KNIGHT
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QUICK GUIDE

Social Media for Public Officials 101

Government officials are increasingly using social media to share information with the public, and to allow members of the public to communicate with them about matters relating to government. The Supreme Court has described social media platforms as "the modern public square," noting that these platforms afford users the opportunity to "petition their elected representatives and otherwise engage with them in a direct manner."

Government officials who use social media accounts to carry out their official duties are engaged in "state action" and are therefore bound by the First Amendment. Thus, one federal appeals court held that former President Donald Trump's Twitter account was a "public forum" for First Amendment purposes, and that the president's practice of blocking users from the account on the basis of viewpoint was unconstitutional. Another federal appeals court reached essentially the same conclusions in a case involving a county official's Facebook page. Several federal district courts have issued rulings in line with these holdings. Against a motion to dismiss, one court upheld a plaintiff's claim that a city board president's decision to block her from his Twitter account was an act of viewpoint discrimination that violated her First Amendment rights; another held that the interactive sections of state legislators' official social media accounts were public forums, and that by blocking a group from those accounts the legislators violated the First Amendment; and another found that a city-created and -maintained social media page was a designated public forum. These courts, and, indeed, nearly all of the courts that have addressed these issues, have relied on the same basic analytical framework.

In this document, we offer some guidance to public officials who use, or want to use, social media in connection with their official duties. What we offer here isn't legal advice—if you're a public official, you should read our guidance, but you should also consult your own attorney. The guidance we provide here is meant to help public officials derive the benefits of social media, and navigate some of the challenges associated with social media, without running afoul of the First Amendment.

Our guidance is informed by settled legal principles as well as an increasing number of court decisions. This said, it's important to note that the technology of social media is new and evolving, that many questions about how the First Amendment should apply to this technology have yet to be resolved by the courts, and that some of these questions are genuinely difficult. We anticipate amending this guidance as the law, technology, and our own thinking evolve.

1. If you want your social media account to remain "personal," don't use it for official purposes.

Public officials don't surrender their First Amendment rights by entering public service. If you'd like to, you can maintain a personal social media account and use it to discuss your family, your golf game, or your thoughts as a citizen about world affairs. And like any other user of social media, you can block followers from a personal account for any reason you want to.

If you use your social media account for official purposes, though, the First Amendment restricts you from doing some of the things you could do with a purely personal account. Our advice: If you don't want to be bound by the First Amendment, don't use your social media account as an extension of your office. Don't use it to make announcements about your official responsibilities or actions. Don't use it to solicit the public's views about what legislation you should introduce or support, or whom you should appoint to an official government post, or whether you should vote to impeach the president. Don't use it to carry out your duties—to call official meetings, for example, or to issue orders that you have the authority to issue only because of your government position.

In deciding whether you are using your account for official purposes, courts are likely to look to the way you use, administer, and present the account, not just the label you give to it. It's not enough for you to simply declare that your social media account is "personal" if in fact you use the account to carry out the duties of your office. In assessing whether you are using your account for official purposes, courts are likely to consider:

- **How you use the account.** Do you use your account to communicate information about your official duties and to solicit information from constituents and the general public related to those duties?
- **Whether you use government resources in connection with your account.** Does your staff help you with your account by, for example, drafting, reviewing, or posting social media messages, or otherwise managing the account? Do you use government equipment or other government resources in operating your account? Do you use your account while carrying out your official responsibilities—for example, while attending events in your official capacity?

- **How you present the account.** Do you associate the account with your official position by, for example, including your official title in your account description, or using a profile picture that shows you acting in your official capacity? Do you refer to the account as "official," or direct constituents or others to it in a way that suggests that the account is an extension of your office?

Courts are likely to evaluate whether your account reflects state action by looking to the totality of the circumstances—that is, by looking to all of these factors, and perhaps others. If you want to maintain both a personal account and an official one, you should maintain a clear separation between the two.

Campaign accounts

One issue that arises in this area involves social media accounts used by candidates for office. If you are running for office but are not currently a government official, then your social media account is not a government-run account for purposes of the First Amendment. But what if you continue to use your "campaign" account once you are elected? As with personal accounts, it depends how you actually use your account after you take office.

While an account used solely as a campaign account is not subject to the First Amendment rules for public forums, an account that you use as an extension of your office will be considered an official account whatever label you may give to it. This is the case even if you maintain another account that you label "official." While occasional and infrequent posts about your official duties will likely not be enough on their own to convert a campaign account to an official one, more frequent use of a campaign account for such purposes will have that effect.

In determining whether a purported campaign account is in fact an official account, a court is likely to look at how the account is used, whether government resources are used in connection with the account, and how the account is presented. A court may consider, for example, whether you use your campaign account to share your official decisions, to solicit input from the public about issues you are dealing with or decisions you have made as a public official, or to share information about how the public can participate in your official events.

2. Don't block users or delete comments just because they criticize you.

If you use your account as an extension of your office, the First Amendment prohibits you from blocking people from the account—or suppressing or deleting their comments, or otherwise penalizing them—because of their viewpoints.

Multiple courts have held that social media accounts used for official purposes are "public forums" within the meaning of the First Amendment. A "public forum" is established when the government invites members of the public to speak in a space that the government owns or controls. Courts have held that the interactive features of social media accounts used for official purposes make those accounts public forums for First Amendment purposes because they enable members of the public to speak by, for example, replying to tweets or posting comments.

While there are different kinds of forums—including public forums in which all topics and speakers are allowed, and "limited" public forums, in which the government restricts which speakers can participate or which topics can be addressed—one rule that applies to all First Amendment forums is that the government may not stop people from speaking in them on the basis of their viewpoints. The rule against viewpoint discrimination ensures that people aren't excluded from public discourse simply because their views are controversial or disagreeable to others. It also helps ensure that government officials don't insulate themselves from the opinions of the people whom they are supposed to represent.

