Speech and Public Officials
A primer for Elected Officials and Managers

South Dakota Municipal League
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We the People
of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common Defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Number of Representatives shall not exceed one for every thirty Thousand, but as the increase of the Nation shall render it necessary, new States may be admitted into this Union; the number of Representatives shall not exceed one for every fifty Thousand, but one Representative shall be chosen for every whole Number, over forty Thousand, from each State, a Proportion of less than forty Thousand, shall not entitle a State to派出. Representatives in the Congress: But every State shall have at least one Representative; and until an apportionment of the number of Representatives in the House of Representatives shall be made, the States so entitled shall have one Representative each. The Speaker of the House shall preside over the Senate, and the House of Representatives, and shall be the Judge of the elections, returns and qualifications of its own Members, and of all cases depending upon it; but in all the other cases it shall be the Judge of the Questions of Privilege and Proceedings on the floor of the House.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote. The Vice-President of the United States shall be President of the Senate, but shall vote only in Case of Equality.

Section 4. The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of choosing Chiefs of foreign Relations, which shall be in the City of Washington, in a Place, which the Congress may by Law determine; and they shall assemble at such Place, on such Time, as they shall by Law appoint; which Place shall be within the District of Columbia.

Section 5. Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. No Person shall be a Candidate for any Office under the United States, who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the State which he shall represent. Congress may by Law, however, make or alter such Regulations in the Case of the Electors, except as to the Time of choosing them, which shall be in November in the Year of their Election. They shall meet in Congress on the 4th Day of March, and elect as President one of themselves; and on the 4th Day of April, the Vice-President.
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Bill of Rights
Congress of the United States.
First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
Congress shall make no law
Abridging the Freedom of Speech
What does it mean?
Types of Speech

- Words you say out loud
- Words you write
- Things you do
- Things you wear
- Things you put on your car
Categories of Speech

• Political speech
• Matters of Public Concern
• Commercial speech
• Personal speech
• False speech
Fourteenth Amendment
Congress shall make no law
Government shall make no law...
Limited Purpose Public Forum
Marketplace of Ideas
Prior Regulation of Speech

- Time
- Place
- Manner
Knight First Amendment Institute v. Trump
Analytical Framework

• Is the Speech protected?
  • Political speech
  • Political discussion
• Is the Forum one owned or controlled by the government
We do conclude, however, 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.

Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 230 (2d Cir. 2019)
Social Media Questions

- When did you create the account?
- Do you discuss campaign issues on the account?
- Do you discuss or engage in discussions on city business on the account?
- Is the registered name of the account related to your public office?
Social Media is entitled to same 1st Amendment protections as other forms of media. *Packingham v. North Carolina* (2017)

A public forum need not be “spatial or geographic” and the same protections under the 1st Amendment apply to a virtual forum. *Rosenberger v. Univ. of Virginia* (1995)

So what about employees who say “stupid” things on Social Media or elsewhere?
Gwinnett County, GA Commissioner Tommy Hunter

- 2016
- Posted on Facebook that Congressman John Lewis is a racist
- Response to Congressman Lewis speaking ill of then-Candidate Trump
Dayna Kempson

- Single Vehicle Fatality in 2010
- Firefighters from Spalding County FR responded
- One of them filmed the scene on his mobile phone
- Shared around firehouse, at a local bar, and on internet
Former Troy, MI Mayor

- Before she was elected
- Posted to Facebook that she would have to give up her I Love New York bag because of the legalization of Gay Marriage.
- Post comes to light after she is elected
- Successful recall
Can I fire this person?

- In what capacity is the person speaking?
  - Is it as an employee?
  - Is it as an individual?
- Is it a matter of public concern?
- Does your state allow public employees to unionize?
Things to Consider in a Social Media Policy

- What are you trying to accomplish?
- What is the employment reason for the restriction on speech?
- Say out loud the government interest you are protecting
- Make sure what you are doing furthers your interest as employer
- National League of Cities

Thank you
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