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# TAKING ORDERS FROM TWEETS: REDEFINING THE FIRST AMENDMENT BOUNDARIES OF EXECUTIVE SPEECH IN THE AGE OF SOCIAL MEDIA

Sara Swartzwelder\*

## I. INTRODUCTION

When the designers of Twitter were choosing a cute little bird as their logo<sup>1</sup> and drafting their terms of service,<sup>2</sup> it is doubtful that they had the faintest idea that they were creating a platform for declarations of war. On September 23, 2017, President Trump tweeted that if North Korea's Foreign Minister "echoes thoughts of Little Rocket Man, they won't be around much longer!"<sup>3</sup> Two days later, Foreign Minister Ri Yong-ho stated that President Donald Trump had declared war on North Korea.<sup>4</sup> Although the White House insisted that the notion was "absurd,"<sup>5</sup> North Korea's reading of the tweet is hardly patently unreasonable under the circumstances. While the not-so-veiled threat in Trump's tweet may not legally constitute a formal declaration of war, the mere fact that it was made by a sitting

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<sup>1</sup> "[W]e came across the word 'twitter,' and it was just perfect. The definition was 'a short burst of inconsequential information' . . . . And that's exactly what the product was." David Sarno, *Twitter Creator Jack Dorsey Illuminates the Site's Founding Document, Part I*, L.A. TIMES (Feb. 18, 2009, 5:04 PM), <http://latimesblogs.latimes.com/technology/2009/02/twitter-creator.html> (quoting Jack Dorsey during a 2009 interview discussing Twitter's origins as an internal messaging system inspired by the "status" function of Instant Messenger); Joshua Johnson, *Twitter's New Logo: The Geometry and Evolution of Our Favorite Bird*, DESIGN SHACK (June 11, 2012), <https://designshack.net/articles/graphics/twitters-new-logo-the-geometry-and-evolution-of-our-favorite-bird/>; TWITTER, <https://twitter.com/>.

<sup>2</sup> *Twitter Terms of Service*, TWITTER, <https://twitter.com/en/tos> (last visited May 5, 2018).

<sup>3</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 23, 2017, 8:08 PM), <https://twitter.com/realdonaldtrump/status/911789314169823232>. "Little Rocket Man" is a demeaning epithet used by Donald Trump to refer to North Korean leader Kim Jong-un. See Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 20, 2017, 8:25 AM), [https://twitter.com/realdonaldtrump/status/936209447747190784?ref\\_src=twsrc%5Etfw&ref\\_url=http%3A%2F%2Fwww.latimes.com%2Fpolitics%2Fpol-updates-everything-president-trump-calls-kim-jong-un-little-rocket-1512093131-htmlstory.html&tfw\\_creator=latimes&tfw\\_site=latimes](https://twitter.com/realdonaldtrump/status/936209447747190784?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.latimes.com%2Fpolitics%2Fpol-updates-everything-president-trump-calls-kim-jong-un-little-rocket-1512093131-htmlstory.html&tfw_creator=latimes&tfw_site=latimes); Adam Edelman et al, *Where Did Trump's Use of 'Rocket Man' Come From?*, NBC NEWS (Sept. 19, 2017, 2:47 PM), <https://www.nbcnews.com/politics/donald-trump/where-did-trump-s-use-rocket-man-come-n802681>.

<sup>4</sup> Alexander Smith & Abigail Williams, *White House Rejects N. Korean Claim That Trump Declared War*, NBC NEWS (Sept. 25, 2017, 2:58 PM), <https://www.nbcnews.com/news/north-korea/north-korean-foreign-minister-says-trump-has-declared-war-n804501>.

<sup>5</sup> *Id.*

U.S. President gives the words themselves significant power—and much higher stakes. North Korean Foreign Minister Yongho emphasized that very point: “[e]ven the fact that this comes from someone who is currently holding the seat of the U.S. presidency is clearly a declaration of war.”<sup>6</sup> The response of North Korean officials<sup>7</sup> makes clear the potential danger of such a statement. Even if Trump did not intend, or did not have an eye toward, its possible consequences, it does not lessen the implications of seeing the prospect of war arise out of a remark made on Twitter.

“Twitter wars” are usually petty feuds between celebrities,<sup>8</sup> but incidents like this one have brought speech on Twitter to the forefront of our national—and global—dialogue and thrown into sharp relief the possible necessity of according a greater level of seriousness to social media speech, especially when made by a sitting President. The fast-escalating battery of heated insults and threats between Trump and North Korean leader Kim Jong-un mirrors the tactics that Trump used throughout the 2016 Republican primaries and his presidential campaign,<sup>9</sup> but this Twitter war may have a real war waiting in the wings. A potentially incendiary tweet from a U.S. President, open to interpretation with all the world watching, could lead to any number of different actions or reactions—“the [P]resident[]’s words alone force the U.S. national security community to focus on nuclear weapons.”<sup>10</sup> Unlike any other speaker in the United States, the President’s words can be taken as provoking or even formally initiating an international conflict.<sup>11</sup> And not without cause: the words of a sitting president have the whole arsenal of

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<sup>6</sup> *Id.*

<sup>7</sup> Joe Sterling et al., *North Korea Official: Trump on Suicide Mission. Trump Tweets Response*, CNN (Sept. 24, 2017, 6:02 PM), <http://www.cnn.com/2017/09/23/asia/north-korea-seismic-activity/index.html>; *North Korea Calls Trump Tweet “a Declaration of War,”* CBS NEWS (Sept. 25, 2017, 8:13PM), <https://www.cbsnews.com/news/north-korea-trump-statement-declaration-of-war-live-updates/>.

<sup>8</sup> See Olivia Wilson, *10 of the Most Intense Celebrity Twitter Wars of All Time*, CLEVVVER (Feb. 17, 2015), <http://www.clevver.com/celebrity-twitter-feuds/>; Maria Yagoda, *The Craziest Celeb Feuds to Ever Take Place on Twitter*, PEOPLE (May 3, 2017, 1:01 PM), <http://people.com/celebrity/kanye-west-wiz-khalifa-tweets-celebrity-twitter-feuds/azealia-vs-iggy>.

<sup>9</sup> Z. Byron Wolf, *Presidential Name-Calling: What ‘Little Marco’ Has To Do with ‘Rocket Man’ (and Nuclear Weapons)*, CNN (Sept. 23, 2017, 1:10 PM), <http://www.cnn.com/2017/09/23/politics/presidential-name-calling/index.html> (noting that Trump used insulting nicknames towards his political opponents “both on Twitter and at campaign rallies . . . to build support among the faithful” and to emphasize that “his opponent was flawed—and that he was the alpha dog”).

<sup>10</sup> Matt Peterson, *Ranked: Twitter Wars that Came a Little Too Close to Real Wars*, ATLANTIC (Jan. 6, 2017), <https://www.theatlantic.com/international/archive/2017/01/twitter-wars-ranked/512330/>.

<sup>11</sup> Quite literally, as North Korea’s reaction showed. See Sterling et al., *supra* note 7.

the United States' power and influence behind them, not to mention its nuclear payload.<sup>12</sup> Independent of the unsettling reality that we live in an age where a stray tweet could start a nuclear war, the fact that what was previously viewed as a casual social media outlet is now center-stage in national and global discussions raises crucial constitutional questions about how First Amendment jurisprudence treats—or should treat—executive speech in the modern day.

Since the advent of the television, U.S. presidents have been able to broadcast messages that reach nearly every home in America simultaneously,<sup>13</sup> so, at first blush, social media simply seems like an upgrade in communication technology. However, with the increasingly ubiquitous role of the Internet and social media in our lives,<sup>14</sup> in politics,<sup>15</sup> and in our overarching political dialogue,<sup>16</sup> it is clear that social media is more than just the latest carrier wave. Our First Amendment standards may need to be reassessed to account for the impact of modern technology, which has reshaped how we conceive of speech—and may call for readjusting how we regulate it. This consideration is especially important in the context of executive power, where the stakes are necessarily higher.

The crucial point is not that the judiciary may need to react differently with Donald Trump in the office of the President than someone else, but that his presidency has demonstrated that executive speech's greater power and therefore greater potential for destructive consequences is on a far different scale than other individuals: global and, without exaggeration, possibly world-ending. Recent legal decisions make it clear that the more entwined the Internet has become with our society, the more the

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<sup>12</sup> U.S. CONST. art. II, § 2 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . .”).

<sup>13</sup> Andrew Glass, *First White House Speech Airs on TV, October 5, 1947*, POLITICO (Oct. 5, 2010, 4:38 AM), <https://www.politico.com/story/2010/10/first-white-house-speech-air-on-tv-october-5-1947-043100>.

<sup>14</sup> See *Internet/Broadband Fact Sheet*, PEW RESEARCH CTR. (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/internet-broadband/> (“The internet represents a fundamental shift in how Americans connect with one another, gather information and conduct their day-to-day lives.”); Andy Kinsey, *The Impact of Social Media on Our Daily Lives*, ANDY KINSEY (Sept. 21, 2012), <https://andykinsey.co.uk/guest-articles/2012-09-21-daily-lives-social-media-impact/>.

<sup>15</sup> See Jeff Fromm, *New Study Finds Social Media Shapes Millennial Political Involvement and Engagement*, FORBES (June 22, 2016, 7:00 AM), <https://www.forbes.com/sites/jefffromm/2016/06/22/new-study-finds-social-media-shapes-millennial-political-involvement-and-engagement/#22c23f782618>.

<sup>16</sup> See Farad Manjoo, *Social Media's Globe-Shaking Power*, N.Y. TIMES (Nov. 16, 2016), [https://www.nytimes.com/2016/11/17/technology/social-medias-globe-shaking-power.html?\\_r=0](https://www.nytimes.com/2016/11/17/technology/social-medias-globe-shaking-power.html?_r=0).

insulation between online and real life has eroded.<sup>17</sup> In a similar way, when social media amplifies the President's words, it amplifies both the power and danger of presidential speech along with it. The reality of their potentially dangerous consequences should not be masked by a seemingly innocuous mode of delivery.<sup>18</sup> As we hear the alarms of nuclear war sounding louder than they have in decades, a medium meant for short, pithy, off-the-cuff thoughts<sup>19</sup> is now the carrier of speech that could get U.S. soldiers killed without further provocation.<sup>20</sup> While Donald Trump's actions may be endemic to his presidency alone, they highlight the risks attendant on presidential speech channeled through social media and raise the question of whether and when executive freedom of speech should be more carefully restricted.

This Note addresses the First Amendment dimensions of executive speech and considers the possible necessity—and ramifications—of developing a new standard for heightened executive speech restrictions that would take into account both the unique power of executive speech and the landscape of social media communication.

The core question is whether executive speech should be held to a higher First Amendment standard because of its greater potential to influence its listeners, because of its increased reach

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<sup>17</sup> From the proliferation of statutes against cyberbullying, cyberstalking, and revenge porn, *see, e.g.*, Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, Cyberbullying Research Ctr., <https://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf> (last updated Jan. 2016); *38 States + DC Have Revenge Porn Laws*, CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> (last visited May 5, 2018), to a recent court case holding a teenage girl criminally responsible for the death of a boyfriend whom she convinced to commit suicide over text, *see, e.g.*, Kalhan Rosenblatt, *Michelle Carter, Convicted in Texting-Suicide Case, Sentenced to 15 Months in Jail*, NBC NEWS (Aug. 3, 2017, 3:34 PM), <https://www.nbcnews.com/news/us-news/michelle-carter-convicted-texting-suicide-case-sentenced-15-months-jail-n789276>, there is an increased willingness to treat actions taken through digital or social media as seriously as their real-world counterparts, *see, e.g.*, 15B AM. JUR. 2D *Computers & the Internet* § 13 (2017) (relating to the interpretation of cyberstalking statutes); Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 846 (2010) (overviewing attempts by policymakers to combat cyberbullying and to account for how “[t]he Internet creates a virtual world that can result in very real consequences”); Taryn Pahigian, *Ending the Revenge Porn Epidemic: The Anti-Revenge Porn Act*, 30 J. C.R. & ECON. DEV. 105, 131–37 (2017).

<sup>18</sup> *See* Nicol Turner-Lee, *How the President's Twitter Account Affects Civil Society*, BROOKINGS: TECHTANK (Feb. 16, 2017), <https://www.brookings.edu/blog/techtank/2017/02/16/how-the-presidents-twitter-account-affects-civil-society/>.

<sup>19</sup> Nick Bilton, *All Is Fair In Love and Twitter*, N.Y. TIMES MAG. (Oct. 13, 2013), <http://www.nytimes.com/2013/10/13/magazine/all-is-fair-in-love-and-twitter.html>.

<sup>20</sup> *See* Smith & Williams, *supra* note 4 (“Since the U.S. declared war on our country, we will have every right to make countermeasures, including the right to shoot down the U.S. bombers even when they are not yet inside the airspace border of our country.” (quoting North Korean Foreign Minister Ri Yong-ho)).

through social media, or because of the confluence of the two. Social media's new place in politics and as part of presidential communications puts stress on our constitutional foundations along two crucial fault lines in First Amendment jurisprudence. First, it evokes the question of whether the executive should be held to a higher, more speech-restrictive standard under the First Amendment because of his or her innately heightened power to influence or incite while speaking in that role. Second, it presents the question of whether that influence has a greater impact through social media that could, in itself, change the equation of whether presidential speech has crossed out of the borders of First Amendment protection. Regardless of who is sitting in the Oval Office, the President's unique role, coupled with its unique reach through social media, supports reevaluating executive speech under the First Amendment and may justify circumscribing it within stricter boundaries.

