

Trump v. Twitter and the First Amendment

By: Hannah Hesel
hheser@unomaha.edu

This research paper was written for a Communication Law and Policy during summer 2021. The author is an undergraduate in the college of Communications, Fine Arts and Media at the University of Nebraska at Omaha. They are working towards a Bachelor of Science in Creative Media.

Trump v. Twitter and the First Amendment

U.S. citizens are protected by the First Amendment through the right to have free speech, religion, press, assembly and the right to petition the government. The First Amendment rights gives social media companies the right to censor everything people post on their websites. From *Knights First Amendment Institute v. Trump*, the court verified that the act of blocking is an official act of violating the First Amendment, just like posting is (*Knights First Amendment Institute v. Trump*[5], 18-1691-cv, (2d Cir. 2019)). The court clarifies that determining if an account on social media is a “government account” subject to First Amendment strictures is a “fact-specific inquiry.” “In 2019, Twitter used its contract rights with users to blur some tweets that might be viewed as harmful. Lawyers that represent employers and employees have been among those warning about the legal dangers of social media posts” (Lipschutz, 2021, [*202]). Twitter changed its Terms of Service in many important ways. This platform labels harmful speech as tweets threatening to “race, ethnicity, national origin, age, disability, or any type of disease. The future of the First Amendment relies heavily on a person’s ability to use social media platforms safely. The purpose of this paper is to explore the different laws within the First Amendment and how much social media has changed in this time period. It also applies to how different laws relate to the case with Trump discriminating against his followers on Twitter. “Democrat and Republican members of Congress have called for hearings on the existing law that protects online sites from being sued by content creators. U.S. privacy law is developing within a context of concern over the contractual power of Twitter to filter and manage content. The *California Consumer Privacy Act (2018)*, is considered to be the most sweeping in the nation, the opt-out provisions are not as tough as Europe’s General Data Protection Regulation

that treats privacy as a fundamental right based on the international law concept of human dignity” (Lipschultz, 2021, [*198]).

A Brief Legal History on Trump v. Twitter and the First Amendment.

President Trump violates the Constitution by blocking @realDonaldTrump followers on Twitter for them going against his viewpoint. “President Donald J. Trump has continued what he has called his running war with the media since the first day of his term” (Olson, [*23]). Each tweet eventually got President Trump banned from Twitter because he went against the First Amendment by blocking his followers. The First Amendment protects more than just the press and Americans continue to preserve their rights of speech, petition and assembly.

This lawsuit was filed in July 2017 by the *Knight First Amendment Institute*, although the United States Court of Appeals for the 2nd Circuit upheld this ruling. The lawsuit maintains Trump’s account as a “public forum” under the First Amendment and the government is not allowed to exclude people based on their views. It also is claiming that the White House violated seven individual plaintiffs’ First Amendment right to petition their government. Since then, the White House has deprived those who are still in the public forum the opportunity to hear critical voices. After this case had gone through 11 consecutive conferences, the court finally let the Trump administration decide whether or not this case could be dismissed.

“As digital media allows individuals to take on roles as publishers through blogs, podcasts, Twitter, Facebook, Instagram, IGTV, TikTok, Reddit, Snapchat and other social postings), there are new freedoms and responsibilities” (Lipschultz, 2021, [*197]). Social media platforms are the frontier of democratic free speech culture where millions of Americans argue, organize their thoughts, and collaborate on their views. All the prejudices of the “real world” exist online and the major social media platforms, such as Twitter, Instagram and Facebook

provide extraordinary opportunities for freedom of expression. This allows a U.S. citizen to challenge discourses, share their perspectives on certain things in life, and publish their own opinions.

Recent Case Law

Knight First Amendment Institute at Columbia University v. Trump, 928 F .3d 226 (2019), argued on March 26, 2019 and decided on July 9, 2019. This case says that President Trump was caught engaging in unconstitutional viewpoint discrimination by using the blocking feature to limit certain individuals access to his Twitter account. This act of discrimination is against the First Amendment. His private account was created in 2009 before he became the President of the United States. The blocking feature is considered acceptable for a user who chooses to create a private profile, and does not use it to engage in a manner of official purposes. Therefore, if Trump actually engaged in government speech when he blocked the individual Plaintiffs, the First Amendment is violated.

