

SECOND CIRCUIT REVIEW

Expert Analysis

First Amendment Forum Analysis In the Digital Era

In *Knight First Amendment Institute v. Trump*, 928 F.3d 226 (2d Cir. 2019), the U.S. Court of Appeals for the Second Circuit considered whether President Trump violated the First Amendment when he blocked certain Twitter users from accessing and interacting with the President Donald J. Trump Twitter account (@realDonaldTrump) because he disliked their critical responses to his tweets. In a unanimous opinion, written by U.S. Circuit Judge Barrington D. Parker, and joined by Circuit Judges Peter W. Hall and Christopher F. Droney, the Second Circuit affirmed the district court's grant of summary judgment in favor of plaintiffs based on stipulated facts. In a narrow opinion, the Second Circuit held that President Trump uses his Twitter account in an official capacity to interact with the public, that the



By
**Martin
Flumenbaum**



And
**Brad S.
Karp**

interactive features associated with the President's account (e.g., replies, likes, and retweets) constitute a designated public forum and, therefore, that President Trump violated the First Amendment when he excluded certain Twitter users from that forum because he disliked the content of their views. Against the backdrop of rising use of social media by both public officials and private citizens, as well as an increased interest in the regulation of social media, the Second Circuit's application of forum analysis to the President's Twitter account represents a notable and important extension of First Amendment law in the digital era.

Prior Decisions Applying First Amendment to Social Media

In three recent decisions, the federal appellate courts have begun

wading into First Amendment issues posed by the rise of social media. First, in *Packingham v. North Carolina*, the Supreme Court reviewed whether a state violated the First Amendment when it made it a felony for a convicted sex offender to use social media websites that permit minors to create accounts. 137 S. Ct. 1730 (2017). The court concluded that such a law infringes the Constitution's guarantee of freedom of speech, because it restricts access altogether to what the court described as "the modern public square." The court's opinion noted that the First Amendment protects everyone's "access to places where they can speak and listen," and that today "social media in particular" provide important forums for the exchange of views. *Id.* at 1735. Next, in *Davison v. Randall*, the Fourth Circuit ruled that a local public official who used a Facebook page to interact and communicate with her constituents acted in a governmental capacity when banning a constituent from the page. 912 F.3d 666 (4th Cir. 2019). Finally, in *Robinson v. Hunt County*, the Fifth Circuit held that a government

MARTIN FLUMENBAUM and BRAD S. KARP are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison, specializing in complex commercial and white-collar defense litigation. Brad is the Chairman of Paul, Weiss. NICOLAS M. KABAT, a litigation associate at the firm, assisted in the preparation of this column.

official practiced unconstitutional viewpoint discrimination when he banned a constituent from an official government Facebook page. 921 F.3d 440 (5th Cir. 2019).

Twitter as a Public Square

Twitter is a social media website that enables users to share messages of limited length with the public. After registering with Twitter and accepting its terms of service, a Twitter user creates an account and may start posting (“tweeting”) her own messages (“tweets”). All of a user’s tweets will appear on the user’s “timeline,” which acts as a repository of the user’s past posts.

In addition to tweeting, users may reply to the tweets of other users, republish the posts of other users (retweeting), or communicate approval of another user’s post by “liking” the message. Once a user replies to another user’s tweet, a “comment thread” appears below the original tweet. These features comprise the interactive experience that makes Twitter a social media website.

Twitter users can also block one another. Blocking another user prevents that user from seeing the blocker’s timeline or any of the blocker’s tweets. The blocked user also cannot reply, retweet, or like any of the blocker’s tweets. Conversely, the blocker will not see the blocked user’s tweets and will not receive an alert if the blocked user mentions the blocker in a tweet. All of these features are a standard part of Twitter’s service and no user can maintain a modified account.

Prior Proceedings in ‘Knight’

The parties agreed at the district court to a set of stipulated facts, as summarized below.

Since his inauguration as President, Donald Trump has used his personal Twitter account (@realDonaldTrump) as a platform for broadcasting his official views and as a forum for interacting with the public. The President and members of the President’s staff have consistently described the President’s tweets as “official statements by the President of the United States” and used the tweets as illustrations of the President’s official policy. The President also has used the

The Second Circuit’s application of forum analysis to the President’s Twitter account represents a notable and important extension of First Amendment law in the digital era.

account to take official actions only a President can take, including nominating Christopher Wray as FBI Director and announcing the Administration’s transgender military ban. As a result, the National Archives, the agency designated to maintain government records, has concluded that the President’s tweets are “official records that must be preserved under the Presidential Records Act.”

