

IS PRESIDENT TRUMP VIOLATING THE FIRST AMENDMENT WHEN BLOCKING CITIZENS ON TWITTER?: EXPLORING MULTI-PARTY NEGOTIATION AS A WAY TO PROTECT CITIZENS' RIGHTS IN THE WAKE OF THE NEW DIGITAL AGE

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I. INTRODUCTION

As our society continues to immerse itself in the social media world, new legal issues arise regarding violation of private citizens' First Amendment rights on Twitter and the President of the United States. Regulation of private citizens' First Amendment rights on the Internet relies on a myriad of factors.¹ As will be discussed, courts use different standards depending on the type of speech and the medium. There have been instances where speech that would have been otherwise protected, is not because of certain surrounding circumstances.² In May 2018, Judge Buchwald issued a declaratory judgment in a class action brought against the President for his use of the block button on Twitter.³ In pertinent part, Judge Buchwald deemed the President's blocking of private citizens on Twitter a violation of their First Amendment rights.⁴ In July 2019, a three-judge panel on the United States Court of Appeals for the Second Circuit unanimously ruled that the President had been violating the Constitution by blocking citizens on Twitter.⁵ Jennifer E. Rothman wrote for the Harvard Journal of Law and Public Policy, stated that the Second Circuit also weighed in, noting that there are genuine

* The author would like to thank her mom, Barbara for her unconditional love and support in every aspect of her life, most importantly, being her biggest motivation.

¹ Charles Nesson & David Marglin, *The Day the Internet Met the First Amendment: Time and The Communications Decency Act*, 10 HARV. J.L. & TECH. 113, 115 (1996).

² *Id.*

³ Charlie Savage, *White House Unblocks Twitter Users Who Sued Trump, but Appeals Ruling*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/us/politics/trump-twitter-account-lawsuit.html>. [hereinafter Savage, *White House Unblocks Twitter Users*].

⁴ *Id.*

⁵ Charlie Savage, *Trump Can't Block Critics From His Twitter Account, Appeals Court Rules*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/2019/07/09/us/politics/trump-twitter-first-amendment.html> [hereinafter Savage, *Trump Can't Block Critics*].

instances in which private citizens' speech may not be protected.⁶ Some of the unprotected speech displayed on the web may amount to criminal prosecution if found to be a genuine threat to the President; "To determine when speech is protected by the First Amendment, and therefore not punishable as a threat, most circuits have adopted either a reasonable speaker or a reasonable listener test."⁷ The Journal also sets forth prongs of tests to show when speech should be protected.⁸ In these tests, the government carries a heavy burden when trying to restrain speech that based on precedent.⁹ The focus rests on the type of speech being restrained and the irreversible harm it would cause to private citizens.¹⁰ The harm is depriving citizens of their free speech rights under the Constitution.¹¹ What constitutes a public platform for the purpose of protection under the First Amendment is imperative in determining what speech constitutes speech made on a truly public platform, that if suppressed, is unconstitutional.¹² The way in which the following questions are answered can be determinative in classifying the President's Twitter as a public platform. First, does the President utilize his social media platform in his official capacity? Second, does the President issue information to make it available to the public? Third, does the President invite comments on the platform? Lastly, is there any screening process imposed on the platform that limits comments? These considerations, if definitive, would present a strong argument for citizens claiming a violation of their First Amendment rights because the President blocked them on Twitter.¹³ Additionally, it is important to be mindful of the ways the President maintains his Twitter account and the ways he exercises control over the platform.¹⁴

⁶ Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y. 283, 287 (2001) ("The free speech clause of the Constitution has never been read to protect all speech. Speech such as obscenity, fighting words, child pornography, incitement, and 'true threats' are considered outside the protections of the First Amendment.").

⁷ *Id.* at 288.

⁸ *Id.* at 289.

⁹ *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

¹⁰ *Id.* at 724 (explaining that the harm to suppress political speech in a public forum is a violation of the First Amendment) (Douglas, J. concurring).

¹¹ *Id.*

¹² *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F.Supp. 3d 702 (E.D. Va. 2017).

¹³ *Id.* at 716-717 (where the court found that Defendant, acting in her capacity as a governmental official, "committed a cardinal sin under the First Amendment" by blocking Plaintiff from participating in her online Facebook forum in order to suppress Plaintiff's criticism of the County government). Note this is not Twitter, but a different social media platform.

¹⁴ *Melville v. Town of Adams*, 9 F.Supp. 3d 77 (D. Mass. 2014).

Categorizing elected officials' social media accounts as public platforms has led to many cases being brought, and ultimately, the determination regarding suppression of citizens' speech on such platforms.¹⁵ Writing for the United State Court of Appeals for the Second Circuit, Judge Barrington D. Parker found that the President uses his Twitter to conduct government business and the government conduct is subject to a "wide-open, robust debate [that] generates a level of passion and intensity the likes of which have rarely been seen."¹⁶ In essence, the ruling has not alluded to the limits of the President's Twitter use, but has classified the use of his Twitter as "clearly acting in a government capacity."¹⁷

This Note seeks to answer the following question: How Twitter, its users, and the President can participate in a multi-party negotiation to decide on terms to enact into a user agreement for Twitter for the purposes of ensuring citizens' First Amendment rights are not violated if the President blocks them on Twitter.¹⁸ Part II of this Note discusses the role of the government when they suppress speech on public forums. It additionally addresses how Trump's actions of blocking citizens were declared a violation of their First Amendment rights.¹⁹ Part III raises the issues citizens face when naming the President as a party to a lawsuit, and the viable defenses that can be raised. It further provides the basis for the first lawsuit in this matter and addresses why litigation will not solve this issue. Part IV provides how a multi-party negotiation between representatives of Twitter, its users, and the President would work, showing strategies and examples with a tweet by a citizen whose Twitter the President blocked. In addition, Part IV discusses potential concerns around having the President as a staple part of the negotiation, but ultimately discerning the arguments. Lastly, this Note aims to address how the proposed multi-party negotiation would combat issues for Twitter, its citizens, and the President without the need for litigation.

¹⁵ *ACLU Warns Elected Officials, Government Agencies, Against Blocking Members of Public on Social Media*, ACLU (Mar. 1, 2018), <https://www.aclu.org/news/aclu-warns-elected-officials-government-agencies-against-blocking-members-public-social-media>.

¹⁶ Savage, *Trump Can't Block Critics*, *supra* note 5.

¹⁷ *Id.*

¹⁸ This Note does not speak to all social media platforms. The sole social media platform is Twitter.

¹⁹ Savage, *Trump Can't Block Critics*, *supra* note 5; see also Tristan Greene, *Federal Judge rules Trump Can't Block People on Twitter*, THE NEXT WEB (May 23, 2018), <https://thenextweb.com/politics/2018/05/23/federal-judge-rules-trump-cant-block-people-on-twitter/>.

II. BACKGROUND

A. *History of First Amendment Rights on a Public Forum*

The Internet is nearly 30 years old.²⁰ The Internet allows millions to be intricately connected, which in turn jeopardizes citizens' freedom and anonymity.²¹ Since 1996, there have been constitutional issues relating to the use of the Internet.²² These issues first came to light when courts were faced with assessing the constitutionality of the Communications Decency Act of 1996 ("CDA").²³ Each case had to be decided on a case-by-case basis, honing in on the specific facts with regard to the medium of communication, since the medium is what frames the legal question for the courts.²⁴ The courts' intuition about today's society is now presented as fact; "the novelty exemplified by the CDA litigation is the prospect of technology giving us change at such a rapid pace that questions about the point in time at which constitutionality is to be assessed come sharply into focus. Today's fictions may turn out to be tomorrow's facts."²⁵ The judges presiding over such novel cases were presented with tough lawsuits—"how can a court render an enduring judgment about the constitutionality of a statute when the very weights on the scales used in the constitutional balancing test are in rapid flux?"²⁶ These lawsuits can be better decided by the parties

²⁰ See Sam Cook, *The First Amendment and What it Means for Free Speech Online*, COMPARITECH (Feb. 10, 2017), <https://www.comparitech.com/blog/vpn-privacy/the-first-amendment-what-it-means-free-speech-online/>.

²¹ *Id.*

²² See Charles Nesson, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act*, 10 HARV. J.L. & TECH. 113, 115 (1996).

²³ See *id.* Communications Decency Act of 1996 ("CDA") is dealing with regulation of indecency on the Internet.

²⁴ See *id.* (explaining that calling in the constitutionality of the CDA were the first instances courts were faced with deciding constitutional rights of citizens on the Internet.).

²⁵ See *id.* "Tomorrow's facts" are presented over a decade later now that Twitter is giving rise to constitutional issues. The time for constitutional issues to be addressed will be focused on the points in time when the President uses his Twitter to block citizens while holding office in his official capacity.

²⁶ See *id.* The "rapid flux" of the Internet demonstrates the constitutional problem presented. The article, written in 1996, seems to have predicted the future. Twitter did not come into existence until a decade later in 2006; see, e.g., Amanda MacArthur, *The Real History of Twitter, In Brief*, LIFEWIRE (Nov. 2, 2018), <https://www.lifewire.com/history-of-twitter-3288854>. The point is that the Internet has changed and will seemingly continue to. With that, more litigation and constitutional issues for the courts.

coming to the table and negotiating.²⁷ When constitutional issues are involved, as in this Note, it is the citizens' basic needs they want to be fulfilled. Negotiation can curtail future litigation issues that would arise as Twitter use continues to expand.

