

4-18-2019

# Don't Delete That Tweet: Federal and Presidential Records in the Age of Social Media

Gabriel M. A. Elorreaga  
*St. Mary's University School of Law*

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>

Part of the [American Politics Commons](#), [Law and Politics Commons](#), [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal Remedies Commons](#), [Other Political Science Commons](#), [Political History Commons](#), and the [President/Executive Department Commons](#)

## Recommended Citation

Elorreaga, Gabriel M. A. (2019) "Don't Delete That Tweet: Federal and Presidential Records in the Age of Social Media," *St. Mary's Law Journal*: Vol. 50 : No. 1 , Article 7.  
Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol50/iss1/7>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact [jllloyd@stmarytx.edu](mailto:jllloyd@stmarytx.edu).

## COMMENT

# DON'T DELETE THAT TWEET: FEDERAL AND PRESIDENTIAL RECORDS IN THE AGE OF SOCIAL MEDIA

GABRIEL M. A. ELORREAGA\*

I.	Introduction.....	484
II.	The Historical Background of Statutes That Govern Records Preservation .....	485
	A. The Federal Records Act (FRA).....	485
	B. The Freedom of Information Act (FOIA) .....	486
	C. The Presidential Records Act (PRA) .....	488
III.	Application of Records Preservation to Evolving Technologies ..	489
	A. Use of Electronic Records During the Internet Boom .....	492
	B. The Need for a Different Standard as the President's Use of Social Media Evolves.....	495
IV.	Case Studies on the Use of Social Media by Public Officials.....	498
	A. The Obama Administration .....	498
	1. Records Preservation During the Obama Administration.....	500

---

\* The author thanks his parents and siblings for their love and support. Specifically, his sister Bianca, whose guidance over the years played an integral role in his life. To Jeremy Jenkins for his mentorship and most importantly for the years of friendship, which are immeasurable. To Jacob Ackerman and Zane Goggans for their friendship and support. Finally, to John Brown and Jordan Jentz for weathering law school with him from their first day and into their final year.

2. Preservation of the Obama Administration's Social Media Records.....	502
B. The Trump Administration.....	503
1. Use of Social Media as President of the United States .....	504
C. Controversy Surrounding the President's Use of Social Media .....	505
D. Issues That May Arise if Social Media Use Is Not Addressed..	507
V. Recommendation on Preservation of Electronic Social Media Records.....	510
A. Social Media Accounts: Official Versus Personal Accounts...	510
B. Proposed Application of the Law .....	511
1. Activities to Be Considered.....	511
a. Creation and Deletion of Social Media Posts .....	512
b. Blocking.....	513
2. Proposed Application of the PRA to Social Media.....	514
3. Application of the FRA and FOIA to Social Media .....	515
VI. Conclusion .....	518

## I. INTRODUCTION

In January 2017, for the first time in U.S. history, a social media account was part of the formal exchange of power between presidential Administrations.<sup>1</sup> Along with other official accounts, the “@POTUS” Twitter handle transitioned to the forty-fifth President, Donald J. Trump, and all of the tweets of the forty-fourth President, Barack H. Obama, transferred to the new “@POTUS44” account for preservation.<sup>2</sup> Due to

---

1. Jenna Amatulli, *POTUS Twitter Changes Hands for First Time in History*, HUFFPOST (Jan. 20, 2017, 12:34 PM), [https://www.huffingtonpost.com/entry/potus-twitter-account-trump\\_us\\_588242bde4b0e3a735689998](https://www.huffingtonpost.com/entry/potus-twitter-account-trump_us_588242bde4b0e3a735689998) [<https://perma.cc/U9YJ-CPRD>].

2. *See id.* (highlighting the exchange of multiple official accounts from the Obama Administration to the Trump Administration); *see also* Kori Schulman, *The Digital Transition: How the Presidential Transition Works in the Social Media Age*, OBAMA WHITE HOUSE ARCHIVES (Oct. 31, 2016, 4:00 PM), <https://obamawhitehouse.archives.gov/blog/2016/10/31/digital-transition-how-presidential-transition-works-social-media-age> [<https://perma.cc/588M-YB6U>] (illustrating the method by which the presidential Twitter accounts would be transferred and preserved).

the historic nature of this transfer, the White House released a blog post outlining the way it would conduct the transition.<sup>3</sup> In the months that followed the transition, a number of issues—possibly fueled by political polarization—emerged.

In particular, the President’s use of Twitter (both in his official and personal accounts) is a divisive topic. Opponents raise issues such as the President’s deletion of posts, blocking of U.S. citizens, and overall social media conduct as grounds for greater scrutiny and even impeachment.<sup>4</sup> However, to discern the minimum legal requirements for “presidential” conduct on social media, it is important to examine the available means of records preservation and the nature of executive power, and to develop an appropriate method for applying these principles to modern social media practices.

## II. THE HISTORICAL BACKGROUND OF STATUTES THAT GOVERN RECORDS PRESERVATION

Starting with the Federal Records Act in the 1950s, the United States set guidelines for handling, managing, and preserving government records.<sup>5</sup> In order to properly determine their use as technology and media evolve, it is of fundamental importance to comprehensively understand the reasons behind their creation.

### A. *The Federal Records Act (FRA)*

In 1950, the eighty-first Congress enacted the Federal Records Act (FRA).<sup>6</sup> This Act arose from a congressional commission during the

---

3. Schulman, *supra* note 2.

4. See Complaint for Declaratory & Injunctive Relief at 3, Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17-cv-05205), 2017 WL 2952634 (arguing the blocking of individuals from the President’s personal Twitter account infringes upon First Amendment rights); Complaint for Declaratory, Injunctive, & Mandamus Relief at 2, Citizens for Responsibility & Ethics in Wash. v. Trump, 302 F. Supp. 3d 127 (D.D.C. 2018) (No. 1:17-cv-01228), 2017 WL 2692497 (asserting the deletion of statements from the President’s personal Twitter account is in violation of the Presidential Records Act); cf. Kyle Cheney, *Trump Impeachment Vote Fails Overwhelmingly*, POLITICO (Dec. 6, 2017, 2:15 PM), <https://www.politico.com/story/2017/12/06/trump-impeachment-vote-fail-282888> [<https://perma.cc/M4ZX-EPZP>] (detailing a failed impeachment attempt of President Trump).

5. Federal Records Act, 44 U.S.C. §§ 3101–3107 (2012).

6. Federal Records Act, ch. 849, 64 Stat. 583 (1950) (codified as amended at 44 U.S.C. §§ 3101–3107 (2012)).

Truman Administration to review the Office of the Executive for administrative and managerial deficiencies.<sup>7</sup> The Hoover Commission (named after the Chairman and former President Herbert Hoover, a Republican) was an effort from a Republican Congress to find and address areas of government waste and inefficiency.<sup>8</sup> The eventual findings, however, would assist in furthering the Truman Administration's interests.<sup>9</sup>

The passage of the FRA is widely held as the cornerstone of the management, maintenance, and disposal of records—federal or otherwise.<sup>10</sup> Over the decades, the FRA has seen many revisions and amendments, but its original intent remains intact. Most recently, in 2014, the Obama Administration released a series of amendments to modernize both the FRA and the Presidential Records Act to include the preservation of electronic records.<sup>11</sup> While the amendments were seen as a positive bipartisan step forward, concerns about the potential for greater governmental waste persisted.<sup>12</sup>

#### B. *The Freedom of Information Act (FOIA)*

Originally enacted in 1966, and since subject to many revisions, amendments, and interpretations, the Freedom of Information Act (FOIA)<sup>13</sup> is the basis by which the public gains access to information from

7. See RICHARD J. COX, CLOSING AN ERA: HISTORICAL PERSPECTIVES ON MODERN ARCHIVES AND RECORDS MANAGEMENT 3 (2000) (stating the FRA came out of the Hoover Commission). See generally Peri E. Arnold, *The First Hoover Commission and the Managerial Presidency*, 38 J. POLITICAL SCIENCE 46, 48–49 (1976) (outlining the origin and purpose of the Hoover Commission).

8. Arnold, *supra* note 7, at 49.

9. See *id.* (noting that although the commission was created by a Republican Congress, its findings allowed for the advancement of Truman's Democratic interests).

10. See COX, *supra* note 7, at 3 (asserting the FRA is the basis from which modern record management has been modeled).

11. Press Release, Nat'l Archives, National Archives Welcomes Presidential and Federal Records Act Amendments of 2014 (Dec. 1, 2014), <https://www.archives.gov/press/press-releases/2015/nr15-23.html> [<https://perma.cc/RW2L-Q27W>].

12. Charles S. Clark, *Obama Signs Modernized Federal Records Act*, GOV'T EXECUTIVE (Dec. 1, 2014), <https://www.govexec.com/technology/2014/12/obama-signs-modernized-federal-records-act/100112/> [<https://perma.cc/P5L6-5JGA>]; see also Ed O'Keefe, *Obama Wants Better Digital Archive of Federal Records*, WASH. POST (Nov. 28, 2011), [https://www.washingtonpost.com/blogs/federal-eye/post/obama-wants-better-digital-archive-of-federal-records/2011/11/03/gIQAXJeA4N\\_blog.html?utm\\_term=.8cb142ad26af](https://www.washingtonpost.com/blogs/federal-eye/post/obama-wants-better-digital-archive-of-federal-records/2011/11/03/gIQAXJeA4N_blog.html?utm_term=.8cb142ad26af) [<https://perma.cc/7J5H-6E7C>] (claiming “[t]he big question is where agencies will come up with the necessary funds to make the transfer to electronic record-keeping”).

13. Freedom of Information Act, 5 U.S.C. § 552 (Supp. IV 2016)

the government.<sup>14</sup> At the FOIA's inception, President Lyndon B. Johnson was skeptical of its use due to his view that such a law could damage the "official view of reality."<sup>15</sup> President Johnson widely opposed journalistic scrutiny of the federal government.<sup>16</sup> This sentiment is not unusual. In fact, since its passage, the FOIA has been adapted and interpreted by every presidential Administration.<sup>17</sup>

For example, a month after the September 11, 2001 attacks, a memorandum from then-Attorney General John Ashcroft relayed a message emphasizing stricter scrutiny for FOIA requests as a method of promoting an increased need for national security.<sup>18</sup> In comparison, nearly eight years later, President Obama released a memorandum focusing on openness as a means for the public to hold the federal government to an increased level of accountability and transparency.<sup>19</sup> Foreshadowing almost the same sentiment as the Obama Administration's, the Clinton Administration presented amendments that helped bring the FOIA into the electronic age.<sup>20</sup>

The FOIA provides exceptions for classified data, personal privacy violations, privileged information and trade secrets, and a multitude of other

14. See WENDY GINSBERG, CONG. RESEARCH SERV., R41933, THE FREEDOM OF INFORMATION ACT (FOIA): BACKGROUND, LEGISLATION, AND POLICY ISSUES 1 (2014) (laying the foundation for the purpose of the FOIA).

15. Bill Moyers, *Bill Moyers on the Freedom of Information Act*, PBS (Apr. 5, 2002), <http://www.pbs.org/now/commentary/moyers4.html> [<https://perma.cc/J249-LWH8>].

16. See *id.* (showing the concerns held by the former President despite signing the FOIA into law).

17. See GINSBERG, *supra* note 14, at 1 ("Each new presidential administration has instructed agencies to implement FOIA differently.").

18. See Memorandum from John Ashcroft, Att'y Gen., on the Freedom of Information Act to the Heads of All Federal Departments and Agencies (Oct. 12, 2001), <https://www.justice.gov/archive/oip/011012.htm> [<https://perma.cc/KLT8-4AMH>] ("Any discretionary decision . . . to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.").

19. Memorandum on the Freedom of Information Act, 2009 DAILY COMP. PRES. DOC. 1 (Jan. 21, 2009).

20. Compare *id.* ("[T]he Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government."), with Memorandum on the Freedom of Information Act, 2 PUB. PAPERS 1685 (Oct. 4, 1993) ("Openness in government is essential to accountability and the [Freedom of Information] Act has become an integral part of that process."). See also Statement on Signing the Electronic Freedom of Information Act Amendments of 1996, 2 PUB. PAPERS 1743 (Oct. 2, 1996) (outlining the Clinton Administration's reasoning behind amending the FOIA).

categories.<sup>21</sup> Despite this, the FOIA maintains its intent of a “general philosophy of . . . disclosure”<sup>22</sup> and provides the public with a continued avenue to know what the federal government is doing at all times.

### C. *The Presidential Records Act (PRA)*

In the wake of the Watergate scandal, Congress enacted the Presidential Records Act (PRA)<sup>23</sup> to ensure that records created during a President's tenure would remain preserved until made public.<sup>24</sup> Initially when former President Nixon left office and desired to have his documents moved to his California home, Congress passed the Presidential Recordings and Materials Preservation Act (PRMPA) in an effort to protect the presidential documents.<sup>25</sup> Soon thereafter, in *Nixon v. Administrator of General Services*,<sup>26</sup> President Nixon sued on the grounds that such a measure violated the separation of powers, but he ultimately lost when the Supreme Court upheld the Act as facially constitutional.<sup>27</sup>

The PRMPA did not last because it applied only to President Nixon's records.<sup>28</sup> In a normal transfer of power, a president's official records become the property of the government.<sup>29</sup> Prior to the Reagan

21. See Freedom of Information Act, 5 U.S.C. § 552(b) (Supp. IV 2016) (providing all of the exceptions under the Freedom of Information Act).

22. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360 (1976) (quoting S. REP. NO. 89-813, at 3 (1965)).

23. Presidential Records Act, 44 U.S.C. §§ 2201–2209 (Supp. IV 2016).

24. See ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* 108–09 (2005) (expounding on the political climate that gave rise to the PRA).

25. See *Collection History*, RICHARD NIXON PRESIDENTIAL LIB. & MUSEUM, <https://www.nixonlibrary.gov/index.php/research/guide-holdings> [https://perma.cc/CTR5-XDM9] (“Congress enacted PRMPA in response to news that President Nixon, only weeks after resigning office, had concluded an arrangement with the head of the General Services Administration that would have allowed him to destroy materials in the collection. PRMPA stipulated that the documents and other materials would remain in the [g]overnment's possession, and further required that the collection stay within [fifty] miles of Washington, D[.]C.”).

26. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977).

27. *Id.* at 455.

28. See WENDY GINSBERG, *CONG. RESEARCH SERV.*, R40238, *THE PRESIDENTIAL RECORDS ACT: BACKGROUND AND RECENT ISSUES FOR CONGRESS* 1 n.1 (2014) (“As a consequence of the Watergate incident, Congress passed the Presidential Recordings and Materials Preservation Act . . . to assure that the presidential papers of Richard M. Nixon were placed under federal custody.”).

29. *Id.* at 2 (“When a President leaves office, his official records remain property of the federal government . . .”). For example, former President Obama's tweets under the “@POTUS” account were transferred to and preserved on the new “@POTUS44” account in accordance with the PRA.

Administration, presidential records were donated to the respective presidential library, or they were left to the President (if alive) or his family.<sup>30</sup> Today, the process is much different because the Archivist of the United States takes the helm in the preservation of presidential records under the PRA.<sup>31</sup>

Much like the FOIA, the PRA is not without its respective interpretations between Administrations.<sup>32</sup> As electronic media use began to evolve, so did the way the PRA addressed such media.<sup>33</sup> There have been efforts to preserve electronic presidential records, such as the Executive Office of the President (EOP) system within the Electronic Records Archive (ERA).<sup>34</sup> But as the use of electronic media continues to grow,<sup>35</sup> we will need additional guidance for presidential records preservation under the PRA.

### III. APPLICATION OF RECORDS PRESERVATION TO EVOLVING TECHNOLOGIES

As the technological revolution grew, so did the use of electronic media. Before the FRA was even enacted, President Franklin D. Roosevelt used modern media to address the nation in his fireside chats.<sup>36</sup> Using state-of-the-art radio equipment as a means of reaching United States citizens, the fireside chats developed as a way for President Roosevelt to informally

*See* Schulman, *supra* note 2 (addressing the transition of social media posts made by the previous President to an account made specifically for the preservation of presidential records and maintained by the National Archives and Records Administration).

30. GINSBERG, *supra* note 28, at 2 n.7.

31. *Id.* at 2.

32. *See id.* at 3–5 (providing examples of how two different Administrations handled and interpreted the use of the PRA with executive orders).

33. *See* Macon Phillips, *Reality Check: The Presidential Records Act of 1978 Meets Web-Based Social Media of 2009*, OBAMA WHITE HOUSE ARCHIVES (Sept. 19, 2009, 8:14 PM), <https://obamawhitehouse.archives.gov/blog/2009/09/19/reality-check-presidential-records-act-1978-meets-web-based-social-media-2009> [<https://perma.cc/7ZZC-AR6D>] (addressing the effects of the PRA on White House daily life and the impact that electronic media has had on day-to-day activities).

34. *See* GINSBERG, *supra* note 28, at 7 (highlighting the use of the EOP system within the ERA to preserve e-mails and SMS text messages from EOP BlackBerries).

35. *See id.* (noting that the process of archiving presidential records differs depending on the type of social media or technology used).

36. *See* Domenico Montanaro, *The Shadowy History of Secret White House Tapes*, NPR (May 13, 2017, 8:00 AM), <https://www.npr.org/2017/05/13/528222995/the-shadowy-history-of-secret-white-house-tapes> [<https://perma.cc/NKQ7-8WRF>] (analyzing the way in which FDR “pioneered” the use of broadcast media to reach the public—averting the media).



address the American people regarding his New Deal and any concerns the people may have had with the government.<sup>37</sup>

In the early years of World War II, new technologies emerged and were slowly incorporated into the Oval Office.<sup>38</sup> Use of electronic recording technology by the President was unprecedented, and President Roosevelt's sentiment toward utilizing this technology was indicative of this apprehensive attitude.<sup>39</sup> Presidential apprehension toward recording conversations continued, and it was not until President John F. Kennedy that tape recording conversations became common practice.<sup>40</sup> Due to the political climate of his presidency, President Kennedy viewed recording conversations as a method of ensuring his legacy's story would be told accurately.<sup>41</sup> As time progressed, President Kennedy incorporated the use of a Dictaphone<sup>42</sup> into the day-to-day activities of his administrative duties.<sup>43</sup>

---

37. See *FDR's Fireside Chat on the Recovery Program*, NAT'L ARCHIVES, <https://www.archives.gov/education/lessons/fdr-fireside> [<https://perma.cc/LG29-9FSK>] (detailing the reasons and methods by which the President conducted his fireside chats).

38. See Marc Selverstone, *Why U.S. Presidents Stopped Secretly Taping Their Conversations*, ATLANTIC (May 23, 2017), <https://www.theatlantic.com/politics/archive/2017/05/trump-tapes-comey/527655/> [<https://perma.cc/UK7C-9U79>] (comparing the manner in which President Roosevelt and subsequent Administrations have recorded conversations).

39. President Roosevelt felt that recording his conversations was a necessity after being misquoted but was so reluctant to record his visitors without their consent that he only recorded around eight hours of conversation on tape. *Id.*

40. See *id.* (comparing the two hundred sixty hours of conversation recorded by President Kennedy with Presidents Roosevelt, Truman, and Eisenhower—none of whom had more than ten hours); see also *The JFK White House Tape Recordings*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <https://www.jfklibrary.org/JFK/JFK-in-History/White-House-Tape-Recordings.aspx> [<https://perma.cc/TF85-ZXNK>] (recognizing that while presidents had previously recorded conversations, the vast majority of taping was done by President Kennedy, which was in large part due to an official recording system that President Kennedy had installed in the spring of 1962).

41. Partly attributed to his age and what it meant for the presidency, pressures from conservatives on economic issues due to a drop in the economy, having his elderly medical plan defeated in Congress, and eventually the political turmoil with the Soviets and Cuba, President Kennedy felt the need to ensure that his records were well kept. See Timothy Naftali, *Five Hundred Days: Introduction to the Presidential Recordings of John F. Kennedy*, PRESIDENTIAL RECORDINGS DIGITAL EDITION, [http://prde.upress.virginia.edu/content/JFK\\_Norton\\_introduction](http://prde.upress.virginia.edu/content/JFK_Norton_introduction) [<https://perma.cc/T6KX-WH9R>] (outlining the political atmosphere that gave rise to President Kennedy's desire to tape conversations and maintain recordings).

42. A Dictaphone is a machine that records one's voice for the purposes of playback or transcription. *Dictaphone*, THE CONCISE OXFORD DICTIONARY (6th ed. 1976).

43. See Naftali, *supra* note 41 (highlighting President Kennedy's use of the Dictaphone in conjunction with his use of other recording technologies).

While the use of electronic recordings continued to grow well after President Kennedy's assassination and during the Johnson Administration,<sup>44</sup> it was not until President Richard Nixon and the Watergate scandal that the President's use of this technology came under legal fire.<sup>45</sup> From a technological standpoint, President Nixon's use of electronic recording technology was an evolutionary step.<sup>46</sup> President Nixon accepted this technology because it was easy to use and the quality of the tape recordings "possess[ed] an authority—an objectivity—that memos and memories just cannot equal."<sup>47</sup> President Nixon's use of recording technology was based on a desire for a fair and accurate representation of presidential intent, and to ensure that the President could vindicate himself through an objective record.<sup>48</sup>

It is noteworthy to mention that while the Supreme Court held that President Nixon could not assert an absolute privilege over his private recordings, the Court recognized the importance of presidential confidentiality and held that presidential communications must be afforded "the greatest protection" and the highest degree of deference.<sup>49</sup> Less than

---

44. President Lyndon B. Johnson was the first to use private electronic recordings for the entirety of his Administration—even recording in the first few hours after President Kennedy was assassinated. David G. Coleman, *The Presidential Recordings of Lyndon B. Johnson*, PRESIDENTIAL RECORDINGS DIGITAL EDITION, [http://prde.upress.virginia.edu/content/LBJ\\_PRDE\\_introduction](http://prde.upress.virginia.edu/content/LBJ_PRDE_introduction) [<https://perma.cc/GNV2-7FJZ>].

45. See Selverstone, *supra* note 38 (reporting on the Watergate scandal's effect on President Nixon's Administration, which would eventually lead to his resignation). President Nixon was sued by the United States to produce full documentation regarding his private recordings after the President's counsel only provided edited transcripts and portions of conversations requested under the subpoena. *United States v. Nixon*, 418 U.S. 683, 688–89 (1974).

46. President Nixon, partly at the recommendation of his chief of staff, used the first-ever voice activated recording system as a means of records preservation. Ken Hughes, *Nixon's First Week of Taping: The Decision to Tape*, PRESIDENTIAL RECORDINGS DIGITAL EDITION, [http://prde.upress.virginia.edu/content/nixon\\_first\\_week](http://prde.upress.virginia.edu/content/nixon_first_week) [<https://perma.cc/X43C-H3BT>].

47. *Id.*

48. See *id.* (analyzing the motives for the Nixon Administration's use of electronic tapings with the benefits of having objective, taped recordings). This desire is consistent with the previous Administration's uses and highlights the common motivations behind a president's decision to incorporate new technologies into administrative duties. See *id.* (commenting on the mindsets of different presidents as they incorporated and used electronic recording devices); Selverstone, *supra* note 38 (describing President Roosevelt's mindset as he started incorporating tape recordings as a means of records preservation).

49. See *Nixon*, 418 U.S. at 715–16 (concluding that the President is not above the law, but as a result of the President's unique role and the public interest, the President is entitled to the greatest amount of protection concerning the confidentiality of his records).

one month after the Supreme Court ruled that the President's private recordings were not subject to an absolute privilege, President Nixon resigned from office.<sup>50</sup> After leaving office, Nixon wished to take his records home to California, but the Supreme Court barred him from doing so.<sup>51</sup> As previously discussed, this event was a catalyst for how the United States Government would address new, emerging technologies.<sup>52</sup>

#### A. *Use of Electronic Records During the Internet Boom*

As the United States continued to progress technologically, so did the methods of presidential communication.<sup>53</sup> In the early years of the Internet, the Clinton Administration put forth efforts to foster a more digitally connected United States.<sup>54</sup> Even so, President Clinton seldom used e-mail (still relatively new technology at the time) during his presidency.<sup>55</sup> Nevertheless, as this new form of communication gained prominence, potential dangers also arose.<sup>56</sup> Consequently, if left unchecked

50. See Letter from Richard M. Nixon, U.S. President, to Henry A. Kissinger, U.S. Sec'y of State (Aug. 9, 1974), <https://www.archives.gov/files/historical-docs/doc-content/images/nixon-resignation-letter.pdf> [<https://perma.cc/C85M-R5JR>] (formalizing President Nixon's resignation from Office); see also *Watergate Fast Facts*, CNN (June 1, 2018), <https://www.cnn.com/2014/01/23/us/watergate-fast-facts/index.html> [<https://perma.cc/82JR-8MVN>] (listing the events that led up to President Nixon's resignation).

51. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 429–31, 484 (1977). President Nixon lost this case before the Supreme Court, which held that the PRMPA did not violate the President's privacy or First Amendment rights. *Id.* at 465–68.

52. See RUDALEVIGE, *supra* note 24, at 108 (discussing how following *Nixon v. Administrator of General Services*, which upheld the PRMPA, the PRA was formulated).

53. See Drew DeSilver, *From Telegrams to Instagram, a Look at Presidents and Technology*, PEW RES. CTR. (Feb. 13, 2015), <http://www.pewresearch.org/fact-tank/2015/02/13/from-telegrams-to-instagram-a-look-at-presidents-and-technology/> [<https://perma.cc/5JMA-FAU2>] (showing the various ways in which presidents have used available technology and incorporated it into their Administrations).

54. See *The Clinton Presidency: Unleashing the New Economy—Expanding Access to Technology*, CLINTON WHITE HOUSE ARCHIVES, <https://clintonwhitehouse5.archives.gov/WH/Accomplishments/eightyears-09.html> [<https://perma.cc/9JBC-4FXV>] (promulgating the efforts of the Clinton Administration in expanding American's access to growing technologies—mainly the Internet).

