

#280 CHARACTERS OF LEGAL TROUBLE: TRUMP, TWITTER, AND THE PRESIDENTIAL RECORDS ACT

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I. INTRODUCTION

President Donald J. Trump rips up legislative bills after signing them, leaving aides to tape together the fragments like a puzzle to avoid violating the law.¹ @realDonaldTrump tweets messages like “Who can figure out the true

* J.D. University of Illinois College of Law, 2020. I would like to thank Professor Heald for his feedback in writing this Note. I also thank my parents and my sister for their immeasurable support over the years. Lastly, I thank the entire staff of JLTP for their dedication and commitment to excellence: especially Colin Mummery, Molly Lindsey, Colin Nardone, and Emily Brown. I have been honored to be the Editor-in-Chief of this journal, and being a part of this publication has been the highlight of my law school career.

1. Annie Karni, *Meet the Guys Who Tape Trump's Papers Back Together*, Politico (June 10, 2018), <https://www.politico.com/story/2018/06/10/trump-papers-filing-system-635164>.

meaning of “covfefe” ??? Enjoy!” and deletes them at will.² So how is a ripped-up bill any different than a deleted tweet, other than the fact that Scotch tape fixes the former and not the latter? The short answer that this Note will expand on is that it is not. However, a tweet written by President Trump, or in the words of one of many former White House Press Secretaries, an “official presidential communication,” can be deleted from the public forum without notice and without oversight.³ This consequence begs a crucial question: is an @realDonaldTrump tweet any less important than a bill or a letter from Senate Minority leader Chuck Schumer?⁴ If it is, is it because of the 280 character limit? Is it because social media should not be taken seriously? Neither justification holds water. Tweets are presidential records, and their preservation is of paramount interest to historians, voters, and the American public—not least of all because their deletion is a violation of a federal statute.⁵

Part II of this Note takes a deep look at the treatment of presidential records and papers over the years, which has transitioned from completely private ownership to public protection and preservation through the Presidential Records Act (hereinafter PRA). This Note continues by describing a similar piece of legislation, the Federal Records Act (hereinafter FRA), which demands the preservation and protection of all other records created by the federal government. The nature of presidential records and papers has changed, however, with the advent and increasingly prevalent use of social media (e.g., Twitter) by heads of state.⁶

Part III of this Note first analyzes the importance of preserving the social media posts made by presidents, addressing the danger of deleting tweets. This section goes further by acknowledging the danger of deleting an entire account, and explores the possible duty that the government might try to impose on Twitter to maintain a presidential account. In addition, this section examines the proper method that should be used to preserve and protect presidential social media posts. This section then concludes with an analysis of the efficacy of the PRA, arguing that although tweets should be included within the definition of presidential records, the structure of the PRA itself renders it ineffective.

Part IV of this Note recommends a two-part solution to allow for the preservation of social media posts. First, social media posts like tweets should be included in the definition of documentary material by amendment and should be explicitly protected by the PRA. Second, the PRA should be amended to include the same enforcement mechanisms that the FRA uses to protect other federal records. Currently, the PRA has all the strength of a suggestion, and its

2. FACTBA.SE, <https://factba.se/search#covfefe> (last visited Oct. 13, 2019).

3. See generally Elizabeth Landers, *White House: Trump's Tweets are 'Official Statements,'* CNN POLITICS (June 6, 2017), <https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html> (quoting former White House Press Secretary Sean Spicer confirming that Presidential tweets are in fact “official statements by the President of the United States,” but not clarifying if that referred to tweets from @POTUS, @realDonaldTrump, or both). A statement from President Trump on his deleted Tweets was unable to be found.

4. *Supra* note 1.

5. Presidential Records Act, 44 U.S.C. §§ 2201–2202 (1978) (amended 2014).

6. This Note will discuss the issue through the lens of Twitter, but social media use in general should fall under the protection of Twitter.

application to presidential social media posts is vague. These two proposals would allow presidents to participate in an increasingly technological society while assuring the American people continued access to the records and communications that shape their sociopolitical arena.

II. BACKGROUND

In an age where social media use is increasingly prevalent, and presidents and heads of state are increasing their use of these services for presidential communications, maintenance and record-keeping of that social media use presents a new kind of problem.⁷ Over the years, presidential records have become a matter of public ownership, and government records have been preserved for public access through either the FRA or the PRA.⁸ Only one of these pieces of legislation, however, has any power to stop destruction of records.⁹ The introduction of technological innovations like blogging on social media complicates that dynamic even further, bringing into the fold a knotty relationship with large, privately owned companies.

A. Treatment of Presidential Records

1. Private to Public

Considering how public the private lives of presidents are nowadays, it might be surprising that presidents' papers and records were traditionally considered the private property of the president.¹⁰ Historically there was no committee or office tasked with sorting through the presidents' papers at the end of a term—in fact, George Washington and others simply packed their notes and papers up and journeyed home.¹¹ Like prized heirlooms, these papers were typically passed down to relatives, who tended to either sell them for profit or save the written legacies for the next generations.¹² It was not until 1940 that President Franklin Delano Roosevelt established the concept of the presidential

7. See Christina Newberry, *130+ Social Media Statistics that Matter to Marketers in 2019*, HOOTSUITE (Mar. 5, 2019), <https://blog.hootsuite.com/social-media-statistics-for-social-media-managers/#general> (“3.48 billion people now use social media. That’s an increase of 9% from last year. Put another way: 45% of the total world population are using social networks.”).

8. See Lee White, *House Passes Major Presidential Records Reform: Previous Efforts Have Been Blocked in the Senate*, PERSPECTIVES ON HISTORY (Mar. 1, 2014), <https://www.historians.org/publications-and-directories/perspectives-on-history/march-2014/house-passes-major-presidential-records-reform> (noting that when Harry S. Truman inscribed the words “[t]he papers of the Presidents are among the most valuable sources of a material for history. They ought to be preserved and they ought to be used,” historians have learned from experience that President Truman should have included the phrase “and the government should make them accessible to the public as soon as possible.”).

9. See *id.* (explaining how bills have passed to prevent destruction of records in Congress only to fail in the Senate).

10. Alana Abramson, *Richard Nixon Is the Reason President Trump’s Aides Have to Repair Documents He Rips Up*, TIME (June 11, 2018), <http://time.com/5308542/trump-presidential-records-nixon/?xid=tcoshare>.

11. See *id.* (describing how past presidents had “owned” their papers before President Nixon’s Watergate Scandal).

12. Bruce P. Montgomery, *Presidential Materials: Politics and the Presidential Records Act*, 66 THE AM. ARCHIVIST 102, 104 (2003).

library, a time capsule of American presidential history that sparked an unofficial policy of presidential recordkeeping that would last for decades.¹³ Even within the concept of a presidential library, however, the presidents and their heirs had sole and unique discretion over which records and papers might be displayed to the public and which might be discarded or hidden from the public eye.¹⁴ Relying on the principles of separation of powers and executive privilege, Congress and the courts largely stayed out of any public claim over these presidential records.¹⁵

However, the period of deference to private presidential ownership of papers and records ended abruptly with President Nixon and the Watergate scandal.¹⁶ At that time, presidents had the option to donate papers to the National Archives, but the Archives could not demand them.¹⁷ Twenty-twenty hindsight makes it unsurprising that President Nixon was fighting to keep the infamous tapes secret in the face of heavy congressional and legal pressure.¹⁸ Ultimately, he was unsuccessful in his 1974 Supreme Court struggle to claim expansive executive privilege over his papers, a position that the Court rejected again in 1977 in *Nixon v. Administrator of General Services*.¹⁹ Facing impeachment, President Nixon resigned the office of the presidency in 1974 and held the tapes under threat of destruction, relying primarily on the same theories of executive privilege and private property.²⁰ In response, public, congressional, and court perception of proper ownership of presidential papers shifted dramatically and Congress rapidly passed The Presidential Recordings and Materials Preservation Act of 1974.²¹ The intent of that measure was to seize Nixon's records in connection with the Watergate incident and require them to be held in the National Archives.²² Although most of the tape recordings and records were preserved by this stop-gap measure, Congress took broader action in 1978 and passed the Presidential Records Act (PRA), which applied to all future presidents, not just Nixon, requiring them to both keep their records and also to archive them.²³

2. *The Presidential Records Act*

The PRA is a federal statute that addresses the required treatment of presidential records, rejecting the coveted private ownership of presidential records and handing the rights to the public.²⁴ The PRA states that, “[t]he United

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *See* Montgomery, *supra* note 12, at 104 (explaining how the decision was up to the president on which documents to submit to the library and which documents to keep hidden).

