

April 6, 1951

Honorable George M. Elsey
Administrative Assistant to the
President.

Dear Mr. Elsey:

Herewith is a draft of the memorandum relating to the President's papers about which I spoke to you this morning. The views set forth in the memorandum are, of course, preliminary ones, but I think they provide a good basis for discussion of the problems involved.

Mr. Rosenthal and I will be at your office on Tuesday, April 10, at 11:00 a.m., to discuss this matter with you.

Sincerely,

Ellis Lyons

7 Mr. Copeland

4 April 6, 1951

4 THE PRESIDENT'S PAPERS

4 1. Authority for Depositing Papers

4 Congress has given specific authorization for the deposit of the papers of the President of the United States with the General Services Administrator. Section 507 of the Federal Records Act of 1950 (Pub. Law 754, 81st Cong., 2d sess.) provides, in pertinent part:

10 "Sec. 507.(a) The Administrator, whenever it appears to him to be in the public interest, is hereby authorized--

10 "(1) to accept for deposit with the National Archives of the United States the records of any Federal agency or of the Congress of the United States that are determined by the Archivist to have sufficient historical or other value to warrant their continued preservation by the United States Government;

10 13 * * * "(3) to direct and effect the transfer of materials from private sources authorized to be received by the Administrator by the provisions of subsection (e) of this section.

10 7 "(b) * * * whenever the head of any agency shall specify in writing restrictions that appear to him to be necessary or desirable in the public interest, on the use or examination of records being considered for transfer from his custody to the Administrator, the Administrator shall impose such restrictions on the records so transferred, and shall not remove or relax such restrictions without the concurrence in writing of the head of the agency from which the material shall have been transferred * * * Provided, however, That statutory and other restrictions referred to in the provisos of this subsection shall not remain in force or effect after the records have been in existence for fifty years unless the Administrator by order shall determine with respect to specific bodies of records that such restrictions shall remain in force and effect for a longer period * * *.

Revised by
manus 7/24/51

"(e) The Administrator may accept for deposit--

10 "(1) the personal papers and other personal historical documentary materials of the present President of the United States, his successors, heads of executive departments, and such other officials of the Government as the President may designate, offered for deposit under restrictions respecting their use specified in writing by the prospective depositors: Provided, That restrictions so specified on such materials, or any portions thereof, accepted by the Administrator for such deposit shall have force and effect during the lifetime of the depositor or for a period not to exceed twenty-five years, whichever is longer, unless sooner terminated in writing by the depositor or his legal heirs: And provided further, That the Archivist determines that the materials accepted for such deposit will have continuing historical or other values;

13 * * *
4 Title to materials so deposited under this subsection shall pass to and vest in the United States.

13 * * * "
4 Congress thus appears to have regarded as two distinct categories the official records of Federal agencies and the personal papers of the President and certain other officials. Restrictions imposed by an agency head on use of papers in the former category (§ 507(a)(1)) can be revoked by his successor in office (§ 507(b)). Restrictions imposed on use of papers in the latter group (§ 507(a)(3)) can be revoked only by the person who has deposited them, or his legal heirs (§ 507(e)(1)).

The Presidency seems to have been regarded by Congress as a Federal agency, the official records of which would be subject to deposit pursuant to sections 507(a)(1) and 507(b). Section 3(b) of the Federal Property and Administrative Services Act of 1949 (Pub. Law 152, 81st Cong., 1st sess.), as amended (of which the Federal Records Act of 1950 is Title V), defines "Federal agency" as including, inter alia, "any executive agency" and section 3(a) defines "executive agency" as "any executive department or independent establishment in the executive branch of the Government * * *." Other parts of that act appear to be applicable to the White House, among other agencies. See, e.g., sections 109, 201-206, 301-309. Moreover, the Senate committee reporting out Public Law 754, wrote:

10 "Section 507(e)(1) is a new provision that would make it possible for the personal papers and other personal historical documentary materials (motion pictures, sound recordings, etc.) of the President and other high level Government officials to be preserved by the Government with related official records.

10 "Documents of this character, when they can be properly released for scholarly research, frequently constitute the most valuable of all the source materials of history. Their preservation in official custody is highly desirable, but is not likely to occur unless adequate assurance is provided that their privacy will not be jeopardized for a reasonable period of time. The restriction on the use of such materials provided in this subsection is designed to assure this privacy. The use of official records transferred by the officials specified would be governed by such restrictions as might be imposed under subsection 507(b), which restrictions could, of course, be removed by a successor in office." (Emphasis supplied.) S. Rept. 2140, 81st Cong., 2d sess., pp. 16-17.

