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– NOTE –

"SHEER FORCE OF TWEET:"[1] TESTING THE LIMITS OF EXECUTIVE POWER ON TWITTER

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ABSTRACT

President Donald Trump's affinity for Twitter has raised novel issues of constitutional law, tested the norms for presidential etiquette, and opened up a dialogue about whether tweets are considered the actual directives of the President. This note explores four subject areas that the President has tweeted about: judicial legitimacy, executive orders, removal of appointees, and entering into armed conflicts. Then, these topics will be considered in terms of whether presidential speech on social media should be regulated to protect against the risks of posting on the Internet and to ensure the preservation of the principles of democracy embedded in the Constitution. This note concludes with four legislative policy recommendations for regulating the President's use of Twitter and other social media platforms while balancing government interests and considers related concerns about President Trump's use of Twitter for official presidential matters.

Keywords: Constitutional law, Donald Trump, executive power, internet, Twitter

[1] Paul Waldman, Opinion, *Policy by Tweet: Trump's Transgender Ban Moves Forward*, WASH. POST (Aug. 24, 2017), https://www.washingtonpost.com/blogs/plum-line/wp/2017/08/24/policy-by-tweet-trumps-transgender-ban-moves-forward/?utm_term=.24e2fa6e4349 [https://perma.cc/X6QD-3ZWC].

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INTRODUCTION

Each new presidency has brought with it a new use of the latest technology in American society. President James Monroe was the first president to ride on a steamboat on May 11, 1819.[3] President Martin Van Buren received the first

[3] Paul McNamara, *Technology 'Firsts' that Made a President's Day*, NETWORK WORLD, (Feb. 10, 2010, 5:45 AM PT), https://www.networkworld.com/article/2229802/data-center/technology--firsts--that-made-a-president-s-day.html [https://perma.cc/3U7D-UEBH].

presidential telegraph from Samuel Morse on February 21, 1838.[4] President Bill Clinton was the first to have a White House Web site whereas President George W. Bush was the first to own an iPod.[5] While President Barack Obama was the first to tweet while in office,[6] President Donald Trump has contributed to this list of technological presidential firsts by regularly interacting with the public through his personal Twitter account (@realDonaldTrump) in addition to the official President of the United States account (@POTUS).[7]

President Trump's Twitter account exposes ambiguities in constitutional law because his posts test the power of the executive branch. This note will explore the unresolved issues of law raised by the President's electronically published official statements; examine whether current policies adequately provide guidance for presidents using Twitter to execute official directives; and explore policy reasons for regulating the President's issuance of orders through an informal, internet medium.

After briefly reviewing the nature of Twitter and presidential usage of the social media platform, I will begin examining, tweet-by-tweet, how President Trump has used Twitter to issue official directives and the potential for him to make further declarations through social media. First, I will discuss the effect of the President's tweets on judicial legitimacy and separation of powers. Second, I will examine Trump's announcement of an executive order by tweet concerning an impending transgender ban in the military. Third, I will review President Trump's exercise of removal power on Twitter by firing the Secretary of State. Fourth, I will explore a hypothetical area for exercising executive power on Twitter at which President Trump has hinted, but not yet exercised: entering armed conflicts. Finally, I will examine current policies regulating the President's use of Twitter and consider how to construct legislation to regulate such usage to safeguard against the limitations of Twitter and preserve the Framers' intent for executive power.

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[4] *Id.*
[5] *Id.*
[6] Ed Henry, *Obama's First 'Tweet' Makes Presidential History*, CNN POLITICS: POLITICAL TICKER… (Jan. 18, 2010, 7:56 PM ET), http://politicalticker.blogs.cnn.com/2010/01/18/obamas-first-tweet-makes-presidential-history/ [https://perma.cc/BCV5-T9QX].
[7] President Trump Tweeted 2,593 times during his first year in office. Mythili Sampathkumar, *The Tweets That Have Defined Donald Trump's Presidency*, INDEPENDENT (Jan. 17, 2018, 18:45 GMT), https://www.independent.co.uk/news/world/americas/us-politics/donald-trump-twitter-president-first-year-a8163791.html [https://perma.cc/N5C7-PFBC]; Donald J. Trump (@RealDonaldTrump), TWITTER, https://twitter.com/realDonaldTrump [https://perma.cc/JZA5-V55D] (last visited Jan. 7, 2019); President Trump (@POTUS), TWITTER, https://twitter.com/POTUS [https://perma.cc/EDE5-FYYW] (last visited Jan. 7, 2019).

A. What is Twitter?

Twitter is a social media platform that has described itself as "a real-time information network powered by people all around the world that lets you share and discover what's happening now."[8] Twitter was first launched in July of 2006.[9] The mission of Twitter is to "[g]ive everyone the power to create and share ideas and information instantly, without barriers."[10] A "tweet" is a small burst of information posted by a user on Twitter, originally limited to 140 characters in length.[11] As of November 7, 2017, tweets can be as long as 280 characters in length.[12]

When a person signs up to use Twitter, the person chooses a username of fewer than 15 characters designated as the handle.[13] The handle gives the Twitter user a unique URL for their profile, which is the webpage where the user's tweets are posted.[14] On each profile, there is a link that others can click on to follow a particular user's tweets.[15] At the time of this writing, President Trump tweets under his personal handle of @realDonaldTrump and has over 50 million followers.[16]

If a second user reads a tweet that he or she likes, that user can choose to "like" the message, or share the tweet with others by retweeting.[17] The act of

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[8] *See* Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. Pa. L. Rev. 331, 334 (reporting language from Twitter's former "About" page). Twitter regularly changes the "About" page, and the language has since changed, but remains accurate. *See About*, TWITTER, https://about.twitter.com/ [https://perma.cc/CS5J-ELZB] (last visited Jan. 7, 2019) ("Twitter is what's happening in the world and what people are talking about right now.").
[9] Nathan Olivarez-Giles, *Twitter, Launched Five Years Ago, Delivers 350 Billion Tweets a Day*, L.A. TIMES (July 15, 2011, 5:59 PM), http://latimesblogs.latimes.com/technology/2011/07/twitter-delivers-350-billion-tweets-a-day.html [https://perma.cc/J3SG-XS58].
[10] *Twitter, Our Services, and Corporate Affiliates*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-services-and-corporate-affiliates [https://perma.cc/Y8V8-DPGX] (last visited Jan. 7, 2019).
[11] Bellin, *supra* note 8, at 336, n.15.
[12] Sarah Perez, *Twitter Officially Expands Its Character Count to 280 Starting Today*, TECHCRUNCH (Nov. 7, 2017), https://www.techcrunch.com/2017/11/07/twitter-officially-expands-its-character-count-to-280-starting-today/ [https://perma.cc/7BZE-3D6T].
[13] Leslie Walker, *Twitter Language: Twitter Slang and Key Terms Explained*, LIFEWIRE (Nov. 8, 2017), https://www.lifewire.com/twitter-slang-and-key-terms-explained-2655399 [https://perma.cc/GAV7-F538].
[14] *Id*.
[15] *How to Follow People on Twitter*, TWITTER, https://help.twitter.com/en/using-twitter/how-to-follow-someone-on-twitter (last visited Mar. 2, 2019).
[16] Donald J. Trump (@RealDonaldTrump), TWITTER, https://twitter.com/realDonaldTrump [https://perma.cc/JZA5-V55D] (last visited Jan. 7, 2019).
[17] *How to Like a Tweet or Moment*, TWITTER, https://help.twitter.com/en/using-twitter/liking-tweets-and-moments (last visited Jan. 7, 2019) (directions to 'liking' tweet); *How to Retweet*, TWITTER, https://help.twitter.com/en/using-twitter/how-to-retweet [https://perma.cc/GG4Z-E8EY] (last visited Jan. 7, 2019) (directions to 'retweet' tweet).

retweeting will allow another user's tweet to appear on the second user's profile, further spreading the influence of the initial post.[18]

B. The History of Presidential Tweets

Presidents have only been tweeting for a mere nine years, but the frequency and influence of these posts has increased dramatically during this time. Though Twitter was created in 2006, neither the White House nor the President had an account during George W. Bush's administration.[19] The White House Twitter account, @WhiteHouse, was the precursor to presidents having their own accounts and was started on May 1, 2009.[20] President Obama would occasionally tweet through the White House account, signing his personal tweets with his initials "-bo."[21] President Obama sometimes used the @BarackObama handle, but the account was run by his former campaign team, Organizing for Action.[22] President Obama did not post his own tweets until January of 2010, when he posted a tweet through the American Red Cross's Twitter account, @RedCross, making him the first tweeting president.[23]

At the time, commentators remarked that the president would not likely be doing much tweeting in office, noting restrictions on White House aides' use of social media due to security concerns.[24] CNN Senior White House Correspondent Ed Henry posited that "the commander-in-chief is a little busy to be re-tweeting the latest cat video on YouTube."[25]

