ARTICLES

@POTUS: Rethinking Presidential Immunity in the Time of Twitter

DOUGLAS B. MCKECHNIE*

President Donald Trump's use of Twitter portends a turning point in presidential communication. His Tweets animate his base and enrage his opponents. Tweets, however, like any form of communication, can ruin reputations. In Nixon v. Fitzgerald, the Supreme Court determined that a president retains absolute immunity for all actions that fall within the "outer perimeter" of his official duties. This Article explores the "outer perimeter" of presidential immunity. It suggests the First, Fifth, and Fourteenth Amendments inform the demarcation of the "outer perimeter," and that when a president engages in malicious defamation, his speech falls outside this perimeter and is not protected by presidential immunity.

The Article begins by examining Twitter as a social media platform and how it facilitates and affects the way we communicate. It then focuses on how Presidents Barack Obama and Donald Trump incorporated the use of Twitter into their presidencies. I then explore four distinct lines of jurisprudence that I argue inform how to identify the "outer perimeter" of a president's official duties: (1) presidential immunity; (2) immunity for executive branch officials; (3)

* Professor McKechnie is an Associate Professor in the Department of Law at the United States Air Force Academy. He earned his J.D. from the University of Pittsburgh School of Law and his B.A. from Ohio University. The views expressed herein are the author's alone and do not necessarily reflect the official policy or position of the United States Air Force Academy, the United States Air Force, the Department of Defense, or the United States Government.

the constitutional implications of defamation; and (4) the Fifth and Fourteenth Amendments' prohibition on government action motivated by animus. I posit that considering these four doctrines, along with the method and manner of communication facilitated by Twitter, malicious defamation falls outside the "outer perimeter" of official presidential duties, and thus, presidential immunity is inapplicable.

INTRODUCTION

Never before has the President of the United States had access to—and so routinely used—an immediate, unfiltered, and pervasive media platform to communicate directly with the world.[1] President

[1] *See Morning Edition: White House Communications Strategy Critiqued by Former Obama Official*, NPR (Feb. 13, 2017, 5:10 AM), http://www.npr.org/2017/02/13/514935085/trump-administration-s-communication-strategy-critiqued-by-former-obama-official [hereinafter NPR's *Morning Edition*].

Donald Trump's use of Twitter has broken the mold.[2] Within this new paradigm, a President can communicate his thoughts at any time, on any subject, without the vetting process traditionally used by, to one degree or another, other modern Presidents.[3] While some laud this as a positive hallmark, it also poses risks that the vetting process can reduce or eliminate.[4] With a President actively participating in the instantaneous communication social media allows, that prophylactic process evaporates and a President's message of the moment is delivered in raw terms.[5] Raw language, however, can lead to liability.[6]

In the past, if a President was drafting remarks to be delivered through traditional mediums and the remarks referred disparagingly to a particular individual, defamatory language undoubtedly would be stricken or wordsmithed so the message was delivered without directly maligning the person's reputation.[7] However, as vetting goes, so goes wordsmithing.[8] In the age of Twitter, those disparaging words that would have otherwise ended up on the cutting room floor may now find themselves contained within a 140-character message[9] delivered by, and directly attributable to, the President of the United States.[10] The individual who draws the ire of a President may now find himself defamed, with reputational injuries resulting from the President's unadulterated words.[11]

---

[2] *Compare* Philip Bump, *You're Not Really Following @BarackObama on Twitter*, ATLANTIC (Apr. 8, 2013), https://www.theatlantic.com/politics/archive/2013/04/youre-not-following-barackobama-twitter/316523/ (creating an Obama Twitter account for the campaign staff to communicate with followers) *with Trump on Twitter: A History of the Man and His Medium*, BBC NEWS (Dec. 12, 2016), http://www.bbc.com/news/world-us-canada-38245530 [hereinafter *Trump on Twitter*] (preferring to directly tweet about issues like foreign policy from his personal twitter account in lieu of press conferences).

[3] NPR's *Morning Edition*, *supra* note 1.

[4] *See id.*

[5] *See id.*

[6] *See infra* Part II.

[7] *See* NPR's *Morning Edition*, *supra* note 1.

[8] *See id.*

[9] "Tweet (n.): A Tweet may contain photos, videos, links and up to 140 characters of text." *The Twitter Glossary | Twitter Help Center*, TWITTER, https://support.twitter.com/articles/166337 (last visited Mar. 28, 2017) [hereinafter *The Twitter Glossary*].

[10] *See* NPR's *Morning Edition*, *supra* note 1.

[11] *See Trump on Twitter*, *supra* note 2.

While textually absent from the Constitution, the Supreme Court has determined that a President retains absolute immunity when he "acts within the 'outer perimeter' of his official" duties.[12] Therefore, one would expect a defamation claim against a President to be met with an absolute immunity defense.[13] However, where a President's defamatory statements are motivated by malice, the absolute immunity defense is unavailable.[14] The Supreme Court has determined that in other constitutional contexts, such as the Fifth and Fourteenth Amendments, where the government is inspired by animus—malice's equivalent—its activities fall outside the boundaries of constitutionally permissible government action.[15] Those actions are void as the Constitution prohibits the government from engaging in official actions for merely malicious reasons.[16] If the Constitution proscribes maliciously motivated government actions,[17] then maliciously motivated defamation likewise falls outside the "outer perimeter" of official acts constitutionally available to a President.[18] As a result, malicious defamation cannot be included within the official duties of a President, and presidential immunity vanishes.

Furthermore, when the Constitution's prohibitions on malicious government actions[19] are coupled with the First Amendment understanding of malicious defamation,[20] the "outer perimeter" of presidential duties is clearer and a presidential immunity claim becomes even more untenable.[21] The United States Supreme Court has determined that in the interests of democracy and to ensure a robust and open dialogue about public officials, the First Amendment protects

---

[12] Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982).

[13] *See id*. at 755–56.

[14] *See* Romer v. Evans, 517 U.S. 620, 631–32 (1996) (stating that when state government actions are motived by "animus," they are constitutionally impermissible under the Fourteenth Amendment).

[15] *See id.*; *see also* United States v. Windsor, 133 S. Ct. 2675, 2693, 2695–96 (2013) (holding a statute invalid as the law served no legitimate purpose and was used to ensure same-sex marriages "will be treated as second-class marriages").

[16] *See Romer*, 517 U.S. at 631–32; *Windsor*, 133 S. Ct. at 2695–96.

[17] *See Romer*, 517 U.S. at 631–32; *Windsor*, 133 S. Ct. at 2695–96.

[18] *Cf.* Nixon v. Fitzgerald, 457 U.S. 731, 757 (1982) (concluding that the President's alleged wrongful act is "well within the outer perimeter of his authority" when it is made within his "constitutional and statutory authority").

[19] *See Romer*, 517 U.S. 620 at 631–32.

[20] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[21] *See id.* at 282.

a significant amount of speech that might otherwise constitute defamation.[22] Yet, no matter how generous the latitude is under the First Amendment, malicious defamation still falls outside the boundaries of protected speech.[23] Thus, the Constitution's intolerance of government actions that are motivated by malice, taken together with its placement of malicious defamation beyond First Amendment protection, evinces a constitutional preclusion of presidential immunity where a President's defamation is motivated by malice.[24]

This article has three parts. Part I explores the developing zone where Twitter and the presidency of the United States converge. It begins with an overview of how Twitter functions and how it encourages a hitherto unavailable form of communication with its own distinctive method and style.[25] It then chronicles how Presidents Obama and Trump, the only Presidents to have used Twitter,[26] have incorporated it into their lives and the presidency. Part II explores four distinct, but relevant, constitutional doctrines: (1) presidential immunity, (2) immunity for executive branch officials, (3) the constitutional implications of defamation, and (4) the Fifth and Fourteenth Amendments' prohibition on government action motivated by animus. Part III argues that, when considering these four doctrines, it becomes clear that if a President engages in malicious defamation, then that speech is outside the constitutionally permissible actions available to a President. Therefore, presidential immunity would not be an available defense, especially in the time of Twitter.

