

President Twitter and the First Amendment

Elizabeth Joh [00:00:00] So quick--without thinking--what is Twitter to you?

Roman Mars [00:00:05] I think of it as broadcasting, actually. I think that's why I'm comfortable on Twitter. I think of it as a place that I can broadcast my thoughts.

Elizabeth Joh [00:00:11] To anyone in the world?

Roman Mars [00:00:12] Yeah. Anyone who wants it.

Elizabeth Joh [00:00:14] Do you have conversations on Twitter?

Roman Mars [00:00:16] I do.

Elizabeth Joh [00:00:17] Do you feel like it's a mass audience, or are they private conversations?

Roman Mars [00:00:21] I think of it as a mass audience.

Elizabeth Joh [00:00:23] Mass audience. Is it a way for you to learn anything or just do the talking?

Roman Mars [00:00:27] It's a way for me to learn things. But as you get more followers, it's a little bit more... You're having a conversation, and you have to keep the conversation going with people who are engaging with you, rather than just monitoring it.

Elizabeth Joh [00:00:41] What is being on Twitter like in 2018 for you?

Roman Mars [00:00:44] I mean, I think of it as this repository of random thoughts for me. And then I use it as a filter device for the news I should be paying attention to.

Elizabeth Joh [00:00:55] So it's both. You're the audience, and you're the speaker.

Roman Mars [00:00:57] Absolutely. And with that as a little prelude, let's now talk about protest, free speech, and women's suffrage.

Elizabeth Joh [00:01:06] On January 10th, 1917, the Silent Sentinels began to pick at the White House. They were a group of women activists representing the National Women's Party, and they were fighting for suffrage--the right to vote. While a number of states allowed women to vote at the time, it wasn't a right recognized throughout the United States.

Roman Mars [00:01:25] The occupant of the White House, Woodrow Wilson, was not especially interested in women's suffrage.

Elizabeth Joh [00:01:30] But for several months, these women would stand on the sidewalk, in front of the White House, six days a week, in every kind of weather to try and change the president's mind. Eventually, more than a thousand women from around the country would take a turn at the picket line outside the White House. The National Women's Party wanted a constitutional amendment that would guarantee women the right to vote, and they wanted Wilson to support them. Day after day, picketers held up signs

with slogans like, "Mr. President, how long must women wait for liberty?" Other signs compared Wilson to the German Kaiser. And President Wilson? He would often tip his hat as he passed by the protesters whenever he left or went to the White House. Sometimes he talked with them, but he didn't seem to be changing his mind. When the United States joined the war in Europe in April of 1917, many people thought of wartime protests as acts of disloyalty. And that included the silent sentinels. Angry crowds pelted the protesters with eggs and tomatoes. The police also arrested many of the women on trumped up charges. Between June and November of 1917, 218 women were arrested. The police treated many of them brutally. Some were beaten at the orders of the jail superintendent. Others were placed in solitary confinement and forced fed.

Roman Mars [00:02:55] The court later found that the suffragists had been illegally arrested.

Elizabeth Joh [00:02:58] The intense publicity given to the protests and the brutal treatment of the arrested women eventually had an effect on the president. Wilson declared his support for women's suffrage in an address to Congress. And the Susan B. Anthony Amendment was approved by Congress in 1919. And on August 18th, 1920, the Tennessee Legislature provided the 36th and necessary vote to ratify the 19th Amendment, giving women the constitutionally protected right to vote. All of this began because the Silent Sentinels thought that the best way to speak to President Wilson was by protesting in public. They used a public space--the sidewalks in front of the White House--as a way to bring their grievance right to the president at his home. That was 1917. So, it's 100 years later. What do you do when you want to make your opinion known to the president of the United States?

Roman Mars [00:03:56] Tweet at him.

Elizabeth Joh [00:03:57] That's right. You tweet at him, of course. But can the president block you on Twitter?

