

2021

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Caylee Phillips

Southern Methodist University, Dedman School of Law

Recommended Citation

Caylee Phillips, *Trump's Twitter Tension: Is Social Media a Modern Restriction on Government Employees?*, 24 SMU SCI. & TECH. L. REV. 135 (2021)
<https://scholar.smu.edu/scitech/vol24/iss1/7>

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TRUMP'S TWITTER TENSION: IS SOCIAL MEDIA A MODERN RESTRICTION ON GOVERNMENT EMPLOYEES?

Caylee Phillips*

I. INTRODUCTION

The Second Circuit Court of Appeals in *Knight First Amendment Institute at Columbia University, Inc. v. Trump* answered the question of whether now former President Donald Trump's blocking of Twitter users from his profile was a violation of the public's First Amendment rights.¹ The court upheld the Southern District of New York's conclusion that President Trump engaged in unconstitutional viewpoint discrimination by "blocking" them from his social media account because he disagreed with their speech.² The courts both agreed that President Trump was using his account to "conduct official business" and, therefore, blocking individuals amounted to viewpoint discrimination.³ The Second Circuit's decision was petitioned for a rehearing *en banc* that was denied, but the decision was not unanimous and included a dissent.⁴

The rise of social media has created a highly interactive space for people across the world to access and interact with news contemporarily. It has also forged a space for politicians on both sides of the aisle to update the public on their stances and express their views.⁵ While this advancement has allowed the public to participate more directly with their elected officials, it is creating questions regarding the scope of the public's First Amendment rights to interact in this forum.

This Casenote addresses the following: (1) a brief discussion on how Twitter works; (2) an overview of relevant First Amendment law; (3) an overview of the Southern District of New York's decision; (4) an overview of the Second Circuit's rehearing *en banc* majority and dissenting opinions; (5) an analysis of why the courts' holdings are correct and additional reasons that support the outcome; and (6) a conclusion discussing potential consequences of the decision. This Casenote concludes that the Second Circuit

* Caylee Phillips is a second-year law student at SMU Dedman School of Law. She attended Oklahoma State University and graduated with a degree in chemical engineering.

1. *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019) (Second Circuit's original decision regarding this case).

2. *Id.*; *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 302 F. Supp. 3d 541, 549 (S.D.N.Y. 2018).

3. *Knight*, 928 F.3d at 230.

4. *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 953 F.3d 216, 217 (2d Cir. 2020) (Second Circuit's denial of a rehearing *en banc*).

5. See Dawn Carla Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B.U. J. SCI. & TECH. L. 1, 3 (2019).

Court of Appeals was right in determining that the President's "blocking" of users from his Twitter account violated the First Amendment because the interactive space of his tweets is a public forum.⁶ Additionally, the outcome of the court of appeal's decision is correct because there are certain freedoms that government employees must give up when taking office, and the use of their social media in an official capacity might just be a modern extension of traditional restrictions. This Casenote will also attempt to explore the ramifications for politicians' social media use in the future and the potential liabilities they could now face considering this decision.

II. THE BASICS OF TWITTER

To understand the nuances of this set of decisions, it is important to understand how Twitter works. Twitter is a social media platform with over 70 million active users in the United States alone.⁷ All users have a unique username that follows an "@" sign, which is called the user's "handle."⁸ Each tweet can only have a maximum of 280 characters.⁹

Once a message has been tweeted, there are a variety of ways that other users can interact with the tweet.¹⁰ A user can "retweet" a tweet, which is essentially reposting the tweet to one's own timeline.¹¹ A user can "like" someone's tweet by clicking the heart that appears beneath each tweet.¹² Both of these functions are seen as signs that the user agrees with or enjoys your tweet.¹³ A person can also "reply" to a tweet.¹⁴ The reply will show up on both the replying user's own timeline and underneath the original tweet.¹⁵ A string of replies to a single tweet is known as a "comment thread."¹⁶ If one were to click on a specific tweet, all the replies would be displayed below this tweet.¹⁷ The interface that displays a specific tweet with all of the replies

6. *Knight*, 953 F.3d at 217.

