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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Memorandum	Memorandum for Arthur B. Culvahouse [20 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/08/2025 JLS] - To: Arthur B. Culvahouse - From: John O. McGinnis	20	08/19/1987	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

PRA (Presidential Records Act) Legal Guidance [3]

FRC ID:

9694

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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SUPERSEDED

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THE WHITE HOUSE

WASHINGTON

January 31, 1989

MEMORANDUM FOR EXECUTIVE OFFICE OF THE PRESIDENT STAFF

FROM:

C. BOYDEN GRAY *cmh*
COUNSEL TO THE PRESIDENT

SUBJECT:

Presidential Records Act Guidance

The requirements governing the ownership, maintenance and disposition of Presidential documents under the Presidential Records Act, 44 U.S.C. §§ 2201-07 (the "Act") are listed in summary on this cover page, and are explained in more detail in the material that follows.

I. SUMMARY OF PRESIDENTIAL RECORDS ACT REQUIREMENTS

- (a) Staff members must adequately document the performance of the President's constitutional, statutory and ceremonial duties.
- (b) Staff members must preserve the original of any Presidential record. Duplicate copies may be destroyed.
- (c) Staff members should preserve their Presidential records in complete and orderly files and should keep their non-Presidential records -- that is, their personal records, federal records or non-record materials -- segregated from their Presidential records, preferably through the use of separate filing systems.
- (d) Staff members departing from the White House must turn over to the Office of Records Management the originals of all Presidential records in their possession.
- (e) Staff members are prohibited from taking copies of any Presidential records with them when they depart from the White House, unless those records have clearly been made public previously (e.g., copies of press releases).
- (f) Staff members may dispose of "non-record" materials such as notes of meetings, rough drafts not circulated to others, visitor logs, duplicate copies, etc.; however, because such records contain official information, staff members are prohibited from removing them (or copies of them) from the White House.

II. TYPES OF RECORDS COVERED BY THE ACT

The Act defines "Presidential records" to include not only the official documents written and received by the President but also the official records created or received by his staff.

"Presidential records" encompass any form of memorializing information, including but not limited to written documents, models, pictures, films and audio and electronic recordings.

While the Act requires that staff members adequately document the performance of the President's constitutional, statutory and ceremonial duties, the decision whether information should be memorialized in the first instance remains with each staff member. For example, it is within the discretion of a staff member to dispose of materials that do not rise to the level of a record, such as scratch pads, unimportant notes to one's secretary, phone logs, visitor logs, notes of meetings, etc., provided this is based upon a determination that creation of a record is not required in the circumstance. However, if non-record material is not disposed of contemporaneously, you must be careful to ensure that it is kept by you exclusively for your own use and not made accessible to others on the staff; making non-record material accessible to others on the staff will convert it into "record" material.

Records relating to political activities which are undertaken in the course of carrying out the President's official or ceremonial duties are Presidential records (e.g., political briefing papers for official trips and official meetings are Presidential records). Records relating to political activities not associated with the President's official duties are not Presidential records (e.g., materials for political and campaign-related meetings and trips.)

Private papers, which staff members might keep in their offices, such as insurance claim forms or purely personal correspondence, are personal, not Presidential records. Personal records include diaries or journals that are kept by a staff member exclusively for his or her own use and reference, are not accessible to others on the staff and are not used for transacting government business. Personal documents and files should be segregated and stored separately from official records.

III. UNITS OF THE EXECUTIVE OFFICE OF THE PRESIDENT COVERED BY THE ACT

All records of the White House Office, the Office of Policy Development, the Council of Economic Advisers, the President's Intelligence Oversight Board and the President's Foreign Intelligence Advisory Board are Presidential records.

Records of the Office of Management and Budget, the Office of the United States Trade Representative, the Council on Environmental

Quality, and the Office of Administration are federal, not Presidential, records.

The records of the National Security Council staff are federal records if they were received or created in connection with the work of the statutorily-created National Security Council. Additionally, the NSC's internal administrative records are federal records. The records of the National Security Council staff are Presidential records if they were received or created for the President, the Assistant to the President for National Security, his Deputy or a member of the White House staff independently of any meeting or policy and staff actions of the NSC.

The records of the Office of Science and Technology Policy are federal records; however, those records produced or received by the Director of OSTP in his role as Science Advisor to the President are Presidential records and should be segregated as such.

IV. MAINTENANCE OF PRESIDENTIAL RECORDS

The law imposes an affirmative obligation on staff members to document adequately the performance of the President's constitutional, statutory and ceremonial duties. Staff members are urged to document the performance of their duties and preserve these records in complete and orderly files. Personal records should be kept apart from official records and clearly labeled as such. Moreover, those officials or units which maintain both Presidential records and federal records should file them separately with a clear indication of whether they are Presidential or federal.

Assistance in distinguishing between Presidential, federal and personal records can be obtained from the Office of the Counsel to the President. Assistance in establishing file systems can be obtained from the White House Office of Records Management.

In addition, staff members should, to the extent possible, ensure that any files that they have which contain particularly sensitive information are clearly labelled to reflect that fact. Under the terms of the Presidential Records Act, as well as available constitutional and common law privileges, most of the sensitive Presidential records can be protected, at least for a specified time period, from public access. While Archives personnel, in consultation with President Bush or his designees, will review all Presidential records and segregate out at least those records that are to be protected under the Presidential Records Act, to avoid inadvertent release of sensitive information it is useful for those who created them, to the extent possible, to mark those files. Possible file labels may include:

- (1) "Classified information" (in general, this label should be unnecessary as classified files should already be clearly marked).

- (2) "Information the release of which may be prejudicial to the maintenance of good relations with foreign nations" (the vast bulk of such information should be classified and therefore would fall within category Number 1 above).
- (3) "Sensitive personal information" (i.e., information the release of which may be embarrassing to the individuals mentioned or to their families).
- (4) "Sensitive information involving the confidential advice requested by or provided to the President or his advisers."
- (5) "Sensitive law enforcement materials."
- (6) "Trade secrets or sensitive commercial or financial information."
- (7) "Information subject to attorney-client or attorney work product privileges."

V. DISPOSITION AND DESTRUCTION OF PRESIDENTIAL RECORDS

Once a decision is made to memorialize and maintain information as a Presidential record it becomes the property of the United States and may be disposed of only in accordance with procedures established by the Archivist of the United States. The Act prohibits the disposal of Presidential records unless those records no longer have administrative, historical, informational, or evidential value. Moreover, before disposing of any records the President must notify the Archivist and under some circumstances appropriate Congressional committees.

The White House Office of Records Management ("ORM") will maintain records disposal schedules, which are approved by the Archivist, for certain recurring types of disposable papers, such as form letter public mail, anonymous public mail, unsuccessful and unsolicited applications for employment, and enclosures received in public mail. If you have a recurring type of disposable material in your office, you may wish to request that ORM enter it on the records disposal schedule. Before you dispose of any documents, contact ORM to determine whether the category of items involved has been approved for disposal. Such prior notice is not necessary for destruction of exact duplicates of documents which are being maintained, or for copies of officially published documents, such as printed reports, etc.

ORM can also arrange for storage of records which are to be preserved, but for which there is no longer a current need. Offices are encouraged to develop systematic records retirement schedules, reserving filing space for those records for which there is a current need.

VI. LEGAL CONTROL OF PRESIDENTIAL RECORDS

Presidential records remain in the custody and control of the President during his term of Office and are not accessible to the public under the Freedom of Information Act. In contrast, federal records are accessible to the public under the provisions of the Freedom of Information Act.

Upon completion of the Administration, the Archivist acquires custody of Presidential records. However, the President may assert control for twelve years over public access to certain categories of records. Basically, these categories are: (a) security classified items; (b) documents related to appointments to Federal office; (c) items specifically exempted from disclosure by other statutes; (d) trade secrets and commercial or financial information; (e) confidential communications requesting or submitting advice between the President and his advisers, or between such advisers; and (f) personnel or medical files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Thereafter, public access is determined by the Freedom of Information Act, subject in all cases to the President's right to invoke any Constitutional privilege against disclosure.

VII. RECORDS THAT MAY BE RETAINED BY STAFF MEMBERS UPON DEPARTURE

To insure that the President maintains the maximum controls permitted by law, staff members may not remove copies of Presidential records from their offices either now or at the end of the Administration. When a staff member leaves the White House, he or she shall deliver all files and records to ORM at the White House or, in the case of the National Security Council staff, to the Executive Secretariat of the National Security Council. Federal records shall be left with the appropriate agency. Staff members may remove only those records which are purely personal.

The foregoing is designed to provide general guidance with respect to the Presidential Records Act. Specific questions of coverage or interpretation should be addressed to the Counsel's Office. Assistance in records maintenance and storage can be obtained from the White House of Records Management.

THE WHITE HOUSE

WASHINGTON

December 1, 1988

MEMORANDUM FOR WHITE HOUSE STAFF

FROM: ARTHUR B. CULVAHOUSE, JR. 
COUNSEL TO THE PRESIDENT

SUBJECT: Presidential Records Act Obligations
of Departing White House Staff

As President Reagan's term begins to draw to a close, increasing numbers of White House staff members are requesting advice with respect to the disposition of the records they have accumulated during their tenure. While guidance on the disposition of White House records is contained in the White House Staff Manual, this appears to be an appropriate time to remind you of your obligations under the Presidential Records Act, and to provide you with a timetable for the transfer of records to the Office of Records Management.

In addition, Counsel's Office is planning on holding one or more briefings in the next month to provide further guidance on the disposition of Presidential records for interested staff members. In the interim, any questions that you have about the requirements of the Presidential Records Act should be addressed to Counsel's Office. Questions concerning the logistics of transferring your records to White House Central Files should be addressed to the Office of Records Management.

Presidential Records Act Obligations

As discussed at greater length in the White House Staff Manual, the ownership, maintenance and disposition of Presidential documents are governed by the Presidential Records Act. The requirements of that Act apply to all records of the White House Office, the Office of Policy Development, the Council of Economic Advisers, the President's Foreign Intelligence Advisory Board and the President's Intelligence Oversight Board. Those requirements also apply to certain records of the National Security Council and to records produced or received by the Director of the Office of Science and Technology Policy in his role as science adviser to the President.

The Presidential Records Act requires that staff members adequately document the performance of the President's constitutional, statutory and ceremonial duties; the decision as to whether information should be memorialized in the first instance rests with each staff member. In general, papers and similar

materials found in the White House fall into one of three categories, */ each of which are subject to different treatment:

1. Presidential Records: Presidential records are the official documents written and received not only by the President but also by his staff. These records encompass any form of memorializing information concerning the President's constitutional, statutory and ceremonial duties, including but not limited to written documents, models, pictures, films and audio and electronic recordings. Presidential records are the property of the United States and when you leave the White House, you should deliver all Presidential records to the Office of Records Management at the White House. To ensure that the President maintains the maximum controls permitted by law, staff members may not retain copies of Presidential records upon departure from the White House.
2. Personal Records: Personal records are the private papers that staff members might keep in their offices. Examples of such papers include insurance claim forms, purely personal correspondence, or personal diaries or journals. Personal documents and files, as indicated in the White House Staff Manual, should have been stored separately from official records. They are your personal property and may be removed by you upon your departure from the White House, or handled in any other manner you so desire.
3. Nonrecord Materials: These are materials that do not rise to the level of a record, meaning that the material (1) does not contain information that either must be memorialized or is not available in a later version of the same document and (2) has been kept by you exclusively for your own use and reference and not made accessible to others on the staff. Examples of nonrecord materials include preliminary drafts of memoranda that are modified before being forwarded to another individual, unimportant notes to your secretary, notes of meetings taken solely for your convenience, and certain telephone and visitor logs. While staff members are free to dispose of materials that are truly nonrecord, because such materials contain official information, you may not remove them from the White House.

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The NSC and OSTP have a fourth category of records, federal records, which are official government records not subject to the Presidential Records Act. A staff member departing from these offices is required to leave the originals of his federal records with his office. Staff members may take copies of their federal records as authorized by the Freedom of Information Act and the guidelines of their respective offices.

Preparation of Presidential Records for Delivery to ORM

Prior to transferring files to ORM, staff members should ensure that they have gathered together all Presidential records and appropriately filed them. While the vast bulk of your records should already appear in well-organized files, you should take care to review your word-processing and/or PROFS computer memory to ensure that you have made a hard copy of all "record" material appearing there which can be transferred to ORM. Users of the EOP Electronic Mail system should be aware that while many electronic mail messages may be the equivalent of telephone calls and not rise to the level of record materials, some of them may contain information concerning the President's constitutional, statutory and ceremonial duties that you are required, under the terms of the Presidential Records Act, to memorialize. Those messages that do contain that information should be converted into hard copy for transfer to ORM.

In addition, staff members should, to the extent possible, ensure that any files that they have which contain particularly sensitive information are clearly labelled to reflect that fact. Under the terms of the Presidential Records Act, as well as available constitutional and common law privileges, most of the sensitive Presidential records can be protected, at least for a specified time period, from public access. While Archives personnel, in consultation with President Reagan or his designees, will review all Presidential records and segregate out at least those records that are to be protected under the Presidential Records Act, to avoid inadvertent release of sensitive information it is useful for those who created them, to the extent possible, to mark those files. Possible file labels may include:

- (1) This file contains classified information (in general, this label should be unnecessary as classified files should already be clearly marked).
- (2) This file contains information the release of which may be prejudicial to the maintenance of good relations with foreign nations (the vast bulk of such information should be classified and therefore would fall within category Number 1 above).
- (3) This file contains sensitive personal information the release of which may be embarrassing to the individuals mentioned or to their families.
- (4) This file contains sensitive information involving the confidential advice requested by or provided to the President or his advisers.
- (5) This file contains sensitive law enforcement materials.

- (6) This file contains trade secrets or sensitive commercial or financial information.

