DON'T ASK, DON'T TWEET
TWITTER AS EVIDENCE IN *LOG CABIN REPUBLICANS V. UNITED STATES*

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Since its recent emergence, Twitter has become an important form of communication. It is used by millions of people, businesses, and organizations to connect with the public. Its sudden and immense impact on society has presented courts with new issues, as they must decide how tweets will be treated as evidence in the courtroom. Recently, a tweet was offered into evidence in court in the case of *Log Cabin Republicans v. United States*, CV 04-08425-VAP (Ex) 2010 WL 3526272. In deciding the admissibility of the tweet, the court dealt with an array of issues that illustrate the difficulties that courts may face as they encounter Twitter and other emerging forms of electronic media.

Log Cabin Republicans v. United States, was a case intensely publicized by the media because it carried significant political implications. The Log Cabin Republicans, a political activist group comprised of republicans who support greater rights for homosexuals, brought suit against the United States government on behalf of its members who served in the military and who were subject to "Don't Ask, Don't Tell." The law restricted those who were openly homosexual from military service. The Log Cabin Republicans argued before Judge Virginia A. Phillips of the United States District Court for the Central District of California that "Don't Ask, Don't Tell" violated constitutional guarantees of due process and free speech. The Justice Department unsuccessfully sought to have the suit dismissed arguing that as long as congress had a rational basis for passing "Don't Ask, Don't Tell," it was constitutional. It also asserted at trial that the Log Cabin Republicans did not have standing to challenge the law.

Judge Phillips ruled that the "plaintiff has demonstrated it is entitled to the relief sought on behalf of its members." Judge Phillips noted that the restrictions placed on the

speech of the Log Cabin Republicans military personnel by “Don’t Ask, Don’t Tell” is “far broader than is reasonably necessary to protect the substantial government interest at stake”[1]. She also ruled that “Don’t Ask, Don’t Tell” limits military personnel from openly joining the Log Cabin Republicans, thereby depriving them of their ability to petition the government for redress of grievances.

On October 12, 2010, Judge Phillips issued a worldwide injunction ordering the military to immediately “suspend and discontinue any investigation, or discharge, separation, or other proceeding, that may have been commenced” under “Don’t Ask, Don’t Tell”[1]. On October 20, 2010, the Justice Department petitioned the United States Court of Appeals for the Ninth Circuit for a stay of Judge Phillips’ order until the matter could be fully briefed and considered on appeal. The United States’ petition was granted and as a result, Judge Phillip’s ruling is currently stayed pending the outcome of the appeal.

During the trial of the case, the Log Cabin Republicans presented as evidence a tweet posted on the twitter account of the Chairman of the Joint Chiefs of Staff, Admiral Michael Mullen. On February 2, 2010, Mullen tweeted, “Stand by what I said: Allowing homosexuals to serve openly is the right thing to do. Comes down to integrity”[2]. The Log Cabin Republicans argued that the tweet was an admission by Admiral Mullen that “Don’t Ask, Don’t Tell” was unfair and unnecessary. The United States objected to the admission of the tweet as evidence, challenging its authenticity and relevance to the case.

In response to the United States’ objections, the Log Cabin Republicans sought to confirm that the tweet indeed came from Admiral Mullen’s twitter account and from Admiral Mullen himself. The group noted that twitter account owners are responsible for

the tweets that appear on their twitter pages. Because the presented tweet appeared on Mullen's twitter page, the Log Cabin Republicans argued that Mullen was responsible for the tweet. The Log Cabin Republicans also noted that Admiral Mullen's official occupational twitter account name was "thejointstaff." They also pointed out that the account was not a personal twitter account. The name was not "Mike Mullen;" it was identified by Mullen's official government title. The Log Cabin Republicans consequently argued in part that because the twitter account was named "thejointstaff," Mullen tweeted in his official capacity.

In response, the United States asserted that twitter is generally used as a vehicle to express personal opinion and is not generally a forum for the communication of official statements and policy. Twitter account owners tweet about what they are doing and thinking. The United States argued that Twitter was not a forum through which Admiral Mullen could make an official declaration. Further, the government asserted that even if Admiral Mullen had authored the tweet, he was certainly not under oath when the February 2nd tweet was authored and the tweet could not be used as an official admission.