7. *Knight*, 302 F. Supp. 3d at 550.

8. *Id.*

9. *How to Use Twitter: Critical Tips for New Users*, WIRED (Aug. 29, 2018, 5:25), <https://www.wired.com/story/how-to-setup-twitter-search-hashtag-and-login-help/>.

10. *Knight*, 302 F. Supp. 3d at 550.

11. *Twitter for Beginners: The Complete Guide*, WIX BLOG (Oct. 24, 2016), <https://www.wix.com/blog/2016/10/twitter-guide-for-beginners/>.

12. *See Knight*, 302 F. Supp. 3d at 551.

13. *Id.*

14. *Id.* at 550.

15. *Id.*

16. *Id.* at 551.

17. *Id.*

beneath it is referred to in the courts' decisions as the "interactive space."¹⁸ The interactive space is essentially the medium for users to interact with the content of a user's tweets.¹⁹

Users can "follow" other accounts to see all tweets posted or retweeted by that specific account.²⁰ Users can also "block" or "mute" other accounts that they do not wish to see or interact with.²¹ "Blocking" an account prohibits that user from seeing your tweets, following your account, or replying to your tweets.²² In contrast, "muting" allows one to remove tweets from a user from their own timeline without unfollowing or blocking them.²³ Muted accounts do not know that you have muted them, and they can be unmuted at any time.²⁴ Additionally, if you do not follow a muted account, you will not receive any notifications about that account, but that account will still be able to see and reply to your tweets.²⁵

III. FIRST AMENDMENT LAW

Each of the courts involved in the *Knight First Amendment Institute at Columbia University v. Trump* case began their analysis by deciding whether the First Amendment protects the interest the blocked users were seeking to redress—the right to interact freely with their elected official.²⁶ The first issue is to determine whether the First Amendment protects the speech in question.²⁷ The First Amendment protects citizens engaging in political speech; in fact, political speech "fall[s] within the core of First Amendment protection."²⁸ The only instances of political speech that would not be protected

18. *Knight*, 302 F. Supp. 3d at 549.

19. *Id.*

20. *Id.* at 551.

21. *About Being Blocked*, TWITTER, <https://help.twitter.com/en/using-twitter/someone-blocked-me-on-twitter> (last visited June 28, 2021); *How to Mute Accounts on Twitter*, TWITTER, <https://help.twitter.com/en/using-twitter/twitter-mute> (last visited on June 28, 2021).

22. *About Being Blocked*, *supra* note 21.

23. *How to Mute Accounts on Twitter*, *supra* note 21.

24. *Id.*

25. *Id.*

26. *See Knight First Amend. Inst. at Colum. Univ. v. Trump*, 953 F.3d 216, 218–19 (2d Cir. 2020); *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019); *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 302 F. Supp. 3d 541, 550 (S.D.N.Y. 2018).

27. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).

28. *Engquist v. Oregon Dep't Agr.*, 553 U.S. 591, 600 (2008).

would be a limited class of speech that involves obscenities, defamation, fraud, incitement, and speech integral to criminal conduct.²⁹

A. Public Forum Doctrine

The Public Forum Doctrine is a subset of the First Amendment that protects individuals from government censorship in places designated as public forums.³⁰ A public forum is a space owned or controlled by the government.³¹ A space may be a public forum based on government control even absent legal ownership of the forum.³² Government property is defined in three categories: (1) traditional public fora; (2) limited and unlimited designated public fora; and (3) all remaining public property.³³ Traditional public fora are places that have consistently been a place for free expression and assembly—like parks and streets.³⁴ This forum has the most protection because the government is extremely limited in their ability to discriminate against the viewpoint or content of speech in these areas.³⁵ A designated public forum is a forum that the government intentionally opened for the purpose of becoming a public forum.³⁶ The government has wide discretion in the establishment of this type of forum, but once it has been established as a forum, “any content-based restrictions must be narrowly tailored to achieve a compelling government interest.”³⁷ Additionally, the speaker must have their access to the forum diminished to seek First Amendment protection.³⁸ The analysis of a public forum should focus on the access sought by the speaker to determine the scope of the public forum.³⁹

29. *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 131 (2011).

