, 8:12 PM), <https://twitter.com/realDonaldTrump/status/598324947140902912>; Donald J. Trump (@realDonaldTrump), TWITTER (July 30, 2016, 5:57 AM), <https://twitter.com/realDonaldTrump/status/759372422692954112>; Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 24, 2016, 7:46 AM), <https://twitter.com/realDonaldTrump/status/713014127061544961>.

14. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 8, 2016, 1:06 PM), <https://twitter.com/realDonaldTrump/status/718530443272970240>.

15. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 2, 2016, 4:35 AM), <https://twitter.com/realdonaldtrump/status/782544407593619457>.

16. Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 24, 2016, 5:05 PM), <https://twitter.com/realdonaldtrump/status/768600125413273600>.

17. *Trump on Twitter: A History of the Man and His Medium*, BBC NEWS (Dec. 12, 2016), <https://www.bbc.com/news/world-us-canada-38245530> [<https://perma.cc/VMV3-UCN9>].

18. *Id.*

19. Donald J. Trump (@realDonaldTrump), TWITTER (June 16, 2015, 8:57 AM), <https://twitter.com/realdonaldtrump/status/610838591242137600>.

20. *Trump on Twitter: A History of the Man and His Medium*, *supra* note 17.

21. Andrew Rafferty, *It's Official: Trump Wins GOP Presidential Nomination*, NBC NEWS (July 19, 2016), <https://www.nbcnews.com/politics/2016-election/trump-set-become-gop-s-official-presidential-nominee-n612616> [<https://perma.cc/UW6V-4T2M>]; Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y.

tripled from the previous year to over 17 million.<sup>22</sup> At the end of 2017, after his first year in office, President Trump had over 45.4 million followers, and by his second year in office, at the end of 2018, he had 56.7 million followers.<sup>23</sup> However, it is difficult to identify the number of followers that are real people as opposed to automated bots. In January 2017, an estimate suggested that approximately 68% of President Trump's followers were real people.<sup>24</sup> While another estimate in October 2018 found that 39% were real, active Twitter accounts.<sup>25</sup>

After his inauguration in 2017, President Trump's administration took control of the @POTUS account.<sup>26</sup> Nevertheless, President Trump continues to tweet from his @realDonaldTrump account.<sup>27</sup> While @POTUS remains the account of the Presidency, government sources often direct the public to @realDonaldTrump and identify the tweets found there as official statements. For example, President Trump's biography page on the White House's official website identifies his Twitter handle as @realDonaldTrump.<sup>28</sup> Moreover, White House Press Secretaries and the Department of Justice have identified President Trump's tweets via @realDonaldTrump as official presidential statements.<sup>29</sup> Indeed, the government's practice of identifying @realDonaldTrump tweets as official statements accords with the way in which President Trump uses the medium.

From the beginning of his presidency, President Trump established the @realDonaldTrump Twitter handle as a means to speak about his presidency, his role as president, and his presidential ambitions, policies,

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TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html> [<https://perma.cc/7JVJ-QEKQ>].

22. *Trump on Twitter: A History of the Man and His Medium*, *supra* note 17.

23. Tracking @realDonaldTrump Followers, TRACKALYTICS (2020), <https://www.trackalytics.com/twitter/profile/realdonaldtrump/> [<https://perma.cc/86FD-A93D>].

24. Yashar Ali (@yashar), TWITTER (Jan. 16, 2017, 3:54 PM), <https://twitter.com/yashar/status/821143532408815616>.

25. Rand Fishkin, *We Analyzed Every Twitter Account Following Donald Trump: 61% Are Bots, Spam, Inactive, or Propaganda*, SPARKTORO (Oct. 9, 2018), <https://sparktoro.com/blog/we-analyzed-every-twitter-account-following-donald-trump-61-are-bots-spam-inactive-or-propaganda/> [<https://perma.cc/9B7G-UDU5>].

26. Jonah Engel Bromwich, *Trump Takes over @POTUS Account on Twitter*, N.Y. TIMES (Jan. 20, 2017), <https://www.nytimes.com/2017/01/20/us/politics/trump-takes-over-the-potus-account-on-twitter.html> [<https://perma.cc/9SUB-4UT5>].

27. *Id.*

28. Donald J. Trump, WHITE HOUSE, <https://www.whitehouse.gov/people/donald-j-trump/> [<https://perma.cc/H9D5-JGK8>].

29. See Press Briefing, Sarah Sanders, White House Press Secretary (Dec. 5, 2017), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-120517/> [<https://perma.cc/S7WJ-SMCW>]; Defendants' Supplemental Submission and Further Response to Plaintiffs' Post-Briefing Notices at 4, James Madison Project v. Dep't of Just., No. 1:17-cv-00144-APM (D.D.C. Nov. 13, 2017).

and goals. Beginning with Inauguration Day 2017, President Trump posted multiple tweets from @realDonaldTrump referring to his assumption of the presidency,<sup>30</sup> his desire to decrease unemployment,<sup>31</sup> and official inauguration events he attended as the new President.<sup>32</sup> While some of the tweets in the first week after his inauguration focused on criticizing the *New York Times*<sup>33</sup> or supporting anti-abortion protesters,<sup>34</sup> the overwhelming majority related directly to his presidency.<sup>35</sup>

For example, on January, 21, 2017, President Trump tweeted: “I am honored [sic] to serve you, the great American People, as your 45th President of the United States!”<sup>36</sup> The next day, he posted a tweet referencing his first official meeting as President—“Had a great meeting at CIA Headquarters yesterday, packed house, paid great respect to Wall, long standing ovations, amazing people. WIN!”<sup>37</sup> On January 25, 2017, he tweeted: “As your President, I have no higher duty than to protect the lives of the American people.”<sup>38</sup> That same day President Trump tweeted: “I will be making my Supreme Court pick on Thursday of next week. Thank you!”<sup>39</sup> Later that week he posted a video of James Mattis being sworn in as Secretary of Defense along with a congratulatory note.<sup>40</sup> Within a few hours President Trump tweeted again posting video where he pledged, in his capacity as President, to support the military.<sup>41</sup> The video clip was

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30. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 20, 2017, 9:51 AM), <https://twitter.com/realdonaldtrump/status/822501803615014918>.

31. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 20, 2017, 9:55 AM), <https://twitter.com/realdonaldtrump/status/822502887477673984>.

32. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 20, 2017, 8:56 PM), <https://twitter.com/realdonaldtrump/status/822669114237943808>.

33. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 28, 2017, 5:08 AM), <https://twitter.com/realdonaldtrump/status/825329757646618624>.

34. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 27, 2017, 8:27 AM), <https://twitter.com/realdonaldtrump/status/825017279209410561>.

35. See TRUMP TWITTER ARCHIVE, [http://www.trumptwitterarchive.com/archive/none/tfff/1-20-2017\\_1-29-2017](http://www.trumptwitterarchive.com/archive/none/tfff/1-20-2017_1-29-2017) [<https://perma.cc/ZX4S-42X8>].

36. Daniel Politi, *Trump Deletes One of First Tweets as President After Writing He Is “Honored” to Serve*, SLATE (Jan. 21, 2017), <https://slate.com/news-and-politics/2017/01/trump-deletes-tweet-after-writing-he-is-honored-to-serve.html> [<https://perma.cc/X572-M75F>].

37. David Jackson, *Trump Attacks the Media in CIA Speech and Praises His Election Win*, USA TODAY (Jan. 21, 2017), <https://www.usatoday.com/story/news/politics/2017/01/21/donald-trump-president-day-two-prayer-service-national-cathedral/96877028/> [<https://perma.cc/LP7J-Q2DC>]; Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 22, 2017, 4:35 AM), <https://twitter.com/realdonaldtrump/status/823146987117772800>.

38. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 25, 2017, 6:14 PM), <https://twitter.com/realdonaldtrump/status/824440456813707265>.

39. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 25, 2017, 4:17 AM), <https://twitter.com/realdonaldtrump/status/824229586091307008>.

40. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 27, 2017, 2:00 PM), <https://twitter.com/realdonaldtrump/status/825101272982355968>.

41. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 27, 2017, 3:46 PM), <https://twitter.com/realdonaldtrump/status/825127844066054144>.

accompanied by text stating, “I promise that our administration will ALWAYS have your back. We will ALWAYS be with you!”<sup>42</sup> President Trump’s use of the @realDonaldTrump Twitter handle in these ways did not stop after the first week of his term. He has continued to use @realDonaldTrump to tweet both benign and consequential statements related to his presidency.

President Trump routinely uses @realDonaldTrump to announce his presidential schedule and events. For example, he used @realDonaldTrump to announce his departure for, and arrival in, Vietnam to attend a meeting with North Korean leader Kim Jong Un.<sup>43</sup> Similarly, he tweeted his arrival in the United Kingdom for a state visit with the Queen of England.<sup>44</sup> He also used @realDonaldTrump to publicize his plan to “Chair the United Nations Security Council meeting on Iran”,<sup>45</sup> his participation at an American Workforce Policy Advisory Board meeting,<sup>46</sup> and his cabinet meetings.<sup>47</sup>

President Trump has also used @realDonaldTrump to announce various governmental personnel decisions, including the hiring, firing, and retirement of top officials. He announced, through a tweet, the resignation of Attorney General Jeff Sessions and the appointment of Matthew Whitaker as Acting Attorney General.<sup>48</sup> He also used @realDonaldTrump to report the appointment of Acting Secretary of Defense Patrick Shanahan and the removal of Secretary of Defense James Mattis, two months before Secretary Mattis’ resignation was to take effect.<sup>49</sup> Although President

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42. *Id.*

43. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 25, 2019, 12:17 PM), <https://twitter.com/realdonaldtrump/status/1100127553203798016>; Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 26, 2019, 7:08 AM), <https://twitter.com/realdonaldtrump/status/1100412227662708737>.

