

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

Faculty Scholarship

---

2021

### Improving Communication with Public Officials on Social Media: Proposals for Protecting Social Media Users' First Amendment Rights

Kendra Kumor  
*Fordham University School of Law*

Evelyn Li  
*Fordham University School of Law*

Nicole Rubin  
*Fordham University School of Law*

Follow this and additional works at: [https://ir.lawnet.fordham.edu/faculty\\_scholarship](https://ir.lawnet.fordham.edu/faculty_scholarship)



Part of the [Constitutional Law Commons](#), and the [Law and Politics Commons](#)

---

#### Recommended Citation

Kendra Kumor, Evelyn Li, and Nicole Rubin, *Improving Communication with Public Officials on Social Media: Proposals for Protecting Social Media Users' First Amendment Rights*, January (2021)  
Available at: [https://ir.lawnet.fordham.edu/faculty\\_scholarship/1113](https://ir.lawnet.fordham.edu/faculty_scholarship/1113)

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).



---

# Improving Communication with Public Officials on Social Media: Proposals for Protecting Social Media Users' First Amendment Rights

Democracy and the Constitution Clinic  
Fordham University School of Law

---

Kendra Kumor, Evelyn Li, & Nicole Rubin

January 2021



FORDHAM UNIVERSITY  
THE SCHOOL OF LAW

---

# Improving Communication with Public Officials on Social Media: Proposals for Protecting Social Media Users' First Amendment Rights

**Democracy and the Constitution Clinic**

Fordham University School of Law

---

**Kendra Kumor, Evelyn Li, & Nicole Rubin**

**January 2021**

This report was researched and written during the 2019-2020 academic year by students in Fordham Law School's Democracy and the Constitution Clinic, where students developed non-partisan recommendations to strengthen the nation's institutions and its democracy. The clinic was supervised by Professor and Dean Emeritus John D. Feerick and Visiting Clinical Professor John Rogan.

## Acknowledgments:

We are grateful to the individuals who generously took time to share their general views and knowledge with us: Floyd Abrams, Esq., Professor Robin Colner, Christopher Cuomo, Esq., Professor Abner Greene, Dov Hikind, the Honorable Robert A. Katzmann, Assemblywoman Aravella Simotas, Conor Walsh, Esq., and Lou Wasson.

This report greatly benefited from Gail McDonald's research guidance and Flora Donovan's editing assistance.

Judith Rew and Robert Yasharian designed the report.

---

# Table of Contents

<b>Executive Summary</b> .....	1
<b>Introduction</b> .....	3
<b>I. Background: Social Media as a New Public Forum</b> .....	3
A. Public Officials’ Widespread Use of Social Media Platforms .....	3
B. The Public Forum Doctrine .....	4
C. Viewpoint Discrimination .....	5
D. Knight First Amendment Institute v. Trump.....	6
<b>II. Current Regulatory Measures: More Is Needed</b> .....	7
A. Regulation of Social Media Companies Is the Wrong Approach .....	8
B. Existing Policies, Laws, and Proposals: Why They Are Insufficient .....	10
<b>III. Recommendations</b> .....	13
A. Implementing Regulation of Public Officials on Social Media .....	13
B. Who Is A “Public Official”? .....	14
C. What Constitutes “Official Use”?.....	17
D. “Any User” Defined.....	19
E. Exceptions to the Proposed Framework.....	20
F. Monitoring and Enforcement .....	22
<b>IV. Conclusion</b> .....	25

---

# Executive Summary

This report advances recommendations to improve interactions between public officials and members of the public on social media platforms. Social media is one of the primary ways that public officials communicate with their constituents and other members of the public. From the White House and Congress to small town mayors' offices and town councils, social media has been almost universally adopted. Social media does not just provide public officials far reaching platforms to spread their chosen messages. It also opens forums for exchanges with members of the public. Most officials' social media pages allow users to post messages. Users can voice their opinions on the public officials' work and engage in discussions with other users and, sometimes, the public officials. When public officials block and delete users' comments on social media, they are often infringing on those users' First Amendment rights and harming dialogue on issues of public importance.

Public officials' blocking of users has led to lawsuits at the federal, state, and local levels. Two of the more prominent suits were brought against President Donald Trump and New York Congresswoman Alexandria Ocasio-Cortez for blocking users on Twitter. The suit involving Trump's Twitter account reached the U.S. Court of Appeals for the Second Circuit, which ruled that Trump violated Twitter users' First Amendment rights when he blocked them from seeing and commenting on his tweets. In *Knight Institute v. Trump*, the court held that the interactive space beneath tweets on Trump's "@realDonaldTrump" account constituted a designated public forum where the First Amendment protects a wide range of speech. A designated public forum is a place set aside by the government for expressive activities where the government needs compelling reasons to prevent speech. The forum beneath Trump's tweets was government-created, the court reasoned, because Trump was using the account for official purposes, such as making announcements about actions he was taking as president. Because parts of Trump's account were a public forum, it was unconstitutional viewpoint discrimination for him to block users based on the opinions they expressed.

We recommend that Congress pass legislation drawing on the Second Circuit's reasoning in *Knight Institute*. The legislation should ban public officials who are using social media for official purposes from blocking any users or deleting any user comments from their social media accounts.

A "public official" should include all federal elected officials and all officials appointed by the president to serve as officers of the United States, except for judges. This designation would include members of Congress, the president, the vice president, Cabinet secretaries, and some other high-ranking executive branch officials. We recommend several factors to determine whether an account is used for official purposes: (1) whether the account includes an explicit

disclaimer that it is as an official government account; (2) whether the account includes a description of the official's government office; (3) whether the account includes one or more links to official government websites; or (4) whether the account is used for posting content in furtherance of an official's government duties, such as publishing press releases, advocating for legislation, or sharing information about hearings, town halls, or state visits.

The statute we are recommending should include exceptions. For example, public officials should be allowed to delete content that is not protected by the First Amendment and use the muting and hiding functions to manage the content that they see.

Although our proposed legislation would only regulate federal officials, states should pass similar laws to cover state legislators, governors, and state executive branch officials. Public officials' uses of social media is a nationwide issue impacting members of both political parties and officials at every level of government. A uniform rule applying to all public officials is the most equitable and efficient way to protect the First Amendment rights of social media users and ensure an open dialogue on social media about matters of public importance.

---

# Introduction

Social media has become one of the most important platforms for communication and dialogue between public officials and members of the public. Even when social media is not used for direct interaction between officials and members of the public, it provides a place for members of the public to interact with each other and learn about officials' work and opinions on matters of public interest. However, officials sometimes block members of the public from their social media pages, which prevents those users from sending them messages, posting comments on their pages, and even seeing their posts. When public officials block users from the social media pages that they use for official business due to objections to users' opinions, the blocked social media users' First Amendment rights are violated. Specifically, users are denied their rights of free speech and assembly and their right to petition the government.<sup>1</sup>

The political discourse on social media platforms between public officials and social media users must be improved. Our report provides a solution, through a statutory framework, that can be implemented at the federal and state levels to help solve this issue. This report begins with a discussion of the prevalence of social media use among public officials and the legal doctrines governing their ability to block social media users and delete their posts. Next, the report provides an overview of social media regulations—from inside government and social media companies—that apply to public officials. The final Part of the report describes our recommendation for a federal law, which states should replicate, that prevents public official using social media accounts for official purposes from blocking other users and deleting posts.

## I. Background: Social Media as a New Public Forum

To better understand the intersection between social media and the First Amendment, this Part provides an overview of public officials' uses of social media and relevant First Amendment doctrines.

