

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND	:	
ETHICS IN WASHINGTON, et al.,	:	
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Plaintiffs,	:	
	:	
v.	:	Civil Action No.
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THE HON. RICHARD B. CHENEY, et al.,	:	
	:	
Defendants.	:	
_____	:	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION**

**PRELIMINARY STATEMENT**

The president and vice president, entrusted by law with safeguarding our nation’s history, instead have adopted policies and guidelines that exclude the public from records that the vice president creates and receives in fulfillment of his constitutional, statutory, and other official and ceremonial duties. For their part, the Archivist and the National Archives and Records Administration (“NARA”) have also adopted guidelines severely and unlawfully restricting the scope of what the vice president is required to leave behind as the property of the American public, notwithstanding their statutory mission to preserve and provide public access to presidential records. As a result of defendants’ unlawful policies and guidelines, we face the permanent and irreparable loss of valuable historical records that, once gone, will leave a gaping hole in our national history.

This action, brought under the Administrative Procedure Act (“APA”) and the Presidential Records Act (“PRA”), challenges defendants’ guidelines and policies as contrary to law and seeks declaratory, injunctive and mandamus relief to compel the defendants to comply

with their mandatory obligations under the PRA. Absent the requested relief plaintiffs -- who include individual historians, organizations representing historians and archivists, and a non-partisan watchdog group -- the public, and future generations will be deprived of these important and valuable historical records. This loss to history is especially acute given the prominent role Vice President Richard B. Cheney has played in developing and implementing key administration policies and objectives, ranging from the administration's energy policy to decisions about going to war with Iraq.

Of equal concern, this loss is not merely threatened some time in the distant future. Rather, with each passing day we face the loss of a growing body of vice presidential records, particularly as the administration begins the process of packing up its records and transferring them to the custody and control of the archivist. A presidential transition, literally years in the planning, does not happen overnight. Generally, the archivist spends years preparing to receive presidential records. Moreover, during their time in office the president and vice president make decisions on a daily basis as to which records to preserve pursuant to the PRA and which to dispose of as personal records not subject to mandatory record keeping obligations. For the vice president this means that as a consequence of his unlawful policies and guidelines and his failure to follow the dictates of the PRA, he is not preserving vice presidential records that the PRA requires him to maintain and transfer to the archivist.

Accordingly, to guard against further loss and the wholesale destruction or alienation of vice presidential records that will occur as the transition is underway, plaintiffs are entitled to a preliminary injunction to prevent any further record destruction. Absent an injunction, plaintiffs and the public will suffer irreparable harm, specifically the risk that the only copies of valuable

historical records will not be preserved. Moreover, given the defendants' patently unlawful interpretations of their responsibilities under the PRA, plaintiffs are likely to prevail on the merits of their lawsuit and the balance of harms tips decidedly in plaintiffs' favor.

### **FACTUAL BACKGROUND**

On November 1, 2001, President George W. Bush issued Executive Order 13,233, entitled "Further Implementation of the Presidential Records Act" ("Bush EO"). Section 11(a) of the Bush EO provides, in relevant part, that "pursuant to section 2207 of title 44 of the United States Code, the Presidential Records Act applies to *the executive records of the Vice President.*" (emphasis added).

The term "executive records of the Vice President" is found nowhere in either the PRA or any NARA regulations implementing the PRA, and President Bush offered no explanation for his use in the executive order of this novel term. The meaning and intent of this provision of the Bush EO have, however, emerged over time. As subsequent events make clear, President Bush limited the scope of the PRA to "the executive records of the Vice President" to exclude from its reach the vast majority of records that the vice president creates and receives, on the theory that the vice president is acting in a non-executive branch capacity.

Since the issuance of the Bush EO, the vice president has taken an extremely narrow view of when -- if ever -- he acts in an executive branch capacity. For example, since 2003, the vice president and the Office of the Vice President ("OVP") have refused to file with the Information Security Oversight Office of NARA any reports about what data they have classified or declassified in accordance with Executive Order 12,958, as amended by Executive Order 13,292, despite the obligation that the executive orders impose on the vice president and the

OVP to comply with NARA's legitimate demand for this information. See Complaint, ¶ 29.<sup>1</sup> And in 2004, the OVP refused to permit NARA to conduct an on-site inspection of the procedures and facilities the OVP uses to safeguard classified national security information, despite NARA's authority and obligation to conduct such an on-site inspection pursuant to Executive Order 12,958. Id. As grounds for both these refusals, the vice president asserted that the OVP is not an entity within the executive branch. Id.

