UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 08-1548 (CKK)
THE HON. RICHARD B. CHENEY, et al.,	:	
Defendants.	:	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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STATEMENT

This lawsuit seeks to prevent Vice President Richard B. Cheney, other White House defendants and the National Archives and Records Administration ("NARA") defendants from rewriting the Presidential Records Act ("PRA") to unlawfully exclude records from the preservation obligations that the Act imposes on them. Through these unlawful policies the Bush White House is attempting to convert a statute enacted to confirm and protect the public's ownership of and access to a president's records into a license for the vice president to unilaterally decide the scope of his obligations under the PRA. Despite statutory language defining what is and is not a vice presidential record, Vice President Cheney claims the absolute and unreviewable discretion to "*alone* . . . determine what constitutes vice presidential records or personal records,"[1] precisely the "*carte blanche*" that the D.C. Circuit denied to the president and, by implication, the vice president in Armstrong v. Nat'l Sec. Archive, 1 F.3d 1274, 1292 (D.C. Cir. 1993) ("Armstrong II").

Defendants have now moved to dismiss the lawsuit on threshold legal grounds, arguing plaintiffs have no judicially enforceable rights under the PRA; that the PRA precludes all judicial review of defendants' compliance with any aspect of the statute, which otherwise is committed to their absolute discretion; and that plaintiffs lack standing to sue. Alternatively, defendants move for summary judgment based on their selective recitation of facts purportedly demonstrating defendants' full compliance with the PRA.

None of defendants' arguments, however, addresses the fundamental issue this case presents: do the White House defendants have a non-discretionary duty to apply the definition

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[1] Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, and Memorandum of Points and Authorities in Support of Defendants' Motion ("Ds' Mem."), p. 24 (emphasis added).

of vice presidential records contained in the PRA? Defendants avoid this question altogether, recasting plaintiffs' claims as challenging the vice president's day-to-day record management practices and decisions, which the D.C. Circuit has held are not subject to judicial review. But that is not this lawsuit; at issue here are policies and guidelines of the vice president and NARA that narrow the scope of vice presidential records subject to the PRA. These guidelines are judicially reviewable.

Defendants also recast plaintiffs' claims as seeking relief under the Administrative Procedure Act ("APA") that they challenge as legally unavailable. But defendants' extensive argument as to why neither the vice president nor the Office of the Vice President ("OVP") can be sued under the APA is completely off-point. Plaintiffs rely on the APA only for their claims against the archivist and NARA, while their claims against defendants Cheney, the OVP and the Executive Office of the President ("EOP")[2] seek a declaratory judgment under the Declaratory Judgment Act ("DJA") and a writ of mandamus.

Defendants' alternative argument -- that any aspect of the vice president's and the OVP's compliance with the PRA is committed solely to their discretion -- fares no better. Neither the vice president nor the OVP has discretion to rewrite the PRA by excluding from its reach categories of records Congress plainly intended to cover. Defendants' assertion of absolute and unreviewable power to decide what the PRA means would give them the concomitant power to render the statute or, at the least, critical parts of the statute null and void, something no court has ever sanctioned.

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[2] Defendants fail to even mention plaintiffs' claims against the EOP, much less offer any reason why they should be dismissed.

Finally, defendants' standing arguments improperly conflate principles of standing and proof with the merits in a blatant attempt to shift to plaintiffs an evidentiary burden properly borne by defendants. While defendants move alternatively for summary judgment, that motion rests on self-selected facts and ignores the central concern behind this lawsuit: the vice president -- on nothing other than his own authority -- is limiting the PRA to records related to only those functions "specially assigned to the Vice President by the President in the discharge of his executive duties and responsibilities."

The limited discovery authorized to date[3] supports, not undermines, plaintiffs' claims. Ms. O'Donnell's deposition reveals she is an unwitting and unknowing mouthpiece for the Bush White House, with no more expertise in or experience with vice presidential records than virtually any other OVP employee. While Ms. O'Donnell signed her name to no fewer than three declarations in this case, she had no part in their drafting. Instead, the declarations were prepared by counsel and reflect counsel's explanation of the vice president's policies and practices. Similarly, Ms. Smith merely reiterated NARA's policy of according vice presidents the discretion to include within the scope of the PRA their legislative records, a policy at the core of plaintiffs' claims against the archivist and NARA.

In short, the discovery preceding these motions demonstrates that defendants have categorically excluded from the PRA all but those records concerning executive-related functions "specially assigned to the Vice President by the President in the discharge of his executive duties and responsibilities" and some unascertained category of legislative records.

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[3] Plaintiffs were granted leave to depose two deponents, NARA official Nancy Kegan Smith and OVP employee Claire M. O'Donnell.

The vice president is creating a loophole in the PRA large enough to drive truckloads of documents through and endangering our national history. Therefore, this Court should transform its preliminary relief into final relief embodied in a judgment for the plaintiffs.

FACTUAL BACKGROUND[4]

Plaintiffs, two individual historians and groups of historians, archivists, and an ethics watchdog group, filed the complaint in this action on September 8, 2008,[5] alleging that defendants have adopted policies and guidelines that improperly and unlawfully limit the scope of vice presidential records subject to the PRA. In particular, plaintiffs allege that Vice President Cheney,[6] the OVP, and the EOP have or will "improperly and unlawfully exclude from the PRA

[4] The factual background section of defendants' brief makes sweeping statements, many of which are completed unsupported by any reference to evidence in the record and are legal conclusions recast as factual statements. For example, defendants claim with no support that "the OVP has been carrying out -- and intends to continue to carry out" its PRA responsibilities "with respect to vice presidential records . . . " Ds' Mem. at 6. And even when defendants offer a citation to record evidence, it often does not support the claim for which it is offered. As an example, defendants cite to Ms. O'Donnell's deposition testimony as support for their claim that "the OVP has applied the PRA to all 'documentary materials, or any reasonably segregable portion thereof, created or received by the [Vice] President, his immediate staff or a unit of [sic] individual of the [Office of the Vice President] whose function is to advise and assist the [Vice] President, in the course of conducting activities 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.'" Ds' Mem. at 6. But Ms. O'Donnell never used this language, borrowed from the PRA, in responding to any question; indeed, she admitted that she "can't guarantee that I've read the whole thing [the PRA]." Deposition Transcript of Claire M. O'Donnell, November 18, 2008 ("O'Donnell Depo.") (attached as Exhibit 1), at 37:13-14.

[5] On September 15, 2008, plaintiffs amended the complaint to add another organizational plaintiff.

[6] Of note, Vice President Cheney is sued in his official capacity only. If this litigation is not resolved before January 20, 2009, plaintiffs will seek to amend the complaint to add claims against the vice president in his individual capacity to ensure plaintiffs' ability to obtain full relief. Given that this lawsuit challenges the policies of this vice president and the effect those policies will have on his records, substitution of Vice President-elect Joe Biden would be ineffective. Mr. Biden will have neither custody of nor control over any of Vice President

records created and received by the vice president in the course of conducting activities related to, or having an effect upon, the carrying out of his constitutional, statutory, or other official [or] ceremonial duties." Memorandum Opinion of October 5, 2008 (Document 27) ("Stay Mem. Op.") at 4-5. Accordingly, pursuant to the Declaratory Judgment Act, Claim One seeks a declaratory judgment that the guidelines issued and/or implemented by Vice President Cheney, the OVP, and the EOP are in violation of the PRA. Amended Complaint, ¶¶ 48-52. Claim Two seeks a writ of mandamus compelling these same defendants to comply with their non-discretionary statutory duty to treat as subject to the PRA "all records of the vice president and his office that relate to the exercise of his constitutional, statutory and other official or ceremonial duties." Id. at ¶ 58; see also id. at ¶¶ 54-58.

Plaintiffs also challenge the policy and practice of the archivist and NARA "to exclude from the reach of the PRA those records that a vice president creates and receives in the performance of his legislative functions and duties." Stay Mem. Op. at 5. Claim Three, brought only against NARA and the archivist,[7] challenges their guidelines as "arbitrary, capricious, an abuse of discretion, not in accordance with law and in excess of statutory authority and limitations." Amended Complaint at ¶ 63. For relief, plaintiffs seek a declaratory judgment that such guidelines, "which are contrary to the terms of the PRA, are unlawful and the defendants

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Cheney's records, which will either be transferred to NARA or remain with Vice President Cheney once he leaves office.

