

#TrumpTweets – Redefining Presidential Twitter A talk with Kate Shaw

I. The Rhetorical Presidency and Use of New Media

- A. Over the last century, there has been a shift in presidential rhetoric, from instructional to persuasion and mobilization. The modern rhetorical presidency began with Presidents Teddy Roosevelt and Woodrow Wilson. Instead of written statements, direct addresses to the public became more common.
- B. Trump is not the first president to use a new medium to reach the public. FDR was one of the earliest examples of a president effectively using a new medium to communicate to the people. FDR's radio fireside chats allowed him to reach the American people directly in their homes to explain policy without using journalists as conduits. In his first fireside chat, he addressed the 4-day bank holiday imposed in March of 1933 and the need for the closures to prevent a bank run and maintain trust in the banking system.
- C. JFK is often cited as the first television president. After the first televised presidential debate in 1960, while Nixon won over radio listeners, JFK was declared the winner among television audiences. JFK was also the first president to allow live coverage of news conferences. His frequent televised addresses allowed the American public to connect with him at an unprecedented level.

II. Tweets As Evidence of Intent

- A. What impact should Trump's tweets have in court?
 - 1. The courts have not come to a consensus on the extent to which tweets are legally operative. The Supreme Court has yet to opine on this issue.
 - 2. Travel ban
 - a. In June 2017, Trump issued the first of several orders seeking to bar individuals from certain majority Muslims from entering the U.S. Executive Order 13769 temporarily suspended entry of individuals from 7 countries, temporarily suspended admission of all refugees, indefinitely suspended admission of Syrian refugees, and prioritized admission of persecuted members of certain religious minorities.
 - b. Several lawsuits were filed across the country. Washington state challenged the order, seeking declaratory and injunctive relief and filed a TRO motion.
 - c. A Washington District Court entered a TRO, subsequently upheld by the 9th Circuit based on due process. The Court noted that the claims relied heavily on statements that Trump made during his campaign and on Twitter that indicated his intent to implement a Muslim ban and that

- such evidence could properly be considered for Equal Protect and Establishment Clauses claims.
- d. The government sought hearing en banc, which was denied. Judge Alex Kozinski dissented to the denial of hearing, that politicians often make contradictory or inflammatory statements on the campaign trail with the sole purpose of getting elected and should not to be used as evidence of intent for acts once elected.
- B. The Trump administration withdrew the order and has since issued subsequent orders seeking to achieve the same purpose.

III. Legal Ramifications of Twitter Use

- A. Personal handle vs POTUS handle and “official statements”
 1. President Trump uses both @POTUS and @realDonaldTrump Twitter handles and seemingly makes no official/non-official use distinction between the two. Trump tweets from his @realDonaldTrump handle more frequently.
 2. The White House confirmed that Trump’s tweets from @realDonaldTrump are “official statements.”
- B. Deleting tweets and Presidential Records Act
 1. Presidential Records Act (PRA) of 1987
 - a. The PRA defines the public ownership of presidential and vice presidential records.
 - b. §2201(2) defines “Presidential records as “documentary materials... created or received by the President... in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.”¹
 - c. §2201(3) defines “personal records” as “documentary materials... of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.”
 - d. Among other things, it requires the president and his staff to take practical steps to delineate personal and presidential records.
 - e. Presidential records are not subject to the Freedom of Information Act during the president’s term.
 2. Generally, each administration determines specific protocols to follow to remain in compliance of the PRA. Under the Obama administration, tweets and other social media posts were archived under the PRA.

¹ 44 U.S.C. § 2201: <https://www.law.cornell.edu/uscode/text/44/2201>

² 9 C.F.R. § 2635.702 – Use of public office for private gain:
<https://www.law.cornell.edu/cfr/text/5/2635.702>

3. Previously, the National Archives and Records Administration had advised the White House to preserve and/or archive tweets that are posted in the course of his official duties. The White House had affirmed that it was doing so.
- C. Promoting personal businesses
1. In February 2017, Trump lambasted Nordstrom for dropping Ivanka Trump products, tweeting that she had been “treated so unfairly” by the retailer. Post-tweet, Nordstrom’s shares dipped for a few minutes before recovering. The @POTUS account retweeted the comment. The first tweet is not likely an ethical violation if Donald Trump was speaking as a private citizen acting in his personal capacity. The @POTUS retweet may more likely be an ethical violation if the @POTUS is considered an official government channel.
 2. While federal government officials are not precluded from making communications in their personal capacity, they may not use their office to endorse a product, service, or enterprise, and cannot give the appearance that the government sanctions or endorses private party activities.²
- D. Blocking users based on viewpoint: Knight First Amendment Institute v. Trump³
1. President Trump has blocked certain Twitter users from his @realDonaldTrump account.
 2. The Knight First Amendment Institute filed suit in June 2017 in the Southern District Court of New York claiming that Trump violated the First Amendment rights of seven people when he blocked them from his @realDonaldTrump account for criticizing him or his policies. The Institute argues that Trump’s twitter feed is a public forum from which individuals cannot be excluded based on viewpoint. Blocking certain individuals also deprives others’ rights to an open forum.
 3. The White House conceded in court filings in September that the president blocks certain users for criticizing the president or his policies. They argue that the @realDonaldTrump account is his personal account and not a government account or that his Twitter is not a public forum.⁴

² 9 C.F.R. § 2635.702 – Use of public office for private gain:
<https://www.law.cornell.edu/cfr/text/5/2635.702>

³ Read the complain here: <https://www.documentcloud.org/documents/3892615-Knight-First-Amendment-Institute-vs-Trump>

⁴ Follow the latest on the case here: <https://knightcolumbia.org/content/knight-institute-v-trump-lawsuit-challenging-president-trumps-blocking-critics-twitter>