NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY
VOLUME 23, ISSUE 1: OCTOBER 2021

EPHEMERAL MESSAGING APPLICATIONS AND THE PRESIDENCY: HOW TO KEEP THE PRESIDENT FROM BLOCKING THE SUNSHINE

Caroline Madison Pope*

Since the creation of Snapchat in 2011, many Americans regularly communicate via ephemeral messaging applications. While novel forms of communication technology—such as e-mails or text messages—have historically created complex record retention problems, ephemeral messaging applications are different because these applications delete messages by default. Thus, this deliberately ephemeral communication model presents unique challenges when used by a sitting United States President because the Presidential Records Act, which mandates record retention, leaves citizens powerless to prevent the President from destroying Presidential Records. This Article presents two potential solutions to this "Presidential-sized" problem. First, Congress could create a private right of action for citizens to challenge the President's use of ephemeral messaging applications to prevent the loss of important government records. Alternatively, since the government owns Presidential records, a President's use of ephemeral messaging applications could be treated as the destruction of government property.

* J.D. Candidate, University of North Carolina School of Law, 2022. The author would like to thank the NC JOLT editors and staff, particularly, Alessandra Carlton, Anna Comer, Meredith Doswell, Amy Jones, Sarah Kirschbaum, Gabby Supak, Andy Tabeling, and Jasmine Washington for their assistance and attention to detail throughout the editorial process. The author would also like to thank Professor Rick Su for his guidance, feedback, and overall support. Finally, she would like to thank her family and friends—especially her mother and grandparents—that served as a sounding board for her ideas and encouraged her along the way.

TABLE OF CONTENTS

I. INTRODUCTION

Imagine a President sitting in the Oval Office while a fire burns in the fireplace. That afternoon, the President receives a letter from a foreign leader concerning a critical trade deal. After reading the letter, what if the President ripped the letter into pieces and threw the scraps in the fire? Similarly, imagine a President using their personal e-mail address to communicate about government business. What if the President subsequently deleted all work-related e-mails from that personal e-mail account? Finally, imagine a President requiring their staff to discard, delete, or destroy any messages the staff received from the President about official business. What if the President's staff did, in fact, destroy those messages? Even more, what if an application automatically deleted those messages as soon as a staff member read them? In other words, what if the President and the President's staff used ephemeral messaging applications, i.e., applications that deliberately delete messages shortly after the recipient reads the messages,[1] to communicate?

Whether a sitting President is permitted to burn, delete, or destroy official documents is not a difficult legal question—the answer is technically no.[2] However, the more difficult question is: If a President chooses to destroy official communications, what can citizens do to stop the President? Unfortunately, right now, the answer is not much.[3]

Record preservation is a longstanding legal duty that arises in several contexts. For example, the common law "duty to preserve" requires parties to refrain from destroying evidence related to

---

[1] PC MAG, DEFINITION OF EPHEMERAL MESSAGE APP, https://www.pcmag.com/encyclopedia/term/ephemeral-message-app [https://perma.cc/M3P4-SC93] (defining an ephemeral messaging app as "[a] messaging application that causes the sent message or video to disappear in the recipient's device after a short duration").

[2] *See* 44 U.S.C. § 2203(e).

[3] *See* Armstrong v. Exec. Off. of the President, Off. of Admin. (*Armstrong II*), 1 F.3d 1274, 1293 (D.C. Cir. 1993) (citing Armstrong v. Bush (*Armstrong I*), 924 F.2d 282, 290 (D.C. Cir. 1991)) ("*[D]isposal* decisions under the PRA *are* unreviewable.").

reasonably foreseeable litigation.[4] This duty stems from the presumption that, if a party resorts to destroying evidence, the evidence must have been harmful to the party who destroyed it.[5]

Similarly, most government officials and agencies are statutorily required to preserve certain records because accessing those materials allows the public to hold elected officials accountable.[6] For example, those government records may be used to satisfy federal Freedom of Information Act ("FOIA") requests, which allow citizens to compel federal agencies to release specific documents.[7] States have enacted their own public records statutes, sometimes

---

[4] *See* Thomas Y. Allman, *Dealing with Prejudice: How Amended Rule 37(e) Has Refocused ESI Spoliation Measures*, 26 RICH. J.L. & TECH. 1, 11–15 (2020) (explaining how this common law duty to preserve is reflected in Rule 37(e) of the Federal Rules of Civil Procedure, which imposes sanctions on any party who "acted with the intent to deprive another party of the information's use"); *see also* FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment. The advisory committee's note explains that Rule 37(e) is based on the common-law duty to preserve and "does not attempt to create a new duty to preserve." *Id.*

[5] *See* Robert Keeling, *Sometimes, Old Rules Know Best: Returning to Common Law Conceptions of the Duty to Preserve in the Digital Information Age*, 67 CATH. U. L. REV. 67, 68–69 (2018) ("Intentional destruction of material evidence once litigation commenced (or was imminent) might give rise to an inference that the evidence was adverse to the interest of the party who destroyed it."); *see also* Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 24 (Tex. 2014) (explaining that, since ephemeral messages are destroyed directly after being sent, a party's use of them may be considered "intentional spoliation" and includes "the concept of willful blindness, 'which encompasses the scenario in which a party does not directly destroy evidence[,] . . . but nonetheless 'allows for its destruction.'"); Mark Rosman et al., *Retaining Ephemeral Messages to Prepare for DOJ Scrutiny*, LAW360, 2 (July 29, 2019, 2:10 PM), https://www.wsgr.com/publications/|PDFSearch/law360-0719.pdf [https://perma.cc/352U-HV7J] ("Some judges may view the mere use of ephemeral messaging apps—because of their temporary nature—as a factor demonstrating an individual's attempt to purposefully conceal unlawful communications.").

[6] *See* Michael Morisy, *Requester's Voice: Nate Jones*, MUCKROCK (Feb. 19, 2016), https://www.muckrock.com/news/archives/2016/feb/19/requesters-voice-nate-jones/ [https://perma.cc/GU9L-FA5X] (explaining that, although the FOIA is not perfect, the statute "gives the public a fighting chance to force the government to give information [the government] wants to keep secret").

[7] 5 U.S.C. § 552.

nicknaming them "sunshine laws,"[8] because these statutes exist "to ensure an informed citizenry vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[9] While these statutes and common law principles have never perfectly prevented material evidence from being destroyed, they emphasize the importance of record retention by deterring document destruction and incentivizing parties to reasonably preserve relevant evidence.[10]

Despite the importance of record preservation, all three branches of government have historically struggled to determine how new communication technology fits within the current "duty to preserve" framework.[11] Ephemeral messaging applications are no exception, yet these apps pose a unique threat to the preservation of documents subject to the Presidential Records Act because, unlike e-mails and text messages, communications sent via ephemeral messaging apps

---

[8] *State Sunshine Laws*, BALLOTPEDIA, https://ballotpedia.org/State_sunshine_laws [https://perma.cc/W8CP-2TBE] (last visited Oct. 11, 2021).

[9] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

[10] *See, e.g.*, WeRide Corp. v. Huang, No. 5:18-cv-07233-EJD 2020 WL 1967209, *9, *11 (N.D. Cal., Apr. 24, 2020) (imposing FED. R. CIV. P. 37(e) sanctions against defendants for failing to preserve Electronically Stored Information ("ESI") given the "staggering" amount of spoliation).

[11] *See e.g.*, Daxton R. Stewart, *Killer Apps: Vanishing Messages, Encrypted Communications, and Challenges to Freedom of Information Laws When Public Officials "Go Dark"*, 10 CASE W. RSRV. J.L. TECH. & INTERNET 1, 3 (2019) (explaining that government officials' use of ephemeral messaging applications is "not the first time a new digital communication technology has created a challenge for government record-keeping and accessibility under open records laws"). The Department of Justice ("DOJ") has similarly struggled with how to handle ephemeral messaging applications. Jamila M. Hall & Jason S. Varnado, *DOJ Loosens Prohibition on "Ephemeral Communications"; SEC Does Not*, Jones Day (Mar. 2019), https://www.jonesday.com/en/insights/2019/03/doj-loosens [https://perma.cc/68UT-AWGM]. In 2017, the DOJ prohibited the use of ephemeral messaging applications for any party that intended to seek Foreign Corrupt Practices Act ("FCPA") remediation credit. *Id.* However, in 2019, the DOJ reversed its policy and now requires any company seeking FCPA leniency to implement "appropriate guidance and controls" on the use of ephemeral messaging services that could "undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or legal obligations." *Id.*

cannot be retrieved.[12] Notably, Congress's failure to update these laws has rendered courts powerless to stop the destruction of government communications when the President and the President's staff use ephemeral messaging applications.[13]

This Article presents two potential solutions to this "Presidential-sized" problem. First, Congress could create a private right of action for citizens to challenge a government official's use of ephemeral messaging applications to better prevent the loss of important government records. Alternatively, since the government owns Presidential records,[14] a President's use of ephemeral messaging applications could be treated as the destruction of government property.

This Article proceeds in five parts. Part II explains that the Presidential Records Act, the Freedom of Information Act, and the Federal Records Act are separate, although sometimes overlapping, spheres with distinct rules governing the retention, preservation, access, and disclosure of executive branch records. Part III defines ephemeral messaging applications and describes how the use of

---

[12] Matthew J. Hamilton & Donna L. Fisher, *Ironically, Disappearing Message Apps Are Here to Stay*, NAT'L L. REV. (July 23, 2020), https://www.natlawreview.com/article/ironically-disappearing-message-apps-are-here-to-stay [https://perma.cc/RX6U-A629]; *see also* EXTERRO ET AL., JUDGES SURVEY 2020, 3 (2020) https://www.exterro.com/2020-judges-survey-ediscovery [https://perma.cc/KG3U-F9SQ] (enter personal information; then click "download this report now") ("68% of judges feel ephemeral apps (Snapchat, Instagram, etc.) represent the biggest future e-discovery risk."); James B. Comey, Dir., Fed. Bureau of Investigation, *Going Dark: Are Technology, Privacy, and Public Safety on a Collision Course?* (Oct. 16, 2014), https://www.fbi.gov/news/speeches/going-dark-are-technology-privacy-and-public-safety-on-a-collision-course [https://perma.cc/CDC5-RRYL] ("We are struggling to keep up with changing technology and to maintain our ability to actually collect the communications we are authorized to intercept.").

[13] Citizens for Resp. & Ethics in Wash. (CREW) v. Cheney, 593 F. Supp. 2d 194, 198–99. (D.D.C. 2009) (explaining that "Congress limited the scope of judicial review and provided little oversight authority for the President and Vice President's document preservation decisions," thus, if there are "any deficiencies in—or unintended consequences of—the PRA, that is an issue for Congress to consider").

[14] MEGHAN M. STUESSY, CONG. RSCH. SERV., R46129, THE PRESIDENTIAL RECORDS ACT: AN OVERVIEW 5 (2019), https://fas.org/sgp/crs/secrecy/R46129.pdf [https://perma.cc/3TKS-QLED].

these applications likely impacts the conservation of "Presidential records," given that Congress granted the President more deference[15] than federal agencies[16] when drafting the Presidential Records Act. Part IV highlights the inadequacies of the Presidential Records Act by analyzing a recent legal battle regarding President Trump's use of ephemeral messaging applications. Part V illustrates why the Presidential Records Act does not adequately preserve Presidential records, thereby frustrating the Act's purpose. Finally, Part VI presents two potential solutions, as mentioned above, to prevent a President from blocking the "sunshine" by using ephemeral messaging applications.

II. THE STATUTES GOVERNING FEDERAL RECORDS

Three separate Acts govern the retention, preservation, access, and disclosure of records created by the executive branch: (1) the Presidential Records Act ("PRA"),[17] (2) the Federal Records Act ("FRA"),[18] and (3) the Freedom of Information Act ("FOIA").[19] Put simply, whether the PRA or the FRA applies to a record depends on who created the record. "Agency records" are governed by the FRA

---

[15] Armstrong v. Bush (*Armstrong I*), 924 F.2d 282, 290 (D.C. Cir. 1991) ("[T]he PRA is one of the rare statutes that does impliedly preclude judicial review."); *CREW*, 593 F. Supp. 2d at 198 ("The PRA incorporates an assumption made by Congress (in 1978) that subsequent Presidents and Vice Presidents would comply with the Act in good faith, and therefore, Congress limited the scope of judicial review and provided little oversight authority for the President and Vice President's document preservation decisions.").