On similar grounds, the vice president and the OVP have refused to comply with the Ethics Reform Act of 1989, which requires every executive agency to file a semi-annual report of payments accepted from non-federal sources. 31 U.S.C. § 1353. On at least three occasions, by letters dated March 18, 2002, January 13, 2004, and February 25, 2005, then-Counsel to the Vice President David S. Addington advised the Office of Government Ethics that the OVP would not comply with the Act's reporting requirements. Complaint, ¶ 30.<sup>2</sup> In a subsequent letter to the Office of Government Ethics dated June 2, 2008, an aide to Vice President Cheney reaffirmed the position of the OVP that the disclosure requirements for privately paid travel do not apply to the OVP based on its claim that it is not an agency in the executive branch. Id.

In 2004, the OVP refused to provide any information for inclusion in the United States Government Policy and Supporting Positions, commonly known as the "Plum Book." Complaint, ¶ 31. But the 2008 edition of the Plum Book, based on information supplied by the OVP, now describes the Office of the Vice President in relevant part as follows: "[t]he Vice

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<sup>1</sup> Letters from NARA and Congressman Henry A. Waxman on behalf of the House Committee on Government Oversight and Reform memorializing these events are attached as Exhibit 1.

<sup>2</sup> Copies of these letters are attached as Exhibit 2.

Presidency is a unique office that is neither a part of the executive branch nor a part of the legislative branch, but is attached by the Constitution to the latter . . .” Id.<sup>3</sup> David Addington, now chief of staff to Vice President Cheney, repeated this characterization of the OVP in recent testimony before the House Judiciary Committee, stating that the vice president “belongs to neither” branch but is “attached by the Constitution” to Congress. Id. at ¶ 32.

In a similar fashion, the OVP has refused to submit its staff list to Congress; as a result a recent report on White House office staff submitted to Congress does not include any staff members of the OVP. Complaint, ¶ 33. The staff and salaries of the Senate Office of the Vice President, however, are listed publicly.<sup>4</sup> Id.

The ability of the vice president to treat his records as non-executive branch records distinct from those of the rest of the EOP is facilitated by the fact that OVP records are not included within or managed by the White House Office of Records Management (“WHORM”). Complaint at ¶ 35. CREW has been advised that the WHORM manages all but the vice president’s records for purposes of the PRA, while the vice president and the OVP retain sole responsibility for managing their records. Id.

Separate and apart from the policies and guidelines adopted by the White House to significantly narrow the categories of vice presidential records subject to the PRA, NARA and the archivist have adopted their own guidelines that exclude from the reach of the PRA records generated or received by vice presidents in their congressional capacities. Complaint at ¶ 36.

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<sup>3</sup> The relevant excerpt from the 2008 edition of the Plum Book is attached as Exhibit 3.

<sup>4</sup> See [http://www.legistorm.com/office/Senate\\_Office\\_of\\_the\\_Vice\\_President/15.html](http://www.legistorm.com/office/Senate_Office_of_the_Vice_President/15.html) (last visited Sept. 2, 2008).

They have imposed this limitation, which is not included anywhere in the language of the PRA, without notice and comment. As a result of NARA's policies on vice presidential records subject to the PRA, Vice President Cheney is free to treat his so-called "congressional records" as personal records that are preserved only as a matter of his discretion. Complaint at ¶ 37. Consequently, they are not part of the records of the Bush presidency that will automatically be transferred to NARA's custody and control at the end of President Bush's term of office. Id.

Planning for that transition began from the first day of President George W. Bush's administration, given the enormity of the task of transferring a president's records from the White House to NARA for ultimate deposit in a presidential library. Complaint, ¶ 38.<sup>5</sup> In addition to hiring staff dedicated to handling President Bush's presidential papers, NARA has leased a temporary presidential materials facility in the Dallas, Texas area. Id. And starting as early as November, the White House will begin assembling its records for transfer to NARA and the physical transfer of many of the president's papers will occur well before January 20, 2009. Id. at ¶ 43.

Typically NARA would also work closely with the staff of the incumbent president to ensure a smooth transition that accounts for all presidential records. Id. at ¶ 39. CREW understands that has not, however, been the case here. Instead, White House staff long rebuffed NARA's efforts to coordinate the transfer of President Bush's records well in advance of the upcoming presidential transition. Id. Until recently, the White House refused to return telephone calls from NARA personnel or to share with NARA details about White House

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<sup>5</sup> A copy of Archivist Allen Weinstein's written congressional testimony of February 26, 2008, before the House Committee on Oversight and Government Reform describing generally NARA's preparations for the upcoming presidential is attached as Exhibit 4.

records and how they are stored. Id. The White House’s secrecy with NARA mirrors its secrecy with the American public on information and record access issues.