18. *Id.* at 105.

19. *Id.* at 106.

20. *Id.* at 105.

21. *See id.* (explaining how in response to Nixon, Congress quickly passed the Presidential Recordings and Materials Preservation Act in 1974).

22. Montgomery, *supra* note 12, at 105.

23. *Id.* at 106.

24. Presidential Records Act, 44 U.S.C. § 2202 (1978) (amended 2014).

States shall reserve and retain complete ownership, possession, and control of Presidential records; and such records shall be administered in accordance with the provisions of this chapter.”²⁵ The PRA defines presidential records as documentary materials that the President (or the President’s immediate staff) creates or receives in carrying out duties or activities of the presidency.²⁶

The PRA clarifies further that “materials” are:

[A]ll books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including but not limited to, audio and visual records, or other electronic or mechanical recordings, whether in analog, digital or any other form.²⁷

At first glance this category seems quite broad, but it specifically does not include “official records of an agency . . . personal records . . . stocks of publications and stationary . . . or extra copies of documents produced only for convenience of reference.”²⁸ Personal records are exactly what one would think—journals, diaries, scribbles on the back of a napkin—but clearly not secret tapes.²⁹

Perhaps unexpectedly, the PRA places much of the responsibility of record keeping and preservation on the shoulders of the President, requiring that he or she “assure that the activities, deliberations, decisions, and policies that reflect the performance of the President’s constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records.”³⁰ But this does not apply to all records.

If the President wishes during the term of office, he or she “may dispose of those Presidential records . . . that no longer have administrative, historical, informational, or evidentiary value.”³¹ However, first the President must consult the National Archivist and get his or her views on the proposed disposal in writing.³² The National Archivist is currently David S. Ferriero, who leads the National Archives and Records Administration of the United States.³³ In other words, he is “the nation’s record keeper.”³⁴ After the President seeks advice, the Archivist may decide whether to turn to Congress and “request the advice of the Committee on Rules and Administration and the Committee on Governmental Affairs of the Senate and the Committee on House Oversight and the Committee

25. *Id.*

26. *Id.* at § 2201 (1978).

27. *Id.*

28. *Id.*

29. 44 U.S.C. § 2201.

30. *Id.* at § 2203.

31. *Id.*

32. *Id.*

33. David Ferriero Biography, NATIONAL ARCHIVES, <https://www.archives.gov/about/archivist/archivist-biography-ferriero.html> (last visited on Oct. 1, 2019); *About the National Archives of the United States*, NATIONAL ARCHIVES, <https://www.archives.gov/publications/general-info-leaflets/1-about-archives.html> (last visited on Oct. 13, 2019).

34. *About the National Archives of the United States*, *supra* note 32.

on Government Operations of the House of Representatives.”³⁵ The Archivist would take this step if he or she felt that “particular records may be of special interest to the Congress,” or if the Archivist decides that it is in the best interest of the public for Congress to be consulted about the disposal.³⁶

If the Archivist chooses to take this action, the President can still get rid of the records as long as “copies of the disposal schedule are submitted to the appropriate Congressional Committees at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date.”³⁷ This is not to be confused with a preventative measure, because it does not stop the President from erasing the records at all. In fact, “[n]either the Archivist nor an agency head can initiate any action through the Attorney General to effect recovery or ensure preservation of presidential records.”³⁸ Moreover, “neither the Archivist nor Congress has the authority to veto the President’s disposal decision.”³⁹ The only role of the Archivist is to give written advice about the disposal to the President, and to keep passing the information along to Congress.⁴⁰ Indeed, in *Armstrong v. Exec. Office of the President, Office of Admin.*, 1 F.3d 1274 (1993), the D.C. circuit court outlined the limitations on judicial review in the documentation process of the PRA, holding that judicial review of the President’s creation, management, or disposal decisions is inappropriate.⁴¹ In turn, Congress’s role in the disposal of presidential records is to form a Congressional opinion, and then . . . do nothing about it, aside from possibly passing new legislation that still would not apply to the records in danger of disposal.⁴² Of course, the Archivist does “have an affirmative duty to make . . . records available to the public as rapidly and completely as possible,” and must “deposit all . . . Presidential records in a Presidential archival depository or another archival facility operated by the United States.”⁴³

The President’s control over records designated as “presidential” is broad and includes treatment of the records even after the end of the President’s term(s).⁴⁴ The PRA states that: “[p]rior to the conclusion of a President’s term of office or last consecutive term of office . . . the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record.”⁴⁵

Records that the President can subject to withholding are those that are “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy,” “relating to appointments to Federal office,” records exempted from disclosure by a statute, “trade secrets,” “confidential communications requesting or submitting advice,”

35. 44 U.S.C. § 2203.

36. *Id.*

37. *Id.*

38. *Armstrong v. Exec. Off. of the President, Off. of Admin.*, 1 F.3d 1274, 1291 (D.C. Cir. 1993).

39. *Id.* at 1291 (citing *Armstrong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991)).

40. *See id.* (describing how the Archivist duties consist of monitoring the disposal of presidential records).

41. *Id.* at 1292.

42. *Id.*

43. Presidential Records Act, 44 U.S.C. § 2203 (1978) (amended 2014).

44. *Id.*

45. *Id.* at § 2204.

or personnel and medical files.⁴⁶ Again, there is no specific mechanism in place right now to enforce presidential compliance with the PRA.⁴⁷

3. *A Life of Conflict*

President Nixon was not the last president to protest release of his presidential records. As part of a clearly developing pattern, President Reagan was the next to try to circumvent the principles underlying the enactment of the PRA by effecting a regulatory framework to prevent the release of Nixon's papers.⁴⁸ In fact, the release of those papers was delayed three times by the White House.⁴⁹ Neither was this the last time that the PRA would be challenged by the Reagan administration: on the eve of the release of presidential records twelve years after his presidency, Reagan tried to withhold his documents again.⁵⁰ President George Bush continued this trend, when on November 2nd of 2001, he signed an executive order that gave a sitting president the power and oversight to keep former presidents' papers secret.⁵¹ Perhaps most importantly, the order allowed the sitting president to take these actions with or without the consent of, and indeed against the direct will of, those former presidents.⁵² Although the administration maintained that the purpose of the executive order was to provide an orderly process for review of the papers, historians and public interest lawyers said the claims concerning the 68,000 pages of records from the Reagan administration were "absurd."⁵³

Near the end of President Bush's administration, Congress began moving to strike that executive order, but it was ultimately an executive order from President Obama that reversed the restrictions.⁵⁴ President Obama took issue with the implication of the first order by President Bush, saying:

For a long time now, there's been too much secrecy in this city. This administration stands on the side not of those who seek to withhold information but with those who seek it to be known. The mere fact that you have the legal power to keep something secret does not mean you should always use it. Transparency and the rule of law will be the touchstones of this presidency.⁵⁵

46. *Id.*

47. See Kel McClanahan, *Trump and the Demise of the Presidential Records Honor System*, JUST SECURITY (Mar. 22, 2019), <https://www.justsecurity.org/63348/trump-and-the-demise-of-the-presidential-records-honor-system/> ("If some activity is prohibited by statute, but nobody can enforce compliance with the statute, can doing that activity really be called a "violation" of the statute?").

48. Montgomery, *supra* note 12, at 102.

49. *Id.* at 108–09.

50. *Id.* at 112.

51. *Id.* at 123.

52. *Id.* at 125.