55. See DeSilver, *supra* note 53 (noting President Clinton sent e-mails merely twice during his presidency—once to U.S. soldiers at sea and once to famed astronaut John Glenn during a mission). During the Clinton Administration, however, the White House did embrace the use of modern technology by launching the first-ever White House website. *Id.*

56. As an example, the George W. Bush Administration came under fire for the deletion of 22 million e-mails, which were later recovered in 2009 by the Obama Administration. Peter Overby,

and unaddressed, the relatively new utilization of e-mail, cell phones, and other modern technology would present even greater obstacles for the modern presidency.<sup>57</sup>

Presidential use of the Internet, e-mail, and social media did not gain the prominence known today until the Obama Administration.<sup>58</sup> President Obama, who is known as the first “Internet President,” used the modern conventions of electronic media available to him in both his campaigns and his presidency.<sup>59</sup> Moreover, as society’s use of modern technology became more significant, President Obama’s use of modern technology became a topic of legal and political discourse.<sup>60</sup> The former President’s use of technology was unique because for the first time a President’s personal enjoyment of technology directly conflicted with his role as President of the United States.<sup>61</sup> In fact, President Obama’s resolve

---

*Millions of Missing Bush-Era E-mails Discovered*, NPR (Dec. 15, 2009, 6:00 AM), <https://www.npr.org/templates/story/story.php?storyId=121452535> [<https://perma.cc/DBZ5-K2QV>].

57. For example, it had come to the attention of the Senate Judiciary Committee that fifty White House staffers during the Bush Administration potentially violated the PRA by using private e-mail accounts, computers, and cell phones to conduct official executive business and by failing to preserve the communications made through these private channels. Massimo Calabresi, *Inside the Bush E-mail Scandal*, TIME (Apr. 13, 2007), <http://content.time.com/time/printout/0,8816,1610414,00.html> [<https://perma.cc/L3XX-QK3P>]. Because the use of electronic records was relatively new at the time, questions regarding the necessity of preservation and the potential for legal issues arose. *Id.*

58. See Omar Wasow, *The First Internet President*, ROOT (Nov. 5, 2008, 12:00 AM), <http://www.theroot.com/the-first-internet-president-1790900348> [<https://perma.cc/UE8G-X8LV>] (stating President Obama’s use of social media, e-mail, and the Internet “will redefine . . . how future presidents campaign and govern”).

59. See *id.* (detailing the ways in which President Obama and his campaign staff used the Internet and social media to reach the American people and secure his victory in the 2008 presidential election); Ian Bogost, *Obama Was Too Good at Social Media*, ATLANTIC (Jan. 6, 2017), <https://www.theatlantic.com/technology/archive/2017/01/did-america-need-a-social-media-president/512405/> [<https://perma.cc/MD4L-TQP2>] (“[T]he Obama White House was indeed the first presidency to make use of services like Twitter, Facebook, Snapchat, and Instagram.”). However, it is of note that President Obama’s use of technology was not without its criticism. See *id.* (referring to Obama’s presidency as the “cool dad presidency” and asserting that “maybe what America needed from 2009 to 2017 wasn’t a cool dad to tweet and stream alongside its citizens[,]” but rather “a guardian to watch and safeguard it against its own worst habits”).

60. See Jeff Zeleny, *For a High-Tech President, a Hard-Fought E-Victory*, N.Y. TIMES (Jan. 22, 2009), <http://www.nytimes.com/2009/01/23/us/politics/23berry.html> [<https://perma.cc/TR7S-XQW3>] (reporting the legal issues President Obama faced when he did not want to give up his BlackBerry phone after becoming President and the compromises he had to make to retain the device).

61. See *id.* (calling President Obama the “nation’s first e-mailing president” because the presidency in the past “has been deprived of the tools of modern communication”). Unlike

to hold on to his personal device was made clear when he mentioned in an interview that “security officials would have to pry his BlackBerry from his hands.”<sup>62</sup>

President Obama’s desire to hold on to his BlackBerry (which, as one of its characteristics, transmits electronic records), and his subsequent victory in doing so, was not a one-sided victory but rather the product of compromise.<sup>63</sup> This illustrates that disputes over a president’s use of technology and electronic media can reach resolutions that satisfy both sides. In this personal “victory,” President Obama replaced his personal device with a similar one conforming to appropriate security measures, such as encrypting all messages sent by the President and limiting communication to only a select few, approved and secured contacts.<sup>64</sup> Six years after the “Internet President” fought to keep his BlackBerry, the White House made a technological jump that had not been seen since the Clinton Administration created the first White House website;<sup>65</sup> the Obama Administration created the first official social media accounts for an Administration.<sup>66</sup> By the end of his second term, President Obama’s use

President Bush, who gave up his personal e-mail address after being elected President, President Obama was so attached to his personal device that he made it a point to retain it. *Id.*

62. Laura Sydell, *Compromise Allows Obama to Keep BlackBerry*, NPR (Jan. 23, 2009, 6:00 AM), <https://www.npr.org/templates/story/story.php?storyId=99790788> [<https://perma.cc/E9SU-63P6>].

63. See Zeleny, *supra* note 60 (highlighting the concessions made by President Obama to keep his personal device, which included securing a new email address and having very limited, vetted contacts).

64. See *President Obama Gets to Keep His BlackBerry*, NEWSWEEK (Jan. 23, 2009, 7:00 PM), <http://www.newsweek.com/president-obama-gets-keep-his-blackberry-77947> [<https://perma.cc/KE96-433Q>] (labeling President Obama’s ability to continue using a BlackBerry his “first presidential triumph” but noting the various stipulations on his use, such as “get[ting] a new device specially equipped with superencrypting software to ward off hackers” and a contact list “limited to a small group of family, friends, and senior staffers”).

65. DeSilver, *supra* note 53.

66. See Bogost, *supra* note 59 (noting President Obama was the “first social-media president” because he was the first to incorporate Twitter, Facebook, Snapchat, and Instagram into his presidency); see also President Obama (@POTUS44), TWITTER (May 18, 2015, 8:38 AM), <https://twitter.com/POTUS44/status/600324682190053376> [<https://perma.cc/74ZD-TXXU>] (showing the first tweet from the official Twitter account of President Obama); Kori Schulman, *President Obama: “Hello, Facebook!”*, OBAMA WHITE HOUSE ARCHIVES (Nov. 9, 2015, 12:25 PM), <https://obamawhitehouse.archives.gov/blog/2015/11/09/president-obama-hello-facebook> [<https://perma.cc/3PH4-DG2Y>] (discussing the reasons for President Obama creating the first White House Facebook page as a means of reaching the American people on important topics to his Administration). Oddly enough, President Obama did not use his approved White House phone

of modern technology slowed and plateaued to a point of stability between concerns over the security of modern technology (and the records they create) and the President's use of it.<sup>67</sup>

B. *The Need for a Different Standard as the President's Use of Social Media Evolves*<sup>68</sup>

A few hours after being sworn in as the forty-fifth President of the United States, Donald J. Trump took to Twitter.<sup>69</sup> In his first tweet as President, Trump used his personal Twitter account to address the American people.<sup>70</sup> Concomitantly, some pointed out issues with President Trump's use of social media.<sup>71</sup> While criticism is expected,<sup>72</sup> looking past the political

---

to send his first tweet but rather elected to use a phone belonging to one of his staff. Zac Hall, *President Obama Borrows iPhone for First Tweet, Avoiding BlackBerry Embarrassment*, 9TO5MAC (May 18, 2015, 12:04 PM), <https://9to5mac.com/2015/05/18/obama-twitter-iphone/> [<https://perma.cc/N9GL-PVU9>]; see also Aaron Pressman, *President Obama's New Smartphone Is More Like a Toddler Phone*, FORTUNE (June 10, 2016), <http://fortune.com/2016/06/10/president-obamas-new-smartphone-is-more-like-a-toddler-phone/> [<https://perma.cc/H83C-7UF6>] (positing that President Obama's smartphone "isn't as smart the typical device" because, in the President's own words, "it doesn't take pictures, you can't text, the phone doesn't work, [and] you can't play your music on it").

67. See Pressman, *supra* note 66 (noting President Obama was the first president to use a mobile device while in office but has since "fallen behind the cutting edge of mobile technology").

68. See Donald J. Trump (@realDonaldTrump), TWITTER (July 1, 2017, 3:41 PM), <https://twitter.com/realdonaldtrump/status/881281755017355264?lang=en> [<https://perma.cc/JDU8-8QWE>] ("My use of social media is not Presidential—it's MODERN DAY PRESIDENTIAL. Make America Great Again!").

69. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 20, 2017, 9:51 AM), <https://twitter.com/realdonaldtrump/status/822501803615014918> [<https://perma.cc/52HE-B5G9>].

70. See *id.* ("Today we are not merely transferring power from one Administration to another, or from one party to another—but we are transferring power from Washington, D.C. and giving it back to you, the American People. #InaugurationDay").

71. See Scott Gerber, *It's Not Just a Trump Problem—We All Have to Take Responsibility for Twitter*, RECODE (Nov. 8, 2017, 2:11 PM), <https://www.recode.net/2017/11/8/16619178/trump-twitter-tweet-civil-public-discourse-democracy-social-media-responsibility-russia> [<https://perma.cc/UY84-DZXD>] ("Rather than use Twitter as a place to educate, organize and inform, Trump has weaponized the platform to assault his enemies, foreign and domestic."); Julian Zelizer, *Trump's Tweets: A Presidential Wrecking Ball*, CNN (Oct. 1, 2017, 8:10 PM), <https://www.cnn.com/2017/10/01/opinions/trump-tweets-politics-opinion-zelizer/index.html> [<https://perma.cc/8FSF-NPAG>] ("President Donald Trump has used presidential tweets as a wrecking ball that divides, insults[,] and spreads false information.").

72. See Brent D. Griffiths, *Poll: Majority of Americans See Trump as Divisive*, POLITICO (Sept. 24, 2017, 10:13 AM), <https://www.politico.com/story/2017/09/24/trump-polls-division->

divisiveness of the Trump Administration highlights that the use of technology in the presidency is evolving once again.

President Trump embraces social media and views it as integral to the transparency of his Administration.<sup>73</sup> This sentiment is not unfamiliar. Former President Roosevelt's motivations for implementing recording technology parallels President Trump's motivations for having social media.<sup>74</sup> However, unlike private recording technology, social media is characteristically public with regard to the community of users, and though privatization is available, privacy from the public is not the default.<sup>75</sup> While this may be considered a facially passive distinction, such a difference is

---

unity-243063 [https://perma.cc/J3KY-S7Q6] (reporting that 66% of people surveyed viewed President Trump as divisive—an over 10% jump from former Presidents Bush or Obama).

73. See Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 1, 2017, 6:55 AM), <https://twitter.com/realDonaldTrump/status/892383242535481344> [https://perma.cc/QZM7-A4RL] (“Only the Fake News Media and Trump enemies want me to stop using Social Media (110 million people). Only way for me to get the truth out!”); see also Donald J. Trump (@realDonaldTrump), Twitter (Aug. 21, 2017, 6:32 AM), <https://twitter.com/realDonaldTrump/status/899625157421039616> [https://perma.cc/APR7-GRHD] (“Thank you, the very dishonest Fake News Media is out of control!”).

74. Compare Selverstone, *supra* note 38 (claiming former President Roosevelt implemented recording technology to ensure he was not misquoted by the press and to maintain “an accurate account of what transpired”), with Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 1, 2017, 6:55 AM), <https://twitter.com/realDonaldTrump/status/892383242535481344> [https://perma.cc/QZM7-A4RL] (referring to the media as “Fake News Media” and asserting social media was the only way for him “to get the truth out”). It is necessary to note that President Trump has had an ongoing disdain for the media in general. However, such divisive rhetoric and conduct has been regarded as a “darkly brilliant” tactic because it has fueled his supporters, seemingly discredited formerly reputable organizations, and changed the way that some view “facts” and presidential transparency. Bret Stephens, *Don't Dismiss President Trump's Attacks on the Media As Mere Stupidity*, TIME (Feb. 26, 2017, 6:59 PM), <http://time.com/4675860/donald-trump-fake-news-attacks/> [https://perma.cc/9WTZ-23Z8]. In addition, in an interview with Bill O'Reilly in which the President was questioned as to the validity of a statement made in regard to immigration and whether he could support the statement he made with documented proof, the President simply replied, “[m]any people have come out and said I'm right.” *Id.* Such a fallible *argumentum ad populum* response makes reminiscent of the idea that “when the President does it, that means it is not illegal.” Sir David Frost, *I Have Impeached Myself*, GUARDIAN (Sept. 7, 2007), <https://www.theguardian.com/theguardian/2007/sep/07/greatinterviews1> [https://perma.cc/4EZF-2F9K]; see also Stephens, *supra* note 74 (noting that President Trump's response “[m]any people say” is what's known as an *argumentum ad populum*).

