



UPDATE: Sidewalks, Streets, and Tweets: Is Twitter a Public Forum?

Valerie C. Brannon

Legislative Attorney

June 5, 2018

Update: The government filed a [notice of appeal](#) on June 4, 2018, indicating its intent to appeal the trial court's decision to the U.S. Court of Appeals for the Second Circuit. The attorneys representing the blocked Twitter users have [reported](#) that seven of their clients "have been unblocked from the @realDonaldTrump Twitter account."

The original post from May 30, 2018, is below.

On May 23, 2018, a federal district court in New York in [Knight First Amendment Institute v. Trump](#) held that the [Free Speech Clause of the First Amendment](#) prohibited President Trump from blocking Twitter users solely based on those users' expression of their political views. In so doing, the court weighed in on the [now-familiar](#) but [rapidly evolving debate](#) over when an online forum qualifies as a "public forum" entitled to special consideration under the First Amendment. Significantly, the district court concluded that "the [interactive space](#) for replies and retweets created by each tweet sent by the @realDonaldTrump account" should be considered a "[designated public forum](#)" where the protections of the First Amendment apply. This ruling is limited to the @realDonaldTrump Twitter account but implicates a number of larger legal issues, including when a social media account is operated by the government rather than by a private citizen, and when the government has opened up that social media account as a forum for private speech. The ability of public officials to restrict private speech on Twitter may be of particular interest to Congress, given that [almost all Members](#) now have a Twitter account.

Legal Background

The First Amendment to the U.S. Constitution protects the [freedom of speech](#) from infringement by state or federal government. As a general matter, the Supreme Court has [said](#) that the Free Speech Clause applies to "state action, not . . . action by the owner of private property used nondiscriminatorily for private purposes only." Accordingly, the First Amendment [ordinarily would not apply](#) to private conduct

Congressional Research Service

7-5700

www.crs.gov

LSB10141

on private sites like Twitter. But the Supreme Court has long [held](#) that “in places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed.” Places like sidewalks, streets, and parks provide examples of “[quintessential public forums](#)” that the government must keep open for some First Amendment activities. Critically, the designation of a given space as a traditional public forum does not always track government ownership. The Supreme Court has held under certain circumstances that the protections of the First Amendment apply to [streets and sidewalks owned by a private company](#), but it has also held that [one particular federally owned sidewalk](#) was *not* a traditional public forum. Under prevailing case law, courts instead ask whether the private property has been [dedicated to public use](#), or whether the government has opened the space for [expressive activity](#).

The government can designate new public forums by making “[an affirmative choice](#)” to create a space that is open for public expression. The Supreme Court has [recognized](#) that the Internet in general, and social media in particular, has become a critical forum for the expression of protected speech. And the federal courts of appeals have [held](#) that the government can create public forums on the Internet. This may include government pages on privately owned social media sites if the government has [intentionally opened the page for public discourse](#). If a new public forum is not expressly designated as a forum for open public communication, then the government can place greater restrictions on the types of speech allowed in that forum. However, even in “[limited](#)” or in “[nonpublic](#)” forums, the government generally cannot discriminate against speakers on the basis of their viewpoint. Accordingly, in determining whether a given restriction in a limited or nonpublic forum is constitutionally permissible, a court often [must determine whether](#) it distinguishes between speech on the basis of its content or on the basis of its viewpoint.

By contrast, when the government speaks for itself, the Supreme Court has [held](#) that “it is not barred by the Free Speech Clause from determining the content of what it says.” Accordingly, if a particular platform is used only to disseminate government speech and is not open for private speech, it will not be considered a public forum under the First Amendment. Applying this principle, one federal appellate court [held](#) that where a school district retained control over its website, used it for its own speech, and did not allow private speakers, that website could not be considered a public forum.

Knight First Amendment Institute v. Trump

One significant [place](#) for public debate today is Twitter. On [Twitter](#), a user can post 280-character “tweets” and follow other users to see their tweets. A user’s tweets show up on the user’s own profile as well as in the “feeds” of the other users who “follow” them. (A user’s feed, compiled by an algorithm, consists of the tweets of every other user they follow, along with some tweets the users they follow have “liked” or retweeted, as well as some promoted tweets—i.e., ads.) A user can interact with others’ tweets not only by viewing those tweets, but also by “retweeting” them so that they show up on the user’s own profile, by liking them, or by replying to them. If a user’s account is public, the user’s retweets, likes, and replies are visible to everyone else on the site. Other users can respond to a user’s retweets or replies just as they would any other tweet. Twitter usually compiles these replies into a single, public conversation.

In *Knight First Amendment Institute*, a number of individual plaintiffs filed suit against President Trump, along with White House staff who operate his Twitter account, challenging the President’s decision to block the plaintiffs from the [@realDonaldTrump](#) Twitter account. When a Twitter user [blocks](#) an account, this prevents the two users from following each other and prevents the blocked account from viewing the user’s tweets. The plaintiffs in the New York case argued that the [@realDonaldTrump](#) Twitter account was a public forum, and that in blocking their accounts, the President had engaged in unconstitutional viewpoint discrimination. (The Knight First Amendment Institute at Columbia University, the first named plaintiff, was not blocked by [@realDonaldTrump](#), but [asserted](#) a desire to read what the blocked users

would have otherwise posted in reply to the President’s tweets, based on [Supreme Court case law](#) recognizing a First Amendment right to receive information.)

