Social Media and Government: What are the Emerging Rules of Engagement?

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Modern Digital Town Square

1. Classification of Forum
2. Focus of Courts’ Legal Analysis
3. Key Functional Questions for Social Media Accounts
4. Lessons from Recent Litigation
5. Setting Policies and Standards for Public Engagement on Accounts
Social Media

• May cities and elected officials block or regulate public participation on their social media accounts?
• May elected officials unfriend, deny or not respond to friend requests on Facebook?
• May people be blocked, muted or unfollowed on Twitter?
• How should policies be drafted and enforced regarding the public’s use of these social media accounts?
• Use of social media, email, and texting by officials and city employees is transforming government

Tools to disseminate public safety information before, during, and after emergencies

Intended (and unintended) public engagement platforms for government outreach and constituent communication
The Challenge

How courts can use established and familiar law to address social media and other communication technologies.
The Supreme Court has recognized the need to apply the First Amendment to new technology...

Internet and social media sites are akin to “the modern public square”

Social media is “perhaps the most powerful mechanism available to a private citizen to make his or her voice heard”

Twitter enables people to “petition their elected representatives and ... engage with them in a direct manner”

Anyone can “become a town crier with a voice that resonates farther than it could from any soapbox”
Key area where “old” case law meets “new” technologies

- Application of Forum Classification

Social media platforms

What happens when these platforms are used by elected officials, official policy makers, or other public employees?
**How should a social media platform be classified?**

- Is it government sponsored or a private platform?
- Is it a traditional public forum?
- Is social media the “modern public square” for the discourse of ideas?
- Or is it more akin to a bulletin board where only designated topics can be discussed?
What is First Amendment Forum Classification?

1. Categorize spaces
2. Apply established legal standards

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
Main Categories of Forum Classification

- City Hall
- Library
- Park
- Airport
- Roadway
- Twitter
- Facebook
- Courthouse
Two Categories of Forum Classification

• Traditional Public Forum
  – Where people have traditionally been able to express their ideas: *town square, park, public street*

• Non-Public Forum
  – Government property traditionally not open to the free exchange of ideas: *courthouse lobby, prison, post office, military base*
Public Forum Test

Content Neutral:
1. Reasonable time, place and manner;
2. Narrowly-tailored to serve a **significant** government interest; *and*
3. Leaves open ample alternative channels of communication.

Content Based:
1. Subject to strict scrutiny;
2. Must be **least restrictive** means to achieve **compelling** government interest; *and*
3. Presumptively invalid
Non-Public Forum Test

Most lenient test

Restrictions need only be:

Reasonable and Viewpoint neutral
Types of Public Fora

**Designated Public Forum**

- Government intentionally opens non-traditional areas for First Amendment activity

- Interior of city hall (*i.e.*, *city opens building to display art*)
- School board meetings
- Municipal auditorium dedicated to expressive activity
Types of Public Fora

**Limited Public Forum**

- Non-public forum opened to First Amendment activity but limited to certain groups, topics
- Public library meeting rooms
- Public school property
- State’s specialty license plate program

Same review as non-public forum
Determination of designated or limited public forum depends on terms of use.

More consistently enforced with objective restrictions

More likely deemed limited public forum
Social Media as Non-Public Space

• Social media platform solely for government's speech

**Example**
Facebook page for providing information with no option for any public discussion or comments

First Amendment does not apply
Social Media as *Limited* Public Forum

• Social media with **some limits** on public discourse

**Example**
Public official’s Twitter account on which he/she discusses public business

**Challenge**
Reasonable and viewpoint neutral restrictions while enforcing limitations evenhandedly
Social Media as *Designated* Public Forum

- Social media with **no limitations** *and no policy* in place

**Example**
Facebook page with no limits on public comments

**Risk**
Likely viewed as public forum for exchange of ideas where government retains little ability to restrict, block, or delete offensive comments
Knight v. Trump: 2nd Circuit

Knight First Amendment Inst. at Columbia Univ., et al. v. Trump, et al.,
928 F.3d 226 (2nd Cir. 2019)

- Philip Cohen
  university professor
- Eugene Gu
  surgery resident
- Holly Figueroa
  songwriter & organizer
- Nicholas Pappas
  comedy writer
- Joseph Papp
  author & former cyclist
- Rebecca Buckwalter-Poza
  writer & legal analyst
- Brandon Neely
  police officer
**Knight v. Trump**

- Trump created Twitter account in 2009
- 85.9 million followers \@realDonaldTrump
- Account used for public issue discussion
- The National Archives has deemed the President’s tweets to be official records

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Donald J. Trump 
@realDonaldTrump · Sep 13

Actually falling very steadily and fast. Deaths and hospitalizations way down, and even cases down despite far more Testing than any other country in the World, by far. India second!

Donald J. Trump 
@realDonaldTrump · 22h

Just signed a new Executive Order to LOWER DRUG PRICES! My Most Favored Nation order will ensure that our Country gets the same low price Big Pharma gives to other countries. The days of global freeriding at America’s expense are over...