The official presidential Twitter, @POTUS, was not created until 2015, with President Obama noting the long interval after the creation of the White House account: "Six years in, they're finally giving me my own account."[26] President Obama used the account to share photographs of his time in office, make remarks about political issues and special occasions, and issue congratulations to

[18] *Id*.
[19] Henry, *supra* note 6.
[20] White House Archived (@ObamaWhiteHouse), TWITTER (May 1, 2009, 11:55 AM), https://twitter.com/ObamaWhiteHouse/status/1670203165 [https://perma.cc/2FP4-JJ6J].
[21] Roberta Rampton, *Obama Gets His Own Account on Twitter: 'It's Barack. Really!'*, REUTERS (May 18, 2015, 12:35 PM), https://www.reuters.com/article/usa-obama-twitter/obama-gets-his-own-account-on-twitter-its-barack-really-idUSL1N0Y915O20150518 [https://perma.cc/2ZRS-FK6R].
[22] *Id*.
[23] Henry, *supra* note 6.
[24] *Id*.
[25] *Id*.
[26] President Obama (@POTUS44), TWITTER (May 18, 2015, 11:38 AM), https://twitter.com/POTUS44/status/600324682190053376 [https://perma.cc/7TB5-4C3A].

outstanding citizens, from NASA scientists to Olympic athletes.[27] He stopped short of issuing official executive orders or directives through social media.

On January 20, 2017, Donald J. Trump took the oath of office and became President of the United States.[28] With this transition of power came the first ever transition of the official presidential Twitter account.[29] Tweets from President Obama's term were archived under a new account, @POTUS44, while the original @POTUS account was transferred to President Trump, a blank slate for the new President's tweets. President Trump also decided to maintain his personal Twitter account during his presidency, @realDonaldTrump.[30] The official presidential Twitter account no longer contains original posts, but it consists of posts retweeted from the President's personal account.[31] The retweeted posts tend to share similarities with President Obama's @POTUS tweets, covering holidays, national tragedies, and promoting policy.[32]

Today, when the President tweets, his postings are considered official presidential statements.[33] All presidential tweets, including deleted ones, are saved by the National Archives and Records Administration.[34]

Jeffrey Bellin describes Twitter as "a vast electronic present sense impression… generator, constantly churning out admissible out-of-court statements."[35] The Ninth Circuit has already taken note of the evidentiary value of presidential tweets, evaluating statements made by President Trump on Twitter during its consideration of the second iteration of the President's travel ban, which

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[27] President Obama (@POTUS44), TWITTER, https://twitter.com/POTUS44 [https://perma.cc/NBL3-Z92E] (last visited Jan. 7, 2019); President Obama (@POTUS44), TWITTER (Aug. 29, 2016, 12:28 PM), https://twitter.com/POTUS44/status/770297035274584068 [https://perma.cc/Y4FP-GYML] (congratulating NASA scientists); President Obama (@POTUS44), TWITTER (Aug. 14, 2016, 7:06 PM), https://twitter.com/POTUS44/status/764961309767131136 [https://perma.cc/ 2FXC-3V4D] (congratulating U.S. Olympians).

[28] Alina Selyukh, *On the Day of White House Transitions, Twitter Shifts @POTUS to Donald Trump*, NPR: ALL TECH CONSIDERED (Jan. 20, 2017), https://www.npr.org/sections/alltechconsidered/2017/01/20/510784802/on-the-day-of-white-house-transitions-twitter-shifts-potus-to-donald-trump [https://perma.cc/W6LZ-5X5G].

[29] *Id*.

[30] *Id*.

[31] President Trump (@POTUS), *supra* note 7.

[32] *Id*.

[33] Sampathkumar, *supra* note 7; *see also* Elizabeth Landers, *White House: Trump's Tweets Are 'Official Statements'*, CNN (June 6, 2017, 4:37 PM ET), https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html [https://perma.cc/G54L-G9FM] (reporting that White House Press Secretary confirmed the President's tweets "are considered official statements by the President of the United States").

[34] Nick Statt, *Trump's Tweets Will Be Preserved by the US National Archives*, VERGE (Apr. 3, 2017, 6:48 PM), https://www.theverge.com/2017/4/3/15168956/donald-trump-twitter-white-house-archives-tweets [https://perma.cc/5JSU-6TVP].

[35] Bellin, *supra* note 8, at 335.

was implemented by executive order.[36] This was the first time that a higher court considered presidential tweets as official White House policy, setting new legal precedent for using Twitter to determine decision-making intent.[37]

While the Ninth Circuit's mention of President Trump's Twitter was relegated to a footnote,[38] the D.C. District Court reiterated the President's tweet announcing a ban on transgender individuals from serving in the military in the first sentence of its opinion partially granting a preliminary injunction on the ban.[39] The opinion contained screenshots of the President's three consecutive tweets proclaiming the ban.[40] The D.C. District Court observed that the sequence of events leading up to a decision could shed light on the purpose of the decision, noting President Trump's abrupt Twitter announcement lacked the usual formality and deliberation accompanying major policy changes.[41] Since this opinion, other federal courts have followed in directly quoting President Trump's tweets in the main body of their opinions.[42]

The Supreme Court first cited to Twitter more generally in *Dietz v. Bouldin*, expressing concern over discharged jurors seeing reactions to verdicts on the social media platform.[43] Most recently, President Trump's tweets have also been noted by the Justices of the nation's highest court. In *Trump v. Hawai'i*,[44] Chief Justice Roberts delivered the majority opinion, and referenced President Trump retweeting

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[36] Hawai'i v. Trump, 859 F.3d 741, n. 14 (9th Cir. 2017) (citing Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 6:20 PM), https://twitter.com/realDonaldTrump/status/871899511525961728 [https://perma.cc/4294-5GCS]).

[37] Joseph P. Williams, *Courts Considered Trump's Twitter in Ruling*, U.S. NEWS (June 12, 2017, 6:16 PM), https://www.usnews.com/news/national-news/articles/2017-06-12/donald-trumps-statements-on-twitter-cited-in-courts-decision-to-upholds-block-on-travel-ban [https://perma.cc/9DM4-R2XU].

[38] *See also* Hawai'i v. Trump, 265 F.Supp.3d 1140, 1148 n.9 (D. Haw. 2017) (citing President Trump's tweets in a footnote).

[39] Doe v. Trump, 275 F.Supp.3d 167, 175 (D.D.C. 2017) (citing Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 8:55 AM), https://twitter.com/realDonaldTrump/status/890193981585444864 [https://perma.cc/6XGB-U2PT]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:04 AM), https://twitter.com/realDonaldTrump/status/890196164313833472 [https://perma.cc/JQ5Z-JK5A]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:08 AM), https://twitter.com/realDonaldTrump/status/890197095151546369 [https://perma.cc/2AN6-A5PC]).

[40] *Id*. at 183.

[41] *Id*. at 213 (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977)).

[42] *See* Stone v. Trump, 280 F.Supp.3d 747, 756 (D. Md. 2017) (including screenshots of transgender ban tweets in opinion); Karnoski v. Trump, No. C17-1297-MJP, 2017 WL 6311305 at *1-2 (D. Wash., Dec. 11, 2017) (including screenshots of transgender ban tweets in opinion).

[43] Dietz v. Bouldin, 136 S.Ct. 1885, 1895 (2016).

[44] Trump v. Hawai'i, 138 S.Ct. 2392 (2018).

the links to three anti-Muslim propaganda videos in November 2017.[45] Chief Justice Roberts elaborated that while presidents often use speech to promote principles such as religious freedom, "the Federal Government and the Presidents who have carried its laws into effect have—from the Nation's earliest days—performed unevenly"[46] in upholding such lofty ideals. Justice Sotomayor addressed the President's tweets even more directly in her dissent, citing numerous instances when the President commented on the travel ban and retweeted anti-Muslim videos.[47] She agreed that the primary objective was not whether the tweets were offensive statements, but whether they were enough to conclude the purpose of the executive action was to disfavor Islam by prohibiting Muslim immigration.[48] She concluded that these statements by the President established sufficient proof.[49]

The President's use of Twitter for issuing official statements opens up novel questions of law, including how much weight should be given to these statements, whether they should be regarded as executive orders when they are issued as directives, and whether they may and should be regulated by Congress based on the peculiar nature of presidential tweets.

