Ronald Reagan Presidential Library
Digital Library Collections

This is a PDF of a folder from our textual collections.

Collection: Roberts, John G.: Files
Folder Title: JGR/Presidential Records (5 of 5)
Box: 39

To see more digitized collections visit:
https://reaganlibrary.gov/archives/digital-library

To see all Ronald Reagan Presidential Library inventories visit:
https://reaganlibrary.gov/document-collection

Contact a reference archivist at: reagan.library@nara.gov

Citation Guidelines: https://reaganlibrary.gov/citing

National Archives Catalogue: https://catalog.archives.gov/

1/16/84

THE WHITE HOUSE

WASHINGTON

TO: JGR

FROM: *Richard A. Hauser*
Deputy Counsel to the President

FYI: ✓

COMMENT: ✓

ACTION: ______

pls note requirement
to publish regs. §2206

M E M O R A N D U M

DATE: May 19, 1981

TO: Fred Fielding, Counsel to the President

FROM: R. Stan Mortenson

RE: Presidential Records Act of 1978

The following are problems I see lurking for the Reagan Administration under the Presidential Records Act.

1. The Act provides that all presidential records within the White House office which "relate to or have a direct effect upon the carrying out of the official or ceremonial duties of the President" are encompassed by the regulatory provisions of the Act. The House Committee Report, in explaining the intent of this language, conveys the impression that the Act will "not impinge on the President's First Amendment right to free speech or political association" because the Act will not cover those materials which ". . . have [only] a tangential effect upon [the President's] or his staff's official or ceremonial responsibilities, but consist of purely personal political communications." Despite this language, the Committee report in a subsequent section states that "almost all of the President's political activities relate to or have a direct effect on his official duties and, as such, records reflecting these activities are included within the scope of what constitutes a "presidential record." (Id. 12.) Later in the report, in denigrating the burden imposed by the Act's requirement that a President segregate his presidential materials from his private materials, the report indicates that the amount of material which will have to be segregated into this "personal" category is "miniscule." (Id.)

In the Senate's compromise version, language was added to insure that political documents strictly relating to the President's efforts to regain his own reelection, or the election of a particular individual, would be considered as purely personal. However, the ultimate legislative interpretation of what constitutes political activities having a "relation to or direct effect upon" the President's official or ceremonial duties is basically equivalent to the criteria the Archivist are applying to the Nixon presidential materials. The examples incorporated in the Nixon archivists' manual as to what activities have a direct effect or relationship to official duties -- which serve as a guide to the reviewing archivists --

provide that a memorandum concerning the President's activities as the leader of his party are to be considered private materials unless it incorporates a reference to his official or ceremonial duties as President. The existence of such a pristinely "political" memorandum is not likely. The Reagan Administration should be alerted that the Act provides virtually no protection for political memoranda generated or received by members of the White House staff. Neither the Act's definition -- nor the examples incorporated in the Nixon archivists' manual which will be the same guidelines used under the Act -- draws an adequate line between what constitutes a President's official materials and his political documents.

2. The Act (§2204) provides that with respect to six specifically defined categories of materials, a President can elect to restrict access to those materials for a period of up to twelve years following his departure from office. Although the categories themselves are fairly all encompassing, there are several pitfalls with respect to this provision.

(a) The President[1/] must make the designated restrictions prior to leaving office. He is not permitted to delegate that responsibility to anyone. Consequently, if a President were to become incapacitated while in office but prior to imposing his chosen restrictions, he will have forever lost the ability to exercise his right under the Act. Those restrictions can be altered at a later point if he so chooses. Indeed, they can even be altered by an appointed designate. But the initial imposition of the restrictions must be made by the incumbent before leaving office.

(b) The period for applying the twelve-year restriction on public access commences at the time the President leaves office. This twelve year limitation would not necessarily impact adversely on President Reagan since twelve years from his earliest departure from office (absent death) will be January 1997. However, the principal inadequacy of the twelve year restriction is that it leaves unprotected those members of the Administration who are likely to seek future public office. Even President Carter, upon leaving office, expressed doubt that the twelve year limitation

---

1/ The Act does not permit this election to be made by a former President.

is adequate, particularly for an outgoing President in his early fifties who will remain active well beyond the otherwise applicable twelve year period.

The fact that President Reagan will not be personally impacted by the twelve year restriction is a forceful reason why he can take the aggressive position of seeking to lengthen this restriction period. The President can point to the adverse impact the twelve year limitation has upon his receiving thorough and candid written advice from his staff. At the same time, he can indicate that his push for an extension of the twelve year limitation has no selfish motivation since it will have little if any effect on his personal papers.

