The Vice President's Privacy: Disclosure Under the Presidential Records Act

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A federal district court, applying the Presidential Records Act, has issued a broad order requiring former Vice President Richard B. Cheney and his office to preserve documents created or received by the vice president, his staff, and office. The former vice president considered by many to be the most secretive in history (as well as the most powerful) may find his records ultimately opened for review by all.

A recent decision by a federal district court in the District of Columbia, in *Citizens for Responsibility and Ethics in Washington v. Cheney*,[1] may do what other courts, newspaper reporters, editorials, and even public opinion have failed to do: open former Vice President Richard B. Cheney's files to review.

The court's decision, issued under the Presidential Records Act ("PRA"),[2] is certainly going to be subjected to further legal proceedings — and the underlying issues may ultimately even reach the U.S. Supreme Court. Yet the legal battle, the court's rationale in *Cheney*, and its conclusions are eerily reminiscent of court decisions and events that took place several decades ago, involving another presidential administration, which ultimately led to the enactment of the PRA. Perhaps more than anything else, the Cheney ruling is a reminder that public servants serve the public, and that openness and transparency underlie that relationship.

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BACKGROUND

Prior to 1974, the wide array of materials generated during a presidency were generally considered the property of that president when his (and to date it has always been "his") term ended, and presidents were not subject to any "specific, express legal duty to create or maintain their papers."[3] In the midst of the Watergate investigation, however, Congress passed the Presidential Recordings and Materials Preservation Act ("PRMPA"), which transferred control of President Richard Nixon's presidential records to the Administrator of General Services (later changed to the Archivist of the United States), and directed the Administrator to develop regulations providing for public access to the materials.[4] The PRMPA was upheld as constitutional in *Nixon v. Administrator of General Services*,[5] and, in 1978, Congress passed the PRA, which addressed the issue of public access to presidential papers in a broader context.

The Supreme Court's opinion in *Nixon v. Administrator of General Services* provides a helpful background for understanding the context in which the PRA was passed, as well as the concerns that animated its enactment:

> The legislative history of the [PRMPA] clearly reveals that, among other purposes, Congress acted to establish regular procedures to deal with the perceived need to preserve [Presidential] materials for legitimate historical and governmental purposes. 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. Congress can legitimately act to rectify the hit-or-miss approach that has characterized past attempts to protect these substantial interests by entrusting the materials to expert handling by trusted and disinterested professionals.[6]

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Congress also sought "to restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of [historical] events."[7]

THE PRA

The PRA defines the term "Presidential records" as:

> documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of 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 the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.[8]

Pursuant to the PRA, "[t]he United States shall reserve and retain complete ownership, possession, and control of Presidential records,"[9] and the president is directed 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."[10]

The PRA differentiates "Presidential records" from "personal records," defining "personal records" as "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."[11] Further, the PRA provides that documentary materials produced or received by the president, his staff, or units or individuals in the EOP whose function is to advise and assist the president "shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately."[12]

The PRA specifically directs that vice presidential records are subject to the provisions of the PRA "in the same manner as Presidential

records," and provides that "[t]he duties and responsibilities of the Vice President, with respect to Vice-Presidential records, shall be the same as the duties and responsibilities of the President under [the PRA] with respect to Presidential records."[13] During the president and vice president's term in office, they may dispose of presidential or vice presidential records "that no longer have administrative, historical, information, or evidentiary value," but only after complying with particular requirements for notifying both the Archivist and the appropriate congressional committee of the planned disposal.[14]

Significantly, the PRA provides that upon conclusion of the president and vice president's last term in office, "the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to," presidential and vice presidential records.[15] The PRA further imposes a duty on the Archivist to "make such records available to the public as rapidly and completely as possible consistent with the provisions of the [PRA]."[16]

THE CREW SUIT

The Citizens for Responsibility and Ethics in Washington ("CREW") and a number of individual historians, archivists, and organizations of archivists and historians, brought suit recently under the PRA, seeking declaratory, injunctive, and mandamus relief against defendants Vice President Cheney in his official capacity, the Executive Office of the President ("EOP"), the Office of the Vice President ("OVP"), the National Archives and Records Administration ("NARA"), and U.S. Archivist Dr. Allen Weinstein, in his official capacity. The plaintiffs alleged that Vice President Cheney, the OVP, and the EOP had improperly excluded records from the PRA and sought a declaratory judgment or alternatively a writ of mandamus based on those allegations. The plaintiffs also alleged that NARA and the Archivist had improperly excluded records from the PRA and had failed to comply with the Administrative Procedure Act,[17] and sought a declaratory judgment or alternatively a writ of mandamus based on those allegations.

