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Social Media and Government: What Are the New Rules of Engagement?

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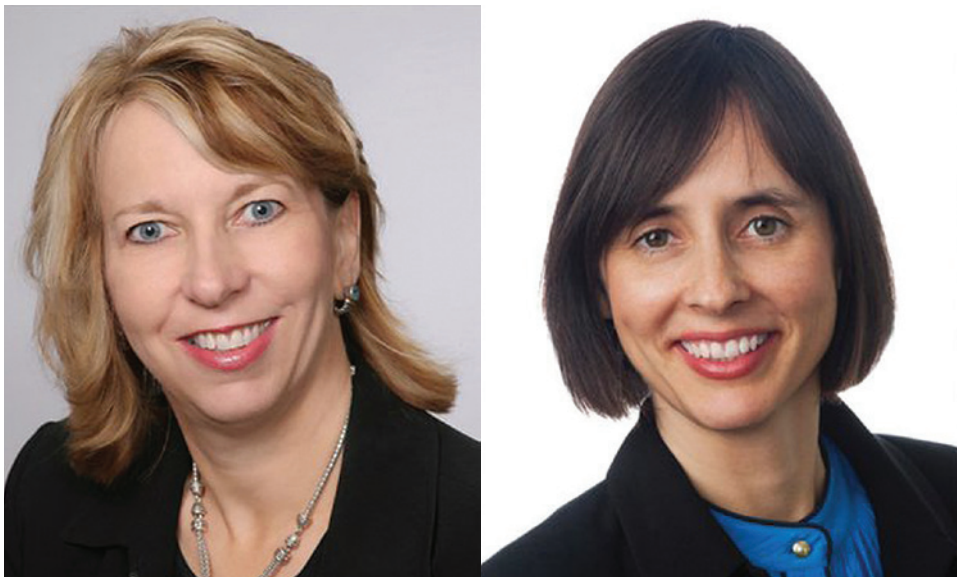
By Deborah Fox and Margaret (Meg) Rosequist

Social media, email, text messaging and other communication technologies are transforming government into a more efficient, effective and dynamic process. Whether it's an elected official using Twitter to address constituents or a city using a Facebook page to make public announcements, government entities and elected officials are becoming more accessible and connected to constituents. And therein lie today's nuanced First Amendment related challenges.



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Court cases and news headlines highlight the controversy about what government entities and elected officials may and may not do to regulate the public's participation in their social media accounts. May elected officials unfriend people from their Facebook pages or unfollow, block or mute people from their Twitter accounts? How should policies and procedures be drafted regarding the public's use of an elected official's or a government entity's social media account in order to pass constitutional muster?

Forum Classification Is the Determining Factor

First Amendment law recognizes four types of fora—public forum, designated public forum, nonpublic forum and limited public forum. The classification of the forum at issue is key to assessing whether a government entity's or an elected official's social media account can withstand a First Amendment challenge. In a public forum and a designated public forum, participant restrictions are subject to an exacting

standard and will survive only if the restrictions are the least restrictive means for achieving a compelling government interest.[1] In these fora, participants' First Amendment activities generally may not be prohibited.[2] By contrast, in a nonpublic or limited public forum, the government is given more leeway and regulations need only be reasonable and viewpoint neutral.

The challenge is applying these concepts to different forms of social media. Courts critically examine the actions and policies of a government entity or elected official to determine which forum has been created.[3] A non-public forum open for general discussion on all topics will be treated as a designated public forum subject to the same exacting standards as a traditional public forum. And, non-public fora open only for limited purposes or topics may be deemed limited public fora where the government has more leeway to impose restrictions. A primary element of the analysis is whether restrictions on participating in the forum—even if deemed to be reasonable, appropriately selective and viewpoint neutral—are consistently enforced.[4] If restrictions are not enforced or exceptions are haphazardly permitted, then a nonpublic forum could be considered a public forum.[5] Consistent treatment across the spectrum of participants is key.

President Trump's Twitter Blockade Sets Appellate Court Showdown

Courts, including the Supreme Court, have described the Internet and social networking sites as akin to "the modern public square"[6] where anyone can "become a town crier with a voice that resonates farther than it could from any soapbox."[7] The Court has also commented that Twitter enables people to "petition their elected representatives and otherwise engage with them in a direct manner."[8]

United States District Court Judge Buchwald recently addressed elected officials' use of Twitter to communicate with constituents in a case brought by a group of Twitter users against President Trump for blocking them on his @realDonaldTrump Twitter account.[9] The Department of Justice argued that this Twitter account is not public property from which individuals can speak while the blocked Twitter users compared the forum to a digital town hall meeting. Despite the novel nature of the claim, Judge Buchwald's ruling tracked established First Amendment case law. The judge addressed the key 21st century question—Does "the 'interactive space' where Twitter users may directly engage with the content of the President's tweets" qualify as a "designated public forum"? Judge Buchwald held that the president's Twitter account is a designated public forum under the First Amendment and "that the blocking of plaintiffs based on their political speech constitutes viewpoint discrimination that violates the First Amendment."