[7] Defendants argue that Claim Three is also brought against the vice president and the OVP, citing to a reference in paragraph 64 to the vice president's and OVP's guidelines implementing the PRA." Ds' Mem. at 15 n.5. But any question raised by plaintiffs' inartful description of the guidelines at issue in Claim Three is answered by the Claim itself, which is described expressly in the Amended Complaint as "For a Declaratory Judgment that *Guidelines Issued by the Archivist and NARA* are in Violation of the PRA." (emphasis added).

may not implement those guidelines." Id. at ¶ 65. In addition, plaintiffs seek mandamus relief against the archivist and NARA to compel them to comply with their non-discretionary duties under the PRA "to treat as subject to the PRA" records that "relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the Vice President," and to take custody and control of all such records. Id. at ¶ 67; see also id. at ¶¶ 68-72.

Simultaneously with their complaint plaintiffs sought a preliminary injunction requiring defendants to preserve all records at issue pending the resolution of this litigation. Defendants opposed the motion purely on the merit-based factual ground that the vice president and the OVP "have been carrying out since January 20, 2001 -- and intend to carry out -- their obligations under the [PRA]." Stay Mem. Op. at 5. In support defendants submitted the declarations of Claire M. O'Donnell, assistant to the vice president, and NARA official Nancy Kegan Smith.

Ms. O'Donnell's declaration raised a key factual dispute concerning the defendants' definition of "vice presidential records" and the extent to which the two categories of records defendants delineated as encompassed by the PRA -- those related to "the functions of the Vice President as President of the Senate" and those related to "the functions of the Vice President specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities" -- encompass all records at issue. Id. at 6. To resolve this ambiguity, the Court ordered defendants to file a supplemental declaration. Id.

On September 20, 2008, the Court issued an order granting the preliminary injunction based in part on the "narrowing interpretation" that defendants apply to their obligations under the PRA. Id. at 7. The Court noted the complete absence of "any legal analysis demonstrating

that Defendants' interpretation [was] correct as a matter of law or any identification of legal authority that would allow Defendants to place limitations on the PRA's statutory language." Stay Mem. Op. at 7.

Subsequently the Court granted plaintiffs leave to depose Nancy Smith and David Addington, outlining six areas of permissible discovery. Discovery Order, September 24, 2008 (Document 20), pp. 19-20. Defendants filed an emergency petition for a writ of mandamus, which the D.C. Circuit denied in large part on October 31, 2008, except to find that on the record before it there was not a sufficient basis to justify the deposition of David Addington. Plaintiffs then took the depositions of Nancy Smith and Claire O'Donnell.

Of note, while defendants filed a motion to dismiss on December 8, 2008, they have yet to file an answer to the amended complaint, which was filed on September 15, 2008.

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.[8] 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 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

[8] 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.

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 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) ("Armstrong I").

Only "personal records," which include those "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," are expressly excluded from the PRA 44 U.S.C. § 2201(3). 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).[9]

Congress intended the delineation between "presidential" and "personal" records to 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.*,

[9] Sen. Percy explained the need for an amendment to the Act's definition and exclusion of "personal papers" to ensure that it did not include "political papers which also involve official duties . . ." Id.

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.[10] See also Armstrong I, 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 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).[11] NARA regulations further provide that vice presidential records are to be treated "in the same manner as Presidential records." Id. at § 1270.12(b).

Adding an additional gloss to this definition, President George W. Bush issued Executive Order 13,233, entitled "Further Implementation of the Presidential Records Act," on November 1, 2001. Section 11(a) provides, in relevant part, that "pursuant to section 2207 of title 44 of the

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[10] 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.

[11] But note that notwithstanding this definition, NARA considers vice presidents to have the discretion to treat their congressional records as personal papers that fall outside the scope of the PRA. See *infra*.

United States Code, the Presidential Records Act applies to *the executive records of the Vice President*." (emphasis added). President Bush offered no explanation for his use of the term "executive records," which is not found in the PRA.

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). See also id. at § 2207; 36 C.F.R. § 1270.12(b).

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 such as 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 "scholars, journalists, researchers and citizens of our own and future generations."[12] The PRA was enacted in recognition of the "immense historical value" of a president's papers.[13] As Rep. Brademas, one of the Act's co-sponsors, explained:

> 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

[12] 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.

[13] 124 Cong. Rec. S36843 (daily Ed. October 13, 1978) (Statement of Rep. Percy).

the decisions and decisionmaking processes of earlier years.

124 Cong. Rec. H31894 (daily ed. Oct. 10, 1978).[14]

ARGUMENT

I. PLAINTIFFS HAVE A CAUSE OF ACTION AGAINST THE WHITE HOUSE DEFENDANTS.[15]

Defendants' challenge to this lawsuit rests fundamentally on the premise that the vice president enjoys the unchecked authority to rewrite the definition of vice presidential records under the PRA, subject to no judicial review.[16] In support they offer a hodgepodge of arguments articulated variously as no private right of action, preclusion of judicial review, and no "private enforceable" rights or remedies.

The structure, purpose, and legislative history of the PRA confirm just the opposite. In clear and unequivocal language, the PRA requires the president and vice president to preserve for the public all but their purely personal papers, which are defined as those that have no relation to the carrying out of their constitutional, statutory, ceremonial, or other duties. Records regarding *any* function that Vice President Cheney performs while in office, whether limited to those functions the Constitution assigns expressly to him or expanded to include all of his self-

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[14] 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.").

[15] References herein to White House defendants include the vice president, OVP and EOP.

[16] Defendants argue the vice president *alone* enjoys this power, Ds' Mem. at 24, suggesting even the president is powerless to stop the vice president from nullifying a provision of the PRA.

proclaimed non-executive functions, unquestionably fall within the definition of vice presidential records the PRA mandates must be preserved.

Given the act's structure and its purpose -- to "promote the creation of the fullest possible documentary record" of a president and insure its preservation for "scholars, journalists, researchers and citizens of our own and future generations"[17]-- it is simply inconceivable that Congress would cede to the vice president unchecked discretion to redefine a central provision of the PRA so as to remove from public access core vice presidential documents. Yet this is the result defendants argue is legally compelled, based on stray language from decisions dealing with the Federal Records Act ("FRA"), a quite different statute with a quite different purpose. At bottom, no matter how analyzed, the result here is the same: plaintiffs have a judicially enforceable cause of action to prevent defendants from rewriting the PRA.

A. Defendants' Challenge To Whether Plaintiffs Have Enforceable Rights Subject To Judicial Review Is Properly Considered Under Fed. R. Civ. P. 12(b)(6).

Relying on Fed. R. Civ. P. 12(b)(1), defendants have moved to dismiss this case for lack of subject-matter jurisdiction on the basis that the PRA "does not provide a private right enforceable through private remedies." Ds' Mem. at 10. But the question of whether plaintiffs "may enforce in court legislatively created rights or obligations" is analytically distinct from the question of the Court's jurisdiction, i.e., "whether a federal court has the power, under the Constitution or laws of the United States, to hear a case." Davis v. Passman, 442 U.S. 228, 240

[17] 124 Cong. Rec. H34894 (daily ed. Oct. 10, 1978) (Statement of Rep. Brademas).

(1979) (citations omitted).[18] Here defendants are really challenging whether plaintiffs have a cause of action to enforce obligations created by the PRA, which goes to plaintiffs' claim for relief, Settles v. U.S. Parole Comm'n, 429 F.3d 198, 1104-05 (D.C. Cir. 2005), and not the Court's jurisdiction.

These differences are not merely matters of nomenclature. A challenge to whether plaintiffs have a cause of action is properly brought under Rule 12(b)(6) for failure to state a claim, not Rule 12(b)(1). Moreover, reliance on facts outside the record -- as defendants have done here -- transforms a Rule 12(b)(6) motion into a Rule 56 motion for summary judgment, which must be based on a lack of disputed material facts. Haase v. Sessions, 835 F.2d 902, 905-10 (D.C. Cir. 1987). Accordingly, defendants' motion is more properly considered a motion under Rule 12(b)(6) for failure to state a claim for relief.

B. Plaintiffs Have Judicially Reviewable Claims.

Beyond using the wrong procedural vehicle to challenge whether plaintiffs have a cause of action, defendants' arguments fail on the merits. Under the rubric of a "private enforceable right" defendants appear to be merging two separate, albeit related concepts -- private right of action and preclusion of judicial review -- and blurring the distinction between a right and a right of action. But defendants ignore the Declaratory Judgment Act, which provides a cause of action here to enforce obligations imposed by the PRA, and the All Writs Act, which authorizes the mandamus relief plaintiffs seek.