The plaintiffs moved for a preliminary injunction, seeking to preserve

all records potentially at issue in this litigation during the pendency of the litigation.

THE PARTIES' CONTENTIONS

The plaintiffs alleged that the defendants had improperly and unlawfully placed limitations on the scope of vice presidential records subject to the PRA. In particular, the plaintiffs alleged that Vice President Cheney, the OVP, and the EOP had or will "improperly and unlawfully exclude from the PRA 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." The plaintiffs also challenged the alleged "policies and practices" 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."[18]

The defendants' opposition to the plaintiff's motion for a preliminary injunction asserted that:

> The Vice President and the Office of Vice President ("OVP") have been carrying out since January 20, 2001 — and intend to continue to carry out — their obligations under the Presidential Records Act with respect to documentary materials that relate to or have an effect upon the Vice President's constitutional, statutory or other official and ceremonial duties, both executive-related and legislative-related duties.

The defendants filed two declarations, one by Claire M. O'Donnell, Assistant to the Vice President and Deputy Chief of Staff, and one by Nancy Kegan Smith, Director of the Presidential Materials Staff in the Office of Presidential Libraries at NARA. In particular, with respect to the plaintiffs' allegation that the defendants would not comply with 44 U.S.C. § 2207 and their allegation that the defendants had limited their compliance with that section based on Executive Order 13,233,[19] the defendants asserted that they were complying with 44 U.S.C. § 2207 and denied that either the vice president or the OVP had relied upon Executive Order 13,233 or

any guidelines issued by the other defendants to exclude any vice presidential records from the requirements of Section 2207.

The plaintiffs replied by asserting that "[f]ar from supplying the requisite assurances that defendants are complying fully with the [PRA], the defendants' declarations offer carefully parsed language establishing only that defendants are preserving two subsets of vice presidential records." The plaintiffs highlighted a potential ambiguity in Ms. O'Donnell's declaration: Ms. O'Donnell defined the term "vice presidential records" to include the definition of the term set forth in the PRA but also stated that, "The constitutional, statutory, or other official or ceremonial duties of the Vice President include both 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."

The court asked the defendants whether this statement indicated that the defendants interpreted the phrase "the constitutional, statutory, or other official or ceremonial duties of the Vice President" 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?" The defendants responded that "the short answer to the Court's question is yes."

THE COURT'S RULING

In its decision, the court noted that the PRA defined 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.[20]

The court added that the PRA did not provide any further definition of the terms "constitutional, statutory, or other official or ceremonial duties of the [Vice] President." Nevertheless, the court explained, the defendants' response to the court's question made it "unmistakably clear" that the defendants were applying a "narrowing interpretation" to that language. Specifically, Ms. O'Donnell averred — and the defendants' response stated — that:

> all the constitutional, statutory, or other official or ceremonial duties of the Vice President fall within either (a) the category of functions of the Vice President specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities or (b) the category of the functions of the Vice President as President of the Senate.

The court stated that the defendants thus defined the terms used in the PRA — the "constitutional, statutory, or other official or ceremonial duties of the [Vice] President" — to include *only* those "functions of the Vice President specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities" and "functions of the Vice President as President of the Senate."

The court noted, however, that the plaintiffs alleged that the defendants had improperly and unlawfully placed limitations on the scope of vice presidential records subject to the PRA. Accordingly, the court declared that the "seminal issue" in this case was whether the defendants' narrowing interpretation of the PRA's language was supported as a matter of law. The court then considered whether the plaintiffs were entitled to the preliminary injunction they sought.