Delivery of Presidential Records to ORM

As noted above, departing staff members are responsible for ensuring that their Presidential Records are appropriately filed and transferred to ORM. In fact, as part of the official check-out procedures, departing staff members must certify that they have transferred their Presidential records to ORM. Under the Presidential Records Act, the United States Archivist will, upon the completion of the Administration, assume custody of the official records of President Reagan and his staff and will transport them to California where they eventually will be housed in the Ronald Reagan Presidential Library. While, as a general matter, staff members should transfer their files to ORM as they depart from the White House, in order to complete in a timely manner the logistical arrangements for moving these records to California, staff members who are staying on until or through January 20, 1989 **/ should comply with the following timetables:

1. Staff members should deposit in Central Files no later than Monday, January 10, all of their Presidential records, with the exception of those records which are essential for the President to carry out his official duties.
2. Those essential records not deposited on or before January 10, along with other records generated after January 10, must be deposited with Central Files by 5:00 p.m. on January 19. (Failure to transfer these records to ORM by January 19 may result in providing members of the new Administration with sensitive information to which they would otherwise not have access.)

To further aid in efforts to prepare these records for shipping to California, each staff member should, as soon as possible, deposit those of his or her Presidential records that are not needed for ongoing business with White House Central Files. Those records can, of course, be returned to the staff member from Central Files if they later become needed.

Archives' Assessments of Records Volume

Finally, staff members should be aware that as part of the preparations for transporting President Reagan's records to California, representatives of the Archivist will, beginning next

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It is important for those members of the White House staff who may be remaining at the White House after January 20 to realize that you must nevertheless transfer all of your official records of the Reagan Administration to ORM in accordance with the timetables specified in this memorandum.

week, visit individual offices solely for the purpose of ascertaining the volume of records stored there. White House staff members should cooperate fully with the efforts of Archives personnel to make these assessments.

PRESIDENTIAL RECORDS ACT

The requirements governing the ownership, maintenance and disposition of Presidential documents under the Presidential Records Act, 44 U.S.C. sections 2201-07 (the "Act") are listed in summary and are explained in more detail in the material that follows.

Summary of Presidential Records Act Requirements

- Staff members must adequately document the performance of the President's constitutional, statutory, and ceremonial duties.
- Staff members must preserve the original of any Presidential record. Duplicate copies may be destroyed.
- Staff members should preserve Presidential records in complete and orderly files and should keep non-Presidential records that is, personal records, Federal records or non-record materials segregated, preferably through the use of separate filing systems.
- Staff members departing from the White House must turn over to the Office of Records Management the originals of all Presidential records in their possession.
- Staff members are prohibited from taking copies of any Presidential records with them when they depart from the White House, unless those records have clearly been made public previously (e.g., copies of press releases).
- Staff members in some instances may dispose of "non-record" materials such as notes of meetings, rough drafts not circulated to others, visitor logs, duplicate copies, etc.; however, because such records contain official information, staff members are prohibited from removing them (or copies of them) from the White House.

Types of Records Covered by the Act

The Act defines "Presidential records" to include not only the official documents written and received by the President but also the official records created or received by his staff. "Presidential records" encompass any form of memorializing information, including but not limited to written documents, models, pictures, films and audio and electronic recordings.

While the Act requires that staff members adequately document the performance of the President's constitutional, statutory, and ceremonial duties, the decision whether information should be memorialized in the first instance remains with each staff member. For example, it is within the discretion of a staff member to dispose of materials that do not rise to the level of a record, such as scratch pads, unimportant notes to one's secretary, phone logs, visitor logs, notes of meetings, etc., provided this is based upon a determination that creation of a record is not required in the circumstance. However, if non-record material is not disposed of contemporaneously, staff members must be careful to ensure that it is kept by them exclusively for their own use. It should not be made accessible to others on the staff; making non-record material accessible to others on the staff will convert it into "record" material.

Records relating to political activities that are undertaken in the course of carrying out the President's official or ceremonial duties are Presidential records (e.g., political briefing papers for

official trips and official meetings are Presidential records). Records relating to political activities not associated with the President's official duties are not Presidential records (e.g., materials for political and campaign-related meetings and trips).

Private papers, which staff members might keep in their offices are personal, not Presidential records. Personal records include diaries or journals that are kept by a staff member exclusively for his or her own use and reference, are not accessible to others on the staff, and are not used for transacting government business. Personal documents and files should be segregated and stored separately from official records.

Units of the Executive Office of the President Covered by the Act

All records of the White House Office, the Office of Policy Development, the Council of Economic Advisers, the President's Intelligence Oversight Board, and the President's Foreign Intelligence Advisory Board are Presidential records.

Records of the Office of Management and Budget, the Office of the United States Trade Representative, the Council on Environmental Quality, and the Office of Administration are Federal, not Presidential, records.

The records of the National Security Council staff are Federal records if they were received or created in connection with the work of the statutorily created National Security Council. Additionally the NSC's internal administrative records are Federal records. The records of the National Security Council staff are Presidential records if they were received or created for the President, the Assistant to the President for National Security, his Deputy, or a member of the White House staff independently of any meeting or policy and staff actions of the NSC.

The records of the Office of Science and Technology Policy are Federal records; however, those records produced or received by the Director of OSTP in his role as Science Advisor to the President are Presidential records and should be segregated as such.

Maintenance of Presidential Records

The law imposes an affirmative obligation on staff members to document adequately the performance of the President's constitutional, statutory, and ceremonial duties. Staff members are urged to document the performance of their duties and preserve these records in complete and orderly files. Personal records should be kept apart from official records and clearly labeled as such. Moreover, those officials or units that maintain both Presidential records and Federal records should file them separately with a clear indication of whether they are Presidential or Federal.

Assistance in distinguishing among Presidential, Federal and personal records may be obtained from the Office of the Counsel to the President. Assistance in establishing file systems may be obtained from the White House Office of Records Management.

In addition, staff members should, to the extent possible, ensure that any files that they have which contain certain types of particularly sensitive information are clearly labeled to reflect that fact. Under the terms of the Presidential Records Act, as well as available constitutional and common law privileges, most of such sensitive Presidential records will be protected, at least for a specified time period, from public access. Archives personnel, in consultation with the President or his designees, will review all Presidential records and segregate out those records that are to be protected under the Presidential Records Act. However, to avoid inadvertent release of sensitive information, it would be

useful for those who created them, to the extent possible, to mark those files. Possible file labels may include:

- "Classified information" (in general, this label should be unnecessary as classified files should already be clearly marked).
- "Information the release of which may be prejudicial to the maintenance of good relations with foreign nations" (the vast bulk of such information should be classified and, therefore, would fall within category Number 1 above).
- "Sensitive personal information" (information the release of which may be embarrassing to the individuals mentioned or to their families).
- "Sensitive information involving the confidential advice requested by or provided to the President or his advisers."
- "Sensitive law enforcement materials."
- "Trade secrets or sensitive commercial or financial information."
- "Information subject to attorney-client or attorney work product privileges."

Disposition and Destruction of Presidential Records

Once a decision is made to memorialize and maintain information as a Presidential record, it becomes the property of the United States and may be disposed of only in accordance with procedures established by the Archivist of the United States. The Act prohibits the disposal of Presidential records unless those records no longer have administrative, historical, informational, or evidential value. Moreover, before disposing of any records the President must notify the Archivist and under some circumstances appropriate congressional committees.

The White House Office of Records Management ("ORM") maintains records disposal schedules, which are approved by the Archivist, for certain recurring types of disposable papers, such as form letter public mail, anonymous public mail, unsuccessful and unsolicited applications for employment, and enclosures received in public mail. If you have a recurring type of disposable material in your office, you may wish to request that ORM enter it on the records disposal schedule. Before you dispose of any documents, contact ORM to determine whether the category of items involved has been approved for disposal. Such prior notice is not necessary for destruction of exact duplicates of documents that are being maintained, or for copies of officially published documents, such as printed reports, etc.

ORM can also arrange for storage of records that are to be preserved, but for which there is no longer a current need. Offices are encouraged to develop systematic records retirement schedules, reserving filing space for those records for which there is a current need.

Legal Control of Presidential Records

Presidential records remain in the custody and control of the President during his term of office and are not accessible to the public under the Freedom of Information Act. In contrast, Federal records are accessible to the public under the provisions of the Freedom of Information Act.

Upon completion of the Administration, the Archivist acquires custody of Presidential records. However, the President may assert control for 12 years over public access to certain categories of records. Basically, these categories are: (a) security classified items; (b) documents related to appointments to Federal office; (c) items specifically exempted from disclosure by other statutes; (d) trade secrets and commercial or financial information; (e) confidential communications requesting or submitting advice between the President and his advisers, or between such advisers; and (f) personnel or medical files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Thereafter, public access is determined by the Freedom of Information Act, subject in all cases to the President's right to invoke any constitutional privilege against disclosure.

Records that May be Retained by Staff Members Upon Departure

To insure that the President maintains the maximum controls permitted by law, staff members may not remove copies of Presidential records from their offices either now or at the end of the Administration. When a staff member leaves the White House, he or she shall deliver all files and records to ORM at the White House or, in the case of the National Security Council staff, to the Executive Secretariat of the National Security Council. Federal records shall be left with the appropriate agency. Staff members may remove only those records that are purely personal.

The foregoing is designed to provide general guidance with respect to the Presidential Records Act. Specific questions of coverage or interpretation should be addressed to the Counsel's Office. Assistance in records maintenance and storage may be obtained from the White House Office of Records Management.

THE WHITE HOUSE

WASHINGTON

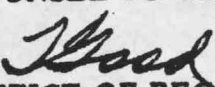
November 28, 1994

MEMORANDUM FOR WHITE HOUSE OFFICE STAFF

FROM:

JOHN PODESTA 
ASSISTANT TO THE PRESIDENT AND STAFF SECRETARY

MARVIN KRISLOV 
ASSISTANT COUNSEL TO THE PRESIDENT

TERRY GOOD 
DIRECTOR, OFFICE OF RECORDS MANAGEMENT

SUBJECT:

Disposition of Office Records

As we approach the end of the second year of the Administration, we remind you that the Office of Records Management is prepared to accept files from your offices for processing and storage. Many of you have already submitted your files -- to date, over 3,000 cubic feet of records have been sent. The more important of these files are now included in two computer data bases: one containing textual abstracts, and one containing optical images.

Proper disposition of your office files and records is required by the Presidential Records Act and is a sound management practice. We encourage you to call on the staff of Records Management for assistance in organizing your files prior to forwarding them for cataloging. Your cooperation will assist the ongoing operations of your offices, and will contribute to writing the history of the Clinton Administration.

CS

THE WHITE HOUSE
WASHINGTON

046526 SS
FE010

MAY 5, 1993

MEMORANDUM FOR ALL WHITE HOUSE AND OTHER EXECUTIVE OFFICE OF THE
PRESIDENT STAFF

FROM: THOMAS F. MCLARTY, III *Tm*
CHIEF OF STAFF

RE: PRESIDENTIAL AND FEDERAL RECORDS

Attached are two memoranda concerning Presidential and federal records -- the records we create and receive in the Executive Office of the President.

All personnel in the White House and other offices in the Executive Office of the President should review these memoranda carefully and comply with the guidance set forth therein.

Thank you for your cooperation.

Attachments

THE WHITE HOUSE

WASHINGTON

May 5, 1993

MEMORANDUM FOR ALL EXECUTIVE OFFICE OF THE PRESIDENT STAFF

FROM:

JOHN D. PODESTA *JDP*
Assistant to the President and
Staff Secretary

STEPHEN R. NEUWIRTH *SN*
Associate Counsel to the President

RE:

Presidential Records

The offices within the Executive Office of the President generate two categories of records: "Presidential Records" and Federal Records." A separate memo from David Watkins and Bruce Overton has been circulated today concerning "federal records."

This memorandum sets forth guidance on the creation, maintenance and disposition of "Presidential records" -- records "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."

It is important that all staff in the Executive Office of the President review this memorandum carefully. The failure to designate documents and other materials properly can have serious implications, including possibly subjecting those materials to public disclosure under the Freedom of Information Act during the President's term of office.

I. UNITS WITHIN THE EXECUTIVE OFFICE OF THE PRESIDENT
THAT GENERATE PRESIDENTIAL RECORDS

All records of the White House Office, the Office of Policy Development, the National Economic Council, the Council of Economic Advisors, the President's Intelligence Oversight Board

and the President's Foreign Intelligence Advisory Board are Presidential records.

As discussed below, records of the Office of the Vice President are Vice Presidential records and are treated under the Presidential Records Act in the same manner as Presidential records. The records of the Office of the Vice President are not federal records.

The records of the National Security Council staff are Presidential records if they were received or created by or for the President, the Assistant to the President for National Security Affairs, the Deputy Assistant to the President for National Security Affairs, the White House Office, or a unit or an individual within the NSC in advising or assisting the President, and are not official records of the NSC. All other NSC records are federal records.

Records produced or received by the Director of the Office of Science and Technology Policy in his role as Science Advisor to the President are Presidential records; all other OSTP records are federal records.

Records of the Office of Management and Budget, the Office of the United States Trade Representative, the Council on Environmental Quality, and the Office of Administration are federal, not Presidential, records.

II. Types of Records Covered by the Act

The Presidential Records Act defines "documentary materials" as "all books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio, audio-visual, or other electronic or mechanical recordings." 44 U.S.C. § 2201(1).

The Act defines "Presidential records," in turn, to mean:

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. Such term --

- (A) includes any documentary materials relating to the political activities of the President or members

of his staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

44 U.S.C. § 2201(2).

Under this definition, Presidential records are documentary materials that meet two tests. First, the materials must have been created or received by the President, his immediate staff, or a unit or individuals (including volunteers) in the EOP whose function it is to advise and assist the President. Second, the records must relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Presidential records may be in any physical form, including paper, film and disk. The method used to record information may be manual, mechanical, photographic, electronic, or any combination of these or other technologies.

A document created by personnel in a White House office, or an EOP office that advises and assists the President, normally is a Presidential record once it is circulated to others in the course of conducting activities which relate to or have an effect upon the carrying out of Presidential duties. Moreover, even documents that are not circulated can be Presidential records if, in the judgment of the office at issue, those documents are needed to conduct business that relates to or has an effect upon the carrying out of Presidential duties.