53. Montgomery, *supra* note 12, at 123.

54. Tom Murse, *President Obama's First Executive Order*, THOUGHTCO. (Jan. 26, 2019), <https://www.thoughtco.com/president-obamas-first-executive-order-3322189>; Elisabeth Bumiller, *Bush Keeps a Grip on Presidential Papers*, N.Y. TIMES (Nov. 2, 2001), <https://www.nytimes.com/2001/11/02/us/bush-keeps-a-grip-on-presidential-papers.html>.

55. Murse, *supra* note 54.

President Obama's first executive order was directly intended to unravel the executive order issued by President Bush, combatting the move that some historians consider to have upended the PRA by "giving presidents veto power over what can or cannot be released."⁵⁶ He maintained this perspective on the PRA, and did not follow in the unwilling footsteps of his predecessors. There has not yet been an attempt to limit the PRA by the Trump Administration.

4. *Sister Act: The Federal Records Act*

If government records were thought of as a road, that road would fork into the PRA and the FRA. When a government record is created, it is essentially classified as either a Presidential Record under the PRA or a Federal Record under the FRA, of which only the Federal Record is subject to a Freedom of Information Act (FOIA) request.⁵⁷

More precisely, the FRA requires federal agencies to accurately document "the policies and transactions of the Federal Government."⁵⁸ The act also requires agencies to maintain the quality and the quantity of the records that the Federal Government produces, and provides that they preserve and dispose of those records "judiciously."⁵⁹

To determine the definition of agency, the FRA looks to FOIA, which was amended in the 1974 by Congress to refer to "establishment[s] in the executive branch of the Government."⁶⁰ This definition also includes the Executive Office of the President, but was not intended to apply to those in the Executive Office whose only duties are advising or assisting the president, including the President's immediate personal staff.⁶¹

Documentary materials are federal records under the FRA if they are received or made by an agency of the US Government, and if they are appropriate for preservation by that agency "as evidence of the organization" of the agency or other important aspects of its inner workings.⁶² In order to bring this preservation about, the FRA places the preservation obligations on the heads of the federal agencies.⁶³ One of these obligations is the imposition of safeguards against destruction of records that ought to be preserved.⁶⁴ However, if the National Archivist (the same person that monitors compliance of the PRA) finds that records that should be preserved under the FRA are in danger of being destroyed or removed, the Archivist must then inform the agency head of the suspected violation, suggest corrective measures, and write a report and submit it to Congress and the President if no corrective measures are taken within a

56. Celestine Bohlen, *Ideas & Trends: Paper Chase; Whose History is it Anyway? The Publics or the Officials?*, N.Y. TIMES (Feb. 24, 2002), <https://www.nytimes.com/2002/02/24/weekinreview/ideas-trends-paper-chase-whose-history-it-anyway-public-s-officials.html>.

57. The Federal Records Act, 44 U.S.C. § 101 (2018).

58. *Id.* at §§ 2101.

59. *Id.*

60. *Id.*

61. *Id.*

62. 44 U.S.C. § 3301.

63. *Id.* at § 3501.

64. *Id.*

reasonable time.⁶⁵ If the need is pending or dire, the Archivist must, along with the appropriate agency head, initiate an action through the Attorney General for the recovery of those records or legal redress for those actions.⁶⁶ If this action is not taken appropriately, private individuals have the right to bring suit to require both the agency head and the Archivist to fulfill their duty to notify and initiate legal action.⁶⁷

The purpose of both the PRA and the FRA is to preserve records that are considered to have value.⁶⁸ But the procedures within the PRA to prevent the destruction of records are significantly less demanding than those of the FRA. The FRA requires the National Archivist to shoulder the heavy burden in preserving documentary materials, and even allows for a private right of action to sue for the fulfillment of that duty.⁶⁹ In contrast, the PRA only requires the National Archivist to advise the President of his opinion on the intended destruction if it seems appropriate, and to notify Congress.⁷⁰ Most telling is that there is no private right of action to enforce compliance with the PRA.⁷¹ Court treatment of the FRA is also more hands-on than the PRA—the PRA is not subject to judicial review and enforcement, but the FRA is.⁷² To put it simply, if a record has been determined to be a federal record, it is protected by a thorough process that includes the threat of legal action. If a record has been determined to be a presidential record, it is protected by a strongly worded note from the Archivist and possibly, members of Congress.

5. *Social Media—A New Avenue of Influence*

Twitter, a publicly traded company, has 326 million monthly active users, and roughly 1.3 billion accounts have been created on the platform.⁷³ Since its birth in 2006, Twitter's numbers have become absolutely staggering—67 million United States citizens are monthly active users of Twitter, and the site receives visits from 500 million people every month who are not even logging into an account.⁷⁴ Just one day's worth of tweets could fill a book with 10 million pages, and while each entry might not be of the utmost national importance, at least eighty percent of the world's leaders are on Twitter.⁷⁵

Twitter is a unique platform because of its capacity for one-on-one interaction between influential public figures and everyday individuals. Of

65. *Id.*

66. *Id.* (noting that if the archivist is forced to take this action alone, the archivist must also notify Congress that a report has been made to the attorney general).

67. *Id.*

68. *Id.* at § 3501.

69. *Id.* at § 3301.

70. Presidential Records Act, *supra* note 5, at § 2203.

71. *Id.*

72. *See* *Armstrong v. Executive Office of the President*, 90 F.3d 553, 556 (1996) (stating that, “[r]ecord-keeping requirements of the FRA are subject to judicial review and enforcement, those of the PRA are not.”).

73. *58 Incredible and Interesting Twitter Stats and Statistics*, BRANDWATCH (Jan. 3, 2019), <https://www.brandwatch.com/blog/twitter-stats-and-statistics/>.

74. *Id.*; *Twitter By The Numbers: Stats, Demographics & Fun Facts*, OMNICORE (last updated Jan. 6, 2019), <https://www.omnicoreagency.com/twitter-statistics/>.

75. *Id.*

course, there have been prior technological innovations that impacted former presidents. President Harding was the first president to be heard on the radio, and President Franklin Delano Roosevelt and President Harry Truman were the first to pioneer televised appearances by presidents.⁷⁶ Although listeners and watchers could decide to send mail in the post to respond to presidential speeches and addresses, the odds that the man or woman in the oval office would have the time to both read someone's personal letter and send mail back were quite slim.

The age of social media has drastically altered the potential for direct communication and access to societal and political leaders. As a head of state, President Trump has 52 million followers, while the population of the United States is roughly 328 million people.⁷⁷ The technological has also intertwined with the spiritual—for example, the Pope has 47.6 million followers on Twitter, presumably drawing from at least some of the 1.2 billion Roman Catholics in the world.⁷⁸ Even from an economic perspective, at least 77 percent of users on Twitter feel more positively about a brand when their tweet was replied to.⁷⁹

Twitter has had such an astounding impact on the way that the public interacts with government representatives that the ability to block other users on Twitter has naturally made its way to the courts.⁸⁰ When some Twitter users were blocked on Twitter by President Trump, they filed a lawsuit seeking an injunction.⁸¹ In that case, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, the District Court held that President Trump's account on Twitter was a public forum to the extent that he was prohibited from blocking people from accessing it.⁸² Although prolific, President Trump was not the first American president to use Twitter in the capacity of the office.⁸³ On May 18, 2015, President Barack Obama sent out the first presidential tweet, saying “ Hello, Twitter! It's Barack. Really! Six years in, they're finally giving me my own account.”⁸⁴ At the end of his final term, President Obama set in motion a method

76. *Who Was The First US President to Appear on Television?*, WORLDATLAS (last updated Oct. 26, 2017), <https://www.worldatlas.com/articles/who-was-the-first-us-president-to-appear-on-television.html>.

77. *World Leaders With the Most Twitter Followers As of January 2019*, STATISTA, <https://www.statista.com/statistics/281375/heads-of-state-with-the-most-twitter-followers/>; *U.S. and World Population Clock*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/popclock/>.