### A. Public Officials' Widespread Use of Social Media Platforms

Social media has become an essential way for public officials to communicate with the public. Compared with traditional media, such as mail and television, social media makes it easy and convenient for public officials to disseminate information to the public. Over the past several years, the importance of social media platforms has been illustrated through their adoption by

---

<sup>1</sup> See U.S. CONST. amend. I; Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 233 (2d Cir. 2019); *infra* Part I.B.

most public officials.<sup>2</sup> Nearly all members of the Senate and House of Representatives use social media platforms to communicate with the public. All Senators use Facebook and Twitter. Among members of the House, 98.8 percent use Facebook and 99.8 percent use Twitter.<sup>3</sup> The widespread use of social media does engender some problems, including raising questions about whether public officials violate users' First Amendment right by blocking them and deleting their comments.

## B. The Public Forum Doctrine

Whether social media users have First Amendment protections when interacting with public officials on social media is partially dependent on whether the officials' social media pages are public forums. A public forum is a forum set aside by the government for expressive activities where, according to the Supreme Court, the government must "demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject."<sup>4</sup> Courts have reached different conclusions on whether a public official's social media account is a public forum. As discussed in more detail below, the U.S. Court of Appeals for the Second Circuit held that the "interactive space" associated with President Donald Trump's Twitter account where users can respond to and discuss his tweets constituted a public forum.<sup>5</sup> But there have been cases in other jurisdictions where a public official's social media account was not considered a public forum. In *Morgan v. Bevin*, a federal trial court ruled that the Kentucky governor's Facebook account was not a public forum, and, therefore, the plaintiffs' First Amendment rights were not violated when they were blocked from access and posting on the page.<sup>6</sup> The court ruled that the governor's social media accounts are privately owned methods of communication. Furthermore, the court stated, "Governor Bevin's Twitter and Facebook accounts are a means for communicating his own speech, not the speech of his constituents."<sup>7</sup>

Courts have also reached varying conclusions at the local level. In *German v. Eudaly*, a political activist brought a First Amendment claim against a Portland City Commissioner for blocking her from a non-official Facebook page. The commissioner had used the Facebook page to respond to criticism from the activist. But the federal trial court held that the commissioner was entitled to block the activist because the page was not a public forum.<sup>8</sup> In *Davison v. Randall*, a resident

---

<sup>2</sup> JACOB R. STRAUS, CONG. RESEARCH SERV., R45337, SOCIAL MEDIA ADOPTION BY MEMBERS OF CONGRESS: TRENDS AND CONGRESSIONAL CONSIDERATIONS 6 (2018), <https://crsreports.congress.gov/product/pdf/R/R45337>.

<sup>3</sup> *Id.*; see also *Congress on Social Media Reports*, QUORUM (2019), [https://quorum-media.s3.amazonaws.com/media/blog/2019-12-16T144239.909055\\_CSMR19\\_FinalV3.pdf](https://quorum-media.s3.amazonaws.com/media/blog/2019-12-16T144239.909055_CSMR19_FinalV3.pdf).

<sup>4</sup> See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983).

<sup>5</sup> *Knight Institute*, 928 F.3d at 234-36 (2d Cir. 2019).

<sup>6</sup> 298 F. Supp. 3d 1003, 1010-12 (E.D. Ky. 2018).

<sup>7</sup> *Id.*

<sup>8</sup> *German v. Eudaly*, 2018 WL 3212020, at \*1, \*6 (D. Or. June 29, 2018).

of Loudon County, Virginia, sued the chair of the County Board of Supervisors, alleging that the chair violated his First Amendment and Due Process rights by blocking him from the chair’s social media page.<sup>9</sup> The court held that the page was a public forum because it explicitly encouraged citizens to use it to comment on matters of public interest.<sup>10</sup>

Courts that have analyzed whether public officials’ social media pages are public forums have not been guided by a clear and uniform standard. The lack of a single standard raises the possibility that social media users in different jurisdictions will receive inconsistent First Amendment protections. Legislation, such as the statute we propose, could ensure that all public officials are held to the same rules.

### **C. Viewpoint Discrimination**

If part of a public official’s social media account is a public forum or the public official is acting in his or her official capacity when using the account, the public official engages in unconstitutional viewpoint discrimination if he or she blocks a user or deletes a user’s comments based on the user’s opinions.<sup>11</sup> The Supreme Court defined viewpoint discrimination as “discrimination because of a speaker’s specific motivating ideology, opinion, or perspective.”<sup>12</sup>

Social media users have sued various government officials for viewpoint discrimination. The court in the lawsuit against the Loudon County supervisor discussed above concluded that the supervisor engaged in viewpoint discrimination by blocking a constituent on Facebook for accusing other officials of corruption.<sup>13</sup> In *Leuthy v. LePage*, two Maine residents sued the governor for viewpoint discrimination. They objected to having their critical comments deleted from the governor’s Facebook page and being blocked from the page.<sup>14</sup> In another suit, a Connecticut citizen sued a police chief and a detective for blocking him from the police department’s Facebook page after he made numerous posts that criticized the department.<sup>15</sup> In Missouri, a constituent sued a state representative for blocking him on Twitter after he retweeted someone else’s criticism of her.<sup>16</sup> And, in *Windom v. Harshbarger*, a West Virginia

---

<sup>9</sup> 912 F.3d 666, 685 (4th Cir. 2019).

<sup>10</sup> *Id.* at 682.

<sup>11</sup> See *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 236 (2019) (citing *Manhattan Community Access Corp. et al. v. Halleck et al.*, 139 S.Ct. 1921 (2019)); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 575 (S.D.N.Y. 2018).

<sup>12</sup> *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 819-20 (1995).

<sup>13</sup> See *Davison*, 912 F.3d at 687-88.

<sup>14</sup> See 2018 WL 4134628 (D. Me. Aug. 29, 2018).

<sup>15</sup> See *Dingwell v. Cossette*, 327 F. Supp. 3d 462, 466-67 (D. Conn. 2018).

<sup>16</sup> See *Campbell v. Reisch*, 367 F. Supp. 3d 987, 990 (W.D. Mo. 2019).

resident alleged viewpoint discrimination in response to being blocked on Facebook by a state legislator whose proposed legislation the resident had criticized.<sup>17</sup>

These cases illustrate that viewpoint discrimination is a widespread, national issue. That there are a variety of public officials who have faced lawsuits, such as governors, police officials, a chair of a county board of supervisors, and members of state legislatures, shows that this is not just an issue that affects only the most prominent public officials.

#### **D. Knight First Amendment Institute v. Trump**

The Second Circuit's ruling *Knight Institute v. Trump* is the seminal case on the intersection of First Amendment rights and public officials' social media use. In *Knight Institute*, several Twitter users sued President Trump after they were blocked from his Twitter page.<sup>18</sup> The court considered whether the public forum doctrine could apply to certain parts of the account, specifically: the content of the tweets, the timeline of the tweets, the comment threads initiated by the tweets, and the interactive space associated with each tweet where other users reply, retweet, or like the tweet.<sup>19</sup> The blocked users sought to engage in political speech, which is protected under the First Amendment.<sup>20</sup>

The court concluded that part of Trump's Twitter account was a public forum. For a space to be a public forum, it must be owned or controlled by the government.<sup>21</sup> Trump argued that his Twitter account was not a public forum because the plaintiffs could not establish that the account was government property and because he did not take steps to make it an official account to host the speech of other Twitter users.<sup>22</sup> The court held that although Twitter is a private company, the president controls various aspects of his Twitter account, including the content of the tweets, who can access his timeline, and who can participate in the interactive space below his original tweets.<sup>23</sup> Despite the fact that @realDonaldTrump was the president's personal account before his presidency, the court nonetheless declared it a public forum because "there was substantial and pervasive government involvement with and control over the account . . . and [the president] consistently used the account as an important tool of governance and executive outreach."<sup>24</sup>

---

<sup>17</sup> See 396 F. Supp. 3d 675, 678-79 (N.D.W. Va. 2019).

