Facebook vs. The First Amendment

Thursday, September 13, 2018 General Session; 4:15 – 5:30 p.m.

Traci I. Park, Partner, Burke, Williams & Sorensen, LLP
Kelly A. Trainer, Partner, Burke, Williams & Sorensen, LLP

Notes:

League of
California Cities
Annual Conference
Long Beach, California
September 13, 2018

Facebook vs. The First Amendment

burke
BURKE, WILLIAMS & SORENSEN, LLP

Traci I. Park, Partner
Burke, Williams & Sorensen, LLP
444 South Flower Street, Suite 2400
Los Angeles, California 90071
213.236.2833
tpark@bwslaw.com

Kelly A. Trainer, Partner
Burke, Williams & Sorensen, LLP
1851 East First Street, Suite 1550
Santa Ana, California 92705
949.265.3416
ktrainer@bwslaw.com

INTRODUCTION

As social media continues to permeate every aspect of culture, politics, and the workplace, the law struggles to keep up. For public agencies, social media opened up new venues for engagement with the public. While this has allowed for increased civic engagement, and a relatively low-cost way to communicate with the public, it has also provided a platform for critics and trolls. Public agencies, and public officials, at all levels of government, have struggled to moderate that on-line public engagement, which frequently includes posts, comments, or replies by members of the public that may be offensive, obnoxious, off-topic, or just plain annoying.

At times, this has led to public agencies or officials removing content posted by members of the public, or limiting their ability to engage by banning/blocking/muting individuals from their social media pages or feeds. These efforts to regulate public online speech have led to allegations of First Amendment violations, a rapidly developing area of the law. Because these issues are highly fact-sensitive, this paper will examine two recent high-profile cases addressing the application of the First Amendment to the metaphysical world of government social media.[1]

Although the cases discussed in this paper stem from the historically conservative Eastern District of Virginia and the notoriously liberal Southern District of New York, they reached similar results and set precedent from which a California federal district court or the Ninth Circuit Court of Appeals would likely draw. Both cases discussed in this paper involved efforts by public officials to regulate public speech and engagement on their social media pages by banning or blocking users, an emerging issue plaguing public entities and local officials across the nation. Similar issues have come up in the Southern District California and the Federal District of Hawaii (both of which fall within the jurisdiction of the Ninth Circuit), but did not result in judicial decisions on the merits.[2] However, it is only a matter of time until a court in

[1] Please note that this paper will not examine the complicated area of public employee free speech on social media.

[2] In *Hawaii Defense Foundation v. City & County of Honolulu* (D. Hi. 2014), the Honolulu Police Department was sued for First Amendment retaliation after it deleted comments critical of the Honolulu Police Department and banned two users from further posting on its Facebook page. The case settled while cross motions for summary judgment were pending, but the Honolulu Police Department was ordered to pay $31,000 in attorney's fees to the plaintiffs. In *Karras v. Gore* (S.D. Cal. 2014), the San Diego County Sheriff's Department deleted hundreds of critical comments from its Facebook page, resulting in a lawsuit by impacted users who sought an injunction against the Department ordering it to (1) restore the deleted posts; (2) lift the ban on the plaintiffs' ability to post and comment; and (3) prohibit the Department from removing posts from its page. Instead of fight the litigation, the Department permanently closed its Facebook page, rendering the plaintiffs' request for injunctive relief moot.

California will inevitably be called upon to address the competing interests of public speech under the First Amendment and a public official's ability to regulate public engagement on his or her social media platforms.

SUMMARY OF FIRST AMENDMENT FORUM ANALYSIS

There are three generally recognized types of fora – a traditional public forum, a designated or "limited" public forum, and a non-public forum. The type of First Amendment analysis that applies to a given statement or expression depends on the forum where the speech takes place.