I. "SO-CALLED" JUDGES: ATTACKING JUDICIAL LEGITIMACY

On February 4, 2017, President Trump posted a tweet criticizing a federal judge's ruling on Executive Order 13769[50]: "The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!"[51] The "so-called judge" to whom President Trump was referring was U.S. District Judge James Robart.[52] Judge Robart issued a temporary restraining order on the enforcement of the executive order, which banned foreign nationals from seven majority Muslim countries from entering the United States and suspended the U.S. Refugee Admissions Program.[53] The following day, President Trump continued to express his opinion on the matter: "Just cannot

[45] *Id*. at 2417.
[46] *Id*. at 2418.
[47] Trump v. Hawai'i, 138 S.Ct. 2392, 2437-38 (2018) (Sotomayor, J., dissenting).
[48] *Id*. at 2438.
[49] *Id*.
[50] Exec. Order No. 13769, 82 F.R. 8977 (2017) (revoked by Exec. Order No. 13780, 82 F.R. 13209 (2017)).
[51] Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 8:12 AM), https://twitter.com/realDonaldTrump/status/827867311054974976 [https://perma.cc/T3J2-SXR4].
[52] Thomas Fuller, *'So-Called' Judge Criticized by Trump Is Known as a Mainstream Republican*, N.Y. TIMES (Feb. 4, 2017), https://www.nytimes.com/2017/02/04/us/james-robart-judge-trump-ban-seattle.html [https://perma.cc/R4TB-M8DZ].
[53] Hawai'i v. Trump, *supra* note 36, at 756-57 (citing Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017)).

believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!"[54] Months later, President Trump again stated his opinion of the federal courts: "The courts are slow and political!"[55]

The relationship between the presidency and the judiciary branch has been tenuous at times, but presidents have ultimately respected judicial decisions, even when the branches disagree. In this section, I will explore how the historical relationship between the judicial and executive branches compares to this modern tension and whether criticism by tweet effects the executive enforcement of judicial opinions.

A. The Historic Relationship Between Executive and Judiciary Branches

The Constitution grants the President the power to "nominate, and by and with the Advice and Consent of the Senate, [to] appoint…Judges of the supreme Court…but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law…"[56] The Judiciary Act of 1801 was one attempt by Congress to vest power in the president to appoint federal judges to lower courts, resulting in President John Adams's appointment of the "midnight judges" in an attempt to politically control the judiciary.[57] The President appoints federal judges for life tenure,[58] which theoretically creates political balance, as presidents entering office are not able to replace judges appointed by their politically-opposed predecessors.

The political aspect of appointing judges, with the tendency for presidents to appoint judges who are political allies, creates fluctuating amounts of deference and authority that presidents assign to federal court decisions. *Marbury v. Madison*, a case regarding one of the midnight judges, was the first test of the legitimacy of judicial review, as it was the first time the court struck down a law as unconstitutional.[59] Much to President Thomas Jefferson's dislike, Chief Justice John Marshall's decision in *Marbury* stated that the Supreme Court owed its

[54] Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 3:39 PM), https://twitter.com/realDonaldTrump/status/828342202174668800 [https://perma.cc/U5NA-3XNV].
[55] Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 6:44 AM), https://twitter.com/realDonaldTrump/status/871679061847879682 [https://perma.cc/4TVP-LZ5K].
[56] U.S. CONST. art. II, § 2, cl. 2.
[57] Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494, 494 (1961).
[58] Matthew Madden, *Anticipated Judicial Vacancies and the Power to Nominate*, 93 VA. L. REV. 1135, 1137 (2007).
[59] Marbury v. Madison, 5 U.S. 137, 173 (1803) (holding that a section of the Judiciary Act of 1789 authorizing the Supreme Court to provide the remedy of a writ of mandamus was unconstitutional).

ultimate allegiance to the Constitution, not Congress, and that the Court's responsibility was to interpret the Constitution.[60] Jefferson preferred that judicial power be distributed among the three branches of government rather than be concentrated in the Supreme Court.[61]

In 1804, Jefferson wrote to Abigail Adams of his thoughts on a powerful judiciary: "the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch."[62] His views of Marshall's Court remained bitter during his lifetime, and he wrote, "The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric."[63] While Jefferson personally disagreed with Marshall's decision in *Marbury*, judicial review remained unchallenged,[64] making way for the continued review of constitutionality of laws, including executive actions.

In 1952, the Supreme court decided *Youngstown Sheet & Tube Co. v. Sawyer*, holding that President Harry Truman's executive order directing the Secretary of Commerce to seize the majority of U.S. steel mills was unconstitutional.[65] Justice Hugo Black wrote in the majority opinion that the Court "cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production."[66] Justice Robert Jackson, who did not care for President Truman, wrote a concurrence defining the tripartite framework of Presidential power, delivering a major blow to Truman's presidential authority by stating the President was acting within the weakest category of the framework.[67]

President Truman thought the Court was wrong, feeling that the Court substituted its judgment for that of the President about an issue of national importance.[68] The President was especially disappointed that two of his personal friends who he appointed as Justices to the Court had sided against his assertion of

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[60] *Id*. at 177.
[61] *Id.*
[62] Johnny C. Burris, *Some Preliminary Thoughts on a Contextual Historical Theory for the Legitimacy of Judicial Review*, 12 OKLA. CITY U. L. Rev. 585, 651-52, n.280 (1987) (citing 10 THE WORKS OF THOMAS JEFFERSON 88 (Paul Leicester Ford ed. 1904)).
[63] *Id*. at 647, n.278 (citing 7 THE WRITINGS OF THOMAS JEFFERSON 192 (H. Washington ed. 1854)).
[64] Robert Aitken & Marilyn Aitken, *Signed, Sealed, But Not Delivered: John Marshall v. Thomas Jefferson - The Marbury Case*, 31 LITIG. 57, 60 (2004).
[65] Ken Gormley, *Foreword: President Truman and the Steel Seizure Case: A Symposium*, 41 DUQ. L. REV. 667, 673-74 (2003).
[66] *Id*. at 674 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).
[67] *Id*. at 674-75.
[68] *Id*. at 675-76.

executive power.[69] Truman ultimately accepted the Court's decision.[70] In his Memoirs, President Truman opined, "I would, of course, never conceal the fact that the Supreme Court's decision, announced on June 2, was a deep disappointment to me."[71] He speculated whether the decision would have gone the same way if a Holmes, Hughes, Brandeis, or Stone had been on the bench,[72] intimating that perhaps the Court's current justices lacked the scholarly legal reasoning of their predecessors. Ultimately, President Truman resolved to "leave the legal arguments to others,"[73] but remained staunchly convinced that he was rightfully within his authority as the President acting during a national emergency.[74]

Presidents Jefferson and Truman both criticized the Supreme Court when decisions were not decided in their favor, but both ultimately respected the Court's legal authority. Their written critiques took the forms of letters and memoirs, reaching far fewer than the 50 million followers of President Trump. In our modern era, the President chose Twitter as his forum to share his discontent. Does President Trump's modern approach compare to presidential precedent on criticizing judicial opinions?

B. Comparing Presidential Tweets to Past Critiques

President Trump's disgruntlement is reminiscent of previous presidential critiques of the judiciary. In questioning judicial legitimacy, the current President's "so-called judge" tweet[75] echoes the sentiment of Thomas Jefferson alluding to the judiciary undermining the work of the federal government.[76] Another similarity is how President Trump expressed his position on why he believes the court overstepped its bounds,[77] the national security reasoning a modern parallel to Truman's effort to avoid a national crisis.[78]

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[69] *Id*. at 675.
[70] *Id*.
[71] HARRY S. TRUMAN, 2 MEMOIRS: YEARS OF TRIAL AND HOPE 476 (1956).
[72] *Id*.
[73] *Id*.
[74] *Id*. at 478.
[75] Trump, *supra* note 51.
[76] Burris, *supra* note 62, at 647, n.278.
[77] Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 7:59 AM), https://twitter.com/realdonaldtrump/status/827864176043376640 [https://perma.cc/4KKQ-ZZ7M] ("When a country is no longer able to say who can, and who cannot , come in & out, especially for reasons of safety &.security – big trouble!"); Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 3:44 PM) https://twitter.com/realDonaldTrump/status/827981079042805761 [https://perma.cc/S8BU-4CSV] ("What is our country coming to when a judge can halt a Homeland Security travel ban and anyone, even with bad intentions, can come into U.S.?").
[78] Truman, *supra* note 71, at 478.

The President's tweets are not novel because of their content, but because of their form. The real question is whether Twitter has changed the impact of presidential criticism on the power of the judicial branch.