The Public Forum Doctrine has been used as the basis for lawsuits. The doctrine has been the subject of lawsuits involving Trump's Twitter use. The doctrine "is an analytical tool used in First Amendment jurisprudence to determine the constitutionality of speech restrictions implemented on government property."²⁸ That is, when a citizen is challenging a violation of their free-speech on a public forum, the place where they communicate can be a determinative factor in evaluating whether groups or individuals have access to engage in expressive activities on such property.²⁹ In *Perry Education Association v. Perry Local Educators' Association*, the Court created three categories of public forums: "traditional public forums, limited public forums and nonpublic forums."³⁰ These categories are determinative when classifying citizens' speech to determine if or how the government can restrict speech, and if the restriction is a violation of their rights. For the purposes of this Note, an alternative category is discussed. A limited public forum is "public property which the state has opened

²⁷ ROGER FISHER & WILLIAM URY, *GETTING TO YES* 13 (Bruce Patton eds., 2d ed. 1991). "In searching for the basic interests behind a declared position, look particularly for those bed-rock concerns that motivate all people. If you can take care of such basic needs, you increase the chance both of reaching agreement and, if an agreement is reached, of the other side's keeping to it." This exemplifies the importance of coming to the table and deciding on a matter with the specific parties involved in order to protect their interests.

²⁸ David L. Hudson Jr., *Public Forum Doctrine*, *THE FIRST AMENDMENT ENCYCLOPEDIA* (2017), <https://www.mtsu.edu/first-amendment/article/824/public-forum-doctrine>.

²⁹ *See id.* (Public forum doctrine states that, "The public has greater ability to exercise its free-speech rights in so-called traditional public forums, such as the city streets, than it does in nonpublic forums, such as a public school classroom."). The courts will have to determine the crux of the issue for each case it is presented with—Specifically for the issue in this Note, whether Twitter is a public forum. The challenges presented in the case are a mere indication of the problems that can arise in the future with the President using Twitter in a capacity the courts would have to collectively decide on the capacity the speech is used, based on the forum it is used on. If not, each time an issue is raised with the President's use of Twitter, the court faced with the case will have to decide (in their judgment based on precedent) the type of speech and classification of the forum it appears on. Even though Judge Parker ruled that it was a violation, there was no further discussion regarding measures to be taken to ensure that this violation would not continue to occur.

³⁰ *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 103 S. Ct. 948 (1983), i.e., "The government can only restrict speech based on content in a traditional public forum, if it can show that its regulation is necessary to serve a compelling state interest and is narrowly tailored to achieve that interest; that is, meet strict scrutiny."

for use by the public as a place for expressive activity.”³¹ When dealing in this category, the Court in *Perry* found that “a State may reserve the use of the property for its intended purposes, communicative or otherwise, as long as a regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”³² This is another category courts will face when litigating issues of types of speech of Twitter, especially in regards to the President.

The government can restrict content if it acts in one of two ways: “(1) *directly* restricting expressive content by targeting particular topics or viewpoints, or (2) restricting content *indirectly* by punishing a speaker for the *reaction* produced by a controversial message (the ‘hostile audience’ cases).”³³ Courts have taken a “categorical” approach for seven other “low-level” categories of speech of “direct restrictions on expressive content, striking down such restrictions as presumptively unconstitutional.”³⁴ The medium of the speech, the government’s ability to suppress it, and the way in which it does will be factors in determining whether citizens’ First Amendment rights were violated. Even though these categories provide a basis for courts to look at for precedent, the question remains open: does the President’s use of and actions on Twitter, in conjunction with the speech he displays, constitute violations of citizens’ rights? Judge Parker answered yes, concluding “evidence of the official nature of the account is overwhelming . . . once the

³¹ *Id.* at 948, 956. Judge Parker did in fact consider the President’s Twitter a public forum, but the Trump administration appealed this decision, ensuing more litigation.

³² *Perry Education Ass’n. v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 38, 103 S. Ct. 948, 951 (1983); See *infra* Section III for a further discussion of this notion, exemplifying the types of speech Trump has suppressed by blocking users.

³³ Kevin F. O’Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 Sw. U. L. REV. 223, 228 (2000). In either context, a court will subject the restriction to heightened scrutiny. The *direct* regulation of expressive content is exemplified by restrictions that prohibit the expression of certain political views (criticizing a foreign government near its embassy, for example, or expressing opposition to organized government), or restrictions that target particular types or topics of speech (singling out hate speech for example, or labor speech). The *indirect* regulation of expressive content is usually accomplished by enforcing general prohibitions against undesirable conduct. These are the famous “hostile audience” cases. They hold that the expression of a controversial viewpoint may not be criminalized merely because it prompts a violent reaction among onlookers enraged by the ideas expressed.

³⁴ *Id.* at 251. These “low-level” categories of speech are denied full First Amendment protection because “such utterances are no essential part of any exposition of ideas.” The less-than-fully-protected categories are: (1) defamatory statements, (2) commercial speech, and (3) lewd, profane, or indecent expression. The protected category is generally vulnerable to content-based regulation. But content-based restrictions are not necessarily valid when applied to the less-than-fully-protected categories.

president has chosen a platform and opened up its interactive space to millions of users and participants, he may not selectively exclude those whose views he disagrees with.”³⁵ The Justice Department does not agree with the Judge’s classification of the President’s Twitter account, instead labeling it as “his personal Twitter account.”³⁶

B. *Twitter, the President, and citizens’ First Amendment Rights*

In 2006, a side project turned into one of the biggest communication technologies to date.³⁷ The side project is known as Twitter. Since he officially took office, President Trump has sent about 11,887 tweets.³⁸ As of November 17, 2019, 66.8 million people are following his account.³⁹ Under his name, his bio states “45th President of the United States of America”.⁴⁰ His predecessor, Barack Obama, was the first president to use Twitter in his official capacity, using @POTUS as his official handle and forming “mass communication between government and citizens.”⁴¹ With the relatively new digital age of Twitter in conjunction with its use by

³⁵ Savage, *Trump Can’t Block Critics*, *supra* note 5.

³⁶ *Id.*

³⁷ See Amanda MacArthur, *The Real History of Twitter*, in *Brief*, LIFEWIRE (Nov. 2, 2018), <https://www.lifewire.com/history-of-twitter-3288854>.

³⁸ See Michael D. Shear, et al., *How Trump Reshaped the Presidency in Over 11,000 Tweets*, N.Y. TIMES (Nov. 2, 2019), <https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-presidency.html>. The context of the President’s tweets can be a factor in determining the type of capacity in which he is using it. This is significant when deciding if the tweets were used under his official capacity as President reaching the public at large. This number is based off of statistics from when the President was inaugurated on January 20, 2017 up until October 15, 2019.

³⁹ See Donald Trump (@TheRealDonaldTrump), TWITTER, https://twitter.com/realDonaldTrump?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor.

⁴⁰ *Id.* The fact that this label is under his bio can be a strong indication of determining in what capacity he is using his Twitter. But, arguably only 11,887 tweets were during his official presidency, while the remaining 34,313 tweets were before.

⁴¹ Nicol Lee, *How the President’s Twitter Account Affects Civil Society*, BROOKINGS (Feb. 16, 2017), <https://www.brookings.edu/blog/techtank/2017/02/16/how-the-presidents-twitter-account-affects-civil-society/>. Obama used the Twitter handle @POTUS—President of the United States, but POTUS is not on Trump’s Twitter. Thus, the issue becomes whether Trump’s Twitter bio discussed in footnote 40 is enough for courts to classify his Twitter and his tweets as acting in his official capacity. The comparison between the types of speech displayed on the former and current President’s Twitter goes toward the issue of the Note.

the President, new constitutional issues are at the forefront of litigation.⁴²

The issue of suppressing citizens' speech on Twitter became paramount in *Knight First Amendment Inst. at Columbia Univ. v. Trump*, when the Knight First Amendment Institute filed a lawsuit against Donald Trump on behalf of seven Plaintiffs who were blocked by the President from his Twitter.⁴³ The Plaintiffs' claims were based on violations of their First Amendment rights on a public forum.⁴⁴ The injured Plaintiffs were seeking an injunction to be imposed on the President.⁴⁵ U.S. District Judge Naomi Reice Buchwald of New York was presented with the issue of whether the Plaintiffs had standing to sue the President, and if they did, whether the President's action of blocking them on Twitter constituted a violation of their First Amendment rights.⁴⁶ Judge Buchwald denied the injunctive relief the Plaintiffs sought and only granted them partial relief. She did not find it necessary to grant an injunction due to the assumption that the President and other officials will follow the law she declared. The Judge reasoned, "no government official — including the President — is above the law, and all government officials are presumed to follow the law as has been declared."⁴⁷ By classifying Trump's acts as unconstitutional, Judge Buchwald explicitly sent out a warning, but stopped short of issuing injunctive relief.⁴⁸ She based her decision on the basis that the President, like every other before him, should follow and abide by the law.⁴⁹ In rendering her decision, Judge Buchwald declared the President's Twitter a public forum, "and that blocking people

⁴² Rothman, *supra* note 6 at 37. Discussed in Part I, there is indication that the President is using his Twitter in an official capacity. If his Twitter is considered a public limited forum, then the President is still susceptible to millions of claims.

⁴³ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F.Supp.3d 541, (S.D.N.Y. 2018).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* This lawsuit was not tried until the judge decided the Plaintiffs had standing. This is a common barrier to lawsuits, and it is even harder when suing the President. Section III will contain more discussion about standing.

⁴⁷ *Id.*

⁴⁸ Phil Helsel, *Unblocked: Politicians on Notice After Trump Twitter Ruling*, NBC NEWS (May 25, 2018), <https://www.nbcnews.com/tech/tech-news/unblocked-politicians-notice-after-trump-twitter-ruling-n877191>.