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[18] Courts have added to the confusion by using the terms "jurisdiction" and "cause of action" interchangeably, and the Supreme Court has admitted that "[j]urisdiction . . . is a word of many, too many, meanings." Arbaugh v. Y&H Corp., 546 U.S. 500, 510 (2006); Comm. on the Judiciary v. Miers, 558 F.Supp.2d 53, 81 (D.D.C. 2008).

1. *Plaintiffs Have A Right Of Action Under The Declaratory Judgment Act.*

Plaintiffs have a right of action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, to enforce rights accorded plaintiffs under the PRA. The DJA's plain language grants a plaintiff a right to litigate when three requirements are met: (1) there is a "case of actual controversy"; (2) the case is "within [the court's jurisdiction]"; and (3) an "appropriate pleading" has been filed. 28 U.S.C. § 2201(a). As the district court recognized in Comm. on the Judiciary v. Miers, "the wording of the statute does not indicate that any independent cause of action is required to invoke the DJA. Instead, the statute is framed in terms of declaring 'rights' and 'legal relations' in a justiciable case within federal jurisdiction." 558 F.Supp.2d at 80. See also Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941) ("Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."). Moreover, the DJA is to be "'liberally construed to achieve the objectives of the declaratory remedy.'" Comm. on the Judiciary, 558 F.Supp.2d at 82 (quoting McDougald v. Jenson, 786 F.2d 1465, 1481 (11th Cir. 1986)).

This suit meets all three requirements. First, there is a clear case or controversy over the extent to which defendants' guidelines interpreting and implementing the PRA comply with the PRA. Second, the Court has jurisdiction under 28 U.S.C. § 1331, something not in dispute.[19] Third, the amended complaint clearly is an "appropriate pleading" that brings these issues before

[19] As noted earlier, defendants have never filed an answer to the amended complaint, and their motion to dismiss was filed well outside the time to file a responsive pleading in lieu of an answer, as set forth in Fed. R. Civ. P. 12(a)(2).

the Court. Under the terms of the DJA, nothing more is required.

The Supreme Court, which has *never* held that the DJA does not create a right of action, has articulated only two limits on the DJA. First, the DJA does not provide federal courts with an independent source of jurisdiction. Schilling v. Rogers, 363 U.S. 666, 677 (1960) (citing Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950)). Second, there must be an "actual controversy"; the DJA is not "the medium for securing an advisory opinion in a controversy which has not arisen." Coffman v. Breeze Corp., 323 U.S. 316, 324 (1945).

The complaint here, far from seeking an advisory opinion, seeks judicial relief to prevent defendants from continuing to implement guidelines that unlawfully limit the scope of vice presidential records subject to the PRA and deprive plaintiffs of access to those records as the law guarantees. Plaintiffs, individuals and organizations who regularly use presidential records in their research and scholarship, seek to ensure preservation of classes of records the PRA requires the vice president to preserve. Defendants, for their part, claim the absolute and unreviewable discretion to "alone . . . determine what constitutes vice presidential records or personal records." Ds' Mem. at 24. With an appropriate pleading before the Court (the amended complaint) and an independent source of jurisdiction (28 U.S.C. § 1331), plaintiffs satisfy the requirements for relief under the DJA.

2. The PRA Affords Plaintiffs A Judicially Remedial Right.

While the court in Comm. on the Judiciary concluded the plaintiff there did not need to identify a cause of action separate from the DJA, the court found the plaintiff "must still identify a judicially remediable right that may be enforced through the DJA." 558 F.Supp.2d at 83-84. In that case the Constitution was the source of the judicially remediable right, while here the

PRA is the source of the right plaintiffs seek to advance through the DJA.

The PRA creates a right of "complete ownership, possession, and control" in the United States of "presidential records," 44 U.S.C. § 2202, which the PRA expressly defines. Id. at § 2201(2). Thus, under the PRA's express language, the vice president is required to preserve vice presidential records *as defined in the Act*, and has no discretion to deviate from that definition. And plaintiffs -- the intended beneficiaries of the PRA -- have a corresponding right to preservation of vice presidential records *as defined in the Act*. Because the vice president has not complied with his legally binding obligations and instead has sought to narrow and redefine the scope of records he is required to preserve, plaintiffs have a judicially remediable right under the PRA that may be enforced through the DJA.

Defendants' argument to the contrary, divorced from any substantive analysis, relies on selective language culled from Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 149 (1980) ("Kissinger"), concerning the FRA. Ds' Mem. at 11.[20] But contrary to defendants' characterization, the Supreme Court in Kissinger did not hold that the FRA creates *no* private enforceable rights. Rather, the Court held only that federal courts could not adjudicate a private party's challenge to the unauthorized removal of agency records, 445 U.S. at 149, and left open other issues such as "what remedies might be available to private plaintiffs complaining that the administrators [the predecessor to the archivist] and the Attorney General have breached a duty to enforce the Records Act [the predecessor to the FRA]." Id. n. 5.

[20] Defendants rely as well on the absence of any express language in the PRA providing for "private enforcement of its terms," id. at 12, an argument that makes no sense given that the private right of action doctrine is all about implying a right of action where none is expressly provided.

Moreover, the differences between the FRA and the PRA are critical given the focus of a private right of action analysis on congressional intent. Thompson v. Thompson, 484 U.S. 1744, 189 (1988). See also Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001). While the FRA was intended "solely to benefit the agencies themselves and the Federal Government as a whole,"[21] the PRA was intended to benefit the public and ensure the preservation of a president's papers for scholars and researchers such as the instant plaintiffs.[22]

Here, the structure, language and legislative intent of the PRA support the creation of a private right of action. Although the PRA is silent on a range of issues addressed in the FRA, such as any authority to interfere with the vice president's records management practices,[23] the PRA expressly and unambiguously delineates the kinds of records the president and vice president must preserve, leaving no room for discretion. See 41 U.S.C. § 2201(2). Just as clearly the PRA creates a right of "complete ownership, possession and control" of the public in those records. 44 U.S.C. § 2202. Plaintiffs are among the intended beneficiaries of the PRA, which was enacted to "promote the creation of the fullest possible documentary record" of a president and insure its preservation for "scholars, journalists, researchers and citizens of our own and future generations."[24] See also Armstrong I, 924 F.2d at 290.

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[21] Kissinger, 445 U.S. at 149.

[22] For these same reasons the district court's conclusion in Armstrong v. Bush that "[f]or purposes of the private right of action inquiry, the PRA is largely indistinguishable from the FRA," 721 F.Supp. 343, 348 (D.D.C. 1989), is not persuasive.

[23] See Armstrong I, 924 F.2d at 290.

[24] 124 Cong. Rec. H34894 (daily ed. Oct. 10, 1978) (Statement of Rep. Brademas). The drafters identified two other principal concerns behind the PRA: "the need to ensure the preservation" of the documentary record and "the need to provide for all possible access to these materials at the earliest possible time . . ." Id. at 34894-5.

The PRA was enacted after a protracted legal battle between President Nixon and the government over his ability to control the records of his presidency after leaving office, and sought to avoid such battles with future presidents by clearly spelling out the universe of documents subject to its terms and confirming the public's ownership of presidential records. As the Supreme Court explained in Nixon v. Administrator,

> An incumbent President should not be dependent on happenstance or the whim of a prior President when he seeks access to records of past decisions that define or channel current governmental obligations. Nor should the American people's ability to reconstruct and come to terms with their history be truncated by an analysis of Presidential privilege that focuses only on the needs of the present.

433 U.S. at 452-53. Through legislation Congress sought "to restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of [historical] events." Id. at 453.

Without the ability of the judiciary to prevent the vice president from rewriting the terms of the PRA, at least key parts of the statute could be rendered null simply by redefining its scope. Against this backdrop it is inconceivable that Congress would have enacted a statute precisely to impose on the president and vice president the unambiguous mandate to preserve all of their records, save those that are purely personal, but disallow a lawsuit seeking to prevent the vice president from redrafting that requirement to narrow its scope. While Congress was sensitive to "separations of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations,"[25] those concerns are not implicated by the vice president's attempt

[25] Armstrong I, 924 F.2d at 290. Defendants cite to this language as evidence that Congress did not create any civil liabilities in the PRA. Ds' Mem. at 12. But this lawsuit does not seek judicial review of the vice president's records management practices or creation and

to re-write the statute.[26]

That neither the vice president nor the OVP is subject to APA review because neither is an agency within the meaning of the APA, Ds' Mem. at 15-17, does not alter this conclusion.[27] Plaintiffs are not relying on the APA as a source of relief for their PRA claims against the vice president and the OVP, but instead seek a remedy under the DJA (as well as mandamus relief).

