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Presidential Tweets and Self-Destructing Messages Under the Records Laws: The New Normal

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At noon on January 20, 2017, Donald J. Trump was sworn in as President. Within the hour, the first of what has become many hundreds of tweets was posted from @realDonaldTrump. In the first six months of his Administration, the President, through use of both his official @POTUS and personal @realDonaldTrump Twitter accounts, has seen fit to address virtually every political controversy making the news, including commenting on judicial opinions striking down his two versions of a travel ban, as well as allegations of his campaign staff's ''collusion'' with the Russian government. He also has seen fit to comment on visits with foreign leaders, pending legislation and Administration policies, from both Twitter accounts. At the same time, he has crafted many dozens of tweets that contain his personal views of perceived adversaries in politics and the media, from Hillary Clinton to ''fake news'' CNN and the ''failing'' New York Times.

Whether or not one finds the President's use of Twitter to be ''refreshing'' or ''dangerous,'' the President's use of this form of 21st century bully pulpit is presenting novel legal issues. Journalists, historians and archivists find this growing public diary to be ''invaluable—chronological, recurrent, instantly archived and intensely revealing.'' See Michael Kruse, ''*I Found Trump's Diary —Hiding in Plain Sight*,'' *Politico* (June 25, 2017).

But are all of the President's tweets presidential records to be permanently preserved by the National Archives? What is the record status of deleted tweets? And does the President have the right to block citizen responses to his tweets that express contrary viewpoints? Aside from tweets, what is the legal status of other forms of communications (apart from e-mail) apparently being used by White House personnel on non-commercial platforms and apps, including ones that by their own terms self-delete? The use of these new technologies and communications platforms represent both a recordkeeping challenge and a new legal frontier of sorts, as they have generated at least two lawsuits to date. They also have implications for the pri-

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vate sector when viewed in a larger information governance context.

The Presidential Records Act

The Presidential Records Act of 1978 (PRA), 44 U.S.C. § 2201 *et seq*., enacted in the wake of Watergate, established legal ownership of all future Presidents' and Vice Presidents' presidential records, beginning with the presidency of Ronald Reagan. (A special statute had been previously enacted to take legal ownership of Richard Nixon's records, including the infamous Watergate tapes. See 44 U.S.C. § 2201 note.) Under the PRA, the President is to ''take all such steps as may be necessary to assure that the activities, deliberations, decisions and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records . . . .'' 44 U.S.C. § 2203(a). Accordingly, records created or received by the President and his immediate staff reflecting the President's constitutional, statutory or ceremonial duties are presidential records. These may include records sent or received internally and not intended for immediate public dissemination, as well as records created online and available to all. Excluded from the definition of presidential records are ''personal records,'' constituting records ''of a purely private or nonpublic character'' unrelated to official duties. 44 U.S.C. § 2201(3). The personal record category includes records of ''private political associations.'' *Id.*

Once a President leaves office, presidential records are to be transferred to the Archivist of the United States for permanent preservation at the National Archives and Records Administration (NARA). 44 U.S.C. § 2203(g). The PRA gives the President the right to dispose of Presidential records during his term in office where the records ''no longer have administrative, historical, information, or evidentiary value,'' but only after notifying both the Archivist and the appropriate congressional committee of his intent to carry out disposal. 44 U.S.C. § § 2203(c), (d). For example, in recent Administrations, e-mail communications received in a White House public mailbox have been authorized for destruction pursuant to § 2203(c).

Although the enactors of the PRA did not anticipate tweets or other forms of social media apps, the statute does provide for ''documentary materials'' otherwise within the scope of the PRA to include ''electronic or mechanical recordations.'' 44 U.S.C. § 2201(1). However, in a pair of landmark decisions out of the D.C. Circuit in the 1990s, members of the judiciary had no trouble deciding that the PRA embraces e-mail communications. See *Armstrong v. Bush,* 924 F.2d 282 (D.C. Cir. 1991) (*Armstrong I*); *Armstrong v. Executive Office of the President* (*Armstrong II*), 1 F.3d 1274 (D.C. Cir. 1993). In general, the *content* rather than the *format* of communications is what decides presidential record status.