<sup>18</sup> Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 230 (2d Cir. 2019).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 238. Note that both parties to this lawsuit stipulated that the plaintiffs did not engage in unprotected speech. See *id.* at 234.

<sup>21</sup> *Id.* at 234-35.

<sup>22</sup> *Id.* at 231.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 235.

After the court reached its public forum finding, it determined that Trump engaged in viewpoint discrimination. Viewpoint discrimination is always presumed impermissible when directed against speech constitutionally protected in a public forum.<sup>25</sup> In a certain category of public forums, government regulations of speech are allowed if they are narrowly drawn to achieve a compelling state interest.<sup>26</sup> In *Knight Institute*, however, the court found that this exception did not exist.<sup>27</sup> Therefore, the continued exclusion of the plaintiffs was impermissible viewpoint discrimination under the First Amendment. And although Trump argued that the blocking did not burden anyone’s speech because of available “workarounds,” such as googling the president’s tweets, the court still held that his actions were unconstitutional.<sup>28</sup> In its holding, the court cautioned 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.”<sup>29</sup>

## II. Current Regulatory Measures: More Is Needed

It is vital to protect social media users from unconstitutional restraints on their right to interact with public officials and other users on social media platforms. Congress should pass a law preventing public officials from blocking social media users from accounts that the officials use for government business. Federal legislation is the most efficient approach because it eliminates jurisdictional differences that might result from courts setting different precedents on the issue. This uniformity would provide clarity and make enforcement simpler. Some might criticize this proposal as part of a tendency toward over-regulation in the United States’ legal system,<sup>30</sup> but our recommended legislation would protect a crucial constitutional right while ameliorating the burden on the courts to resolve disputes over social media users’ First Amendment rights.

As this Part illustrates, legislation is preferable to regulating social media companies and relying on existing social media policies at the federal, state, and local levels.

---

<sup>25</sup> *Id.* at 239-40.

<sup>26</sup> *Id.* at 239.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 239.

<sup>29</sup> *Id.* at 240.

<sup>30</sup> See, e.g., Ilya Somin, *Why the Rule of Law Suffers When We Have Too Many Laws*, WASH. POST (Oct. 2, 2017, 10:25 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/01/why-the-rule-of-law-suffers-when-we-have-too-many-laws/>; see also *Grudges and Kludges: Too Much Federal Regulation Has Piled Up in America*, ECONOMIST (Mar. 2, 2017), <https://www.economist.com/united-states/2017/03/02/too-much-federal-regulation-has-piled-up-in-america>.

## A. Regulation of Social Media Companies Is the Wrong Approach

Regulation of social media platforms is not an ideal method to tackle the challenges surrounding online public discourse because regulation could harm social media companies' First Amendment rights and because social media platforms self-regulate through terms of service and content moderation.<sup>31</sup>

The level of First Amendment protection afforded to social media companies varies based on different conceptions of their role in society. When social media sites are treated as state actors, they are fully subject to constitutional restrictions on free speech prohibitions.<sup>32</sup> Similarly, if social media companies are viewed as special service providers, such as cable providers, their platforms are essentially designated public forums, meaning courts might only approve of content-neutral regulation of users' speech.<sup>33</sup> But if social media platforms are treated as private news media companies that make editorial decisions to moderate or remove content, the broadest First Amendment protections from government regulation apply.<sup>34</sup> However, when a social media platform grows too big, the Communications Act of 1934, which requires broadcast media to operate in the "public interest, convenience and necessity,"<sup>35</sup> might limit the companies' discretion.<sup>36</sup> The Supreme Court has indicated that social media

---

<sup>31</sup> Public officials are generally subject to terms of service as a condition of using social media platforms for official and personal purposes. Modified terms of services between social media companies and certain government entities also exist. *See The Twitter Rules*, TWITTER: HELP CENTER, <https://help.twitter.com/en/rules-and-policies/twitter-rules> (last visited Sept. 8, 2019); *see also Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> (last visited Sept. 12, 2019).

<sup>32</sup> Treating private entities as state actors in First Amendment jurisprudence is predicated on "the company town theory." *See Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (holding that a privately owned "company town," like a government, could not restrict First Amendment rights.). The *Marsh* Court noted that when balancing "the Constitutional rights of property owners against those of the people to enjoy freedom of press and religion . . . the latter occupy a preferred position." This approach is sweepingly broad and may be the most restrictive for social media companies. Some federal courts have resisted treating social media companies as company towns. For example, in a lawsuit against YouTube and Google for content censoring, a federal district court noted that social media companies should not be treated as company towns simply because they can carry out functions traditionally performed by the government. "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Prager Univ. v. Google LLC*, 2018 WL 1471939, at \*5 (N.D. Cal. Mar. 26, 2018) (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978)).

<sup>33</sup> *See* VALERIE C. BRANNON, CONG. RESEARCH SERV., R45650, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT 30-32 (Mar. 27, 2019), <https://fas.org/sgp/crs/misc/R45650.pdf>; *see also* Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301, 304 (2013) (arguing that the public forum doctrine is the proper way to address First Amendment application to social media sites).

<sup>34</sup> *See id.* at 37-38 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

<sup>35</sup> Communications Act of 1934, 47 U.S.C. § 309(a) (2018).

<sup>36</sup> Under the public interest standard, federal-licensed broadcasters in the 1920s, who were able to access and even monopolize precious radio airwaves, were considered "trustees of the public's airwaves" and therefore were required to use the broadcast medium in the public's interest, including responding to the needs of local communities. MEDIA BUREAU, FCC, THE PUBLIC AND BROADCASTING 1, 10 (Aug. 2019), <https://www.fcc.gov/sites/default/files/public-and-broadcasting.pdf>.

sites resemble private news media, and thus enjoy the fullest First Amendment protections.<sup>37</sup> Therefore, regulation of social media to improve interactions between users and public officials might run afoul of the First Amendment.

Furthermore, social media companies already engage in self-regulation of their platforms, although it is imperfect.<sup>38</sup> Twitter takes steps to limit the dissemination of posts by public officials that might violate Twitter's user rules.<sup>39</sup> When Twitter believes it is against the public interest to remove such a post, such when a world leader wrote it, the company adds a notice to the post explaining its decision and adjusts its algorithm to prevent the post from being widely seen.<sup>40</sup> Although this policy does not directly address the problems posed by public officials blocking users, it is an example of Twitter attempting to balance increasingly extreme political rhetoric with the need for open dialogue on social media about matters of public importance.<sup>41</sup>

Facebook is establishing a board to provide independent oversight over content deletion decisions.<sup>42</sup> The board will also give policy advice, such as by providing input on who the company should define as a politician.<sup>43</sup> Additionally, Facebook also has a feature that allows users to filter out profanity in their pages' comments sections,<sup>44</sup> which government accounts can employ. Above all, social media sites' terms of service agreements contractually bind their

---

<sup>37</sup> See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) (holding that "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints").

<sup>38</sup> See, e.g., Derek du Preez, "The Age of Inadequate Self Regulation Must Come to an End"—MPs Publish Facebook Fake News Report, DIGINOMICA (Feb. 17, 2019), <https://diginomica.com/the-age-of-inadequate-self-regulation-must-come-to-an-end-mps-publish-facebook-fake-news-report>.

<sup>39</sup> Twitter Safety, *Defining Public Interest on Twitter*, TWITTER: BLOG (Jun. 27, 2019), [https://blog.twitter.com/en\\_us/topics/company/2019/publicinterest.html](https://blog.twitter.com/en_us/topics/company/2019/publicinterest.html).

<sup>40</sup> See *id.* Twitter used this approach with some of President Trump's tweets following the 2020 presidential election. Kate Conger, *Twitter Has Labeled 38% of Trump's Tweets Since Tuesday*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/technology/donald-trump-twitter.html>.