44. Donald J. Trump (@realDonaldTrump), TWITTER (June 3, 2019, 3:37 AM), <https://twitter.com/realdonaldtrump/status/1135495710894374917>; Stephen Collinson, *Trump’s Surreal Royal Visit Turns from Pomp to Politics*, CNN (Jan. 4, 2019), <https://www.cnn.com/2019/06/04/politics/donald-trump-queen-elizabeth-state-banquet/index.html> [<https://perma.cc/RPV9-K2FY>].

45. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 21, 2018, 6:23 AM), <https://twitter.com/realdonaldtrump/status/1043128595231604738>.

46. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 6, 2019, 2:04 PM), <https://twitter.com/realdonaldtrump/status/1103416016082739201>.

47. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 8, 2018, 10:58 AM), <https://twitter.com/realdonaldtrump/status/971822550757138433>.

48. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 7, 2018, 11:44 AM), <https://twitter.com/realdonaldtrump/status/1060256623439110146> (part one); Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 7, 2018, 11:44 AM), <https://twitter.com/realdonaldtrump/status/1060256619383193601> (part two).

49. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 20, 2018, 2:21 PM), <https://twitter.com/realdonaldtrump/status/1075878792168685568>; Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 23, 2018, 8:46 AM), <https://twitter.com/realdonaldtrump/status/1076881816462737408>; Helene Cooper & Katie Rogers, *Trump, Angry Over Mattis’s Rebuke, Removes Him 2 Months*

Trump has used @realDonaldTrump to announce his personnel decisions after they have occurred, at least one official, his first Secretary of State, Rex Tillerson, reportedly learned of his dismissal through a tweet from @realDonaldTrump.<sup>50</sup>

President Trump has also used @realDonaldTrump to declare some of his most consequential public policy decisions. For example, in his capacity as Commander in Chief, President Trump turned to Twitter to announce a prohibition on transgender troops serving in the military; the defeat of ISIS in Syria and the attendant plan to withdraw troops; and a plan to use the military to build a wall between Mexico and the United States.<sup>51</sup> He also turned to Twitter to announce a major deportation operation by U.S. Immigration and Customs Enforcement.<sup>52</sup>

Finally, President Trump uses his @realDonaldTrump account to outline foreign policy and conduct foreign affairs. Among other things, he anticipates future, and reflects on previous, meetings with heads of state through his Twitter account. For example, hours before their meeting was to take place, President Trump tweeted about his plans to speak with Turkey's President Recep Tayyip Erdogan about Middle East policy.<sup>53</sup> President Trump also routinely uses @realDonaldTrump to discuss trade negotiations with China<sup>54</sup> and tariffs on Mexico.<sup>55</sup> Additionally, he uses Twitter to communicate directly with other leaders when, for example, he directed the following tweet to the Iranian President: "NEVER, EVER

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*Early*, N.Y. TIMES (Dec. 23, 2018), <https://www.nytimes.com/2018/12/23/us/politics/trump-mattis.html> [https://perma.cc/Q37P-RRRY].

50. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 13, 2018, 5:44 AM), <https://twitter.com/realdonaldtrump/status/973540316656623616>; Dan Mangan, *Rex Tillerson Found Out He Was Fired as Secretary of State from President Donald Trump's Tweet*, CNBC (Mar. 13, 2018), <https://www.cnbc.com/2018/03/13/tillerson-learned-he-was-fired-from-trumps-tweet.html> [https://perma.cc/6WTY-JWPR].

51. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <https://twitter.com/realdonaldtrump/status/890193981585444864>; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realdonaldtrump/status/890196164313833472>; Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 19, 2018, 6:29 AM), <https://twitter.com/realdonaldtrump/status/1075397797929775105>; Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 19, 2018, 3:10 PM), <https://twitter.com/realdonaldtrump/status/1075528854402256896>; Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 20, 2018, 12:10 AM), <https://twitter.com/realdonaldtrump/status/1072471575956504576>.

52. Donald J. Trump (@realDonaldTrump), TWITTER (June 17, 2019, 6:20 PM), <https://twitter.com/realdonaldtrump/status/1140791400658870274>; Aaron Rugar, *Trump Blindsides ICE with Mass Deportation Announcement on Eve of Reelection Rally*, VOX (June 18, 2019), <https://www.vox.com/2019/6/18/18683600/trump-mass-deportation-tweet-ice> [https://perma.cc/TD2Q-R4YB].

53. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 24, 2017, 4:04 AM), <https://twitter.com/realdonaldtrump/status/934029886842458112>.

54. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 4, 2018, 6:30 AM), <https://twitter.com/realdonaldtrump/status/1069962093301022720>.

55. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 5, 2019, 6:11 AM), <https://twitter.com/realdonaldtrump/status/1114153614216441856>.

THREATEN THE UNITED STATES AGAIN OR YOU WILL SUFFER CONSEQUENCES THE LIKES OF WHICH FEW THROUGHOUT HISTORY HAVE EVER SUFFERED BEFORE. WE ARE NO LONGER A COUNTRY THAT WILL STAND FOR YOUR DEMENTED WORDS OF VIOLENCE & DEATH. BE CAUTIOUS!”<sup>56</sup>

Because of the significance of these statements, domestic and international media, along with foreign governments, pay close attention to President Trump’s @realDonaldTrump account. Major U.S. news outlets like Fox News, NBC, CBS, ABC, the *New York Times*, and the *Wall Street Journal* routinely report on the substance of President Trump’s tweets.<sup>57</sup> Similarly, news outlets in Europe, Russia, China, and the Middle East regularly report on President Trump’s tweets.<sup>58</sup> When introducing or referring to tweets posted via @realDonaldTrump, news outlets reference them in the following ways: “President Donald Trump’s tweets,”<sup>59</sup> “the President’s tweets,”<sup>60</sup> “President Trump tweeted,”<sup>61</sup> and “the President tweeted.”<sup>62</sup> Still, it is not only media outlets. World leaders like Russia’s President Vladimir Putin scrutinize @realDonaldTrump tweets. President Trump’s tweets are part of President Putin’s daily briefings, and the Russian government considers them official statements.<sup>63</sup>

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56. Donald J. Trump (@realDonaldTrump), TWITTER (July 22, 2018, 8:24 PM), <https://twitter.com/realdonaldtrump/status/1021234525626609666>.

57. See, e.g., Andrew O’Reilly, *Trump Administration Declares Support for Venezuela Uprising Against Maduro: ‘We Are With You!’*, FOX NEWS (Apr. 30, 2019), <https://www.foxnews.com/politics/pence-venezuela-protesters-maduro> [<https://perma.cc/EH43-MEAX>]; Charlie Savage & Michael D. Shear, *Trump Attack on Envoy During Testimony Raises Charges of Witness Intimidation*, N.Y. TIMES (Nov. 19, 2019), <https://www.nytimes.com/2019/11/15/us/politics/trump-witness-intimidation.html> [<https://perma.cc/Y37Z-26NM>].

58. See, e.g., *Donald Trump Cancels G20 Meeting with Putin over Kerch Crisis*, MOSCOW TIMES (Nov. 29, 2018), <https://www.themoscowtimes.com/2018/11/29/donald-trump-cancels-g20-meeting-with-putin-over-kerch-crisis-a63657> [<https://perma.cc/6HZN-2K2H>].

59. *U.S. Companies with Large China Exposure Could Face Major Issues*, FOX BUS. (May 7, 2019), <https://www.foxbusiness.com/markets/u-s-companies-with-large-china-exposure-could-face-major-issues> [<https://perma.cc/FBV9-RBGB>].

60. Devan Cole, *President, Trump Jr. Warn Roy Moore Against Senate Bid in Alabama*, CNN (May 29, 2019), <https://www.cnn.com/2019/05/29/politics/roy-moore-alabama-donald-trump-jr/index.html> [<https://perma.cc/KRY5-QQPF>].

61. Josh Mitchell, *Pelosi Calls for Tightened Security on Omar After Trump Tweet*, WALL ST. J. (Apr. 14, 2019), <https://www.wsj.com/articles/pelosi-calls-for-tightened-security-on-omar-after-trump-tweet-11555282376> [<https://perma.cc/XV28-YREF>].

62. Abby Ohlheiser, *Inside the Last 12 Hours of Trump’s Tweets, from a Debunked Hoax to a Fake Pence Account*, WASH. POST (Nov. 28, 2018), <https://www.washingtonpost.com/technology/2018/11/28/inside-last-hours-trumps-tweets-debunked-hoax-fake-pence-account/> [<https://perma.cc/D9C-KE75>].

63. Sabra Ayres, *When Trump Tweets, Putin Is Briefed*, L.A. TIMES (Dec. 12, 2017), <https://www.latimes.com/politics/washington/la-na-pol-essential-washington-updates-when-trump-tweets-putin-is-briefed-1513094902-htmllstory.html> [<https://perma.cc/WE65-D4SJ>].

## II. THE DEVELOPMENT OF THE GOVERNMENT SPEECH DOCTRINE AND ITS FUNDAMENTAL PRINCIPLES

### A. *The Inception of the Government Speech Doctrine*

One of the earliest references to the modern understanding of the government speech doctrine appeared in *Columbia Broadcast System, Inc. v. Democratic National Committee*.<sup>64</sup> In *Columbia*, two public issue organizations challenged the policies of various radio and television stations that refused to air their editorial advertisements.<sup>65</sup> The organizations argued that because the stations were licensed to operate by the federal government, the First Amendment forbade the stations from refusing their advertisements.<sup>66</sup> The Supreme Court determined, however, the radio and television stations were not obligated to sell editorial advertising time to public issue organizations.<sup>67</sup> The Court reasoned that the government was not a partner, nor so intertwined with the stations and their decisions, that the First Amendment prohibited the stations from making content-based editorial decisions.<sup>68</sup>

In his concurrence, Justice Stewart likewise rejected the argument that the government's regulation of the airways gave rise to an individual First Amendment right to advertise on licensed stations.<sup>69</sup> Broadcasters, Justice Stewart reasoned, are protected from government interference by way of the First Amendment, but the government lacks an analogous protection.<sup>70</sup> Justice Stewart asserted that while the First Amendment is intended to protect private expression, the "[g]overnment is not restrained by the First Amendment from controlling its own expression."<sup>71</sup> Notably, in support of his assertion, Justice Stewart cited his concurrence in *New York Times Co. v. United States*.<sup>72</sup> In particular, he cited the portion of his concurrence that discussed the President's virtually limitless power in the realm of national defense and international relations to speak, or refrain from speaking, on behalf of the United States.<sup>73</sup>

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64. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973).