This conclusion is reinforced by the D.C. Circuit's approach in Armstrong I. There the Court found first that the APA did not provide a cause of action for judicial review because the president is not an agency within the meaning of the APA. 924 F.2d at 288-89. The Court then went on to analyze the PRA itself and whether it impliedly precluded judicial review. Id. at 290-91. But if the lack of APA review were dispositive, this second step of the Court's analysis would have been entirely unnecessary.

3. The PRA Does Not Preclude Judicial Review.

Alternatively defendants argue that the PRA precludes judicial review, which is otherwise not available under the APA. Ds' Mem. at 18. This argument seriously misinterprets the import of Armstrong II as well as the limitation on judicial review articulated in Armstrong I.

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disposal decisions, as the Amended Complaint makes clear. Rather, plaintiffs are challenging defendants' efforts to rewrite the PRA by more narrowly defining the scope of vice presidential records subject to the Act's preservation requirements, a classification decision well within the scope of review authorized by Armstrong II.

[26] Indeed, ceding to the executive the unreviewable discretion to rewrite an act of Congress would itself raise separation of powers concerns.

[27] But note that the EOP is an agency subject to the APA. Public Citizen v. Carlin, 2 F.Supp.2d 1, 8-9 (D.D.C. 1997), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999) (EOP is an agency both for purposes of the FOIA and the FRA); see also CREW v. EOP, 2008 U.S. Dist. LEXIS 99511, *38-39 (D.D.C. Nov. 10, 2008) (same). Accordingly, defendants' arguments on the lack of judicial review here for APA claims against the vice president and the EOP, Ds' Mem. at 15-17, have no merit with respect to the EOP.

In a series of cases, the D.C. Circuit addressed the interplay between the PRA and the FRA and the degree to which courts could review a president's decisions and actions under both statutes. Starting with Armstrong I, the Court found an implied preclusion of judicial review in the PRA "of the President's recordkeeping practices and decisions," reasoning:

> [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 terms of office and public ownership and access to the records after the expiration of the President's term.

924 F.2d at 291.

Subsequently in Armstrong II, the D.C. Circuit clarified that its ruling in Armstrong I "does not stand for the unequivocal proposition that all decisions *made pursuant to the PRA* are immune from judicial review." 1 F.3d at 1293 (emphasis added). Nor does Armstrong I grant to the president the ability to "designate any material he wishes as presidential records, and thereby exercise 'virtually complete control' over it . . ." Id. at 1294. Rather, Armstrong I deals with "only the 'creation, management, and disposal decisions,'" but not "the initial classification of materials as presidential records." Id. at 1294. Accordingly, guidelines "describing which *existing* materials will be treated as presidential records in the first place are subject to judicial review." Id. (emphasis in original).[28]

This is precisely the suit plaintiffs have brought here: not an attempt to challenge the vice president's "creation, management, and disposal decisions," but a challenge to guidelines

[28] Stated differently, "the courts may review what is, and what is not, a 'presidential record . . . '" 1F.3d at 1294.

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.

The two district courts to most recently address the impact of Armstrong II on judicial review under the PRA -- this Court and Judge Henry H. Kennedy, Jr. in CREW v. EOP -- confirmed that Armstrong I does not preclude the kind of lawsuit plaintiffs bring here. In its Memorandum Opinion denying defendants' motion for a stay, this Court reasoned that the discovery it had authorized was justified because "the PRA permits review of issues associated with the 'initial classification of materials,' which also permits review of 'guidelines describing which existing materials will be treated as presidential records in the first place . . .'" Stay Mem. Op. at 16 (citing Armstrong II, 1 F.3d at 1294). Because the "core issues in this case concern Defendants' interpretations of the PRA's language that defines Vice Presidential records," the question of whether defendants "have properly interpreted this language" is "[a]n area of inquiry that falls squarely within the classification decisions identified in *Armstrong II* as judicially reviewable . . ." Id. Similarly, in CREW v. EOP, Judge Kennedy rejected defendants' argument "that no judicial review of compliance with PRA is available." 2008 U.S. Dist. LEXIS 99511, at *12. Judge Kennedy, like this Court, concluded that courts are empowered to review "Presidential Records Act classification decisions (and guidelines related thereto) . . ." Id. at *14 (citing CREW v. Cheney, 2008 WL 4456871, at *2 (D.D.C. Oct. 5, 2008)).

Defendants' insistence that both Armstrong I and Armstrong II preclude judicial review of plaintiffs' claims flows from a cramped interpretation of both cases and procedural

distinctions that, properly understood, do not bar this suit. Defendants reason that Armstrong II has no effect on claims grounded in the PRA, and is limited to "FRA- or FOIA-based claims" challenging presidential guidelines. Ds' Mem. at 19 (emphasis omitted). The language of Armstrong II, however, belies such a narrow application.

First, as the D.C. Circuit in Armstrong II made clear, under Armstrong I decisions involving the "'creation, management and disposal decisions'" under the PRA are immune from judicial review. 1 F.3d at 1294 (citing Armstrong I, 924 F.2d at 290, 291). The Court went on to explain exactly what each of these terms encompasses:

> A 'creation' decision refers to the determination to *make* a record documenting presidential activities . . . 'Management decisions' describes the day-to-day process by which presidential records are maintained . . . finally, 'disposal decisions' describes the process outlined in 44 U.S.C. § 2203(c)(e) for disposing of presidential records.

Armstrong II, 90 F.3d at 1294 (emphasis in original). By contrast, "guidelines describing which existing materials will be treated as presidential records in the first place are subject to judicial review." Id. (emphasis omitted). This description of those areas subject to judicial review under the PRA cannot be reconciled with the narrow, "FOIA or FRA-based" interpretation defendants urge this Court to adopt.

Moreover here, as in Armstrong II, the judicial review preclusion used by the Court "must be read in the context of the issue before the court . . ." 90 F.3d at 1294. As defendants point out, the plaintiffs in Armstrong II dropped their PRA claims on remand, believing them foreclosed in their entirety by the Armstrong I opinion. Nevertheless, the Court in Armstrong II characterized the issue before it as involving "*decisions made pursuant to the PRA*," specifically "guidelines that purport to implement the PRA," noting that the Court's task was to review those

guidelines "for conformity with the PRA definition of presidential records . . ." 1 F.3d at 1293. (emphasis added). Clearly a ruling on the merits -- which the D.C. Circuit left for the district court on remand -- would involve determining the lawfulness of specific guidelines defining the categories of records subject to the PRA, the very relief plaintiffs seek here.[29]

To be sure, the Court in Armstrong II discussed the interplay of the PRA and FOIA, fearful that absent judicial review a president could render the FOIA a nullity. Id. This case raises related concerns; "forbid[ing] judicial review" of the White House defendants' guidelines narrowing the scope of vice presidential records "for conformity with the PRA definition of [vice] presidential records would be tantamount to allowing" the vice president "to functionally render the [PRA] a nullity." Id. In short, defendants seek the kind of *carte blanche* expressly repudiated by the Court in Armstrong II.

4. Plaintiffs State Claims Against The White House Defendants for Writs of Mandamus.

Alternatively, plaintiffs are entitled to mandamus relief for their claims against the White House defendants. Mandamus relief, authorized by the All Writs Act, 28 U.S.C. § 1651(a), is available to a plaintiff with a clear right to relief, no other adequate remedy, and where the defendant has a clear duty to act. Swan v. Clinton, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996). See also United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 420 (1931) ("The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable.");

[29] In another example of circuitous logic, defendants argue that preclusion of judicial review here is also"consonant with the reach of the APA." Ds' Mem. at 22. But defendants draw this conclusion from Kissinger , which they improperly characterize as holding that "no private right of action exists under the PRA." Id. As discussed supra, Kissinger held only that judicial review of certain kinds of FRA claims was foreclosed. 445 U.S. at 149.

