SECOND CIRCUIT

Second Circuit Decides Constitutional Significance of 'Blocking' on Twitter in Trump Case

By Mark A. Cuthbertson and Matthew DeLuca

Viewed by many as different and a disruptor, President Trump seems more like a run-of-the-mill politician in his distaste for criticism on Twitter. His actions to block critics on Twitter are at the heart of the Second Circuit's recent decision in *Knight First Amendment Institute, et al v. Donald J. Trump, et al,* _F.3d_ (2d Cir. 2019), which ultimately held that President Trump engaged in illegal viewpoint discrimination by blocking Twitter users' access to his social media account. While the President, it noted, "is certainly not required to listen [to critics], once he opens up the interactive features of his account to the public at large, he is not entitled to censor selected users because they express views with which he disagrees."

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In reaching its decision, the Second Circuit provided the following helpful primer on Twitter and its interactive features:

Twitter is a social media platform that allows its users to electronically send messages of limited length to the public. After creating an account, a user can post their own messages on the platform (referred to as tweeting). Users may also respond to the messages of others (replying), republish the messages of others (retweeting), or convey approval or acknowledgment of another's message by "liking" the message . . . When one user replies to another user's tweet, a "comment thread" is created. When viewing a tweet, this comment thread appears below the original tweet and includes both the first-level replies (replies to the original tweet) and second-level replies (replies to the first-level replies). The comment threads "reflect multiple overlapping 'conversations' among and across groups of users" and are a "large part" of what makes Twitter a "'social' media platform" . . . Twitter users can also "follow" one another. If User A follows User B, then all of User B's tweets appear in User A's "feed" . . . Conversely, User A can "block" User B. This prevents User B from seeing User A's timeline or any of User A's tweets. User B, if blocked by User A, is unable to reply to, retweet, or like any of User A's tweets. Similarly, User A will not see any of User B's tweets and will not be notified if User B mentions User A.

While the court noted there were various "workarounds" that would allow each of the individual plaintiffs to engage with President Trump's account after being blocked, it was stipulated by the parties that as a consequence of having been blocked the individual plaintiffs were burdened in their ability to view or directly reply to the President's tweets and to par-

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ticipate in the comment threads associated therewith.

Ultimately, the Second Circuit affirmed the District Court's decision, which found that the "interactive space" associated with each tweet constituted a public forum "in which other users may directly interact with the content of the tweets by . . . replying to retweeting or liking the tweet." *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018). By blocking the individual plaintiffs because of their expressed political views in those replies, it concluded that President Trump had engaged in viewpoint discrimination.

In affirming that decision the Second Circuit considered and rejected President Trump's four main arguments: (1) that when he blocked the individual plaintiffs, he was exercising control over a private, personal account; (2) that the act of blocking was not state action; (3) that even if the account was a public forum, blocking does not prevent the individual plaintiffs from accessing the forum; and (4) that the President's posts on Twitter are government speech to which the First Amendment does not apply.

In addressing the first argument, the court explained that the government's contention that the President's use of the account is private "founders in the face of the uncontested evidence in the record of substantial and pervasive government involvement with and control over the account." Finding the evidence of the official nature of the President's Twitter account to be "overwhelming," it examined how the President has consistently used the account as an important tool of governance and outreach since he took office. The court noted that the page is presented as "belonging to, and operated by, the President," and his tweets are preserved as "official records" by the National Archives under the Presidential Records Acts. It also noted the official action he has taken through Twitter, such as announcing policy initiatives and terminating his chief of staff.

On the second argument, whether a state action was involved, the court concluded that "because the President . . . acts in an official capacity when he tweets, we conclude that he acts in the same capacity when he blocks those who disagree with him." As such, it found that blocking the individual plaintiffs constituted state action for First Amendment purposes.

In addressing the President's third argument, the court explained that once it is established that the President is a government actor with respect to the use of his Twitter account, viewpoint discrimination violates the First Amendment. It also wrote that a public forum had been created when the account "was intentionally opened for public discussion when the President, upon assuming office, repeatedly used the Account as an official vehicle for governance and made its interactive features accessible to the public without limitation." In arriving at this conclusion, the court focused on the speech aspects of Twitter's various features noting that "[r]eplying, retweeting and liking are all expressive conduct that blocking inhibits" and "replying and retweeting are messages that a user broadcasts and, as such are undeniably speech."

The court also held that the available "workarounds" to being blocked burdened the individual plaintiff's speech. As content-based burdens are subject to the same scrutiny as content-based bans, this was sufficient for First Amendment violation. Ultimately, the court concluded that "when the government has discriminated against a speaker based on the speaker's viewpoint, the ability to engage in other speech does not cure that constitutional shortcoming."

Finally, the court rejected the claim that the President's account was government speech. The court explained that while the President's initial tweets are government speech, and thus not required to be viewpoint neutral, "the retweets, replies, and likes of other users in response to his tweets are not government speech under any formulation."

The Second Circuit's decision is in keeping with the weight of authority from the other courts that have considered these issues. Leading among those cases is the Fourth Circuit's decision in *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019), which held that when a government official banned a constituent from an official Facebook Page it constituted unconstitutional viewpoint discrimination in connection with a public forum. Also in line with that decision is the Fifth Circuit's decision in *Robinson v. Hunt Cty., Texas*, 921 F.3d 440 (5th Cir. 2015) and a lower court case from Maine, *Leuthy v. LePage* 2018 WL4134638, (D.C. Maine, 2018). The only outlier from this trend is a lower court case from Kentucky, *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018), which was a decision on a motion for a preliminary injunction that rejected the notion that social media was subject to forum analysis and held that a governor's social media posts were government speech.

In the end, few, if any, public officials enjoy being criticized on social media (or for that matter in any forum). However, such criticism is a part of having a robust and healthy debate in our democracy, which the Second Circuit highlighted when it concluded its opinion by stating that "if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less."

The District Court, in a footnote to its decision, made the interesting suggestion that another function available on Twitter, "muting," might have been a means to settle the case. It stated that if President Trump unblocked those who he had been blocked and instead muted them that this would have passed constitutional muster. "Muting" is a Twitter function that would restore the individual plaintiffs' ability to interact directly with (including by replying directly to) tweets from the @realDonaldTrump account while preserving the President's ability to ignore tweets sent by users from whom he does not wish to hear. While the parties did not settle based on this suggestion, it is an approach that a more thin-skinned public official might consider. By "muting" someone on Twitter, a public official will no longer see critical comments but the rest of the world will. They can thereby do what they are entitled to do under the First Amendment, ignore their critics, but still avoid unconstitutional censorship by allowing their critics to use their Twitter account as a forum in which to speak.

Ultimately, the issue of "blocking" on Twitter seems to be subject to a pretty straightforward constitutional analysis. However, stay tuned. As the Second Circuit noted, its decision did not address whether an elected official violates the Constitution by excluding persons from wholly private social media accounts or whether private social media companies are bound by the First Amendment when policing their platforms. As was noted in a concurrence in the Fourth Circuit decision in *Davison*, those and other more nuanced issues are likely to arise in the near future.

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