78. *How Many Roman Catholics Are There in the World*, BBC NEWS (March 14, 2013), <https://www.bbc.com/news/world-21443313>; *World Leaders With the Most Twitter Followers As of January 2019*, STATISTA, <https://www.statista.com/statistics/281375/heads-of-state-with-the-most-twitter-followers/>.

79. Meghann Elrhoul (@megel), *Research: Four Ways Brands Can Build Customer Service Relationships on Twitter*, TWITTER: BLOG (July 30, 2015), https://blog.twitter.com/marketing/en_us/a/2015/research-four-ways-brands-can-build-customer-service-relationships-on-twitter.html.

80. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 551 (S.D.N.Y. 2018).

81. *Id.* at 549.

82. *Id.* at 575.

83. President Obama, (@POTUS44), TWITTER (May 18, 2015 11:38 AM), <https://twitter.com/potus44/status/600324682190053376?lang=en>.

84. *Id.*

for preserving tweets in cooperation with the National Archivist, but it is unclear if that same method will be adopted by succeeding presidents.⁸⁵

Congress has also recognized the importance of presidential social media use, offering an amendment to the PRA called the COVFEFE Act.⁸⁶ Although named with tongue firmly in cheek and referencing the “covfefe” tweet in the Introduction of this Note, the proposed COVFEFE Act takes presidents deleting tweets very seriously and calls for social media materials to be included in the definition of “documentary materials” for purposes of the PRA.⁸⁷

III. ANALYSIS

Presidential use of Twitter highlights several issues that must be resolved in order to better protect the rights of the American people concerning access and ownership of Presidential Records. First and foremost, it must be addressed that tweets made by the office of the President, and the President acting in his official capacity, are documentary materials and therefore are Presidential Records deserving of protection and preservation as outlined in the PRA.⁸⁸ This leads to a secondary issue of what a functional transition and preservation of this Twitter data would actually look like. The National Archives are tasked with and should take steps to archive this data, as was done with President Obama’s former social media information.⁸⁹ Although it might be in Twitter’s best interests as a company to preserve and facilitate Presidential use of the site, the company is not a public utility provider, and an attempt to force Twitter to host and maintain these presidential records would likely be considered government compelled speech and would be impermissible under judicial review.⁹⁰ However, this discussion is almost moot given the abject lack of enforcement power in the PRA.⁹¹

A. *Why, How, and Who?*

1. *Why Should We Preserve Tweets?*

Currently, the use of social media, primarily Twitter, by President Donald Trump is astoundingly prolific and unprecedented.⁹² This is unique, because

85. Lizzie Plaugic, *Obama Administration Releases Searchable Archive of Social Media Posts*, THE VERGE (Jan. 5, 2017, 3:20 PM), <https://www.theverge.com/2017/1/5/14181274/obama-social-media-archive-twitter-instagram-facebook>.

86. COVFEFE Act of 2017, H.R. 2884, 115th Cong. (1st Sess.2017).

87. *Id.*

88. See Presidential Records Act, 44 U.S.C. § 2201(2) (1978) (amended 2014) (“The term “documentary material” means all books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio and visual records, or other electronic or mechanical recordings, whether in analog, digital, or any other form.”).

89. Plaugic, *supra* note 85.

90. See *Constitutional Challenges to Compelled Speech—Particular Situations or Circumstances*, 73 A.L.R. 281, 2 (“[W]hat the Constitution prohibits, is being forced to speak rather than to remain silent.”).

91. Presidential Records Act, 44 U.S.C. § 2201 (1978) (amended 2014).

92. Frank Newport, *Deconstructing Trump’s Use of Twitter*, GALLUP (May 16, 2018), <https://news.gallup.com/poll/234509/deconstructing-trump-twitter.aspx> (“President Donald Trump’s

unlike a radio address or a televised lecture, social media is interactive by design.⁹³ In fact, the President's Twitter usage has a tangible impact on the American public, and a recent Gallup poll shows that "[seventy-six percent] of Americans see, read or hear about Trump's tweets," but the manner in which they do so makes their preservation all the more important.⁹⁴ The poll shows that, taking into account the twenty-six percent of Americans with a Twitter Account and the thirty percent of that group that actually follows President Trump's Twitter account, only about four percent of Americans are receiving the important and influential presidential information in those tweets unfiltered.⁹⁵ In other words, seventy-two percent of the Americans that are exposed to the President's official words are getting them from another source, which increases the likelihood that alterations, edits, and deletions to the tweets by the President will prevent at least some of the original content from reaching the American people before dubbing.⁹⁶

Preserving presidential social media use like tweets is incredibly valuable to historians, academics, and the American People because it is necessary to understand the complete tapestry of historical events, and it was this appreciation for the power of history that drove the original passing of the PRA of 1978.⁹⁷ Deletion is also potentially dangerous. For example, we look to President Trump's tweet directed at North Korea's Kim Jung UN:



unprecedented use of the social media platform Twitter as one of his primary means of presidential communication appears to be effective from a big-picture perspective.”).

93. Richard Hanna et al., *We're All Connected: The Power of the Social Media Ecosystem*, 54 BUS. HORIZONS 265, 267 (2011) (“It is clear that interactive digital media platforms are changing the marketing landscape, and the nature and sources of information and connectivity are vast, in effect creating a 24/7 collaborative world.”).

94. Newport, *supra* note 92.

95. *Id.*

96. See *Donald Trump-Deleted Tweets*, FACTBA.SE, <https://factba.se/topic/deleted-tweets> (showing that as of Sept. 26, 2019, President Trump has deleted 631 tweets) (last visited on Oct. 13, 2019).

97. 124 Cong. Rec. H34894 (Oct. 10, 1978) (“The past may not be the surest guide to the future, but neither can we in Government afford to ignore its lessons altogether. . . . But essential to understanding the past is access not the historical record, to the documents and other materials that are produced in the course of governing and shed light on the decisions and decisionmaking processes of earlier years.”).

*President Trump, Tweet Regarding Threat of Nuclear Action*⁹⁸

This tweet is arguably a threat to take action against North Korea with the weight of the American Federal Government behind it. Even a United States District Court has acknowledged that President Trump uses Twitter:

[T]o announce, describe, and defend his policies; to promote his Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; to challenge media organizations whose coverage of his Administration he believes to be unfair; and for other statements, including on occasion statements unrelated to official government business.⁹⁹

As of right now, the tweet directed at North Korea remains accessible and undeleted on President Trump's twitter account, and has caused an uproar.¹⁰⁰ But what if President Trump decides to delete it, as he has 620 other times (and counting)?¹⁰¹ If he deleted the tweet immediately after posting it, that might not be soon enough to stop other foreign powers from seeing it.¹⁰² Maybe it would have been England to notice the tweet first, and the biggest repercussion would be the Prime Minister contacting the American government to inquire if there was a change in our nuclear policy. Or maybe, it would have been North Korea to take notice first, see the deletion, and attempt to preempt the possible US aggression by take the first action towards war with the United States. In this scenario, the United States would be engaged in a war with an unpredictable foreign nation, based off of a tweet that was sent and deleted with no government record of it ever happening.

Even deleting the tweet now would affect the work of political scientists and historians attempting to map or predict the relationship between the United States and North Korea. As unsettling as a tweet like this can be on its own, deleting it immediately or down the road creates uncertainty—allies will be unclear on whether a new policy is being adopted or rejected by the United States, and they will have no time to prepare any sort of response. Without a record of every official presidential communication, the reality of what official positions have been hinted at, taken, and/or retracted is lost. And indeed, they

98. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 2, 2018, 4:49 PM), <https://twitter.com/realDonaldTrump/status/94835557022420992>.

99. Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 571 (2018) (citing *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

100. Stephen Collinson, *The Nuclear War Tweet Heard 'Round the World*, CNN POLITICS (Jan. 3, 2018, 7:12 AM), <https://www.cnn.com/2018/01/03/politics/donald-trump-nuclear-button-north-korea/index.html> (“[B]efore Trump, no US President has made such public and cavalier threats, apparently relishing the power he wields as the person who could, by himself, deploy America’s earth-shattering nuclear arsenal within a matter of minutes.”).