⁴⁹ Cristian Farias, *How a Federal Judge Is Laying Down the Law on Trump's Twitter Habits*, N.Y. MAG. (May 23, 2018), <http://nymag.com/intelligencer/2018/05/donald-trump-twitter-block-judge-test.html?gtm=top>. Judge Buchwald, in short, presumed that Trump is a normal president who believes in the rule of law. She concluded that "there is simply no reason to depart from this assumption at this time."

based on their political speech ‘constitutes viewpoint discrimination that violates the First Amendment.’”⁵⁰ In an opinion written by Judge Parker, a unanimous three-judge Second Circuit panel upheld this decision.⁵¹

A spokeswoman for the Department of Justice announced that the President did not agree with the decision made by the judge.⁵² Initially, Twitter had not made any statements and had not taken any action to suspend the President’s account since he is a world leader and the information he presents is novel.⁵³ But, as will be discussed in Section III, Jack Dorsey, the CEO of Twitter, has commented on the President’s Twitter use and has met with him.⁵⁴ As of now, there is no binding rule set forth on what Twitter must do next in order to ensure the President is not violating citizens’ First Amendment rights on its platform.⁵⁵ Lawsuits do not seem to be the appropriate avenue for blocked citizens to pursue. There are hurdles to overcome when having the President as a party to a lawsuit, shifting a heavy burden onto citizens.⁵⁶ Even though Judge Buchwald provided declaratory relief, she did not issue an injunction to require the President to unblock the accounts.⁵⁷ Courts may be hesitant to issue injunctive relief ordering the President to unblock citizens because of the separation of pow-

⁵⁰ See *id.* “Buchwald wrote in the ruling that parts of Trump’s Twitter account – the ‘interactive space’ where Twitter users may directly engage with the content of the President’s tweets” – is a public forum.”

⁵¹ Savage, *Trump Can’t Block Critics*, *supra* note 5.

⁵² Helsel, *Unblocked*, *supra* note 48.

⁵³ Savage, *Trump Can’t Block Critics*, *supra* note 5 at 48. Discussed in Part I, what *type* of information is available to the public (on Twitter) helps judges classify the medium of the speech.

⁵⁴ Tony Romm, *Trump met with Twitter CEO Jack Dorsey – and Complained About His Follower Count*, WASH. POST (Apr. 23, 2019), https://www.washingtonpost.com/technology/2019/04/23/trump-meets-with-twitter-ceo-jack-dorsey-white-house/?utm_term=.7be80b6f3223.

⁵⁵ Savage, *Trump Can’t Block Critics*, *supra* note 5. This is the first judge to decide an issue in which the President’s actions on Twitter raised constitutional concerns. Even though she did provide declaratory judgment, there was no official remedy imposed on the President to conform how he must use his Twitter account.

⁵⁶ Glenn Fleishman, *The People vs. Donald Trump: Every Major Lawsuit and Investigation the President Faces*, FORTUNE (Sep. 21, 2018), <http://fortune.com/2018/09/21/donald-trump-lawsuit-investigation-charges-news-update/>.

A sitting president cannot be sued as an individual for official actions taken while in office, courts have decided. But a federally filed lawsuit that relates only to unofficial or personal behavior could proceed, ruled the U.S. Supreme Court in 1994’s *Jones v. Clinton* lawsuit. In that decision, the Supreme Court didn’t determine whether a state lawsuit might proceed, and indicated that different constitutional issues, including federalism, would have to be decided.

see also *Clinton v. Jones*, 520 U.S. 681 (1997).

⁵⁷ Savage, *Trump Can’t Block Critics*, *supra* note 5.

ers [issue(s)] lurking in the background.⁵⁸ If the President blocking citizens is going to be a continuing issue, then each judge presiding over the bench will have to either reverse the judgment before or add additions to the previous ruling.⁵⁹ In essence, every time the President is being sued for blocking a citizen on Twitter, a judge will have to make a decision that can have a chilling effect on future lawsuits.⁶⁰ Real life conflicts arise among the court system when the district court decides such issues and the appeals court will then be faced with affirming or overturning the lower court's decisions.⁶¹ In addition, due to the Justice Department's dissatisfaction with the 2019 ruling, an appeal may be forthcoming to the full appeals court or to the Supreme Court.⁶² That is, if an injured plaintiff alleging the injury can prove standing against the President.⁶³ Even though the Courts' ruled that the President blocking citizens on Twitter is unconstitutional, there has not been a discussion regarding injunctions or future action if the President were to continue to block citizens.⁶⁴ Without a governing rule set forth of what type of speech the President is and is not allowed to block on

⁵⁸ See generally, Dan Froomkin, *For Brett Kavanaugh, the Separation of Powers Is a One-Way Street*, AM. CONST. SOC'Y (July 26, 2018), <https://www.acslaw.org/acsblog/for-brett-kavanaugh-the-separation-of-powers-is-a-one-way-street/>. This is an example of how a political figure does not have a blank check in the separation of powers to over-step on other powers. By issuing an injunction against the President, this could insinuate that the judiciary is casting doubt on the executive.

⁵⁹ Randy Kozel, *The Problem of Precedent*, WASH. POST (July 10, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/10/the-problem-of-precedent/?utm_term=.936b6ef10cd2. Stating:

A perennial question at the Supreme Court is how today's justices should deal with yesterday's decisions. The court has been issuing opinions for centuries, so when new justices take their seats on the bench, they have plenty of material to work with. Then again, it's all but certain that a newly appointed justice will find some decisions she disagrees with.

(showing that even though precedent exists, new justices may form different opinions on rulings).

⁶⁰ See, e.g., Cheyenne Haslett, *Judge Expected to Rule Whether White House Must Immediately Restore CNN Reporter Jim Acosta's Press Pass*, ABC NEWS (Nov. 15, 2018), <https://abcnews.go.com/Politics/emergency-court-hearing-looms-white-house-defends-revoking/story?id=59191520>. The notion is that if a judge provides a specific remedy for the actions that must be taken while the President uses his Twitter account, there may be a chilling effect for the future.

⁶¹ See, e.g., Margaret N. Kniffen, *Overruling Supreme Court Precedents: Anticipatory Actions By United States Court of Appeals*, 51 FORDHAM L. REV. 53 (1982) (on the assumption that the appeals judge will overturn a judgment in favor of the blocked citizens).

⁶² Savage, *Trump Can't Block Critics*, *supra* note 5.

⁶³ See *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F.Supp.3d (discussing the difficulties associated with suing the President and the citizens bearing the burden to prove standing).

⁶⁴ Savage, *Trump Can't Block Critics*, *supra* note 5.

Twitter and when he may do so, the President may continue to block citizens and use Twitter as a “megaphone to amplify personal grievances against those that dare to deviate from the administration’s priorities.”⁶⁵ Although the 2019 ruling prohibits the President from excluding people from an “otherwise open online dialogue because they say things that the official finds objectionable,” this still leaves open the possibility of the President arguing valid reasons for why he may block a citizen for speech other than ones he finds objectionable.⁶⁶

III. DISCUSSION

A. *Barriers posed by naming the President as a party to a lawsuit*

1. Immunity

When a president is named a party to litigation, he may raise the defense of immunity.⁶⁷ However, President Trump may be open to this type of litigation if it means that he can continue to block citizens as he wishes just because they are in disagreement with him if no black-letter law is set forth guiding the President’s use on Twitter when suppressing speech. But, with no court order directing the President to appear, no litigation can be certain.⁶⁸ The President may even pick and choose when he wants to raise this defense, which would result in unfair opportunity to citizens. Though, as discussed below, the President may be willing to engage

⁶⁵ Lee, *supra* note 41. Just because the President wants to block a private citizen for not agreeing with him, he can. There is no basis or sound reason needed. All that really is required is his subjective belief, and the press of the block button.

⁶⁶ Savage, *Trump Can’t Block Critics*, *supra* note 5.

⁶⁷ See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Clinton v. Jones*, 520 U.S. 681 (1997) (each case explains different instances where sitting presidents were sued and raised the immunity defense).

⁶⁸ Michael Kranish & Ann E. Marimow, *Supreme Court Nominee Has Argued Presidents Should Not Be Distracted by Investigations and Lawsuits*, WASH. POST (July 9, 2018), https://www.washingtonpost.com/politics/top-supreme-court-prospect-has-argued-presidents-should-not-be-distracted-by-investigations-and-lawsuits/2018/06/29/2dd9c1cc-7baa-11e8-80be-6d32e182a3bc_story.html?utm_term=.9b61d4c25c58. “Earlier this month, New York’s highest court rejected Trump’s attempt to halt discovery in the suit, paving the way for the president to be deposed.” From the article it is shown that when a judge steps in, the President may be ordered to partake in civil suits and follow the court’s order. It favors negotiation where the President would be in control of the decisions being made and future actions taken that he would have agreed to.

in multi-party negotiation if it means the negotiation will be the first of its kind that a president in the past has never participated in.⁶⁹ Thus, litigation is a grey area for citizens wishing to sue the President for blocking them on Twitter and protecting their First Amendment rights.

The problems courts were faced with when discussing the Internet and constitutional rights were paramount and novel over a decade ago; but because of the complexity, they were decided on a case by case basis.⁷⁰ The courts only recently declared Trump's Twitter a public forum.⁷¹ The limiting guidelines set forth by the 2019 decision are bound to be tested by the Justice Department, leading to inevitable litigation.⁷² If these matters continue to be litigated, courts will have the impossible task of classifying every citizen's social media account and every outlet on cyber space under a specific forum.⁷³ Essentially, this would be burdensome for the courts to be tasked with setting forth bright-line rules for instances where the President may actually be constitutionally allowed to suppress speech by blocking a citizen on the Internet. There is a strong presumption in favor of certain officials being immune from litigation, unless their actions can be classified as acting within their official duties.⁷⁴ Since Trump sends out Tweets pursuant to his official capacity as President, but also for personal reasons, the distinction may be too difficult to draw a hard line,

⁶⁹ See, e.g., Nick Tabor, *55 Ways Donald Trump Structurally Changed America in 2017*, N.Y. MAG, <http://nymag.com/intelligencer/2017/12/55-ways-donald-trump-structurally-changed-america-in-2017.html> (last visited Jul., 2019) (showing the "first" and changes made by Trump that other presidents have not done).

