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CONSPIRACY THEORIES AND THE U.S. PRESIDENT'S EXERCISE OF FREE SPEECH ON SOCIAL MEDIA: CONSTITUTIONAL ISSUES AND CHALLENGES

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I. INTRODUCTION

Freedom of expression is the pinnacle of a rich, vibrant, and dynamic democracy, and the exercise of this freedom is fundamental in the debates that animate societies. Freedom is an essential tool for democratic exercise that can be weakened or subject to controversy in the communication of politics, an essential vector that links representatives and citizens. “Free speech leads to a ‘marketplace of ideas’ in which the truth prevails, and falsehoods are widely rejected.”¹ The concept of the marketplace of ideas has far more than a century of ardently influenced First Amendment doctrine and the conceptualization of public debate. Yet the recent proliferation of conspiracy theories refutes the premise that “reason always wins out in the public square of liberal democracy.”² It also endangers the democratic order and its pillar, the Constitution. Since his election, Donald Trump has substantially modified the implicit and tacit rules that govern rhetorical exercises and political communication, especially through his increased use of conspiracy theories on Twitter with its climax on allegations of fraudulent elections. This practice of communicative rhetoric raises different issues and concerns correlating to the First Amendment. It, therefore, seems essential to question the conspiracy discourse as a speech act that is performed by political actors with political objectives. Hannah Arendt, in her classic work on totalitarianism in the early 1950s, asserted that the ideal subject of fascist ideology was the person “for whom the distinction between fact and fiction (*i.e.*, the reality of experience) and the distinction between true and false (*i.e.*, the standards of thought) no longer exist.”³ The stake is far more than information.

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¹ Mohamed Ali, *What Defenders and Critics Get Wrong About the 'Marketplace of Ideas'*, QUILLETTE (June 24, 2019), <https://quillette.com/2019/06/24/what-defenders-and-critics-get-wrong-about-the-marketplace-of-ideas/>.

² *Id.*

³ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 474 (1973).

Some moral barriers had already cracked in recent months, and by doing so, have collapsed the constitutional and democratic order. Indeed, with the President's use of this new medium, the constitutional contours of the freedom of expression of the government's speech, through the prism of social networks, are questioned. This article will first deal with the issue of conspiracy theory correlated to political speech and its constitutional limits. Then it will analyze the idea of internet platforms trying to police political speech raising the issue of GAFAs⁴, specifically Twitter, as new courtrooms.

II. CONSPIRACY THEORY, POLITICAL SPEECH, AND ITS CONSTITUTIONAL LIMITS

Nowadays, conspiracy theories are abundant and protean in political discourse. They take many forms and shapes, and even though the label might differ, their impact and effects are what hold them in common: (1) a biased intentional political narrative, (2) whose ethical limits differ from its legal frame crafted by the First Amendment doctrine.

A. A Biased Interpretation and Use of Truth

It is first essential to clarify some key terms. Conspiracy theories “are attempts to explain an event or set of circumstances as the result of a secret plot by usually powerful conspirators,”⁵ and also a “theory asserting that a secret of great importance is being kept from the public”⁶ with powerful actors being at the origin of significant social and political situations due to their secret plots.⁷ From a legal perspective, a conspiracy is “an agreement between two or more people to commit an illegal act, along with an intention to achieve the agreement's goal.”⁸

In practice, lies have become more democratic and do not spare the parties or the media. But recently, the phenomenon has grown to settle comfortably on the political scene as a communication strategy and a political discourse around the world and, in particular, in the United

⁴ An acronym for Big Tech, comprising the four biggest tech companies, Google, Amazon, Facebook, and Amazon.

⁵ *Conspiracy Theory*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/conspiracy%20theory> (last updated Sept. 25, 2021).

⁶ *Id.*

⁷ See DAVID AARONOVITCH, *VOODOO HISTORIES: THE ROLE OF THE CONSPIRACY THEORY IN SHAPING MODERN HISTORY* (1st ed. 2010); JOVAN BYFORD, *CONSPIRACY THEORIES: A CRITICAL INTRODUCTION* (2011); *CONSPIRACY THEORIES THE PHILOSOPHICAL DEBATE* (David Coady ed., 1st ed. 2006).

⁸ *Conspiracy*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/conspiracy> (last visited Oct. 2, 2021).

States. Yet, lying as a political tool is not recent, as writer and satirist Jonathan Swift, best known as the author of *Gulliver's Travels*, pointed out in his 1710 essay *The Art of Political Lying*.⁹ Indeed, the pamphlet which is all the more relevant in contemporary society explored the common occurrence of falsehoods in the political realm, and posed as early as the eighteenth century the following problematic question which has crossed the ages and is highly topical: should we deceive the people for their own good? These different common practices that operate at all levels of the political spectrum with varying degrees of frequency have been concomitant with a decline in the confidence that voters show in institutions.

Indeed, in 1958, the National Election Study started for the first time, asking about trust in government; back then, nearly three-quarters of Americans trusted the federal government to do the right thing almost always or most of the time.¹⁰ A new Pew Research Center survey, which was conducted April 5-11, 2021 revealed a totally different picture.¹¹ Public trust in government remains low in comparison with previous decades.¹² Now, only about one-quarter of Americans say they can trust the government in Washington to do what is right “just about always” (2%) or “most of the time” (22%).¹³ According to Kent Grayson, associate professor of marketing at the Kellogg School and faculty coordinator of The Trust Project at Northwestern University,¹⁴ whenever any two people talk about trust, they may think they are talking about the same thing when they actually are not.¹⁵

Trust can be broken down into three components: competence, honesty, and benevolence.¹⁶ This complicates the perception of politics whose role and image are ambiguous. The use of lies dates back at least to Machiavelli and, in particular, to chapter eighteen of *The Prince*, which highlights the political value of lying.¹⁷ The political lie can be

⁹ JONATHAN SWIFT, *THE ART OF POLITICAL LYING* (1710).

¹⁰ *Public Trust in Government: 1958-2021*, PEW RESEARCH CTR. (May 17, 2021), <https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021/>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ An initiative designed to advance the study and management of trust in business and society. See *The Trust Project at Northwestern University*, <https://www.kellogg.northwestern.edu/trust-project/about.aspx>.

¹⁵ Drew Calvert, *Cultivating Trust Is Critical—and Surprisingly Complex*, KELLOGG INSIGHT (Mar. 7, 2016), <https://insight.kellogg.northwestern.edu/article/cultivating-trust-is-critical-and-surprisingly-complex>.