## II. BACKGROUND

### *A. First Amendment Roots: Where We've Come From*

At an elemental level, the First Amendment guarantee that "Congress shall make no law . . . abridging the freedom of speech"<sup>21</sup> affects the President the same way as any other citizen<sup>22</sup>. The President can say whatever he or she wants, subject only to the same embattled outer edges of First Amendment protection that apply to the average person.

While a system that seems to value speech—all speech, intrinsically—predominates now, the United States has gone through epochs of far more speech-restrictive and government-protective jurisprudence.<sup>23</sup> Oliver Wendell Holmes' famous

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<sup>21</sup> U.S. CONST. amend. I.

<sup>22</sup> See Robert Sharp, *Does Freedom of Speech Apply to the President?*, QUORA (Dec. 25, 2016), <https://www.quora.com/Does-freedom-of-speech-apply-to-the-president> ("The free speech protections of the First Amendment and the subsequent Supreme Court case law applies to all citizens, and the president is a citizen.").

<sup>23</sup> In the early 20th century, the Court upheld a series of convictions under the Espionage and Sedition Acts, allowing suppression of speech that the government believed would undermine the war effort or support ideologies deemed dangerous to the government's position. See *Schenck v. United States*, 249 U.S. 47, 49, 53 (1919) (affirming convictions for "conspiracy to commit an offense against the United States" by encouraging others to oppose the military draft); *Abrams v. United States*, 250 U.S. 616, 617, 624 (1919) (affirming convictions for conspiracy to distribute printed materials containing "disloyal" language intended to engender contempt or encourage resistance toward the United States government). The Court has indicated these cases would not be decided the same way today. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) ("Although the Sedition Act [of 1798] was never tested in this Court, the attack upon its validity has carried the day in the court of history . . . [and t]he invalidity of the Act has also been assumed by Justices of this Court.").

dissent in *Abrams v. United States*<sup>24</sup> foreshadowed a very different approach to the First Amendment. Although Holmes

d[id] not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger . . . [of] substantive evils that the United States constitutionally may seek to prevent[,] . . . only the present danger of immediate evil or an intent to bring it about . . . warrants Congress in setting a limit to the expression of opinion . . . .<sup>25</sup>

While acknowledging that “war opens dangers that do not exist at other times[,] . . . I had conceived[,]” Holmes reflected, “that the United States through many years had shown its repentance for the Sedition Act of 1798.”<sup>26</sup> With it, Holmes seemed to suggest, the United States had also repented of its willingness to stifle dissonant speech simply because it ran counter to the government’s position.<sup>27</sup> The notion Holmes advocated has since taken the field of First Amendment jurisprudence by storm: rather than suppressing speech to stabilize democracy in times of crisis, the “best test of truth is the power of the thought to get itself accepted in the competition of the market[,]” and the best test of our democracy is to weather those conflicting voices and to grow based on the outcome of their debate.<sup>28</sup> Modern First Amendment decisions reflect a desire to put faith in the democratic cacophony of free speech to resolve itself into clarity, and place the burden on the government to allow criticism and prove itself by withstanding dissent.

Law students and legal scholars of today may take the concept of the marketplace for granted, along with its theoretical underpinnings. However, the widespread acceptance of Holmes’ perspective involved a key philosophical shift: regarding free speech as necessary—in fact, vital—for democracy. “The freedom that the First Amendment protects is not . . . an absence

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<sup>24</sup> 250 U.S. 616 (1919).

<sup>25</sup> *Id.* at 627–28 (Holmes, J., dissenting).

<sup>26</sup> *Id.* at 628, 630. The Sedition Act to which Holmes refers, which restricted and criminalized speech critical of the federal government, was part of the Alien and Sedition Acts, antecedents to the laws at issue in *Abrams*. See *Sullivan*, 376 U.S. at 273 (“[T]he great controversy over the Sedition Act of 1798 . . . first crystallized a national awareness of the central meaning of the First Amendment.”).

<sup>27</sup> *Abrams*, 250 U.S. at 628 (“Congress certainly cannot forbid all effort to change the mind of the country.”); see also *id.* at 630 (criticizing the government’s argument that the common law of seditious libel is left intact under the First Amendment).

<sup>28</sup> *Id.* at 630.

of regulation. It is the presence of self-government.”<sup>29</sup> On this view, the First Amendment embodies the role of the people in a representative democracy: the importance of protecting speech is, in part, protecting the ability of the people to hold their leaders accountable.<sup>30</sup> Free speech is also meant to press forward the ideals of freedom, change, and progress. The reason that the Constitution is not a strict enumeration of immutable rights and responsibilities (apart from sheer impracticality) is because the Founders understood that for the democratic experiment to succeed, they needed to build into its system of government the potential for change.<sup>31</sup> The fora of free speech are, theoretically, supposed to drive that change.<sup>32</sup> Ideas gather momentum and support in the marketplace, and, forged by the fires of critical debate, emerge to steer the country toward a different future—on Holmes’ theory,<sup>33</sup> a better one. “[T]he principle of the freedom of speech[,] as it stands in the Constitution . . . is an expression of the basic American political agreement that, in the last resort, the people of the United States shall govern themselves.”<sup>34</sup>

The marketplace philosophy can feel like a devil’s bargain. The host of ideas that march through the open doors of our current First Amendment philosophy is a cavalcade ranging over all imaginable forms of the grotesque, the appalling, the

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<sup>29</sup> Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 252.

<sup>30</sup> In the pursuit of a strong, functional democracy, [w]e, the people who govern, must try to understand the issues which, incident by incident, face the nation. We must pass judgment upon the decisions which our agents make upon those issues. And, further, we must share in devising methods by which those decisions can be made wise and effective, or, if need be, supplanted by others which promise greater wisdom and effectiveness. Now it is these activities, in all their diversity, whose freedom fills up the “scope of the First Amendment.”

*Id.* at 255.

<sup>31</sup> *See id.* at 264 (“[T]he Framers could not foresee the specific issues which would arise as their ‘novel idea’ exercised its domination over the governing activities of a rapidly developing nation in a rapidly and fundamentally changing world . . . . [B]oth they and we have been aware that the adoption of the principle of self-government by ‘The People’ of this nation set loose upon us and upon the world at large an idea which is still transforming men’s conceptions of what they are and how they may best be governed.”).

<sup>32</sup> *See* *Whitney v. California*, 274 U.S. 357, 375 (Brandeis, J., concurring) (“Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . and that this should be a fundamental principle of the American government.”).

<sup>33</sup> *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas . . . .”).

<sup>34</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 109 (1960).

hateful, the cruel, and the repulsive. Examples of what must be defended in the name of guarding the dedication to truth and democracy may make one balk at enforcing Holmes' ideology. In that light, it is important to remember why we need speech. When we question First Amendment standards, we are questioning those rationales and the value of speech to democracy.

B. *Brandenburg: Where We Are*

The current test for protected speech remains, as it has been since the 1969 decision in *Brandenburg v. Ohio*,<sup>35</sup> a very speech-protective one.<sup>36</sup> *Brandenburg* was a member of the Ku Klux Klan who invited a local reporter to film a rally taking place in Hamilton County, Ohio.<sup>37</sup> The film, subsequently broadcast on several local and national networks, showed burning crosses, members of the group carrying weapons, and a speech containing derogatory statements about African-Americans and other groups, advocating excising them from American society, and calling for a march on Washington, D.C.<sup>38</sup> *Brandenburg's* speech also threatened "revengeance" against the government if it "continue[d] to suppress the white, Caucasian race."<sup>39</sup>

*Brandenburg* was convicted under the Ohio Criminal Syndicalism Act, which prohibited advocating the duty or necessity of using violence, crime, and other unlawful means for political reform, or assembling a group to teach or advocate that doctrine.<sup>40</sup> The Supreme Court reversed the conviction and held the statute unconstitutional: in order to protect the right of free speech, a state is forbidden from "proscrib[ing] advocacy of use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>41</sup> This test reflects a key First Amendment balancing act: finding the point at which

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<sup>35</sup> 395 U.S. 444 (1969).

<sup>36</sup> See, e.g., Lyrrisa B. Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH. L. REV. 147, 159 (2011) (describing *Brandenburg* as "a proud pillar of American First Amendment jurisprudence precisely because it sets an extremely high bar to imposing liability in incitement cases" despite the "completely despicable" content of the speech at issue); Marc Rohr, *Grand Illusion?*, 38 WILLAMETTE L. REV. 1, 3 (2002) (describing *Brandenburg* as "so extraordinarily speech-protective" that it raises the question of whether it "really means as much as its literal wording seems to imply" and whether courts are truly "prepared to make the commitment to freedom of speech that the [*Brandenburg*] test appears to require").

<sup>37</sup> *Brandenburg*, 395 U.S. at 445.

<sup>38</sup> *Id.* at 445–46.

<sup>39</sup> *Id.* at 446.

<sup>40</sup> *Id.* at 444–45.

<sup>41</sup> *Id.* at 447–48.

advocacy of an ideology, so crucial to protest and to change, becomes dangerous enough to justify restriction.<sup>42</sup>

The *Brandenburg* test still stands today.<sup>43</sup> For speech to be circumscribed under the First Amendment, it must be “directed to inciting or producing imminent lawless action,” and the gravity of the harm feared must be balanced against the likelihood of the speech actually causing that harm.<sup>44</sup> Courts weigh the potential dangers that could arise from the speech at issue against the likelihood and imminence of the possible harm.<sup>45</sup> The *Brandenburg* decision—and truly the track of First Amendment jurisprudence at large—reflects the high priority placed on the right to freedom of speech and its role in our democracy.<sup>46</sup> It embodies the view that the price of democracy, the price of our constitutional principles, is that speech, whatever its nature and content, will not be suppressed unless it reaches the high threshold of being tied to a concrete and immediate risk.<sup>47</sup> Unrestricted speech is supposed to feed the diverse dialogue behind our representative democracy, and bring us closer to truth and to a “more capable citizenry and more perfect polity[,]”<sup>48</sup> but, even when the speech at issue is hateful, destructive, and seems to contribute nothing positive, modern First Amendment jurisprudence will not restrict it on that basis alone.<sup>49</sup> The reasoning is that if speech that is unpopular in one moment in history is allowed to be suppressed simply because it

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<sup>42</sup> “[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas . . . . That at any rate is the theory of our Constitution.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>43</sup> Chris Montgomery, *Can Brandenburg v. Ohio Survive the Internet and the Age of Terrorism: The Secret Weakening of a Venerable Doctrine*, 70 OHIO ST. L.J. 141, 142 (2009).

<sup>44</sup> *Brandenburg*, 395 U.S. at 447.

<sup>45</sup> See, e.g., *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1071 (9th Cir. 2002) (“*Brandenburg* . . . makes it clear that the First Amendment protects speech that advocates violence, so long as the speech is not directed to inciting or producing imminent lawless action and is not likely to incite or produce such action.”); *id.* at 1092 (Kozinski, J., dissenting) (“[U]nder *Brandenburg*, encouragement or even advocacy of violence is protected by the First Amendment . . . .”); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 236 (2002) (“[T]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it, absent some showing of a direct connection between the speech and imminent illegal conduct.”) (internal citations omitted).

<sup>46</sup> *Pennekamp v. Florida*, 328 U.S. 331, 353 (1946) (Frankfurter, J., concurring) (explaining that Justice Holmes’ foundational formulation of First Amendment doctrine “served to indicate the importance of freedom of speech to a free society”); Steven Pinker, *Why Free Speech is Fundamental*, BOS. GLOBE (Jan. 27, 2015), <https://www.bostonglobe.com/opinion/2015/01/26/why-free-speech-fundamental/aaAWVYFscrhFCC4ye9FVjN/story.html>.

<sup>47</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>48</sup> *Cohen v. California*, 403 U.S. 15, 24 (1971).

<sup>49</sup> See *Brandenburg*, 395 U.S. at 447.

is unpopular, it creates a precedent that may block the way of crucial debate—often the road to crucial change—in the future.<sup>50</sup>

*C. Speech in the Era of Social Media: Where We're Going*

With *Brandenburg* accompanying us into the modern day, two key questions before the country may call for changing—or adjusting our reading of—that long-standing test as applied to executive speech. First is the question of whether executive speech itself changes the *Brandenburg* equation because of the President's greater power to influence people and to incite violence, harm, or "imminent lawless action."<sup>51</sup> Second is whether social media's transformation of the country's political dialogue calls for a change in how "immediacy" is viewed, and whether the use of social media—particularly by the executive, whose inherent power may already heighten the risks endemic to his or her speech—could justify heightened free speech restrictions for the executive.

### III. EXECUTIVE SPEECH

Holding political office comes with both opportunities and costs. On the one hand, what better way to be heard in a representative democracy than to be a representative, and to have the chance to speak for the ideals that you and, presumably, your constituents share. On the other hand, from a First Amendment perspective, being a political figure renders you less protected from the speech of others.<sup>52</sup>

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<sup>50</sup> Take, for instance, the work of abolitionists and civil rights advocates early in the nation's history. They certainly represented a minority view, unpopular with many, and had the government been allowed to repress their speech to alleviate the discomfort of the majority at hearing their ideas, vital changes to society might never have been made. See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383 (referring to abolitionists in the 1840s and civil rights protesters in the 1950s and 1960s as beneficiaries of the fact that "for most of America's history, protecting free speech has helped marginalized or unpopular groups to gain political power and influence"); MARGARET A. BLANCHARD, *REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA*, 282, 416 (1992) (emphasizing the importance of protests and boycotts, "a form of expression protected by the First Amendment," in creating momentum for the Civil Rights Movement, and noting that "[a]nother group of protesters in the 1830s had launched the highly unpopular campaign to end slavery").