Fornaro v. James, 416 F.3d 63, 69 (D.C. Cir. 2005). Rooted in a common law writ, mandamus is treated like an equitable remedy to be administered in the court's discretion. Ex parte Peru, 318 U.S. 578, 584 (1943). Moreover, "[n]o separate waiver of sovereign immunity is required to seek a writ of mandamus to compel an official to perform a duty required in his official capacity." Fornaro, 416 F.3d at 69 (citations omitted).

Here plaintiffs seek mandamus relief to compel the White House defendants to comply with their mandatory, non-discretionary duties prescribed by the PRA. The PRA unambiguously defines vice presidential papers as those the vice president receives and creates in fulfillment of his "constitutional, statutory, or other official or ceremonial duties,"[30] leaving the vice president no discretion to deviate from this definition. This definition advances the core purpose of the statute, establishing public ownership of "all records which are neither agency records subject to FOIA nor personal records." H.R. Rep. No. 95-1487, at 3, *reprinted in* 1978 U.S.C.C.A.N. at 5734. There simply is no issue here "of 'construction' or 'application'" of the PRA, "nor is this a case involving a statute pursuant to which 'discretion extends to a final construction by the officer of the statute he is executing.'" Nat'l Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974) (quoting Work v. United States ex rel. Rives, 267 U.S. 175, 177 (1925)). The PRA imposes on the White House defendants an indisputable and "clearly prescribed" duty to preserve vice presidential records as defined in the PRA, "which, under traditional criteria, is a proper subject for mandamus relief in the face of [defendants']

[30] 44 U.S.C. §§ 2201 (defining "Presidential records"); 2207 (vice presidential records subject to PRA "in the same manner as Presidential records").

nonperformance of such duty." Id. [31]

Moreover, this case presents the type of "exceptional circumstances . . . that justify the invocation of this extraordinary remedy." Cheney v. U.S. District Court, 542 U.S. 367, 381 (2004) (quotations omitted). Left unchecked, defendants' unlawful guidelines narrowing the scope of vice presidential records subject to mandatory preservation obligations under the PRA will completely undermine the utility of the Act, depriving plaintiffs and the public forever of access to historically valuable records that Congress intended be preserved for public ownership and access.

In arguing that mandamus is not available here defendants rely almost exclusively on language from another provision of the PRA, 44 U.S.C. § 2203, that they argue "fairly exudes deference to the Vice President." Ds' Mem. at 15. Section 2203 of the Act is labeled "Management and custody of Presidential records," and therefore concerns areas not at issue here. Reinforcing that point is the language on which defendants rely, directing the president (and the vice president) to "take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records . . ." 44 U.S.C. § 2203; Ds' Mem. at 15.

Plaintiffs, however, are not challenging the vice president's management and maintenance of his records. Rather, they challenge the vice president's effort to rewrite the statutory definition of vice presidential records found at 44 U.S.C. § 2201(2). Accordingly,

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[31] That plaintiffs seek this remedy against the vice president is no bar to the entry of mandamus relief, given that the president is subject to mandamus. Nat'l Treasury Employees Union v. Nixon, 492 F.2d. at 601.

whatever discretion section 2203 "exudes," it has no bearing on plaintiffs' challenge, which rests on the completely non-discretionary language of section 2201.

For similar reasons defendants' argument that their compliance with the PRA is committed to their discretion by law, Ds' Mem. at 23-25, is equally without merit. That records creation, management and disposal decisions are committed to the vice president's discretion[32] does not render "guidelines describing which existing materials will be treated as presidential records in the first place" also immune from judicial review. Armstrong II, 924 F.3d at 1294. Indeed, defendants' demand for unchecked discretion not only contravenes binding Circuit precedent, but reflects an astonishing belief that "*[t]he Vice President alone may determine what constitutes vice presidential records or personal records*," Ds' Mem. at 24 (emphasis added), notwithstanding any statutory definition to the contrary. Such a notion is repugnant to our democratic ideals and the rule of law.

II. PLAINTIFFS HAVE A CAUSE OF ACTION AGAINST THE NARA DEFENDANTS.

Claims Three and Four of plaintiffs' Amended Complaint are directed to the archivist and NARA (the NARA defendants) based on their separate policy to consider the legislative records of a vice president subject to the PRA only at the discretion of the vice president. Claim Three seeks a declaratory judgment that such guidelines are contrary to the PRA, Amended Complaint at ¶¶ 59-65, while Claim Four seeks a writ of mandamus compelling the NARA defendants to comply with their non-discretionary duties under the PRA to define the scope of vice presidential records as including records relating to the vice president's legislative functions and duties. Id.

[32] Armstrong I, 924 F.2d at 290.

at ¶¶ 66-72.

These claims 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 accord to a vice president the discretion to exclude his legislative records from the preservation obligations of the PRA, fits squarely within the category of judicially reviewable cases recognized in Armstrong II. Moreover, 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.

Defendants argue that plaintiffs have no private right of action to pursue these claims, pointing to "the absence of any authorization for the Archivist to promulgate guidelines regarding 'the scope of Vice President Cheney's records subject to the PRA.'" Ds' Mem. at 12 n.3 (citation omitted). As support, defendants cite to language in Armstrong I discussing the absence in the PRA of any provision authorizing the archivist to assist the president and vice president in developing a records management system through NARA guidelines and regulations. Id. In addition, defendants rely on Nancy Kegan Smith's deposition testimony "that she was unaware of any written documents or guidance that NARA has issued further defining or explaining the scope of the PRA with respect to vice presidential records." Ds' Mem. at 17 n.8.

But this argument ignores guidelines NARA has issued defining vice presidential records for purposes of the PRA, found at 36 C.F.R. § 1270.14(d), and promulgated pursuant to authority

granted NARA by the PRA. See 53 Fed. Reg. 50404 (Dec. 15, 1988). As a result, either defendants are wrong in their assertion that NARA lacks authority to "promulgate guidelines regarding 'the scope of Vice President Cheney's records subject to the PRA,'" Ds' Mem. at 12 n.3, or those regulations are ultra vires. The short answer is that NARA has such authority and its exercise of that authority in a manner that contravenes the PRA is subject to review under the APA.[33]

III. PLAINTIFFS HAVE STANDING TO MAINTAIN THIS ACTION.

A. Defendants' Standing Arguments Are Really Merits Arguments Properly Raised In A Motion For Summary Judgment.

Article III standing, "[d]erived from the Constitution's 'case-or-controversy' requirement for federal court jurisdiction, requires plaintiffs to establish, as an 'irreducible constitutional minimum,' that they face 'injury in fact' caused by the challenged conduct and redressable through relief sought from the court." Shays v. FEC, 414 F.3d 76, 83 (D.C. Cir. 2005) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000)). An organizational plaintiff "has standing on its own behalf if it meets the same standing test that applies to individuals." Spann v. Colonial Vill., Inc., 899 F.2d 24, 27 (D.C. Cir. 1990).

The standing inquiry, however, is "not intended to provide a vehicle for resolution at the threshold of fundamentally merits issues." Wooden v. Bd. of Regents of the Univ. Sys. of Georgia, 247 F.3d 1262, 1280 (11th Cir. 2001). Thus, courts must be wary of "conflating the

[33] Thus Ms. Smith's testimony, far from bolstering defendants' arguments, undermines her own credibility given her lack of knowledge about basic NARA regulations implementing the PRA.

standing inquiry with resolution of the merits," id., and a challenge that rests on "disputed jurisdictional facts" "inextricably intertwined with the merits of the case" should be deferred "until the merits are heard." Herbert v. Nat'l Acad. of Sciences, 974 F.2d 192, 198 (D.C. Cir. 1992). Further, "when dismissal is sought, a Plaintiff's complaint must be construed liberally, and the plaintiff should receive the benefit of all favorable inferences that can be drawn from the alleged facts." Sierra Club v. Mainella, 2005 U.S. Dis. LEXIS 18911, *13 (D.D.C. 2005).

Here defendants conflate standing arguments with merits arguments, seeking dismissal based on a standing argument that rests on disputed merits-based facts. Specifically, defendants allege that plaintiffs have suffered no injury because defendants have complied with the PRA. Ds' Mem. at 29-35. By disguising their merits argument as a challenge to plaintiffs' standing, defendants seek to avoid the evidentiary burden that is properly theirs on a motion for summary judgment. But because it would require the Court to resolve "fundamentally merits issues," Wooden, 247 F.3d at 1280, resolution should be deferred pending resolution of the merits on a properly supported motion for summary judgment.