75. Twitter users have the availability to make their accounts “private,” which would allow only approved followers to view their posts, or “public,” which means that anyone—even spectators who do not have a Twitter account—may view the user's posts but not necessarily engage. See Complaint for Declaratory & Injunctive Relief, *supra* note 4, at 8–11 (outlining the way in which one accesses and uses Twitter).

unprecedented given the ways in which presidents have historically grafted technology into their Administrations: by (mostly) public and private means.<sup>76</sup> It is no stretch of the imagination to see that social media stands alone as the modern hybrid of communicative technology. Moreover, social media has taken a seat of power in the modern world, and—as it continues to rapidly evolve—politicians, personalities, or those who wish to have their voice heard use social media to do so.<sup>77</sup> As social media evolves, so does the way people become informed—especially in the way they get their news.<sup>78</sup> Moreover, because tweets from the President are considered official statements<sup>79</sup> hosted on servers from a private company (Twitter), the water becomes murkier with regard to the President’s use of social media.<sup>80</sup>

---

76. Compare Selverstone, *supra* note 38 (introducing the way in which modern recording technology was first incorporated into the Oval Office for private use, unless use was necessary to clear up a misquoting), with Sydell, *supra* note 62 (recognizing that the incorporation of a cellular phone was met with technical and security issues but explaining that the phone would only be used in a private capacity for text messaging or e-mail).

77. See *Social Media Fact Sheet*, PEW RES. CTR. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/social-media/> [<https://perma.cc/7GGE-2D7A>] (“Today around seven-in-ten Americans use social media to connect with one another, engage with news content, share information[,] and entertain themselves.”); Shannon Greenwood, Andrew Perrin, & Maeve Duggan, *Social Media Update 2016: Facebook Usage and Engagement Is on the Rise, While Adoption of Other Platforms Holds Steady*, PEW RES. CTR. (Nov. 11, 2016), <http://www.pewinternet.org/2016/11/11/social-media-update-2016/> [<https://perma.cc/KG7Y-TSNA>] (reporting that “68% of all U.S. adults are Facebook users, while 28% use Instagram, 26% use Pinterest, 25% use LinkedIn[,] and 21% use Twitter”); Andrew Perrin, *Social Media Usage: 2005—2015*, PEW RES. CTR. (Oct. 8, 2015), <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/> [<https://perma.cc/K9UG-PYU4>] (finding that “nearly two-thirds of American adults (65%) use social networking sites”).

78. See Kevin Curry, *More and More People Get Their News Via Social Media. Is That Good or Bad?*, WASH. POST (Sept. 30, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/30/more-and-more-people-get-their-news-via-social-media-is-that-good-or-bad/?utm\\_term=.20343e737eb2](https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/30/more-and-more-people-get-their-news-via-social-media-is-that-good-or-bad/?utm_term=.20343e737eb2) [<https://perma.cc/6M6S-MS44>] (pointing out the tendency of voters, and people in general, to rely on social media for their source of information and pointing out the dangers with this practice).

79. Complaint for Declaratory & Injunctive Relief, *supra* note 4, at 13; *Sean Spicer Says President’s Tweets Are Official Statements*, C-SPAN (June 6, 2017), <https://www.c-span.org/video/?c4672393/sean-spicer-says-presidents-tweets-official-statements> [<https://perma.cc/8RMX-YC5Q>].

80. In fact, on November 3, 2017, the President’s personal Twitter account was removed from Twitter for eleven minutes. Joanna Walters & Olivia Solon, *Experts Warn About Security After Donald Trump’s Twitter Account Briefly Deleted*, GUARDIAN (Nov. 3, 2017, 12:56 PM), <https://www.theguardian.com/technology/2017/nov/03/experts-warn-about-security-after-donald-trumps-twitter-account-briefly-deleted> [<https://perma.cc/WRJ8-7QTX>]. After the account was compromised, concerns grew in regard to the security of the President Trump’s Twitter account and



## IV. CASE STUDIES ON THE USE OF SOCIAL MEDIA BY PUBLIC OFFICIALS

Political use of the Internet is not a new concept. Fourteen years ago, the use of the Internet by former Governor of Vermont, Howard Dean, garnered political attention.<sup>81</sup> Dean was known for using the Internet as a political tool during the 2004 presidential election.<sup>82</sup> Dean's efforts—though ultimately unsuccessful—paved the way for modern political campaigning.<sup>83</sup> It would follow that the 2008 presidential election solidified the power of the Internet and social media to reach voters<sup>84</sup> and the beginning of politicians fully embracing the technology.

A. *The Obama Administration*

Widely accepted as the first President to use social media as a means of winning the presidential election,<sup>85</sup> Obama was not shy when it came to utilizing the tools necessary to win young voters who actively<sup>86</sup> used social

the potential security (and even economic) issues which could arise from this one instance. Yuliya Talmazan, *Trump's 11-Minute Twitter Outage Raises Broader Security Questions*, NBC NEWS (Nov. 3, 2017, 2:09 PM), <https://www.nbcnews.com/news/us-news/trump-s-11-minute-twitter-outage-raises-broader-security-questions-n817196> [<https://perma.cc/E5ET-XBQW>].

81. See Matthew Hindman, *The Real Lessons of Howard Dean: Reflections on the First Digital Campaign*, 3 PERSP. ON POL. 121, 123–24 (2005) (discussing the ways in which Howard Dean's presidential campaign garnered positive support from the media and led to a new avenue for political fundraising).

82. See *id.* at 121 (noting that "Dean's use of the Web to organize, invigorate, and finance his campaign" was "unprecedented").

83. See *id.* at 127 ("[T]he Dean campaign seemed poised to do for the Internet what the Kennedy-Nixon debate did for the television: provide an undeniable demonstration of the new medium's political power.").

84. See Claire C. Miller, *How Obama's Internet Campaign Changed Politics*, N.Y. TIMES (Nov. 7, 2008, 7:49 PM), <https://bits.blogs.nytimes.com/2008/11/07/how-obamas-internet-campaign-changed-politics/> [<https://perma.cc/42PP-F6JW>] ("Were it not for the Internet, Barack Obama would not be [P]resident. Were it not for the Internet, Barack Obama would not have been the nominee.") Further, President Obama's election was seen as a parallel for the way presidents adopt new mediums of technology to change the way the American political process is conducted. See *id.* ("One of the many ways that the election of Barack Obama as [P]resident has echoed that of John F. Kennedy is his use of a new medium that will forever change politics. For Mr. Kennedy, it was television. For Mr. Obama, it is the Internet.")

85. See Jeffrey P. Hinkeldey, *The 140-Character Campaign: Regulating Social Media Usage in Campaign Advertising*, 40 RUTGERS COMPUTER & TECH. L.J. 78, 78 (2014) (noting that the trend of social media usage in political campaigns "began with President Barack Obama embracing the use of social media during his first presidential campaign in 2008").

86. See Perrin, *supra* note 77 (reporting that "90% of young adults use social media").

media.<sup>87</sup> President Obama continued his embrace of modern technology in a memorandum which called for government agencies to be transparent with the people and “harness new technologies to put information about their operations and decisions online and [make them] readily available to the public.”<sup>88</sup> After the Obama Administration successfully used social media to engage the public, the following years experienced an influx of politicians and government officials who followed the trend of using social media.<sup>89</sup>

As President Obama prepared to leave office, his Administration “launched The Obama White House Social Media Archive, a searchable collection of everything the President and his administration posted on Instagram, Twitter, Flickr, Facebook, Google+, and Pinterest during his two terms in office.”<sup>90</sup> For the first time in history, the Obama Administration preserved the entirety of its social media accounts for the purposes of public records preservation.<sup>91</sup> In an effort to ensure a peaceful transition between the two Administrations, the Obama Administration emptied and preserved the entire official “@POTUS” account onto a separate account (deemed “@POTUS44”) and transitioned the official “@POTUS” account over to the Trump Administration.<sup>92</sup> Despite being the first digital transition of

---

87. See David Carr, *How Obama Tapped into Social Networks' Power*, N.Y. TIMES (Nov. 9, 2008), [http://www.nytimes.com/2008/11/10/business/media/10carr.html?\\_r=0](http://www.nytimes.com/2008/11/10/business/media/10carr.html?_r=0) [<https://perma.cc/R8S2-DRJL>] (detailing the many methods President Obama used in reaching and winning over potential voters through social media). President Obama also used social media in his second presidential campaign and was ultimately successful, going on to win the 2012 presidential election. Hinkeldey, *supra* note 85, at 78.

88. Memorandum on Transparency and Open Government, 2009 DAILY COMP. PRES. DOC. 1 (Jan. 21, 2009); David S. Levine, *The Social Layer of Freedom of Information Law*, 90 N.C. L. REV. 1687, 1726 (2012).

89. See Shontavia J. Johnson, *Donald Trump, Disruptive Technologies, and Twitter's Role in the 2016 American Presidential Election*, 27 WIDENER COMMONWEALTH L. REV. 39, 68 (2018) (asserting that President Obama's social media and Internet use influenced state and local elections).

90. Lizzie Plaugic, *Obama Administration Releases Searchable Archive of Social Media Posts*, VERGE (Jan. 5, 2017, 4:20 PM), <https://www.theverge.com/2017/1/5/14181274/obama-social-media-archive-twitter-instagram-facebook> [<https://perma.cc/2AY4-8WRY>].

91. Schulman, *supra* note 2.

92. *Id.*

power,<sup>93</sup> the Obama Administration set a precedent for the way an Administration handles its use of social media.<sup>94</sup>

### 1. Records Preservation During the Obama Administration

On the eve of Thanksgiving 2014, President Obama signed off on a set of changes to the FRA.<sup>95</sup> This aligned with the Obama Administration's desire to bring records preservation into the modern technological world.<sup>96</sup> The Obama Administration believed "if records management policies and practices [were] not updated for a digital age, the surge of information [w]ould overwhelm agency systems, leading to higher costs and lost records."<sup>97</sup> Through implementing new guidelines for records preservation, the Obama Administration sought a more transparent and efficient government.<sup>98</sup>

In conjunction with the changes to the FRA, the Obama Administration approved amendments to the PRA, which modernized the processing and preservation of presidential records for the twenty-first century.<sup>99</sup> The changes increased efficiency and decreased the turnaround time for requests of presidential records.<sup>100</sup> Oddly enough, disagreement over the

---

93. Alex Byers, *@POTUS Tweets Headed to Obama Social Media Archive*, POLITICO (Jan. 5, 2017, 5:44 PM), <https://www.politico.com/story/2017/01/obama-tweets-social-media-archive-233245> [<https://perma.cc/K58S-6YU8>].

94. Schulman, *supra* note 2.

95. Clark, *supra* note 12. The amendments also applied to the PRA. Press Release, Nat'l Archives, *supra* note 11.

96. See Memorandum on Managing Government Records, 2011 DAILY COMP. PRES. DOC. 1 (Nov. 28, 2011) (proposing a "[twenty-first] century framework for the management of Government records"); see also Clark, *supra* note 12 (reporting that the amendments to the FRA were in furtherance of President Obama's memorandum on the management of governmental records).

97. Memorandum on Managing Government Records, 2011 DAILY COMP. PRES. DOC. 1 (Nov. 28, 2011).

98. See *id.* (asserting that "proper records management is the backbone of open Government").

99. Clark, *supra* note 12; Josh Gerstein, *President Barack Obama Signs Presidential Records Reform*, POLITICO (Nov. 26, 2014, 11:59 PM), <https://www.politico.com/blogs/under-the-radar/2014/11/president-barack-obama-signs-presidential-records-reform-199326> [<https://perma.cc/3FNC-P4YV>].

100. See Gerstein, *supra* note 99 (showing the different—and seemingly intentional—ways in which presidential Administrations stifled and delayed presidential record requests prior to the amendments under the Obama Administration).

preservation of electronic records under the PRA dates back to as early as 1995.<sup>101</sup>

In 2016, the Obama Administration furthered their mission of transparency by updating areas of the FOIA,<sup>102</sup> which works in conjunction with the FRA to provide access to executive branch records that are free from exemptions.<sup>103</sup> These changes also aligned with the Obama Administration's desire for governmental transparency, which was a fundamental pillar of its directives.<sup>104</sup> The FOIA Improvement Act of 2016<sup>105</sup> made simple, but substantial, changes to bring the Act into the twenty-first century.<sup>106</sup> One of the most innovative changes, however, was the creation of a centralized electronic portal for record requests.<sup>107</sup> While the achievement was a necessary one, amending the FOIA was not done on a mere whim but rather took some trial and error.<sup>108</sup>

---

101. In *American Historical Ass'n v. Peterson*, the United States District Court for the District of Columbia held that an agreement between President George H.W. Bush and a former Archivist, which allowed the President to retain exclusive control over certain electronic records, violated the PRA. *Am. Historical Ass'n v. Peterson*, 876 F. Supp. 1300, 1318–20 (D.D.C. 1995).

102. Mario Trujillo, *Obama Signs Bill to Expand Access to Federal Records*, HILL (June 30, 2016, 4:30 PM), <http://thehill.com/policy/technology/286183-obama-signs-bill-to-expand-access-to-federal-records> [<https://perma.cc/67PD-6BK5>].