(c) Prior to the Nixon Administration, when Presidents were able to impose restrictions on access to their presidential materials without respect to any limitations, the Archives would consult with the former President or his designees in determining whether any particular document or categories of documents fell within the intended scope of the limitations specified in the President's deed of gift. Under this Act, although the President can designate a restriction of twelve years upon the six legislatively specified categories, he has no control over the archivists' determination as to which documents fall within those specifications. The President's only avenue for a challenge is through administrative and judicial appeal on a document-by-document basis.

3. The Act provides that material restricted by a former President is to remain available, nevertheless, to the incumbent President and Congress -- or any committee or subcommittee -- for ongoing government business. (§2205.) Such access is subject only to the "assertion of any rights, privileges or defenses" anyone may have. This provision places President Reagan and all future Presidents in the position of having to contend in court that an incumbent President or committee of Congress is attempting to gain access to his presidential materials for political reasons, not for legitimate government concerns. This is an unrealistic burden.

4. The Act provides that the President and his staff <u>are required</u> to adequately document his official and ceremonial functions. (§2203(a).) While the "adequately document" language seems to give the President leeway in deciding what paper record

to create on various matters, have this provision may well provide a basis on which reporters or historians can sue an Administration, seeking a declaratory judgment which forces that Administration to create records of the President's conduct of the office.

5. The Act provides for an elaborate procedural mechanism which must be employed before the White House can dispose of any documents that are created or received during the President's term, including the requirement that the President ask the Archivist whether he can dispose of some material. The Committee Report on this provision alludes to the possibility of a private cause of action in which the litigant may attempt to enjoin the disposal of documents and is entitled to review all of the documents which are subject to the proposed disposal prior to the implementation of the Archivist's disposal order. (<u>Committee Report</u>, p. 13.)

6. With regard to materials that are subject to a twelve year restriction imposed by the President, public access will be permitted to any of such restricted materials in the event the President or his agent makes disclosure of the materials while the materials are under restriction. While it may appear rational to permit the Archives to give public access to any document a President or his associates have previously disclosed, this particular provision of the Act is subject to a judicial interpretation under which "disclosure" could stem simply from the fact that the President or his agent discussed an event or item referred to in a document. For example, if within three or four years after leaving office President Reagan were to write his memoirs and discuss the decision process underlying some event, historians could demand immediate access to all documents (even those otherwise carrying a twelve year restriction) on the basis that "disclosure" had been made by the President. There is language in the floor discussion in the House which supposedly ties this "disclosure" criteria to some actual revelation of the document or "a description of the document." Cong. Rec. October 10, 1978, 11927. However, one may take little comfort in this colloquy. The stated purpose of this provision is to permit "unbiased historians" to evaluate the written record if a President or his agent presents his own version. This purpose is served by access to the raw data, whether or not the President's revelations are tied to specific documents.

7. The Act specifically provides that all of the rules concerning public access discussed above are applicable to the

records of the Vice President. Although the materials of the Vice President will presumably not be as all-encompassing as those of the President, this provision brings into focus even more dramatically the inadequacies of the twelve year limitation. Presumably the Vice President is someone with a great deal of interest in a longer period of public access restriction.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release   October 19, 1984

STATEMENT BY THE PRESIDENT

I am pleased to sign today S. 905, the "National Archives and Records Administration Act of 1984."

This legislation establishes the National Archives and Records Administration -- currently part of the General Services Administration -- as an independent agency within the Executive Branch. The agency will be headed by the Archivist of the United States, who will be appointed by the President, with the advice and consent of the Senate.

The principal purpose of S. 905 is to extend independence to an agency that many believe has suffered as a result of its placement within the General Services Administration in 1949. I concur in this assessment, and my Administration has supported independence for the Archives.

The public papers and other materials that the Archives safeguards are precious and irreplaceable national treasures, and the agency that looks after the historical records of the Federal government should be accorded a status that is commensurate with its important responsibilities. Independence for the Archives this year, in which we are commemorating the fiftieth anniversary of its creation, is a particularly fitting step, both practical and symbolic, in achieving that important goal.

# # # # # #

DRAFT

February 4, 1985

Dear Fred:

As I have discussed with members of your staff, I will be taking to the Department of the Treasury extra copies of certain notes and other documents created during my tenure as Chief of Staff. These copies were produced only for convenience of reference, and have been clearly identified as extra copies. They will be segregated in separate files at the Department of the Treasury and will in no way become part of the Treasury filing or records system. Only myself and my immediate staff, acting on my behalf, will have access to these files. I will obtain clearance from the White House Counsel's office or the appropriate officials of a future Reagan Presidential Library before granting others access to the files or permitting them to become public in any manner.