In an attempt to justify the admission of the tweet into evidence, the Log Cabin Republicans called a witness who had received the tweet to testify about its authenticity. The United States objected to the calling of such a witness claiming that a witness who was not the author of a tweet could not give sufficient testimony about the tweet's authenticity. The United States cited three cases, which they claimed established the framework for a witness testifying about the authenticity of an Internet based text entry. The first case was *United States v. Tank*, 200 F.3d 627 (9th Cir. 2000). In *Tank,* the defendant David Tank had been accused of producing and distributing child pornography

through the Internet from his computer. During the case, Tank argued that Internet logs obtained from Ronald Riva, a member of Tank's Internet chat room club, were not sufficiently proven authentic. The *Tank* court ruled, however, that the evidence was authentic because, "the government made a prima facie showing of authenticity because it presented evidence sufficient to allow a reasonable juror to find that the chat room log printouts were authenticated." Riva gave testimony that "explained how he created the logs with his computer and stated that the printouts, which did not contain the deleted material, appeared to be an accurate representation of the chat room conversations among members"[3]. In contrast, the government claimed that the Log Cabin Republicans' witness had not personally created computer records or logs nor was he a part of any group to which Admiral Mullen belonged.

The second case cited by the United States was *Perfect 10, INC. v. Cybernet Ventures, INC.,* CV 01-2595 LGB(SHx). In that case, Perfect 10 claimed that Cybernet Ventures infringed on copyrights, violated trademarks, and engaged in unfair business practices. During the case, Cybernet objected that evidence that was printed off the Internet was insufficiently authenticated. The court, however, ruled that the witness who produced the documented evidence provided sufficient testimony to authenticate the evidence because the witness presented:

1. True and correct copies of documents produced by *Cybernet* in discovery (identified by a CV prefix);

2. True and correct copies of pictures from Perfect 10 Magazine or from Perfect 10's website; or

3. True and correct copies of pages printed from the Internet that were printed

by Zadeh [the witness] or under his direction.[4]

Further, the court noted that the evidence presented contained the Internet domain address from which the image was printed and the date on which it was printed. The United States argued that no such evidence was available to authenticate the Mullen tweet.

The final cited case was *Lorraine v. Markel American Insurance Company,* 241 F.R.D. 534 (D.Md. May 4, 2007). That case dealt with a claim that Jack R. Lorraine made against his insurance company Markel American. During the trial, both parties filed motions for summary judgment and both parties attached as exhibits, e-mails that discussed the policy at issue. Neither party, however, supplied authentication for the e-mails sufficient to support a motion for summary judgment. The *Lorraine* opinion consequently discussed the circumstances under which electronically stored information could be appropriately offered into evidence. With regard to the foundational testimony of the supporting witness, Judge Grimm, who decided *Lorraine*, stated that the witness must "provide factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change or the process by which it is produced if the result of a system or process that does so"[5]. Here again, the government claimed that the Log Cabin Republicans' witness could not meet that burden.

After reviewing the cases cited by the United States, Judge Phillips allowed the Log Cabin Republicans' witness to testify. That witness, Patrick Hunnius (a previous employee of White & Chase LLP, the law firm that represented the Log Cabin Republicans) testified that he followed Admiral Mullen on Twitter and that he received

all of the Admiral's tweets. He also confirmed that he had received the February 2nd tweet that the Log Cabin Republicans offered as evidence.

Hunnius was asked how he found the twitter evidence and responded that while reading an article about Admiral Mullen's congressional testimony, he became aware that the Admiral had a twitter account. The article referred its reader to the Joint Chief of Staff's website, jcs.mil. That website contained a link to Admiral Mullen's twitter page. Hunnius also noted that the Department of Defense's website, defense.gov, also had a link to Mullen's twitter page. The Log Cabin Republicans asserted that the government website links to the twitter account furthered their argument that Mullen tweeted in his official capacity. They claimed that the government uses the websites to inform the public of official authorized information; the links to the twitter account appeared to extend the same authority to Mullen's twitter account.