¹⁶ *Id.*

¹⁷ NICCOLÒ MACHIAVELLI, *THE PRINCE* (1532).

beneficial for the people in an approach of cohesion of the general interest transcending individual interest; a corollary approach of the conception of society. It can also correspond to a structural element of the exercise of power or of a method for achieving power, or moral pragmatism. The subject of Machiavellianism, in fact, is in a relationship of strangeness to the objective institution of the State and to the universal, he wants and thinks his “*stato*,” and not the state.¹⁸ In politics, a society that is transparent to itself, but also perhaps first of all to the power that is exercised there, is not devoid of negative characteristics and even the breeding ground for oppressive and coercive systems.

It is reported that the first fake news in history might be the branding of Pharaoh Ramses (1303–1213 BCE) as a mighty general.¹⁹ Such news could not be easily verified before the popularization of information technologies, yet the phenomenon continues.

In contemporary societies, the means of access to information and the sources of information have multiplied due to substantial technological advances. This element correlates to the length of time devoted to screening practices in all their diversity, which seemed to legitimately facilitate access to knowledge. However, allowing a global and better-informed population of individuals access to knowledge inherently permits part of the population to seize an abundance of varied sources and knowledge.

It turns out that the ideas and “facts” disseminated on certain platforms and by certain people are very distant from the truth. This new era is paradoxical and problematic because facts matter less than personal beliefs, leading to a disintegration of truth and fact. For some, the notion of feelings is more accurate than facts, believing something because it feels right. Former President Trump is the leading exponent of “post-truth” politics and an ardent promoter of conspiracy theories, which began with his allegations that President Obama was not born in the United States and was thus disqualified from being President.²⁰

¹⁸Jocelyn de Sinéty, *Machiavelli and Machiavellianism: The Spirit of Right*, THESIS.FR (Sept. 11, 2018), <http://www.theses.fr/2018PA100088>.

¹⁹Mike Addelman, *New Evidence Shows Might of Pharaoh Ramses Is Fake News*, PHYS.ORG (Jan. 29, 2018), <https://phys.org/news/2018-01-evidence-pharaoh-ramses-fake-news.html>.

²⁰Adam Serwer, *Birtherism of a Nation*, ATLANTIC (May 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/birtherism-and-trump/610978/>.

In four years, President Trump made 30,573 false or misleading claims.²¹ This makes Donald Trump definitely somewhat unique among politicians. Other political leaders will drop a false claim after it has been deemed false. But Trump continued to repeat the same claim over and over as a communication strategy.

“Post-truth” was named 2016 Word of the Year by the Oxford Dictionaries.²² According to the Oxford Dictionary, “post-truth” in 2016 became “a mainstay of political commentary.” Its usage increased by 2,000% compared to the previous year,²³ in an international political context marked by the Brexit referendum in the United Kingdom in June, and by the election of Donald Trump in the United States in November of the same year.²⁴ “Post-truth is an adjective defined as 'relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.'”²⁵ Critical communication approaches locate its historical legacy in the earliest forms of political persuasion and questions of ethics and epistemology, such as those raised by Plato in the *Gorgias*.²⁶ While there are timeless similarities, post-truth is a twenty-first-century phenomenon.²⁷

Ralph Keyes notes, “[a]t one time we had truth and lies. Now we have truth, lies, and statements that may not be true but we consider too benign to call false.”²⁸ Euphemisms abound. We are “economical with the truth,” we “sweeten it,” or tell “the truth improved.”²⁹ The term “deceive” gives way to spin. At worst, we admit to “misspeaking,” or “exercising poor judgment.”³⁰ Nor do we want to accuse others of lying. We say they're in denial. A liar is “ethically challenged,” someone for

²¹ Glenn Kessler et al., *In Four Years, President Trump Made 30,573 False or Misleading Claims*, WASH. POST, https://www.washingtonpost.com/graphic-s/politics/trump-claims-database/?itid=lk_inline_manual_11 (last updated Jan. 20, 2021).

²² *Word of the Year 2016*, OXFORD UNIV. PRESS, <https://languages.oup.com/word-of-the-year/2016/> (last visited Oct. 7, 2021).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Jayson Harsin, *Post-Truth and Critical Communication Studies*, OXFORD RES. ENCYC. (Dec. 20, 2018), <https://oxfordre.com/communication/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-757>.

²⁷ *Id.*

²⁸ Ralph Keyes, Book Summary, *The Post-Truth Era: Dishonesty and Deception in Contemporary Life*, <https://ralphkeyes.com/book/the-post-truth-era/>.

²⁹ RALPH KEYES, *THE POST-TRUTH ERA: DISHONESTY AND DECEPTION IN CONTEMPORARY LIFE*, 14-17 (2004).

³⁰ *Id.*

whom “the truth is temporarily unavailable.”³¹ This is post-truth. In the post-truth era, borders blur between truth and lies, honesty and dishonesty, fiction and nonfiction.³² Deceiving others becomes a challenge, a game, and ultimately a habit.³³

A debate between Immanuel Kant and Benjamin Constant—Kant, in favor of an unconditional, absolute duty of truthfulness, allowing no exceptions, not even for the sake of “humanity,” Constant, pleading for a “right to lie” which becomes an element of freedom of conscience,³⁴—symbolized the conflict between the deontological leading principle of the Doctrine of Right and the utilitarian leading principle of individual freedom. The unconditional duty of truthfulness was incompatible with political society.³⁵

Post-truth did not start with the 2016 election; Lee McIntyre provocatively argues that the right-wing borrowed from postmodernism—specifically, the idea that there is no such thing as objective truth—in its attacks on science and facts.³⁶ The absence of objectivity, therefore post-truth, was one pillar postmodernism. The publication in 1979 of Jean-Francois Lyotard's essay entitled *The Postmodern Condition: A Report On Knowledge* founded the postmodern movement, especially among academics, defining postmodernism as “incredulity towards metanarratives.”³⁷ This approach led to a deconstruction of the concept of objectivity. Indeed, Herman and Chomsky analyzed the ways mass communication media manufactures public consent and manipulates public opinion through a propaganda system backed by both economic and political interests by deploying editorial filters aimed to silence or distort discourses, voices, or stories.³⁸

The emergence of new media has not transcended the factual, but rather, perpetuated a distorted system in which the traditional media is now positioned as the legitimate guarantor of a certain objectivity by virtue of the ethics that regulate the profession, making it a lot more trustworthy than social media. One of the major tools for the propagation

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See Immanuel Kant, *On A Supposed Right to Tell Lies from Benevolent Motives* (1797).

³⁵ Jacob Weinrib, *The Juridical Significance of Kant's 'Supposed Right to Lie'*, 13 *KANTIAN REV.* 141 (2008).

³⁶ LEE MCINTYRE, *POST-TRUTH* (2018).

³⁷ JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., University of Minnesota, 1984) (1979).