President Trump's forum for criticizing the courts differs vastly from Jefferson's and Truman's approaches. The platform of Twitter allowed his statements to reach a wide audience at a speed never before possible. Additionally, it may be President Trump's intention to reach such a wide audience and spread his stance on the case, using Twitter to intentionally violate social norms and presidential etiquette.[79]

Twitter allows President Trump to rapidly express his opinion of the courts and his position on the executive order, and perhaps even influence the outcome of the case. Not only would this have been difficult in the past, but former presidents have actively avoided interfering with pending litigation, waiting to comment until judgment is rendered. President Truman refused to comment at the point when his executive order reached litigation.[80] Thomas Jefferson chose not to attack the decision in *Marbury* at the time it was announced, even though he had contemporaneous personal and philosophical reasons to criticize the decision.[81]

By publishing his opinion of the judiciary, President Trump instantly reached millions of people, news outlets, and potentially, the judges themselves, within a matter of seconds. Posting on Twitter requires little forethought, and minimal afterthought. President Jefferson wrote his opinion in personal letters.[82] While letters are another informal means of communication, they do not have the capability of reaching a wide audience and they have a low probability of circulating back around to the courts. President Truman expressed his opinion through formal announcements and by later writing about his continued disagreement with the *Youngstown* decision in his Memoirs.[83]

While a published book has the means of reaching a wider audience than a personal letter, it is limited in comparison to Twitter's reach. Besides reaching President Trump's millions of followers, the "so-called judge" tweet was retweeted over 32,000 times and liked an additional 150,000 times.[84] The spread of this tweet coupled with news coverage of the tweet, showing screenshots of them on

[79] Tyler Cowen, *Commentary: The Strategic Reason for Donald Trump's Tweets*, CHI. TRIB. (Jun. 12, 2017, 12:30 PM), http://www.chicagotribune.com/news/opinion/commentary/ct-donald-trump-tweets-strategy-20170612-story.html [https://perma.cc/64RX-6PV8?type=image].
[80] Truman, *supra* note 71, at 475 ("For the government, I took the position that, once the case had reached the courts, it was not proper for me to express an opinion.").
[81] Burris, *supra* note 62, at 652.
[82] *Id*.
[83] Truman, *supra* note 71.
[84] Trump, *supra* note 51.

television and in online articles helped the President's comment spread farther than ever before.

It is hard to measure the exact impact of one tweet, but it appears that there are real life consequences to the President's postings. Economists have noted that the President's tweets are correlated with certain changes in the stock markets.[85] The effect appears to be short term,[86] but nevertheless, the President's tweets have an impact on our economy. It is within reason to consider that his tweets are influential enough to shape the balance of federal power.

Measuring the balance of power is a speculative venture, but the President's use of Twitter seems powerful. The ability of a tweet to reach millions of people in seconds has real world consequences. Has Twitter allowed the President to take power and trust away from the federal courts? If so, the effect thus far is minimal, perhaps even the opposite of President Trump's intended effect. At 53%, the Supreme Court's approval rating is the highest it has been since 2009.[87]

When past presidents disagreed with the judiciary, the courts carried on and grew steadily more powerful. Their decisions became defining interpretations of constitutional law. The courts today are carrying on as before, with judges striving to be stewards of impartiality. Still, caution should be exercised in reviewing whether future presidential tweets simply criticize the courts or take further steps in undermining judicial authority.

II. TWEETING EXECUTIVE ORDERS: OFFICIAL BUSINESS IN 280 CHARACTERS OR LESS

> "After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]"[88]

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[85] Tae Kim, *Here's What Happens to Shares of Companies that Trump Attacks*, CNBC (Apr. 5, 2018, 6:40 PM), https://www.cnbc.com/2018/04/05/heres-what-happens-to-shares-of-companies-that-trump-attacks.html [https://perma.cc/H35N-JF26].

[86] *Id*.

[87] Megan Brenan, *Supreme Court Approval Highest Since 2009*, GALLUP (July 18, 2018), https://news.gallup.com/poll/237269/supreme-court-approval-highest-2009.aspx?g_source=link_NEWSV9&g_medium=tile_1&g_campaign=item_4732&g_content=Supreme%2520Court%2520Approval%2520Highest%2520Since%25202009 [https://perma.cc/C9PL-876U].

[88] Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 8:55 AM), https://twitter.com/realDonaldTrump/status/890193981585444864 [https://perma.cc/KZB7-UL4N]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:04 AM),

The President's tweet caused a flurry of confusion – could a tweet really count as an executive order? The tweet was followed by a formal presidential memorandum, offering further guidance on how the Secretary of Defense planned to carry out the policy.[89] The day after the tweet, an internal memo by the Chairman of the Joint Chiefs of Staff expressed that the current policy, set to accept transgender recruits in January 2018, would not be modified without further instructions from the President due to the confusion.[90] Naturally, the tweets and subsequent memos were followed by a series of lawsuits.[91]

This section explores the formal requirements of an executive order, for which the Constitution leaves no instructions. These three tweets raise the novel issue of the disconnected nature of tweets; courts must decide whether they can be viewed as forming a single thought or whether they are to be viewed as individual fragmented statements. Another question raised by the posts is what weight the courts will give to tweets as compared to formal orders. This discussion will help in later considering whether Twitter is an adequate forum for executive action or whether such actions should be restricted to more traditional methods.

A. The Formalities: The Basic Procedure for Issuing an Executive Order

Executive orders are "official documents, numbered consecutively, through which the President of the United States manages the operations of the Federal Government."[92] The Washington Post describes an executive order as "an official statement from the president about how the federal agencies he oversees are to use their resources."[93] There is a hierarchy of formality to executive actions, with executive orders being the most formal, followed by presidential memorandums (which outline a position on a policy), proclamations, and directives.[94] The

https://twitter.com/realDonaldTrump/status/890196164313833472 [https://perma.cc/893W-XW8W]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:08 AM), https://twitter.com/realDonaldTrump/status/890197095151546369 [https://perma.cc/B4RU-KLNB].

[89] Comment, *Tweets on Transgender Military Servicemembers*, 131 HARV. L. REV. 934, 934 (2018).

[90] *Id.* at 935-36.

[91] *Id.* at 936.

[92] *Federal Register: FAQ's About Executive Orders*, NAT'L ARCHIVES, https://www.archives.gov/federal-register/executive-orders/about.html [https://perma.cc/W37R-2NXG] (last visited July 24, 2018).

[93] Aaron Blake, *What Is an Executive Order? And How Do President Trump's Stack Up?*, WASH. POST (Jan. 27, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/27/what-is-an-executive-order-and-how-do-president-trumps-stack-up/?utm_term=.48b4c2a46e01 [https://perma.cc/LU5S-UMYN].

[94] *Id.*

President's executive actions are limited by the constraints set by both Congress and the Constitution.[95] All executive orders are recorded in the Federal Register after being signed by the President.[96]

Executive orders date back to George Washington, and include some of the most notorious documents in American history, including the Emancipation Proclamation ending slavery in the Confederate States, the order sending troops to integrate schools in Little Rock, Arkansas during the Civil Rights era, and the order sending Japanese Americans to internment camps during the Second World War.[97]

In sum, the most formal executive action, the executive order, must be an official document, signed by the President, and assigned a number consecutive to all of its predecessors. While President Trump's tweets may fall short of these formalities, they may still qualify as a less formal version of executive action. They fit within the general function of what executive actions tend to accomplish and the tweets are official statements of the President. Now that courts have been faced with this question, we have a better idea of what legal significance a presidential tweet holds.

B. Is a Tweet Enough?

The National Archives, the daily journal of the United States government that publishes the Federal Register, has not published the transgender military ban tweets, but has published executive orders that were written after the President's tweets.[98]

In *Doe v. Trump*,[99] the very first sentence of the opinion by U.S. District Judge Colleen Kollar-Kotelly quotes the aforementioned series of tweets announcing the transgender ban and the formal presidential memorandum that followed. The first apparent takeaway is that even though the President made three separate posts to complete his statement, the court viewed this as one cohesive statement in the opinion.[100] As Twitter was intended to be short bursts of information,[101] this is a surprising result. Allowing the President to tack tweets together opens up the possibility of issuing longer statements via Twitter.

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[95] *Id*.
[96] *Executive Orders*, FED. REG., https://www.federalregister.gov/presidential-documents/executive-orders [https://perma.cc/H555-HUJU] (last visited July 24, 2018).
[97] Blake, *supra* note 93.
[98] FED. REG., *supra* note 96.
[99] Doe v. Trump, 275 F.Supp.3d 167, 175 (D.D.C. 2017)
[100] *Id*.
[101] Bellin, *supra* note 8, at 336, n.15.