Likelihood of Success

The court analyzed whether the plaintiffs had demonstrated a likelihood of success on the merits of their legal claims. The defendants suggested that the plaintiffs could not demonstrate any likelihood of success on the merits of their legal claims because the defendants had followed the requirements of the PRA with respect to vice presidential records. As

support for this assertion, the defendants cited to Ms. O'Donnell's sworn declarations. In turn, those declarations made clear that the defendants believed they were complying with their obligations under the PRA to preserve documentary material reflecting the "constitutional, statutory, or other official or ceremonial duties of the [Vice] President" by preserving *only* documentary material reflecting the "functions of the Vice President specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities" and the "functions of the Vice President as President of the Senate." The court said that Ms. O'Donnell's declarations stated the defendants' "apparent legal conclusion" as to the proper interpretation of the PRA's statutory language. However, it found, both Ms. O'Donnell's declarations and the defendants' pleadings were "bereft of any legal analysis" demonstrating that the defendants' interpretation was correct as a matter of law or any identification of legal authority that would allow the defendants to place limitations on the PRA's statutory language. In short, the court found, Ms. O'Donnell's declarations and the defendants' pleadings offered only their "*ipse dixit*" that the defendants' narrowing definition was the correct one. Further, the court continued, Ms. O'Donnell identified herself as Assistant to the Vice President and Deputy Chief of Staff, and asserted that she was "responsible for all aspects of administration and operations of the Office of the Vice President, including records management." Nevertheless, it found, neither of Ms. O'Donnell's declarations provided any factual assertion — or even suggested — that Vice President Cheney *only* engaged in activities that fell within the two narrow categories that the defendants asserted comprised all of his "constitutional, statutory, or other official or ceremonial duties."[21]

The court found that it did not have to credit Ms. O'Donnell's legal conclusions and that, in fact, whether the defendants' narrowing definition was correct as a matter of law was a complex issue of first impression and the seminal issue that it had to resolve in addressing the merits of the plaintiffs' complaint. It added that Ms. O'Donnell had not offered any factual grounds on which it could determine that the plaintiffs' allegations — that the defendants had misinterpreted the PRA— were unfounded. In addition, the court said, the defendants' declarations and

pleadings failed to explain why a narrowing definition of the PRA's statutory language would be appropriate in light of the context in which the PRA was passed, and the concerns it was meant to address.

The court stated that in "flatly asserting" that the PRA's statutory language was limited in the manner that they apparently perceived it to be, the defendants did not explain how a narrowing construction accorded with the concerns or accomplished Congress's goals. For their part, the plaintiffs argued that the defendants had misinterpreted the PRA by narrowly construing it, and proffered examples of situations in which the vice president carried out activities that appeared to be excluded from the defendants' narrowing definitions, but that might nevertheless be considered "related to the [Vice President's] constitutional, statutory, or other official or ceremonial functions."[22]

The plaintiffs further noted that any documents created in connection with such activities would not be preserved under the defendants' narrowed interpretation of the PRA. The court stated that if the plaintiffs were correct that the defendants had improperly narrowed the PRA and that the defendants' definition was not correct as a matter of law, then the plaintiffs would have a 100 percent likelihood of success on the merits because the defendants had admitted to applying their narrowing definition in carrying out their obligations under the PRA.

The court then stated that the legal question in this case — whether the defendants' narrowing interpretation was correct and/or supported as a matter of law — was "serious, substantial, difficult and doubtful." It therefore concluded that the plaintiffs had established a sufficient showing to carry their burden under the first prong of the preliminary injunction standard.

Irreparable Injury

The court next analyzed whether the plaintiffs had established that they would suffer irreparable injury in the absence of a preliminary injunction. This question also was premised on the defendants' claim that they were complying with the PRA, which in turn, the court stated, had to be viewed through the lens of the defendants' narrowed definition of the PRA's statutory language. The court said that at this point there had

been no judicial determination that the defendants' narrowed interpretation was correct as a matter of law, and there also had not been a factual predicate established as to whether or not the vice president in fact created or received records relating to his "constitutional, statutory, or other official or ceremonial duties" that were not encompassed by either of the defendants' narrowed definitions. The court stated that what was clear, however, was that the defendants admitted that they interpreted the PRA to cover only documentary material reflecting the "functions of the Vice President specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities" and the "functions of the Vice President as President of the Senate." Thus, the court observed, the defendants did not treat any records that did not fall within their narrowed definition as protected by the PRA.