65. *Id.* at 97–98.

66. *Id.* at 121–22.

67. *Id.* at 132.

68. *Id.* at 119.

69. *Id.* at 138–39.

70. *Id.* at 139.

71. *Id.* at 139 n.7.

72. *Id.*

73. *Id.* *New York Times Co. v. United States*, 403 U.S. 713, 728–29 (1971) (Stewart, J., concurring). In *New York Times Co. v. United States*, the government sought injunctions against the *New York Times* and the *Washington Post* prohibiting the release of the Department of Defense's classified report titled, "History of U.S. Decision-Making Process on Viet Nam Policy"—also known as the "Pentagon Papers." 403 U.S. at 728–29. The Court held, with virtually no analysis, that the

Over the course of the next forty years, the Supreme Court developed and explored a more nuanced understanding of Justice Stewart's nascent government speech doctrine. Ultimately, the Court's buildout of the doctrine included two fundamental principles: the impact of the First Amendment on government speech and how to identify when the government is speaking. Beginning with *Rust v. Sullivan*, the Court embraced the idea that the government is free to choose the viewpoints it wishes to express.<sup>74</sup> In *Rust*, recipients of federally funded family planning grants challenged the Secretary of Health and Human Resource's regulations, which prohibited the recipients from discussing abortion as a family planning method.<sup>75</sup> The recipients claimed, among other things, the regulations violated their First Amendment rights by withholding grant funding if they discussed the government's disfavored message—that is, abortion as a viable family planning method.<sup>76</sup> The Court rejected the recipient's First Amendment claim.<sup>77</sup>

Presumably, because it was unlikely the grant recipients would be confused with a government spokesperson, the Court's analysis lacked a specific discussion of whether the government was speaking. Instead, the Court's analysis focused on the government's freedom to select those programs and messages it wanted to fund to the exclusion of those it did not—even where the funding prohibited certain speech.<sup>78</sup> The Court held the government was free to engage in viewpoint discrimination by allocating funds to serve one policy goal to the detriment of a competing, disfavored goal.<sup>79</sup> The government simply chose to use private speakers to articulate its message instead of speaking for itself.<sup>80</sup> The Court reasoned that it would impair the government's ability to choose and effectuate policy goals if the First Amendment prohibited the government from making viewpoint and messaging choices.<sup>81</sup>

The Court in *Rust* limited its discussion to the specific question of the government's freedom to allocate funds to private entities in

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government did not meet its "heavy burden" in demonstrating the need for an injunction. *See New York Times Co.*, 403 U.S. at 714. Though the Court issued its opinion as a per curiam decision, various Justices issued concurring opinions in which they opined about the legal burden the government must meet to obtain an injunction prohibiting the publication of national security material. *New York Times Co.*, 403 U.S. at 714–47. In discussing his view of the appropriate legal burden, Justice Stewart noted the significant amount of power the Executive Branch, and in particular the President, wielded over national defense and international relations. *New York Times Co.*, 403 U.S. 727–29.

74. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

75. *Id.* at 179–80.

76. *Id.* at 192.

77. *Id.* at 200.

78. *Id.* at 193.

79. *Id.* at 192–93.

80. *Id.* at 194.

81. *Id.*

furtherance of its message. However, soon after *Rust*, in *Rosenberger v. Rector & Visitors of the University of Virginia* and *Board of Regents v. Southworth*, the Court restated the essential government speech doctrine principle: “When the State is the speaker, it may make content-based choices”<sup>82</sup> because “in the end, [it is] accountable to the electorate and the political process for its advocacy.”<sup>83</sup>

In *Johanns v. Livestock Marketing Ass’n*, the Court took one of the first steps toward identifying government speech and distinguishing it from private speech.<sup>84</sup> In *Johanns*, cattle farmers challenged the government’s decision to use their checkoff funds to promote beef consumption through advertisements.<sup>85</sup> The cattle farmers claimed the government’s messaging violated the First Amendment’s prohibition on compelled speech and undermined their efforts to promote American beef.<sup>86</sup> In reviewing whether the advertisements were government speech, and thus whether the First Amendment was inapplicable, the Court analyzed who controlled the message produced for the advertising campaign.<sup>87</sup> Initially, Congress passed legislation implementing the promotional program and, along with the Secretary of Agriculture, established the overall message of the campaign.<sup>88</sup> Additionally, while a committee was created to shape the specifics of the advertisements, Agriculture Department officials rejected and rewrote some of the committee’s work and the Secretary had “final approval authority over every word used.”<sup>89</sup> In the end, the Court found that the advertising campaign was government speech because the government crafted the fundamental message and approved each word before the advertisements were disseminated.<sup>90</sup>

*Johanns* was the Court’s first major attempt to distinguish between government speech and private speech. However, in his dissent in *Johanns*, Justice Souter criticized the Court’s “relatively new” government speech doctrine as inexact and failing to offer more than the most general delineations.<sup>91</sup> For these reasons, the Court’s decisions that followed *Johanns*—*Pleasant Grove City v. Summum* and *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*—were doctrinal

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82. *Rosenberg v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

83. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000).

84. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).

85. *Id.* at 555–57.

86. *Id.* at 556.

87. *Id.* at 560–62.

88. *Id.* at 561.

89. *Id.*

90. *Id.* at 562.

91. *Id.* at 574 (Souter, J., dissenting).

advancements of the government speech doctrine.<sup>92</sup> In both cases the Court fleshed out not only the specific factors to be used in identifying government speech but also constitutional guardrails that limit the government's latitude to say what it will.

*B. The Government Speech Doctrine's Fundamental Principles:  
Identifying the Speaker and Demarcating the Government's Liberty to  
Speak*

In *Summum*, Pleasant Grove City accepted various privately donated displays for exhibition in a public park.<sup>93</sup> One of those displays was a Ten Commandments monument.<sup>94</sup> *Summum*, a religious organization, submitted a request to the City's mayor seeking approval to place a stone monument in the park with the religion's precepts.<sup>95</sup> The City rejected the proposed monument asserting that, unlike the others, it had no relation to the City's history and the group had no ties with the community.<sup>96</sup> *Summum* claimed that the City violated the First Amendment's Free Speech Clause by accepting the Ten Commandments and rejecting its monument.<sup>97</sup> The Court disagreed.<sup>98</sup>

The Court began its discussion by repeating its sweeping language regarding the latitude the government enjoys in its ability to "speak for itself" and "say what it wishes," and the attendant inability to challenge the government's viewpoint choices through the First Amendment.<sup>99</sup> However, for the first time, the Court cabined the government speech doctrine.<sup>100</sup> It cautioned that the significant freedom the government retains under the government speech doctrine is nonetheless limited by other constitutional principles.<sup>101</sup> For example, the Court noted government speech "must comport with the Establishment Clause."<sup>102</sup> While the Court did not elaborate on this point within the context of the case, the Court presumably meant that the Establishment Clause

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92. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015).

93. *Summum*, 555 U.S. at 464–65.

94. *Id.* at 465.

95. *Id.*

96. *Id.*

97. *Id.* at 466.

98. *Id.* at 467.

99. *Id.* at 468.

100. *See id.* *But see* *Wooley v. Maynard*, 430 U.S. 705 (1977) (where, for the first time, government speech was cabined, though not so explicitly within the context of a government speech case).

101. *Summum*, 555 U.S. at 468.

102. *Id.*

prohibits the government from speaking in a way that would, for example, constitute proselytizing.<sup>103</sup>

First though, the Court had to determine who was speaking by displaying the Ten Commandments.<sup>104</sup> If it was the government's speech, then *Summum's* First Amendment claim would likely fail.<sup>105</sup> If the government had created a public forum for private speech in the public park, then the government's decisions could run afoul of the First Amendment if the government engaged in viewpoint discrimination.<sup>106</sup> The Court opted for the former and found the Ten Commandments display constituted government speech.<sup>107</sup>

The Court reasoned that, from time immemorial, governments have used permanent monuments to communicate to their constituents.<sup>108</sup> Moreover, although the Ten Commandments monument had been donated by a private entity, the reasonable observer would presume a monument in a public park was placed there to convey the property owner's—the government's—message, not the donor's.<sup>109</sup> Finally, the government took ownership of the Ten Commandment display and, like the government's advertisement program in *Johanns*, the City retained control over the selection process for all monuments in the park.<sup>110</sup> Thus, the City's editorial decision to accept one display and reject another was viewpoint discrimination not subject to First Amendment review and permissible under the government speech doctrine.<sup>111</sup>

In *Summum*, the Court made two moves toward fleshing out the government speech doctrine. First, it cabined the government's authority to say what it will. Before *Summum*, the Court suggested the sole check on government speech was the post hoc democratic process. In *Summum*, however, the Court recognized that the Constitution itself limits the government's speech *ex ante*. Furthermore, the Court added specificity to the jurisprudence surrounding how to differentiate between a private speech and government speech. In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Court identified a specific example of

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103. *See id.* at 482–83 (Scalia, J., concurring); *see also* *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring). Justice Stevens also noted in *Summum* that while government speech is not restricted by the Free Speech Clause, “government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.” 555 U.S. at 482.

104. *Summum*, 555 U.S. at 470.

105. *Id.* at 469.

106. *Id.* at 469–70.

