AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

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

**Knight First Amendment Institute v. Trump, 17 Civ. 5205** (S.D.NY. 2018)

*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 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.*

JUDGE BUCHWALD.

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. . . . As a threshold matter, for a space to be susceptible to forum analysis, it must be owned or controlled by the government. *Cornelius v. NAACP Defense Fund* (1985). Further, the application of forum doctrine must be consistent with the purpose, structure, and intended use of the space.

The Supreme Court has instructed that in determining whether these requirements are satisfied (i.e., whether forum analysis can be appropriately applied), we should identify the putative forum by "focus[ing] on the access sought by the speaker." . . .

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Here, the government-control prong of the analysis is met. Though Twitter is a private (though publicly traded) company that is not government-owned, the President and [White House Director of Social Media Dan] Scavino nonetheless exercise control over various aspects of the @realDonaldTrump account: they control the content of the tweets that are sent from the account and they hold the ability to prevent, through blocking, other Twitter users, including the individual plaintiffs here, from accessing the @realDonaldTrump timeline (while logged into the blocked account) and from participating in the interactive space associated with the tweets sent by the @realDonaldTrump account. . . .

. . . . [T]he President presents the @realDonaldTrump account as being a presidential account as opposed to a personal account and, more importantly, uses the account to take actions that can be taken only by the President as President. Accordingly, we conclude that the control that the President and Scavino exercise over the account and certain of its features is governmental in nature.

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. . . . While the President and Scavino can control the interactive space by limiting who may directly reply or retweet a tweet initially sent by the @realDonaldTrump account, they lack comparable control over the subsequent dialogue in the comment thread. As plaintiffs acknowledge, even the individual plaintiffs who have been blocked "can view replies to @realDonaldTrump tweets, and can post replies to those replies, while logged in to the blocked accounts," and that these "[r]eplies-to-replies appear in the comment threads that originate with @realDonaldTrump tweets." Because a Twitter user lacks control over the comment thread beyond the control exercised over first-order replies through blocking, the comment threads -- as distinguished from the content of tweets sent by @realDonaldTrump, the @realDonaldTrump timeline, and the interactive space associated with each tweet -- do not meet the threshold criterion for being a forum.

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Government speech is one category of speech that falls outside the domain of forum analysis: when the government "is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc*. (2015). "The Free Speech Clause restricts [only] government regulation of private speech; it does not regulate government speech."

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In assessing whether speech constitutes government speech as opposed to private speech, the Supreme Court has considered at least three factors: whether government has historically used the speech in question "to convey state messages," whether that speech is "often closely identified in the public mind" with the government, and the extent to which government "maintain[s] direct control over the messages conveyed." . . .

Based on the government speech doctrine, we reject out of hand any contention that the content of the President's tweets are susceptible to forum analysis. It is not so susceptible because the content is government speech: the record establishes that the President, sometimes "[w]ith the assistance of Mr. Scavino," uses the content of his tweets "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; to challenge media organizations whose coverage of his Administration he believes to be unfair; and for other statements, including on occasion statements unrelated to official government business." . . .

The same cannot be said, however, of the interactive space for replies and retweets created by each tweet sent by the @realDonaldTrump account. At minimum, as to replies, they are most directly associated with the replying user rather than the sender of the tweet being replied to: a reply tweet appears with the picture, name, and handle of the replying user, and appears most prominently in the timeline of the replying user. . . .

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Ultimately, the delineation of a tweet's interactive space as the putative forum is consistent with the Supreme Court's directive to "focus[] on the access sought by the speaker." When a user is blocked, the most significant impediment is the ability to directly interact with a tweet sent by the blocking user. While a blocked user is also limited in that the user may not view the content of the blocking user's tweets or view the blocking user's timeline, those limitations may be circumvented entirely by "using an internet browser or other application that is not logged in to Twitter, or that is logged in to a Twitter account that is not blocked." By contrast, the ability to interact directly cannot be completely reestablished, and that ability -- i.e., access to the interactive space -- is therefore best described as the access that the individual plaintiffs seek.

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. . . . [T]he interactive space is a designated public forum. "The @realDonaldTrump account is generally accessible to the public at large without regard to political affiliation or any other limiting criteria," "any member of the public can view his tweets," and "anyone [with a Twitter account] who wants to follow the account [on Twitter] can do so," unless that person has been blocked. Similarly, anyone with a Twitter account who has not been blocked may participate in the interactive space by replying or retweeting the President's tweets. Further, the account -- including all of its constituent components -- has been held out by Scavino as a means through which the President "communicates directly with you, the American people!" And finally, there can be no serious suggestion that the interactive space is incompatible with expressive activity. . . .

. . . . "Regulation of [a designated public forum] is subject to the same limitations as that governing a traditional public forum" -- restriction are permissible "only if they are narrowly drawn to achieve a compelling state interest." Regardless of the specific nature of the forum, however, "[v]iewpoint discrimination . . . is presumed impermissible when directed against speech otherwise within the forum's limitations." . . .

Here, the individual plaintiffs were indisputably blocked as a result of viewpoint discrimination. The record establishes that "[s]hortly after the Individual Plaintiffs posted the tweets . . . in which they criticized the President or his policies, the President blocked each of the Individual Plaintiffs." . . . The continued exclusion of the individual plaintiffs based on viewpoint is, therefore, impermissible under the First Amendment.

. . . . No First Amendment harm arises when a government's "challenged conduct is simply to ignore the [speaker]," as the Supreme Court has affirmed that "[t]hat it is free to do." *Smith v. Arkansas State Highway Employees* (1979). Stated otherwise, "[a] person's right to speak is not infringed when government simply ignores that person while listening to others," or when the government "amplifies" the voice of one speaker over those of others. Nonetheless, when the government goes beyond merely amplifying certain speakers' voices and not engaging with others, and actively restricts "the right of an individual to speak freely [and] to advocate ideas," it treads into territory proscribed by the First Amendment.

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. . . . [E]ven though defendants are entirely correct in contending that the individual plaintiffs may continue to access the content of the President's tweets, and that they may tweet replies to earlier replies to the President's tweets, the blocking of the individual plaintiffs has the discrete impact of preventing them from interacting directly with the President's tweets, thereby restricting a real, albeit narrow, slice of speech. No more is needed to violate the Constitution.

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[T]hough we conclude that injunctive relief may be awarded in this case -- at minimum, against Scavino -- we decline to do so at this time because declaratory relief is likely to achieve the same purpose. The Supreme Court has directed that we should "assume it is substantially likely that the President and other executive . . . officials would abide by an authoritative interpretation of [a] . . . constitutional provision." . . .

. . . . [W]e have held that the President's blocking of the individual plaintiffs is unconstitutional under the First Amendment. Because no government official is above the law and because all government officials are presumed to follow the law once the judiciary has said what the law is, we must assume that the President and Scavino will remedy the blocking we have held to be unconstitutional.

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