The court stated that it did not reach a determination on the merits of the plaintiffs' complaint, adding that it had to, and did, assume that the defendants would abide by their legal obligations and "act in good faith." However, it added, the defendants admitted that they had interpreted the PRA "in a narrow fashion" and had only preserved documentary material in accordance with that narrow interpretation. As such, the court stated, if the defendants' interpretation was not correct as a matter of law, there was no question that documents that might be entitled to PRA protection would not receive the statute's protections. Those unprotected documents "could be transferred to other entities, destroyed, or not preserved," the court noted, adding that if any of these events occurred, the damage was "inherently irreparable"; once documentary material was gone, it could not be retrieved.

Interestingly, the court stated that, in reaching its conclusion that the plaintiffs had demonstrated a substantial possibility of irreparable injury, it took note of the procedural history of this case. In particular, it pointed out, the defendants were unwilling — in lieu of litigating the plaintiffs' motion for a preliminary injunction — to agree to preserve all records potentially at issue in this litigation, and to treat them as if they were covered by the PRA until a decision on the merits of the plaintiffs' claims could be issued. Instead, the court said, the defendants only were willing to agree to a preservation order that tracked their narrowed interpretation of the PRA's

statutory language. This unwillingness suggested to the court that there was, in fact, a substantive difference between "all records potentially at issue in this litigation," as described by the PRA's statutory language, and the defendants' "narrowed interpretation." The court stated that this unwillingness also heightened its concern that, in the absence of a preliminary injunction, all records potentially covered by the PRA as a matter of law would not be preserved through the termination of this litigation.

Finally, the court found, the plaintiffs' assertion that they would suffer irreparable injury in the absence of a preliminary injunction was "significantly bolstered" by the declarations they proffered from two historians describing the use that they intended to make of the records potentially at issue in this litigation when they become available to the public.[23] The declarations also noted the historical significance of those records both to future members of the executive branch and to members of the public.[24] The court said that if, however, records that were correctly encompassed in the PRA's statutory language were not preserved, they would "not be available for future generations."

Injury to Other Interested Parties

Next, the court analyzed whether a preliminary injunction would cause injury to the defendants. It found that, in contrast to the injury that the plaintiffs had suffered and would continue to suffer if the defendants had improperly adopted a narrowed interpretation of the PRA's statutory language, there was no injury to the defendants that would arise from a preliminary injunction or any prejudice that would result from requiring the defendants to preserve all records potentially at issue in this litigation while this action was ongoing.

The Public Interest

Finally, the court concluded that the public interest was "undoubtedly served" by ensuring that all documentary material potentially encompassed by the PRA's statutory language was actually preserved as Congress saw fit in enacting the PRA. In considering this factor, the court stated that it was guided by the Supreme Court's discussion of the purposes underlying the PRA's enactment in *Nixon v. Administrator of*

General Services. The court said that the PRA served to "preserve [presidential and vice presidential] materials for legitimate historical and governmental purposes" and to ensure that future members of the executive branch can access historical records as necessary in carrying out their duties.[25] It added that the PRA also served the public interest by ensuring the "preservation of an accurate and complete historical record" by "trusted and disinterested professionals," and thus enhanced "the public confidence in our political processes."[26]

The court said that these public interests were of the "utmost significance" and, as discussed above, were not and would not be fully protected if the defendants' narrowed interpretation of the PRA's statutory language was incorrect as a matter of law. The defendants admitted that they had only preserved under the PRA those records that they had unilaterally determined to be encompassed in the phrase "documentary material…created or received by the [Vice] President…in the course of conducting activities which relate to or have an effect upon the carrying out of [his] constitutional, statutory, or other official or ceremonial duties…." The court said that the American public, however, had a right to the preservation of *all* records encompassed by the PRA's statutory language. As such, the court found, until it was able to determine whether the defendants' narrowed interpretation was legally supported, the public interest favored the issuance of a preliminary injunction.