The Court's decision appears to examine the directives of the memorandum only, which is a recognized type of executive action.[102] While the court did not recognize the President's tweets as an executive action in and of themselves, it did recognize the impact of the tweets on transgender members of the military, including that of Dylan Kohere.[103] After the announcement on Twitter, "Dylan felt that the plan he had made for his life had been 'thrown out the window.'"[104]

In July of 2018, another Court ruled that the President's ban on transgender members of the military was still on hold.[105] In *Karnoski,* the Court looked at the Twitter announcement and the presidential memorandum together to determine whether the President had ordered a study of the policy; both parts unilaterally proclaimed the prohibition.[106] Because this Court seems to address the tweets and the memorandum together, it may be that the court sees the tweets as informing the memorandum, or as an extension of it, but this is never clearly expressed.[107] The Court did note that because the prohibition was "announced by President Trump on Twitter, abruptly and without any evidence of considered reason or deliberation[,]"[108] the government was not entitled to substantial deference, ultimately ruling that the government failed to show that the prohibition policy was substantially related to important government interests.[109]

As of yet, the courts do not recognize the tweets as executive actions, but do consider their weight as evidence of intent and deliberation because they are official statements of the President. Courts also seem to treat a series of tweets as a single unified statement. Could Twitter be utilized, in a longer series of tweets, to issue an actual executive action: an executive order, a presidential memorandum, a proclamation, or a directive? This may be possible. Looking at President Trump's exercise of executive removal power on Twitter may offer further enlightenment.

III. "YOU'RE FIRED!" POLITICAL APPOINTMENT AND REMOVAL

"Mike Pompeo, Director of the CIA, will become our new Secretary of State. He will do a fantastic job! Thank you to Rex Tillerson for his service! Gina

[102] Doe v. Trump, 275 F.Supp.3d at 175-176.
[103] *Id*. at 190.
[104] *Id*.
[105] Karnoski v. Trump, No. C17-1297-MJP, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017); Bob Egelko, *Court Ruling: Trump Ban on Transgender Military Service Still on Hold*, S.F. CHRON. (July 18, 2018, 9:19 PM), https://www.sfchronicle.com/lgbt/article/Trump-ban-on-transgender-military-service-blocked-13086811.php [https://perma.cc/9N8J-A2U3].
[106] Karnoski v. Trump, 2017 WL 6311305, at *6-7.
[107] *Id*.
[108] *Id*. at *8.
[109] *Id*.

Haspel will become the new Director of the CIA, and the first woman so chosen. Congratulations to all!"[110]

Again, President Trump tweets and chaos ensues. The White House reported that Rex Tillerson found out about his impending removal before the President's social media post, but other sources paint a different sequence of events.[111] The undersecretary of state for public diplomacy and public affairs, Steve Goldstein, told media outlets that White House Chief of Staff John F. Kelly told Secretary of State Rex Tillerson that he should expect a presidential tweet, but did not explain what the tweet would be about.[112] Rex Tillerson found out through news reports and received a phone call from the President three hours after the tweet was posted.[113] Aaron David Miller, Vice President for New Initiatives and Middle East Program Director at the Woodrow Wilson International Center for Scholars remarked, "The firing of a secretary of state on social media is both humiliating and without precedent."[114]

The President's power of removal is rooted in history and the Constitution.[115] This section will briefly review the power of removal and whether President Trump's tweet constitutes an official executive action.

A. The Legal Standards for Appointment and Removal

The power of the President to remove a person from office follows from the power to appoint that person to certain positions. The U.S. Constitution describes the power of the President to nominate and appoint certain positions within the government:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and

[110] Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 13, 2018, 8:44 AM), https://twitter.com/realDonaldTrump/status/973540316656623616 [https://perma.cc/NEL4-N4UF].
[111] Michelle Singletary, *Trump Dumped Secretary of State Rex Tillerson in a Tweet. What's the Worst Way You've Been Fired?*, WASH. POST (Mar. 15, 2018), https://www.washingtonpost.com/news/get-there/wp/2018/03/15/trump-dumped-secretary-of-state-rex-tillerson-in-a-tweet-whats-the-worst-way-youve-been-fired/?utm_term=.b43a91bcd905 [https://perma.cc/35E8-FE9X].
[112] *Id*.
[113] Philip Rucker (@PhilipRucker), TWITTER (Mar. 13, 2018, 2:13 PM), https://twitter.com/PhilipRucker/status/973623006231744517 [https://perma.cc/DP76-KKT8].
[114] Singletary, *supra* note 111.
[115] U.S. CONST. art. II, § 2, cl. 2.

> which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[116]

The Constitution is explicit about the President's ability to nominate and appoint Officers of the United States, but it is silent on the President's removal power.[117] The President's power of removal is also partially derived from the Vesting Clause – "[t]he executive Power shall be vested in a President of the United States of America."[118]

The President has a great deal of discretion when it comes to hiring and removal of officers in the executive branch.[119] James Madison felt that the power of appointing, overseeing, and controlling the people who execute the laws was an inherently executive power.[120] Alexander Hamilton disagreed, feeling that the consent of the Senate was needed to remove officers in addition to appointing, an interpretation that governed the power of removal until 1926.[121]

On October 25, 1926, the Supreme Court ruled in *Myers v. United States* that an 1876 law requiring the President to obtain the advice and consent of the Senate to remove three classes of postmasters was unconstitutional.[122] In 1933, the President's power of removal was again challenged when President Franklin Roosevelt fired a commissioner of the Federal Trade Commission, William Humphrey.[123] The court ruled that the Federal Trade Commission Act, which limited the President in the ability to remove a commissioner only for inefficiency, neglect of duty, or malfeasance in office, was constitutional.[124] The Supreme Court determined that the Constitution did not give the President the "illimitable power of removal."[125]

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[116] *Id*.
[117] Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case for Executive Power*, 160 CAL. L. REV. 1, 33 (2018).
[118] U.S. CONST. art. II, § 1, cl. 1.
[119] Daniel Tagliarina, *Why the President Can't Unilaterally Hire or Fire Who He Wants*, UTICA C. CTR. OF PUB. AFF. AND ELECTION RES. (May 16, 2017), https://www.ucpublicaffairs.com/home/2017/5/16/why-the-president-cant-unilaterally-hire-or-fire-who-he-wants-by-daniel-tagliarina [https://perma.cc/X823-BYKU]; *see also* 1 ANNALS OF CONG. 581 (1789) (Joseph Gales ed., 1834).
[120] Tagliarina, *supra* note 119.
[121] *Id*.
[122] Myers v. United States, 272 U.S. 52 (1926).
[123] Humphrey's Ex'r v. U.S., 295 U.S. 602 (1935).
[124] *Id*.
[125] *Id*. at 629.

In 1988, the Supreme Court decided the monumental case, *Morrison v. Olson*,[126] which determined that the Constitution allows Congress to require good cause before the President can remove inferior executive branch officers.[127]

This leads to the present question of whether the President can exercise his constitutionally limited removal power through a tweet.

B. When Your Fate Is Written in a Tweet

"In the interim, Hon. Robert Wilkie of DOD will serve as Acting Secretary. I am thankful to Dr. David Shulkin's service to our country and to our GREAT VETERANS!"[128] The President tweeted another removal and replacement on March 28, 2018.[129]

Twice within two weeks, the President used Twitter to announce the firing of two executive branch employees.[130] The events even sparked the hashtag, #FBT, standing for "fired by tweet."[131] Experts did not expect personnel decisions to come through the President's Twitter feed, and believe this will be a rare occurrence in the future.[132] They also speculate that the President's actions could impact how employees are fired in the private workforce, leading to an acceptance of the unusual practice.[133]

Under the Federal Vacancies Reform Act of 1998, the president has the power to fill vacancies in federal agencies with a person confirmed by the Senate.[134] This potentially allows the fired employees to challenge the nominations of their

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[126] Morrison v. Olson, 487 U.S. 654 (1988).
[127] Steve Vladeck, *Trump Tweeted that He Can Fire Anyone (Including Robert Mueller). Here's What the Law Actually Says*, NBC: THINK (May 3, 2018, 4:52 PM), https://www.nbcnews.com/think/opinion/trump-tweeted-he-can-fire-anyone-including-robert-mueller-here-ncna871166 [https://perma.cc/GP44-JU6J].
[128] Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 28, 2018, 5:31 PM), https://twitter.com/realDonaldTrump/status/979108846408003584 [https://perma.cc/D6K5-XEXV].
[129] *Id*.
[130] *Id*.; Trump, *supra* note 110.
[131] Sean Rossman, *Firing by Tweet Works for Trump, but It Would Be an HR Nightmare Anywhere Else*, USA TODAY (Mar. 29, 2018, 12:35 PM), https://www.usatoday.com/story/news/nation-now/2018/03/29/firing-tweet-works-trump-but-would-hr-nightmare-anywhere-else/468853002/ [https://perma.cc/73KS-3LG9].
[132] *Id*.
[133] *Id*.
[134] Margaret Hartmann, *Trump's Habit of Firing via Tweet Could Spark Legal Showdown*, N.Y. MAG: INTELLIGENCER (Apr. 2, 2018), http://nymag.com/daily/intelligencer/2018/04/trumps-habit-of-firing-via-tweet-could-spark-legal-showdown.html [https://perma.cc/M5C3-XDSN].

replacements in office,[135] but another possibility is to challenge the validity of the removal itself—being fired by a tweet.

