FRIENDS FOREVER? PUBLIC OFFICIALS, PUBLIC CRITICS, AND SOCIAL MEDIA

by TERENCE REX BOGA

Malka Older's critically acclaimed science fiction novel *Infomocracy* envisions a world in which global "micro-democracy" has replaced nation-states because of a Google-like search-engine monopoly known as "Information." Whatever one thinks of the probability and desirability of such a future, the internet already profoundly affects electoral politics. Social media platforms Facebook and Twitter facilitate unprecedented communication between politicians and constituents. Predictably, some public officials have blocked access to their social media pages by public critics and courts are being called upon to determine First Amendment free speech rights in this cyberspace setting.

A brief introduction to Facebook, Inc. and

Twitter, Inc. is necessary for context. These rival technology companies have similar ambitions. Facebook's mission statement is "to give people the power to build community and bring the world closer together."[1] Twitter's mission statement is "to give everyone the power to create and share ideas and information instantly without barriers."[2] Both companies operate an online networking site where users worldwide can post content (text, pictures, and videos) to pages they create; can control who (i.e., a select group or the general public) is able to access their pages; and can react to (e.g., signal agreement with, comment on, or reply to) content posted on other users' pages. Each of these social media platforms garners millions of daily users in the United States alone.

Given this tremendous popularity, it is unsurprising that politicians at every level of government are using Facebook and Twitter to provide information about official activities and otherwise connect with constituents. Given the inherent contentiousness of democracy, it is equally unsurprising that members of the public are using these social media platforms to express opposition to government policies and otherwise criticize their elected representatives. President Donald Trump, Kentucky Governor Matt Bevin, and Supervisor Phyllis Randall of Loudoun County, Virginia are examples of public officials who have blocked access to their social media pages by public critics and have faced a civil rights lawsuit as a result.

In *Knight First Amendment Institute v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018), the federal district court ruled that President Trump violated the First Amendment by denying public critics access to his @realDonaldTrump account on Twitter. As most everyone knows, and as acknowledged in the stipulated facts, the president uses that account to post "tweets" that announce, describe, and defend his public policies; promote his legislative agenda; announce official decisions; engage with foreign political leaders; publicize state visits; challenge media organizations; and, on occasion, communicate on matters unrelated to government business. The case was filed by seven Twitter users who posted a message critical of the president or his polices in reply to a tweet from the @ realDonaldTrump account and were blocked from the account shortly afterwards. Deeming the interactive space of the tweet from @ realDonaldTrump account to be a designated public forum, the court concluded that "the blocking of the individual plaintiffs as a result of the political views they have expressed is impermissible under the First Amendment."[3]

In *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D.Ky. 2018), however, the federal district court declined to issue a preliminary injunction that would require Governor Bevin to reinstate access to his Twitter and Facebook accounts for two Kentucky residents. The governor created those social media pages to inform constituents of his vision, policies, and activities, and to receive feedback. One citizen was blocked from the Twitter account for posting comments regarding the governor's then-overdue property taxes. The other citizen was blocked from the Facebook account after criticizing the governor's right-to-work policies. Deeming public forum analysis inapplicable, the court ruled that "constituents don't have a right to be heard and Governor Bevin has no obligation to listen to everyone who wishes to speak to him."[4]

Most recently, in *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019), the Fourth Circuit Court of Appeals ruled that Supervisor Randall violated the First Amendment by blocking access to her Facebook account by a county resident. The supervisor designated the Facebook account as a "governmental official" page and used it to inform constituents of county business, as well as to solicit public input on policy issues. After the supervisor posted on the Facebook account about a town hall meeting held with the local school board, a citizen posted to that page accusations that school board members and their families had conflicts of interests related to municipal financial transactions. The supervisor responded by deleting the original post and all public comments related to it. She also blocked the citizen from her Facebook account but, about twelve hours later, reconsidered and unblocked him. Deeming the interactive component of the Facebook page to be a public forum, the court concluded that "Randall's decision to ban Davison because of his allegation of governmental corruption constitutes black-letter viewpoint discrimination."

The only one of these decisions that is unexpected is the *Morgan* case, in which the federal district court framed the dispute as an attempt to compel Governor Bevin to listen to the opinions of particular constituents. This characterization disregarded the reality that, by excluding the plaintiffs from his Twitter and Facebook accounts, Governor Bevin did more than ignore their posts. He denied them the opportunity speak to the audience of people who follow his social media pages. Although the plaintiffs undoubtedly hoped the governor would read their posts, it is equally likely that they hoped to influence political discourse by having their posts read by the public at large. The court accepted the governor's arguments that the plaintiffs were blocked for making off-topic posts and that unfettered access could result in his social media pages being shut down altogether. Yet the remedy for an off-topic post is deletion of *that* post. By allowing the governor to deny the plaintiffs the same opportunity to make on-topic posts as available for other citizens, the court sanctioned his suppression of speech.

Forty years ago, the California Court of Appeal reminded public officials that thick skin is a prerequisite for those engaged in politics: "It is an essential part of our national heritage that an irresponsible slob can stand on a street corner and, with impunity, heap invective on all of us in public office."[5] Only a few tweaks are needed to update this wisdom for modern times: It is an essential part of our national heritage that an irresponsible troll can sit at a keyboard and, with impunity, heap invective on all of us in public office. Politicians today would do well to remember this.

ENDNOTES

(1) *See Company Info*, Facebook Newsroom (January 28, 2019), https://newsroom.fb.com/company-info/.

(2) *See FAQ,* Twitter, Inc. (January 28, 2019), https://investor.twitterinc.com/contact/faq/.

(3) *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 577 (S.D.N.Y. 2018).

(4) *Hargis v. Bevin*, 298 F. Supp. 3d 1003, 1012 (E.D. Ky. 2018).

(5) *Desert Sun Publishing Co. v. Superior Court*, 97 Cal. App. 3d 49, 51 (1979).

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