[16] David S. Ferriero, *NARA's Role Under the Presidential Records Act and the Federal Records Act*, 49 PROLOGUE MAG., Summer 2017, https://www.archives.gov/publications/prologue/2017/summer/archivist-pra-fra [https://perma.cc/2P23-TRES] ("Under the PRA, NARA does not have direct oversight authority over the White House records program, as it does over federal agencies under the FRA.").

[17] Presidential Records Act, 44 U.S.C. §§ 2201–09.

[18] The FRA encompasses several statutes: Archival Administration, 44 U.S.C. §§ 2101–20; Records Management by the Archivist of the United States and by the Administrator of General Services, *Id.* §§ 2901–09; Records Management by Federal Agencies, *Id.* §§ 3101–07 (1988); Disposal of Records, *Id.* §§ 3301–14. Jessica de Perio Wittman, *A Trend You Can't Ignore: Social Media as Government Records and Its Impact on the Interpretation of the Law*, 31 ALB. L.J. SCI. & TECH. 53, 71 n.77 (2021).

[19] 5 U.S.C. § 552.

while "Presidential records" are governed by the PRA; therefore, no federal record may simultaneously fall within both categories.[20] Although the PRA and the FRA apply to different government records, both Acts are strikingly similar because both require record retention and preservation.[21] Essentially, the PRA and the FRA prevent the President and federal agencies from tossing official records in the trash. The FOIA, on the other hand, mandates an entirely different type of executive branch action: the FOIA requires the federal government to disclose information.[22] Because the duties outlined in each of these three Acts are closely related, understanding the nuances of these Acts and how they each interact with one another is essential.

A. The Retention and Preservation of Agency Records Under the Federal Records Act

The FRA broadly defines "records" to include "all recorded information…made or received by a Federal agency under Federal law or in connection with the transaction of public business."[23] When determining whether something should constitute an agency record, the focus is on the content contained in the material, "regardless of form or characteristics."[24] If the material reflects the

---

[20] Armstrong v. Exec. Off. of the President (*Armstrong III*), 90 F.3d 553, 556 (D.C. Cir. 1996) (explaining that "no record is subject to both the FRA and PRA").

[21] James D. Lewis, *White House Electronic Mail and Federal Recordkeeping Law: Press "D" to Delete History*, 93 MICH. L. REV. 794, 799 (1995) ("On the one hand, the government must manage information, which includes the creation, retention, and disposal of records in order to carry out and document government activities; the FRA and the PRA regulate these information management practices. On the other hand, the government must also disclose information to the public; the FOIA regulates this duty to disclose.").

[22] Joshua Jacobson, *The Secretary's Emails: The Intersection of Transparency, Security, and Technology*, 68 FLA. L. REV. 1441, 1447–51 (2016).

[23] 44 U.S.C. § 3301(a)(1)(A). Notably, the definitions of both Presidential and federal records were expanded in 2014 to better encompass the various types of electronic records produced by rapidly changing technology. STUESSY, *supra* note 14, at 2.

[24] 44 U.S.C. § 3301(a)(1)(A); STUESSY, *supra* note 14, at 2 ("As a result of the Presidential and Federal Records Act Amendments of 2014, all government records (both Presidential and federal) are assessed for preservation not by the

"organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government" or contains "informational value," the material is a record under the FRA.[25]

The FRA imposes several other obligations on federal agencies. For example, federal agencies must "make and preserve" records[26] and "establish safeguards against the removal or loss of records."[27] Additionally, the Archivist (the Presidential appointee in charge of the National Archives and Records Administration[28]) must "promulgate standards, procedures, and guidelines with respect to records management"[29] and "conduct inspections or surveys of the records and the records management programs and practices."[30] Notably, if the head of a federal agency or the Archivist becomes aware of "any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records,"[31] then the Archivist must help the head of the agency recover the records by "assist[ing] the head of the agency in initiating action through the Attorney General for the recovery of records unlawfully removed and for other redress provided by law."[32]

B. The Access and Disclosure of Agency Records Under the Freedom of Information Act

The FRA and the FOIA work hand-in-hand to govern when federal agencies must retain and disclose records to the public. While the FRA and the FOIA impose independent requirements, possessing or controlling a federal record is quite obviously a

---

media used to store the information but rather by the content of the information itself.").

[25] 44 U.S.C. § 3301(a)(1)(A).

[26] *Id.* § 3101.

[27] *Id.* § 3105.

[28] *Id.* § 2103(a).

[29] *Id.* § 2904(c)(1).

[30] *Id.* § 2904(c)(7).

[31] *Id.* § 2905(a).

[32] *Id.*; Lewis, *supra* note 21, at 802 n.53 (citing 44 U.S.C. § 2905(a) (1988) (archivist duties) and 44 U.S.C. § 3106 (1988) (agency head duties)) ("The FRA does not specify the range of actions the Attorney General may pursue after being notified of the unlawful removal or destruction of records, but the FRA clearly contemplates that the Attorney General may file a lawsuit.").

prerequisite for an agency to actually fulfill its disclosure duties under the FOIA.[33] Put simply, the FOIA only works if agencies are retaining records, as required under the FRA, to subsequently respond to any FOIA requests.[34] For example, if an agency fails to preserve certain records and thus deprives the public of the unlawfully discarded information, an agency only violates the FRA in such a scenario—not the FOIA; if no record is available to satisfy a FOIA request, the agency is not unlawfully withholding any records and is thereby acting in accordance with the FOIA.[35] Further, the FOIA never requires an agency to create documents in response to a FOIA request because the FRA alone governs the *creation* and retention of agency records.[36]

Notably, the FOIA does not give the public the right to access every document an agency creates.[37] The FOIA has nine exceptions that allow agencies to avoid disclosing certain records.[38] For example, some records may be kept secret in the "interest of national defense or foreign policy."[39] If a requester receives an "adverse determination" (i.e., access to the requested records has been

---

[33] Lewis, *supra* note 21, at 799 ("Though separate statutes govern these management [duties under the FRA] and disclosure duties [under the FOIA], the duties themselves are clearly interrelated: a duty to disclose a particular type of information is meaningless without a corresponding duty to retain the information in the first place.").

[34] *See* Jacobson, *supra* note 22, at 1451.

[35] *Id.*

[36] Wash. Post v. U.S. Dep't. of State, 632 F. Supp. 607, 661 (D.D.C. 1986).

[37] 5 U.S.C. § 552(b).

[38] *Id.* § 552(b).

[39] *Id.* § 552(b)(1). The other exceptions shield agency records from disclosure if the records are: (2) "related solely to the internal personnel rules and practices of an agency," (3) "specifically exempted from disclosure by statute" other than the FOIA, (4) "trade secrets and commercial or financial information obtained from a person and privileged or confidential," (5) "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency," (6) "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," (7) certain "records or information compiled for law enforcement purposes," (8) records relating to an agency responsible "responsible for the regulation or supervision of financial institutions," and (9) "geological and geophysical information and data, including maps, concerning wells." *Id.* § 552(b)(2)–(9).

denied), the requester has at least ninety days to appeal the decision to the head of the agency.[40] A requester may submit an appeal if they have a good reason to believe an agency either falsely claimed that the agency did not possess the requested records, unlawfully withheld certain records that were responsive to the request, or failed to adequately search for the records.[41]

C. The Retention and Preservation of Presidential Records Under the Presidential Records Act

The PRA requires the President to preserve any records concerning the President's "activities, deliberations, decisions, and policies" that "reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties."[42] Additionally, the President must implement "records management controls" and "take all such steps as may be necessary" to preserve and maintain any records the President creates.[43]

The PRA governs any "documentary material" that is "created or received by the President, the President's immediate staff," or any entity whose "function is to advise or assist the President."[44] While documentary material naturally includes documents and physical forms of communication, it also encompasses "other electronic or mechanical recordations, whether in analog, digital, or any other form."[45] For example, e-mails are considered Presidential records.[46]

---

[40] *Id.* § 552(a)(6)(A)(i)(III)(aa).

[41] *Filing a Department of the Interior FOIA Appeal,* U.S. DEP'T OF INTERIOR, https://www.doi.gov/foia/appeals [https://perma.cc/KS4T-CCRY] (providing a list of reasons why FOIA requesters may appeal the Department of the Interior's decision concerning a FOIA request, which are the same reasons requesters may appeal FOIA decisions from any federal agency).

[42] 44 U.S.C. § 2203(a).

[43] *Id.*

[44] *Id*. § 2201(2).

[45] *Id*. § 2201(1).

[46] *Id*. § 2911. These recently enacted e-mail retention protocols are specific and time sensitive. All e-mails must be retained, and any e-mail related to "official business" must be transferred to the government recording device within 20 days after the e-mail has been sent. *See also* CREW, *CREW Sues President Trump over Presidential Records* (June 22, 2017) https://www.citizensforethics.org/press-release/crew-sues-president-trump-presidential-records/ [https://perma.cc/NM3Y-MUK6].

Similarly, President Obama considered his tweets Presidential records and auto-archived all of his Twitter posts.[47] However, the PRA does not require the President to maintain or disclose "personal records,"[48] which are those documentary materials that are "purely private or nonpublic" and are not related to any of the President's official duties.[49] "[D]iaries, journals, or other personal notes" are personal records as long as the materials are "not prepared or utilized for, or circulated or communicated in the course of, transacting Government business."[50]

The President may only dispose of documentary materials if the records "no longer have administrative, historical, informational, or evidentiary value" and the President obtains approval from the Archivist.[51] If the President wishes to dispose of any Presidential documents, the President must (1) obtain a written copy of the Archivist's views concerning the disposal, and (2) verify that the Archivist does not intend to bring the matter before Congress.[52] The Archivist is authorized to seek advice from Committees in the House of Representatives and the Senate concerning the disposal of any record that "may be of special interest to Congress" or is "in the public interest."[53]

Accordingly, under the statute's plain language, the President is seemingly prohibited from unilaterally deciding to discard information without first ensuring that the public interest would not be thwarted. However, just because the President must ask for the Archivist's "views" before disposing of any records does not mean

---

[47] Rachel Treisman, *As President Trump Tweets and Deletes, The Historical Record Takes Shape*, NPR (Oct. 25, 2019, 9:17 AM) https://www.npr.org/2019/10/25/772325133/as-president-trump-tweets-and-deletes-the-historical-record-takes-shape [https://perma.cc/P4TV-X6EQ].

[48] 44 U.S.C. § 2201(3).

[49] *Id.* § 2201(3).

[50] *Id.*

[51] 44 U.S.C. § 2203(c). The Archivist is the head of the National Archives and Records Administration ("NARA"). STUESSY, *supra* note 14, at 2.

[52] 44 U.S.C. § 2203(c), (e).

[53] *Id.* § 2203(e). More specifically, before disposal, the Archivist must seek advice from the following congressional committees: the Committee on Rules and Administration, Governmental Affairs of the Senate, House Oversight, and Government Operations of the House of Representatives. *Id*.

the President must take the Archivist's advice.[54] Further, the PRA essentially relies on the honor system because, if a President chooses not to comply with the PRA, there is no enforcement mechanism to bring the President into compliance.[55]

D. The Public's Long Road to Accessing Presidential Records

The FOIA allows individuals to request records from an "agency,"[56] which does not include the President, the Office of the President, or any entity in close proximity to the President that lacks authority "independent from the President."[57] Thus, while a President is in office, the public cannot request any materials to verify that a President is indeed retaining Presidential records.[58]

Nevertheless, understanding the FOIA's relationship with the PRA is important for two reasons. First, at least one President has attempted to use the PRA to prevent agency documents from being

---

[54] 44 U.S.C. § 2203(c); *see also* Deb Riechmann, *Will Trump's Mishandling of Records Leave a Hole in History?*, AP NEWS (Jan. 16, 2021), https://apnews.com/article/donald-trump-technology-politics-vladimir-putin-russia-65748b70e3cf3f7eecffa265da9ccae7 [https://perma.cc/7QPV-G495] ("The Presidential Records Act states that a [P]resident cannot destroy records until he seeks the advice of the national archivist and notifies Congress. But the law doesn't require him to heed the archivist's advice. It doesn't prevent the [P]resident from going ahead and destroying records.").