In light of all the evidence that the vice president was interpreting the PRA so narrowly that it would improperly exclude the vast majority of his papers, plaintiff CREW<sup>6</sup> wrote to the vice president on July 8, 2008, outlining CREW’s concerns that he does not intend to comply fully with the terms of the PRA. Complaint, ¶ 44.<sup>7</sup> To date, CREW has not received a response to its letter. CREW also wrote to NARA’s general counsel on July 21, 2008, expressing CREW’s concern with NARA’s policy of treating the legislative records of the vice president as personal records not subject to the PRA.<sup>8</sup> Id. at 45. CREW urged NARA to rethink this policy and to issue guidance confirming that the PRA applies to all records the vice president creates or receives while carrying out his constitutional, statutory, official or ceremonial duties. Id. To date, CREW has not received a response to this letter either. Id.

### **STATUTORY BACKGROUND**

Congress enacted the PRA in 1978, following a protracted legal battle between President Nixon and the government over his ability to control the records of his presidency after leaving office.<sup>9</sup> The PRA, which first took effect on January 20, 1981, directs the president to “take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies

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<sup>6</sup> CREW is the acronym for Citizens for Responsibility and Ethics in Washington.

<sup>7</sup> A copy of CREW’s letter is attached as Exhibit 5.

<sup>8</sup> A copy of CREW’s letter is attached as Exhibit 6.

<sup>9</sup> Congress first enacted the Presidential Recordings and Materials Act in 1974 to transfer control of President Nixon’s presidential records to the Administrator of the General Services Administration (later changed to the archivist) and to address the issue of public access to the materials. See 44 U.S.C. § 2111 note.

that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records . . .” 44 U.S.C. § 2203(a). The PRA specifies that “[t]he United States shall reserve and retain complete ownership, possession, and control of Presidential records . . .” Id. at § 2202.

The statute defines “presidential records” as:

documentary materials . . . created or received by the President, his immediate staff, or a unit or individual in the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

Id. at § 2201(2). Records of components of the Executive Office of the President (“EOP”) that do not advise or assist the president are governed by the Federal Records Act. Armstrong v. Bush, 924 F.2d 282, 286 n.2 (D.C. Cir. 1991).

The PRA also defines “personal records,” which fall outside the scope of the Act, as including:

all documentary materials, or any reasonably segregable portion thereof, of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

44 U.S.C. § 2201(3). Personal records include those related to the president’s election activities, but only to the extent they “have no relation to or direct effect upon carrying out of constitutional, statutory, or other official or ceremonial duties of the President.” Id. at § 2201(3)(C). Thus, if a record of the president (or vice president) has any relation to or effect on the president’s official duties, it is not considered a personal paper outside the scope of the PRA.

See 124 Cong. Rec. S26844 (Oct. 13, 1978) (Statement of Sen. Percy).<sup>10</sup>

Congress intended that the delineation between “presidential” and “personal” records be “both mutually exclusive and all encompassing.” H.R. Rep. No. 95-1487, at 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5742. Accordingly, the scope of the term “presidential records” “is very broad since a great number of what might ordinarily be construed as one’s private activities are, because of the nature of the presidency, considered to be of a public nature, *i.e.*, they affect the discharge of his official or ceremonial duties.” Id. at 5742-43.

Under the PRA, the records of the vice president are to be treated “in the same manner as Presidential records.” 44 U.S.C. § 2207.<sup>11</sup> The PRA also directs the vice president to assume the same duties and responsibilities with respect to vice presidential records as the president is directed to assume for presidential records. Id. See also Armstrong v. Bush, 924 F.2d at 286 n.2 (“The President, the Office of Vice President, and the components of the EOP whose sole responsibility is to advise the President are subject to the PRA and create ‘presidential records.’”).

NARA regulations implementing the PRA define “Vice-Presidential records” as:

documentary materials, or any reasonably segregable portion thereof, created or received by the Vice President, his immediate staff, or a unit or individual of the Office of the Vice President whose function is to advise and assist the Vice President, in the course of conducting activities

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<sup>10</sup> Sen. Percy was explaining the need for an amendment to the Act’s definition and exclusion of “personal papers” to ensure that it does not include “political papers which also involve official duties . . .” Id.

<sup>11</sup> The only exception is that the archivist may, upon a determination that it is in the public interest, agree to place vice presidential records “in a non-Federal archival depository.” 44 U.S.C. § 2207.

which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the Vice President. The term includes documentary materials of the kind included under the term Presidential records.

36 C.F.R. § 1270.14(d).<sup>12</sup> NARA regulations also provide that vice presidential records are to be treated “in the same manner as Presidential records” Id. at § 1270.12(b).

