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From Secret White House Recordings to @realdonaldtrump: The Democratic Value of Presidential Tweets

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From Secret White House Recordings to @realDonaldTrump: The Democratic Value of Presidential Tweets

DOUGLAS B. MCKECHNIE*

ABSTRACT

Modern U.S. presidents have chosen their words meticulously and deliberately, with the assistance of aides and speechwriters, all with a view toward how their message would be delivered and understood. Rarely has the electorate had access to the unvarnished thoughts of a president. At times, secretly recorded conversations in the White House have allowed Americans to hear the unabashed thoughts of various presidents. However, save for the Watergate scandal, those recordings had no immediate, discernible democratic impact because they were released years after the presidents' words were recorded. The recordings are noteworthy because they capture presidents' musings in the private sphere, where one is more secure and more likely to engage in self-reflective, authentic expression. In contrast, presidents typically engage the electorate in the public sphere, where one's speech is more likely to be refined and restrained and where the democratically oriented interchange of ideas occurs. First Amendment jurisprudence reflects these realities.

The Supreme Court has identified the value of speech in the private sphere as facilitating individual cognitive and emotional development, while speech in the public sphere is valued because it is essential to self-governance. Social media, however, has the capacity to collapse the public and private spheres so that private, self-reflective expression and affect easily enter the public sphere. This Article posits that, to the extent social media collapses the public and private sphere, President Donald Trump's use of Twitter redounds to the electorate's benefit. While private, self-reflective expression might otherwise only serve the needs of an individual,

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it becomes a matter of public concern worthy of democratic value when it is on public display in a President's tweets. Through President Trump's tweets, the electorate can instantly access the President's character and motivation and make concomitant democratic decisions.

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INTRODUCTION

The twentieth century marked a turning point in Americans' understanding of their presidents' inclinations, motivations, and character. Americans had historically relied on public appearances, speeches, and press releases to gain a better understanding of a president's policies and the purposes behind them. Those appearances, however, were often scripted, such that the American electorate was only exposed to the refined message that the president's staff would have deemed politically advantageous and most appropriate for public consumption. In 1940, however, a new option for insight into a president's personality materialized when President Franklin D. Roosevelt ordered a secret audio recording system be installed in the Oval Office.¹ With President

1. *Roosevelt Tapes: Overview*, MILLER CTR., <https://perma.cc/77WM-9AJG>.

Roosevelt's White House recording system, and those that followed, came the possibility that the American public might have unfettered access to its presidents' recorded closed-door conversations—recordings that had the potential to change the course of history.

From thoughts about war and peace to politics and prejudice, secret White House recordings have captured presidents' behind-closed-doors musings. These intimate moments, memorialized on audiotapes, provide a unique and previously unattainable window into private and raw presidential contemplation and discussions with confidants.² However, only in the rarest of cases, like Watergate, did the recordings have a direct impact on a sitting president.³ Instead, most of the recordings were released long after the president's tenure, thus negating their immediate value to the electorate's democratic decision-making.⁴ While historically significant, the release of secret White House tapes a decade or more after they are recorded is of little value to passing political judgment on a current president. President Donald Trump's use of Twitter, however, has ushered in a new era. Instead of waiting for the delayed release of secret White House recordings, the American electorate has instantaneous access to a president's private thoughts.

Secret White House recordings have been revelatory because they captured presidents' musings in the private sphere. Because one typically has spatial and cognitive control over the private sphere, one is more likely to engage in candid self-realization. To the extent this candid self-

2. For example, in 1973, following the *Roe v. Wade* decision, President Richard Nixon's White House recording system captured him telling an aide: "There are times when an abortion is necessary. I know that. When you have a black and a white." Charlie Savage, *On Nixon Tapes, Ambivalence over Abortion, Not Watergate*, N.Y. TIMES (June 23, 2009), <https://nyti.ms/2jL9ekH>.

3. In 1973, President Richard Nixon's presidential aide, Alexander Butterfield, informed the Senate's Watergate Committee that President Nixon had an elaborate audio taping system in the White House. Before that moment, the public was unaware that the President had been secretly recording his meetings and telephone conversations. It was only after Butterfield's Watergate testimony that the John F. Kennedy library acknowledged President Kennedy also created recordings of his meetings. As a result, the public did not learn of President Kennedy's White House recordings until a decade after his assassination. See *The JFK White House Tape Recordings*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <https://perma.cc/VK7Z-KMU9>; see also Ernest May & Timothy Naftali, *The Presidential Recordings Program*, in 5 THE PRESIDENTIAL RECORDINGS: LYNDON B. JOHNSON, at xxi, xxii–iii (David Shreve et al. eds., 2007).

4. See *The JFK White House Tape Recordings*, *supra* note 3. President Franklin Delano Roosevelt's recordings were not discovered and released to the public until 1978, thirty-three years after his death. See Domenico Montanaro, *The Shadowy History Of Secret White House Tapes*, NAT'L PUB. RADIO (May 13, 2017, 8:00 AM), <https://perma.cc/2QYQ-2QKW>.

realization has expressive components that develop individual thought and opinion, the Supreme Court has identified them as having some First Amendment value. However, it is the public sphere where quintessential First Amendment activity occurs, as the public sphere is the traditional locus of the robust interchange of ideas that leads to the political changes desired by society. Historically, these spheres have been described as dichotomous and separated. But social media has the capacity to erode this separation.

The unique nature of social media collapses the private and public spheres. This creates a conduit through which the authentic and candid expressions of the private sphere flow into the public sphere. And when the President of the United States relies on Twitter as a primary tool for communication, this collapse takes on a democratic dimension. In the text of a tweet, the electorate has instantaneous access to the president's authentic temperament and impetus. This unprecedented access to a president's contemporaneous, candid thoughts has democratic value in that the electorate can make a more informed, and immediately impactful, political judgment about the president; it need not wait a decade for the secret White House recordings to be released.

This Article has four parts. Part I discusses secret White House recordings. It chronicles a sample of the revelatory, candid ideas expressed by presidents in the private sphere. It suggests that while there is historical value in presidents' ideas captured in secret White House recordings, they typically lacked any contribution to immediate democratic decision-making by the electorate. Part II discusses the private and public spheres. It examines the traditional understanding and importance of the private/public sphere divide and discusses the First Amendment implications of the expressive activity that occurs in each sphere. Part II also posits that social media collapses the public and private spheres in a way that allows private, self-reflective thought to enter the public sphere. Part III discusses President Donald Trump's use of Twitter as a tool for communication. It highlights some of the more controversial Twitter posts as evidence of his use of Twitter as a forum for candid, publicly accessible contemplation. Finally, Part IV argues why a president's use of Twitter can be valuable for American democracy.

I. HISTORY OF PRESIDENTIAL REVELATIONS

Throughout most of American history, the public has rarely had an opportunity to access the most intimate thoughts or private conversations of presidents of the United States. Instead, citizens primarily relied on staged, managed events such as speeches and press releases for presidents to

communicate policy ideas and intentions. However, when President Franklin D. Roosevelt installed a recording system in his White House office in 1940, it marked a turning point in documenting presidents' present-sense impressions, emotional responses, and unedited reactions.⁵ While other sources, like notetakers and memoirs, attempt to capture these behind-the-scenes moments, recordings serve to "pierce the presidential veil created by staffers and image-makers."⁶ From 1940 through 1973, presidents, to varying degrees, used secret recording systems that captured conversations within the White House.⁷

President John F. Kennedy was the first president to use recording systems in a significant way.⁸ While President Nixon's recordings are perhaps the most well-known and extensive, each presidential recording system captured at least some unvarnished, private thoughts that may have otherwise remained unshared with the public but for the recording. To be sure, it is impossible to predict how the public would have reacted had it been contemporaneously privy to some of the presidents' trains of thought and unguarded comments caught on tape. Had the public gained immediate access to these innermost thoughts of a president, it may have changed the trajectory of not only a presidency but also the nation.

A. *President Franklin Delano Roosevelt*

President Roosevelt was the first to install a secret system and make audio recordings of conversations in the White House.⁹ After having a private conversation misquoted and leaked, President Roosevelt instructed his staff to find a way to safeguard against future misrepresentations.¹⁰ At the behest of the President and his presidential stenographer, secret service agents installed a sound-activated recording system under the Oval Office.¹¹ Only seven people knew about the secret system—the President, two presidential stenographers, an inventor, a representative from the recording system manufacturer, and the secret service agents who installed

5. See CONRAD BLACK, FRANKLIN DELANO ROOSEVELT 596 (2003).

6. May & Naftali, *supra* note 3, at xxi.

7. *Id.* There is evidence that Ronald Reagan secretly recorded conversations in the White House's Situation Room. However, these tapes were routinely erased or discarded because President Reagan used them to ensure accurate record-keeping in the event of faulty connections and poor translations. Gary Buiso, *Never-Before-Heard Tapes of Reagan Revealed*, N.Y. POST (Nov. 8, 2014, 4:00 PM), <https://perma.cc/3JWW-BSXA>.