Traditional Public Forum. "[T]raditional public fora are "places which by long tradition or by government fiat have been devoted to assembly and debate."[3] In a traditional public forum, "regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. Such regulations survive only if they are narrowly drawn to achieve a compelling state interest." [4]

Designated and/or Limited Public Forum. "In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[5] There is some confusion over whether a limited public forum and a designated public forum are the same. Indeed, in many cases, the terms are used interchangeably. However, the Ninth Circuit is very clear that a limited public forum is a subcategory of designated public forum:

> The designated public forum has been the source of much confusion. As this court has put it, with considerable understatement, "The contours of the terms 'designated public forum' and 'limited public forum' have not always been clear. Some courts and commentators refer to a "designated public forum" as a "limited public forum" and use the terms interchangeably. But they are not the same, at least not in this circuit. Rather, a limited public forum is a sub-category of a designated public forum that "refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics. In a limited public forum, restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible.

[3] *Perry Education Ass'n v. Perry Local Educators' Ass'n,* (1983) 460 U.S. 37, 45.
[4] *Int'l Soc. for Krishna Consciousness, Inc. v. Lee* (1992) 505 U.S. 672, 678.
[5] *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.* (1985) 473 U.S. 788, 802.

> In other words, the fact that the government has opened a nonpublic forum to expressive activity does not determine whether we must apply strict scrutiny or the lower reasonableness standard. Rather, we must examine the terms on which the forum operates to determine whether it is a designated public forum or a limited public forum. If a forum is a "designated public forum," we apply strict scrutiny. But if it is merely a "limited public forum," then we apply the reasonableness test.[6]

The impact of the distinction between designated and limited public fora in the Ninth Circuit is the level of scrutiny applied. "In traditional and designated public forums, content-based restrictions on speech are prohibited, unless they satisfy strict scrutiny. In limited public forums, content-based restrictions are permissible, as long as they are reasonable and viewpoint neutral."[7]

In determining whether a forum is designated or limited, "[w]e look first to the terms of any policy the government has adopted to govern access to the forum."[8] If a policy has been adopted, then the court also looks to "how that policy has been implemented in practice."[9]

With respect to a public agency's or official's social media page or feed, if the agency or official has no policy, no posting guidelines, and permits the public to freely engage, that social media page or feed will likely be treated as a public forum, where regulation of speech would likely require strict scrutiny. If, however, the public agency or official has a policy, posting guidelines, and a clear designation as a limited public forum, it is more likely that a reviewing court will apply the reasonableness and view-point neutral standard.

Nonpublic Forum. Finally, all remaining public space that is not a public forum or a designated/limited public forum is generally classified as a nonpublic forum. In a nonpublic forum, "[t]he challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view."[10]

DEVELOPING LEGAL PRECEDENT

The question of how the First Amendment applies to the use of social media by a public agency or public official is making its way through courts across the country.

---

[6] *Hopper v. City of Pasco* (9th Cir. 2001) 241 F.3d 1067, 1074-75 (*internal citations omitted*).
[7] *Seattle Mideast Awareness Campaign v. King County* (9th Cir. 2015) 781 F.3d 489, 496.
[8] *Id.* at 497.
[9] *Ibid.*
[10] *Int'l Soc. for Krishna Consciousness, Inc. v. Lee* (1992) 505 U.S. 672, 679.

Summarized below are two instructive cases, both of which are currently on appeal to a circuit court, that address the issue of officials blocking users on social media accounts.

Davison v. Loudoun County Board of Supervisors, et al., 267 F.Supp.3d 702 (E.D. Va. 2017), appeal docketed, No. 17-2002 (4th Cir. 2017), cross appeal docketed, No. 17-2003 (4th Cir. 2017).

Phyllis Randall is the Chair of the Loudoun County Board of Supervisors in Loudoun County, Virginia. While running for office, she established a Facebook page titled "Friends of Phyllis Randall" that she used to communicate with the electorate. When elected, she established a new Facebook page titled, "Chair Phyllis J. Randall," and invited the followers of "Friends of Phyllis Randall" to "visit [her] County Facebook Page[,] Chair Phyllis J. Randall."

