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B-222963

June 10, 1986

The Honorable Lawton Chiles
Ranking Minority Member
Subcommittee on Intergovernmental
Relations
Committee on Governmental Affairs
United States Senate

Dear Senator Chiles:

This responds to your letter of April 22, 1986, also signed by Senators Mathias and Eagleton. You asked us to review a recent opinion by the Office of Legal Counsel (OLC), Department of Justice, which addresses regulations issued by the Archivist of the United States to carry out his functions under the Presidential Recordings and Materials Preservation Act of 1974, as amended, with respect to the historical materials of former President Nixon.

The enclosed detailed analysis presents the results of our review and answers each of the specific questions you posed regarding the OLC opinion. The most significant aspect of the opinion, in our view, is OLC's conclusion that the Archivist must accept without challenge any claim of executive privilege asserted by former President Nixon, even if the Archivist believes that the documents involved are outside the scope of the privilege. We find this conclusion to be inconsistent with the Archivist's regulations and contrary to his statutory responsibilities under the 1974 Act. This conclusion is also at odds with past practice under the Act. On several occasions the Archivist, with the support of the Justice Department, has reviewed and evaluated claims of executive privilege asserted by Mr. Nixon and has rejected many of Mr. Nixon's claims.

Finally, we believe that OLC's conclusion in this case calls into question whether the Justice Department will permit the Archivist to exercise fully his responsibilities under the Presidential Records Act of 1978 with respect to the materials of future ex-Presidents.

We hope that our analysis will be useful to you in considering the issues raised by the OLC opinion.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosure

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B-222963

ANALYSIS OF OFFICE OF LEGAL COUNSEL OPINION ON NATIONAL ARCHIVES REGULATIONS GOVERNING ACCESS TO MATERIALS OF THE NIXON PRESIDENCY

We have been asked to review an Office of Legal Counsel opinion concerning regulations promulgated recently by the Archivist of the United States to implement his functions under the Presidential Recordings and Materials Preservation Act of 1974, as amended. This Act, which governs the records of former President Nixon, requires the Archivist to develop regulations that will open the historical materials of the Nixon presidency to public access subject, among other conditions, to preserving a party's opportunity to assert claims of constitutional privilege. The Office of Legal Counsel opinion centers on how the Archivist should respond to claims of executive privilege which might be asserted by either an incumbent President or former President Nixon in an effort to prevent public access to the Nixon historical materials.

The Archivist's regulations in question here represent the sixth attempt since 1974 to promulgate rules to effect public access to the Nixon materials under the 1974 Act. The Act itself has been subject to protracted litigation, including a constitutional challenge by former President Nixon that was decided by the United States Supreme Court. An overview of the Act and the actions that have occurred under it, with particular reference to the issues of executive privilege addressed in the Office of Legal Counsel opinion, is necessary to put in context the specific questions submitted to us.

I. BACKGROUND

On December 19, 1974, the Presidential Recordings and Materials Preservation Act, Public Law No. 93-526, 88 Stat. 1695, was enacted to govern the records of former President Richard M. Nixon. Nullifying an earlier agreement between Mr. Nixon and the Administrator of the General Services Administration (GSA), title I of the Act provided for Mr. Nixon's materials to be placed in the custody and control of the Administrator, who was assigned certain functions and responsibilities with regard to those materials. The Act was amended in 1984 to substitute the Archivist of the United States for the Administrator.[1/]

1/ See the National Archives and Records Administration Act of 1984, Public Law No. 98-497 (October 19, 1984), § 107(c), 98 Stat. 2291.

Under title I of the Act, as amended, 44 U.S.C. § 2111 note (Supp. II, 1984), the Archivist is to process and screen the Nixon materials; return to Mr. Nixon those materials that are personal; and establish terms and conditions under which those materials of historical significance may be opened for public access. Section 104(a) of the Act requires the Archivist to develop regulations that would provide public access to the Nixon materials, taking into account the following factors, among others:

> "(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate';
>
> * * * * *
>
> "(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;
>
> "(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1) * * *."

As originally enacted, section 104(b) subjected these regulations to a legislative veto. 88 Stat. 1697. This subsection was amended in 1984 to substitute for the legislative veto a provision that the regulations not take effect until the expiration of 60 legislative days following their submission to the Congress.

Section 105(a) of the Act vests the United States District Court for the District of Columbia with exclusive jurisdiction--

> "* * * to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or

> proceeding involving the question of title, ownership, custody, possession, or control of any tape recording of material referred to in section 101 or involving payment of any just compensation which may be due in connection therewith. * * *"

On the day after the 1974 Act was enacted, former President Nixon initiated a lawsuit to challenge its constitutionality. Affirming a three-judge district court decision, the United States Supreme Court in Nixon v. Administrator, 433 U.S. 425 (1977), upheld the constitutionality of the Act.