Nor should it matter whether the President chooses to use a private Twitter account he set up in 2009 (@realDonaldTrump), or his official @POTUS account (which was set up under President Obama and presumably will remain in place for the current President's successors in office to also use). Consistent with this reading, the Archivist recently stated that he gave President Trump advice to preserve all tweets posted in the course of his official duties, including deleted tweets. See correspondence from Archivist David Ferriero to Ranking Senators Claire McCaskill and Tom Carper on the Senate Committee on Homeland Security and Governmental Affairs, Mar. 30, 2017.

Indeed, the Presidential Records Act and Federal Records Act Amendments of 2014 expressly anticipated the use of electronic messaging from commercial accounts to send official records, where Congress added two provisions applying to the President, see 44 U.S.C. § 2109 (''Disclosure requirement for official business conducted using non-official electronic messaging accounts'') and to the Executive branch generally, 44 USC § 2911 (same title). Fairly interpreted, under § 2109 the President and his aides may use commercial services, including various kinds of smartphone apps, for official messaging so long as they contemporaneously copy or transfer the messages to an official electronic messaging account within 20 days. [A side note: These statutory provisions were passed after Secretary of State Hillary Clinton left office, although, in the view of some, any Executive branch official in the first Obama Administration who failed in a timely way (i.e., before they exited government), to make sure his or her e-mails on a private server relating to government business would be transferred into agency custody, acted inconsistently with their record keeping obligations under then-existing NARA regulations. See Testimony of Jason R. Baron to the Senate Judiciary Committee, May 1, 2015 (citing 36 C.F.R. 1236.22, unchanged since 2009).]

It follows that use by the President and his staff of the newest forms of communications that reasonably constitute documentary materials in electronic form relating to the President's official duties should be considered presidential records. If the allegations made in a new federal lawsuit are true, this would include use by the current President's staff of such state-of-the-art applications as ''What's App,'' ''Signal'' (also known as ''Open Whisper Systems Private Messaging,'' an encrypted peer-to-peer messaging application), and the ''Confide'' smartphone messaging app, all of which have the capacity to self-destruct after a set period of time. See Complaint in *Citizens for Responsibility and Ethics in Washington et al. v. The Hon. Donald J. Trump and the Executive Office of the President* (*CREW v. Trump*), No. 1:17-cv-01228 (S.D.N.Y. filed June 22, 2017).

Among other things, the complaint in *CREW v. Trump* alleges that the President's and his staff's use of Twitter from a private account (@realDonaldTrump), especially in light of the ability of the President to delete tweets at will, has blurred the line on what are official records, and otherwise displays insufficient attention to his recordkeeping obligations under the PRA. CREW takes the position that the President's pervasive, public use of @realDonaldTrump renders *all* communications posted on that forum official records. Additionally, the complaint alleges that presidential staff are using communications platforms that allow for ''self-deletion,'' while failing to put into place any archiving scheme responsible for the capture of such messages (either by automated means or by staff copying messages manually, as contemplated under 44 U.S.C. 2109). For these reasons and many others, the suit seeks declaratory relief that the President and his staff are out of compliance with their obligations under the PRA.

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Presidential Discretion The new lawsuit raises a host of novel and interesting legal questions that have only been partially dealt with under existing precedent. *Who* gets to decide whether a given communication is ''personal'' or ''presidential'' in nature, so as to fall within the scope of the PRA? Apart from record ''creation,'' what other types of recordkeeping decisions are within the President's sole ambit to make? Which are properly subject to judicial review (in other words, a court's second guessing) of what a President decides? And does a third party (e.g., a public interest group) have standing to enforce the PRA in terms of how particular presidential record communications are managed or archived before they get deleted (either by automatic self-destruction or by manual deletion on a staffer's part)?