103. See WENDY GINSBERG, CONG. RESEARCH SERV., R43072, COMMON QUESTIONS ABOUT FEDERAL RECORDS AND RELATED AGENCY REQUIREMENTS 11 (2015) (explaining the interrelation between the FRA and the FOIA).

104. See Trujillo, *supra* note 102 (noting the changes to the FOIA complemented the overarching goal of the Obama Administration to pursue a more open government).

105. FOIA Improvement Act of 2016, Pub. L. No. 114–85, 130 Stat. 538 (2016) (codified as amended at 5 U.S.C. § 552 (Supp. IV 2016)).

106. See Trujillo, *supra* note 102 (asserting the changes were “a long time coming” because it was the “first major overhaul of the 1966 law in more than a decade”). For example, one of the more minute facial changes, but wholly necessary to encompass the vast majority of records under new technological formats, was the change of language in Subsection (a)(2) from “for public inspection and copying” to “for public inspection in an *electronic* format.” FOIA Improvement Act of 2016, sec. 2, § 552(1)(A)(i), 130 Stat. at 538 (emphasis added). Before these changes, the process of obtaining federal records was such a long and arduous process that in some events litigation was pursued to speed up the process. See Trujillo, *supra* note 102 (highlighting the issues that plagued FOIA record requests prior to the amendments).

107. Trujillo, *supra* note 102. The changes to the FOIA won bipartisan support and were characterized as an “important step forward.” *Id.*

108. Ironically, in 2014, a document from the Justice Department revealed the Obama Administration originally opposed the amendments to the FOIA because of fears it “would ‘undermine’ the success of the Freedom of Information Act (FOIA).” See Mario Trujillo, *Administration Strongly Lobbies Against FOIA Reform*, HILL (Mar. 9, 2016, 1:07 PM), <http://thehill.com/policy/technology/272386-administration-strongly-lobbied-against-foia-reform>

## 2. Preservation of the Obama Administration's Social Media Records

As the Obama Administration prepared to transition out of office, questions arose as to how the official, public social media accounts would be managed. The Obama Administration implemented a plan to preserve all social media accounts through the National Archives and Records Administration (NARA).<sup>109</sup> Social media content was akin to handwritten letters and emails because of their manner of preservation.<sup>110</sup> However, the method utilized by the Obama Administration was not final; in fact, the Obama Administration solicited ways in which preservation and collection of social media accounts could be more efficiently executed.<sup>111</sup> Social media interactions by their very nature present a method for people to reach out to their government, and the Obama Administration recognized this new frontier for presidential records.<sup>112</sup> On the eve of the transition from the Obama to the Trump Administration, the Obama Administration implemented different methods for preserving electronic records created on various social media platforms.<sup>113</sup> It is of interest to note that the official personal Twitter account of President Obama was not included in the

---

[<https://perma.cc/CHE2-NM76>] (discussing the objections the Obama Administration had to the FOIA amendments). This information was uncovered when an independent organization sued the Department of Justice after their own FOIA requests had stalled. Jason Leopold, *It Took a FOIA Lawsuit to Uncover How the Obama Administration Killed FOIA Reform*, VICE NEWS (Mar. 9, 2016, 8:50 AM), <https://news.vice.com/article/it-took-a-foia-lawsuit-to-uncover-how-the-obama-administration-killed-foia-reform> [<https://perma.cc/3XZ5-62QR>]. Fifty years after its inception and two years after a close, but failed, attempt, the FOIA was unanimously brought into the twenty-first century. Gerstein, *supra* note 99; Trujillo, *supra*.

109. Schulman, *supra* note 2.

110. *See id.* ("From tweets to snaps, all of the material we've published online will be preserved with NARA just as previous administrations have done with records ranging from handwritten notes to faxes to emails.")

111. *Id.* Specifically, the Administration solicited the public's help in coming up with "creative ways" to preserve the materials for the future. *Id.*

112. *See* Phillips, *supra* note 33 ("[W]e've concluded that comments and messages the White House receives on its official pages are presidential records."). It is worth noting that this blog post from former Director of Digital Strategy Macon Phillips is in line with the Obama Administration's goals to be a more open and transparent government. *Compare id.* (classifying social media interactions and posts on the White House social media page as presidential records and therefore necessary for preservation), *with* Memorandum on Transparency and Open Government, 2009 DAILY COMP. PRES. DOC. 1 (Jan. 21, 2009) (calling for efforts by government agencies to preserve and provide access to their records in an effort to facilitate a more transparent government).

113. For example, animated GIFs and "Vines (the Twitter-owned short video service that shut down last fall)" were archived on the server of a private company, and a host of other methods were utilized to ensure that President Obama's social media posts were preserved. Bogost, *supra* note 59.

archival process due to the President relinquishing power over the account during his terms in office.<sup>114</sup>

### B. *The Trump Administration*

Before taking the oath of office as the forty-fifth President of the United States, Donald J. Trump was no stranger to social media.<sup>115</sup> Trump garnered a great deal of attention through his use of social media in various instances.<sup>116</sup> Much to the chagrin of his political critics, after being elected, President Trump showed no intention of diverting from the way in which he used social media to boost his celebrity.<sup>117</sup> To gain a better understanding of the ways in which his Administration utilizes social media, it is imperative that we look at the ways in which Trump has used social media—both personally and professionally. Prior to winning the 2016 presidential election, Trump gained a reputation for controversy—both on and off social media—which many believe helped him secure his

---

114. Compare Philip Bump, *You're Not Really Following @BarackObama on Twitter*, ATLANTIC (Apr. 8 2013) [hereinafter Bump, *You're Not Really Following @BarackObama*], <https://www.theatlantic.com/politics/archive/2013/04/youre-not-following-barackobama-twitter/316523/> [perma.cc/LC3U-HWFFH] (clarifying the misinformation with regard to how the “@BarackObama” Twitter account was used and controlled during the Obama presidency), and Philip Bump, *Barack Obama Makes Clear That He Is Not @BarackObama*, WASH. POST (May 18, 2015), [https://www.washingtonpost.com/news/the-fix/wp/2015/05/18/barack-obama-joins-twitter-make-s-clear-that-he-is-not-barackobama/?utm\\_term=.55aafd4636e1](https://www.washingtonpost.com/news/the-fix/wp/2015/05/18/barack-obama-joins-twitter-make-s-clear-that-he-is-not-barackobama/?utm_term=.55aafd4636e1) [https://perma.cc/5TFH-6ZZ9] (highlighting the way in which Obama’s campaign used the “@BarackObama” Twitter account but transferred its use to a different affiliated non-profit organization), with Barack Obama (@BarackObama), TWITTER (Jan. 20, 2017, 1:04 PM), <https://twitter.com/BarackObama/status/822550300942856193> [https://perma.cc/UM3N-RSHW] (“Hi everybody! Back to the original handle. Is this thing still on? Michelle and I are off on a quick vacation, then we’ll get back to work.”), and President Obama (@POTUS44), TWITTER (May 18, 2015, 8:38 AM), <https://twitter.com/POTUS44/status/600324682190053376> [https://perma.cc/74ZD-TXXU] (“Hello, Twitter! It’s Barack. Really! Six years in, they’re finally giving me my own account.”).

115. See *Trump on Twitter: A History of the Man and His Medium*, BBC NEWS (Dec. 12, 2016), <http://www.bbc.com/news/world-us-canada-38245530> [https://perma.cc/BUW4-NA4C] (demonstrating the exponential growth in President Trump’s Twitter use).

116. See Julia Zorthian, *Here’s Roughly Every Controversial Thing Donald Trump Has Ever Said Out Loud*, TIME (Aug. 7, 2015), <http://time.com/3988886/donald-trump-controversy/> [https://perma.cc/J8PX-SH4L] (providing a timeline of controversial statements made by Trump before his presidency).

117. Van Jones, *Trump: The Social Media President?*, CNN (Oct. 26, 2015, 3:31 PM), <https://www.cnn.com/2015/10/26/opinions/jones-trump-social-media/index.html> [https://perma.cc/D7VA-JHVS].

nomination and the presidency, even if they do not politically agree with him.<sup>118</sup>

### 1. Use of Social Media as President of the United States

As previously discussed, though President Obama had social media accounts, he did not use them personally. When President Trump took office, he became the first President to *actively* use social media.<sup>119</sup> While at times divisive, it is no stretch of the truth to say that President Trump's use of Twitter has been effective.<sup>120</sup> Even objectively, the President's use of Twitter and social media to gain the nomination of the Republican Party and the presidency is truly unprecedented.<sup>121</sup> Not shy of his distrust of the media,<sup>122</sup> President Trump has utilized his personal Twitter and the @POTUS account to speak his mind without the conventions of formal press releases and television interviews that previous presidents

118. Compare *id.* (detailing how Trump “master[ed] his era’s media tools”), with Michael Andor Brodeur, *From Obama to Trump, the First Internet President to the Second*, BOS. GLOBE (Jan. 20, 2017), <https://www.bostonglobe.com/arts/2017/01/19/the-internet-president/mKXwJwaVwirduDeBc57GwM/story.html> [<https://perma.cc/9VTQ-NQSU>] (outlining how Trump’s social media presence led to his presidency). Despite what his critics may say were the underlying methods used, even the President would agree that his use of social media (mainly, Twitter) was the instrument to his success. Lesley Stahl, *President-Elect Trump Speaks to a Divided Country*, CBS NEWS (Nov. 13, 2016), <https://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/> [<https://perma.cc/3F3M-M5Z6>].

119. See Jones, *supra* note 117 (comparing the President’s use of Twitter and social media to garner the attention of the American people to the ways in which previous presidents have done the same with similar technologies). *But see* Brodeur, *supra* note 118 (noting Presidents Trump and Obama both actively used social media but drawing a distinction between the way they used the platform).

120. See *Trump on Twitter: A History of the Man and His Medium*, *supra* note 115 (delving into the ways in which Trump has used Twitter to further his political and personal ambitions); see also Tamara Keith, *Commander-In-Tweet: Trump’s Social Media Use and Presidential Media Avoidance*, NPR (Nov. 18, 2016, 3:46 PM), <http://www.npr.org/2016/11/18/502306687/commander-in-tweet-trumps-social-media-use-and-presidential-media-avoidance> [<https://perma.cc/XS3D-FC9A>] (discussing how President Trump has incorporated his Twitter use into his presidency).

121. See Stephens, *supra* note 74 (framing the President’s use of social media as the vehicle by which he shares his thoughts through unfiltered rhetoric, which gained him devotion from his supporters); see also Keith, *supra* note 120 (analogizing President Trump’s social media presence to the next step in the evolution of presidential use of technology and media to speak to the American public with an increasingly unfiltered voice).

122. See Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), <https://twitter.com/realDonaldTrump/status/832708293516632065> [<https://perma.cc/85FA-4F2U>] (“The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!”).

employed.<sup>123</sup> What can be said about such use is that President Trump favors this method of reaching the American people and views it as a necessity of his presidency.<sup>124</sup>

### C. *Controversy Surrounding the President's Use of Social Media*

Statements made by the President have not been devoid of reprisal or opposition,<sup>125</sup> and the President's Twitter—as one of the main instruments used to convey those statements—has been no stranger to this controversy.<sup>126</sup> The President's Twitter has come under the close scrutiny of his critics with regard to the security of his phone,<sup>127</sup> the deletion of his tweets,<sup>128</sup> and even the blocking of people from viewing posts or interacting with him on Twitter.<sup>129</sup> During the first year of his presidency, President Trump spurred action from government officials for his use of

123. See Keith, *supra* note 120 (reporting the ways in which President Trump averted his interactions with the media through his Twitter use).

124. See Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 30, 2017, 2:36 PM), <https://twitter.com/realDonaldTrump/status/947235015343202304> [<https://perma.cc/53FS-VTS4>] (“I use Social Media *not* because I like to, but because it is the *only* way to fight a VERY dishonest and unfair ‘press,’ now often referred to as Fake News Media. Phony and non-existent ‘sources’ are being used more often than ever. Many stories & reports a pure fiction!” (emphasis added)).

125. See Joseph Russomanno, “Falsehood and Fallacies”: Brandeis, Free Speech and Trumpism, 22 COMM. L. & POL’Y 155, 155–57 (2017) (highlighting the ways in which the President’s statements have been received and the responses which they have invoked).

126. See John Wagner et al., *Trump Says Nothing to Fear in Flynn’s Talks with FBI, but Tweet Raises Questions*, CHI. TRIB. (Dec. 2, 2017, 10:35 PM), <http://www.chicagotribune.com/news/nationworld/politics/ct-trump-tweets-fired-flynn-for-lying-20171202-story.html> [<https://perma.cc/2JT2-4DNS>] (showing the ways in which the President’s use of Twitter has garnered backlash with regard to a pending investigation into a former national security advisor). The President’s Twitter has been the subject of other issues as well. See Complaint for Declaratory & Injunctive Relief, *supra* note 4, at 3 (claiming that the President’s blocking of certain individuals from viewing his Twitter posts is in violation of the First Amendment).

