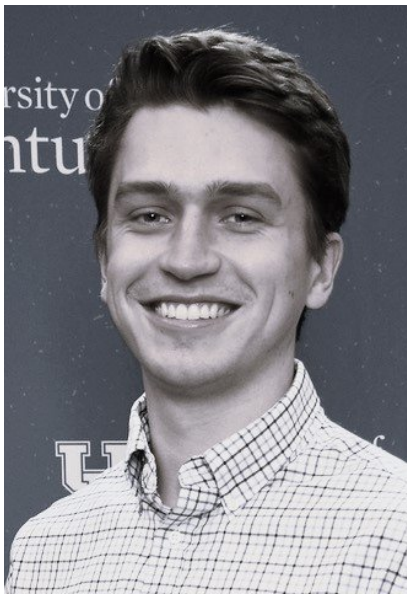
"Blocking Out the Haters:" Government Officials Create Split Among Federal Judiciary

APRIL 17, 2023



Blog Post | 111 KY. L. J. ONLINE | April 17, 2023

"Blocking Out the Haters:" Government Officials Create Split Among Federal Judiciary

By: Andrew Weisgerber, Staff Editor, Vol. 111

Social media has created a new world for how people communicate and interact with one another. With the ability for users to send messages out instantly to countless individuals, public officials have recognized the value of these platforms and have begun using them for their benefit.[1] Whether it is the President of the United States or a city manager, social media allows government actors to connect with their constituents conveniently.[2] But as is often the case with technological advancements, new constitutional issues are implicated when using these platforms.[3] As a result, an objective test is needed to aid the courts when entering into the new realm of social media.

State actors, operating in their public capacity, can use social media platforms for their benefit in a variety of ways except for one popular feature — they do not have the luxury of blocking other users.[4] The courts agree that a government official cannot block their constituents without violating their First Amendment rights.[5] Of course, if the state actor manages her social media account as a private citizen, she has free reign to block who she pleases. The trick, however, is determining whether the state official conducts her social media page in a private versus public capacity. That is where the federal circuit courts split.

42 U.S.C. § 1983 allows individuals to bring a claim against a state official for violation of a federal right.[6] To succeed in a cause of action under Section 1983, the court must find the government official acted "under color of state law."[7] The Supreme Court has stated that the requirements for a Section 1983 claim are identical to that of state action.[8] The primary question asked in a state action inquiry is whether the "defendant's actions are 'fairly attributable to the State.'"[9] Thus, for a plaintiff whose account was blocked by a state actor, she must show the state official's management of the account is fairly attributable to the State to get relief under Section 1983.[10]

Federal circuit courts take two main approaches in determining whether a social media account is operated in a public capacity. The first approach, adopted by five circuit courts, looks at the appearance and purpose of the social media page.[11] For example, the Eighth Circuit determined a state legislator's Twitter page was not conducted under color of state law because she created the account for campaign purposes.[12] Even though the state legislator continued to use the account well into her term in office and posted updates about her congressional work, the court mainly focused on the purpose for creating the account, which was to be elected and, in the future, re-elected.[13] This was sufficient to escape liability under Section 1983.[14]

The Second Circuit provided another example of the appearance and purpose analysis.[15] The court determined that former President Donald Trump's Twitter account was fairly attributable to the state and, as a result, violated the First Amendment rights of those he blocked on the platform.[16] This conclusion was drawn based on factors such registering the account to the "45th President of the United States of America" and tweeting about matters relating to his position as chief executive.[17]

In contrast to the approach taken by its sister courts, the Sixth Circuit devised its own analysis for determining when a social media page is fairly attributable to the state.[18] The court looked to more objective factors rather than the appearance and purpose of the account.[19] The court examined three aspects: (1) whether there was a law or ordinance requiring the official to operate a Facebook page, (2) whether the account would be transferred to the next person who would assume that government position, and (3) whether state employees were paid to help operate the account.[20] Finding the answer to be no to all three questions, the court determined the account was not fairly attributable to the state.[21]

The method utilized by the Sixth Circuit should be the prevailing view. Examining objective factors provides a more straightforward test for lower courts to apply.[22] Under this approach, there is no need for judges to try and determine whether an account is managed for campaign purposes as opposed to official state business.[23] Trial courts also will not have to comb through the accounts and individual posts to decide if the appearance of the account in fairly attributable to the state.[24] Rather, the objective questions asked by the Sixth Circuit can be applied uniformly to all potential government accounts.[25]

[1] Pinar Yildirim, *How Social Media is Shaping Political Campaigns*, Knowledge at Wharton (Aug. 17, 2020), https://knowledge.wharton.upenn.edu/article/how-social-media-is-shaping-political-campaigns/ (https://knowledge.wharton.upenn.edu/article/how-social-media-is-shaping-political-campaigns/).

[2] *See* Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2nd Cir. 2019), *vacated as moot*, 141 S.Ct. 1220 (2021); Lindke v. Freed, 37 F.4th 1199, 1202 (6th Cir. 2022).

[3] *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34 (2001) (applying Fourth Amendment protections to new "sense-enhancing technology").

[4] *Knight*, 928 F.3d at 239.

[5] *See id.* at 235; Davison v. Randall, 912 F.3d 666, 687 (4th Cir. 2019); Campbell v. Reisch, 986 F.3d 822, 824 (8th Cir. 2021).

[6] Erwin Chemerinsky, Federal Jurisdiction 524 (8th ed. 2021).

[7] West v. Atkins, 487 U.S. 42, 50-51 (1988).

[8] Lugar v. Edmondson Oil Co., 457 U.S. 922, 928 (1982).

[9] Lindke v. Freed, 37 F.4th 1199, 1202 (6th Cir. 2022).

[10] Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1170 (9th Cir. 2022).

[11] Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 235-36 (2nd Cir. 2022), *vacated as moot,* 141 S.Ct. 1220 (2021); *Davison v. Randall*, 912 F.3d 666, 680-81(4th Cir. 2019); Campbell v. Reisch, 986 F.3d 822, 827 (8th Cir. 2021); *Garnier*, 41 F.4th at 1171-72; Charudattan v. Darnell, 834 F. App'x 477, 482 (11th Cir. 2020).

[12] *Campbell*, 986 F.3d at 826.

[13] *Id.*

[14] *Id.*

[15] *Knight*, 928 F.3d at 235-36.

[16] *Id.* at 236.

[17] *Id.* at 235.

[18] Lindke v. Freed, 37 F.4th 1199, 1202 (6th Cir. 2022).

[19] *Id.* at 1205-06.

[20] *Id.*

[21] *Id.* at 1207.

[22] *Id.* at 1206.

[23] *Id.*

[24] *Id.*

[25] *Id.*

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