Opening the Floodgates to the Modern Town Square

The digital town square phenomenon highlights the importance for government entities and elected officials to set policies and standards for public engagement on these platforms. The critical inquiry is whether government entities and elected officials have opened digital channels for expressive activity *and* on what terms. For example, on Facebook, page owners can choose to restrict users from leaving comments, and under that scenario, there is a strong argument that the government has not opened that digital forum for any type of public discourse but is, instead, engaging only in its own speech. A similar situation occurs when the owner of a chat app, such as Twitter, does not accept any follower requests. Operating a Facebook page or chat app on these terms presents a low risk of a First Amendment challenge.

Once elected officials use their social media accounts to comment on official business, they need to be aware that they may have limited ability to restrict or block users or comments on their accounts. In a recent cautionary tale, the ACLU

filed several suits against U.S. Congressman Paul Gosar for blocking a user from his Facebook page due to use of profanity. The suit led Gosar to adopt new guidelines for posting and removing comments. In dismissing the complaint, the ACLU noted its overarching goals were achieved because comments would not be hidden or deleted based on viewpoint, users would only be blocked for repeated violations (and then only for a limited period of time), and the congressman's staffers responsible for managing the Facebook page would implement the new policy in a viewpoint-neutral and non-discriminatory manner.

In California, the legal landscape could soon be defined by a recently flurry of federal lawsuits filed in San Diego and Sacramento alleging that local elected officials had improperly blocked residents on Facebook and Twitter in order to silence criticism of the officials and their policies. These cases are in their early stages yet should be closely watched for guidance. The Ninth Circuit has been very permissive in allowing provocative or inflammatory speech in public parks and at city council meetings and courts will likely be similarly permissive with such speech on government or elected officials' social media accounts open for public discourse.[10]

The challenge will be to craft restrictions that pass constitutional muster. Outright prohibitions where public business is being discussed are unlikely to prevail. Absent clear court guidance, government entities and elected officials will be faced with tough choices in trying to decide when provocative speech has crossed over into fighting words or actual threats of bodily harm. As law lags technology, the courts will be called upon to address these evolving issues and determine if the lines of permissibility on this new mode of communication have been correctly drawn.

Endnotes:

[1] *Perry Education Ass'n v. Perry Local Educator's Ass'n,* 460 U.S. 37, 46 (1983); *DiLoreto v. Downey Unified School Dist. Bd. of Educ.*,196 F.3d 958, 965 (9th Cir. 1999) .

[2] *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 800 (1985).

[3] *Hopper v. City of Pasco,* 241 F.3d 1067, 1076 (9th Cir. 2001).

[4] Id. at 1076-78; *Cornelius*, 473 U.S. at 804-05; *see also Perry*, 460 U.S. at 47; *Lehman v. Shaker Heights* (1974); 418 U.S. 298, 302-04; *Children of the Rosary v. City of Phoenix,* 154 F.3d 972, 976 (9th Cir. 1998), cert. denied 526 U.S. 1131 (1999).

[5] *Hills v. Scottsdale Unified School Dist.,* 329 F.3d 1044, 1049 (9th Cir. 2003).

[6] *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017); *hiQLabs, Inc. v. LinkedIn Corporation*, 273 F. Supp. 3d 1099 (N.D. Cal. 2017); *Twitter, Inc. v. Sessions,* 263 F. Supp. 3d 803 (N.D. Cal. 2017) .

[7] *Reno v. ACLU,* 521 U.S. 844, 853 (1997)

[8] *Packingham*, 137 S.Ct. at 1735, 1737.

[9] *Knight First Amendment Institute at Columbia University, et al. v. Trump, et al.*, No. 17-cv-5205 (NRB) (S.D.N.Y. 2017); appeal pending.

[10] See *Gathright v. City of Portland*, 439 F.3d 573 (9th Cir. 2006); see also *White v. City of Norwalk,* 900 F.2d 1421, 1425 (9th Cir. 1990); *Acosta v. City of Costa Mesa*, 718 F.3d 800, 811 (9th Cir. 2013).

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