[55] *See* Armstrong v. Exec. Off. of the President, Off. of Admin. (*Armstrong II*), 1 F.3d 1274, 1291–93 (D.C. Cir. 1993) (citing Armstrong v. Bush (*Armstrong I*), 924 F.2d 282, 290 (D.C. Cir. 1991)) (explaining that "*disposal* decisions under the PRA *are* unreviewable" and thus "neither the Archivist nor the Congress has the authority to veto the President's disposal decision").

[56] 5 U.S.C. § 551(1).

[57] Armstrong v. Exec. Off. of the President, Off. of Admin. (*Armstrong III*), 90 F.3d 553, 567 (D.C. Cir. 1996) (finding that the National Security Council is "more like 'the President's immediate personal staff' than it is like an agency exercising authority, independent of the President," and therefore is not an agency under the FOIA) (quoting Meyer v. Bush, 981 F.2d 1288, 1293 (D.C. Cir. 1993)).

[58] *Armstrong II*, 1 F.3d at 1292–93 ("Congress was 'keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations,' and thus 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 [P]residential records during the President's term of office.'") (quoting *Armstrong I*, 924 F.2d at 290).

released to the public via FOIA requests.[59] In *Armstrong II,*[60] the plaintiffs[61] argued the guidelines designating whether a "documentary material" constituted a Presidential record were drawn too broadly.[62] Those guidelines allowed every document received by certain agency officials to be shielded from the public.[63] The plaintiffs asserted that at least some of the records those agencies created should be governed by the FRA and thus immediately subject to FOIA requests.[64]

After reviewing the legislative history of the PRA, the *Armstrong II* court found that Congress intended for the PRA to only include those records that are *not* subject to the FOIA.[65] In other words, the FOIA's definition of whether a material constitutes an agency record trumps whether a material is a Presidential record

---

[59] *Id.* at 1294 (holding that several agencies' recordkeeping guidelines "violate the PRA to the extent that they classify as [P]residential records materials that would otherwise be subject to the FOIA"); *see also* Citizens for Resp. & Ethics in Wash. (CREW) v. Trump, 302 F. Supp. 3d 127, 135 (D.D.C. 2018) (citing *Armstrong II*, 1 F.3d at 1290) (explaining that the Executive Office of the President during the H. W. Bush Administration "issu[ed] guidelines that improperly instructed federal agencies to treat agency records as [P]residential records and thereby shield[ed] them from immediate release under FOIA").

[60] *Armstrong II*, 1 F.3d at 1274.

[61] The plaintiffs included Scott Armstrong, the National Security Archivist, and several other researchers and nonprofit organizations. *See* Citizens for Resp. & Ethics in Wash. v. Cheney, 593 F. Supp. 2d 194, 213 (D.D.C. 2009) ("The Armstrong line of cases began in 1989 when several individuals and organizations sought to prevent the destruction of materials created during the last two weeks of the Reagan Administration and stored on a National Security Archive computer system, alleging that the records had to be maintained pursuant to the Federal Records Act ("FRA") or the PRA.").

[62] *Armstrong II*, 1 F.3d at 1291–92.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 1294 (explaining that the PRA explicitly exempts any records subject to the FOIA from its reach, and the FOIA uses the Administrative Procedure Act's definition of "agency"); 44 U.S.C. § 2201(2)(B); 44 U.S.C. § 552(f); 5 U.S.C. § 551(1).

under the PRA.[66] Although the PRA precludes judicial review,[67] courts have an "indispensable role in ensuring proper government disclosure under the FOIA."[68] Therefore, it is essential that a President's designation of records does not become a "[P]residential *carte blanche* to shield materials from the reach of the FOIA" and judicial review.[69] If advising the President was not the agency official's "*sole* responsibility," at least some of the records the agency made and received were agency records, not Presidential ones.[70] Thus, the agency's decision to consider every record a "Presidential" one—effectively insulating the record from the public's reach for many years—was improper.[71]

Second, the PRA and the FOIA are interrelated because Presidential records may eventually become subject to FOIA requests, even though Presidential records are not subject to FOIA requests while the President is in office.[72] When enacting the PRA, Congress wanted to "minimize outside interference with the day-to-day-operations of the President and his closest advisors" and "ensure executive branch control over Presidential records during the President's term in office."[73] Thus, only after the President leaves office will all of the documentary materials created

---

[66] *Armstrong II*, 1 F.3d at 1292.

[67] *Id.* at 1292–93 ("Congress was 'keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations,' and thus 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 [P]residential records during the President's term of office.'") (quoting Armstrong v. Bush (*Armstrong I*), 924 F.2d 282, 290 (D.C. Cir. 1991)).

[68] *Id.* at 1292.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *See* DEP'T OF JUSTICE, *FOIA Update: FOIA Memo on White House Records* (Jan. 1, 1993), https://www.justice.gov/oip/blog/foia-update-foia-memo-white-house-records [https://perma.cc/E9HV-YCES] ("This means, among other things, that the parts of the Executive Office of the President that are known as the 'White House Office' are not subject to the FOIA; certain other parts of the Executive Office of the President are."); David Cohen, *FOIA in the Executive Office of the President*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 203, 206 (2018).

[73] *Armstrong I*, 924 F.2d at 290 (D.C. Cir. 1991).

throughout their term be turned over to the National Archives and Records Administration ("NARA").[74]

Additionally, even after a President leaves office and turns over their records to the NARA, private citizens must still wait years to access the records created throughout a President's term.[75] Generally, Presidential records are subject to FOIA requests five years after the Archivist has either obtained custody of the records or completely processed and organized the records (whichever date is earlier).[76] However, if the information contained in the record falls within certain exceptions,[77] public access may be restricted for up to twelve years.[78] These statutory restrictions mean that any records created during the initial months of a two-term President's eight years in office will be withheld from the public for thirteen to twenty years. Thus, a President may escape the political consequences for any failure to preserve Presidential records because that failure is undiscoverable until after a President has left office.[79]

---

[74] 44 U.S.C. § 2203(g) (2018); NATIONAL ARCHIVES, *Presidential Records Act*, https://www.archives.gov/presidential-libraries/laws/1978-act.html [https://perma.cc/PX6Z-BW6Z].

[75] 44 U.S.C. § 2204(a).

[76] *Id.* § 2204(b)(2).

[77] Before leaving office, the President may specify a duration, which is "not to exceed 12 years," during which access to certain Presidential records may be restricted. 44 U.S.C. § 2204(a). However, the record must be: (1) "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy," (2) related to "Federal office" appointments, (3) specifically exempted by another statute that "leaves no discretion on the issue" and "establishes particular criteria" or "types of material" to be withheld," (4) "trade secrets and commercial or financial information obtained from a person and privileged or confidential," (5) "confidential communications requesting or submitting advice, between the President and the President's advisers, or between such advisers," or (6) "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.*

[78] *Id.* § 2204(a).

[79] Armstrong v. Exec. Off. of the President, Off. of Admin. (*Armstrong III*), 90 F.3d 553, 556 (D.C. Cir. 1996) (explaining that (1) while both the PRA and the FRA require document retention and preservation, the procedures delineated in the FRA are more demanding, and (2) although agencies that fail to follow the FRA are subject to judicial review, the decisions of a President who fails to comply with the PRA is not reviewable by a court).

III. EPHEMERAL MESSAGING APPLICATIONS

Ephemeral messaging applications ("apps") present a unique threat to preserving Presidential records under the PRA for two reasons. First, because messages sent on ephemeral messaging apps erase themselves,[80] the President is deprived of any chance to obtain the Archivist's advice before disposing of ephemeral messages.[81] Second, the structure of the PRA insulates Presidential records from between five and twenty years after their creation, so the public cannot assess whether any information is missing until a substantial period of time has passed.[82] This gap between the creation of a Presidential record and its disclosure to the public is alarming considering the FOIA practices by federal agencies—which are monitored more closely than the President and granted less deference by courts.[83]

A. Ephemeral Messaging Apps: Defined and Explained

Ephemeral messaging apps are electronic platforms that allow users to send messages that "delete by default."[84] In other words, users can send messages, knowing the messages will be deleted shortly after the recipient views the message.[85] Some ephemeral messaging apps delete messages immediately after the recipient

---

[80] PC MAG., *supra* note 1.

[81] 44 U.S.C. § 2203(c), (e).

[82] *Id*. § 2204; *see supra* Part II.D (explaining the significant period of time between when a Presidential record is created and when it finally becomes subject to FOIA requests).

[83] Armstrong v. Exec. Off. of the President, Off. of Admin. (*Armstrong II)*, 1 F.3d 1274, 1292 (D.C. Cir. 1993) (citing Armstrong v. Bush (*Armstrong I*), 924 F.2d 282, 290 (D.C. Cir. 1991).

[84] Nathan C. Ranns, *Gone in A Snap?: The Effect of 17 U.S.C. § 102(a) Fixation Precedents on Ephemeral Messaging Platforms*, 45 AIPLA Q.J. 255, 256 (2017) (referencing statements made by Evan Spiegel, the CEO and co-founder of Snap, Inc., in Snapchat's initial public offering ("IPO") video about Snapchat's preference for a "delete by default" system).

[85] PC MAG., *supra* note 1.

opens them.[86] Other apps delete messages after a predefined period of time, ranging from several seconds to twenty-four hours.[87]

The ephemeral nature of these messages has given them a variety of nicknames, such as "vanishing messages"[88] or "self-destructing messages."[89] In a speech about how "data encryption" apps[90] shield law enforcement officers from accessing the information exchanged on encrypted apps, Former FBI Director James Comey termed the use of such specialized messaging apps as "going dark."[91] The decision to use ephemeral messaging apps is often called "going dark" because the information exchanged on ephemeral messaging platforms is difficult—if not impossible—for the government to

[86] Philip J. Favro & Keith A. Call, *A New Frontier in Ediscovery Ethics: Self-Destructing Messaging Applications*, UTAH B.J. (March/April 2018), at 40, https://www.utahbar.org/wp-content/uploads/2018/03/Mar_Apr_2018_FINAL.pdf [https://perma.cc/26A8-C8XJ].

[87] *Id.*

[88] Stewart, *supra* note 11, at 2.

[89] Favro & Call, *supra* note 86, at 40.

[90] *See* David Nield & Brian Turner, *Best Encrypted Instant Messaging Apps of 2021 for Android*, TECHRADAR (Jan. 13, 2021), https://www.techradar.com/best/best-encrypted-messaging-app-android [https://perma.cc/4VZ8-49EP] (explaining the basic functions of data encryption apps and listing five of the best encrypted messaging apps).

[91] Comey, *supra* note 12 ("[T]he law hasn't kept pace with technology, and this disconnect has created a significant public safety problem. We call it 'Going Dark,' and what it means is this: Those charged with protecting our people aren't always able to access the evidence we need to prosecute crime and prevent terrorism even with lawful authority."); *see also* Steven Nelson, *Comey: Encrypted Messaging Not Needed to Block Mass Surveillance*, U.S. NEWS (July 8, 2015, 4:41 PM), https://www.usnews.com/news/articles/2015/07/08/comey-encrypted-messaging-not-needed-to-block-mass-surveillance ("Sen. Mike Lee, R-Utah, suggested to Comey consumers are worried about someone without a warrant accessing their communications.").

obtain.[92] Further, several ephemeral messaging apps also provide data encryption capabilities, so the distinction is mainly semantic.[93]

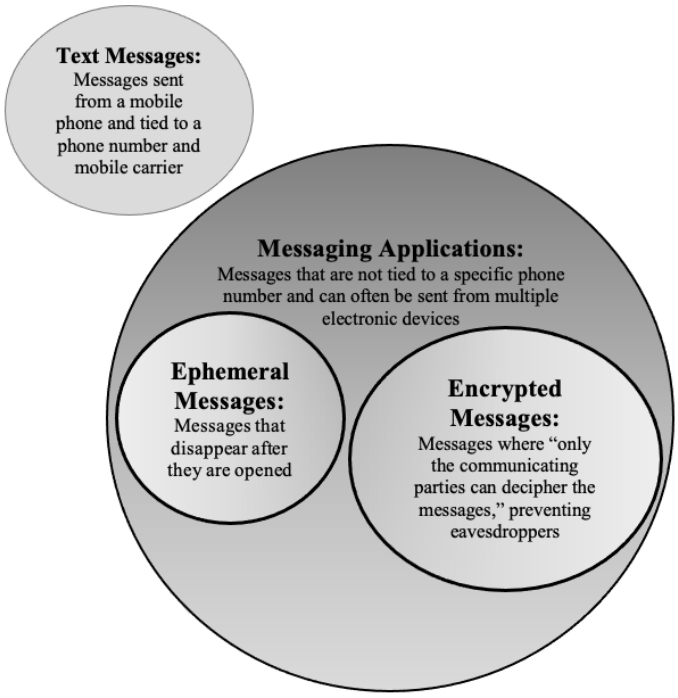

Figure 1.[94]

---

[92] Stewart, *supra* note 11, at 3. Stewart discusses how government employees "appear to be 'going dark' in their communications as part of their official jobs." *Id.* However, while government officials may have gone dark in the past, government officials' use of Snapchat and Confide, which are ephemeral messaging apps, present additional problems aside from the encryption itself. The use of such applications has the "potential to be deadly to public records laws, providing an easy way for government officials to dodge public scrutiny without any trace of their subversion." *Id.* at 3.

