Rules of Engagement for Today’s Digital Town Square:
May Elected Officials Block or Regulate Users on Their Social Media Accounts?

By Deborah Fox and Meg Rosequis

Elected officials and government entities are becoming more accessible and connected to constituents through social media. The Supreme Court has commented that Twitter enables people to “petition their elected representatives and otherwise engage with them in a direct manner,” and courts have described the Internet and social networking sites as akin to “the modern public square” where anyone can “become a town crier with a voice that resonates farther than it could from any soapbox.”

In the rapidly emerging digital town square environment, the 21st century question is what may government entities and elected officials do and not do to block or otherwise regulate public participation on their social media accounts? May elected officials unfriend people from their Facebook pages or unfollow, block, or mute people from their Twitter accounts? And how should policies and procedures be drafted and enforced regarding the public’s use of an elected official’s or a government entity’s social media account in order to pass First Amendment constitutional muster?

President Trump’s Blocking of Twitter Followers Found Unconstitutional

As the law frequently lags technology, the challenge is to apply legal concepts found in current jurisprudence to the nuanced First Amendment issues that lie at the core of today’s public engagement through social media. First Amendment law recognizes four types of fora—public forum, designated public forum, non-public 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 its unanimous July 9, 2019 opinion in the precedent-setting case of Knight First Amendment Institute v. Donald J. Trump (Case No. 18-1691), the Second Circuit provided critical guidance on forum analysis in concluding that President Trump’s blocking of followers on his @realDonaldTrump Twitter account was unconstitutional viewpoint based discrimination because the account constituted a public forum.

Court in Knight v. Trump Highlights Factors that Demonstrate a Public Forum

In Knight v. Trump, the Second Circuit affirmed the lower court in full, finding the @realDonaldTrump account to be a public forum because it was opened as an “instrumentality of communication” for “indiscriminate use by the general public.” The Second Circuit’s decision makes clear that if government officials open their social media accounts to the public at large as a way of communicating about official business, then their accounts will be analyzed under the public forum doctrine where blocking users as a result of criticism is not allowed.

In deciding whether the President’s Twitter account constituted a public forum, the Court examined the policy, practice, and intent in operating the account. The Second Circuit took note that the header photograph of the account shows the President engaged in his official duties, the President and his aides have characterized his tweets as official statements, and the President extensively uses his account to announce, describe, and defend his official policies. Moreover, the interactive features of the President’s Twitter account are accessible to the public without limitation. As the evidence of the official nature of the account was “overwhelming,” the court held that the President could not selectively exclude users from his account when they expressed views that he disliked because the account had been intentionally opened for public discussion as an official vehicle for governance.
Not All Social Media Accounts of Elected Officials Are Public Forums

The Second Circuit opinion clearly calls out that not every elected official’s social media account will necessarily be a public forum. The outcome of that inquiry will be informed by how the official describes and uses the account, to whom features of the account are made available, and how others, including other government officials and agencies, regard and treat the account. The Court also explained that while the President’s initial tweets were government speech, the initial tweets were not at issue—only the responses and comments to the initial tweets found in the interactive space (i.e. public discussion) of the President’s Twitter account. By recognizing that the President’s Twitter account was intentionally opened for public discussion, the Second Circuit applied public forum analysis and the resulting protections of the First Amendment to the interactive space of the account.

It is important to note that the court specifically stated: “We do not consider or decide whether an elected official violates the Constitution by excluding persons from a wholly private social media account. Nor do we consider or decide whether private social media companies are bound by the First Amendment when policing their platforms. We do conclude, however, that the First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise-open online dialogue because they expressed views with which the official disagrees.”

Next Steps for Elected Officials and Government Entities

To date, neither the Ninth Circuit nor the Supreme Court have weighed in on this issue, but social media platforms have been examined by the Fourth and Fifth Circuits. See, e.g., Davison v. Randall, 912 F.3d 666 (4th Cir. 2019) [holding the interactive component of a Facebook page was a public forum] and Robinson v. Hunt Cty., Texas, 921 F.3d 440 (5th Cir. 2019) [finding that plaintiff alleged facts sufficient to state a claim that removal of posts from the Sheriff’s Office Facebook page was unconstitutional viewpoint discrimination]. In light of these recent decisions from sister circuits, elected officials should be cognizant that if they want their social media platforms to remain private—and beyond the reach of the First Amendment—they should not post information that relates to the conduct of their official duties, nor should they open the interactive portion of their accounts to the general public. 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. Final determinations as to whether an account has been intentionally opened to the public will be a fact-specific inquiry.

If an elected official or government entity wishes to regulate participation on social media accounts, the challenge will be to craft restrictions that pass constitutional muster. For example, when drafting guidelines for posting and removing comments, factors to consider include making sure that comments will not be hidden or deleted based on viewpoint, users will be blocked only for repeated violations (and then only for a limited period of time), and personnel who are responsible for managing social media accounts will implement the policy in a viewpoint-neutral and non-discriminatory manner. Outright participation prohibitions where public business is being discussed are unlikely to prevail against a constitutional challenge and, absent clear court guidance, government entities and elected officials will be faced with difficult choices in trying to decide when provocative speech has crossed over into fighting words or actual threats of bodily harm. 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 entities’ or elected officials’ social media accounts open for public discourse. The legal landscape is evolving and case law should be closely monitored as we all await a test case to be taken up by the Ninth Circuit.

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