107. *Id.* at 472.

108. *Id.* at 470.

109. *Id.* at 470–71.

110. *Id.* at 473.

111. *Id.* at 481.

where the Constitution limits government speech and, citing *Summum*, more specifically established the factors for distinguishing government from private speech.<sup>112</sup>

In *Walker*, the Sons of Confederate Veterans submitted a proposed specialty license plate design through Texas' specialty license plate program.<sup>113</sup> When the Texas Motor Vehicles Board rejected the design because it contained a confederate flag, the Sons of Confederate Veterans alleged the Board violated the Free Speech Clause by engaging in viewpoint discrimination.<sup>114</sup> Like the monument in *Summum*, the government's authority to reject the license plate design rested on the nature of the specialty license plate: whether specialty license plates are government speech or private speech.<sup>115</sup> The Court reiterated that the First Amendment has no bearing on the government's ability to choose the viewpoint it wishes to espouse and that the democratic process provides the primary check on those decisions.<sup>116</sup> However, the Court again acknowledged the democratic process is not the sole means to limit government speech.<sup>117</sup> The Constitution also plays a role.<sup>118</sup> Here the Court went further than in *Summum* and identified a particular situation where the Free Speech Clause would limit the government's ability to say what it wishes.<sup>119</sup> The Court posited that the Free Speech Clause, for example, prohibits the government from compelling someone to convey the government's speech.<sup>120</sup> Thus, while the First Amendment does not require viewpoint neutrality on behalf of the government, the government exceeds its freedom to speak when it interferes with the constitutional rights of a private individual.<sup>121</sup>

In addition, the Court extrapolated from *Summum* and identified the factors that guide how it distinguishes private from government speech. The Court considered: (1) the history of the medium, and whether the government has "long used" it to speak to the public; (2) whether the public identifies and associates the medium with the government; (3) whether the government maintains control over the medium and the messages; and (4) whether other relevant considerations strike in favor of the medium constituting government speech.<sup>122</sup> Applying these factors, the

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112. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207–09 (2015).

113. *Id.* at 203–04.

114. *Id.* at 206–07.

115. *Id.* at 207.

116. *Id.*

117. *Id.* at 208.

118. *Id.*

119. *Id.*

120. *Id.*

121. *See id.*

122. *Id.* at 209–13.

Court determined the specialty license plate program was government speech.<sup>123</sup> The Court noted that license plates have long displayed government messages and slogans, and because they are principally government identification tools, the public identifies them and the information contained therein with the government.<sup>124</sup> Furthermore, Texas law provided the government final authority over all specialty license plate proposals.<sup>125</sup> As an additional relevant factor, the Court noted that license plates are simply not traditional public forums for private speech.<sup>126</sup> Because the license plates are government speech, the government was free to choose or reject whatever design it liked or disliked without concern for the First Amendment.<sup>127</sup>

III. @REALDONALDTRUMP IS GOVERNMENT SPEECH BECAUSE IT MEETS THE THREE FACTORS ARTICULATED IN *WALKER* AND THE PRESIDENT IS UNIQUELY POSITIONED TO SPEAK FOR THE U.S. GOVERNMENT

It is undeniable that the government has the right to speak for itself.<sup>128</sup> With that right comes the freedom to express whatever viewpoint the government chooses, without the need to ensure impartiality.<sup>129</sup> However, the government does not enjoy an unfettered freedom to speak. As recognized by the Court in *Sumnum* and *Walker*, while the Free Speech clause does not compel neutrality when the government articulates its viewpoint, the Constitution nevertheless contains content-based proscriptions that restrict government speech.<sup>130</sup> Still, differentiating between private speech and government speech in the first instance is paramount as these constitutional, content-based proscriptions only apply if it is indeed the government speaking.

While the whole of Twitter is certainly not government speech, similar to a government's legal notice appearing in a privately owned newspaper, the government can use a Twitter account as a means to communicate its message. Therefore, the relevant medium to analyze is not Twitter as a social media platform, but the specific content of a Twitter account—in this case, @realDonaldTrump. Applying the *Walker* factors

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123. *Id.* at 214.

124. *Id.* at 211–13.

125. *Id.* at 213.

126. *Id.* at 216.

127. *Id.* at 219–20.

128. *Id.* at 207.

129. *Id.*

130. *Id.* at 208; *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 468 (2009).

to @realDonaldTrump establishes that it is indeed government speech and thus subject to constitutional proscriptions.<sup>131</sup>

A. @realDonaldTrump and the Walker Factors

1. The History of President Trump's Use of @realDonaldTrump

The first factor the *Summum* and *Walker* Courts considered in determining whether a message was government speech was the history of the medium used to deliver it. The longer the government uses a medium to deliver a message, the more likely the message is government speech.<sup>132</sup> Social media, to say nothing of Twitter, is a comparatively new medium for communication. Nevertheless, when considering the history of President Trump's use of @realDonaldTrump, from the day he was inaugurated, President Trump immediately began using his Twitter account as a means to speak as President of the United States. In the first days of his presidency, President Trump chose messages that referred to his assuming the role of President, the transfer of executive authority, and his administration's priorities.<sup>133</sup> He reported on official meetings he held in his capacity as President with government agencies or CEOs from the automotive industry.<sup>134</sup> Moreover, he chose language that referenced and invoked his position, authority, and power as President.<sup>135</sup> He referred to himself as "President"; spoke of his Article II authority to nominate Supreme Court justices; and asserted his executive authority to order criminal investigations.<sup>136</sup> As a result, from the moment he was

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131. In *Knight First Amendment Institute at Columbia University v. Trump*, the government conceded, and the court found that President Trump's tweets were government speech. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 239 (2d Cir. 2019). Nevertheless, a thorough analysis of the question is important for a variety of reasons. First, the Supreme Court has yet to determine whether a president's tweets from his personal account are government speech. Second, because the parties conceded the point in *Knight*, the Second Circuit did not illustrate how President Trump's tweets meet the factors articulated by the Supreme Court's government speech doctrine. *Id.* Moreover, as is relevant herein, the Second Circuit did not analyze the boundaries of the government speech doctrine or under what circumstances the President's tweets might violate the First Amendment. *Id.* Finally, an analysis of President Trump's use of @realDonaldTrump, in light of the government speech doctrine, demonstrates its social and political power and influence, as well as its outsized ability to impact First Amendment rights.

132. *Walker*, 576 U.S. at 210–11.

133. Trump, *supra* notes 32–35.

134. See Sanders, *supra* note 29; Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 24, 2017, 1:46 PM), <https://twitter.com/realDonaldTrump/status/824055927200423936>.

135. See *Summum*, 555 U.S. at 470.

136. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 25, 2017, 3:14 PM), <https://twitter.com/realdonaldtrump/status/824440456813707265>; Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 25, 2017, 1:17 AM), <https://twitter.com/realdonaldtrump/status/824229586091307008>; Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 25, 2017, 1:10 AM), <https://twitter.com/realdonaldtrump/status/824227824903090176>.

inaugurated, President Trump used @realDonaldTrump as a means to communicate to the public as President of the United States. To be sure, this has continued throughout his presidency.

Like monuments and license plates that have historically communicated messages from the government, @realDonaldTrump has consistently been a platform for President Trump to convey his thoughts as President and on behalf of the U.S. government. Just as a monument might communicate a government's values, President Trump has systematically and continually employed @realDonaldTrump to spotlight his Administration's policies. He used @realDonaldTrump to discuss the Executive Branch's immigration and national security policy.<sup>137</sup> He also discusses his Administration's policy regarding space exploration, foreign intelligence surveillance, and taxes—all fundamentally government-related functions and goals embraced by the President.<sup>138</sup>

Moreover, just as a monument might memorialize an event of civic importance, President Trump has routinely used @realDonaldTrump to celebrate and commemorate the U.S. government's actions taken at his behest as President.<sup>139</sup> For example, on December 6, 2017, President Trump issued a Presidential Proclamation stating "that the United States recognizes Jerusalem as the capital of the State of Israel and that the United States Embassy to Israel will be relocated to Jerusalem."<sup>140</sup> That same day he posted a tweet and a short White House video clip discussing his Presidential Proclamation.<sup>141</sup> The following year, via @realDonaldTrump, he observed the one year anniversary of the U.S. Embassy opening in Jerusalem, at his direction as President.<sup>142</sup>

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137. Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2018, 3:13 AM), <https://twitter.com/realdonaldtrump/status/1023557246628900864>; Donald J. Trump (@realDonaldTrump), TWITTER (June 2, 2019, 1:44 AM), <https://twitter.com/realdonaldtrump/status/1135150118120939521>; Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 18, 2017, 12:49 PM), <https://twitter.com/realdonaldtrump/status/942904686125965312>; Donald J. Trump (@realDonaldTrump), TWITTER (June 16, 2017, 12:32 PM), <https://twitter.com/realdonaldtrump/status/875843513761583104>.

138. Donald J. Trump (@realDonaldTrump), TWITTER (May 13, 2019, 11:34 AM), <https://twitter.com/realdonaldtrump/status/1128050996545036288>; Donald J. Trump (@realDonaldTrump), TWITTER (June 7, 2019, 7:38 AM), <https://twitter.com/realdonaldtrump/status/1137051097955102720>; Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 11, 2018, 3:14 AM), <https://twitter.com/realdonaldtrump/status/951457382651056128>; Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 16, 2017, 9:05 AM), <https://twitter.com/realdonaldtrump/status/942123433873281024>.

139. *See Summum*, 555 U.S. at 470.

140. Proclamation No. 9683, 82 Fed. Reg. 58,331, 58,332 (Dec. 11, 2017).

141. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 6, 2017, 10:14 AM), <https://twitter.com/realdonaldtrump/status/938517073508163584>.

142. Donald J. Trump (@realDonaldTrump), TWITTER (May 14, 2019, 6:27 AM), <https://twitter.com/realdonaldtrump/status/1128336007856660481>.