Congress appears, therefore, to have assumed that there were "official" as well as "personal" papers of the President. Such a dichotomy appears difficult to effectuate. In the activities of the President, the personal and the official are inextricably intertwined. While the White House Central File includes, among others, an "Official" and a "Personal" file, these classifications are fairly arbitrary; moreover, both are dwarfed by the "General File," which likewise contains material of personal, official, and mixed nature.

Historically, all White House records, with the exception of the "precedent file," some papers relating to the "housekeeping" of the White House, and similar matters of comparatively little importance, have always been regarded as the personal property of each President and removed by him upon his departure from office. This precedent began with President Washington and has continued to date. See Andreassen, Archives in the Library of Congress, 12 American Archivist 20, 23 (1949). See also the following comment of President Taft:

10 "The office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become the property or a record of the government unless it goes on to the official files of the department to which it may be addressed. The President takes with him all the correspondence,

original and copies, carried on during his administration.
 * * * Taft, The Presidency (1916), p. 30.

President Franklin D. Roosevelt gave his papers to the Franklin D. Roosevelt Library, to be administered by National Archives, but his assumption in making this gift was that he had the absolute right of their disposal.

Section 507(e) of the Federal Records Act of 1950, supra, provides that "Title to materials so deposited under this subsection [personal papers] shall pass to and vest in the United States." No similar provision appears with respect to official papers of heads of agencies, indicating that Congress regarded the title to such papers as already in the Government; in fact, removal of such papers by heads of agencies might well be a crime. See 62 Stat. 795, 18 U.S.C. 2071(b). If Presidential records belong to each President and not to the Government, and are removable by him upon leaving office, they would therefore appear not to fall within the "official" papers which are covered by sections 507(a)(1) and 507(b).

This problem was obviously not thought through by Congress. One way of reconciling its assumption that there would be some official papers of the Presidents, which could be deposited pursuant to sections 507(a)(1) and 507(b) rather than under sections 507(a)(3) and 507(e)(1), with its expectation that official papers would be those as to which title was already in the Government, would be to treat as official papers only that narrow category of files which are normally not taken with him by each President when he leaves office -- to wit, the "precedent file," records relating to the internal management of the White House office, the records of Presidential commissions that have been turned over to the White House, and similar materials. This would be in keeping with the suggestion made by the Record Officer of the Bureau of the Budget in item 7 of her report to Mr. Elsey "The White House Central File," dated January 22, 1951. As a practical matter, this would be virtually the only way in which the statute could be administered with respect to the papers of the Presidents, as separation of documents into official and personal categories would be an impossible task. Furthermore, it would effectuate the congressional purpose, evidenced in the committee reports, of inducing deposit of papers with the Administrator, which, if their use could not be effectively restricted, would be likely to be removed or destroyed. As stated by the Senate committee in discussing section 507(e)(1): "Their preservation in official custody is highly desirable, but is not likely to occur unless adequate assurance is provided that their privacy will not be jeopardized for a reasonable period of time.

The restriction on the use of such materials provided in this subsection is designed to assure this privacy." S. Rept. 2140, 81st Cong., 2d sess., pp. 16-17; H. Rept. 2747, 81st Cong., 2d sess., p. 15.

This construction of the statute would be the most convenient to administer, would probably come closest to effectuating the congressional purpose, and would be most nearly in conformance with the historic functions of the Presidency. The question arises, however, whether a later President, General Services Administrator and Archivist could challenge the determination of the present incumbents of these offices that certain papers were "personal" and hence appropriate for deposit under section 507(e)(1). They might contend that certain papers were in fact "official," and that the acts of deposit and acceptance under restrictions permissible only as to "personal" papers were illegal and could be set aside. One way of forestalling such a challenge might be for President Truman to note specifically that the restrictions on use were effective not only against the general public but also against successor Presidents, General Services Administrators, Archivists and their staffs. Being unable to see the papers in question, they would have difficulty in refuting the designation under which they had been accepted. Such action might not be necessary, since it appears likely that the restrictions imposed would be binding upon everyone, including the afore-mentioned officials; furthermore, it might seem gratuitously insulting, raising suspicions and bringing pressure upon Mr. Truman, after leaving office, to modify his restrictions.

The better policy would undoubtedly be to rely upon all concerned not to challenge the restrictions imposed. The interpretation of the statute suggested herein should stand up under attack, especially since it would constitute the first construction of the law by those authorities charged with carrying it out. It may be desirable, in addition, to submit the question to the Federal Records Council, established pursuant to section 504 of the act. Approval of this interpretation by the Council would go far towards ensuring public acceptance of it should it ever be questioned.