Her "Chair" page was established with the assistance of Jeanine Arnett, her Chief of Staff. As Chief of Staff, Ms. Arnett was paid through a discretionary budget provided to Ms. Randall by the County. In addition to having a professional relationship, Ms. Randall and Ms. Arnett had a personal friendship that predated their professional relationship. Both Ms. Randall and Ms. Arnett had administrator rights to the "Chair" page. The page was categorized as "Government Official," and it provided Ms. Randall's County telephone number and email address, as well as a link to the County's official website.

Ms. Randall used the "Chair" page to address County residents and constituents and to share information of interest. The page was purposefully created outside of normal County channels "so as to not be constrained by the policies applicable to County social media websites." Neither Ms. Randall nor Ms. Arnett used County equipment in managing the "Chair" page.

There were no terms of use posted on the "Chair" page, but in one post, Ms. Randall shared the following:

> Everyone, could you do me a favor. I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your thoughts. However, I really try to keep back and forth conversations (as opposed to one time information items such as road closures) on my county Facebook page (Chair Phyllis J. Randall) or County email (Phllis.randall@loudon.gov [*sic*]). Having back and forth constituent conversations are Foiable (FOIA) so if you could reach out to me on these mediums that would be appreciated. Thanks much, Phyllis.

The majority of the posts on the page were related to her role as the Chair of the Board of Supervisors. They included items such as soliciting participation in the "Commission on Women and Girls," an initiative she created in her Chair capacity; information about Board of Supervisors' meetings; conferences she attended as the Chair; promoting events she would attend in her capacity as Chair; invitations to her "State of the County" address; and press conferences. She sometimes used the comment section of her posts to engage directly with constituents.

Her office regularly released an official "Chair Phyllis J. Randall" newsletter, which was primarily written by her executive assistant. It was also on the County website and distributed through its mailing list. The bottom of each newsletter included the words, "STAY CONNECTED" with an image of a Facebook icon, which linked to her "Chair" Facebook page.

Her "Chair" page also included some more personal matters, such as personal congratulations, an afternoon shopping trip, and proclaiming her affection for the German language.

Ms. Randall also maintained a personal Facebook page (for purely personal and family-related content), and the "Friends of Phyllis Randall" page, which she used to discuss politics.

The plaintiff in the case, Brian Davison, was active in local politics, and had a particular interest in what he believed to be "corruption" by the Loudoun County School Board. He attended a joint town hall meeting between the School Board and the Board of Supervisors. He anonymously submitted two questions to the town hall, and one was selected. His question concerned Ms. Randall's campaign proposal that public servants take an ethics pledge and whether School Board members should be required to take such a pledge. Ms. Randall answered the question, but stated that she did not "appreciate" the "set-up question," and that her proposed ethics pledge was not intended as a "tool to accuse somebody or hit somebody over the head."

Mr. Davison found her response to be inadequate, and took to Twitter to post a message directed at Ms. Randall: "@ChairRandall 'set up question'? you might want to strictly follow FOIA and the COIA as well."

Ms. Randall posted about the town hall on her "Chair" Facebook page that night. Mr. Davison then commented on her post. He could not recall the exact content of his comment, but Ms. Randall recalled that it alleged corruption on the part of School Board Members and conflicts of interest between Board Members and their families. Ms. Randall took issue with his comment, and decided that she would delete her original post, which included Mr. Davison's comment, because it was "probably not something [she] want[ed] to leave" on her Facebook page.

Ms. Randall also banned Mr. Davison from her Facebook page because she did not want someone commenting on her site that "would make comments about people's family members." Although he was banned, Mr. Davison could still read and share content posted on the page, but he could not comment or send private messages.

The next morning, she reconsidered her actions and unbanned him. As a result, Mr. Davison was banned from the page for no more than 12 hours.

