If Trump can't block people on Twitter, can you?

By the New York State Association of School Attorneys

Although the White House maintains official Twitter accounts for the executive branch and the president (@WhiteHouse and @POTUS, respectively), President Donald Trump has used a longstanding account (@realDonaldTrump) while in office. Similarly, many school leaders have official social media accounts (used to communicate on behalf of the school district) as well as "personal" accounts, typically used to interact with friends and express personal opinions.

What does the law require of public officials regarding such social media accounts? This article will explore this emerging area of law, particularly with regard to blocking access of certain individuals.

Twenty-three years before Twitter debuted in 2006, the U.S. Supreme Court said certain actions by a school district can create a "public forum" or "limited public forum," in which participants and would-be participants have free speech rights that are protected by the First Amendment (see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 1983).

A school district can lawfully censor content or prevent access to a public forum or limited public forum only if the rationale passes "strict scrutiny" – the most stringent standard applied in free speech analysis.

But determining what standards apply to social media can be more complicated, especially when an official uses a "personal" account to make statements about government policy or official business – as President Trump has done.

The U.S. District Court for the Southern District of New York recently considered issues related to preventing access to Donald Trump's Twitter feed in *Knight First Amendment Institute at Columbia University v. Trump*. At issue was Trump's use of a "blocking" feature on Twitter to deny certain users access to the @realDonaldTrump feed. Trump admitted to blocking users who criticized him or his administration.

To determine whether blocking individuals from the Trump Twitter feed implicated the First Amendment, the court was required to consider whether @realDonaldTrump was a "public" account as asserted by the plaintiffs or a "personal" account as contended by Trump's legal team.

As a threshold matter, the court first determined that when the plaintiffs responded to Trump in his Twitter feed, their speech was political speech, and, therefore, protected by the First Amendment. As this speech is protected, the court then analyzed whether Trump's Twitter feed is "owned or controlled by the government" as required for the First Amendment forum analysis to be applicable.

The court found Trump's Twitter feed was "governmental in nature" because (1) the Twitter account is self-identified as being registered to Donald J. Trump, "45th President of the United States of America, Washington, D.C."; (2) the tweets "are official records that must be preserved under the Presidential Records Act"; and (3) the Twitter account had been used for executive functions such as for "the appointment of officers…the removal of officers, and the conduct of foreign policy."

The next question considered by the court concerned the rights of Trump's followers on his Twitter feed, which includes an "interactive space" in which readers can post comments on Trump's tweets and respond to one another. Were a user's First Amendment rights violated if Trump blocked access to his feed given that his Twitter account appears to be a forum established by the government?

In *Knight*, the court answered this question in the affirmative. When Trump blocks a user from @realDonaldTrump and the accompanying interactive space based upon the user's political views, this constitutes "viewpoint discrimination" in violation of the First Amendment, according to the court.

Although the office of the president is unlike any other government office in the country, *Knight* is instructive to school officials. It demonstrates that the content posted on one's "personal" social media accounts can morph those accounts into "public" forums. Once a public forum or limited public forum is established, those who access the feed are entitled to the protections of the First Amendment.

Therefore, school officials should be cautious and consult with counsel before blocking users from official social media accounts, or those accounts where a school official has discussed public business, even if the individual considers that account to be "private" or "personal."

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Is it possible to ensure that one's "personal" social media accounts remain only that, in the eyes of the law? Yes; although the court was not persuaded by the defendants' arguments that Trump's account is "personal," the court said it is possible for a public official to have a "purely personal" and private Twitter feed. According to the court: "No one can seriously contend that a public official's blocking of a constituent from her purely personal Twitter account – one that she does not impress with the trappings of her office and does not use to exercise the authority of her position – would implicate the forum analysis."

The *Knight* decision serves as a "road map" of the steps board members and other school officials can take to avoid having such social media accounts become "public" accounts.

First, an official can maintain two separate social media presences: one in his/her capacity as a public official, the second, a personal presence, in his/her capacity as a private citizen. To distinguish the "personal" accounts from the "public" accounts, the school official should refrain from referencing his/her position in the "personal" accounts and/or expressly state in his or her profile that the account is a personal account. For example, on a "public" account, the description underneath the name could be listed as "Superintendent of Schools" or "Board Member of XYZ School District," while it is inadvisable to reference one's official capacity in a truly "personal" account.

Additionally, the name attached to the account could assist in distinguishing a "personal" from a "public" account; a profile labeled "Superintendent John D. Smith" could be seen by a court as an indication that the account is "public," while a profile for "John D. Smith" does not necessarily carry such an association.

Finally, and most importantly, the content of a personal account should not overlap with school business. Certainly, one should refrain from making or repeating (e.g., re-tweeting) official statements in one's personal account.

While a school official may still comment on issues related to his/her position as a school official in a personal social media account, statements which could be construed as being made in his/her capacity as a school official ought to be avoided. For example, commenting on a given sports team's recent game/event may be appropriate for a personal account, while commenting on the coaching situation of a given sports team would likely be inappropriate. Avoid phrases such as, "As a school board member …" The safest route for school officials is to avoid making any statements on a personal account which could potentially be construed as having been made in the individual's official capacity.

As the law regarding social media is new and evolving, school board members and school employees should be cautious regarding both the content they post and any decisions to block followers. When in doubt, consult your school attorney.


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