127. See Sam Sanders, *Is Trump Tweeting from a ‘Secure’ Smartphone? The White House Won’t Say*, NPR (Feb. 3, 2017, 5:29 PM), <https://www.npr.org/sections/alltechconsidered/2017/02/03/513256171/is-trump-tweeting-from-a-secure-smartphone-the-white-house-wont-say> [<https://perma.cc/66ND-J63N>] (“The absence of a clear statement from the White House on the security of Trump’s communications, matched with the continued reports of unsecured smartphone use, has led some to accuse Trump of hypocrisy.”).

128. See Rebekah Entralgo, *Trump Sued for Allegedly Violating Presidential Records Act*, NPR (June 22, 2017, 6:48 PM), <https://www.npr.org/sections/thetwo-way/2017/06/22/533977417/trump-sued-for-allegedly-violating-presidential-records-act> [<https://perma.cc/7U2E-B7ZA>] (Any of Trump’s statements made on Twitter are subject to federal record keeping, and the lawsuit argues that any deleted tweets would count as a violation of the PRA as well.”).

129. Complaint for Declaratory & Injunctive Relief, *supra* note 4, at 3.



Twitter.<sup>130</sup> This manifested into proposed legislative changes to existing records preservation legislation.<sup>131</sup> Given that such issues surrounding the President's use of social media have surfaced so quickly,<sup>132</sup> a need to preemptively address certain aspects of them exists because of the growing amount<sup>133</sup> of records being created and the lack of any indication that this growth will slow down.<sup>134</sup>

The increased use of social media in the Oval Office requires us to address the preservation of such materials.<sup>135</sup> While social media is not specifically referenced in the PRA,<sup>136</sup> the Obama Administration treated

130. 163 CONG. REC. H4858, 4859 (daily ed. June 13, 2017) (statement of Rep. Quigley) (discussing an incident where the President misspelled a word in a tweet, writing "covfefe," and promptly deleted the tweet, bringing to light concerns over the President's deletion of Twitter "records").

131. See Communications over Various Feeds Electronically for Engagement Act of 2017, H.R. 2884, 115th Cong. (2017) (proposing the express addition of social media accounts to the PRA). While tongue-in-cheek to the say the least (the Act's acronym spells COVFEFE), the proposed legislation reflects the real concerns over the President's active use of this modern method of communication. Laurel Wamsley, *The Covfefe Act Has a Silly Name—But It Addresses a Real Quandary*, NPR (June 12, 2017, 6:13 PM), <https://www.npr.org/sections/thetwo-way/2017/06/12/532651827/the-covfefe-act-has-a-silly-name-but-it-addresses-a-real-quandary> [https://perma.cc/9YKC-6BMX].

132. See Jessica Estepa, *Trump Has Tweeted 2,461 Times Since the Election. Here's a Breakdown of His Twitter Use*, USA TODAY (Nov. 8, 2017, 12:26 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/11/07/trump-has-tweeted-2-461-times-since-election-heres-breakdown-his-twitter-use/822312001/> [https://perma.cc/Y6TW-UARA] (noting President Trump has tweeted 2,461 times, which "adds up to, on average, about six to seven tweets per day").

133. Compare GINSBERG, *supra* note 28, at 8–9 (noting the rapid growth of electronic records, their volume, and the potential for growth as their use becomes more prevalent), with Estepa, *supra* note 132 (reporting the number of tweets the President has generated during the first year of his presidency).

134. See Wamsley, *supra* note 131 (acknowledging the constant and far-reaching impact of the President's Twitter use). But see Nick Gass, *Trump Says He Won't Tweet As President*, POLITICO (Apr. 25, 2016, 2:22 PM), <https://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/04/trump-no-tweeting-president-222408> [https://perma.cc/UYK7-74AB] (noting Trump said he would give up tweeting after he became President).

135. In fact, internal electronic messaging by the Trump Administration has come under the radar of watchdog groups in conjunction with the President's social media use as potentially damaging if left unchecked. See Entralgo, *supra* note 128 (describing the concerns from a lawsuit filed over deletion of both internal messages and tweets in accordance with records preservation).

136. See 163 CONG. REC. H4858, 4859 (daily ed. June 13, 2017) (statement of Rep. Quigley) (acknowledging the need for social media to be added to the Presidential Records Act); see also Communications over Various Feeds Electronically for Engagement Act of 2017, H.R. 2884, 115th Cong. (2017) (proposing amendments to the PRA that would include social media being explicitly stated in the statutory language).

their social media as records analogous to e-mail and written correspondence.<sup>137</sup> This has not stopped issues arising out of social media use from coming to the forefront.<sup>138</sup> If social media is left unaddressed, further issues are sure to follow.

#### D. *Issues That May Arise if Social Media Use Is Not Addressed*

Concern over the President's use of Twitter in his first year garnered attention from the courts.<sup>139</sup> Statements on a limited public forum<sup>140</sup> like Twitter could present some difficult issues when it comes to domestic politics—such as the travel ban on refugees from certain Muslim nations,<sup>141</sup> opinions regarding citizen protests,<sup>142</sup> and ongoing investigations<sup>143</sup>—because the nature of the President's social media presence is inherently

---

137. See Schulman, *supra* note 2 (discussing how social media posts would be preserved in the same way NARA preserved other previous records); accord Phillips, *supra* note 33 (proposing new processes for preservation of social media in accordance with the PRA because of the communicative nature of social media).

138. See Complaint for Declaratory & Injunctive Relief, *supra* note 4, at 3 (arguing the blocking of individuals from the President's Twitter account violates the First Amendment); Entralgo, *supra* note 128 (examining a lawsuit filed against President Trump, which “argues that any deleted tweets [by President Trump] would count as a violation of the PRA”).

139. See Ariane de Vogue, *Judges in Travel Ban Case Concerned About Trump Tweets*, CNN (Dec. 8, 2017, 2:55 PM), <http://www.cnn.com/2017/12/08/politics/travel-ban-trump-tweets/index.html> [<https://perma.cc/99LF-C4DH>] (relaying the Fourth Circuit Court of Appeals' concerns over the President's statements on Twitter).

140. When social media websites are utilized to engage the public—in the case of the President's views on his Twitter, as a means to speak directly to the people free of media intervention—they may serve as a limited public forum for First Amendment purposes. See *Davison v. Loudoun Cty. Bd. of Supervisors*, 227 F. Supp. 3d 605, 611–12 (E.D. Va. 2017) (discussing how use of social media by an elected official may create a limited public forum); see also Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 1, 2017, 6:55 AM), <https://twitter.com/realDonaldTrump/status/892383242535481344> [<https://perma.cc/QZM7-A4RL>] (“Only the Fake News Media and Trump enemies want me to stop using Social Media (110 million people). Only way for me to get the truth out!”).

141. See Vogue, *supra* note 139 (noting that President Trump's “recent tweets and statements concerning Muslims and the travel ban played a central role” in a federal appeals case).

142. See Jeremy Gottlieb et al., *Roger Goodell Responds to Trump's Call to 'Fire' NFL Players Protesting During National Anthem*, WASH. POST (Sept. 23, 2017), [https://www.washingtonpost.com/news/early-lead/wp/2017/09/22/donald-trump-profanely-implores-nfl-owners-to-fire-players-protesting-national-anthem/?utm\\_term=.1ae949e87000](https://www.washingtonpost.com/news/early-lead/wp/2017/09/22/donald-trump-profanely-implores-nfl-owners-to-fire-players-protesting-national-anthem/?utm_term=.1ae949e87000) [<https://perma.cc/RPT9-AJ4F>] (analyzing the tweets made by President Trump regarding the protests by NFL players during the national anthem).

143. See Wagner et al., *supra* note 126 (asserting a recent tweet by President Trump about former national security advisor Michael Flynn “could add to Trump's legal exposure in a potential obstruction-of-justice investigation”).

divisive.<sup>144</sup> While the President's non-social media statements may pose their own set of difficulties,<sup>145</sup> a predominant concern with the President's Twitter use has been his willful deletion of that material.<sup>146</sup> Despite communicating mainly from his "@RealDonaldTrump" account and not from the official "@POTUS" account, such a distinction is inconsequential to the account's applicability to the PRA.<sup>147</sup>

In the scope of international politics, the President's social media presence is cause for concern.<sup>148</sup> President Trump has not been shy about calling out his own officials with regard to international issues<sup>149</sup> or discussing his opinion of foreign leaders.<sup>150</sup> As the political climate

144. See Brian Fung & Hamza Shaban, *Trump Violated the Constitution When He Blocked His Critics on Twitter, a Federal Judge Rules*, WASH. POST (May 23, 2018, 3:18 PM), [https://www.washingtonpost.com/news/the-switch/wp/2018/05/23/trump-cannot-block-twitter-users-for-their-political-views-court-rules/?utm\\_term=.fc0059ac6498](https://www.washingtonpost.com/news/the-switch/wp/2018/05/23/trump-cannot-block-twitter-users-for-their-political-views-court-rules/?utm_term=.fc0059ac6498) [<https://perma.cc/NG6N-QSFQ>] (considering the difference of opinion regarding a recent decision of a federal court that the President's Twitter account was used as a public forum).

145. For example, a statement made by President Trump came under fire for his less-than-favorable rhetoric toward protests conducted by NFL players—effectively referring to a hypothetical player who would silently protest as a “son of a bitch.” See Adam Serwer, *Trump's War of Words with Black Athletes*, ATLANTIC (Sept. 23, 2017), <https://www.theatlantic.com/politics/archive/2017/09/trump-urges-nfl-owners-to-fire-players-who-protest/540897/> [<https://perma.cc/96MQ-39S7>] (showing different, and at times inconsistent, ways President Trump has commented on various domestic issues).

146. Entralgo, *supra* note 128; Darren Samuelsohn, *Trump's Deleted Tweets Present Legal Liabilities*, POLITICO (Sept. 27, 2017, 1:34 PM), <https://www.politico.com/story/2017/09/27/trump-deleted-tweets-legal-issues-243212> [<https://perma.cc/78KN-MPDH>]; Eli Watkins et al., *The Presidential Records Act and @realDonaldTrump*, CNN (Feb. 18, 2017, 2:42 PM), <http://www.cnn.com/2017/02/18/politics/presidential-records-act-donald-trump-twitter/index.html> [<https://perma.cc/V7GA-KU5U>]; *Is It Legal for Donald Trump to Delete Tweets As President?*, FORBES (Feb. 8, 2017, 1:46 PM), <https://www.forbes.com/sites/quora/2017/02/08/is-it-legal-for-donald-trump-to-delete-tweets-as-president/#134f822b3705> [<https://perma.cc/VJ78-AZN2>].

147. Watkins et al., *supra* note 146.

148. See Krishnadev Calamur, *The International Incidents Sparked by Trump's Twitter Feed in 2017*, ATLANTIC (Dec. 19, 2017), <https://www.theatlantic.com/international/archive/2017/12/trump-tweets-foreign-policy/547892/> [<https://perma.cc/2XW8-6RNP>] (examining the various ways President Trump interacted with foreign governments and entities through social media and its subsequent effect on foreign relations).

149. See Colin Dwyer, *Trump Says Tillerson Is 'Wasting His Time' on Talks with North Korea*, NPR (Oct. 1, 2017, 5:54 PM), [https://www.npr.org/sections/thetwo-way/2017/10/01/554927089/trump-says-tillerson-is-wasting-his-time-on-talks-with-north-korea?utm\\_source=facebook.com&utm%20source=facebook.com](https://www.npr.org/sections/thetwo-way/2017/10/01/554927089/trump-says-tillerson-is-wasting-his-time-on-talks-with-north-korea?utm_source=facebook.com&utm%20source=facebook.com&utm%20source=facebook.com) [<https://perma.cc/H4F6-SY8V>] (commenting on a tweet made by President Trump regarding statements by Secretary of State Rex Tillerson).

150. See Calamur, *supra* note 148 (providing an overview of the tweets President Trump made that “[s]parked” “[i]nternational [i]ncidents”); see also Mary Papenfuss, *U.S. Officials Tell World Leaders to*

surrounding refugees from Muslim countries changed, President Trump's own opinions on the issue were effectively used against him.<sup>151</sup> As President Trump continues to shift the nature of presidential communications, the potential dangers reside not only in the content but also in their rapid-fire nature of creation and in drawing consistencies where contradictions are sure to surface.<sup>152</sup> Of course, concerns over the President's fervent use of social media does not end there.

Diplomatic relations are sensitive by nature because they have the ability to shake up, create, and destroy foreign policy and relationships between nations.<sup>153</sup> President Trump's diplomatic advances—whether intentional or merely out of unfiltered whim—are not considered entirely dangerous to diplomatic relations.<sup>154</sup> However, the criticisms are with the President's

---

*Ignore Trump's Tweets*, HUFFPOST (Feb. 19, 2018, 7:31 AM), [https://www.huffingtonpost.com/entry/world-leaders-ignore-trump-tweets\\_us\\_5a8a604ee4b004fc31939e98?guccounter=1](https://www.huffingtonpost.com/entry/world-leaders-ignore-trump-tweets_us_5a8a604ee4b004fc31939e98?guccounter=1) [<https://perma.cc/36WR-5DPZ>] (“U.S. officials reportedly tried to reassure global policy representatives at an international conference in Germany over the weekend, urging them to pay no attention to the [P]resident's Twitter rants.”).