³⁸ EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* (1988).

of conspiracy theories and disinformation is embodied by social networks and, in particular, Twitter because, unlike traditional media, social media is for both amateurs and professionals, and that might be the main issue.

As Rousseau noted, “lying for one's own benefit is a sham, lying for the benefit of others is fraud, lying to harm is slander; this is the worst kind of lie. Lying without profit or prejudice to oneself or to others is not to lie: it is not a lie, it is fiction.”³⁹ Indeed, this underlines the importance of the enunciative act in itself, which is often defined by its linguistic dimension, and in particular the propensity which accompanies it to know how to generate new “realities,” such as fiction.⁴⁰

Post-truth is deployed by the advent of alternative facts in presidential speech. Indeed, these new realities took on an institutional dimension in 2017 with the emergence of a new term emanating from the American presidency, “alternative facts,” the genesis of the term following the inauguration of Donald Trump as the 45th President of the United States, which took place in Washington, D.C. on January 20th, 2017.⁴¹ As in the past, there was a crowd of supporters, this time many of them wearing “Make America Great Again” caps.⁴² They were gathered to watch the inaugural ceremonies, which were held on the West Front of the Capitol Building.⁴³ A controversy appeared between the traditional media and the White House in terms of the number of spectators present at the ceremonies.⁴⁴ The Trump Administration spent its first full day in office taking shots at the media and arguing about crowd sizes because traditional media presented the event as having drawn fewer supporters than Barack Obama's inauguration in January 2009.⁴⁵ On January 21, 2017, Press Secretary Sean Spicer asserted that reporters had engaged in “deliberately false reporting.”⁴⁶ For him, “this was the largest audience to ever witness an inauguration—period—both in person and around the globe.”⁴⁷ A vision that was also shared by

³⁹ JEAN-JACQUES ROUSSEAU, *REVERIES OF A SOLITARY WALKER*. (Russel Goulbourne trans., Oxford University Press 2011) (1992).

⁴⁰ Noudelmann, François (2015): *The Genius of the Lie*. Paris (Max Milo).

⁴¹ Jim Rutenberg, ‘*Alternative Facts*’ and the Costs of Trump-Branded Reality, N.Y. TIMES (Jan. 22, 2017), <https://www.nytimes.com/2017/01/22/business/media/alternative-facts-trump-brand.html>.

⁴² Jessica Taylor, *Trump Administration Goes to War With The Media Over Inauguration Crowd Size*, NPR (Jan. 21, 2017, 7:18 PM), <https://www.npr.org/2017/01/21/510994742/trump-administration-goes-to-war-with-the-media-over-inauguration-crowd-size? t = 1630166223905>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

President Trump who declared, "I looked out, the field was . . . it looked like a million, million and a half people."⁴⁸

Then, Kellyanne Conway, Trump's key senior advisor who was previously in charge of candidate Trump's communication, was confronted on NBC's *Meet the Press* with testimonies from the public which contradicted Spicer's statement.⁴⁹ She defended her colleague's statement explaining that he had conveyed "alternative facts" to respond to the "wrong things" broadcast by the media.⁵⁰

Conspiracy theories generally tend to have a bottom-up approach which differentiates them from the top-down post-truth or alternative facts political methods. These expand communication vertically between leaders and voters with a close horizontal perspective. Following the interview, social media exploded with the new term "#AlternativeFacts."⁵¹ On January 23, 2017, Spicer used the same position by saying at a press conference: "Sometimes we [The White House] can disagree with the facts."⁵² The era of alternative facts has thus unfolded, with its advent and terminology correlated with Donald Trump as President. The President's speech is, above all, political speech that needs to be circumscribed.

B. Political Speech and Its Constitutional Contours

The exercise of free speech is a fundamental civil liberty, but it may often appear very opaque. As U.S. Supreme Court Justice Thurgood Marshall stated, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."⁵³ But what about for the government to have no restriction in its own speech, and above all, that

⁴⁸ Glen Kessler, *Spicer Earns Four Pinocchios for False Claims on Inauguration Crowd Size*, WASH. POST (Jan. 22, 2017), <https://www.washingtonpost.com/news/fact-checker/wp/2017/01/22/spicer-earns-four-pinocchios-for-a-series-of-false-claims-on-inauguration-crowd-size/>.

⁴⁹ Hal Boedeker, *'Meet the Press' Explores 'Alternative Facts'; Ivanka Trump on 'Face the Nation'*, ORLANDO SENTINEL (Dec. 27, 2019), <https://www.orlandosentinel.com/entertainment/tv-guy/os-et-meet-the-press-alternative-facts-ivanka-trump-face-the-nation-20191227-acy3u2amu5flvhtx473qdwhnye-story.html>.

⁵⁰ *Id.*

⁵¹ Reena Flores, *Kellyanne Conway Draws Fire After "Alternative Facts" Defense*, CBS NEWS (Jan. 22, 2017), <https://www.cbsnews.com/news/kellyanne-conway-draws-fire-after-alternative-facts-defense/>.

⁵² David Smith, *Sean Spicer Defends Inauguration Claim: 'Sometimes We Can Disagree with Facts'*, GUARDIAN (Jan. 23, 2017, 5:44 PM), <https://www.theguardian.com/us-news/2017/jan/23/sean-spicer-white-house-press-briefing-inauguration-alternative-facts>.

⁵³ *Police Dept. Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

of the head of the government, the President? Most politicians are constrained by politeness and what policies are considered acceptable by the electorate. The President's free speech is constrained by the realities of politics, and presidents have long viewed their function as speaking to the values of the nation. Nowadays, the use of social networks is a core element in political communication and has changed the nature of interaction and opened a new debate. In the case *Garcetti v. Ceballos*, the Supreme Court held that when public employees speak in their official public capacities, the First Amendment does not protect them from being disciplined for their speech.⁵⁴

In *Brandenburg v. Ohio*, the Supreme Court introduced a two-element test which has been applied ever since, to evaluate the legal limits of speech. The first element is that speech can be prohibited if it is "directed to inciting or producing imminent lawless action" and second, if it is "likely to incite or produce such action."⁵⁵ This test has been reaffirmed several times,⁵⁶ creating a precedent on which the web giants have rested for over a decade.

The Supreme Court has long considered political and ideological speech to be at the core of the First Amendment, including speech concerning "politics, nationalism, religion, or other matters of opinion."⁵⁷ Political speech can take other forms beyond the written or spoken word, such as money⁵⁸ or symbolic acts.⁵⁹ Legally speaking, political discourse is the most protected. Indeed, for some scholars, political speech should be the only speech protected by the First Amendment. In this regard, Robert Bork ardently supports the position that "the notion that all valuable types of speech must be protected by the First Amendment confuses the constitutionality of laws with their wisdom. Freedom on non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives."⁶⁰ As the Criminal Court of New York held in *The People of the State Of New York v. Malcolm Harris*, "the Constitution gives you the right to post, but as numerous people have learned, there

⁵⁴ *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006).

