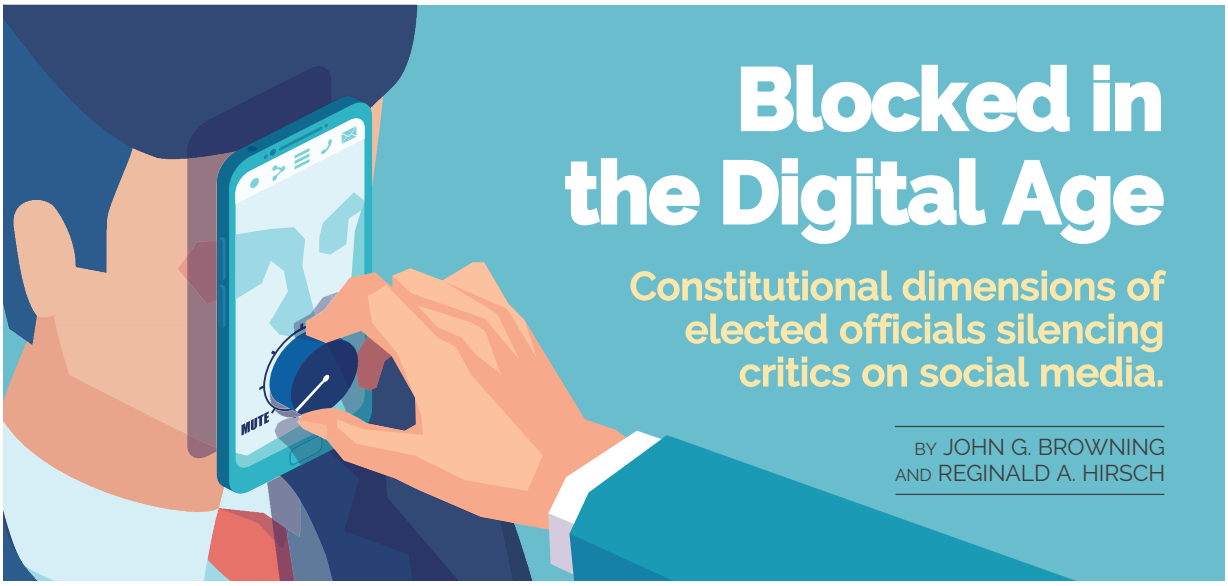

Blocked in the Digital Age

Constitutional dimensions of elected officials silencing critics on social media.

BY JOHN G. BROWNING
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One may not think that opposites on the political spectrum like President Donald Trump and Democratic Congresswoman Alexandria Ocasio-Cortez have something in common, but they do: Both have been sued for blocking critics on Twitter. In fact, in today's digital age, elected officials at all levels and of all political stripes have come under fire for blocking or censoring critics on social media platforms like Twitter and Facebook. In cases all around the country, courts are tackling the question of how sites run by a governmental entity or public official for public business qualify as "limited public forums" protected by the First Amendment, as well as how under certain circumstances, even a personal Twitter account like @realDonaldTrump can function as a limited public forum. Currently three federal circuit courts have examined these issues, along with several federal district courts in Texas, New York, Virginia, Colorado, Wisconsin, Kentucky, Maryland, Maine, Missouri, and Vermont.

Before reviewing specific cases, let's examine how such controversies usually arise. In an environment in which around 79% of Americans have at least one social networking profile and in which Twitter processes roughly 6,000 tweets every second, the importance of social media in daily life cannot be underestimated. And these platforms go beyond just the latest memes and cat videos; according to a Pew internet research study, 71% of Twitter users get their news there, while 67% of Facebook users rely on the platform for news.[1] Because of this, it's easy to understand why government leaders value having a social media presence (according to Burson Cohn & Wolfe's 2018 "Twiplomacy" study, governments, heads of state, and foreign ministers of 187 countries maintain an official presence on the platform). Politicians have replaced face-to-face and personal contact with potential and current constituents and voters with social media outreach in part, because the cost is minimal and the reach is far greater. And while public officials may recognize social media's significance as a broadcasting tool and a means for engaging with constituents, they don't always react well to critical commenters, sometimes resorting to blocking these users or deleting their comments.