B. Plaintiffs Are Threatened With Imminent Injuries-In-Fact.

Ignoring that their failure to comply with the PRA means historically significant documents will not be preserved for future access, defendants allege plaintiffs lack standing because they "can only assert a speculative or hypothetical interest in seeking future access to vice presidential records years from now." Ds' Mem. at 27. In support defendants cite to this Court's initial opinion in Am. Historical Ass'n v. Nat'l Archives & Records Admin., 310 F.Supp.2d 216, 228 (D.D.C. 2004) ("AHA"), and CREW v. U.S. Dep't of Homeland Sec., 527 F.Supp.2d 101 (D.D.C. 2007), neither of which is persuasive authority here.

In AHA, this Court concluded initially that although the plaintiffs had demonstrated past injury in fact, they had failed to demonstrate a future injury "that is sufficiently imminent and not conjectural and hypothetical." 310 F.Supp.2d at 228. This conclusion was based on the specific facts before the Court, namely that at that stage there were no presidential records currently subject to the challenged Bush Executive Order and the 12-year period of restricted access was about to expire. Id. Thus, it was purely conjectural whether plaintiffs or other interested parties would choose in the future to seek the records of a different president. Id.[34]

Plaintiffs' claims here share none of the attributes of the conjectural claims presented in AHA. At issue is not whether Vice President Cheney's records will eventually be subject to an executive order that may bar plaintiffs' access, but whether the defendants' guidelines narrowing the scope of vice presidential records subject to the PRA are unlawful because they deprive plaintiffs of access to documents Congress intended be preserved for public ownership. Requiring plaintiffs to wait until the vice president has actually destroyed vice presidential records or transferred them out of his control in reliance on his unlawful guidelines will effectively deprive plaintiffs of any relief, as the records they seek will be irretrievably lost to plaintiffs and to history. Clearly this constitutes "immediate and irreparable" harm. Armstrong v. Bush, 807 F.Supp. 816, 820 (D.D.C. 1992).[35]

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[34] Defendants fail to mention that subsequently the AHA plaintiffs presented the Court with two key additional facts -- they had outstanding requests for presidential records and they intended to challenge former President Bush's assertion of privilege over 74 pages of his records -- from which the Court concluded that plaintiffs' suit was justiciable. Am. Historical Ass'n v. Nat'l Archives & Records Admin., 402 F.Supp.2d 171, 179 (D.D.C. 2005).

[35] Plaintiffs there sought emergency relief to prevent the loss of back-up tapes that would otherwise have been destroyed when President Reagan left office. In granting the requested relief, the district court recognized that destruction of the tapes would result in "immediate and

CREW v. U.S. Dep't of Homeland Sec. is equally inapposite, as the court's conclusion that CREW lacked standing to pursue a FRA claim was based on a lack of sufficient evidence in the record that CREW "has a FOIA request pending with the DHS or that it intends to file a specific FOIA request with the DHS for . . . records in the near future." 527 F.Supp.2d 101, 106.[36] CREW rested its standing in part on its intent to file future FOIA requests, which the Court found was not adequately documented.

Here, by contrast, plaintiffs have sued to prevent defendants from relying on guidelines that will make categories of documents completely unavailable to anyone, as the documents will either be destroyed or remain with Vice President Cheney or a surrogate when he leaves office. Plaintiffs' standing rests on the harm they will suffer if entire classes of vice presidential records are placed beyond the reach of the PRA and accordingly are inaccessible to the world. Moreover, plaintiffs cannot be faulted for failing to identify any currently pending FOIA requests for the records of Vice President Cheney, as those records will not be accessible through the FOIA for at least five years, and access to many most likely will be restricted for at least 12 years. See 44 U.S.C. § 2204(a)(1)-(6) (authorizing presidents to restrict access to certain categories of information for up to 12 years), §§ 2204(b)(2)(A), 2204(c)(2) (records not so restricted are not publicly available for at least five years, after which they are accessible through the FOIA).

In addition, the allegation at the heart of defendants' standing argument -- that plaintiffs

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irreparable" harm. Id.

[36] By contrast, in CREW v. EOP, the Court concluded that CREW had standing because it sufficiently documented in a declaration its intent to file future FOIA requests for the same kinds of records at issue. 2008 U.S. Dist. LEXIS 99511, *28-31.

lack standing because none has alleged it ever filed a FOIA request for vice presidential records[37] -- reflects a fundamental misunderstanding about how historians access records of past administrations. The PRA, enacted in 1978, first took effect in 1981. Accordingly, President H.W. Bush is the first president subject to its provisions and the only president for which the 12-year period has now expired. Access to records of administrations pre-dating former President Bush's is available through an entirely different scheme, the Mandatory Review process. See Second Declaration of Anna Kasten Nelson ("2d Nelson Decl."), ¶ 5 (attached as Exhibit 2).

Not only have the plaintiffs sought access to records of prior administrations[38] thereby establishing their past injuries, but they intend to seek such records in the future. For example, Plaintiff Stanley Kutler "plan[s] to research Vice President Cheney's advocacy of something he calls the 'unitary theory'" for which "[t]he vice president's emails with his staff and his other papers are crucial to understanding the unitary theory and my writing on this subject." Declaration of Stanley I. Kutler at ¶ 6 (Document 11-2). Likewise Plaintiff Martin J. Sherwin, a Pulitzer Prize winning historian, "has an interest in accessing historical presidential and vice presidential records, including the records of the current administration, in a timely fashion for

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[37] Ds's Mem. at 29.

[38] See 2d Nelson Decl. at ¶ 6 (confirming Ms. Nelson's use of the Mandatory Review process to access records of prior administrations); Declaration of Stanley I. Kutler (Document 11-2) at ¶ 3 ("In my research, I make extensive use of the records of former presidents and vice presidents at presidential libraries and other [NARA] facilities."); Amended Complaint, ¶¶ 9 ("As part of their historical research activities, AHA's members regularly request and make use of presidential and vice presidential records held by NARA."); 10 ("As part of their historical research activities, OAH's members regularly request and make use of presidential and vice presidential records held by NARA."); 12 ("As part of their historical research activities, SHAFR's members regularly request and make use of presidential and vice presidential records held by NARA."); 11 (describing SAA's efforts to access to records of former presidents).

academic and other purposes." Amended Complaint at ¶ 8. See also id. at ¶¶ 6 (same interest as to CREW); 9 (same interest as to AHA), 10 (same interest as to OAH), 11 (same interest as to SAA), 12 (same interest as to SHAFR).

Further, as eminent historian Anna Nelson confirms, the records of Vice President Cheney are of particular importance to historians because "[n]o vice-president . . . has been as powerful as Richard Cheney." 2d Nelson Decl. at ¶ 10. His records are critical to understanding whether "the country profits or suffers from a vice-president as involved as Richard Cheney." Id. Indeed, without full access to his records, "the American public will never understand the formation of policy within an administration that has fought two wars and mismanaged one of the greatest natural disasters in the last half century." Id. at 11.

Plaintiffs here have identified specific, non-speculative imminent injuries that support their standing to sue. Article III requires nothing more. While defendants argue extensively that plaintiffs have suffered no injury because the OVP has been complying with and intends to continue to comply with the PRA, Ds' Mem. at 29-36, those arguments are merit-based and therefore more properly addressed through a motion for summary judgment. In any event, as discussed below, far from demonstrating their full compliance with the PRA, defendants have confirmed the existence of guidelines that unlawfully narrow the scope of vice presidential records subject to the PRA and, accordingly, cause each of the plaintiffs an injury in fact.

C. Plaintiffs' Injuries Are Fairly Traceable To Defendants' Actions And Redressable Through The Requested Relief.

Defendants also challenge plaintiffs' standing on the ground that as to the NARA defendants and the EOP, there is an "absence of traceability from the alleged injury to relief sought . . ." Ds' Mem. at 36. This argument hinges on a myopic view of the PRA and an

extremely overinflated view of the vice president's authority.

Plaintiffs are challenging the NARA defendants' admitted policy of ceding to the vice president the discretion to include his legislative records within his vice presidential papers over which NARA will assume custody and control at the end of the administration. As a direct result of this policy, NARA will not take custody and control of all of Vice President Cheney's records as the PRA mandates.