Roman Mars [00:04:03] In 2018, whether or not the president can block you on Twitter became a real question of constitutional importance. Let's do this. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where we, along with the U.S. Court of Appeals, take the Twitter stream of the 45th president of the United States and use it to examine our Constitution like we never have before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. If you can name only one big idea written into our Constitution, it's probably the First Amendment's protection of free speech.

Elizabeth Joh [00:05:08] It's a broad idea with a lot of exceptions and limitations, most of which have been explained by the Supreme Court's decisions. And one very important First Amendment idea is called the Public Forum Doctrine. The Supreme Court first recognized in the early 20th century that the government is required to keep certain government-owned or government-controlled spaces open for the purposes of free speech. And over time, the Court has recognized a couple of different kinds of forums. One is called a "traditional public forum." Sidewalks and public parks are good examples of this.

Roman Mars [00:05:43] Another kind is called a "designated public forum."

Elizabeth Joh [00:05:45] With this kind of space, the government doesn't have to open it up for speech. But once it does, it basically has to treat it like a traditional public forum. And some other kinds of places are called "nonpublic forums." And if you have a nonpublic forum, the government can be pretty restrictive in what can be said in that space. So, for example, in 1992, the Supreme Court decided that the airports in New York City were nonpublic forums. That meant that the Port Authority--which owned and operated the airports--could ban solicitation inside of the terminals, even if that prevented the International Society for Krishna Consciousness--you'll recognize them as Hare Krishnas--from asking the public for donations. But when it comes to a space that's considered either a traditional public forum or a designated public forum, the government has to stick to some pretty rigid rules. And the most important one probably is that the government can't make choices based on the viewpoint of the person speaking.

Roman Mars [00:06:43] In other words, it can allow some people to speak based on their views, while banning other people to speak based on their views.

Elizabeth Joh [00:06:50] That's called "viewpoint discrimination," and the First Amendment prohibits it. The government can make other kinds of rules that don't apply to what's being said. They're called "time, place and manner restrictions." But the main point here is that the government is generally not allowed under the First Amendment to let some speakers talk in these spaces while banning others from saying what they want to say.

Roman Mars [00:07:13] Now let's call back to Twitter and how we use it.

Elizabeth Joh [00:07:16] So Twitter is a social media platform, it's run by a private company, and it offers its service for free to anyone. You can use the platform to send short messages to people who choose to follow you and read your tweets. All of a user's tweets become their timeline. Even if you don't have an account or don't even follow a particular person's Twitter account, it's still possible to read their tweets. It's just a little more cumbersome. Twitter is a real time conversation about anything you can imagine. And many people know about Twitter's troll problem. These are the people who use the platform to harass, annoy, and intimidate people. And so, as a response, Twitter offers two options.

Roman Mars [00:07:55] First, you can mute someone.

Elizabeth Joh [00:07:57] That means they can keep shouting at you online on Twitter, but you don't see them doing it.

Roman Mars [00:08:01] "Scream into the well, moron. Just go for it. I don't have to hear it."

Elizabeth Joh [00:08:04] They can read your messages, but you don't really have to listen to them anymore.

Roman Mars [00:08:08] Second and more extreme, you can block a person on Twitter.

Elizabeth Joh [00:08:11] That means that the person who wants to follow you can't read your tweets anymore and they can't reply to your tweets, even if they want to. Donald Trump has had a Twitter account since 2009, long before he was president. From his account, @realDonaldTrump, he's tweeted more than 30,000 times and now has more

than 52 million followers. Before running for the presidency, Trump tweeted about his show, *The Apprentice*, celebrities, and ratings. Actually, he still tweets about all these things. But Trump used his Twitter account as a way of speaking to voters when he was a candidate. In 2015, he said on the campaign trail, "I understand social media maybe better than anybody. Somebody said I'm the Ernest Hemingway of 140 characters." Trump also said of Twitter, "When somebody says something to me, I'm able to go, 'Bing, bing, bing,'" I think that's typing, "and I take care of it." But when someone following Trump on Twitter replied to one of his tweets with a criticism, sometimes Trump would block that person. And that meant that that person could neither see Trump's tweets nor respond to them.