8. See May & Naftali, *supra* note 3.

9. See *Roosevelt Tapes: Overview*, *supra* note 1; *The JFK White House Tape Recordings*, *supra* note 3.

10. *Roosevelt Tapes: Overview*, *supra* note 1.

11. *Id.*

it.¹² While the system only recorded approximately eight hours of conversations, it nevertheless caught a politically ruthless side of the President while campaigning for his third term in 1940.¹³

President Roosevelt chose Henry Wallace as his running mate, and, with existential questions about war and peace being debated throughout the country, the campaign became antagonistic.¹⁴ President Roosevelt fended off suggestions that he had secretly committed American troops to fight overseas in what would become World War II.¹⁵ Meanwhile, his opponent, Wendell Willkie, was inclined to aid the United States' European allies.¹⁶ President Roosevelt later became concerned that his opponent's political allies had obtained embarrassing information about Wallace's interest in mysticism and the occult.¹⁷ If the information became public, it had the potential to harm Roosevelt politically and call into question his judgment on such critical decisions as whom to nominate as Vice President.¹⁸ When informed that his political opponents might release the information, President Roosevelt, speaking with an aid, explored the possibility of intentionally disseminating rumors about Willkie's rumored affair with a book reviewer.¹⁹ In particular, President Roosevelt said:

We can't have any of our principal speakers refer to it but people down the line can get it out. I mean the Congress speakers and the state speakers, and so forth. They can use raw material as a matter of fact. Now, now, if they want to play dirty politics in the end, we've got our own people . . . [.]. Now, you'd be amazed at how this story about the gal is spreading around the country.²⁰

Willkie's allies never released the information about Vice President Wallace, and President Roosevelt's allies never disseminated the infidelity rumors about Willkie.²¹

12. *Id.*

13. *Id.*

14. RICHARD MOE, ROOSEVELT'S SECOND ACT 219–20 (2013).

15. *Id.* at 290–91.

16. *Id.* at 158.

17. *Id.* at 278. Vice President Wallace had been attracted to the teachings of a Russian theosophist, Nicholas Roerich. Wallace had corresponded directly with Roerich, referring to him as “Guru.” Moreover, as Secretary of Agriculture, Wallace steered federal funding to Roerich's international religious missions. Roerich's appearance and teachings were so far outside the American mainstream that publicizing the connection could doom Wallace's, and possibly Roosevelt's, political careers. *See id.*

18. *See id.*

19. *Id.* at 279, 281.

20. *Id.* at 280–81.

21. *See id.* at 314.

Perhaps of equal import, because the recordings of President Roosevelt's private discussion were released more than forty years later in 1982, the voters in the 1940 election never knew that he was prepared to "play dirty politics" in the way he had suggested.²² It is, of course, unknown how voters would have reacted had this information been available to the public. It could have been particularly damaging in light of President Roosevelt running for this third term. Moreover, given the era, voters may have recoiled at hearing a president speak bluntly about playing dirty politics and disseminating what could be extraordinarily damaging rumors. Nevertheless, it certainly may have had a serious impact on how voters viewed the President both morally and politically and, ultimately, whether they were confident in his ethical bearing, judgment, and leadership.

B. *President John F. Kennedy*

President Harry Truman inherited President Roosevelt's recording system yet rarely employed it.²³ In fact, there are only approximately ten hours of recordings from President Truman's presidency, and only a few hours are intelligible.²⁴ Similarly, archivists have discovered and released only approximately fifteen hours of President Dwight D. Eisenhower's conversations in the White House.²⁵ It was not until the election of President John F. Kennedy that an elaborate recording system was installed—a recording system that captured private conversations President Kennedy likely never thought would be made public.²⁶

President Kennedy's recording system captured frank discussions about various issues of national importance, from Vietnam, to Cuba, to the

22. R.J.C. Butow, *The Story Behind The FDR Tapes*, AM. HERITAGE, Feb.–Mar. 1982, <https://perma.cc/YX66-HS38>. Archivists at the Franklin D. Roosevelt Library who had custody of President Roosevelt's recordings denied, for many years, that the recordings existed. Arthur Schlesinger, Jr., *The FDR Tapes*, AM. HERITAGE, Feb.–Mar. 1982, <https://perma.cc/B5XD-LWEW>. While the Library possessed audio recordings, the archivists believed the recordings merely captured some of President Roosevelt's press conferences in 1940. *Id.* In 1978, however, while doing research at the Library, Dr. Butow discovered the recordings were more than just press conferences. *Id.* It took him three years to decipher and transcribe his discovery. *Id.*

23. *About Truman's Secret White House Tapes*, MILLER CTR., <https://perma.cc/Z4PW-7UW3>.

24. *Id.*

25. *About Eisenhower's Secret White House Tapes*, MILLER CTR., <https://perma.cc/6EDZ-Y7S6>.

26. Philip Zelikow & Ernest May, *The Presidential Recordings Project*, in KENNEDY, JOHNSON, AND THE QUEST FOR JUSTICE, at ix, xi (Jonathan Rosenberg & Zachary Karabell eds., 2003); SHELDON M. STERN, *THE WEEK THE WORLD STOOD STILL* 8 (2005).

Civil Rights movement.²⁷ For example, in 1963, South Vietnam President Ngo Dinh Diem began a repressive crackdown on Buddhists in South Vietnam.²⁸ As President Diem began to lose popularity among his people, the American government became increasingly concerned about South Vietnam's stability and its overtures toward other countries.²⁹ With the number of U.S. troops stationed in South Vietnam increasing, President Kennedy received counsel from top advisors suggesting that the United States should overthrow President Diem's government.³⁰

During a meeting with his advisors in August 1963, President Kennedy's recording system captured him discussing the proposed coup.³¹ Unsure about the decision, President Kennedy appeared to waffle.³² He seemed to think the coup may not be successful and was concerned that South Vietnam's generals may be ineffective.³³ Nevertheless, he did not reject the proposal outright.³⁴ Instead, he was recorded saying, "I don't see any reason to go ahead unless we think we have a good chance of success."³⁵ That same month, Roger A. Hilsman, Assistant Secretary of State for Far Eastern Affairs, sent a diplomatic cable to the United States' Ambassador to South Vietnam.³⁶ The cable appeared to evince the Kennedy administration's approval of South Vietnamese generals initiating a coup to topple President Diem.³⁷ The generals did, in fact, carry out a coup, though the Kennedy administration denied ordering, or tacitly approving, it.³⁸ The coup ultimately culminated in the execution of President Diem on November 2, 1963.³⁹ A series of incompetent South Vietnamese regimes followed.⁴⁰ Only two days after the execution, President Kennedy, in a private dictation, seemed to regret—or second

27. See generally PATRICK J. SLOYAN, *THE POLITICS OF DECEPTION* (2015) (examining President Kennedy's last year in office through the use of recordings from the Cabinet Room and Oval Office).

28. LISTENING IN: THE SECRET WHITE HOUSE RECORDINGS OF JOHN F. KENNEDY 233 (Ted Widmer ed., 2012).

29. *Id.*

30. *Id.*

31. *Id.* at 239.

32. See *id.*

33. See *id.*

34. *Id.*

35. *Id.*

36. John Prados, *JFK and the Diem Coup*, NAT'L SECURITY ARCHIVE (Nov. 5, 2003), <https://perma.cc/552N-3QGV>.

37. *Id.*

38. *Id.*

39. LISTENING IN, *supra* note 28, at 234.

40. *Id.*

guess—the coup decision.⁴¹ He was concerned that the coup leaders would create a repressive, undemocratic regime that would disenfranchise South Vietnam’s citizens.⁴²

President Kennedy never had the opportunity to stand for re-election, and the recordings of his conversations were not revealed until a decade after his assassination.⁴³ It is impossible to predict how the electorate would have voted in 1964 had President Kennedy lived. However, had he lived, and had the American people known his private concerns about the coup, his reasons for not supporting it—because of a possibility of failure, not necessarily the ethical implications—and his apparent regrets, this information certainly could have swayed the election.