Mr. Davison brought a section 1983 claim against Ms. Randall in her official and personal capacity, alleging that she violated his First Amendment and due process rights by blocking him. He sought injunctive and declaratory relief. The District Court held a one-day bench trial, and issued the following holdings:

1. Ms. Randall acted under color of state law in maintaining the "Chair" page and in banning Mr. Davison from that page.
2. Ms. Randall engaged in viewpoint discrimination and banning Mr. Davison from the page in violation of the First Amendment.
3. The Board of Supervisors was not subject by section 1983 *Monell* liability for Ms. Randall's actions.
4. Ms. Randall did not violate Mr. Davison's due process rights.
5. An injunction was unwarranted, but declaratory judgment was warranted.

Acting Under Color of State Law

The court found that Ms. Randall's actions "arose out of public, not personal, circumstances," and that her "Chair" page was "born out of, and is inextricably linked to, the fact of [her] public office." As such, she acted under color of state law. The court found that, when considered under the totality of the circumstances, the following facts supported its conclusion:

- She used it as a tool of governance and to engage in discussions with her constituents. For example, she facilitated disaster relief efforts after a storm, promoted events that were related to her work as the Chair, and used the page to keep her constituents advised of her activities and important events in local government.
- She used County resources to support the page. Her Chief of Staff helped create and maintain the page, and she was a salaried employee of the County. Official County newsletters included links promoting her Chair page, which were drafted by a County employee, hosted on the County's website, and disseminated through a mailing list provided to Ms. Randall by the County.
- Ms. Randall made efforts to swathe the "Chair" page in the "trappings of her office." The title of the page included her title; the page was categorized as a

government official; it included her County email address and telephone number; it included the County's website; most of the posts were addressed to "Loudoun" (her constituents); she asked her constituents to use the page for "back and forth constituent conversations"; and the content posted related to her office.

- Her decision to remove content and ban Mr. Davison was based on his criticism of her colleagues in County government, and as such, she "acted out of 'censorial motivation' to suppress criticism of county officials related to the 'conduct of the official duties.'"

As to the First Amendment claims, the court noted that because Mr. Davison brought suit against Ms. Randall in both her official and individual capacities, that the County would only be liable under *Monell v. Department of Social Services of City of New York* (1978) 436 U.S. 658, if the County was a "moving force behind the deprivation" and its "policy or custom must have played a part in the violation of federal law." The court held that, under these standards, Ms. Randall was not liable in her official capacity, but was liable in her individual capacity.

Was the Speech Entitled to First Amendment Protection?

While neither party could recall the exact substance of Mr. Davison's deleted comment, the court found that it raised "ethical questions" about the conduct of School Board members, and that this kind of "criticism of official conduct is not just protected speech, but lies at the very heart of the First Amendment." Accordingly, the court determined the deleted post was speech entitled to First Amendment protection.

Appropriate Forum and Viewpoint Discrimination

Next, explaining that Ms. Randall deliberately permitted public comment and "virtually unfettered discussion" on the "Chair" page, the court found that Ms. Randall had opened a forum for speech, or "a digital space for the exchange of ideas and information" when she established the page.[11] Of particular relevance to the court was that she actively encouraged comments, including criticisms, from her constituents.

[11] The Court noted that in *Page v. Lexington County School District One* (4th Cir. 2008) 531 F.3d 275, the "Fourth Circuit has suggested that the government may open a forum for speech by creating a website that includes a chat room or bulletin board in which private viewers could express opinions or post information, or that otherwise invites or allows private persons to publish information or their positions."

The court then noted that, at this point in the analysis, the question would normally be to determine the nature of the forum – traditional, limited, or non-public. However, the Court found that this analysis was unnecessary because the record demonstrated that Ms. Randall engaged in viewpoint discrimination when she banned Mr. Davison from her page.[12] Viewpoint discrimination is prohibited in all forums. According to the court:

> If the Supreme Court's First Amendment jurisprudence makes anything clear, it is that speech may not be disfavored by the government simply because it offends. Here…Defendant acted in her governmental capacity. Defendant's offense at Plaintiff's views was therefore an illegitimate basis for her actions – particularly given that Plaintiff earned Defendant's ire by criticizing the County government. Indeed, the suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment guards. By prohibiting Plaintiff from participating in her online forum because she took offense at his claim that her colleagues in the County government had acted unethically, Defendant committed a cardinal sin under the First Amendment.