Donald J. Trump 
@realDonaldTrump · Sep 13

But people don’t want to get mugged, beaten up, or killed. Let New York’s Finest (who proudly endorsed me!) do their job. Rehire crime squad and fired police. They will bring safety back to NYC, FAST!!!
Is @realDonaldTrump a designated public forum?

• DOJ argued President Trump’s Twitter account is not public property

• Blocked users claim Twitter account acts as a digital town hall meeting
Knight v. Trump: 2nd Circuit

Second Circuit: Oral Argument

Two Critical Questions:

1. Is the President’s Twitter account a public forum?
2. Is the blocking by President Trump official action?

Panel: Parker, Hall, Droney
DOJ Argument

• Conceded some tweets were official statements, but argued blocking was not state action

• Noted President Trump created the account before becoming president and will retain control of it after leaving office

• Claimed it is not a public forum; instead, it is an account that was opened as a platform for his own speech

• President Trump is not acting in his official capacity when he blocks users – blocking function is available to all users

• Blocking did not ban or burden anyone’s speech – work arounds available
Second Circuit’s Ruling

- Governmental control of the account subjects it to First Amendment forum analysis
- Account’s interactive features are open to the public
- Evidence of the public nature of the account is overwhelming
- Opening an instrumentality of communication for indiscriminate use by the general public creates a public forum ➔ viewpoint discrimination not allowed
- President’s initial tweets are government speech, but the case turns on his actions taken in the interactive space of the account, not his initial tweets
Judges further note...

- Of course, not every social media account operated by a public official is a government account...
- Factually nuanced
- Depends on how the account is used
- What features are made available
Key Second Circuit Holding

President Trump’s Twitter account is a public forum because:

1. It was opened as an “instrumentality of communication” for “indiscriminate use by the general public,”

2. Account was used to announce, describe, and defend official policies, and

3. Account’s interactive features are accessible to the public without limitation
**Knight v. Trump: SCOTUS**

- DOJ’s request for an *en banc* rehearing denied
- DOJ appeals case to SCOTUS
- Supreme Court will likely decide this fall whether to hear the case
Davison v. Randall – 4th Circuit

Davison v. Randall, 912 F.3d 666 (4th Cir. 2019)
First federal court of appeals to consider whether free-speech protections prevent public officials from barring critics from social media

Plaintiff:
Davison, outspoken Loudoun County resident

Defendant:
Randall, Chair of Loudoun County Board of Supervisors
Randall created the “Chair Phyllis J. Randall” Facebook page

- Chair’s Facebook page identified as “governmental official” page
- Chair used Facebook page to:
  - Notify and post about official duties and responsibilities
  - Advise about official action taken by Loudoun Board

*Davison v. Randall – 4th Circuit*
In response to a post on Chair’s Facebook page, Davison made comments about alleged unethical use of government funds.

- Randall deleted Davison’s comments
- Randall deleted her original post and any other comments on the original post
- Randall blocked but then reconsidered and unblocked Davison
Davison v. Randall – 4th Circuit

• Court **unanimously held** defendant could not delete or block critical comments from a constituent on the Facebook page that defendant uses to conduct government business.
  
  ✓ Official acted under color of state law when banning comment
  
  ✓ Official’s page had “‘power and prestige of h[er] state office’”
  
  ✓ Official made and used the page to conduct “*actual or apparent dut[ies] of h[er] office*”
Davison v. Randall – 4th Circuit

Court Found

- Interactive component of the Facebook page constituted a public forum
- Unconstitutional viewpoint discrimination when she banned Davison from forum

Court Rejected

- Argument that forum analysis does not apply because Facebook is privately owned
- Argument that the entire Facebook page was “government speech”
Open Questions

✓ Court did not determine whether the public forum at issue was a traditional, designated, or limited forum

✓ Concurring opinion notes:
  ❖ Supreme Court guidance is needed on which public officials have the ability to open a public forum on social media platforms
  ❖ Potential tensions between the policies of privately owned social media platforms and a government actor opening a public forum on those sites
Limited Public Forum

• Not a First Amendment violation when **off-topic comment removed** from Loudoun County Commonwealth’s Attorney Facebook page.

• **Social Media Comments Policy created limited public forum** open for purpose of moderated discussion on select topics.

Allegations:

• Plaintiff alleges Hunt County Sheriff Meeks and several Sheriff’s Office employees unconstitutionally removed her comments and blocked her from Hunt County Sheriff’s Office (“HCSO”) Facebook page.
Robinson described a dead law enforcement officer as a “terrorist pig with a shiny badge.”

HCSO deleted her comments & blocked her from its Facebook page.

Plaintiff alleged facts sufficient to sustain claim that removal of comments was unconstitutional viewpoint discrimination.

Whether removal of the posts would comply with Facebook’s policies did not bar the action.

On remanded to district court case settled and dismissed.
Garnier v. Poway – S.D. Cal.


• **Plaintiffs**  
  Parents of children attending school in the district. Frequently posted on school board members’ social media pages.

