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# Social Media Posts by Government Officials: Traps for the Unwary After Lindke v. Freed

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Everyone on social media at some point has to figure out how they're going to use it. Will their account be public? Will they post information about family? Current events? Religion? Politics? If the account's not open to everyone, who do they let in? Who gets excluded? Depending on your perspective, LinkedIn and Instagram are either happy diversions or social and professional minefields or both.

If you're a government official, the questions are even more fraught. Does the right to free speech in the First Amendment limit your ability to block users or their comments? The issue comes up pretty often. Today, in *Lindke v. Freed*, the US Supreme Court cleared a path for government officials who use social media to be allowed to use the "block" and "delete" functions of those apps.

But be careful, government officials posting on Facebook. The Court's path to deleting rude posts or blocking annoying commenters is winding and narrow.

What exactly did the Supreme Court decide in its unanimous opinion today? Justice Barrett, writing for the Court, made clear that figuring out whether a government social media post is "official" or "private," can be difficult. If the post is "official," then comments can't be deleted just because the government official disagrees with them or dislikes them. "Personal" posts, though, and the comments on them, can be edited or deleted or blocked however the official sees fit.

So here's the rule: social media postings made by government officials create First Amendment rights for others "only if the official (1) possessed actual authority to speak on the [government's] behalf, and (2) purported to exercise that authority when he spoke on social media." If a commenter on an "official" post has her comment deleted because of the viewpoint of the comment, that violates the First

Amendment. If the comment is about a "personal" post, the Constitution doesn't care why the comment got deleted.

Like lots of debates about what the Constitution permits, and doesn't, the threshold question is whether "state action" is involved. On social media posts, there is only state action if the government official had "actual authority" to speak on behalf of the government. And how can you tell if the official had "actual authority"? The Court explained that we have to look at the official's legal duties and job description. The official's authority must be "rooted in written law or longstanding custom to speak for the [government]."

But even that explanation doesn't end the analysis. Sometimes, public officials have opinions about public matters, even ones that fall within their job duties, but still their comments aren't "official" speech: "If the public employee does not use his speech ***in furtherance of his official responsibilities***, he is speaking in his own [personal] voice." The Court then gave this hypothetical which will cause some bald spots with all the head scratching it induces:

Consider a hypothetical from the offline world. A school board president announces at a school board meeting that the board has lifted pandemic-era restrictions on public schools. The next evening, at a backyard barbecue with friends whose children attend public schools, he shares that the board has lifted the pandemic-era restrictions. The former is state action taken in his official capacity as school board president; the latter is private action taken in his personal capacity as a friend and neighbor. While the substance of the announcement is the same, the context—an official meeting versus a private event—differs. He invoked his official authority only when he acted as school board president.

Got that?

Some social media accounts are *personal*. Some are *official*. Even *official* ones might have *personal* posts that *don't* create First Amendment rights for commenters. But, some *personal* accounts might have *official* posts that *do* create First Amendment rights. Sometimes an official can talk about his job duties and, if he's wearing a tie and speaking from a podium, that might be *official* speech because it involved *state action*. On the other hand, if he says the exact same things at a neighborhood barbecue, that might be *personal* speech *without* state action.

Even if you find those distinctions clear enough (and good on you if you do), it's easy to imagine the difficulty associated with proving all this if there's a dispute. The official who wants to delete a hostile comment on her Facebook page will have to ask herself whether she was speaking officially or personally. She'll also have to ask if the subject was about an official matter whether it was it made in her personal capacity.

A judge or jury will want to know what the official's job duties were and where the official was when he spoke and who the intended audience was. Did the Facebook account include just a few family photos and favorite Bible verses, or lots of them? The more personal the page, the more likely the posting was personal. Was the discussion mostly about sports and weather, or mostly about politics and legislation? If it was about politics and legislation, were those the sort of things that were part of the official's job duties? Even if they were, did the postings advance those job duties?

Oh, boy.

The Court's opinion made clear what we should expect from these cases. Because many officials have broad duties, it won't be easy to "to discern a boundary between their public and private lives. Yet these officials too have the right to speak about public affairs in their personal capacities."

And don't get started about blocking someone from a social media account altogether instead of just deleting some of their posts or comments. "Blocking … is a different story. Because blocking operate[s] on a page-wide basis, a court would have to consider whether [an official] had engaged in state action with respect to *any post* on which [the blocked person] wished to comment. … *A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability*."

This last bit of instruction might be summed up with the traditional admonition not to play where you work.

The Court's opinion today set some guardrails around what kinds of posts amount to government action. When those posts do involve government action, the First Amendment limits officials' use of "delete" and "block" to curate and control social media. But discerning the dividing line between personal and official posts will be hard as ever. As always, be careful out there.

If you have any questions about this post or litigation issues, please contact Cullen at (804)783-7235 or CSeltzer@sandsanderson.com.