

# Packingham's residual effects may impact Facebook, Twitter, even President

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By Lincoln Caplan . . . DONALD TRUMP'S TWITTER account now has 40 million followers. It ranks 21st worldwide among 281.3 million or so accounts. It's no secret that Trump is proud of his ability to use the account to communicate directly with his constituents. This summer, the president tweeted, "My use of social media is not Presidential—it's MODERN DAY PRESIDENTIAL." He meant that his tweets are official statements of the president of the United States. The National Archives concurs: It says they must be preserved under the Presidential Records Act. When Trump's aides have tweeted about the president's agenda, they have referred to it as the agenda of @realDonaldTrump.

Trump has used Twitter to announce his plan to ban transgender people from the military, to blow air kisses to Russia's Vladimir Putin, to attack the so-called fake media's coverage of his administration, and to assert his version of the facts

("No WH chaos!"). Almost every week, he takes to Twitter to feud with new foes: NFL players, for kneeling during the national anthem; the mayor of San Juan, Puerto Rico, for deriding the federal government's sluggish response to the island's dire needs after the monstrous Hurricane Maria; Senator Bob Corker of Tennessee, for tweeting, "It's a shame the White House has become an adult day care center." Trump's following climbs about 80,000 a day—a rate of almost 30 million add-ons a year.

Anyone with a Twitter account can follow the president.

Well, almost anyone.

In June, Rebecca Buckwalter-Poza, a writer and legal analyst in Washington, DC, was blocked from reading and replying to the president's account and from reading other related comments. This happened after Trump tweeted, "Sorry folks, but if I would have relied on the Fake News of CNN, NBC, ABC, CBS washpost or nytimes, I would have had ZERO chance winning WH," and Buckwalter-Poza tweeted back, "To be fair you didn't win the WH: Russia won it for you." Also in June, a police officer in Houston, Texas, named Brandon Neely was similarly blocked after the president tweeted, "Congratulations! First new Coal Mine of Trump Era Opens in Pennsylvania," and Neely replied, "Congrats and now black lung won't be covered under #TrumpCare." Many other people have been blocked, apparently for similar dissents.

It raises the question: Are social media platforms like Twitter subject to the First Amendment? Is there a right to free speech on social media owned by private corporations?

The Knight First Amendment Institute thinks so. In July, the institute sued the president, his director of social media, and his press secretary to unblock the blocked. By banning these [users](#) based on views they expressed about tweets by the president, the Institute argues, Trump violated the users' right to free speech because the blocks were based on

disagreement with the users' messages. (I am affiliated with the institute, but not directly involved in the lawsuit.) Two weeks ago, as part of this litigation, lawyers for the president acknowledged that he personally blocked the Twitter users "because the Individual Plaintiffs posted tweets that criticized the president or his policies"—what free speech law calls "viewpoint discrimination." In places where the First Amendment applies—such as public forums—it bars the government or its officials from such bias.

The president's Twitter account is not a traditional public forum, like a town hall or public park, where citizens are said to exchange views in the "marketplace of ideas" on which, it's also said, democracy depends. In those forums, the government can restrict speech based on its content only if the restriction serves a strong interest of the government, like preventing violence. But here's the thing: In an age when so much public discourse happens on platforms like Twitter, @realDonaldTrump should be subject to the same strict standard as a designated, or limited, public forum used for expressing views of the president.

Otherwise, the Knight Institute argues, the government could turn the marketplace of ideas into an echo chamber, where the only opinions heard are favorable to the president and his administration. That would contradict the bedrock idea of the First Amendment about free speech, which Justice William J. Brennan Jr. summarized 53 years ago, in *New York Times v. Sullivan*, as "the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

In early June, a month before the Knight Institute filed its lawsuit, the group wrote a widely [publicized letter](#) to Trump asking him to unblock the accounts of its clients and others blocked for similar reasons. Some of the country's leading constitutional scholars responded, explaining that they

thought the institute's legal argument was wrong. One wrote that @realDonaldTrump is a personal account—"the work of Trump-the-man (albeit a man to whom people pay attention because he is president), just as it was before November [of 2016], and not Trump-the-president. His decisions about that account are therefore not constrained by the First Amendment."

Harvard Law School's Noah Feldman added his voice to the dissenters. "There's no right to free speech on Twitter," he asserted. "The only rule is that Twitter Inc. gets to decide who speaks and listens—which is its right under the First Amendment. If Twitter wants to block Trump, it can. If Trump wants to block followers, he can. Trump's account can't be a 'designated public forum,' as the center claims, because it isn't public at all. Rather, Trump's account is a stream of communication that's wholly owned by Twitter, a private company with First Amendment rights of its own."

The institute replied that the "fact that Twitter is a private company doesn't mean the First Amendment is inapplicable to President Trump's Twitter account. The key question is whether the president has opened up a forum for expressive activity to the public." This view is about the account's function and the president's use of it, not Twitter's form as a company. The lawsuit is against the government, not Twitter.

The Supreme Court indirectly supported that view in late June. It struck down a North Carolina law that made it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." The law, Justice Anthony M. Kennedy [wrote](#) for a majority of the Court, violated a "fundamental principle of the First Amendment"—namely "that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." Now, Kennedy wrote, quoting a prior Court opinion, the most important of those places is "cyberspace—the 'vast

democratic forums of the internet' in general, and social media in particular."

Still, Feldman's argument is significant because it reflects the dominant view of free speech law, which builds on that law's fundamental purpose. As part of the Bill of Rights, whose role is to protect the rights of individuals against incursions of the government, the First Amendment and its clause protecting "the freedom of speech" do so only by prohibiting *government* action restricting that freedom. Last year, Floyd Abrams, a venerated lawyer and advocate for free speech, published a book called *The Soul of the First Amendment*. The soul, he says, is "anticensorial," against all but narrowly defined "*government* interference with and control over free expression" (I added the italics for emphasis).

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