In May and June 2017, the individual plaintiffs were blocked by the President’s account. Each had

posted a reply to one of the President’s tweets that criticized the President or his policies. And the President conceded that he blocked them because of their criticisms. As a result of being blocked, the individual users could not access the President’s tweets, directly reply to his tweets, like or retweet his tweets, or access the comment thread associated with each of the President’s tweets. They claimed the potential workarounds—such as creating a new account or viewing the President’s tweets without being signed-in—were burdensome.

In July 2017, the individual plaintiffs and the Knight Institute, a non-profit organization that focuses on the protection of First Amendment rights and which operates a Twitter account, filed suit against President Trump and three members of his staff. In late 2017, the parties cross-moved for summary judgment. On the stipulated facts, the district court concluded that the President and his staff “exert[ed] government control over” the interactive space associated with each of the President’s tweets and that this interactive space “constituted a public forum” in which viewpoint discrimination was unlawful. In accordance with its rulings, the court issued a declaration holding that the President’s blocking of individual accounts “because of their express political views” violated the First Amendment.

The Second Circuit Opinion

On appeal, the President’s main argument was that he used Twitter

in a personal and private capacity. The Second Circuit summarily disagreed, joining the Fourth Circuit in *Davison* in holding that a public official may use a social media account in an official capacity. The court noted, first, that the government's "temporary control" over the President's account "is not determinative" of whether the government exercises sufficient control over the property to make it a forum under the First Amendment. *Knight First Amendment Institute*, 928 F.3d at 235. The court next rejected the notion that the President used his account in a private nature. The court noted, among other things, that the President and his staff routinely present the Twitter account as "official" and "MODERN DAY PRESIDENTIAL"; that the President conducts official business from the account; that the President's tweets constituted "official records" under the Presidential Records Act; that the President uses the account to "engage with foreign leaders"; and that he uses "likes," "retweets," and "replies" to interact with and understand the public. The court concluded that such facts represented "overwhelming" evidence of the account's "public, non-private nature." *Id.* at 235-36. Finally, the court rejected the President's argument that because any Twitter user can use the blocking function, the President did not act in an official capacity when blocking other users. The account, the court concluded, was "government-controlled property." *Id.*

The President also argued that his account is not a public forum

and, even if it were, blocking "did not ban or burden anyone's speech." The Second Circuit rejected these arguments as well, joining the Fifth Circuit in *Robinson* in holding that blocking a social media user constituted a burden on free speech. The court determined that, by using his account "as an official vehicle for governance" and making publicly accessible replies to and views of his comments, the President had created a public forum. Moreover, by blocking plaintiffs, the court con-

The Second Circuit's ruling in 'Knight First Amendment Institute' establishes important, new guidance for how government officials may interact with the public in the social media era and expands First Amendment liability for public officials.

cluded, the President limited their ability to view, like, reply directly to, or retweet the President's tweets, and thereby fully participate in the robust conversation that followed the President's tweets. Plaintiffs were therefore censored, even if they could still employ various "work-arounds." *Id.* at 237-38. And this censorship, as the President conceded, was because of their disfavored speech. The court concluded that the President had engaged in prohibited "viewpoint discrimination" in a public forum. *Id.* at 239.

The final argument rejected by the court was that President Trump's Twitter account, as a government-

controlled account, comprises "government speech." It was undisputed, the court noted, that President Trump's tweets themselves were government speech. The crux of the issue in the case, however, was the President's supervision of the interactive space associated with his initial tweets. And the retweets, replies, and likes of *other* users in that interactive space, the court concluded, do not constitute government speech "under any formulation." *Id.*

Conclusion

The Second Circuit's ruling in *Knight First Amendment Institute* establishes important, new guidance for how government officials may interact with the public in the social media era and expands First Amendment liability for public officials. But, as the court notes at the end of the decision, we live in an era where the public's conversation about the administration of government is perhaps unrivaled in its diversity of views, intensity of disagreement, and breadth of subjects. The court's decision hopefully will protect that robust civil discourse by encouraging greater speech.