Case Brief: Davison v. Randall, 912 F.3d 666 (4th Cir. 2019)*

INTRODUCTION

The day before Phyllis Randall assumed her duties as the elected Chair of the Board of Supervisors for Loudoun County, Virginia on January 1, 2016, she took what was is an increasingly common first step for public officials: she created a Facebook page.[1] No doubt aware of the power of social media as a tool for civic engagement,[2] Randall decided to use her page, which she characterized as her "county Facebook page," as a platform both for keeping the public informed on county affairs and also for soliciting input from her constituents.[3] Little did Randall know that an impulsive decision to delete some comments left on the page by a constituent (which she viewed as "slanderous"[4]) would lead to a federal lawsuit and a foray into the growing thicket of government, social media, and the First Amendment.

STATE OF THE LAW

The emergence of social media over the last two decades as a powerful—and seemingly unstoppable—force in our culture has brought with it challenging new questions regarding our fundamental freedoms of speech and association including what power, if any, public officials have to control access to government-sponsored social media platforms. One such question is whether these platforms should be treated as public forums. It is well established that governments are "strictly limited" in their authority to regulate private speech in a public forum, so classifying social media platforms as such has serious implications for government engagement with its citizens in these spaces.[5]

At least two lower courts have considered the issue prior to the Fourth Circuit's decision in *Davison v. Randall*, each reaching a different conclusion. In *Knight First Amendment Institute at Columbia University v. Trump*,[6] a case that garnered significant public attention, the Second Circuit held that President Donald Trump, a prolific Twitter user, engaged in unconstitutional viewpoint

1. Davison v. Randall, 912 F.3d 666, 673 (4th Cir. 2019).

2. *See generally*, Homero Gil de Zúñiga, Nakwon Jung, & Sebastián Valenzuela, *Social Media Use for News and Individuals' Social Capital, Civic Engagement and Political Participation*, 17 J. COMPUTER-MEDIATED COMM. 319 (2012).

3. *Davison*, 912 F.3d at 673–74.

4. *Id.* at 687.

5. Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009).

6. Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019).

discrimination when he blocked access to his account from individuals who disagreed with his political views.[7] The court rejected the President's contention that his account was purely private, citing the "overwhelming" evidence of its use for official government communication.[8] The court further determined that the President had "made [his account's] interactive features accessible to the public without limitation" by freely allowing his followers to comment on, like, and retweet his posts.[9] Because the official government account had been "intentionally opened for public discussion," the court held he had created a public forum subject to First Amendment protections.[10] When he blocked the plaintiffs' access to that forum because of their criticism of his policies, the President thus engaged in impermissible viewpoint discrimination. In summary, the court held that "the First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise-open online dialogue because they expressed views with which the official disagrees."[11]

In *Morgan v. Bevin*,[12] however, a federal district court reached the opposite conclusion when deciding whether then-Kentucky Governor Matt Bevin violated the First Amendment rights of multiple constituents when he blocked them from his official government Facebook and Twitter profiles.[13] In that case, two plaintiffs claimed to have been blocked by Governor Bevin following postings that were critical of his policies and alleged failure to pay property taxes, but not "obscene, abusive, defamatory, or otherwise in violation of Twitter's Terms of Service."[14] While conceding that "the application of free speech to developing technology" was a new and evolving area within the law, the district court nevertheless concluded that public forum analysis did not apply.[15] Rather, it held that because Governor Bevin used the social media accounts to communicate with the public in his official capacity, rather than create a space for public dialogue, it qualified as "government speech."[16]

7. Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 230 (2d Cir. 2019). *Id.* at 230. The Second Circuit issued its opinion in *Knight* after the Fourth Circuit decided *Davison*, but because it largely affirmed the finding of the district court (the opinion of which *Davison* cites), I treat it as precedential for purposes of this note.

8. *Id*. at 235–36. The court highlighted, *inter alia*, that the account identifies the President as the "45th President of the United States"; that it has been used to announce Cabinet-level staffing changes and alterations to domestic and foreign policies; and that the National Archives has classified his tweets as "official records" that must be preserved under the Presidential Records Act. *Id*. at 235–36.

9. *Id.* at 235–237.

10. *Id.* at 237.

11. *Id.* at 230.

12. 298 F. Supp. 3d 1003 (E.D. Ky. 2018).

13. *Id.* at 1005–06.

14. *Id.* at 1008.

15. *Id.* at 1009–10.

16. *Id*. at 1010–13 (citing Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2250 (2015)).