## 2. @realDonaldTrump Is Closely Identified in the Public Mind with the Government

The second factor the *Sumnum* and *Walker* Courts examined was whether the medium and message are often closely identified in the public mind with the government. To the average observer, @realDonaldTrump is the President's official Twitter account. Indeed, the public has reason to identify it as the primary medium where the President articulates his policies and directs the government. While @POTUS is the "official" Twitter handle of the President of the United States, the government itself has designated the @realDonaldTrump account as a definitive source for official presidential statements.<sup>143</sup> In this way, the government has certified that the information conveyed in an @realDonaldTrump tweet is the President's authoritative view on the particular topics addressed. As a result, the public rightly identifies the information communicated via @realDonaldTrump as containing the President's imprimatur with the concomitant power to presumptively bind, direct, and halt government action.

Moreover, media across the political spectrum routinely report on the President's tweets from @realDonaldTrump. In the first 100 days of his presidency, the *New York Times* covered tweets from @realDonaldTrump on eighty-four days, the *Washington Post* on seventy-six days, and the *Wall Street Journal* on thirty-five days.<sup>144</sup> Within that same time, fifty-six tweets made the front page of at least one of those newspapers.<sup>145</sup> When media coverage refers to or discusses @realDonaldTrump, the tweets are not presented as Donald Trump tweeting in his individual capacity. To the contrary, media outlets refer to them as the "President's tweets," or a derivative thereof. In doing so, the tweets are presented as statements by the President, which in turn connects, in the public mind, the @realDonaldTrump Twitter handle with the authority of the office of the President and the role the President plays in American society. When the frequency of coverage is coupled with the manner of coverage, the public develops the expectation that @realDonaldTrump is a relevant source for the President's government-related decrees, policies, and actions.

That expectation is well-founded, and the media justifiably perpetuates it through its reporting because @realDonaldTrump is the

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143. *Trump on Twitter: A History of the Man and His Medium*, *supra* note 17.

144. Zedan Xu, *The Rise of Twitter in Presidential Communication: An Examination of the Relationship between President Trump's Twitter Feed and the Media Coverage of His First 100 Days*, 48-50 (Aug. 2018) (M.A. thesis, University of Texas), <https://rc.library.uta.edu/uta-ir/bitstream/handle/10106/27670/XU-THESIS-2018.pdf?sequence=1&isAllowed=y> [<https://perma.cc/SUQ8-8SFV>].

145. *Id.* at 51.

locus of some of the most consequential announcements President Trump has made in his capacity as President. As Commander in Chief, President Trump has used @realDonaldTrump to announce military policy and decision-making, such as a change in U.S. policy regarding transgender troops and the reasons behind canceling military strikes against Iran.<sup>146</sup> @realDonaldTrump has been the source for the public to first learn of the hiring and firing of the most senior U.S. government officials responsible for implementing U.S. government policy.<sup>147</sup> It has also been the source for the public to learn of noteworthy U.S. foreign policy decisions, like President Trump canceling a meeting with Russia's President due to Russia capturing Ukrainian ships and sailors.<sup>148</sup> Additionally, it has been the source for the public to learn of historic U.S. foreign policy decisions, such as the first U.S. presidential visit to North Korea.<sup>149</sup> Particularly in light of the dramatic decline in White House press briefings, the public turns to @realDonaldTrump for U.S. government announcements, disclosures, strategy, and intent.<sup>150</sup>

### 3. Only President Trump and a Government Official Maintain Control of @realDonaldTrump

The third factor the *Summum* and *Walker* Courts considered was whether the government maintains direct control over the message. The government has not officially identified each person who has had access to tweet from @realDonaldTrump. Nevertheless, investigative reports suggest that President Trump maintains direct control over the content of his tweets and has likely delegated control to one other person.<sup>151</sup>

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146. Press Release, U.S. Dep't of Def., Secretary of Defense Ash Carter Announces Policy for Transgender Service Members (June 30, 2016), <https://www.defense.gov/Newsroom/Releases/Release/Article/821675/secretary-of-defense-ash-carter-announces-policy-for-transgender-service-members/> [<https://perma.cc/7B7S-2TWN>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 2:55 AM), <https://twitter.com/realdonaldtrump/status/890193981585444864>; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 3:04 AM), <https://twitter.com/realdonaldtrump/status/890196164313833472>; Donald J. Trump (@realDonaldTrump), TWITTER (June 21, 2019, 3:03 AM), <https://twitter.com/readonaldtrump/status/1142055388965212161>.

147. Trump, *supra* note 47; Trump, *supra* note 48.

148. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 29, 2018, 5:34 AM), <https://twitter.com/realdonaldtrump/status/1068181367857397760>.

149. Donald J. Trump (@realDonaldTrump), TWITTER (June 28, 2019, 12:51 PM), <https://twitter.com/realdonaldtrump/status/1144740178948493314>; Rebecca Ballhaus & Andrew Jeong, *Trump's Twitter Invitation to Kim Set Off 24-Hour Scramble*, WALL ST. J. (June 30, 2019), <https://www.wsj.com/articles/trumps-twitter-invitation-to-kim-set-off-24-hour-scramble-11561943026> [<https://perma.cc/Y48D-6TAQ>].

150. Karen Yourish & Jasmine C. Lee, *The Demise of the White House Press Briefing Under Trump*, N.Y. TIMES (Jan. 28, 2019), <https://www.nytimes.com/interactive/2019/01/22/us/politics/white-house-press-briefing.html> [<https://perma.cc/WBK9-MFPK>].

151. Michael D. Shear, Maggie Haberman, Nicholas Confessore, Karen Yourish, Larry Buchanan & Keith Collins, *How Trump Reshaped the Presidency in Over 11,000 Tweets*, N.Y.

Primarily, President Trump is regularly communicating his thoughts through @realDonaldTrump by typing the tweets himself.<sup>152</sup> If President Trump is not drafting the tweets, then Dan Scavino Jr., White House Director of Social Media and Assistant to the President, “assists President Trump in operating the @realDonaldTrump account, including by drafting and posting tweets.”<sup>153</sup> Mr. Scavino is a longtime confidant of the President and one of the few remaining original members of President Trump’s administration.<sup>154</sup> Mr. Scavino reportedly acts as scrivener while President Trump dictates a tweet.<sup>155</sup> In the alternative, Mr. Scavino drafts original content for @realDonaldTrump and has been described as having an uncanny ability to channel the President.<sup>156</sup>

Whether President Trump or Mr. Scavino are operating the @realDonaldTrump account, all editorial control remains with the President of the United States and a U.S. government official. By retaining the unobstructed authority to select each word in a tweet, the President chooses the message and how to characterize it. His control over the account allows him to intentionally and selectively draft, revise, publish, and delete a tweet; his sharing that authority with Mr. Scavino is of no consequence. First, as the Director of Social Media and Assistant to the President, Mr. Scavino is a government employee. Perhaps more significantly, as one of the longest serving, original members of President Trump’s administration, Mr. Scavino’s continued employment and continued assistance with operating the account indicates the President approves of Mr. Scavino’s substantive editorial decisions on the President’s behalf.<sup>157</sup>

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TIMES (Nov. 2, 2019), <https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-presidency.html> [<https://perma.cc/Y6ND-Y5KZ>].

152. *Id.*

153. Robert Draper, *The Man Behind the President’s Tweets*, N.Y. TIMES (Apr. 16, 2018), <https://www.nytimes.com/2018/04/16/magazine/dan-scavino-the-secretary-of-offense.html> [<https://perma.cc/86ZU-LDCR>].

154. Nate Chute, *He Writes Trump’s Tweets and Has Been with Trump’s Campaign Since Day One*, USA TODAY (June 18, 2019), <https://www.usatoday.com/story/news/politics/2019/06/18/donald-trump-twitter-president-white-house-dan-scavino-golf-course-covfefe/1495205001/> [<https://perma.cc/WXH6-63HX>].

155. Draper, *supra* note 153.

156. Eliana Johnson, *Dan Scavino Is the Other @realDonaldTrump*, POLITICO (June 10, 2017), <https://www.politico.com/story/2017/06/10/dan-scavino-trump-social-media-profile-239381> [<https://perma.cc/R465-S23Z>].

157. Chute, *supra* note 154.

*B. @realDonaldTrump Is Government Speech Because the President of the United States Speaks for the U.S. Government*

The history of @realDonaldTrump, its role in the public mind, and its management all evince that the tweets are government speech. Still, perhaps the most significant factor establishing the tweets are government speech is the role their author plays within the U.S. constitutional structure and government. Article II of the Constitution establishes the office of the President of the United States, including the means by which the President is elected and the President's role and authority within the federal government.<sup>158</sup> Whether by law or normative development, the President, as an individual, has an outsized role as the embodiment of the U.S. government. As a result, "the President . . . possess[es] an extraordinary power to speak" on behalf of his fellow citizens and the government of the United States.<sup>159</sup>

First, the President leads the U.S. as head of government.<sup>160</sup> Pursuant to Article II's "Take Care" clause, the President is responsible for ensuring the U.S. government enforces congressional legislation through federal government agencies.<sup>161</sup> As the highest ranking official in the Executive Branch, the President has authority over the U.S. government's bureaucratic functionaries, their decisions, and their vast resources.<sup>162</sup> Yet, the President is not limited to a mechanical implementation of legislation. Through his communication with federal agencies and their staff, the President can coordinate, shape, and effectuate U.S. government policy and legally bind the U.S. government's agencies.<sup>163</sup> For these reasons, the electorate holds presidents accountable for the success or failure of the entire government.<sup>164</sup>

The President has repeatedly demonstrated the power of his tweets to not only influence but animate government action. For example, in 2018, the U.S. Department of Commerce proposed a plan to add a citizenship question to the 2020 census.<sup>165</sup> Ultimately, the United States Supreme Court held that the Department's reasoning for adding the question was a pretext and upheld a District Court ruling remanding the

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158. U.S. CONST. art. II.