30. Nunziato, *supra* note 5, at 20–21.

31. *Cornelius*, 473 U.S. at 800.

32. *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 679 (2010).

33. Terri R. Day & Danielle Weatherby, *Shackled Speech: How President Trump’s Treatment of the Press and the Citizen-Critic Undermines the Central Meaning of the First Amendment*, 23 LEWIS & CLARK L. REV. 311, 331 (2019).

34. Nick Reade, *Is There A Right to Tweet at Your President?*, 88 FORDHAM L. REV. 1473, 1478 (2020).

35. *Id.*

36. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009).

37. Reade, *supra* note 34, at 1479.

38. *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 302 F. Supp. 3d 541, 565 (S.D.N.Y. 2018).

39. *Id.*

B. Government Speech Doctrine

Another subset of the First Amendment is the Government Speech Doctrine.⁴⁰ The First Amendment restricts the government's regulation of private speech but does not restrict the regulation of the government's own speech.⁴¹ The government cannot restrict private speech based on viewpoint or content discrimination. However, the government is not engaging in viewpoint discrimination when it decides the content of its own speech at the exclusion of other viewpoints.⁴² Courts look to three factors when determining whether speech is government speech or private speech: (1) "whether the government has historically used the speech in question to convey state messages"; (2) "whether the speech is often closely identified in the public mind with the government"; and (3) "the extent to which the government maintains direct control over the messages conveyed."⁴³

IV. *KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY V. TRUMP*

A. District Court Decision

The Southern District of New York held that the interactive space of President Trump's Twitter account was considered a public forum; therefore, President Trump cannot block people from the account based on their contrary political views because this would be considered viewpoint discrimination.⁴⁴ The court started the analysis by determining that the access the plaintiffs sought was very limited—they did not seek access to the account as a whole.⁴⁵ Instead, the court analyzed the content of the tweets, the comment threads initiated by those tweets, and "the interactive space associated with each tweet."⁴⁶

President Trump set up his Twitter account in 2009 as a private account, but upon running for and subsequently winning the presidency, the account served as a "channel for communicating and interacting with the public about his administration."⁴⁷ The profile of the Twitter account was registered to "Donald Trump, 45th President of the United States."⁴⁸ The court found that the account was government controlled because President Trump and his social media director, Daniel Scavino, controlled the content of the tweets and

40. Day & Weatherby, *supra* note 33, at 329.

41. *Id.*

42. *Id.*

43. *Id.* at 336.

44. *Knight*, 302 F. Supp. 3d at 549.

45. *Id.* at 566.

46. *Id.*

47. *Id.* at 552.

48. *Id.*

had the ability to prevent other accounts from viewing the tweets by blocking.⁴⁹ Additionally, the control was governmental because the tweets were being preserved under the Presidential Records Act, and the account was being used to appoint, remove, and announce executive officers—actions that can only be taken by the President.⁵⁰ Even though the account was originally set up as a private one, the proper analysis would be to analyze the forum as it existed at the time, which was as a means of communicating and interacting with the public as the President of the United States.⁵¹ The control the President had over the account did not extend to the comment thread, as President Trump did not have control over who replied to the tweets or the content of those replies.⁵² He only had direct control over the content of his own tweets and who has access to the interactive space associated with the account.⁵³

In contrast, the court held that the content of the tweets was considered government speech and therefore not subject to the forum analysis.⁵⁴ The record proved that President Trump used the account to “defend his policies; to promote legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; and to challenge media organizations whose coverage of his Administration he believed to be unfair.”⁵⁵ However, the interactive space was not held to be government speech because the replies were associated with the private citizen who owned that account and not President Trump himself.⁵⁶ Additionally, the primary purpose of tweeting is “to allow speakers to engage with the content of the tweet.”⁵⁷ The court noted that when an individual is blocked, their ability to directly interact with the tweets is thwarted.⁵⁸

After determining that the interactive space of President Trump’s Twitter was subject to forum analysis, the court concluded that it was a non-traditional forum because there has been no historical practice of using this type of forum.⁵⁹ President Trump is one of the first politicians that has used social media, not only as a platform for his presidential campaign, but also as a means to directly interact with the American public instead of using more

49. *Id.* at 566.