Materials received by personnel in the White House office, or in EOP offices that advise and assist the President, similarly become Presidential records when they are received in the course of conducting activities which relate to or have an effect upon the carrying out of Presidential duties. Materials received may be Presidential records whether they have been transmitted in person, by messenger, by mail, by electronic communication, or by any other means.

At the same time, several types of documentary materials are not subject to the Presidential Records Act. The Act expressly excludes documentary materials that are (1) official records of an agency; (2) stocks of publications and stationery; and (3) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified.

The Act also excludes "personal records," defined to include 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." Personal records may include:

- diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal, which are not prepared or utilized for, or circulated or communicated in the course of, transacting government business;
- materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President;
- papers and other materials accumulated by a staff member before joining government service and not used in the course of transacting government business;
- materials that relate to a staff member's private affairs, such as personal financial records, insurance forms, and materials relating to an individual's professional activities and outside business and political pursuits;
- personal photographs;
- materials relating exclusively to the President's own election to the office of the Presidency; and
- materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

Further examples of materials not covered by the Presidential Records Act may include items such as those listed below:

- preliminary drafts, that are not circulated to any other individual, of correspondence, reports, and studies;
- preliminary drafts, work sheets and informal notes that contain information reflected in final documents and that do not document policy development or execution;

- tickler, follow-up or suspense copies of correspondence, provided there are copies of such documents in the official files;
- newspaper clippings or news summaries, that have not been annotated, or organized or arranged for some official purpose;
- copies of printed or processed materials, such as operating and procedural manuals, directives, and notices, distributed for the information and use of office employees;
- shorthand and other notes that have been transcribed or converted to formal documents that have been verified for accuracy and completeness; and
- catalogs, trade journals, and other publications that are received from other government agencies, commercial firms, or private institutions and that are maintained for reference purposes.

It is important to remember, however, that certain documents in the categories listed above may be Presidential records -- particularly given that, in the White House, drafts, working papers and other similar materials often document policy development, significant decisions, or other matters related to the carrying out of Presidential duties, as discussed below.

III. Requirements for creation and maintenance of Presidential records

When advising or assisting the President in carrying out his duties, White House and EOP employees are responsible for complying with the Presidential Records Act and related regulations.

The law imposes an affirmative obligation on staff members to document adequately the performance of the President's constitutional, statutory and ceremonial duties. Where appropriate, staff members should document -- through notes, minutes or memoranda -- meetings, conversations and other business in connection with, or related to, the carrying out of the President's duties.

Presidential records should be maintained in organized files. For offices creating both Presidential and federal records, it is critical that staff members carefully segregate Presidential and federal records. Federal records are subject to

the Federal Records Act and may be subject to public disclosure under the Freedom of Information Act during the President's term of office. Presidential records, by contrast, are not subject to the Federal Records Act and are not subject to the provisions of the Freedom of Information Act during the President's term of office. Those offices (such as the National Security Council) that create or receive both Presidential records and federal records should file them separately with a clear indication of which records are Presidential and which are federal.

In addition, staff members should, to the extent possible, ensure that any files containing particularly sensitive records are clearly marked to reflect that fact. Designations for files containing sensitive records may include:

- (1) "classified information";¹
- (2) "information the release of which may be prejudicial to the maintenance of good relations with foreign nations";
- (3) "sensitive personal information" (i.e., information the release of which may be embarrassing to the individuals mentioned or to their families);
- (4) "sensitive law enforcement materials";
- (5) "trade secrets or sensitive commercial or financial information"; and
- (6) "information subject to attorney-client or attorney work product privileges."

Finally, personal records should be clearly labeled, kept apart from Presidential records (and federal records) and not made available to other staff in connection with any official purpose.

IV. Electronic Presidential records

Increasingly, Presidential records may be created electronically. Records may be generated on word processing or electronic mail ("e-mail") systems, or on electronic databases.

¹ Please note that nothing in this memorandum should be construed to override existing Executive Orders setting forth who may designate specific documents as classified and what terms must be used in connection with such designations.

Records generated electronically must be incorporated into an official recordkeeping system. Thus, no word processing or e-mail document that is a Presidential record should be deleted unless it has been (a) printed and placed in an appropriate file, or (b) preserved in an appropriate electronic system. Questions concerning the record status of electronically generated materials should be directed to the White House Records Management Office. That office will periodically monitor electronic systems to ensure that correct records status determinations have been made.

As is the case for all record matters, the White House Records Management Office will continue to work with the White House Counsel's Office to coordinate policy and practices with respect to electronic Presidential records.

V. Disposition and destruction of Presidential records

Presidential records are the property of the United States and may be disposed of only in accordance with procedures established by the Archivist of the United States. The Presidential Records Act prohibits the disposal of Presidential records unless those records no longer have administrative, historical, informational, or evidentiary value. Moreover, before disposing of any Presidential records, the President must notify the Archivist who, under certain clearly defined circumstances, will notify appropriate Congressional committees.

The White House Records Management Office will provide guidance concerning disposal of certain recurring types of papers, including form letter public mail, unsolicited public mail that is not reviewed by any person in the White House with decision-making authority and not answered by any member of the White House staff, anonymous public mail, and enclosures received in public mail -- most of which may be destroyed after notification to the Archivist of the United States or the Archivist's representative.

Offices that have these recurring types of disposable material should coordinate all disposal procedures through the Office of Records Management. Under no circumstances should such material be disposed of without prior approval of the White House Records Management Office. (Prior approval is not necessary for the destruction of exact duplicates of documents which are being retained, or for unmarked copies of officially published documents, such as printed reports.)

The White House Office of Records Management serves as a central file for all Presidential records. Its primary role is to manage, process, maintain and store records for the daily use

of the President and all the policy units in the White House. Concurrently, it preserves these same records to ensure a comprehensive history of the Administration. All EOP staff members are encouraged to consult with this office for guidance on the creation and maintenance of files and on procedures for appropriate and systematic filing of documents.

VI. Legal control of Presidential records

Presidential records remain in the custody and control of the President during his term of office and are not subject to disclosure under the Freedom of Information Act during that term. As noted above, federal records are, by contrast, subject to the FOIA public disclosure provisions.

Upon completion of the Administration, the Archivist acquires custody of Presidential records. Many of these records will become available to the public under the FOIA five years after the end of the President's term of office. The President, however, may assert control over public access to certain categories of information -- generally including classified materials, documents related to appointments to federal offices, items specifically exempted from disclosure by other statutes, trade secrets or commercial information, confidential communications requesting or submitting advice between the President and his advisers (or between such advisers), and information implicating personal privacy concerns -- for up to twelve years after the end of the President's term. After twelve years, public access to these categories of documents is governed by the FOIA, subject to any Constitutional privilege against disclosure.

VII. Records that may be retained by staff members upon departure from office

Staff members may not remove Presidential records, or copies of such records, from their offices at any time, except in connection with an official function. Classified Presidential records may not be removed from the office at any time without compliance with the rules applicable to such materials. Records used in an official capacity should be returned to proper files immediately after such use.

When a staff member leaves the White House or another office in the EOP, he or she must deliver all Presidential records to the White House Records Management Office (or leave records in his or her office for pick-up). Staff members are not entitled to retain copies of any Presidential records for

personal use, except copies of documents that have already been publicly released.

Federal records should be left at the appropriate agency, and disposed of in accordance with the advice set forth in the federal records guidance memorandum from David Watkins and Bruce Overton.

Purely personal, unclassified materials may be removed from the office by staff members at any time, subject to any agency procedures regulating such removal. If, during the course of service at the White House, a staff member wishes to store personal (including private political) materials at the White House Office of Records Management, the staff member must clearly designate those materials as "personal."

VIII. Records in the Office of the Vice President

The Presidential Records Act expressly provides that records of the Office of the Vice President are Vice-Presidential records and are to be treated under the Presidential Records Act in the same manner as Presidential records. Thus, materials created or received in the Office of the Vice President should be treated in accordance with the guidance set forth above. The Office of the Vice President has its own records management staff, and personnel in the Office of the Vice President should consult with that staff for additional guidance regarding the filing and disposition of Vice President's Office records.

The Presidential Records Act further provides that "[t]he authority of the Archivist with respect to Vice-Presidential records shall be the same as the authority of the Archivist with respect to Presidential records, except that the Archivist may, when the Archivist determines that it is in the public interest, enter into an agreement for the deposit of Vice-Presidential records in a non-Federal archival depository."

IX. Training

The White House Office of Records Management and other appropriate personnel will be providing records management training in the near future.

* * *

The foregoing is designed to provide general guidance with respect to the Presidential Records Act. Specific questions of coverage or interpretation should be addressed to the White House Counsel's office. Assistance in records maintenance and

disposition can be obtained from the White House Office of Records Management (or, in the case of the Office of the Vice President, from the Vice President's records management staff).

THE WHITE HOUSE

WASHINGTON

May 5, 1993

MEMORANDUM FOR ALL EXECUTIVE OFFICE OF THE
PRESIDENT STAFF

FROM:

DAVID WATKINS *DW*
Assistant to the President for
Management and Administration

BRUCE OVERTON *BO*
General Counsel,
Office of Administration

RE:

Federal Records

INTRODUCTION

The offices within the Executive Office of the President generate two categories of records: "Presidential Records" and "Federal Records."

Records are "Presidential" if they are "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." Such Presidential records are subject to the provisions of the Presidential Records Act, 44 U.S.C. § 2201. Presidential records remain in the custody and control of the President during his term of office and are not accessible to the public until five years after the end of the Administration, at the earliest. The treatment of Presidential records will be addressed in a separate memorandum issued today by the White House Office.

It is the purpose of this memorandum to discuss the identification, maintenance and disposition of "federal" records. Materials are "federal records" if (1) the materials have been created or received by agency personnel in connection with their official duties in a federal agency, and (2) the materials are appropriate for preservation as evidence of the agency's activities or because they contain information of value. Federal records are subject to the provisions of the Federal Records Act, 44 U.S.C. Chapters 29, 31 and 33. Unlike Presidential records, federal records are accessible to the public during the

Administration's term, unless exempt from disclosure under the provisions of the Freedom of Information Act.¹

The Federal Records Act imposes certain legal obligations with respect to the creation and receipt, custody and maintenance, and disposition of federal records. The responsibilities apply regardless of whether the records are generated in paper form or by automated systems.

It is critical that staff members in offices, such as the National Security Council, that create or receive both federal and Presidential records, file those records separately in clearly designated files. Once a document is filed as a federal record, it becomes subject to the Federal Records Act and may be subject to public disclosure under the Freedom of Information Act. Presidential records, by contrast, are not subject to the Federal Records Act and are not subject to the provisions of the Freedom of Information Act during the President's term of office. Personal records (defined and discussed below) also should be segregated, and filed separately, from official records.

¹ All records of the White House Office, the Office of Policy Development, the National Economic Council, the Council of Economic Advisers, the President's Intelligence Oversight Board and the President's Foreign Intelligence Advisory Board are Presidential records.

The records of the Office of the Vice President are treated in the same manner as Presidential records under the Presidential Records Act. The records of the Office of the Vice President are not federal records.

Records of the National Security Council staff are Presidential Records if they were received or created by or for the President, the Assistant to the President for National Security Affairs, the Deputy Assistant to the President for National Security Affairs, the White House office, or a unit or an individual within the NSC in advising or assisting the President, and not official records of the NSC.

Records produced or received by the Director of the Office of Science and Technology Policy in his role as Science Advisor to the President are Presidential records and should be segregated as such. Other records of the OSTP are federal records.

Records of the Office of Management and Budget, the Office of the United States Trade Representative, the Council on Environmental Quality, and the Office of Administration are federal, not Presidential records.

The guidance that follows will assist EOP staff in complying with the Federal Records Act, which is designed to ensure that documentation of official activities is adequately created and preserved. See 44 U.S.C. § 3101. As explained below, not every document that you create or receive will be subject to the Federal Records Act, and it is therefore important to review this guidance to understand when Federal Records Act obligations do apply. In preparing this guidance, we have consulted with officials of the National Archives and Records Administration.

DEFINITION OF FEDERAL RECORDS

The Federal Records Act defines federal records as:

[A]ll books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

-- 44 U.S.C. § 3301.

Under this definition, federal records are documentary materials that meet two tests. First, the materials must have been created or received by agency personnel in connection with their official duties in a federal agency. Second, the materials must be appropriate for preservation as evidence of the agency's activities or because they contain information of value. Federal records may be in any physical form, including paper, film and disk. The method used to record information may be manual, mechanical, photographic, electronic, or any combination of these or other technologies.

A document created in any agency normally becomes a federal record once it is circulated to others in the course of conducting agency business, or once it is placed in files accessible to others. Moreover, even documents that are not circulated can become federal records if, in the judgment of the agency, those documents are needed to conduct agency business -- and whether or not those documents are accommodated by current filing systems employed by the agency.

Materials received by agency personnel are federal records when they are received in the course of official business. Materials received can become federal records whether they have been transmitted in person, by messenger, by mail, by electronic communication, or by any other means.

At the same time, certain types of documentary materials are not subject to the Federal Records Act. The Act specifically excludes (1) library and museum materials created, or acquired and preserved, solely for reference or exhibit purposes; (2) extra copies of documents kept only for convenience of reference; and (3) stocks of publications and processed documents. These and other types of transitory or duplicate records are considered "nonrecord" because they are not "appropriate for preservation" as defined in the Act. Such materials are not needed to provide full and accurate documentation of an agency's policies, decisions, procedures, and program activities. These materials need not be maintained in official files, and, unlike federal records, may be destroyed when no longer needed and without prior approval of the National Archives and Records Administration.

Other examples of "nonrecord" materials not covered by the Federal Records Act may include:

- Preliminary drafts, that are not circulated to any other individual, of correspondence, reports, and studies.
- Preliminary drafts, work sheets and informal written notes that contain information reflected in final documents and that do not document policy development or execution.
- Tickler, follow-up or suspense copies of correspondence, provided there are copies of documents in the official files.
- Newspaper clippings or news summaries, particularly if they are not annotated.
- Copies of printed or processed agency materials, such as operating and procedural manuals, directives, and notices, distributed for the information or use of agency employees.
- Shorthand and other notes that have been transcribed or converted to formal documents that have been verified for accuracy and completeness.
- Catalogs, trade journals, and other publications that are received from other government agencies,

commercial firms, or private institutions and that are maintained for reference purposes.