Testimony concerning "verified accounts" was also solicited. Hunnius testified that twitter uses a set procedure to contact selected twitter users of high public interest to verify that they are the true authors of the twitter accounts listed under their names. Evidence was presented that with regard to certain twitter accounts, "verification is used to establish authenticity for accounts who deal with identity confusion regularly on Twitter. Verified Accounts must be public and actively tweeting." Further, the testimony was that Twitter's goal is to "limit confusion by making it easier to identify authentic accounts on Twitter"[6].

Finally, Hunnius testified that Twitter accounts, which have been officially verified display a blue "Verified Badge" next to the account name. After explaining the verified accounts, Hunnius was asked, "And does Admiral Mullen's Joint Staff twitter

account have that check mark?" Hunnius responded, "It does." Hunnius was then asked, "What does that signify?" Hunnius answered, "It signifies that Twitter at least is satisfied that this is the Admiral's twitter account"[8]. The evidence was that Mullen was responsible for the "thejointstaff" twitter account.

After the Log Cabin Republicans finished examining Hunnius, the United States began its cross-examination. The United States asked Hunnius, "Other than being a Twitter account called "thejointstaff," you cannot definitively say sitting here today that Admiral Mullen was the individual who wrote the statement contained in JX330 (February 2nd tweet), correct?" Hunnius conceded that he could not. Hunnius was then asked, "For example, you do not know if one of Admiral Mullen's assistants wrote the statement contained in JX330, correct?" Hunnius responded, "I do not"[8]. The United States finished the cross-examination by reiterating its earlier objections to Hunnius' testimony. Because Hunnius did not produce the tweet, he could not appropriately testify about its authenticity.

In ruling on the objection to the introduction of the tweet into evidence, Judge Phillips first addressed the issue of whether or not Admiral Mullen produced the tweet. She articulated that "even if it's an assistant who wrote - - it's immaterial who might have written the actual words if they are authorized or ratified at the time they are published, so the testimony on redirect is immaterial to the question before the court." Admiral Mullen, she opined, was ultimately responsible for the content displayed on his twitter account.

In ruling on the admissibility of the tweet, Judge Phillips also commented on the three cases cited by the United States, stating:

> Well, having looked at all three of these cases, in general, the rule is that the propounder has to make a prima facie showing of authenticity once the evidence has been - - once sufficient evidence has been adduced to allow the trier of fact to find - - what's the standard here? There is to be sufficient evidence to support a finding that the matter in question is what the proponent claims, so reasonable trier of fact could find in favor of authenticity or identification. [8]

In essence, Judge Phillips ruled that in order for a tweet or other similar evidence to be admissible, the propounder of the evidence must provide clear proof that the proposed evidence is in fact authentic. The cases *U.S. v. Tank* and *Perfect 10 v. Cybernet Ventures* established a framework for the admission of such evidence but did not directly deal with twitter evidence. Phillips noted that *U.S. v. Tank* referred to "a different kind of electronic evidence - - that is e-mail evidence." She also noted that *Perfect 10 v. Cybernet Ventures* was dissimilar because "it was a hearing on a preliminary injunction where the standards for the introduction of evidence with respect to what needs to be shown for a preliminary injunctive relief in a copyright infringement case is really not that transferable to the context here"[8]. Judge Phillips consequently found that the guidelines established in *Tank* and *Perfect 10* were not exactly on point when it came to the process of authenticating a tweet.

The court ultimately ruled that Admiral Mullen's tweet was proven sufficiently authentic and it was accepted as evidence. As the court heard arguments and witness testimony, it encountered many of the difficult issues that future courts will face when they are presented with tweets as evidence. The *Log Cabin Republicans* court had to

consider how a witness could properly testify about a tweet's authenticity and also in what context the tweet author produced the tweet. Courts will inevitably face countless similar issues in dealing with future Twitter evidence and other new and emerging forms of public communication. If Judge Phillips provided a glimpse into the future admissibility of such evidence, the glimpse indicates that most issues surrounding the admissibility of such evidence will be issues related to authentication. If the evidence is trustworthy, relevant, and authenticated, the courts will admit it. If the evidence is not, the courts will likely reject it.

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