• **Defendants**  
  School board members that blocked Plaintiffs from their public Facebook and Twitter pages.
Garnier v. Poway – S.D. Cal.

- **Court** rejects Defendants’ request for summary judgment
  - Defendants acted under color of state law
  - Interactive portion of Facebook page is public forum
  - Category of forum created is designated public forum
  - Disputed facts as to whether deleting posts is content-based

- **Plaintiffs** blocked for criticizing board members
- **Defendants** blocked for posting repetitive, unrelated comments
Social media pages:
- “tools of governance”
- “swathed in the trappings of their office”

Defendants acted under color of state law

- Post board’s positions and policies
- Identify themselves by official titles
- Official school board email addresses
- Provide information about school board activities and other school board information
Defendants created a public forum

Not determinative that district did not “own” social media pages because social media pages:

• Controlled by board member as government officials

• Used to keep constituents updated on board events

• Opened for “indiscriminate use by the general public”
Court social media pages are designated public forum

- Any member of the public could access and post comments (unless they were blocked)
- Defendants did not identify restrictions limiting groups or categories of speech as needed to establish a limited public forum
- Disputed facts remain as to whether deleting Plaintiffs’ posts was an unconstitutional content-based action
- Bench trial set for September 2020
Faison, et. al. v. Sheriff Jones of Sacramento County
440 F.Supp.3d 1123 (Cal. E.D. 2020)

• ACLU files suit on behalf of two Black Lives Matter leaders.

• Alleging Sacramento Sherriff blocked them from his official Facebook page for making comments critical of the Sheriff.
Court grants Plaintiffs’ PI motion finding:

- Sheriff acting under color of state law in deleting posts and banning users;
- Interactive component of sheriff's social media page is a public forum;
- Sheriff engaged in unconstitutional viewpoint discrimination when deleting posts
- Deleted comments are not Government Speech
Sheriff wearing uniform in profile photo, banner photo shows squad car, uses his official title, posts about official business, asks supporters to get involved and oppose outside oversight, and claims in case arise from his role as sheriff.

Open to members of public at large for comments and exchanges. Fact that a few other users were banned does not diminish status as public forum.

Faison v. Jones – E.D. Cal.
Comments deleted and users banned for critical comments. Defendant offers no alternative explanation.

Sherriff’s posts may qualify as Government Speech exempt from First Amendment scrutiny, but Plaintiffs’ comments do not.

After PI ruling, case settles, dismissed July 17, 2020
Alexandria Ocasio-Cortez (AOC) • Aug 29, 2019

1. I have 5.2 million followers. Less than 20 accounts are blocked for ongoing harassment. 0 are my constituents.

2. Harassment is not a viewpoint. Some accounts, like the Daily Caller, posted fake nude photos of me & abused my comments to spread it. No one is entitled to abuse.

5.4K 14.7K 116.4K

Alexandria Ocasio-Cortez (AOC) • Aug 29, 2019

US House candidate, NY-14

People are free to speak whatever classist, racist, false, misogynistic, bigoted comments they’d like.

They do not have the right to force others to endure their harassment and abuse. 🙅‍♀️
Case No. 1:19-CV-03956 (E.D.N.Y. 2019)

• Plaintiff, former New York State Assemblyman, blocked from @AOC Twitter account

• Case settles, AOC says Plaintiff’s posts not harassing, unblocks him

• AOC continues to block several conservative activists and right-wing groups
1. **Identify the social media platforms**
   (e.g., Facebook, Twitter, Snapchat, Instagram, etc.)
   a. Recognize that personal accounts might remain personal or might be changed to a public forum, depending on their use.
   b. For each platform, will the forum be truly public? Or will it be a limited public forum, or government speech?
   c. Evaluate the purpose of each platform – which ones will be recognized as part of the agency’s limited public forum?
2. Establish rules for public participation
   a. Include warning that violation of rules could result in removal of comments.
   b. Set out retention period for comments.
   c. Provide a procedure for contesting restrictions based on violations
      - require timely response
      - provide email address for challenge to decision
   d. Add disclaimers.
3. Identify person(s) who may post on behalf of the public entity on official social media sites

   a. Ensure the employee has knowledge about all aspects of the public entity, or knows who to contact to get information.

   b. Allow adequate time/resources for the employee to devote to the social media platforms.

   c. Provide training so the employee knows how to use the platforms and what social media policies apply, and understands legal considerations.
4. For officials using personal accounts for public business
   a. Learn requirements for following the agency’s policy.
   b. Identify employees subject to the policy. Who might be “official actors” or “acting under color of state law” for § 1983 liability?
   c. Factors to consider:
      • Can disciplinary action be imposed on employees for violating the policy?
      • Will defense/immunity be triggered when elected officials do not use their personal platforms in accordance with the policy?
Final Thoughts:

• Is the social media page necessary?
• Consider subject matter based restrictions
• Uniformly enforce
• Tolerate criticism
• Review before deleting or banning
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