In addition, certain "personal papers" fall outside the scope of the Federal Records Act. Personal papers are documentary materials that are not used in the transaction of agency business. Examples include:

- Papers and other materials accumulated by a staff member before joining government service.
- Materials that relate to a staff member's private affairs, such as personal financial records, insurance forms, and materials relating to an individual's professional activities and outside business and political pursuits.
- Personal photographs.
- Materials that may refer to official duties but are not directly used to carry out those duties. These include diaries, personal calendars, journals, and notes intended for an individual's personal use (memory aids and personal observations on work-related matters).²

It is important to remember, however, that certain informal documents may be federal records. In the Executive Office of the President, to a greater extent than in many other government offices, drafts, notes, background materials or working papers can be considered federal records because they document policy development, significant decisions, major activities, or other matters basic to an understanding of the office and its role in government operations. Such materials should be treated as federal records and maintained in official files if they were circulated for review or clearance, and if they have been modified substantively.

When it is difficult to determine whether documents or other records should be treated as federal records, you should tentatively treat them as federal records and contact the appropriate EOP agency records management office for a final determination. Legal questions will be referred by the records management office to appropriate counsel.

² For further information on personal papers, consult Personal Papers of Executive Branch Officials: A Management Guide, published by the National Archives and Records Administration. Copies are available in the Office of Administration, Records Management Office.

RECORDS CREATION AND MAINTENANCE REQUIREMENTS

When acting in their capacity as employees of a federal agency, such agency employees are responsible for complying with the Federal Records Act and related regulations.

The law requires that adequate and proper records be created and preserved to document the organization, functions, policies, decisions, procedures and essential transactions of the agency. The law also specifically requires that records be kept for appropriate periods if they can be used to protect the legal and financial rights of the Government or individuals directly affected by the agency's activities.

In order to ensure that agency records contain an adequate and proper account of policy development, implementation and decision-making, each employee must document those discussions, meetings and telephone conversations that are necessary to understand these functions. Where appropriate, in formal settings, minutes or notes should be taken for the purpose of including them in official files.

All staff members are responsible for complying with procedures that result in adequate and proper records creation and maintenance. All materials meeting federal records criteria must be incorporated into appropriate agency files or records systems. EOP staff members should consult with the appropriate EOP agency records management office to address any questions concerning the creation and maintenance of federal records.

ELECTRONIC FEDERAL RECORDS

Increasingly, federal records may be created electronically. Records may be generated on word processing, or electronic mail ("e-mail"), systems or other computer applications.

Records generated electronically must be incorporated into an official recordkeeping system. Thus, no word processing or e-mail document that is a federal record should be deleted unless it has been (a) printed and placed in an appropriate file, or (b) preserved in an appropriate electronic system.

On January 6 and 11, 1993, in the case of Armstrong v. Executive Office of the President, United States District Judge Charles R. Richey directed the National Archives and Records Administration to work with components of the EOP to develop further recordkeeping guidance both for e-mail communications in the EOP and for disposition of EOP electronic federal records generally. Pursuant to these orders, and until further

instructions, the following special rules should be observed by components of the EOP that generate federal records:

1. Material may not be deleted from any e-mail file unless (a) the material has been retained in full on a back-up tape or other comparable medium, and (b) the retained version includes both full text and all available transmittal information; and
2. EOP staff members with records management responsibility must monitor the implementation of guidance on federal records (including the status of records) to ensure consistent application of the court's order.

Questions concerning the status of electronic records, or the application of these rules to particular computer systems, should be directed to the appropriate EOP agency records management office. Those offices will periodically monitor electronic records systems to ensure that correct records status determinations have been made.

DESTRUCTION OR REMOVAL OF FEDERAL RECORDS

Federal records, as defined by the Federal Records Act, may not be destroyed, or permanently removed from appropriate official files, without the prior approval of the National Archives and Records Administration.

Federal records should be maintained in organized files and may not be damaged or altered by any staff member. Nor may federal records be temporarily removed from official files except for official purposes, and only if returned to the official files upon completion of that official function.

Policies and procedures governing the disposition of federal records are prescribed by the National Archives and Records Administration and are incorporated into the EOP records management program. Further information concerning these policies and procedures should be obtained from the appropriate EOP records management office.

REMOVAL OF NONRECORD AND PERSONAL MATERIALS

Purely personal, unclassified materials may be removed from the office by staff members at any time, subject to any agency procedures regulating such removal.

Unclassified nonrecord materials, with the exception of copies of records, may be removed with the prior approval of an agency official with records management responsibility.

Except where expressly authorized by appropriate agency officials, copies of federal records, regardless of the reason for which they have been duplicated, may not be taken by staff members for any purpose other than an official purpose related to the staff members' official duties and responsibilities.

No classified materials may be removed from the office at any time, without compliance with the rules applicable to such materials.

TRAINING

EOP agency records management offices and other appropriate personnel will be providing records management training for all employees who generate or receive federal records.

THE WHITE HOUSE
WASHINGTON

May 9, 1997

MEMORANDUM FOR EXECUTIVE OFFICE OF THE PRESIDENT STAFF

FROM: Charles F.C. Ruff
Counsel to the President

SUBJECT: Presidential Records

The Presidential Records Act, 44 U.S.C. §§ 2201-07, imposes certain requirements regarding Presidential documents. This Guidance will first summarize the White House policies regarding the statute, and then discuss them in more detail.

Summary of White House Policies Regarding the Presidential Records Act

- The purpose of the Presidential Records Act is to document the performance of the President's constitutional, statutory and ceremonial duties.
- To accomplish this purpose, the Act requires the preservation of all original Presidential records. You do not have to keep identical copies.
- You need not keep "nonrecord" materials, such as notes for your own use, rough drafts not circulated to others, or call and visitor logs.
- You should file Presidential Records -- those pertaining to the performance of the President's duties -- separately from your personal records.
- When you leave the White House, send the Office of Records Management all original Presidential Records you have.
- Unless they have been publicly released, you may not take copies of Presidential Records when you leave, without permission from Counsel's Office.
- If you have any questions whether particular documents are Presidential Records, contact Robert Weiner in Counsel's Office (6-6297).
- This Guidance addresses your obligations under the Presidential Records Act. In addition, the White House has received subpoenas and document requests. You must preserve all materials that are covered by such subpoenas or requests.

GUIDELINES FOR THE PRESIDENTIAL RECORDS ACT

I. What are Presidential Records?

Presidential Records must meet two tests:

- 1 They must be **created** or **received** by the President, his immediate staff, or others in the EOP whose job is to advise and assist the President, and
2. They must relate to or directly affect the performance of the President's constitutional, statutory, ceremonial or other official duties.

II. What units in the EOP generate Presidential Records?

Records of the following units which meet the two tests above are Presidential Records:

White House Office	Council of Economic Advisors
National Security Council	President's Intelligence Oversight Board
Office of Policy Development	President's Foreign Intelligence Board
National Economic Council	

Records of the Office of the Vice President are treated in the same manner as Presidential Records. Records of other units in the Executive Office of the President are not Presidential Records, but may be subject to the Federal Records Act if they were created or received by employees of the agency and reflect the agency's activities or otherwise contain information of value.

III. What types or forms of records are included as Presidential Records?

A Presidential Record may be in any physical form, including: "books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio, audio-visual, or other electronic or mechanical recordings." E-mails and documents existing only on computer are also included.

IV. What materials are not Presidential Records?

The following are not Presidential Records:

1. Personal records.
2. Nonrecord materials.
3. Official records of an agency.
4. Stocks of publications and stationery.
5. Extra copies of documents produced only for convenience or reference, when the copies are clearly identified as such.

V. What are "personal records?"

Personal records have a "purely private or nonpublic character" and do not relate to or affect the President's official duties. Personal records may include:

1. Diaries, journals, and the like if they are not prepared, used or circulated for government business.
2. Materials gathered by a staff member before joining government service, if not used for government business.
3. Materials relating solely to the staff member's private affairs, such as financial records, insurance forms, and outside professional associations.
4. Personal photographs.
5. Materials relating to the election of others to federal, state, or local office, which have no relation or direct effect on the performance of the President's official duties.

VI. Are political documents Presidential Records?

Under the statute, materials regarding the political activities of the President and his staff which do not relate to or directly affect the performance of the President's official duties are not Presidential Records. Neither are materials relating exclusively to the President's own election. Because it sometimes can be difficult to judge which documents fall into these categories, you should consult the Office of White House Counsel regarding the records you may remove.

VII. What are "nonrecord materials?"

The following types of materials may not be Presidential Records:

1. Preliminary drafts not circulated to persons besides the authors.
2. Preliminary drafts, work sheets, and notes if they are reflected in the final product and they do not document the development or implementation of policy.
3. Shorthand and other notes once they are transcribed or converted to formal documents which are verified for accuracy and completeness.
4. Scratch pads, visitor and call logs, and similar nonsubstantive documents.

VIII. What are your obligations regarding the creation of Presidential Records?

The Presidential Records Act requires that staff members adequately document the performance of the President's constitutional, statutory, and ceremonial duties. The decision whether to memorialize information rests in the first instance with each staff member.

IX. How should you maintain Presidential Records?

Maintain Presidential Records in organized files. Label and keep personal records separate from Presidential Records, and do not make personal records available to other staff for official business.

If your office has both Presidential and Federal Records, keep them separate. You may have to disclose Federal Records under the Freedom of Information Act. Presidential Records are not subject to such disclosure.

X. Can you destroy Presidential Records?

No. Presidential Records are the property of the United States, and may be disposed of only in accordance with procedures established by the Archivist.

One narrow exception: If your office receives certain recurring types of papers, including form letter public mail, unsolicited public mail not reviewed or answered by anyone in the White House, anonymous public mail, or enclosures in public mail, the White House Records Management Office will provide guidance regarding when you may dispose of those materials. Consult that Office before disposing of any such records.

XI. What happens to Presidential Records?

During his term, the President retains custody and control of Presidential Records.

At the end of the Administration, Presidential Records go to the Archives. Some will become subject to disclosure five years later. The President can restrict public access to certain documents, such as classified materials, documents related to appointments to federal office, or trade secrets, for up to 12 years. The materials then become publicly available as limited by any constitutional or other privilege.

XII. What can you take with you when you leave the EOP?

You may not take Presidential Records with you at the end of your employment. You also may not take copies of Presidential Records unless the records have been publicly released, or you have received permission from Counsel's Office. You may not remove classified documents from your office at any time without complying with the rules applicable to those materials. You may take political documents only with the approval of Counsel when you leave the EOP. You may also take personal records with you.

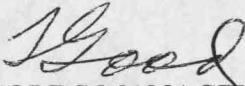
When a staff member leaves the White House or the EOP, he or she must deliver all Presidential Records to the White House Records Management Office (or leave the records in his or her office). NSC staff should provide their records to the NSC Records Management Office.

XIII. Who should you ask about the Presidential Records Act?

If you have questions regarding the coverage or interpretation of the Act, call Robert Weiner in the Office of White House Counsel (6-6297). Direct your questions about records maintenance and disposition of files to the White House Office of Records Management (or, for the Office of the Vice President, to the Vice President's records management staff, and for the NSC, the NSC Records Management Office).

January 26, 2001

MEMORANDUM FOR: MICHELLE SALINAS

FROM: TERRY GOOD 
OFFICE OF RECORDS MANAGEMENT

RE: DRAFT OF "FILES" SECTION FOR
WHITE HOUSE STAFF MANUAL

I have taken the liberty to revise this section, having found that the previous section left many staff confused. What follows will clarify and answer some of the most frequent questions that we received.

The Presidential Records Act, 44 U.S.C. §§ 2201-07, imposes certain requirements on the President and his staff regarding Presidential documents. The purpose of the Act is to ensure that documentation is created and preserved of the President's constitutional, statutory, and ceremonial actions. The Act applies to both the President and his staff who are his delegates. Thus staff must create and preserve documentation of their actions in carrying out the President's responsibilities. Some documents are considered "nonrecord," including identical copies, stocks of publications, notes for your own use, rough drafts not circulated to others, and logs of visitors and telephone calls. Any records relating to you personally, having nothing to do with your official duties, must be maintained separately from the official records.

At the end of your White House service, the official records in your custody must be left with either your successor or forwarded to the Office of Records Management. Unless they have been publicly released, you may not take copies of Presidential records when you leave, without permission of the Counsel's Office. If you have any questions about whether particular documents are Presidential records, contact the Counsel to the President (Room 128, EEOB, x67900).

In addition to the provisions of the Presidential Records Act, the White House may receive subpoenas and other requests for documents. You must preserve all materials that are covered by such subpoenas or requests.

FILES (also see *Tab C-Records Management, Office of*)

The Presidential Records Act, 44 U.S.C. §§ 2201-07, imposes certain requirements regarding Presidential documents. The purpose of the Presidential Records Act is to document the performance of the President's constitutional, statutory and ceremonial duties. To accomplish this purpose, the Act requires the preservation of all original Presidential records. You do not have to keep identical copies. You need not keep "nonrecord" materials, such as notes for your own use, rough drafts not circulated to others, or call and visitor logs. In addition, official records of an agency and stocks of publications and stationery are not considered Presidential Records. You should file Presidential Records—those pertaining to the performance of the President's duties—separately from your personal records.

When you leave the White House, send the Office of Records Management all original Presidential Records you have. Unless they have been publicly released, you may not take copies of Presidential Records when you leave, without permission from Counsel's Office. If you have any questions about whether particular documents are Presidential Records, contact the Counsel to the President (Room 128, EEOB, x67900).

In addition to the provisions of the Presidential Records Act, the White House may receive subpoenas and other requests for documents. You must preserve all materials that are covered by such subpoenas or requests.

How NARA Can Help You with Records Management

What Is Records Management?