⁷⁰ Savage, *White House Unblocks Twitter Users*, *supra* note 3.

⁷¹ Clay Calvert, *Federal Judge Rules Trump's Twitter Account Is a Public Forum*, THE CONVERSATION (May 24, 2018), <http://theconversation.com/federal-judge-rules-trumps-twitter-account-is-a-public-forum-97159>. Twitter, however, is not a real-world space—And it's run by a private company. The judge's ruling found, however, that the company has less control over the @realDonaldTrump account than Trump himself and White House social media director Dan Scavino—also a public official. Their power includes the ability to block people from seeing the account's tweets, and "from participating in the interactive space associated with the tweets," in the form of replies and comments on Twitter's platform. Also key was the fact that the @realDonaldTrump account is used for governmental purposes. Specifically, the judge found that "the President presents the @realDonaldTrump account as being a presidential account as opposed to a personal account and, more importantly, uses the account to take actions that can be taken only by the President as President"—such as announcing the appointments and terminations of government officials.

⁷² Savage, *Trump Can't Block Critics*, *supra* note 5.

⁷³ Hudson, *Public Forum Doctrine*, *supra* note 28.

⁷⁴ *Halperin v. Kissinger*, 606 F.2d 1192 (1979). (Parker, J.) (deeming the President as having been acting in his official capacity while using his Twitter). In turn, however, the President's administration disagrees and is taking the next steps to pursue possible future litigation.

revoking his *entire immunity* from civil suits.⁷⁵ As recently seen, Judge Parker did draw a hard vast line declaring the President's Twitter a public forum, but to his dissatisfaction, it is inevitable that these matters are going to continue to be brought in front of the courts when speech appears in different forms.⁷⁶ If the President's Twitter is used in a "personal capacity," then he can raise absolute immunity.⁷⁷ An argument can be made that maintaining a Twitter account and distributing information via this account about political affairs is what the President is responsible for, and the distribution of the information is similar to a press conference.⁷⁸ Some of the information distributed is to inform the public at large.⁷⁹ But, the Department of Justice has attempted to counter this argument declaring that Trump is immune from being obligated to engage with the public.⁸⁰ The Departments' muddled arguments have not

⁷⁵ See Donald Trump, (@TheRealDonaldTrump), TWITTER, (last visited Feb. 8, 2018), https://twitter.com/realDonaldTrump?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor (where the president used his Twitter Account to tweet: "[t]he pathetic and dishonest Weekly Standard, run by failed prognosticator Bill Kristol [who, like many others, never had a clue], is flat broke and out of business. Too bad. May it rest in peace!") Emphasizing the President using his Twitter for personal reasons and beliefs).

⁷⁶ Savage, *Trump Can't Block Critics*, *supra* note 5.

⁷⁷ Mike Pearl, *An Expert Explains Why It Would Be So Hard To Sue President Donald Trump*, VICE (Nov. 11, 2016), https://www.vice.com/en_us/article/qbn3b7/an-expert-explains-how-to-sue-the-president (explaining "absolute immunity" which means he cannot be sued [for] anything he does in a personal capacity while he's president. [Defining] "in a personal capacity," meaning that a citizen wouldn't be suing him personally. They'd be suing the United States.).

⁷⁸ See Andrew Buncombe, *Donald Trump One Year On: How The Twitter President Changed Social Media and the Country's Top Office*, INDEPENDENT (Jan. 17, 2018), <https://www.independent.co.uk/news/world/americas/us-politics/the-twitter-president-how-potus-changed-social-media-and-the-presidency-a8164161.html> (setting forth an argument for declaring Trump's Twitter as an official capacity):

He often says it is the most effective way to connect with the country, without the filter of a traditional media he claims not to trust. The White House was obliged to clarify that his tweets also represent presidential statements, and should carry the same imprimatur as a comment issued by his press office.

⁷⁹ Calvert, *supra* note 71. The importance of the President using his Twitter to distribute information to the public at large is a factor to determine the capacity and use of his Twitter. This categorization will likely be a factor in a court deciding the issue of Trump's violation and his use on Twitter if there is a set forum his Twitter is designated as. By doing this, courts will be faced with a hard task of drawing a line that would set forth a rule that other presidents will have to abide by.

⁸⁰ David Choi, *Justice Department Argues Trump Could Block Anyone He Wants On Twitter, Not Obligated To Let People "Piggyback" On His Tweets*, BUSINESS INSIDER (Aug. 7, 2018), <https://www.businessinsider.com/can-donald-trump-block-people-on-twitter-argument-2018-8>. The Justice Department asserted that Trump's account belongs to him "in his personal capacity," and "not the control of the government," and thereby affords him immunity from obligations to engage with the public. The argument continued by saying Trump could not be compelled as a government official on a personal account to include all "people from his own property. And

been given great weight since citizens' whose speech were suppressed by Trump were raising violations of free speech because they were blocked for stating their opinions on Twitter.⁸¹ Judge Parker strongly concurs in the citizens' arguments because of the categorization of declaring the President's Twitter a public forum.⁸²

2. Standing

When naming the President as a party, citizens must overcome the hurdle of showing that they have standing to sue.⁸³ According to *Lujan v. Defenders of Wildlife*, a plaintiff has standing when they have "a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision."⁸⁴ This is because a problem arises when a court rules on important constitutional issues in the abstract that would "create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature, and open the Judiciary to an arguable charge of providing 'government by injunction.'"⁸⁵ The threshold for the injury and relief available for citizens blocked on Twitter by the President may be harder to overcome since there must be a showing that the injury is particularized and relief requested can redress the injury.⁸⁶ In turn, citizens can argue that this is not a reasonable likelihood of the injury occurring, but rather an actual occurrence where they were blocked by the President and stripped of their First Amendment rights.⁸⁷ If this argument is not compelling enough, when "[f]uture injury [is] certainly impending, rel[ying] on the history of prior enforcement of the law [sic], coupled with the facts that 'any person' could file a complaint

when he exercises the power enjoyed by all Twitter users to block other users from their own accounts, he is not using any authority belonging to or conferred on him by the federal government."

⁸¹ See Dan Mangan, *Read the Tweets That Got These People Blocked on Twitter by President Donald Trump*, CNBC, (May 23, 2018), <https://www.cnbc.com/2018/05/23/read-the-tweets-that-got-these-people-blocked-on-twitter-by-president-donald-trump.html>.

⁸² Savage, *Trump Can't Block Critics*, *supra* note 5.

⁸³ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F.Supp.3d (2018).

⁸⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2136 (1992).

⁸⁵ *Schlesinger v. Reservists Committee*, 418 U.S. 208 (1974).

⁸⁶ See *Lujan*, 504 U.S. 555. A citizen trying to sue Trump must show that the injury is not shared amongst a general population. This may not be a problem for the citizens who have been blocked since it has only been 86. The problem will arise for future blocked citizens who wish to sue the President.

⁸⁷ See *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013) (Reaffirming the notion that when courts analyze injury, they make sure the alleged injury is concrete and particularized).

under the law, and any threat of enforcement of the law could burden political speech.”⁸⁸ This magnifies the problem for citizens bringing lawsuits against the President since some citizens may be bound by a court decision, but as of now are not blocked so “threatened enforcement [is not] sufficiently imminent.”⁸⁹ But again, this puts courts in a tough position by having to decide against the Executive branch and, in turn, issuing an order with which the President must comply.⁹⁰ The question remains open during the Trump presidency of how much of a check the Judiciary will need to have on the President, who has little to no regard for legal rules and constraints.⁹¹ If the court does redress the injury,

⁸⁸ *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). A year after *Amnesty International*, the Court in *Susan B. Anthony* reaffirmed that pre-enforcement challenges to a statute can occur

under circumstances that render the threatened enforcement sufficiently imminent . . . [A]n organization planning to disseminate a political advertisement, which was previously the source of an administrative complaint under an Ohio law prohibiting making false statements about a candidate or a candidate’s record during a political campaign, challenged the prospective enforcement of that law. The Court, in finding that the plaintiff’s future injury was certainly impending, relied on the history of prior enforcement of the law with respect to the advertisement, coupled with the facts that ‘any person’ could file a complaint under the law, and any threat of enforcement of the law could burden political speech.

see also U.S. Const. art. III, §2, cl. 1.

⁸⁹ *Susan B. Anthony*, 573 U.S. The problem would be the citizens who have not yet been blocked by Trump but may in the future and will want to file a lawsuit against him for a different speech issue on Twitter that has not been the type presented, may be turned away because there has already been a judgment made by the class of citizens’ who have been blocked for other types of speeches which they are bound to; *see* Legal Terms Glossary, OFFICE OF THE U.S. ATTORNEY, <https://www.justice.gov/usao/justice-101/glossary> (last visited Oct. 9, 2019). Defining binding precedent as:

[a] prior decision by a court that must be followed without a compelling reason or significantly different facts or issues. Courts are often bound by the decisions of appellate courts with authority to review their decisions. For example, district courts are bound by the decisions of the court of appeals that can review their cases, and all courts – both state and federal – are bound by the decisions of the Supreme Court of the United States.

⁹⁰ *Every Time The Supreme Court Ruled Against A United States President*, RANKER NEWS, <https://www.ranker.com/list/president-supreme-court-clashes/ranker-news> (last visited Oct. 9, 2019) [hereinafter *SCOTUS Rulings Against a President*]. The United States has a system of checks and balances. This means no single person has complete power over laws and rulings within the country, not even the president.