Accordingly, much like the city government in *Summum* had the right to control the messages it communicated by restricting the types of monuments it would allow in its public parks,[17] so too did Governor Bevin have the right to control his social media presence by restricting the content on his individual platform.[18] Furthermore, even if the plaintiffs had been using the Governor's social media profiles to convey legitimate policy views, they had "no constitutional right as members of the public to a government audience for their policy views."[19] In other words, Governor Bevin was entitled to ignore their comments by restricting their ability to communicate with him.[20]

THE DECISION IN *DAVISON V. RANDALL*

In many ways, Phyllis Randall's use of her Loudoun County Chair Facebook page most resembled that of President Trump's Twitter account, albeit for a much smaller audience and subject to much less controversy and media scrutiny. Randall regularly used the page to notify the public of upcoming meetings of the Board of Supervisors, public safety issues, opportunities to participate in public forums regarding key community issues, and various trips she took in the course of her official business.[21] In addition, Randall's campaign Facebook page made clear that she wanted to converse with constituents on the official Chair page: "I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, complement or just your thoughts. However, I really try to keep back and forth conversations . . . on *my county Facebook page* . . . ."[22] Other indicia of the official nature of the page included its publication in Randall's official newsletter, which was prepared by County employees, hosted on the County website, and distributed using Randall's official county email address.[23]

On February 3, 2016, Brian Davison, an outspoken Loudon County resident, attended a town hall meeting that included Randall.[24] In response to a question by Davison implying that members of the School Board had acted unethically in approving certain financial transactions, Randall called it a "set-up question" and stated that she did not "appreciate" it.[25] Later that evening, Randall posted a summary of the town hall meeting to the Chair Facebook page.[26] Davison, acting through a Facebook page he personally managed

17. Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 479 (2009).
18. *Morgan*, 298 F. Supp. 3d at 1012.
19. *Id.* at 1011 (quoting Minn. State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271, 286 (1984)).
20. *Id.*
21. Davison v. Randall, 912 F.3d 666, 673–74 (2019).
22. *Id.* at 673.
23. *Id.* at 675.
24. *Id.*
25. *Id.*
26. *Id.*

("Virginia SGP") commented on Randall's post, and while neither Randall nor Davison could recall the exact content of the post, Randall testified that it contained "accusations" of financial impropriety on the part of School Board members and their families.[27] Believing Davison's comments to be inappropriate content for the Chair's page, Randall deleted the entire post (including her original post and other public comments thereto) and banned Davison's Virginia SGP page from the Chair's page.[28] The following morning, Randal "reconsidered her actions and unbanned Davison's Virginia SGP Page."[29]

In response to these actions, Davison filed a Section 1983 claim against Randall, in both her individual and official capacities, alleging that the "banning of Davison from commenting on the Chair's Facebook Page is viewpoint discrimination."[30] Additionally, Davison asserted that Randall had limited his constitutionally protected speech because the Chair's page was a "limited public forum."[31] The district court dismissed the Board from the suit at the summary judgment phase, but ultimately found in favor of Davison on his First Amendment claims against Randall.[32]

On appeal, the Fourth Circuit considered, *inter alia*, whether Randall had acted "under color of state law" in maintaining the Chair's Facebook page and subsequently banning Davison from it.[33] In addition, it examined whether or not the page constituted a public forum.[34] On the first question, the court, per Judge Wynn, emphasized that Randall had used the page as a "tool of governance" to "further her duties as a municipal officer."[35] More specifically, she had "clothed the Chair's Facebook Page in 'the power and prestige of her state office' . . . 'and created and administered the page to perform actual or apparent duties of her office.'"[36] Among other things, (1) the page's title included Randall's official title, (2) the page was designated as that of a "government official;" (3) the page listed the email address and telephone number for Randall's county office, as well as the county's official website; (4) most of the posts were explicitly addressed to Randall's constituents; (5) Randall often posted on behalf of the Loudoun Board as a whole; (6) Randall encouraged her constituents to communicate with her via the Facebook page;

27. *Id.*
28. *Id.*
29. *Id.* at 676.
30. *Id.*
31. *Id.*
32. *Id.* at 676–77.
33. *Id.* at 679.
34. *Id.* at 681.
35. *Id.* at 680.
36. *Davison*, 912 F.3d at 681 (quoting Harris v. Harvey, 605 F.2d 330, 337 (7th Cir. 1979); Martinez v. Colon, 54 F.3d 980, 986 (1st Cir. 1995)).

and (7) the posted content primarily related to Randall's official duties.[37] Accordingly, by banning Davison from the Chair page in response to comments critical of public officials (the School Board members), Randall had used the power of the state to suppress Davison's speech.[38]

Moving to the issue of whether or not the Chair Facebook page constituted a public forum, the court distinguished between two recognized categories of forums: "traditional public forums—such as streets, sidewalks, and parks," which have historically been used for expressive conduct—and "limited" or "designated" public forums—spaces that the government has "purposefully opened to the public . . . for expressive activity."[39] In either case the "hallmark" of a public forum is that "the government has made the space available—either by designation or long-standing custom—for 'expressive public conduct' or 'expressive activity,' and the space is compatible with such activity."[40] The court identified numerous aspects of Randall's Facebook page that bore such "hallmarks" including that Randall opened the comment section for public discussion and did not restrict access to the page or use of the interactive components, allowing members of the public to make numerous posts on matters of public concern.[41]

