Social Media of Public Officials

First Amendment Implications

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Overview of Three Eastern District of Virginia (EDVA) Cases Regarding the First Amendment and Social Media

Meet Brian Davison . . . .

https://loudoun.granicus.com/MediaPlayer.php?view_id=68&clip_id=4579&starttime=1302&stoptime=1436&autostart

Social Media Accounts at Issue

1. **Government maintained/operated sites**

- Official site used to communicate with the public. Can simply be used to post information. If public comment is permitted then a limited public forum has been created.

2. **A Public Official's social media site**

- Depends on how site was created maintained, operated and used. Was it created in the official capacity of the public official? Does public official's individual social media become a public forum if it contains too many trappings of the office?

Davison v. James Plowman, Loudoun Commonwealth's Attorney (CA)

Eastern District of Virginia, Civil Action No. 1:16-cv-180

- Decided: March 28, 2017; Judge James C. Cacheris.
- Summary: CA's office deleted Davison's comment on CA official Facebook, blocked Davison for several weeks, later restored Davison's access.
- Opinion: CA did not violate First Amendment; CA entitled to qualified immunity in his individual capacity; CA entitled to 11th Amendment immunity in his official capacity; no damages.

Facts in *Davison v. Plowman* (CA)

- CA's Facebook page was maintained by an employee in his office, but CA retained decision-making authority over the page's content.
- CA admitted his office Facebook page was a limited public forum.
- CA had adopted Loudoun County's social media comments policy, which permitted the removal of comments that were "clearly off topic".
- CA deleted at least one "off topic" comment posted by Davison.
- CA blocked Davison from posting comments on CA's Facebook page from late December 2015 or early January 2016 until May 2, 2016.

Finding in *Davison v. Plowman* (CA)

- CA did not violate the First Amendment by deleting Davison's "off topic" comment, because the comment "did not comport with the purpose of the forum, and the restriction justifying its removal was both viewpoint neutral and reasonably related to the purpose of the forum".
- Qualified immunity shields government officials from individual liability for civil damages where their actions do not violate clearly established law. Whether a right is "clearly established" is evaluated based on a reasonable person standard.
- CA was entitled to qualified immunity for blocking Davison's access because any First Amendment right Davison ***might*** have to continue posting on CA's Facebook page despite Davison's repeated violations of the applicable social media comments policy was not "clearly established".
- Notably, the court did not rule that such a right actually exists; rather the court ruled only that ***if*** such a right exists, it is not clearly established.

Finding in *Davison v. Plowman* (CA)

- Eleventh Amendment immunity extends to suits seeking civil damages against state officers in their official capacity.
- Eleventh Amendment immunity applies to CA who is Virginia is an elected constitutional officer.
- No damages – While he was blocked from commenting on CA's page, Davison purchased two Facebook ads; court determined that even if CA could be liable for damages, Davison was not entitled to recover because his "damages" were unnecessary; he had other avenues to express himself without purchasing ads.

Finding in *Davison v. Plowman* (CA)

- Declaratory and Injunctive relief were inappropriate.
- Declaratory relief is reserved for forward looking actions.
- CA adopted County's updated social media policy which delegated authority to delete comments to Loudoun County's Public Affairs Office, not to CA himself.
- Therefore, declaratory relief would only address constitutionality of CA's past acts; the mere possibility that CA might someday re-adopt the former policy does not justify declaratory relief.
- Davison sought injunction requiring CA to follow the County's updated social media policy.
- Suit was based on CA's actions to delete Davison's comments and to block his access; but since CA no longer controls those decisions, the request for injunctive relief was moot.
- Furthermore, an injunction requiring the CA to follow a policy that he voluntarily adopted, indefinitely, is not legally permissible; although CA opened a limited public forum, he is free to modify or close that forum as he sees fit.

Davison v. Deborah Rose, et al.
Loudoun County School Board (LCSB)

Eastern District of Virginia, Civil Action No. 1:16-cv-540

- Decided: July 28, 2017; Judge Anthony J. Trenga.
- Summary: School Board members deleted Davison's comments and blocked him from their Facebook pages.
- Opinion: Official capacity claims were barred by res judicata (due to parallel state court litigation against LCSB) and sovereign immunity; LCSB members entitled to qualified immunity for claims in their individual capacities.

Facts of *Davison* v. *Rose, et. al.* (LCSB)

- In 2015, several members of LCSB deleted Davison's comments from and/or blocked him from commenting on their Facebook pages.
- In the summer of 2015, Loudoun County Public Schools (LCPS) deleted Davison's comments from the LCPS Facebook page.
- LCPS then stopped accepting comments on its Facebook page for the duration of the 2015 election cycle.
- Davison asserted a number of First and Fourteenth Amendment claims; the "official capacity" claims against individual defendants were barred by *res judicata* as a result of parallel state court litigation against LCSB.