151. Judges have begun to use President Trump's twitter as a means of establishing—or at least, providing reasonable insight into—the President's mindset when putting forward certain policies. See Gregory Korte, *Trump and the Twitter Presidency: @realDonaldTrump's Tweets Often Carry Legal Weight*, USA TODAY (Nov. 8, 2017, 5:47 PM), <https://www.usatoday.com/story/news/politics/2017/11/08/trump-and-twitter-presidency-realdonaldtrumps-tweets-often-carry-legal-weight/815980001/> [<https://perma.cc/PQ25-WJDA>] (exploring the impact of the way in which judges have applied the President's social media voice to interpret the constitutionality of the President's policies).

152. See Kathy Gilsinan & Uri Friedman, *Donald Trump's Asymmetric War on the Establishment*, ATLANTIC (Jan. 5, 2017), <https://www.theatlantic.com/international/archive/2017/01/trump-asymmetric-war-establishment/512231/> [<https://perma.cc/2H2G-V62C>] (implying that the sheer amount and nature of the President's tweets—even if focused on interpreting foreign-policy—is overwhelming). This will be further exasperated if we consider the President's tweets as official White House statements. *Sean Spicer Says President's Tweets Are Official Statements*, *supra* note 79.

153. One example is when the President admitted on Twitter to speaking with the President of Taiwan (an acknowledgement heavily weighted amongst commentators on U.S.-China diplomatic relations) and then responded to the criticisms with a series of tweets criticizing the Chinese government. See Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 2, 2016, 4:44 PM), <https://twitter.com/realdonaldtrump/status/804848711599882240?lang=en> [<https://perma.cc/W6R6-DWG2>] (“The President of Taiwan CALLED ME today to wish me congratulations on winning the Presidency. Thank you!”); see also Charlie Campbell, *Donald Trump Angers China with Historic Phone Call to Taiwan's President*, TIME (Dec. 5, 2016, 10:25 AM), <http://time.com/4589641/donald-trump-china-taiwan-call/> [<https://perma.cc/UU83-FLRP>] (pointing to the ways in which President Trump's actions on Twitter caused heightened tensions with the Chinese government).

154. See Mark Landler & Jane Perlez, *Trump's Call with Taiwan: A Diplomatic Gaffe or a New Start?*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/world/asia/china-donald-trump-taiwan-twitter.html> [<https://perma.cc/MB5C-STJY>] (explaining that some praised President Trump

deviation from strategic planning of diplomatic relations.<sup>155</sup> It is of no stretch of the imagination that issues will continue to present themselves as President Trump continues to harness social media and incorporate it into the presidency.

## V. RECOMMENDATION ON PRESERVATION OF ELECTRONIC SOCIAL MEDIA RECORDS

### A. *Social Media Accounts: Official Versus Personal Accounts*

When the official account of a president's Administration engages the public, such interactions are considered presidential records.<sup>156</sup> This was a practice established by the Obama Administration in line with the PRA.<sup>157</sup> However, when President Obama left office, his "personal" account—@BarackObama—was not included because President Obama did not use his personal account during his presidency.<sup>158</sup> What happens then when a sitting president uses his personal Twitter account or any social media account to engage the American public and the world? There are differing views.

Social media has become the "modern public square" in the twenty-first century.<sup>159</sup> When President Trump tweets from the @realDonaldTrump

---

for his phone call with the President of Taiwan because it "could lay the groundwork . . . for a healthier relationship with China").

155. See, e.g., Peter Apps, *Commentary: Trump's Brave New World of Twitter Diplomacy*, REUTERS (Dec. 5, 2016, 5:21 PM), <https://www.reuters.com/article/us-apps-twitter-commentary/commentary-trumps-brave-new-world-of-twitter-diplomacy-idUSKBN13U2VX> [<https://perma.cc/9JSQ-P9YW>] ("Traditionally, the key events in something as strategically crucial as Sino-U.S. relations are heavily discussed for hours, if not days, at the highest ranks of government. The new [P]resident-elect, however, shows every sign of being more spontaneous—and looks set to continue to use his personal social media posts in a way that will terrify foreign policy purists."); Nolan D. McCaskill, *Clinton Slams Trump's Twitter Diplomacy: That Doesn't Work!*, POLITICO (May 2, 2017, 1:54 PM), <https://www.politico.com/story/2017/05/02/hillary-clinton-mocks-trump-twitter-diplomacy-237884> [<https://perma.cc/ENF3-4H64>] ("Negotiations are critical, but they have to be part of a broader strategy, not just thrown out on a tweet . . .").

156. See Phillips, *supra* note 33 ("[C]omments and messages the White House receives on its official pages are presidential records.").

157. *Id.*

158. Bump, *You're Not Really Following @BarackObama*, *supra* note 114.

159. Brief of Amici Curiae First Amendment Legal Scholars in Support of Plaintiff's Motion for Summary Judgment et al. as Amici Curiae Supporting Plaintiffs at 2, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17-cv-05205), 2017 WL 9533186 (quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017)).

account, one position asserts that the President uses this account in his capacity as Commander-in-Chief, and thus, the account should be regarded as an official administrative channel.<sup>160</sup> In fact, when the President uses Twitter to engage the public through his posts, responds to other users, and shares other viewpoints via retweets, he creates a public forum by government designation.<sup>161</sup> The government is not limited by the public forum doctrine, with certain exceptions applicable where the government communicates its own viewpoint.<sup>162</sup> The very nature of the “@realDonaldTrump” account thus requires us to address it like other personal effects.<sup>163</sup>

#### B. *Proposed Application of the Law*

When President Trump was sworn in—despite some inclinations to the contrary<sup>164</sup>—he continued to use his personal Twitter account with vigor.<sup>165</sup> Eight years prior, President Obama came into the White House adamant to use his BlackBerry and was able to do so—but with concessions.<sup>166</sup> In the case of President Trump’s use of Twitter, some concessions should be made as well.

##### 1. Activities to Be Considered

In an attempt to shelter concerns of presidential free speech or executive power, concessions should be made with regard to the following activities within the social media platform:

---

160. See Complaint for Declaratory & Injunctive Relief, *supra* note 4, at 13–16 (relaying the ways in which the President has used his personal account in an official capacity that must be considered representative of an official government channel).

161. Brief of Amici Curiae First Amendment Legal Scholars in Support of Plaintiff’s Motion for Summary Judgment et al. as Amici Curiae Supporting Plaintiffs, *supra* note 159, at 8–10.

162. *Id.* at 5–6.

163. See *id.* at 17–18 (detailing the importance of declaring President Trump’s personal Twitter account a public forum); see also *President Obama Gets to Keep His BlackBerry*, *supra* note 64 (highlighting the issues surrounding President Obama’s use of a personal cellular device in the Oval Office).

164. See Gass, *supra* note 134 (noting during the 2016 presidential campaign, Trump promised voters he would not tweet if elected President).

165. See Estepa, *supra* note 132 (stating President Trump has tweeted 2,461 times since being elected).

166. See Sydell, *supra* note 62 (explaining President Obama was permitted to keep his BlackBerry after being elected, but his use was limited as a precautionary security measure).

a. Creation and Deletion of Social Media Posts

Perhaps the more contentious of issues amongst the general criticism of President Trump's social media presence has been his consistent posts and deletion of others.<sup>167</sup> Despite the sentiment surrounding President Trump's responses to various events,<sup>168</sup> the President is protected by the First Amendment.<sup>169</sup> While President Trump's use of hyperbolic rhetoric in his "modern fireside chats" may be irksome to his critics, the proper method of addressing issues with this is not through government action but rather through an informed, educated citizenry.<sup>170</sup>

The issue which garners attention is whether President Trump may delete social media posts. When brought up by those who find concern over this issue, the Archivist of the United States conveyed to the White House the importance of preserving all social media posts, even if they are deleted.<sup>171</sup> In June 2017, the Citizens for Responsibility and Ethics in Washington (CREW) filed a lawsuit arguing that President Trump's deletion of Twitter posts is an open violation of public records laws.<sup>172</sup> The complaint further stressed a concern over the preservation of records due to the nature of secrecy surrounding the Trump Administration.<sup>173</sup> While there may be some contentious views with regard to the court's ability to review records

---

167. See 163 CONG. REC. H4858, 4859 (daily ed. June 13, 2017) (statement of Rep. Quigley) (asserting "when the President deletes a tweet, it is equivalent to him destroying a record"); see also Complaint for Declaratory & Injunctive Relief, *supra* note 4, at 3 (declaring the President's blocking of individuals from social media as a breach of First Amendment rights).

168. See Gottlieb et al., *supra* note 142 (recalling President Trump's tweets about NFL players kneeling during the national anthem).

169. See Devlin Barrett, *Lawyers Say Trump's Free Speech Shows Contempt for Free Speech*, WASH. POST (Sept. 24, 2017), [https://www.washingtonpost.com/world/national-security/lawyers-trumps-free-speech-shows-contempt-for-free-speech/2017/09/24/2a6c31c2-a140-11e7-ade1-76d061d56efa\\_story.html?utm\\_term=.cc6579ca551d](https://www.washingtonpost.com/world/national-security/lawyers-trumps-free-speech-shows-contempt-for-free-speech/2017/09/24/2a6c31c2-a140-11e7-ade1-76d061d56efa_story.html?utm_term=.cc6579ca551d) [<https://perma.cc/9BTV-HVWJ>] ("[E]veryone involved in this has First Amendment Rights, including the [P]resident.").

170. See Russomanno, *supra* note 125, at 183–84 ("According to Vincent Blasi, Brandeis' trust in people 'and giving them opportunities to assume responsibility is an under-appreciated way to summon their best efforts, a source of "power" far greater than top-down decision-making, even in the quest to make us safe.").

171. Samuelsohn, *supra* note 146.

172. *Id.*

173. Complaint for Declaratory, Injunctive, & Mandamus Relief, *supra* note 4, at 3–4. Additionally, because the President's Twitter is the best source for information to the workings of the Administration, it would indicate that the tweets are integral to public records preservation. See *id.* at 22 (outlining how President Trump has used his personal Twitter account "to tweet his views, commentary, and official actions to the American public").

guidelines of the Executive Office of the President (EOP), the courts do in fact have the ability and discretionary power to review the EOP's proper compliance with records preservation.<sup>174</sup>

b. Blocking<sup>175</sup>

One month after CREW filed its lawsuit against the EOP,<sup>176</sup> the Knight First Amendment Institute filed a complaint disputing the constitutionality of President Trump's blocking of private citizens from viewing and interacting with his personal Twitter account.<sup>177</sup> When President Trump blocks an individual from his public account, he is effectively removing them from a public forum of expression—or at the very least, shutting down dialogue which he solicits through the open use of the Twitter platform.<sup>178</sup> As more and more people use social media to access and engage their communities and government,<sup>179</sup> the importance of protecting open discourse becomes tantamount.<sup>180</sup> The federal courts have already recognized that the blocking of individuals from limited public forums, such as Facebook or Twitter, created for the purposes of public engagement and discourse was a violation of First Amendment rights.<sup>181</sup>

---

174. *See* *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1290 (D.C. Cir. 1993) (“[T]he court may review the EOP guidelines for the limited purpose of ensuring that they do not encompass within their operational definition of presidential records materials properly subject to the FOIA.”).

175. The subject of blocking is provided here to highlight the issues surrounding President Trump's use of Twitter. The impact blocking has on the records laws is minimal and will be addressed merely in passing.

176. Complaint for Declaratory, Injunctive, & Mandamus Relief, *supra* note 4, at 1.

177. Complaint for Declaratory & Injunctive Relief, *supra* note 4, at 1.

178. *See id.* at 2–3 (“Because of their criticism of the President, these Plaintiffs have been prevented or impeded from viewing the President's tweets, from replying to the tweets, from viewing the discussions associated with the tweets, and from participating in those discussions.”); Kristian Porter, *BLOCKED: When You Can't View the President's Tweets*, NORTHERNER (Sept. 25, 2017), <https://www.thenortherner.com/news/2017/09/25/blocked-when-you-cant-view-the-presidents-tweets/> [<https://perma.cc/D7RZ-9WWN>] (providing an example of a Twitter user who was blocked from following President Trump's tweets after openly disagreeing with a policy decision).

179. *See* Complaint for Declaratory & Injunctive Relief, *supra* note 4, at 2 (noting President Trump's Twitter handle has more than 33 million followers).

180. *See* *Davison v. Loudoun Cty. Bd. of Supervisors*, 227 F. Supp. 3d 605, 611 (E.D. Va. 2017) (“That Court has repeatedly affirmed the First Amendment significance of social media, holding that speech utilizing Facebook is subject to the same First Amendment protections as any other speech.” (citing *Liverman v. City of Petersburg*, 844 F.3d 400, 410 (4th Cir. 2016); *Bland v. Roberts*, 730 F.3d 368, 385–86 (4th Cir. 2013))).