<sup>41</sup> For a general discussion on increasingly partisan tweeting and Twitter's algorithm frequently displaying extreme content from both sides of the political spectrum, see Oliver Darcy, *How Twitter's Algorithm Is Amplifying Extreme Political Rhetoric*, CNN (Mar. 22, 2019, 7:42 AM), <https://www.cnn.com/2019/03/22/tech/twitter-algorithm-political-rhetoric/index.html>.

<sup>42</sup> See FACEBOOK, OVERSIGHT BOARD CHARTER 4-5 (Sept. 2019), [https://fbnewsroomus.files.wordpress.com/2019/09/oversight\\_board\\_charter.pdf](https://fbnewsroomus.files.wordpress.com/2019/09/oversight_board_charter.pdf). The board will likely consist of 11 to 40 members, with two to three co-chairs. The board will serve appellate review functions, including reviewing content removal decisions: "In instances where people disagree with the outcome of Facebook's decision and have exhausted appeals, a request for review can be submitted to the board by either the original poster of the content or a person who previously submitted the content to Facebook for review." *Id.*

<sup>43</sup> *Id.* at 2, 7.

<sup>44</sup> See *Moderate Your Facebook Page*, FACEBOOK FOR MEDIA (Dec. 7, 2015), <https://www.facebook.com/facebookmedia/blog/moderating-your-facebook-page>.

users and allow the companies to take action when inappropriate content appears on their sites.<sup>45</sup>

## **B. Existing Policies, Laws, and Proposals: Why They Are Insufficient**

Existing federal-level policies regarding public officials' uses of social media are insufficient and inconsistent. The policies vary across the agencies and branches of government. The White House does not have a published social media policy that the public can view. Congress's policies define key terms inadequately and do not guarantee effective enforcement measures. The types and the extent of restrictions, if any, differ widely with the officials' positions.<sup>46</sup> Additionally, it does not appear to be common practice to regulate public officials' use of personal social media accounts that are used partially for official business.

The Senate rules only generally prescribe that a senator's use of a third-party website must include the senator's title and must display an identifying statement that the account or profile is the "official account of" the senator.<sup>47</sup> For the House, a short rule requires that "[m]embers ... ensure their social media URLs and account names reflect their position."<sup>48</sup> Neither chambers' rules clearly address lawmakers' personal use of social media accounts, even though the line between personal and official uses is at the crux of many disputes over public officials' uses of social media. Compared to Congress, the Department of Justice ("DOJ") has given much more attention to streamlining its employees' use of social media. An extensive DOJ memorandum provides detailed guidance on social media use, including use for personal purposes.<sup>49</sup>

---

<sup>45</sup> See *Terms of Service*, TWITTER, <https://twitter.com/en/tos> (last visited June 11, 2020) ("You may use the Services only if you agree to form a binding contract with Twitter and are not a person barred from receiving services under the laws of the applicable jurisdiction.").

<sup>46</sup> For purposes of this report, "public officials" are individuals elected or appointed to a government office.

<sup>47</sup> *Internet Services and Technology Resources Usage Rules*, UNITED STATES SENATE, <https://www.senate.gov/usage/internetpolicy.htm>.

<sup>48</sup> STAFF OF COMM. ON HOUSE ADMIN., *MEMBERS' CONGRESSIONAL HANDBOOK 31* (2019), [https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/116th%20Members%27%20Congressional%20Handbook\\_0.pdf](https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/116th%20Members%27%20Congressional%20Handbook_0.pdf).

<sup>49</sup> The DOJ's attention to streamlining its employees' use of social media is demonstrated by the rules' identification of six specific issues potentially relevant to any official social media activity. First, due to the sensitive and confidential nature of the department's work, employees are required to protect confidential information while using social media. Second, employees are generally restricted from commenting on social media about a pending trial or releasing information that may "reasonably be expected to influence the outcome of" a case. Third, DOJ employees are prohibited from engaging in discrimination or harassment on social media. Fourth, the employees are not allowed to post online anonymously. Fifth, employees are not allowed to comment online about judges. Sixth, employees are to closely monitor their uses of departmental property, such as official computers and official time. Memorandum from James M. Cole, Deputy Att'y Gen. of the United States, to All Department Employees (Mar. 24, 2014).

## 1. Issues with Official Versus Personal Uses of Social Media

Official and personal uses of social media are often difficult to distinguish. In addition to using accounts that are clearly identified as official accounts, members of Congress often use their personal accounts to publish posts or interact with the general public about their work as legislators. This amounts to using the accounts for official activity, triggering First Amendment protections for users who interact with those accounts.<sup>50</sup> Popular personal accounts, such as the unofficial “@AOC” account for Representative Alexandria Ocasio-Cortez, can be more conversation-driving than lawmakers’ official accounts.<sup>51</sup> When a Congress member’s social media account includes his or her official title, it makes it more likely that a court would conclude that it is an official page constituting a First Amendment-protected public forum. But it does not end the inquiry; courts will probably look to the content of posts to determine an account’s nature.

Some federal social media policies attempt to define official use but may lack sufficient detail. The Senate’s rules define “official business” as “activities and duties that directly or indirectly pertain to the legislative process or to any congressional representative functions generally.”<sup>52</sup> Examples of official activities in the Senate rules are the “conveying of information to the public, and the requesting and collection of the views of the public . . . or the views and information of other governmental entities.”<sup>53</sup> The Office of Personnel Management (“OPM”) states that employees using social media for personal purposes “must not engage as if presenting the official position of OPM.”<sup>54</sup> The Department of Interior (“DOI”) states that social media accounts are created as “professional personas . . . for official business and maintained using government resources . . . [and] are the property of the federal government.”<sup>55</sup> Personal uses of social media accounts can “blur the line between professional and personal lives and interactions.”<sup>56</sup> Therefore, the DOI mandates that “care must be taken to ensure that personal use of social media does not create the appearance of official use of social media.”<sup>57</sup> The DOJ’s social media memorandum contains the same “blurred line” language.<sup>58</sup>

---

<sup>50</sup> See *infra* Part III.D.3.

<sup>51</sup> Representative Ocasio-Cortez’s personal Twitter account has over ten million followers and she is active on the account multiple times every day. See Alexandria Ocasio-Cortez (@AOC), TWITTER, <https://twitter.com/aoc>. Her official account, however, has approximately 430,000 followers, and she does not post on that account on a daily basis. See Rep. Alexandria Ocasio-Cortez (@RepAOC), TWITTER, <https://twitter.com/repaoac>.

<sup>52</sup> *Internet Services and Technology Resources Usage Rules*, *supra* note 47.

<sup>53</sup> *Id.*

<sup>54</sup> OPM, SOCIAL MEDIA POLICY 15 (Jul. 2017), <https://www.opm.gov/news/social-media-presence/social-media-policy.pdf>.

<sup>55</sup> OFFICE OF COMM’N, DOI, 470 DM 2, DEPARTMENT OF THE INTERIOR DEPARTMENTAL MANUAL 2 (May 21, 2019).

<sup>56</sup> *Id.* at 4.