Roman Mars [00:09:22] When Trump became president in 2017. He did not stop his Twitter habit, as everyone knows.

Elizabeth Joh [00:09:27] His Twitter profile describes him as the "45th president of the United States of America." And President Trump began to use Twitter to do things that only presidents usually do. Here's a couple of examples. In June of 2017, Trump tweeted that he was going to nominate Christopher Wray to be the FBI director.

Roman Mars [00:09:48] You know, to replace that director he fired, James Comey.

Elizabeth Joh [00:09:51] He'd used Twitter before any other kind of communication to announce this. On March 13th, 2018, Trump tweeted. "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." Two weeks later, he tweeted, "Honorable 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." In other words, Trump fired both his secretary of state and his secretary of Veterans Affairs by tweet. If you were a journalist, a private citizen, or anyone blocked by Trump's account, you didn't get to see those tweets directly. Is that a constitutional problem? A group of seven individuals and a nonprofit called the Knight Foundation First Amendment Center thought so. Each of the seven Twitter users had tweeted something critical to the president. And each found out that they'd been blocked by the president right after the criticism. Remember, because of the way Twitter works, that meant that they couldn't see what the president was tweeting, even if they'd tried to follow him. And in July of 2017, these individuals and the Knight Foundation filed a lawsuit against Trump, the White House social media director, Dan Scavino, and some others in the White House. The lawsuit argued that Trump's Twitter habits violated the First Amendment. And on May 23rd, 2018, a federal district judge agreed with them. So, let's be clear here. We usually talk about Trump in cases that have been decided by the United States Supreme Court. And their decisions are final until the Supreme Court decides--if it wants to--to change its mind. So, what we have here is a federal trial level court issuing an opinion in the case of Knight First Amendment Institute versus Trump.

Roman Mars [00:11:49] The Trump team plans to appeal this ruling, and we'll get to that. But this is the first time a court has weighed in on the First Amendment implications of a president's Twitter habits. So, it's worth looking at what the 75-page opinion said.

Elizabeth Joh [00:12:02] So first, the federal judge found that the plaintiffs in the case had standing. That is, they had a legally recognizable injury that allowed them to sue in the first place. Then Federal Judge Naomi Buchwald went right to the First Amendment. The judge spent a lot of time talking about the mechanics of Twitter--a person's timeline, their replies to other tweets, comment threads, blocking, and muting--for a very particular reason. Remember the First Amendment's strict rules on what the government can do apply only if

the space is a public forum. But what is the @realDonaldTrump Twitter account? So, here's where the opinion is very specific. Under the First Amendment, when the government itself speaks, the public forum rules don't apply. The judge decided that that's how we should think about the content of each tweet that Trump sent out. And the collection of all those Trump tweets--Trump's Twitter timeline--that's all government speech, too, not subject to the First Amendment's public forum rules. But the opinion makes another important distinction. When Trump tweets, that tweet opens up what the judge called an "interactive space," where people can immediately reply to Trump. And of course, they do. Each tweet Trump posts gets thousands of replies and retweets. That's someone amplifying Trump's tweet by sending it themselves. And because each Trump tweet is a space where a follower can decide to reply or retweet the president's tweet, the judge concluded that it's this space--this part of Trump's account--that is a designated public forum for purposes of the First Amendment. That conclusion is a big deal. The judge's ruling on the First Amendment has important consequences not just for Trump, who's president, but for any public official who's using Twitter for official public business. So, the decision doesn't mean that Twitter in general is regulated by the First Amendment. It's a private company, and it can't be. But a lot of our legal system relies on analogy. When President Trump tweets and you tweet back, what's the best way to think about that digital space? Of course, it's not really a sidewalk or a park or even a private theater that the government might rent and open up for a public speech. But in 2018, social media platforms might be the same thing as a public square. It's not physical space, of course, but these digital spaces are being used in the same way traditional public spaces are. So, the judge concluded here that this little spot where a follower of the president's Twitter account can see a Trump tweet and react to it is a First Amendment regulated space.