101. See *Donald Trump-Deleted Tweets*, FACTBA.SE, <https://factba.se/topic/deleted-tweets> (listing President Trump’s deleted tweets).

102. See Help Center, *About Notifications on Mobile Devices*, TWITTER (last visited Oct. 13, 2019), <https://help.twitter.com/en/managing-your-account/notifications-on-mobile-devices> (showing the capability that Twitter users have to receive immediate notifications on their mobile devices when users they subscribe to tweet).

are official presidential statements, according to former White House Press Secretary Sean Spicer.¹⁰³

The subject matter of the tweet does not have to be nuclear for it to be relevant—just this year on September 1, President Trump tweeted that Alabama was under threat from Hurricane Dorian and, in all capital letters, instructed people to “BE CAREFUL.”¹⁰⁴ The Weather Service in Alabama, an arm of the National Oceanic and Atmospheric Administration (NOAA), quickly tweeted out that residents of Alabama were not at risk, but President Trump did not acknowledge that his warning to Alabama was a mistake.¹⁰⁵ Instead, in a subsequent video address President Trump indicated on a map that the possible “cone of uncertainty” of the storm extended into Alabama.¹⁰⁶ That extension was quite clearly drawn on with a black marker, meaning that at the very least someone in the President’s Office doctored an official National Hurricane Center product.¹⁰⁷ Moreover, “Trump had complained for several days that forecasters from the National Oceanic and Atmospheric Administration contradicted his Sept. 1 Alabama tweet.”¹⁰⁸ This led to White House acting Chief of Staff Mick Mulvaney to call Wilbur Ross, the Commerce Secretary, to tell him to “fix the issue.”¹⁰⁹ Soon after that call and a call from Ross to NOAA acting administrator Neil Jacobs, NOAA released an unsigned statement backing President Trump’s original tweet about the threat to Alabama.¹¹⁰ These conversations were noted by government officials and relayed to the press on condition of anonymity, and President Trump’s reaction to the claims that he directed NOAA to issue that statement so far has been a familiar refrain: “I never did that. It’s a hoax by the media. That’s just fake news.”¹¹¹ But the gravity of this chain of events cannot be overstated—the President tweeted out incorrect information about a potential natural disaster that could have incited a state-wide panic. Instead of correcting the information, political pressure was placed “on a group of scientists who are supposed to be independent.”¹¹² This break from logic was not lost on Congress, whose Science Committee is now requesting a briefing with “Commerce Department staff who may have been involved in issuing instructions to NOAA.”¹¹³ The implications of this scenario clearly

103. Elizabeth Landers, *White House: Trump’s Tweets Are Official Statements*, CNN POLITICS (June 6, 2017 3:37 PM), <https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html>.

104. Andrew Freeman et al., *Trump Pushed Staff to Deal with NOAA Tweet That Contradicted his Inaccurate Alabama Hurricane Claim, Officials Say*, WASH. POST (Sept. 11, 2019), <https://www.washingtonpost.com/weather/2019/09/11/lawmakers-commerce-department-launch-investigations-into-noaas-decision-back-presidents-trump-over-forecasters/?noredirect=on>.

105. *Id.*

106. *Id.*; Washington Post, *Tweets, a Sharpie and the NOAA: The Domino Effect of Trump’s False Dorian Claim*, YOUTUBE (Sept. 9, 2019), <https://www.youtube.com/watch?v=vZs79dqJmUk>.

107. See Washington Post, *supra* note 105 (“Let me be clear, this was a black and white issue . . . there was no credible forecast model which showed Alabama at risk from this storm.”).

108. Freeman et al, *supra* note 104.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. See Freeman et al, *supra* note 104 (highlighting Representative Johnson’s statement, “[w]e are deeply disturbed by the politicization of NOAA’s weather forecast activities for the purpose of supporting incorrect statements by the president.”).

underscore both the important role that tweets from the president now play in our society, and the real necessity to preserve them.¹¹⁴ The result of this tweet was chaos—had it been deleted after some time and been seen only by some people, that chaos easily could have multiplied. If this description is not convincing enough, keep in mind that the President’s tweets affect everyone, and Wall Street is taking notice. JPMorgan has created the Volfefe Index as a measure of the volatility of the markets in relation to the President’s tweets, and Bank of America has advised its clients that “the stock market tends to fall slightly on the days Trump tweets more.”¹¹⁵ The physical and financial security of the nation could be at the whim of two thumbs and a message that could be deleted at any time.

2. *How Should These Tweets Be Preserved?*

In theory, tweets from the Federal Government have the potential to be classified as either federal records and subject to the FRA (and FOIA requests), or presidential records under the PRA.¹¹⁶ The source, nature, and impact of the tweets are key to determining which act they and other social media posts should be preserved under, and these criteria indicate that the most appropriate action would be to designate tweets coming from the President as documentary materials and subject to the PRA.¹¹⁷

The source of the tweets is also sometimes difficult to discern, because the @realDonaldTrump account is active at sporadic hours.¹¹⁸ Sometimes it seems as if the tweets are coming straight from the thumbs of the President, and other times, it seems more likely that the tweets are coming from aides.¹¹⁹ In either case, however, the FRA dictates that records and communications that come from the office of the President or his immediate staff are *not* federal records under the act.¹²⁰ The PRA, however, states that documentary materials coming from or received by President and “the President’s immediate staff,” are subject to the guidelines in the PRA.¹²¹ Based on the source, the tweets coming from

114. See, e.g. Newman, *supra* note 92 (stating over 75% of the population read or hear about Trump’s tweets).

115. Emily Stewart, *The Volfefe Index, Wall Street’s New Way to Measure the Effects of Trump Tweets, Explained*, VOX (Sept. 9, 2019, 3:10 PM), <https://www.vox.com/policy-and-politics/2019/9/9/20857451/trump-stock-market-tweet-volfefe-jpmorgan-twitter> (“In other words, our extremely online president might be losing people money, and business strategists are trying to come up with a way to measure it.”).

116. See Presidential Records Act, 44 U.S.C. § 2201(2) (1978) (amended 2014) (“The term “Presidential records” means documentary materials, or any reasonably segregable portion thereof, created or received by the President.”).

117. See *id.* at § 2201(1) (“The term “documentary material” means all books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio and visual records, or other electronic or mechanical recordings, whether in analog, digital, or any other form.”).

118. Ashley Feinberg, *How To Tell When Someone Else Tweets From @realDonaldTrump*, WIRED (Oct. 6, 2017), <https://www.wired.com/story/tell-when-someone-else-tweets-from-realdonaldtrump/>.

119. *Id.*

120. The Federal Records Act, 44 U.S.C. § 2101 (2018).

121. Presidential Records Act, 44 U.S.C. § 2201 (1978) (amended 2014).

the @realDonaldTrump account are more appropriately subject to the PRA rather than the FRA.¹²²

The nature of the material being created is slightly more difficult to slot under either the PRA or the FRA. The PRA states that Presidential Records for purposes of the Act are considered to be “documentary materials . . . created or received by the President . . . the President’s immediate staff . . . in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.”¹²³ Under the FRA, records are, broadly, “documentary materials, regardless of physical form or characteristics.”¹²⁴ At first glance, this seems to encompass the electronic medium of the Twitter posts made by a President. The FRA also includes records relating to “the transaction of public business . . . as evidence of the organization, functions, policies, decisions, procedures, operations . . . of the Government”¹²⁵ The subject matter of the @realDonaldTrump account since President Trump assumed the Presidency has been interchangeably his personal statements and opinions, and statements indicating official United States policy, similar to the tweet above about nuclear policy, or even more clearly, this recent tweet:



*President Trump, stating new foreign policy in the Palestine-Israel conflict.*¹²⁶

Tweets like this are clearly declarations of policy and would fall under definitions of documentary material in both the PRA and FRA.¹²⁷ But tweets like, “Who can figure out the true meaning of “covfefe” ??? Enjoy!” seem less like official United States policy according to the FRA.¹²⁸ Instead, they seem much more like they are documenting the “activities which relate to” his duties in the office of the Presidency and would be covered under the PRA.¹²⁹

122. *See id.* (detailing the definitions for what can constitute Presidential records).