In *Armstrong I*, the D.C. Circuit held that a President's decisions with respect to how e-mail records would be preserved (i.e., whether they can be preserved only in hard-copy, or must be preserved in electronic form with complete header information about senders and recipients), was a matter for the President to decide, and therefore nonjusticiable. 982 F.2d at 290-91. As summarized by a court in a later lawsuit involving the record status of Vice President Cheney's records:

> The [Armstrong I] Court reviewed the statutory and legislative history of the PRA and found that it balanced two competing goals. On the one hand, 'Congress sought to establish the public ownership of presidential records and ensure the preservation of presidential records for public access after the termination of a President's term in office.' *Id.* at 290 (citing H.R. Rep. No. 95-1487, 95th Cong., 2d Sess. 2 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5732, 5733). On the other hand, Congress sought to 'minimize outside interference with the day-to-day-operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President's term in office.' *Id.* Accordingly, the PRA requires the President to 'maintain records documenting the policies, activities, and decisions of his administration,' but leaves in his hands the 'implementation of such a requirement.' *Id.* The Court therefore reversed the lower court's decision that the plaintiffs could challenge the President's 'recordkeeping practices and decisions' because such judicial review 'would upset the intricate statutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns.' *Id.* at 290-91. In reaching this decision, the Court emphasized that Congress 'presumably relied on the fact that subsequent Presidents would honor their statutory obligations to keep a complete record of their administrations.' *Id.* at 290.

Citizens for Responsibility & Ethics in Washington v. Cheney, 593 F.Supp.2d 194, 213 (D.D.C. 2008). As the *Armstrong* case involved a challenge to the entirety of the EOP's email record keeping practices, the *Armstrong I* court remanded for the district court to focus solely on whether federal agencies within the EOP (e.g., the Office of Management and Budget), were complying with their Federal Record Act obligations under 44 U.S.C. Chs. 21, 29, 31 & 33. This was not the last word however, as the issue on later appeal involved whether e-mail records of the National Security Council were governed by the Presidential Records Act or the Federal Records Act (*Armstrong II*). The Cheney court went on to characterize *Armstrong II* as:

> [a]cknowledg[ing] that *Armstrong I* limits the scope of judicial review under the PRA, but explain[ing] that review was *not* precluded entirely. *Id.* at 1293 ('[t]he *Armstrong I* opinion does *not* stand for the unequivocal proposition that all decisions made pursuant to the PRA are immune from judicial review'). To the contrary, 'courts are accorded the power to review guidelines outlining what is, and what is not, a ''presidential record'' under the terms of the PRA. The PRA does not bestow on the President the power to assert sweeping authority over whatever materials he chooses to designate as presidential records without any possibility of judicial review.' *Id.* The Court explained that *Armstrong I* concerned only the 'creation, management, and disposal decisions' of the President, and *not* 'the initial classification of existing materials.' *Id.*

593 F.Supp.2d at 214 (italics in original). The *Armstrong II* court itself held that:

> A 'creation' decision refers to the determination to *make* a record documenting presidential activities. Thus, the court may not review any decisions regarding *whether to create* a documentary presidential record. 'Management decisions' describes the day-to-day process by which presidential records are maintained. The courts may likewise not review these particulars of the presidential records management system. Finally, 'disposal decisions' describes the process outlined in 44 U.S.C. 2203(c)-(e) for disposing of presidential records. Judicial review of the President's actions under these provisions is also unavailable. *But guidelines describing which existing materials will be treated as presidential records in the first place are subject to judicial review*.

1 F.3d at 1294. The case was remanded to the district court to make further findings on the status of NSC's records, after which the case was appealed a third time. See *Armstrong v. EOP*, 90 F.3d 553 (D.C. Cir. 1996) (Armstrong III), *cert. denied*, 117 S. Ct. 1842 (1997) (holding that the NSC's records were covered solely under the PRA).

Accordingly, in *CREW v. Trump*, a court essentially will be faced with deciding whether *Armstrong I* or *Armstrong II* is the more applicable precedent with respect to at least a portion of the claims at issue in the Complaint. Do plaintiffs have standing to ''interfere'' with a President's decision not to treat all tweets from a private account as presidential records? Do plaintiffs have standing to demand that a President's deleted tweets be restored as presidential records? If the Administration takes the position that certain forms of communications are ''presidential records'' unworthy of permanent preservation, without formal invocation of 44 U.S.C. 2203, may a court issue a declaratory judgment that the President is acting arbitrarily and capriciously in ignoring Congress' statutory scheme for disposition of presidential records? If White House counsel reads 44 U.S.C. 2109 narrowly, to exclude apps like ''Confide'' within its use of the term ''electronic messaging,'' resulting in White House staff not being required to copy or transfer presidential records to an official electronic account before individual communications self-destruct, is that decision reviewable? What if White House counsel issues an opinion stating that, as a practical matter, not all smartphone apps that result in automatically deleted messages may be copied or transferred to an official recordkeeping system given the state of the White House's archiving capabilities? Is that a kind of management decision that courts should not be second-guessing? If the court reaches the merits, it will make new law on some or all of these issues.

