Silencing Critics in the Age of America's First Tweeter-in-Chief

Where Social Media Meets the First Amendment

ELLIOT D. OSTROVE *is a partner at Epstein Ostrove, LLC, in Edison, and practices in the areas of commercial litigation and real estate litigation.*

YALE A. LEBER *is an associate in the firm, practicing in commercial litigation.*

by Elliot Ostrove and Yale Leber

It is hardly a shock that America's first Twitter presidency has encouraged members of Congress, governors, state representatives, and countless local and municipal public officials around the country to create an 'official' presence on popular social media platforms. Most public officials who have claimed a 'Facebook profile' or 'Twitter handle' find social media provides one of the most effective mechanisms to broadcast their proposals and agendas. The changes have been equally as groundbreaking for citizens who are constantly in search of a fast, free, and direct way to petition their grievances to their accountable representatives on Capitol Hill, in the state house, or at the local town hall. For good or for ill, the acceleration of political discourse onto platforms like Facebook and Twitter is likely a trend that will continue for the foreseeable future.

A few decades ago, physical locations, such as town squares, public parks, or other places of congregation and expression, provided the basic framework upon which the First Amendment's public forum doctrine was built. Today, citizens are free from the constraints of the physical world to express their First Amendment rights and, in ever-increasing numbers, have chosen to exercise their right to participate, speak, organize, fundraise, and petition their government directly, on the Internet, at any time, from anywhere. As protected political speech increasingly enters the boundless and virtual world of the 'Twitterverse,' the internet will force changes in how the forum doctrine is understood and applied.

One such example that has already raised significant and far-reaching First Amendment concerns involves public officials who have ostensibly opened their social media accounts to the public, only to block, mute, or otherwise prevent certain users from viewing, posting, or participating in the dialogue. Recently, public officials, including, most famously, President Donald Trump, faced particular scrutiny for blocking users or removing posts critical of the official or their policies.[1] Consequently, courts have begun wrestling with the distinctly 21st century question: Does the First Amendment prohibit public officials from limiting a user's access to or ability to comment on a government-controlled social media account?

The *Knight First* Decision

In May 2018, a Manhattan federal judge addressed this issue directly with respect to the president's @realDonaldTrump account. In *Knight First Amendment Institute at Columbia University v. Trump*,[2] U.S. District Judge Naomi Reice Buchwald ruled that the defendants, President Trump and White House Social Media Director Daniel Scavino, had restricted political speech, in violation of the First Amendment, when they blocked Twitter users from seeing or interacting with tweets from the @realDonaldTrump account after the plaintiffs had posted comments critical of the administration. The court found that the interactive features built into Twitter's platform, including user-submitted 'replies,' 'retweets,' and 'likes,' functioned as virtual "interactive spaces" the court analogized as a "designated public forum."[3] Based on this framework, the court ultimately concluded the defendants had engaged in "viewpoint-based exclusion of the individual plaintiffs from that designated public forum [which is] proscribed by the First Amendment and cannot be justified by the President's personal First Amendment interests."[4]

President Trump has since appealed the decision and unblocked the users at issue, freeing the plaintiffs to resume their expressive activities on the president's Twitter feed. While the ruling was limited to the facts presented as a result of the specific conduct in question, the holding in the 75-page *Knight* decision expressly noted its analysis is equally applicable to government officials, at every level of government, who are now regularly engaging with the public on Twitter, Facebook, and other social media platforms.[5]

The court began its decision by explaining how users interact on the Twitter platform. Twitter provides users registered on the website with a forum to post and exchange tweets or messages containing no more than 280 characters of text. To post and interact with other users, a user must register an account on Twitter; however, registration is not required in order to view public postings. Interaction between users on the platform takes place by replying, following, retweeting, or liking particular tweets. When a user replies to a tweet, a 'comment thread' is created below the tweet, allowing additional users to converse on the topic. Users can also follow other registered users, permitting them to view a timeline of previous tweets and receive alerts when a new tweet is posted. Retweeting allows users to republish tweets by other users. The court found these features, inherent to the Twitter platform, create "interactive spaces" that facilitate further discussion among users.[6]

The court also considered Twitter's blocking or muting features, which allow users to limit interactions with others. When a user blocks another user, they are prevented from replying, retweeting, following, or liking tweets from the blocking user's account. Tweets from a user who is muted will not appear on the blocking user's timeline, which displays a stream of tweets from followed accounts.