⁹¹ Farias, *supra* note 49 Stating,

We’ve already seen, time and again, how judges react to some of [Trump’s] administration’s policies. But when it comes to his private mendacity, like the tweets he sends out in the dead of night, we’ve yet to see much judicial intervention, and with good reason: not everything Trump does is subject to judicial review.

the President may not follow orders.⁹² That is, Trump unblocking or not being allowed to block citizens for their speech made on Twitter. Trump can simply not follow the order, which would make him the subject of continued lawsuits.⁹³ Recently though, the seven plaintiffs who were the faces of the *Knight First Amendment Institute v. Trump* case were unblocked.⁹⁴ Notably, only the citizens who were named were unblocked, not all citizens who had been blocked.⁹⁵ But, the catch-22 is that the lawsuit is not done. The Trump administration is exploring next steps after disagreeing with the 2019 ruling.⁹⁶ Trump is still the subject of an ongoing lawsuit.⁹⁷ Since the administration did not agree with the decision of Judge Buchwald or Judge Parker, it is fair to assume the President and the Department of Justice are going to raise defenses of why the President should be allowed to block citizens.⁹⁸ The decision of the issue on appeal, if found to be inconsistent with the lower courts, exemplifies the potential chilling effect with this type of litigation.⁹⁹

As mentioned previously in this Note, the President's defense of immunity may prevail.¹⁰⁰ Under the holding in *Clinton v. Jones*, "Mr. Trump is *not immune* from lawsuits that *do not* relate to his

⁹² *SCOTUS Rulings Against a President*, *supra* note 90. Presidents who lost to the Supreme Court reacted in different ways. While some rulings were quietly accepted, others were challenged or outright ignored.

⁹³ *Id.*

⁹⁴ NCC Staff, *Trump Appeals Twitter Ruling, Unblocks Plaintiffs*, CONST. DAILY (June 5, 2018), <https://constitutioncenter.org/blog/trump-appeals-twitter-ruling-unblocks-plaintiffs>. Last year, the Justice Department argued that a ruling for Knight and the plaintiffs would raise clear constitutional questions. Attorney Michael Baer said

It would send the First Amendment deep into uncharted waters to hold that a President's choices about whom to follow, and whom to block, on Twitter – a privately run website that, as a central feature of its social-media platform, enables all users to block particular individuals from viewing posts – violate the Constitution.

⁹⁵ Savage, *Trump Can't Block Critics*, *supra* note 5.

⁹⁶ *Id.* This is the big umbrella issue, the litigation, even when brought by the seven plaintiffs and a declaratory judgment was awarded, has not stopped. In the future, the litigation process is likely to become more burdensome for the courts and new challenges are sure to arise naming the President as the face of these lawsuits, especially since he is known to not like to back down.

⁹⁷ NCC Staff, *supra* note 94.

⁹⁸ Ramsey Touchberry, *Donald Trump's Right to Block Critics on Twitter May Have Just Been Dealt a Major Blow By New Court Ruling*, NEWSWEEK (Jan. 7, 2019), <https://www.newsweek.com/court-ruling-donald-trump-blocking-twitter-critics-1282900>. Trump's attorneys have said "the 'block function' is 'merely an exercise of his personal, not governmental, authority to exclude individuals from that private account.'"

⁹⁹ *See, e.g.*, Haslett, *supra* note 60.

¹⁰⁰ Kranish & Marimow, *Supreme Court Nominee*, *supra* note 68.

activities in office (emphasis added).”¹⁰¹ As shown in the first case, the court in *Knight v. Trump* classified the President’s use of Twitter as relating to his official role in office.¹⁰² The concern is that in interpreting the reading under *Clinton v. Jones*, it seems that because the President *was not* immune from lawsuits, that his Twitter is *not* considered related to his activities in office. It appears to be contradictory in *Knight v. Trump* since the President *was* a party to litigation and “the ruling also rejected the government’s claim that Mr. Trump operates the account merely in a personal capacity, concluding that he ‘uses the account to take actions that can be taken only by the president as president.’”¹⁰³ The discrepancy in interpretation highlights the problems and concerns that litigation can cause surrounding the President’s use of Twitter. Most importantly, the highlighting factor is that the President, even after two decisions, is still not done in court due to dissatisfaction with the rulings.¹⁰⁴

B. *Multi-party negotiation as a solution*

Negotiation has been defined as “joint decision making between interdependent individuals with divergence of interests.”¹⁰⁵ A multi-party negotiation “consists of a group of three or more individuals, each representing his or her own interests, who attempt to resolve perceived differences of interest or work together to achieve a collective objective.”¹⁰⁶ The resolution process “occurs on cognitive (perception), emotional (feeling), and behavioral

¹⁰¹ Drew York, *Presidential Privilege? Why Presidents Can’t Escape Litigation in Office*, GRAY REED (Nov. 28, 2016), <https://www.tiltingthescales.com/2016/11/28/presidential-privilege-why-presidents-cant-escape-litigation-in-office/> (“[t]he United States Supreme Court ruled in *Clinton v. Jones* that a sitting president is not immune from litigation for acts that occurred before he became president. This means presidents may be forced to go to trial and engage in discovery, such as a deposition, during the presidency”; see generally *Clinton*, 520 U.S.).

¹⁰² Josh Herrman, *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>.

¹⁰³ *Id.* “In her ruling, Judge Buchwald said Mr. Trump and Dan Scavino, the White House social media director, ‘exert governmental control over certain aspects of the @realDonaldTrump account.’”

¹⁰⁴ Savage, *Trump Can’t Block Critics*, *supra* note 5.

¹⁰⁵ Gerben A. Van Kleef et al., *The Interpersonal Effects of Emotions in Negotiations: A Motivated Information Processing Approach*, J. PERSONALITY & SOC. PSYCHOL. 510, 510 (2004).

¹⁰⁶ *Multiparty Negotiations*, BUS. INSIDER, <https://thebusinessprofessor.com/knowledge-base/multiparty-negotiations> (last visited Nov. 17, 2019).

(action) dimensions.”¹⁰⁷ The common definition of negotiation rests on “back-and-forth communication[s] designed to reach an agreement between two or more parties with some interests that are shared and others that may conflict or simply be different.”¹⁰⁸ The benchmark of success for a particular negotiation is when “a wise outcome [is] reached efficiently and amicably.”¹⁰⁹ A multi-party negotiation better suits the President, Twitter, and its users, because each would not need to maintain a “constant position,” which in the most general cases involves “negotiations [that] include trade-offs between multiple issues, [] multiple parties, each with their own agendas, rather than dynamically vary their goals, strategies to achieve those goals, and agenda for carrying out those strategies as the negotiation proceeds.”¹¹⁰ Negotiation in this way would not put the President directly adverse to citizens and Twitter. Highlighted in the issues above, multi-party negotiation would be a more effective method for the parties to “dynamically vary their goals, strategies to achieve those goals, and agenda for carrying out those strategies as the negotiation proceeds.”¹¹¹

One negotiation approach considered in analyzing an agreement where the government is a party is a traditional method of negotiation referred to as “positional bargaining.”¹¹² In this approach, each party to the negotiation “takes a position, argues for it, and makes concessions to reach a compromise.”¹¹³ Under this methodology, a position is defined as “a proposed outcome that represents merely one way among many that issues might be resolved and interests met.”¹¹⁴ Since this Note is focusing on the President as a party, it can be argued that he will take a position on

¹⁰⁷ BERNARD MAYER, *THE DYNAMICS OF CONFLICT: A GUIDE TO ENGAGEMENT AND INTERVENTION* 124 (2d ed. 2012).

¹⁰⁸ BRUCE PATTON, *THE HANDBOOK OF DISPUTE RESOLUTION* 279 (Michael L. Moffitt & Robert C. Bordone eds., 2007).

¹⁰⁹ Johnathan G. Odom, *A Modern-day Pentagon Paper In a Post-Pentagon Papers World: A Case Study of Negotiations Between the Washington Post and The U.S. Government Regarding Publication of the 2009 Afghanistan Assessment*, 23 HARV. NEGOT. L. REV. 216, (2018) (citing ROGER FISHER & WILLIAM URY, *GETTING TO YES* 13 (Bruce Patton eds., 2d ed. 1991) (“negotiation says the goal of a successful negotiation is to meet each party’s interests and for the agreement to be better than, or at least as good as, each of their respective best alternative.”)).

¹¹⁰ Jonathan Gratch et al., *Multi-party Multi-issue, Multi-strategy Negotiation for Multi-modal Virtual Agents*, S. CAL INST. 1, <http://ict.usc.edu/pubs/Multi-party,%20Multi-issue,%20Multi-strategy%20Negotiation.pdf>. Negotiating in this way would help, rather than hinder, the experience of resolving disputes with multiple parties.

¹¹¹ *Id.*

¹¹² Odom, *supra* note 109.

¹¹³ FISHER & URY, *supra* note 27.

¹¹⁴ *Id.*

being able to continue to block citizens on Twitter.¹¹⁵ But, this may be overcome by the multi-party negotiation where the proposed terms are agreed upon by all parties, and technically the power would be vested in each party to the negotiation.¹¹⁶ Even if the President decides not to be in the negotiation, he can have a government official act as his agent or appoint an attorney.¹¹⁷ With multi-party negotiation as an alternative dispute resolution technique, Twitter, its users, and the President can sit at the table and negotiate terms that will not violate citizens' First Amendment rights.

IV. PROPOSAL

Since two judges issued a warning to the President, I believe that lawsuits of this nature are going to open the floodgates to further litigation.¹¹⁸ The rise of Twitter in conjunction with its use by the President is almost certain to create more constitutional issues for the courts.¹¹⁹ In a recent press conference, President Trump threatened the potential regulation of social media and that "the government may have to do something about it."¹²⁰ The process

¹¹⁵ Touchberry, *supra* note 98.