123. *Id.*

124. NATIONAL ARCHIVES, *Frequently Asked Questions about Federal Records Management* (July 7, 2015), <https://www.archives.gov/records-mgmt/faqs/federal.html>.

125. *Id.*

126. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 21, 2019, 12:50 PM), <https://twitter.com/realdonaldtrump/status/1108772952814899200>.

127. Presidential Records Act, 44 U.S.C. § 2201 (1978) (amended 2014); NATIONAL ARCHIVES, *supra* note 126.

128. Matt Flegenheimer, *What’s a ‘Covfefe’? Trump Tweet Unites a Bewildered Nation*, N.Y. TIMES (May 31, 2017), <https://www.nytimes.com/2017/05/31/us/politics/covfefe-trump-twitter.html>; FACTBA.SE, *Deleted Tweet from Twitter* (May 31, 2017) <https://factba.se/search#covfefe>.

129. Presidential Records Act, 44 U.S.C. § 2201 (1978) (amended 2014).

Based on the language of the *Knight* case, a district court is likely to agree.¹³⁰ The United States District Court for the Southern District of New York held that the content and interactive space and comment threads of President Trump’s Twitter accounts together is considered a public forum, and that he could not block people from accessing that public forum by blocking them on the site.¹³¹ That same court addressed the fact that President Trump uses his account for official presidential communications, noting that, “the account—including all of its constituent components—has been held out . . . as a means through which the President ‘communicates directly with you, the American people!’”¹³²

By using Twitter for these direct presidential communications to the American People, the tweets satisfy the need in the PRA of being “official” in nature, their intended communicative value satisfies the “documentary,” aspect, and their source being the fingertips of the office of the presidency satisfy the “created” aspect of the PRA.¹³³ Their source is not an agency, so the tweets are simply not protected by the FRA.¹³⁴ There is no reasonable definition of a tweet that does *not* place it firmly within the definition of a presidential record according to the PRA. A tweet is not a scrap of paper that the president idly scribbles on; it is not a grocery list. It is a piece of documentary material created by the hands of the president in his official capacity and intended to directly convey presidential messages to the American People.¹³⁵ In short, it is a Presidential Record.

3. *Whose Job Is It?*

On a Thursday evening in 2017, President Trump’s Twitter account was deleted, although for just eleven minutes.¹³⁶ Noting that the presidency “has seemed, at times, to be conducted primarily in 140-character pieces, this was a seismic event,” reporting of the incident appeared to joke, although tinged with seriousness, that “[t]his is the way the world ends: not with a bang but a deleted Twitter account.”¹³⁷ Although Twitter has not revealed what the range of employee access to the presidential account is, or what possible safeguards the account has, the absence for less than twenty minutes of the @realDonaldTrump account left some Twitter users with a “sense of dread,” and imprinted the true impact of Twitter as a means of presidential communication on everyone.¹³⁸

If the PRA is adequately followed, there is a precedent as to how the preservation of a presidential Twitter account could take place and what it could look like. As the first president to use a Twitter account to communicate from

130. Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 574 (2018).

131. *Id.*

132. *Id.*

133. Presidential Records Act, 44 U.S.C. § 2201 (1978) (amended 2014).

134. NATIONAL ARCHIVES, *supra* note 126.

135. Presidential Records Act, 44 U.S.C. § 2201 (1978) (amended 2014).

136. Maggie Astor, *Rogue Twitter Employee Briefly Shuts Down Trump’s Account*, N.Y. TIMES (Nov. 2, 2017), <https://www.nytimes.com/2017/11/02/us/politics/trump-twitter-deleted.html>.

137. *Id.*

138. *Id.*

the office of the presidency, President Obama provided a blueprint for transitioning his tweets, seemingly completely compliant with the PRA.¹³⁹ When President Obama left office, his @POTUS account data was moved to @POTUS44, which is a Twitter account maintained by the National Archives and Records Administration.¹⁴⁰ The tweets on the @POTUS Twitter handle were wiped clean, as were the followers, and a fresh slate was provided for the incoming administration.¹⁴¹ In the same manner, the White House account was wiped clean of tweets made and followers acquired during the President Obama administration, and that data was transferred to the account @obamawhitehouse, which again is maintained by the National Archives and Records Administration.¹⁴²

One of the challenges highlighted by this example of a possible transition and preservation of Twitter records is that President Obama used the presidential Twitter account and White House account for his online presidential communications.¹⁴³ President Trump, however, has made it very clear that his personal account @realDonaldTrump and the @POTUS account are used interchangeably.¹⁴⁴ Presumably, upon the next presidential transition the National Archives and Records Administration will take the same steps as they did with President Obama, with the additional step of duplicating and transferring all tweets made and followers accrued from the @realDonaldTrump account during his tenure over to a separate account, allowing him to maintain his personal account while also preserving these presidential records.¹⁴⁵

Twitter's role in maintaining the @realDonaldTrump account, and in turn, the presidential communications contained within, is murky. Twitter has made a statement that they will not delete the President's account (for longer than eleven minutes)—but what if they did?¹⁴⁶ It is unclear whether the private company can be compelled to host the President's account.¹⁴⁷ The most applicable precedent for analyzing possibly compelling Twitter to host the account addresses the difference between the levels of activity and passivity in newspaper and other mediums.¹⁴⁸ In *Miami Herald Pub. Co. v. Tornillo*, the United States Supreme Court held that government compulsion of newspapers to publish content that the newspaper reasonably should not publish is

139. Lauren Boyer, *Where Did President Obama's Tweets Go?*, US NEWS (Jan. 20, 2017), <https://www.usnews.com/news/national-news/articles/2017-01-20/what-happened-to-president-obamas-tweets>.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Boyer, *supra* note 142.

145. *See id.* (describing how Obama's tweets from the POTUS Twitter account would be transferred into a separate account).

146. *See* Harper Neidig, *Twitter Explains Why It Won't Delete Trump's Account*, THE HILL (Jan. 5, 2018), <https://thehill.com/policy/technology/367675-twitter-explains-why-they-wont-delete-trumps-account>

("... Twitter argued that world leaders have an important place in the public conversations the company hopes to foster among users. 'Blocking a world leader from Twitter or removing their controversial Tweets, would hide important information people should be able to see and debate.'").

147. *See id.* (discussing Twitter's response regarding lack of action toward the President's Twitter account and that "world leaders are not always subject to the same content policies as other users").

148. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974).

unconstitutional.¹⁴⁹ In that case, the newspaper *Miami Herald* refused to allow a political candidate space to reply to political ads in the paper attacking his character—a right afforded him by Florida Statute.¹⁵⁰ The newspaper in that case would have been subject to punishment by noncompliance with the Florida Statute.¹⁵¹ Although whatever method the Government might try to use to compel Twitter to host a Presidential account may or may not include an element of punishment, the holding in *Miami Herald* was clear that the punitive nature of the Florida Statute was not the deciding factor.¹⁵² The Court held that removing the decision of the editors of a newspaper of what content to put into the paper is a violation of the freedom of press under the First Amendment.¹⁵³

The Court also held, however, that the newspaper in question was “more than a passive receptacle or conduit for news, comment, and advertising.”¹⁵⁴ That begs the question of what kind of publication medium Twitter is. Like a newspaper, Twitter has its own standards for what may be hosted on the site and reserves the right to remove inappropriate and illegal content.¹⁵⁵ That indicates that Twitter is not entirely passive. Unlike a newspaper, however, the Twitter Terms of Service very clearly places the responsibility of the published material on the site on the users that post.¹⁵⁶ Twitter Terms of Service also refer to content and ability to access that content as “use of services.”¹⁵⁷ Based on the terms of service, Twitter functions as a somewhat-passive conduit for news, where users are allowed to comment and participate with other users while being exposed to ads.¹⁵⁸ The nature of Twitter and its own self-description suggests that the Supreme Court might distinguish Twitter from a newspaper by relying on the “passive . . . conduit” description, opening a window to possibly allowing compelled speech in the form of a Presidential Twitter account.¹⁵⁹ This court battle, however, should never have to be fought—the tweets should be archived by the National Archivist under the PRA.¹⁶⁰

B. *The Empty Promise of the PRA*

The Presidential Records Act in its current state does not protect the interest of American People in the Presidential Communications, because it is not guarded by any mechanism of enforcement.¹⁶¹ In *Armstrong v. Exec. Office of*

149. *Id.* at 248.