159. *Trump v. Hawaii*, 138 U.S. 2392, 2417–18 (2018).

160. J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L. REV. 1, 7 (1961).

161. Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1046 (2013).

162. Scott Morgenstern, John Polga-Hecimovich & Sarah Shair-Rosenfield, *Tall, Grande, or Venti: Presidential Powers in the United States and Latin America*, 5 J. POL. LATIN AM. 37, 42 (2013).

163. Andrias, *supra* note 161, at 1047–48; Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 264 (2006).

164. DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY 25–27 (2003).

165. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2561 (2019).

issue back to the Department.<sup>166</sup> Less than a week after the Court's decision, on June 2, 2019, the Justice Department and the Secretary of Commerce confirmed the government would print the 2020 census without the citizenship question.<sup>167</sup> Later that night, at 7:30pm, President Trump stated, via @realDonaldTrump, that he was instructing "the Department of Commerce and the Department of Justice . . . to do whatever is necessary to bring this most vital of questions, and this very important case, to a successful conclusion."<sup>168</sup> The next morning President Trump tweeted, "The News Reports about the Department of Commerce dropping its quest to put the Citizenship Question on the Census is incorrect or, to state it differently, FAKE! We are absolutely moving forward, as we must, because of the importance of the answer to this question."<sup>169</sup> Five days later, on July 8, 2019, Attorney General William Barr affirmed the government was working on a plan to add the citizenship question to the census.<sup>170</sup> In every practical sense, the President's tweet articulated and effectuated the U.S. government's intent and policy regarding the citizenship question.

In addition to being head of government, the President is the head of state and as such speaks for the U.S. government in international relations. Constitutionally, the authority to conduct foreign affairs resides with the federal government.<sup>171</sup> In particular, of the political branches, it is the President who effectively retains absolute purview over international relations and diplomacy.<sup>172</sup> Not only have presidents normatively claimed complete control over U.S. diplomatic communication with other nations,<sup>173</sup> the Supreme Court has identified the President "as the sole organ of the federal government in the field of international relations—a

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166. *Id.* at 2574–76.

167. Tucker Higgins, *Trump Administration Says It Will Print Census Without Citizenship Question*, CNBC (July 2, 2019), <https://www.cnbc.com/2019/07/02/census-will-print-without-citizenship-question-trump-administration.html> [<https://perma.cc/KX3G-EM8V>]; Mike Schneider & Mark Sherman, *2020 Census to Be Printed Without Citizenship Question*, REALCLEAR: POL. (July 3, 2019), [https://www.realclearpolitics.com/articles/2019/07/03/2020\\_census\\_to\\_be\\_printed\\_without\\_citizenship\\_question\\_140700.html](https://www.realclearpolitics.com/articles/2019/07/03/2020_census_to_be_printed_without_citizenship_question_140700.html) [<https://perma.cc/XD4X-Z5EE>].

168. Donald J. Trump (@realDonaldTrump), TWITTER (July 2, 2019, 7:33 PM), <https://twitter.com/realdonaldtrump/status/1146245459268263938>.

169. Donald J. Trump (@realDonaldTrump), TWITTER (July 3, 2019, 8:06 AM), <https://twitter.com/realdonaldtrump/status/1146435093491277824>.

170. Katie Benner, *Barr Says Legal Path to Census Citizenship Question Exists, but He Gives No Details*, N.Y. TIMES (July 8, 2019), <https://www.nytimes.com/2019/07/08/us/politics/william-barr-census-citizenship.html> [<https://perma.cc/Z9W4-WD9J>].

171. Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 601 (2019).

172. *Id.*

173. Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 454 (2018).

power which does not require as a basis for its exercise an act of Congress.”<sup>174</sup> In addition to being the singular spokesperson pursuant to both statute and inherent Article II authority, presidents have the power to bind the U.S. government, if not legally then at least politically, through executive agreements.<sup>175</sup>

There are examples of @realDonaldTrump tweets that demonstrate the President’s perceived and actual plenary authority to speak for the U.S. government on the international stage. President Trump reportedly caused shock and concern in Qatar about the U.S. commitment to its relationship with the Kingdom when his tweets suggested Qatar funded “Radical Ideology” and “extremism.”<sup>176</sup> President Trump spoke for the U.S. government and exercised functional U.S. foreign relations authority when he announced the U.S. withdrawal from the Joint Comprehensive Plan of Action (JCPOA) related to Iran’s nuclear program.<sup>177</sup> Indeed, the same day he announced the withdrawal in an address to the press, he tweeted a quote and a highlight video from his speech.<sup>178</sup> President Trump also used @realDonaldTrump to announce his decision to delay the U.S. government’s “tariff hikes” on China as a result of what he perceived to be positive advancements in trade talks.<sup>179</sup> These @realDonaldTrump tweets communicated U.S. government intent and action regarding international relations, whether real or perceived. They also exemplify the President’s ability to speak as the “sole organ” for the U.S. government in foreign affairs, even if through a tweet.

Finally, the President speaks for the U.S. government because he is the highest ranking, nationally elected official in a presidential democracy. As such, the President assumes a role, indeed an authority, within the U.S. democracy that is unlike any other individual within the two political branches of the federal government. Members of Congress derive their

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174. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

175. COMM. ON FOREIGN RELATIONS, 106TH CONG., *STUDY ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE U.S. SENATE* (Comm. Print 2001).

176. Emily Tamkin, *Did Trump Torpedo U.S. Relations with Qatar on Twitter, of All Places?*, FOREIGN POL’Y (June 6, 2017), <https://foreignpolicy.com/2017/06/06/did-trump-torpedo-u-s-relations-with-qatar-on-twitter-of-all-places/> [<https://perma.cc/T4WQ-5TL2>]; David E. Sanger, Mark Landler & Eric Schmitt, *Trump Has Busy Day in Vortex of Middle East Relations*, N.Y. TIMES (June 7, 2017), <https://www.nytimes.com/2017/06/07/world/middleeast/trump-qatar-saudi-arabia-middle-east.html> [<https://perma.cc/HT7W-4FBN>].

177. Press Release, The White House, *President Donald J. Trump Is Ending United States Participation in an Unacceptable Iran Deal* (May 8, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-ending-united-states-participation-unacceptable-iran-deal/> [<https://perma.cc/M3VT-9PZH>].

178. Donald J. Trump (@realDonaldTrump), TWITTER (May 8, 2018, 3:11 PM), <https://twitter.com/realdonaldtrump/status/993976643898281984>.

179. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 25, 2019, 12:12 PM), <https://twitter.com/realdonaldtrump/status/1100126391729774592>.

individual democratic authority from the discrete electorate within their congressional districts.<sup>180</sup> When a member of Congress speaks, her democratic legitimacy empowers her to speak on behalf of her local constituents alone. The President's authority, conversely, is derived from the entire national electorate: the citizens of the United States, the sovereign.<sup>181</sup> From the perspective of democratic legitimacy, the President possesses an unparalleled authority to speak on behalf of the entire U.S. government. This authority is arguably greater than the authority one may find in the chief executives of other forms of democracy.

For example, in some parliamentary democracies, the prime minister begins as a member of the legislative branch elected to represent a discrete local constituency, like a member of Congress in the United States.<sup>182</sup> The prime minister, who is responsible for exercising executive power, is then chosen from among the legislators.<sup>183</sup> As a result, the prime minister's executive legitimacy and authority in these parliamentary democracies is not derived from the national electorate but from the legislature.<sup>184</sup> Certainly, a prime minister wields the legitimate executive authority in these parliamentary democracies.<sup>185</sup> Nevertheless, a U.S. president, by virtue of the electorate that has chosen him—the citizens of the entire nation—has an exceptional, prevailing claim of democratic legitimacy to speak for the nation.

#### IV. THE USE OF @REALDONALDTRUMP TO TROLL GOVERNMENT OPONENTS VIOLATES THE FIRST AMENDMENT

Since ancient times, governments have communicated to the public.<sup>186</sup> While these messages were originally delivered through mediums like statues and monuments, in the twenty-first century, governments speak through various electronic mediums, including social media. Social media can undoubtedly be an efficient and effective means to disseminate a message. At the same time, because of the nature of social media, the ideas communicated can be less refined, less modulated, and less tempered. Kings and emperors waited years for their statues and triumphal arches to be built, all the while undoubtedly agonizing over the precise placement, message, and meaning of each detail. Social media

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180. U.S. CONST. art. I, §§ 2–3.

181. Matthew Søberg Shugart, *Semi-Presidential Systems: Dual Executive and Mixed Authority Patterns*, 3 FRENCH POL. J. 323, 325 (2005).

182. See, e.g., Arthur Beauchesne, *Parliamentary Institutions*, in HOUSE OF COMMONS PROCEDURE AND PRACTICE 8 (Robert Marleau & Camille Montpetit eds., 2000).

183. Shugart, *supra* note 181, at 324.

184. *Id.*

185. *Id.*

186. *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).

enables governments to share their thoughts instantly with all those who have access to the Internet.

Governments use social media to communicate various messages—those ranging from the benign to the strategic. More specifically, some governments and their supporters use social media to influence the opinions and actions within society.<sup>187</sup> At times, these attempts to influence others through social media manifest themselves in “trolling” government opponents or dissuading and intimidating them from participating in discussions of matters of public concern.<sup>188</sup> Indeed, since his election, President Trump has been accused of using his @realDonaldTrump account to troll his opponents in an effort to discourage them from criticizing him or speaking out against his official policies.<sup>189</sup>

#### A. *The Government’s Trolling Speech via Twitter*

As discussed above, President Trump’s use of Twitter predates his presidency. Similarly, his use of Twitter to engage in trolling activity also predates his presidency. For example, in 2016, Marlene Ricketts, part of a politically active family, contributed \$3 million to a political action committee whose goal it was to oppose President Trump’s candidacy.<sup>190</sup> In response, then-candidate Trump, a private citizen, posted the following statement on his @realDonaldTrump account: “I hear the Ricketts family, who own the Chicago Cubs, are secretly spending \$’s against me. They better be careful, they have a lot to hide!”<sup>191</sup> Contributing money to a political action committee is, of course, expressive activity.<sup>192</sup>

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187. Jessikka Aro, *The Cyberspace War: Propaganda and Trolling as Warfare Tools*, 15 EUR. VIEW 121, 123–24 (2016).