One related point is worth making here. Social media companies sometimes remove speech from their platforms that you, as a public official, couldn't lawfully suppress or block. Because the companies are private actors, their conduct is generally not subject to First Amendment limitations. But your conduct is. In our view, the First Amendment bars public officials from directing or encouraging platforms to take down speech that the officials couldn't constitutionally take down themselves. If the First Amendment bars you from suppressing speech directly, it bars you from suppressing it indirectly, too.

Our advice: If you use your account for official purposes, don't discriminate on the basis of viewpoint. It's undemocratic and unconstitutional.

3. Have a social media policy, make it public, and follow it.

If you use your social media account for official purposes, you should adopt policies for the account and post those policies publicly. Posting your policies publicly will let your followers (and others) know how you intend to use the account, and how you hope others will use the forum established by the account. Your policies should explain:

- **The general purposes you hope the account will serve;**
- **Any limitations on what users may post in the comment threads; and**
- **How you will address violations of those limitations.**

Make your policies as clear as possible. Be especially careful with the words you use to describe any limitations on what users may post in the comment threads. Policies that use words or phrases susceptible to multiple interpretations don't give users sufficient notice of what speech is allowed and what speech is disallowed, and those policies will be vulnerable to constitutional challenge. More on this below.

It's important to understand that the rule against viewpoint discrimination applies not just to your policies but also to your enforcement of those policies. In other words, the First Amendment prohibits you from adopting a policy that discriminates on the basis of viewpoint, but it also prohibits you from enforcing a nondiscriminatory policy in a way that discriminates on the basis of viewpoint.

4. If you limit what your followers can post, the limits should be reasonable and viewpoint-neutral, and enforced consistently.

As a public official, you may be subjected to speech that is pointed, disparaging, critical, mocking, unfair, cheap, dishonest, false, abusive, outrageous, and offensive. You can of course call out this speech and respond to it. As a general matter, though, you can't suppress it. For good reasons, the First Amendment provides very broad protection to political speech, and the courts have been especially protective of speech directed at public officials.

This said, there's no question that some kinds of speech can be disruptive, discourage civic participation that's important to our democracy, and make a public forum less useful than it might otherwise be. On social media, abuse and harassment are significant problems, especially for women and minorities. There are measures you can take to address some categories of speech that can be especially disruptive.

- **You can disallow content that falls outside the protection of the First Amendment—for example, "true threats" and "obscenity."** These are narrow categories, but they are broad enough to encompass some forms of abusive and harassing speech. ("Abusive speech" and "harassing speech" are not themselves well-defined categories, and a prohibition that relied on those phrases would likely be struck down as unconstitutionally vague.)

- **You can impose reasonable and viewpoint-neutral rules relating to the "time, place, or manner" of speech.** Though no court has addressed the issue, we think that the First Amendment would permit you to place a reasonable limit on the number of times any given user can comment on one of your posts. A restriction like this might help ensure that a comment thread doesn't get hijacked by a single speaker.

- **You can impose limitations on the topics that can be addressed in the forum, so long as the limitations are viewpoint-neutral and reasonable in light of the purpose of the forum.** We think that the First Amendment would allow you to restrict people from posting advertisements, promotions, and solicitations of commercial products and services. And we think it would allow you to require users to stay "on topic" on a post-by-post basis, so long as you enforce the limitation consistently and in a viewpoint-neutral way. An "on-topic" requirement may give you a tool for addressing at least some kinds of abusive and harassing speech.

- **You may also be able to limit who can speak in the forum, so long as the limitations are viewpoint-neutral and reasonable in light of the purpose of the forum.** For example, if you have a reliable way of differentiating constituents from others, the First Amendment might permit you to restrict the forum to your constituents.

We believe that the kinds of restrictions described above could be defended against a First Amendment challenge—assuming (yet again) that you enforce them consistently and in a viewpoint-neutral manner. Still, you should think carefully before adopting any of these restrictions. Consider whether the restriction you have in mind could suppress speech that is important, even if it's inconvenient or offensive. Consider whether the restrictions would insulate you or your followers from views you should hear, or deprive you of information that you or your followers should know. Also consider whether you have the time and resources to enforce the restrictions. If you have millions of followers and no social media staff, it may not be feasible for you to enforce these kinds of restrictions consistently, and inconsistent enforcement will be vulnerable to First Amendment challenge.

5. If you moderate speech on your account, don't forget due process.

If you restrict the kind of content that can be posted by others in the comment threads associated with your account, you should make clear in your publicly posted social media policy that you will notify users if you determine they have violated your policies. When you provide notice, the notice should:

- **Specify the provision of your policy you believe the user has violated;**

- **Include a copy of the content you believe violated the policy;**

- **If it isn't readily apparent, explain why the content violated the provisions you've cited;**

- **Explain what measures you've taken, or will take, in response to the violation; and**

- **Explain how the user can challenge your decision.**

The consequence for violating the terms of your social media use policy should be tailored to the violation, taking into account whether the user can correct the issue, and whether the user has violated the same policy in the past.

You should block users only as a last resort, because blocking prevents the blocked users from speaking at all in the forum. You should consider whether less severe restrictions—like "muting" users, or "hiding" replies, both of which are possible on Twitter—would achieve what you want to accomplish. We recommend that, if you block people from your account for violation of your policies, you block them for only brief periods. You should block people for longer periods only if they violate your policies repeatedly.

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If you have questions about, or reactions to, anything we've written here, we'd like to hear from you. You can write to us at info@knightcolumbia.org.

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