C. *President Richard Nixon*

President Richard Nixon had the most elaborate recording system of any president known to have recorded conversations in the White House.⁴⁴ Only President Nixon, H.R. Haldeman, and a few close personal assistants knew the system existed.⁴⁵ With recording devices in the White House, Oval Office, Old Executive Office Building, Cabinet Room, and Camp David, President Nixon secretly recorded more than 3,700 hours of meetings and conversations.⁴⁶ It is the existence of those recordings that led to the issuance of a third-party subpoena *duces tecum* to the President as part of a grand jury indictment for which the President was an unindicted coconspirator.⁴⁷ The recordings further led to the Supreme Court affirming the enforcement of the subpoena and holding that general claims of executive privilege to ensure confidentiality, without more, do not supersede the judicial process or the rule of law.⁴⁸ Finally, it is their existence, and the revelations therein, that eventually led to President Nixon’s resignation.⁴⁹

While the well-known Watergate-related recordings are credited with President Nixon’s political downfall, his recording system captured other

41. *Id.* at 245–46.

42. *Id.* at 246–47.

43. *Id.* at 6.

44. May & Naftali, *supra* note 3, at xxiii.

45. *History of the White House Tapes*, RICHARD NIXON PRESIDENTIAL LIBR. & MUSEUM, <https://perma.cc/83PX-EFPV>.

46. *Id.*; *Watergate*, MILLER CTR., <https://perma.cc/7E5C-5X3W>.

47. *United States v. Nixon*, 418 U.S. 683, 686–88 (1974).

48. *Id.* at 707, 713.

49. John Dart, *Graham and Nixon: Anti-Jewish Words on Tape*, CHRISTIAN CENTURY, Mar. 13, 2002.

private conversations that revealed his candid thoughts—thoughts that would presumably be of interest to voters. For example, while President Nixon’s supporters often defended against his critics’ allegations that the President harbored anti-Semitic sentiments, his Oval Office conversations seem to confirm the allegations.⁵⁰ President Nixon’s recordings captured his raw, unfiltered musings about the Jewish community in the United States in confidential surroundings with trusted intimates.

In February 1972, President Nixon and evangelical leader Billy Graham retired to the Oval Office after a prayer breakfast.⁵¹ While in the Oval Office, the pair discussed the United States’ Jewish community and what they perceived to be its effect on the country.⁵² Agreeing with a prior comment about Jews in the country, Graham told President Nixon that the Jewish “stranglehold has got to be broken or the country[] [was going to go] down the drain.”⁵³ President Nixon asked Graham if he truly believed that comment, and Graham confirmed.⁵⁴ “So do I,” President Nixon agreed; but he also recognized that he could not acknowledge those beliefs publicly.⁵⁵ Graham also referred disparagingly to Jewish friends he had in the entertainment industry and admitted his friends did not “know how [he] really [felt] about what they’re doing to this country.”⁵⁶ “You must not let them know,” President Nixon counseled.⁵⁷

The Watergate burglary took place in June 1972, four months after President Nixon and Graham’s conversation in the Oval Office.⁵⁸ Six months later, in November 1972, President Nixon was re-elected. It was not until thirty years later, in 2002, that the recording of the conversation between President Nixon and Graham was revealed.⁵⁹ As with each of the presidential recordings discussed above, the 1972 electorate was not privy to the behind-closed-doors conversations President Nixon had with his confidant about the Jewish community. Had the American people known President Nixon’s unabashed, anti-Semitic thoughts, perhaps it would have resulted in a different outcome in 1972. As evidenced by the recordings,

50. David Greenberg, *Nixon and the Jews. Again.*, SLATE (Mar. 12, 2002, 11:44 AM), <https://perma.cc/8XZE-BPN4>.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Billy Graham Apologizes to Jews for His Remarks on Nixon Tapes*, N.Y. TIMES (Mar. 3, 2002), <https://nyti.ms/2lyvde9>.

58. Greenberg, *supra* note 50.

59. *Billy Graham Apologizes to Jews for His Remarks on Nixon Tapes*, *supra* note 57.

however, President Nixon knew he could not reveal his private thoughts publicly. He ostensibly understood that for many Americans who would otherwise support him, those ideas were abhorrent and could cost him politically.

II. SOCIAL MEDIA'S EFFECT ON THE DUALITY OF EXPRESSION IN THE PRIVATE AND PUBLIC SPHERES

Traditionally, when identifying the way people express themselves, a duality has existed between the public and private spheres. Unsurprisingly, this duality has been reflected in the Supreme Court's First Amendment jurisprudence. In the private sphere, where people generally retain control of their physical space and cognitive input, they are more likely to engage in authentic, self-reflective expression. The Court has recognized a First Amendment value in this expression; however, it has ranked speech on private matters as less valuable than its opposite—speech on matters of public concern. Unlike the private sphere, in the public sphere, one retains less physical and cognitive authority. Public expression takes on a more reserved character but a role more often directly applicable to self-governance. The Court has identified this expressive activity as the most valuable for First Amendment purposes. Social media, however, has collapsed the public and private spheres allowing private, self-reflective expression to fluidly enter the public sphere. Thus, content and affect traditionally reserved for the private sphere become instantaneously, publicly accessible.

A. *The Private Sphere and the Constitutional Value of the Expressive Activity that Occurs Therein*

The presidential recordings discussed in Part I are noteworthy for various reasons, not least of which because they provide a unique opportunity—available only to those in the room at the time—to have access to a president's uninhibited, prevailing impressions and thoughts. These thoughts were unabashedly expressed because the recordings captured the president in a private setting, not facing constituents, reporters, or dignitaries. It is only through secret recordings, in an otherwise private setting, that this sort of expressive activity has typically been memorialized because privacy, considered by many to be a basic human need, facilitates authentic emotional and cognitive disclosure.

Privacy theory, within the context of common law and American jurisprudence, manifests itself in various ways. For example, the common law “right to be left alone” resides in the inherent right to disclose, or not

disclose, one's thoughts and emotions to whomever one chooses.⁶⁰ In addition, this right has historically included the sanctity of certain physical spaces, like the home, which were singled out for their inherently private qualities.⁶¹ The right to privacy is also inherently implicated in the freedoms of expression and association found in the First Amendment.⁶² Finally, modern concepts of privacy include the right to informational privacy and control of personal data; various European legal theories, for instance, have connected privacy and dignity in this realm through doctrines like the right to be forgotten.⁶³ While each of these privacy interests is important in their own right, a discussion about the democratic value of presidential tweets most immediately implicates speech and the First Amendment. What is relevant, therefore, for the purposes of this Article, is what expressive activity occurs in the private sphere, as compared to the public sphere, and how the separation between the public and private spheres is affected by modern technology.

1. *The Importance of Privacy to an Individual*

Most modern Western cultures consider privacy—rooted in the desire for “bodily integrity, personal space, and intimacy”—a prerequisite for “individual autonomy, identity, and integrity.”⁶⁴ Set against secrecy, or hiding information, privacy provides an individual the liberty and security to engage in self-exploration and self-realization.⁶⁵ Privacy is often discussed by legal scholars in the negative—a right to privacy *from* government intrusion.⁶⁶ In the context of private presidential thoughts, privacy is a positive concept—the degree of, and control over, intimacy and confidants.⁶⁷

There are various ways in which humans practice control over their privacy. When a person is in control of his or her psychological privacy, he or she can distinguish and discriminate between those with whom he or she chooses to interact.⁶⁸ Once determining with whom one will interact,

60. JON L. MILLS, *PRIVACY IN THE NEW MEDIA AGE* 18–19 (2015).

61. *Id.* at 22–23.

62. *Id.* at 23.

63. *See id.* at 22–24; *see also* Bernhard Debatin, *Ethics, Privacy, and Self-Restraint in Social Networking*, in *PRIVACY ONLINE* 47, 48 (Sabine Trepte & Leonard Reinecke eds., 2011).

64. Bernhard Debatin, *supra* note 63, at 47.

65. *See id.*

66. *Id.* at 48.