In government we all create records to do our business. In the Executive Office of the President (EOP), records that are created are either covered by the Presidential Records Act (PRA) or the Federal Records Act (FRA) which set legal requirements for recordkeeping and define the authorities and responsibilities of the President and his appointees.

The two acts differ to some extent in what they require (see attached), but records management is the common discipline that provides assistance in determining the most effective ways of meeting those differing requirements. The foundation of records management is that records go through a "life cycle" that applies to all records in all media.

- Creation phase - whereby an organization creates the records it needs to do its business
- Active phase - where the records are used to conduct the organization's business
- Disposition phase - where decisions are made about the length of time records must be retained.

What Are the Advantages of Good Records Management?

Good records management helps you in four basic ways:

1. It helps you conduct your business more effectively and efficiently throughout the life cycle by:
 - Specifying what documentation is necessary to conduct business to minimize the number of records that must be created and to maximize their value to meet business needs.
 - Identifying the most cost effective ways to organize, index, file, retrieve, and store records to achieve the maximum benefit for the money invested.
 - Determining the proper length of time to retain records for business purposes and identifying those records that warrant preservation in the National Archives or Presidential Library suitable for destruction and those and regularly carrying out those disposition instructions.
 - Developing requirements for computer systems to manage your records to meet your business needs.
2. It helps you comply with applicable governmental records management requirements.
3. It helps you respond completely and efficiently to requests for access to records
4. It ensures a good historical record that will allow those in the future to understand the accomplishments of the administration.

How Can NARA Assist You in Improving Records Management?

NARA recognizes that the EOP and its components have active records management programs, and NARA staff members have worked with these programs for many years. With the change of administrations, NARA would like to help the EOP through targeted assistance projects that support records management in the Bush administration. NARA staff can assist in all phases of records management. Here are examples of where NARA staff can help:

- Understanding and interpreting relevant records management statutes and applicable regulations and suggesting practices for implementing them effectively and efficiently.
- Developing criteria for identifying personal, presidential, and federal records.
- Selecting records management software and improving the records management capabilities of new and planned systems.
- Developing EOP specific guidance for FRA and PRA organizations
- Training staff in records management responsibilities
- Storing PRA (Presidential and Vice Presidential) and FRA records, personal materials, and gifts.
- Determining the appropriate disposition of records in all media within the context of applicable statutory requirements
- Planning for the transfer of records to NARA.

Implementing the Presidential Records Act and Federal Records Act Requirements.

As noted above, in the Executive Office of the President (EOP), records that are created are either covered by the Presidential Records Act (PRA) or the Federal Records Act (FRA). The Presidential Records Act applies to records created by components of the EOP that solely advise and assist the President.

The components of the EOP that create Presidential records are:

- The White House Office
- The Office of the Vice President
- Office of Policy Development
- Council of Economic Advisors
- The President's Intelligence Oversight Board
- The National Security Council
- The President's Foreign Intelligence Advisory Board
- The National Economic Council

The EOP components that generate Federal records that are governed by the Federal Records Act are:

- Office of Management and Budget
- Office of the United States Trade Representative
- The Council on Environmental Quality
- The Office of Administration
- The Office of Science and Technology Policy
- The Office of National Drug Control Policy

Both acts require the head of the organization (President or agency head) to take the necessary steps to ensure that adequate documentation of activities is created and maintained. Records management provides common tools for doing that in an effective and efficient manner. However, there are differences between the acts that will affect how records management is implemented.

- The FRA is supported by a series of Federal regulations that provide more specific direction about how agencies should implement a records management program. There are no similar regulations for the PRA.
- The FRA assumes that most Federal records will eventually be destroyed and only a small percentage will eventually come to NARA. The PRA assumes that most Presidential records will be preserved.
- The FRA and PRA set out different procedures for records disposition. Under the FRA agency heads submit records schedules to request the Archivist's approval for the disposition of records. In the case of Presidential records, the PRA states that the incumbent President must obtain the views in writing of the Archivist before disposing of any Presidential records, 44 USC §2203 (c) –(f).
- Access restrictions are different for PRA and FRA records. FRA records will be subject to the Freedom of Information Act (FOIA) during the Bush administration. PRA records are not subject to the FOIA until five years after the end of the administration.

Contact Point: Michael L. Miller, NARA
michael.miller@arch2.nara.gov

301-713-7110x229 (voice)
301-713-6852 (fax)

NARA Records Management Issues for Discussion with Bush Transition Team

Draft of 01/16/01

This document lays out a series of recommendations for improving records management and related information technology (IT) infrastructure based on the experience of National Archives and Records Administration (NARA) staff. These recommendations are meant to start a dialogue with the incoming administration on records management generally and the assistance NARA can provide.

Issues Requiring Immediate Attention

- Give guidance and training to all EOP staff on PRA, FRA, and personal records. Provide clear guidance on personal records to the appropriate staff handling these materials for the President, Vice President, and First Lady.
- Issue a memorandum on records management *responsibilities* to all staff.
- From the beginning of the administration clearly delineate and separate out what are records under the Presidential Records Act (PRA), what are personal papers under the PRA, and what are federal records under the Federal Records Act (FRA). This should be done for paper and electronic records.
- Establish by the President the ownership of personal (including political) materials generated by White House Staff and the appropriate disposition of such materials. This includes identifying for White House Staff what personal material belongs to the employee and what belongs to the President.

Priority Issues to Address Shortly After the Transition

- Develop a joint list of records management priorities reflecting EOP and NARA needs.
- Establish an overall management perspective for records at the Administration and Management level. Evaluate the potential for establishing a Chief Information Officer (CIO) for the EOP and having a records officer for the EOP reporting directly to the CIO.
- To the extent possible, establish common practices for managing PRA records (including records of the Vice President and First Lady), personal papers under the PRA, and FRA records in all media.
- Develop a system to replace ARMS II that meets both business and records management needs, including the need to maintain PRA, FRA, and personal records separately and the ability to distinguish between non-record material, and short-term and long-term FRA records.
- Determine whether these requirements (and other business requirements) are best met by a system developed in-house, a COTS/GOTS product, or a records management application.
- Incorporate records management requirements in all EOP systems as they are redesigned or upgraded, e.g., the Presidential Diary System.
- Establish in accordance with the PRA a regular process for disposal of Presidential records that are not needed for EOP or statutory or archival reasons. Examples include bulk mail (and bulk e-mail) and backup tapes.
- Work with the White House Gift Unit on implementing guidance for the *disposal or other disposition* of Presidential gifts that are not appropriate for retention in a Presidential Library.
- Establish a routine process for recycling backup tapes once authorization is obtained from the Archivist as required by statute. Develop a process to maintain backups of PRA and FRA records separately.

Specific Issues That Need to Be Addressed as Part of the Review

- The management of Vice President's Records, both paper and electronic, needs to be addressed, including the issue of the records of the Vice President in the Senate. The two systems are not integrated, although V.P. email could be routed into ARMS.
- The filing procedures for the central file for Presidential records should be reviewed. Sometimes, current filing practices result in the interfiling of personal and Presidential records.
- Review the management of the electronic directory of EOP employees. Could it be modified to serve as a historical record of employees as well as a record of those currently employed?
- Provide guidance to staff on the appropriate way to file electronic records to efficiently use the available drives and effectively manage the electronic records on them. Determine how best to manage the electronic versions of textual documents.
- Provide assistance in the management of First Lady's files, both electronic and paper.
- Designate clear records status at the point of establishment for the records of Task Forces and Commission and provide records management guidance to the staff of the Task Force or Commission including information on closing out the Task Force/Commission and the appropriate disposition of the records.
- Provide regular records management briefings for new employees, including interns. Where necessary, training should include or be supplemented with training on records classification, declassification, and redaction.
- Develop clear recordkeeping requirements for all types of transactions so that staff know what records must be created and maintained to document their work.

THE WHITE HOUSE

WASHINGTON

2/8/01

John:

The attached is a modified copy
of the Counsel's draft.

I have taken the liberty of
providing ORM's comments in
italicized inserts.

Jerry

DRAFT 2

February __, 2001

**MEMORANDUM FOR WHITE HOUSE OFFICE
OFFICE OF POLICY DEVELOPMENT
COUNCIL OF ECONOMIC ADVISORS
PRESIDENT'S INTELLIGENCE
OVERSIGHT BOARD
NATIONAL SECURITY COUNCIL
PRESIDENT'S FOREIGN INTELLIGENCE
ADVISORY BOARD
NATIONAL ECONOMIC COUNCIL**

FROM: ALBERTO R. GONZALES

SUBJECT: PRESIDENTIAL RECORDS ACT

The Presidential Records Act applies to all officers and employees in the above units within the Executive Office of the President. This memorandum, issued at the direction of President Bush, summarizes and explains your obligations under the Act.

The President has the statutory authority and responsibility under the Presidential Records Act (Section 2201-2207 of Title 44) to establish records management controls "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." The Act provides that "[d]ocumentary materials produced or received by the President, his staff, or units or individuals in the Executive Office of the President the function of which is to advise and assist the President, shall, *to the extent practicable*, be categorized as Presidential records or personal records upon their creation and be filed separately." The Act thus grants the President substantial discretion to determine the most "practicable" means for ensuring that records "adequate" to document the activities, deliberations, decisions, and policies reflecting the performance of his duties are created and preserved. In light of the President's substantial discretion, the President's records policies, as applied to those units in the EOP covered by the Presidential Records Act, are not subject to judicial review. *See Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993).

This memorandum provides guidance for you to determine (i) which of your records must be preserved and (ii) which records can be handled or discarded as you see fit. In preparing this memorandum, Counsel has carefully examined the Presidential Records Act, its statutory history, relevant court precedents, and regulations issued by the Archivist interpreting the analogous definition of records in the Federal Records Act, *see* 36 C.F.R. 1222.34, 1222.36. In addition, Counsel has closely studied the policies and practices of past Administrations, which are reflected in numerous memoranda, and has consulted with officials from the National Archives.

The executive summary immediately below provides the guidance you will need on a day-to-day basis in order to comply with the Act. The remainder of the memorandum explains in greater detail the Counsel's interpretation of the Presidential Records Act and how that Act applies to particular categories of documents.

EXECUTIVE SUMMARY:

What records must be preserved and when, if ever, will they become public?

As a general matter, you must ensure preservation of any document that (i) is related to your official White House business *and* (ii) is received from or circulated to another person, regardless whether that other person is inside or outside the White House. That includes letters, memos, e-mails, notes, speeches, and other similar documents that relate to your official business *and* are received from or circulated to another person.

You must ensure preservation of all official documents that you receive from anyone outside the White House -- including Congress, departments and agencies of the Executive Branch, state governments, and private individuals and groups. In addition, you must ensure preservation of a copy of all official documents that you send to anyone outside the White House -- including Congress, departments and agencies of the Executive Branch, state governments, and private individuals and groups.

You are *not* required to preserve:

copies of documents if you are aware that someone else is maintaining a copy

personal documents

election- or campaign-related documents

notes or rough drafts so long as the notes or drafts are *not* circulated or made available to others (A document is not considered circulated to another person merely because an assistant helps in the physical preparation of a document, such as by typing drafts.)

publications such as congressional reports, books, newspapers, magazines, or news summaries and news clips

rolodexes, telephone logs, message logs, message slips, calendars, and visitor logs (unless, for example, a message slip communicates a substantive official message)

If you have any doubt whether particular documents or records must be preserved, you should preserve the documents and contact the Counsel's office.

Notwithstanding the minimum requirements of the Presidential Records Act, it bears mention that a fundamental purpose of the National Archives system and the Presidential Records Act is to preserve for history significant documents that accurately reflect the workings of a President and his White House advisors. Therefore, if you create or receive documents that are not

covered by the requirements of the Presidential Records Act, but that you nonetheless conclude would assist future historians in understanding the workings of this Administration (such as careful and accurate notes of particular meetings), you may donate them to the National Archives. You can simply give such documents, along with your Presidential records, to the Office of Records Management when you conclude your White House service.

We have several concerns/questions re this paragraph:

- 1) *While the staff person can donate them to NARA, it is incorrect to state that they can "simply give such documents to the Office of Records Management. . .," ORM will not accept personal records.*
 - 2) *One might read this paragraph and draw the conclusion that ORM is only an archival operation where inactive records are stored. We do provide daily support to many offices in a variety of ways. This is more fully addressed later in our comments on the Section entitled "Office of Records Management."*
-

It also is important for you to understand *when* and *how* the public can gain access to Presidential records. To begin with, the White House Office and the other offices listed at the top of this memorandum, are **not** subject to the Freedom of Information Act while the President is in office. At the end of the Administration, the National Archives will take control of Presidential records (and will operate in conjunction with the designated Presidential library). The Archives must make most documents available for public release beginning 12 years after the end of the President's term or second term in the event of a two-term Presidency. The 12-year period has exceptions: The Archives must allow release of certain non-sensitive documents after 5 years, and the Archives must protect certain highly sensitive documents, such as national security documents and privacy information, forever.

We would offer a rephrasing of the last sentence above:

Following the conclusion of the Administration, the archivists at the Presidential Library where these records will be preserved, will begin a review process in anticipation of opening them to the public. Some documents will be available in their entirety 5 years after the Administration's end. Those containing national security or other sensitive information will be closed for longer time periods, until the information's classified or sensitive nature passes. Some privacy information may never be opened.

Finally, it is critical for you to read and understand Counsel's separate memorandum regarding the process that the White House will employ in the event it is ever necessary to respond to a subpoena or document request from Congress, a grand jury, or another investigative body. As is explained in that memorandum, your obligations in response to a subpoena or document request often will be more onerous than the more limited requirements of the Presidential Records Act outlined here. In particular, a subpoena or document request usually will require preservation of all documents (including notes, drafts, and potentially even your personal documents) that refer or relate to a particular

subject matter and that you possess at the time of the document request or thereafter create or receive.

You *always* must comply with all of the terms of any subpoena or document request even in those circumstances where those requirements are more stringent than your obligations under the Presidential Records Act.

II. DISCUSSION

1. General Definition of Presidential Records

The Presidential Records Act defines "Presidential records" to include "documentary materials, or any reasonably segregable portion thereof, created or received by the President" – or created or received by members of the staff of the covered EOP components – "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." The definition expressly encompasses not only written documents, but also models, pictures, films, and audio recordings.

