AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Freedom of Speech

**Trump v. Knight First Amendment Institute, No. 18-1691-cv (2nd Cir. 2019)**

*President Donald Trump uses Twitter. Twitter is a social media platform that allows the posting of short messages. Twitter aggregates an individual account’s messages in a timeline, and other users have the ability to post replies to individual messages. It is also possible to block an account so that the blocked account cannot see or respond to the messages of the blocking account. Donald Trump routinely blocks other users on Twitter.*

*The Knight First Amendment Institute operates a Twitter account that follows the president, and while not blocked itself the staff of the Institute express a desire to see the (hypothetical) replies of those who have been blocked by the president. The Knight Institute joined with a group of individuals who had been blocked by the president in a suit filed in federal district court seeking an injunction preventing the president from blocking users on Twitter on the grounds that they had a First Amendment right not to be blocked by a government official’s official Twitter account. The trial court determined that the ability to post replies directly to a government official’s tweet was a designated public forum, and that the government could not block individuals from that forum simply because the government disapproved of their message. The court granted the petitioners declaratory relief, but refrained from issuing an injunction to the president.*

*The president appealed to the federal circuit court, which affirmed the ruling of the trial court.*

Judge [PARKER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I215b0bc634f411e9bc5c825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I215b0bc634f411e9bc5c825c4b9add2e).

. . . .

The President concedes that he blocked the Individual Plaintiffs because they posted tweets that criticized him or his policies. He also concedes that such criticism is protected speech. The issue then for this Court to resolve is whether, in blocking the Individual Plaintiffs from the interactive features of the Account, the President acted in a governmental capacity or as a private citizen.

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The government’s contention that the President’s use of the Account during his presidency 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. First, the Account is presented by the President and the White House staff as belonging to, and operated by, the President. . . .

Second, since becoming President he has used the Account on almost a daily basis “as a channel for communicating and interacting with the public about his administration.” The President utilizes White House staff to post tweets and to maintain the Account. He uses the Account to announce “matters related to official government business,” including high‐level White House and cabinet‐1 level staff changes as well as changes to major national policies. He uses the Account to engage with foreign leaders and to announce foreign policy decisions and initiatives. . . .

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. . . . Here, a public official and his subordinates hold out and use a social media account open to the public as an official account for conducting official business. That account has interactive features open to the public, making public interaction a prominent feature of the account. These factors mean that the account is not private. *Rosenberger v. Rector & Visitors of University of Virginia* (1995). . . . Accordingly, the President excluded the Individual Plaintiffs from government‐controlled property when he used the blocking function of the Account to exclude disfavored voices.

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Once it is established that the President is a government actor with respect to his use of the Account, viewpoint discrimination violates the First Amendment. *Manhattan Community Access Corp. et al. v. Halleck et al.* (2019). . . .

. . . . 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. We hold that this conduct created a public forum.

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. . . . The government is correct that the Individual Plaintiffs have no right to require the President to listen to their speech. *Minnesota State Bd. For Cmty. Colleges v. Knight* (1984). However, the speech restrictions at issue burden the Individual Plaintiffs’ ability to converse on Twitter with others who may be speaking to or about the President.7 President Trump is only one of thousands of recipients of the messages the Individual Plaintiffs seek to communicate. While he is certainly not required to listen, 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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It is clear that if President Trump were engaging in government speech when he blocked the Individual Plaintiffs, he would not have been violating the First Amendment. Everyone concedes that the President’s initial tweets (meaning those that he produces himself) are government speech. But this case does not turn on the President’s initial 1 tweets; it turns on his supervision of the interactive features of the Account. . . .

Considering the interactive features, the speech in question is that of multiple individuals, not just the President or that of the government. When a Twitter user posts a reply to one of the President’s tweets, the message is identified as coming from that user, not from the President. . . . Accordingly, while the President’s tweets can accurately be described as government speech, the retweets, replies, and likes of other users in response to his tweets are not government speech under any formulation. . . .

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*Affirmed*.