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Recommended Citation

Hashway, Jenna Wims, "RWU First Amendment Blog: Jenna Wims Hashway's Blog: First Amendment Lets Officials Mute But Not Block Twitter Critics 10/09/2018" (2018). *Law School Blogs*. 495.
https://docs.rwu.edu/law_pubs_blogs/495

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First Amendment lets officials mute but not block Twitter critics

First Amendment lets officials mute but not block Twitter critics

October 9, 2018

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Public agencies and officials run afoul of First Amendment protections if they block Twitter followers for criticizing them. But those First Amendment arguments are moot if those government officials simply hit “mute.”

That’s the upshot of a recent ruling by U.S. District Court Judge Naomi Reice Buchwald, who said that President Trump’s decision to block Twitter followers for their political views represented a violation of the First Amendment. “No government official — including the President — is above the law,” Buchwald wrote for the U.S. District Court for the Southern District of New York.

Trump has filed an appeal with the 2nd U.S. Circuit Court of Appeals. Meanwhile, here in Rhode Island, the May ruling has forced public agencies and officials to wrestle with the question of whether they can or should block hostile followers in the Twittersphere. For example, [The Providence Journal's "Political Scene" column](#) on Oct. 8 examined whether the state Department of Transportation may block a Twitter user, identified as "Smoking Bluntz," for flaming the DOT with tweets and whether Cranston Mayor Allan W. Fung, the Republican candidate for governor, may block critics from his [@MayorFung](#) account.

A close reading of Judge Buchwald's decision, in the case of [Knight First Amendment Institute v. Trump](#), would strongly suggest that government agencies may not constitutionally block Twitter users if the decision to block amounts to "viewpoint discrimination."

In the Knight case, the defendants did not dispute that the plaintiff users were blocked for criticizing the president and his policies, and the court held that continued exclusion of the plaintiffs was impermissible. Agencies likely could, however, block users for conduct that is not consistent with the forum's own limitations. Twitter's "hateful conduct policy," for example, states that users may not "promote violence against or directly attack or threaten other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease." If a state agency were to block a user for violating that policy, it's unlikely a court would find it infringed on the user's First Amendment rights.

From a policy perspective, it makes sense that an agency shouldn't be able to block users on Twitter. For example, the only purpose for the Department of Transportation to have a Twitter presence would be to communicate relevant transportation information to the public. Indeed, the [@RIDOTNews](#) Twitter feed consists mainly of announcements about traffic. That information should not be limited to users who do not criticize the DOT.

The question of whether a public official, rather than a government agency, may block users is a little more complicated.

Unlike the DOT, an official is a person with rights of his or her own. In the Knight case, the judge noted that "a public official does not lose his First Amendment rights upon taking office." Officials such as

Mayor Fung enjoy the same rights of speech and assembly as their critics. However, although Mayor Fung's campaign characterizes [@MayorFung](#) as a "personal" account, a review of recent posts indicates that it is used to convey campaign information (including critiques of state government) and news specific to Cranston businesses.

Significantly, there is nothing that requires a public official to listen or respond to a citizen's petition, complaint or tweet. Both President Trump and Mayor Fung are free to ignore speech without infringing on the speaker's rights. However, what they cannot do is restrict the right of a citizen to "advocate ideas."

So what is a weary DOT employee or mayor with aspirations for higher office to do when a Twitter follower posts an unflattering comment? Judge Buchwald offers a suggestion: Twitter allows users to either block or mute another user. Blocking has the effect of preventing a user from reading the official's tweets or responding to them. Muting, on the other hand, merely ensures that the official will not receive notifications of the user's tweets.

In other words, muting allows an official to ignore speech without infringing on the speaker's rights. Judge Buchwald drew a distinction between blocking and muting, and implied that muting may, in fact, pass constitutional scrutiny.