I. TWITTER AND THE PRESIDENCY

A. *Twitter: A Window Into the Soul*

Twitter is a public, Internet-based platform that allows users to post asynchronous messages, or tweets, that are 140 characters long.[27] Tweets require comparatively little time to draft and can be posted by way of a mobile phone, computer, tablet, or virtually any

---

[22] *Id.* at 269–70.

[23] *See id.* 279–80.

[24] *See id.* at 282.

[25] *See generally* DHIRAJ MURTHY, TWITTER: SOCIAL COMMUNICATION IN THE TWITTER AGE 1–3 (2013).

[26] *See* NPR's *Morning Edition*, *supra* note 1.

[27] MURTHY, *supra* note 25, at 1–2.

device connected to the Internet.[28] Although tweets can be restricted to a limited group of people with private access to a user's account, tweets are typically accessible by the general public, unlike posts on social networking sites like Facebook.[29] Tweets can refer to, and be directed at, other Twitter users, thus allowing Twitter users to interact with each other regardless of a preexisting relationship or otherwise being acquainted.[30] Though it is an available option, Twitter is less a means by which to carry on bidirectional communication and more a means to link the tweets of strangers so as to contribute to a larger discussion.[31]

Twitter users are identified by their username preceded by the @ symbol.[32] A Twitter user's tweet can reference any other user, whether or not the users know each other, by simply adding the @ symbol as a prefix to a username.[33] By using the # symbol, or hashtag, in a tweet, tweets on a particular topic are aggregated.[34] As a result, if a user clicks on a word or phrase preceded by a # symbol, he will see a list of tweets containing the same word or phrase.[35] As of August 12, 2017, Twitter had approximately 328,000,000 active monthly users, and of those users, 80% of them accessed Twitter through a mobile device.[36]

Unlike social networking sites that emphasize connecting with and sustaining personal relationships, Twitter is a social media platform.[37] It promotes the buildup of an audience, or followers, and facilitates the airing of one's thoughts to the audience in the form of tweets.[38] With limited space for posts, Twitter is considered a microblog most often used to capture and articulate one's thoughts of

---

[28] *Id.* at 3.
[29] *Id.* at 2.
[30] *Id.* at 3.
[31] *Id.* at 3–4.
[32] *The Twitter Glossary*, *supra* note 9.
[33] *See id.*
[34] MURTHY, *supra* note 25, at 3.
[35] *The Twitter Glossary*, *supra* note 9.
[36] Salman Aslam, *Twitter by the Numbers: Stats, Demographics & Fun Facts*, OMNICORE (Aug. 12, 2017), https://www.omnicoreagency.com/twitter-statistics/ (noting the percentage of Twitter users on a mobile device was last updated on Jan. 24, 2017).
[37] MURTHY, *supra* note 25, at 7–8.
[38] *Id.* at 8.

the moment or "quick reflections" as opposed to "coherent statements and discourse."[39] Twitter, like other microblogs, relies on its members' regular contributions.[40] Indeed, it is this regularity and repetition that can cause a loss of inhibition regarding what a user reveals.[41] It becomes second nature to retrieve one's mobile device, access Twitter, and "quasi-unconsciously" share intimate thoughts and details with the world.[42]

These revelations, and other types of self-disclosure, are not the only results of repetition. Sharing information about oneself on platforms like Twitter activates the same pleasure region of the brain as food and sex.[43] It is this biological reaction that creates a "reciprocal cyclical feedback," encouraging continued sharing of information.[44] The impulsive, reckless self-disclosure fuels instant gratification and can be repeated on demand.[45] Additionally, reticence to share otherwise private thoughts is eroded on Twitter because of the lack of visual cues that humans usually rely on to discourage oversharing.[46] This lack of visual cues also creates a disembodied aspect to the communication and allows a user to more easily disassociate himself from his actions, whether banal, malicious, or profound.[47]

B. *Presidential Use of Twitter*

President Barack Obama's personal Twitter account, @BarackObama, was created by a campaign worker on March 5, 2007, two months before he announced his candidacy.[48] His campaign continued to run the account from 2007 through the 2008 presidential campaign, into his first term as President, and throughout his 2012 presidential campaign.[49] While he occasionally signed tweets from the @BarackObama account with his initials "-bo" to

---

[39] *Id.* at 8–9.
[40] *See id.* at 10–11.
[41] *Id.* at 10.
[42] *Id.* at 134–35.
[43] *See* SUSAN GREENFIELD, MIND CHANGE: HOW DIGITAL TECHNOLOGIES ARE LEAVING THEIR MARK ON OUR BRAINS 103 (2015).
[44] *Id.*
[45] *See id.* at 103, 267.
[46] *See id.* at 104.
[47] *See id.* at 146.
[48] Bump, *supra* note 2.
[49] *Id.*

indicate it was he who posted the tweet, his campaign staff was most often responsible for the tweets.[50] The tweets from the @BarackObama account dealt primarily with policy priorities and motivating followers to support the President's efforts.[51] In January 2013, control of the @BarackObama account was transferred from the President's campaign staff to Organizing for Action, a political non-profit engaged in advocacy issues.[52]

In addition to his occasional personal tweets from @BarackObama, President Obama sometimes signed tweets from the official White House account, @WhiteHouse.[53] On May 18, 2015, President Obama posted the first official presidential tweet from the presidential Twitter handle, @POTUS.[54] When @POTUS was created, the intent was that the Twitter handle would remain the official Twitter account of the President of the United States, and the next President would take over the account.[55] On January 20, 2017, after the inauguration of President Donald Trump, former President Obama returned to @BarackObama and now tweets from that account.[56]

Unlike President Obama, President Trump had a significant presence on Twitter as a private citizen before being elected President and taking control of the @POTUS account.[57] Donald Trump created his personal @realDonaldTrump account in May 2009, seven years before being elected President.[58] In the first few years, Donald Trump shared responsibility for his @realDonaldTrump account with his staff; tweets he wrote himself included "from Donald

---

[50] *Id.*; Roberta Rampton, *Obama Gets His Own Account on Twitter: 'It's Barack. Really!'*, REUTERS (May 18, 2015, 12:35 PM), http://www.reuters.com/article/usa-obama-twitter-idUSL1N0Y915O20150518.

[51] Bump, *supra* note 2.

[52] *Id.*

[53] Rampton, *supra* note 50.

[54] *Id.*

[55] *Id.*

[56] Brooke Seipel, *Obama Returns to Personal Twitter: 'Is This Thing Still on?'*, THE HILL (Jan. 20, 2017, 4:18 PM), http://thehill.com/blogs/in-the-know/in-the-know/315363-obama-returns-to-personal-twitter-is-this-thing-still-on.

[57] *See generally Trump on Twitter*, *supra* note 2.

[58] *Id.* Because the @DonaldTrump Twitter account had been created as a parody account, President Trump's name is preceded by the word "real." *Id.*

Trump" in the message.[59] Initially, his tweets pertained to his television show, his public appearances, and his family—not politics.[60]

In 2011, "from Donald Trump" stopped appearing in tweets from the @realDonaldTrump account, which made it unclear whether he or his staff drafted the tweets.[61] At this same time, Donald Trump's tweets became more political and more numerous.[62] For example, in July 2011, with fewer than 2,000,000 followers, Donald Trump tweeted about the relationship between China and the United States.[63] He suggested China was the United States' enemy and was bent on destroying it.[64] In May that same year, he made his first reference to running for President.[65] While he had only tweeted around 275 times in the two-year period from May 2009 to May 2011, in the last six months of 2011 he tweeted over 550 times.[66] By 2016, Donald Trump was tweeting, on average, 375 times a month and had approximately 12,000,000 followers.[67]

On June 16, 2015, Donald Trump announced his candidacy for President of the United States.[68] He continued to use his @realDonaldTrump account throughout the campaign to comment on a variety of issues, including Macy's department store's decision to discontinue selling his fashion line, presidential debate performances, and his political adversaries.[69] Regarding his political adversaries, he referred to them as "weak," "failed," "nasty," dumb," "wacko," "light weight," dopey," and "crazy."[70] After his election,

---

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*; David Lazer et al., *I. You. Great. Trump.**, POLITICO (May/June 2016), http://www.politico.com/magazine/gallery/2016/04/donald-trump-twitter-account-history-social-media-campaign-000631?slide=0.