Finding in *Davison v. Rose, et al.* (LCSB)

- Davison claimed that Facebook is a public forum.
- The court stated it is "not a clear legal matter" whether the Facebook pages at issue constitute public forum – either traditional limited.
- The court further stated that the law is "less than settled" as to whether Davison had a right to post on a Facebook page maintained by a public official, and whether this right was violated when the postings were removed or when Davison was prevented from posting his comments.
- It could not be said that the First Amendment right claimed by Davison was a "clearly established" right "of which a reasonable person would have known."
- Therefore, Defendants were entitled to qualified immunity, in their individual capacities, for the actions they took against Davison with respect to their Facebook pages.

Davison v. Loudoun County Board of Supervisors, et al. (Chair Phyllis J. Randall)

Eastern District of Virginia, Civil Action No. 1:16-cv-932

- Decided: July 25, 2017; Judge James C. Cacheris.
- Summary:
  - Davison's comments disappeared from Loudoun County's official Facebook page.
  - Chair Randall deleted her own post, thus causing all comments to that post (including Davison's) to be deleted; Chair Randall temporarily blocked Davison (for less than 12 hours) from commenting on her "Chair Phyllis J. Randall" Facebook page because she was offended by certain of his comments.
- Opinion:
  - Case against Loudoun County dismissed because Facebook admitted that it deleted Davison's comments on its own due to its operating algorithm.
  - No violation by Chair Randall in her official capacity because her page was operated outside her official duties; in her individual capacity, Chair Randall violated First Amendment because she is a "government actor" and her decision to block Davison's access constituted "viewpoint discrimination"

Facts of *Davison v. Loudoun County Board of Supervisors, et al.* (Chair Randall)

- Phyllis Randall established the "Chair Phyllis J. Randall" Facebook page in December of 2015 after her election and prior to taking office.
- The Chair Phyllis J. Randall Facebook page was created and maintained using Ms. Randall's personal electronics.
- Chair Randall's Chief of Staff (paid by the County) had co-administrative rights on the page.
- Ms. Randall purposely created the Chair Phyllis J. Randall Facebook page outside the purview of the County's social media policy. She exercises plenary control over the page; it will not revert to the County when she leaves office.
- In the "About" section, the page is categorized as that of a "government official"; it lists her County telephone number and email address, and the web address for her official County website.

Facts of *Davison v. Loudoun County Board of Supervisors, et al.* (Chair Randall)

- The purpose of the Chair Phyllis J. Randall Facebook page is "to address County residents." Most posts relate to Ms. Randall's work and/or position as Chairman of the Loudoun County Board of Supervisors.
- In one post Ms. Randall stated that she wanted "to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your thoughts," but requested that constituents reach out to her on her "county Facebook page (Chair Phyllis J. Randall) or County email."
- Most posts on the Chair Phyllis J. Randall page are expressly addressed to "Loudoun" – Ms. Randall's constituents.
- Ms. Randall also maintains a personal Facebook profile, which she uses to discuss family matters, and a "Friends of Phyllis Randall" page, which she uses to discuss politics. Her Chief of Staff does not have administrative privileges over those pages.

Facts of *Davison v. Loudoun County Board of Supervisors, et al.* (Chair Randall)

- Ms. Randall did not have an adopted social media policy for the Chair Phyllis J. Randall page.
- Around 11 pm on February 3, 2016, Ms. Randall deleted her post about a LCPS event because she was offended by a comment posted by Davison in which he criticized her LCSB "colleagues". Deleting the post also deleted all comments to that post, including Davison's.
- At the same time, Ms. Randall banned Davison from the Chair Phyllis J. Randall Facebook page because "if he was the type of person that would make comments about people's family members," then she didn't want him to be commenting on her site.
- The next morning, 8-12 hours later, Ms. Randall unbanned Davison from the Facebook page.
- During the period when Davison was "banned" he was able to see and share content from Ms. Randall's page, and he was able to post the same comments on multiple other pages. However, he was unable to post on Ms. Randall's page.

Findings in *Davison v. Loudoun County Board of Supervisors, et al.* (Chair Randall)

Decision: The "totality of circumstances" demonstrates that Ms. Randall "acted under color of state law" both in maintaining her page, generally, and in banning Davison from the page.

- The court observed that this case raises a "novel" legal question – "When is a social media account maintained by a public official considered "governmental" in nature, and thus subject to constitutional constraints?"
- The court acknowledged that there were "some indications" that the Chair Phyllis J. Randall page was "entirely private" – namely, her official duties do not include maintenance of a social media account, the account will not revert to the County when she leaves office, and she does not use County-owned electronics to maintain the site. But the court concluded that these considerations were not dispositive.
- In finding that Ms. Randall acted under color of state law, the court observed that her actions "arose out of public, not personal circumstances" – e.g., her impetus for creating the Chair Phyllis J. Randall Facebook page was her election to public office; she created the page the day before she took office for the purpose of addressing her constituents; she encouraged her constituents to communicate with her via that page, etc.

Findings in *Davison v. Loudoun County Board of Supervisors, et al.* (Chair Randall)

Decision: Davison's claims against Ms. Randall in her official capacity fail.