50. *Knight*, 302 F. Supp. 3d at 567.

51. *Id.* at 569.

52. *Id.* at 569–70.

53. *Id.*

54. *Id.* at 571.

55. *Id.*

56. *Knight*, 302 F. Supp. 3d at 572.

57. *Id.* at 573.

58. *Id.*

59. *Id.* at 574.

traditional means such as news outlets or press conferences.⁶⁰ Further, the court held that President Trump intended to make his Twitter account's interactive space a public forum because it was generally accessible to the public at large (as long as you are not blocked), and anyone who wanted to follow the account could do so.⁶¹ The interactivity of Twitter is "one of its defining characters" and "accommodates a substantial body of expressive activity."⁶²

Lastly, the court considered specifically the blocking of individual users from the Twitter account.⁶³ Restriction of a public forum is only acceptable if it achieves a "compelling government interest," but viewpoint discrimination is not permissible in any public forum.⁶⁴ In this case, the users were blocked immediately after expressing views that were critical of the President's policies or critical of him.⁶⁵ While the President has his own First Amendment rights that include the ability to not engage with the individuals, the court held that the blocking of the users went beyond this right, as he could simply mute or ignore them.⁶⁶ The President retains the right to not listen, to not respond, and even to amplify the voice of one individual over the others.⁶⁷ The court concluded that President Trump was merely permitted to mute individuals from his Twitter, not block them, because this would remove their tweets from his view but still allow the individual users to see, respond, and interact with his tweets.⁶⁸

B. Second Circuit's Denial of Rehearing *En Banc*

The Second Circuit affirmed the district court's holding.⁶⁹ The Second Circuit held that a court must look at how the official "describes and uses the account; to whom the features will be made available; and how others, including government officials and agencies, regard and treat the account" when determining if an account from a politician will be subject to forum analysis.⁷⁰ The decision was appealed and denied for a rehearing *en banc*, but there was a dissenting opinion that argued that the court had misapplied what

60. *See id.* at 552–53.

61. *Id.* at 574.

62. *Knight*, 302 F. Supp. 3d at 575.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 577.

67. *Id.* at 576.

68. *Knight*, 302 F. Supp. 3d at 576.

69. *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019).

70. *Id.* at 236.

constituted a state action.⁷¹ The dissent concluded that the First Amendment does not include a right to post on other people's social media accounts—even those accounts held by government officials.⁷² Instead, the dissent argued that the court failed to continue the analysis of what constitutes a state action by failing to consider “whether the President exercised some right or privilege created by the State” when blocking users from his Twitter account.⁷³

The dissent considered that Twitter is privately owned and controlled, meaning that the use of features on the app would “involve no exercise of state authority.”⁷⁴ President Trump was able to block users before he became President, so he “exercised no special powers possessed by virtue of law,” nor “were his actions made possible only because he was clothed in the authority of the law.”⁷⁵ The dissent worried that if the use of personal accounts to tweet about their work in office were made state actions, then government officials would be inhibited from “discussing public matters on their personal accounts without converting all activity on those accounts into state action.”⁷⁶

The dissent also argued that the analysis should not have been conducted on the entire account, but that the court should have considered whether the actual action of blocking users amounted to state action.⁷⁷ Precedent of the court showed that they should “look to the nature of the officer's actions, not simply his duty status,” and by taking a broader approach, all of an official's social media account turned into state action when only some of it was being used in that way.⁷⁸ There was also the consequence of creating confusion of when the account specifically turned into state action or what it would take to turn a personal account into a government official's account.⁷⁹

Turning to the First Amendment analysis, the dissent found that the court had misapplied precedents of the public forum analysis to the interactive space of the account.⁸⁰ First, the dissent argued that any time government

71. Knight First Amend. Inst. at Colum. Univ. v. Trump, 953 F.3d 216, 217 (2d Cir. 2020).

72. *Id.* at 226 (Park, J., dissenting).