63 Donald J. Trump (@realDonaldTrump), TWITTER (July 20, 2011, 1:10 PM), https://twitter.com/realdonaldtrump/status/93774719052029953; *Trump on Twitter*, *supra* note 2.

64 Trump, *supra* note 63.

65 Lazer et al., *supra* note 62.

66 *See Trump on Twitter*, *supra* note 2.

67 *Id.*

68 *Id.*

69 Lazer et al., *supra* note 62; Andrew McGill, *What Trump Tweets While America Sleeps*, ATLANTIC (Oct. 7, 2016), https://www.theatlantic.com/politics/archive/2016/10/what-trump-tweets-while-america-sleeps/503141.

70 Lazer et al., *supra* note 62.

but before his inauguration, President-elect Trump continued to tweet from his @realDonaldTrump account on a range of issues, including the media, his cabinet selections, and foreign and domestic policy.[71]

President Trump assumed control of the @POTUS Twitter account on January 20, 2017, and now operates two Twitter accounts simultaneously—@POTUS and @realDonaldTrump.[72] As an indicator that he has personally drafted a tweet posted by the @POTUS account, the initials "-DJT" are included with the tweet.[73] Tweets are posted from both of these accounts daily and, at times, within hours or minutes of each other.[74] For example, on February 6, 2017, at 11:32 a.m., he tweeted the following from @realDonaldTrump: "The failing @nytimes writes total fiction concerning me. They have gotten it wrong for two years, and now are making up stories & sources!"[75] An hour later at 12:38 p.m., he tweeted the following from @POTUS: "Will be interviewed on @oreillyfactor tonight at 8:00 P.M. Enjoy! –DJT . . . ."[76]

Since taking control of these two accounts, President Trump tweets on a range of issues from both accounts.[77] He has tweeted about the media, his family, his choice for the Supreme Court, his travel plans, his meetings with foreign heads of state, intelligence leaks, his cabinet, his critics, and foreign and domestic policy.[78] The way in which President Trump communicates via Twitter ranges from insulting to complimentary and from unabashed to measured. It is his brash tweets, however, that have garnered the most attention. For example, on January 26, 2017, he tweeted from @realDonaldTrump about the of release of Chelsea Manning from prison and wrote: "Ungrateful TRAITOR Chelsea Manning, who should never have been released from prison, is now calling President

---

[71] Amanda Wills & Alysha Love, *All the President's Tweets*, CNN, http://www.cnn.com/interactive/2017/politics/trump-tweets (last updated Sept. 27, 2017, 3:11 PM).

[72] *See id.*

[73] *See id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

Obama a weak leader. Terrible!"[79] On February 4, 2017, in response to a District Court judge's decision to issue a Temporary Restraining Order and stop the implementation of his Executive Order on immigration, he tweeted from @realDonaldTrump: "The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!"[80]

Perhaps, however, his tweets about President Obama have caused the most controversy. On March 4, 2017, at 6:35 a.m., President Trump, tweeting from his @realDonaldTrump account, wrote: "Terrible! Just found out that Obama had my 'wires tapped' in Trump Tower just before the victory. Nothing found. This is McCarthyism!"[81] At 6:49 a.m., he tweeted from the same account: "Is it legal for a sitting President to be 'wire tapping' a race for President prior to an election? Turned down by court earlier. A NEW LOW!"[82] Three minutes later, at 6:52 a.m., he wrote: "I'd bet a good lawyer could make a great case out of the fact that President Obama was tapping my phones in October, just prior to Election!"[83] Ten minutes later, at 7:02 a.m., he wrote: "How low has President Obama gone to tapp [sic] my phones during the very sacred election process. This is Nixon/Watergate. Bad (or sick) guy!"[84]

Undoubtedly, it could be a crime if President Obama ordered an intelligence agency to wiretap President Trump during the presidential campaign after having failed to obtain a warrant or order from the Foreign Intelligence Surveillance Court. However, if President Obama did no such thing, then President Trump's allegations that President Obama criminally misused intelligence-gathering techniques could have a harmful effect on President Obama's reputation. While the story is still unfolding at the time of this writing, when testifying before the House Intelligence Committee, the former Director of the Federal Bureau of Investigation stated he had no information that supported the veracity of President Trump's tweets.[85]

---

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 Matt Apuzzo et al., *F.B.I. Is Investigating Trump's Russia Ties, Comey Confirms*, N.Y. TIMES (Mar. 20, 2017), https://www.nytimes.com/2017/03/20/us/politics/fbi-investigation-trump-russia-comey.html.

II. THE DISPARATE, RELEVANT DOCTRINES: ABSOLUTE IMMUNITY, DEFAMATION, EQUAL PROTECTION, AND DUE PROCESS

A. *Presidential Immunity*

No exploration of presidential immunity would be complete without a discussion of the first Supreme Court case considering the issue—*Nixon v. Fitzgerald*.[86] In *Nixon*, a U.S. Air Force civilian employee, A. Ernest Fitzgerald, appeared in front of a congressional oversight committee to provide testimony regarding cost overruns on a transport airplane.[87] Mr. Fitzgerald's testimony reportedly provided embarrassing information about his supervisors and their ineptitude.[88] Two years later, under a new presidential administration, Mr. Fitzgerald's position was eliminated as part "of a departmental reorganization and reduction in force."[89] While President Richard Nixon and his administration considered reassigning Mr. Fitzgerald to a different federal agency, in the end, he failed to obtain another position.[90] Mr. Fitzgerald complained to the Civil Service Commission and alleged his separation from federal employment constituted retaliation for his congressional testimony.[91]

At the Commission's hearing, the Secretary of the Air Force invoked executive privilege to avoid answering certain questions.[92] Five days later, when asked at a news conference about Mr. Fitzgerald's separation, President Nixon took full responsibility for the decision.[93] The next day, the White House retracted the President's statement and suggested that President Nixon had confused Mr. Fitzgerald with another employee.[94] Ultimately, the Civil Service Commission concluded that Mr. Fitzgerald's termination had been a result of his supervisor's dissatisfaction with his performance and not being a team player.[95] Mr. Fitzgerald filed suit and, after some procedural hurdles and discovery, included the President of the

---

86 457 U.S. 731 (1982).
87 *Id.* at 733–34.
88 *Id.* at 734.
89 *Id.* at 733.
90 *Id.* at 735–36.
91 *Id.* at 736.
92 *Id.* at 737.
93 *Id.*
94 *Id.*
95 *Id.* at 738 n.16.

United States as a defendant.[96] The President claimed absolute immunity, which the District Court and Court of Appeals for the District of Columbia rejected.[97]

As this was a case of first impression, the Supreme Court began its analysis of President Nixon's absolute immunity claim by surveying the jurisprudential landscape of immunity for government officials.[98] Nearly 100 years before President Nixon invoked presidential immunity, the Court considered the Postmaster General's claim of immunity from civil liability in *Spalding v. Vilas* and held that "public policy and convenience" compelled recognition of immunity for suits arising from official acts.[99] In *Spalding*, the Court reasoned that failure to recognize such immunity would cause executive officials to be apprehensive in exercising their discretion for fear of civil liability, particularly when time called for bold action.[100] In other words, when acting in his capacity as a chief executive, and within the limits of his authority, the head of a governmental agency should not be in fear that the motivation behind his actions will be the subject of a lawsuit.[101]

The Court continued a review of its case law by noting similar reasons for recognizing absolute immunity for judges' actions taken in furtherance of their judicial responsibilities.[102] The Court also pointed out its previous recognition of a qualified "good faith" immunity for police officers and state executive officials for actions taken in furtherance of their respective professional responsibilities.[103] Nonetheless, the Court rejected the argument that, like

---

96 *Id.* at 739–40.