Application of the Public Forum Doctrine

After determining the plaintiffs had standing to bring suit against the president and Scavino, the court turned to the substantive issue of the case: whether "a public official's blocking of the individual plaintiffs in Twitter implicates a forum for First Amendment purposes."[7] The court considered this issue in a series of analytical steps, beginning with whether the plaintiffs' speech was protected. The court quickly determined that since there was "no suggestion that the speech in which the individual plaintiffs engaged and seek to engage falls within the 'well-defined and narrowly limited classes of speech,' such as obscenity, defamation, fraud, or incitement," it could "readily conclude that the speech in which the plaintiffs seek to engage is protected speech."[8]

The court then addressed the susceptibility of the defendants' conduct on Twitter, a privately owned social media platform, to analysis under the public forum doctrine, a principle of First Amendment law used to evaluate whether burdens on speech are appropriate for certain types of government property. To be susceptible to analysis under the public forum doctrine, the space sought for expression must be "owned or controlled by the government," and the application of the public forum doctrine must be consistent with "the purpose, structure, and intended use" of that space.[9]

Government Control

Despite the fact that Twitter is not property of the government, the court found the government control prong was met.[10] Judge Buchwald held that "the extent to which the President and Scavino can, and do, exercise control over aspects of the @realDonaldTrump

account are sufficient to establish the government-control element."[11] The court found relevant to the government control requirement three crucial facts from the record, that: 1) the @realDonaldTrump account was "registered to Donald J. Trump, 45 President of the United States of America, Washington, D.C.;" 2) "the President's tweets from @realDonaldTrump are official records that must be preserved under the Presidential Records Act;" and 3) "the @realDonaldTrump account has been used in the course of the appointment of officers (including cabinet secretaries), the removal of officers, and the conduct of foreign policy."[12]

The court rejected "any contention that the @realDonaldTrump account as a whole is the would-be forum to be analyzed."[13] The plaintiffs, according to the judge, were not asking for the right to send tweets as the president, to receive his Twitter notifications, or to decide who to follow or unfollow on the @realDonaldTrump account. Instead, as the court explained, the plaintiffs sought use of the "interactive space" associated with each @realDonaldTrump tweet, including access to "the content of the tweet sent, the timeline comprised of those tweets, the comment threads initiated by each of those tweets," including the ability to reply, retweet, or like the tweet.[14]

Purpose, Structure, and Intended Use

The court also ruled that application of the public forum doctrine would indeed be consistent with the purpose, structure, and intended use of the interactive space.[15] As the court explained, the "tweets sent by the @realDonaldTrump account regularly attract tens of thousands, if not hundreds of thousands, of replies and retweets."[16] These posts, the court found, were "generally accessible to the public at large without regard to political affiliation or any other limiting criteria, such that any Twitter user who has not been blocked may so engage."[17]

While the interactive space was not a 'traditional' public forum, such as a street or park, they share certain characteristics. "[J]ust as a park can accommodate many speakers and, over time, many parades and demonstrations," the "interactive space of a tweet can accommodate an unlimited number of replies and retweets."[18] The court also noted that, unlike a public park, the interactive space was not constrained by the selectivity and scarcity that is inherent in traditional public spaces. Accordingly, the court classified the interactive space surrounding @realDonaldTrump tweets as a designated public forum, finding nothing to suggest "the 'application of the forum analysis' to the interactive space associated with a tweet would lead almost inexorably to the closing of the forum."[19]

Viewpoint Discrimination

Upon determining that the interactive space associated with @realDonaldTrump tweets was susceptible to forum analysis as a designated public forum, Judge Buchwald held that the exclusion of the plaintiffs from viewing or interacting with the tweets constituted impermissible viewpoint-based discrimination.[20] The court found the defendants' use of Twitter's blocking function allowed the president and Scavino to prevent certain disfavored users from viewing or responding to discussions about the president's tweets, based solely on the political content of the users' posts. Despite the fact the president retained a personal First Amendment interest in selecting those with whom he associates, the defendants could have, but elected not to, mute the plaintiffs, which, according to the judge, would have "vindicate[d] the President's right to ignore certain speakers and selectively amplify the voices of certain others but—unlike blocking—does so without restricting the right of the ignored to speak."[21]

Some Guidance for Public Officials

As social media becomes the medium of choice for public debate, the *Knight* decision may carry important implications for public officials at every level of government. Indeed, the *Knight* decision expressly stated its analysis is not limited to the office of the presidency, and was equally applicable to other officials using social media, elected or unelected.[22] While the *Knight* decision reflects one district court opinion, subject to a pending appeal, it is likely that court's opinion provides meaningful guidance for social media use as a public official, whether one is the president of the United States or a member of the local board of education.

