

OLC 78 0886/1

OGC 78-1824

23 March 1978

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MEMORANDUM FOR:

FROM :

Office of General Counsel

SUBJECT : Proposed Legislation on Presidential Records:
H.R. 10998 and S. 2596

1. I have reviewed the proposed legislation pursuant to your request, believe you have covered the essential points, and agree with your conclusions that these bills raise some problems for the CIA. As you point out in paragraph 3a of your paper, it is clear that CIA documents sent to the President will be among those presidential records covered by the legislation. I am not sure, however, whether your paragraph 3b points to a problem which should be of particular concern to us since it concerns merely disposal of presidential records, presumably in accordance with existing schedules for destruction of non-essential Government materials. Existing legislation contains a similar provision. Nevertheless, it might help to request clarification of this provision.

2. Cause for greater concern is to be found in those portions of the legislation which would permit the Archivist, who would be custodian of the records, to make final decisions as to public access to the documents. Although the additional exemption under the Freedom of Information Act in H.R. 10998 seems to be designed to protect information now protected under exemption b(1) and b(3), two factors pose problems: first, the provision which we would view as a sources and methods exemption applies only to statutes which require that matters be withheld from the public and leaves no discretion on the issue. While today we assert that our statutory exemption meets this criterion, I am not at all confident that this proposal maintains the status quo.

3. The second point for consideration concerns the placing of discretion for utilizing these exemptions in the hands of the Archivist or the director of a presidential archival depository. You are absolutely correct that the bill would place in their hands the authority to make decisions regarding matters which at the present time are the responsibility of this Agency. Finally, I think it is also clear that the 15 year period during which information would be protected under S. 2596 is too short, but that it does not damage or affect CIA equities in view of the other FOIA exemptions; however, the powers granted to the Archivist are, as in H.R. 10998, too broad.

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4. At the present time requests to a Government agency for documents which have been originated by another agency are referred to the originator under what is known as the "third agency rule." The CIA and the National Archives alike are subject to this rule. It is for this reason that Agency documents found in presidential libraries are referred to CIA on classification questions. Furthermore, NARS does not pretend to have the expertise or the time which is necessary for an appropriate review of Agency materials. Quite willingly, therefore, matters are referred to CIA. Perhaps because of extensive guidelines prepared for NARS by this Agency, certain instances may arise in which further consultation is unnecessary; however, such instances are few and far between. The position of this Agency consistently has been that we must be consulted prior to the declassification of Agency materials.

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5. I believe you should contact the DDA's [redacted] or Information Systems Analysis Staff for more information on the cooperation between CIA and the Archives. [redacted] should be able to help you out. They may, for example, find a distinction between declassification of documents for which Agency permission would be required and access to documents which might not require consultation. My own view is that this is unlikely.

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6. In conclusion I agree that these bills pose potential problems for this Agency in that they place the control of Agency documents, received by a president, into the control of a third party. While the Archivist under existing legislation is custodian, his discretion is tempered somewhat by the donor's deed of gift, which generally requires adherence to Executive Order 11652 on classification and, at least inferentially, the third agency rule. The proposed bill seems to take all classification decisions out of the control of the originator of a document. I believe that we should comment on the inappropriateness of such a requirement, perhaps after coordinating with Mike Cardozo at the White House. You should note also that the same objections would apply to vice presidential records which are treated in the same manner. Do not hesitate to contact me if you have any further questions or comments.

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