A few other cases from the New Communication Technologies chapter include *Police Department of Chicago v. Mosley*, *Hudgens v. NLRB* and *Reed v. Town of Gilbert* to conclude that the First Amendment allows for a lot of time, places, and manner restrictions. These cases are not allowed to discriminate against any expressive content.

“Social media platforms should exercise their First Amendment rights and ignore any politician who doesn’t agree to a set of ground rules” (Venkat, 2019). Trump never had a legitimate reason for blocking users, however, he did own up to his mistake of blocking other accounts. According to this, there was no possible way to make an argument out of this because Trump has fired government employees and announced new policies through his tweets. He even said he uses his private account to share official decisions for the United States. This lawsuit was

over Trump's ego and the Second Circuit ended up telling him to grow up and stop whining about presidential harassment. This entire lawsuit is supposed to remind the public that if the First Amendment means anything, it measures the best response to disfavored speech on matters of public concern is more speech.

Law Review Analysis

In the "Moderating content moderation: A Framework For Nonpartisanship in Online Governance" review, Lee (2021) describes internet platforms as having two important roles. Social media platforms, such as Twitter facilitate exchanges of free speech by millions of people, however it also limits speech according to "community standards." For example, as protests over George Floyd's death began, Twitter started the sea of change by flagging President Donald Trump's tweets with labels that said he was violating its policies against misinformation, voter suppression, and glorification of violence. This review also explores social media platforms further through adopting principles of nonpartisanship in their moderation of content by political candidates. A principle of political neutrality exists under section 230 of the CDA, which limits liability. Although some courts have misread section 230, a clearer reading mentions that a platform's removal of content is subject to section 230 (C)(2) and not (C)(1). "This law review also offers a model framework for nonpartisan content moderation (NCM) in order to decide on this important idea" (Lee, 2021 [*9]).

Part one of the NCM analyzes section 230 to show how the Ninth Circuit and other courts around the area have not comprehended the relationship between its two subsections. (C)(1) refers to publication of objectionable user content while the removal of user content falls under (C)(2). Part two is in charge of establishing their deficiencies in how nonpartisanship is ensured,

while part three suggests that internet platforms adopt a principle with respect to moderation of content by political candidates and officials holding a public office in the U.S. Essentially, a social media platform has the right to limit speech of users, when that speech violates healthy standards and represents hate. Users, however, do not have the right to restrict viewers from access to their content when engaging in official business matters, and can be held liable for doing so.

Another platform that has been criticized from the opposite end of the political spectrum is Facebook. This company showed favoritism towards conservative politicians. One of the company's top executives, Mark Zuckerberg has been accused of steering Facebook's content moderation policy to protect the content of conservatives.

Different goals of content moderation result in biased decisions that depend on the viewer. Twitter let Trump's tweet remain on their site longer than it should have been. It was under its "public interest" exception, but flagged the tweet with a label that it violated the rules about glorifying violence. The court classified this case as a public forum because the interactive features of the account have been opened up indiscriminately. In any form of event, viewpoint discrimination is not allowed. The acts of liking, commenting, retweeting or any other form of replying to something online are all expressive in nature. The government argued with the media that blocking did not restrict anyone's participation in the interactive space of the account.

The Second Circuit decided that Trump used his Twitter account to conduct official government business, and is not allowed to block Americans from his page on the basis of their political views. In the *Cubby, Inc. v. CompuServe, Inc.*, "the Southern District of New York heard this case arising from the publication of defamatory material by a third-party to an electronic forum maintained by defendant CompuServe. This service hosted more than one hundred and

fifty similar forums. They exceeded minimal editorial control and processed a high volume of content which led the court to publish it into a library or news vendor” (Primeau, 2021[*177]). A few years later, *Stratton Oakmont, Inc. v. Prodigy Services Co.* the New York Superior Court examined a similar case, but received a different result. *Stratton Oakmont* came from defamatory third-party content, as well. Overall, both “*Cubby* and *Stratton Oakmont* presented a paradox. If an internet service refrained from content moderation, it would risk the creation of an environment conducive to vulgar, offensive and malicious speech” (Primeau, 2021[*178]).

