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INSIGHT: Government Attorneys—Tell Your Clients They Can't Censor People on Social Media

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The Second Circuit was correct in ruling President Trump violated the First Amendment when he blocked critics and opponents from his Twitter account, according to Ballard Spahr First Amendment attorneys. Those advising public officials would be wise to counsel them to heed the decision and others that came before it.

The Second Circuit recently affirmed a district court's ruling that President Trump violated the First Amendment when he blocked critics and opponents from his Twitter account.

In *Knight First Amendment Institute at Columbia University v. Trump*, 928 F.3d 226 (2d Cir. July 9, 2019), the U.S. Court of Appeals for the Second Circuit joined the Fourth Circuit in holding that the interactive space of a public official's social media account—the place where the official and others "speak" to each other—is subject to First Amendment strictures.

The opinion is the latest in a fast-growing consensus among federal courts. At least seven other courts have reached the same conclusion regarding government officials' social media pages. Only one has ruled to the contrary.

So why has the Second Circuit's decision prompted handwringing by some?

Harvard Law Professor Noah Feldman has decried the decision as having "serious negative implications for the freedom of speech." According to Feldman, the court has wrongly determined that the social media pages are public fora. They are not truly public spaces, he argues, because they are subject to the content regulations of the social media companies.

Feldman worries that government officials will be able to limit free speech if they can "piggyback on the social media platforms' content rules—which would be unconstitutional if the government itself adopted them."

THE SECOND CIRCUIT GOT IT RIGHT

Here's why the Second Circuit got it right, and why attorneys advising public officials would be wise to counsel them to heed the decision (and similar decisions by the vast majority of courts that have addressed the issue).

1. The fact that social media platforms have their own content moderation policies is irrelevant. The First Amendment is violated when the government censors speech, not when private parties do. In these cases, it is the government official who is responsible for blocking users' speech, not the social media platform on which the official operates his or her account.

Feldman's doctrinal concern about government officials end-running the First Amendment by holding public conversations in social media fora with content moderation policies is overwrought. Indeed, much of what is in these policies would survive constitutional scrutiny if the government were to impose them.

Feldman conflates viewpoint discrimination, which the government is always prohibited from doing in public forums, with content regulation, which the government may do to varying degrees depending on the particular type of forum involved. For example, the government may dedicate a town hall meeting to a particular subject, such as the topic of gun control. What the government cannot do is censor the discussion based on viewpoint within that subject, e.g., limit the discussion to pro-gun control points of view.

The fact that social media companies can independently impose such regulations within the context of an otherwise public forum the government has established on their platforms does not bring these cases so far outside the ambit of established public forum jurisprudence that the Supreme Court "is going to have to fix it" as Feldman suggests.

First, it's still up to the social media companies to decide to enforce their policies in any particular instance, and there is no evidence the government would hold any sway in that decision-making. More importantly, the point of the Supreme Court's public forum jurisprudence is that the government is prohibited from engaging in viewpoint discrimination in town hall-type contexts. Its application and prohibition of the challenged conduct makes sense here, just as it would were the government to rent a private space for a "town hall" meeting on gun control knowing that the space's owner would not allow any gun owners to enter the hall.

Non-viewpoint based restrictions imposed by the private space's owner (for example, that anyone spouting "fighting words," threats, or racial epithets would be asked to leave the town hall) are similar to the kinds of restrictions the social media companies have and are far less troubling.

At bottom, it seems unlikely that the Supreme Court will either force government to create public forums exclusively in spaces where third parties cannot impose their own modest, nonpartisan content regulations, or, conversely, permit government itself to discriminate based on viewpoint in social media spaces just because the platforms' owners theoretically can.

2. The government speech doctrine is inapplicable. Only a single court, the Eastern District of Kentucky (*Morgan v. Bevin*), has ruled that an official's entire social media page—including the interactive space where third parties are talking to each other and to the government official—is "government speech" to which the First Amendment does not apply. Every other court to consider this argument has, correctly, rejected it out of hand.

3. Qualified immunity either doesn't exist or will evaporate quickly. Government officials have immunity from damages claims where it was not, at the time they acted, "clearly established" that their actions were unconstitutional. But the question for a court to decide when an official claims qualified immunity in this context is not the narrow one of whether it was clearly established that the official could block people on social media based on viewpoint.

It is, instead, whether government officials can engage in viewpoint discrimination in a space to which they have invited the public at large to speak. The answer to that question is an unequivocal "no." It has been clearly established, nationwide, for a long time. Yet, even on the narrower question, viability of the argument that the law is not clearly established is weakening in light of the Second and Fourth Circuits' decisions and the other court decisions.

4. Unblocking the plaintiff does not moot the case. Courts have rejected arguments by public officials that they have mooted a case by unblocking the plaintiff after the complaint has been filed. That's because under the voluntary cessation doctrine, the official "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."

For all these reasons, government attorneys should advise their clients that the Second Circuit's recent ruling is correctly decided and, notwithstanding its limited geographic reach as binding precedent, accurately states the law of the land.

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The authors of this article, in conjunction with Mack Wilding of Ballard Spahr, and Mark Silverstein and Sara R. Neel of the ACLU Foundation of Colorado, are currently litigating a case against Colorado State Sen. Ray Scott (R) in which one of his constituents alleges he blocked and banned her and others from his official social media accounts based on their viewpoints. The lawsuit, Landman v. Scott, No. 1:19-cv-01367 (D. Colo. filed May 13, 2019), remains pending.