[93] *See* Nield & Turner, *supra* note 90 (including Signal, Whatsapp, and Telegram in its list of data encryption apps); *see also* William D. Semins et al., *The Compliance Risk Facing Companies that Use Chat Apps*, LAW360 (June 16, 2020), https://www.law360.com/articles/1282305/the-compliance-risks-facing-companies-that-use-chat-apps [https://perma.cc/B2TG-4SQP] ("Many of these applications—in addition to being ephemeral in nature—are end-to-end encrypted.").

[94] Sean Broderick, *Ephemeral Messaging Apps*, NAT'L LITIG. SUPPORT BLOG (Sep. 14, 2020), https://nlsblog.org/2020/09/14/ephemeral-messaging-apps/

Snapchat is perhaps the first ephemeral messaging app to gain widespread popularity.[95] Other examples of ephemeral messaging apps include: Confide,[96] Telegram, Hash, Signal,[97] Cover Me, Whatsapp, and Wickr.[98] Over time, the list of ephemeral messaging apps will likely continue to grow, as Snapchat's "deliberately

---

[https://perma.cc/C3L7-ASPT]. Short Message Service ("SMS") texts are the traditional form of text messages that utilize cellphone tower infrastructure and are not encrypted. Zak Doffman, *Why You Should Stop Sending SMS Messages—Even On Apple iMessage*, FORBES (Aug. 8, 2020, 7:20 AM), https://www.forbes.com/sites/zakdoffman/2020/08/08/apple-iphone-ipad-imessage-security-update-sms-rcs-google-whatsapp-encryption/?sh=6aea04de5b4d [https://perma.cc/J4KK-WBYT]. While messages sent using Apple's iMessage application are end-to-end encrypted, these messages are not the "ubiquitous," "plaintext short-form messages" that can be sent from traditional "un-smart" phones. *Id.* Further, iMessage occasionally reverts to sending SMS texts (which are not encrypted) when a data network is unavailable, or the message's recipient does not have an Apple device. *Id.* Phones utilizing an Android operating system are only encrypted on the front-end, meaning a message's content is encrypted between the device sending the message and the device's server, but not the recipient. *Id.*

[95] Brian O'Connell, *History of Snapchat: Timeline and Facts*, THE STREET (Feb. 28, 2020, 3:35 PM), https://www.thestreet.com/technology/history-of-snapchat [https://perma.cc/HM8Q-NLH2] (explaining that Snapchat first entered app stores in 2011 and, not even a decade later, is "one of the most widely used social media platforms in the world").

[96] Confide, https://getconfide.com/ [https://perma.cc/2DVW-88WA]. Confide markets itself as a company that protects the privacy of its users, promising a cloak of secrecy around any messages that are sent using its platform: "With encrypted, self-destructing, and screenshot-proof messages, Confide gives you the comfort of knowing that your private communication will now truly stay that way." *Id*.

[97] *See* Jordan McMahon, *Ditch All Those Other Messaging Apps: Here's Why You Should Use Signal*, WIRED (Nov. 5, 2017, 08:00 AM), https://www.wired.com/story/ditch-all-those-other-messaging-apps-heres-why-you-should-use-signal/ [https://perma.cc/C8LJ-M3LR] ("The thing that actually makes Signal superior is that it's easy to ensure that the contents of every chat remain private and unable to be read by anyone else.").

[98] *See* Thomas J. Kelly & Jason R. Baron, *The Rise of Ephemeral Messaging Apps in the Business World*, NAT'L L. REV. (Apr. 23, 2019), https://www.natlawreview.com/article/rise-ephemeral-messaging-apps-business-world [https://perma.cc/2DMZ-YXSN].

ephemeral" business model[99] has demonstrated the market's demand for these platforms and paved the way for similar applications to follow.[100] For instance, Facebook's Messenger and Instagram now mimic several of Snapchat's ephemeral messaging features to compete with Snapchat among younger demographics.[101]

The market demand for ephemeral messaging apps is not always nefariously motivated. One reason for the growing number of ephemeral messaging apps is the public's desire for privacy and general fear of an overly intrusive government.[102] Another reason is that ephemeral messaging apps save businesses from spending an

---

[99] *See* Felix Salmon, *How Snapchat Is Sending #MeToo Down the Memory Hole*, https://www.wired.com/story/snapchat-sending-metoo-down-the-memory-hole/ [https://perma.cc/VM7C-2P9W] (noting that "a growing subset of Snapchat-inspired messaging apps is deliberately ephemeral, with communications self-destructing after 24 hours or even immediately upon receipt").

[100] *Id. See also* Sean Broderick, *Ephemeral Messaging Apps,* NAT'L LITIG. SUPPORT BLOG (Sep. 14, 2020), https://nlsblog.org/2020/09/14/ephemeral-messaging-apps/ [https://perma.cc/C3L7-ASPT] ("Although these apps were initially only used by teenagers, they are now a ubiquitous part of corporate culture.").

[101] *See* Nick Statt, *Facebook's Vanish Mode on Messenger and Instagram Lets You Send Disappearing Messages*, THE VERGE, (Nov. 12, 2020, 2:00 PM), https://www.theverge.com/2020/11/12/21561286/facebook-vanish-mode-launch-instagram-messenger-disappearing-snapchat [https://perma.cc/D9Q9-P3ZM] ("While Snapchat popularized ephemeral messaging among US teens with Stories and its DM design, Facebook has since adopted many of its rival's features and implemented them throughout Messenger, Instagram, and WhatsApp for users of all age groups around the world.").

[102] *Id.* ("And while some people, *still*, might think it cool to live in a *Black Mirror* episode where all past communications can be called up and replayed at will, most of us, including *Black Mirror*'s creators, would consider such a service to be the chilling manifestation of a feared dystopian panopticon."); Nelson, *supra* note 91; *see* Mara Gay, *Messaging App Has Bipartisan Support Amid Hacking Concerns*, THE WALL ST. J. (Jan. 24, 2017), https://www.wsj.com/articles/messaging-app-has-bipartisan-support-amid-hacking-concerns-1485215028 [https://perma.cc/DE6L-2DRJ] ("[Signal, an ephemeral messaging] app is also popular among activist types seeking to avoid surveillance from government agencies or others who may be listening in.").

exorbitant amount of money storing unnecessary personal data, which only increases the risk of security breaches.[103]

B. Are Ephemeral Messages Presidential Records?

Ephemeral messages should be considered "documentary materials" under the existing legal framework found in the PRA for several reasons. First, whether or not documentary material falls within the PRA's purview depends on the content of the communication rather than the medium through which the communication was sent.[104] This shift was announced in the 2014 PRA amendments, which updated the PRA and the FRA to include new types of electronic communications.[105] Second, the PRA specifies that, along with papers and other written materials, "documentary material" includes "audio and visual records, or other electronic or mechanical recordations, whether in analog, digital, or any other form."[106] Given that ephemeral messages are communications via "electronic recordations"—or, at the very least, another "form" of electronic recordations—ephemeral messages easily fall within such an expansive definition. Lastly, dicta in a recent court ruling, opining that a President's use of such messages "*would almost certainly run afoul* of the Presidential Records Act," suggests that ephemeral messaging apps fall under the scope of the

---

[103] *See* William Semins et al., *The Compliance Risk Facing Companies that Use Chat Apps*, LAW360 (June 16, 2020) https://www.law360.com/articles/1282305/the-compliance-risks-facing-companies-that-use-chat-apps [https://perma.cc/B2TG-4SQP].

[104] Jeremy Gordon, *What Rules Apply to Government Records During a Presidential Transition?*, LAWFARE (Dec. 9, 2020, 10:22 AM), https://www.lawfareblog.com/what-rules-apply-government-records-during-presidential-transition [https://perma.cc/8P3H-3Z7A]; *see* WENDY GINSBERG, CONG. RSCH. SERV., R40238, THE PRESIDENTIAL RECORDS ACT: BACKGROUND AND RECENT ISSUES FOR CONGRESS 5 (2014), https://fas.org/sgp/crs/secrecy/R40238.pdf [https://perma.cc/3NXG-BASW] ("Federal statute would seem to suggest that the sender and content of the message created on an electronic messaging account would determine whether the message qualified as a [P]residential record.").

[105] *Id.* at 102.

[106] 44 U.S.C. § 2201(1).

PRA.[107] In short, as long as the content of an ephemeral message is related to the President's "constitutional, statutory, or other official or ceremonial duties,"[108] the message will almost certainly be considered a Presidential record under the PRA.[109]

C. The Ephemeral Messaging App Problem

Congress has expressed doubt over whether federal agencies are complying with FOIA requests,[110] and reports have indicated that noncompliance is getting worse.[111] According to an Associated Press article analyzing FOIA request data, the federal government "censored, withheld[,] or said it couldn't find records" more times in the first eight months of President Trump's term than at any point in the prior decade.[112] More generally, the government responded with censored files or, worse, nothing at all in 78% of all FOIA requests submitted in the last ten years.[113] For requests where the government declined to hand over any records, the government

---

[107] Citizens for Resp. & Ethics in Wash. ("CREW") v. Trump, 302 F. Supp. 3d 127, 129 (D.D.C. 2018), *aff'd*, 924 F.3d 602 (D.C. Cir. 2019) (emphasis added). The plaintiffs also alleged that Trump violated the Take Care Clause of the Constitution. *Id.* at 129.

[108] 44 U.S.C. § 2201(3).

[109] *CREW*, 302 F. Supp. 3d at 129.

[110] *See* Lauren Harper, *Rep. Chaffetz Tells Fed FOIA Head Melanie Pustay that She Lives in "La-La-Land" if She Thinks FOIA is Working Properly, and Much More*, UNREDACTED (June 14, 2015), https://unredacted.com/2015/06/04/rep-chaffetz-tells-fed-foia-head-melanie-pustay-that-she-lives-in-la-la-land-if-she-thinks-foia-is-working-properly-and-much-more-frinformsum-642015/ [https://perma.cc/FZQ5-L9AT]. In 2015, the House Committee on Oversight and Government Reform held a hearing called "Ensuring Transparency through the Freedom of Information Act." *Id.* During that hearing, Chairman Jason Chaffetz informed the DOJ's Office of Information Policy Director, Melanie Pustay, that Pustay had to be "living in la-la-land" if Pustay seriously believed the FOIA was properly administered. *Id.*

[111] Ted Bridis, *US Sets New Record for Censoring, Withholding Gov't Files*, AP NEWS (Mar. 12, 2018), https://apnews.com/714791d91d7944e49a284a51fab65b85/US-sets-new-record-for-censoring,-withholding-gov%27t-files [https://perma.cc/US5H-EUH2].

[112] *Id.*

[113] *Id.*

reportedly could not find any records for slightly more than half of those requests.[114]

Nevertheless, as Nate Jones, the Director of the FOIA Project for the National Security Archive, explains, the "government is actually pretty good about [proactively] giving information out that it wants to."[115] While Jones' point is a positive one, the corollary is that the government may be slow to disclose information detrimental to the government or may never disclose the information at all.[116] For example, in mid-2018 the Environmental Protection Agency ("EPA") had a ten-year backlog of FOIA requests.[117] The information eventually obtained from those FOIA requests produced some of the "most damning allegations" against Scott Pruitt, the EPA Administrator who later resigned amid a scandal.[118] Thus, agencies may intentionally slow down their responses to certain FOIA requests to avoid political backlash.

