Trump vs. Twitter

Jud Mathews

30.05.2020 doi: 10.17176/20200530-133317-0

Donald Trump is among the world's most famous and prolific Twitter brawlers, picking fights — while the sitting President of the United States — with, among others, Greta Thunberg, supermodel Chrissy Teigen, and his former Secretary of State Rex Tillerson. Now he finds himself in a fight with Twitter itself, and he is bringing the power of his high office to bear. After Twitter began flagging tweets from the President under a new fact-checking policy, Trump issued an Executive Order (EO) that threatens actions against platforms engaged in "Online Censorship." The legal effects of the President's action are likely to be limited. The broader political effects are harder to gauge.

The new EO opens with a long first section that lays out the President's case against social media companies. Free speech, "the bedrock of American democracy," is under threat from online platforms that "hand pick the speech that Americans may access and convey on the internet." These platforms amount to "a 21st century equivalent of the public square," but they "engag[e] in selective censorship that is harming our national discourse" on the basis of "inconsistent, irrational, and groundless justifications." Action is required "to protect and preserve the integrity and openness of American discourse and freedom of expression."

From there, the EO introduces a number of measures to turn up the heat on social media platforms. Section 230(c) of the Communications Decency Act, a 1996 federal statute, provides that internet platforms are not to be treated as the authors of third-party content that they share, and further immunizes them from liability for good faith removal of "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" content. The EO declares that it is national policy to construe that immunity to exclude "deceptive or pretextual actions (often contrary to their stated terms of service) to stifle viewpoints with which they disagree." The EO directs all agencies to align their applications of the provision with that understanding. It further requires agency officials to petition the Federal Communications Commission (FCC) for a rulemaking to clarify the scope of the immunity.

The EO goes on: (1) to require a review of agency advertising spending on online platforms; (2) to require the Federal Trade Commission (FTC) to investigate online platforms' restrictions of speech, report on violations of the EO, and "take other actions as appropriate"; (3) to arrange the creation of a working group to investigate state law solutions; and (4) to instruct the Attorney General to draft a federal legislative proposal.

Modest legal effects

In short, the President, unhappy with how non-governmental communication services manage their content, threatens increased legal liability, decreased ad revenue, adverse regulatory action, and state and federal legislation, under the banner of protecting the freedom of speech. Who says irony is dead?

In any case, the immediate legal effects of the EO are modest. The President is, of course, free to espouse a narrow reading of the Section 230(c) immunity grant. But it is the courts that apply that provision to concrete cases, and they are in no way bound to follow the President's preferred construction. Similarly, the President is free to instruct the Secretary of Commerce, whom he can remove at will, to petition the FCC to issue a regulation adopting a narrow construction of the provision. But the FCC, an independent agency, gets to decide for itself whether or not to engage in the requested rulemaking. It's not obvious that the FCC even has the authority to make a rule clarifying the meaning of this provision, since the provision is not administered by the agency. But even

supposing the agency did issue such a rule, it is not clear how it would affect the legal liability of internet platforms.

The President is at liberty also to tell the FTC to "consider taking actions" against internet platforms that engage in "unfair or deceptive acts or practices." This does nothing to add to the FTC's existing power to police business practices, nor does it compel that agency, also independent, to use that power against internet platforms. And state officials can brainstorm ways to regulate internet platforms, but to the extent that those state measures are inconsistent with federal law, including Section 230, they are preempted, and hence invalid.

Even apart from its legal infirmities, the EO does not leave an impression of careful craftsmanship. In the old days, EOs would typically be worked over by teams of lawyers from the White House and relevant agencies, so that the language is buttoned-down and precise. In places, this EO has the casual construction and overwrought rhetoric of a letter to the editor composed as an assignment for a college writing course:

> *Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike.*

The EO was not rushed together in the wake of this week's conflict with Twitter, however. The White House reportedly had assembled a draft back in August, but did not take further action at that time. Why is the White House releasing this now?

Executive Orders make a statement, and that statement is: The President is taking action. President Obama relied heavily on devices other than EOs to direct agency activity, notably presidential memoranda, and was able to boast that he issued fewer EOs than any two-term President since Ulysses S. Grant. But no one would accuse President Obama of a passive Presidency, and it seems likely he avoided issuing EOs whenever other tools would suffice in an effort to blunt charges of executive overreach. Conversely, by issuing an Executive Order, President Trump makes a show of pushing back against Twitter's treatment of him, even when the EO has little legal substance.

What is harder to judge is the longer-term political effects of the President's campaign against social media platforms. Conservatives have accused Facebook, Twitter, and others of left-leaning bias for some time. Whatever their content-management policies actually entail, that charge fits with the narrative that these outfits are run by coastal elites who hold the lives and views of ordinary Americans in contempt. Efforts to punish media companies for how they handle people in power have not gotten off the ground in the United States, as they have elsewhere. But this EO is another way for the President to push the argument that such measures are necessary here.

ABOUT THE AUTHOR

Jud Mathews
Jud Mathews is a Professor of Law at Penn State Law and an Affiliate Professor in Penn State's School of International Relations. He is Associate Editor at Verfassungsblog.

SUGGESTED CITATION

Mathews, Jud: Trump vs. Twitter, Verfassungsblog, 30.05.2020, doi: 10.17176/20200530-133317-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20200530-133317-0.