181. *See id.* (observing circuit court decisions where the court held social media is afforded First Amendment protections identical to other forms of speech).



## 2. Proposed Application of the PRA to Social Media

When it comes to President Trump's personal use of Twitter (or any social media), the only governing authority comes from the PRA.<sup>182</sup> As a general rule, the PRA requires that:

[T]he President shall take all such steps as may be necessary to 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 pursuant to the requirements of this section and other provisions of law.<sup>183</sup>

As the complexity of the way records are generated evolves in close conjunction with modern technology, it is necessary that steps are put into place for the PRA to address this issue.<sup>184</sup> As issues continue to surface regarding private internal messaging in the White House, the use of social media must also be addressed due to the sensitivity of the information conveyed.<sup>185</sup> Today, if President Trump deletes an electronic Twitter record, there are two possible ways in which it is preserved—either the White House adheres to their directives by properly preserving all tweets (even those deleted), or the tweets are preserved by private third parties.<sup>186</sup>

Third parties may be preserving this information, but the government should ensure that they address the need themselves for the purposes of complying with the PRA or solicit the help from third-party websites in the

---

182. *See* *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (noting the PRA governs the preservation of presidential communications).

183. Presidential Records Act, 44 U.S.C. § 2203(a) (Supp. IV 2016).

184. *See* *Complaint for Declaratory, Injunctive, & Mandamus Relief*, *supra* note 4, at 2 (citing the reasons the plaintiff brought forth its complaint).

185. This is partly due to President Trump's distrust of the news media coupled with the necessity for the public to be well informed of the President's activities. This, in conjunction with reports that President Trump compelled internal staff to sign non-disclosure agreements and reports of electronic document purging, further emphasizes the drastic need for the PRA to address the necessity of adequate records preservation for the twenty-first century and repercussions for failure of compliance. *See id.* at 14, 21 (listing the ways President Trump and his staff have allegedly violated the PRA).

186. Currently, there is a large "Trump Twitter Archive" and a collection of tweets (even those that have been deleted) from President Trump's Twitter. TRUMP TWITTER ARCHIVE, <http://www.trumptwitterarchive.com/> [<https://perma.cc/3GMR-DSF4>].

way the Obama Administration did.<sup>187</sup> This could be akin to placing a bandage on a mortal wound; however, even the Obama Administration saw the need to solicit help despite the fact that the amount of social media used was significantly smaller.<sup>188</sup>

The best effort so far at addressing this issue was the COVFEFE Act of 2017. The Act simply applies the term “social media” to the preserved material and includes a clear definition of the communication considered.<sup>189</sup> The distinction that should be made here—not necessarily in the statutory language but rather through legislative interpretation—is one which safeguards and reaffirms the EOP’s First Amendment and privilege rights. Furthermore, a comprehensive preservation method moving forward for social media would ensure that First Amendment rights—of both the President and the public—are preserved.<sup>190</sup>

### 3. Application of the FRA and FOIA to Social Media

Though the FRA may not apply to the President, it applies to “records generated by those . . . [in] the Executive Office of the President that have statutory responsibilities other than advising and assisting the President.”<sup>191</sup> Ensuring that changes made to the PRA are also applied to the FRA would

187. See Schulman, *supra* note 2 (discussing how President Obama’s social media postings were preserved).

188. See *id.* (noting how the archiving of President Obama’s social media posts was an unprecedented task and predicting that the manner of preservation may evolve in the future).

189. See Communications over Various Feeds Electronically for Engagement Act of 2017, H.R. 2884, 115th Cong. (2017) (“The term ‘social media’ means any form of electronic communication (such as a website for social networking and microblogging) through which users create an online community to share information, ideas, personal messages, and other content (such as videos).”).

190. For example, preservation of social media ensures that President Trump is free to exercise his First Amendment right to speak through Twitter but also preserves the public’s right to know what was said in accordance with the PRA. Compare Memorandum of Law in Support of Motion for Summary Judgment at 23, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17-cv-05205), 2017 WL 9533183 (advocating for the position that blocking does not violate First Amendment rights), with *Russomanno*, *supra* note 125, at 184–85 (discussing how allowing then-candidate Donald Trump to freely speak his mind on social media is in line with free speech doctrine).

191. Defendants’ Memorandum of Points & Authorities in Support of Motion to Dismiss at 5, *Citizens for Responsibility & Ethics in Wash. v. Trump*, 302 F. Supp. 3d 127 (D.D.C. 2018) (No. 1:17-cv-01228), 2017 WL 7542570; see also *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (noting “the President’s immediate personal staff . . . whose sole function is to advise and assist the President” are not included within the definition of the Act (quoting H.R. REP. NO. 93–1380, at 15 (1974) (Conf. Rep.))).

provide direction should the use of social media become more prevalent amongst other federal agencies.<sup>192</sup> More attention to the power of social media is not a new concept to be stressed to federal agencies.<sup>193</sup> Agencies have used and engaged the public in positive ways—some even to the point of reaching high public praise and opinion.<sup>194</sup> Despite the prevalence social media has seen over the years in federal agencies<sup>195</sup> and the guidelines set by NARA, there are still gaps to be addressed.<sup>196</sup> In January 2017, the Department of Transportation (DOT) placed a hold on their social media accounts (the second to do so at the time) without a specific reason

---

192. See Defendants' Memorandum of Points & Authorities in Support of Motion to Dismiss, *supra* note 191, at 5 (noting the purpose of the PRA was to protect those presidential records not under the purview of the FRA). Federal agencies have increasingly utilized social media to engage and discuss issues with the public. Justin Herman, *Social Media Metrics for Federal Agencies*, DIGITAL GOV (Apr. 19, 2013), <https://www.digitalgov.gov/2013/04/19/social-media-metrics-for-federal-agencies/> [<https://perma.cc/PF8K-P5TU>]; see also Matt Anthes, *Social Media As a Vital Engagement Platform for Government Outreach*, FORBES (Oct. 2, 2017, 7:30 AM), <https://www.forbes.com/sites/forbesagencycouncil/2017/10/02/social-media-as-a-vital-engagement-platform-for-government-outreach/#5e9a53f14b29> [<https://perma.cc/H7CM-HLLM>] (describing how the government uses social media to receive feedback from the public).

193. See Herman, *supra* note 192 (outlining the ways in which government agencies should engage and reach out to the public in line with government policies).

194. For example, the Transportation Security Administration (TSA) used their social media presence to engage and shift the public's opinion of them by using photos submitted to their Twitter or Instagram to answer questions about travel and imbue the agency with a more personable tone through the use of humor. See Claire Nowak, *TSA's Instagram Is the Best-Kept Secret on the Internet*, READER'S DIGEST, <https://www.rd.com/culture/tsa-instagram/> [<https://perma.cc/A88G-4W5L>] (praising TSA's use of their social media presence to gain popularity amongst the public by answering real questions in an engaging way); see also Ben Waldron, *3 Government Agencies Doing Innovative Things on Social*, SPRINKLR (Apr. 17, 2017), <https://blog.sprinklr.com/government-agencies-social-media-engagement/> [<https://perma.cc/BL7P-NQHM>] (providing examples of how the TSA gained public approval and even surpassed celebrity accounts amongst the most popular social media accounts).

195. See Herman, *supra* note 192 ("Agencies are using social media to share information and deliver service more quickly and effectively than ever before.")

196. For example, the Department of Homeland Security's (who oversees the TSA) social media comment policy specifically states that, while social media websites are covered as public forums and are used as methods of engagement, responses and comments on the website are not preserved by the agency or Department. *DHS Moderation/Comment Policy*, DEP'T HOMELAND SECURITY (Oct. 14, 2015), <https://www.dhs.gov/comment-policy> [<https://perma.cc/H996-H7S2>].

stated.<sup>197</sup> This led to speculation regarding the Administration's (particularly, the President's) policies on social media.<sup>198</sup>

When not properly addressed, social media records may fall into the bureaucratic sandpit that has plagued FOIA requests.<sup>199</sup> Because the very nature of the FOIA is to promote government transparency,<sup>200</sup> ensuring that social media records are entirely preserved and cataloged is pivotal to the purpose of the FOIA. If agencies continue to use shared drives as a means of preserving electronic records (and include social media posts and interactions), the potential headaches from the vastness of social media records could be alleviated for the future.<sup>201</sup> The United States is not alone in recognizing the seemingly arduous task of addressing the large amount of social media records and the difficulty of finding ways to preserve and provide those records to the public.<sup>202</sup> The United Kingdom unveiled a strategy for addressing such issues in March 2017 wherein they laid the foundation for improving the methods of preservation, as well as those for researching and accessing those records.<sup>203</sup>

---

197. Lauren Gardner, *DOT Reins in Social Media Postings After Interior Blackout*, POLITICO (Jan. 23, 2017, 5:39 PM), <https://www.politico.com/story/2017/01/transportation-department-social-media-on-hold-234044> [<https://perma.cc/6DDV-CW55>].

198. *See id.* (suggesting the Trump Administration was responsible for restricting federal agency use of Twitter after several unfavorable posts were made regarding President Trump's policies).

199. *See* *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 145–47 (2d Cir. 2010) (discussing the difficulty news organization Bloomberg had in obtaining information from the Federal Reserve).

200. *See* Levine, *supra* note 88, at 1697–98 (“FOIA, enacted in 1966 as a result of increased interest in allowing investigative journalism, is designed to force disclosure and ‘permit access to official information long shielded unnecessarily from public view’ by permitting any citizen or business to request information from the federal government by making a FOIA request.” (footnotes omitted) (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973), *superseded by statute*, Act of Nov. 21, 1974, Pub. L. No. 93–502, 88 Stat. 1561, *as recognized in* *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978))).

201. *See* GEOFFREY H. WOLD, STATE & LOCAL GOVERNMENT SERIES: TECHNOLOGY PLANNING & MANAGEMENT § 27.03(3)(g) (Judith Ryser ed., 2017) (“The social media working group should apply the definition of an agency record to social media content and identify what constitutes a complete record, including the content, context, structure, and necessary metadata.”).

202. *See* *Digital Strategy*, NAT'L ARCHIVES (Mar. 2017), <https://www.nationalarchives.gov.uk/documents/the-national-archives-digital-strategy-2017-19.pdf> [<https://perma.cc/6K2B-K4UZ>] (“Users rely on digital services like Discovery to explore our catalogue and catalogues held by other archives, the UK Government Web Archive to access archived government websites and legislation.gov.uk to read the law.”).

203. *See id.* (outlining a three-year strategy by the British government to address the issue of records preservation).

A similar plan could be implemented with regard to the FOIA to bring it into the twenty-first century. The FOIA should be redeveloped to account for the growth and use of social media akin to the new National Archives plan implemented by the United Kingdom. The FOIA could be centralized and could comprehensively digitize records over the coming years.<sup>204</sup> With the exponentially increasing amount of records requests that plague the FOIA coupled with the growth of social media, it would be helpful to adopt an approach similar to the National Aeronautics and Space Administration's (NASA's) data portals.<sup>205</sup> NASA's data portals are collections of public information containing datasets for developers, open source code, application programming interfaces (APIs), and even access to medical journal archives from NASA-funded research.<sup>206</sup> This effort by a governmental entity highlights the efficiency and well-executed manner in which records could be organized and made available to the general public.

## VI. CONCLUSION

Records preservation is something so tied to the fundamentals of liberty that it must not be ignored as technology has made seemingly insurmountable leaps in the way in which records are created. Coupled with the continued ways in which politicians and government officials access, utilize, and introduce new technologies into the government, an even greater need stems awareness. While political divisiveness may befall one Administration or another, we can discover solutions from the criticisms and bring balance to competing concerns. Learning from the political climates and gaffes that gave rise to the FRA, PRA, and FOIA provides the basis by which we can look to the future. Through assessing the apprehension of presidents toward utilizing new technologies and the presidents who perhaps over-embrace, we can synthesize methods for preserving records as they are created while still ensuring respect for presidential rights.

---

204. *See id.* (laying the foundation for how the British National Archives would create new systems for records preservation).

205. NASA'S OPEN DATA PORTAL, <https://data.nasa.gov/> [<https://perma.cc/N8AG-55RG>]. The British National Archives recognized the method utilized by NASA in using cloud providers to encompass their data records and provide them free to the public in a searchable format. *See id.* ("We should investigate cloud search technologies and other benefits we can gain through using commodity cloud based services.")

206. *See id.* (listing the various features of NASA's data portal).

As the world continues to change with the Trump Administration, we can look past the politically-driven rhetoric and resolve that our methods for records preservation are not adequate for the times in which we live. Both federal and presidential records law must specifically account for social media in all aspects and provide clear direction for preservation. The methods by which we catalog, maintain, and offer the information must evolve alongside our increasingly digital world. This method should properly and efficiently allow the public to see and hear how their government is conducting itself. Only through this will the public be able to ensure that the government maintains itself in an open and honest way for the benefit of the people.