Generally, an agency's decision to deny FOIA requests or withhold a large number of records is alarming given the typical outcomes of FOIA appeals.[119] When FOIA requesters appeal an

---

[114] *Id.* Questions often arise about whether the government made an honest or reasonable effort when searching for a FOIA request or if government officials simply glanced around the room. *See* JPat Brown, *FOIA FAQ: What to Do When an Agency Claims Not to Have Records You Know it Has*, MUCKROCK (Sept. 6, 2018), https://www.muckrock.com/news/archives/2018/sep/06/foia-faq-nrd-wtf/ [https://perma.cc/HHB6-QXKT].

[115] Michael Morisy, *Requester's Voice: Nate Jones*, MUCKROCK (Feb. 19, 2016), https://www.muckrock.com/news/archives/2016/feb/19/requesters-voice-nate-jones/ [https://perma.cc/MM2A-X8TH] (emphasis added).

[116] Ellen Knickmeyer, *The Latest: Scrutiny of 'Politically Charged' FOIA Requests*, AP NEWS (July 13, 2018), https://apnews.com/5011ec08abf1403cb31dc616f12ef595/The-Latest:-Scrutiny-of-%27politically-charged%27-FOIA-requests [https://perma.cc/5QDM-YVXY].

[117] *Id.*

[118] *Id.* (detailing how the EPA assigns "politically charged" FOIA requests for special review and the EPA's subsequent denial of intentionally slowing down its response to such requests).

[119] *Federal Government Sets New Record for Censoring, Withholding Files Under FOIA*, CBS NEWS (Mar. 12, 2018, 2:40 PM), https://www.cbsnews.com/news/foia-federal-government-sets-new-record-for-censoring-withholding-files-trump-administration/ [https://perma.cc/Y3RK-GEZ4].

agency's decision, more than one-third of those appeals reveal that the government improperly tried to withhold information.[120] However, only 4.3% of FOIA requesters file an appeal when the government responds with redacted material or withholds documents under one of the FOIA's nine exceptions.[121] If the trends demonstrated by this data hold true for the entire population of FOIA requesters, the government fails to disclose information for approximately one out of every three FOIA requests.

While the problems outlined above involve FOIA requests and therefore focus on agency behavior, these issues highlight an important theme: the government generally favors nondisclosure.[122] This governmental tendency to hide information is especially concerning when questions arise regarding the President's compliance with the PRA, as Congress gave the President greater leniency and more deference than federal agencies when drafting the PRA.[123] For instance, while courts have an active role "in ensuring proper government disclosure under the FOIA,"[124] "*disposal* decisions under the PRA *are* unreviewable."[125] Further, unlike the FRA, "[n]either the Archivist nor an agency head can initiate any action through the Attorney General to effect recovery or ensure preservation of [P]residential records" if records are being

---

[120] *Id.*

[121] *See id.*

[122] *See* Nick Schwellenbach & Sean Moulton, *The "Most Abused" Freedom of Information Act Exemption Still Needs to Be Reined In*, POGO (Feb. 6, 2020), https://www.pogo.org/analysis/2020/02/the-most-abused-foia-exemption-still-needs-to-be-reined-in/ [https://perma.cc/C2SM-XRCH].

[123] Armstrong v. Exec. Off. of the President, Off. of Admin. (*Armstrong II*), 1 F.3d 1274, 1292 (D.C. Cir. 1993) (citing Armstrong v. Bush (*Armstrong I*), 924 F.2d 282, 290 (D.C. Cir. 1991) ("Congress was 'keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations,' and thus 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 [P]residential records during the President's term of office.'"); Armstrong v. Exec. Off. of the President (*Armstrong III*), 90 F.3d 553, 556 (D.C. Cir. 1996).

[124] *Armstrong II*, 1 F.3d at 1292.

[125] *Id.* at 1293 (citing *Armstrong I*, 924 F.2d at 290).

destroyed.[126] Thus, at present, neither the courts nor American citizens can prevent a President from destroying Presidential records.[127]

This problem is aggravated by the amount of time that passes before the public realizes what information is missing. Suppose the public wants to access certain Presidential records to investigate one of the President's recent decisions. Unfortunately, the public must wait a minimum of five years after the President leaves office for that information to become subject to a FOIA request.[128] Then, the public has to wait an additional, unknown period of time for the Archivist or the appropriate Presidential Library[129] to process and respond to the request.[130] On the other hand, agency records are subject to FOIA requests immediately after agency records are created, although requesting individuals must similarly wait for the agency to respond to their inquiry.[131]

---

[126] *Id.* at 1291 (comparing the disposal protocols under the PRA with the actions agency heads and the Archivist can take to "seek legal action through the Attorney General to recover or preserve the records" that are being destroyed, described in 44 U.S.C. § 3106 and § 2905(a)).

[127] *See id.* at 1293 (citing *Armstrong I*, 924 F.2d at 290).

[128] 44 U.S.C. § 2204(b)(2).

[129] *Access to Presidential Records* (Jan. 22, 2021), DIGIT. MEDIA L. PROJECT, https://www.dmlp.org/legal-guide/access-presidential-records [https://perma.cc/SKM5-3ZQH].

[130] *Good News and Bad News on FOIA Responsiveness*, THE FOIA PROJECT (Jan. 26, 2016), http://foiaproject.org/2016/01/26/good-news-and-bad-news-on-foia-responsiveness/ [https://perma.cc/G3TK-5ATK] (highlighting the general wait times for different government agencies); JPat Brown, *What Ever Happened to that State Department FOIA from Hell?*, MUCKROCK (Nov. 28, 2018), https://www.muckrock.com/news/archives/2018/nov/28/what-ever-happened-state-department-foia-hell/ [https://perma.cc/35VR-SXDH] (explaining how one of their writers waited four and a half years for a two-page FOIA response).

[131] While some agency records are excluded from the FOIA (such as information related to an ongoing criminal investigation), no limitations exist regarding when an individual may request agency records once records are created. 5 U.S.C. § 552; *see also* FOIA.GOV, (last visited Apr. 12, 2021), https://www.foia.gov/faq.html [https://perma.cc/J5GJ-33SA].

The use of ephemeral messaging apps further exacerbates these problems.[132] Ephemeral messaging apps destroy information as soon as the information is received or shortly thereafter,[133] thereby denying the public of the possibility to ever request those records.[134] Recognizing the threat that ephemeral messaging apps pose, the NARA published a bulletin titled "Guidance on Managing Electronic Messages," including Snapchat and WhatsApp on the list of electronic messaging apps subject to the FRA.[135] Even though these apps are more likely to "contain transitory information or information of value for a much shorter period of time," agencies are still required to "capture and manage these records."[136] While

---

[132] *See* GINSBERG, *supra* note 104, at 1 ("Presidents from both major political parties have faced questions and concerns about their abilities to maintain accurate, comprehensive, and accessible archives, especially considering their increasing use of electronic—and perhaps ephemeral—platforms like e-mail, Facebook, Twitter, blogs, and YouTube."); *see also* Complaint at 2, Citizens for Resp. and Ethics in Wash. ("CREW") v. Trump, 302 F. Supp. 3d 127 (D.D.C. 2018) (No. 17 Civ. 01228), https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/06/22122345/Complaint.pdf [https://perma.cc/XCW8-3TMJ] [hereinafter CREW v. Trump Complaint] ("Critical checks and balances are built into our system of government, including those implemented through congressional and judicial oversight. The ability of those checks and balances to work depends on the availability of a record of President Trump's actions.").

[133] PC MAG., *supra* note 1.

[134] *See* CREW v. Trump Complaint, *supra* note 132, at 18–23; *see also* Jordan Libowitz, *CREW and American Oversight Request Trump Stop Destroying Presidential Records*, CITIZENS FOR ETHICS (June 14, 2018), https://www.citizensforethics.org/press-release/crew-and-american-oversight-request-trump-stop-destroying-presidential-records/ [https://perma.cc/4HYW-DGPP] ("Trump's practice of ripping up records isn't just bizarre. It's representative of the [P]resident's complete failure to grasp what it means to be a public servant . . . The [P]resident's counsel and staff need to put an immediate end to Trump's paper-tearing habit before we lose any more irreplaceable historical records.").

[135] NARA, BULL. 2015-02 *Guidance on Managing Electronic Messages*, (July 29, 2015), https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html [https://perma.cc/8HJB-LCVL].

[136] *Id.* Enforcing a blanket prohibition against the use of all forms of ephemeral messaging applications is too difficult to implement and ignores the ways employees communicate. *Id.* Thus, the NARA suggested several options for

this bulletin only applies to federal agencies, it demonstrates that ephemeral messaging apps are inherently different than other forms of communication and should be addressed independently in a Presidential records policy.[137]

Finally, Presidents have recently been incentivized to use ephemeral messaging apps. Indeed, news reports reveal that prominent political leaders have used ephemeral messaging apps, including President Obama, President Trump, and Secretary of State Hillary Clinton.[138] One of President Obama's senior aides explained in an interview that "everybody learned the lessons of the Clinton campaign when it came to communicating about sensitive issues over e-mail," demonstrating politicians' general fear of their internal conversations being revealed to the public.[139] According to the Wall Street Journal, Democrats and Republicans have at least one thing in common: a "singular goal to avoid a repeat of the WikiLeaks scandal."[140]

---

addressing the challenges in capturing the data from electronic messages, such as training employees on how to identify and capture records. *Id.* Additionally, agencies can "[c]onfigure electronic messaging systems to allow for automated capture of electronic messages and metadata" or "[u]se third-party services to capture messages." *Id.*

[137] The bulletin's indented audience is the "Heads of Federal Agencies," not the President. *Id.* Additionally, as discussed, the FRA does not apply to the President.

[138] Gay, *supra* note 102; *see also* Kaveh Waddell, *The Risks of Sending Secret Messages in the White House*, THE ATLANTIC (Feb. 15, 2017), https://www.theatlantic.com/technology/archive/2017/02/white-house-secret-messages/516792/ [https://perma.cc/VM9T-4G54]; Maya Kosoff, *White House Staffers Are Using a Secret App to Speak Freely*, VANITY FAIR (Feb. 27, 2017), http://www.vanityfair.com/news/2017/02/white-house-staffers-are-using-a-secret-chat-app-to-speak-freely [https://perma.cc/8Z6D-7G3M].

[139] Gay, *supra* note 102.

[140] *Id.*; WikiLeaks, "a whistleblowing platform founded by Julian Assange," was created to distribute "classified documents and data sets from anonymous sources and leakers." Before the 2016 Presidential election, over 20,000 pages of e-mails from Hillary Clinton's campaign chair and the Democratic National Convention were leaked. Francis Whittaker, *What Is WikiLeaks? Everything You Need to Know*, NBC NEWS (Apr. 30, 2018, 10:24 AM), https://www.nbcnews.com/storyline/smart-facts/what-wikileaks-everything-you-need-know-n869556 [https://perma.cc/GB9S-5THH]; Jeff Stein, *What 20,000 Pages of Hacked WikiLeaks Emails Teach Us About Hillary Clinton*, VOX (Oct.

IV. THE ROLE OF COURTS IN OVERSEEING A PRESIDENT'S USE OF NEW COMMUNICATION TECHNOLOGY

In 2017, media reports revealed that President Trump might not have complied with the PRA.[141] Allegedly, White House staff continuously used ephemeral messaging applications to communicate, regardless of whether the messages related to official White House business or the President's official duties.[142] The White House neither confirmed nor denied that President Trump or any of his staff used ephemeral apps to communicate yet firmly insisted the White House's policies complied with the PRA.[143]

In response to these news reports, Citizens for Responsibility and Ethics in Washington ("CREW") and the National Security Archives, two watchdog organizations that frequently initiate lawsuits to hold government officials accountable,[144] brought a suit against President Trump.[145] The plaintiffs alleged that the White House's use of ephemeral messaging apps violated the PRA and sought mandamus relief.[146] Their claims were centered around two arguments: (1) *Armstrong II* established that policies delineating which records are subject to the PRA are subject to judicial review, and (2) the PRA creates a clear and compelling duty for Presidents to implement record management and retention protocols.[147]

The plaintiffs first argued that the court's ruling in *Armstrong II* "establishe[d] a clear dichotomy: record creation, management, and disposal decisions are not reviewable, but record classification

---

20, 2016, 9:30 AM), https://www.vox.com/policy-and-politics/2016/10/20/13308108/wikileaks-podesta-hillary-clinton [https://perma.cc/238T-UN5U].

[141] CREW v. Trump Complaint, *supra* note 132, at 17 ("Notwithstanding this guidance, on January 24, 2017, the Wall Street Journal reported that at least some of the President's staff were using Signal, an encrypted peer-to-peer messaging application, to communicate with each other about Presidential or federal business.").