<sup>51</sup> See *Brandenburg*, 395 U.S. at 447.

<sup>52</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1969) (holding that a published advertisement expressing criticism of and grievances against an Alabama elected official was protected by the First Amendment even though it contained erroneous statements of fact because "[t]he interest of the public . . . outweighs the interest of [a public official]" (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (1942))).

### A. Executive Immunity

Legally speaking, government actors are generally afforded some special protections. They are insulated from certain forms of liability: for instance, actions taken or decisions made by government officials while acting in their official capacity and within the scope of their duties typically cannot subject them (or the government itself) to tort liability.<sup>53</sup> The President in particular is insulated from suits based on actions undertaken in his or her capacity as executive.<sup>54</sup> The rationale for these protections—that, to ensure smooth and effective government, the law should prevent political actors from being subjected to a battery of lawsuits for their decisions that could potentially hobble the necessary functions of government<sup>55</sup>—is especially significant with respect to the President.<sup>56</sup> The intricacies of government involve balancing many high-stakes interests and making choices that often involve sacrifice and compromise.<sup>57</sup> The theory of democracy relies upon putting someone in the position to make those choices unencumbered.<sup>58</sup>

With respect to the executive in particular, this reasoning takes on special importance. At its core, Article II of the U.S. Constitution empowers the President as a decision-maker, a

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<sup>53</sup> See, e.g., *Cope v. Scott*, 45 F.3d 445, 446–48 (D.C. Cir. 1995) (finding no liability in a negligence action against the United States under the Federal Tort Claims Act because the government, when exercising policy judgment in discretionary functions, is shielded from liability).

<sup>54</sup> See generally *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (“In view of the special nature of the President’s constitutional offices and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the ‘outer perimeter’ of his official responsibility.”).

<sup>55</sup> “The reason for the official privilege is said to be that the threat of damage suits would otherwise inhibit the fearless, vigorous, and effective administration of policies of government.” *Sullivan*, 376 U.S. at 282 (internal quotation marks omitted).

<sup>56</sup> See *Nixon*, 457 U.S. at 751 (“Because of the singular importance of the President’s duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government.”).

<sup>57</sup> The decisions and discretionary functions of government officials involve balancing different, often-conflicting policy considerations, and weighing the risks and advantages of any given course of action. This aspect of governmental decision-making is what gives rise to immunity for liability in the execution of discretionary functions. The higher a government official is on the chain of decision-making authority, the more heightened the considerations and consequences balanced in their choices—particularly for military leaders, or for the Commander in Chief, whose decisions directly involve risks to the lives of American soldiers. See 63 C.J.S. *Municipal Corporations* § 886 (2018) (discussing the balancing in decision-making that underlies discretionary immunity for a governmental body); 91 C.J.S. *United States* § 321 (2018) (providing an overview of the sovereign immunity usually provided to the government and extended to its agents).

<sup>58</sup> See, e.g., *United States v. Nixon*, 418 U.S. 683, 705 n.15 (1974) (“There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy . . . . Most of the Framers acknowledge that without secrecy no constitution of the kind that was developed could have been written.”) (internal citations omitted).

position of trust in which the person in office is supposed to reflect, by their actions and statements as an individual, the interests and ideals of the people.<sup>59</sup> The executive must examine and synthesize all of the competing concerns and large-scale decisions facing the country, and, in light of all those factors, make the choice that most represents the will and ideals of the people.<sup>60</sup> It is for this reason that the law does not allow private citizens, who may only be able to see a tiny fraction of the larger backdrop against which the decision was made, to attack the executive for those difficult choices.<sup>61</sup>

The Supreme Court has held that the President “is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.”<sup>62</sup> Because the President is “entrusted with supervisory and policy responsibility of utmost discretion and sensitivity[,] . . . diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government.”<sup>63</sup> The President must be vested with the power to carry out his Article II duties, and “[t]he [P]resident cannot, therefore, be liable to arrest, imprisonment or detention[] while he is in the discharge of his duties of office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.”<sup>64</sup>

“The President’s unique status under the Constitution distinguishes him from other executive officials.”<sup>65</sup> The legal treatment of executive power recognizes two central constitutional principles of separation of powers. First, that the crux of executive power is based on the importance of vesting in one individual the ability to make crucial, high-stakes decisions

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<sup>59</sup> Article II entrusts the president with receiving foreign ambassadors, and appointing United States ambassadors, U.S. CONST. art. II, §§ 2–3, meaning that the president and his or her appointees form the public, international face of the country. The president is also required to deliver a report on the “State of the Union” to Congress, conveying to lawmakers the status of the country at large—and, presumably, communicating the interests and needs of the people at large. *See id.* § 3.

<sup>60</sup> In a representative form of government, the leadership is meant to reflect the will of the people, and is accountable to its constituents—thus the avenue of impeachment, by which leaders and public officials can be removed if they are believed to be unfit for their role, is left open. *See* U.S. CONST. art. II § 4. For a discussion of the executive’s difficulties in balancing their own ideologies and their responsibility to their constituents, see Kathy B. Smith, *The Representative Role of the President*, 11 PRESIDENTIAL STUD. Q. 203 (1981).

<sup>61</sup> *See* *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

<sup>62</sup> *Id.* at 749.

<sup>63</sup> *Id.* at 750–51.

<sup>64</sup> *Id.* at 749 (quoting 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, 418–19 (1st ed. 1833)) (internal quotation marks omitted).

<sup>65</sup> *Id.* at 750.

on behalf of the nation that require a speed and decisiveness that neither the legislature nor the judiciary can supply.<sup>66</sup> As such, in reviewing the actions of past presidents, the other branches have been careful not to throw any administrative roadblocks in the path of the executive that he or she could trip over in a crucial moment.<sup>67</sup> Second, judicial decisions concerning executive power highlight the Court's unwillingness to be in the business of policing and second-guessing every executive decision, and for the same reason—separation of powers. The executive must be able to execute its power, while the judiciary is there to define the boundaries of the law when crossed.<sup>68</sup> Preserving the ability of the executive to act without constant judicial oversight and without fear of reprisal for difficult choices forms the basis for executive immunity.<sup>69</sup> The judiciary operates on a presumption of regularity<sup>70</sup> and a presumption of good faith in assessing the official acts of public officials.<sup>71</sup> This trust in, and deference to, the executive branch allows courts to smooth their own processes, rather than busying themselves with overseeing the minutia of executive activity, another nod to the all-important balance of powers.<sup>72</sup>

Moving closer to the domain of speech, the President can claim privilege in his or her confidential communications.<sup>73</sup> While the privilege is far from absolute, the courts balance the

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<sup>66</sup> See Martin Wald, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1411 (1984) (“The President is capable of acting with more speed, decisiveness and secrecy than any legislature . . . . There is a constant tension between the goals of flexibility and efficiency, embodied in a head of state, and caution and consensus, embodied in a legislature.”).

<sup>67</sup> See *id.* (noting that the War Powers Resolution left intact the emergency exception, allowing the president to respond to an attack without waiting for congressional approval); see also 50 U.S.C. § 1541 (2012).

<sup>68</sup> “Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.” *United States v. Nixon*, 418 U.S. 683, 705–06 (1974).

<sup>69</sup> See *Nixon v. Fitzgerald*, 457 U.S. 731 at 752–53.

<sup>70</sup> “It is a presumption of law, that all public officers, and especially such high functionaries [as the President], perform their proper official duties until the contrary is proved.” *Phila. & Trenton R.R. Co. v. Stimpson*, 39 U.S. 448, 458 (1840); see also *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926) (“[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties.”).

<sup>71</sup> See, e.g., *Jones v. FBI*, 41 F.3d 238, 242 (6th Cir. 1994) (“[Government] agency actions and affidavits are normally entitled to presumption of good faith.” (citing *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 179 (1991))).

<sup>72</sup> “The Federal Supreme Court has recognized for a very long time that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government.” 16A AM. JUR. 2D *Legislative Motivation* § 187.

<sup>73</sup> See *United States v. Nixon*, 418 U.S. 683 at 708.

necessity of the information and the interest of justice against the recognition that protecting the confidentiality of the President's words may be uniquely important.<sup>74</sup> Confidentiality of presidential communications also implicates separation of powers.<sup>75</sup> "Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based."<sup>76</sup> Further, the privilege takes note of the high stakes of the President's role, particularly as Commander-in-Chief: when "there is a reasonable danger that compulsion of [government documents as] evidence will expose military matters which, in the interest of national security, should not be divulged[,] . . . the occasion for the privilege is appropriate and the court should not jeopardize the security which the privilege is meant to protect."<sup>77</sup>

### B. *Executive Vulnerability*

In the context of free speech, by contrast, the First Amendment traps public officials in the spotlight. Generally, the speech of government actors, including the executive, is treated no differently from that of other citizens—within the confines of *Brandenburg*, they can say whatever they like.<sup>78</sup> However, their role renders them uniquely vulnerable to the speech of others. Critical and even false speech against public officials is protected.<sup>79</sup> What would be defamation against a private citizen is perfectly allowable against a public official or public

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<sup>74</sup> In explaining the heightened protection given to presidential communications, the Supreme Court reasoned that

[t]he expectation of a President to the confidentiality of his conversations and correspondence . . . has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications.

*Id.*

<sup>75</sup> *See id.* ("The privilege" protecting confidentiality of presidential communications is "inextricably rooted in the separation of powers under the Constitution.")

<sup>76</sup> *Id.* at 711.

<sup>77</sup> *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

<sup>78</sup> *See Sharp, supra*, note 22.

<sup>79</sup> *See generally* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1969) (finding that an elected commissioner could not succeed in a libel suit based on published criticisms of his official conduct, even if they contained false statements of fact).

figure.<sup>80</sup>The rationale for disadvantaging political officials in this way is much the same as the rationale for protecting them in other contexts: their fundamental role in the democratic process.<sup>81</sup>To preserve the integrity of a representative democracy, citizens must be able to hold their leaders accountable.<sup>82</sup> The importance of dissent and criticism—pushback on government actions—is considered so central to democracy that First Amendment jurisprudence allows for a wide margin of error and even for intentional falsehood in order to keep a free flow of speech that may call politicians to account for their actions.<sup>83</sup> Allowing both the press and the citizens to act as a check on the actions of political figures, the Court has said, entails allowing robust criticism of officials both as to their policies and as individuals.<sup>84</sup> Politicians are seen as having essentially assumed this risk by stepping into the political spotlight.<sup>85</sup> As such, the President’s legal standing with respect to the First Amendment is already shaped by his or her role.

### C. *The Boundaries of Executive Speech*

The already-differential treatment of the President under the Constitution, in both positive and negative ways, lends support to the argument that presidential speech might likewise be justifiably restricted to a different degree than that of the

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<sup>80</sup> *Compare Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“[W]e have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made ‘with knowledge that it was false or with reckless disregard of whether it was false or not.’” (citing *Sullivan*, 376 U.S. at 279–80)), with *Gertz v. Robert Welch*, 418 U.S. 323, (1974) (“Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*.”).

<sup>81</sup> See *Sullivan*, 376 U.S. at 282–83 (“It is as much [the citizen-critic’s] duty to criticize as it is the official’s duty to administer . . . . It would give public servants an unjustified preference over the public they serve [if immune from criticism.]”).

<sup>82</sup> THE FEDERALIST PAPERS NO. 70 (Alexander Hamilton) (“[T]he two greatest securities [the people] can have for the faithful exercise of any delegated power [are], first, the restraints of public opinion . . . and, secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.”).

<sup>83</sup> See *Sullivan*, 376 U.S. at 271–72.

<sup>84</sup> *Id.*

<sup>85</sup> See *Gertz*, 418 U.S. at 344 (“An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case.”); *Sullivan*, 376 U.S. at 275 (“[T]he press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law’ . . . . The right of free public discussion of the stewardship of public officials was thus, in Madison’s view, a fundamental principle of the American form of the government.” (quoting James Madison, *Report of 1800 (Jan. 7, 1800)*, in 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 570 (1836))).

average citizen. First Amendment jurisprudence has promoted (or at least tolerated) caution with respect to presidential speech, allowing executives to keep their confidences when national security or other critical interests are at stake, rather than being forced to disclose the inner workings of their decisions as President.<sup>86</sup> This approach contains a recognition of the inherently higher risks involved with presidential actions and communications.<sup>87</sup> By that same token, it hearkens to the reality—as discussed above in the context of North Korea—that presidential communications carry potential danger when spoken that justifies their being kept confidential. As Justice Stewart presciently noted, “the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age.”<sup>88</sup>

The Court’s First Amendment decisions have been colored by the understanding that the judiciary is not the first line of defense; it is the people and the press.<sup>89</sup> As much as executive speech is privileged to protect its democratic purpose, analogous considerations support the freedom of speech of the citizen-critic of government:<sup>90</sup>

In the absence of governmental checks and balances[,] . . . the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an

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<sup>86</sup> One ground supporting the argument for executive privilege is “the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion.” *United States v. Nixon*, 418 U.S. 683, 705 (1974).