The Court also noted that while the consequences of Mr. Davison's temporary ban were "fairly minor," it would not withhold First Amendment protection for that reason.

Finally, the court noted that there are circumstances under which public officials can exercise control over their social media sites:

> All of this isn't to say that public officials are forbidden to moderate comments on their social media websites, or that it will always violate the First Amendment to ban or block commenters from such websites. Indeed, a degree of moderation is necessary to preserve social media websites as useful forums for the exchange of ideas. Neutral, comprehensive social media policies like that maintained by Loudoun County – and eschewed by Defendant here – may provide vital guidance for public officials and commenters alike in navigating the First

[12] While not engaging in a forum analysis, the Court did note that Ms. Randall had posted no policy for the "Chair" page that limited the types of comments that were posted, and the closest she did come to posting such a policy was to actively encourage constituents to comment on "ANY issue…"

Amendment pitfalls of this protean and revolutionary forum for speech.[13]

Appeal

Both Ms. Randall and Mr. Davison have appealed the decision to the Fourth Circuit.[14] Ms. Randall argues that declaratory judgment was improper, that she did not act under color of state law, that her "Chair" page was not a public forum, that she did not engage in viewpoint discrimination, and that the "relatively inconsequential" impact on Mr. Davison was not actionable. She also asserts that the District Court did not pay sufficient attention to Ms. Randall's own First Amendment rights, and that the District Court erred in "accepting the notion that Plaintiff has a First Amendment right to post comments on Facebook using any particular screen name."[15]

Mr. Davison argues that the District Court erred in denying his claims for due process violations and his claims against Ms. Randall in her official capacity. He further argues that his motion for leave to amend his complaint to add an additional First Amendment claim should have been granted.

Key Takeaways

Among other things, to reduce the likelihood of a public forum finding, public officials should be wary of using any public resources, whether it be staff time or electronic resources provided by the public agency, to create, administer, or maintain a social media page. In addition, identifying oneself as a public official and providing official email, phone, or other contact information, or links to other agency-controlled websites or publications, are factors that may weigh towards a public forum. Even if the page includes a mix of personal and public interest posts, the use of social media to engage with residents and constituents on public issues will likely factor toward a public forum.

---

[13] The County maintained a policy declaring that its purpose was to "present matters of public interest in Loudon County," but advised users that "the County reserves the right to delete submissions" that violated enumerated rules, such as "vulgar language" and "spam." According to the court, the County's policy "evinces the County's purposeful choice to open its social media websites to those wishing to post questions, comments and concerns, within certain limits."

[14] Mr. Davison appeared pro se at the District Court, but is now represented by counsel on appeal (including by the Knight First Amendment Institute at Columbia University, who is a named plaintiff in the second case discussed in this paper).

[15] Mr. Davison had multiple Facebook accounts – one in his own name, and another – the one used to post on Ms. Randall's "Chair" page that was named "Virginia SGP." He explained that the Virginia SGP could be turned over to another activist.

For public officials who intend to use social media to engage with the public, establishing a set of user posting guidelines may provide at least some limited ability to remove content or block users, so long as the guidelines are actually viewpoint neutral, not directed at core political speech, and are applied accordingly.

Knight First Amendment Inst. at Columbia Univ. v. Trump, et al., 302 F. Supp. 3d 541 (S.D.N.Y. 2018), appeal docketed, No. 18-1691 (2nd Cir. 2018).

On May 23, 2018, the United States District Court for the Southern District of New York issued the most publicized decision to-date on an official's use of social media.[16]

Donald Trump established the @realDonaldTrump account in March 2009, well before he sought public office. Before his inauguration, he used the account to tweet about a variety of topics, including pop culture and politics. Since his inauguration in January 2017, he has continued to use the @realDonaldTrump "as a channel for communicating with the public about his administration."