[142] *Id.* at 3.

[143] *See* Citizens for Resp. & Ethics in Wash. (CREW) v. Trump, 302 F. Supp. 3d 127, 131 (D.D.C. 2018), aff'd, 924 F.3d 602 (D.C. Cir. 2019).

[144] *About CREW*, CITIZENS FOR ETHICS, https://www.citizensforethics.org/about/ [https://perma.cc/FN72-CFLS] (last visited Mar. 9, 2021).

[145] CREW v. Trump, 302 F. Supp. 3d at 127.

[146] *Id.* at 129.

[147] *Id.* at 133, 135–36.

decisions are."[148] In *Armstrong II*, the guidelines issued by the Executive Office of the President were subject to judicial review because those guidelines shielded agency records from FOIA requests by classifying the agency records as "Presidential."[149] In *CREW*, the plaintiffs argued that the Trump Administration's treatment of ephemeral messages was a "record classification decision" like the guidelines from the Executive Office of the President in *Armstrong II*.[150] Put simply, if a President permits the use of ephemeral apps, the President is essentially classifying those messages as personal records (and not Presidential ones) because Presidential records cannot be deleted without the Archivist's permission.[151] The Government disagreed with the Plaintiffs' interpretation of *Armstrong II*.[152] Moreover, the Government argued that, even if the Plaintiffs' interpretation of *Armstrong II* was correct, "judicial review [was] still precluded because CREW [was] challenging creation, management, and disposal decisions, not classification decisions."[153]

The court declined to "resolve these competing interpretations" because, regardless of the holding in *Armstrong II*, the plaintiffs did not state a valid mandamus claim.[154] Both the PRA[155] and the Declaratory Judgement Act[156] did not provide a "valid cause of

---

[148] *Id.* at 134–35.

[149] *Id.* at 135 (citing Armstrong v. Exec. Off. of the President, Off. of Admin. (*Armstrong II*), 1 F.3d 1274, 1293–94 (D.C. Cir. 1993)) ("[*Armstrong II*] held that although 'the PRA impliedly precludes judicial review of the President's decisions concerning the creation, management, and disposal of presidential records during his term of office,' courts 'may review guidelines outlining what is, and what is not, a "[P]residential record"' because to hold otherwise would 'be tantamount to allowing the PRA to functionally render the FOIA a nullity.'").

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.* (citing Jud. Watch, Inc. v. NARA, 845 F. Supp. 2d 288, 299 n.5 (D.D.C. 2012)) ("The Presidential Records Act does not itself provide [a valid cause of action].").

[156] *Id.* (citing Schilling v. Rogers, 363 U.S. 666, 677 (1960)) ("Nor can the Declaratory Judgment Act standing alone supply a cause of action: it 'is not an

action," which is required for the court to reach a decision on the merits.[157] Likewise, mandamus relief—which gives federal courts jurisdiction "in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff"[158]—is a "drastic" relief that is purely discretionary.[159] Before awarding such a drastic relief, the defendant must owe the plaintiff a "clear and compelling" duty.[160]

The Plaintiffs argued that two PRA provisions provided a "clear and compelling duty."[161] The PRA requires the President to implement "records[,] controls[,] and other necessary actions . . . [and] all such steps as may be necessary" to capture and maintain Presidential records.[162] Additionally, records created or received by the President or his staff "shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt."[163]

However, the court in *CREW* found that neither of those two PRA provisions created a sufficiently clear duty necessary to compel the President to create classification guidelines regarding ephemeral messaging apps.[164] Although the PRA plainly requires the President "to take steps to preserve records, [the PRA] nowhere dictates which steps to take" and "nowhere clearly and definitively directs [the President] to issue particular guidelines."[165] Apparently, the PRA does not create a clear, compelling, or indisputable duty to issue guidelines about preserving records; without any guidelines to

---

independent source of federal jurisdiction' and thus 'the availability of [declaratory] relief presupposes the existence of a judicially remediable right.'").

[157] *Id.*

[158] 28 U.S.C. § 1361.

[159] Citizens for Resp. & Ethics in Wash. (CREW) v. Trump, 302 F. Supp. 3d 127, 135 (D.D.C. 2018), *aff'd*, 924 F.3d 602 (D.C. Cir. 2019).

[160] *Id.* at 136 (citing In re Cheney, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc)).

[161] *Id.* at 136.

[162] 44 U.S.C. § 2203(a).

[163] *Id*. § 2203(b).

[164] *CREW*, 302 F. Supp. 3d at 137.

[165] *Id.*

review, like the record classification guidelines in *Armstrong II*, the PRA precludes judicial review.[166]

Despite the Court's insistence that it was not ruling on the merits of the case, the Court nevertheless declared that: "The use of automatically-disappearing text messages to conduct White House business would almost certainly run afoul of the Presidential Records Act."[167] Thus, the decision in *CREW* provides two significant takeaways. First, a President's use of ephemeral messaging applications almost certainly violates the PRA. Second, if other courts follow the precedent in *CREW*, those courts are unlikely to find that the PRA provides a "clear and compelling duty" to create classification guidelines for new forms of communication technology or follow other PRA provisions.[168] If the PRA does not provide a "clear and compelling duty," a court is also unlikely to find that the PRA creates a private right of action. Consequently, judicial action will likely be precluded in PRA cases, and citizens must find a remedy elsewhere.

---

[166] *Id.* at 135.

[167] *Id.*

[168] For example, the plaintiffs in *CREW* appealed the district court's decision because the district court failed to address "whether the use of message-deleting apps violated the other two [PRA] duties identified in the complaint (records categorization and pre-disposal notification)." Citizens for Resp. & Ethics in Wash. v. Trump, 924 F.3d 602, 605 (D.C. Cir. 2019). To reach its decision, the appellate court judicially noticed a memorandum from White House Counsel "direct[ing] White House personnel to 'conduct all work-related communications on [their] official ... email account[s]' and to 'preserve electronic communications that are presidential records.'" *Id.* at 605–07. Similarly, the court also took judicial notice of an email advising staff that the "'[u]se of ... messaging apps (such as Snapchat, Confide, Slack or others) ... is not permitted.'" *Id.* Although the plaintiffs cited recent news articles—reporting that "White House personnel have continued using message-deleting apps" despite the pending lawsuit and White House Counsel reminders—the appellate court found that those news reports did not matter. *Id.* at 608. Even if the PRA is "imperfectly enforced," the appellate court still "lack[ed] jurisdiction to order the White House to take corrective action." *Id.*

V. THE PRESIDENT'S USE OF EPHEMERAL MESSAGING APPS

As inferred in *CREW*, the use of ephemeral messaging applications almost certainly violates the PRA. However, courts are seemingly prohibited from intervening, demonstrating how the PRA's purpose is frustrated by a President's use of ephemeral messaging apps.

A. The Problem with a President Using Ephemeral Messaging Apps

The President's duties under the PRA are sometimes categorized as "creation, management, and disposal decisions."[169] A "creation decision," as its name suggests, is "the determination to make a record documenting [P]residential activities."[170] A "management decision," on the other hand, "describes the day-to-day process by which [P]residential records are maintained."[171] Lastly, a "disposal decision" involves the process outlined in 44 U.S.C. §§ 2203(c)–(e), which requires the President to ask the Archivist for permission *before* destroying any Presidential records that "no longer have administrative, historical, informational, or evidentiary value."[172] Ephemeral messaging apps prevent the President from making the second type of decision mandated under the PRA—managing the records a President creates—because a "creation" decision instantly transforms into a "disposal" decision when a President communicates on ephemeral messaging apps.

Skipping over a "managing decision" is particularly problematic because, in the "management decisions" timeframe, the President is statutorily obligated to make several choices. First, the President must decide if the "documentary material" should be "categorized as "Presidential" or "personal" upon their creation or receipt."[173] If the record is related to any of the President's "constitutional, statutory, or other official or ceremonial duties,"[174] it is a Presidential

---

[169] Armstrong v. Exec. Off. of the President, Off. of Admin. (*Armstrong II*), 1 F.3d 1274, 1294 (D.C. Cir. 1993) (quoting Armstrong v. Bush (*Armstrong I*), 924 F.2d 282, 290–91 (D.C. Cir. 1991).

[170] *Id.* (citing 44 U.S.C. § 2203(a)).

[171] *Id.* (citing 44 U.S.C. § 2203(a), (b)).

[172] 44 U.S.C. § 2203(c), (e).

[173] *Id.* § 2203(b).

[174] *Id.* § 2203(a).

record; if the record consists of "purely private or nonpublic" documentary material, then it is a personal one.[175] Next, the President should decide what to do with those materials that are categorized as Presidential records.[176] The President must either "preserve[] and maintain[]" the Presidential records or ask permission from the Archivist before destroying the records.[177]

The crux of the problem with many ephemeral messaging apps is that, as soon as a President or the President's staff opens an ephemeral message, the message disappears shortly thereafter.[178] Consequently, even if the President has time to decide whether a record is Presidential or personal, the President has little time to preserve those messages before the messages are destroyed. Similarly, the disappearance of ephemeral messages happens before the President can obtain permission from the Archivist, as statutorily required.[179] Because ephemeral messaging apps disrupt the process for maintaining records established by the PRA, using ephemeral messaging apps to create and receive Presidential records violates the PRA.

B. Ephemeral Messaging Apps Frustrate the Purpose of the Presidential Records Act

In the aftermath of the Watergate scandal under the Nixon Administration in 1978,[180] Congress enacted the PRA.[181] Although the PRA was enacted decades before ephemeral messaging apps were invented,[182] the legislative history of the PRA provides a useful tool to determine whether the purpose of the PRA has been thwarted by ephemeral messaging.

The PRA is a complex piece of legislation enacted for various reasons. Yet, the original drafters of the PRA intended for the PRA

---

[175] *Id.* § 2201(3).
[176] *Id.* § 2203(a), (c)–(e).
[177] *Id.*
[178] *See* Ranns, *supra* note 84, at 256.
[179] 44 U.S.C. § 2203(c)–(e).
[180] Citizens for Resp. & Ethics in Wash. v. Cheney, 593 F. Supp. 2d 194, 198 (D.D.C. 2009).
[181] 44 U.S.C. § 2201 *et seq.*
[182] O'Connell, *supra* note 95.

to serve two primary purposes.[183] First, the PRA established that the public, not the President, owns any records created by the President when fulfilling official duties.[184] The enactment of the PRA terminated the "private ownership" of Presidential records and freed the public from relying on the Presidential tradition of "volunteerism" to access a President's records.[185] Second, the PRA established procedures to guarantee Presidential records would be preserved and available to the public once the President leaves office, assuring "preservation of the historical record" and mandating that public access would be "fixed in law."[186] In sum, when determining whether an act thwarts the purpose of the PRA, the drafters considered the important purposes of the PRA to be: (1) maintaining public ownership, (2) establishing procedures to guarantee public access, and (3) ensuring the preservation of historical records.

When assessing the PRA's legislative history, it is also imperative to understand the historical backdrop of the Act (i.e., President Nixon's actions following Watergate) and why President Nixon's actions spurred Congress to enact the PRA at that particular point in history.[187] When the PRA was introduced, Congress desired to protect future Presidential records from being destroyed after

---

[183] H.R. REP. NO. 95-1487, at 5733 (1978).

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Hearings Regarding Executive Order 13233 and the Presidential Records Act Before the H. Comm. on Gov't. Reform and H. Subcomm. on Gov't. Efficiency, Fin. Mgmt. and Intergovernmental Relations*, 107th Cong. 80-152 (2001-2002) (statement of Anna Nelson, Professor, American University), https://www.govinfo.gov/content/pkg/CHRG-107hhrg80152/html/CHRG-107hhrg80152.htm [https://perma.cc/E9K7-VZVW] [hereinafter *Hearings Regarding Executive Order 13233*] ("Influenced by the actions of former President Nixon, then, as the Archivist Mr. Carlin noted, Congress passed the Presidential Records Act for two reasons: one, to ensure the protection of these records so that they could not be destroyed, since Mr. Nixon was in that business; and, second, to ensure that the records of the Presidents would be open within a reasonable period of time.").

witnessing President Nixon's attempts at destruction.[188] Similarly, future Congresses have come to understand that the PRA was meant to "inhibit the kind of secrecy and dirty tricks that characterized the Nixon re-election campaign."[189] In other words, the PRA was enacted to prevent Presidents from rewriting history, whether they intend to bolster their reputation or cover up any wrongdoings.[190]

Given the historical background and legislative history of the PRA, a President's use of ephemeral messaging apps frustrates the purpose of the PRA for three reasons. First, ephemeral messaging apps fail to maintain public ownership because government property is destroyed—thereby preventing the public from ever accessing those records.[191] Second, ephemeral messaging apps violate the procedures established in the PRA because the Archivist's permission is not obtained before disposing of the record, and the record is not preserved.[192] Third, ephemeral messaging apps prevent the creation of an authentic historical record. Even if a President is otherwise complying with the PRA, the historical record being preserved is more like the flattering tapes President Nixon intended

---

[188] *Id.*; *see also* Citizens for Resp. & Ethics in Wash. v. Trump, 924 F.3d 602, 604 (D.C. Cir. 2019) ("Richard Nixon could only have dreamed of the technology at issue in this case: message-deleting apps that guarantee confidentiality by encrypting messages and then erasing them forever once read by the recipient.").