Roman Mars [00:14:46] Once the judge concluded that this space was a designated public forum, it's clear that Trump can't use Twitter the way he does.

Elizabeth Joh [00:14:53] Remember, the government is not supposed to engage in what's called "viewpoint discrimination." That is, make choices about who can speak based on what they think. And the plaintiffs in this case who brought the lawsuit--they were blocked by the president precisely because of their viewpoint. "And that," concluded the judge, "violates the First Amendment." These speakers were prevented from speaking to the president because of their views about the president, and the Constitution doesn't allow that. And as an aside--and this is a really deep dive into Twitter's specifics--the judge said that "if Trump is muting you as a follower, that's not a First Amendment problem. You can still tweet at the president if you're muted. He just might never see you. And that's fine," said the judge, "for First Amendment purposes." So how do you resolve all of this? The judge noted that both Dan Scavino and President Trump both control therealDonaldTrump account. The judge issued what's called "declaratory relief." This is a legal conclusion that blocking people from therealDonaldTrump account because of their political views violates the First Amendment. So, in theory, that means that this interpretation of the First Amendment has to be followed by Scavino and Trump; they're going to have to unblock people. And in this very 21st century legal opinion about the Twitter-obsessed president of the United States, the judge ended the illegal opinion with a citation to none other than the 1803 opinion of Marbury versus Madison. She quoted Chief Justice Marshall's statement that it is "emphatically the province and duty of the judicial department to say what the law is." And the law says that the president can't walk you on Twitter.

Roman Mars [00:16:36] On June 4th, Trump unblocked the accounts of the seven Twitter users who sued him. But the Trump team also filed notice in court that it was appealing the

ruling to the Second Circuit U.S. Court of Appeals. We shall see what happens. More Trump Con Law after this.

Elizabeth Joh [00:16:52] So a bit of a postscript. On January 21st, 2017--a hundred years after the Silent Sentinel protests--hundreds of thousands of people participated in the Women's March on Washington, D.C., to march for the cause of women's rights and to make a statement about the newly elected president. The following day, Trump tweeted, "Watched protest yesterday but was under the impression that we just had an election. Why didn't these people vote? Celebs hurt cause badly." Then he tweeted, "Peaceful protests are a hallmark of our democracy. Even if I don't always agree, I recognize the rights of people to express their views." And finally, that day, he tweeted, "Wow. Television ratings just out. 31 million people watched the inauguration. 11 million more than the very good ratings from four years ago."

Roman Mars [00:17:45] Why did you want to highlight those? What does that tell you?

Elizabeth Joh [00:17:49] Well, it's kind of a remarkable way of the president interacting with the public who was protesting against him. He tweeted at the public.

Roman Mars [00:17:57] Right.

Elizabeth Joh [00:17:58] They were protesting him. And he--instead of addressing them in some public speech or in a press announcement--tweeted at them. He tweeted at us about his displeasure and his high ratings.

Roman Mars [00:18:11] Right. And the real problem is not about not having access to the information that Donald Trump is presenting. It's about having the ability to air your grievance back.

Elizabeth Joh [00:18:21] Exactly. And that's why the muting isn't a problem, according to the judge. The government doesn't have to listen, but they have to let you speak. And again, you know, it's just one federal district court judge. So, we'll have to see what happens after this case is appealed. But it is the very first time we've seen, you know, any court talk about what are these social media platforms. And in some ways, it's hard to even figure out how this would translate to something else. Maybe if you had a president using Facebook in a controversial way, you'd have to really be specific about the mechanics of Facebook... Or the Instagram president, or who knows what in the future?

Roman Mars [00:19:00] Right.

Elizabeth Joh [00:19:02] The virtual reality president.

Roman Mars [00:19:04] Were you impressed by the level of detail with which the judge described Twitter and presented the information?

Elizabeth Joh [00:19:09] Oh, totally. I mean, I think the average person has never thought about all these ins and outs of Twitter and their First Amendment implications that there is a constitutional difference between blocking and muting.

Roman Mars [00:19:33] This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumpconlaw.com and on Facebook and Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You

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