Once a president leaves office, the archivist assumes full custody and control over all of his presidential and vice presidential records and has the sole responsibility for preserving those records and preparing them for public access. 44 U.S.C. §§ 2203(f)(1), 2207. In addition, the PRA imposes on the archivist “an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act.” 44 U.S.C. § 2203(f)(1). The archivist has the same responsibilities and authority with respect to vice presidential records as the archivist has with respect to presidential records. Id. at § 2207. See also 36 C.F.R. § 1270.12(b) (archivist’s authority over vice presidential records “shall be the same as the Archivist’s authority with respect to Presidential records . . .”).

The legislative history of the PRA explains that the Act was intended to guard against the very conduct that is the subject of this lawsuit and to protect the interests of individuals and entities just like the plaintiffs here. Congress enacted the PRA in 1978 to “promote the creation of the fullest possible documentary record” of a president and insure its preservation for

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<sup>12</sup> But note that notwithstanding this definition, NARA treats the congressional records of a vice president as the personal papers of the vice president that fall outside the scope of the PRA. See supra.

“scholars, journalists, researchers and citizens of our own and future generations.”<sup>13</sup> Expansive in its scope, the PRA’s exclusion of “purely personal” records<sup>14</sup> was intended to reach records such as those concerning a president’s election activities that have “no relationship or direct effect on the President’s official activities.”<sup>15</sup>

Congress recognized the “immense historical value” of a president’s papers.<sup>16</sup> As Rep. Brademas, one of the Act’s co-sponsors, eloquently articulated:

the past may not be the surest guide to the future, but neither can we in Government afford to ignore its lessons altogether. And essential to understanding the past is access to the historical record, to the documents and other materials that are produced in the course of governing and shed light on the decisions and decisionmaking processes of earlier years.

124 Cong. Rec. H31894 (daily ed. Oct. 10, 1978).<sup>17</sup>

### ARGUMENT

Plaintiffs are seeking a preliminary injunction to guard against the destruction or alienation of Vice President Cheney’s records created or received while fulfilling his

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<sup>13</sup> 124 Cong. Rec. H34894 (daily ed. Oct. 10, 1978) (Statement of Rep. Brademas). The Supreme Court recognized the legitimacy of these interests in Nixon v. Administrator, 433 U.S. 425, 452 (1977), when it upheld the constitutionality of the predecessor law to the PRA.

<sup>14</sup> 44 U.S.C. § 2201(3).

<sup>15</sup> 124 Cong. Rec. H34896 (daily ed. Oct. 10, 1978) (Statement of Rep. Preyer); see also H.R. Rep. No. 95-1487, at 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 5742.

<sup>16</sup> 124 Cong. Rec. S36843 (daily Ed. October 13, 1978) (Statement of Rep. Percy).

<sup>17</sup> See also 124 Cong. Rec. H38284 (daily ed. Oct. 14, 1978 (Statement of Rep. Thompson) (“The preservation and guarantee of public access to the official papers and records of the President, the Vice President, and White House staff personnel is of vital importance to historians and scholars in the reconstruction and public understanding of decisionmaking events in which our Nation’s leaders have participated.”).

constitutional, statutory, ceremonial, or other duties pending the resolution of this lawsuit. The unlawful guidelines and policies he and his office have adopted, which attempt to limit the PRA's reach to only a very narrow subset of records to the exclusion of the vast majority of his records documenting how he has carried out the duties of his office, present a serious risk that valuable records will be forever lost absent this Court's immediate intervention. This risk is heightened further by the unlawful guidelines and policies of the archivist and NARA, which carve out from the PRA the vice president's congressional records even though the vice president creates those records in the administration of his constitutional duties. In addition to CREW, plaintiffs include prominent historians and organizations whose members have a continuing interest in accessing presidential and vice presidential records in a timely fashion for academic and other purposes. The rights plaintiffs seek to protect here are not only those of the plaintiffs, however, but the rights of the American public to access a complete national history. Absent the requested relief we will be left instead with historical records that reflect only those parts of our history that the vice president wants the public to see.

## **I. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION.**

### **A. Standards For Preliminary Injunctive Relief**

This Circuit employs a four-part test to determine whether preliminary injunctive relief is warranted: (1) the plaintiff's likelihood of success on the merits; (2) irreparable injury to the plaintiff absent the requested relief; (3) harm to other parties; and (4) the public interest. Ellipso, Inc. v. Mann, 480 F.3d 1153, 1157 (D.C. Cir. 2007). See also Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998); CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995). The reviewing court balances these factors on a sliding scale

and “[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.” CityFed. Fin. Corp., 53 F.3d at 746.

**B. Plaintiffs Have A Likelihood Of Success On The Merits**

Through the PRA Congress imposed a clear and unambiguous obligation on the president and vice president to preserve records that the PRA defines in equally clear and unambiguous language as encompassing records they create or receive in the course of conducting their constitutional, statutory, or other official or ceremonial duties. The defendants’ policies and guidelines excluding from the PRA records the vice president creates and receives while fulfilling his constitutionally assigned job of presiding over the Senate and breaking a tie in Senate votes (Art. I, § 3) as well as records that he creates and receives in his capacity as advisor to the president and in the discharge of his assigned functions are in direct conflict with the PRA.