<sup>57</sup> *Id.*

<sup>58</sup> Cole, *supra* note 49, at 3 (“The line between public and private, personal and professional, is often blurred, especially when an employee using social media includes his or her Department affiliation or title, or comments on

The Food and Drug Administration’s (“FDA”) regulation of its employees’ uses of personal social media is far reaching, and, therefore, potentially more effective. The rules provide that standards of conduct applicable to FDA employees in their official capacities may also apply to uses in their personal capacities.<sup>59</sup> Certain ethical restrictions apply to personal use, including regarding receipt of compensation, disclosure of nonpublic information, and improper use of a government title.<sup>60</sup> To help prevent confusion on personal accounts, the rules recommend using a disclaimer, such as “the views and information presented here are mine.”<sup>61</sup>

## 2. State and Local Policies

State and local governments have also created policies for government officials’ and employees’ uses of social media. For example, the City Council of Minneapolis established rules restricting social media use for official businesses to only authorized accounts that are registered with the city.<sup>62</sup> The City of South San Francisco’s Social Media Policy has a very specific “comment policy” as to what can and cannot be deleted in the comments section.<sup>63</sup>

New York regulates official use of social media by requiring its officials to use social media sites in compliance with applicable laws and the social media platforms’ terms of service agreements, and subject to a content review and approval process.<sup>64</sup> New York’s rules do not regulate personal use, although the rules encourage employees to use disclaimer language indicating that their personal posts do not represent the views of the state.<sup>65</sup>

---

matters related to his or her work, or the work of the Department . . . Two types of social media commenting merit special attention and should cause Department employees to exercise extreme care: comments that can be perceived as showing prejudice based on race, gender, sexual orientation, or any other protected basis; and comments on the work of the Department, including cases and investigations.”).

<sup>59</sup> FDA, U.S. FOOD AND DRUG ADMINISTRATION SOCIAL MEDIA POLICY 4 (Nov. 2015), <https://www.fda.gov/media/94313/download>.

<sup>60</sup> *Id.* at 5.

<sup>61</sup> *Id.*

<sup>62</sup> These rules apply to public officials and city employees, covering over 4,200 people. See Andy Mannix, *Minneapolis Approves New Social Media Restrictions for Elected Public Officials, Employees*, STAR TRIBUNE (Jul. 25, 2019, 9:08 PM), <http://www.startribune.com/minneapolis-approves-new-social-media-restrictions-for-elected-officials-employees/513198342/>.

<sup>63</sup> See CITY OF SOUTH SAN FRANCISCO, SOCIAL MEDIA POLICY, <https://www.ssf.net/departments/city-manager/communications/connect-with-us/social-media-policy> (last visited June 12, 2020).

<sup>64</sup> OFFICE OF INFO. TECH. SERVS., N.Y. STATE, No. NYS-P11-001, IT POLICY: SOCIAL MEDIA (Aug. 14, 2018), [https://its.ny.gov/sites/default/files/documents/nys-p11-001\\_social\\_media\\_0.pdf](https://its.ny.gov/sites/default/files/documents/nys-p11-001_social_media_0.pdf).

<sup>65</sup> *Id.*

### III. Recommendations

Existing case law, social media companies' rules, and government social media policies are inadequate to address this nationwide First Amendment issue that impacts members of both political parties. Congress should pass a law, which state legislatures should replicate in their jurisdictions, that bridges the gap between existing solutions and necessary protections for all social media users. A statutory solution would ensure that all social media users enjoy consistent and efficient protection of their First Amendment rights in their engagement with public officials' social media accounts. The legislation would reduce the need to seek recourse through expensive and time-consuming litigation.

Proposed Rule
If a person is a "public official" and that person is using a social media account for "official use," then he or she shall not block any user or delete any user comments from their social media account.

This Part focuses on elaborating on our proposed framework. First, it discusses why our proposal should be implemented primarily through a federal law. Second, this Part navigates the challenges of determining the characteristics of a public official and what type of social media activity constitutes official use. Third, this Part discusses the meaning of "any user" who public officials cannot block and whose comments public officials cannot delete. Finally, this Part provides an overview of the exceptions to this framework as well as the proposed monitoring and enforcement mechanisms.

#### A. Implementing Regulation of Public Officials on Social Media

Restrictions on government employees' speech have withstood constitutional scrutiny.<sup>66</sup> The above framework could be used as a rule of a legislative chamber, state legislation, or federal legislation. Each approach has benefits and drawbacks. As a rule of a chamber of Congress or other legislative body, implementation and monitoring might be simpler because the legislative body implementing the rule would be responsible for its enforcement. However, a legislative rule would not be legally binding, and it would only apply to legislators. Legislators are not the only public officials with whom social media users have a right to engage.

---

<sup>66</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline").

As a state law, the framework would be binding on all state officials,<sup>67</sup> significantly more officials than a legislative chamber rule. Additionally, states might be better positioned to enforce the framework than the federal government because state government officials are not as numerous or geographically dispersed as federal government employees. However, the state legislation approach could result in variation among different states. Uniformity is important for this type of law because social media has a national and global reach, and all social media users, not just public officials’ constituents, need access to their pages.

Federal legislation is the best approach for implementing the framework because it would be legally binding and uniform across the country. It would regulate federal public officials, who have the most constituents and largest social media presences in most circumstances. Additionally, federal legislation would serve as a template for legislation at the state level to regulate state officials while accounting for circumstances that are unique to individual states. Federal legislation does have its drawbacks. Members of Congress will probably hesitate to impose legally binding regulations on themselves and there are definitional and enforcement issues, which are discussed below. Still, federal legislation with supplementary state laws is the most effective approach for implementing our proposed regulation of public officials on social media.

## **B. Who Is A “Public Official”?**

The definition of a “public official” is not clearly provided in case law in this area. In the various lawsuits addressing public officials blocking constituents on social media platforms, a president,<sup>68</sup> a congresswoman,<sup>69</sup> a chair of a county board of supervisors,<sup>70</sup> and a governor<sup>71</sup> have all been deemed public officials for the purposes of the relevant suit. These examples help shape our definition, but they do not constitute a comprehensive list of the position that make someone a public official. This Part explores various existing definitions of a public official from the perspectives of the government and social media platforms.

---

<sup>67</sup> The First Amendment has been incorporated to the states via the Due Process Clause of the Fourteenth Amendment. *See generally* *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating the freedom of speech clause); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (incorporating the freedom of the press clause); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (incorporating the freedom of assembly clause and the freedom to petition the government for a redress of grievances clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the free exercise of religion clause); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (incorporating the establishment clause).

<sup>68</sup> *See Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019).

<sup>69</sup> *See Hikind v. Ocasio-Cortez*, 2019 WL 2994693 (E.D.N.Y. Nov. 4, 2019).

<sup>70</sup> *See Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017).

<sup>71</sup> *Leuthy v. LePage*, 2018 WL 4134628 (D. Me. Aug. 29, 2018).

## 1. Government Perspective: Internal Revenue Service Definition

In the context of income taxes, the Internal Revenue Service (“IRS”) defines a public official as “any individual who . . . is an employee of the government for whom he or she serves.”<sup>72</sup> The IRS’s definition is extremely broad and is meant to encompass any person who is on a federal, state, or local government payroll. This definition would regulate thousands of people whose social media platforms likely would not constitute a public forum. Overregulating social media use would create an unconstitutional burden on some government employees. The definition of a public official must be narrower for the purposes of our proposed legislation.

## 2. Social Media Perspective: Twitter’s Verified Badge and World Leaders

Twitter provides two relevant definitions pertaining to who could qualify as a public official. First, Twitter uses a blue “verified” checkmark to validate high-profile users’ accounts. The blue verified badge is intended to let people know that an account of public interest is authentic.<sup>73</sup> Some examples of accounts of public interest include users who are involved in “music, acting, fashion, government, politics, religion, journalism, media, sports, business, and other key interest areas.”<sup>74</sup> Because this verified badge is used so broadly and covers many people who do not work in government or hold public office, it should not be dispositive in determining whether a user is a public official for the purposes of our proposed legislation.