Section 230 found that no provider of an interactive computer service shall be treated as the publisher or speaker of any information by another provider” (Primeau, 2021[*179]). Conservative criticism of section 230 suspects that the major social media platforms are biased against right-wing users. They are more suspicious of Twitter because of shadow banning campaigns.

On November 7, 2020, Donald Trump classified himself as the victor in several tweets. The warning labels Twitter put on Trump’s tweets operated as a screen that covered the tweet and allowed the user to click “Learn more” to view the content.

Donald Trump’s incitement by his claims of a “stolen” election, before and after the attack on Congress led to the internet platforms’ most severe measures against him. The companies feared more violence from him and his supporters if they didn’t remove him from their sites. The fear of this violence led technology companies that are not even involved in content moderation to act upon this lawsuit.

Conclusion

This paper focused research on a person's right to free expression on social media and their First Amendment rights. A few questions that came to mind when researching this topic were: When someone with authority posts something negative, how should people react to it? Is it up to the Supreme Court to decide what happens, or should Trump have deleted what he wrote and apologized for his actions online? Why does Donald Trump use Twitter as his main form of communication and not another platform? Will the Supreme Court ever dismiss this case? Social Media should definitely be regulated a little more, especially with people that use it to communicate through their career. The court had nothing left to report in the case after Trump was permanently banned from the app and ended his presidential term in January. Twitter decided to remove Trump from their platform after the attack on the Capitol on January 6, 2021. The company said this decision was based on the risk of further acts of violence in the future.

The Supreme Court recently dismissed this case over former President Donald Trump's efforts to block critics from his personal account on Social Media. My view on this case is that former President Donald Trump should not have been banned, but he definitely should be punished for going against the First Amendment.

Future research on this case should extend their model cases from *Knight First Amendment Institute*, as social media continues to grow and becomes more involved in people's daily lives. Another reason for this is because this case involved more than the Supreme Court and the President. It involved U.S. citizens being blocked for believing in their rights. Future research would predict how negative social media posts affect more than the law.

References

Lee, Edward. (2021) "MODERATING CONTENT MODERATION: A FRAMEWORK FOR NONPARTISANSHIP IN ONLINE GOVERNANCE."

Primeau, Philip. (2021) "COMMENT: ESICA: Securing - Not Compelling - Speech on the "Vast Democratic Forums" of the Internet" *26 Roger Williams U. Law Review* 160.

Olsen, K. K. (2021) The First Amendment in Theory and Practice. *Communication and the Law*, 2021 Edition (p. 23-34) W. Wat Hopkins (ed.). Northport, AL: Vision Press.

Lipschultz, J.H. (2021) New Communication Technologies. *Communication and the Law*, 2021 Edition (p. 225-250) W. Wat Hopkins (ed.). Northport, AL: Vision Press.

Youm, K.H. (2021) Defamation. *Communication and the Law*, 2021 Edition (p. 81-116) W. Wat Hopkins (ed.). Northport, AL: Vision Press.

Knight First Amendment Institute at Columbia University v. Trump, 928 F .3d 226 (2019)

Mongiello, B. Ashley. (2019) "NOTE: IS PRESIDENT TRUMP VIOLATING THE FIRST AMENDMENT WHEN BLOCKING CITIZENS ON TWITTER?: EXPLORING MULTI-PARTY NEGOTIATION AS A WAY TO PROTECT CITIZENS' RIGHTS IN THE WAKE OF THE NEW DIGITAL AGE " *21 Cardozo J. Conflict Resol.* 217.

Venkat, Balasubramani. (2019) "Pres. Trump Violates the Constitution By Blocking @RealDonaldTrump Followers-Knight First Amendment v. Trump"

