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

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In the highly anticipated case involving President Trump's Twitter account, the U.S. Court of Appeals for the Second Circuit found that the President's blocking of followers on his @realDonaldTrump account was unconstitutional viewpoint-based discrimination. In its unanimous July 9, 2019 opinion in *Knight First Amendment Institute v. Donald J. Trump*[1], the Second Circuit affirmed the lower court in full, finding the account to be a public forum because it was opened as an "instrumentality of communication" for "indiscriminate use by the general public."

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. Thus, the Second Circuit found that @realDonaldTrump was intentionally opened for public discussion as an official vehicle for governance. 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.

The Second Circuit opinion clearly calls out that not every social media account operated by a public official will necessarily be a public forum. That will depend on factors such as how the official describes and uses the account, to whom features of the account are made available, and how others, including government officials and agencies, regard and treat the account. The Second Circuit also explained that while the President's initial tweets were government speech, it was not the initial tweets that were at issue but the responses and comments to the initial tweets found in the interactive space (i.e., public discussion) of the President's Twitter account. The Second Circuit recognized that the President's Twitter account was intentionally opened for public discussion and accordingly public forum analysis and the protections of the First Amendment were applicable to the interactive space of the account.

To date, neither the Ninth Circuit nor the Supreme Court have weighed in on this issue but social media platforms have also been examined by the Fourth and Fifth Circuits. *See, e.g., Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) [finding the interactive component of a Facebook page was a public forum]; *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, public officials should be cognizant that

1. *Knight First Amendment Institute at Columbia University v. Trump*, 928 F.3d 226 (2nd Cir. 2019).

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. Final determinations as to whether an account has been intentionally opened to the public will be a fact-specific inquiry.

WHAT DOES THE DECISION MEAN?

The Second Circuit's decision makes clear that where government officials open their social media accounts to the public as a way of communicating about official business, then their accounts will be analyzed under the public forum doctrine, which prohibits selectively blocking "persons from an otherwise-open online dialogue because they expressed views with which the official disagrees."

WHAT DOESN'T THE DECISION MEAN?

The Second Circuit opinion clearly points out that not every social media account operated by an elected official 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 government officials and agencies, regard and treat the account.

WHAT SHOULD ELECTED OFFICIALS AND GOVERNMENT ENTITIES DO NEXT?

Elected officials and government entities that wish to regulate participation on social media accounts should draft guidelines for posting and removing comments. To pass constitutional muster, 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 for a limited period of time, and personnel responsible for managing social media accounts will implement guidelines in a viewpoint-neutral and non-discriminatory manner.

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