150. *Id.*

151. *Id.* at 256–57.

152. *Id.* at 258.

153. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S., at 258.

154. *Id.*

155. TWITTER, *Twitter Terms of Service*, <https://twitter.com/en/tos> (last visited on Oct. 13, 2019).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Miami Herald*, 418 U.S. at 241.

160. See Presidential Records Act, 44 U.S.C. § 2201 (1978) (amended 2014) (listing the types of documents that should be reserved in the PRA); Shontavia Johnson, *Donald Trump's Tweets Are Now Presidential Records*, THE CONVERSATION (Feb. 1, 2017), <https://www.usnews.com/news/national-news/articles/2017-02-01/donald-trumps-tweets-are-now-presidential-records>.

161. *Armstrong v. Exec. Office of the President, Office of Admin.*, 1 F.3d 1274, 1291 (D.C. Cir. 1993).

the President, Office of Admin., 1 F.3d 1274 (1993), the D.C. Circuit Court of Appeals discussed the limits of the PRA.¹⁶² The PRA, they held, “accords the President virtually complete control over his records during his term of office.”¹⁶³ The court also recognized that, although the Archivist can seek the advice of Congress if notified that the President intends to destroy records of perceived importance, “neither the Archivist nor the Congress has the authority to veto the President’s disposal decision.”¹⁶⁴ In that case, the Court considered the impact that the judiciary is permitted to have over the treatment of presidential records, and concluded importantly that although there was no basis for judicial review over the deletion of presidential records, there was an allowance in the PRA for the judiciary’s “limited review to assure that guidelines defining presidential records do not improperly sweep in nonpresidential records.”¹⁶⁵

This holding is significant because it ultimately means that the courts may not determine what presidential records may be destroyed, but they may determine what records are considered presidential records to begin with.¹⁶⁶ In *Armstrong*, the court highlighted this significance through a comparison of the treatment of presidential records under PRA to the treatment of agency records under FOIA.¹⁶⁷ The PRA “provides that all materials that are subject to the FOIA do not qualify as presidential records,” and materials that are subject to the FOIA are protected from destruction.¹⁶⁸ Specifically, the agency heads must notify the Archivist of “unlawful removal or destruction of federal records and . . . seek legal action through the Attorney General to recover or preserve the records.”¹⁶⁹ In contrast, records that the Executive might seek to destroy that are qualified as presidential records are not subject to restriction or protection.¹⁷⁰ So, thinly-veiled tweets full of animosity like the following might be deleted without redress:

162. *Id.* at 1284.

163. *Id.* at 1291.

164. *Id.*

165. *Id.* at 1278.

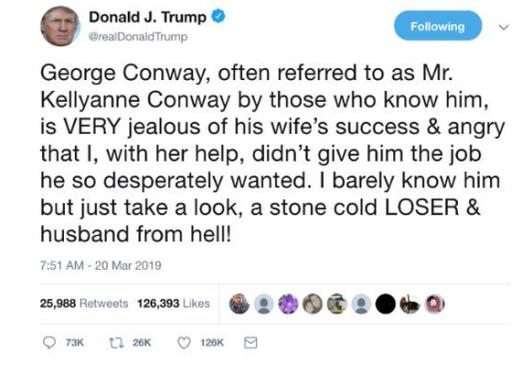
166. *Armstrong v. Exec. Office of the President, Office of Admin.*, 1 F.3d, at 1290.

167. *Id.* at 1278.

168. *Id.*

169. *Id.* at 1291.

170. *Id.*



*President Trump commenting on the husband of one of his advisors.*¹⁷¹

This dichotomy of treatment and protection by the PRA and the FRA is influential, and may affect the intention in the original designation of records.¹⁷² The desire to destroy a record might lead a decision-maker to be more likely to preserve it as presidential record, for which destruction has no remedy, and no real method of prevention.¹⁷³ The desire to preserve a record, on the other hand, might lead a decision-maker to be more likely to preserve it as a Federal Record, subject to the requirements and protection of FOIA.¹⁷⁴ Of course, this is not to say that all heads of state should be distrusted, but protections for accidental misclassification of records should be implemented to protect the interests of the American people in open governance. This importance cannot be overstated, now more than ever, as the overwhelming speed of the news cycle is leading consumers to prioritize “quantity over depth in their news intake.”¹⁷⁵

IV. RECOMMENDATIONS

A. *Two Steps Forward*

Presidential records must be protected, and legislation should be passed to include social media use in the PRA. But just expanding the definition of

171. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 20, 2019, 6:51 AM), <https://twitter.com/realdonaldtrump/status/1108335293671845888>.

172. *Armstrong*, 1 F.3d at 1278 (1993).

173. Margaret Hartmann, *Trump Won't Stop Tearing Up Papers, So Staffers Tape Them Back Together*, INTELLIGENCER (June 11, 2018), <http://nymag.com/intelligencer/2018/06/trump-loves-tearing-papers-staffers-tape-them-back-together.html?utm=top> (showing that because there is no clear remedy for PRA violations, White House staff scrambles for self-help solutions, like taping back papers torn up by President Donald Trump).

174. Freedom of Information Act, 5 U.S.C. § 552 (2018).

175. Sam Forsdick, *News Consumers are Pursuing 'Quantity Over Depth' as They are 'Overwhelmed' by 24-hour News Cycle*, OFCOM RESEARCH SHOWS, PRESSGAZETTE (July 16, 2018), <https://www.pressgazette.co.uk/news-consumers-are-pursuing-quantity-over-depth-as-they-are-overwhelmed-by-24-hour-news-cycle-ofcom-research-shows/>.

documentary material in the PRA to explicitly include social media use is not sufficient when the Act has no enforcement mechanism.¹⁷⁶

1. *But First, COVFEFE*

Presidential communications executed through use of social media should be preserved and documented in the same way as other presidential communications and records. Although this seems like a logical conclusion, their protection is too important to leave up to court interpretation of the PRA, and the first step to assuring their preservation is to pass legislation including social media in the PRA definition of documentary materials.¹⁷⁷ The COVFEFE Act is an example of legislation that should be adopted to solve whatever ambiguity might exist in the PRA regarding social media use.¹⁷⁸ If members of Congress had meant to say it in 1978, they would have done so, and if Congress had meant to amend it, it would have done so in the subsequent amendment to the PRA in 2014.¹⁷⁹ The COVFEFE Act specifically designates that social media use, like President Trump's tweets, ought to be protected and preserved under the PRA.¹⁸⁰ Which is logical, but also necessary. The effect of a presidency whose social media account can be carefully pruned after the fact is stifling. Tweets can be edited and deleted, allowing for the creation of a curating effect that permits the Executive to construct a pure and perfect version of themselves in the eyes of the American public.¹⁸¹

Removing the people's continued access to accurate records of the President's announcement, descriptions, and defenses of his policies is disingenuous, it is censorship, and it is wrong.¹⁸² No one questions the propriety of the Executive seeking advice before posting on social media—that demonstrates a consideration and careful thought that has been a significant part of the political realm since its birth. But allowing a President to delete the presidential communication after the fact is allowing the President to unring a bell simply by virtue of being the President. In an age where social media use is prevalent and heads of state can interact with volatility on those platforms, it is of paramount importance that freedom of information, not just *some* information, or *altered* information, be preserved for the good of the American people.¹⁸³ The American people clearly agree; a cursory search shows that there

176. *Armstrong*, 1 F.3d 1274, 1291 (1993).