Defendants maintain this harm is not traceable to any action of the NARA defendants based on their view that NARA has no role in implementing the PRA. See Ds' Mem. at 36-37. To the contrary, as existing NARA regulations amply illustrate, NARA has authority under the PRA and has used that authority to issue guidance on the definition of vice presidential records. See 53 Fed. Reg. 50404 (Dec. 15, 1988). That the vice president believes himself free to ignore that guidance, Ds' Mem. at 36-37 (vice president alone has the authority to implement the PRA's terms), does not provide a basis to deny plaintiffs standing.

Defendants are equally dismissive of the ability of this Court to redress plaintiffs' harm, claiming without explanation that there is "no likelihood" plaintiffs' "requested relief will remedy their alleged injuries." Ds' Mem. at 37 (citation omitted). But if, as plaintiffs have shown, defendants' unlawful guidance deprives plaintiffs of access to the full historical record of this vice presidency, declaratory and mandamus relief from this Court will directly redress this harm. Indeed, plaintiffs' harm is only non-redressable if the vice president chooses to ignore or flout an order of this Court, something the Court should not presuppose and that, in any event, does not undermine the legal redressability of plaintiffs' injuries.

D. Plaintiffs Have Prudential Standing To Pursue Their Claims.

Finally, defendants claim that plaintiffs lack prudential standing because the interests they seek to advance "'are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" Ds' Mem. at 37, citing Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987). As discussed *supra*, the interests plaintiffs seek to protect through this lawsuit are in perfect congruence with the reasons why Congress enacted the PRA in the first place. Because plaintiffs satisfy the zone-of-interest requirement, they have prudential standing to maintain this lawsuit.

III. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO PLAINTIFFS.

A. The White House Defendants' Guidelines Narrowing The Categories Of Vice Presidential Records Subject To The PRA Are Contrary To Law.

Several months ago in granting plaintiffs' request for a preliminary injunction, this Court noted the evidence before it included defendants' admission "that they have interpreted the PRA in a narrow fashion and have only preserved documentary material in accordance with that narrow interpretation." Memorandum Opinion of September 20, 2008 ("PI Op.") (Document 16) at p. 16. Specifically, defendants admitted they interpreted the statutory definition of vice presidential records in the PRA as exclusively encompassing "the functions of the Vice President as President of the Senate" and "the functions of the Vice President specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities." Stay Mem. Op. at 6. The Court noted further that both defendants' declarations and their pleadings were "bereft of any legal analysis demonstrating that defendants' interpretation [was] correct as a matter of law or any identification of legal authority that would allow Defendants to place limitations on the PRA's statutory language." PI Op. at 12. The Court subsequently authorized limited discovery directed at defendants' classification decisions and seeking to answer the

Court's questions such as whether "Vice President Cheney *only* engages in activities that fall within the two narrow categories that Defendants assert comprise all of his 'constitutional, statutory, or other official or ceremonial duties.'" Id. (emphasis in original).

Even with the benefit of that discovery, defendants still have not offered any legal analysis demonstrating how their truncated interpretation of the PRA is correct as a matter of law. Nor have they adduced facts justifying their narrow definition of vice presidential records. Thus, the Court's preliminary assessment remains true today: defendants have adopted an unduly narrow interpretation of vice presidential records that cannot be reconciled with the PRA.

First, defendants have not repudiated the definition of vice presidential records, proffered in the sworn declarations of Claire O'Donnell, as encompassing those records related to "the functions of the Vice President as President of the Senate" and "the functions of the Vice President specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities." While defendants cite to extensive deposition testimony of Ms. O'Donnell, they obscure the central point that nothing in her testimony sheds light on the derivation, meaning or intent of defendants' narrow, under-inclusive definition. When pressed on how "specially assigned" reflects the various responsibilities that statutes assign to the vice president Ms. O'Donnell replied only "I don't get into the legalese of all of the Vice President's duties." Deposition of Claire M. O'Donnell ("O'Donnell Depo.") at 29, 34 ("I wouldn't want to get into the legalese of it. I just know he does perform executive duties assigned to him by the President."). Yet the precise question before the Court is the legal significance of this narrow definition of the vice president's duties and responsibilities and whether it encompasses all of his

duties and responsibilities generating records covered by the PRA.[39]

Ms. O'Donnell's deposition testimony reveals she was not a competent witness to testify regarding the meaning of the phrase "specially assigned" or any of the other matters to which she attested in the three declarations she submitted in this lawsuit. Notwithstanding her title of deputy chief of staff and assistant to the vice president, Ms. O'Donnell essentially serves as an office manager in an administrative office of the OVP, with limited responsibility

> to hire staff, get them on board, get them office space, get them their passes, parking, just help with the personnel and the management of the office.

O'Donnell Depo. at 7. Although she has some responsibility for records management within the OVP, id., it is limited to managing her own files[40] and referring OVP employees with records management questions to the counsel to the vice president. Id. at 11.

Ms. O'Donnell has personal knowledge of only five subsets or categories of records: the four she personally maintains and the records generated by the energy task force Vice President Cheney headed up. The four categories of records Ms. O'Donnell maintains and that fall within the scope of the PRA are personnel records, which include resumes and clearance information;[41] budget files relating to the vice president's "authorized budget" (e.g., "how we spend it . . . any kinds of bills");[42] the vice president's trip files with records concerning "who traveled with him,

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[39] Moreover, as Ms. O'Donnell admitted, her declarations were drafted by counsel (O'Donnell Depo. at 24, 32) and reflect counsel's explanation, not hers.

[40] Id. at pp. 14, 16 ("I only manage my own files"), 18.

[41] O'Donnell Depo. at p. 14.

[42] Id. at 15.

what rental cars we paid for, per diem, things like that";[43] and a file of bills paid, which includes "payroll bills . . . supplies . . . transportation of things within the office, travel bills."[44] Ms. O'Donnell also has personal knowledge of records relating to the energy task force because those records were housed in her office space, O'Donnell Depo. at 49-50, and at that early stage of the administration she had "more hands on . . . to make sure that things were being done" and was assigned personal responsibility for those records. Id. at 50.

In implementing these limited records management responsibilities Ms. O'Donnell received extremely limited guidance and instruction, no more so than any other OVP employee. She recalled having received only two written memoranda, each from the then-White House counsel and each directed to all staff. Id. at 9. The first memorandum, issued in January 2001, "didn't apply just to the vice president" but "to everybody." Id. Ms. O'Donnell could not recall what, if any, specific guidance the memorandum offered as to vice presidential records. O'Donnell Depo. at 9. The second memorandum was issued by White House Counsel Harriet Miers shortly after she replaced Alberto Gonzales. Id. at 44-45. Ms. O'Donnell described this second memorandum as "basically the same thing" as the first, but could not "remember the details of it." Id. at 9.

Perhaps most revealing of all about Ms. O'Donnell's limited role in implementing the PRA, she did not receive and has no familiarity with a memorandum issued by Fred Fielding on October 8, 2008, that pertains in part to vice presidential records. Id. at 13. This memorandum

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[43] Id.

[44] Id. at 16. Ms. O'Donnell also maintains other "miscellaneous files of just different documents" her office "receive[s] or create[s]" and that she described as "kind of a conglomeration of things." O'Donnell Depo. at 18.

was prepared *after* plaintiffs filed this lawsuit and *after* Ms. O'Donnell submitted her declarations in this matter. Nevertheless, it was not shared with Ms. O'Donnell, the very person the White House has proffered as a purportedly knowledgeable declarant about the vice president's and OVP's compliance with the PRA. This alone suggests Ms. O'Donnell was not competent to testify or submit declarations pertaining to the White House defendants' compliance with the PRA.

Beyond this limited and very generic written guidance, Ms. O'Donnell testified that she also has received verbal reminders and annual ethics briefings, each of which she described as imparting generic advice. O'Donnell Depo. at 8, 10. Ms. O'Donnell in turn has offered her staff only reminders about the process of how to archive records, and refers her staff to counsel if "they have more specific questions than that." Id. at 10-11; see also id. at 43 ("I always defer to counsel.").

As for the PRA itself, Ms. O'Donnell testified that while she has "read portions of it" she "can't guarantee that I've read the whole thing." Id. at 14. Indeed, Ms. O'Donnell has no working knowledge of what constitute "personal records" under the PRA. O'Donnell Depo. at 22 ("I'm not sure of the definition of personal."). And when asked about what is included in the legislative records category, Ms. O'Donnell responded "I really don't distinguish myself . . ." Id. at 23.