*1. The Policies Of The White House Defendants Implementing The PRA With Respect To Vice Presidential Records Are Contrary To Law And Their Clear Statutory Responsibilities.*

The PRA draws a clear distinction between presidential and vice presidential papers -- which are those the president and vice president receive and create in fulfillment of their “constitutional, statutory, or other official or ceremonial duties”<sup>18</sup> – and personal papers, which are those of a “purely private or nonpublic character” that have no effect on those duties.<sup>19</sup> By this demarcation, Congress intended to establish public ownership of “all records which are

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<sup>18</sup> 44 U.S.C. § 2201 (defining “Presidential records”); § 2207 (vice presidential records subject to PRA “in the same manner as Presidential records”). See also 36 C.F.R. 1270.14(d) (NARA regulation defining vice presidential records as those the vice president and his staff create or receive while carrying out “the constitutional, statutory, or other official or ceremonial duties of the Vice President.”).

<sup>19</sup> 44 U.S.C. § 2201(3).

neither agency records subject to FOIA nor personal records,” while leaving to a president those of his records “neither developed in connection with nor utilized during the transaction of Government business.” H.R. Rep. No. 95-1487, at 3, *reprinted in* 1978 U.S.C.C.A.N. at 5734.

Notwithstanding this clear line of demarcation, the White House defendants -- Vice President Cheney, the OVP and the EOP -- have followed and continue to follow guidelines and policies that unlawfully restrict the scope of the vice president’s records subject to the PRA. First, through Section 11(a) of Executive Order 13,233, President Bush limited the scope of the PRA to “the executive records of the Vice President,” a limitation at odds with the express language of that Act. Vice presidential records -- which are co-extensive with presidential records (see 44 U.S.C. § 2207) -- include *all* records that relate to the vice president’s “constitutional, statutory, or other official or ceremonial duties,” and not merely a vice president’s “executive records.” 44 U.S.C. § 2201(2). Indeed, as discussed *infra*, the vice president’s “constitutional duties” include presiding over the Senate and breaking a tie in Senate votes pursuant to Art. I, § 3 of the Constitution.<sup>20</sup> Yet under the Bush EO, records related to the vice president’s fulfillment of these duties, which are related to the legislative not executive branch of government, would fall outside the PRA.<sup>21</sup>

Beyond the Bush EO, the vice president and the OVP have made it clear that they take an extremely restricted view of when, if ever, the vice president acts in an “executive” capacity.

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<sup>20</sup> The only other constitutional duties assigned specifically to the vice president are those set forth in Article II, section 1 (succeeding the president) and the 25th Amendment (taking over as acting president under certain conditions).

<sup>21</sup> The vice president also has very limited statutory duties, which include membership on the National Security Council. See 50 U.S.C. § 402(a).

According to the vice president, he is not a part of the executive branch, but instead is nominally attached to the legislative branch. See Complaint, ¶¶ 31-32. As a consequence of this extreme view, the vice president and the OVP have refused to provide information on their handling of classified data, id. at ¶ 29, their receipt of travel payments from non-federal sources, id. at ¶ 30, and even the identities of OVP staff members, id. at ¶ 33. These exclusions undoubtedly have carried over into their designation of which, if any, of their records are “executive” and encompassed within the PRA. But such designations are directly at odds with the language of the PRA, which applies to *all* records relating to the vice president’s discharge of constitutional, statutory, official or ceremonial duties. H.R. Rep. No. 95-1487, at 11-12 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 5742-43.<sup>22</sup>

*2. The Policies Of The Archivist And NARA Implementing  
The PRA With Respect To Vice Presidential Records Are  
Contrary To Law And Their Clear Statutory Responsibilities.*

Similarly, the guidelines and policies adopted by the archivist and NARA (“the NARA defendants”), which exclude the vice president’s congressional records from the scope of the PRA, directly conflict with the statutory language and intent of the Act to encompass records

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<sup>22</sup> Given the expansive coverage of the PRA, the Court need not decide for purposes of resolving this motion to what extent the vice president is part of the executive branch. Even with no or very limited specific constitutional or statutory responsibilities, as an executive branch officer the vice president advises and assists the president and, accordingly, as with others who advise and assist the president, his records are covered by the PRA. See 44 U.S.C. § 2201(3) (defining “Presidential records” to include materials created or received by, *inter alia*, “a unit or individual of the Executive Office of the President whose function is to advise and assist the President . . .”). See also Office of Legal Counsel, Whether the Office of the Vice President is an “Agency” For Purposes of the Freedom of Information Act (Feb. 14, 1994), available at <http://www.usdoj.gov/olc/foiavp.htm> (vice president not subject to FOIA because his executive role is limited to advising and assisting the president).

relating to the vice president's constitutional duties.<sup>23</sup> NARA's policies and guidelines exclude from the scope of the PRA the vice president's congressional records. But by definition the vice president's congressional records were created in his exercise of his constitutional duties, specifically Article I, Section 3 of the Constitution. Moreover, to the extent such records exceed the vice president's specific duties enumerated in the Constitution, they still relate to the exercise of his official responsibilities and accordingly fall within the PRA.