73. *Id.*

74. *Id.* at 227 (Park, J., dissenting).

75. *Id.* (quoting Colombo v. O'Connell, 310 F.3d 115, 118 (2d Cir. 2002) (per curiam)).

76. *Id.*

77. *Knight*, 953 F.3d at 227–28 (Park, J., dissenting).

78. *Id.* at 228 (Park, J., dissenting).

79. *Id.*

80. *Id.*

speech is involved, it is not subject to forum analysis.⁸¹ It also noted that even Twitter does not make a distinction between the actual tweets and the interaction space, so this distinction by the majority was arbitrary.⁸² Second, the dissent argued that President Trump did not intend to create a public forum by continuing to use the account the same way he did before taking office because “the government does not create a public forum by inaction or by permitting limited discourse.”⁸³ The court’s dissent ended their discussion by concluding that this decision would create uncertainty in the use of social media for all levels of government officials.⁸⁴

While the dissent made interesting points of contention, the majority’s analysis properly disavowed these arguments. First, the majority held that President Trump was exercising a “right or privilege created by the state” by blocking users on Twitter because of the nature of the tweets.⁸⁵ For example, when President Trump tweeted about foreign policy, he was speaking as the Nation’s Chief Executive and the Commander in Chief.⁸⁶ This is precisely a “right or privilege” created by the state, and the majority emphasizes that if this was not considered such a privilege, “it would be hard to imagine what might be.”⁸⁷ Additionally, the majority clarified that even though the blocking feature was available to all users, the issue was not the mere fact that President Trump blocked users, but that he blocked users from an official account.⁸⁸ The fact that every user is able to use this feature does not by itself make it a private action.⁸⁹

Second, the majority also contended that the line between what are actions by public officials and what is purely personal is not as blurred as the dissent contended.⁹⁰ The majority reaffirmed the discussion the court of appeals analyzed in their first opinion—that the control President Trump and his staff used over the account and the use of the account as an “official channel of communication” was the reason it was considered an action by a public figure.⁹¹ While this is true, the majority’s test might not have been as clear-cut as they intended and will be discussed further below.

81. *Id.*

82. *Id.* at 229 (Park, J., dissenting).

83. *Knight*, 953 F.3d at 228 (Park, J., dissenting) (quoting *Perry v. McDonald*, 280 F.3d 159, 167 (2d Cir. 2001)).

84. *Id.* at 230 (Park, J., dissenting).

85. *Id.* at 219.

86. *Id.*

87. *Id.*

88. *Id.* at 220.

89. *Knight*, 953 F.3d at 220.

90. *Id.* at 219.

91. *Id.* at 219–20.

Lastly, turning to the First Amendment analysis, the majority held that it was not straying from traditional forum analysis by drawing a distinction between the content of the tweets themselves and the interactive space of the account.⁹² The court drew an analogy to traditional public fora: when public officials hold a town hall meeting, statements made by the public officials are protected by the government speech doctrine; however, when the public is allowed to comment, the officials may not prohibit certain people from engaging in that discussion.⁹³ Significantly, the court held that even if the account was not considered a public forum, “excluding individuals who express disfavored viewpoints is not permitted.”⁹⁴

V. POLITICIANS WHO USE THEIR SOCIAL MEDIA ACCOUNTS AS AN EXTENSION OF THEIR OFFICE SHOULD BE SUBJECT TO RESTRICTIONS

The Second Circuit and Southern District of New York reached the right result in finding that blocking users based solely on contrary viewpoint discrimination was a violation of the First Amendment when that social media account is deemed to be a public forum.⁹⁵ However, the courts could have constructed a clearer standard. The Second Circuit established a multifactor test to use in determining whether any account by a politician will be subject to forum analysis.⁹⁶ While the court listed factors to consider, these factors were given little rationale.⁹⁷ The court merely stated it is informative “how the official describes and uses the account; to whom the features will be made available; and how others, including government officials and agencies, regard and treat the account.”⁹⁸