97 *Id.* at 740–41.

98 *Id.* at 744–45.

99 Spalding v. Vilas, 161 U.S. 483, 498 (1896). The *Nixon* Court noted that its earliest recognition of immunity defense drew upon English common law's recognition of the defense. *Nixon*, 457 U.S. at 744.

100 *Nixon*, 457 U.S. at 744–45.

101 *Id.* at 745.

102 *Id.* at 745–46.

103 *Id.* at 746.

judges, all federal executive officials possessed absolute immunity.[104] Judges require absolute immunity "because of the special nature of their responsibilities."[105] However, the Court's previous case law had specifically left open the question of whether some federal officials might be entitled to absolute immunity for public policy reasons.[106] The question for the Court, therefore, was whether the President was the sort of federal official entitled to absolute immunity.[107]

The Court held that the President of the United States is indeed entitled to absolute immunity for civil damages arising out of official acts.[108] The Court reasoned that, when taking into account the constitutional structure, separation of powers, and the nature of the President's office, the President is uniquely situated such that absolute immunity is required.[109] The President's Article II powers are action-oriented—enforcing law, conducting foreign affairs, managing the executive branch—and thus, absolute immunity is a must when the President is acting within his official capacity.[110] Absolute immunity frees the President and provides the maximum space to operate without fear of liability.[111] This is particularly so, as the President often finds himself navigating issues where feelings run high.[112] The visibility of the office and the effects of presidential actions on countless people necessitate absolute immunity because the execution of presidential duties must be unencumbered from fear of lawsuits.[113]

The Court placed some limitations, however slight, on this absolute immunity.[114] Absolute immunity was not to be a magical incantation that would mechanically bar any lawsuit.[115] Recognizing

---

104 *Id.* at 747.

105 *Id.* The Court added prosecutors to this list of government officials who require absolute immunity. *Id.*

106 *Id.*

107 *Id.* at 748.

108 *Id.* at 749.

109 *Id.* at 748–49.

110 *Id.* at 749–50.

111 *Id.* at 751–52.

112 *Id.*

113 *Id.* at 753.

114 *Id.* at 756.

115 *See id.* at 753–54.

that absolute immunity traditionally only extended to acts in furtherance of an official's duties, the Court extended the President's absolute immunity to those acts within the "outer perimeter" of his official duties.[116] Undoubtedly, this was both an intentional and comparatively expansive grant of immunity; however, such immunity was not without its limits. Actions falling outside of the "outer perimeter" of his official responsibilities would not retain the absolute immunity shield.[117] Ultimately, after applying this standard to the allegations against President Nixon, the Court wasted no time in holding that his actions regarding Mr. Fitzgerald's employment fell within his authority and were thus entitled to absolute immunity.[118]

Fifteen years later, the Court addressed a "temporary" presidential immunity claim by President William J. Clinton in a lawsuit over allegedly tortious actions that took place *before* he became President.[119] President Clinton argued that this temporary immunity prohibited civil litigation during the course of a President's term and extended to all but the most exceptional cases—even requiring temporary immunity for unofficial, pre-presidency acts.[120] The Court revisited its rationale from *Nixon* and the benefits of absolute presidential immunity.[121]

The Court reiterated its commitment to absolute presidential immunity for official acts because of the liberating effect it has on the President.[122] The public good is served, the Court restated, when a President is free to take action in his official capacity without the constant threat of liability for his decisions.[123] However, because "the sphere of protected action must be related closely to the immunity's justifying purposes," immunity from unofficial actions fails to serve that same public good.[124] Thus, though the President's absolute immunity extends to the "outer perimeter of his authority,"

---

116 *Id.* at 755–56. The Court also discussed the political options available for "punishing" a President; namely, impeachment and running for reelection. *Id.* at 757.

117 *Id.* at 756.

118 *Id.* at 757.

119 Clinton v. Jones, 520 U.S. 681, 692 (1997).

120 *Id.* at 684.

121 *Id.* at 694.

122 *Id.* at 693.

123 *Id.*

124 *Id.* at 694–95.

it does not extend to those acts unrelated to the particular functions of his office.[125]

B. *Defamation and Immunity for Government Officials*

The absolute immunity doctrine articulated in *Nixon* and *Clinton* stemmed from claims for wrongful termination against President Nixon while he was in office and for various torts that allegedly occurred before President Clinton was elected.[126] Neither case considered a claim for defamation against a sitting President. Nevertheless, the Court has spoken on the question of immunity for actions by federal executive branch employees.[127] Indeed, nearly twenty-five years before the Court was first asked to consider the question of presidential immunity, it explored similar immunity claims in the context of alleged defamation by a government official.[128]

In *Barr v. Matteo*, former federal employees sued a government agency and its director for defamation.[129] The employees alleged that the director, after being derided by Senators in the press, issued a press release wrongly blaming them for implementing a policy that resulted in mismanagement of government resources.[130] Moreover, the employees claimed the director had issued the allegedly untrue press release with malice.[131] The director claimed that, as a government official, he was entitled to absolute privilege or immunity, which barred the employees' malicious defamation claim.[132]

Recognizing that immunity for executive branch officials is a judicial construct, unlike the Constitution's specific immunity for members of Congress, the Court set out to explore the boundaries of a government official's absolute immunity defense for a claim of

---

[125] *Id.* at 694.

[126] Nixon v. Fitzgerald, 457 U.S. 731, 739 (1982); *Clinton*, 520 U.S. at 685–86.

[127] Questions of immunity for executive branch employees are different from immunity questions vis-à-vis members of Congress, as members of Congress are covered by the Speech and Debate Clause. *See* U.S. CONST. art. I, § 6, cl. 1.

[128] Barr v. Matteo, 360 U.S. 564, 564–65 (1959).

[129] *Id.* at 565.

[130] *Id.* at 567–68.

[131] *Id.* at 568.

[132] *Id.* at 568.

malicious defamation.[133] Like in *Nixon*, the Court relied on the Postmaster General's immunity claim in *Spalding v. Vilas* where the Postmaster General allegedly disseminated maliciously false information to harm the business prospects of an attorney.[134] The Court quoted, with agreement, the *Spalding* Court's rationale, which recognized an interest in protecting government officials from the trepidation that would imbue their official actions if their motives could be the subject of a suit for liability.[135] That trepidation, the Court reasoned, would only tend to inhibit the official's performance of his duties and thus impede a well-functioning government.[136]

As noted in *Nixon* and *Clinton*, this immunity is not without limitations.[137] It applies to only those acts that are within the scope of the official's duties.[138] Although one might argue the aim of official duties can only be to further the public good, thus barring immunity if an official's actions are not intended to do so, the Court suggested the question is simpler than that.[139] The question is only whether "the occasion . . . would have justified the act, if [the official] had been using his power for any of the purposes on whose account it was vested in him . . . ."[140] As the government official's position and duties increase, so increases the privilege and the acts protected.[141]

Applying its reasoning to the employees' defamation claim, the Court held that, while it was a close call, the director's press release was within his duties and thus shielded by immunity.[142] As an acting director, he had the discretion to use the means at his disposal to respond publicly to accusations of mismanagement.[143] It was of no consequence that the director was not legally required to issue a press release.[144] Press releases are a standard practice often used by

---

133 *Id.* at 569.
134 *Id.* at 570 (discussing Spalding v. Vilas, 161 U.S. 483 (1896)).
135 *Id.*
136 *Id.* at 571.
137 *Id.* at 572 (quoting Gregoire v. Biddle, 177 F. 2d 579, 581 (2d Cir. 1949)).
138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.* at 573.
142 *Id.* at 574.
143 *Id.* at 574–75.
144 *Id.* at 575.