177. Presidential Records Act, 44 U.S.C. §§ 2201–2202 (1978) (amended 2014).

178. *Id.*

179. *Presidential Records Act (PRA) of 1978*, NATIONAL ARCHIVES (April 27, 2018), <https://www.archives.gov/presidential-libraries/laws/1978-act.html> (“The PRA was amended in 2014, which established several new provisions.”).

180. COVFEFE Act of 2017, H.R. 2884 115th Cong. (2017).

181. Presidential Records Act, 44 U.S.C. §§ 2201–2202 (1978) (amended 2014).

182. *Knight First Amendment Inst. at Columbia Univ.*, 302 F. Supp. 3d at 571, (2018) (citing *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

183. Presidential Records Act, 44 U.S.C. §§ 2201–2202 (1978) (amended 2014); Martin Rosenbaum, *10 Things We Found Out Because of Freedom of Information*, BRIT. BROADCASTING CORP. (Jan. 2, 2015), <https://www.bbc.com/news/magazine-30645383> (discussing that the most valuable of information to be uncovered is of course the kind that would want to be destroyed).

are several sites devoted to preserving and archiving these deleted tweets.¹⁸⁴ For example, a recently deleted tweet from President Trump features some controversial viewpoints:



A record of a deleted tweet from the @realDonaldTrump account calling Representative Omar “Foul Mouthed”¹⁸⁵

Because absence of discussion of a topic in legislative history can be interpreted as the lack of the Congressional intent to enact certain policies, in this case designation of social media posts as presidential records under the PRA, Congress should clear the air and adopt COVFEFE—an act already in line with the spirit of the PRA. By formally establishing social media posts and documents as documentary material and presidential records this way, it would remove the possibility of either the president or a corporation controlling what is exposed to the public and should rightfully belong to them. President Trump has deleted tweets as recently as Sept. 3, 2019:



184. *Donald Trump–Deleted Tweets*, FACTBA.SE, <https://factba.se/topic/deleted-tweets>; *Deleted Tweets From Donald J. Trump, R-D.C.*, PROPUBLICA (last visited Mar. 25, 2019), <https://projects.propublica.org/politwoops/user/POTUS>.

185. *Donald Trump–Deleted Tweets*, FACTBA.SE, (July 29, 2019, 12:04 PM) <https://media-cdn.factba.se/realdonaldtrump-twitter/1152187922747154434.jpg>.



A deleted tweet from the @realDonaldTrump account harshly criticizing the Mayor of London in apparent retaliation for an opinion on his golf game.¹⁸⁶

This country has not quite forgotten that Vice President Dan Quayle misspelled “potato,” but aggressive and demeaning tweets like the one above can be deleted and disappear without a trace.¹⁸⁷ It must be recognized that some of these tweets are not simple misspellings—they are being deleted to curate an image. It is time for tweets like these to be preserved and regulated.

2. *The Good Sister—Adopt the FRA Enforcement Structure*

The deference given to the President in determining what is considered a presidential record is inappropriate. Functionally, the documents under the umbrella of the FRA and subsequently FOIA power are able to be protected, while the presidential records under the PRA are not.¹⁸⁸ The President can choose to dispose of the presidential records, required only to report this action to the Archivist, who may then report it to Congress.¹⁸⁹ The President may be required to wait 60 days.¹⁹⁰ Congress may then do absolutely nothing about it, short of talking to the press to generate public interest in the matter.¹⁹¹ In other words, the PRA has no enforcement mechanism.

However, agency records are protected from disposal at the whim of the Executive.¹⁹² This presents three problems. First, the discrepancy in levels of protection incentivizes those who want to *preserve* records to determine that they are agency records, because they are then safe from presidential deletion. Second, and for the same reasons, it incentivizes those who want to *dispose* of records to determine that they are presidential records, properly or not. For example, a tweet might be deleted out of a desire to mitigate the cost of public

186. *Donald Trump—Deleted Tweets*, FACTBA.SE, (Sep. 3, 2019, 10:20 AM) <https://media-cdn.factba.se/realdonaldtrump-twitter/1168891438324756481.jpg>.

187. Mark Fass, *How Do You Spell Regret? One Man’s Take On It*, N.Y. TIMES (Aug. 29, 2004), <https://www.nytimes.com/2004/08/29/nyregion/politics-how-do-you-spell-regret-one-man-s-take-on-it.html>.

188. 5 U.S.C. § 552 (2018); *Armstrong v. Exec. Office of the President, Office of Admin.*, 1 F.3d 1274, 1290 (1993).

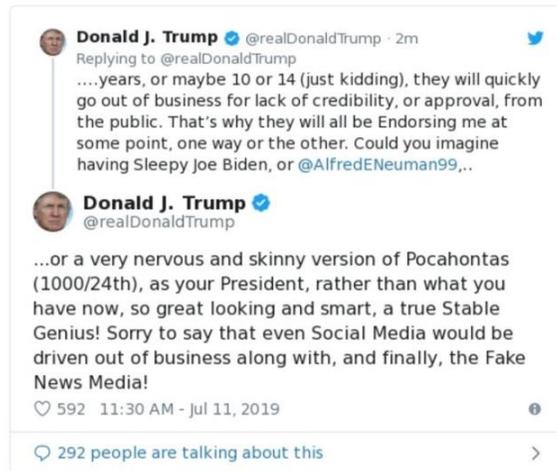
189. Presidential Records Act, 44 U.S.C. § 2203 (1978) (amended 2014).

190. *Id.*

191. *Id.*

192. The Federal Records Act, 44 U.S.C. § 2101 (2018).

outcry—perhaps that was the motive for deleting a tweet referring to Elizabeth Warren as Pocahontas:



*A deleted tweet likely referring to Elizabeth Warren as Pocahontas.*¹⁹³

Third, this scheme requires further inquiry as to who may make those designations, and to what extent are their designations limited by judicial review. This results in the already burdened court system assuming the work of judicial review of the designation of records to ensure that records are being preserved properly.¹⁹⁴ Amending the PRA with an enforcement mechanism that prevents deletion of presidential records subject to congressional approval solves all three of these problems. Moreover, an effective framework for this enforcement already exists in the text of the FRA.¹⁹⁵ The PRA amendments should include the requirement found in the FRA that the National Archivist initiate legal action with the Attorney General if the Archivist reasonably judges that Presidential Records are in danger of improper destruction.¹⁹⁶ A private right of action for litigants to enforce the Archivist to shoulder this duty should also be adopted into the PRA—however, where the FRA allows a private right of action against agency heads, the parallel PRA amendment should be carefully drafted so as to ensure that there is no private right of action against a sitting president.¹⁹⁷

193. *Donald Trump—Deleted Tweets*, FACTBA.SE, <https://factba.se/topic/deleted-tweets> (showing that this is one of several deleted tweets referring presumably to presidential hopeful Elizabeth Warren as Pocahontas).

194. See Abramson, *supra* note 10; *Armstrong*, 1 F.3d 1274.; *Knight First Amendment Inst. at Columbia Univ.*, 302 F. Supp. 3d at 541 (illustrating the long, expensive, and painstaking efforts of judicial review onto what constitutes a Presidential Record).

195. The Federal Records Act, 44 U.S.C. § 2101 (2018).

196. *Id.*

197. *Id.*

V. CONCLUSION

The definition of documentary materials included under the PRA should be expanded to include all interaction with social media by the office of the President to prevent the possibility of manipulation of presidential communications—by any interested actor—for any reason other than those provided by the legislation. It is logical and entirely within the spirit of the PRA and policy of a healthy democracy. Moreover, the PRA should be amended to allow for actual enforcement of its terms, using the framework that is already laid out in the FRA. Specifically, there should be a mechanism to initiate legal action through the Attorney General when a record is in danger of being destroyed, there should be a private right of action to bring suit to force the National Archivist to perform the duties of the office, and there should be judicial review over the classification process of records. As it stands, the PRA pays lip service to the American people—let’s give it some teeth.