But President Trump’s use of his Twitter account has been an unprecedented approach to how politicians communicate with the public, especially considering the position he had—the President of the United States.⁹⁹ While the court’s multifactor test might be easy to apply in this case—where the tweets concerned the appointment of executive officers, announced major

92. *Id.* at 220.

93. *Id.* at 221.

94. *Id.* at 223.

95. *Knight*, 953 F.3d at 218–19; *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 302 F. Supp. 3d 541, 577 (S.D.N.Y. 2018).

96. *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019).

97. *See id.*

98. *Id.*

99. Tamara Keith, *Commander-in-Tweet: Trump’s Social Media Use and Presidential Media Avoidance*, NAT’L PUB. RADIO (Nov. 18, 2016, 3:46 PM), <https://www.npr.org/2016/11/18/502306687/commander-in-tweet-trumps-social-media-use-and-presidential-media-avoidance>.

political news and foreign policy, and are considered preserved under the Presidential Records Act—the next case discussing a politician's social media may not be as straightforward.¹⁰⁰ The sparse rationale for this standard makes future litigation for public officials uncertain; therefore, the standard for what politicians should strive for in their social media use for personal accounts is also unclear. The court did not establish a clear-cut continuum of when an account crosses the line, and it is likely that President Trump's use of social media was far more active and garners much more national attention than most politicians' tweets would.¹⁰¹ The court muddies the middle ground by not expanding on these factors, especially considering the only example of the application of these factors happens to be one that is extreme.¹⁰²

Despite the potential uncertainty this decision has created, the courts reached the right result because there are certain freedoms that public figures must give up when deciding to take office, and this might just be a modern extension of those sacrifices. For example, the government can restrict the speech of their employees when their speech affects the operation of the government.¹⁰³ Thus, government employees do not receive the full protection of the First Amendment.¹⁰⁴ The ability to restrict the speech is not absolute; if the speech is considered a matter of public concern or the employee is speaking as a private citizen (not pursuant to official job duties), the government may not filter the speech.¹⁰⁵ Speech is a matter of public concern when it relates to “any matter of political, social, or other concern to the community.”¹⁰⁶

Another example where government employees give up some of their freedom by taking a government position is the Hatch Act.¹⁰⁷ Under this Act, federal employees are forbidden from “tak[ing] an active part in political management or political campaigns.”¹⁰⁸ The Supreme Court has affirmed this limitation by emphasizing that the government has a substantial interest in forbidding partisan political activities, and these interests outweigh the rights

100. *See Knight First Amend. Inst. at Colum. Univ. v. Trump*, 302 F. Supp. 3d 541, 552–53 (S.D.N.Y. 2018).

101. *See Knight*, 928 F.3d at 236.

102. *See id.*

103. *Connick v. Meyers*, 461 U.S. 138, 157 (1983).

104. *Id.* at 156–57.

105. *Id.* at 157.

106. *Snyder v. Phelps*, 56 U.S. 443, 453 (2011).

107. *See Particular Government Regulations that Restrict Expression*, JUSTIA (Sept. 30, 2020), <https://law.justia.com/constitution/us/amendment-01/13-particular-governmental-regulations.html>.