¹¹⁶ Odom, *supra* note 109, at 217, 228.

The simplest and most common approach is haggling, or positional bargaining. One party stakes out a high (or low) opening position (demand or offer) and the other a correspondingly low (or high) one. Then a series of (usually reciprocal) concessions are made until an agreement is reached somewhere in the middle of the opening positions, or no agreement is reached and the parties walk away to pursue their respective BATNAs.

This would be a different case for the President because there is no 'demand' to be positioned on. Rather, there are terms that must be discussed that the parties can have opinions on, but those opinions are going to be different than offers of take it or leave it as in a positional bargaining sense. If it were to be that the President may feel a term belongs in the rules and the citizen and Twitter do not, this is where the 'middle ground' would come in and they would work through the multiple ones. The proposed multi-party negotiation about rules and terms is not high/low offer, but a way where the respective parties can discuss; *See also* Patton, *supra* note 108.

¹¹⁷ Matt Ford, *Who is Marc Kasowitz?*, ATLANTIC (May 25, 2017), <https://www.theatlantic.com/politics/archive/2017/05/marc-kasowitz-trump-russia/528147/>.

¹¹⁸ Cook, *supra* note 20. It is quite obvious that the President is going to continue to appeal the rulings until he is satisfied.

¹¹⁹ Andy Kiersz, *13 Charts Reveal Donald Trump's Twitter Habits – From His Favorite Topics to Time of Day*, BUS. INSIDER (July 14, 2017), <https://www.businessinsider.com/president-trump-twitter-by-subject-2017-7>. Since inauguration in January 2017, the President has tweeted 920 times. This statistic is based on a seven-month period. This shows the President's increased use of Twitter.

¹²⁰ Romm, *supra* note 54.

for lawsuits poses a myriad of conflicts by having the President named as a party as is discussed in Section III(A) of this Note. Now with Trump alluding to appealing the 2019 decision, the litigation continues, and depending on the judge's decision, may raise conflict between the Judiciary and Executive branches.¹²¹ In the past, the U.S. Court of Appeals for the Fourth Circuit found that a County Board of Supervisors violated a citizen's First Amendment right by blocking him on a public Facebook page.¹²² Judge Barbara Milano Keenan concurred in the opinion, but "she asked the court to 'exercise great caution' and to 'await further guidance' from the Supreme Court when it comes to uncharted territories involving the 'First Amendment's reach into social media.'"¹²³ A prime issue is lurking in the background—waiting for the Supreme Court to make a decision that will end up being the guiding factor for judges in the future. The problem of having different results in litigation can be solved by having uniformity in terms on social media that are understood and made by the parties whose interests need protecting. The aim of this Note is just that—to enter the "uncharted territories" by having all interests accounted for in multi-party negotiation.¹²⁴

The main purpose of the immunity defense has been to keep the president out of court to keep the focus on their presidential duties; though in the modern age, the complete opposite is happening.¹²⁵ With that being said, a realistic solution can be met by using multi-party negotiation. There have been alternative avenues suggested that may pose potential threats of lawsuits because if the President is not immune, he can be sued indefinitely for his actions

¹²¹ *President Trump Unblocks Twitter Critics and Files Notice of Appeal in Knight Institute Lawsuit*, KNIGHT FIRST AMENDMENT INSTITUTE (June 4, 2018), <https://knightcolumbia.org/content/president-trump-unblocks-twitter-critics-files-notice-of-appeal-in-knight-institute-v-trump>. The litigation is going to continue, and this is just a small look in to the future of what the litigation process will look like while having the President as a face of lawsuits, *especially* when they are not in his favor.

¹²² Touchberry, *supra* note 98.

¹²³ Touchberry, *supra* note 98 (emphasizing the point that courts are now for the first time being presented with issues of First Amendment rights on elected officials' social media accounts).

¹²⁴ *Id.* A multi-party negotiation can safeguard future potential parties to such lawsuits by having a representative at the table to protect citizens' interests.

¹²⁵ Michael Rios, *Are Presidents Immune From Civil Lawsuits in State Court Over Their Private Conduct?*, PBS NEWS HOUR (Apr. 13, 2017), <https://www.pbs.org/newshour/politics/presidents-immune-civil-lawsuits-state-court-private-conduct> ("Under current law, President Donald Trump is immune from civil lawsuits in federal court, when it comes to his official acts as president. But a legal battle playing out in New York could determine if Mr. Trump and future presidents are subject to civil suits in state court over their private conduct.").

on Twitter. One suggestion was the constitutional use of the “mute” button on Twitter.¹²⁶ Another suggestion has been for the President’s social media director to go on the President’s Twitter and unblock the users.¹²⁷ None of these alternatives result in a universal solution to an ongoing problem.¹²⁸

I propose that having multi-party negotiations between selected representatives from Twitter (or the CEO, Jack Dorsey, if he chooses)¹²⁹, a potential plaintiff, and the President (or who he elects to represent him to protect his interests) meet to negotiate terms of potential clauses to put in the “Twitter Rules, which concern “tweets, adding content to your tweet, search and trends, following and unfollowing, blocking and muting, direct messages,””¹³⁰ The multi-party negotiation would involve having each party look at “The Twitter Rules” and identify the issue(s), either avoid and/or attack the issue(s), negotiate and advocate.¹³¹ If these strategies

¹²⁶ Scott Bomboy, *Can Politicians Block Negative Comments On Their Social Media Accounts?*, CONST. DAILY (Apr. 5, 2018), <https://constitutioncenter.org/blog/can-politicians-block-negative-comments-on-their-social-media-accounts> (This was a case heard in early March in New York City, where a judge urged both sides to reach a compromise solution).

¹²⁷ Herrman, *supra* note 102.

¹²⁸ Each of the proposed solutions can be seen as taking away some power from the President, or having power over the President. This is inconsistent with our history; *see, e.g.*, Andrew Prokop, *The 25th Amendment, Explained: How a President Can Be Declared Unfit to Serve*, VOX (Sept. 21, 2018), <https://www.vox.com/policy-and-politics/2017/2/9/14488980/25th-amendment-trump-pence>.

¹²⁹ *See* Gabrielle Canon, *Twitter and Salesforce CEOs bicker over who is helping the homeless more*, GUARDIAN (Oct. 12, 2018), <https://www.theguardian.com/us-news/2018/oct/12/jack-dorsey-marc-benioff-homelessness-twitter-san-francisco>. Jack Dorsey tweets about his opposite views on a proposed tax, going back and forth with another user, but does not answer some of the tweets that publicly call his character into question. This may signify that Dorsey understands what the platform should be used for and is best suited to protect the interests of Twitter and its users.

¹³⁰ *See, e.g.*, *The Twitter Rules*, <https://help.twitter.com/en/rules-and-policies/twitter-rules> (explaining the “rules” governing Twitter users).

¹³¹ Gratch, *supra* note 110. The strategies further explained in pertinent part.

Factor: The possible moves include requesting a topic of negotiation from another agent [sic], proposing a topic, or proposing constraints on topic selection. Avoid: This strategy is appropriate in the case when there is no topical issue or the focused issue is undesirable but seen as avoidable. The moves include talking off-topic, e.g. small talk, trying to leave the meeting or the topic, or switching the topic to another issue. Attack: This strategy is appropriate in the case where the topic is seen as not avoidable and having negative utility, with little potential for improving the utility. It is an assumed bad outcome. Negotiate: This strategy is appropriate in the case where it is not clear what the outcome of adopting the issue will be – there is a potential for either negative, neutral or positive results, depending on how the plan is carried out, and whether all individuals involved will do their parts. Here, the agent is not necessarily for or against the issue, but willing to consider whether it can be made to work or not. Advocate: This strategy is appropriate when one has good reason to believe

can be properly implemented and the parties can mutually agree on the post-negotiation “Twitter Rules,” the courts will have a guide to decide future matters that may appear before them. In turn, the post-negotiation “Twitter Rules” will provide an accurate roadmap for constitutional claims raised by citizens to determine if being blocked by the President was a violation of their First Amendment rights.¹³²

Twitter long maintained that different standards applied to prominent public figures “given that their comments[,] even offensive ones[,] remain in the public interest.”¹³³ In turn, in March, Twitter announced it would adopt a new approach, “labeling offensive tweets so users know why such content hasn’t been removed.”¹³⁴ The labeling of offensive tweets is exactly the type of subject matter that the multi-party negotiation would involve.¹³⁵ Twitter’s Head of Legal stated that they are figuring out a way to “put some context around it so people are aware that content is actually a violation of our rules and it is serving a particular purpose in remaining on the platform.”¹³⁶ This type of process is exactly what the multi-party negotiation would be developing; a way for all parties to understand and be aware of a violation on Twitter while protecting each parties’ interests.

The post-negotiation “Twitter Rules” would require the President and government officials to act in accordance with the terms agreed upon by the parties.¹³⁷ This would limit the instances in which citizens would have to sue for violation of their First

that the outcome of the issue will have positive utility. The moves involved include proposing plans to bring about the outcome, proposing solutions or ameliorations to flaws that have been introduced, and offering commitment to the issue or its component parts. Success: This strategy involves the follow-through of a successful mutual commitment to an issue – it may involve formalizing remaining details of how to carry it out, as well as friendly disengagement from the meeting.

¹³² *The Twitter Rules*, *supra* note 130. The conditions, or lack of, constituting permissible blocking would be the topic of negotiation that ultimately Twitter can display and users can look to in order to see if blocking was permissible under the negotiated terms.

