Social Media and Government Communications

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- Is social media the new public square?
- Can government actors block access to government information by putting it on a private account?
- Should government officials be allow to post official business on their private social media accounts?

Social media has become so much a part of our everyday lives that we often don't think about how we use it. This has led to what appears to be a large percentage of Americans developing what can at best be described as some "interesting ideas" about the relationship between government and the various social media platforms. Some recent cases bring the question of the relationship between government actors and social media companies into question. Probably the most well known would be Missouri v. Biden, where the states of Missouri and Louisiana have brought suit claiming that members of the Biden Administration violated the First Amendment by attempting to influence what content would be deleted or deemphasized on various social media platforms. Two other cases involving local officials focus on how government actors can block access to their social media accounts. While most of the country seems to be focused on Missouri, these two cases bring up some questions the American people should really think about.

Should the federal government pressure social media companies

to censor content on their platforms? I would hope the American people would not only recognize that it would be wrong, but a violation of the First Amendment. Today, we'll be looking at a couple of other cases involving local government actors and how they use social media. While the case Missouri v. Biden is extremely important, like so many other things we should not let what's going on in Washington, D.C. distract us from what is going on in our own back yard. That is why we're looking at Lindke v. Freed and O'Connor-Ratcliff v. Garnier.

Social Media

I have to admit to a bit of a love-hate relationship with social media. On the one hand, these platforms help me put content in front of thousands of people I wouldn't normally have access to. They allow me to post articles, videos, and podcasts on their platforms, usually for no charge. That is a tremendous boon for the information age. Many of these platforms have not only censored some of my content, but have blocked my account entirely, preventing me from using their services. These are private organizations, so I don't have a problem with them censoring content since these are their platforms, not mine. Still, these two cases highlight dangerous misunderstandings about social media.

The dialogue between public officials and their constituents is fundamental to our democracy. Much of that conversation now takes place online, with social media platforms serving as the new town square, where public officials provide important information about what they're doing on the public's behalf and soliciting comments in return.

Lindke v. Freed – Oral Arguments

First of all, the United States and each of the Several States are republics not democracies. While the fundamental difference has been ignored and corrupted over the years, it's especially important in these cases. In a democracy, the

people legislate directly.

Government by the people; a form of government, in which the supreme power is lodged in the hands of the people collectively, or in which the people exercise the powers of legislation.

Democracy – Webster's 1828 Dictionary

While in a republic, the people's sovereign power is vested in representatives elected by the people.

A commonwealth; a state in which the exercise of the sovereign power is lodged in representatives elected by the people.

Republic – Webster's 1828 Dictionary

If we lived in a democracy, the need to dialog with public officials would not be as great since we could create laws to dictate their powers directly. In a Republic, public officials are exercising power loaned to them from their election to office. That means the need to dialog is even greater.

Second is this idea of social media platforms serving as the new "town square", or as it is sometimes referred to, the new "public square". The most fundamental problem with this view of social media is that it's not publicly owned, but privately. When someone posts something on social media, it's not equivalent of posting a broadside on the town hall or in the square around it. Rather, social media is the equivalent of your neighbor allowing people to post notices on the fence that runs along their property. The fence is still their property, so they have every right to deny individuals or content for whatever reason they deem fit. Furthermore, this metaphorical fence, with all of these posts on it, is not directly accessible via public property. In order to access many of the features, especially the ability to "dialog" with the poster, a person must have an active account on these services. Since these companies are privately owned, their

property and their systems are private as well. This means that not only can these companies regulate what gets posted, but also who has access to it and to what level. For these reasons, social media is not, cannot, and never should be considered the "public square".

Mr. Kedem, attorney for Mr. Lindke, went on with another common misunderstanding often used in the legal profession.

While public officials retain First Amendment rights, use of a private social media account does not immunize an official's conduct from First Amendment or constitutional scrutiny.

Lindke v. Freed – Oral Arguments

Whatever these officials have done, it cannot be a violation of the First Amendment. As I've stated numerous times in these pages, the first five words of that amendment are "Congress shall make no law". Since the defendant, Mr. Freed, is a city manager, not only is he not a member of Congress and his actions were not taken under a law created by Congress, there can be no First Amendment violation. If there is a violation of the right to petition, it would be of Article I, Section 3 of the Michigan Constitution:

The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances.