Naturally, those prevented from participating in what many elected officials regard as digital town halls have considered such blocking as a form of censorship and a violation of their First Amendment right to express themselves in a public forum. Blocking by politicians goes beyond party lines and ideologies. Ocasio-Cortez recently settled two lawsuits brought by two politicians she blocked on Twitter, New York congressional candidate Joseph Saladino and former New York State Assemblyman Dov Hikind.[2] Trump, meanwhile, has faced a number of lawsuits over blocking users as a form of viewpoint discrimination, one of which reached the U.S. Court of Appeals for the 2nd Circuit earlier this year. With elected officials like both Ocasio-Cortez and Trump, however, the boundaries between personal Twitter account and official government site become blurred, with both using their personal accounts to tweet official government business. In 2017, then-White House Press Secretary Sean Spicer even proclaimed that President Trump's tweets were "official statements" of the president. That position was contradicted by the U.S. Department of Justice in an August 2019 appeal brief to the 2nd Circuit, arguing that the president's personal Twitter account was not a limited public forum and thus he was free to block critics.

However to date, decisions have been overwhelmingly in favor of applying the First Amendment to the digital forums of Twitter and Facebook in the same way that it applies to town halls and open school board meetings. Moreover, this constitutional protection will also apply to personal sites belonging to elected officials when they are administered to perform public duties and are inextricably linked to their public office.

The U.S. Court of Appeals for the 4th Circuit was the first federal appellate court to articulate this in its January 2019 decision in *Davison v. Randall*.[3] Phyllis Randall, chair of the Loudoun County (Virginia) Board of Supervisors, maintained a Facebook page to keep in touch with her constituents, writing in one post that "I really want to hear from ANY

Loudoun citizen on ANY issues, request, criticism, complement [sic] or just your thoughts." Loudoun resident Brian Davison took her up on this offer, posting a comment on her page alleging corruption by Loudoun County's school board. Randall reacted by deleting the entire post (including Davison's comment) and blocking him (though she later unblocked him). Davison sued, alleging that his right of free speech had been violated. U.S. District Judge James Cacheris agreed, noting that because Randall had blocked Davison over being offended by his criticism of her colleagues, she had "engaged in viewpoint discrimination," a "cardinal sin under the First Amendment." In response to Randall's argument that Davison was free to disseminate his criticism elsewhere, the court noted the U.S. Supreme Court's recent decision in *Packingham v. North Carolina* and its recognition that social media may be "the most important" modern forum "for the exchange of views." Cacheris wrote that "the Court cannot treat a First Amendment violation in this vital, developing forum differently than it would elsewhere simply because technology has made it easier to find alternative channels through which to disseminate one's message." And while Randall had set up the page as a personal one, the court observed, she was listed on it as a "government official," routinely used the page for official proclamations, made posts "on behalf of the Loudoun County Board of Supervisors," and regularly engaged with constituents in the comments section.

The 4th Circuit affirmed Cacheris' ruling, holding that while the Facebook page may have been a personal one, its "interactive component" gave it all the "hallmarks" of a public forum, including the stated purpose of the page as "public discourse."[4] Additionally, the court held that because Randall sought to "suppress" Davison's opinion about corruption on the school board, her decision to ban him "constitutes black-letter viewpoint discrimination."[5] The concern with such blocking was all the more problematic, the court said, because speech like Davison's "occupies the core of the protection afforded by the First Amendment."[6]

In July 2019, the 2nd Circuit echoed its 4th Circuit counterparts, albeit in a somewhat more high profile matter—that of seven individual Twitter users (represented by the Knight First Amendment Institute at Columbia University) who sued Trump (along with other White House officials) after being blocked from his Twitter account after expressing views the president disliked.[7] The court affirmed the lower court ruling of U.S. District Judge Naomi Buchwald that Trump had engaged in unconstitutional viewpoint discrimination by blocking such critics. Observing that "once the President has chosen a platform and opened up its interactive space to millions of users and participants, he may not selectively exclude those whose views he disagrees with," the court held that the First Amendment does not permit a public official who utilizes a social media account "for all manner of official purposes" to exclude persons from an otherwise open online dialogue "because they expressed views with which the official disagrees."[8] The court rejected the argument that the act of blocking users was merely private conduct, noting that the public presentation of the @realDonaldTrump Twitter account and the webpage associated with it "bear all the trappings of an official, state-run account" and that the government itself conceded that, since Trump's inauguration, the account had been used "as a channel for communicating and interacting with the public about his administration."[9] The 4th Circuit was, however, careful to state that its ruling did not consider or decide whether elected officials may constitutionally exclude persons from a wholly private social media account, or whether private social media companies like Twitter and Facebook are bound by the First Amendment when policing their platforms. As far as the blocking of critics by Trump, the court was decisive in its constitutional analysis. Observing the irony of having to confront this issue "at a time in the history of this nation when the conduct of our government and its officials is subject to wide-open, robust debate," the court ended its opinion with a sobering reminder that "if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less."[10]