Because many U.S. government employees are categorized as "at will," most commentators believe that the president's tweets do actually constitute a legal removal of a federal employee.[136] The current case law governs more of who the President can fire and whether or not he needs approval. It does not address the means of communicating with an employee that he has been fired. As it stands, it seems fair to say that the President can legally fire an employee by tweet, provided that this falls within the other limits set by Congress and allowed under the Constitution.[137] Whether or not the president should remove employees by tweet is another issue, perhaps one that legislation can address.

IV. THREATENING WARFARE: TWEET US NOT INTO ENTERING ARMED CONFLICTS

On September 23, 2017, President Trump again spoke his mind by means of Twitter: "Just heard Foreign Minister of North Korea speak at U.N. If he echoes thoughts of Little Rocket Man, they won't be around much longer!"[138] North Korea responded to the presidential Tweet, claiming that this threat constituted a declaration of war on North Korea. The question was raised of whether the President could order the United States into an armed conflict by a tweet.

This was not President Trump's first comment directed towards Kim Jung Un, the supreme leader of North Korea. In July of 2017, after North Korea claimed to have launched its first intercontinental ballistic missile, President Trump tweeted "North Korea has just launched another missile. Does this guy have anything better to do with his life?"[139] By August, President Trump tweeted, "Military solutions

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[135] *Id*.
[136] *Getting "Fired By Tweet" Is Degrading, Rude, and Totally Legal*, VONDER HAAR L. OFFICES (Jun. 13, 2018), https://vonderhaarlaw.com/employment-law-help/fired-by-tweet/ [https://perma.cc/FM9Z-KPXZ]; Nicole Gaouette, et al., *Trump fires Tillerson, Taps Pompeo as Next Secretary of State*, CNN (Mar. 13, 2018, 2:36 PM), https://www.cnn.com/2018/03/13/politics/rex-tillerson-secretary-of-state/index.html [https://perma.cc/UB55-96GJ].
[137] Gaouette, et al., *supra* note 136.
[138] Donald J. Trump (@realDonaldTrump), TWITTER (July 3, 2017, 10:19 PM), https://twitter.com/realDonaldTrump/status/911789314169823232 [https://perma.cc/XT3Y-K4JU].
[139] Donald J. Trump (@realDonaldTrump), TWITTER (July 3, 2017, 10:19 PM), https://twitter.com/realDonaldTrump/status/882061157900718081 [https://perma.cc/CMF5-CQRM].

are now fully in place,locked and loaded,should North Korea act unwisely. Hopefully Kim Jong Un will find another path!"[140]

What are the consequences of the President making threats on Twitter? This section will review the historical expansion of presidential powers related to war and armed conflict and then take a closer look at how Twitter increases the risks of these threatening armed warfare.

A. The Historical Context for Threatening Armed Conflict

The President has never had the power to declare war. The United States Constitution is explicit in the delegation of war powers to Congress.[141] This has not stopped past presidents from entering into armed conflicts, especially in response to military provocation.[142] The Constitution names the President as Commander in Chief of the armed forces,[143] allowing the President to have some power to respond to crises and control military strategy.

President James K. Polk played a large role in initiating the Mexican American War.[144] President Andrew Jackson interpreted the Indian Removal Act of 1830 as giving him unfettered power to command the military to remove Native Americans from their lands when they refused to relocate.[145] Presidents have used provocation before; they have initiated military action within Congressional authorization.

In 1973, Congress enacted the War Powers Resolution[146] to ensure that the President could not commit troops to combat without congressional consent by requiring a report to be sent within forty-eight hours of sending troops into combat absent a declaration of war.[147] After sixty days, the President must terminate the action unless Congress has enacted further authorization.[148] On September 18, 2001, in response to terrorist attacks on September 11, Congress passed a joint

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[140] Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 11, 2017), https://twitter.com/realDonaldTrump/status/895970429734711298 [https://perma.cc/KAE3-P53W].
[141] U.S. CONST. art. I, § 8, cl. 11.
[142] Joshua Keating, *Actually, U.S. Presidents Have Been Going to War Without Congress Since the Beginning*, FOREIGN POLICY (May 9, 2013), https://foreignpolicy.com/2013/05/09/actually-u-s-presidents-have-been-going-to-war-without-congress-since-the-beginning/ [https://perma.cc/5R4Y-X97J].
[143] U.S. CONST. art. II, § 2.
[144] Keating, *supra* note 142.
[145] *Id*.
[146] 50 U.S.C. §§ 1541-1548 (1976 & Supp. V 1981).
[147] Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984).
[148] *Id*.

resolution entitled "Authorization for Use of Military Force."[149] This resolution authorized the President to use all necessary and appropriate force against those nations, organizations, or persons he determined were involved in the terrorist attacks of September 11 and to prevent any future act of international terrorism against the United States.[150] This broad authorization gives presidents vast freedom to deploy troops in armed conflicts even today.

President Trump has yet to do so via Twitter, but he has made some threats which could potentially spark an armed conflict, which will be addressed next.

B. By Fire, By Ice, or By Tweet?

Twitter adds a new layer of complication to the issue of entering an armed conflict and making threats of such action.

President Trump posted a tweet directed to Iranian President Rouhani: "NEVER, EVER THREATEN THE UNITED STATES AGAIN OR YOU WILL SUFFER CONSEQUENCES THE LIKES OF WHICH FEW THROUGHOUT HISTORY HAVE EVER SUFFERED BEFORE. WE ARE NO LONGER A COUNTRY THAT WILL STAND FOR YOUR DEMENTED WORDS OF VIOLENCE & DEATH. BE CAUTIOUS!"[151] There seemed to be confusion over the President's tweet, leaving experts unsure what consequences the President was implying would be enforced.[152]

In trying to determine the President's reason for the tweet, experts looked back to his tweets directed towards North Korea.[153] While one might think that the President's threatening tweets would only lead to an escalation of conflict, instead, Kim Jong Un and President Trump met together in Singapore and shook hands in June of 2018.[154] Just like the Supreme Court approval ratings discussed previously, the results of the President's tweets were not as anticipated.

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[149] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. §1541 (2001)).
[150] *Id*.
[151] Donald J. Trump (@realDonaldTrump), TWITTER (July 22, 2018, 11:24 PM), https://twitter.com/realDonaldTrump/status/1021234525626609666 [https://perma.cc/LZ8E-H6SY].
[152] Austin Ramzy, *Trump Threatens Iran on Twitter, Warning Rouhani of Dire 'Consequences'*, N.Y. TIMES (July 22, 2018), https://www.nytimes.com/2018/07/22/world/middleeast/trump-threatens-iran-twitter.html [https://perma.cc/3WFL-EE9T?type=image]; Mark Landler, *Trump's Twitter Threat vs. Iran: Loud but Hardly Clear*, N.Y. TIMES (July 23, 2018), https://www.nytimes.com/2018/07/23/us/politics/iran-donald-trump-policy.html [https://perma.cc/Y7XK-HAEB?type=image].
[153] Landler, *supra* note 152.
[154] Feliz Solomon, *This Is the Moment President Trump Shook Hands With North Korean Leader Kim Jong Un in Singapore*, TIME (June 12, 2018, 10:07 PM), http://time.com/5309062/donald-trump-kim-jong-jong-un-handshake-singapore/ [https://perma.cc/6L8L-S8DA].

The President's tweets have created a foreign policy nightmare due to their impact on diplomatic relations.[155] Critics of the President maintain that his more threatening tweets could have nuclear consequences.[156] One nuclear policy expert, Joe Cirincione, projected that "Trump's latest tweets will convince many world leaders that not only is he unstable and unreliable, but potentially truly dangerous."[157] The tweets reveal information to foreign governments that may reveal characteristics of the President or be misunderstood by national adversaries.[158]

Twitter is a public forum, and legislation may be desirable in order to protect sensitive information from disclosure, whether that involves the President's behavior or more specifics on what kind of force the President is threatening. Not only would regulations protect this information, they might also prevent catastrophic retaliation in reaction to one of the President's foreign policy tweets. The President has yet to send specific military orders by tweet, and unless legislation prevents it, it may only be a matter of time before President Trump ventures into this new Twitter territory.

V. RESTRICTING EXECUTIVE LIBERTY: WEIGHING POLICY INTERESTS IN EVALUATING PRESIDENTIAL TWEETS

A. Policy Considerations

Twitter users' posts are already subject to certain forms of regulation and review. First, Twitter is a private company, and sets some of its own limitations on how speech is used on the platform. Second, there are some governmental regulations that guide the use of these platforms. These leave many gaps, though, and exceptions have been made to allow the President to tweet more freely. I propose that more specific regulation governing the President's use of Twitter, and more broadly, all U.S. elected officials, may serve to safeguard against abuses that the current rules do not address.

