KTJ

KLEIN, THORPE & JENKINS, LTD.
Attorneys at Law

July 24, 2019

LEGAL ALERT

Limits on "Censoring" Access to Twitter or Social Media Platforms Used For Public Business

The federal 2nd Circuit Court of Appeals has concluded that once an elected official determines to use a social media platform as a channel for communicating and interacting with the public about government business, the official may have created a public forum limiting the ability of the official to manage or regulate the account. As such, the Court found that the government or official cannot then censure or block certain users based upon their opinions or the content of their messages. *Knight First Amendment Institute, et al v. Donald J. Trump, Sara Huckabee Sanders, et al,* No.18-1691 cv (2nd Cir. 2019). In *Knight*, the federal appellate court involved provided further guidance on the proper use and need for an understanding of the legal doctrines which may apply to the use of certain social media tools by public and elected officials.

A more detailed summary of the 2nd Circuit Court of Appeals' decision in *Knight First Amendment Institute, et al v. Donald J. Trump, Sara Huckabee Sanders, et al,* No.18-1691 cv (2nd Cir. 2019) is set forth in this legal alert.

A copy of the full decision of the 2nd Circuit Court of Appeals' decision in *Knight First Amendment Institute, et al v. Donald J. Trump, Sara Huckabee Sanders, et al,* No.18-1691 cv (2nd Cir. 2019) is available at:

Knight First Amendment Institute, et al v. Donald J. Trump, Sara Huckabee Sanders, et al

[1] In this case, Twitter was used by President Trump for the dissemination of government information, decision making, policy, opinion, while allowing for public feedback and comment.

For any questions or comments you might have regarding this newsletter, please feel free to contact:

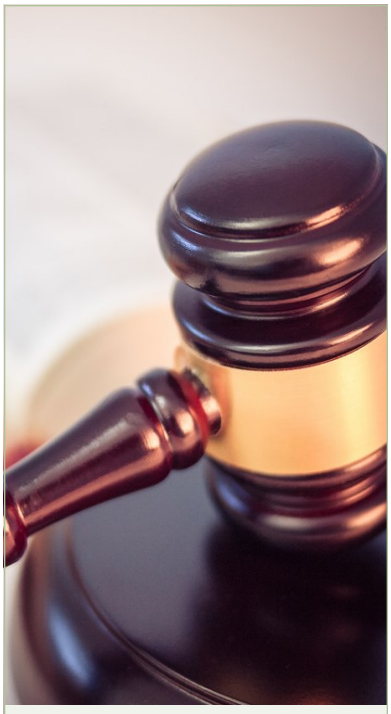
Authored By:

Name: Scott F. Uhler

Email: sfuhler@ktjlaw.com

Phone: (312) 984-6421

Inside This Issue



SOCIAL MEDIA PLATFORMS UNDER GOVERNMENT CONTROL CAN BECOME "PUBLIC FORUMS" SUBJECT TO 1ST AMENDMENT PROTECTIONS

Following a legal challenge to the decision of President Trump to block certain users from his Twitter account due to his disagreement with their views and opinions, the Federal Appellate Court for the 2nd Circuit Court of Appeals has clarified certain of the rules which apply to the lawful use of such an electronic platform by the government.

Relevant Criteria – Establishing a Public Forum

The decision of the Court in this instance makes certain aspects of the use of social media by local governments potentially more important, such as:

- how the public body or a public official describes and uses the social media account;
- to whom features of the account are made available; and
- how others, including government officials and agencies, regard and treat the account.

The federal 2nd Circuit Court of Appeals has affirmed the prior decision of a federal district court which held that President Trump violated the First Amendment by selectively blocking users on his public Twitter account. *Knight First Amendment Institute, et al v. Donald J. Trump, Sara Huckabee Sanders, et al,* No.18-1691 cv (2nd Cir. 2019) The prior decision of the federal district court was that the "interactive space" associated with the President's tweets served to create a public forum under the First Amendment due to the open interactions in using the forum for direct, public communication. The Court found that based on its public nature and use, that social media platform was controlled by the government and operated as an official, government medium as opposed to a personal account. The Court noted that the information disseminated on the Twitter account by the President were for messages and actions that can only be taken by the President in his official capacity.