Second, Twitter has created a definition for people of public interest to whom the normal Twitter Rules do not apply.<sup>75</sup> For an exception to the Twitter Rules to apply, the account owner must: (1) “[b]e or represent a government/elected official, be running for public office, or be considered for a government position;” (2) “[h]ave more than 100,000 followers;” and (3) “[b]e verified.”<sup>76</sup> This definition is too narrow for the purposes of this legislation. Requiring a certain number of followers in the definition of a public official would allow many public officials to evade any regulation and could incentivize public officials to stop gaining followers on their accounts. Under-regulation would defeat the purpose of guaranteeing constituents access to public officials at all levels of government, especially the state level.

---

<sup>72</sup> IRS, CLASSIFICATION OF ELECTED AND APPOINTED OFFICIALS, [https://www.in.gov/sboa/files/Hoff\\_3\\_Classification\\_of\\_Elected\\_and\\_Appointed\\_Officials.pdf](https://www.in.gov/sboa/files/Hoff_3_Classification_of_Elected_and_Appointed_Officials.pdf).

<sup>73</sup> *About Verified Accounts*, TWITTER: HELP CENTER, <https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts> (last visited June 15, 2020).

<sup>74</sup> *Id.*

<sup>75</sup> See Twitter Safety, *Defining Public Interest on Twitter*, TWITTER: BLOG (June 29, 2019), [https://blog.twitter.com/en\\_us/topics/company/2019/publicinterest.html](https://blog.twitter.com/en_us/topics/company/2019/publicinterest.html); Twitter Inc., *World Leaders on Twitter: Principles & Approach*, TWITTER: BLOG (Oct. 15, 2019), [https://blog.twitter.com/official/en\\_us/topics/company/2019/worldleaders2019.html](https://blog.twitter.com/official/en_us/topics/company/2019/worldleaders2019.html).

<sup>76</sup> *Id.*

### 3. Constituent-Based Definition

Another possible definition of a public official is any person elected to office who has constituents. This creates a bright-line rule for any level of government and any branch of government. Having constituents implies a duty to engage in a discourse with them, which is the type of communication our proposal seeks to facilitate and protect. However, this definition could also be under-inclusive. For example, Cabinet secretaries and other public officials in the federal government's executive branch would fall outside the scope of a solely constituent-based definition.

### 4. Recommended Definition: Elected and Appointed Approach

We recommend defining “public official” as: “Anyone who is currently elected by the public, or appointed by the president as a principal officer of the United States, excluding judges.” This definition is meant to encompass current employees in the federal government and does not apply to public officials after they leave office. In a version of the law adapted for the state-level, the definition would simply change from anyone appointed by the president to anyone appointed by the governor.

Judges are explicitly excluded from the definition, even though they are appointed. Judges are not expected to interact with the public in the same way as political figures. They communicate with the public primarily through written opinions and statements from the bench. Additionally, judges have their own rules of conduct and ethics that cover their interactions with the public.<sup>77</sup> However, state law versions of this proposed federal legislation could take into account the fact that some states elect their judges.<sup>78</sup>

---

<sup>77</sup> See MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2010) (stating “[a] judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office”).

<sup>78</sup> *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUSTICE (May 8, 2015), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> (stating that 39 states use elections to select their judges at some level of their state judiciary).

Public Officials Under Our Proposed Legislation	
Legislative Branch	Executive Branch
<ul style="list-style-type: none"> <li>All Members of the House of Representatives</li> <li>All Senators</li> </ul>	<ul style="list-style-type: none"> <li>President</li> <li>Vice President</li> <li>Ambassadors<sup>79</sup></li> <li>All statutorily-designated Cabinet members<sup>80</sup> and any official the president designates as a Cabinet-level official.</li> </ul>

### C. What Constitutes “Official Use”?

Currently, courts have considered the totality of the circumstances to determine whether a public official is using a social media platform in his or her official capacity. Although indicia can be helpful on a case-by-case basis, the purpose of imposing a regulation is to create a uniform standard that can be consistently and efficiently applied. The driving question behind the definition of official use is whether an average constituent perceives a social media account to be an extension of a public official’s office. This Part explores the indicia that courts have used to determine official use as well as the Federal Tort Claims Act’s (“FTCA”) definition of scope of employment for guidance. Finally, this Part proposes a list of factors that will automatically constitute official use under our proposed legislation.

#### 1. Judicial Interpretation of Official Use

Courts have used a variety of factors to establish “official use” in cases where public officials’ blocking of users or deletion of user comments were challenged.<sup>81</sup> They look to the “public presentation of the [a]ccount” to see if it “bear[s] all the trappings of an official state-run account.”<sup>82</sup> An explicit disclaimer of official use is often an important factor in a court’s analysis.

---

<sup>79</sup> The Constitution’s Appointments Clause gives the president the power to “appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other [principal] officers of the United States.” U.S. CONST. art. II, § 2. According to the Supreme Court, principal officers are essentially limited to Cabinet members, federal judges, and ambassadors. *See generally* Morrison v. Olson, 487 U.S. 654 (1988).

<sup>80</sup> 5 U.S.C. § 101 (2006) (listing the 15 executive departments whose leaders make up the president’s Cabinet: the Department of State, Department of the Treasury, Department of Defense, Department of Justice, Department of the Interior, Department of Agriculture, Department of Commerce, Department of Labor, Department of Health and Human Services, Department of Housing and Urban Development, Department of Transportation, Department of Energy, Department of Education, Department of Veterans Affairs, and Department of Homeland Security).

<sup>81</sup> *See supra* Part I.B-C.

<sup>82</sup> Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 231 (2d Cir. 2019).

For instance, in *Knight Institute*, the Second Circuit was partially persuaded by the plaintiff’s argument that Trump’s Twitter account stated that it belonged to the “45th President of the United States of America, Washington D.C.”<sup>83</sup> Listing a government website (“.gov”) or linking to a government page on a social media account is also a strong indicator of official use.<sup>84</sup> The way that a public official’s staff refers to the social media account is also instructive.<sup>85</sup>

Some public officials may explicitly describe the purposes of their pages, such as soliciting comments and conversation from the general public about governmental matters. For example, the Chair of a County Board of Supervisors whose account was the subject of a lawsuit stated that her Facebook page was open to “ANY Loudoun citizen” to post comments “on ANY issues, request, criticism, complement or just your thoughts.”<sup>86</sup>

Courts also look to the type of content public officials post. Making formal policy announcements is a strong indicator of official use. The Second Circuit focused on the fact that Trump had used his Twitter account to announce that he fired Chief of Staff Reince Priebus and replaced him with General John Kelly.<sup>87</sup> Trump had also used his Twitter account to share information about his discussions with South Korea’s president about North Korea’s nuclear program.<sup>88</sup> Additionally, publishing press releases, advocating for legislation, sharing information about hearings, town halls, or state visits indicate use in one’s official capacity.<sup>89</sup>

## 2. FTCA Interpretation of Official Use

Statutory definitions provide further guidance on what constitutes official use. The FTCA provides that federal employees can face lawsuits for tortious actions performed “within the scope of [their] office or employment.”<sup>90</sup> The statute and interpreting case law define the scope of employment by considering “whether the employer hired the employee to perform the act in question and whether the employee undertook the allegedly tortious activity to promote the employer’s interests.”<sup>91</sup> Translating this framework to the public official context, official use could be an action that a public official was elected to perform in the normal course of business

---

<sup>83</sup> *Id.*

<sup>84</sup> See *Davison v. Randall*, 912 F.3d 666, 683 (4th Cir. 2019); *Leuthy v. LePage*, 2018 WL 4134628, at \*4 (D. Me. Aug. 29, 2018).

<sup>85</sup> *Leuthy*, 2018 WL 4134628, at \*4.

<sup>86</sup> *Davison*, 912 F.3d at 682. Cf. *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1011 (E.D. Ky. 2018) (holding that the governor of Kentucky’s Facebook page was not a designated public forum where the page stated that its purpose was to “communicate [the governor’s] vision, policies, and activities to constituents and receive feedback from them on specific topics that he chooses to address in his posts.” (emphasis added)).

