

BUT HIS EMAILS! KUSHNER'S UNIQUE EXPOSURE UNDER THE PRESIDENTIAL RECORDS ACT

The focus on what Trump will burn down in his final days as President has brought renewed focus on whether Trump will manage to destroy evidence on his way out. For example, Trump's refusal to concede defeat may have delayed the normal archiving process, not to mention the instructions to White House employee that there needed to be an archiving process.

When Trump lost the November election, records staffers were in position to transfer electronic records, pack up the paper ones and move them to the National Archives by Jan. 20, as required by law. But Trump's reluctance to concede has meant they will miss the deadline.

"Necessary funding from the (White House) Office of Management and Budget was delayed for many weeks after the election, which has caused delays in arranging for the transfer of the Trump presidential records into the National Archives' custody," the National Archives said in a statement to The Associated Press. "Even though the transfer of these records will not be completed until after Jan. 20, the National Archives will assume legal custody of them on Jan. 20 in accordance with the Presidential Records Act."

White House spokesman Judd Deere said Saturday that contesting the election did not cause the delay in getting the president's records transferred to the archives and that guidance was available

to staffers on how to pack up their materials.

One person familiar with the transition said guidance typically emailed to executive branch employees explaining how to turn in equipment and pack up their offices was sent out in December, but quickly rescinded because Trump insisted on contesting the election.

With little guidance, some staffers in the White House started quietly calling records workers to find out what to do.

In early December, CREW and the National Security Archive tried to sue to preserve records, requesting a Temporary Restraining Order. While a key part of that suit – which the parties may be moving to novel litigation over – pertains to whether it’s enough to take a screen shot of an electronic communication, the suit also focuses on Jared Kushner’s well-documented habit of using private communications.

72. Notwithstanding these requests and the preservation directive, Mr. Kushner and his wife and Advisor to the President Ivanka Trump reportedly re-routed their personal email accounts to Trump Organization computers within one to two days of receiving the September 25, 2017 letters. Mar. 21, 2019 Oversight Letter, at 3.

73. In a December 2018 interview with then-House Oversight and Government Reform Chairman Gowdy and Ranking Member Cummings, Mr. Kushner’s counsel “confirmed that Mr. Kushner has used—and continues to use—WhatsApp” to create or send Presidential records, including to communicate “with people outside the United States.” Mar. 21, 2019 Oversight Letter, at 6. When asked by Rep. Cummings if “Mr. Kushner has ever used WhatsApp to discuss classified

information,” his counsel replied, “That’s above my pay grade.” Id.

74. WhatsApp is a non-official, encrypted electronic messaging application.

75. Mr. Kushner’s lawyer further explained that Mr. Kushner preserves Presidential records created or sent from his WhatsApp account by “tak[ing] ‘screenshots’ of these communications and forward[ing] them to his official White House email account or to the National Security Council.” Mar. 21, 2019 Oversight Letter, at 6 (emphasis added).

76. Mr. Kushner’s attorney also admitted that between January and August 2017, Mr. Kushner used his personal email account to send and receive official emails. Mar. 21, 2019 Oversight Letter, at 2-3.

The government is trying to make all this go away quickly though, arguing, in part, that the NGOs suing have no private right of action under the Presidential Records Act (meaning there’s no way for them to demand more diligent treatment of records).

Here, Plaintiffs cannot make such a showing; not only does the PRA lack any private right of action, see *Judicial Watch, Inc. v. NARA*, 845 F. Supp. 2d 288, 299 n.5 (D.D.C. 2012), but, as discussed above, the D.C. Circuit has concluded that it affirmatively precludes judicial review.

That’s one of the reasons I’m so interested in what happened in the last week in another lawsuit, Andrew McCabe’s lawsuit against DOJ for being fired as a result of Trump’s personal retaliation against him.

Whereas CREW and NSA sued in December, McCabe instead submitted a document subpoena to the Executive Office of the President on November 4 asking for materials relating to McCabe and his firing. Since then, the parties have been squabbling over how to deal with the subpoena and, specifically, how to make sure that relevant records stored on private accounts would be preserved.

In a mid-December hearing, Judge Randolph Moss endorsed, in principle, that such records should be preserved both by those who've already left government and those who remained at the White House.

That's when things got interesting.

According to a status report submitted the day of the insurrection, even though this dispute was primarily about those still in the White House, the government tried to claim it would be too onerous to ask current White House employees – McCabe focused specifically on Hope Hicks, Dan Scavino, Stephen Miller, and Jared Kushner – to simply ask these four specifically whether they *have* archived their private server emails and WhatsApp chats properly and if not, to both do so and tell McCabe's team if they haven't.

Defendants' position is as follows:
Plaintiff asks that Defendants apply the procedure outlined in paragraph five above to four current EOP employees (Hope Hicks, Jared Kushner, Stephen Miller, and Daniel Scavino) to ensure that the individuals have copied any PRA records to an official EOP account before the end of their service at the White House. The White House has reminded all employees since the November election of their existing obligation to do just that—ensure that any official communications conducted on personal devices have been preserved on an official EOP account before the transition. Thus, there is no need to provide additional reminders to these

individuals, particularly where there is no reason to presume that they have not complied with their obligations to preserve records. The benefit, if any, of requiring another reminder is outweighed by the burden on the EOP and its employees, especially given the deference owed to the White House in matters of discovery, see *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 387 (2004), and the alleged peripheral, at best, role of the four EOP employees in this litigation, as to which the White House is not even a defendant.

As McCabe's team pointed out, it's not enough to say these White House employees have a general obligation under the toothless PRA; these employees should also know they have a specific obligation under a lawsuit in which discovery has already been granted.

Moreover, a general post-election reminder to preserve documents does not suffice to inform the four current EOP employees of their obligation, specific to this litigation, to preserve relevant documents.

There's no reason for DOJ to react in the way they did unless they had reason to believe the simple document retention request would cause problems. That's particularly true given that, over the course of the Mueller investigation, DOJ has learned over and over that Jared (and people like Steve Bannon) weren't archiving official records on specifically this topic. They already know details about what Jared (and Bannon) destroyed, which may explain why they responded in this fashion.

On January 8, Judge Moss sided with McCabe on this dispute, and ordered DOJ to give the four people specific warnings.

I assume, like everyone else, that Trump and his spawn have been lighting bonfires on their way out.

But in Jared's case, he will now be asked, legally, whether he has done so.

The PRA still doesn't have any teeth. But we may learn whether DOJ has been covering for Jared's past document destruction, including on matters pertaining to the Mueller investigation and Trump's vengeance for the investigation.