<sup>87</sup> Even beyond the potentially dangerous ripple effect that presidential statements can create in foreign affairs, and the high military stakes associated with the role of Commander in Chief, *see* discussion *supra* Section I, the “sheer prominence” of the President’s office and the fact that the President is entrusted with “the most sensitive and far-reaching decisions . . . under our constitutional system” also heighten the possible consequences of a President’s words and behavior, on both the domestic and global stage, *see* Aviva A. Orenstein, *Presidential Immunity from Civil Liability: Nixon v. Fitzgerald*, 68 CORNELL L. REV. 236, 245 (1983).

<sup>88</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713, 727 (1971) (Stewart, J., concurring).

<sup>89</sup> *See Sullivan*, 376 U.S. at 269, 275 (“The constitutional safeguard [of the First Amendment] ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))); *see also* Owen M. Fiss, *Building a Free Press*, 20 YALE J. INT’L L. 187, 191 (1995) (“Democracy is a system of government that ultimately allows the public to decide how it wishes to live; but democracy presupposes that the public is fully informed . . . . A free press is meant to make this supposition a reality.”).

<sup>90</sup> *Sullivan*, 376 U.S. at 282.

enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.<sup>91</sup>

In the end,

neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity . . . The impediment that [it] would place in the way of the primary constitutional duty of the Judicial Branch . . . would plainly conflict with the function of the courts under Article III.<sup>92</sup>

There is a tacit presumption that the person in the office of the President will modulate his or her speech in a way that reflects his or her heightened capacity to influence and incite. However, if the President is not effectively guarding against the innate power (and corresponding danger) of speaking from that office, the Court may be empowered to inscribe lines around the executive sphere of freedom of speech, boundaries that would recognize that a President's capacity to incite is far above that of the average citizen. The President's words are like a match being struck above a line of gasoline that laces its way across the globe, not an unknown masked man trying to start a brushfire in rural Ohio with a pair of sticks.

*D. Danger & Likelihood: Responses to Executive Speech*

The *Brandenburg* balance first takes into account the potential dangers that can arise from the speech in question. While no constitutional rule should be designed around the behavior of a single individual or a single speaker, some of the specters raised by the interpretations of President Trump's speech—and the ripple effect of those words—furnish examples of how executive speech can more readily give rise to very serious potential harms that, both in their scope and severity, would not attach to the words of another speaker.

Several aspects of the President's role contribute to the greater potential of executive speech to incite action by others. In a number of contexts, presidential speech can literally be regarded as a call to action, possibly crossing the line into making the speech dangerous enough to regulate. First and most obviously, the President is the Commander in Chief of the

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<sup>91</sup> *N.Y. Times Co.*, 403 U.S. at 728.

<sup>92</sup> *United States v. Nixon*, 418 U.S. 683, 706–07 (1974).

military.<sup>93</sup> What happens if a President tweets “Let’s bomb North Korea!”? To be sure, Twitter is not the standard platform for military orders, but technically speaking, that sentence is a command from someone with the authority to issue it. Second, if not an order, presidential permission could be a powerful influence—and a possible defense—to one’s actions. When President Trump referred to suspected Latino gang members as “animals” and encouraged police officers to let them strike their heads on the doors of squad cars,<sup>94</sup> did he give permission to engage in police brutality? Against the backdrop of Trump’s continuing promises to “build a wall” to prevent Latino and Latina people from entering the United States, those words become racially charged, and could generate fear for people of color in America, whether citizens or not.<sup>95</sup> Another example of a potentially coercive use of executive speech was Trump’s Twitter attack on the NFL players who chose to kneel in protest during the national anthem.<sup>96</sup> While a private entity like the NFL can exercise control over the speech of its employees without violating the Constitution, it would be emphatically and quintessentially unconstitutional for the government to stifle an act of protest speech on that basis alone.<sup>97</sup> As such, Trump’s tweet, suggesting that tax laws should be changed to penalize the NFL for allowing the protest,<sup>98</sup> could be seen as an attempt to leverage the threat of presidential power to compel certain

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<sup>93</sup> U.S. CONST. art. II, § 2 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . .”).

<sup>94</sup> Barbara Demick & Kurtis Lee, *Trump Urges Officers and Immigration Officials to be ‘Rough’ on ‘Animals’ Terrorizing U.S. Neighborhoods*, L.A. TIMES (July 28, 2017, 4:20 PM), <http://www.latimes.com/nation/la-na-pol-trump-ms13-story.html>.

<sup>95</sup> *Id.*

<sup>96</sup> *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 30, 2017, 3:26 PM), <https://twitter.com/realdonaldtrump/status/914255264282480640?lang=en> (“Very important that NFL players STAND tomorrow, and always, for the playing of our National Anthem. Respect our Flag and our Country!”); Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 18, 2017, 4:06 AM), <https://twitter.com/realdonaldtrump/status/920606910109356032?lang=en> (“The NFL has decided that it will not force players to stand for the playing of our National Anthem. Total disrespect for our great country!”). For a list of additional tweets, see Sam Beldon, *Trump Tweeted About the NFL and National Anthem 37 Times in a Month*, BUS. INSIDER (Oct. 23, 2017, 3:19 PM), <http://www.businessinsider.com/trump-twitter-campaign-against-anthem-protests-2017-10>.

<sup>97</sup> Like all provisions of the Constitution, the First Amendment protects the rights of private citizens from infringement by the government, but does not protect against invasions of those rights by corporate entities or other private citizens. *See* U.S. CONST. amend I; *see also, e.g.*, *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 736 (1996) (“[T]he First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech . . .”).

<sup>98</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 10, 2017, 3:13 AM), <http://twitter.com/realdonaldtrump/status/917694644481413129?lang=en> (“Why is the NFL getting massive tax breaks while at the same time disrespecting our Anthem, Flag and Country? Change tax law!”).

actions by government agencies, private organizations, and, by extension, citizens.<sup>99</sup>

A more removed but perhaps more widespread ripple effect: a President's vindication or tacit acceptance of hate speech or discriminatory attitudes carries a greater risk of leading to the proliferation of hate crimes and violence, because people holding those discriminatory views may believe that they have the President's stamp of approval to act on their beliefs.<sup>100</sup> Such speech from the executive may also chill speech on the other side of the line: people who are part of a racial or other minority group might be deterred from speaking for fear of reprisal from the President, or of the violence his or her words seem to be inviting against them by others.<sup>101</sup> In that light, would Trump's inflammatory rhetoric with regard to race relations,<sup>102</sup> LGBT individuals,<sup>103</sup> or Muslims,<sup>104</sup> constitute incitement to violence and hate crimes? Bias-motivated crimes are acknowledged to entail different, broader risks than other crimes,<sup>105</sup> so if certain speech increases their likelihood, restricting it may be more

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<sup>99</sup> See Noah Feldman, *The Guy in the Bully Pulpit Can't be a Bully*, BLOOMBERG (Oct. 11, 2017, 2:35 PM), <https://www.bloomberg.com/view/articles/2017-10-11/trump-s-presidential-bullying-violates-the-first-amendment> (arguing that because the IRS answers to the president, this tweet can be seen as an "order [to] the IRS to reconsider or alter the league's tax status," constituting a violation of the First Amendment, which "bars presidential bullying that includes a concrete threat to take government action against a private citizen or group in order to coerce speech").

<sup>100</sup> Julia Manchester, *David Duke: Charlottesville Protests About 'Fulfilling Promises of Donald Trump*, THE HILL (Aug. 12, 2017, 4:19 PM), <http://thehill.com/blogs/blog-briefing-room/news/346326-david-duke-charlottesville-protests-about-fulfilling-promises>.

<sup>101</sup> "For marginalized communities, the power of expression is impoverished for reasons that have little to do with the First Amendment. Numerous other factors in the public sphere chill their voices but amplify others. . . . [S]ystematic harassment and threats . . . stifle their ability to speak." K-Sue Park, *The A.C.L.U. Needs To Rethink Free Speech: Commentary*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/opinion/aclu-first-amendment-trump-charlottesville.html>.

<sup>102</sup> See Marc Fisher, *Trump and Race: Decades of Fueling Divisions*, WASH. POST (Aug. 16, 2017), [https://www.washingtonpost.com/politics/trump-and-race-decades-of-fueling-divisions/2017/08/16/5fb3cd7c-8296-11e7-b359-15a3617c767b\\_story.html?utm\\_term=.53a0b9ef0f92](https://www.washingtonpost.com/politics/trump-and-race-decades-of-fueling-divisions/2017/08/16/5fb3cd7c-8296-11e7-b359-15a3617c767b_story.html?utm_term=.53a0b9ef0f92).

<sup>103</sup> See Trudy Ring, *Trump's 14 Most Egregiously Homophobic and Transphobic Moves*, ADVOCATE (Nov. 9, 2017, 6:28 AM), <https://www.advocate.com/politics/2017/11/09/trumps-14-most-egregiously-homophobic-and-transphobic-moves>.

<sup>104</sup> See Anthony Zurcher, *What Trump Team Has Said About Islam*, BBC NEWS (Feb. 7, 2017), <http://www.bbc.com/news/world-us-canada-38886496> (presenting a measured analysis of statements by Trump and his advisors about Muslims, but quoting Professor Khaled Baydoun as asserting that "[s]capegoating Islam and vilifying Muslims was far more than merely campaign messaging; for Donald Trump it was a winning strategy").

<sup>105</sup> *Wisconsin v. Mitchell*, 508 U.S. 476, 487–88 (1993) (upholding a statute singling out bias-motivated crimes for greater penalties in part because such crimes are "more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest").

readily justified. To be restricted, speech must be “directed to inciting or producing imminent lawless action.”<sup>106</sup> President Trump’s statements may not have been infused with that intent, but that did not prevent them from having an effect,<sup>107</sup> and *Brandenburg* turns on effects.<sup>108</sup>

*E. Immediacy: When the Harm Becomes Real*

The *Brandenburg* metrics of immediacy and likelihood of imminent lawless action<sup>109</sup> seem to indicate that the decision leaned in part on the Court’s sense that the words of the speakers in *Brandenburg* were unlikely to have an effect or reach a large audience, or, at the very least, not imminently.<sup>110</sup> The likelihood of a harm occurring in response to someone’s speech is a function of two things: how many people are listening and how likely they are to act on the speaker’s words. The presidency inherently increases the count on both of these variables. The greater weight and influence of executive speech may, in itself, tip the risk analysis of *Brandenburg* toward subjecting presidential speech to heightened restrictions because the likelihood of lawless action occurring as a direct result is higher. Unlike *Brandenburg*, who had few listeners, and even fewer inclined to give credence to his views, all eyes are on whoever holds the office of President, so he or she has a much larger audience and a much larger possible response. Before the Charlottesville riot,<sup>111</sup> David Duke, former leader of the KKK, referred to

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<sup>106</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasizing that speech should not be restricted on the basis of ideas alone, even those promoting possible violence, so long as they fall short of creating an imminent and likely risk of lawless action in response to the speech). Indeed,

[T]he mere abstract teaching of . . . the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial . . . evidence of a call to violence now or in the future which is sufficiently strong . . . .

*Noto v. United States*, 367 U.S. 290, 297–98 (1961).

<sup>107</sup> Clark Mindock, *Number of Hate Crimes Surges in Year of Trump’s Election*, INDEP. (Nov. 14, 2017), <http://www.independent.co.uk/news/world/americas/hate-crimes-us-trump-election-surge-rise-latest-figures-police-a8055026.html>; Alexis Okeowo, *Hate On The Rise After Trump’s Election*, NEW YORKER (Nov. 17, 2016, 2:10 PM), <https://www.newyorker.com/news/news-desk/hate-on-the-rise-after-trumps-election>.

<sup>108</sup> See *Brandenburg*, 395 U.S. at 449.

<sup>109</sup> *Id.*

<sup>110</sup> See Daniel T. Kobil, *Advocacy On Line: Brandenburg v. Ohio and Speech in the Internet Era*, U. TOL. L. REV. 227, 233 (2000).

<sup>111</sup> Originally called the “Unite the Right” rally by its organizers, white nationalists from around the United States flooded the streets of Charlottesville, Virginia, on August 11–12, 2017, protesting the removal of a statue of Robert E. Lee. The violent demonstrations and clashes with counter-protesters led to the death of one left-wing counter-protester and left more than twenty others injured when a member of one of the white supremacist groups drove a speeding car through the crowd. See Richard

Donald Trump directly when he said that he and the hundreds of “alt-right”<sup>112</sup> protesters with him had taken Trump at his word that “he’s going to take our country back” and were there to vindicate the promises made during Trump’s campaign.<sup>113</sup> Listeners may give more weight to a President’s words, so whatever risk of harm those words create, the sheer number of listeners provided by the vast reach of the Internet, increases the likelihood of lawless action in response.<sup>114</sup> These factors argue for moving the line of what constitutes “immediacy” further back from the cliff’s edge, rather than risking escalation when the results may be on a much larger scale than with another speaker.

The best reason to hesitate in restricting the speech of the President is that, at the heart of the executive’s role, he or she is supposed to speak for the people. The United States is a representative democracy,<sup>115</sup> and electing a representative is the democratic act of consolidating the voices of many into one person, entrusted to represent our interests when, as individuals, we would be too diffuse to speak for ourselves. The President is, for four years,<sup>116</sup> the figurehead and spokesperson of the people.<sup>117</sup> In that light, censoring the speech of the President seems deeply antithetical to our democratic ideals. If we believe in the democratic and electoral system, then our President is a reflection of us, however imperfect, and we have empowered the

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Fausset & Alan Feuer, *Far-Right Groups Surge Into National View in Charlottesville*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com.libproxy.lib.unc.edu/2017/08/13/us/far-right-groups-blaze-into-national-view-in-charlottesville.html?partner=bloomberg>; Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), [https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm\\_term=.167680d20015](https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.167680d20015).

