

AUTHORED ARTICLES & PUBLICATIONS | AUG 23, 2018

The Public Square has Gone Online

BB&K Attorneys Christine Wood and HongDao Nguyen Write About Public Officials' Social Media Use in *PublicCEO*



By **Christine Wood and HongDao Nguyen**

Social media is the modern-day public square.

Facebook, Twitter and other social media platforms have effectively harnessed

technology to turn communication into an interactive dialogue — fundamentally shifting the way people connect with the world around them.

While these sites have become instrumental tools for public officials and agencies to communicate directly with constituents, they have also presented an array of challenges. The use of built-in features to hide comments and block users can infringe upon a user's protected freedom of speech.

As public officials use personal social media accounts to communicate official government business, once-personal pages are being transformed into limited public forums, raising the question: When does an official's account become governmental in nature such that it is subject to constitutional consideration?

In a digital world of re-tweeting, liking, hiding and blocking, recent court rulings have shed light on the lengths to which courts will go to protect an every-day users' First Amendment rights.

Sex Offenders and Social Media

The U.S. Supreme Court unanimously agreed in *Packingham v. North Carolina* (2017) that a North Carolina law prohibiting convicted sex offenders from accessing and using "commercial social networking" websites where minor children could be members violated the First Amendment.

North Carolina enacted a statute in 2008 making it a felony for a registered sex offender to access commonplace websites such as Facebook and Twitter.

In 2012, Lester Gerard Packingham, a registered sex offender who pled guilty a decade earlier to taking indecent liberties with a child, posted on Facebook about having a traffic ticket dismissed. The Durham Police Department was investigating registered offenders thought to be violating the law at the time.

People



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Packingham was indicted and was denied a motion to dismiss on the grounds that the charge against him violated the First Amendment. He was convicted and given a suspended prison sentence.

A state appellate court struck down the law on First Amendment grounds. That decision was overturned by the North Carolina Supreme Court, which concluded the law was “constitutional in all aspects.” The nation’s High Court disagreed, unanimously overturning the law.

“[S]ocial media users employ these websites to engage in a wide array of protected First Amendment activity on topics ‘as diverse as human thought,’” Justice Anthony M. Kennedy [wrote in the Court’s opinion](#). “These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”

Damage of a Presidential Block

Then, in May 2018, a federal judge ruled that President Donald Trump’s practice of blocking critics from his @realdonaldtrump Twitter account violated the blocked users’ First Amendment rights.

In July 2017, the Knight First Amendment Institute filed a lawsuit contending Trump and the White House communications team violated the First Amendment by blocking seven people who were critical of the president or his policies from the @realdonaldtrump account.

The account @realdonaldtrump, branded as the “45th President of the United States of America,” is used daily as a presidential account to announce official government business matters to more than 53 million followers.

In defending the user blocks, the White House argued the president’s @realdonaldtrump Twitter page was not a public forum because the government didn’t own the space and that public officials do not lose First Amendment rights upon taking office.

While the court agreed with the latter argument, it clarified that officials may not exercise their constitutional right in a way that infringes the corresponding First Amendment rights of those who have criticized them. The loss of those rights, for even short time periods, causes injury, the Court said.

The Court also conducted a public forum analysis and examined the “interactive space” associated with tweets. Given that interactivity is a defining trait of Twitter, where users can interact directly with users and content by replying, retweeting or liking the tweet, the Court found it to be a designated public forum.

“No one can 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 forum analysis, but those are hardly the facts of the case,” U.S. District Court Judge Naomi Reice [Buchwald wrote in the decision](#).

Context is important here. If the account was purely personal, the Court’s

conclusion would differ.

On June 4, the White House confirmed the seven users were unblocked and filed a notice of appeal.

Trump isn't the only official who has blocked people on social media. And, with both officeholders and public employees maintaining and posting online, can liability be placed on an agency?

Agency or Official: Who is Liable?

A 12-hour block was at the heart of *Davison v. Loudoun County Board of Supervisors*.

Loudoun County Board of Supervisors Chair Phyllis J. Randall ran a Facebook page to stay in touch with her constituents in the Virginia county. In one post, she called out for comments, "I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your thoughts."

Local resident Brian C. Davidson followed through and posted about alleged corruption in the Loudoun County School Board.

Unsure of the allegation's accuracy, Randall deleted the post and blocked Davidson. She unblocked him the next morning — 12 hours later. During this time, Davidson could view and share content on Randall's Facebook page, but was unable to comment on her posts.

Davidson sued, alleging the block violated his First Amendment rights.

The Court agreed, finding that Randall's blocking of a user based upon critical views was viewpoint discrimination, which violated the user's First Amendment rights.

"By prohibiting Plaintiff from participating in her online forum because she took offense at his claim that her colleagues in the County government had acted unethically, Defendant committed a cardinal sin under the First Amendment," U.S. District Judge James C. [Cacheris explained in his decision](#).

Even though Randall was operating under the color of state law, the court found her, not the agency, personally liable because she was entirely responsible for her page.

Cautionary Social Media Tale Takeaways

These recent rulings have shown that no government official is above the law. In light of these cases and decisions, when using social media, officials should:

- Use caution when posting about public business on a personal account
- Understand that blocking, deleting and hiding posts may be a First Amendment violation
- Know if a First Amendment issue arises, several factors will be at play, including:
 - The way you use the account
 - The type and tone of interaction you have with constituents

- The way the account is characterized

For agencies, the social media accounts of officeholders are becoming another public records source to retain. As a general rule, agencies should retain social media records like any other public record. But it is also a good idea to review records retention policies and put social media policies and practices in place.

Here are a few things to consider:

- Will all content be retained in the same manner?
- What is the records retention schedule? How long will they be kept?
- How will these records be stored? In an index, inventoried or on cloud-based storage?

More information on hiding and archiving posts, re-tweets and more can be found in a Q&A from Best Best & Krieger LLP's recent webinar: [Social Media Meets First Amendment](#).

The discussion on social media and how agencies retain these and other electronic records is ever evolving. For more articles on the topic, check out these PublicCEO articles: [Reigning in Digital Records](#) and [The Way After San Jose: Emails and E-Discovery](#).

This article first appeared on [PublicCEO.com](#) on Aug. 21, 2018.

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