Complicating matters further, in a second lawsuit (filed in the same district court), a public interest group at Columbia University has sued the President alleging that by blocking responses from citizens to tweets emanating from the @realDonaldTrump Twitter account,

the President has acted unconstitutionally in violation of the First Amendment. Complaint, *Knight First Amendment Institute at Columbia University et al. v. Donald J. Trump, et al.*, No. 1:17-cv-05205 (S.D.N.Y.). Plaintiffs argue that notwithstanding Twitter's status as a private entity, the fact that the President is a government official means that blocking citizen's responses to his pronouncements is the equivalent of prohibiting their speech (in the form of petitioning the government), and that he is therefore engaged in an improper form of government viewpoint-based censorship. In making this argument, plaintiffs will have to convince the court that the @realDonaldTrump Twitter feed constitutes a ''designated public forum'' under First Amendment precedent. They are bolstered in making this argument by the President's Press Secretary, Sean Spicer, who asserted that the President's tweets are ''official statements'' of the President.

In representing the White House in court, Department of Justice lawyers will have to reconcile their positions in the two lawsuits on the issue of whether and to what extent tweets from @realDonaldTrump are or are not ''presidential records.'' For purposes of *CREW v. Trump*, the government would be expected to argue that a President has discretion to consider a portion of his tweets to be ''personal'' in nature, and that a lawsuit challenging the decisions he makes in that regard, including deletion (as well as the decisions of his staff with respect to allowing communications on smartphone apps to be deleted), are controlled by *Armstrong I* and thus are nonjusticiable. However, DOJ will presumably also take the position (or be forced to concede) that a substantial number of the President's tweets @realDonaldTrump do constitute government records appropriate for permanent preservation.

On the other hand, in the *Knight First Amendment Institute* case, any stipulation or concession by the government that a substantial amount of ''presidential records'' exist on @realDonaldTrump arguably undermines the position that the President's private Twitter account does not amount to governmental speech. In the end, resolution of the First Amendment case may end up depending on whether the court chooses to focus on the forest or the trees – in other words, whether it will focus on the Twitter platform in its entirety across millions of users, or on the President's use of his own individual account through the tweets he has chosen to create.

Information Governance As fascinating as the unique aspects of federal recordkeeping laws might be, these cases also raise information governance issues that have direct applicability to private sector institutions. Increasingly, companies find themselves empowering their employees to use online applications for the purpose of creating a more efficient workplace. In doing so, however, companies lose some measure of control of the decisions made by staff. For example, instead of storing company documents on a known company server, an employee might choose to use Dropbox or Box or Google Documents. Or instead of communicating on an e-mail platform that is archived, an employee may choose to discuss company business on any number of smartphone and online applications that are not controlled by the company's IT staff. These uses of online technology constitute the ''shadow IT'' environment. Jason R. Baron & Amy R. Marcos, *Beyond BYOD: What lies in the shadows*, Ethical Boardroom (Summer 2015).

Shadow IT apps unquestionably empower employees to use their creative skills in the workplace, and to communicate more effectively in companies with a global footprint. And yet, the emerging, pervasive use of such apps and platforms poses some measure of increased risk -- especially when a company faces obligations to preserve relevant evidence for litigation, audits, or investigations of various kinds. Indeed, unlike in the Federal context, there is no legal obligation requiring that electronic messages about company business be copied or transferred to a company server.

The lesson for institutions both private and public is that better guidance, training, and most importantly, strategic thinking need to be employed, especially given the rapid pace of change in technology. The legal controversies surrounding the record status of Presidential tweets and self-destructing messages only serve to highlight the need for better information governance in all workplaces.

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