67. *See id.*

68. Sabine Trepte & Leonard Reinecke, *The Social Web as a Shelter for Privacy and Authentic Living*, in *PRIVACY ONLINE*, *supra* note 63, at 61, 63.

one can further practice social privacy by retaining authority over “affective and cognitive inputs and outputs,” including what personal feelings to disclose and when to disclose them.⁶⁹ Finally, physical privacy is controlled by exerting authority over physical space and who may access that space.⁷⁰ These controls over the private sphere result in a sense of emotional freedom, which in turn increases the likelihood of unguarded expressions of candid beliefs and ideas.⁷¹

Privacy cultivates authenticity and candor by providing safe places for the individual to contemplate and explore his or her sense of self without the fear of social repercussions.⁷² Privacy also provides autonomy.⁷³ With the lack of external influence in the private sphere, one can objectively reflect on one’s character and identity without the interference of social pressures and cues; this isolation enables uninfluenced, self-realized genuineness.⁷⁴ Authenticity is also developed in the private sphere through “emotional relief,” creating space for the individual to let down his or her guard and break from social norms.⁷⁵ This freedom to deviate from social expectations increases the likelihood that one’s actions in the private sphere will more accurately reflect the true self.⁷⁶ Finally, authenticity is fostered in the private sphere by facilitating intimacy and confidentiality.⁷⁷ The ability to establish boundaries and control those with whom we interact increases trust, and thus openness, sincerity, and truthfulness.⁷⁸

2. *Constitutional Implications of Private Expression*

Many of the characteristics and benefits of the private sphere implicate expressive activity. Whether it is a thought contemplated during self-reflection or an intimate discussion with a confidant, the intellectual exploration that occurs and the signs of authenticity in the private sphere are often manifested through expression. And the freedom to engage in that expression has constitutional implications. Indeed, Thomas Emerson,

69. *Id.* (citing Judge K. Burgoon, *Privacy and Communication*, in COMMUNICATION YEARBOOK 6, at 206, 224 (Michael Burgoon ed., 1982)).

70. *Id.*

71. *See id.* at 66–67.

72. *Id.*

73. *Id.* at 67.

74. *Id.*

75. *Id.* (emphasis omitted) (citing Alan F. Westin, *Science, Privacy, and Freedom*, 66 COLUM. L. REV. 1003, 1031 (1966)).

76. *Id.*

77. *Id.* (citing Alan F. Westin, *Privacy, and Freedom*, 25 WASH. & LEE L. REV. 166 (1968)).

78. *Id.* at 62.

in his seminal article *Toward a General Theory of the First Amendment*, suggests that one of the four basic values reflected in the First Amendment's protection of free speech is "assuring individual self-fulfillment," a decidedly individual and inward-focused value.⁷⁹ Though not necessarily discussed within the context of the private sphere, Emerson argues that, in the Western tradition, the ultimate end to which human beings strive is to develop intellectually and, accordingly, attain self-realization.⁸⁰ Human beings are driven to use imagination, abstract thought, and mental exploration to cultivate their personalities and their beliefs about the world and their place in it.⁸¹ Emerson posits that the expression of ideas is an integral part to individual development, and the First Amendment's protection of free speech serves to protect that interest.⁸²

Within the context of American jurisprudence, the Supreme Court has had various opportunities to examine the constitutional implications of private expression.⁸³ The First Amendment, in particular, shelters private expression within the private sphere while recognizing a limitation on the social and constitutional value of privately concerned speech. As for the First Amendment's protection of expression in the private sphere, one need look no further than obscenity jurisprudence.

In the seminal case *Chaplinsky v. New Hampshire*, the Supreme Court purported to list, for the first time, various categories of speech that were presumptively not protected by the First Amendment's Free Speech clause.⁸⁴ Though only dicta, included in that list was "lewd and obscene" speech.⁸⁵ In *Roth v. United States*, the Court followed this perfunctory declaration with a more thorough discussion and explanation of why obscenity is unprotected speech.⁸⁶ Noting that the Free Speech clause was intended to "assure unfettered interchange of ideas for the bringing about of *political and social changes*," the Court held obscenity played little-to-no

79. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 878–79 (1963).

80. *Id.* at 879–80.

81. *Id.* at 879.

82. *Id.* at 879–81.

83. To be sure, privacy and private expression implicate the Due Process Clauses of the Fifth and Fourteenth Amendments, as well as the right to be free from unreasonable searches and seizures in the Fourth Amendment; however, because this Article focuses on information conveyed by a president and its value to society, the First Amendment implications of private expression are explored below.

84. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

85. *Id.* at 572.

86. *Roth v. United States*, 354 U.S. 476, 485–88 (1957).

role in those changes.⁸⁷ The Court found, when reviewing the landscape of American legal history and the international consensus reflected in agreements regulating obscene materials, obscenity was wholly useless and of no social import.⁸⁸

Nevertheless, twelve years later, the Court took a step toward protecting this “useless” form of expression within the private sphere.⁸⁹ In *Stanley v. Georgia*, the owner of sexually explicit films was convicted of possessing obscene materials under Georgia’s obscenity statute.⁹⁰ In reversing the conviction, the Supreme Court distinguished the public distribution of obscene material with its private possession and consumption.⁹¹ Unlike the commercial distribution of obscenity in *Roth*, the Court held that the private exchange of ideas, particularly in inviolable places such as the home, is protected by the First Amendment.⁹² This protection is available even when the ideas are socially worthless.⁹³ The First Amendment protects the unconventional feelings, emotions, and intellectual stimuli revealed and displayed in the home, which is the locus of the private sphere.⁹⁴ The Court recognized the value of the private sphere—and the unfettered exchange of ideas therein—to the development of one’s intellectual and emotional needs.⁹⁵

The *Stanley* Court recognized the First Amendment’s implications and the significance of the private sphere as a place to develop emotionally and intellectually.⁹⁶ In doing so, it protected from government regulation the intellectual exploration that occurs there.⁹⁷ At the same time, however, the Court has been unwilling to protect private speech at the expense of the public’s right to access information that is a matter of public concern. For example, in *Bartnicki v. Vopper*, an unknown person electronically intercepted and recorded a politically charged, private telephone conversation between a union president and its chief negotiator.⁹⁸ A local opponent of the union obtained the recording when someone anonymously

87. *Id.* at 484–85 (emphasis added).

88. *Id.*

89. *See Stanley v. Georgia*, 394 U.S. 557 (1969).

90. *Id.* at 558–59.

91. *Id.* at 560–64.

92. *Id.* at 564.

93. *Id.*

94. *Id.* at 564–67.

95. *Id.*

96. *See id.*

97. *Id.*

98. *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001).

left it in his mailbox.⁹⁹ The union opponent then distributed the recording to local news outlets, who disseminated it through radio and print media.¹⁰⁰ After the recordings were published by media outlets, the union officials sued the union opponent and media outlets.¹⁰¹ They claimed the recording and distribution violated federal and state statutes prohibiting the disclosure of the contents of illegally obtained recordings of private conversations.¹⁰² The defendants invoked the First Amendment's protection and argued the statutes punished the publication of matters of public concern.¹⁰³

The Court began its discussion by framing the exceedingly important interests involved in the case: “[F]ull and free dissemination of information concerning public issues, and . . . the interest in individual privacy and, more specifically, in fostering private speech.”¹⁰⁴ The government argued the statutes were necessary to reduce the incentive to surreptitiously record private conversations and to minimize the harm when conversations have been illegally intercepted.¹⁰⁵ The Court spent little time rejecting the government's argument regarding the need to disincentivize surreptitious recordings.¹⁰⁶ It reasoned that because those who published the recordings were not the ones who recorded the conversation, it would be inappropriate to punish the individual who did not engage in the illegal activity.¹⁰⁷ Instead, the Court reasoned the government can regulate the underlying illegal conduct, in this case, the recording, but not the associated speech—the publication of the legally or innocently obtained information.¹⁰⁸ The Court, however, spent more time addressing the government's “considerably stronger” second argument.¹⁰⁹

Private communication, the Court noted, is not only an important interest but also essential for a functioning democracy.¹¹⁰ Private conversations, free of concerns that they will be disclosed, are imperative to deliberation and experimentation with ideas.¹¹¹ Indeed, the fear that the private sphere is being intruded upon, even if unfounded, can significantly

99. *Id.* at 519.

100. *Id.*

101. *Id.* at 519–20.

102. *Id.* at 523–24.

103. *Id.* at 520.

104. *Id.* at 518.

105. *Id.* at 529.

106. *Id.* at 528–32.

107. *Id.*

108. *Id.* at 529–30.

109. *Id.* at 532–35.

110. *See id.* at 533–35.