agency directors to communicate with the public to ensure a governmental agency functions effectively.[145] What is more, the employees' allegations of malice had no effect on the Court's application of the privilege.[146] Certainly, injuries may go without a remedy; but, on balance, the public good is more effectively served by ensuring the government official is not constantly looking over his shoulder.[147] On this point, Chief Justice Warren disagreed.[148]

Chief Justice Warren posited in his dissent that the interests to be balanced go beyond the singular wrong inflicted on the defamation victim.[149] In addition to the public interest in limiting defamation claims so a government official feels uninhibited, there is a public interest in ensuring citizens feel free to criticize government officials without fear of "being subjected to unfair—and absolutely privileged—retorts."[150] The absolute immunity provided to government officials in defamation cases will only serve to chill the speech of those who would criticize them.[151] Why rail against a public official if your criticism can be met with privileged defamation?[152] Absolute immunity as applied to defamation claims protects the powerful, silences the powerless, and limits open discussion.[153] And this, Chief Justice Warren argued, "is a much more serious danger than the possibility that a government official" may be forced to litigate a claim for malicious defamation.[154]

C. *The First Amendment Implications of Defamation*

While the absolute immunity doctrine ostensibly applies to any presidential act that falls within the "outer perimeter" of presidential responsibilities, some presidential acts necessarily implicate other constitutional principles.[155] For example, a President's Article II role as Commander-in-Chief is not a self-contained constitutional

---

145 *Id.* at 574.
146 *Id.* at 575.
147 *Id.* at 576.
148 *Id.* at 584 (Warren, C.J., dissenting).
149 *Id.*
150 *Id.*
151 *Id.* at 585.
152 *Id.*
153 *Id.*
154 *Id.*
155 Clinton v. Jones, 520 U.S. 681, 694 (1977).

authority.[156] A President's Commander-in-Chief power is influenced by, and must be considered in light of, Congress's Article I authority to declare war.[157] Similarly, communicating is not a self-contained presidential act. A President's power to speak is influenced by, and must be considered in light of, the First Amendment.[158] In particular, defamatory speech occupies a unique position within First Amendment jurisprudence, and that jurisprudence influences the realm of protected speech, including presidential speech.[159] Such jurisprudence shapes and illuminates the "outer perimeter" of presidential duties.[160]

Though recognized as a common law tort, and "never" considered protected speech,[161] defamation took on a constitutional dimension in *New York Times v. Sullivan*.[162] In *Sullivan*, a public official sued a group of civil rights activists and the New York Times.[163] The civil rights activists ran an advertisement in the New York Times alleging an abusive and violent course of conduct directed at civil rights activists by the police in Montgomery, Alabama.[164] Sullivan, the plaintiff, alleged that the statements were untrue and that the reference to "police" linked the untruths to him in his capacity as a supervisor of the police department.[165] He was successful in his defamation claim in Alabama state court, but the decision was eventually reversed by the Supreme Court.[166]

The Court reasoned that Alabama state law governing defamation was constitutionally deficient in light of the First Amendment.[167] Alabama state law permitted a finding of defamation if the

---

156 *See* Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, COUNCIL ON FOREIGN REL. (Mar. 2, 2017), https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president.

157 *Id.*

158 *See* Lincoln Caplan, *How the First Amendment Applies to Trump's Presidency*, NEW YORKER (Mar. 21, 2017), http://www.newyorker.com/news/news-desk/how-the-first-amendment-applies-to-trumps-presidency.

159 *See id.*

160 Clinton v. Jones, 520 U.S. 681, 694 (1997).

161 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

162 376 U.S. 254, 256 (1964).

163 *Id.*

164 *Id.* at 256–58.

165 *Id.* at 258.

166 *Id.* at 284.

167 *See id.* at 283–84.

words tended to injure the victim's reputation and, where the victim was a public official, an untrue statement permitted a presumption of reputational harm.[168] The Court found this burden on the public official plaintiff insufficiently low when compared with the goals of the First Amendment.[169] The First Amendment, the Court reasoned, evinces a deep, national commitment to a robust discussion of matters of public concern.[170] This commitment recognizes and allows for the possibility that untruths will seep into public discourse.[171] However, that possibility does not erode the protection afforded by the First Amendment for speech critical of public officials.[172]

The First Amendment, the Court decided, places a high burden on a public official's defamation lawsuit and proscribes unnecessarily strict burdens that might be placed on speakers.[173] The First Amendment compels a public official to prove the statements were made with "actual malice" or "knowledge that it was false or with reckless disregard of whether it was false . . . ."[174] This high burden on public officials assures wide latitude for the governed who are critical of those who govern.[175] Anything less could result in self-censorship; those who might otherwise inveigh against public officials will steer clear of criticism that could contain even negligible errors for fear that misstatements will open them to liability.[176] This would inhibit the "unfettered interchange of ideas" needed to bring about "political and social changes desired by the people."[177]

D. *Government Action Motivated by Animus in Other Constitutional Contexts*

The viability of absolute immunity in defense of a malicious defamation allegation against a President is not informed simply by presidential immunity and defamation jurisprudence. Instead, it

---

168 *Id.* at 267.
169 *Id.* at 269–73.
170 *Id.* at 270.
171 *Id.* at 273.
172 *Id.*
173 "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions" cannot stand First Amendment scrutiny. *Id.* at 279.
174 *Id.* at 279–80.
175 *Id.* at 279.
176 *Id.*
177 *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

must also be considered in light of the Supreme Court's understanding of the Constitution's intolerance of maliciously motivated government actions.[178] Indeed, the Supreme Court has opined on the constitutionality of malicious governmental motivations and has done so more recently than virtually all the cases discussed above.[179] In particular, though using malice's synonym, the Court has found that government action motivated by *animus* violates the Equal Protection and Due Process clauses of the Constitution and are thus beyond the realm of constitutionally allowable government acts.[180]

1. THE EQUAL PROTECTION CLAUSE'S PROHIBITION ON GOVERNMENT ACTION MOTIVATED BY ANIMUS

In *Romer v. Evans*, the Court had occasion to consider whether a Colorado state constitutional amendment could survive an Equal Protection challenge where it was motivated by nothing more than animus.[181] In *Romer*, multiple Colorado municipalities enacted ordinances that prohibited discrimination based on sexual orientation.[182] In response to these ordinances, Colorado adopted a constitutional amendment prohibiting those and other antidiscrimination laws that singled out gays, lesbians, or bisexuals for protection from discrimination.[183] The State posited that the constitutional amendment simply placed gays and lesbians in the same position as others, providing no more and no less rights.[184]

The Court found that argument unpersuasive.[185] Instead, the Court interpreted the amendment as carving out only gays and lesbians from the larger population and prohibiting laws that would otherwise protect them from discrimination.[186] With the enactment of the amendment, the state and its municipalities would be incapable of including gays and lesbians in any enumerated list of classes of people specifically protected by antidiscrimination laws in either

---

178 *See* Romer v. Evans, 517 U.S. 620, 631–32 (1996).

179 *See generally* United States v. Windsor, 133 S. Ct. 2675 (2013).

180 *Romer*, 517 U.S. at 632 (discussing Equal Protection Clause); *Windsor*, 133 S. Ct. at 2693 (discussing Due Process Clause).

181 517 U.S. at 632.

182 *Id.* at 623–24.

183 *Id.* at 624.

184 *Id.* at 626.