Twitter "Blocking" Option Not Lawful With a Public Forum

The issue in dispute was the President's use of Twitter's option to block users by selecting and limiting the public access of certain users to his Twitter messages and feedback. The Court noted the President uses the Account frequently "to announce, describe, and defend his policies; to promote his Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; [and] to challenge media organizations whose coverage of his Administration he believes to be unfair."

Due to the President's disagreement with the views and opinions of certain members of the public accessing and expressing themselves on his Twitter feed, the President chose to block those persons from his account. The government acknowledged that each of them was

blocked after posting replies in which they criticized the President or his policies and that they were blocked as a result of their criticism. The government also confirmed that because these persons were blocked they were unable to view the President's tweets, to directly reply to those tweets, or to use the @realDonaldTrump webpage to view the comment threads associated with the President's tweets.

Several of those persons and entities that the President blocked sued contending that the President's use of his Twitter account is an extension of the government and the office of the President. To selectively block certain person's access to the account based upon the content of their messages, would constitute unconstitutional viewpoint discrimination.

The Department of Justice, on behalf of the President, argued that while the President does send messages on Twitter in his official capacity as an elected government representative, that when he blocks anyone, he does so as a personal matter. The Court dismissed such an argument, finding that the President and his advisors had created a public forum in the interactive space of his Twitter account. By blocking these select individuals due to disagreement with their expressed political views, the government was guilty of unconstitutional viewpoint discrimination.

The 2nd Circuit Court of Appeals reviewed the practice of a public official selectively determining who would be allowed access to participate and communicate on their official "government" social media platform, essentially "censoring" messages that the public official preferred not to allow or read. The Court stated that "the First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise open online dialogue because they expressed views with which the official disagrees."

The Court concluded that the White House created a public forum in the interactive space of the Twitter account and that by blocking certain persons based on their political views, the government unlawfully engaged in viewpoint discrimination.

Personal Account Can Become a "Government" Account

The President argued that his Twitter account is exclusively a vehicle for his own speech to which the individuals he chose to block have no right of access and to which the First Amendment does not apply. The Court also noted that the fact that Trump personally used this Twitter account before he assumed office in 2016 and that the government doesn't "own" the Twitter account in the traditional sense is "not determinative of whether the property is, in fact, sufficiently controlled by the government to make it a forum for First Amendment purposes." What was determinative for the Court was the actions of the President in the use of a platform by opening it up as an interactive space to millions of users and participants. Once creating such a public forum, the government (including the President) cannot selectively exclude those views that the government disagrees with. The Court concluded that when a public official uses a social media account open to the public as an official account to conduct official government business and account is open to the public with interactive communications a central feature, the account is not private. The Court was also emphasized that these communications became "presidential records" subject to specific maintenance and preservation requirements under

the law. The Court found the President's tweets are official records that must be preserved under the Presidential Records Act.

Not All Use of Social Media by Public Officials Becomes a Government Account

The Court was careful to note that it was not making any determinations about whether an elected official violates the Constitution by excluding persons from a wholly private social media account nor whether private social media companies are bound by the First Amendment when policing their platforms. Further, the Federal Appeals Court noted it was not concluding that every social media account operated by a public official is necessarily a government account:

> "Whether First Amendment concerns are triggered when a public official uses his account in ways that differ from those presented on this appeal will in most instances be a fact-specific inquiry. The outcome of that inquiry will be informed by how the official describes and uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account."

Knight First Amendment Institute, et al v. Donald J. Trump, Sara Huckabee Sanders, et al, No.18-1691 cv (2nd Cir. 2019)

For any questions or comments you might have regarding this newsletter, please feel free to contact:

Chicago Office

20 N. Wacker Drive, Ste. 1660
Chicago, IL 60606

T: (312) 984-6400

F: (312) 984-6444

Orland Park Office

15010 S. Ravinia Ave., Ste 10
Orland Park, IL 60462

T: (708) 349-3888

F: (708) 349-1506

Streator Office

7 Northpoint Drive
Streator, Illinois 61364

T: (815) 672-3116

F: (815) 672-0738

www.ktjlaw.com

KTJ
KLEIN, THORPE & JENKINS, LTD.
Attorneys at Law