Ms. O'Donnell has absolutely no personal knowledge about the vast majority of records that either the OVP or the vice president himself creates or maintains. She admittedly is "not familiar with how the Vice President's immediate office handles his papers or how he [the vice

president] does . . ." Id. at 30.[45] Similarly, she has no "firsthand knowledge of anything that he [the vice president] has created that is not covered for us under the PRA." O'Donnell Depo. at 38. When asked about a series of records on topics ranging from documents potentially responsive to congressional subpoenas to records of communications between the OVP and the FISA Court, Ms. O'Donnell admitted having no personal knowledge about how the records are being treated under the PRA[46] and could only assume, based on the very general guidance she has received, that the records are being preserved. See id. at pp. 47-58.

Nor does it fall to Ms. O'Donnell to decide whether a particular activity constitutes vice presidential support of presidential functions. See O'Donnell Depo. at 27 ("I wouldn't make that determination"). Moreover, Ms. O'Donnell admitted that "[t]he Vice President's staff isn't specially assigned. The Vice President's staff is there to support the Vice President. Whether he gets specially assigned is something between the President and the Vice President."[47] And Ms. O'Donnell testified further, in explaining language drafted by counsel for her use in another lawsuit concerning the purposes for which the vice president and his staff conduct meetings with outside individuals, the vice president "is a man of authority, he is going to get a lot of information. So it wouldn't be just to advise the President." Id. at 63.

As her testimony reveals, Ms. O'Donnell was presented with declarations drafted by counsel that she readily signed, with no particular understanding of their legal implications or the

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[45] See also id. at 30 (in response to questions about what the vice president does with records that he keeps in his immediate office and how they are handled for purposes of the PRA Ms. O'Donnell testified "I have no personal knowledge.").

[46] Id. at 20 ("I don't have specific knowledge"; "I don't have personal knowledge."); 53.

[47] Id. at 59. Ms. O'Donnell also testified that she has not spoken directly to the vice president about records issues. Id. at 29.

reason why specific language, such as the "specially assigned" description, was used. She was unaware of any other guidance or documentation containing this language.[48] She could not explain why she used both the term "specially" and "executive"[49] to describe the vice president's functions and testified that she included this language upon "the advice of counsel." Id. at 34. Nor could she confirm that all documents reflecting the vice president's "specially assigned" functions and duties are being treated as covered by the PRA; the most she could offer was her assumption, based on the orientation and general guidance she received as an OVP employee, that other OVP employees and the vice president himself were treating records as within the scope of the PRA. See, e.g., id. at 35 ("People are aware of the guidance and the practices they should be adhering to.").

In short, Ms. O'Donnell could shed no light on the meaning of the "specially assigned" language defendants proffered to define the scope of vice presidential responsibilities generating vice presidential records within the meaning of the PRA. Like virtually the entire OVP staff Ms. O'Donnell has received limited guidance and ultimately must rely on others to define and explain what the PRA requires. She has no personal knowledge about the vice president's understanding and implementation of the PRA and can competently address only how her narrow subset of records are being treated.

Accordingly, the Court is left with a facially under-inclusive definition of vice presidential records that excludes those responsibilities assigned to the vice president by

[48] O'Donnell Depo. at 32.

[49] O'Donnell Depo. at 34.

Congress[50] as well as functions that go to the core of Vice President Cheney's power over policy making: the advice he gives the president on his own initiative and the influence he has over the president's decisions. Neither can legitimately be understood as "specially assigned" to the vice president from the president, yet each is integral to explaining Vice President Cheney's role in the Bush administration. See also 2d Nelson Decl. at ¶ 10.

Defendants' insistence that these narrowing policies and guidelines do not exist and that neither Vice President Cheney nor the OVP will destroy any vice presidential records, Ds' Mem. at 32, is not backed up by competent and persuasive evidence of record. Indeed, the record is completely devoid of any evidence as to Vice President Cheney's practices, actions or intentions, even though he is a named defendant.

The only legal justification defendants offer is a citation to 3 U.S.C. § 106, an appropriation statute from which they claim the "specially assigned" language was borrowed. Ds' Mem. at 33 n.13. As this Court has pointed out, however, 3 U.S.C. § 106 is "a budgetary provision related to the Vice President's hiring and payment of staff, and not a statute related to the classification of materials under the PRA." Stay Mem. Op. at 9. Moreover, the language in 3 U.S.C. 106 on which defendants rely "was added to that statute pursuant to an amendment on November 2, 1978"; two days later Congress enacted the PRA. Id. n.4. This timing belies defendants' claim that Congress intended the phrase "specially assigned to the Vice President by

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[50] For example, the vice president is assigned as a member of the National Homeland Security Council by statute, 6 U.S.C. § 493; is authorized to receive terrorism information by statute, 50 U.S.C. § 404o; is included in the Smithsonian Institution by statute, 20 U.S.C. § 41; is authorized to appoint a senator to the Board of Visitors to the U.S. Merchant Marine Academy by statute, 46 U.S.C. § 51312; is a member on the National Security Council by virtue of the National Security Act of 1947; and is a member on the President's Council on Counter-Narcotics by statute, 21 U.S.C. § 1708.

the President" in the budget amendment to have the same meaning as the phrase "statutory, ceremonial or other official duties" in the PRA. Id.[51]

B. The NARA Defendants' Guidelines Narrowing The Categories Of Vice Presidential Records Subject To The PRA Are Contrary To Law.

NARA and the archivist have adopted their own guidelines that exclude from the mandatory reach of the PRA records generated or received by vice presidents in their legislative capacities. Plaintiffs became aware of these guidelines, which were neither promulgated with notice and comment nor to plaintiffs' knowledge embodied in a publicly available written document, as a result of a discussion with NARA General Counsel Gary Stern.[52] Under 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 preserved only at his discretion. Id. Accordingly, there is no assurance these records will be transferred to NARA's custody and control at the end of President Bush's term of office.

In a declaration submitted in this litigation in support of defendants' opposition to plaintiffs' motion for a preliminary injunction ("Smith Decl.") (Document 9-4), Nancy Kegan

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[51] Defendants' ad hominem attacks on plaintiffs' counsel (Ds' Mem. at 33 n.13) do not merit a response beyond noting that to accurately describe the source of arguments contained in the referenced brief would require plaintiffs' counsel to reveal privileged information, including the role of the client and its counsel, David Addington.

[52] Attached as Exhibit 3 is a copy of a letter from CREW's Chief Counsel Anne Weismann to Gary Stern memorializing their telephone conversation of July 21, 2008, in which NARA advised CREW of its policy to treat legislative or congressional records of a vice president as his personal papers not subject to the PRA. 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, nor has NARA issued any guidance on this issue.

Smith, described NARA's policy of treating legislative records of vice presidents as "covered under the PRA, absent an express indication from the former Vice President or his representative that such records are considered to be 'personal' in nature." Smith Decl., ¶ 4. Ms. Smith's deposition testimony confirms NARA's view that individual vice presidents have discretion whether or not to treat their legislative records as encompassed by the PRA. See Deposition Transcript of Nancy Kegan Smith, November 10, 2008 (attached as Exhibit 4) at 39:8-17; 47:18-48:2 (testifying to her belief that the vice president has the discretion under the PRA to determine which categories of records are encompassed within the PRA).

NARA's policy, however, directly conflicts with the non-discretionary mandate of the PRA that the vice president treat as vice presidential records subject to the PRA "documentary materials . . . created or received . . . 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 [Vice] President." 44 U.S.C. § 2201(2) (emphasis added). Article I, Section 3 of the Constitution designates the vice president as head of the Senate, with the responsibility to break a tie vote. Thus, records relating to the vice president's legislative functions are part of his constitutional duties and must therefore be preserved pursuant to the PRA. NARA's policy of according the vice president the discretion to treat his legislative records as covered by the PRA is at direct odds with the PRA.

Defendants offer nothing -- factually or legally -- to counter the irrefutable evidence that NARA and the archivist have adopted a policy that contravenes the PRA. Accordingly plaintiffs are entitled to relief in the form of a declaratory judgment or, alternatively, mandamus, as requested in Claims Three and Four of their Amended Complaint.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss and alternative motion for summary judgment should be denied and plaintiffs' motion for summary judgment as to all defendants should be granted.

Respectfully submitted,

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