The @realDonaldTrump page is registered to "Donald J. Trump, 45th President of the United States of America, Washington, D.C." The page is generally accessible to the public at large, and any individual can view his tweets without being signed into Twitter. Twitter users engage frequently with the President's tweets, often resulting in hundreds or thousands of replies and retweets. President Trump has not issued any rule or statement purporting to limit the speech of those who reply to his tweets. The National Archives and Records Administration has advised the White House that the tweets from @realDonaldTrump are official records that must be preserved under the Presidential Records Act.

Daniel Scavino, White House Social Media Director and Assistant to the President, has assisted in the operation of the @realDonaldTrump page. Together, Mr. Scavino and President Trump have used the @realDonaldTrump page to:

- Announce, describe, and defend his policies;
- Promote his Administration's legislative agenda;
- Announce official decisions, at times before the matter is announced through official channels (such as the nomination of Christopher Wray for FBI Director);
- Remove appointees from office;

[16] The Knight Institute has uploaded all the legal documents from the case, as well as some media coverage of the case, and it is available at https://knightcolumbia.org/content/knight-institute-v-trump-lawsuit-challenging-president-trumps-blocking-critics-twitter (last checked by the authors of this paper on August 21, 2018).

- Engage with foreign political leaders;
- Publicize state visits;
- Challenge media organizations whose coverage of his Administration he believes to be unfair; and
- Criticize opponents, critics, and organizations who oppose his policies and legislative agendas.

Various individuals have been blocked by the @realDonaldTrump account, including the seven individual plaintiffs who ultimately brought suit in this case. Each of them had their access to the President's Twitter feed blocked after tweeting a message critical of the President or his policies in response to tweets from @realDonaldTrump. As a result of being blocked, the plaintiffs could not view the @realDonaldTrump tweets, directly reply to them, or use the @realDonaldTrump page to view the comment threads while they were logged into their verified Twitter accounts. However, they could still see @realDonaldTrump tweets when not logged into their Twitter own accounts. In addition, even when blocked, the plaintiffs could still view replies to the @realDonaldTrump tweets and could post replies to those replies – even from their own blocked accounts. Because they could only view the replies to the tweet and not the original tweet, it could make the context of the reply tweets difficult to understand.

The Knight Institute and the individual plaintiffs brought suit against President Trump, Hope Hicks, Sarah Huckabee Sanders, and Daniel Scavino, seeking declaratory judgment and injunctive relief. The parties entered a stipulation of facts and cross-moved for summary judgment on the basis of that stipulation. The court granted summary judgment in favor of Sarah Huckabee Sanders due to a lack of standing because the plaintiffs' injuries were not attributable to her.[17] The court found that there was standing against Daniel Scavino and Donald Trump, and granted summary judgment in favor of the plaintiffs.

The court then turned to the "First Amendment's application to the distinctly twenty-first century medium of Twitter." It first found that the speech the plaintiffs sought to engage in was protected by the First Amendment because it was political speech, which is at the core of First Amendment protection.

Applicability of Forum Analysis

The defendants asserted that Twitter is not owned or controlled by the government, and therefore, not susceptible to forum analysis. In considering this argument, the

[17] Defendant Hope Hicks was later dismissed given her resignation from the position of White House Communications Director.

court made clear that the correct inquiry is to focus on the "access sought by the speaker." For example, in *Perry Education Association v. Perry Local Educators Association*, where the plaintiff sought access to the school's internal mail system, the mail system, rather than the entire school was the space, was in question.[18] As such, the court clarified that it was not the entire @realDonaldTrump account that was the forum to be analyzed. Rather, the plaintiffs only sought access to specific parts of the account: "the content of the tweets sent, the timeline comprised of those tweets, the comment threads initiated by each of those tweets, and the interactive space associated with each tweet in which other users may directly interact with the content of the tweet by, for example, replying to, retweeting, or liking the tweet."