⁵⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁵⁶ See *Hess v. Indiana*, 414 U.S. 105 (1973); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

⁵⁷ *W. Va. State Bd. Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁵⁸ See *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

⁵⁹ See *Texas v. Johnson*, 491 U.S. 397 (1989).

⁶⁰ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28 (1971).

are still consequences for your public posts. What you give to the public belongs to the public. What you keep to yourself belongs only to you.”⁶¹

The consequences of Donald Trump's account need to be discussed, approaching the issue of governmental speech in respect to the blocking of some accounts by @realDonaldTrump, and questioning the constitutionality of such a practice. As far as the liability for the comments posted on Twitter, it is the user's and not Twitter's liability. Indeed, under Section 230 of the Communications Decency Act (CDA) enacted in 1996, social media benefits from immunity in this regard.⁶² The ruling of *Reno v. American Civil Liberties Union* clarified the system.⁶³ Following this ruling, the framework for internet operators was designed. It was not until 2017 that the U.S. Supreme Court focused on the First Amendment and social media in *Packingham v. North Carolina*.⁶⁴ Even though the ruling focuses on North Carolina's legislative restriction of social media and its interference with the First Amendment, there is no question that *Packingham* revisits the jurisprudence interpreting *Brandenburg v. Ohio*.⁶⁵

III. PRESIDENT TRUMP'S TWEETS: FROM BLOCKING TO SUSPENSION

The President has a special status in the American administration. In *Garcetti v. Ceballos*, the Supreme Court held that “when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁶⁶ Therefore, they speak not on their personal behalf, but in their capacity. The issue of the divide between public and private is particularly difficult when it comes to the presidency. It is even more complex when applied to the use of social media, such as Twitter, being a new forum for political discourse.

A. The President's Exercise of Twitter

First, it is necessary to analyze the genesis of Donald Trump's use of Twitter while President. During his tenure in the White House, former U.S. President Barack Obama only used the official account @POTUS to send messages. His personal account, @BarackObama,

⁶¹ *People v. Harris*, 36 Misc.3d 868, 878 (2012).

⁶² 47 U.S.C. § 230 (1996).

⁶³ *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

⁶⁴ *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017).

⁶⁵ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁶⁶ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

which had been launched in 2007, was maintained by his nonprofit, Organizing for Action, during his eight years as President.⁶⁷ Obama reclaimed his personal account after leaving office. The @POTUS Twitter account was then passed to the new President, Donald Trump, in January 2017, along with former President Obama's fourteen million followers, a number which quickly increased after Inauguration Day to reach thirty-three million by the end of his term in 2021.⁶⁸

Therefore, the current situation is novel with this blurred line between personal and official speech as far as the American President is concerned. "What FDR was to radio and JFK to television, Trump is to Twitter."⁶⁹ President Donald Trump was very active on Twitter for many years even prior to his election as President. Indeed, before being elected, Donald Trump reassured some of the Republican Party members who were concerned about his habit of tweeting and the confusion that it might lead to in the future. "I'll give it up after I'm president," Trump said of Twitter during a speech in Rhode Island on April 22, 2016, "we won't tweet anymore."⁷⁰ Yet, from the Inauguration Day until January 8, 2021, the President continued tweeting. With his official personal account @realDonaldTrump, the President had over eighty million followers.⁷¹ In addition, the U.S. President used two accounts, @POTUS and @realDonaldTrump, the former retweeting the latter's tweets.⁷² Trump tweeted 2,461 times in the first year following his electoral victory

⁶⁷ *President Obama Gets His Own Twitter Account*, BBC NEWS (May 19, 2015), <https://www.bbc.com/news/technology-32780520>.

⁶⁸ Katie Canales, *Biden Just Inherited the @POTUS Twitter Handle - But He Didn't Get its More Than 33 Million Followers*, BUS. INSIDER FRANCE (Jan. 20, 2021, 11:06 AM), <https://www.businessinsider.fr/us/biden-wont-inherit-trumps-twitter-followers-2020-12>.

⁶⁹ Neal Gabler, *Donald Trump, the Emperor of Social Media*, MOYERS & Co. (Apr. 29, 2016), <http://billmoyers.com/story/donald-trump-the-emperor-of-social-media/>.

⁷⁰ Nick Gass, *Trump Says He Won't Tweet as President*, POLITICO (Apr. 25, 2016, 2:22 PM), <https://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/04/trump-no-tweeting-president-222408>.

⁷¹ Tommy Beer, *Trump Suddenly Loses 220,000 Twitter Followers—First Big Drop in 5 Years*, FORBES (Dec. 5, 2020, 12:10 PM), <https://www.forbes.com/sites/tommybeer/2020/12/05/trump-suddenly-loses-220000-twitter-followers-first-big-drop-in-5-years/?sh=2c8a68537f2c>.

⁷² Jake Lahut, *The White House Won't Explain Why the Official Presidential Twitter Account Doesn't Retweet Trump's Most Controversial Tweets*, BUS. INSIDER (May 28, 2020), <https://www.businessinsider.com/potus-vs-realdonaldtrump-account-white-house-wont-explain-retweeting-policy-2020-5>.

(including retweets and deleted tweets).⁷³ That adds up to, on average, about six to seven tweets per day. It is worth bearing in mind that “that is still less than half the number of tweets compared to the previous year. From November 8, 2015, to November 8, 2016, he tweeted 4,994 times, an average of about 13–14 tweets a day.”⁷⁴ His tweets set the tone in all the other forms of media and provided national conversation on a daily basis. President Trump “tweeted or retweeted approximately 3,500 times in 2018, 7,700 times in 2019 and on over more than 12,000 occasions in 2020.”⁷⁵ “Trump tweeted 5.7 times per day on average during his first half year in the White House and that had grown to 34.8 times a day on average during the second half of 2020.”⁷⁶

According to Donald Trump, social media has enabled him to convey his message directly to the public without needing support from other traditional media, which he often depicts as reporting “fake news.” He referred to it on June 6, 2017, explaining to his 45.2 million followers: “The FAKE MSM is working so hard trying to get me not to use Social Media.”⁷⁷ Referring to the mainstream media, he stated: “They hate that I can get the honest and unfiltered message out.”⁷⁸ Even though the message is conveyed by social media, a survey conducted in December 2017 among 1,500 U.S. adults reveals that the majority of respondents, 59%, considered Donald Trump's Twitter use as inappropriate.⁷⁹ In the latest Economist / YouGov poll, public opinion does not consider that the tweets represent government policy, indeed, only 16% of respondents thought so.⁸⁰

Like other social networks, Twitter promotes compulsive, simple, emotional patterns of use. Yet, Donald Trump's use of Twitter is not ordinary or anecdotal. His position meant that his tweets commanded the authority related to his status as President. Therefore, they were going

⁷³ Jessica Estepa, *Trump Has Tweeted 2,461 Times Since the Election. Here's a Breakdown of His Twitter Use*, USA TODAY (Nov. 8, 2017, 12:26 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/>.