Sincerely,

James A. Baker, III

DRAFT

THE WHITE HOUSE
WASHINGTON

4-15

TO: RAH

FROM: John G. Roberts, Jr.
Associate Counsel
to the President JGR

☐ FYI

☐ COMMENT

☐ ACTION

HERE'S THE KIMMITT MEMO; ITS MORE GENERAL AND SIMPLY REQUESTS BROAD GUIDANCE. I THINK WE'D BETTER WAIT UNTIL THE R.R. FOUNDATION ISSUES ARE RESOLVED BEFORE DOING AS BOB SUGGESTS.

ID # 270708 CU

FE010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Robert M. Kimmitt

☐ **MI Mail Report** **User Codes:** (A) ____ (B) ____ (C) ____

Subject: Presidential Records Act

ROUTE TO: Office/Agency (Staff Name)	**ACTION** Action Code	Tracking Date YY/MM/DD	**DISPOSITION** Type of Response	Code	Completion Date YY/MM/DD
CO Holland	ORIGINATOR	85/03/25			/ /
	Referral Note:				
CUAT 18	A	85/03/25			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: NSC 8500992

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

MEMORANDUM

PSR - action pls see me

THE WHITE HOUSE

WASHINGTON

February 6, 1985

ACTION

MEMORANDUM FOR FRED F. FIELDING

FROM: ROBERT M. KIMMITT Bob

SUBJECT: Presidential Records Act

On an increasing basis, we are being asked questions about the Presidential Records Act. As agencies begin to box up first-term files for transport to their respective depositories, I think it would be prudent for us to convey to those agencies our guidance on Presidential records, or copies thereof, in those files. Would it be possible to set up a meeting on this subject, with appropriate White House and selected agency representation, e.g., Justice and Archives? I think it would pay dividends downstream.

Thank you.

<u>PRESIDENTIAL RECORDS ACT</u>

This is the first Administration to be subject to the Presidential Records Act of 1978, 44 U.S.C. § 2201 *et seq*. Our review of the Act has disclosed numerous problems, some rising to a constitutional level. For example, the Act specifies that access to Presidential records may be restricted for no more than 12 years after the conclusion of the Administration, but the constitutionally-based doctrine of executive privilege could justify restricting access for a longer period. We are beginning to develop suggested amendments to the Act, and are also beginning to develop an approach to our responsibilities under the Act and the Constitution in the event the problems with the Act are not cured.

Many of the issues surrounding the Presidential Records Act could well be decided in the context of litigation by former President Nixon and members of the Nixon White House staff against the Archives, which has been attempting to open Nixon White House files to the public under the Nixon Records Act. That litigation has been pending in one form or another for over a decade, and will enter a new round shortly when the Archivist re-issues regulations recently held invalid because the Nixon Records Act contained an unconstitutional legislative veto. The Counsel's office closely monitors this dispute between Nixon and the Archivist to protect against adverse precedent concerning the treatment to be accorded the Reagan White House files.

ID # 397685 CU

FE010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ **O - OUTGOING**

☐ **H - INTERNAL**

☐ **I - INCOMING**
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Fred F. Fielding

☐ **MI Mail Report** **User Codes: (A)** ____ **(B)** ____ **(C)** ____

Subject: Threat to Deliberative Privilege Posed by the Presidential Records Act

ROUTE TO: ACTION DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CWHolland	ORIGINATOR	86/03/28			/ /
	Referral Note:				
CWAT 24	C	86/03/28			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:

- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:

- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments:

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

Dean McGrath

Dean -

I'd like you to become proficient in the Presidential Records Act (ask Bob Kruger for assistance with research) Fred seems to assume that a constitutional challenge is not "ripe" until 12 years have passed, but if in fact candid advice is chilled

PRESERVATION COPY

today, the ripeness
issue might be overcome.
Please look at this
question with Bob.
I agree with Fred's
suggestion for a task force,
and would like your
recommendations on
membership.

Peter

PRESERVATION COPY

THE WHITE HOUSE
WASHINGTON

3/28/86

TO: DEAN MCGRATH

FROM: PETER WALLISON

I'd like you to become proficient in the Presidential Records Act (ask Bob Kruger for assistance with research).

Fred seems to assume that a constitutional challenge is not "ripe" until 12 years have passed, but if in fact candid advice is chilled today, the ripeness issue might be overcome. Please look at this question with Bob.

I agree with Fred's suggestion for a task force, and would like your recommendations on membership.

PRESERVATION COPY

THE WHITE HOUSE
WASHINGTON

3/27/86

TO: Peter Wallison

FROM: **DONALD T. REGAN**
CHIEF OF STAFF

Welcome aboard!!