<sup>112</sup> Originated by white supremacist Richard Spencer around 2010, “‘Alt Right’ is short for ‘alternative right.’ This vague term actually encompasses a range of people on the extreme right who reject mainstream conservatism in favor of forms of conservatism that embrace implicit or explicit racism or white supremacy.” *Alt Right: A Primer About the New White Supremacy*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/resources/backgrounders/alt-right-a-primer-about-the-new-white-supremacy>; see also John Daniszewski, *How to Describe Extremists Who Rallied in Charlottesville*, AP: THE DEFINITIVE SOURCE (Aug. 16, 2017), <https://blog.ap.org/behind-the-news/how-to-describe-extremists-who-rallied-in-charlottesville>.

<sup>113</sup> Manchester, *supra* note 100.

<sup>114</sup> The impact of the Internet and social media generally, as well as their role in the precipitation and organization of the Charlottesville rally, is discussed more extensively *infra* Section IV.

<sup>115</sup> *Your Government and You: Democracy in the United States*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., [https://www.uscis.gov/system/files\\_force/USCIS/files/Government\\_and\\_You\\_handouts.pdf](https://www.uscis.gov/system/files_force/USCIS/files/Government_and_You_handouts.pdf).

<sup>116</sup> U.S. CONST. art. II § 1.

<sup>117</sup> “When a head of state arrives in a foreign country the red carpet is extended to the individual who represents his state *in his person*.” Smith, *supra* note 60, at 206.

person in that role to speak on our behalf.<sup>118</sup> When presidential speech creates the kind of dangers, at home or abroad, that would be cause to restrict the speech of an ordinary citizen in order to prevent harm, we are left with the strange conundrum of needing to silence someone who is meant to be our voice.

If one should guard against the absolute corruption of absolute power, what about democratic power? Democratically elected officials are only entrusted with power because they are meant to represent the citizens, not because the citizens abdicate their own voice and give the officials unrestricted license to act as they choose.<sup>119</sup> “[I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”<sup>120</sup> That perspective may empower the Court, with an eye on the First Amendment goal of bettering our democracy, to constrain executive speech when it is detrimental to its own source.

#### IV. SOCIAL MEDIA IN THE POLITICAL ARENA

The advent of social media has transposed much of our cultural and political dialogue into the form of online commentary and discussion.<sup>121</sup> During his presidency, Trump has stated that social media is his preferred mode of communication with the American people, and that he is speaking in his official capacity as President over Twitter.<sup>122</sup> Through the megaphone of social media, the risks and ramifications of presidential speech are likewise magnified.<sup>123</sup> In that respect, First Amendment jurisprudence is met with a

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<sup>118</sup> See *id.* at 205 (“The standard by which a representative should be judged in a democratic state . . . is ‘whether he has promoted the objective interests of those he represents’ . . . . A good representative may not always follow the opinions of his constituents. When he chooses to depart from [them] he has a burden to explain his actions [to the people].”).

<sup>119</sup> THE FEDERALIST NO. 62 (James Madison) (“It is a misfortune incident to republican government . . . that those who administer it may forget their obligations to their constituents, and prove unfaithful to their important trust.”).

<sup>120</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>121</sup> See Hayley Eastman, *Communication Changes with Technology, Social Media*, DAILY UNIVERSE (July 7, 2013), <http://universe.byu.edu/2013/07/07/1communication-changes-with-technology-social-media/>.

<sup>122</sup> See Tamara Keith, *Commander-In-Tweet: Trump’s Social Media Use and Presidential Media Avoidance*, NPR (Nov. 18, 2016, 3:46 PM), <https://www.npr.org/2016/11/18/502306687/commander-in-tweet-trumps-social-media-use-and-presidential-media-avoidance>.

<sup>123</sup> The intersection of many attributes of social media creates this effect. Posts are delivered instantaneously, and, depending on the number of followers, to a large number of people. From there, they can proliferate equally quickly as they are shared between users and across social media platforms, fanning out across the world to a huge number of people in a matter of hours or days, with little to no filtering or editing.

question it has not confronted before: whether executive speech over social media should be held to the same standards as that of other users, or whether, in combination with the power and influence of the speaker, it requires a higher standard.

*A. Fitting Social Media Into the First Amendment*

Speech on social media is by and large treated the same way as other speech.<sup>124</sup> Legally speaking, it has been brought into the fold of the First Amendment relatively quickly: digital speech is speech, protected in the same way and to the same extent as spoken or printed words.<sup>125</sup> “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.”<sup>126</sup> The courts have already begun to address the increasing role of social media in politics<sup>127</sup> and are taking steps to ensure that political speech cannot be stifled by politicians simply because it is easier to block someone on Facebook than silence them in a town meeting.<sup>128</sup> Indeed, far from insulating politicians’ conduct, a public official who, in her official capacity, blocked a constituent from an online forum because she took offense at his claim of unethical government conduct was held to have “committed a cardinal sin under the First Amendment.”<sup>129</sup> As a young physician currently suing<sup>130</sup> Donald Trump for blocking him on Twitter insightfully warns:

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<sup>124</sup> *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].”).

<sup>125</sup> *Id.*

<sup>126</sup> *Packingham v. North Carolina*, 137 S. Ct 1730, 1735 (2017) (holding that a statute restricting registered sex offenders’ access to certain social media websites was unconstitutional under the First Amendment, and noting that it was one of the first cases that the Court had taken to “address the relationship between the First Amendment and the modern Internet”).

<sup>127</sup> *Id.* at 1735 (noting that governors in all fifty states and almost every member of Congress have set up Twitter accounts for the purpose of engaging with their constituencies); see also David Kravets, *Politicians’ Social Media Pages Can Be 1st Amendment Forums, Judge Says*, ARSTECHNICA (July 28, 2017, 1:18 PM), <https://arstechnica.com/tech-policy/2017/07/politician-dinged-for-blocking-critical-constituent-from-facebook-page/>.

<sup>128</sup> See *Davison v. Loudon Cty. Bd. of Supervisors*, 227 F. Supp. 3d 605 (E.D. Va. 2017).

<sup>129</sup> *Davison v. Loudon Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 718 (E.D. Va. 2017).

<sup>130</sup> See Complaint, *Knight First Amend. Inst. v. Trump*, No. 1:17-CV-05205 (S.D.N.Y. filed July 11, 2017), <https://assets.documentcloud.org/documents/3892179/2017-07-11-Knight-Institute-Trump-Twitter.pdf>.

While America's founding fathers may not have envisioned something like Twitter, they certainly knew the importance of free speech to a democracy. They would have been outraged if the president could ban an American citizen from reading his announcements in a newspaper or book. We have now extended [free speech] rights to both television and radio. If Twitter is somehow exempt, so too will be many new and emerging technologies. Blocking private citizens from reading a president's communications threatens our democracy, our freedoms, and our future.<sup>131</sup>

Thus far, the law has not considered whether the boundaries of free speech should be redrawn to account for how the advent of social media has altered our speech, in everything from day-to-day relationships to our national political dialogue. Instead, it is trying to fit social media within the metric of our existing First Amendment jurisprudence, where, in reality, it may no longer fit. While "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears[.]"<sup>132</sup> in "considering the application of unchanging constitutional principles to new and rapidly evolving technology, . . . [we] should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar."<sup>133</sup> "Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."<sup>134</sup> The question is whether social media like Twitter are different enough—and have changed speech enough—to change where we draw the lines of the First Amendment.

*B. Executive Speech Amplified: Presidential Voices in New Media*

Trump's use of social media to "circumvent traditional media and talk directly to the people"<sup>135</sup> may seem like an enticing notion and, in fact, it is not unprecedented. During the Great Depression, for instance, Franklin D. Roosevelt's fireside chats were an important step taken by a President to

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<sup>131</sup> Eugene Gu, *Why I'm Suing President Trump for Blocking Me on Twitter*, FORTUNE (July 12, 2017), <http://fortune.com/2017/07/12/donald-trump-twitter-lawsuit-sued-block-unconstitutional/>.

<sup>132</sup> *Brown v. Entm't. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (internal quotation marks omitted).

<sup>133</sup> *Id.* at 806 (Alito, J., concurring).

<sup>134</sup> *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

<sup>135</sup> Gu, *supra* note 131.

communicate directly and personally with the public<sup>136</sup>—and, carried over radio, they were a “revolutionary experiment with a nascent media platform[,]”<sup>137</sup> as Twitter is today. There is a “long tradition of presidents going around the so-called filter of the press . . . and get[ing] directly to the American people . . . Presidents want to get their message out, unfiltered by the press.”<sup>138</sup> Traced from the fireside chats to Reagan’s primetime news conferences to Obama’s highly produced videos released on social media,<sup>139</sup> Trump’s use of Twitter can be seen “as an extension of what other presidents have done,”<sup>140</sup> a natural development for the presidency in the social media age.

President Obama’s use of Twitter during his presidency exemplified the niche one might have expected social media to fill in the Oval Office.<sup>141</sup> The first President to take office with social media truly on the rise, Obama adopted it as a notable part of his online presence, and “his tech savvy was heralded as a bright light for democracy.”<sup>142</sup> Using it to make announcements or to express sentiments of sympathy or solidarity, “[t]he tweets he post[ed] to @POTUS never seem[ed] impulsive; they seem[ed] made for posterity.”<sup>143</sup> Obama did not use social media to cast aspersions on dissenters or political opponents, let alone address world leaders in ways that could be read as goading them toward nuclear war. “Even his jokes [were] calculated to be minimally offensive and maximally educational.”<sup>144</sup>

However, with many of Trump’s tweets a far cry from the carefully composed presidential addresses of Roosevelt and other successive presidents,<sup>145</sup> the question is whether and how

<sup>136</sup> Diana Mankowski & Raissa Jose, *The 70th Anniversary of FDR’s Fireside Chats*, MUSEUM OF BROAD. COMMUNIS, <https://web.archive.org/web/20120517183213/http://www.museum.tv/exhibition/section.php?page=79> (last visited May 5, 2018).

<sup>137</sup> Adrienne LaFrance, *Donald Trump is Testing Twitter’s Harassment Policy*, ATLANTIC (July 2, 2017), <https://www.theatlantic.com/politics/archive/2017/07/the-president-of-the-united-states-is-testing-twitters-harassment-policy/532497/> (suggesting that perhaps the Twitter platform itself should take steps to police Donald Trump’s invectives on Twitter).

<sup>138</sup> Keith, *supra* note 122.

<sup>139</sup> *See id.* (noting that one example of President Obama’s forays into the social media world was a video on a popular comedian’s show that was meant to “sell the Affordable Care Act to young people”).

<sup>140</sup> *Id.*

<sup>141</sup> *See* Amanda Hess, *Trump, Twitter and the Art of His Deal*, N.Y. TIMES (Jan. 15, 2017), [https://www.nytimes.com/2017/01/15/arts/trump-twitter-and-the-art-of-his-deal.html?nytmobile=0&\\_r=1](https://www.nytimes.com/2017/01/15/arts/trump-twitter-and-the-art-of-his-deal.html?nytmobile=0&_r=1).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *See* Bridie Pearson-Jones, *Donald Trump Has Been on a Very Long, Very Incoherent Twitter Rant*, INDEP.: INDY 100, <https://www.indy100.com/article/donald-trump-crashed-twitter-loving-viral-potus-fake-news-theresa-may-angela-merkel-7760336>; *see also* Matt Flegenheimer, *What’s a ‘Covfefe’? Trump Tweet Unites a Bewildered Nation*,

to regulate the presidential use of new media.<sup>146</sup> Roosevelt “used his fireside chats to explain policy without having reporters condense and interpret his message . . . [and to] reassure the public, directly.”<sup>147</sup> Trump’s communication over Twitter has the opposite effect: rather than using a platform to communicate more expansively with the American people, Twitter, with its miniscule character limit,<sup>148</sup> invites oversimplification if not distortion.<sup>149</sup> People want to hear from their President, to “[t]ake his measure and that’s not something that’s suitable for Twitter. Announcements are, but explaining the guts of policy isn’t.”<sup>150</sup> Although many presidents had friction with the media,<sup>151</sup> it should raise eyebrows for a president to revel in circumventing the media,<sup>152</sup> given their important historical role in acting as a check on politicians,<sup>153</sup> both by keeping the citizenry informed so that representative reinforcement can act as a pressure on sitting government officials, and by being the source of information if the government commits a wrong.<sup>154</sup> “[T]he principle of elected

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N.Y. TIMES (May 31, 2017),

<https://www.nytimes.com/2017/05/31/us/politics/covfefe-trump-twitter.html?mtrref=www.google.com>.

<sup>146</sup> Under Trump, “[w]hat was once a hopeful place for global connection and resistance has become a site for coordinating harassment campaigns, connecting with white supremacists and accelerating unverified and sometimes dangerous rumors.”

See Hess, *supra* note 141.

<sup>147</sup> Keith, *supra* note 122.

<sup>148</sup> See Brett Molina, *So Long, 140. Hello, 280: Twitter Doubles Character Count on Tweets*, USA TODAY (Nov. 7, 2017, 5:41 PM),

<https://www.usatoday.com/story/tech/news/2017/11/07/so-long-140-hello-280-twitter-doubles-character-count-tweets/839604001/>.