¹³³ Romm, *supra* note 54.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See *ACLU Warns Elected Official, Government Agencies, Against Blocking Members of Public on Social Media*, ACLU (Mar. 1, 2018), <https://www.aclu.org/news/aclu-warns-elected-officials-government-agencies-against-blocking-members-public-social-media>. Government officials were issued letters about blocking citizens on social media platforms before turning to litigation. The problem goes further than just President Trump, this is a governmental problem. Even if courts hold the President to a different standard than government officials, the courts can still use the negotiation as precedent with the highest power official.

Amendment rights, and would protect government officials and the President from the threat of lawsuits. The citizen would have the ability to access the “Twitter Rules” to determine if their constitutional right was violated.¹³⁸ In effect, the citizen will not need to use the resources of the courts to determine if a violation occurred.¹³⁹

In an attempt to make sense of the proposed multi-party negotiation, it is best to present a tweet that was blocked by Trump and go through the proposed negotiation methods.¹⁴⁰ The relevant part of the “Twitter Rules” currently states, “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.”¹⁴¹



Assuming Twitter, an injured Plaintiff (in this example, Nick), and the President are all properly represented at the multi-party negotiation, the issue (or ‘factor’) is displayed in the “Twitter

¹³⁸ See *Davison v. Loudoun Cnty. Bd. of Supervisors*, 267 F.Supp.3d 702 (E.D. Va. 2017) (where a government official was sued because the citizen did not have access to view the official’s Facebook page).

¹³⁹ It is of the utmost importance that the post-negotiation “Twitter Rules” address types of speech that can be constitutionally suppressed.

¹⁴⁰ See Dan Mangan, *Read the Tweets That Got These People Blocked on Twitter by President Donald Trump*, CNBC, (May 23, 2018), <https://www.cnbc.com/2018/05/23/read-the-tweets-that-got-these-people-blocked-on-twitter-by-president-donald-trump.html>. The image was taken directly from the site about a comic and writer from New York who was blocked by President Trump on Twitter.

¹⁴¹ *The Twitter Rules*, *supra* note 130. The Twitter Rule as it appears on the website provides: 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. Context matters when evaluating for abusive behavior and determining appropriate enforcement actions. Factors we may take into consideration include, but are not limited to whether: the behavior is targeted at an individual or group of people; the report has been filed by the target of the abuse or a bystander; the behavior is newsworthy and in the legitimate public interest.

Rule.” What would the parties would want to ‘avoid’ is discussing the viewpoints of the actual tweet? The President (or his representative) would not bring emotions to the table. For example, the President (or his representative) should not argue the validity of whether Jared Kushner is corrupt and/or stating the reasons for hiring him. If emotions become so severe, that is when “you step outside to the balcony.”¹⁴² The other strategy the President (or his representative) would use is to “attack.”¹⁴³ The topic of the President having blocked this citizen is an unavoidable topic and the reason for the negotiation in the first place. So it follows, that the topic is going to come up and it is fairly imaginable that the President would want to justify his reasoning as feeling “harassed”¹⁴⁴ by the citizen. This is where Twitter would “attack” the unavoidable “Twitter Rules” which the President raised as a defense. Twitter (or its representative) would be put in a position in which it would have to state the meaning behind its rules and the interpretation. The citizen would “attack” and argue that this does not amount to the level of harassment the “Rules” seek to suppress. As identified, this strategy may help to see where the parties are “positioned,”¹⁴⁵ but it does not seem to further this negotiation. The next two strategies would be the ones this Note seeks to advocate for, “negotiate and advocate.”¹⁴⁶ This strategy would put the three parties in a position in which they assess the “Twitter Rules” that apply to the tweet and the reason for blocking to formulate common ground terms. While negotiating, it is almost inevitable that the parties will advocate for their proposal. For example, the President may advocate that the “Twitter Rules” use of the word “harassment” be supplemented with “attacking ones’ family causing public uproar.” The President will negotiate the terms with Twitter and the citizen to see if his supplemental phrase helps clarify that in these specific cases, speech is considered harassment and is constitutionally allowed to be blocked. It is clear to see how a multi-party negotiation will be a difficult conversation because of the subjective nature of the interests. But, by coming to the table, the parties have a better chance of success by each having their interests protected, and by negotiating for common purposes rather than appearing before an impartial tribunal that essentially de-

¹⁴² FISHER & URY, *supra* note 27. Emotions hinder the negotiation and may result in judgment becoming clouded.

¹⁴³ Gratch, *supra* note 110 at 4.

¹⁴⁴ Odom, *supra* note 109.

¹⁴⁵ Gratch, *supra* note 110 at 1.

¹⁴⁶ *Id.* at 5.

clares a judgment in favor of one side. By having a multi-party negotiation, success is on the table.

Twitter has reserved the right to modify or change “The Twitter Rules.”¹⁴⁷ On Twitter’s page regarding blocking, there are criteria to help understand if the user is blocked and how they may report it, but no mention of valid reasons why a user may block on this forum.¹⁴⁸ The citizens who have sued Trump did not report him, but sued him, resulting in the problem of naming the President in lawsuits. Multi-party negotiation would help combat this by having certain types of speech or situations that have been agreed upon by the parties selected for negotiation (as displayed on the webpage that warrants valid blocking).¹⁴⁹ Instead of citizens turning to lawsuits and the courts, Twitter will be in the position to see the speech of the citizen who was blocked by Trump and under the agreed-upon terms, decide if the blocking was warranted. A citizen who looks to the post-negotiation “Twitter Rules” and is still unsure if their speech was protected can then reach out to Twitter to determine if the speech was considered a “constitutional block.” Twitter’s representative who was present in deciding on the post-negotiation “Rules” would be better situated to aid users instead of the courts. By having this system implemented, citizens will not need to file lawsuits every time they have a doubt as to the validity of their constitutional right on Twitter.

In addition, the President (or his elected officials) would have agreed upon these terms to protect his interests, so he would be more likely to abide by the “Rules” set forth for blocking. This would diminish the claims for violation of First Amendment Rights for citizens since their interests will be represented at the negotiation as well, by deciding on the proposed terms for the “Twitter Rules.”¹⁵⁰ The parties sitting at the negotiation table must bear in mind that when negotiating on the terms, they must only propose constitutional ones, to combat the conflict at hand.¹⁵¹ Since the

¹⁴⁷ TWITTER.COM, *supra* note 130. Twitter reserved itself the right to modify or change its’ terms. So, there should be no obstacle with regard to Twitter modifying its’ terms based on negotiations with citizens and the President.

¹⁴⁸ TWITTER.COM, *supra* note 130. “Twitter gives people a variety of tools to control their experience, including blocking.” There is the option to block users, but no mention of when it is constitutional.

¹⁴⁹ TWITTER.COM, *supra* note 130.

¹⁵⁰ When speaking about citizens’ First Amendment claims, the claims in relation to Twitter use, and the President—not all First Amendment claims universally.

¹⁵¹ See *Principles and Tactics of Negotiation*, PMC (Mar. 2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2793751/>. The proposed terms in this case would have to be constitutionally protected terms that citizens are entitled to when using Twitter.

above referenced three parties will be represented at the table, it is important that representatives who are going to negotiate are familiar with the conflict and negotiate “. . . Keep[ing] that longer term in mind to be sure that everyone [sic] gets what’s best for them.”¹⁵² This problem is eliminated by having each party who has a “stake in the game” represented.¹⁵³

The “Twitter Rules” apply to all of its users on the platform. Twitter has the power to shut off an account for disobeying the rules.¹⁵⁴ This turns on the argument that Twitter can be classified as a public forum, and provides a defense for the ability to suppress certain speech on such a forum.¹⁵⁵ The reason negotiation of the above terms should be strongly urged is because the President can argue that these are the types of speech he is allowed to constitutionally block as a government entity.¹⁵⁶ But, with new technology and the President using Twitter as a platform, the terms should be negotiated to include a rule section for citizens’ speech on Twitter that is directed toward the President (arguably in his official capacity), to allow for constitutional blocking. This section can be incorporated into the “Twitter Rules.”

The final phase of the multi-party negotiation would be to decide what the remedy would be if the President blocks a citizen that did not violate the post-negotiation “Twitter Rules.” One solution would be to allow Twitter to unblock users, who under the negotiated terms, the President was not allowed to block. Twitter already has this power under its current rules, but this would be regarded as a remedy provided to the blocked citizen, which would be one of the negotiated factors.¹⁵⁷ By negotiating a remedy, instead of Twitter executing on its own, each party may feel this “represents the opportunity to capitalize on all of the work done in the earlier phases [of the negotiation].”¹⁵⁸ To make sure that all parties uphold the negotiation terms, a writing with what they agreed to must be signed.¹⁵⁹ As mentioned earlier, when courts rule a cer-

¹⁵² *Id.*

¹⁵³ *See Id.*

¹⁵⁴ TWITTER.COM, *supra* note 130. *Our Range of Enforcement Options*, TWITTER.COM, [HTTPS://HELP.TWITTER.COM/EN/RULES-AND-POLICIES/ENFORCEMENT-OPTIONS](https://help.twitter.com/en/rules-and-policies/enforcement-options).

¹⁵⁵ *See Hudson, supra* note 28.

¹⁵⁶ *See* Section II (A).

¹⁵⁷ TWITTER.COM, *supra* note 130 (dictating the rules governing Twitter and its users).

¹⁵⁸ Sonia Kukreja, *Characteristics of Negotiation*, MGMT. STUDY HQ, <https://www.managementstudyhq.com/characteristics-and-steps-of-negotiation-process.html> (referencing “Stage 4: Closure Phase”).