111. *Id.* at 532–33.

deter complete and candid exploration of ideas.¹¹² Nevertheless, the Court was also compelled to consider the overwhelming social interest in publishing matters of public concern.¹¹³ The Court cited the myriad cases that repeatedly point to the American commitment, as expressed through the First Amendment, to a robust, uninhibited discussion of matters of public import.¹¹⁴ In the balance, the primacy of free speech and a robust discussion of matters of public concern prevailed.¹¹⁵ The Court found the loss of privacy and exposure of the self to others—even if unintended—is simply a cost of living in a modern society that values the freedom of speech and the press.¹¹⁶

Private expression is important because it facilitates the intellectual and emotional development of the individual. The private sphere offers the individual the security to entertain all manner of ideas, including those considered deviant or unorthodox. Because private expression plays this vital role in the development of one's identity and ultimately redounds to the benefit of society, the Court has recognized the First Amendment implications of intrusions into the private realm. Nevertheless, in the conflict between protecting private expression at the expense of limiting public expression, the Court has identified the latter as taking priority in light of First Amendment values.

B. The Public Sphere and the Constitutional Value of the Expressive Activity That Occurs Therein

To truly conceptualize privacy and the self-reflective, raw expression that occurs there, it is necessary to juxtapose the private sphere with the public sphere. The public sphere, as opposed to private life, is the locus of human civic engagement.¹¹⁷ The public sphere is a place where reasoned, public debate and discussion occur regarding matters of public concern.¹¹⁸ This is particularly so in a representative democracy.¹¹⁹ As a result, it is the province of social interaction where one does not, and perhaps cannot, control the information to which one is exposed.¹²⁰ Instead, one engages in self-exploration within the safety and freedom of the private sphere and

112. *Id.* at 533.

113. *Id.* at 534.

114. *Id.* at 534–35.

115. *Id.*

116. *Id.* at 534.

117. ZIZI A. PAPACHARISSI, A PRIVATE SPHERE 113 (2010).

118. *Id.*

119. *Id.*

120. *See id.*

then enters the public sphere to communicate and exchange ideas.¹²¹ Ideally, this discussion of ideas in the public sphere facilitates both decision-making by the state and a connection between citizens and the state.¹²² Traditionally, because of its inherent nature, the public sphere was not generally understood to be a place that cultivated and ensured control over psychological, social, or physical privacy.¹²³ It is because of the lack of control in the public sphere that one is unlikely to find true authenticity; instead, one's truly genuine character is developed and on display in private.¹²⁴

The utility and value of the public sphere is primarily found in its facilitation of interactions among a polity. Ideally, the engagement that occurs with others in the public sphere is brought about by sharing ideas through communicative activities—activities that have First Amendment implications. Unlike the private sphere discussed above, most of the values Emerson explores in *Toward a General Theory of the First Amendment* revolve around the public sphere, the public interchange of ideas, and the resulting social good.¹²⁵ He posits that Western democracies rely on the protection of free speech in the public sphere to separate truth from falsity.¹²⁶ The separation of truth from falsity through the free submission, modification, and rejection of ideas ultimately leads to better-informed social judgment.¹²⁷ This improvement in social judgment results in public policy that is better able to fulfill society's needs.¹²⁸ Moreover, unfettered expression in the public sphere also meets the goals of democratic societies.¹²⁹ Democracy presupposes that each individual must be recognized as having the right to contribute to social development and that leaders legitimately govern only when those they govern are free to articulate their needs and desires.¹³⁰

The quintessential expressive activity contemplated by First Amendment jurisprudence is precisely the activity discussed above—speech on matters of public concern in the public sphere.¹³¹ The Supreme

121. Trepte & Reinecke, *supra* note 68, at 61–63.

122. PAPACHARISSI, *supra* note 117, at 121–23.

123. *See id.* at 113.

124. Trepte & Reinecke, *supra* note 68, at 66.

125. *See, e.g.*, Emerson, *supra* note 79, at 901–03.

126. *Id.* at 881–82.

127. *Id.*

128. *Id.* at 882.

129. *Id.*

130. *Id.* at 882–84.

131. *See Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940). The Court further stated: “Freedom of discussion, if it would fulfill its historic function in this nation, must embrace

Court has held this speech to be deserving of the most robust constitutional protection because it “occupies the ‘highest rung of the hierarchy of First Amendment values.’”¹³² The Court has placed speech on matters of public concern in such a vaunted position because, as Emerson suggested, it is the “essence of self-government.”¹³³ Because the First Amendment was intended to ensure the free flow and interchange of ideas to bring about social and political change, mere self-expression and private speech are not of equal First Amendment import.¹³⁴

Instead, the Court has characterized publicly articulated speech on matters of private concern as less socially valuable and less worthy of rigorous constitutional protection.¹³⁵ While not entirely devoid of value and First Amendment protection, self-expression and privately concerned speech in the public sphere are less valuable because their focus is inward on issues of import only to the individual.¹³⁶ Limitations on self-expression and private speech are less concerning because any self-censorship that may result—and any harm resulting from the inability to share those ideas—is borne by the individuals involved.¹³⁷ Because self-expression and private speech lack public import, the loss to the community, to democracy, and to self-governance is minimal.¹³⁸

As a result, while the public sphere is the locus of classic First Amendment activity, not all speech that occurs there is of equal Constitutional value. The content of speech determines its value. Speech that contributes to the debate on matters of public concern is most revered because it has the most social utility—whether occurring in the private or public sphere. Speech that is useful only to the individual is of less First Amendment import—whether it occurs in the private or public sphere. Privately concerned speech, however, like self-reflection and introspection, can be a matter of public concern in some circumstances. This is particularly so when that privately concerned speech is the musings of a president. Because candid musings often only occur in the private sphere, they rarely enter the public sphere. Social media, though, has made that possible, if not probable.

all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” *Id.* at 102.

132. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

133. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

134. *Roth v. United States*, 354 U.S. 476, 484–85 (1957).

135. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985).

136. *Id.* at 762.

137. *See Snyder v. Phelps*, 562 U.S. 443, 452–53 (2011).

138. *See id.*

C. *Social Media and the Collapse of the Private and Public Spheres*

Active participation in social media requires, perhaps because of its *raison d'être*, the willingness to engage in some self-revelation.¹³⁹ Studies have shown that users are often willing to reveal more information about themselves online than they would in a face-to-face conversation.¹⁴⁰ Though physically disconnected from their audience, social media users (particularly Twitter users) attain a feeling of intimate connectedness when tweeting.¹⁴¹ However, the feeling of connectedness is not necessarily a bidirectional experience resulting in a discussion of issues. Instead, the majority of Twitter posts are self-referential or autobiographical.¹⁴² Indeed, the more private the thought expressed via social media, the more its authenticity is affirmed.¹⁴³

Traditionally, public and private situational boundaries affect the information individuals share.¹⁴⁴ However, social media has created a “publicly private stage” that removes those boundaries.¹⁴⁵ On this “publicly private stage,” the individual engages in private, self-reflective expression through an “always-on platform,” like Twitter, such that the use of social media causes the public and private spheres to collapse.¹⁴⁶ Although the individual is situated in a physically private location, social media allows for communication of self-reflective, private thoughts that effortlessly transgresses the boundary between private and public.¹⁴⁷ The social media user seeks—by sharing personal thoughts with an imagined audience—the feeling of intimacy that traditionally existed in the private sphere alone.¹⁴⁸

There are two reasons that social media collapses the private and public sphere: the immediate access to the public sphere from the private sphere and the mobility that technology enables.¹⁴⁹ Unlike the previous

139. For example, to maintain a profile on social media, one often shares their name, gender, and a personal photo. Moreover, self-revelation occurs with such simple actions as tagging oneself in photos, showing approval of an organization by following or liking its page, or writing on others' profile pages. FACETS OF FACEBOOK 150-51 (Kathrin Knautz & Katsiaryna S. Baran eds., 2016).

140. *Id.* at 150.

141. ZIZI PAPACHARISSI, *AFFECTIVE PUBLICS* 100 (2015).

142. *Id.*

143. *Id.* at 109.

144. *Id.* at 99.

145. *Id.* at 96.

146. *Id.* at 99.

147. *Id.* at 96.

148. *Id.* at 109.