The Preliminary Injunction Order

The court then held that the plaintiffs had carried their burden of demonstrating that a preliminary injunction was necessary and appropriate. The court found that, based on the factual record before it, the preliminary injunction had to bind all of the defendants.

CONCLUSION

Accordingly, the court granted the plaintiffs' motion for a preliminary injunction. Toward that end, it ordered all of the defendants to preserve throughout the pendency of this litigation all documentary material, or any reasonably segregable portion thereof created or received by the vice

president, his 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, without regard to any limiting definitions that the defendants might believe were appropriate.

The future course of this litigation will certainly be quite interesting, and will determine whether the scope of the documents generated by Vice President Cheney will be available to the public in the future, or kept out of public view, in private, forever.

NOTES

[1] No. 08-1548 (CKK) (D.D.C. Sept. 20, 2008).
[2] 44 U.S.C. § 2201 et seq.
[3] *See Nixon v. United States*, 978 F.2d 1269, 1276 (D.C. Cir. 1992); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 431 (1977).
[4] *See* 44 U.S.C. § 2111 note.
[5] 433 U.S. 425 (1977).
[6] 433 U.S. at 452-53.
[7] *Id.* at 453.
[8] 44 U.S.C. § 2201(2).
[9] 44 U.S.C. § 2202.
[10] *Id.* § 2203.
[11] *Id.* § 2201(3).
[12] *Id.* § 2203(b).
[13] *Id.* § 2207.
[14] *Id.* § 2203(c)-(d).
[15] *Id.* § 2203(f)(1).
[16] *Id.*
[17] 5 U.S.C. § 701 et seq.
[18] *Id.*
[19] Executive Order 13,233 provides, in relevant part, "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." See 66 Fed. Reg. 56,025.

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[20] 44 U.S.C. §§ 2201(2), 2207.

[21] 44 U.S.C. § 2201(2).

[22] 44 U.S.C. § 2201(2).

[23] On this point, the plaintiffs offered the declaration of Stanley I. Kutler, one of the named plaintiffs in this case, and the E. Gordon Fox Emeritus Professor of American Institutions and Professor of Law at the University of Wisconsin. Professor Kutler is the author of many books, papers, and plays on American presidents, as well as the founder and former editor of the journal Reviews in American History. Professor Kutler averred that in his research, he makes "extensive use of the records of former presidents and vice presidents at presidential libraries and other [NARA] facilities." Professor Kutler also stated that "[i]n the future, [he plans] to research Vice President Cheney's advocacy of something he calls the 'unitary theory' of our government," and notes that "[t]he vice president's emails with his staff and his other papers are crucial to understanding the unitary theory and [Professor Kutler's] writing on this subject."

[24] In this respect, the plaintiffs proffered the declaration of Anna Kasten Nelson, a member of the Organization of American Historians, one of the named plaintiffs in this action. Dr. Nelson is the Distinguished Historian in Residence at American University, where she teaches courses related to the history of American foreign relations. Dr. Nelson stated that she had "done research in five presidential libraries and with the Nixon papers," and had used this research to publish "more than 25 articles, essays and reviews, edited a forthcoming book and [is] completing another book on presidents and the organization of the national security process." Dr. Nelson asserted that "[h]istory has show[n] us that vice presidents produce useful records illuminating the White House policies," and averred that she "cannot imagine writing about the process of making foreign policy during the [President George W.] Bush administration without the records created by [Vice President Cheney's] office." Dr. Nelson stated that, if vice presidential records were not preserved as required by the PRA, "not only will [she] be harmed in [her] ability to conduct presidential research, but the American public will be limited in its ability to understand the events of the past."

[25] 433 U.S. at 452-53.

[26] *Id.* at 452-53 and n.14 (quoting *Nixon v. Administrator of General Servs.*, 408 F. Supp. 321, 338-39 (D.D.C. 1976)).