188. *See id.*; Marc Owen Jones, *Social Media, Surveillance and Social Control in the Bahrain Uprising*, 9 WESTMINSTER PAPERS IN COMM’N & CULTURE 69, 77 (2013). *See generally* DAPHNE SKILLEN, *FREEDOM OF SPEECH IN RUSSIA: POLITICS AND MEDIA FROM GORBACHEV TO PUTIN* (2017).

189. Colvin & Mascaro, *supra* note 8.

190. John Dodge, *In Tweet, Donald Trump Tweet Blasts Ricketts Family*, CBS CHI. (Feb. 22, 2016), <https://chicago.cbslocal.com/2016/02/22/in-tweet-donald-trump-blasts-ricketts-family/> [<https://perma.cc/EG97-BJWC>]; *Itemized Receipts: Schedule A Line #11AI*, FED. ELECTION COMM’N, <https://docquery.fec.gov/cgi-bin/forms/C00603621/1051610/sa/11AI> [<https://perma.cc/B269-WPKK>] (itemized receipts of campaign finance data for Marlene Ricketts).

191. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 22, 2016, 6:42 AM), <https://twitter.com/realDonaldTrump/status/701779181986680832>.

192. *See Buckley v. Valeo*, 424 U.S. 1, 29 (1976) (holding that provisions within the Federal Election Campaign Act, which limited the amount of money an individual could spend on independent expenditures, were invalid because campaign contributions constitute political expression under the First Amendment); *Citizens United v. FEC*, 558 U.S. 310, 65–66 (2010) (holding that provisions of the Bipartisan Campaign Reform Act, which restricted unions and corporations from spending money on independent political advocacy, violated the First Amendment); *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (holding that the Federal Election Campaign Act violated the First Amendment where it limited contributions to a political independent expenditure group).

Nevertheless, then-candidate Trump warned the Ricketts family about their contribution because they might have embarrassing secrets that could or would be revealed in retaliation for their political contribution. Undoubtedly, as a private citizen, then-candidate Trump's social media posts had no constitutional implications. However, where the government speaks of retaliation for protected speech, it takes on a constitutional dimension.

For example, the government, through @realDonaldTrump, has suggested that certain media outlets should have their broadcast licenses contested or their broadcasting credentials revoked. After reporting that President Trump was exploring an increase in the U.S. nuclear arsenal, the government tweeted "Fake @NBCNews made up a story that I wanted a 'tenfold' increase in our U.S. nuclear arsenal. Pure fiction, made up to demean. NBC = CNN!"<sup>193</sup> Ten minutes later, it tweeted, "With all of the Fake News coming out of NBC and the Networks, at what point is it appropriate to challenge their License? Bad for country!"<sup>194</sup> However unlikely a successful challenge might be, the government itself, through the presidentially appointed Federal Communication Commission, is responsible for regulating, renewing, and revoking all radio and television station licenses in the United States.<sup>195</sup> When the government, acting as a regulator, criticizes the actions of those it regulates and questions the continued authorization to operate because of those actions, its criticism will undoubtedly garner the attention of the regulated organizations.

Similarly, the government has tweeted its contemplation of whether press credentials should be revoked because of negative reporting about President Trump. In particular, the government tweeted:

The Fake News is working overtime. Just reported that, despite the tremendous success we are having with the economy & all things else, 91% of the Network News about me is negative (Fake). Why do we work so hard in working with the media when it is corrupt? Take away credentials?<sup>196</sup>

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193. Jamiles Lartey, *Donald Trump Tweet Attacks NBC News, Suggesting a Challenge to 'Their License,'* THE GUARDIAN (Oct. 11, 2017), <https://www.theguardian.com/us-news/2017/oct/11/donald-trump-tweet-nbc-news-challenge-license> [<https://perma.cc/K4LH-U5DQ>]; Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 6:45 AM), <https://twitter.com/realdonaldtrump/status/918110279367643137>.

194. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 6:55 AM); <https://twitter.com/realdonaldtrump/status/918112884630093825>.

195. 47 U.S.C. § 303.

196. Donald J. Trump (@realDonaldTrump), TWITTER (May 9, 2018, 4:38 AM), <https://twitter.com/realDonaldTrump/status/994179864436596736>.

Unlike the withdrawal of broadcast licenses, the revocation of press credentials is an administratively easier endeavor, which the government has in fact undertaken.<sup>197</sup>

The government's trolling through @realDonaldTrump has not been limited to media outlets. The government has also targeted the President's individual detractors in ways that have intimated the revocation of security clearances, the exposure of negative information, or the initiation of criminal investigations. For example, after a cable news debate where a pundit argued that President Trump was revoking security clearances as political retaliation, the government questioned the pundit's "mental condition" and whether his own security clearance "[s]hould be revoked."<sup>198</sup> After President Trump's former lawyer, Michael Cohen, reported that he lied during his Congressional testimony regarding the President, the government tweeted the assertion that Mr. Cohen was "[l]ying to reduce his jail time[.]"<sup>199</sup> In that same tweet, the government also insinuated that Mr. Cohen's father-in-law should be "watched" for his own criminal activity.<sup>200</sup> Finally, the government targeted the whistleblower who alleged wrongdoing in President Trump's Ukraine policy and his telephone call with the Ukrainian President.<sup>201</sup> The government recommended, through @realDonaldTrump, that the whistleblower and his lawyer be criminally investigated for fraudulent activity.<sup>202</sup>

### *B. The First Amendment and Government Threats*

The Supreme Court has not directly addressed whether government speech may intentionally discourage the exercise of rights protected by the Free Speech Clause. Nevertheless, the Court has routinely rejected other government actions that dissuade speakers from expressing themselves. In *Bantam Books, Inc. v. Sullivan*, Rhode Island created the "Rhode Island Commission to Encourage Morality in Youth" (the Commission) to

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197. See, e.g., *Karem v. Trump*, 404 F. Supp. 3d 203 (2019).

198. John Wagner, *Trump Threatens Clearance of Former Official After Seeing Him in Heated TV Debate*, WASH. POST (Aug. 21, 2018), [https://www.washingtonpost.com/politics/trump-threatens-clearance-of-former-official-after-seeing-him-in-heated-tv-debate/2018/08/21/3917e034-a529-11e8-8fac-12e98c13528d\\_story.html](https://www.washingtonpost.com/politics/trump-threatens-clearance-of-former-official-after-seeing-him-in-heated-tv-debate/2018/08/21/3917e034-a529-11e8-8fac-12e98c13528d_story.html) [<https://perma.cc/3T8Q-4SAN>]; Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 20, 2018, 7:06 PM), <https://twitter.com/realDonaldTrump/status/1031724100719403009>.

199. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 18, 2019, 7:02 AM), <https://twitter.com/realDonaldTrump/status/1086277705916502017>.

200. *Id.*

201. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 11, 2019, 6:12 AM), <https://twitter.com/realdonaldtrump/status/1193894144747429889>.

202. *Id.*

educate the public about obscene, lewd, and indecent publications.<sup>203</sup> The Commission retained the authority to investigate and recommend purveyors of the publications for prosecution.<sup>204</sup> After an investigation, the Commission would send a notice, on Commission stationary, to the publisher or distributor of a publication deemed objectionable for sale.<sup>205</sup> The typical notice informed the recipient that the Commission had deemed the publication objectionable for sale or distribution.<sup>206</sup> The notice also solicited cooperation or thanked the recipient, in advance, for his cooperation.<sup>207</sup> The notice reminded the recipient of the Commission's duty to report to the authorities those who distribute obscenity.<sup>208</sup> Finally, the notice informed the recipient that lists of objectionable publications were shared with local police departments.<sup>209</sup>

The Commission found a distributor's books and magazines objectionable and issued him at least thirty-five notices.<sup>210</sup> The distributor, along with the publishers of the books and magazines, challenged the Commission's actions as violating the First Amendment.<sup>211</sup> The trial court found that the notices intimidated the distributors.<sup>212</sup> The trial court further found that the intimidation and threat of prosecution caused the distributor to cease selling the materials and thus suppressed the sale and circulations of the materials listed in the notice.<sup>213</sup> Notably, the government conceded that some of the material listed in the notice was protected speech for the purposes of the First Amendment.<sup>214</sup>

The government asserted that the Commission's notices and referrals for prosecution did not violate the First Amendment because the Commission itself lacked authority to sanction distributors.<sup>215</sup> In fact, the distributor who challenged the Commission's action had not been sanctioned in any way.<sup>216</sup> The Court, however, rejected the government's form-over-substance argument.<sup>217</sup> It found that though the Commission lacked formal authority to censor, its informal censorship was equally

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203. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 59–60 (1963).

204. *Id.* at 59.

205. *Id.* at 61.

206. *Id.* at 62.

207. *Id.*

208. *Id.*

209. *Id.* at 62–63.

210. *Id.* at 61.

211. *Id.*

212. *Id.* at 63–64.

213. *Id.*

214. *Id.* at 64.

215. *Id.* at 66–67.