[189] *Hearings Regarding Executive Order 13233*, *supra* note 187 (statement of Rep. Jan Schakowsky, Member, H. S. Comm. on Gov't Efficiency, Fin. Mgmt., and Intergovernmental Relations).

[190] *Id.* (statement of Richard Reeves, Author of PRESIDENT NIXON: ALONE IN THE WHITE HOUSE) ("And no matter what archival system is used, the families and the former aides will try to protect their reputation, which is what you would expect of them, and you would expect of us to try to bring that into more objective light. They were greatly influenced, the American Presidents of our generation, by Winston Churchill, who once said, 'my task, my goal is to make the history and then write it before anyone else does.' That is one of the reasons Richard Nixon was keeping tapes.").

[191] *See infra* Part VI.B.

[192] 44 U.S.C. § 2203(c), (e) (explaining that the President must seek permission from the Archivist before disposing of Presidential records and that the Archivist may sometimes seek advice from Congress if the Archivist thinks it is in the public interest to do so or thinks Congress may have a special interest in the records).

to create rather than the authentic historical account that Congress envisioned.[193]

VI. TWO SOLUTIONS TO STRENGTHEN THE PRESIDENTIAL RECORDS ACT AND PROTECT THE ACT'S PURPOSE

Congress should amend the PRA to prevent a President from using ephemeral messaging apps because the use of those apps to conduct official business violates the PRA and frustrates its purpose. Given that judicial remedies are limited,[194] as demonstrated in *CREW*, Congress should create a private right of action or, in the alternative, hold a President criminally liable for the destruction of government property if the President uses ephemeral messaging apps to conduct official business.

A. Congress Should Create a Private Right of Action

One way to prevent the destruction of government records is to grant individuals a private right of action against any administrative official who intentionally destroys Presidential records. This solution would allow courts to adjudicate legitimate claims instead of precluding judicial intervention on procedural grounds.[195]

1. How to Structure the Private Right of Action and Handle Litigation

First, a heightened pleading standard should be implemented to better insulate the President from frivolous and excessive PRA litigation. For example, the Federal Rules of Civil Procedure require

---

[193] *Hearings Regarding Executive Order 13233*, *supra* note 187 (explaining that the reason President Nixon recorded his secret tapes was not to create an accurate record, but to write his version of history first and discard the portions that painted him in an unfavorable light). Congresswomen Janice Schakowsky also touches on this point when she describes the tension between how Congress views the PRA versus how the President (or, at least, President Bush) does. *Id.* According to Schawosky, Congress reasoned that, "[i]f officials know their acts will become a matter of public record in the future . . . they will alter their behavior today." *Id.* However, President Bush countered that Presidents and other public officials will not be truthful or speak candidly "[i]f officials know their acts will become a matter of public record in the future." *Id.*

[194] *See supra* Part V.

[195] *Id.*

fraud claims to be pled with a heightened degree of specificity.[196] A similar standard could be required to bring forth claims under the PRA because implementing a heightened standard forces plaintiffs to "do more than the usual investigation" before initiating a suit.[197] Requiring a heightened degree of specificity also gives the President some deference when conducting day-to-day operations, just like Congress originally granted the President more deference when enacting the PRA by prohibiting the public from immediately accessing Presidential records.[198]

Additionally, these potential suits brought under a heightened pleading standard could be dismissed unless there is evidence within the complaint that ephemeral messaging apps are being used to either conduct official business or hide information from the public. One option for plaintiffs to fulfill this requirement is by creating a non-exclusive "factors" test for courts to apply when deciding whether to grant a President's motion to dismiss. For example, courts could require evidence concerning: (1) whether a public official downloaded an ephemeral messaging app on their work or personal phone, (2) when the app was downloaded (i.e., in close temporal relation to a political event), (3) time stamps indicating when the app was used, (4) the recipient of the ephemeral messages, (5) the rationale for why the President or the President's staff needed to use an ephemeral messaging app versus another communication

---

[196] FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

[197] Adam Hirsh, *It's All in the Details: The Importance of FRCP Rule 9 in Fraud Cases*, FIN. POISE (Sept. 24, 2020), https://www.financialpoise.com/frcp-rule-9-fraud/ [https://perma.cc/57QE-R9QY].

[198] Armstrong v. Exec. Off. of the President, Off. of Admin. (*Armstrong II*), 1 F.3d 1274, 1292 (D.C. Cir. 1993) (citing Armstrong v. Bush (*Armstrong I*), 924 F.2d 282, 290 (D.C. Cir. 1991) ("Congress was 'keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations,' and thus 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 [P]residential records during the President's term of office.'"); *Armstrong I*, 924 F.2d at 290–91 (explaining that "the intricate statutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns" precluded judicial review under the PRA).

method, (6) the number of messages sent on the ephemeral messaging apps, or (7) the total time logged in the app. Finally, if the ephemeral messaging app has time stamps demonstrating when White House officials used the messaging apps, those time stamps could create a presumption that the message included material related to the President's official duties if the individual sending or receiving the message was on the clock or at the White House when the message was sent.

2. Benefits and Drawbacks

One key benefit of implementing a private right of action is that allowing individuals to sue the President does not unnecessarily restrict the free speech of government officials.[199] In Missouri, Governor Eric Greitens was accused of using an ephemeral messaging app to conduct official business.[200] When Greitens was sued, the court refused to grant a temporary restraining order prohibiting the Governor from using ephemeral messaging apps because the judge worried that granting such an order would infringe on the Governor's First Amendment right.[201] Similarly, the provisions in the PRA allowing a President to segregate political records (i.e., records about political activities that do not directly affect a President's duties) from Presidential ones stemmed from related First Amendment concerns.[202] More specifically, the political versus Presidential distinction was implemented so that the PRA "would not impinge on the President's First Amendment right to free speech or political association."[203] Thus, creating a private right of action would align with Congress's decision to not unnecessarily "impinge" on the President's First Amendment rights.

---

[199] Stewart, *supra* note 11, at 2 ("In Missouri, two attorneys sued then-Governor Eric Greitens, arguing that his use of Confide violated the state's public records law. A county judge denied their request for a temporary restraining order to halt Greitens's use of Confide, in part, because of a lack of evidence that he had been using it to conduct government business, but noted that there were 'a whole bunch of open questions here,' including whether the governor has a First Amendment right to use the app to communicate, as his attorneys contended.").

[200] *Id.*

[201] *Id.*

[202] H.R. REP. NO. 95-1487, at 5732–33 (1978).

[203] *Id.*

Additionally, other government officials have brought similar suits under the First Amendment when the government, while acting as an individual's employer, allegedly restricted an individual's First Amendment rights.[204] In those cases, the government was not allowed to restrict its employee's speech if the individual was acting as a "private citizen."[205] Typically, these cases arise when employees are fired after posting certain content on social media.[206] Creating a private right of action would not run afoul of such problems because government officials are not altogether banned from using social media apps that have ephemeral messaging functionality—government officials are only prohibited from using ephemeral messaging apps if the material discussed relates to their "official capacity."[207]

However, creating a private right of action amendment would inevitably result in more work for the President. Indeed, the President would almost certainly face more litigation.[208] This

---

[204] Lata Nott, *Government Employees & First Amendment Overview*, FREEDOM F. INST. (Apr. 24, 2017), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/free-speech-and-government-employees-overview/ [https://perma.cc/HZJ6-9P5C].

[205] *Id.*

[206] David L. Hudson Jr., *Public Employees, Private Speech: 1st Amendment Doesn't Always Protect Government Workers*, ABA J. (May 1, 2017, 4:10 AM), https://www.abajournal.com/magazine/article/public_employees_private_speech [https://perma.cc/Q6GF-R2L4] (explaining that the "problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees"). As one Fourth Circuit judge noted, "the speculative ills targeted by the social networking policy are not sufficient to justify such sweeping restrictions on officers' freedom to debate matters of public concern." *Id*. On the other hand, employers feel they should be able to punish employees for racist or inflammatory speech that goes against company values and reflects poorly on their business.

[207] *Id.* ("In *Garcetti v. Ceballos* (2006), the court declared that when public employees make statements pursuant to their official job duties, they have no free speech protection at all—even if the speech blows the whistle on alarming governmental corruption.").

[208] Armstrong v. Exec. Off. of the President, Off. of Admin. (*Armstrong II*), 1 F.3d 1274, 1292 (D.C. Cir. 1993) (citing Armstrong v. Bush (*Armstrong I*), 924 F.2d 282, 290 (D.C. Cir. 1991) ("Congress was 'keenly aware of the separation

increase in litigation is especially true for litigation regarding the PRA, which is often funded by watchdogs or other nonprofits who have the resources and time to take on such lengthy litigation.[209]

Finally, and most importantly, this solution depends on action by Congress and support from the courts. Creating a private right of action would require Congress to amend the PRA—which depends on the political will of Congress at the time the bill is brought to the floor.[210] Additionally, a plaintiff may lack Article III standing unless the Supreme Court expands current standing doctrine for subsequent caselaw.[211]

B. Congress Should View the President's Use of Ephemeral Messaging Apps as a Crime

Because all Presidential records are government property, a President's decision to destroy Presidential records via the use of ephemeral messaging apps should be treated as the destruction of government property. Therefore, the President should be subject to criminal liability.

---

of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations,' and thus 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 [P]residential records during the President's term of office.'")). Thus, *Armstrong II* implies that the President's workflow would be hindered if the President cannot maintain complete control over their records and is constantly dealing with litigation. *See also* Citizens for Resp. & Ethics in Wash. v. Cheney, 593 F. Supp. 2d 194, 198 (D.D.C. 2009) (explaining that "judicial review 'would upset the intricate statutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns'") (quoting *Armstrong II*, 924 F.2d at 290–91).

[209] *See About CREW*, *supra* note 144 and accompanying text.

[210] Lee Drutman, *Congress Should Do Its Job. But the Job Members Can Do Depends on the Resources They Have*, VOX (Feb. 15, 2017, 11:40 AM), https://www.vox.com/polyarchy/2017/2/15/14623588/congress-underresourced [https://perma.cc/NNM8-49FZ].

[211] *See generally* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (internal quotations omitted) (explaining that, in order to obtain standing, a plaintiff must show: (1) that the plaintiff suffered an "injury in fact" that is "actual or imminent, not conjectural or hypothetical," (2) a "causal connection between the injury and the conduct complained of," and (3) the injury is redressable).

1. Presidential Records are Government Property

The PRA provides that the U.S. Government has "complete ownership, possession, and control of [all] Presidential records."[212] The words "ownership,[213] possession,[214] and control" are strong terms of art in the realm of property law, and Congress did not choose these words by accident.[215]

Yet again, understanding the legislative context of the PRA is crucial because, when enacting the PRA, "the principal issue, and the one on which all of the witnesses were in agreement, was that action should be taken by Congress to declare a President's official records the property of the United States."[216] One of the main issues in the Watergate scandal was determining who owned President Nixon's secret tape recordings from the Oval Office.[217] President Nixon argued the tapes were his personal property because the tapes detailed President Nixon's personal conversations.[218] However, the government argued the tapes were government property because the tapes chronicled President Nixon's decisions in his official capacity as President.[219] Thus, Congress enacted the PRA with the specific purpose of preventing future Presidents from claiming ownership

---

[212] 44 U.S.C. § 2202.

[213] Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 253 (2007) (explaining how ownership has come to include a "bundle of rights").