As a result, the NARA defendants have failed to carry out their responsibility to assume custody and control over all vice presidential records for past vice presidents subject to the PRA, and will likewise not assume custody and control over the congressional records of the current vice president. Given the NARA defendants' failure to repudiate either their unlawful policies or the unlawful policies and guidelines of the White House defendants, it is a near certainty that they also will not comply with their statutory obligations to take custody and control of all of the vice presidential records of Vice President Cheney.

The blatant contradictions between the terms of the PRA and the policies and the guidelines of the defendants demonstrate that plaintiffs have a strong likelihood of prevailing on their claims that these policies and guidelines are contrary to law.

### *3. Plaintiffs' Claims Are Judicially Reviewable.*

Defendants are likely to argue that notwithstanding the clear conflict between the defendants' guidelines and the requirements of the PRA, plaintiffs cannot maintain this lawsuit because the vice president's compliance with the PRA is unreviewable. Such a claim must fail

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<sup>23</sup> Again, while the PRA does not define vice presidential records, it makes it clear that they are co-extensive with presidential records. 44 U.S.C. § 2207.

under D.C. Circuit precedent.

In a series of cases, the D.C. Circuit addressed the interplay between the PRA and the Federal Records Act (“FRA”) and the degree to which courts could review a president’s decisions and actions under both statutes. Starting with Armstrong v. Bush, 924 F.2d 282 (“Armstrong I”), the court found an implied preclusion of judicial review in the PRA “of the President’s recordkeeping practices and decisions.” 924 F.2d at 291. The court reasoned:

[a]llowing judicial review of the President’s general compliance with the PRA at the behest of private litigants would substantially upset Congress’ carefully crafted balance of presidential control of records creation, management, and disposal during the President’s term of office and public ownership and access to the records after the expiration of the President’s term.

Id.

Thereafter, in Armstrong v. Nat’l Sec. Archive, 1 F.3d 1274 (D.C. Cir. 1993) (“Armstrong II”), the D.C. Circuit clarified that its ruling in Armstrong I did not render all decisions made pursuant to the PRA “immune from judicial review.” Id. at 1293. Rather, Armstrong I dealt with “only the ‘creation, management, and disposal decisions,’” but not “the initial classification of materials as presidential records.” Id. at 1294. Accordingly, the Armstrong II court held that guidelines “describing which *existing* materials will be treated as presidential records in the first place are subject to judicial review.” Id. (D.C. Cir. 1993) (emphasis in original).<sup>24</sup>

That is precisely the suit plaintiffs have brought here: not an attempt to challenge the vice president’s “creation, management, and disposal decisions,” but rather a challenge to

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<sup>24</sup> Stated differently, “the courts may review what is, and what is not, a ‘presidential record . . .’” 1 F.3d at 1294.

guidelines designating which materials the vice president will treat as subject to the PRA in the first place. Without judicial review, the vice president will have “carte blanche” to shield materials from the public, Armstrong II, 1 F.3d at 1292, a result not countenanced by either the PRA or prior Circuit precedent.

In Armstrong II the court was concerned that absent judicial review, a president would have “carte blanche to shield materials from the reach of the FOIA” by designating them as presidential. Id. This case raises a closely related concern that absent judicial review the vice president will have carte blanche to designate materials as personal, rather than presidential, and thereby shield them from the eventual reach of the public through the FOIA, as the PRA contemplates. Judicial review is necessary in both cases to prevent the president and vice president from exercising “virtually complete control” over their records in a manner that is patently at odds with the PRA’s definition of ‘presidential records.’” Id. at 1293-94.

Moreover, plaintiffs are also seeking mandamus relief for the defendants’ violations of their clear, non-discretionary duties. A plaintiff states a claim for mandamus relief where the plaintiff has a clear right to relief, the defendant has a clear duty to act, and no other adequate remedy is available. See Swan v. Clinton, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996). Plaintiffs’ complaint seeks mandamus relief for the defendants’ violations of their mandatory, non-discretionary duties prescribed by the PRA. Accordingly, to the extent there is no alternative remedy against the White House defendants, mandamus relief is available here.<sup>25</sup>

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<sup>25</sup> Plaintiffs are permitted to plead alternate remedies without facing immediate dismissal. See, e.g., Bland v. Sec’y of Army, No. 05-2143, 2007 U.S. Dist. LEXIS 20778, at \*16 n.8 (D.D.C. Mar. 23, 2007) (Kennedy, J.) (dismissing mandamus claim only after recognizing and adjudicating cause of action for identical relief under the APA).