⁷⁴ *Id.*

⁷⁵ *End Of the Road for Trump's Twitter Account*, STATISTA (Jan. 11, 2021), <https://www.statista.com/chart/19561/total-number-of-tweets-from-donald-trump/>

⁷⁶ *Id.*

⁷⁷ Tweet from June 6, 2017, TRUMP TWITTER ARCHIVE (last visited Dec. 9, 2021), <https://www.thetrumparchive.com>.

⁷⁸ *Id.*

⁷⁹ *Economist Toplines December 25 2017*, ECONOMIST/YOU GOV (Dec. 27, 2017), <https://docs.cdn.yougov.com/h1j6p8y4qx/econToplines.pdf>.

⁸⁰ *Economist Toplines January 22 2018*, ECONOMIST/YOU GOV (Jan. 24, 2018), <https://docs.cdn.yougov.com/sqnlgzhr9l/econTabReport.pdf>

to be noticed and commented upon. They had an immediate effect on other users' accounts by being retweeted, but also, they were being discussed in other forms of media, and that is where the blurred lines between private and public discourse appeared. These tweets were published in newspapers, on news sites, discussed during television news or other programs, and read on the radio.

The elucidation between private speech and governmental speech was directly made by the U.S. President on July 1, 2017, when Donald Trump clarified the situation when criticized that his use of social media was inappropriate. He replied on his personal account, thus making it the official presidential account: "My use of social media is not Presidential - it's MODERN DAY PRESIDENTIAL. Make America Great Again."⁸¹ The U.S. National Archives had already followed an identical path, because in a letter dated back to March 30, 2017, they reported a request to the White House to preserve the tweets generated by the President of the United States.⁸² There was a positive response to their request from the White House, somewhat laconic, regarding the tools deployed and the deleted tweets, but this approach and the response proves the lack of ambiguity around the presidential use of Donald Trump's initially personal Twitter account. It thus falls within the context of governmental activity and the prerogatives and constraints relating thereto. Indeed, the Presidential Records Act, passed in 1978, obviously does not refer to social media but mandates the preservation of all presidential records. Presidential correspondence was interpreted by the previous administration as including tweets.⁸³ The Act was amended by the Presidential and Federal Records Act Amendments of 2014, and now requires the President not to use an unofficial account unless he has copied or transferred his electronic activities to the official account.⁸⁴ Deleted tweets are supposed to be automatically preserved, and this was the case for the Obama administration.⁸⁵ Nevertheless, although the law explicitly refers to sanctions against official employees if they do not comply with its application, no sanction is indicated against the President of the United States and the courts, and the Archives have no jurisdiction

⁸¹ Donald Trump (@realDonaldTrump), TWITTER (July 1, 2017).

⁸² Letter from David Ferriero, Archivist of the U.S. Nat'l Archives, to Senators McCaskill and Carper (Mar. 30, 2017), <https://www.archives.gov/files/press/press-releases/aotus-to-sens-mccaskill-carper.pdf>.

⁸³ See Rachel Treisman, *As President Trump Tweets and Deletes, The Historical Record Takes Shape*, NPR (Oct. 25, 2019, 9:17 AM), <https://www.npr.org/2019/10/25/772325133/as-president-trump-tweets-and-deletes-the-historical-record-takes-shape>.

⁸⁴ 44 U.S.C. § 2209 (2014).

⁸⁵ Treisman, *supra* note 82.

on this subject. There remains significant legal uncertainty regarding the use of social media.

White House Press Secretary Sean Spicer, on July 6, 2017, reiterated that President Donald Trump's tweets were indeed official statements. "The President is the President of the United States, so they're considered official statements by the President of the United States," Spicer said, when asked during his daily briefing how they should be characterized.⁸⁶ The Press Secretary did not indicate whether that included both of the President's Twitter accounts, @realDonaldTrump and @POTUS. But considering that a few days prior to his statement, the President used his personal account to point it out, there is no longer doubt about the use of @realDonaldTrump Twitter account. Moreover, from a legal perspective, several courts have used the President's tweets (@realDonaldTrump) as official statements about his policy, in other words, as government statements. Indeed, while refusing President Donald Trump's executive order that would block travel from several Muslim-majority countries on the basis that it was unconstitutional, two sets of federal appellate judges in Hawaii and Maryland referred to some messages that President Trump posted on Twitter. The Criminal Court of New York observed in *The People of the State Of New York v. Malcolm Harris*⁸⁷ that "the Constitution gives you the right to post, but as numerous people have learned, there are still consequences for your public posts. What you give to the public belongs to the public. What you keep to yourself belongs only to you."⁸⁸ The consequences of Donald Trump's account need to be discussed, including the issue of governmental speech with respect to blocking some accounts by @realDonaldTrump and questioning the constitutionality of such a practice. The Supreme Court has also characterized the ability to criticize the government and its officers as "the central meaning of the First Amendment."⁸⁹

B. Twitter in Chief: Blocking and Suspension

The exchanges between government and people are the pillars on which a democratic system rests. They are corollary to the system of representation and popular sovereignty. This is the very essence of Rousseau's social contract in that freedom of speech "is a deduction from

⁸⁶ Elizabeth Landers, *White House: Trump's Tweets are 'Official Statements'*, CNN (June 6, 2017, 4:37 PM), <https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html>.

⁸⁷ *People v. Harris*, 36 Misc. 3d 868, 949 N.Y.S.2d 590 (Crim. Ct. 2012).

⁸⁸ *Id.*

⁸⁹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

the basic American agreement that public issues shall be decided by universal suffrage.”⁹⁰ The issue of blocking exchanges between the President of the United States and some citizens is beyond the use of social media and is more correlated to the exercise of the First Amendment by the U.S. Government.

According to Professor Vincent Blasi, freedom of speech serves as an essential “checking value” on government.⁹¹ It checks the abuse of power by public officials and, through speech, voters retain “a veto power to be employed when the decisions of officials pass certain bounds.”⁹²

If someone is blocked from exercising his expression in relation to political discussion, it prevents all the mechanics of the political debate from starting. Indeed, “self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”⁹³ Twitter now represents a new platform of political discourse.

