

The Prospects for Free Expression?

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From the signs given by the President-elect and those around him, the situation of the First Amendment in a Trump Administration will be quite difficult in a number of ways. First, let's note that the First Amendment encompasses five (or six, depending on the way you count) distinct guarantees: **freedom from establishment of religion, free exercise of religion, freedom of speech, freedom of the press, freedom of peaceable assembly and freedom to petition the government for redress of grievances**. Certainly the administration has indicated that it has plans to alter the first four; it is hard to see how the final two—assembly and petition—can survive unscathed.

In **establishment**, the President-elect has strongly indicated a desire to restore America's lost greatness in civic culture by re-emphasizing what until recently was called the "Christian nation" aspect of America. In his pronouncements this takes the form of saying that we will all be more or less compelled to say "Merry Christmas" and drink our coffee from red holiday cups. Those are officially obnoxious, but legally more consequential are two likely effects of the new administration. The first is the expansion of so called "religious freedom" exemptions to civil rights and employment discrimination laws to make it legal to exclude and stigmatize LGBT people—the first such measure, the so-called First Amendment Defense Act—is now pending in Congress. The second is the appointment of a significant number of judges—probably including at least one Justice—committed to a Christian-right view of the place of religion in our Constitution and our legal system. That will accelerate a trait that has been underway for the past 15 years of court decisions sanctioning a sort of "Judeo-Christian" centrality to civic acknowledgements of God.

Free exercise of Christianity will be well protected (as noted above) but minority religions, and especially Islam, are in a much different situation. The appointment of people like Sessions and Flynn to high posts signals a good deal of sympathy for the formerly far-right meme that 1) the United States is in a religious war, either with "radical Islam" or Islam as a whole and 2) Islam is not in fact a "religion" in the sense that would qualify it for protection under the Free Exercise Clause. Muslim immigration bans, and the idea of a Muslim registry, are ideas that are now being taken quite seriously by people in high places. The progress we have made—in cases like *Hassan v. NYPD*—in establishing that Muslims have a right to be free of law-enforcement profiling as Muslims is in danger of being reversed.

Freedom of speech faces a number of challenges. The first and most important is in essence extra-legal. The president-elect has shown himself willing to use his own access to public opinion as a means of threatening and punishing those who cross him. The president of a union local who challenged Trump's account of the supposed saving of jobs at a Carrier plant in Indiana was the target of a Trump tweet—and immediately afterwards, the target of death threats. Trump also used his Twitter feed to retaliate against the CEO of Boeing who mildly

dissented in a business forum against the escalation of trade sanctions possible under the new administration. The result at least temporarily tanked Boeing's stock and sent a warning to other business executives that they had better not contradict the new administration. Now we are seeing the beginning of a more or less extra-judicial war against academics who dissent, in cases like the one in Georgia where professors who publicly opposed the Sessions nomination are now being subjected to intrusive public-records requests for their emails, obviously in hope of finding some reason to demand job action against them. At the same time, we will see an escalation of what I call the weaponization of the speech clause as a protection for entrenched power in cases protecting the speech rights of rich individuals and corporations against government regulation.

But it is in the area of **the press clause** that I am most fearful for the future. The new administration has obviously declared open war on the press and on the very idea of government transparency and openness. Regrettably, it must be said that the outgoing administration has forged and left for them a truly terrifying set of tools to use to muzzle the press. For reasons I do not pretend to understand, the Obama administration has been aggressive in its use of federal surveillance, federal law-enforcement, and federal criminal justice against reporters. The president-elect has shown his eagerness to use these weapons: when news broke of potential collusion between members of his campaign and the Russian state-security service, his response was to demand an investigation—of the leak, not of the accusations. I expect we will see a number of reporters being subpoenaed, and possibly jailed, to demand their sources; I expect we will see expanded use of FISA warrants and other surveillance techniques to monitor journalists and their sources; I also expect that as AG, Jeff Sessions will (as his predecessor John Ashcroft did during the early years of the W. Bush administration) more or less a civil disobedience campaign against compliance with Freedom of Information Act requests. At the same time, extrajudicial retaliation against and intimidation of the press has already begun, as anyone who saw the president-elect's news conference must surely have seen.

All told, the climate of free expression in the United States has turned distinctly chilly. It will be remarkable if, four years from now, we have the same freedom of religion, information, and discussion that we have today.