185 *Id.*

186 *Id.* at 627.

public accommodations or from government action.[187] Indeed, even adverse, arbitrary government action would go unchallenged if the basis for the action was a person's status as a homosexual.[188] The amendment, the Court found, did no more than single out and impose a unique disability on gays and lesbians.[189]

While laws routinely classify and benefit some classes of people over others, to be permissible under the Equal Protection Clause those laws must at least pass the minimum standard of scrutiny and "bear[] a rational relation to some legitimate end."[190] In this, the amendment failed.[191] The Court reasoned gays and lesbians were targeted as a class to make it more difficult for them to seek aid from the government and protection from the law.[192] Relatedly, the Court determined this objective was motivated by nothing more than animus for gays and lesbians.[193] Because government action motivated by animus, or bare desire to harm, can never constitute a legitimate government interest, Colorado's amendment could not survive a Fourteenth Amendment challenge.[194]

2. THE FIFTH AMENDMENT'S PROHIBITION ON GOVERNMENT ACTION MOTIVATED BY ANIMUS

In addition to the Fourteenth Amendment's Equal Protection Clause, the Due Process Clause of the Fifth Amendment prohibits the federal government from enacting legislation motivated by animus.[195] In *United States v. Windsor*, the Court considered whether the Defense of Marriage Act (DOMA) was constitutional in light of the Fifth Amendment.[196] Because of moves by some states to permit same-sex marriage, the federal government enacted DOMA, an

---

187 *Id.* at 629–30.
188 *Id.* at 630.
189 *Id.* at 631.
190 *Id.*
191 *Id.* at 632.
192 *Id.* at 633–34.
193 *Id.* at 634.
194 *Id.* at 634–35.
195 *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. Surely, the Fourteenth Amendment's Due Process Clause would also prohibit state legislation motivated by animus. *Id.*
196 133 S. Ct. 2675, 2694 (2013).

amendment to the Dictionary Act, which redefined the word "marriage" for the purposes of the federal legislation to mean "a legal union between one man and one woman."[197] When a widow did not qualify for the federal estate tax's marital exemption because her deceased spouse was a woman, she filed suit challenging the constitutionality of DOMA.[198] The Court concluded that DOMA's purpose was to impose disabilities, and thus injury and indignity upon a class of people, thereby violating the liberty protected by the Fifth Amendment.[199]

In reviewing the history of DOMA, the Court found the indignity that resulted from the law was not an unintended byproduct, but "was its essence."[200] First, the mere fact that the federal government was weighing in on a subject often left to the states increased the unusual nature of DOMA.[201] More importantly, Congress itself articulated the intent that the law would demonstrate and inflict a moral rejection of state-sanctioned same-sex marriage.[202] DOMA, the Court determined, served no other purpose than to impose inequality, humiliate, and burden a class of people some states sought to protect.[203] While the Government argued it was acting within its authority to articulate national policy, the Court noted that "[t]he power the Constitution grants it also restrains."[204] In particular, the liberty protected by the Due Process Clause of the Fifth Amendment limits malevolent government aims.[205] The Amendment demarcates a border between constitutional, permissible government power and extra-constitutional, impermissible government power.[206] It then

---

197 *Id.* at 2683 (quoting 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013)).

198 *Id.*

199 *Id.* at 2692, 2695–96.

200 *Id.* at 2693.

201 *Id.* at 2691.

202 *Id.* at 2693.

203 *Id.* at 2693–95.

204 *Id.* at 2695.

205 *Id.*

206 *Id.*; This concept of a demarcation between constitutional and unconstitutional authority within our democracy is not uncommon. For example, in *Helvering v. Gerhardt*, the Court noted that in our democracy, the legislative branch has the power to determine "what services and functions the public welfare requires" so long as those actions are "within the sphere of constitutional action . . . ." 304 U.S. 405, 427 (1938) (Black, J., concurring).

places the power to maliciously degrade and demean on the extra-constitutional, impermissible side of the border.[207]

III. IDENTIFYING THE "OUTER PERIMETER": ACTUAL MALICE AND ANIMUS, TWO SIDES OF THE SAME CONSTITUTIONAL COIN

Before beginning a discussion of how the Court's constitutional understanding of maliciously motivated government action shapes the presidential immunity doctrine, it seems necessary to establish, in the first instance, that animus and malice are, at their core, related concepts. Merriam-Webster's dictionary defines "malice" as a "desire to cause pain, injury, or distress to another . . ." while "animus" is defined as "a usually prejudiced and often spiteful or malevolent ill will . . . ."[208] Black's Law Dictionary states that "'[m]alice,' in its common acceptation, means ill will towards some person."[209] Thesaurus.com lists "animosity" as a relevant synonym for "malice."[210] Whether one acts with "animus" or "malice" seems to connote the same motivation: acting with contemptuous malevolence and hostility. As a result, the terms may be used interchangeably below because whether the animating intent behind government action is labeled "malice" or "animus" is a difference without a distinction.

The Constitution, through the Fifth and Fourteenth Amendments, draws a perimeter around the sovereign power of the state and the federal governments.[211] First, the Fifth Amendment's Due Process Clause prohibits government from depriving a person's liberty by demeaning them for no other reason than animus.[212] At the same time, the Fourteenth Amendment's Equal Protection Clause similarly prohibits laws and government policies that have no legitimate purpose other than to classify a group of people and maliciously inflict injury upon them for no other reason than enmity.[213] In exceeding these boundaries, government finds itself in a no man's

---

[207] *Windsor*, 133 S. Ct. at 2693, 2695.

[208] *Malice*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003); *Animus*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

[209] *Malice*, BLACK'S LAW DICTIONARY (2d ed. 1910).

[210] *Malice*, THESAURUS.COM, http://www.thesaurus.com/browse/malice (last visited Aug. 18, 2017).

[211] *See* Romer v. Evans, 517 U.S. 620, 631–32 (1996); *Windsor*, 133 S. Ct. at 2695.

[212] *Windsor*, 133 S. Ct. at 2695.

[213] *Romer*, 517 U.S. at 631–32.

land. It is beyond the limits of constitutionally permissible action. The Fifth and Fourteenth Amendments' boundaries, however, cannot be the only limitation on government action found in the Constitution. These "animus" boundaries—boundaries that create a perimeter demarcating legitimate from illegitimate state interests, demarcating constitutionally protected and unprotected action—must exist elsewhere.

Malicious defamation constitutes a defamatory statement where the speaker knows the statement to be untrue, or recklessly disregards its truth.[214] If a statement harms a victim's reputation and the speaker knew the statement to be untrue, then the speaker must have been motivated by ill will, or animus, toward the victim.[215] This becomes no less true if the President is the speaker. Indeed, if a President maliciously defames, it does not simply stand alone as a defamatory statement.[216] It takes on the imprimatur of state action.[217] As the head of state and in control of the executive power of the United States government, the President is the highest-ranking political leader. Thus, a President's words are taken as an expression of the government's intentions, interests, and goals.[218]

Presidential immunity rests on the idea that the constitutional orientation of a President's responsibilities requires him to act, and those actions should be as unencumbered as possible.[219] Having to continuously review one's actions in light of potential liability, the reasoning goes, will simply slow a President down and inhibit his ability to perform his duties.[220] So long as a President is acting within the "outer perimeter" of those duties, absolute immunity serves the public good.[221] This rationale and policy is arguably convincing as it pertains to various situations in which a President may find himself. For example, whether it be a mundane, managerial decision or a consequential, foreign policy decision, absolute immunity frees a President to effectuate the executive branch's responsibilities. However, if a President maliciously defames, he transcends the

---

214 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).
215 *See id.* at 263.
216 *See Trump on Twitter*, *supra* note 2.
217 *See id.*
218 *See id.*
219 *See* Nixon v. Fitzgerald, 457 U.S. 731, 751–52 (1982).
220 *Id.* at 753.
221 *Id.* at 756.

"outer perimeter" of his constitutional duties and finds himself beyond the legitimate functions of his office; he is in a no man's land.[222] Like the Fifth and Fourteenth Amendments cabin government action by requiring, at the least, government action not be motivated by animus,[223] the general thrust of the Constitution and the First Amendment cabins the President's official actions.

As absolute sovereignty in the United States resides in the people, and not the government, a President is in a position of limited powers.[224] He holds only the powers granted through the Constitution, and, as discussed in *Nixon* above, his absolute immunity flows from his Article II powers.[225] Unlike a single, king-like sovereign that retains unfettered power and thus the inherent authority to act without limitations, a President's power cannot extend beyond the power the people of the United States—the sovereign—have relinquished to their government.[226] While the people have clearly articulated enumerated powers in Article II that further the legitimate goals of a President's constitutional role, a sovereign would not surrender the authority, and thus not grant a President absolute immunity, to engage in actions that are motivated by nothing but mere animus.