4 2. Mechanics of Depositing Presidential Papers

4 As to the precedent file, papers pertaining to the "housekeeping" of the White House, etc., which would be regarded as "official" and deposited pursuant to sections 507(a)(1) and 507(b), the following findings and statements would be required:

(a) The President would offer each batch of papers to the General Services Administrator, together with a written statement as to restrictions on their use or examination, if any, which he states appear to him "to be necessary or desirable in the public interest";

(b) The Archivist would make a finding that the papers "have sufficient historical or other value to warrant their continued preservation by the United States Government";

(c) The Administrator would issue a statement, accepting them for deposit and finding that it appears to him "to be in the public interest" to do so;

(d) If the President's offer is accepted by the Archivist and the Administrator, he would deliver the papers, together with a statement that he was doing so pursuant to the restrictions contained in his offer.

As to all other papers, which are regarded as "personal" and would be deposited pursuant to sections 507(a)(3) and 507(e)(1), the following findings and statements would be required:

(a) The President would offer each batch of papers to the Administrator for deposit, together with a written statement as to restrictions on their use or examination;

(b) The Archivist would issue a statement that he "had determined that the materials will have continuing historical or other values";

(c) The Administrator would issue a statement, accepting them for deposit and finding that it appears to him "to be in the public interest" to do so;

(d) If the President's offer is accepted by the Archivist and the Administrator, he would deliver the papers, together with a statement that he was doing so pursuant to the restrictions contained in his offer.

Since it might not be practicable for the President to complete this task before the end of his term of office, he could do so afterwards. Section 507(e)(1) puts no limitation on who may deposit the papers of a President. It may be an ex-President, or even a relative, friend, or stranger.

Provision should also be made to ensure that the President's purposes with respect to his "personal" papers would not be frustrated in the event of his death while in office. In the case of President

Franklin D. Roosevelt, a valid inter vivos gift to the United States was made, but it was upheld because the Surrogate's Court was able to spell out an acceptance by the United States through legislation and other acts. Matter of Roosevelt's Estate, 190 Misc. 341, 73 N.Y.S. (2d) 821. The Federal Records Act of 1950, however, provides for a specific form of acceptance, by the General Services Administrator, involving findings by the Archivist and the Administrator which they might not be able conscientiously to make before the papers had been clearly ascertained. The device of a "token delivery," which succeeded in President Roosevelt's case, might thus not be applicable.

It would therefore appear to be most advisable for the President to draw up a codicil to his will providing for deposit of such papers pursuant to sections 507(a)(3) and 507(e)(1) and nominating a committee of trusted friends to segregate the papers and determine the restrictions to be imposed. Since the statute does not require that the restrictions imposed under these subsections must be drawn up by the President, or, indeed, that only the President can donate Presidential papers, delegation to such a committee would be valid. Since, however, the restrictions must be imposed "by the depositor," and since the heirs of the depositor may revoke restrictions, it might be best for the papers to be left to the President's widow, or daughter, in trust for the purpose of depositing them pursuant to restrictions to be drawn up by the committee, and, at the time of deposit, for his widow or daughter, as the case may be, herself to accept the restrictions drawn up by the committee and offer the papers for deposit pursuant to them. This would place the power of revocation in the President's family rather than in the committee's heirs.

4 3. Establishment of Museum at Grandview, Missouri

4 It is also part of the President's plan to take with him, when leaving office, certain papers and other materials which would be placed in a museum or library, to be erected on his family's farm at Grandview, Missouri, similar to, although smaller than, the Franklin D. Roosevelt Library on the Roosevelt estate at Hyde Park, New York. In the latter case, the following steps were taken:

(a) On December 10, 1938, a press conference was held, at which Mr. Roosevelt outlined his intention that his papers be preserved in one place, a library to be erected at Hyde Park, the title to which would be in the United States and the materials therein under the care of the Archivist of the United States.

(b) On the same date he executed a document authorizing use of his name in the formation of a membership corporation under the laws of New York.

(c) The certificate of incorporation of the Franklin D. Roosevelt Library, Inc., was filed on December 22, 1938.

(d) On February 4, 1939, the trustees of the corporation appealed for private gifts to meet the cost of building the library, and received contributions totaling approximately \$400,000 from 28,000 people.

(e) On July 18, 1939, a Joint Resolution of Congress was enacted (53 Stat. 1062), accepting the land to be used as the site for the library, permitting the corporation to construct the library building at no cost to the Government, accepting for the library as a gift from Mr. Roosevelt such historical materials as should be donated by him, and authorizing the library to acquire material from other sources as well. The faith of the United States was pledged to provide the necessary funds for upkeep.

(f) On July 4, 1940, when the building was virtually completed, it was turned over to the Government by the corporation, and accepted for the Government by the Archivist of the United States. During the following year, Mr. Roosevelt began delivering papers, books, etc. to the library.