<sup>149</sup> Peter Suber, *Not On Twitter Please*, BERKMAN KLEIN CTR. FOR INTERNET & SOC’Y (last revised Oct. 25, 2017, 9:59 AM),

[https://cyber.harvard.edu/~psuber/wiki/?title=Not\\_on\\_Twitter\\_please&oldid=1043](https://cyber.harvard.edu/~psuber/wiki/?title=Not_on_Twitter_please&oldid=1043) (“I like dialogue . . . But I don’t like oversimplification. In fact, I like dialogue in part because it helps us overcome oversimplification. Hence, I don’t like dialogue on Twitter.”).

<sup>150</sup> Keith, *supra* note 122 (quoting Martha Joynt Kumar, Professor of Political Science, Towson University).

<sup>151</sup> Jason Daley, *The Complicated History Between the Press and the Presidency*, SMITHSONIAN: SMARTNEWS (June 14, 2016),

<https://www.smithsonianmag.com/smart-news/complicated-history-between-press-and-presidency-180959406/>.

<sup>152</sup> Matt Kwong, *Trump’s Strategy of Bypassing the Media Raises ‘Danger Signs,’* CBC NEWS (Nov. 23, 2016, 5:00 PM), <http://www.cbc.ca/news/world/trump-media-strategy-1.3863148>.

<sup>153</sup> *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.”).

<sup>154</sup> See *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (“The press was protected [by the First Amendment] so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.”); see generally Clay Calvert & Mirelis Torres, *Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet*, 13 VAND. J. ENT. & TECH. L. 323 (2011) (discussing the “watchdog” role of

officials being accountable to the public through the press is one that's fundamental to our democracy."<sup>155</sup> "The social media platforms that were once heralded as democratic tools could also be used to undermine democratic norms[,] "<sup>156</sup> compromising citizens' ability to effectively question the government, and distorting the representative relationship between the President and the people.

### C. Reach & Risks: Presidential Social Media Presence

"An unprecedented feature of Donald Trump's successful campaign for president was his personal use of Twitter."<sup>157</sup> As President, his tweets seem to have been making front-page news since day one,<sup>158</sup> and the stakes have been rising as he discusses increasingly serious matters via tweet.<sup>159</sup> The Department of Justice addressed some of the uncertainty around Trump's modus operandi with a perhaps more unsettling conclusion: Trump's tweets are "official statements of the President of the United States."<sup>160</sup> The D.O.J. treating the tweets as official statements indicates that, in a legal context, they could be relied on, and sharply underlines what is at stake when the executive speaks over social media.<sup>161</sup>

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journalism and its First Amendment "checking value . . . against government malfeasance"); see also Martha Joynt Kumar, *Presidential Press Conferences: Windows on the Presidency and Its Occupants*, THE WHITE HOUSE HISTORICAL ASS'N, <https://www.whitehousehistory.org/presidential-press-conferences> (last visited May 5, 2018) ("In a representative government, . . . [r]eporters act as surrogates for the public.").

<sup>155</sup> Keith, *supra* note 122 (quoting Brendan Nyhan, Professor of Gov't, Dartmouth College); see also Fiss, *supra* note 89.

<sup>156</sup> Hess, *supra* note 141.

<sup>157</sup> Keith, *supra* note 122.

<sup>158</sup> See *id.*; see also Jessica Estepa, *Trump Has Tweeted 2,461 Times Since the Election. Here's A Breakdown of His Twitter Use*, USA TODAY (Nov. 7, 2017, 3:13 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/11/07/trump-has-tweeted-2-461-times-since-election-heres-breakdown-his-twitter-use/822312001/>.

<sup>159</sup> For a discussion of President Trump's interchanges with North Korea, see discussion *supra* section I.

<sup>160</sup> Lorelai Laird, *DOJ Says Trump's Tweets are Official Presidential Statements*, ABA J. (Nov. 14, 2017, 2:49 PM)

[http://www.abajournal.com/news/article/government\\_says\\_trumps\\_tweets\\_are\\_official\\_presidential\\_statements/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/news/article/government_says_trumps_tweets_are_official_presidential_statements/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email). In the pending case of *James Madison Project v. Department of Justice*, seeking the release of documents related to Trump's alleged ties to Russia, the Department of Justice attorneys filed a response to the judge in which they stated that "the government is treating the statements upon which the Plaintiffs rely as official statements of the President of the United States." *Id.*

<sup>161</sup> Among the starkest examples to date are those that border on threats that could precipitate nuclear war with North Korea. See note 3 and accompanying text; see also Donald J. Trump (@realDonaldTrump), TWITTER, (Sept. 3, 2017, 4:46 AM), <https://twitter.com/realdonaldtrump/status/904309527381716992> (implying that violence is the "one thing" North Korea understands and would be the only recourse).

A prominent example is the series of tweets in which Trump said that transgender individuals would no longer be allowed to serve in the U.S. military.<sup>162</sup> Did those statements constitute an Executive Order? A directive from the Commander in Chief? The response from the rest of the government was telling: the Pentagon would not change its policies for transgender troops until given more details from the White House, and military officials would not take any steps with respect to transgender people in the military until the tweets were clarified or codified<sup>163</sup>—they expressly refused to take orders from a tweet.<sup>164</sup>

Notwithstanding its now-formalized status,<sup>165</sup> the fact that the initial revelation of this “policy” took place over Twitter with little advance warning to or consultation with military officials<sup>166</sup> shows what a fine—and potentially dangerous—line a president walks when communicating through Twitter. As with the possibility of declaring war, the stakes are high when major policy decisions are fired off without warning on social media, and certain declarations, taken at face value, could have immediate and chaotic effects. The intuition that the consequences of statements made over social media are not as serious<sup>167</sup> does not align with the gravity of presidential speech, nor with its heightened ability to impact American lives—now with 140 characters and the press of a button.<sup>168</sup>

The question of how social media speech by an executive will be handled by the courts has already seen the light of day

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<sup>162</sup> 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 (July 26, 2017, 6:08 AM), <https://twitter.com/realdonaldtrump/status/890197095151546369>.

<sup>163</sup> Bryan Bender & Jacqueline Klimas, *Pentagon Takes No Steps to Enforce Trump’s Transgender Ban*, POLITICO (July 27, 2017, 11:28 AM), <https://www.politico.com/story/2017/07/27/trump-transgender-military-ban-no-modification-241029> (pointing to a statement from the Joint Chiefs of Staff that there would be “‘no modification’ to the military’s transgender policy, until the White House drafts a formal request for a policy change”).

<sup>164</sup> *Id.*

<sup>165</sup> After a more official directive from President Trump, the “transgender military ban” began working its way through federal courts and has currently been blocked by preliminary injunction in a D.C. Circuit district court. *See Doe v. Trump*, 275 F. Supp. 3d 167, 207 (D.D.C. 2017).

<sup>166</sup> Travis J. Tritten, *Top Army General Says He Learned of Trump Transgender Ban Through News Reports*, WASH. EXAMINER (July 27, 2017, 2:30 PM), <http://www.washingtonexaminer.com/top-army-general-says-he-learned-of-trump-transgender-ban-through-news-reports/article/2629893>.

<sup>167</sup> *See* John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV., 321, 322 (2004) (noting that the anonymity and invisibility of online interactions contributes to the belief that online actions are disconnected real life ramifications).

<sup>168</sup> Twitter’s original 140-character limit was doubled to 280 on—perhaps pointedly—Election Day, 2017. *See* Molina, *supra* note 148.

during Trump's presidency.<sup>169</sup> The so-called "travel bans" or "Muslim bans" were a series of executive orders that halted citizens of seven predominantly Muslim countries from entering the United States.<sup>170</sup> The various incarnations of the "travel ban" met with protests across the country, and took a fast track to the courtroom in the form of injunctions on behalf of U.S. citizens with relatives trapped, as it were, on the other side of the barricade.<sup>171</sup> The circuit courts demonstrated a willingness to acknowledge social media in their legal evaluations of presidential speech and actions.<sup>172</sup> *En banc* arguments before the Fourth Circuit focused on whether or not extrinsic statements by the President during both his campaign and his presidency—including those made over Twitter—could be considered in analyzing the motivations behind the Executive Orders.<sup>173</sup> "In context[.]" the Fourth Circuit decision declared, the Executive Order "drips with religious intolerance, animus, and discrimination."<sup>174</sup> The context to which the court referred included negative statements about Muslims that Trump made during his campaign, on his campaign website, in news interviews—and over Twitter.<sup>175</sup> Trump also explained that if he could not point overtly to Muslims, he would refer to the targets of his revised Executive Order as "territories" instead.<sup>176</sup>

During oral arguments, members of the court seemed affronted by the idea that they were judicially obligated to turn a blind eye to Trump's tweets because the Executive Order was arguably neutral on its face—especially since Trump had

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<sup>169</sup> See *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (2017), *vacated*, 138 S.Ct.353 (2017). Because the provisions of the Executive Order had expired by their own terms, the Supreme Court gave instructions to dismiss the challenge as moot, but "express[ed] no view on the merits." *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353 (Mem.) (2017); *Washington v. Trump*, 858 F.3d 1168 (9th Cir. 2017); 772, *Hawaii v. Trump*, 859 F.3d 741, 772 n.14 (2017) (citing to Trump's tweets and discussing whether they are "official statements"), *vacated*, *Hawaii v. Trump*, 874 F.3d 1112 (mem.) (9th Cir. 2017) (dismissing the case as moot following a Supreme Court order and opinion).

<sup>170</sup> Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017); Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 9, 2017); Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017) (extending the effect of the original two Executive Orders after the expiration date of the second ban).

<sup>171</sup> Michael D. Shear, *New Order Indefinitely Bars Almost All Travel from Seven Countries*, N.Y. TIMES (Sept. 24, 2017), <https://www.nytimes.com.libproxy.lib.unc.edu/2017/09/24/us/politics/new-order-bars-almost-all-travel-from-seven-countries.html?partner=bloomberg>.

<sup>172</sup> *Id.*

<sup>173</sup> Oral Argument, *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (2017) (No. 17-2231(L)), <http://coop.ca4.uscourts.gov/OAarchive/mp3/17-1351-20170508.mp3> (centering on a discussion of whether statements by President Trump that allegedly evinced anti-Muslim animus could justify striking down an Executive Order despite its facial neutrality with respect to religion).

<sup>174</sup> *Int'l Refugee Assistance Project*, 857 F.3d at 572.

<sup>175</sup> *Id.* at 575-76.

<sup>176</sup> *Id.* at 576.

essentially confessed on Twitter that it was fueled by identical anti-Muslim sentiments.<sup>177</sup> The court found the Order unconstitutional, a violation of the Establishments Clause of the First Amendment.<sup>178</sup> Although there is a high bar for challenging “the political branches’ power over immigration . . . [it] is not tantamount to a constitutional blank check”: the challenged government action must be “facially legitimate and bona fide”—that is, it must have a valid reason on its face, and be issued “in good faith.”<sup>179</sup> In finding that President Trump’s Executive Order was unconstitutionally discriminatory,<sup>180</sup> the court needed to look no further than—and did not hesitate to look at—Trump’s Twitter feed.<sup>181</sup>

*D. Imminence & Immediacy: The Impact of Social Media under Brandenburg*

These constitutional clashes have brought executive speech over social media to the center of our national stage. The key First Amendment question invoked is whether the ubiquity of social media coupled with the innate power of executive speech changes how executive speech should be viewed under *Brandenburg*. The *Brandenburg* test tries to balance the variable of whether the harm feared is really imminent against whether there is a concrete likelihood that it will occur, rather than restricting speech based on speculation as to what may or may not happen in the future as a result of the speech.<sup>182</sup> On both the metrics of immediacy and likelihood of harm, executive speech, with social media as its carrier, may well cross the threshold into being dangerous enough to regulate.

Because Twitter is a private entity, and because of its origins as a platform for unencumbered, pithy expressions of personal opinion, it lacks some of the filters through which

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<sup>177</sup> See Oral Argument, *supra* note 173, at 23:18–24:13, 24:32–25:04, 26:18–28:11, 33:25–35:02, 41:20–43:15, 49:30–50:17, 1:17:25–1:18:31; see also *Int’l Refugee Assistance Project*, 857 F.3d at 633 (Keenan, J., concurring) (describing the second Executive Order as the “proverbial wolf in sheep’s clothing” because it “simply attempted to effectuate the same discrimination through a slightly different vehicle”).

<sup>178</sup> Because the issue before the court was whether to grant a preliminary injunction, it framed its argument in terms of the likelihood of the plaintiffs’ success on the merits and dubbed the Executive Order “likely unconstitutional” in violation of the Establishment Clause, stating strongly that “EO-2 cannot be divorced from the cohesive narrative linking it to the animus that inspired it.” *Int’l Refugee Assistance Project*, 857 F.3d at 601, 603.

<sup>179</sup> *Int’l Refugee Assistance Project*, 857 F.3d at 590.

<sup>180</sup> See *id.* at 601, 612 (Wynn, J., concurring) (“Invidious discrimination that is shrouded in layers of legality is no less an insult to our Constitution than naked invidious discrimination . . . [W]e again encounter the affront of invidious discrimination—this time layered under the guise of a President’s claim of unfettered . . . authority to control immigration . . .”).

<sup>181</sup> See *id.* at 575–76, 594.