Among his other contentions, Mr. Nixon had asserted that the Act's requirement for archival review of his presidential materials violated his constitutional right of executive privilege. The Supreme Court adopted the Solicitor General's view that a former President still could assert executive privilege. 433 U.S. at 448-49, but went on to hold that the archival review called for by the 1974 Act did not violate Mr. Nixon's executive privilege rights. The Court noted that "the fact that neither President Ford nor President Carter supports appellant's claim detracts from the weight of his contention that the Act impermissibly intrudes into the executive function and the needs of the Executive Branch." Id. at 449. The Court also emphasized that the issue before it concerned only whether the Act was constitutional on its face:

> "* * * We must, of course, presume that the Administrator and the career archivists concerned will carry out the duties assigned to them by the Act. Thus, there is no basis for appellant's claim that the Act 'reverses' the presumption in favor of confidentiality of Presidential papers recognized in United States v. Nixon. Appellant's right to assert the privilege is specifically preserved by the Act. The guideline provisions on their face are as broad as the privilege itself. If the broadly written protections of the Act should nevertheless prove inadequate to safeguard appellant's rights or to prevent usurpation of executive powers, there will be time enough to

> consider that problem in a specific factual context. For the present, we hold, in agreement with the District Court, that the Act on its face does not violate the Presidential privilege." Id. at 455.

Prior to the set of implementing regulations developed by the Archivist that are now pending, there were five attempts by GSA to promulgate regulations under section 104 of the Act. The first three versions were disapproved by legislative veto; the fourth version became effective briefly, but GSA withdrew these regulations as part of the settlement of another lawsuit by Mr. Nixon; and the fifth version was invalidated by the United States District Court for the District of Columbia in Allen v. Carmen, 578 F. Supp. 951 (1983), on the ground that they were "tainted" by exercise of the unconstitutional legislative veto.

The current set of regulations was published as a proposed rulemaking on March 29, 1985, 50 Fed. Reg. 12575. These regulations were published without substantive change as a final rule on February 28, 1986, 51 Fed. Reg. 7228, and were submitted to the Congress on February 26, 1986. They are to become effective on June 26, 1986. The regulations are to be codified as 36 C.F.R. Part 1275; the description hereafter refers to the C.F.R. sections.

The regulations provide in 36 C.F.R. § 1275.42(a) for initial archival processing of the Nixon materials with priority given to segregating private or personal materials and transferring them to their owners. The Archivist will then open for public access all materials which are neither restricted pursuant to § 1275.50 or § 1275.52 of the regulations nor subject to outstanding claims of persons seeking such restrictions. The restricted categories contained in §§ 1275.50 and 1275.52 include those historical materials: for which the Archivist is in the process of reviewing or has determined under 36 C.F.R. § 1275.44 the validity of a claim of privilege or need to protect the right to a fair trial; whose release would violate a Federal statute or would constitute a clearly unwarranted invasion of personal privacy or libel of a living person; or which are subject to classification in the interest of national defense or foreign policy. See 36 C.F.R. §§ 1275.50(a)(1)-(4); 1275.50(b); and

1275.52(a). Additional restricted categories are provided for non-"Watergate" historical materials. See 36 C.F.R. § 1275.52(b).

After segregation of materials covered by the restricted categories, the remaining materials would be opened for public access on the basis of "integral file segments" covering a complete unit for purposes of historical research. At least 30 days before an integral file segment is opened, the Archivist would publish notice of the proposed opening in the Federal Register and would also provide individual notice to the incumbent President and to former President Nixon, among other persons. 36 C.F.R. § 1275.42(b). With respect to privilege claims, the regulations provide in section 1275.44(a):

> "Within 30 days following publication of the notice prescribed in § 1275.42(b), any person claiming a legal or constitutional right or privilege which would prevent or limit public access to any of the materials shall notify the Archivist in writing of the claimed right or privilege and the specific materials to which it relates. Unless the claim states that particular materials are private or personal (see paragraph (d) of this section), the Archivist will notify the claimant by certified mail, return receipt requested, of his decision regarding public access to the pertinent materials. If that decision is adverse to the claimant, the Archivist will refrain from providing public access to the pertinent materials for at least 30 calendar days from receipt by the claimant of such notice."

On July 11, 1985, the National Archives had submitted the regulations to the Office of Management and Budget (OMB) for final review pursuant to Executive Order No. 12291, 46 Fed. Reg. 13193 (1981), 5 U.S.C. § 601 note (1982). By letter dated February 21, 1986, Mr. Robert P. Bedell, Deputy Administrator of OMB's Office of Information and Regulatory Affairs, informed the Acting Archivist that "we have concluded our review and believe that the rule as submitted for our review, and as interpreted in the enclosed memorandum from the Office of Legal Counsel in the Department of Justice, is consistent with Executive Order No. 12291." Mr. Bedell's letter enclosed

a 30-page memorandum to him dated February 18, 1986, signed by Mr. Charles J. Cooper, Assistant Attorney General for the Office of Legal Counsel (OLC), captioned "Nixon Papers Regulations."

The OLC opinion recites the reasons why it was requested and its ultimate finding as follows:

> "You have asked that this Office review the proposed regulations to determine whether they meet the statutory mandate of PRMPA [the Presidential Recordings and Materials Preservation Act] to 'protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials.' As we discuss below, we believe the proposed regulations are adequate to meet that standard, so long as they are interpreted and administered as set forth in this opinion." OLC opinion at page 1.