We would offer a slight rephrasing of the last sentence above:

"The definition expressly encompasses not only written documents, but other materials such as, but not limited to, models, pictures, films, and audio recordings."

Congress intended that this definition be interpreted in accord with the definition of "federal records" in the analogous Federal Records Act, a separate records statute that was enacted before the Presidential Records Act and that applies to most federal departments and agencies in the Executive Branch. As the House Committee report accompanying the Presidential Records Act explained, "[t]o the extent that certain categories of documentary materials are not considered to be records under [the Federal Records Act], the same categories of materials generated or received by the President and his aides would generally also fall outside the ambit of what constitutes a record." H. Rep. No. 95-1487, at 11 (1978). That Congressional direction is instructive, for the National Archives has established regulations interpreting the Federal Records Act that, in turn, have guided our interpretation of the Presidential Records Act.

2. Act's Application to Particular Subject Matters

 The Act expressly exempts two specific categories of documents -- political documents and personal-private documents – from the definition of Presidential records.

Political Documents Relating to Elections and Private Political Associations

The Act does not cover certain political and election-related documents.

First, the Act does not apply to (i) "materials relating exclusively to the President's own election to the office of the Presidency" and (ii) "materials directly relating to the election of a particular individual or individuals to Federal, state, or local office, which have no relation to or direct effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President."

Second, the Act does not cover "materials relating to private political associations and having no relation to or direct effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President."

The purpose of this exception is to ensure that documents related to political associations, elections, and campaigns are not classified as Presidential records. This exclusion from the Presidential records act works in tandem with the Hatch Act's express authorization of political activities by EOP employees. (Political activities are those activities primarily related to specific elections, to a campaign, or to the success of a political party.)

b. Personal documents

The Act also does not apply to records 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." That includes any *personal* letters notes, private financial documents, or other documents that you may create, receive, or possess in your office.

c. Transition Records

Transition records are not Presidential records. However, if you bring transition or other records into the White House and then use them for official purposes in a manner that otherwise would make them Presidential records, then those records are in fact Presidential records.

We would offer a semantic change in the sentence above:

"..... then those records become in fact Presidential records."

d. Documents Containing Both Record and Non-Record Portions

The Act expressly recognizes that some documents may contain portions that are a Presidential record and portions that are a non-record (because they are either political or personal). The definition of

We would suggest that "a" be inserted here.

Presidential record provides that only the "reasonably segregable" portion of the document that would qualify as a Presidential record is a Presidential record. Therefore, White House officials may segregate the official portions of a document from the personal portions (by redaction or by copying only the official portions and preserving that copy as the Presidential record) and preserve as a Presidential record only that portion of the document that actually qualifies as such.

The suggestion that staff may segregate official portions of a document from the non-record portions is unreasonable and impractical. They will not take the time, nor be consistent in their effort. No two people will agree. Having wrestled with this issue during three previous PRA Administrations, we can say that it was never tried and for good reason. Is it not far better to error on the side of history and state that, in instances of documents with mixed heritage, Presidential trumps non-record.

Official Documents that meet the definition of Presidential Records.

The Act requires preservation of virtually every document related to official business that you (i) show or send to another person (other than to an administrative or secretarial assistant involved in physically preparing the document) or (ii) receive from another person. That includes:

memos, letters, and other written communications circulated to or received from others, including documents to or from those outside the Government;

draft documents that are circulated or shown to a person other than the author;

marked-up edits or comments that are circulated or shown to another person; and

notes or minutes of meetings that are circulated or shown to others.

Post-it notes are no different from other kinds of documents. If they relate to official business and are circulated to others (for example, if you attach post-it notes on a draft document returned to its author), they are Presidential records and must be preserved, whether attached or unattached to other documents.

Similarly, e-mail is no different from other kinds of documents. Any e-mail relating to official business therefore qualifies as a Presidential record. All e-mail to your official e-mail address is automatically archived as if it were a Presidential record, and all e-mail from your official e-mail

address is treated as a Presidential record unless you designate otherwise (which you should not do unless it is clearly personal).

Finally, if you happen to receive an e-mail on a personal e-mail account or receive a letter or memorandum at home that otherwise would qualify as a Presidential record, it is your duty to treat that record as a Presidential record and to ensure that it is preserved and filed as such.

Non-Record Documents

a. Notes that are *not* shown or circulated to others

The 1978 House Committee Report accompanying the Presidential Records Act indicates that Congress intended the scope of covered "records" to be the same under both the Federal Records Act and the Presidential Records Act. That Congressional mandate is important because the National Archives has already issued regulations governing work-related notes for purposes of the Federal Records Act. Those regulations provide:

"Working files, such as . . . *rough notes*, and other similar materials shall be maintained . . . if (1) [t]hey were circulated or made available to employees, other than the creator, for official purposes . . . ; and (2) [t]hey contain unique information, such as substantive annotations or comments included therein, that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities."

Consistent with the express Congressional direction regarding the equivalent scope of the two Acts, Counsel has followed this analogous Federal Records Act regulation in determining the requirements of the Presidential Records Act. In addition, Counsel also has carefully studied and obtained guidance from the past policies and practices of Presidents Reagan, Bush, and Clinton. The policy reflected in this memo with regard to uncirculated notes is consistent with the policies and practices of these three Presidents.

b. Drafts that are *not* circulated to or shown to others.

In determining the point at which a draft document rises to the level of a Presidential record, Counsel again has examined both the regulations of the National Archives interpreting the analogous definition for "federal records" and to the past policies and practices of Presidents Reagan, Bush, and Clinton.

The regulations provide that drafts must be preserved only if "(1) [t]hey were circulated or made available to employees, other than the creator, for official purposes . . . ; and (2) [t]hey contain unique information, such as substantive annotations or comments included therein, that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities." Moreover, prior Administrations did not require White House staffers to preserve uncirculated drafts.

For that reason, Counsel has concluded that drafts that are not circulated to others are not Presidential records. However, any draft that is circulated to others is a Presidential record and must be preserved along with any comments or suggested edits on the draft.

c. Newspaper Clippings or News Summaries

The Act does not require maintenance of "stocks of publications," which applies to news clippings and news summaries, as well as extra copies of publications such as congressional reports, congressional records, and newspapers. If, however, you circulate or receive a news clip with a handwritten note or a post-it note, that would qualify as a Presidential record and must be preserved.

d. Copies

The Act does not require preservation of extra copies of documents that are produced only for convenience of reference, but this exception applies only to copies are clearly identified as such.

Telephone and Visitor Logs, Message Slips, and Calendars

White House staffers need not preserve message slips, message logs, visitor logs, and official calendars unless a message slip or log records a substantive message communicating a substantive decision or course of action.

f. Voice Mail

The White House voice mail system (like most voice mail systems currently in operation) does not have the capacity to maintain voice mail recordings as opposed to overwriting them (unlike the e-mail system, which archives e-mails). In addressing the question of voice mail, therefore, the Counsel has taken into account the Act's requirements that the President, in establishing record management controls, take such steps "as may be necessary to assure" that Presidential decisionmaking is "adequately documented" and that documentary materials be categorized "to the extent practicable" as Presidential records. Given the present state of White House voice mail technology (as is also true with most other government and corporate voice mail systems today), voice mails cannot reasonably be preserved on an ongoing basis without technological upgrades. Therefore, they do not qualify as Presidential records.

C. Office of Records Management

White House staffers should maintain their personal records separately from their Presidential records and label their folders accordingly. The White House Office of Records Management can provide assistance in establishing appropriate file systems and in storing files that are no longer needed on an ongoing basis.

When terminating White House employment, you must leave your Presidential records with the Office of Records Management and you may not take any Presidential records (or copies thereof) absent the express approval of the Counsel.

We would prefer a fuller treatment of ORM's mission. What follows appeared in an early Clinton Administration memorandum of records.

"The White House Office of Records Management (ORM) serves as a central file for all Presidential records. Its primary role is to manage, process, maintain and store records for the daily use of the President and all the policy units in the White House. Concurrently, it preserves these same records to ensure a comprehensive history of the Administration. All White House staff members are encouraged to consult with this office for guidance on the creation and maintenance of files and procedures for appropriate and systematic filing of documents."

Perhaps the last sentence could be modified with the phrase, "...as discussed in this memorandum."

The second paragraph might be worded as follows, to provide another option, in addition to the departure guidelines.

"Staff members, upon termination of White House employment, may elect to leave their office files for their successor or turn them over to ORM. They may not take with them any Presidential records or copies, absent the express approval of the Counsel. However, the departing staff member may take personal records. To reduce last minute confusion, the Counsel's Office and ORM encourage staff, throughout their tenure, to maintain these records separately from their official records."

D. Counsel's Office

If you have any doubt whether particular documents are Presidential records, preserve the documents and contact the Counsel's office. The Counsel's Office will assist with any specific questions you have. As recurring questions occur, as they almost certainly will, the Counsel's Office will issue updates and revisions to this policy as necessary and appropriate.

~~Culva~~

1D3

<Personal>

8/17/87

MEMORANDUM FOR ARTHUR B. CULVAHOUSE
Counsel to the President

RE: Protection of Confidential Presidential Records at the
Conclusion of the President's Term

This memorandum examines the alternatives available to the President to protect confidential deliberative presidential records from public disclosure after he leaves office. At least for 12 years after conclusion of the President's term, primary protection will be afforded through the Presidential Records Act, 44 U.S.C. 2201 et seq. (PRA), which applies for the first time to records of this Administration.¹ The PRA allows the President to direct that certain types of presidential communications, including "confidential communications requesting or submitting advice, between the President and his advisers" be withheld from public disclosure for up to 12 years. 44 U.S.C. 2204. We discuss below the scope of the PRA and provide recommendations with respect to its implementation.

In addition to the statutory protections afforded by the PRA, the President may of course rely on the constitutionally-based executive privilege to protect confidential communications from public disclosure. See United States v. Nixon, 418 U.S. 683, 705 (1974); Nixon v. Administrator, 433 U.S. 425, 451

¹ Although enacted in 1978, the Act became effective only "with respect to any Presidential records . . . created during a term of office of the President beginning on or after January 20, 1981." Pub. L. No. 95-591, section 3, 92 Stat. 2523, 2528 (1978). With the exception of the records of the Nixon Administration, which are subject to the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2111 note, presidential records have not previously been subject to a mandatory statutory

(1977). Although the need to assert executive privilege will most likely arise only after expiration of the mandatory restrictions imposed by the President under the PRA, the constitutional considerations that inform executive privilege also inform our interpretation of the scope and applicability of the PRA.

I. The Presidential Records Act

A. Definition of "Presidential Records"

The PRA applies only to the "presidential records" maintained by an Administration. In order to fall within the scope of "presidential records," documents must be "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." 44 U.S.C. 2201. Thus, only documents created or received by the President's close advisers, and not by all employees in the Executive Office of the President, constitute presidential records under the PRA.

This line is congruent with the definition of "agency" under the Freedom of Information Act, 5 U.S.C. 552 (FOIA), which excludes from FOIA (and therefore also from the Privacy Act) the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.² In short, the reach of the PRA extends where FOIA does

¹ (Cont.) scheme governing processing and disclosure.

² The definition of "agency" under FOIA (and by reference, under the Privacy Act) specifically includes "any executive department . . . or any other establishment in the executive branch of the Government (including the Executive Office of the President)" 5 U.S.C. 552(e) (emphasis added). As this Office has opined on a number of occasions, however, the legislative history of the 1974 amendments to FOIA, which added the reference to the Executive Office of the President, makes clear that the Act was not intended to disturb the result in Soucie v. David, 448 F.2d 1067 (1971). This decision excluded from the Act's coverage "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." See S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 15

not. See H. Rep. No. 1487, 95th Cong., 2d Sess. 3 (1978) ("The definition of Presidential records was designed to encompass those records which currently fall outside the scope of the Freedom of Information Act."); 44 U.S.C. 2201(2)(B)(i) ("Presidential records" do not include "official records of an agency [as defined in the Freedom of Information Act]").

In addition, the definition of presidential records under the PRA requires that the documents be generated "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." 44 U.S.C. 2201(2). Records that do not fit this definition are deemed to be "personal records," also defined by the Act,³ and are excluded

² (Cont.) (1974). See generally Memorandum for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, re "Status of NSC as an 'Agency' under FOIA" (Sep. 6, 1978); Memorandum for Robert J. Lipshutz, Counsel to the President, from Larry A. Hammond, Acting Assistant Attorney General, re "Intelligence Oversight Board" (Nov. 18, 1977); Memorandum for Honorable Fred F. Fielding, Counsel to the President, from Larry L. Simms, Deputy Assistant Attorney General, re "Applicability of Freedom of Information Act to White House Records Entered and Stored in Office of Administration Computers" (Feb. 22, 1982). See S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 15 (1974).

³ "Personal records" include "all documentary materials . . . 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." The term is specifically defined to include --

(1) diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business;

(2) materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; and

(3) materials relating exclusively to the President's own election to the office of the Presi-

from "presidential records." 44 U.S.C. 2201(2)(B), (3). The Act encourages the President and his staff, "to the extent practicable," to categorize records as either presidential or personal upon their creation or receipt, and to file those materials separately. 44 U.S.C. 2203(b). It does not, however, provide for any administrative or judicial review of decisions to categorize particular records as "personal" or "presidential."⁴

In practical terms, this means that records generated within the Executive Office of the President that are subject to FOIA are not "presidential records" within the meaning of the PRA. Records that are not subject to FOIA because they were generated or received by the President or those "whose sole function is to advise and assist the President" fall within the scope of the PRA, so long as they relate to or have an effect on the President's constitutional, statutory, official or ceremonial du-

³ (Cont.) dency, and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

44 U.S.C. 2201(3).

⁴ The substantive provisions of the PRA providing for processing of records by the Archivist and review of decisions to restrict access apply only to "presidential records," and therefore would come into play only after "personal records" had already been segregated. See, e.g., 44 U.S.C. 2202 (United States to "reserve and retain complete ownership, possession, and control of Presidential records"); 2203(c) (Archivist's authority over disposition of presidential records); 44 U.S.C. 2203(f)(1) (Archivist's authority to assume responsibility for the custody, control, and preservation of, and access to, presidential records); 44 U.S.C. 2204 (Archivist's authority to administer restrictions on access to presidential records). There is no provision on the face of the statute authorizing the Archivist to segregate personal from presidential records (although presumably the President could delegate that responsibility to the Archivist if he so chose), or providing for review of the segregation decisions.

ties.⁵ Based on this definition, we would expect that most, if not all, documents in the White House Office that do not fit the definition of "personal records" would be deemed to be presidential records, because in general the sole function of employees of the White House Office is to advise and assist the President. Documents generated or received by an individual within the Executive Office of the President could fall either within FOIA or within the PRA, depending on whether the individual only advises and assists the President or makes decisions in his own right -- for example, pursuant to a statutory delegation of authority -- or could be considered personal records. Many of these determinations will have to be made on a case-by-case basis, consistent with the distinctions that are now drawn under FOIA. We will be glad to provide you with additional guidance with respect to particular questions that may arise.