149. PAPACHARISSI, *supra* note 117, at 133–34, 138–39.

understanding of the private/public sphere dichotomy, the individual using social media in the private sphere is no longer disconnected from the public sphere and burdened by location.¹⁵⁰ Accessing the public sphere had historically required a physical change of location. Through social media, the public sphere is accessible as soon as the user connects to the Internet. As a result, he or she is not prohibited from sharing thoughts that can become immediately, publicly accessible.¹⁵¹ Thoughts and ideas that are generated in a private environment, and that would have previously remained private, can enter the public sphere fluidly.¹⁵² This occurs without requiring physical entry into a public space and without compromising the intimacy felt in the private space.¹⁵³ The individual-focused, personalized nature of social media ensures that the self remains the focal point of expression via social media.¹⁵⁴ Thus, social media fits seamlessly into the private sphere and facilitates the publicly accessible expression of authentic contemplation and reflection that occurs there.¹⁵⁵

Moreover, technology and remote connectivity allow the mobile sharing of information. This, in turn, has added to the collapse of the public and private spheres through social media.¹⁵⁶ The private sphere can exist temporally and spatially in various locations and is not tied solely to the home.¹⁵⁷ While individuals define private times and spaces for themselves, technology allows them constant access to social media, such that making private thoughts publicly accessible is limited only by a connection to the Internet.¹⁵⁸ As a result, while one may have a private moment in an otherwise public venue, like the doctor's office or a restaurant, the non-static nature of the private sphere in that moment is accommodated and eroded by the mobility of technology that facilitates connectivity to social media.¹⁵⁹ It is accommodated and eroded because self-reflection that occurs in public spaces is often not made public due to social norms. However, through mobile connectivity, a private thought in a public space can now be broadcast to a publicly accessible social media network. Thus, self-reflective, authentic, private thoughts can be made

150. *Id.* at 133.

151. *Id.*

152. *Id.* at 133–34, 137–39.

153. *Id.*

154. *Id.* at 137.

155. *Id.*

156. *See id.* at 139–40.

157. *Id.* at 139.

158. *Id.*

159. *Id.* at 138–39.

publicly accessible through social media anywhere and anytime.¹⁶⁰ Social media users can share their private thoughts while sitting at home in their robe and slippers or while having an intimate conversation at a bar. The user has the illusion of sharing ideas in an intimate and private setting, while social media allows the public to listen in on the conversation.

III. PRESIDENT DONALD TRUMP'S USE OF SOCIAL MEDIA

While President Barack H. Obama's presidency spanned the beginnings of the social media revolution, President Donald Trump is arguably the first "social media" president. He is the first U.S. president to have a significant, ongoing, and robust personal presence on social media that predates his presidency; that presence has continued throughout his tenure.¹⁶¹ Before becoming president, President Trump maintained a personal Twitter account, @realDonaldTrump, and has continued to use it, along with the official presidential account, @POTUS, since his inauguration.¹⁶² The President tweets from each account almost daily and, at times, tweets are posted from both accounts within minutes of each other.¹⁶³

The President and his administration have never divulged who, in addition to the President, has access to the @realDonaldTrump and @POTUS accounts for the purposes of drafting and posting tweets.¹⁶⁴ To be sure, it is unlikely that each tweet from these accounts is conceived, drafted, and posted by the President.¹⁶⁵ Moreover, it is difficult to identify whether any particular tweet was posted by the President, and entire websites have been dedicated to using computer analytics to deduce authorship.¹⁶⁶ Nevertheless, apart from an occasional tweet, it appears that the President and the White House social media director Dan Scavino are the only people to have continued access to the accounts.¹⁶⁷ A review of tweets from the @realDonaldTrump account suggests that many tweets are

160. *Id.* at 139.

161. See Douglas B. McKechnie, *@POTUS: Rethinking Presidential Immunity in the Time of Twitter*, 72 U. MIAMI L. REV. 1, 9–10 (2017).

162. *Id.* at 10.

163. *Id.*

164. See Jason Le Miere, *Does Trump Write His Own Tweets? Apparently Not This One*, NEWSWEEK (Oct. 4, 2017, 2:41 PM), <https://perma.cc/6TH7-2U8T>.

165. *Id.*

166. *Id.*; e.g., DID TRUMP TWEET IT?, <https://perma.cc/S2TK-B6JQ>.

167. Abby Ohlheiser, *The (Other) Man Behind the Curtain of Trump's Twitter Account Is Revealed . . . Again*, WASH. POST: THE INTERSECT (Oct. 4, 2017), <https://perma.cc/FA2S-CH68>.

posted in the middle of the night or in the early morning hours, indicating that it is unlikely his aides or staff are drafting and posting the tweets.¹⁶⁸ Reports suggest the President often begins his day tweeting while watching cable news and lying in bed or sitting in the den next to his bedroom.¹⁶⁹

Certainly, many of the President's provocative tweets occur during the day, such as when the @realDonaldTrump account, on February 17, 2017 at 1:48 p.m., labeled the "FAKE NEWS media"—including the New York Times, ABC, CBS, NBC, and CNN—"the enemy of the American People!"¹⁷⁰ But it is often the late-night and early-morning tweets that are the most revealing, the most controversial, the most unabashed, or the most provocative. For example, on June 29, 2017, the @realDonaldTrump account posted two tweets—the first at 5:52 a.m. and the second, a continuation of the first, at 5:58 a.m.¹⁷¹ The tweets criticized the cable news show Morning Joe for its ratings and referred to its host Joe Scarborough as a "[p]sycho."¹⁷² Additionally, the tweets referred to the show's other host, Mika Brzezinski, as "low I.Q. Crazy Mika."¹⁷³ The tweets also suggested the hosts were disingenuous because they were criticizing the President on their show yet insisted on joining him at his Mar-a-Lago resort for New Year's Eve celebrations.¹⁷⁴ Perhaps most controversially, the tweets claimed that Brzezinski was bleeding from a facelift when she and Scarborough visited the resort.¹⁷⁵

The President's confrontational @realDonaldTrump tweets are not reserved for the media, or the early morning hours, alone. Provocative

168. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 7, 2017, 2:53 AM), <https://perma.cc/7VWE-GU8K>; Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 30, 2017, 4:25 AM), <https://perma.cc/VX7P-TX5G>; Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 4, 2018, 3:32 AM), <https://perma.cc/PX5E-94FX>; Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 23, 2018, 3:31 AM), <https://perma.cc/YV9L-99R9>; Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 20, 2018, 4:24 AM), <https://perma.cc/NU9R-NFF4>; Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 20, 2018, 5:38 AM), <https://perma.cc/C8T4-JRLZ>.

169. Maggie Haberman, Glenn Thrush & Peter Baker, *The President vs. the Presidency*, N.Y. TIMES, Dec. 10, 2017, at A1.

170. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), <https://perma.cc/3FRX-BP6B>.

171. Donald J. Trump (@realDonaldTrump), TWITTER (June 29, 2017, 5:52 AM), <https://perma.cc/DDY4-HB6Z>; Donald J. Trump (@realDonaldTrump), TWITTER (June 29, 2017, 5:58 AM), <https://perma.cc/MGS9-99M6>.

172. Donald J. Trump (@realDonaldTrump), TWITTER (June 29, 2017, 5:52 AM), <https://perma.cc/DDY4-HB6Z>.

173. *Id.*

174. Donald J. Trump (@realDonaldTrump), TWITTER (June 29, 2017, 5:58 AM), <https://perma.cc/MGS9-99M6>.

175. *Id.*

political tweets have been posted in the middle of the night. For example, on July 25, 2017, the President posted a tweet at 3:12 a.m. criticizing his Attorney General, Jeff Sessions.¹⁷⁶ The tweet condemned the Attorney General as being ineffective for failing to investigate both former Secretary of State Hillary Clinton's alleged crimes and those who were leaking intelligence.¹⁷⁷ In another set of tweets in the middle of the night, President Trump criticized Senators Lindsey Graham of South Carolina and Jeff Flake of Arizona.¹⁷⁸ Starting at 3:19 a.m. and tweeting again at 3:24 a.m., two tweets from @realDonaldTrump accused Senator Graham of lying about the President's comments following the deadly white supremacist rally and attacks in Charlotte, North Carolina.¹⁷⁹ The third tweet, at 3:56 a.m., then moved to pillory Senator Flake for being "WEAK on borders" and a "non-factor in the Senate" and to celebrate his Republican primary challenger, Dr. Kelli Ward.¹⁸⁰

The President has also used Twitter to respond to affronts and criticisms regarding his presidential capabilities. For example, he has turned to Twitter to address reports that those within his inner circle questioned his competency, intelligence, and acuity.¹⁸¹ On January 5, 2018, book publisher Henry Holt began selling an expose of the President's administration; the book suggests his top advisors believe he is mentally unfit and intellectually incapable of serving as President.¹⁸² The President responded to the reports the next day with three tweets.¹⁸³ In his tweets between 4:19 a.m. and 4:30 a.m., he asserted that his two greatest assets

176. Donald J. Trump (@realDonaldTrump), TWITTER (July 25, 2017, 3:12 AM), <https://perma.cc/QX5K-HNE2>.

177. *Id.*

178. Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 17, 2017, 3:19 AM), <https://perma.cc/6DPN-LV22>; Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 17, 2017, 3:24 AM), <https://perma.cc/3Z7L-X6WM>.

179. Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 17, 2017, 3:19 AM), <https://perma.cc/6DPN-LV22>; Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 17, 2017, 3:24 AM), <https://perma.cc/3Z7L-X6WM>.

180. Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 17, 2017, 3:56 AM), <https://perma.cc/XG7B-MWKR>.

181. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2018, 4:19 AM), <https://perma.cc/4XCC-T8XB>; Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2018, 4:27 AM), <https://perma.cc/U86T-8AYT>; Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2018, 4:30 AM), <https://perma.cc/WY3H-55F7>.

182. See Alex Pappas, *White House Tell-All to Hit Bookshelves Early, as Publisher Defies Trump Demand*, FOX NEWS (Jan. 4, 2018), <https://perma.cc/LQL8-XHPE>.

183. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2018, 4:19 AM), <https://perma.cc/4XCC-T8XB>; Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2018, 4:27 AM), <https://perma.cc/U86T-8AYT>; Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2018, 4:30 AM), <https://perma.cc/WY3H-55F7>.

throughout his life have been his “mental stability” and being “really smart.”¹⁸⁴ He further asserted his moves from successful businessman to television celebrity to President prove that he is not simply “smart, but genius . . . and a very stable genius at that!”¹⁸⁵

The relevance of these tweets, and many others, has bedeviled President Trump’s administration. The President’s first White House Press Secretary, Sean Spicer, identified the tweets as official presidential statements.¹⁸⁶ At the same time, other administration officials, such as Deputy White House Press Secretary Sarah Huckabee Sanders and Counselor to the President Kellyanne Conway, have lamented the media’s “obsession” with President Trump’s tweets.¹⁸⁷ Still other administration officials, such as the White House Chief of Staff John Kelly, do not follow the President’s Twitter usage.¹⁸⁸

Regardless of whether his tweets are official presidential statements, they nonetheless deserve attention for no other reason than their function as revelatory statements by the President of the United States. Unlike virtually any public statements by previous presidents, their unique character as social media communication furthers society’s understanding of his thoughts, his affect, and his authentic self.

IV. THE VALUE OF PRESIDENTIAL TWEETS

The public has historically relied on secret White House recordings, sometimes released long after their immediate political relevancy, to gain intimate insight into a president’s private thoughts and ideas.¹⁸⁹ With this delayed release, the task falls to historians to piece together the worth and relevance of a president’s true feelings, and perhaps his true self, as articulated in private settings. These historically interesting records, however, leave the electorate with little direct democratic use for the information at the time of their release. If the electorate had contemporaneous access to the recordings, it would have provided a window into the president’s authentic self through his unguarded

184. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2018, 4:27 AM), <https://perma.cc/U86T-8AYT>.

185. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2018, 4:30 AM), <https://perma.cc/WY3H-55F7>.

186. Ali Vitali, *Trump’s Tweets ‘Official Statements,’ Spicer Says*, NBC NEWS (June 6, 2017, 5:02 PM), <https://perma.cc/E39J-Q8QC>.

187. *Id.*

188. Rebecca Savransky, *John Kelly: I Don’t Follow Trump’s Tweets*, THE HILL (Nov. 12, 2017, 7:44 AM), <https://perma.cc/U5NP-7MK8>.

189. *See supra* Sections I.A–B.

reflections and musings. In those moments, the electorate could have democratically judged the president's true character and fitness for the office. Yet the closed-door discussions were recorded in private settings inaccessible to the public. These settings allowed presidents to engage in all of the activities one enjoys in the private sphere—candor, self-exploration, and the like—all the while retaining a more guarded, public persona in the public sphere. As a result, potentially politically self-destructive candor rarely reached the outside world.

As evidence, one need look no further than the secret White House tapes that captured presidents' most exposed selves. The well-known Watergate tapes and the aftermath of their discovery show the immediate impact of capturing a president's discussions of illegal activity. However, a recording capturing evidence of a president's criminal behavior is the exception. Instead, secret White House recordings are most often useful for historically contextualizing presidential decisions and national events, as well as providing a glimpse into a president's unguarded thoughts. Whether it is President Roosevelt's threats to unleash a political smear campaign or President Kennedy's transactional approach to toppling an allied regime, hearing the recordings of a president's unvarnished deliberations and cogitations allows the public to gain a better, albeit post hoc, understanding of a previous president's nature and disposition.¹⁹⁰ President Nixon's confession that he could never publicly admit his anti-Semitic sentiments demonstrates presidents are undoubtedly aware that the public's contemporaneous access to their musings could redound to their political detriment.¹⁹¹

The Supreme Court's exploration of the constitutional implications of uninhibited private speech, in *Stanley* and *Bartnicki*, reveals the personal and democratic value for a president. A protected private sphere allows a president "to satisfy his intellectual and emotional needs"¹⁹² and "voice critical and constructive ideas."¹⁹³ To be sure, providing a president the intellectual refuge of a private sphere is undoubtedly a goal that benefits not only him but also society. It allows a president to test his thoughts and entertain new, and perhaps unconventional, ideas, all without risking the potential for public backlash and politically dangerous results that might

190. *See id.*

191. Dart, *supra* note 49.

192. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

193. *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (quoting PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 202 (1967)).

accompany uncensored self-reflections.¹⁹⁴ Among other things, it gives society a president who can strengthen and deepen his understanding of the core values that animate his policy, reconsider his preconceived notions, or simply increase his self-awareness as a leader.

The benefits to American society, however, focus solely on the ex post facto value of a president's expressive activities in the private sphere. That is to say, the social value of a president's expressive freedom in the private sphere is realized through its effects on the president in the public sphere. It is only in the public sphere that the electorate can pass judgment on the publicly accessible knowledge about a president, which is often a refined, edited, or altered version of the thoughts articulated in the private sphere. What a vivid, deep, and democratically actionable understanding the electorate could have of a president if only his inaccessible, authentic musings were likewise publicly accessible.

A contemporaneous piercing of the private sphere's veil would allow the electorate to have access to a president's self-expressed character and proclivities. Whether privately and unabashedly waxing on matters of public import or engaging in self-reflection about private matters, a president's private expressive activity takes on a democratically significant tenor, even if not intended to directly contribute to the public debate. This information, whether revolving around public issues or quotidian topics, contains democratic value simply as a way for the electorate to understand, debate, and pass judgment on a president's inherent nature. Society's insights into a president's true identity increase its informed judgment regarding that president. This more deeply informed judgment then facilitates American society's ability to bring about social and political change, "for the *identities* of those who are elected will inevitably shape the course that we follow as a nation."¹⁹⁵ Therefore, it is significant when a president uses a technology, like President Trump's use of Twitter, which acts as a forum for speech and has the tendency to collapse the public and private spheres. It allows instant public access to the president's candid contemplations, and these contemplations immediately climb to the highest rung of valuable speech in American democracy.

In the past, presidents might brashly criticize a subordinate in private. Unhappiness with a cabinet member's job performance might have been

194. Of course, this is likely true of all presidencies. For example, when speaking about leaks coming from the White House, White House National Security Advisor Lt. Gen. H. R. McMaster commented on the "frank, candid and oftentimes unconventional conversations" that one would expect to occur in any White House. Nicki Rossoll, *McMaster Won't Say if President Trump Confronted Russian Officials About Election Interference*, ABC NEWS, (May 21, 2017, 9:01 AM), <https://perma.cc/2NYY-N99H>.

195. *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (emphasis added).

handled through a private airing of grievances with confidants or directly with the official. These behind-the-scenes discussions, however, would simply remain confidential rebukes; perhaps suspected by the public but unconfirmed by the administration. The presidential use of Twitter, however, provides an always-connected platform for sharing those grievances immediately as they come to mind or as they develop into an articulable idea. A president may be physically situated in a private location, but, through the use of social media, his or her visceral, unrestrained impressions about a subordinate can all-too-easily be transmitted and accessed by the public. A president is no longer beholden to the previous impediments of time and place that could serve to temper and refine the expression of his or her ideas.