One of the biggest questions confronting the trial judge was whether Twitter—a private social media platform—could be considered a public forum for First Amendment purposes. This inquiry was complicated by the fact that the [@realDonaldTrump](#) account is distinct from the official [@POTUS](#) account and was previously operated by the President as a private citizen. The court acknowledged that Twitter was a private platform, but [concluded](#) that the President exercised sufficient control over certain aspects of the [@realDonaldTrump](#) account—including the power to control who may retweet or reply to the President’s tweets by blocking users—that parts of Twitter could be considered a public forum. The court further [determined](#) that the President’s control over the account was “governmental in nature” because “the President presents the [@realDonaldTrump](#) account as being a presidential account as opposed to a personal account and, more importantly, uses the account to take actions that can be taken only by the President as President.” The court [rejected](#) the government’s [argument](#) that the President’s personal Twitter account represented acts taken in his personal capacity, similar to a public official giving a campaign speech, rather than state action subject to the First Amendment.

While the court [held](#) that the President’s own tweets were government speech and did not implicate the First Amendment, the trial judge also [determined](#) that “the interactive space for replies and retweets created by each tweet sent by the [@realDonaldTrump](#) account” *did* constitute a public forum. However, the court further [held](#) that the President did not control any “subsequent dialogue in the comment thread,” and so the “interactive space” beyond the initial, direct replies, or retweets was not a forum. Because the court held that the interactive space for private users to retweet or directly reply to the President’s tweets was a public forum, it [concluded](#) that the government could not exclude users from the forum on the basis of their viewpoints. Significantly, the government did not contest that the President blocked the individual plaintiffs because of their expressed political viewpoints. Accordingly, the court’s conclusion about the nature of the forum necessitated [holding](#) that the President had engaged in unconstitutional viewpoint discrimination. Ultimately, the court [granted](#) the plaintiffs declaratory—and not injunctive—relief. (This remedy was likely the product of Supreme Court case law [stating](#) that courts cannot grant injunctive relief related to the President’s performance of discretionary duties.)

Implications

The New York case was not the first one to consider when the government may prevent private individuals from interacting with public social media accounts like Facebook or Twitter, and commentators have [predicted](#) that it will not be the last, given that other citizens have challenged decisions by federal and local officials to block them on social media. The developing body of case law in the trial courts suggests that the resolution of First Amendment cases involving government officials’ social media accounts depends in large part on the specific circumstances presented. For example, in March of this year, a federal district court in Kentucky [concluded](#) that the governor’s Facebook and Twitter pages were personal speech and not a public forum, and that the First Amendment therefore did not prohibit the governor from deleting comments on his Facebook page or blocking users on Twitter. In that case, the court found that the governor had never opened up his social media accounts to others’ speech, and had intended only to distribute his own speech on those accounts. In another case, a federal district court in Virginia [concluded](#) that while a local official’s Facebook page was a limited public forum because the government had invited citizens’ speech on that page, the official’s decision to delete a comment that was off topic and violated the government’s announced policy for social media comments [did not violate](#) the Constitution. And in a different dispute resolved by the same federal judge, the court [held](#) that a local official had engaged in unconstitutional viewpoint discrimination when she deleted political criticism from her Facebook page, which was otherwise held open for discussion. Finally, an Illinois district court [held](#) in 2015 that a municipality could “prohibit political messages” on its website

and Facebook page because those pages were limited purpose forums intended to act only “as small business forums.”

Commentators have noted the importance of official social media policies in these disputes. The government’s statements about the purpose and scope of discussion allowed on its Facebook and Twitter accounts can be highly significant factors in determining whether those platforms are public forums in the first place and, if they are forums, in figuring out whether the government has reasonably limited the types of content that may be discussed on those forums. It is probably unlikely, however, that even a clear social media policy would fully eliminate any constitutional concerns about limiting who can participate in an online venue. In a famous dissent, Supreme Court Justice William Brennan pointed out the difficulty of deciding whether a stated restriction is one that permissibly defines the scope of a public forum, or if instead the limitation was imposed after the forum was defined and should therefore be subject to strict scrutiny.

The New York federal district court’s decision thus represents an important data point in the growing body of law exploring the First Amendment implications of government use of social media. Nonetheless, because the law governing the inquiry into the nature of a forum requires a fact-specific analysis into whether any given space has been intentionally opened by the government for all—or some—public expression, the ruling in *Knight First Amendment Institute* may ultimately be limited to the facts of the specific dispute. So far, litigation over the application of the First Amendment to governmental social media sites has largely been limited to the lower courts. It remains to be seen whether any appellate courts will weigh in on the issue, and the government has 60 days from the date of decision to decide whether to appeal the decision in *Knight First Amendment Institute*.