B. Processing of Presidential Records under the PRA

Under the PRA, presidential records are the property of the United States, and pass under the control of the Archivist of the United States at the conclusion of the President's term.⁶

⁵ Also excluded from the definition of "presidential records" are stocks of publications and stationery and extra copies of documents produced only for convenience of reference. 44 U.S.C. 2201(2)(B).

⁶ The PRA provides that the President may dispose of presidential records lacking "administrative, historical, informational, or evidentiary value," after obtaining the written views of the Archivist. 44 U.S.C. 2203(c). If the Archivist determines that the records the President proposes to destroy are of particular interest to Congress or if the public interest requires, he must notify and consult with Congress. 44 U.S.C. 2203(e). The President may then dispose of the records, after providing Congress with copies of the disposal schedule at least 60 calendar days of continuous session of Congress in advance of the disposal date.

Because the Archivist is a subordinate executive officer, the congressional notification and consultation provisions should be understood to require (a) that the President (through the Archivist) report to Congress in appropriate cases, and (b) that the President (again, through the Archivist) provide a written expla-

44 U.S.C. 2202. Prior to leaving office the President may specify that access to certain types of presidential records, including "confidential communications requesting or submitting advice, between the President and his advisers" may be restricted from public disclosure for a period no greater than 12 years.

44 U.S.C. 2204(a)(5).⁷ Presidential records containing information within a restricted category "shall be so designated by the Archivist," and access "shall be restricted" until (1) waiver by the former President of the restriction; (2) expiration of the designated time period; or (3) a determination by the Archivist that the record "or . . . any significant element or aspect of the information contained in [the record] . . . has been placed in the public domain through publication by the former President, or his agents." 44 U.S.C. 2204(b)(1). Records that are not subject to any mandatory restrictions are nonetheless exempt from public access until (a) completion by the Archivist of processing and organization of the records or (b) five years after the Archivist assumes custody of the records, whichever is earlier.

The PRA provides a few exceptions to the otherwise mandatory statutory restrictions imposed by the President. Employees of the National Archives and Records Administration "who are engaged in the performance of normal archival work" and the former President or his "designated representative"⁸ may have access to all presidential records, including those that are restricted. 44 U.S.C. 2205(1), (3). In addition, otherwise restricted records may be made available --

⁶ (Cont.) nation of any decision to destroy documents.

⁷ Other permissible restrictions include (1) classified material; (2) documents relating to appointments to a federal office; (3) documents specifically exempted from disclosure by statute; (4) "privileged or confidential" trade secrets and commercial or financial information; and (5) personnel, medical, and similar files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 44 U.S.C. 2204.

⁸ The language of the PRA refers to "designated representative" in the singular, but we know of no reason why the former President would be restricted to only one representative.

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- (1) pursuant to subpoena or other judicial process;
 - (2) to an incumbent President, "if such records contain information that is needed for the conduct of current business of his office and that is not otherwise available;" and
 - (3) to Congress and its committees or subcommittees (within the scope of their jurisdiction), "if such records contain information that is needed for the conduct of its business and that is not otherwise available."⁹

44 U.S.C. 2205(2).

During the period of restricted access, the Archivist is responsible for responding to requests for access to presidential records. The PRA vests considerable statutory discretion in the Archivist with respect to categorization and disclosure of particular presidential records.¹⁰ Although it is the President who designates which categories should be restricted and for how long, the PRA contemplates that the Archivist will determine, "in his discretion," and "after consultation with the former President," whether particular documents fall within those restricted categories. 44 U.S.C. 2204(b)(3). The legislative history of the PRA confirms that Congress believed the Archivist, because

⁹ Consistent with our long-held view that statutes authorizing disclosures to Congress must be interpreted broadly, so as not to impinge upon the constitutional prerogatives of the executive branch, we interpret this last provision to authorize disclosure only of information that is not subject to a valid claim of executive privilege by the former or the incumbent President.

¹⁰ The Archivist exercises this discretion, of course, subject to the supervision and control of the incumbent President. See Nixon v. Administrator, 433 U.S. at 424; Buckley v. Valeo, 424 U.S. 1, 123 (1976); Myers v. United States, 272 U.S. 52, 163-164 (1926). For a general discussion of the incumbent President's authority to supervise the Archivist's exercise of his statutory responsibilities, see Memorandum to Robert P. Bedell, Deputy Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel (Feb. 18, 1986) (Bedell Memorandum) at 20-24.

of his professional skill and experience, should determine which documents fall within the restrictive statutory categories designated by the President:

Subsection (b)(3) establishes that a final determination as to whether particular records fall within a mandatory Presidential restriction is to be made by the Archivist. Although the subsection provides for consultation with the former President in this process, current practice is expected to continue whereby the former President is consulted in situations requiring his personal assessment of the nature of a particular document .

. . . The actual identification and segregation of materials pursuant to restrictions is left to the Archivist.

H. Rep. No. 1487, 95th Cong., 2d Sess. 16 (1978).¹¹

The Archivist is required to establish procedures for administrative appeals of denials of access. 44 U.S.C. 2204(b)(3). During the period of restricted access, however, his decisions whether to grant access to particular records under the terms authorized by the PRA are not subject to judicial review, 44 U.S.C. 2204(b)(3), except that the former President may initiate an action during that time "asserting that a determination made by the Archivist violates [his] rights or privileges." 44 U.S.C. 2204(e) (jurisdiction over such actions vested in United States District Court for the District of Columbia).

Records that are not restricted by the Archivist under the PRA (for example, because they do not fall within any of the categories designated by the President or because the prescribed time limits on those restrictions have expired) must be processed by the Archivist in accordance with the procedures prescribed by FOIA, with one major exception. The Archivist may not withhold

¹¹ As we discuss below (see p. __, *infra*), vesting this discretionary responsibility in the Archivist would probably withstand constitutional challenge, but that aspect of the PRA counsels in favor of processing presidential records prior to completion of the President's term.

documents under FOIA exemption (b)(5), which ordinarily would be used to protect inter-agency and intra-agency deliberative records.¹² 44 U.S.C. 2204(c)(1). As discussed below, confidential communications that fall within exemption (b)(5) and are not otherwise protectable under some other exemption could be protected only by an assertion of executive privilege.

Finally, the PRA gives the Archivist the responsibility to promulgate "regulations necessary to carry out the provisions of [the Act]." 44 U.S.C. 2206. These regulations must include --

- (1) provisions for advance public notice and description of any presidential records scheduled for disposal;
- (2) provisions for giving the former President notice whenever otherwise restricted materials are to be made available under one of the exceptions listed in 44 U.S.C. 2205(2) [see above];
- (3) provisions for notice by the Archivist to the former President "when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have;" and
- (4) provisions for consultations with other federal agencies regarding materials which may be subject to FOIA exemption (b)(7) [investigatory law enforcement files].

Ibid. The Archivist has not yet promulgated any such regulations.

II. Interplay between the Presidential Records Act and Executive Privilege

¹² Exemption (b)(5) authorizes the withholding of inter-agency and intra-agency records "which would not be available by law to a party other than an agency in litigation with the agency." This exemption has long been construed to include the "deliberative process privilege." See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

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We would like to emphasize that the PRA only establishes a statutory scheme for custody, processing, and disclosure of presidential records. Even absent the explicit disclaimer in the Act that "[n]othing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President," 44 U.S.C. 2204(c)(2), we would construe the Act to leave intact the President's constitutional ability to protect confidential communications through an assertion of executive privilege.¹³ The disclaimer makes clear that Congress shared this view.

As a practical matter, the mandatory restriction on release of confidential communications authorized by the PRA should largely obviate the need to assert executive privilege so long as those restrictions continue.¹⁴ The protection afforded by the PRA for confidential communications, together with the protection of classified information, documents relating to appointments, and "personnel, medical, and similar files," should be broad enough to encompass any documents that might conceivably fall within the scope of executive privilege.¹⁵ This assumes, however, that the former President and the Archivist agree as to which documents fall within the restricted categories. Given the discretion vested in the Archivist, it is conceivable that he might disagree with the former President over whether certain

¹³ It is well-established, of course, that a former President can assert executive privilege with respect to documents created during his Administration. See Nixon v. Administrator, 433 U.S. at 449.

¹⁴ Those restrictions do not come into effect until "the conclusion of a President's term of Office." 44 U.S.C. 2203(f)(1). Until completion of his last term, therefore, the President would have to assert executive privilege to protect White House records from disclosure in response to compulsory congressional or judicial process.

¹⁵ The reverse may not be true, however. Although the parameters of executive privilege are far from clear, Presidents have generally exercised caution in claiming the privilege, and have confined its applicability in practice to the most sensitive executive communications. As is the case under FOIA, it is unlikely that all of the documents protected under the statutory categories would necessarily also be considered privileged by the

documents meet the statutory definition of "confidential communications requesting or submitting advice, between the President and his advisers," 44 U.S.C. 2204(a)(4), or other of the statutory categories. If that disagreement could not be sorted out through consultations, as contemplated by the statute, the former President could object to release of the documents on the ground of executive privilege.¹⁶

In addition, the former President would have to assert executive privilege to protect confidential deliberative communications after expiration of the mandatory restriction period designated under the PRA.¹⁷ Statements in both the House and Senate debates make clear that the former President's only recourse after the mandatory period is executive privilege. See 124 Cong. Rec. 36844 (1978) (remarks of Sen. Percy); *id.* at 34895 (remarks of Rep. Preyer). Because the documents remain in the custody of the Archivist and are deemed to be records of the National Archives and Records Administration,¹⁸ objections to release based on executive privilege would presumably be lodged with the Archivist, following notice to the former President by the Archivist of the planned release.¹⁹

¹⁵ (Cont.) former President.

¹⁶ As we discuss below, the former President's ability to object to release of particular documents on the ground of executive privilege -- even in the face of the Archivist's determination that the documents are not covered by the statutory protections of the PRA -- saves the PRA from constitutional objection. See p. ____ infra.

¹⁷ As discussed above, the PRA prohibits the Archivist from using FOIA exemption (b)(5) to protect presidential records from disclosure. Other FOIA exemptions would, however, be available after the period of mandatory restrictions. These exemptions could be used to continue protection, for example, of classified information (552(b)(1)); personnel, medical, and other files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy (552(b)(6)); and certain law enforcement investigatory records (552(b)(7)).

¹⁸ See 44 U.S.C. 2204(c)(1).

¹⁹ As described above, the regulations to be promulgated by the Archivist must, inter alia, provide "for notice . . . to the former President when the disclosure of particular documents may

The PRA does not spell out what happens if the former President objects to release of a document on the basis of executive privilege. It does, however, specifically contemplate that the former President could sue in the D.C. district court if a determination made by the Archivist "violates the former president's rights or privileges." 44 U.S.C. 2204(e). Such a lawsuit should not prove necessary to resolve a disagreement between the Archivist and the former President over whether documents subject to a claim of executive privilege may be disclosed.²⁰ As we advised in our memorandum to the Office of Management and Budget with respect to the Presidential Recordings and Materials Preservation Act (see supra n. ____), we believe an incumbent President should respect a claim of executive privilege made by a former President, unless the incumbent President believes that withholding the document would conflict with discharge of his constitutional responsibilities.²¹ See Bedell Memorandum at 25-26.²²

¹⁹ (Cont.) adversely affect any rights and privileges which the former President may have." 44 U.S.C. 2206(3).

²⁰ This judicial review section would come into play in other disputes. For example, if the former President disagreed with the Archivist over application of the statutory categories to particular documents, or if he asserted a personal right (such as the right of privacy or First Amendment right) to justify withholding of the documents, a suit against the Archivist might well be appropriate.

²¹ We advised in that memorandum that a former President's right to assert executive privilege over records generated during his Administration would be considerably undercut if a subsequent Administration could overrule or second-guess claims of privilege made by a prior Administration. Therefore, we concluded that the incumbent President (who of course directs the Archivist's exercise of his statutory responsibilities) should respect claims of privilege made by former presidents, except in the rare cases in which disclosure of records is necessary to enable the incumbent to fulfill his constitutional responsibilities.

²² In Public Citizen v. Burke, C.A. No. 86-1782 (D.D.C., March 6, 1987), a district court declared that our advice in that memorandum "is contrary to law and cannot be relied on by the National Archives in implementing the Presidential Recordings and Materials Preservation Act." The court found our conclusion that an incumbent President (and therefore the Archivist) "should respect

As we noted in that analysis, under the PRMPA claims of executive privilege made by former President Nixon should ultimately be resolved in the courts, through lawsuits brought by persons denied access to the documents by the Archivist. See Bedell Memorandum at 26. The PRA, however, expressly cuts off judicial review of the Archivist's determinations during the restricted access period, except for suits brought by the former President. We do not believe that this preclusion of judicial review alters our advice that the incumbent President should generally honor claims of privilege made by a former President. While the availability to third parties of judicial review may mitigate concerns about any possible abuse of executive privilege by a former President, we do not believe such judicial review is

22 (Cont.) a former President's claim of executive privilege" to be contrary to the D.C. Circuit's opinion in Nixon v. Freeman, 670 F.2d 346 (D.C. Cir. 1982), which upheld certain limited aspects of an earlier, similar set of regulations governing access to the Nixon Papers. In addition, the court rejected the government's ripeness and standing arguments, concluding that "the injury required by the justiciability doctrines of standing and ripeness is present," given the acknowledgment at oral argument by former President Nixon's counsel that claims of executive privilege would be made, and the Acting Archivist's prior statement to a congressional subcommittee that he considered himself bound by the OLC opinion.