- An "official capacity" claim is not truly against the individual, but against the governmental entity she represents.
- Ms. Randall operated the Chair Phyllis J. Randall Facebook page outside of County policy. She made "an unilateral decision to ban Davison in the heat of the moment."

Decision: The case concerns speech that is protected by the First Amendment.

- Davison's comment raised ethical questions about the conduct of LCSB officials.
- Criticism of official conduct "lies at the very heart of the First Amendment."

Findings in *Davison v. Loudoun County Board of Supervisors, et al.* (Chair Randall)

Decision: By deliberately permitting – indeed, soliciting – public comment on the Chair Phyllis J. Randall Facebook page, Ms. Randall created a "forum for speech."

- The court observed that ordinarily it would next determine whether the forum was traditional, limited or non-public.
- However, that was unnecessary because . . . .

Decision: Ms. Randall engaged in "viewpoint discrimination," which is prohibited in all forums.

- Ms. Randall did not ban Davison pursuant to any neutral policy or practice that she applied in an evenhanded manner.
- Ms. Randall banned Davison because she was offended by his criticism of her LCSB "colleagues."
- "[S]peech may not be disfavored by the government simply because it offends. . . . [T]he suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment guards."

Conflicts in Precedent

The two federal court judges in the same district applied very different standards.

- Judge Cacheris made a "normative judgment" based on "a totality of the circumstances" that Ms. Randall acted under color of state law, when she created and maintained her Chair Phyllis J. Randall Facebook page, even though she acted in her individual capacity.
- Judge Trenga, relying upon Supreme Court precedent, observed that "the government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."

Wait & See Pending Appeals

- The Fourth Circuit affirmed the District Court's decision in *Davison v. Plowman*.
- *Davison v. Board of Supervisor, et al.* (Chair Randall) is on appeal to the Fourth Circuit.
- *Davison v. Rose, et al.* (LCSB) was remanded back to District Court for a final order because there was no ruling on an injunction. Given that the Court ruled against Davison, the injunction should be denied and an appeal will likely be filed from the final order.

Law Remains Unsettled

The status of social media is a novel question in the law. Judge Trenga used the traditional public forum analysis to determine no Constitutional violation occurred, while Judge Cacheris weighed the totality of the circumstances and concluded that government action was involved in what otherwise was a private Facebook page. An appellate court will need to clarify how and when social media constitute a public forum.

Social Media Comments Policy Update

Clearly states the Loudoun County's official social media are "moderated" (limited public forum).

- Expanded, more explicit list of instances when comments will be removed.
- New procedure for removing comments.
- Announce intention to gain voluntary compliance.
- Provide an avenue for appeal.

https://www.loudoun.gov/index.aspx?nid=2779

Process for Removing Comments

- A department head suspecting a comment violates the social media policy notifies the County's Communications Officer.
- The Communications Officer, in consultation with the County Attorney's Office, quickly issues an opinion. Comments may be temporarily hidden while seeking opinion.
- Clear violations are "screen shotted" and deleted.
- The comment deletion procedure puts the decision on the Communications Officer rather than affected the department head.

Unanswered Questions

1. How would a reasonable public official know when his/her personal social media becomes a public forum based on the "totality of the circumstances" test?
2. If a public official's social media is deemed to be a public forum has he or she also violated sunshine/freedom of information laws or records retentions procedures?

Unanswered Questions

3. Do elected officials lose their individual rights of privacy and free speech when they establish a public social media account?

4. How would social media be affected if public officials are held individually liable for deleting comments on their public accounts that are later deemed to be public forums based on a "totality of the circumstances" analysis?

Key Take Aways for Communicators

- Have a Social Media Comments Policy.
- Tread carefully regarding administration of elected officials' social media.
- Raise awareness among your staff social media administrators about potential free speech issues.
- Before hiding and deleting comments, and blocking followers from commenting, carefully consider your comments policy.
- Stay tuned: U.S. Court of Appeals for the Fourth Circuit Court of Appeals will hear the Randall case (and potentially the LCSB case).

Links to *Davison* Cases

- *Davison v. Plowman*, 247 F. Supp. 3d 767 (E.D. Va. 2017) https://scholar.google.com/scholar_case?case=11720865077895881682&q=davison+v+plowman&hl=en&as_sdt=6,47, summarily affirmed by *Davison v. Plowman*, U.S. Court of Appeals for the Fourth Circuit, Case No. 17-1771 (March 19, 2018) https://scholar.google.com/scholar_case?case=2451822360859720753&q=davison+v+plowman&hl=en&as_sdt=6,47
- *Davison v. Rose, et al.*, U.S. District Court for Eastern District of Virginia, Civil Action No. 1:16-cv-540 (July 28, 2017) https://scholar.google.com/scholar_case?case=3849722979107547491&q=davison+v+plowman&hl=en&as_sdt=6,47
- *Davison v. Loudoun County Board of Supervisors, et al.*, U.S. District Court for the Eastern District of Virginia, Civil Action No. 1:16-cv-932 (July 25, 2017) https://scholar.google.com/scholar_case?case=8170091525228980822&q=davison+v+plowman&hl=en&as_sdt=6,47