Plaintiffs' claims against the NARA defendants are brought under the APA, and present a traditional APA claim that agency action is contrary to law. See 5 U.S.C. §§ 706(2)(A), (C). As discussed *supra*, the PRA authorizes judicial review of guidelines dictating whether certain records fall within or outside the scope of the PRA. Plaintiffs' challenge here to the NARA defendants' guidelines, which exclude a vice president's congressional records from the PRA, fit squarely within the category of judicially reviewable cases recognized in Armstrong II.<sup>26</sup>

Finally on the merits, defendants may argue that plaintiffs' complaint must be dismissed as unripe. Ripeness is part of the standing requirement that a plaintiff's "injury in fact be sufficiently impending." Nat'l Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996), *citing* Duke Power Co. v. Carolina Env'tl. Study Group, 438 U.S. 59, 81 (1978); DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 297 (D.C. Cir. 1989). The Supreme Court, in Abbott Labs. v. Gardner,<sup>27</sup> established a two-prong test for ripeness that evaluates "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149. At the same time, the constitutional requirements for standing will be established by "a threatened injury" that is "sufficiently 'imminent.'" Nat'l Treasury Employees Union, 101 F.3d at 1428.

In applying the Abbott Labs. test, the Supreme Court has looked specifically to the extent to which delayed review would harm the plaintiffs; the extent to which judicial intervention

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<sup>26</sup> Plaintiffs' claims for mandamus relief based on the NARA defendants' failure to comply with their clear and non-discretionary duties under the PRA are also cognizable for the same reasons that the mandamus claims plaintiffs have brought against the White House defendants are cognizable.

<sup>27</sup> 387 U.S. 136 (1976).

would “inappropriately interfere with further administrative action”; and the extent to which the reviewing court “would benefit from further factual development of the issues presented.” Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 732 (1998). A case will be deemed ripe “when it presents a concrete legal dispute [and] no further factual development is essential to clarify the issues, . . . [and] there is no doubt whatever that the challenged agency practice has crystallized sufficiently for purposes of judicial review.” Public Citizen v. Dep’t of State, 276 F.3d 634, 641 (D.C. Cir. 2002), *quoting* Rio Grande Pipeline Co. v. FERC, 178 F.3d 533, 540 (D.C. Cir. 1999) (alterations in original).

Applying Abbott Labs. here, there is no doubt that the challenged policies and procedures have sufficiently crystallized to permit judicial review and that the harm to the plaintiffs from withholding review is both dire and sufficiently imminent. The NARA defendants’ unlawful guidelines excluding a vice president’s congressional records from the scope of the PRA have already been applied to the records of former vice presidents, Complaint, ¶ 37, and given NARA’s refusal to disavow these guidelines, their application to the congressional records of Vice President Cheney is clearly imminent. Moreover, no further factual development is necessary for clarification of the issues; their policy is clear, unambiguous, and rests not on the specific facts of a specific vice president’s records, but instead on the sweeping conclusion that a vice president’s congressional records as a generic category are exempt from the PRA. And of greatest significance, the plaintiffs face irreparable injury if the Court withholds review until after the presidential transition is completed. At that time, any records the vice president has destroyed or transferred out of his control, acting on the theory they are his personal papers that he is free to dispose of at his discretion, will be lost forever to the plaintiffs and to history.

Likewise, the White House defendants' policies and guidelines are sufficiently ripe to warrant judicial review now. Those policies start with the erroneous proposition, expressed in the Bush EO, that only the "executive records" of the vice president are subject to the PRA. From there the White House defendants have proceeded to exclude virtually all of the vice president's records from the category of "executive records" on the ground that the vice president is not part of the executive branch for virtually everything he does. As with NARA's guidelines, further factual development is not necessary for the Court to review the issues surrounding the White House defendants' guidelines. And the harm to the plaintiffs of delaying review would be equally irreparable, as plaintiffs and the public would be deprived forever of records documenting the vice president's discharge of his functions and responsibilities.

Finally, as to all defendants, judicial review now will not "inappropriately interfere with further administrative action." Ohio Forestry Ass'n, 523 U.S. at 732. To the contrary, judicial resolution of defendants' responsibilities under the PRA with respect to vice presidential records will advance, not thwart, further administrative action given the upcoming transition and the decisions that the White House and NARA must make about which presidential and vice presidential records to preserve. Plaintiffs' claims against all defendants are therefore ripe for review.