[214] Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 74 (1985) ("For the common law, *possession* or "occupancy" is the origin of property.").

[215] Citizens for Resp. & Ethics in Wash. v. Trump (*CREW I*), 302 F. Supp. 3d 127, 130 (D.D.C. 2018), *aff'd*, 924 F.3d 602 (D.C. Cir. 2019) (emphasis added) ("[The PRA] was enacted in 1978 following controversy over the ownership of Richard Nixon's [P]residential records. Congress, in passing the PRA, 'sought to establish the public ownership of [P]residential records and ensure the preservation of [P]residential records for public access after the termination of a President's term in office.'" (internal citations omitted)).

[216] H.R. REP. NO. 95-1487, 5738 (1978).

[217] Citizens for Resp. & Ethics in Wash. v. Cheney, 593 F. Supp. 2d 194, 198 (D.D.C. 2009).

[218] John M. Crewdson, *White House Says Tapes Are Nixon's Own Property* (Aug. 15, 1974), https://www.nytimes.com/1974/08/15/archives/white-house-says-tapes-are-nixons-own-property-they-will-be.html [https://perma.cc/KY59-5H4X].

[219] *Id.*

over records created by the President—deliberately intending to invoke traditional property concepts when using the words "ownership, possession, and control."[220]

Congress is not the only one to invoke property law concepts when determining how to access Presidential records and resolve other PRA problems. Legal scholars have likewise asserted that property law effectively solves PRA issues, although in a different context.[221] Jonathon Turley, a George Washington University Law Professor, argued that common law property principles could be used to convert documentary materials (created by Presidents who held office before the PRA was enacted) into public property.[222]

All records created by Presidents whose terms began before the PRA was enacted are not subject to the PRA.[223] While pre-PRA Presidents have historically donated their Presidential materials to the government or to their own museums,[224] there are some Presidential records that "Congress either did not consider . . . to be public property or, more likely, [Congress] was content to leave the issue unresolved and rely on the good intentions of former Presidents."[225] Turley's article focuses on converting those private records into government property, explaining that "[f]or post-PRA Presidents and their successors, there was no further legitimacy to private property claims after Congress declared these records to be the property of the American people."[226] While Turley's conclusion is different than the one advanced in this Article, the underlying premise is the same: the government's ownership of Presidential

---

[220] *Cheney*, 593 F. Supp. 2d 194, 198 (D.D.C. 2009).

[221] *See generally* Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 CORNELL L. REV. 651 (2003) (arguing that Presidents whose terms ended before the enactment of the PRA could be considered public property).

[222] *Id.* at 651.

[223] *Id.* at 721–29.

[224] *Id.* at 661; Bruce P. Montgomery, *Nixon's Legal Legacy: White House Papers and the Constitution*, 56 AM. ARCHIVIST 586, 591 (1993).

[225] Turley, *supra* note 221, at 664.

[226] *Id.* at 707–25.

records changes what a President may or may not do with those records.

Accordingly, if a President destroys records or otherwise handles records in a way that violates the law, the President could potentially be prosecuted. Because Presidential records are government property, ownership vests in the government as soon as a Presidential record is sent or received.[227] Notably, the PRA never specifies that the government only owns Presidential records after the President leaves office.[228] Instead, the PRA states that any records created by the President or related to the President's official duties are under the "ownership, possession, and control" of the government—demonstrating that the government owns Presidential records the moment a Presidential record is created.[229] Thus, after ownership is vested in the government, the destruction, deletion, or disposal of Presidential records constitutes the destruction of government property.

2. Two Statutes Governing the Destruction of Government Property

The two most common statutes that criminalize the destruction of government property are 18 U.S.C. §§ 2071 and 1361.[230] For those crimes, criminal liability only attaches "to the 'willful' destruction of U.S. government property and U.S. government records."[231] Notably, both crimes are specific intent crimes, so the government must prove the President themself knew they were violating the law when they decided to act.[232] Moreover, to support a felony conviction under § 1361, "the government must prove that the damage from the destruction exceeded $1,000," which may be difficult for Presidential records that do not "have inherent value" aside from the historical input those Presidential records provide.[233]

---

[227] *See supra* Part V.A (explaining that a Presidential record exists immediately after a President creates material regarding the President's official duties).

[228] *See* 44 U.S.C. § 2202.

[229] *Id.*

[230] Brian Greer, *How to Ensure That Trump Preserves Official Documents*, LAWFARE (Nov. 6, 2020, 2:39 PM), https://www.lawfareblog.com/how-ensure-trump-preserves-official-documents [https://perma.cc/BG6L-EJPT].

[231] *Id.*

[232] *Id.*

[233] *Id.*

Thus, although these crimes could apply to a President who destroys the Presidential records created while in office, the statutes seemingly provide several hoops Congress must jump through before holding a President criminally liable.

3. Benefits and Drawbacks

One of the most significant barriers to prosecuting the President, when considering criminal liability for the destruction of government property via the use of ephemeral messaging apps, is the longstanding debate over whether a sitting President can be indicted for crimes. Throughout American history, two Attorneys General have issued separate advisory opinions on this subject—one in 1973 and one in 2000.[234] Both reports agree that indicting or criminally prosecuting a sitting President would be unconstitutional.[235]

However, a President does not necessarily need to be prosecuted to face consequences. Impeachment is one method, squarely within the separation of powers framework, to hold the President accountable for "high Crimes and Misdemeanors."[236] As Gerald Ford explained, "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history."[237] Though impeachment is discretionary, if Congress

---

[234] A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. Att'y Gen. 222 (2000), https://www.justice.gov/file/19351/download [https://perma.cc/K3CC-3NKC].

[235] *Id.* The 1973 opinion issued in response to Watergate concluded that "indictment or criminal prosecution of a sitting President would be unconstitutional because it would impermissibly interfere with the President's ability to carry out his constitutionally assigned functions and thus would be inconsistent with the constitutional structure." *Id.* at 223. After examining the legal analysis used in the 1973 memorandum and reviewing three Supreme Court decisions concerning separation of power arguments, the Attorney General's 2000 opinion agreed with the 1973 memorandum, concluding that "[t]he indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions." *Id.* at 222, 260.

[236] U.S. CONST. art. 2, § 4.

[237] Jan Wolfe, *Explainer: Impeachment Depends on 'High Crimes and Misdemeanors' - What are they?*, REUTERS (Sept. 25, 2019, 12:52 PM),

views the President's use of ephemeral messaging as the destruction of government property under §§ 2071 and 1361, Congress may be more willing to impeach a President simply for using ephemeral messaging apps to communicate about official business.

Nevertheless, several practical and political considerations should be addressed. First, impeachment requires a majority of the House of Representatives to charge a President and two-thirds of the Senate to convict.[238] Therefore, in a partisan and sharply divided political environment, a President is more likely to be impeached in the House of Representatives, where only a majority is required, and is much less likely to receive the two-thirds vote needed to convict in the Senate.[239] Second, while the Constitution specifies that Presidents may be removed for committing "other high Crimes and Misdemeanors,"[240] evidence suggests that the Founding Fathers meant to encompass something other than the modern understanding and classification of crimes.[241] While destruction of government property may be considered a crime, Congress holds the ultimate authority in deciding what actions rise to the level of an impeachable offense.[242] Third, impeachment is often used "as a political weapon" and can be initiated merely "to intimidate an otherwise powerful office holder" or "as a strategy to advance a political agenda."[243] Thus, Congress may not have the political will to impeach a President—even if the President has committed an impeachable offense—or the impeachment process may be abused in a way that

---

https://www.reuters.com/article/us-usa-trump-whistleblower-crimes-explai/explainer-impeachment-depends-on-high-crimes-and-misdemeanors-what-are-they-idUSKBN1WA288 [https://perma.cc/C5TA-RVUX].

[238] U.S. CONST. art. 1, § 3.

[239] DANIEL P. FRANKLIN ET AL., THE POLITICS OF PRESIDENTIAL IMPEACHMENT 14 (2020).

[240] U.S. CONST. art. 2, § 4.

[241] FRANKLIN ET AL., *supra* note 239, at 6 ("[Madison] clearly meant the provision for "high crimes and misdemeanors" to mean something other than that to which we make modern reference in the classification of crimes (i.e., felonies and misdemeanors). As a result, the House and Senate, as elected bodies, can be the judge of what constitutes a high crime or misdemeanor rising to the level of impeachment. Thus, impeachment, to a considerable extent, can be considered a political process.").

[242] *Id.*

[243] *Id.* at 2.

delegitimizes serious impeachments.[244] Finally, given that four Presidential impeachments have failed in the Senate, impeachment may not be the most effective tool to prevent the destruction of Presidential records.[245]

VII. CONCLUSION

The statutes governing the retention, preservation, access, and disclosure of records created by the executive branch—the PRA, the FRA, and the FOIA—are identical in some respects[246] and mutually exclusive in others.[247] Accordingly, understanding how these statutes fit together is imperative for understanding the problems posed by a President's use of ephemeral messaging applications.

Ephemeral messaging applications, like many new forms of technology, pose a unique challenge to the current structure of government record-keeping laws because ephemeral messages delete by default. While ephemeral messages are almost certainly a Presidential record under the PRA,[248] Congress granted the President great deference[249] when drafting the PRA; thus, any issues apparent in federal agencies' compliance with FOIA requests and record

---

[244] *Id.* ("Since impeachment is both a safeguard and a political weapon, an important question needs to be asked: Has the impeachment power been used in accordance with its original intent, or has it evolved into something far beyond the desires of the founders of our government?").

[245] Peter Grier & Noah Robertson, *Four Impeachments, Zero Removals: Sign of Cracks in Constitution?*, CHRISTIAN SCI. MONITOR (Feb. 17, 2021) https://www.csmonitor.com/USA/Politics/2021/0217/Four-impeachments-zero-removals-Sign-of-cracks-in-Constitution [https://perma.cc/52EA-YYMC].

[246] Lewis, *supra* note 21, at 799–815.

[247] Armstrong v. Exec. Off. of the President (*Armstrong III*), 90 F.3d 553, 556 (D.C. Cir. 1996) (explaining that "no record is subject to both the FRA and PRA").

[248] *See supra* Part III.B.

[249] Armstrong v. Bush (*Armstrong I*), 924 F.2d 282 (D.C. Cir. 1991) ("[T]he PRA is one of the rare statutes that does impliedly preclude judicial review."); Citizens for Resp. & Ethics in Wash. v. Cheney (*CREW*), 593 F. Supp. 2d 194, 198 (D.D.C. 2009) ("The PRA incorporates an assumption made by Congress (in 1978) that subsequent Presidents and Vice Presidents would comply with the Act in good faith, and therefore, Congress limited the scope of judicial review and provided little oversight authority for the President and Vice President's document preservation decisions.").

retention practices will almost certainly be mirrored in the President's handling of Presidential records.

Recently, courts have declined to stop the destruction of governmental communications, especially when the President and the President's staff use ephemeral messaging applications.[250] The decision in *CREW* provides just one example of how the PRA's current statutory structure prevents courts from compelling the President to comply with the PRA. Additionally, the dicta in *CREW* demonstrates why a President's use of ephemeral messaging apps likely violates the PRA.

Lastly, two workable solutions prevent a President from blocking the "sunshine" when using ephemeral messaging applications. First, Congress could create a private right of action for citizens to challenge a government official's use of ephemeral messaging applications (under a limited set of circumstances) to prevent the loss of important government records. Notably, this solution requires Congress to cooperate and pass meaningful legislation creating a right of action. This solution also potentially exposes the President to a flood of litigation. Alternatively, a President's use of ephemeral messaging applications could be treated as the destruction of government property. While a President likely cannot be prosecuted, destroying Presidential records could constitute an impeachable offense if Congress considers the destruction of Presidential records a high crime. However, given that most Presidential impeachments have failed, whether the possibility of impeachment will truly deter a President from using ephemeral messaging apps remains unclear. Although neither of the two solutions advanced in this Article completely prevent a President from destroying Presidential records, these solutions give the public a better chance of exposing Presidential records to the "sunshine"—satisfying the purpose of both the PRA and the FOIA.

---

[250] *Cheney*, 593 F. Supp. 2d, at 198–99 (emphasizing that "Congress limited the scope of judicial review and provided little oversight authority for the President and Vice President's document preservation decisions," and thus, if there are "any deficiencies in—or unintended consequences of—the PRA, that is an issue for Congress to consider").