<sup>182</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

information has travelled in the past—media such as newspapers, television, or radio, where there is an opportunity for at least a screening of the views to be aired, and for a reflective choice to be made in giving something airtime.<sup>183</sup> On top of the innate immediacy of instant access to a speaker’s words, social media reaches citizens wherever they are, whatever they are doing,<sup>184</sup> giving speech greater potential to incite.<sup>185</sup> On one level, this observation is simply a numbers game: if the speech can reach everyone and there is anyone who needs no more than the words to be incited to action, the harm will occur. This reality conflicts with the intuitive concept of imminence as a present tense, interpersonal dynamic. A barrage of messages from the President to the people, if not checked or carefully thought through,<sup>186</sup> creates a unique danger: if there is no opportunity to temper or clarify those words, or to stem their almost-instantaneous spread, that speech, imbued with the weight of executive authority, could lead to action far more quickly and easily than the words of another speaker, or of a President of the past. With any inflammatory remarks<sup>187</sup> poised to light a fire because of the presidential role,<sup>188</sup> the reach of media platforms like Twitter—and the Internet generally—make any potential harm a more immediate concern. If, anywhere in the darkest corners of the internet, people need only to be galvanized by a destructive call to action, then words that seem to carry the endorsement of a person in authority may create the sense that

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<sup>183</sup> See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 733 (1971) (“[A] responsible press may choose never to publish the more sensitive materials.”); see also Jennifer Grygiel, *Twitter Needs to Monitor Trump’s Tweets: A Modest Proposal to Prevent an Accidental Nuclear War*, SLATE (Aug. 1, 2017, 7:15 AM), [http://www.slate.com/articles/technology/future\\_tense/2017/08/a\\_modest\\_proposal\\_to\\_moderate\\_trump\\_s\\_tweets.html](http://www.slate.com/articles/technology/future_tense/2017/08/a_modest_proposal_to_moderate_trump_s_tweets.html) (suggesting that Twitter could monitor and police tweets released by the President to prevent potentially dangerous consequences of statements made in error or without due consideration for their effects).

<sup>184</sup> See Yoram Ebrahimi, *The Effects of Social Media on Thinking and Behavior*, THE ODYSSEY (Aug. 24, 2015), <https://www.theodysseyonline.com/the-effects-social-media-thinking-and-behavior>.

<sup>185</sup> See *Brandenburg*, 395 U.S. at 447; see also Liam Stack, *Brooklyn Man Arrested, Accused of Supporting Islamic State*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/nyregion/brooklyn-man-arrested-isis.html> (describing how a Brooklyn man, charged with trying to provide material support to terrorists, worked to engage with ISIS and ISIL over social media and hoped “to stage an attack in Times Square similar to the one that killed 86 people in Nice, France”).

<sup>186</sup> “Trump overwhelms the [news] media with boatloads of what was once a rare commodity: access. He creates impressions faster than journalists can check them. By the time they turn up the facts, the news cycle has moved on to his next missive.” Hess, *supra* note 141.

<sup>187</sup> Tina Nguyen, *Trump’s Violent Campaign Rallies Come Back To Haunt Him*, VANITY FAIR (May 2, 2017, 5:41 PM), <https://www.vanityfair.com/news/2017/05/donald-trump-campaign-rally-lawsuits-incitement>.

<sup>188</sup> See discussion *supra* Sections III.D–E.

their views have momentum—and their actions have permission.<sup>189</sup> Even if the innate incendiary power of executive speech itself does not cross the line into being dangerous enough to regulate more stringently under the First Amendment, the addition of social media may push it over the edge—the equivalent of giving a powerful speaker a sound truck that broadcasts worldwide, at all hours, and reaches everyone.<sup>190</sup>

“[The] Court’s First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct[, and] the government may not prohibit speech because it increases the chance an unlawful act will be committed at some indefinite future time . . . Without a significantly stronger, more direct connection, the Government may not prohibit speech . . . .”<sup>191</sup> The necessity of this link poses problems for analyzing online speech under the First Amendment. Over the Internet, there may be a time lag or a huge leap of distance between the inciter and the person they incite, making the required connection seem weaker or harder to prove. However, given the realities of digital communication, perhaps temporal and physical proximity should no longer be regarded as the only ways that a cause can be connected to its effect with sufficient “imminence.”<sup>192</sup> The argument that speech diffused over the Internet, its potential impact is unknown, cannot have a clear enough causal link to hold the speaker accountable for the actions of the listener does not hold water as well for the executive, who has more influence than an ordinary, unknown user.

That said, it is important not to conflate the question of immediacy of harm<sup>193</sup> with the fact that social media has simply made the risk of harm more uncertain. Because social media communications ostensibly reach anyone with an Internet connection, it makes the ability to predict potential harm perhaps millions of times more difficult. Instead of a speaker standing on

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<sup>189</sup> See, e.g., Manchester, *supra* note 100 (discussing David Duke’s comments surrounding the Charlottesville rally, in which he stated that Donald Trump’s election “represents a turning point” and that the KKK “are determined to take our country back, we’re going to fulfill the promises of Donald Trump.”).

<sup>190</sup> The medium through which speech is delivered—not just the speech itself—can be the basis for the restriction of First Amendment rights. See *Kovacs v. Cooper*, 336 U.S. 77 (1949) (holding that otherwise permissible speech was not protected by the First Amendment when it was broadcast from a sound truck using sound amplifying devices that created a loud and disruptive noise as it travelled down city streets).

<sup>191</sup> See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (holding that, under the First Amendment, virtual child pornography could not be restricted solely on the ground that it would encourage illegal conduct on the part of those who consume it because the connection between the two is too remote).

<sup>192</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>193</sup> *Id.*

a street corner,<sup>194</sup> or circulating leaflets to passersby,<sup>195</sup> where the imminence of lawless action can be felt in the air or read in the faces of the crowd, the immediacy of harm may not be so easy to see coming in the age of social media. For any one of the people listening, the speech could be the catalyst to action. The Internet audience is a darkened theatre house, where the size and location of the crowd is unknown, and it is harder to know whether they will react, or how violently, until they do.

It would be a drastic step to redefine imminence to include not only what is actually and obviously impending, but to encompass anything that is feared because its likelihood is an unknown variable. However, social media may push society toward this more cautious model over time out of necessity, precisely because of the risks attached to that uncertainty, which become more obscure as the Internet becomes more expansive. As more of our lives are conducted in the digital world,<sup>196</sup> the law will have to stretch its definition of culpability into that arena rather than letting actions that take place online be insulated because they seem, arguably, abstracted from their results in the physical world.

*E. Power & the Potential for Violence: Reassessing the Likelihood of Harm*

This crucial question of where to draw the lines of free speech online may need to come to the forefront more quickly with respect to the President. When it comes to executive speech, the argument for preemptive restriction and greater caution is more compelling. The President's ability to influence or incite is more apparent, and, consequently, the potential harm more likely if he or she invites violence.<sup>197</sup> The presidency is a position of trust—on the premise that we the people bestow on one individual the ability to make choices for us and speak for us as a country.<sup>198</sup> We are more likely to follow people we trust, more

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<sup>194</sup> See *Feiner v. New York*, 340 U.S. 315 (1951).

<sup>195</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>196</sup> As the use of Internet technology has become more accessible, more portable, and more pervasive, it has become a bigger part of how Americans conduct their daily lives; it is being used for a fast-increasing and diverse range of tasks—from sending work emails and depositing checks to hailing cabs and seeking romantic partners. See Lee Rainie & John B. Horrigan, *Getting Serious Online: As Americans Gain Experience, They Pursue More Serious Activities*, PEW RESEARCH CTR. (Mar. 3, 2002), <http://www.pewinternet.org/2002/03/03/getting-serious-online-as-americans-gain-experience-they-pursue-more-serious-activities/>; Lee Rainie & Andrew Perrin, *10 Fact About Smartphones as the iPhone Turns 10*, PEW RESEARCH CTR. (June 28, 2017), <http://www.pewresearch.org/fact-tank/2017/06/28/10-facts-about-smartphones/>.

<sup>197</sup> See, e.g., discussion *supra* Section III.D.

<sup>198</sup> See THE FEDERALIST NO. 68 (Alexander Hamilton) (“[T]he sense of the people should operate in the choice of the person to whom so important a trust [i]s to be confided.”).

likely to listen to them, and more likely to act based on their example.<sup>199</sup> The extent to which social media is woven into society compounds executive speech's greater potential to incite imminent lawless action. Unlike the defendants in *Brandenburg*, whose views were broadcast on a limited network of Ohio news platforms,<sup>200</sup> speakers on social media today can have an audience of millions in a matter of minutes, and their words stay plastered on the wall of a Twitter message board, giving readers plenty of time to join the mob of supporters. The *Brandenburg* decision may have been partly rooted in the Court's sensibility that a dozen men in a field in rural Ohio had little potential to impel others to action<sup>201</sup>—not forgetting that the speech in *Brandenburg* included a direct invitation to a KKK march on Washington, D.C., “four hundred thousand strong.”<sup>202</sup> However, social media places us in a different age. Social media entails an intrinsically greater reach—if *Brandenburg* had been speaking today on Twitter, that march<sup>203</sup> might have actually occurred. While a chorus of Twitter likes, even thousands of them, seems harmless in the digital world, it would be a mistake to think that those expressions are far away from the edge where they spill over into real-world actions—especially since they already have.

On August 12, 2017, every First Amendment professor's most sobering hypothetical went marching through the streets of Charlottesville, Virginia.<sup>204</sup> The heavily armed white nationalist, KKK, neo-Nazi protest that cost the life of a counter-protester<sup>205</sup> would not have happened without the organizational forces of the Internet and social media to actualize a call for action that summoned people from all corners of the Internet, from all parts

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<sup>199</sup> Jojanneke van der Toorn et al., *More Than Fair: Outcome Dependence, System Justification, and the Perceived Legitimacy of Authority Figures*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 127, 137 (2011) (demonstrating how perceived legitimacy of an authority figure—defined as trust and confidence in authority—can not only be a product of dependence on that authority, but can also lead to a stronger feeling of obligation to defer to that person and their requests).

<sup>200</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969).

<sup>201</sup> See discussion *supra* Section III.E; *Brandenburg*, 395 U.S. at 447–48.

<sup>202</sup> *Brandenburg*, 395 U.S. at 446.

<sup>203</sup> See, e.g., *supra* note 111 and accompanying text; *infra* note 206 and accompanying text.

<sup>204</sup> See *supra* note 111 and accompanying text; *infra* note 206 and accompanying text.

<sup>205</sup> See *supra* note 111 and accompanying text; *infra* note 206 and accompanying text.

of the country.<sup>206</sup> Today, a small, isolated group of speakers<sup>207</sup> can reach and organize a vast number of people with ease, and far more readily prompt them to engage in far more lawless actions than gathering in protest.<sup>208</sup> Giving that same reach to someone with the arsenal of the presidency behind their words tips the scales precipitously if they were to espouse the same kind of ideas. Coupling the reality of social media communication with the credence often given to presidential speech, there is a greater risk that a President's comments reviling certain racial or ethnic groups,<sup>209</sup> certain sexual orientations,<sup>210</sup> or simply political opponents<sup>211</sup> could incite, or even be seen to compel, violent or lawless action by his listeners. Or, to use the unintentionally ominous Twitter terminology, his "followers."<sup>212</sup>

The conversation between the President and the country is a unique dynamic. Since the advent of the Internet, the law has mostly confronted a small smattering of frightening stories, where lone individuals inspired or instructed by what they saw

<sup>206</sup> The "Unite The Right" rally that became the Charlottesville riot was orchestrated by various "alt-right" websites and their affiliated clubs, with some attendees having traveled hundreds, and even thousands, of miles to Charlottesville, Virginia. See Maura Judkis, *Charlottesville White Nationalist Demonstrator Loses Job at Libertarian Hot Dog Shop*, WASH. POST (Aug. 14, 2017), [https://www.washingtonpost.com/news/food/wp/2017/08/14/charlottesville-white-nationalist-demonstrator-fired-from-libertarian-hot-dog-shop/?utm\\_term=.35976a54f7b7](https://www.washingtonpost.com/news/food/wp/2017/08/14/charlottesville-white-nationalist-demonstrator-fired-from-libertarian-hot-dog-shop/?utm_term=.35976a54f7b7) (describing how a man from Berkeley, California was fired for his participation in the white nationalist rally in Charlottesville).

<sup>207</sup> See, e.g., *Brandenburg*, 395 U.S. at 445.

<sup>208</sup> In light of the fact that the Charlottesville rally was brought about and facilitated through online groups, Judkis *supra* note 206, this would not be the time to forget the horrible, racially-motivated murders and lynchings that the KKK—in attendance at Charlottesville—organized in the past, for which they gained their notoriety, see *KU KLUX KLAN: AMERICA'S FIRST TERRORISTS EXPOSED* 210 (Patrick O'Donnell ed., 2006).

<sup>209</sup> See Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 24, 2015, 7:14 PM), <https://twitter.com/realdonaldtrump/status/635998754546548737> ("Jeb Bush is crazy, who cares that he speaks Mexican, this is America, English!!"[sic]); Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 24, 2016, 7:38 AM), <https://twitter.com/realdonaldtrump/status/713012045214531584> ("It is amazing how often I am right, only to be criticized by the media. Illegal immigration, take the oil, build the wall, Muslims, NATO!"); see also Jay A. Pearson, *Trump is a Textbook Racist*, L.A. TIMES (Oct. 4, 2017, 3:00 AM) <http://www.latimes.com/opinion/op-ed/la-oe-pearson-trumps-textbook-racism-20171004-story.html> (describing how Trump's "insensitive, disrespectful and mean-spirited statements and actions" fit within the metric of various scholarly categories of racism); James Griffiths & Laura Smith-Spark, *'Shame on Trump!' World Reacts to Trump's 'Shithole Countries' Remarks*, CNN (Jan 12, 2018, 3:05 PM), <https://www.cnn.com/2018/01/12/politics/trump-shithole-countries-reaction-intl/index.html>.