216. *Id.*

217. *Id.* at 67.

violative of the First Amendment.<sup>218</sup> While the Commission was limited to leveling opprobrium and admonishments, the Court reasoned that threats, coercion, persuasion, and intimidation designed to suppress protected speech have the same effect as affirmative legal prohibitions.<sup>219</sup>

The government posited that the notices and lists of objectionable publications were simply legal advice, presumably intended to inform rather than deter.<sup>220</sup> The Court noted that the distributor certainly could have ignored the Commission's notices as he was under no legal obligation to comply.<sup>221</sup> Nevertheless, the intimidating nature of the notices were enough to induce compliance themselves as "people do not lightly disregard public officials' thinly veiled threats . . . if they do not come around."<sup>222</sup> Because the Commission's tactics constituted a prior administrative restraint and were intended to suppress speech, the Court held that its informal censorship was unconstitutional.<sup>223</sup>

To be sure, *Bantam Books, Inc.* is only one example of the Court's analysis of government threats and their impact on free speech. Throughout its jurisprudence, the Court has routinely found that the government violates the First Amendment when it attempts to intimidate speakers. Where schoolchildren refused to utter the government's preferred maxim, the Court prohibited the government from threatening those students with expulsion and their parents with prosecution.<sup>224</sup> The Court found that those sorts of threats, aimed at coercing uniformity with the government's preferred message, violated the First Amendment.<sup>225</sup> The Court reasoned that it would subvert the very purpose of the First Amendment if government coercion controlled public opinion instead of public opinion controlling government.<sup>226</sup>

Similarly, the Court has found that the government violates the First Amendment when public employees are threatened with losing their jobs if they fail to espouse the government's preferred political opinions or if they utter disfavored ideas.<sup>227</sup> These threats, the Court has reasoned, force public employees to compromise their individual beliefs for fear of being fired, thereby indirectly compelling a result the government could not,

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218. *Id.* at 67–68.

219. *Id.* at 67.

220. *Id.* at 67.

221. *Id.*

222. *Id.*

223. *Id.* at 70–72.

224. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630, 642 (1943).

225. *Id.* at 640–42.

226. *Id.* at 641.

227. *Elrod v. Burns*, 427 U.S. 347, 359 (1976); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

constitutionally, directly command.<sup>228</sup> Threats cause speakers to steer well wide of the zone of disfavored ideas and “may deter [speech] almost as potently as the actual application of sanctions.”<sup>229</sup> To be sure, government threats for failure to express a preferred message violate the First Amendment even where the government did not intend a deterrent effect.<sup>230</sup>

### C. *The Government’s Trolling Tweets Violate the First Amendment*

Undoubtedly, the government may use social media to espouse viewpoint specific speech. However, the government’s power to communicate through @realDonaldTrump is not plenary; “like every other governmental power, [it] must be exercised in subordination to the applicable provisions of the Constitution.”<sup>231</sup> As the Court recognized in *Sumnum* and *Walker*, the Free Speech Clause delimits government speech. To illustrate the point in *Walker*, the Court—presumably relying on cases like *Wooley v. Maynard*—noted that government speech cannot compel a private person to convey government speech.<sup>232</sup> As this was only one example, other Free Speech Clause doctrines must also define the range of permissible government speech. Consequently, government speech that threatens reprisal for protected speech is no less permissible than government policies that threaten or bring about the reprisal.

Where the government uses Twitter to threaten those engaging in expressive activity, its method of discouraging disfavored speech is no less unconstitutional than a statute or regulation whose aim is the same. A government tweet that suggests a speaker will suffer an adverse consequence for his prior statements is not simply government speech that expresses a viewpoint. Instead, it is coercive innuendo that dissuades similar speech in the future for fear of expressing an idea that conflicts with the government’s viewpoint. While even a vague threat can cause speakers to steer clear of the zone of disfavored ideas, of particular First Amendment concern are tweeted government innuendos suggesting a consequence that can only be meted out through the unique levers of power wielded by the government alone.

A tweet from a private person suggesting the need for a criminal investigation or the withdrawal of a government benefit would certainly

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228. *Elrod*, 427 U.S. at 355–59.

229. *Keyishian*, 385 U.S. at 604.

230. *See Elrod*, 427 U.S. at 362.

231. *See United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936).

232. *Walker v. Tex. Div., Sons of Confederate Veterans*, 576 U.S. 200, 207 (2015); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state cannot constitutionally require individuals to participate in dissemination of the government’s ideological messages by displaying it on private property for the express purpose that it be observed and read by the public).

be irksome, though protected speech. However, it is another thing altogether if the government tweets the same exhortation. Unlike the private person, the government has distinct power to act on its *in terrorem* tweets—the power to, for example, conduct a criminal investigation or terminate a government benefit. Jurisdiction over the threatened action ensures the object of the tweet will be exceptionally attuned to the government’s insinuation.<sup>233</sup> This is particularly so when the government is known to use a particular Twitter account to not simply report trivial acts but instead to articulate consequential government policy and command government agencies.

To be sure, not all government tweets are direct, unmistakable threats of harm. The government may simply tweet musings about the possibility of adverse consequences befalling its critics. It may dress up a tweet as a suggestion or piece of advice to heed, lest some reasonably imaginable negative outcome materialize. However, the impact on First Amendment rights of these Twitter contemplations and prescriptions can be just as powerful. Even if one cannot definitively prove an intended deterrent effect, people do not lightly disregard what appear to be the government’s thinly veiled threats if they do not come around.<sup>234</sup> Moreover, despite the government’s protestations that its musings are nothing more than recommendations, they “pose the inherent risk that the Government seeks not to advance a legitimate . . . goal, but to suppress unpopular ideas or information.”<sup>235</sup>

The government’s nondiscriminatory prediction, unconnected to, or unprompted by, prior First Amendment activity, is less likely to be demonstrably coercive and thus unconstitutional.<sup>236</sup> The government’s generous latitude to say what it pleases suggests it cannot be wholly prohibited from communicating its good faith thoughts on a topic that might refer to First Amendment activity. For example, where a protester is exhorting her listeners in a way that approaches incitement to imminent lawlessness, the government must be free to urge her to avoid “demonstrably probable consequences beyond [the government’s] control.”<sup>237</sup> However, where the government’s tweets are disconnected from objective facts and suggest it may activate its various, unique powers in response to protected First Amendment activity, the tweets are no longer simply reasonable forecasts.<sup>238</sup> They are warnings of government induced

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233. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

234. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963).

235. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

236. See *Gissel Packing Co.*, 395 U.S. at 620.

237. *Id.* at 618.

238. See *id.* at 618–19.

vengeance that, because of their vast distribution, will have the tendency to curb the free flow of ideas regarding the issue that aroused the government's indignation.

When the government is engaging in constitutionally permissible speech, it seeks to be yet another voice—however outsized—in the debate about matters of public concern. Like any speaker, it provides its viewpoint on the issues of the day in the hope that it will inform and move the public debate; listeners are free to accept, reject, or respond. However, when the government's speech aims to troll its citizens, when it seeks to discourage speakers who might oppose it, the government dissuades the very civic engagement the First Amendment was intended to protect.<sup>239</sup> This changes the government from an agent acting on behalf of self-governing people, to an antagonistic government hostile toward the ideas of those it governs.<sup>240</sup> The government, in this instance, is not dispassionately enforcing laws on dissenters or adding its opinioned voice to a debate; it is dissuading government opponents from participating in debates that can range from exercising constituent power to choosing the government itself.<sup>241</sup>

Invariably, those whose viewpoints differ from the government are those that attract government trolling. It is those same dissidents who often perform the checking functions the First Amendment encourages and facilitates.<sup>242</sup> Because of the government's unique powers, its misconduct can have more significant repercussions when compared with misconduct by private social institutions.<sup>243</sup> The First Amendment's protections, among other things, act as a bulwark against those powers by ensuring citizens can, and do, challenge abuses of official power.<sup>244</sup> If the government can respond with threats of adverse repercussions coyly made to look like innocent observations or predictions, the United States' distinctive jurisprudential rejection of seditious libel is illusory.<sup>245</sup>

While targeted critics suffer a direct interference with their First Amendment rights, dissenters who differ with the government on unrelated topics also suffer a collateral infringement of their freedom of speech. Undoubtedly, the government already has an outsized influence

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239. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25–27 (1948).

240. *Id.* at 6.

241. *See id.* at 9–11; Thomas Irwin Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 878, 883–84 (1963).

242. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 *AM. BAR FOUND. RSCH. J.* 521, 538–39 (1977).

243. *See id.*

244. *See id.* at 527.

245. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

on society in its ability to voice its approval or disapproval of various activities.<sup>246</sup> Skeptics of the government’s positions are already inundated with its messages and feel the social pressures to comply or refrain from objecting.<sup>247</sup> Coupling those pressures with the heeded trolling of outspoken critics, chastens the dissenter who might have otherwise participated in the discussion of a different matter of public concern—better to remain silent and avoid the tweet-inspired specter of government scrutiny that has befallen others. This is particularly so when the government shows a heightened sensitivity and inclination to respond to those who challenge the government officials who directly control the government’s message.

When the government’s social media communication resides in the hands of a single individual, with unilateral control over the message, the likelihood of improper coercion increases. Those government tweets that hector critics in response to their expressive activity are unlikely to be viewpoints that merely express a different opinion. Instead, the tweets, motivated by bias toward the content of the critique, are intended to disrupt the criticism. Not only is this the sort of content-based government reaction to disfavored speech prohibited by the First Amendment, it is an interference with “speech . . . [that] occupies the highest rung of the hierarchy of First Amendment values.”<sup>248</sup>

#### CONCLUSION

Throughout human history, governments have spoken to their people. Many of those messages were originally delivered through erecting monuments and statues; today they are delivered via tweets from @realDonaldTrump. As the public has turned to President Trump’s Twitter account for messages from the government on policy and personnel decisions, it has also found musings and contemplations. Though the First Amendment places no restraints on government’s freedom to choose the viewpoint it expresses in its musings, its message can nonetheless have First Amendment implications. Where government speech is intended to discourage the expression of its critics through trolling, the Free Speech Clause is the muzzle—it censors the government’s speech.

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246. STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 89 (1990).

247. *Id.* at 95.

248. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).