We believe that the court's decision on both the procedural and substantive issues is flawed. On the merits, we believe the court erred in concluding that Nixon v. Freeman reached the issue addressed by the OLC opinion. Although isolated language in that opinion can be read to support Judge Revercomb's decision, in fact the Nixon v. Freeman court addressed only whether the Archivist's refusal to pre-screen and segregate privileged documents violated the presumptive nature of executive privilege. It did not address how the incumbent President should treat claims of privilege made by a former President. The OLC opinion is not inconsistent with the Nixon v. Freeman holding; nor is it inconsistent with the language of the statute or the National Archives' regulations. We have appealed the decision, although the Archivist is complying with its terms pending appeal. We do not believe, however, that the court's opinion affects implementation of the PRA, because it deals only with the particular scheme of the PRMPA, which does contemplate that the incumbent or former President will file objections with the Archivist that are based on executive privilege. As we have discussed, the PRA is a wholly statutory scheme, and does not

constitutionally required. Individuals other than the incumbent or former President do not have any constitutionally-based interest in disclosure of presidential records. Their right of access is prescribed and limited by statute, and we believe that Congress may therefore limit their right to seek judicial review if it does so expressly, as it has in the PRA. By the same token, Congress could choose to provide by statute for judicial review of only certain kinds of administrative determinations -- for example, determinations to restrict access based solely on an assertion of executive privilege by a former President.

III. Implementation of the Presidential Records Act

Arguably, the PRA has the potential to interfere with the free flow of candid discussion between the President and his advisers because (1) the statutory protection for confidential communications lapses after 12 years; and (2) the Archivist, rather than the former President, is responsible for determining which documents fall within the mandatory restrictions. Nonetheless, we believe that the PRA is constitutional. First, any consideration by the courts of the facial constitutionality of the Act is likely to be confined to the questions already addressed by the Supreme Court in Nixon v. Administrator, supra. In that case, former President Nixon mounted a facial challenge to the PRMPA (see n. ____), which applied uniquely to President Nixon's presidential records. Like the PRA, the PRMPA transferred custody of presidential records to another member of the executive branch (originally the Administrator of General Services, and then the Archivist), and directed that individual to screen the materials and to promulgate regulations providing for public access.²³ President Nixon asserted that the Act breached

²² (Cont.) purport to require, by its terms, that the Archivist make any determination on executive privilege claims.

²³ Unlike the PRA, however, the PRMPA did not establish statutory categories of records that could be withheld, but rather required that the regulations promulgated by the Archivist take

the separation of powers, eroded executive privilege, and violated his rights of personal privacy and association.

Throughout its opinion in Nixon v. Administrator, supra, the Court emphasized that it needed to address only the question whether the transfer of custody of President Nixon's documents and their screening by archivists violated any of the privileges or rights which Nixon asserted. See 433 U.S. at 438-439. The Court rejected President Nixon's argument that the screening and potential public disclosure of communications given to him in confidence would adversely affect the ability of future presidents to obtain the candid advice necessary for effective decisionmaking, and concluded that the limited intrusion into executive privilege effected by the custody and archival screening of the Nixon papers was constitutional.²⁴ The Court postponed resolution of the question whether executive privilege would be impermissibly eroded by the disclosure of particular documents until regulations were issued implementing the Act, and the constitutional question was presented in a specific factual context, presumably at the time such a document was actually to be released. Id. at 455.

²³ (Cont.) into account a variety of factors, including the "need to provide the public access to those materials which have general historical significance" and the "need to protect any party's opportunity to assert any legally or constitutionally based privilege." The PRMPA therefore only protects the former President's ability to assert executive privilege; it does not establish any separate statutory system to protect those records. For a fuller discussion of the provisions of the PRMPA, see Bedell Memorandum, supra.

²⁴ The Court first noted that "the expectation of confidentiality" in executive branch communications had always been limited and subject to erosion over time after an administration leaves office. 433 U.S. at 451. The Court, however, did not hold that a claim of executive privilege would fail after any specific period of time. Thus, Nixon v. Administrator does not foreclose a claim of executive privilege by a former president to protect particularly sensitive documents after the 12-year statutory period for withholding under the PRA ends. The Court then held that, particularly in light of this limited expectation, the interest in preserving presidential materials for legitimate governmental and historical reasons outweighed any danger that the free flow of information would be curtailed by the prospect

While the PRA is somewhat less explicit than the PRMPA concerning the Archivist's duty to promulgate regulations to protect the rights and privileges of former Presidents, the language and legislative history of the PRA do confer on the Archivist the ability to craft regulations to protect the opportunity of former presidents to assert executive privilege, for example, by providing adequate advance notice of the release of any potentially privileged documents. See p. __, supra. If presented with a challenge to the PRA, the Court, as it did in Nixon v. Administrator, is thus likely to limit its review to whether the screening of presidential records itself vitiates executive privilege (a question it has already answered in the negative) and wait to adjudicate specific claims of executive privilege when they are raised in a particular factual context.

Even if the Court were willing to go further than it did in Nixon v. Administrator, we believe it would find the PRA facially constitutional. Much like FOIA, the PRA authorizes an executive branch agency (in this case the National Archives) to withhold from the public, in its discretion, documents that fall within certain categories, and establishes the broad outline of procedures to be followed in making those determinations. Under FOIA this outline is then fleshed out by regulations and by practice. In some cases the statutory categories exempted from public disclosure under FOIA overlap with the constitutionally-based protection afforded by executive privilege, as they do under the PRA (see p. __ supra). For example, many documents that are protectable under FOIA exemption (b)(1) (protecting properly classified documents) or FOIA exemption (b)(5) (protecting deliberative inter-agency and intra-agency communications) would also be presumptively protectable under the state secrets or deliberative process arms of executive privilege in other contexts, such as an authorized request from Congress or a discovery request in litigation. Even in a FOIA suit, if a court were to determine that particular documents did not meet the statutory criteria for

²⁴ (Cont.) that presidential documents would be screened by archivists employed in the executive branch.

withholding, the President (or in unusual circumstances a former President) could assert executive privilege for those documents.²⁵ Because FOIA does not alter the inherent constitutional authority of the President or former Presidents to assert executive privilege, but merely sets up a parallel statutory scheme for protection of certain kinds of information, we have never considered that FOIA raises any constitutional problem.²⁶

What is implicit in FOIA is explicit in the PRA. As mentioned above, the PRA expressly disclaims any intent to alter the applicability of executive privilege. It also requires the Archivist to provide advance notice to a former President of any release that may "adversely affect any rights or privileges [he] may have," 44 U.S.C. 2206(3), and provides jurisdiction over any action brought by a former President asserting a right or privilege against disclosure of his presidential records. While the statutory protections provided by the PRA may not be equal in all respects to the scope of executive privilege, the PRA preserves intact a former President's ability to assert executive privilege, and contemplates that no documents will be released over a former President's objection until the claim of privilege has been adjudicated. Therefore, we believe the PRA is not susceptible to a constitutional challenge.

Because of the interplay between executive privilege and the PRA, however, we recommend that procedures be established that would enable the President, before he leaves office, to take full advantage of the protections afforded by the PRA and the doctrine of executive privilege. These procedures could address the two potential problems raised by the PRA that we mentioned

²⁵ In practice, of course, the need to assert executive privilege in FOIA cases does not arise, both because the statutory exemptions provide fairly complete protection and because FOIA does not apply to the most sensitive presidential communications. See p. ____ supra.

²⁶ Our approach to FOIA is consistent with the well-established practice of this Department to construe narrowly statutes that might impinge upon executive privilege, and with the familiar rule that courts will adopt an interpretation of a statute that will avoid constitutional questions. See, e.g., United States v.

above: (1) that the PRA vests discretion in the Archivist to determine which documents fall within the designated restricted categories; and (2) that the statutory protections for confidential presidential records lapses after 12 years. In addition, such procedures could reconcile the potentially awkward interplay between implementation of the PRA and processing of claims of executive privilege.

The most important step would be to undertake the screening of presidential records before completion of the President's term, if possible.²⁷ During this screening, designated subordinates of the President (including the Archivist²⁸) could identify documents that fall within each of the statutorily restricted

²⁶ (Cont.) Rumely, 345 U.S. 41, 45 (1956).

²⁷ Concern has been expressed that expedited processing of the records may lead to premature disclosure. Section 2204(b)(2) mandates disclosure of records which do not contain restricted information on the earlier of the following dates:

- (A) the date which is 5 years after the date on which the Archivist obtains custody of such record pursuant to section 2203(f)(1) [cross-reference in United States code incorrectly appears as 2203(d)(1), a subsection which does not exist];
- (B) the date on which the Archivist completes the processing and organization of such records or integral file segment thereof.

Section 2203(f)(1) refers to a date certain -- the conclusion of the President's term -- and therefore the date referenced by section 2204(b)(2)(A) will not be affected by the date the Archivist begins to screen documents. The date section 2203(b)(2)(B) references may be affected because the earlier the Archivist begins the process of screening documents the earlier he is likely to complete processing. The only documents that would be released as a result of the operation of this section are documents that are not restricted under one of the designated presidential categories. Because such documents are not by their nature confidential, their early disclosure should presumably not be deemed to outweigh the advantages of screening the documents while the President is still in office.

²⁸ Although the President could certainly direct others in the White House or executive branch agencies to do the screening, the Archivist's professional expertise and experience in the processing of presidential records and his statutory role under the PRA counsel in favor of including him in development and implementa-

categories. In addition, those particularly sensitive records that warrant protection under the doctrine of executive privilege beyond the 12-year period could be identified, and time periods set for their possible release.

This pre-screening would have several advantages. First, because it would be done by individuals subject to the President's direct supervision and control, it would reflect the President's individualized judgments as to whether -- and how long -- to protect particular documents or types of documents. Second, the segregation of documents by the restricted categories should minimize subsequent disagreements, after expiration of the President's term, between the Archivist and the former President about whether documents should be restricted, particularly if the Archivist is involved in the pre-screening. Third, even if such disagreements arise, the pre-screening will enable the Archivist to determine easily whether the former President has an interest in a proposed release, and to give him adequate notice of the release.²⁹ Finally, the pre-screening for records that the President determines should also be protected by executive privilege would enable the Archivist to treat those records consistent with constitutional requirements, as we discuss below.³⁰

²⁸ (Cont.) tion of the pre-screening process.

²⁹ The pre-screening would not necessarily alter the procedure envisioned by section 44 U.S.C. 2204(b)(3), whereby the Archivist is to determine, in response to a request from the public, whether access to a presidential record must be restricted. The Archivist would still evaluate whether the record falls within any of the restricted categories, with the sole change that he would already have the benefit of the former President's recommendation. In addition, he could consult with the former President, as contemplated by the statute, even if the President had determined during the pre-screening that the record should not be disclosed. It may be, for example, that the President would consent to releases of particular records, despite the restrictions, because of subsequent public disclosures.

³⁰ Although the PRA appears to contemplate that the screening process will begin only after a President leaves office, nothing in the Act or its legislative history prevents the President, through his staff, from also screening the documents before leaving office and providing detailed recommendations as to how the statutory categories should be applied. Moreover, the Presi-

In addition, we recommend that the regulations promulgated by the Archivist be drafted carefully, so as to protect fully the former President's rights under the statute, and to give both the former and incumbent President adequate notice of any releases that might implicate executive privilege. Because executive privilege stems from the President's inherent constitutional authority, we do not believe it would be appropriate for the Archivist to implement procedures protecting executive privilege in the regulations he promulgates to implement the PRA. Accordingly, the Archivist's regulations should specifically state that they do not address the issue of executive privilege. Procedures to protect the privilege would then be established by the President, through an executive order or other directive, preferably issued contemporaneously with the promulgation of the PRA regulations. We would be pleased to work with you in the drafting of such an executive order or directive.

John O. McGinnis

Deputy Assistant Attorney General

³⁰ (Cont.) dent clearly has the inherent constitutional authority to take steps he believes necessary to protect the confidentiality of privileged information. See, e.g., Exec. Ord. 12356 (governing the handling and disclosure of national security information).

Federal records

THE WHITE HOUSE

WASHINGTON

January 29, 1993

MEMORANDUM FOR EXECUTIVE OFFICE OF THE PRESIDENT AGENCY HEADS

FROM: DAVID WATKINS *David Watkins*
ASSISTANT TO THE PRESIDENT FOR THE OFFICE OF
MANAGEMENT AND ADMINISTRATION

SUBJECT: Guidance Regarding Records Retention

Attached for your information is guidance from the National Archives and Records Administration (NARA) regarding the preservation of electronic Federal records. Pursuant to court orders issued in the Armstrong v. Executive Office of the President (EOP) case, electronic materials may not be removed, deleted, or altered on EOP electronic communications systems until action is taken to prevent the destruction of Federal records. This guidance does not affect those EOP components that solely create Presidential records.

Once sufficient safeguard measures are in place that meet the requirements of the orders, such as backup tapes, agencies may again delete from their systems. More detailed guidance is expected from NARA on adequate safeguard measures. Concurrent with the Archivist's letter, the Office of Administration (OA) has been consulting with the Department of Justice (DOJ) and NARA with respect to implementing interim steps, consistent with the courts' orders, that affect the operation of its systems.

However, until adequate preservation safeguards are in place, each EOP agency should advise its staff that electronic materials are not to be deleted from electronic communications systems by individual users who create Federal records. Further clarification of the scope of the orders and questions should be directed to the OA Library and Information Services Division (LISD). Please call Mary H. Anton, LISD director, at 395-2527.

Attachment