<sup>87</sup> *Knight*, 928 F.3d at 232.

<sup>88</sup> *Id.*

<sup>89</sup> See *Leuthy*, 2018 WL 4134628, at \*4; see also *Windom v. Harshbarger*, 2019 WL 2397809, at \*1 (N.D.W. Va. Jun 6, 2019).

<sup>90</sup> 28 U.S.C. § 1346(b)(1) (2013).

<sup>91</sup> KEVIN M. LEWIS, CONG. RESEARCH SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 12 (2019).

or an action that could benefit the government institution for which he or she works. This definition would likely include promoting policies, interacting with constituents and soliciting their concerns, and disseminating government-related information. Although there could be disagreement about what exactly public officials are hired to do, the FTCA guidelines are helpful in framing the scope of official use.

### 3. Recommended Definition: Official Use

Our recommended definition of official use encompasses four factors. The following characteristics should automatically make an account “official” for purposes of our proposal: (1) an explicit disclaimer of an account’s status as an official government account; (2) a description on the account of the person’s official government office; (3) one or more links to an official government website; or (4) posting content in furtherance of one’s official duties, including, but not limited to, publishing press releases, advocating for legislation, or sharing information about hearings, town halls, or state visits. The fourth prong of this definition is broad but necessary. For example, without the fourth prong, a public official could evade this law simply by listing his or her name without a disclaimer, description, or link to government website but post substantively about his or her role as a public official. A content-based prong is necessary to close any loopholes and ensure all elected and appointed public officials as defined above are regulated.

Official Use Examples	
<b>Explicit Disclaimer</b>	“Official Senate Account” “Official Account of the Secretary of State”
<b>Description of Office</b>	“45th President of the United States of America, Washington D.C.” “U.S. Senator, Massachusetts”
<b>Government Link</b>	Any website ending in “.gov” “https://ocasio-cortez.house.gov”

### D. “Any User” Defined

The proposed legislative framework specifically prohibits blocking or deleting comments from “any user,” not just a public official’s constituents or U.S. citizens. It would be impractical to limit the legislation’s protections to public officials’ constituents because enforcing the law would require verifying that a user was a given official’s constituent. Additionally, social media has a global reach and constituents are not the only people invested in what public officials

post. This is especially true for federal officials whose votes and actions have a national and, in some cases, global impact.<sup>92</sup>

There is no need to distinguish between citizen social media users and non-citizen social media users because the First Amendment may apply to non-citizens as well as citizens. The Supreme Court has extended some, but not all, constitutional protections to non-citizens.<sup>93</sup> For example, the Supreme Court has ruled that in the context of the Fifth and Fourteenth Amendments, an undocumented immigrant is “surely a ‘person.’”<sup>94</sup>

## **E. Exceptions to the Proposed Framework**

Our proposal would not prevent a public official from deleting comments from social media users that include speech that is not protected by the First Amendment. Additionally, public officials have options for managing content that stop short of blocking users or deleting their posts.

### **1. Language Not Traditionally Protected by the First Amendment**

Language not traditionally protected by the First Amendment need not be tolerated by public officials on their accounts. The following nine categories of speech are traditionally viewed by courts as unprotected by the First Amendment: obscenity, fighting words, true threats, incitement to imminent lawless action, defamation (including libel and slander), child pornography, perjury, blackmail, and solicitations to commit crimes.<sup>95</sup>

Although it appears that unprotected speech can be organized into one neat list, applying these exceptions would likely be challenging in some cases. What constitutes obscenity has been famously defined by the Supreme Court’s “know it when I see it” test.<sup>96</sup> Fighting words and true threats are also arguable based on subjective interpretations of the words in a particular

---

<sup>92</sup> Representative Alexandria Ocasio-Cortez settled a lawsuit for blocking a former New York lawmaker who is not one of her constituents. See Letter from Jameel Jaffer, Exec. Dir., Knight First Amendment Inst. at Columbia Univ., to Alexandria Ocasio-Cortez, Member, U.S. House of Representatives (Aug. 28, 2019).

<sup>93</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990).

<sup>94</sup> *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

<sup>95</sup> *Which Types of Speech Are Not Protected by the First Amendment?*, FREEDOM FORUM INST., <https://www.freedomforuminstitute.org/about/faq/which-types-of-speech-are-not-protected-by-the-first-amendment/> (last visited June 15, 2020).

<sup>96</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The Supreme Court has since refined this test in cases like *Miller v. California*, where the Court held the three-part test for obscenity is: “(a) whether ‘the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.’” 413 U.S. 15, 24 (1973) (internal citations omitted).

context, despite definitions provided by the Supreme Court. Public officials should make use of these exceptions in good faith and should not attempt to seize on ambiguities in the law to censor protected speech.

<b>Examples of Exceptions: Language Not Protected by the First Amendment</b>	
<b>Fighting words</b>	“‘[F]ighting words’ [are] those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” <sup>97</sup>
<b>True threats</b>	“‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” <sup>98</sup> “Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” <sup>99</sup>
<b>Incitement to Imminent Lawless Action</b>	Imminent lawless action must: (1) be directed toward a specific group or person; (2) be a direct call to commit immediate lawless action; and (3) be an expectation that the speech will lead to lawless action. <sup>100</sup>

## 2. Caveat: Muting and Hiding Functions on Social Media Platforms

Our proposed legislation prohibits public officials from blocking users or deleting comments unless they fall into the above exceptions. However, there is one caveat to this rule that the trial court in *Knight Institute* considered. Twitter and Facebook both have an option to “mute” a user instead of blocking the user, and Facebook allows users to “hide” comments posted to users’ pages. When a user is blocked, he or she cannot see the blocker’s tweets nor interact with the blocker’s account in any way.<sup>101</sup> However, when a user is muted, that user’s tweets are simply eliminated from the muting user’s timeline.<sup>102</sup> To analogize to the pre-social media era,

<sup>97</sup> *Cohen v. California*, 403 U.S. 15, 20 (1971) (holding that the display of the words, “Fuck the Draft” was not fighting words); *see also* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>98</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003). *See* *Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that political hyperbole is not a true threat).

<sup>99</sup> *Virginia*, 538 U.S. at 360.

<sup>100</sup> *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973); *see also* *Schenck v. United States*, 249 U.S. 47, 52 (1919) (providing the famous example of shouting fire in a crowded theatre as this type of unprotected speech).

<sup>101</sup> *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 551-52 (S.D.N.Y. 2018).

<sup>102</sup> *How to Mute Accounts on Twitter*, TWITTER: HELP CENTER, <https://help.twitter.com/en/using-twitter/>

blocking a user is akin to prohibiting people from sending letters to public officials, while muting is akin to allowing letters to be sent, but not mandating that public officials open or read the letters.

In *Knight Institute*, the District Court for the Southern District of New York acknowledged that muting on Twitter would be constitutional under the First Amendment.<sup>103</sup> We agree with this view and believe that hiding comments on Facebook falls into the same category. Constituents must be able to voice their opinions, but there should not be a legal requirement that public officials listen or respond to them.<sup>104</sup>

## F. Monitoring and Enforcement

Our proposal should be enforced by entities inside the legislative and executive branches. The penalty for an official who does not follow the regulations should be the release of a public report alerting the public to the official's non-compliance.