The U.S. Court of Appeals for the 5th Circuit has also weighed in on the issue of officials blocking critics on social media. In its April 2019 decision in *Robinson v. Hunt County*, the 5th Circuit addressed whether a county sheriff in Texas had violated the free speech rights of an individual by deleting her comments and banning her from his office's public Facebook page.[11] In January 2017, Hunt County Sheriff Randy Meeks' Facebook account included a post noting that, following a killing of a North Texas police officer, the sheriff's office had received a number of "anti police calls" and several posts on its Facebook page from "people trying to degrade or insult police officers," prompting Meeks to remind visitors that "comments that are considered inappropriate will be removed and the user banned." Deanna Robinson posted a response saying that "… insulting police officers is not illegal, and in fact has been ruled time and time again, by multiple US courts as protected First Amendment speech." Following her comment, it and other posts were removed, and Robinson herself was banned. Although the district court sided with the sheriff (reasoning that removal of the comments could comply with Facebook's own policies), the 5th Circuit disagreed, ruling that deleting Robinson's comment and banning her from the Facebook page constituted viewpoint discrimination. Reinstating her constitutional claims and remanding her case to the trial court for reconsideration of Robinson's request for injunctive relief, the court held that "Official censorship based on a state actor's subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination."[12]

Another Texas case may someday add to this growing body of constitutional law. Texas House Speaker Dennis Bonnen is currently embroiled in a similar federal lawsuit brought by pro-Second Amendment activists. Lone Star Gun Rights co-founder Justin Delosh, senior editor Derek Wills, and one other plaintiff claim that Bonnen blocked them from his Facebook page after they expressed disagreement over a gun bill in the 2017 legislative session. The bill in question concerned "constitutional carry," and would have allowed Texans to carry a firearm without a license. Bonnen, who opposed the bill, blocked the Lone Star Gun Rights members and posted

about how "fringe gun-rights activists" were harassing him and making death threats.[13] The plaintiffs maintain that because they were blocked by the speaker, they could not respond to Bonnen's criticisms or refute his allegations of death threats. While they allege that the blocking violates their First Amendment rights, Bonnen argues that free speech is not implicated because the Facebook page in question is Bonnen's personal campaign page rather than one maintained in his official government capacity. As we have seen in other cases, much will depend on how intertwined such a page is with Bonnen's official role.

As elected officials from the local school board to the Oval Office have recognized the power and reach of social media, the urge to block or silence their critics engaging with them or their platforms has followed. But as court after court has acknowledged, such digital spaces need not be echo chambers where officials are insulated from criticism or accountability. As the U.S. Supreme Court noted in 2017's *Packingham v. North Carolina*, not only does the First Amendment apply to "commonplace social networking sites like Facebook, LinkedIn, and Twitter," but "to foreclose access to social media . . . is to prevent the user from engaging in the legitimate exercise of First Amendment rights."[14] **TBJ**

Notes

1. Elisa Shearer & Katerina Eva Matsa, *News Use Across Social Media Platforms 2018*, Pew Res. Ctr. (Sept. 10, 2018), https://www.journalism.org/2018/09/10/news-use-across-social-media-platforms-2018/.
2. Shelby Brown, *After Trump Ruling, Ocasio-Cortez Sued for Blocking Twitter Critics*, Cnet (July 10, 2019), https://www.cnet.com/news/after-trump-ruling-ocasio-cortez-sued-for-blocking-twitter-critics/.
3. No. 17-2002 (4th Cir. 2019).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Knight First Amendment Institute et al. v. Trump*, No. 18-1691-cv (2d Cir. 2019).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Robinson v. Hunt Cty.*, No. 18-10238 (5th Cir. 2019).
12. *Id.*
13. Ryan Autullo, *Texas House Speaker Dennis Bonnen blocked gun activists on Facebook, lawsuit says*, Austin Am. Statesman (May 16, 2019), https://www.statesman.com/news/20190516/texas-house-speaker-dennis-bonnen-blocked-gun-activists-on-facebook-lawsuit-says.
14. *Packingham v. N. Carolina*, 582, U.S. ___ (2017), 137 S. Ct. 1730, 198 L. Ed. 2d 273.

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