(g) On June 30, 1941, the library was dedicated and opened to the public. Mr. Roosevelt continued to deliver materials to it.

(h) When Mr. Roosevelt died on April 12, 1945, a large amount of material appropriate for the library was still at the White House. Except for a few papers taken temporarily into custody by President Truman in the interest of national security, the papers were transmitted to National Archives, and subsequently to the library.

(i) On July 21, 1947, in response to a petition by the executors for a determination whether Mr. Roosevelt had made a valid and effective gift of all his papers and files, including those in his possession at his death, to the United States Government, the Surrogate of Dutchess County, New York, ruled in the affirmative. 190 Misc. 341, 73 N.Y.S. (2d) 821. All remaining papers were taken over by the library staff.

(j) The task of determining which papers were to be restricted and on what conditions has since been completed by the survivors of the committee appointed for that purpose by President Roosevelt.

The same devices -- a press conference, establishment of a corporation, appeal for private gifts, joint resolution of Congress, and turning over of the building by the corporation to the United States at a ceremony of formal acceptance could be followed in the case of the projected library at Grandview. Specific papers could be turned over physically to the library, or where this is temporarily impracticable, deeds of gift executed. For such gifts to be effective, there would have to be an acceptance on behalf of the library.

Thomas v. Thomas, 107 Mo. 459, 463. This presupposes an existing entity or Government authority which could accept them. If properly accepted, a deed can convey title to personal property under Missouri law, without actual physical delivery of the property. See In re Harlow v. Harlow, 239 Mo. App. 607, 619; Cartell v. St. Louis Union Trust Co., 348 Mo. 372, 383.

Of course, it would have to be made clear throughout that Mr. Roosevelt's pattern of turning everything over to the library would not be followed, but that most papers would go directly to the National Archives. It might therefore be more difficult than it was in President Roosevelt's case to obtain large contributions from those interested in preserving historical records.

Presumably, the materials to be taken to Grandview would not be of a type requiring restriction on use or examination.

If the President wishes that this plan of a library at Grandview be carried out even if he dies in office, he could provide for this in his will, perhaps authorizing the same committee which is to determine the restrictions on his papers in the event of his death to determine as well which papers are to go to National Archives and which are to be sent to Grandview. The device of an inter vivos gift could be used for papers already earmarked for Grandview by the President, but could not be used as to unsegregated or after-acquired papers unless some means can be found of designating in advance which papers are to stay in Washington and which to go to Grandview.

4. Tax Consequences

4 One objection to the proposal that the President make provision in his will for the deposit of his papers with the United States is that a tax burden might thereby be imposed. While bequests to or for the use of the United States are deducted from the value of the gross estate, for purposes of the Federal Estate Tax (Internal Revenue Code, § 812(d)), it is not clear that they would be exempted under the Missouri Inheritance Tax laws.

Mo. Rev. Stat. Ann. (Supp. 1950), section 576, exempts all transfers "for county, city, town or municipal purposes, or for religious, charitable, or educational purposes in this state. * * *" This exemption would presumably cover the bequest for the library at Grandview but not that for National Archives. There is no reference in the statutes to bequests to the United States, nor have any cases involving the question of their exemption been found. There is no constitutional requirement that such an exemption be conferred. United States v. Perkins, 163 U.S. 625.

It is possible, however, that such a bequest might not be subject to inheritance tax, on either of the following grounds:

(a) There is some authority that a decedent's papers are not assets of his estate. Eyre v. Higbee, 35 Barb. (N.Y.) 502; In re Ryan's Estate, 115 Misc. 472, 188 N.Y. Supp. 387. While the issue in these cases was not one of taxability, their reasoning -- the undesirability of forcing relatives to bid in a decedent's papers in order to protect their privacy -- is pertinent. No Missouri authorities on this issue have been found.

(b) The Missouri Supreme Court has held that where the value of a bequest is unascertainable, no inheritance tax can be levied. In re Estate of Clark, 270 Mo. 351 (trustee to give beneficiary an amount each year for life, determined solely in trustee's discretion). It might be asserted that the value of the President's papers could not be appraised, and that a forced sale would be against public policy because of the interest of national security which might thereby be jeopardized. Another possible approach would be that it could not be ascertained in advance which papers would go to Grandview, and therefore be exempt, and which to the Archives, thus bringing the situation within the rule of the Clark case, supra. The reaction to this argument might, of course, be to deny the exemption rather than to drop the tax.

If the foregoing arguments fail, an attempt might be made to induce the Missouri legislature to exempt the bequest. Failing this, Congress could be asked to appropriate sufficient funds to pay the tax.