[155] David Jackson, *Analysis: How Trump's 'Nuclear Button' Tweet Could Jeopardize His Foreign Policy*, USA TODAY (Jan. 3, 2018, 5:00 PM), https://www.usatoday.com/story/news/politics/2018/01/03/analysis-how-trumps-nuclear-button-tweet-could-jeopardize-his-foreign-policy/998976001/ [https://perma.cc/WJG5-G9SP?type=image].
[156] *Id*.
[157] *Id*.
[158] *Id*.

Twitter has its own extensive list of rules that prohibit certain content and behavior, and enforce consequences on users who violate the terms of service.[159] The Twitter User Agreement encompasses the Twitter Rules, the Privacy Policy, and the Terms of Service.[160] There are certain categories of content boundaries and prohibited uses of Twitter, including intellectual property, graphic violence and adult content, unlawful use, trends, third-party advertising in video content, misuse of Twitter badges, and misuse of usernames.[161] There is a large section governing abusive behavior on Twitter. The preface states:

> We believe in freedom of expression and open dialogue, but that means little as an underlying philosophy if voices are silenced because people are afraid to speak up. In order to ensure that people feel safe expressing diverse opinions and beliefs, we prohibit behavior that crosses the line into abuse, including behavior that harasses, intimidates, or uses fear to silence another user's voice.[162]

One notable area of Twitter's policy is the section on threats of violence which reads, "You may not make specific threats of violence or wish for the serious physical harm, death, or disease of an individual or group of people."[163] The policy notes that this includes threatening or promoting terrorism.[164] Additionally, Twitter bans hateful conduct, telling users, "You may not promote violence against, threaten, or harass other people"[165] on a number of bases.

Some of President Trump's tweets have raised concerns with users who have reported the tweets to Twitter as violating the Twitter User Agreement. Tweets to North Korea and Iran elicited a mass response of users and a wave of reporting in protest of the President's Twitter usage.

Twitter took its stance on presidential tweets in September of 2017 on the official Twitter Public Policy account, which it announced in a series of 6 tweets. The response stated that "newsworthiness" and whether a tweet was a matter of public interest were among the considerations as to whether or not a tweet violated the rules. The President's tweets threatening North Korea's leader compelled a

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[159] *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules [https://perma.cc/9L6T-F4ZH] (last visited July 24, 2018).
[160] *Id*.
[161] *Id*.
[162] *Id*.
[163] *Id*.
[164] *Id*.
[165] *Id*.

revision of Twitter's rules in December 2018 to more clearly articulate the public policy considerations.

Analysts have identified three loopholes in Twitter's policy that allow the President's threatening tweets to stay on Twitter: a loophole for "military or government entities," a "newsworthiness" factor, and an intentional vagueness in the Twitter Rules that allows the company to interpret on a case-by-case basis.[166] One reason Twitter has given for not removing the President's threatening tweets is that the rule only prohibits specific threats of violence, and his tweets have lacked specific details.[167]

Additionally, use of Twitter is governed by state and federal law, with regards to defamatory statements, harassment, menacing, fraud, and other crimes where the acts are verbal.[168] While the First Amendment protects a great deal of speech on Twitter, it does not protect the use of Twitter to commit criminal activity.

Courts have referenced the President's tweets in regards to their impact on individuals and society. The posts are weighed by what they reveal about the amount of deliberation that went into a decision and what harm they have caused or may cause in the future. Reviewing the tweets has shown that, as of yet, the President's tweets have not been a display of executive authority, save for constituting a legal exercise of the president's removal power. The possibility remains, however, that the President could begin to issue longer statements on Twitter more frequently, tacking tweets together in a chain to form a longer thought.

Tweets are also subject to the various faults of the Internet. If a presidential tweet alone is not enough to provoke conflict, then imagine the President's account being hacked or deactivated in the following moments. Take, for example, the rogue Twitter employee who managed to shut down the President's account for eleven minutes in November 2017.[169] Since the tweets are considered official statements of the President, a hacker getting into the account and tweeting in the President's name could cause chaos (although it might be hard to top some of the President's personal threats).

The President's tweets are public. They are preserved for posterity, raising concerns over the audience of the postings and what amount of forethought and

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[166] Abby Ohlheiser, *The 3 Loopholes that Keep Trump's Tweets on Twitter*, WASH. POST (July 23, 2018), https://www.washingtonpost.com/news/the-intersect/wp/2018/01/03/the-3-loopholes-that-keep-donald-trumps-tweets-on-twitter/?noredirect=on&utm_term=.23b6c021e8ab [https://perma.cc/8GP4-PY3P].
[167] *Id*.
[168] Luke Scanlon, *Twitter and the Law: 10 Legal Risks*, GUARDIAN (Aug. 10, 2012), https://www.theguardian.com/law/2012/aug/10/twitter-legal-risks [https://perma.cc/Z3UW-C76P].
[169] Yuliya Talmazan, *Trump's 11-Minute Twitter Outage Raises Broader Security Questions*, NBC NEWS (Nov. 3, 2017, 3:09 PM), https://www.nbcnews.com/news/us-news/trump-s-11-minute-twitter-outage-raises-broader-security-questions-n817196 [https://perma.cc/4ADP-RSM8].

control should be exercised in shaping legislation and regulation of the President's use of Twitter.

Another concern involves the potential for other abuses on Twitter, including the ability of a user to block other users from seeing his posts. In *Knight First Amendment Institute at Columbia University v. Trump*,[170] the United States District Court for the Southern District of New York ruled that President Trump's act of blocking his critics from seeing his tweets was unconstitutional as a violation of the free speech clause of the First Amendment.[171] Judge Naomi Reice Buchwald surmised that the President blocking users on Twitter following criticism constituted viewpoint-based discrimination because it was done by a public official acting in his official capacity.[172] The courts have applied the final layer of legislation, the Constitution, but there are still gaps in regulation that would protect the people from a President who would tweet like a tyrant.

There are already some legislative rules in place that limit what federal employees can post on social media. For example, federal social media policies prohibit soliciting political contributions and engaging in political activity using one's official title.[173] These regulations stem from the Hatch Act,[174] which limits the political activities of government employees. According to the U.S. Office of Special Counsel, these regulations necessarily extend to government employee activity on social media, and restrictions range from workplace prohibitions to 24/7 bans on certain activities.[175] The guidance tells federal employees not to "retweet a message or comment in support of or in opposition to a political party, candidate in a partisan race, or partisan political group while on duty or in the workplace."[176] There is a 24/7 prohibition on employees posting or tweeting solicitations for political contributions and inviting others to fundraising events.[177]

The President is still held to a different standard, especially in cyberspace.[178] The Hatch Act defines "employee" as "any individual, other than the President and the Vice President" who works for or holds an office in an Executive Agency or

[170] Knight First Amend. Inst. at Colum. Univ. v. Trump, 302 F.Supp.3d 541 (S.D.N.Y. 2018).
[171] John Herrman & Charlie Savage, *Trump's Blocking of Twitter Users Is Unconstitutional, Judge Says*, N.Y. TIMES (May 23, 2018), https://www.nytimes.com/2018/05/23/business/media/trump-twitter-block.html [https://perma.cc/79FQ-9Y66?type=image].
[172] Knight First Amend. Inst. at Colum. Univ. v. Trump, 302 F.Supp.3d at 575-6.
[173] Claudia Geib, *There Are Strict Rules About What Some Federal Employees Can Say on Social Media*, FUTURISM (Mar. 8, 2018), https://futurism.com/federal-employees-social-media-hatch-act/ [https://perma.cc/H82S-WJ4P].
[174] 5 U.S.C. § 7321, et seq. (2000).
[175] *See* OFFICE OF SPEC. COUN., ADVISORY OPINION ON HATCH ACT GUIDANCE ON SOCIAL MEDIA (Feb. 13, 2018).
[176] *Id*. at 2.
[177] *Id*. at 5.
[178] *Id*.

another position within the competitive service and excludes uniformed services.[179] A separate piece of legislation could be introduced that would address how the speech of the President and Vice President may be restricted on social media without imposing an undue burden on their freedom of speech.

Critics of the Hatch Act have called for more specifically tailored regulation of government employees' use of social media and the internet.[180] Ultimately, the Hatch Act is narrow in its focus on employees' political activities and fails to address the risks of employees using social media to conduct official government business. Regulating what the president can do on social media would intrude upon personal rights more than the Hatch Act; to protect the government's interests, regulation would, in a sense, instruct the President on how to do his job.

