

In Brief

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PUBLIC OFFICIALS' SOCIAL MEDIA ACCOUNTS—AN UNINTENTIONAL PUBLIC FORUM?

Public officials and employees who personally create or maintain interactive blogs or social media accounts to communicate with the public about government matters cannot lawfully block users or censor comments based on the user's viewpoint. At least two federal courts have determined that a public official's privately created social media page, even if only partially devoted to government business, opens a forum for speech and exposes the official to money damages and attorneys' fees under 42 USC 1983, 1988 for viewpoint-based censorship.

In *Davison v. Loudoun County Board of Supervisors*, 267 F.Supp.3d 702 (E.D Virginia, 2017), the County Board Chair personally created and maintained a Facebook page outside of official County channels, without using County resources. Her duties did not specifically require her to maintain a website or social media page. Later, the Chair banned the plaintiff and removed "inappropriate" posts plaintiff had made criticizing other county government officials.

The federal court raised "the novel legal question: when is a social media account maintained by a public official considered 'governmental' in nature, and thus subject to constitutional constraints?" The court reviewed the "totality of circumstances" and concluded that the Chair's actions had "a sufficiently close nexus with the state to be fairly treated as the actions of the state itself." Among other characteristics, the Facebook page:

- arose out of public, not personal circumstances;
- was titled "Chair of the Loudoun County Board of Supervisors," a government officials' page;
- contained the Chair's County email address and phone number and the County's web address;
- included posts on behalf of the entire Board of Supervisors;

- was used for "back and forth constituent conversations," and
- banned plaintiff due to his criticism of the Chair's "colleagues" in the County government.

More recently, President Donald Trump's personal twitter page, "@realDonaldTrump," created by him prior to his election as President, was held to be under the control of government for free speech purposes. *Knight First Amendment Institute at Columbia University v. Trump*, 302 F.Supp3d 541 (SDNY 2018). In *Knight*, the court concluded that interactive space on the twitter account was a designated public forum and restrictions were permissible only to the extent that they were "narrowly drawn to achieve [a] compelling state interest." The President's action of barring access to certain users who spoke against his policies and actions was the result of viewpoint discrimination in violation of the First Amendment.

First Amendment social media law is still rapidly developing. Nevertheless, public officials should be aware that a court may treat a personally-created interactive blog or social media page as a public forum if the "totality of circumstances" indicate that the page is operating under color of state law. Content-based censorship on such a page amounts to viewpoint discrimination, exposing the public official to money damages and attorney's fees under the First Amendment and 42 U.S.C. 1983.

If you are planning to create such a page, or you plan to convert an election campaign-based social media page into a "tool of government" page, contact your Robbins Schwartz attorney to avoid unintended exposure to financial and political risk.