108. 5 U.S.C. § 7323(b)(2) (2008).

of employees to participate in political activities even though this restriction impairs some First Amendment rights.¹⁰⁹

Presumably, government employees must expect some limitations on the scope of their rights when the interests of the public at large are at stake. In this situation, the interest at stake is the right of free exchange of ideas, a fundamental right with immense historical significance in our country.¹¹⁰ The Supreme Court identified, early in its precedent, that the First Amendment requires “an environment that promotes robust public discussion and limits the power of the government to silence opposition.”¹¹¹ President Trump’s blocking of users solely based on the fact that they had views different from his own hindered the “robust public discussion” that the Supreme Court has long recognized as protected under the First Amendment.¹¹² President Trump’s Twitter account produced public discussion every day in the interactive space of his tweets, and allowing all users equal access to participate in this discussion is vital to the free exchange of ideas.¹¹³

However, President Trump was not left without any options to censor his Twitter account. He could still “mute” users without violating their constitutional rights because a muted user can still see and interact with the tweets, but the user does not have to see or interact with any of the muted user’s tweets.¹¹⁴ Trump was also free to simply ignore the users who had contrary views, and he was even permitted to promote users with views similar to his own over users with contrary views.¹¹⁵ The narrow restriction the court was seeking to enforce was only to allow users the ability to access and reply to the President’s tweets for as long as he was President of the United States, since this account had become an extension of the office.¹¹⁶

Additionally, it is important to note that this is not a political issue—this restriction affects politicians from both sides of the aisle and from varying levels of government.¹¹⁷ In 2017, a Virginia court held that the Loudoun County Board of Supervisor’s Chair, Randall Phyllis, could not block Brian Davison from the Facebook page she set up for her position just because he

109. *Broadrick v. Oklahoma*, 413 U.S. 601, 616–17 (1973).

110. *Day & Weatherby*, *supra* note 33, at 323.

111. *Id.*

112. *See id.*

113. *See Knight First Amend. Inst. at Colum. Univ. v. Trump*, 928 F.3d 226, 231 (2d Cir. 2019); *Day & Weatherby*, *supra* note 33, at 346.

114. *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 302 F. Supp. 3d 541, 552 (S.D.N.Y. 2018).

115. *Id.* at 576.

116. *Id.* at 566.

117. *See Davison v. Loudoun Cty. of Bd. Supervisors*, 267 F. Supp. 3d 702, 723–24 (E.D. Va. 2017).

made a comment with which she disagreed.¹¹⁸ In July 2019, Twitter users similarly sued Representative Alexandria Ocasio-Cortez for blocking them from her Twitter account; she eventually settled the lawsuit and issued a public apology.¹¹⁹ Both of these cases dealt with public figures from positions in a different level of government than President Trump, but the result was the same. Courts are not going to enforce this limitation just against those in the highest levels of government.¹²⁰

VI. CONCLUSION—WHAT ARE THE IMPLICATIONS OF THIS DECISION?

Twitter is the new “town hall” of public forums and has created the ultimate interactive space for constituents to engage with their elected officials.¹²¹ In a world of rapidly evolving technology, the law must also evolve to protect the public’s fundamental right of free exchange of ideas that is essential to a democracy. Social media appears to only be getting more involved with our lives, so it will become even more vital for the Supreme Court to take this case on appeal to clarify some of the ambiguity that politicians now face.¹²²

After *Knight First Amendment Institute at Columbia University v. Trump*, it appears the politicians could be subject to the public forum analysis if they use their account in any way that could be considered an extension of their office—tweeting about their own public policies, putting their official position in the biography of their account profile, conversing with other public officials veiled with their current position, or announcing matters related to official government business.¹²³ The most conservative option would be for public figures to make their personal accounts private and create a separate account solely for their public position. In this way, they will not have to worry about what actions may cross the line as their personal and public spheres of life will be separate.

118. *Id.*

119. Elana Lyn Gross, *Trump Sued Again for Blocking People on Twitter*, FORBES (July 31, 2020, 4:01 PM), <https://www.forbes.com/sites/elanagross/2020/07/31/trump-sued-again-for-blocking-people-on-twitter/#6e51153ab114>.

120. *See id.*

121. *See Nunziato, supra* note 5, at 3.

122. *See Day & Weatherby, supra* note 33, at 338.

123. *See Knight First Amend. Inst. at Colum. Univ. v. Trump*, 302 F. Supp. 3d 541, 552–53 (S.D.N.Y. 2018).