<sup>210</sup> See *supra* notes 162–66 and accompanying text (discussing the treatment of transgender military personnel).

<sup>211</sup> Aaron Rupar, *How Donald Trump Insulted His Way to the Top of the GOP*, THINKPROGRESS (May 4, 2016, 6:14 PM), <https://thinkprogress.org/how-donald-trump-insulted-his-way-to-the-top-of-the-gop-b5ab95b676ec/>.

<sup>212</sup> See *Following FAQs*, TWITTER, <https://support.twitter.com/articles/14019> (last visited May 5, 2018).

online have committed violent crimes.<sup>213</sup> In those instances, the connection to the original speaker seemed too oblique, and the actions of the listener too disassociated from the speaker's intention to justify ascribing liability for the result.<sup>214</sup> However, the President of the United States is a uniquely powerful and highly visible speaker. Running the full voltage of presidential influence through Twitter is about as likely as one could imagine to transmute Internet speech into real world action. Donald Trump has the ear of the nation, and his speech over Twitter is intended to foster agreement with his ideas and sentiments.<sup>215</sup> There is an innately greater risk that people—be they foreign leaders,<sup>216</sup> U.S. military officials,<sup>217</sup> or everyday citizens<sup>218</sup>—will act based on his words as an authority figure.<sup>219</sup> As such, presidential speech carries a greater risk of incitement, and social media facilitates that potential for harm by extending the reach of that speech to a greater number of people.

It is true that social media is increasingly becoming a normal part of political campaigns and has been added to the regular repertoire of means by which politicians speak to their constituents.<sup>220</sup> That trend will surely continue, and a Twitter

<sup>213</sup> See, e.g., Martha Smitley, *School Shooters: The Progression from Social Rejection to Mass Murder*, in *GUN VIOLENCE IN AMERICAN SOCIETY: CRIME, JUSTICE AND PUBLIC POLICY* 71 (Lisa A. Eargle & Ashraf Esmail eds., 2016) (“Loners and hate group members use [the Internet] for bomb making instructions and information on the acquisition of guns.”); Nicky Woolf, *Slender Man: The Shadowy Online Figure Blamed in Grisly Wisconsin Stabbing*, *THE GUARDIAN* (June 4, 2014, 4:41 PM), [https://www.theguardian.com/world/2014/jun/04/slender-man-online-character-wisconsin-stabbings](https://www.theguardian.com/world/2014/jun/04/slender-man-online-character-wisconsin-stabbings;); Will Worley, *YouTube Removing ‘Bump Stock’ Videos that Show How to Make Guns Fire Faster after Las Vegas Shooting*, *INDEP.* (Oct. 8, 2017, 8:55 PM), <http://www.independent.co.uk/news/world/americas/youtube-removing-bump-stock-videos-guns-automatic-las-vegas-shooting-stephen-paddock-a7988646.html>.

<sup>214</sup> See discussion *supra* Section IV.D.

<sup>215</sup> The New York Times quoted Trump as saying that “his millions of followers on various social media sites had given him ‘such power’ that it helped him win the election,” and noted his assertion that as President he would “still use such tactics to galvanize his supporters, just as he did during his bid for the White House.” Julie Hirshfield Davis, *Donald Trump Appears to Soften Stance on Immigration, but Not on Abortion*, *N.Y. TIMES* (Nov. 13, 2016), <https://www.nytimes.com/2016/11/14/us/politics/donald-trump-twitter-white-house.html>. During the interview Trump also “boasted that since his election, he had built up his social media following by tens of thousands of people.” *Id.*

<sup>216</sup> See, e.g., *supra* notes 4, 6, 20 and accompanying text (discussing the reactions of North Korean leadership to seemingly threatening tweets from President Trump).

<sup>217</sup> See, e.g., *supra* notes 163–64 and accompanying text (discussing the reactions of military officials to the “transgender ban”).

<sup>218</sup> See, e.g., Manchester, *supra* note 100 and accompanying (discussing the reactions and actions of David Duke and other white supremacists following Donald Trump’s campaign and election); Willingham, *infra* note 225 and accompanying text (discussing same).

<sup>219</sup> People are generally more likely to obey the instructions of an authority figure. See generally STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974).

<sup>220</sup> See *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017); see also Kravets, *supra*, note 127.

account or Facebook page will probably be a regular part of future presidents' official presence going forward. Because social media will likely play a role in presidential speech in the future, the Court should be wary of preventing it from naturally filling that space. There is value in a President's ability to reach as wide an audience as possible, including people who do not have televisions or cannot be home in time for the broadcast of a presidential address, and social media provides that accessibility. There is also value in the President keeping up with technology and engaging with people where they usually congregate to speak these days: online.<sup>221</sup> However, with "Twitter town halls" replacing "some typical presidential press interactions," perhaps there is a risk that "Twitter provides the veneer of populist connection without the hassle of accountability" and the President "can easily make himself available to anonymous fans instead of the scrutiny of the press."<sup>222</sup> While use of social media by the executive may have unique democratic benefits, its misuse also poses unique dangers. Leaving room for the President to utilize social media as a means of speaking to the people is not mutually exclusive with drawing lines that circumscribe the possible dangers native to his or her speech when amplified through that medium.

## V. CONCLUSION

It may be that we are heading toward an era in which Executive Orders issued over Twitter are par for the course. But it is important for First Amendment jurisprudence to adjust for the ways in which social media is different from what it has encountered before, and for the ways in which executive speech through that medium may be treading on very thin ice. Trump's actions have thrown into sharp relief the possible dangers of executive speech conducted through social media. Twitter may seem like a communication utopia for democratic discussion,<sup>223</sup> and, in fact, Twitter is ostensibly grounded in such principles.<sup>224</sup> That level of freedom, however, is not appropriate for the President, whose most careless words have power—to change, trigger, influence, incite. Presidential statements condoning violence carry a greater likelihood of causing violence. For

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<sup>221</sup> See *Reno v. ACLU*, 521 U.S. 844, 870 (1997); see also *Social Media Fact Sheet*, PEW RESEARCH CTR. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/social-media/>.

<sup>222</sup> Hess, *supra* note 141.

<sup>223</sup> *Id.*

<sup>224</sup> *Twitter for Good*, TWITTER, [https://about.twitter.com/en\\_us/values/twitter-for-good.html](https://about.twitter.com/en_us/values/twitter-for-good.html) ("We believe the open exchange of information can have a positive impact on the world.").

example, even Trump's failure to speak strongly against racism and hate speech bolstered groups in the "alt-right."<sup>225</sup> The stakes of presidential speech are too high for it to be treated casually, even over Twitter.

Although Donald Trump's presidency has provided some dramatic illustrations, it is the attributes of the executive office itself that make executive speech innately more dangerous. It should, therefore, be subject—at least potentially—to heightened First Amendment restrictions. If a President is inattentive to the native risks and responsibilities of his or her position, the law should draw the outer boundaries of executive freedom of speech at a point where the harm the speech has the power to create can be prevented, even if that means stopping short of the liberties accorded to an ordinary citizen. That line should be drawn cautiously, but will inevitably encroach further into the President's sphere of personal liberty than an average person, whose speech has neither the same reach nor gravity.

The added dimension of social media should also alter how the requirements of *Brandenburg* are assessed for presidential speech. First Amendment jurisprudence may naturally evolve in a more restrictive direction in reaction to the burgeoning of internet communication, following the trellis along which technology is growing, and surely the President's speech would be included in any such changes. However, the impact of social media on presidential speech deserves special—and perhaps swifter—attention. Wholesale destruction of the *Brandenburg* principles<sup>226</sup> may not be called for, but the dynamics of modern communication make it clear that "immediacy" and "likelihood" do not mean what they meant in 1969.<sup>227</sup> New media carry communication faster and further than before, and the distance from words in the palm of one's hand to a clenched fist may be shorter than it seems. Previously, one might interact in person with a speaker with whom they disagreed, or spend weeks composing a letter to the editor of their local newspaper to respond. Now, people can fire back a comment almost instantaneously, with no built-in time for reflection. Further, with each individual moving within a personalized sphere of

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<sup>225</sup> Because Trump's response to the Charlottesville riot did not "rebuke white nationalism by name[,] Nazi, alt-right and white supremacist groups . . . were emboldened by the condemnation, which they saw as a defense, or even as a tacit approval." A.J. Willingham, *Trump Made Two Statements on Charlottesville. Here's How White Nationalists Heard Them* CNN (Aug. 15, 2017, 7:16 AM), <http://www.cnn.com/2017/08/14/politics/charlottesville-nazi-trump-statement-trnd/index.html>.

<sup>226</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>227</sup> See Kobil, *supra* note 110.

information,<sup>228</sup> people may be less likely to constructively engage ideas with which they do not agree. The terrain of executive speech through social media, likewise, is more treacherous in the digital age. When it comes to assessing the danger of a potential speaker's words, the executive role and its social media mode of transmission both counsel for a more restrictive speech standard.

Preserving a true, indiscriminate marketplace of ideas by protecting the right of free speech to the greatest possible extent—regardless of its content, repugnance, or cruelty—is a noble goal, and standing on principle is certainly a proud legal tradition. However, the purpose behind flooding the marketplace with speech is distorted by social media.<sup>229</sup> It re-routes speech exclusively into the channels where people want to hear it: where it already fits their ideals,<sup>230</sup> or perhaps justifies actions they already wanted to take. In this way, the social media age is not in sync with the thought processes and intentions that guided past free speech decisions. The Internet throws open great horizons of possibility for sharing ideas and for global communication that seem to align with the hope of constructive discussion.<sup>231</sup> However, while the law is busy trying to fit social media within historical concepts of speech regulation, it is not acknowledging that some of the variables have changed.<sup>232</sup> Great risks are taken and sacrifices made in the name of democracy, especially in the realm of free speech. It mirrors one of the classic compromises—and difficult choices—made by the judicial

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<sup>228</sup> “Social media . . . encapsulates users in *filter bubbles* . . . which are the result of the careful curation of social media feeds that enable users to be surrounded by like-minded people and information that is congruent with their existing beliefs.” Nicole A. Cooke, *Posttruth, Truthiness, and Alternative Facts: Information Behavior and Critical Information Consumption for a New Age*, 87 LIBR. Q. 221, 215 (July 2017) (discussing the roles of Internet communication and confirmation bias in creating “a posttruth era”).

<sup>229</sup> Maeve Duggan & Aaron Smith, *The Political Environment on Social Media*, PEW RESEARCH CTR. (Oct. 25, 2016), <http://www.pewinternet.org/2016/10/25/political-engagement-and-social-media/> (analyzing how the nature of political discourse on social media may be more negative and less constructive).

<sup>230</sup> Alexander Stille, *Adding Up the Costs of Cyberdemocracy*, N.Y. TIMES (June 2, 2001), <https://www.nytimes.com/2001/06/02/arts/adding-up-the-costs-of-cyberdemocracy.html> (“[P]olarization is just one of the negative political effects of the Internet, which allows people to filter out unwanted information, tailor their own news and congregate at specialized Web sites that closely reflect their own views.”).

<sup>231</sup> *Id.* (“In its first years, the Internet was seen euphorically as one of history’s greatest engines of democracy, a kind of national town hall meeting in which everyone got to speak.”).

<sup>232</sup> Legal decisions operate by analogy, but while the Court wrestles with such questions as what type of forum the Internet should be considered and whether true threats can travel over Facebook, it is perhaps missing an elemental disjuncture between the existing laws and the emerging problems those laws are struggling to address. See Lidsky, *supra* note 36, at 155 (“Existing First Amendment doctrine are not well tailored to address the harms of incendiary social media speech . . . and perhaps they should not be.”).

system: waiting for bodies to pile up on the courthouse steps before we reassess whether we properly gauged the risks of our chosen philosophy.

While Donald Trump's presidency is bringing to light manifold potential dangers of uninhibited presidential speech, it raises broader questions that do not apply only to him, and will not go away in the future. His words have taken us to the treacherous outer reaches of free speech where, perhaps, we should already have been reconsidering whether baseline First Amendment boundaries really fit the modern executive. If the President is the representative of the people, the embodiment of how we think and act, then the judiciary is our conscience. The separation of powers between the President and the Court<sup>233</sup> emphasizes respect for the challenges of executive office, deference to the President as speaker for the people, and trust that he or she will "faithfully execute"<sup>234</sup> the duties of office. One key part of our trust as a nation, however, stays with the Supreme Court: the reliance on its function as a check on the President, and the belief that it will speak if the President crosses the line and leverages the power of his or her speech in a way that creates violence, or does violence to our principles. To be true to the principles of the Constitution and of the First Amendment, it is necessary to adapt to the times, but it is also necessary to keep in mind the balance within the government—and the dialogue between the government and the people—that we are trying to preserve in the face of a new and changing world.

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<sup>233</sup> 16A AM. JUR. 2D, *Constitutional Law* § 272.

<sup>234</sup> U.S. CONST. art. II § 1.