¹⁵⁹ *Best Negotiating Practices*, WATERSHED ASSOCIATES, <https://www.watershedassociates.com/learning-center-item/negotiation-stages-introduction.html> (explaining Stage 5 of negotia-

tain way against Presidents, they are not always followed or implemented. By having the terms set forth and agreed to by the President (or his representatives), the writing and signature amount to his duty to follow the rules.¹⁶⁰

V. CONCLUSION

A multi-party negotiation should be strongly encouraged in order to protect citizens' First Amendment Rights, Twitter, and the President. By taking this route instead of litigation, there is no need to have courts classify Twitter into a public forum category which it would be bound to in the future.¹⁶¹ In a multi-party negotiation, citizens will not be faced with the burden of proving standing. The Twitter representative will have the class of persons protected, thus lawsuits from citizens who are blocked in the future already have their interests accounted for by the negotiation. Further, since Trump (or his representative) would be a party to this negotiation, he cannot raise immunity since this is not a lawsuit.¹⁶² There would be no reason for him to raise it because the proposed multi-party negotiation would have provided for all of the issues. The agreement will appear on Twitter's official website so all users are aware of the terms and can reference the site if they become blocked by the President.

A multi-party negotiation between the three interested parties will be a stepping stone for challenges to First Amendment rights on Twitter. There have been instances, and will continue to be with the rapid expansion of the Internet, where citizens' constitutional rights are jeopardized by government officials on social media. Using the proposed multi-party negotiation as the dispute resolution

tion: "Stage 5 is implementation of the agreement. This stage may also be viewed as preparation for the next negotiation opportunity. You must ensure that you follow through on promises made in order to strengthen the relationship and to build trust.").

¹⁶⁰ *Id.* "The research that has been done in the preparation phase, combined with all of the information that has been gained is useful in the closing phase. It also involves the sealing of the agreement in which both parties formalize the agreement in a written contract or letter of intent. Reviewing the negotiation is as important as the negotiation process itself." The emphasis on having the signatures on the "Twitter Rules" would be just as paramount as the negotiation itself.

¹⁶¹ The point that Twitter will not have to be limited to a classification of a public forum does not mean that it will not when other instances arise. Specifically, the courts will not be held to classifying Twitter as a public forum for the President's use when blocking citizens and then in the future (in a set of completely unrelated facts and parties) hold the categorization the same.

¹⁶² See generally *supra* note 67.

method, the President can continue to do what he was elected for, execute his presidential duties. This form of dispute resolution will not violate citizens' rights, but negotiate to protect them.

The proposed multi-party negotiation will have many steps for the parties to go through. But, without the President (or a representative to protect his interests), none of the proposed negotiation can occur. It is no secret that the President has many roles and tasks.¹⁶³ Getting the President (or a representative) to appear at the proposed negotiation of such a novel kind may not be easy. But, President Trump may agree to such a negotiation because it would be the first one of its kind that a president would have partook in with Twitter and injured plaintiffs.¹⁶⁴ President Trump has said, "We have done [sic] about as much as anybody ever in a short period of time for the presidency. . . ." The proposed negotiation would be another thing the President could add to his 'firsts' while holding office.¹⁶⁵ President Trump has met with Twitter CEO Jack Dorsey, not about blocking people, but about his follower accounts.¹⁶⁶ The President was the one who invited Jack Dorsey to the White House to discuss this issue.¹⁶⁷ This supports the proposed negotiation by exemplifying the ability and willingness of both the President and the CEO of Twitter to meet and discuss issues regarding the platform. The meeting appeared to go smoothly, as can be presumed from Jack Dorsey tweeting in response to the President, "Thank you for your time. Twitter is here to serve the entire public conversation, and we intend to make it healthier and more civil. Thanks for the discussion about that."¹⁶⁸ This strengthens the position that the discussion regarding the climate of Twitter and the President's use can be an amicable and a

¹⁶³ See, e.g., Robert Dallek, *Power and the Presidency, From Kennedy to Obama*, SMITHSONIAN (Jan. 2011), <https://www.smithsonianmag.com/history/power-and-the-presidency-from-kennedy-to-obama-75335897/> (explaining the President's roles and enumerated powers under Article II of the Constitution, as well as the pressing issues he must deal with daily).

¹⁶⁴ See Jeremy B. White, *Trump's Extraordinary First White House Year in Quotes*, INDEP. (Jan. 20, 2018), <https://www.independent.co.uk/news/world/americas/us-politics/trump-quotes-first-year-charlottesville-fbi-immigration-quotes-a8170056.html>. Exemplifying the views of Trump doing things during his presidency that other presidents have not. At the first full cabinet meeting on June 12, 2017, Trump stated, "When I ran it was 'make America great again' and that's what we're doing, believe me, we're doing it and we're doing it at a much faster pace than anyone thought. I will say that never has there been a president – with few exceptions, case of FDR, he had a major depression to handle – who's passed more legislation, who's done more things than what we've done. . . ."

¹⁶⁵ *Id.*

¹⁶⁶ Romm, *supra* note 54.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

successful one when the President and the CEO come to the table rather than a court room. The President likes to set new standards and has tweeted about past Presidents not doing what he has done.¹⁶⁹ By having Twitter, a citizen, and the President at the table, every party will have their interests protected while appearing in a representative capacity, for the negotiation of its kind.¹⁷⁰

On January 9th, 2019, the President partook in negotiations involving the government shutdown.¹⁷¹ The referenced negotiation clearly identifies a potential issue of the President not agreeing on “Twitter Rules” and the possibility of him walking out.¹⁷² This would leave open the question of whether the President violates citizens’ First Amendment rights if he continues to block them on Twitter. To this end, it is different than the type of negotiation on January 9th because the President was not taking away the livelihood from citizens.¹⁷³ The negotiation on January 9th could have resulted in blocking people from this country.¹⁷⁴ In the proposed multi-party negotiation, the President is dealing with the blocking of citizens from Twitter—losing access to his tweets (in a digital sphere).¹⁷⁵ To compare the levels of negotiations is beyond the scope of this Note. However, the grave weight the President can

¹⁶⁹ *The Trump Administration, in Its Own Words*, WASH. POST (Jan. 18, 10:51), https://www.washingtonpost.com/graphics/2018/opinions/the-year-in-trump_quotes/?noredirect=on&utm_term=.B7d7b0566907. The President would be enticed to negotiate since no other president has before in a three-way negotiation essentially making rules for Twitter. The President would likely to mark another “first” while holding office.

¹⁷⁰ See JAY FOLBERG, ET. AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* 540-44 (2d ed. 2010) (“claiming that the advantages [sic] include efficiency, speed, low cost, avoidance of precedent, expertise of the decision maker, informality, flexibility and finality.”). Negotiations between the three said parties will only foster this type of dispute resolution in the future, rather than hinder conflicts with litigation.

¹⁷¹ Erica Werner, *Trump Walks Out Of Shutdown Negotiations After Democrats Reject Wall Money, Calling Meeting ‘Total Waste Of Time,’* THE WASH. POST (Jan. 9 2019), https://www.washingtonpost.com/business/economy/shutdown-day-19-trump-comes-to-congress-as-gop-faces-unity-test-over-wall-funding/2019/01/09/8f3bfab8-1423-11e9-b6ad-9cfd62dbb0a8_story.html?noredirect=on&utm_term=.34c5b02d9286.

¹⁷² *Id.* “Talks between President Trump and congressional Democrats aimed at ending the partial government shutdown collapsed in acrimony and disarray Wednesday, with the President walking out of the White House meeting and calling it “a total waste of time” after Democrats rejected his demand for border-wall funding.”

¹⁷³ *Id.* “. . . as they continue to negotiate over his border wall demands. With the shutdown nearing the three-week mark, some 800,000 workers are about to miss their first paycheck.”

¹⁷⁴ *Id.* The negotiation on January 9th was one the President *had to* be a part of. It is a power vested in him to deal with these issues.

¹⁷⁵ Calvert, *supra* note 71. “Trump’s attorneys have said the ‘block function’ is ‘merely an exercise of his personal, not governmental, authority to exclude individuals from that private account.’”

have by engaging in a multi-party negotiation would make a great impact on constitutional rights in the new digital age, notably, on Twitter.

First Amendment rights have been around since way before social media. But, with the new digital age, these constitutional rights are more paramount than ever. The way President Trump is using Twitter as a platform may compromise his role in carrying out official duties, and instead of ensuring constitutional rights—violate them. The President deals with issues that are subjectively more serious than a Tweet or a post; but when the issue amounts to the violation of private citizens' rights, it becomes just as serious. The recent 2019 decision written by Judge Parker sheds light on the widespread issues, showing how an unfavorable decision leads to more litigation, not resolution.¹⁷⁶

The long-standing notion was that public officials were immune from suits so they can carry out their official duties without the fear of being sued.¹⁷⁷ With the Internet only being 30 years old and Twitter only a decade, new constitutional issues are arising in the digital sphere.¹⁷⁸ By proposing that a multi-party negotiation take place to resolve constitutional issues on Twitter, the President can use an evolving platform without entering the murky waters of litigation every time he presses send on Twitter. This solution would resonate closely with the mission of immunity. By agreeing with the terms of the multi-party negotiation, the President will understand what he is responsible for, while having his interests accounted for. The proposed terms that would be agreed upon by all parties would combat lawsuits that stem from issues in the past, present, and likely future. A multi-party negotiation between representatives of respective parties would ensure that the President can use a platform that reaches millions of citizens while protecting their First Amendment rights. Resolving this issue with a multi-party negotiation would place the President on the opposite end of the table rather than the courtroom.

¹⁷⁶ Pointing out that Trump's administration is discussing next steps to bring this lawsuit in front of another court. Coming full circle to the issue that this Note is seeking to address, seeing the President at a table for multiple negotiations would be preferable to seeing his name on multiple lawsuits.

¹⁷⁷ See generally *supra* note 67.

¹⁷⁸ MacArthur, *Real History of Twitter*, *supra* note 37.