Moreover, the nonphysical nature of the forum did not make it any less "compatible with expressive activity." Indeed, "Congress has recognized the internet and interactive computer services as offering a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[42] That, in the court's mind, was exactly what Randall invited through the Facebook page. While acknowledging, as the *Morgan* court did, that Randall's own comments and posts constituted "government speech," the interactive nature of the page, where each comment or reply attached to an individual user, ensured that speech with which Randall disagreed could not be mistaken for her own.[43] Ultimately, the court concluded that "the interactive component of the Chair's Facebook page constituted a public forum, and Randall engaged in unconstitutional viewpoint discrimination when she banned Davison's Virginia SGP page from that forum."[44]

37. *Id.* at 680–81 (citing the district court opinion).

38. *Id.* at 681.

39. *Id.* (quoting *Am. Civil Liberties Union v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005)).

40. *Id.*

41. *Id.* at 682.

42. *Id.* (quoting Zeran v. Am. Online, Inc. 129 F.3d 327 (4th Cir. 1997) (internal citations and quotation marks omitted)).

43. *Id.* at 686.

44. *Id.* at 688.

FUTURE IMPLICATIONS

The three cases discussed in this brief are likely only the tip of the spear. Judge Kennan, concurring in *Davison*, predicted that "cases necessarily will arise requiring courts to consider the nuances of social media and their various roles in hosting public forums established by government officials or entities."[45] In the absence of guidance from the Supreme Court,[46] lower courts will continue to face difficult questions. One is the question raised by Judge Keenan in her concurrence in *Davison*: does an elected official automatically create a public forum, one subject to First Amendment protections, anytime they engage with the public through social media? The Second Circuit did not seem to think so, holding that "[w]hether First Amendment concerns are triggered when a public official uses his account . . . will in most instances be a fact–specific inquiry."[47] Among the factors for the court to consider were "how the official describes and uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account."[48] Reasonable though such a test may seem, it provides imprecise guidance for the thousands of elected officials using social media for constituent engagement across the country, many of whom are not trained in the law.

Another implication of *Davison* and related decisions is what it means for the relationship between governments and the private companies that maintain social media platforms. Whereas traditional public forums like parks and streets, and even some limited forums like public universities and assembly halls, are largely owned by the government, here the government is creating a public forum on what is arguably private "property"—the websites and servers supporting the platforms. Nevertheless, the Fourth Circuit noted that "the Supreme Court never has circumscribed forum analysis solely to government-owned property."[49] On the contrary, it has held that "private property, whether tangible or intangible, constitute[s] a public forum when, for example, the government retain[s] substantial control over the property under regulation or by contract."[50] The court in this case emphasized the "significant control" that

45. *Davison*, 912 F.3d at 693 (Keenan, J., concurring).

46. In March, the Second Circuit denied a petition for en banc review of the *Knight* decision. It is not yet clear if President Trump will ask the Supreme Court to take the case. Todd Spangler, *Donald Trump Violated First Amendment by Blocking Critics on Twitter, Appeals Court Affirms*, VARIETY (Mar. 23, 2020), https://variety.com/2020/digital/news/donald-trump-violated-first-amendment-twitter-blocking-1203542245/ [https://perma.cc/EN7F-L6BT].

47. Knight First Amendment Inst. At Columbia Univ. v. Trump, 928 F.3d. 226, 236 (2d Cir. 2019).

48. *Id.*

49. *Davison*, 912 F.3d at 682–83.

50. *Id.* at 683 (citing Promotions, Ltd. v. Conrad, 420 U.S. 546, 547, 555 (1975)).

Randall retained over the Chair Facebook page, but it made no mention of a regulatory or contractual relationship between Facebook and the government.[51]

The ultimate question, however, is what it means when the government, or an agent thereof, can establish a public forum on platform that itself is not bound by the First Amendment. The relative newness of these cases and the divergence of opinions suggests a clear answer is remote, but even while the positive legal debate carries on, we can hope that normative analysis leads to a resolution in favor of free speech. As Judge Barrington eloquently stated at the end of his opinion in *Knight*:

> "The irony in all of this is that we write at a time in the history of this nation when the conduct of our government and its officials is subject to wide–open, robust debate. This debate encompasses an extraordinarily broad range of ideas and viewpoints and generates a level of passion and intensity the likes of which have rarely been seen. This debate, as uncomfortable and as unpleasant as it frequently may be, is nonetheless a good thing. In resolving this appeal, we remind the litigants and the public that if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less."[52]

If Justice Brandeis were alive and tweeting today (@Brandeis,J.?), I'm sure he would agree.

RYAN COLLINS**

51. *Id*.

52. *Knight First Amendment Inst. At Columbia Univ.*, 928 F.3d. at 240.

** J.D. Candidate, Class of 2021.