B. Policy Recommendations to Tame the Force of Tweet

The Hatch Act provides an idea of what moderating government employee use of media can look like while balancing concerns for freedom of speech and expression against the concerns of corrupt political influence. I recommend the following provisions for legislation limiting the President's use of social media to exercise executive power. First, future legislation should limit the President's ability to comment on pending litigation via social media to balance influence on the outcome with the right to comment on current affairs. Second, I propose a prohibition on issuing executive orders on a social media platform to address the need for continuity and specificity in the execution of directives. Third, based on the alternative forms of communication available to the President and in consideration of exercises of government ethics, I suggest limiting the President's methods of communicating the appointment and removal of government officials. Fourth, legislation should prohibit the President from entering an armed conflict or otherwise commanding the military by tweet because national security and safety considerations outweigh the President's interest in being able to commence action through social media. Underlying all of these policy recommendations is the common thread that the President already has a vast array of available options for carrying out executive actions and publicly expressing opinions.

1. Restrict Commentary on Pending Litigation

Legislation on the President's use of social media to conduct official business should include a provision restricting the President's ability to comment

[179] 5 U.S.C. § 7322(1).
[180] *See e.g.*, Nadeea Zakaria, *#OutdatedProvisions: How the Hatch Act Should Be Applied to Social Media Activity*, 25 GEO. J. LEGAL ETHICS 841 (2012).

on pending litigation, particularly litigation in which he is a named party. The balancing test here must weigh a few factors. Congress must consider that while such comments are not actually an action of the President, his official statements on Twitter nevertheless have a powerful ability to sway the masses. Similar to the Hatch Act's concern that government officials posting political content on social media could sway the outcome of an election, Congress should be concerned that the President's postulations could unduly influence the popular opinion and, potentially, the outcome on a case.

While I would advocate for a broad prohibition of social media commentary on any pending case in the judicial system, a narrower approach, such as limiting this speech only where the President is a named party, may also help to satisfy these goals. This would account for considerations for the President's freedom of expression, especially as the Chief Executive has a greater interest in free speech than other federal employees, as evidenced by the Hatch Act's exclusion of the President and Vice President.[181] Prohibiting the President from making commentary posts on social media, however, would only be a small intrusion on this right, as the President has many other means of expressing his views, whether by communicating through the White House Press Secretary or by directly publishing an op-ed in a newspaper.[182] In the interests of fairness and in respect of the separation of powers, Congress should limit the means by which the President may comment on pending litigation.

2. Prohibit Executive Orders by Tweet

Executive orders offer guidance in advancing the policy of the President, but, require continuity and formality to give clear and effective direction. Twitter, as a forum, falls short of these standards that ensure a smooth delivery of executive directives and actions. Congress should prohibit the President from using Twitter to issue executive actions because of the interests in avoiding confusion over the execution of these orders.

President Trump's announcement of the forthcoming ban of transgender individuals in the military, while falling short of being an official directive, still raised immediate confusion over what the President wanted, whether the ban would be effective immediately, and how the ban would be implemented.[183] Additionally,

[181] 5 U.S.C. § 7322(1).
[182] *See e.g.*, Barack Obama, *President Obama Reflects on the Impact of Title IX*, NEWSWEEK (June 25, 2012, 1:00 AM), https://www.newsweek.com/president-obama-reflects-impact-title-ix-65097 [https://perma.cc/A6ZV-S629].
[183] Tom Vanden Brook, David Jackson, & Emma Kinery, *Trump's Ban Leaves Transgender Troops in Limbo, and His White House and Pentagon Scrambling*, USA TODAY (July 26, 2017,

Courts were forced to grapple with how to address strings of social media posts, ultimately stitching them together into one official statement of the President. Again, prohibiting the President from issuing an executive order on social media is but a small intrusion on the President's ability to carry out the duties of office. Maintaining a level of formality will limit confusion and preserve the clarity and effectiveness of executive orders.

3. Limit Appointment and Removal Via Social Media

The President's powers of appointment and removal are necessary to his office, but it is not necessary for the President to exercise these powers on Twitter. Congress should limit the ability of the President to fire individuals on social media platforms in the interests of ethics and privacy for individuals involved. Publicly announcing the removal from office of a high-profile official before giving notice to that individual defies ordinary standards of ethical practice. This method of removal risks harming that person by failing to provide immediate notice and disrupting personal life. If the Secretary of State does not check Twitter regularly, how can he know whether he remains employed when the President can announce removal by tweet?

The repercussions of firing an employee are much greater when the person doing the firing is the President of the United States. While I would not recommend that Congress attempt to regulate the President's ability to comment on such firing, the act itself could be justifiably regulated to preserve the dignity of both the Presidency and the office from which an executive branch official is removed.

Here, there are already standards in law and policy concerning the discussion of others in public forums.[184] The President has alternative means of appointing and removing government officials from office. Restricting social media usage would not greatly intrude upon the President's freedoms when weighed against the dignity that could be preserved by requiring a more traditional and personal approach to firing.

4. Proscribe the Use of Social Media to Engage in Armed Conflict

President Trump has danced around the idea of entering armed conflicts or taking military action on Twitter. The stakes involved in such actions are extremely

6:44 PM), https://www.usatoday.com/story/news/politics/2017/07/26/trumps-tweets-banning-transgender-troops-military-spark-confusion/513729001/ [https://perma.cc/5M75-MPX8].

[184] *See, e.g.*, Hateful Conduct Policy, TWITTER, https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy [https://perma.cc/J66K-8ARL] (last visited Feb. 5, 2019).

high, and there are national security risks involved in publicly revealing military strategy on social media.[185] These interests are extremely high compared to the interest in protecting the President's right to free speech. Again, harkening back to the confusion troops experienced when the transgender ban was introduced,[186] it is not unreasonable to imagine that similar confusion would ensue were the President to direct the troops in or out of a military conflict using his Twitter account. These exceptionally high stakes warrant a slight intrusion on the President's freedom by Congress forbidding the President from making such announcements through social media when there are other appropriate forums available.

I would recommend that Congress pass regulation incorporating these recommendations that specifically address some of the concerns raised by President Trump's use of Twitter. Current restrictions do not adequately address the nature of these posts, and the problems brought to light by our current President's proclivity to share his thoughts.

The Constitution does not set out specifics about how the President of the United States is to perform the job. Some traditions and formalities have emerged, and these formalities stand starkly in contrast to the President's tweets that have pushed the boundaries of executive power.

While the next President may take a more traditional approach to communication than the current one, introducing legislation prohibiting the exercise of executive power on social media would clarify the distinction between an official statement of the President and an official action by the President. It also would account for uniformity if there for future variation of governing style. Some rules and regulations may seem obvious. For example, the Rules of the Senate provide that "[n]o Senator in debate shall refer offensively to any State of the Union."[187] This rule restricting the speech of Senators may seem like a simple matter of common decency, but the rule remains in place to preserve the prestige of the office and the tradition of civil debate. Such straightforward rules regulating the conduct of the President are similarly warranted to preserve the integrity of the nation's highest office.

The Constitutional Framers desired to avoid a concentration of power, a tyrannical unitary head of the government.[188] Legislation regulating the President's use of social media to offer commentary on pending judicial matters and exercise of the powers of the executive branch would be consistent with the Framers' intent

[185] Nahal Toosi, *Is Trump's Twitter Account a National Security Risk?*, POLITICO (Dec. 13, 2016, 5:06 AM), https://www.politico.com/story/2016/12/trump-twitter-national-security-232518 [https://perma.cc/5TLG-6NJD].
[186] Vanden Brook, *supra* note 183.
[187] STANDING RULES OF SENATE, S. DOC. NO. 113-18, at 14 (2013).
[188] Philip B. Kurland, *The Constitution: The Framers' Intent, the Present and the Future*, 32 ST. LOUIS UNIV. L. J. 17 (1987).

and ensure that the actions of the executive branch are the product of careful deliberation and not the product of a whim. The legislature is, therefore, justified in setting out specific guidelines restricting the President's use of social media, and help to determine what a modern-day presidential tweet should be. The restriction need not and should not be absolute, but should distinguish executive action from opinion, and allow the latter to proceed.

[189]

CONCLUSION

President Trump's tweets have raised new questions about the power of the president, and whether the president can use his constitutional powers through the medium of Twitter. He has already tweeted in ways that resemble executive action and attack the judiciary, and has hinted at further action related entering armed conflicts. Yet, the federal courts have been reluctant to recognize the tweets as official directives of the president, general looking to interpret more formal documentation issued by the White House in the aftermath of the Twitter posts.

Looking forward, a legislative solution would help clarify the nature of presidential tweets and other social media posts, and will be capable of lasting through multiple presidential terms of office. The Framers of the Constitution intended there to be forethought before decisions were made in government to protect against tyrannical abuse. This principle should help to govern future regulation of the President's social media use, as well as usage by other members of the government.

[189] Donald J. Trump (@realDonaldTrump), TWITTER (July 1, 2017, 6:41 PM), https://twitter.com/realDonaldTrump/status/881281755017355264 [https://perma.cc/9F28-JE5Y].