

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Randolph Moss to Beth Nolan, re: Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order (2 pages)	01/29/2000	P5
002a. memo	Bill Leary and Mary Derosa to Samuel Berger, re: Disposition of Clinton Administration Records (7 pages)	03/10/2000	P5
002b. memo	Sameul Berger to John Podesta and Beth Nolan, re: Disposition of NSC Records (7 pages)	ca. 03/2000	P5

COLLECTION:

Clinton Presidential Records
National Security Council
Legal Advisor (Derosa, Mary)
OA/Box Number: 4057

FOLDER TITLE:

Transition Issues [1]

2008-0015-F
ke1581

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]

C. Closed in accordance with restrictions contained in donor's deed of gift.

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

RR. Document will be reviewed upon request.

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]



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

January 29, 2000



**MEMORANDUM FOR BETH NOLAN
COUNSEL TO THE PRESIDENT**

From: Randolph D. Moss *RD*
Acting Assistant Attorney General

Re: Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order

You have asked our opinion whether there is any substantive legal difference between an executive order and a presidential directive. As this Office has consistently advised, it is our opinion that there is no substantive difference in the legal effectiveness of an executive order and a presidential directive that is not styled as an executive order. We are further of the opinion that a presidential directive would not automatically lapse upon a change of administration; as with an executive order, unless otherwise specified, a presidential directive would remain effective until subsequent presidential action is taken.

We are aware of no basis for drawing a distinction as to the legal effectiveness of a presidential action based on the form or caption of the written document through which that action is conveyed. Cf. Memorandum for Harold Judson, Assistant Solicitor General, from William H. Rose, *Re: Statement of Policy Regarding Certain Strategic Materials* (Aug. 28, 1945) (concluding that a letter from President Roosevelt stating the government's policy "constitute[d] a Presidential directive having the force and effect of law," notwithstanding its informality of form). It has been our consistent view that it is the substance of a presidential determination or directive that is controlling and not whether the document is styled in a particular manner. This principle plainly extends to the legal effectiveness of a document styled as a "presidential directive."

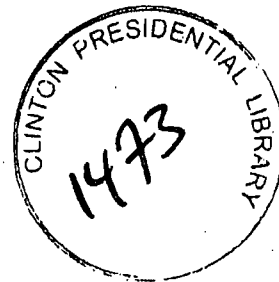
Moreover, as with an executive order, a presidential directive would not lose its legal effectiveness upon a change of administration. Rather, in our view, because a presidential directive issues from the Office of the Chief Executive, it would remain in force, unless otherwise specified, pending any future presidential action. Cf. Memorandum for Michael J. Egan, Associate Attorney General, from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Amendments to 28 CFR 16, Subpart B* (Apr. 21, 1977) (raising possible concerns about a proposal to delegate to the Deputy Attorney General certain authorities to invoke executive privilege because such a delegation could potentially be inconsistent with a 1969 Memorandum from President Nixon on executive privilege). Indeed, Presidents have

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frequently used written forms other than executive orders to take actions that were intended to have effect during a subsequent administration. For example, delegations of presidential authority under 3 U.S.C. § 301 have been made pursuant to presidential memoranda.¹ *See also, e.g.,* Presidential Memorandum for the Heads of Executive Departments and Agencies, Re: Establishing a Federal Energy Management Program, 3 Pub. Papers 1015 (Nov. 4, 1976) (including a directive to be carried out for FY 1977).

You have also inquired whether a presidential directive could be published in the Federal Register. It is our understanding that any presidential determination or directive can be published in the Federal Register, regardless of how it is styled. At present, a range of presidential determinations and directives styled other than as executive orders are routinely published in the Federal Register. *See, e.g.,* Determination Pursuant to Section 2(c)(1) of the Migration and Refugee Assistance Act of 1962, as amended, 64 Fed. Reg. 65653 (Nov. 10, 1999); Report to Congress Regarding Conditions in Burma and U.S. Policy Toward Burma, 64 Fed. Reg. 60647 (Oct. 27, 1999) (memorandum directing the Secretary of State to transmit report to Congress). We see no reason to believe that the Federal Register would decline to publish the contemplated directive.²

Please let us know if we may be of further assistance.



¹ At various points over time, Presidents have delegated presidential functions both by executive order and by presidential memorandum. Compare Memorandum for the Secretary of State Re: *Delegation of Authority Under Section 1401(b) of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106-65)* (Jan. 5, 2000), reprinted in 65 Fed. Reg. 3119, with Exec. Order No. 10,250 (1951) (delegation of functions to the Secretary of the Interior), reprinted as amended in 3 U.S.C. § 301 app.

² Because the decision whether an item can be published is made by the Office of the Federal Register, we would suggest confirming this with that office. If you would like, we would be happy to do so on your behalf.

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