Michigan Constitution, Article I, Section 3

Public vs Private

Mr. Mooppan, the attorney for Ms. O'Connor-Ratcliff, one of two members of the Poway Unified School District Board of Trustees, approached his argument from the other side of the issue.

Individuals who hold public office are still private citizens too. When acting in their personal capacity, they retain their

First Amendment rights to decide who can participate in a community discussion that they host at their own property. They are thus free to block users from their personal social media pages, unless they chose to operate those pages in their official capacities instead.

[O'Connor-Ratcliff, v. Garnier – Oral Arguments]

While making the same First Amendment mistake as Mr. Kedem, Mr. Mooppan also claims that a person's social media pages are their property. Is that true? To an extent.

The exclusive right of possessing, enjoying and disposing of a thing; ownership. …

Possession held on one's own right.

The thing owned; that to which a person has the legal title, whether in his possession or not.

[Property – Webster's 1828 Dictionary]

A person's social media space is not owned by them, but by the social media company. This company effectively rents the space on their system, in exchange for access to the data and activity of the user. Just as the renter of an apartment has the legal authority to determine who may enter said property, the user of a social media platform has the right to determine who may enter and participate in their virtual space.

The Right to Petition

As with all of our rights, the right to petition comes with the responsibility of the consequences of those actions. In both cases the government officials claimed that in their case, the other party abused their right to petition.

In 2020, Petitioner Kevin Lindke posted disparaging remarks on Freed's personal Facebook page. Freed deleted Lindke's comments and blocked Lindke from the page. Lindke sued,

claiming Freed violated his constitutional rights under the First Amendment.

Lindke v. Freed – Petition for Certiorari

Petitioners, two elected members of the Poway Unified School District Board of Trustees, used personal Facebook and Twitter accounts to communicate with the public about their jobs and the District. Respondents, parents of children attending schools in the District, spammed Petitioners' posts and tweets with repetitive comments and replies. So Petitioners blocked Respondents from the accounts.

O'Connor-Ratcliff v. Garnier – Petition for Certiorari

The Crux of the Matter

In both of these cases, one party is a government employee who used their "private" social media accounts to communicate with the public about matters related to their jobs. Apparently neither of the governments that employed these people had any control over the social media accounts in question. To me, the only way to determine if these actions were public or private is to determine whether these government actors were using their private accounts to conduct government business, and if so, to what extent would that limit their control over those accounts?

Let's step away from the social media question and look at this another way. Say a government official occasionally uses their private vehicle when conducting public business. While they were doing so, you could reasonably require they follow all government regulations. For example, if the official was using their private vehicle in a public parade, they could not deny certain individuals from approaching while allowing others full access. In a similar way, they could not deny access to public information they posted on their private page, especially if that was the primary way of communicating with the public. However, unlike a private vehicle, access to

a social media content is not limited to specific posts. You either have access to view and comment or you don't. So it's not an exact analogy, but I think it shows the problem. To me, the real problem is not the blocking of specific accounts by government actors, but the mixing of public and private data on a platform not fully within the control of the account holder.

Conclusion

If social media platforms cannot be the "public square" and account holders can determine who is allowed to access their information, we seem to have a legal quandary. Can government actors hide or otherwise deny access and commentary to content simply by placing it on a "private" social media account? Once the government actor places official material on their private account, is that account still private? Then there's the question of consequences for people who abuse their right to petition their government for a redress of grievance via social media?

There are several conclusions I think we can come to from this discussion. First, treating social media as a public area is not only legally dubious, but very dangerous. Since the social media companies themselves can determine whether or not a person is allowed to access or have an account on their platform, they effectively have veto power over access to information from government actors, and the ability to comment on them. If we make social media platforms the "new public square", we effectively are allowing government to take them over. Under the Fifth Amendment, would that be a takings or a deprivation of property without due process, or both? Furthermore, does posting information on "private" social media accounts allow government actors to unilaterally deny access to said information without any due process? Would placing data on a "private" social media account violate any Freedom of Information laws? Do you see how complicated and dangerous this "public square" view of social media is?

There is a lot more to these cases than first meets the eye. Since the Supreme Court has only just heard oral arguments, it is likely to take months before they release their decision. Could all of this been avoided by state and local governments requiring that government business only be performed on government accounts, maybe with an exception for posts on private accounts that point to the publicly available information? Perhaps what we really need is a separation of social media and state?

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