The court also concluded that the forum analysis applied to spaces that are "owned or controlled" by the government or government official, so that legal ownership of the platform generally is not a requirement. While Twitter is a private company that is not government-owned, Mr. Scavino and President Trump exercise control over many aspects of the @realDonaldTrump account, including those the plaintiffs wished to access. The court also found that the control that Mr. Scavino and President Trump exercise is "governmental" because of the following factors, which are executive functions:

- The @realDonaldTrump account is presented as being registered to Donald J. Trump, "45th President of the United States of America, Washington, D.C.";
- The tweets are official records and must be preserved under the Presidential Records Act;
- The account has been used in the course of the appointment of officers, the removal of officers, and the conduct of foreign policy.

The court then turned to the concept of government speech, as a category of speech that falls outside the forum analysis, because the First Amendment restricts government regulation of private speech, but does not regulate government speech. In determining whether speech qualifies as government speech, the court looked at three factors identified by the Supreme Court:

1. Whether the government has historically used the speech in question to convey state messages;
2. Whether the speech is often closely identified in the public mind with the government; and
3. The extent to which the government maintains direct control over the messages conveyed.

[18] *Perry Education Association, supra*, at 46-47.

The court first held that the President's tweets themselves are government speech, and therefore not subject to a forum analysis. However, the court also found that the "interactive space" for the replies and retweets that occur after each initial tweet by the President is not government speech. Rather, those replies "remain the private speech of the replying user." The court found that the association between the President's tweet and the replies to that tweet (that they exist on the comment thread) was insufficient to make the reply government speech.

Forum Classification

Finally, having determined that the forum analysis was appropriate for the interactive space associated with a tweet, the court then determined the proper classification: traditional public forum, designated public forum, or a nonpublic forum. The court concluded that there was strong support for finding that the interactive space on the @realDonaldTrump Twitter account was a designated public forum, which it defined as follows:

> A second category consists of public property which the state has opened for the use by the pubic as a place for expressive activity. To create a forum of this type, the government must intend to make the property generally available to a class of speakers. The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse, and we look to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.

In looking at the intent of the government, the court noted that intent is inferred from objective factors: "the government's policy and past practice, as well as the nature of the property and its compatibility with expressive activity." The court noted that the @realDonaldTrump account is generally available to the public, without any limiting criteria. Any person can follow the account on Twitter, unless that person has been blocked. Any (unblocked) person can participate by replying to and retweeting the President's tweets. Twitter is certainly compatible with expressive activity, and, as the court reasoned, the "interactivity of Twitter is one of its defining characteristics, and indeed, the interactive space of the President's tweets accommodates a substantial body of expressive activity."

Viewpoint Discrimination

In a designated public forum, restrictions on speech "are permissible only if they are narrowly drawn to achieve a compelling state interest." However, regardless of the "specific nature of the forum…viewpoint discrimination is presumed impermissible

when directed against speech otherwise within the forum's limitations." Here, the court found that the individual plaintiffs were "indisputably blocked as a result of viewpoint discrimination" when they were critical of the President or his policies.[19]

The defendants argued that blocking the individual plaintiffs was permissible:

> [They argue that] the President retains a First Amendment interest in choosing the people with whom he associates and retains the right not to engage with (i.e., the right to ignore) the individual plaintiffs. Further, they argue, the individual plaintiffs have no right to be heard by a government audience and no right to have their views amplified by the government. While those propositions are accurate as statements of law, they nonetheless do not render the blocking of the individual plaintiffs constitutionally permissible.

The Court recognized that "a public official does not lose his First Amendment rights upon taking office." Further, the Court recognized that the First Amendment does not require that public officials "listen to or respond to" the speaker. "Nonetheless, when the government goes beyond merely amplifying certain speakers' voices and not engaging with others, and actively restricts the right of an individual to speak freely and to advocate ideas, it treads into territory proscribed by the First Amendment."

The court also examined the "muting" and "blocking" features on Twitter, which is how the platform allows users to limit interaction with other users:

> Muting is a feature that allows a user to remove an account's Tweets from the user's timeline without unfollowing or blocking that account. For muted accounts that the muting account does not follow on Twitter, replies and mentions will not appear in the muting account's notifications, nor will mentions by the muted account. That is, muting allows a user to ignore an account with which the user does not wish to engage. The muted account may still attempt to engage with the muting account, among other capabilities – but the muting account generally will not see those replies. Critically, however, the muted account may still reply directly to the muting account, even if that reply is ultimately ignored.