Re the attached –

K. I. M. —

and let's discuss once you've found the key to you know where —

Don

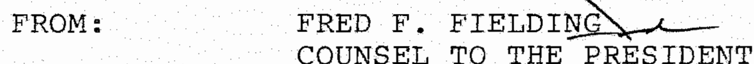
PRESERVATION COPY

THE WHITE HOUSE

WASHINGTON

March 25, 1986

MEMORANDUM FOR DONALD T. REGAN
CHIEF OF STAFF



FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Threat to Deliberative Privilege Posed by the Presidential Records Act

This is the first Administration to be subject to the Presidential Records Act of 1978, 44 U.S.C. §§ 2201-2207. That Act provides, among other things, that internal White House memoranda and notes are the property of the United States, and pass under the control of the Archivist of the United States upon the conclusion of President Reagan's second term. Pursuant to 44 U.S.C. § 2204, a President, prior to leaving office, may specify durations, not to exceed 12 years, for which access to certain types of Presidential records shall be restricted. One type of document for which access may be restricted, but for no more than 12 years, is "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers." 44 U.S.C. § 2204(a)(5). I took steps to have President Reagan and Vice President Bush exercise this option to the fullest extent possible by law.

After expiration of the specified period of restricted access (the year 2001 at the latest), all Presidential records -- even the most sensitive, confidential communications -- will be administered in accord with the Freedom of Information Act (FOIA). Pursuant to 44 U.S..C. § 2205(c)(1), however, exemption (b)(5) of FOIA -- the provision most frequently used to block disclosure of confidential documents -- is explicitly not available to withhold Presidential records from disclosure. In other words, the most non-national security sensitive White House document from this Administration may be fully open to the public by the year 2001. (I should also note that Vice Presidential records are subject to the foregoing in the same manner as Presidential records, 44 U.S.C. §2207).

Twelve years is a brief time in history and public life. Many of the personalities that may be candidly discussed in White House memoranda, and certainly many of the authors of the memoranda, will still be active twelve years from now. My concern is not so much the embarrassment that might result in the year 2001 when

PRESERVATION COPY

comments made under different circumstances become public, but the danger that the prospect of disclosure after such a brief period might inhibit the free flow of candid advice and recommendations within the White House. That flow is protected by the constitutionally based doctrine of executive privilege, and a strong argument can be mounted that the statutory 12-year ceiling on restricting access is unconstitutional, at least as applied to the most sensitive internal White House communications.

This argument was in fact raised by the Carter Department of Justice when the Presidential Records Act was being considered by Congress. A representative of the Department's Office of Legal Counsel testified as follows:

> The Supreme Court has clearly recognized that a constitutional privilege rooted in the doctrine of separation of powers extends to confidential communications between the President and his advisers and among those advisers. Although the justifications supporting the privilege may become less critical with the passage of time, there is no indication that it can be said to dissipate altogether after the passage of any particular period of years. An effective declaration that the privilege can be asserted for 10, 13, or 15 years but no longer must consequently be seen as of doubtful constitutionality. Statement of Deputy Assistant Attorney General Larry A. Hammond, Hearing Before the Senate Committee on Governmental Affairs on S. 3494, 95th Congress, 2d Session 14 (1978).

The Act contains a statement that "Nothing 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. § 2205(c)(2), but that statement merely frames the dispute.

As noted, this is the first Administration subject to the Act. Prior Presidents were considered to have control over the records of their Administration, and when these records were donated to the Archives the former Presidents typically reserved to themselves or aides chosen by them the right to restrict access to sensitive communications, for periods considerably longer than the 12-year period permitted under the Act. President Nixon's case was an exception, and the authority of the Government to seize the Nixon papers and open them to public access is still not totally resolved. In any event, the validity of the present Act is very much in doubt.

The difficulty is that in all likelihood no court challenge to the 12-year ceiling on restricting access can be mounted until the case is legally "ripe," which will not be until the year 2001, when the Archivist actually proposes to release Reagan Administration documents and someone with legal standing sues to

PRESERVATION COPY

block disclosure. At that point any executive privilege claim would hinge to a large extent on the views of the incumbent President, who may or may not be in a position to place the long-term interests of the institution above short-term political interests that may be served by disclosure of Reagan Administration documents. In any event, the existence of the statute, however vulnerable to later challenge, still serves to chill the full and robust exchange of views the President requires to discharge the office; it also may lead to personal attempts by staff members to "write history" instead of giving candid advice where there is a general awareness of the Act.

For these reasons, steps should be taken before the end of the Administration to cure the infirmities of the Act. The most obvious possibility is legislative amendment. Other possibilities include Archives regulations explicitly recognizing the validity of possible executive privilege claims to block disclosure after the expiration of the statutory 12-year period.

I urge that a task force be formed to work on this issue. From informal discussions, I think you will find bipartisan support among members of previous White House Staffs.

cc: William L. Ball, III

PRESERVATION COPY