Separate Public Social Media from Private Social Media

For public officials who wish to maintain separate social media presences—one as an individual and one as a public official—it is likely an advisable course of action to limit government-related tweets and posts strictly to a government-controlled social media account. The *Knight* decision emphasized the importance of the trappings associated with a public official's social media presence. The court, quick to dismiss the president's argument that @realDonaldTrump was created and continues to function only as a personal account, made it susceptible to strict scrutiny, in large measure, because of how the president publicly characterized his 'official' Twitter account and how that account was used to effectuate the responsibilities of his office. Accordingly, under the rationale in *Knight*, a public official addressing an issue of public concern could inadvertently designate his or her social media profile as a public forum on an account that was otherwise intended to be private, thereby triggering restrictions on the official from exercis-

ing unfettered administrative control over who is allowed to interact with and what is posted on the account.

Report Harassing Users to the Social Media Company

Reporting offensive or harassing conduct that results in the social media company's removal of posts or comments is unlikely to trigger First Amendment scrutiny. Today, popular social media platforms offer the option to report abusive or harassing comments directly to the website owners, typically, as violative of the platform's terms of use or community standards. The social media company, in turn, will respond against the harassing user or their comments, by, among other things, blocking users and/or deleting their comments. The advantage to this approach, as opposed to directly blocking a user, is that the social media company, not the public official, is taking action against a harassing user, and is not doing so on the basis of their political viewpoint, as was the case in the *Knight* case, but as a violation of the social media company's policy.

Facebook, for instance, employs comment moderation and reporting tools designed to allow harassing comments to be hidden or deleted if the company determines they are in violation of Facebook's 'community standards' policy.[23] Notably, the Facebook anti-bullying policy, which will result in Facebook's removal of content that purposefully targets private individuals with the intention of degrading or shaming them, does not apply to public figures because "[Facebook] want[s] to allow discourse, which often includes critical discussion of people who are featured in the news or who have a large public audience."[24] However, discussion of public figures must still comply with other aspects of Facebook's community standards, and Facebook will remove content about public officials that it deems to be hate speech or a credible threat.[25]

Explore Features Available on Social Media that Restrict or Limit Offensive Posts, but Do Not Block Users

In addition to reporting the offending post or comment, popular social media companies, like Twitter, offer features aimed at limiting harassing or threating speech, but do not go as far as to completely prevent speech. For example, the court in *Knight* explained the distinction between "muting and blocking...as useful in addressing the potentially conflicting constitutional prerogatives of the government as a listener on the one hand and of the speakers on the other..."[26] As explained above, a public official can mute a user, but the muting feature can also be used to prevent specific keywords or phrases from appearing on the public official's timeline.

Conclusion

Knight represents one of the first decisions extending the public forum protections of First Amendment to today's social media and communication platforms. Should the court's analysis in *Knight* prove influential, as courts around the country grapple with similar issues, public officials—who find themselves increasingly dependent on social media accounts to foster speech and debate among their constituents—are well served to remember they have no greater authority to curtail or suppress dissent on the internet than they do in a public park.

Officials are cautioned to proceed with care in this new virtual forum. When deciding whether to block a user, these officials ought to give full thought to whether such a decision is based on constitutionally impermissible considerations, such as the user's expressed political views. ⚖

Endnotes

1. Joe Palazzolo, Court Rules Against Politician Who Banned Access to Her Facebook Page, *The Wall Street Journal*, July 27, 2017, https://www.wsj.com/articles/court-rules-against-politician-who-banned-access-to-her-facebook-page-1501176625 (last visited Nov. 27, 2018).
2. No. 17 Civ. 5205 (NRB) (S.D.N.Y. May 23, 2018).
3. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 566 (S.D.N.Y. 2018).
4. *Id.* at 580.
5. *See Id.* at 560.
6. *See Id.* at 574.
7. *See Id.* at 549.
8. *Id.* at 565.
9. *Id. E.g., Pleasant Grove City v. Summum*, 555 U.S. 460, 480 (2009) ("[W]here the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.").
10. *Knight First Amendment*, 302 F. Supp. 3d at 566.
11. *Id.* at 567.
12. *Id.* at 571.
13. *Id.* at 566.
14. *Id.* at 566.
15. *Id.* at 549.
16. *Id.* at 573.
17. *Id.* at 572.
18. *Id.* at 573.
19. *Id.*
20. *See Id.* at 575.
21. *Id.* at 577.
22. *Id.* at 579.
23. A similar set of rules and policies is enforced on Twitter, which, like Facebook, sets forth detailed descriptions of permitted and prohibited user conduct. *See* the Twitter Rules, Twitter, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Nov 2, 2018).
24. Facebook, Facebook Community Standards, Bullying, https://www.facebook.com/communitystandards/bullying (last visited Nov. 2, 2018).
25. *Id.* Facebook Community Standards, Harassment.
26. *Id.* at 576.