The case *Rosenberger v. Rector and Visitors of Univ. of Va.*, reaffirmed that “viewpoint discrimination” equals “content discrimination,” which is absolutely unconstitutional.⁹⁴ The Supreme Court held that the government could not interfere in the regulation of discourse.⁹⁵ The government must abstain from regulating speech when the specific motivating ideology, the opinion, or perspective of the speaker is the rationale for the restriction.⁹⁶ Thus, there must be evidence that the blocking of Twitter exchanges by the President of the United States is an ideological disagreement and that discrimination on this point has taken place. The jurisprudence of the Supreme Court has demonstrated the total unconstitutionality of such practices. Therefore, the government may not regulate speech based on its substantive content or the message it conveys.⁹⁷ Discrimination against speech because of its message is presumed to be unconstitutional.⁹⁸

Yet, when the government is considered the origin of the message as the speaker, it has the right to “speak for itself,” as ruled in

⁹⁰ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

⁹¹ Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 A.B.A. FOUND. RES. J.521 (1977).

⁹² *Id.*

⁹³ Alexander Meiklejohn, *The First Amendment is an Absolute*, SUP. CT. REV. 245 (1961).

⁹⁴ *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

⁹⁵ *Id.*

⁹⁶ *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983).

⁹⁷ *Police Dep't. Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

⁹⁸ *Turner Broad. Sys., Inc. v. FCC*, 52 U.S. 622, 641–43 (1994).

Board of Regents of Univ. of Wisconsin System v. Southworth.⁹⁹ When the communication is governmental speech, the recital of principles previously stated diverge and the principle is that the government can speak for itself,¹⁰⁰ and it is “entitled to say what it wishes.”¹⁰¹ A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.¹⁰²

On July 11, 2017, the Knight Institute filed a lawsuit in federal court against President Trump for having blocked seven individuals from the @realDonaldTrump Twitter account based on their previous critical posts.¹⁰³ When blocked, users can no longer see or reply to the President's tweets and can no longer send private messages. However, to characterize this as discrimination poses certain problems in the sense that if the U.S. President maintains exchanges among his followers with political opinions divergent from his own, the postulate of point of view discrimination would be challenged, but it remains that government regulation may not favor one speaker over another.¹⁰⁴ Blocking Twitter exchanges can be related to the topic or views on a topic. In the latter situation, the Supreme Court stated in *R.A.V. v. St Paul*¹⁰⁵ that “when the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”¹⁰⁶

U.S. District Judge Naomi Reice Buchwald ruled on May 23, 2018, that comments on the President's account were public forums and that this practice of blocking was a violation of the plaintiffs' constitutional rights, thus ordering Trump or a subordinate to stop the practice.¹⁰⁷ U.S. District Judge Naomi Reice Buchwald wrote in the 75-page opinion, “this case requires us to consider whether a public official may, consistent with the First Amendment, 'block' a person from his Twitter account in response to the political views that person has expressed, and whether the analysis differs because that public official is

⁹⁹ Bd. Regents Univ. Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000).

¹⁰⁰ *Id.*

¹⁰¹ Rosenberger v. Rector Visitors Univ. Va., 515 U.S. 819, 833 (1995).

¹⁰² Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

¹⁰³ Knight First Amend. Inst. At Columbia v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018).

¹⁰⁴ Members City Council Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

¹⁰⁵ R.A.V. v. City St. Paul, 505 U.S. 377 (1992).

¹⁰⁶ *Id.* at 391.

¹⁰⁷ Knight, *supra* note 102.

the president of the United States, . . . the answer to both questions is ‘no’”.¹⁰⁸

On July 31, 2020, the Knight Institute filed a second lawsuit¹⁰⁹ in federal court against President Trump and his staff for continuing to block critics from the @realDonaldTrump Twitter account.¹¹⁰ The case was dismissed on April 16, 2021.¹¹¹ The U.S. Court of Appeals for the Second Circuit affirmed the district court's holding that President Trump's practice of blocking critics from his Twitter account violates the First Amendment.¹¹² Recently, the Supreme Court vacated the decision of the Court of Appeals.¹¹³ It decided the case was moot “because of the change in Presidential administration, the Court correctly vacates the Second Circuit's decision.”¹¹⁴

The notion of public space and private space is the key to determining the constitutionality of the practices of the President of the United States through the use of his Twitter account. The blocking of some users seems inconsistent with the First Amendment when the criteria of government discourse and discrimination against a point of view is proven. The last fundamental element as far as constitutional law is concerned is the characterization of social media. For Twitter, there is no filter; the notion of community classifies it as a public space since there is no prerequisite to access the information, unlike with some other social media. Access to a Twitter account is not dependent on owning an account yourself, as well as from the public domain one can see into the unfenced garden. Twitter is, therefore, a public space. Because of its public character, the remarks made are similar to those made in an official ceremony and not a private meeting that would gather only supporters and people sharing a common ideology. Nevertheless, the management of the account and the interaction with the user is not mandatory since the basic element, the prerequisite in this situation, is the opening of an account.

On May 26, 2020, Twitter signaled President Trump's tweets with a fact-check label for the first time in response to two Trump tweets

¹⁰⁸ *Id.*

¹⁰⁹ Knight First Amendment Inst. Colum. Univ. v. Trump, No. 1:20-cv-05958 (S.D.N.Y.).

¹¹⁰ Knight Inst. v. Trump, KNIGHTCOLUMBIA.ORG, <https://knightcolumbia.org/cases/knight-institute-v-trump-2>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Biden v. Knight First Amend. Inst. Colum. Univ., 141 S. Ct. 1220 (2021) (Thomas, J., concurring).

¹¹⁴ *Id.*

over 24 hours.¹¹⁵ In an election year, Trump's tweets claimed that mail-in ballots were fraudulent. The first one stated, “there is NO WAY (ZERO!) That Mail-In Ballots will be anything less than substantially fraudulent. Mailboxes will be robbed; ballots will be forged & even illegally printed out & fraudulently signed. The Governor of California is sending Ballots to millions of people, anyone . . .”¹¹⁶ It was followed by another tweet from Donald Trump saying that “living in the state, no matter who they are or how they got there, will get one. That will be followed up with professionals telling all of these people, many of whom have never even thought of voting before, how, and for whom, to vote. This will be a Rigged Election. No way!”¹¹⁷

A few days later on May 29, the social network restricted access to a tweet from the President suggesting live ammunition could be fired at protesters in Minneapolis, hiding the tweet behind a warning sign.¹¹⁸ The tweet was flagged as glorifying violence, which violated the rules for using Twitter, which blocked replying to or liking the tweet.¹¹⁹

¹¹⁵ Brian Fung, *Twitter Labeled Trump Tweets with a Fact Check for the First Time*, CNN (May 27, 2020 4:39 AM), <https://www.cnn.com/2020/05/26/tech/twitter-trump-fact-check/index.html>.

