Coates' Canons Blog: The First Amendment Keeps the “Social” in Government Social Media

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Social media has become a regular feature of the political landscape. From the campaign to the business of governing, elected and appointed public officials are getting their message out on Facebook, Twitter, and other social media platforms. And they’re encouraging their constituents to join the conversation with comments, retweets, and likes. But the “social” part of social media is not always well-received. What happens when a government official blocks a critic from commenting? Two recent court cases have held that a governmental social media account is a public forum for free expression if the site broadly invites public engagement. See *Knight First Amendment Institute at Columbia v. Trump* 302 F.Supp. 3d 541 (2018), and *Davison v. Randall,* 17-2002, 2019 WL 114012 (4th Cir. Jan. 7, 2019). These cases have held that government officials (in one case President Trump and in the other the chair of the Loudoun County board of supervisors) violated the First Amendment rights of citizens by blocking them based on the content of their comments. This blog post describes how government social media fits in the First Amendment public forum analysis and provides some tips for public officials who engage with the public via social media.

Forum Analysis Overview

Expressive rights protected under the First Amendment vary depending upon the nature of the forum. The US Supreme Court long ago identified some places in which, without any action by the government, the public can exercise free expression rights, subject only to content neutral, time, place, and manner restrictions. Public parks and streets are the examples regularly cited as traditional public forums. Are social media sites on the Internet traditional public forums? In an opinion involving a North Carolina law that restricted registered sex offenders’ access to certain social networking Web sites, the US Supreme Court compared the Internet with parks and streets.

> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the “vast democratic forums of the Internet” in general,… and social media in particular.

Packingham v. North Carolina, 137 S.Ct. 1730, 1835 (2017) (citations omitted). The comparison was just that, and it does not count as holding by the court. Nonetheless, it’s a strong message about the role of the Internet and social media in the marketplace of ideas.

In addition to traditional public forums, courts have recognized free expression rights in other government places that are intentionally opened up for public expression. These forums may allow the full scope of expressive right that exists in traditional public forums, and they can be opened up for particular purposes as defined by the government. From employee mailboxes to license plate programs, and now social media platforms, courts must analyze these limited or designated forums, to determine whether the government intended to open the forum for public expression, and if so, to what extent. The government has no obligation to create these forums, but when it does, the expressive rights are the same as they are in traditional public forums. The government can create a forum for a limited the purpose, but once the forum is established, expression that is consistent with the forum’s purpose cannot be restricted because the government objects to the content. As described in the case law, government is prohibited from engaging in “viewpoint discrimination” in any type of public forum.

The government may also reserve a forum for its own speech. That is considered “government speech” and the public forum analysis simply does not apply. Indeed, a forum may have distinct parts. For example, as I described in my blog post here, a town council agenda is government speech. The town council doesn’t have to be viewpoint neutral about what it wants to take up, and citizens have no right to demand equal time. North Carolina’s statutorily mandated public comment period, however, provides a public forum. Citizens may comment on any subjects with some relationship to the

jurisdiction of the town, subject to some limited content, time, place and manner restrictions. Recent cases regarding government social media mirror the forum analysis of a public meeting.

Recent Cases

In the *Knight v. Trump* case, individuals who had commented on the President's Twitter account were blocked because the President objected to their comments. The court conducted a detailed analysis of the various parts of the Twitter platform, concluding that the actual tweets posted by the President (or his communication employees who had access to post on the President's behalf), were government speech. That part of the forum was clearly not opened up for public expression. On the other hand, the court found the comment space to be a public forum:

> We hold that portions of the @realDonaldTrump account – the "interactive space" where Twitter users may directly engage with the content of the President's tweets – are properly analyzed under the "public forum" doctrines set forth by the Supreme Court, that such space is a designated forum, and that the blocking of the plaintiffs based on their political speech constitutes viewpoint discrimination that violates the First Amendment. In so holding, we reject the defendants' contentions that the First Amendment does not apply in this case and that the President's personal First Amendment interests supersede those of plaintiffs.

