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OLC 78-0886

8 March 1978

Pro legislation

MEMORANDUM FOR: [redacted] STAT
Office of General Counsel

FROM: [redacted] STAT
Office of Legislative Counsel

SUBJECT: Attached H.R. 10998 and S. 2596, the "Presidential Papers Act of 1978" and "Presidential Records Act of 1978" Respectively

1. Per our conversation of last week I am forwarding the two bills mentioned in the above-captioned subject.

2. H.R. 10998, the "Presidential Papers Act of 1978" would accomplish the following:

a. amend 44 U.S.C. section 2107, the "Presidential Recordings and Materials Preservation Act" of 1974, an act aimed at preserving those Presidential recordings and materials made in the White House or in the office of the President in the EOB's in D.C., Camp David, Key Biscayne or San Clemente during the period beginning 20 January 1969 and ending 9 August 1974.

b. redesignate the "Presidential Recordings and Materials Preservation Act" of 1974, supra, as subsection (a) of 44 U.S.C. section 2107 and add the new subsections listed under section 2(a)(2) of H.R. 10998.

c. assert public ownership, possession and control of Presidential records and documentary materials, other than personal papers, "made or received in connection with the constitutional, statutory, or other official or ceremonial duties by the President, his immediate staff, or a unit or individual of the Executive Office of the President." (H.R. 10998, 95th Cong., 2d Sess., section 2(e)(2))

d. establish procedures governing retention of those documents and access to them.

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H.R. 10998 is problematic for the following reasons:

a. By virtue of the fact that the documentary materials and Presidential records falling within the scope of H.R. 10998 include not only those "produced" or "made" but also those "received" by the President, his staff, or units or individuals in the Executive Office of the President, it is possible that certain sensitive CIA documents sent to "advise and assist the President" in carrying out his "constitutional, statutory, or other official or ceremonial duties" will be among those Presidential records custody of which is transferred to the Archivist of the U.S. at the conclusion of a President's term of office.

b. Once the Archivist takes custody of the Presidential records and after they have been deposited in a Presidential archival depository, the archivist is given authority to "dispose of such Presidential records" which he alone determines have "insufficient administrative, historical, informational, or evidentiary value to warrant ... continued preservation," subject only to 60 days advance notice of such disposal to be published in the Federal Register. Arguably, this provision applies to classified as well as unclassified material which may contain "sources and methods" information; nonetheless, no provision is made to exempt these documents from the "Archivist Axe" or to at least require the Archivist to dispose of such documents only after consultation with appropriate Agency officials.

c. Public access to documents in the custody of the Archivist is provided for under the provisions of the Freedom of Information Act which under H.R. 10998 will be amended by adding a new subsection "f" thereto (5 U.S.C. section 552(f)). To date Presidential papers have not been considered Government records and have therefore not been required to be disclosed under FOIA (H.R. Rept. No. 793, 95th Cong., 1st Sess. (1977). Since 5 U.S.C. section 552(f), the new subsection, specifically excludes applicability of the current section 552(b) exemptions and establishes its own exclusive exemptions, a determination must be made concerning the sufficiency of the exemptions for Agency purposes in light of case law to date. [Note that subsections f(2)(A) and (2)(C) are identical to section 552(b)(1)(A) and (B) and (b)(3) of the FOIA. Note also subsection (f)(2)(D) contains an exemption for a rather nebulous category of "in confidence" information "the disclosure of which could reasonably be expected to damage the foreign affairs of the U.S. ...". The exact scope of this exemption is questionable.]

d. All requests for Presidential records made under FOIA are to be addressed to the Archivist or the director of a Presidential archival depository (section (f)(1)) who themselves determine, subject to administrative appeal and eventual judicial review, whether to apply any of the (f)(2) exemptions. With regard to any CIA documents that may be considered Presidential records under HR 10998, if enacted, and notwithstanding

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appropriate judicial review provisions of HR 10998, the bill would place in the hands of the Archivist or director of a Presidential archival depository the authority to make decisions re "sources and methods" with regard to which the DCI alone is given statutory responsibility.

4. In a recent conversation with OMB on the subject of HR 10998, I was told that the Administration's position re the bill is being directed out of the White House itself and has to date taken the form of a Presidential "Decision Memorandum" stressing the following salient points:

a. The President supports the statutory transfer of records at the conclusion of a President's term of office;

b. The President opposes the applicability of FOIA to papers of former Presidents;

c. Any legislation addressing the matter of Presidential papers should allow the former President to retain control, to include access control, of his Presidential papers for a period of 15 years after his term of office has come to an end; and

d. Any legislation addressing the matter of Presidential papers should not be applicable to incumbent Presidents if reelected.

5. S. 2596, the "Presidential Records Act of 1978," like H.R. 10998, "asserts public ownership of documentary materials created or received by future Presidents and their staffs and establishes procedures governing retention of those documents and access to them" 124 Cong. Rec. 2394 (1978).

6. While the primary objective of both bills is the same, viz., to make "Presidential records" (other than "personal papers") the property of the United States, the bills differ in terms of the statutory procedures governing access to Presidential records. Notably, S. 2596, unlike H.R. 10998, does not extend the applicability of the Freedom of Information Act to Presidential records. Instead, S. 2596 would permit:

a. "... the President to place access restrictions on papers of his administration, but pursuant to a congressional judgment setting a maximum period [15 years] during which restrictions could apply." 124 Cong. Rec. 2397 (1978).

b. the Archivist to place access restrictions on Presidential records for a period of up to 15 years and to periodically review and, if he deems it appropriate, to remove such restrictions, with or without express Presidential authorization to do so (S. 2596, 95th Cong., 2d Sess. section (f) and (g) respectively) in the event that the President dies or leaves office without having either expressly prescribed restrictions on access or stated that no restriction on access may be imposed.

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c. the Archivist to restrict access to "any Presidential records specifically authorized by statute or under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" (S. 2596, supra, section 3503(h)(1)) or to "any Presidential records the disclosure of which would result in a clearly unwarranted invasion of the privacy of an individual (S. 2596, supra, section 3503(h)(2)). [Note, however, that these restrictions would be effective only for a period not to exceed 15 years after the end of the President's term of office and themselves are subject to removal by the Archivist as he deems necessary or appropriate.]

d. judicial review of denials of access to Presidential records in accordance with procedures established under 5 U.S.C. section 552(a)(4)(B) if denial of access was based on restrictions listed under S. 2596, supra, sections 3505(h)(1) or (h)(2).

e. Presidential records to be obtained through subpoena or other lawful process (S. 2596, supra, section 3504(2)).

7. In addition, S. 2596 makes provision for custody and disposition of Presidential records during a President's incumbency (S. 2956, supra, section 3503(b)) and also addresses the "Acting President" situation (U.S. Const. amend XXV, sections 3, 4).

8. It is perhaps appropriate to address the following questions with regard to S. 2596:

a. Since sensitive CIA documents may very well be included in those documents which could fall within the scope of the definition of "Presidential records," are the restrictions on access built into S. 2596 adequate to protect CIA equities? (See para 3a, this memorandum.)

b. Does the rather all encompassing authority given the Archivist under S. 2596 run counter to the DCI's responsibility to protect sources and methods, and if so, how can a remedy be fashioned to protect CIA's equity in this regard? (See para 3b, this memorandum.)

c. Is the 15-year period problematic?

9. After you have had a chance to review the bills, I would appreciate your contacting me to discuss.

SIGNED

[redacted] STAT

Office of Legislative Counsel

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