¹¹⁶ Donald Trump (@realDonaldTrump), TWITTER, (May 26, 2020) https://twitter.com/realDonaldTrump/status/1265255835124539392?ref_src=twsrc%5Etfw.

¹¹⁷ Donald Trump (@realDonaldTrump), TWITTER, (May 26, 2020) https://twitter.com/realDonaldTrump/status/1265255845358645254?ref_src=twsrc%5Etfw.

¹¹⁸ Davey Alba, Kate Conger & Raymond Zhong, *Twitter Adds Warnings to Trump and White House Tweets, Fueling Tensions*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/technology/trump-twitter-minneapolis-george-floyd.html> (last updated June 3, 2020).

¹¹⁹ *Id.*

Twitter holds political leaders to different standards, a practice which is known as the “public interest exception” based on the postulate that the “content to be in the public interest if it directly contributes to understanding or discussion of a matter of public concern.”¹²⁰ The criteria for a public interest exception are:

The account has more than 100,000 followers; and, the account represents a current or potential member of a local, state, national, or supra-national governmental or legislative body: current holders of an elected or appointed leadership position in a governmental or legislative body, [or] candidates or nominees for political office, [or] registered political parties.¹²¹

Tweets are not removed once they are considered to have clear public interest value.¹²² Twitter can, however, hide them or give them a warning message.¹²³

However, the social network has been led, over the past year, to change its position due to protests from all sides against Donald Trump's tweets questioning the probity of the American electoral system and opposing vigorously to the results of the presidential elections marked by his defeat, which he attributed to a massive electoral fraud, thus delegitimizing the American democratic institutions.¹²⁴

In the 24 days following the election, Twitter added warning labels to 200 (and counting) of President Trump's tweets or posts he retweeted indicating, that they contained false, disputed, or misleading information.¹²⁵ Few Twitter accounts acted as “super-spreaders” during the election period, as the study conducted by the Election Integrity Partnership revealed that “20 users are the source (original tweet) for approximately 20% of all of the retweets in our dataset. This means that a small number of accounts is responsible for a large portion of the spread of misleading election-related information.”¹²⁶

¹²⁰ *About Public Interest Exceptions on Twitter*, TWITTER HELP CTR., <https://help.twitter.com/en/rules-and-policies/public-interest>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See Permanent Suspension of @realDonaldTrump*, TWITTER INC. BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.

¹²⁵ Todd Spangler, *Twitter Has Flagged 200 of Trump's Posts as 'Disputed' or Misleading Since Election Day. Does It Make a Difference?* VARIETY (Nov. 27, 2020), <https://variety.com/2020/digital/news/twitter-trump-200-disputed-misleading-claims-election-1234841137/>.

¹²⁶ ELECTION INTEGRITY PARTNERSHIP TEAM, *REPEAT OFFENDERS: VOTING MISINFORMATION ON TWITTER IN THE 2020 UNITED STATES ELECTION* (2020), <https://www.eipartnership.net/rapid-response/repeat-offenders>.

Finally, after blocking users and allegations of electoral fraud, President Trump's account was permanently banned by Twitter following the events of January 6, 2021, that is to say, after the storming of the U.S. Capitol in an attempt to block Congress from certifying Joe Biden's victory of the presidential elections.¹²⁷ The platform explained that two tweets were under particular scrutiny as they were posted right after the attacks: "On January 8, 2021, President Donald J. Trump Tweeted: "The 75,000,000 great American Patriots who voted for me, AMERICA FIRST, and MAKE AMERICA GREAT AGAIN, will have a GIANT VOICE long into the future. They will not be disrespected or treated unfairly in any way, shape or form!!!"¹²⁸ Shortly thereafter, the President tweeted: "To all of those who have asked, I will not be going to the Inauguration on January 20th."¹²⁹

Twitter believed that Donald Trump's tweets incited the attacks and his future posts would lead to more violence.¹³⁰ It stated: "After close review of recent Tweets from the @realDonaldTrump account and the context around them - specifically how they are being received and interpreted on and off Twitter - we have permanently suspended the account due to the risk of further incitement of violence."¹³¹ Other accounts were also permanently suspended, as Twitter stated a few days later: "We've been clear that we will take strong enforcement action on behavior that has the potential to lead to offline harm. Given the violent events in Washington, DC, and increased risk of harm, we began permanently suspending thousands of accounts that were primarily dedicated to sharing QAnon content on Friday afternoon."¹³²

Donald Trump encouraged insurrectionists to walk to Capitol Hill, assuring that he would walk with them in order to claim a victory which he continues to claim, against all evidence.¹³³ Declaring the election as stolen, President Trump witnessed these images of chaos from the White House, tweeting twice to ask protesters to be peaceful, but

¹²⁷ *Permanent Suspension*, *supra* note 123.

¹²⁸ *Id.*

¹²⁹ **Error! Hyperlink reference not valid.***Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *An Update Following the Riots in Washington, DC*, TWITTER SAFETY (Jan. 12, 2021), https://blog.twitter.com/en_us/topics/company/2021/protecting-the-conversation-following-the-riots-in-washington--.

¹³³ Steve Holland, Jeff Mason & Jonathan Landay, *Trump Summoned Supporters to "Wild" Protest, and Told Them to Fight. They Did*, REUTERS (Jan. 6, 2021, 10:13 AM), <https://www.reuters.com/article/us-usa-election-protests/trump-summoned-supporters-to-wild-protest-and-told-them-to-fight-they-did-idUSKBN29B24S>.

never ordering them to refrain or withdraw.¹³⁴ President Trump's supporters stormed the Capitol to stop Congress from certifying Biden's presidential election victory.¹³⁵ The insurrection led to the death of five people.¹³⁶

Two different issues remain. The first one is directly correlated to the action which took place against American institutions, a clear and doubtless violation of the American Constitution. The revolt and insurrection against the democratic electoral results fall into the scope of sedition. Seditious conspiracy is generally defined as conduct or language inciting rebellion against the authority of a state,

if two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof . . .¹³⁷

The remarks made by Donald Trump, questioning the probity of the elections and the democratic system, and then encouraging the crowd of insurgents who marched towards the Capitol to stop the democratic process could be interpreted as incitement to sedition, or as treason since the President swears to "execute the Office of President of the United States, and will to the best of [their] Ability, preserve, protect and defend the Constitution of the United States."¹³⁸ Preserving the democratic foundations, including the institutions, the guarantee of the electoral process and its results are part of the President's duties and obligations. Any willful breach of these duties would fall within the framework of a betrayal exercised against the American democratic republic, violating its foundations and exceeding the perimeters of the protections of the First Amendment in matters of freedom of expression and political speech, including presidential speech. Actually, Article 3, Section 3 of the Constitution specifically defines treason as "levying war" against the

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Kelly McLaughlin, *5 People Died in The Capitol Insurrection. Experts Say It Could Have Been So Much Worse.*, BUS. INSIDER (Jan. 23, 2021, 7:43 A M), <https://www.businessinsider.com/capitol-insurrection-could-have-been-deadlier-experts-say-2021-1>.