Similarly, in *Davison v. Randall*, the chair of the Loudoun County Board of Supervisors, created an official Facebook page, and invited contributions from "ANY Loudoun citizen on ANY issues, request, criticism, complement or just your thoughts." Davison was a frequent critic of the board at meetings, and continued his criticism on the chair's Facebook page. The chair initially blocked Davison, but a short time later reinstated him. As in the *Trump* case, the court had no trouble concluding that, "Randall's comments and curated references on the Chair's Facebook Page to other Pages, personal profiles, and websites amount to governmental speech…. But the interactive component of the Chair's Facebook Page—the portion of the middle column in which the public can post comments, reply to posts, and 'like' comments and posts—is materially different."

In each of these cases, the facts were clear: comments were blocked because the account owner disliked the content. As described above, the First Amendment prohibits viewpoint discrimination. Think about how this would play out at a city council meeting. Imagine the Mayor telling someone who wants to speak during the public comment period that she can't because the council members don't like what she said at the last month's public comment period. The *Davison* opinion states:

> Upon concluding that [the] interactive component of the Chair's Facebook Page amounts to a public forum, we would normally need to determine whether it constitutes a traditional public forum or designated or limited public forum. In the present case, however, we need not decide that question because Randall's ban of Davison amounted to "viewpoint discrimination," which is "prohibited in all forums."

This is how the First Amendment keeps the social in social media.

Defining Government Social Media

First Amendment protections apply only in a government forum. They don't apply to a private person's or a private organization's Facebook page. While this may seem obvious, electronic forums can be difficult to categorize. Indeed, the two cases discussed here used slightly different standards to arrive at the conclusion that the social media accounts were government forums. Both courts rejected the government's argument that the platforms they were using were privately owned. The Trump case focused on the President's use of Twitter to conduct official business:

> Even though Twitter is privately owned, the court had no difficulty concluding that @realDonaldTrump is controlled by the President and his employee, Daniel Scavino who had access to the account, and that the President uses it for governmental purposes. Evidence supporting this conclusion included:
>
> 1) The account is presented as being registered to Donald J. Trump, 45th President of the United States of America,
> 2) His tweets are official records that must be preserved under the Presidential Records Act, and
> 3) The account has been used in the course of the appointment of officers, the removal of officers, and the

> conduct of foreign policy.

The *Davison* case focused on the federal statute governing remedies for civil rights violations (42 U.S.C. § 1983) which applies to individuals acting "under color of state law." The analysis, however, involves the same factors:

> Randall created and administered the Chair's Facebook Page to further her duties as a municipal official. She used the Chair's Facebook Page "as a tool of governance,"… through the Chair's Facebook Page, Randall provides information to the public about her and the Loudoun Board's official activities and solicits input from the public on policy issues she and the Loudoun Board confront.

Another factor used in these and other cases is whether public resources, including employees or government-funded IT infrastructure, are used to support the social media platform and content. As described in *Davison v. Randall*:

> The Davison [district] court found the following dispositive: (1) the social media page's obvious public, not private, purpose (defendant's election to public office and subsequent use as "a tool of governance"); (2) defendant's use of government resources, including government employees, to maintain the page; (3) the connection between defendant's official newsletters and the page; and (4) defendant's efforts to "swathe" the page "in the trappings of her office."

Be Intentional When Using Social Media

The takeaway from these cases for government officials is pretty clear: Whether it's Twitter, Facebook, or just an old fashion website, if you control it, and are actually using it to transact public business, you should assume that it will be classified as governmental and viewpoint discrimination will be prohibited. On the other hand, if the purpose of the platform is clearly for the exclusive, one-way communication by the government, with no option for general comment, the forum analysis does not apply. Your platform should be clear about its purpose and you should adhere to any rules that are set out for its use. If public interaction is allowed on the platform, make sure there are clear rules for participation.

Public officials use social media for both governmental purposes and for political purposes. Many public officials may not recognize the significance of mixing government business and political communication. Indeed, it's often difficult to distinguish between the two. This can create problems beyond First Amendment violations, such as violations of campaign finance laws, public records and records retention requirements, and restrictions on use of public funds for political or other private purposes. Rather than leave it to the courts to define, public officials should be explicit about the purposes and rules they intend for their entry into the digital marketplace of ideas.