More specifically, a sovereign would not grant power to a limited agent to engage in injurious actions motivated by malice or animus. The exercise of this sort of power must be beyond the confines implicit in the allocation of a President's Article II powers. Thus, if a President's defamatory statements are motivated by malice, he transcends the "outer perimeter" of his Article II power.[227] He finds himself in the same extra-constitutional no man's land the government finds itself in under the Fifth and Fourteenth Amendment when

---

[222] *See id.* at 755–56 (recognizing that there is a limit to the sphere of immunity).

[223] *See* Romer v. Evans, 517 U.S. 620, 632 (1996).

[224] ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 19 (4th ed. 1948).

[225] Nixon v. Fitzgerald, 457 U.S. 731, 749–50 (1982).

[226] *See* CHAFEE, *supra* note 224, at 19.

[227] *See Nixon*, 457 U.S. at 755.

its actions are motivated by nothing more than animus and enmity.[228] Like the lack of constitutional authority to enact animus motivated laws in *Romer* and *Windsor*,[229] a President's maliciously defamatory speech would be illegitimate and thus, beyond the protection of absolute immunity.

The relationship between sovereign and President is not the only source useful in identifying the "outer perimeter" of a President's absolute immunity as it relates to malicious defamation.[230] The same cabining of the President's speech is also found in the First Amendment.[231] In *Sullivan*, the Court considered the question of how the First Amendment and defamation co-exist.[232] In balancing the First Amendment's robust commitment to open debate of matters of public concern, and in particular of government officials, the Court announced the actual malice standard.[233] *Sullivan* placed a constitutionally mandated high burden on public officials to succeed in a defamation lawsuit.[234] In doing so, the Court recognized that the debate on matters of public concern needs room for errors and misstatements.[235] Nevertheless, the Court also recognized that while good faith misstatements and misrepresentations inevitably occur in

---

[228] A similar constitutionally mandated prohibition exists in the Fifth Amendment's procedural due process guarantees. The Fifth Amendment's Due Process Clause limits the government's ability to communicate information about its citizens. U.S. CONST. amend V. While the government owes no procedural due process for simply communicating information about someone, it may not communicate information injurious to one's reputation unless the government first provides procedural due process. Goss v. Lopez, 419 U.S. 565, 574, (1975) (holding that "'[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied.").

[229] Romer v. Evans, 517 U.S. 620, 632–33 (1996); United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

[230] *Nixon*, 457 U.S. at 755.

[231] U.S. CONST. amend. I.

[232] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 282–83 (1964).

[233] *Id.* at 279–82.

[234] *See id.* at 283.

[235] *Id.* at 279.

this realm, morally culpable speech uttered in bad faith is still subject to legal censure.[236] Thus, malicious defamation of a public official, even in the face of the First Amendment's commitments, may be proscribed.[237]

While the Court in *Barr* held that maliciously motivated defamation does not, *ipso facto*, exceed the boundaries of absolute immunity, the Court's decisions in *Romer* and *Windsor*, in light of *Sullivan*, command otherwise.[238] As discussed above, *Romer* and *Windsor* invalidate government action when it is animated by nothing more than malevolence.[239] These sorts of government policies are illegitimate in their genesis and beyond the boundaries that encompass constitutional policy options available to the government. To be sure, these boundaries that demarcate permissible from impermissible government action under the Fifth and Fourteenth Amendments are in no way narrow.[240] At a minimum, the Fifth and Fourteenth Amendments simply require a government action be legitimate and rational—an exceedingly generous parameter of options.[241]

Likewise, *Sullivan* contemplates that however robust the First Amendment's protections may be, however exceedingly generous the parameter of speech possibilities, maliciously motivated defamation also transcends the constitutionally available options of protected speech.[242] Initially, of course, defamation was never thought to be protected speech,[243] and a question existed as to whether seditious libel was unprotected speech.[244] Nonetheless, *Sullivan* extends the protective boundaries of the First Amendment and brings some defamatory untruths into its fold.[245] But it stops short of bringing

---

236 *Id.* at 279–80.

237 *Id.*

238 Barr v. Matteo, 360 U.S. 564, 574 (1959); Romer v. Evans, 517 U.S. 620, 631–32 (1996); United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013); *Sullivan*, 376 U.S. at 279–80.

239 *Romer*, 517 U.S. at 631–32; *Windsor*, 133 S. Ct. at 2695–96.

240 *Romer*, 517 U.S. at 631–32.

241 *See id.* at 631; *Windsor*, 133 S. Ct. at 2695–96.

242 *Sullivan*, 376 U.S. at 279–80.

243 Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

244 *Sullivan*, 376 U.S. at 273–74.

245 *Id.*

malicious defamation within the boundaries of speech protected by the First Amendment.[246]

Thus, when taken together, *Romer, Windsor*, and *Sullivan* delineate one "outer perimeter" for presidential absolute immunity—malicious defamation.[247] The boundaries of speech encompassed by presidential absolute immunity are no doubt expansive, like the boundaries laid out by the Fifth and Fourteenth Amendments.[248] However, when the President's speech is defamatory and motivated by nothing more than bad faith and malice, it is as equally illegitimate as the government action in *Romer* and *Windsor*;[249] its genesis dooms its absolute immunity protection from the start. Just as the *Sullivan* Court stopped short of extending the First Amendment's protection to encompass malicious defamation,[250] the absolute immunity provided to presidential speech must bump up against a boundary that expects no more than the Constitution expects in other circumstances: that government actions, whether legislative policy or presidential speech, not be motivated simply by malice.

To be sure, it is of no concern whether a President speaks within his capacity as President or in his personal capacity. While a President might speak on a matter traditionally within his purview, it is no more entitled to absolute immunity if it is maliciously defamatory. In *Romer*, the amendment was brought about by a plebiscite: the direct expression of the will of the people to govern themselves and within the traditional power of a democratic system.[251] In *Romer* and *Windsor*, the laws would have regulated an area that is generally and typically within the government's usual legislative authority.[252]

---

246 *See id.* at 279–80.

247 United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013); Romer v. Evans, 517 U.S. 620, 631–32 (1996); *Sullivan*, 376 U.S. at 273–74.

248 *Windsor*, 133 S. Ct. at 2695–96; *Sullivan*, 376 U.S. at 279–80.

249 *Romer*, 517 U.S. at 626–28; *Windsor*, 133 S. Ct. at 2683.

250 *Sullivan*, 376 U.S. at 279–80.

251 *Romer*, 517 U.S. at 623.

252 *Id.* at 627–28. In *Romer*, Colorado was acting within the realm of anti-discrimination legislation. *See id.* (noting that "most States have chosen to counter discrimination by enacting detailed statutory schemes."); In *Windsor*, the federal government had engaged in the relatively common practice of amending the Dictionary Act, which defines words used throughout its statutes. *Windsor*, 133 S. Ct. at 2683. Of course, the Court found that the specific amendment was atypical as the federal government was defining "marriage," a term usually left to the states to define. *See id.* at 2683, 2689–90.

Nevertheless, these government actions, because they were motivated by animus, exceeded the constitutional periphery of government power established by the Fifth and Fourteenth Amendments.[253] Likewise, while a President may be speaking on a topic that is otherwise well within his official capacity, malicious defamatory speech exceeds the outer perimeter of official actions—in this case, speech—available to a President. At that point, a President leaves behind the absolute immunity that shields his actions within the perimeter.