[19] The court noted this finding would be the same even in a nonpublic forum: "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. The blocking of the individual plaintiffs, which resulted from their tweets that criticized the President or his policies, is not viewpoint-neutral, and is therefore impermissible regardless of how the property is categorized under forum doctrine."

> Blocking, by contrast, goes further. The blocking user will not see any tweets posted by the blocked user just as a muting user would not see tweets posted by a muted user, but whereas muting preserves the muted account's ability to reply to a tweet sent by the muting account, blocking precludes the blocked user from seeing or replying to the blocking user's tweets entirely. The elimination of the blocked user's ability to reply directly is more than the blocking user merely ignoring the blocked user; it is the blocking user limiting the blocked user's right to speak in a discrete, measurable way. Muting equally vindicates the President's right to ignore certain speakers and to selectively amplify the voices of certain others but – unlike blocking – does so without restricting the right of the ignored to speak.

The court rejected the contention by defendants that muting and blocking are the same, noting that, in particular, that the reply or retweet is not directed solely at the user who posted the original tweet. Rather, the reply is visible to others and may be replied to by other users. As such, blocking a user limits that user's ability to speak to that audience, a restriction which is impermissible under the First Amendment. The court found this violation, even while being mindful of the President's First Amendment rights:

> While we must recognize, and are sensitive to, the President's personal First Amendment rights, he cannot exercise those rights in a way that infringes the corresponding First Amendment rights of those who have criticized him.

Finally, the court found that the minimal infringement on the individual plaintiffs' First Amendment rights was not relevant because "the First Amendment recognizes, and protects against, even de minimis harms."

Appeal

President Trump and Mr. Scavino appealed the ruling to the Second Circuit, and their brief was submitted on August 7, 2018. They argue that the @realDonaldTrump account has remained President Trump's personal account and he does not use any government authority when blocking users. They further argue that it is not a "forum" for public expression, but rather that

> Donald Trump uses it not to provide a platform for public discussion, but to disseminate his own views to the world. When he blocks a particular user from reading or replying to his tweets, he is exercising his right to choose with whom he will engage in speech. Nothing in the First Amendment divests him of that prerogative or compels him to

> receive messages that he does not wish to hear. Blocked users remain free to express their views to other Twitter users through their own Twitter accounts; the First Amendment does not entitle them to piggyback on Donald Trump's speech to amplify their own.

Key Takeaways

If upheld, the Trump Twitter case confirms that when a public official uses social media to post about public interest issues or to communicate and engage with the public, the regulation of comments and replies by the public will be reviewed under a forum analysis. Notably lacking in this case were any user guidelines, and the President's efforts to block users were directed specifically at those who were critical of him, his policies, his agenda, or his conduct in general, all of which constitute core political speech.

Although President Trump was not the first to argue that because Twitter is a private company, the First Amendment should not apply, the Southern District of New York made clear that the interactive space where users may reply and retweet and engage with each other and directly with the President himself was a forum "owned or controlled" by the government or a government official.

Whenever a local public official uses social media to post about government business or issues of public importance, due to the interactive nature of social media, they are inviting public engagement and must be mindful of First Amendment limitations on regulating comments and replies by the public. Public officials may not block or ban users merely because they disagree with the comment or reply, or because the comments or replies are critical of the official, the government, or actions taken by either.

CONCLUSION

Social media technology continues to develop and change at a pace far more rapid than the courts and Legislature can keep up with. The facts and circumstances of each case are different, and bright line rules do not yet exist, so it remains difficult to predict how a court will rule on any given issue. Thus, it is incumbent upon cities and other public agencies to be mindful of their practices and policies, ensure they have clear posting guidelines, designate and operate their social media pages as limited forums, and consult with legal counsel as questions arise. As a best practice, cities and other public entities should consider adopting policies and procedures for social media use, and training elected and appointed officials on their personal use of social media.