**C. Plaintiffs Will Suffer Irreparable Injury Absent The Requested Injunction.**

As Magistrate Judge John M. Facciola recognized recently under comparable circumstances, the threatened obliteration of records plaintiffs face "is a text book example of irreparable harm." CREW v. Executive Office of the President, Civil No. 07-1707 (HHK/JMF), Report and Recommendation (Oct. 19, 2007), p. 3 (attached as Exhibit 7). In that case, CREW

and the public faced the loss of the only remaining copies of millions of missing emails from White House servers and CREW accordingly sought an injunction requiring the defendants to preserve all existing back-up tapes. In recommending that the requested relief be granted, Judge Facciola readily concluded that CREW had demonstrated irreparable harm.<sup>28</sup>

The harm plaintiffs seek to guard against here is also comparable to the harm the Armstrong plaintiffs were threatened with at the end of the Reagan presidency that justified the entry of a temporary restraining order. Armstrong v. Bush, 807 F.Supp. 816 (D.D.C. 1992). In Armstrong, the plaintiffs sought emergency relief to prevent the loss of back-up tapes that would otherwise have been destroyed when President Reagan left office. The district court granted the emergency relief, recognizing that destruction of the tapes would result in “immediate and irreparable” harm. Id. at 820.

Here, too, absent immediate injunctive relief, plaintiffs and the public are threatened with the permanent loss of a valuable part of our national history – records documenting how Vice President Cheney has discharged the duties and responsibilities of his office. This imminently threatened destruction or alienation of the vice president’s records constitutes “immediate and irreparable” harm justifying the entry of a preliminary injunction.

**D. The Defendants Will Not Be Harmed By The Requested Preliminary Injunction.**

The immediate relief that plaintiffs seek will require nothing more of the defendants than what the law already mandates: treating the records that the vice president and the OVP receive

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<sup>28</sup> Judge Facciola’s Report and Recommendation was adopted by Judge Henry Kennedy, Jr. in an order that required the White House defendants to preserve backup tapes and not transfer them out of their custody and control. See Order of November 12, 2007 (attached as Exhibit 8).

or create in the course of conducting their constitutional, statutory and other official and ceremonial duties as vice presidential records subject to the PRA. Requiring the defendants to comply with the law cannot properly be characterized as a burden. Indeed, courts have recognized in circumstances substantially similar to those present here that preliminary injunctive relief requiring document preservation is appropriate “where the parties dispute the adequacy of the government’s record keeping procedures . . .” Armstrong v. Bush, 807 F.Supp. at 823; see also Am. Friends Serv. Comm. v. Webster, 487 F.Supp. 222 (D.D.C. 1980).

#### **E. The Public Interest Favors The Requested Relief.**

The PRA was enacted to “promote the creation of the fullest possible documentary record” of a president and ensure its preservation for “scholars, journalists, researchers and citizens of our own and future generations.”<sup>29</sup> Toward that end, the PRA vests the public with ownership rights in the papers of a presidency and provides a process of public access to those papers once a president leaves office. See 44 U.S.C. § 2202. Recognizing the “immense historical value” of a president’s papers,<sup>30</sup> Congress wanted to provide the people with a key to our past, in the hope it will shed light on the course we should chart for the future.<sup>31</sup> It is self-evident that defendants’ non-compliance with the PRA’s directives frustrates the Act’s purpose and intent.

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<sup>29</sup> 124 Cong. Rec. H34894 (daily ed. Oct. 10, 1978) (Statement of Rep. Brademas).

<sup>30</sup> 124 Cong. Rec. S36843 (daily Ed. October 13, 1978) (Statement of Rep. Percy).

<sup>31</sup> See also 124 Cong. Rec. H38284 (daily ed. Oct. 14, 1978 (Statement of Rep. Thompson) (“The preservation and guarantee of public access to the official papers and records of the President, the Vice President, and White House staff personnel is of vital importance to historians and scholars in the reconstruction and public understanding of decisionmaking events in which our Nation’s leaders have participated.”).

The preliminary injunctive relief plaintiffs are seeking is designed expressly to ensure that the public's right and ability to access important historical documents is preserved, not thwarted. Under these circumstances, the public interest clearly favors granting the requested relief, which will preserve the status quo as well as the rights of the plaintiffs and the public in a significant portion of the records of the Bush presidency. Moreover, there is no countervailing interest whatsoever that weighs against granting the requested relief.

### **CONCLUSION**

For the foregoing reasons, plaintiffs' motion for a preliminary injunction should be granted. Further, plaintiffs respectfully request, pursuant to Local Rule 65.1(d), that the Court schedule a hearing on this motion at the Court's earliest convenience.

Respectfully submitted,

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