¹³⁷ 18 U.S.C. § 2384 (1994).

¹³⁸ U.S. CONST., art. II, § 1, cl. 8.

United States or “adhering to their enemies, giving them aid and comfort.”¹³⁹

Thus, when Trump himself acknowledges that he acts as President and not as an individual, his words and actions fall within another legal framework that is conferred solely because of his individual responsibility and liability. When he speaks, his voice is no longer his, but that of the administration he represents. A President has more influence to mobilize crowds than an ordinary individual, and his words have a broader impact. The President indicates under the presidential oath that he protects the Constitution, or the base of the values on which it rests, which is not necessarily respected in use subject to the interpretation of some tweets. However, because of the concise and vague tweets of the President of the United States, it seems very difficult, but yet possible, to characterize them by some elements that do not conform to freedom of expression as the jurisprudence of the First Amendment has crafted. In addition, the Supreme Court has rarely interpreted language as sedition and treason cases are rare.¹⁴⁰ An elected leader has almost never been charged with the crime.¹⁴¹

Much remains to be defined on this issue and the position of the United States Supreme Court on various points, including the comments of politicians on social media, will be necessary. Both the *Pickering*¹⁴² and *Connick*¹⁴³ opinions are clearly concerned with the potentially harmful effects of employee speech on government operation.¹⁴⁴ Using a medium without a filter directly raises questions over the security and confidentiality of the American administration. It opens up a wider question about the use of new technologies and the risks inherent to such practices. In particular, constitutionally and ethically speaking, the two elements are corollary.

IV. CONCLUSION

A forum is “property that the State has opened for expressive activity by part or all of the public.”¹⁴⁵ In *Manhattan Community Access Corp. v. Halleck*, the Court stated that only the equivalent of a state actor

¹³⁹ U.S. CONST., art. III, § 3.

¹⁴⁰ See Jeannie Suk Gersen, *Did Trump and His Supporters Commit Treason?*, NEW YORKER (Jan. 28, 2021), <https://www.newyorker.com/news/our-columnists/did-donald-trump-and-his-supporters-commit-treason>.

¹⁴¹ *Id.*

¹⁴² *Pickering v. Board of Education*, 391 U.S. 563 (1968).

¹⁴³ *Connick v. Myers*, 461 U.S. 138 (1983).

¹⁴⁴ Peter C. McCabe III, *Connick v. Myers: New Restrictions on the Free Speech Rights of Government Employees*, 60 IND. L.J. 339 (1985).

¹⁴⁵ *Int'l Soc'y Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992).

can be considered as operating a public forum and that a private entity which “opens its property for speech by others is not transformed by that fact alone into a state actor.”¹⁴⁶ The Supreme Court applied the state action doctrine, based on the criteria set in *Jackson v. Metropolitan Edison Co.*, defining the status of a state actor being applicable to a private entity when it exercises a function “traditionally exclusively reserved to the State.”¹⁴⁷

The question of the public or private space that arises on the internet and the fact that social media has widened the perimeter of the possibilities of exchanges passing from the physical domain by a physical presence in a given place to a new form of a public place is closely related to the characterization of this new communication forum: public or private? The very fact that this question now arises is due to the democratization of social networks and the internet, and it is a legal issue on which, in the future, well-defined contours will have to be built. Public or private forums do not obey the same rule, but overall, the democratization of the internet and the number of users makes the boundaries between the two spaces very narrow.

Although equality provisions do not apply directly to the business world, in principle, at least ethically speaking, the rules of service are supposed to be applied in the same way to all those who have registered there. There is no question of distinguishing between individuals; legally, this is questionable, ethically, it is hardly acceptable. The government entity exception applied to Donald Trump's account makes him switch his liability from individual to political since the service recognizes that he has an advantageous position exercising his freedom of expression. When he was banned from the service, it was therefore not in an individual capacity, but as President of the United States. As Justice Thomas stated, “Twitter can remove any person from the platform—including the President of the United States—at any time for any or no reason.”¹⁴⁸

The subjective interpretation and importance of the political debate, through the new communication tools offered by social media, are two elements that preserve the freedom of expression of the President through his choice, namely, Twitter. The difficulty of this exercise and the limits of the legality lie in the fact that it is a new forum of discussion.

Moreover, if the same perspective is followed considering that Donald Trump's speech, in his capacity as President, is speech of the

¹⁴⁶ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921 (2019).

¹⁴⁷ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974).

¹⁴⁸ *Biden*, 141 S. Ct. at 1221 (Thomas, C., concurring, quoting the Twitter User Agreement).

executive and that social networks are a public forum (another postulate that should be defined) from this angle in the continuity of the preceding rationale, this central question which arises is the permanent suspension of Donald Trump's account which took place when he was still president, and which continues now. Logically, Twitter benefits to date from all the latitude to act. Nevertheless, the permanent suspension of a politician who, in the jurisprudence of the First Amendment, is supposed to enjoy the broadest amplitude of freedom of expression is confusing. As Justice Thomas pointed out, "the disparity between Twitter's control and Mr. Trump's control is stark, to say the least."¹⁴⁹ "Mr. Trump blocked several people from interacting with his messages. Twitter barred Mr. Trump not only from interacting with a few users, but removed him from the entire platform, thus barring all Twitter users from interacting with his messages."¹⁵⁰

Indeed, sanctions can be applied as *a posteriori* control; when it is a question of a permanent ban, the approach is more an *a priori* control and thus generates a viewpoint of discrimination. In the current context, it is clear that terrorist groups benefit from visibility for their propaganda with their Twitter accounts without being suspended by Twitter, regardless of their past abuses and current atrocities, but that the now-former President of the United States, who has not been convicted for his comment on Twitter is still excluded from any political exchange, is paradoxical, puzzling, and not acceptable. It strongly questions the powers conferred on social networks. Voters and politicians certainly have a responsibility for this new form of communication which has developed to become the essential vector of political discourse. A return to the public space, to local exchanges devoid of private interference seems to be difficult but also nonetheless remains necessary in order to reappropriate the fullness of the exercise of freedom of expression, since, for now, the Supreme Court does not wish to delimit the framework of social networks. The public forum doctrine is the sole topic at issue, and the Supreme Court, until now, has not set its directives. These are some of the legal questions and factual details that have not been yet addressed but would be essential to tackle in the near future.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*