As the Court noted in *Barr*, *Nixon*, and *Clinton*, presidential absolute immunity is a judicial construct and necessarily requires a balancing of interests.[254] Specifically, with regard to defamation, the Court in *Barr* suggested that those interests are, on the one hand, the defamation victim obtaining redress, and, on the other hand, freeing the government official to act.[255] But, as Chief Justice Warren's dissent in *Barr* notes, there is yet another interest of equal import: the chilling nature of absolute immunity for malicious defamation.[256] In the context of malicious defamation and absolute immunity, the First Amendment and Article II are in conflict.[257] In that conflict, the First Amendment seeks to give the widest possible latitude to citizens to criticize a government official, including the President. Article II, *Nixon* holds, necessitates a sphere of absolute immunity within which a President can operate.[258]

The First Amendment's protection, however, is not extended to malicious defamation by a President.[259] That speech is unprotected. If a President's malicious defamation is protected by absolute immunity, a situation arises where one party can sue for defamation and one cannot. With the visibility of the office, "it will take a brave person to criticize [the President] knowing that in reply [the President] may libel [his critic] with immunity . . . ."[260] This becomes even more chilling if a President has a penchant for litigiousness

---

253 *Romer*, 517 U.S. at 631–32; *Windsor*, 133 S. Ct. at 2695–96.

254 Barr v. Matteo, 360 U.S. 564, 564–65 (1959); Nixon v. Fitzgerald, 457 U.S. 731, 754–55 (1982); Clinton v. Jones, 520 U.S. 681, 693–94 (1997).

255 *Barr*, 360 U.S. at 576.

256 *Id.* at 585 (Warren, C.J., dissenting).

257 U.S. CONST. amend. I; U.S. CONST. art. II.

258 *Nixon*, 457 U.S. at 755–56.

259 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

260 *Barr*, 360 U.S. at 585 (Warren, C.J., dissenting).

and, in particular, defamation lawsuits.[261] Placing malicious defamation beyond the outer perimeter of legitimate presidential acts, and thus beyond the protection of absolute immunity, safeguards the First Amendment's commitment to ensuring the freedom to criticize our representatives, even the President.

The need for a distinction between absolutely immune defamation and defamation which falls outside the immunity sphere is only more evident and essential in light of social media platforms like Twitter. Twitter facilitates, if not encourages, unrestrained, visceral expression.[262] Human experience has always allowed for this sort of communication, and the First Amendment undoubtedly and rightly protects it; yet, human experience has also encouraged a tempering

---

[261] President Trump and his attorneys have repeatedly threatened to sue and have sued individuals and news outlets for allegedly defamatory statements. The list of lawsuits and threats to file suit are beyond the space allotted for a typical footnote. As a result, the following is only a handful of examples. In 1984, President Trump sued an architecture critic for critiquing his plan to build the tallest building in the world. Paul Goldberger, *Architecture View; Can a Critic Really Control the Marketplace?*, N.Y. TIMES (Oct. 14, 1984), http://www.nytimes.com/1984/10/14/arts/architecture-view-can-a-critic-really-control-the-marketplace.html?pagewanted=all. In 2005, President Trump threatened to "definitely sue" the ABC television network if its biographical movie about his life contained inaccuracies. Lisa de Moraes, *The Donald's Plan to Trump ABC: Threaten a Lawsuit*, WASH. POST (Feb. 10, 2005), http://www.washingtonpost.com/wp-dyn/articles/A12561-2005Feb9.html. In 2009, his $5 billion defamation lawsuit against an author was dismissed for lack of evidence; President Trump had alleged that the author defamed him by misstating and undervaluing his net worth. Peter S. Goodman, *Trump Suit Claiming Defamation Is Dismissed*, N. Y. TIMES (July 15, 2009), http://www.nytimes.com/2009/07/16/business/media/16trump.html. In 2011, President Trump mused about suing a news personality for allegedly false statements. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 26, 2011, 9:23 AM), https://twitter.com/realDonaldTrump/status/129231564067442688?ref_src=twsrc%5Etfw. In 2013, he successfully won an arbitration claim against a former beauty pageant contestant for claiming his beauty pageant was "rigged." Bill Vidonic, *Ex-Miss Pa. Shocked by $5M Ruling Against Her*, TRIB LIVE (Dec. 29, 2012, 10:58 PM), http://triblive.com/state/pennsylvania/3210923-74/monnin-miss-pageant#ixzz2GY0ySz2V. In 2016, President Trump threatened to sue a magazine reporter if he did not like what the reporter wrote. David Cay Johnston, *Just What Were Donald Trump's Ties to the Mob?*, POLITICO (May 22, 2016), http://www.politico.com/magazine/story/2016/05/donald-trump-2016-mob-organized-crime-213910.

[262] *See generally* MURTHY, *supra* note 25, at 3.

of the most destructive, harmful speech. Social cues, personal interaction, and time for reflection can serve as a moderating force. A lack of these moderating forces, coupled with the inclination toward uninhibited self-disclosure of otherwise private thoughts, as is found on platforms like Twitter, facilitates a liberation of harmful speech. This liberation in the hands of a President, if entitled to absolute immunity, can only exacerbate the negative aspects of communicating via Twitter, including the harm it can cause.

Notably, when the Court considered the absolute immunity doctrine in *Barr*, the defendant's allegedly defamatory speech was communicated in a press release.[263] Press releases and similar mediums for government speech provide the opportunity to contemplate, reflect on, and choose one's words before communicating. To be sure, communicating through a press release, or any official statement, does not preclude the risk that defamation will occur. Moreover, public officials are often called upon to engage in extemporaneous speech, and this sort of communication can be valuable; it often provides a more nuanced understanding of their ideas. However, the sort of unbridled spontaneous communication unleashed by Twitter and similar social media platforms significantly increases the likelihood that government communication will contain harmful inaccuracies.[264] These harms become more damaging in the hands of a President because of both the prominence of his social media presence and effects of his words on numerous people.[265]

Excluding malicious defamation from the absolute immunity sphere may certainly result in a President hesitating before turning to social media to communicate with the public. However, viewing absolute immunity for what it is—a judicial construct motivated by public policy determinations—this hesitation will encourage and increase contemplative communication. Thoughtful, deliberate communication then decreases the prospect that a President will propagate communication motivated by nothing more than animus. Perhaps in 1959, when *Barr* was decided and press conferences were

---

263 Barr v. Matteo, 360 U.S. 564, 565 (1959).

264 NPR's *Morning Edition*, *supra* note 1.

265 *See* Nixon v. Fitzgerald, 457 U.S. 731, 753 (1982) (discussing the visibility of the office of the President and the "effect of his actions on countless people").

the platform of the day,[266] the need for encouraging measured communication was less crucial. Nevertheless, with Twitter and instantaneous uninhibited communication becoming the norm, an interpretation of absolute immunity that results in reflection and avoiding speech motivated by animus encourages a President to act within the realm of constitutionally permissible government action.

CONCLUSION

Twitter and similar social media platforms have ushered in a new way to communicate instantaneously, often in unadulterated terms.[267] Unadulterated speech, however, can be a breeding ground for defamation. This is no less the case when Twitter is used as a means for a President of the United States to communicate. While a President's immunity from liability is no doubt expansive, it is not unlimited.[268] Undoubtedly, a President is entitled to absolute immunity for acts within the "outer perimeter" of his official duties.[269] However, if a President's defamatory speech is motived by nothing more than malice, he transcends that perimeter. When considering the Constitution's prohibition on government actions motivated by animus,[270] as well as the First Amendment's exceedingly protective boundaries that nevertheless stop short of protecting malicious defamation,[271] it becomes clear that presidential immunity does not apply to malicious defamation claims. The Constitution neither tolerates nor protects government actions, including speech, when they are motivated by #malice or #animus,[272] even if tweeted by @POTUS.

---

266 *Barr*, 360 U.S. at 565.
267 MURTHY, *supra* note 25, at 2–3.
268 Clinton v. Jones, 520 U.S. 681, 694 (1997).
269 *Nixon*, 457 U.S at 755–56.
270 Romer v. Evans, 517 U.S. 620, 631–32 (1996).
271 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).
272 *Romer*, 517 U.S. at 631–32.