### 1. Enforcement for the Legislative Branch

The procedures for enforcing congressional ethics rules could be used to monitor lawmakers' compliance with the proposed legislation. The House of Representatives Office of Congressional Ethics ("OCE") "has jurisdiction to investigate any alleged violation of a 'law, rule, regulation, or other standard of conduct' committed by a 'Member, officer, or employee of the House.'"<sup>105</sup> Information about potential violations can come from a variety of sources, including the public.<sup>106</sup> After an investigation, the OCE decides what to recommend to the Committee on Ethics.<sup>107</sup> The Committee on Ethics then decides whether to dismiss the investigation, conduct further investigation, or impose sanctions.<sup>108</sup> Unless the OCE recommends dismissal of the investigation, the OCE's report and findings must be released to the public.<sup>109</sup>

The Senate Select Committee on Ethics "is authorized to receive and investigate allegations of . . . violations of law . . . and report violations of law to the proper federal and state authorities."<sup>110</sup> Similar to the OCE, the Senate Committee receives information from "virtually

---

twitter-mute (last visited June 15, 2020).

<sup>103</sup> 302 F. Supp. 3d at 577.

<sup>104</sup> See *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) (stating "the First Amendment does not impose any affirmative obligation on the government to listen [or] to respond").

<sup>105</sup> *Learn*, OFFICE OF CONG. ETHICS, <https://oce.house.gov/learn> (last visited June 15, 2020) (quoting H.R. Res. 895, 110th Cong. § 1(9)(C)(1)(A) (2008) (enacted)).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Jurisdiction*, U.S. SENATE SELECT COMM. ON ETHICS, <https://www.ethics.senate.gov/public/index.cfm/jurisdiction> (last visited June 15, 2020).

any source,” including the public.<sup>111</sup> If the Committee finds the information about the violation of law to be credible, the Committee can issue a public or private admonition, recommend further disciplinary action, or initiate an adjudicatory review.<sup>112</sup>

Because we are proposing a federal law, members of the public who have been blocked or had their comments deleted by a member of Congress can report the violation directly to the OCE or Senate Select Committee on Ethics. The OCE is mandated to act much faster than the courts.<sup>113</sup> Although the Senate Select Committee on Ethics does not provide a specific timeline for each investigation, the Committee states that its investigations are faster if not many interviews are required and there is not a parallel criminal inquiry.<sup>114</sup> Here, there would be no need for any interviews or criminal inquiry because evidence of blocking or deleting comments could be obtained immediately through the user’s social media account. This approach to enforcement eliminates the delay of lengthy and expensive court battles because members of the public would not have to hire lawyers to file a lawsuit to be unblocked by a public official.

## 2. Enforcement for the Executive Branch

Enforcement for executive branch public officials should be conducted by two separate entities. First, public officials appointed by the president to positions in federal agencies should be monitored by their agencies’ inspectors general. Second, public officials elected to their positions in the executive branch, namely the president and vice president, should be monitored by Congress via the House Oversight Committee or the Senate Committee on Homeland Security and Governmental Affairs.<sup>115</sup>

The offices of inspectors general were established by the Inspector General Act of 1978.<sup>116</sup> Inspectors general are placed within each agency to monitor its operations and investigate cases of fraud, waste, misconduct, and other abuses within each agency.<sup>117</sup> Inspectors general

---

<sup>111</sup> *Frequently Asked Questions: Investigations*, U.S. SENATE SELECT COMM. ON ETHICS, <https://www.ethics.senate.gov/public/index.cfm/frequently-asked-questions1> (last visited June 15, 2020).

<sup>112</sup> *Id.*

<sup>113</sup> See H.R. Res. 895, 110th Cong. § 1(9) (2008) (enacted).

<sup>114</sup> U.S. SENATE SELECT COMM. ON ETHICS, *supra* note 111.

<sup>115</sup> See Brianne Gorod, *The Need for Congressional Oversight Goes Far Beyond Impeachment*, ATLANTIC (Sept. 30, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/future-congressional-oversight-risk/598996/> (detailing the history and scope of congressional oversight of the executive branch).

<sup>116</sup> WENDY GINSBERG & MICHAEL GREENE, CONG. RESEARCH SERV., R43814, FEDERAL INSPECTORS GENERAL: HISTORY, CHARACTERISTICS, AND RECENT CONGRESSIONAL ACTIONS 2 (2016).

<sup>117</sup> See *id.* at 1.

can conduct investigations either independently or in response to reports of misconduct from the public.<sup>118</sup> There are currently 73 offices of inspectors general.<sup>119</sup>

The president and vice president are not subject to the jurisdiction of the inspectors general, nor are they subject to many other ethics rules applicable to most federal employees.<sup>120</sup> However, Congress has two committees that have the ability to monitor presidential and vice presidential actions: the House Oversight Committee and the Senate Committee on Homeland Security and Governmental Affairs. The House Oversight Committee has broad jurisdiction to oversee “any matter” within the jurisdiction of other standing House committees.<sup>121</sup> The current House Oversight chairman has used the committee’s authority to launch inquiries into the use of President Trump’s Washington, D.C., hotel and the president’s handling of classified information.<sup>122</sup> The Senate Committee on Homeland Security and Governmental Affairs also has broad jurisdiction in “studying and investigating the compliance or noncompliance with rules, regulations and laws, . . . which have an impact upon or affect the national health, welfare and safety.”<sup>123</sup>

### 3. Specific Enforcement Methods

As a penalty for blocking users or deleting comments in violation of the proposed law, we recommend the release of investigative reports to the public. The political pressure associated with the release of reports would likely result in the unblocking or restoring of user comments. Civil penalty schemes might not be as effective. They could allow public officials to pay their fines but continue to block users or delete user comments. There is evidence that the effectiveness of a civil penalty depends on the severity of that penalty,<sup>124</sup> and we are hesitant to recommend high-cost fines for a civil infraction. Public discontent will more likely result in the intended reaction from public officials than would the mandate to pay a civil fine.

---

<sup>118</sup> Robert Longley, *About the US Inspectors General*, THOUGHTCO. (Aug. 4, 2019), <https://www.thoughtco.com/about-the-office-of-inspector-general-3322191>.

<sup>119</sup> *Id.*

<sup>120</sup> Alina Selyukh, *Who Oversees the President’s Ethics?: Here’s Our List*, NPR (Mar. 27, 2017), <https://www.npr.org/2017/03/27/520983699/who-oversees-the-president-s-ethics-a-reference-sheet>.

<sup>121</sup> *Committee Jurisdiction*, HOUSE COMM. ON OVERSIGHT AND REFORM, <https://oversight.house.gov/about/committee-jurisdiction> (last visited June 15, 2020).

<sup>122</sup> Alina Selyukh, *Who Oversees the President’s Ethics? Here’s Our List*, NPR (Mar. 27, 2017), <https://www.npr.org/2017/03/27/520983699/who-oversees-the-president-s-ethics-a-reference-sheet>.

<sup>123</sup> *About the Permanent Subcommittee on Investigations*, U.S. SENATE COMM. ON HOMELAND SEC. AND GOV’T AFFAIRS, <https://www.hsgac.senate.gov/subcommittees/investigations/about> (last visited June 15, 2020).

<sup>124</sup> See Roger C. Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421, 453 (1969).

## IV. Conclusion

Public officials use social media platforms as their primary mode of communication with the public. Yet, the First Amendment rights of social media users have not been adequately protected through existing congressional and agency-imposed social media policies. Judicial review of user claims against public officials who have blocked their accounts or deleted their comments on social media platforms is inconsistent, time-consuming, and costly. Legislation is needed so that all social media users' First Amendment rights are protected consistently and efficiently. Our proposed legislation prohibits "public officials" using social media for "official use" from blocking any users or deleting any user comments. The legislation allows for exceptions where the user is posting content that is not protected by the First Amendment, such as true threats or fighting words. Although this report focuses on federal legislation, state legislatures should apply this framework to their governments as well. Without this statutory protection, social media users' First Amendment rights will only be selectively enforced based on their ability to file a lawsuit and the case law of the jurisdiction where a suit is filed.