Similarly, it would be no surprise that a president might believe, during his or her tenure, that the media and public criticism has been unfair. It would be equally unsurprising that a president might privately fume about public criticism and a perceived media bias. However, many of the thoughts one expresses in the private sphere, particularly as reactions to feelings of being unfairly treated, are unfiltered, raw, and visceral. One may blow off steam in private and, when addressing those affronts in public, moderate his or her initial reaction. With the collapse of the private and public sphere made possible through social media, the reaction a president might have while watching television personalities, pundits, and authors criticize his fitness can now be instantaneously shared with the world while in the comfort of his bedroom. This presents an opportunity for the electorate to judge the Freudian Id of a president as, for example, in President Trump's case: Does the electorate support a President that believes the majority of the major media outlets are "the enemy of the people"?¹⁹⁶ And what are the impacts on democracy if a president views the press in that way?

Although perhaps easily dismissed as an inconsequential musing, these sort of social media posts by a president have value. Internationally, leaders in other countries are briefed on President Trump's tweets as geopolitically significant statements.¹⁹⁷ Moreover, his tweets have taunted other world leaders and encouraged protests and political change in other countries.¹⁹⁸

196. Donald J. Trump (@realDonaldTrump), TWITTER (June 29, 2017, 5:52 AM), <https://perma.cc/DDY4-HB6Z>; Donald J. Trump (@realDonaldTrump), TWITTER (June 29, 2017, 5:58 AM), <https://perma.cc/MGS9-99M6>.

197. Adam Taylor, *Putin Receives Briefings on Trump's Tweets, Kremlin Says*, WASH. POST (Dec. 12, 2017), <https://perma.cc/XW78-PN22>.

198. For example, President Trump has used his Twitter account to coyly refer to North Koran President as "short and fat." Donald J. Trump (@realDonaldTrump), TWITTER (Nov.

Closer to home, presidential tweets are also valuable for American democracy—though not in a way one might expect. Many presume social media is a marketplace of ideas; however, many users are unlikely to engage in robust debate through social media and instead use it as “a prime tool to advertise the self.”¹⁹⁹ As evidenced by President Trump’s decision to regulate and block Twitter followers, the President himself does not view his Twitter account as a public forum for discussion and debate.²⁰⁰ Instead, he uses social media as an “electronic confessional” to share his own thoughts without truly engaging with others’ ideas.²⁰¹ The value of a president’s social media usage does not lie in the robust debate that occurs there; it lies in the window citizens have into a president’s politically relevant thoughts and intent, as well as his affect and personality.

The development of ideas that occurs in the private sphere, which Emerson and *Stanley* recognize as bringing value to the individual, brings democratic value to the electorate when the president is engaged in the exercise on public display.²⁰² Viewing a president’s basic instincts, as described in a tweet, can serve to inform the electorate—in real time—about the president’s frank evaluation of policy and current events. These Twitter-based reactions and their tenor, uncoordinated with external forces that may attempt to modulate or quiet them, can also reveal a president’s character and inclinations. For example, they can reveal how a president reacts when he takes umbrage: Are his first instincts to ignore a slight, wilt, or retaliate? The electorate can use this information to make more informed, democratic decisions regarding their agreement or disagreement, or their trust or distrust, of a president’s disposition and effectiveness. The electorate can then act on this information in making political decisions regarding not only the next presidential election but also, to the extent it supports or undermines the president, legislative elections, as well.

11, 2017, 4:48 PM), <https://perma.cc/EJU9-YY96>. Additionally, he has referred, with approval, to protest in Iran and the need for political change in the country. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 29, 2017, 7:42 PM), <https://perma.cc/RZ9W-QGPB>; Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 1, 2018, 4:44 AM), <https://perma.cc/EQU3-5ZXJ>.

199. A Pew Research study found that on an issue that equally divided the country—the Edward Snowden revelations about government surveillance programs—86% of Facebook and Twitter users were willing to have an in-person conversation about the issue, but only 42% were willing to post about it. Keith Hampton et al., *Social Media and the ‘Spiral of Silence’*, PEW RES. CTR. (Aug. 26, 2014), <https://perma.cc/QUH7-RLS9>; JOSÉ VAN DIJCK, *THE CULTURE OF CONNECTIVITY* 76 (2013).

200. Hamza Shaban, *Why Blocked Twitter Users Are Suing President Trump*, WASH. POST (July 12, 2017), <https://perma.cc/U3D9-7HLV>.

201. MARK DEUZE, *MEDIA LIFE* 92 (2012).

202. See Emerson, *supra* note 79; *Stanley v. Georgia*, 394 U.S. 557, 564–66 (1969).

Moreover, visceral reflections via Twitter, not filtered by staff for public consumption, can also be democratically valuable as legally significant evidence of presidential intent. To the extent presidential policies and actions are challenged as violating the Constitution or statutory law, tweets can evince and record the motivation behind decisions and policies. For example, in *International Refugee Assistance Project v. Trump*, the Fourth Circuit considered President Trump's third executive order instituting travel restrictions on citizens from eight countries.²⁰³ The populations of six of the countries were majority-Muslim, and the plaintiffs challenged the travel restrictions on Establishment Clause grounds, among others.²⁰⁴ In affirming the district court's preliminary injunction enjoining the executive order, the court used President Trump's tweets as evidence of his "desire to ban those of Islamic faith from entering the United States."²⁰⁵ The court described the tweets as displaying the President's "bias," "reason," "desire," and "purpose."²⁰⁶

Likewise, as part of the FBI's investigation into Russian interference with the 2016 election, Special Counsel Robert Mueller is reportedly exploring whether President Trump attempted to obstruct justice.²⁰⁷ In particular, Mueller is allegedly interviewing witnesses in an effort to determine whether President Trump intended to remove Attorney General Sessions and appoint a replacement who would exert control over the investigation.²⁰⁸ Mueller is purportedly trying to determine the President's state of mind regarding Attorney General Sessions in July and August 2017.²⁰⁹ It was during this same time that President Trump was tweeting, in the middle of the night and in the early morning, that Attorney General Sessions was "weak" and "beleaguered."²¹⁰ These disparaging tweets, channeling the President's visceral, instinctive thoughts, seem to evince his contemporaneous attitude regarding the Attorney General—an attitude that might rightly be described as disapproval, condemnation, or contempt.

Within the secure environment of the private sphere, individuals uninfluenced by external norms are less likely to disguise the purpose

203. *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 250–51 (4th Cir. 2018).

204. *Id.* at 251, 255.

205. *Id.* at 269.

206. *Id.* at 264, 267–68.

207. Devlin Barrett et al., *Mueller Investigation Examining Trump's Apparent Efforts to Oust Sessions in July*, WASH. POST (Feb. 28, 2018), <https://perma.cc/75LE-SGCA>.

208. *Id.*

209. *Id.*

210. Donald J. Trump (@realDonaldTrump), TWITTER (July 24, 2017, 5:49 AM), <https://perma.cc/5LN7-DMV7>; Donald J. Trump (@realDonaldTrump), TWITTER (July 25, 2017, 3:12 AM), <https://perma.cc/QX5K-HNE2>.

behind their actions. At a minimum, entrance into the public sphere can result in an explanation for an action that shades the intent that animated it. In the extreme, entrance into the public sphere can result in intent being disguised or altered for public consumption. Tweets that capture a president's impetus as it relates to his policies and decisions may be as equally clear evidence of intent as a secretly recorded conversation among confidants in a private setting; both memorialize the musings of a president while he inhabits a secure emotional state. The Tweet, however, brings with it the benefit of contemporaneous democratic usefulness.

CONCLUSION

American democracy does itself a disservice to ignore the value of presidential Tweets. At various times throughout the twentieth century, post hoc releases of secret White House recordings revealed previously unknown presidential thoughts and inclinations. While historically fascinating and illuminating, most recordings, accessible only years later, had no immediate implications for democratic decisions by the electorate. The recordings captured presidents in the private sphere, where contemplation and development often manifest themselves in unguarded expressive activity. Social media, however, has collapsed the divide between the private and public sphere. Social media facilitates the revelation of unfiltered ideas by serving as a conduit to fluidly transfer them to a publicly accessible space. As a result, a president's use of social media is valuable to American democracy to the extent that it can capture and distribute self-reflective information about the president, typically not accessible in the public sphere. Through a presidential Twitter account, the electorate can gain instant access to the genuine motivations, affect, and character of a president without having to wait for secret White House recordings to be released.