

Determining the privacy of a public figure's tweets

President Joe Biden has more than 9.3 million followers on his official Twitter account. Governor Mike Parson has more than 46 thousand Twitter followers. Anderson Cooper has more than 10.1 million followers. The New York Times has more than 49.6 million followers.

With today's news cycles being what they are, Twitter has become one of the most important sources of news for the public — just as important, if not more so, than television and radio, which used to claim immediacy as their biggest benefit. We can read it faster on our phones than the announcer can read it on the air.

And, Twitter lets the user both pass the news on, as well as engage in conversation with the source of the news. That interaction helps support its popularity. The public likes talking back to its sources. Sometimes, however, the source doesn't want to hear what you have to say. You get a message saying you are blocked.

If the person you are following is a public official, are they allowed to do that with their official account? A group of Twitter users, including the Knight First Amendment Institute at Columbia University, found themselves blocked by President Trump in late spring 2017, after he took his personal Twitter account and turned it into the primary forum for his viewpoints on national political issues. As a result of his blocking them, they filed suit against the President.

The President's attorneys did not dispute that this account was his "official" account, even though it was not the designated President's government-controlled account. They agreed that his actions constituted "government control" over the blocking function of the account.

This caused the Court to determine that these actions created a "public forum" and that the

President's blocking was "viewpoint discrimination," a violation of the Plaintiffs' First Amendment rights. A government entity is not permitted to discriminate based upon viewpoint in a public forum.

The federal appellate court issuing this decision recognized that not every social media account operated by a public official was a "government account."

Key in its analysis that this was a public forum was the President's own actions making the Twitter retweets and comments features "accessible to the public without limitation." So, when the President blocked the plaintiffs, he violated their First Amendment rights.

Why is this two-year old opinion important today? Well, last month, the federal appellate court in our circuit spoke on this very issue. State Rep. Cheri Reisch (R-44th District) blocked a constituent on her Twitter account.

Mike Campbell, the plaintiff, who was following the State Representative's Twitter account, retweeted a comment made by third person who criticized a comment the State Representative had made about an opponent. The Plaintiff, unhappy to be blocked from the account, sued, claiming a First Amendment violation.

The U.S. District Court held that Campbell was right and that his speech was protected by the First Amendment because the State Representative's account was a "designated public forum" and that she acted to block the plaintiff "under color of state law."

But in late January, the 8th Circuit Court of Appeals held that the State Representative's actions were "unofficial conduct." The appellate judges considered the Trump decision

in making their decision in Campbell's case, but held that the Trump decision did acknowledge "not every social media account operated by a public official is a government account."

Having said that, however, the

appellate court went on to cite every factor that the Trump decision held as demonstrating his account was public, and then saying that same factor showed Rep. Reisch's account was private. It is a decision that makes explaining it very hard for lawyers.

There is a dissenting opinion in the Campbell v Reisch case. Reisch has asked for the entire judicial panel to review the decision, the first step in filing an appeal, which would ultimately go before the U.S. Supreme Court. Stay tuned.

One last note: One sentence in the Trump decision is hilarious: "...[T]he government argues first that the Account is the President's private property because he opened it in 2009 as a personal account and he will retain personal control over the Account after his presidency." We all know how that turned out. Someone forgot Twitter is privately owned.

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Jean Maneke,
is IPMA's Legal Hotline attorney.
Contact her at (816) 753-9000;
jmaneke@manekelaw.com.