In accordance with the above mandate, the opinion's analysis "focuses primarily on whether the proposed regulations provide sufficient protection for documents covered by executive privilege." Id. at 18. The opinion draws two basic conclusions on this point. First, it holds that the Archivist is required to accept any claim of executive privilege with respect to the Nixon materials that might be asserted by the incumbent President. Second, it holds that the Archivist also is bound to accept any claim of executive privilege over the materials asserted by former President Nixon.

The OLC opinion recognizes that the regulations provide for the Archivist to review and make administrative decisions concerning executive privilege claims but concludes:

> "Needless to say, if this provision applied literally to claims of the incumbent President -- that is, if the Archivist could deny an incumbent President's claim of executive privilege, thereby forcing the President to test the Archivist's decision in court -- it would be an unconstitutional infringement

> on the President's power. We believe, however, that this provision need not and should not be read to allow the Archivist to sit in judgment on an incumbent President's claim of executive privilege. On the contrary, we believe that the Archivist, as an officer of the Executive Branch, is legally bound to respect such claims." Id. at 19.

The opinion goes on to state that this legal conclusion does not necessitate any revision to the regulations:

> "* * * the President's authority to supervise and control the actions of his subordinate officers is implicit in any regulations implementing statutory or constitutional authority. It would be * * * extraordinary for the regulations * * * to recite explicitly that the Archivist is bound by the incumbent President's assertions of executive privilege. The ability of the incumbent President to assert the privilege, and the duty of the Archivist to execute the President's decisions, must be regarded as implicit in the Archivist's responsibility under the regulations." Id. at 24.

The opinion next turns to the question of how the Archivist should respond to an assertion of executive privilege by Mr. Nixon. By way of an analytical framework, the opinion suggests that:

> "Since the Archivist, as previously noted, is an Executive Branch official subject to the authority of the incumbent President, the question really is how the incumbent President should properly treat a claim of executive privilege asserted by a predecessor." Id. at 24-25.

The opinion answers this question as follows:

> "The Court's conclusion and reasoning in Nixon v. Administrator strongly indicate, in our view, that an incumbent President should

> respect a former President's claim of executive privilege even if the incumbent either (a) would not have personally invoked the privilege under the circumstances or (b) does not believe that the documents fall within the scope of the privilege. A former President's privilege would be of little value if it were dependent upon the ratification of his successors. Moreover, we believe that it would be inconsistent with the rationale underlying the former President's privilege for the incumbent to sit as judge of the validity of a predecessor's claim. * * * Accordingly, we believe that, as a general matter, an incumbent President should respect a former President's claim of executive privilege without judging the validity of the claim. Any judgment regarding such a claim should be left to the judiciary in litigation between the former President and parties seeking disclosure. Only if such disputes are resolved by the judiciary will the integrity of the privilege be preserved and the potential for an appearance of impropriety be avoided." Id. at 25-26.

The only exception which the opinion recognizes to this general principle of deference is when the incumbent believes that the discharge of his constitutional duties demands the release of information over a former President's claim of privilege. The opinion cautions that "[t]his situation, however, should not be confused with situations involving only a generalized public interest in disclosure." Id. at 26.

Summarizing the opinion's conclusions on the two issues discussed above it states:

> "* * * just as we believe, for the reasons previously explained, that the Archivist must and will honor any claim of executive privilege asserted by an incumbent President, we believe that the Archivist must and will treat any claim by a former President in the manner outlined in this opinion." Id.

Thus, the OLC opinion requires the Archivist to accept without challenge any claim of executive privilege that former President Nixon may assert, even if the Archivist does not believe

that the documents fall within the scope of the privilege and regardless of any generalized public interest in disclosure of the documents.

II. QUESTIONS AND ANSWERS

Against this background, we turn to the specific questions posed regarding the OLC opinion.

QUESTION 1: Is the OLC opinion binding on the Archives? What is the difference between an opinion of the Office of Legal Counsel and an opinion of the Attorney General in this regard?

ANSWER: Archives officials testified at an April 29 congressional hearing on this subject[2/] that they are "bound" by the OLC opinion because OMB's clearance of their regulations was conditioned upon compliance with the OLC opinion and because the Justice Department could control their position on this issue in litigation. While the OLC opinion does not have the "binding" effect of a formal Attorney General opinion, we believe that the Archives officials' reaction is correct as a practical matter. We also believe, however, that the Archivist cannot legally implement the OLC opinion without changing his regulations. See answer to question 2.

ANALYSIS: The Attorney General regards his formal opinions as having binding effect within the Executive Branch. See, e.g., 42 Op. Att'y. Gen. 405, 415-416 (1969); 38 Op. Att'y Gen. 176 (1935); see also, Smith v. Jackson, 241 F. 747, 773 (5th Cir. 1917), aff'd., 246 U.S. 388 (1918), quoting with approval the statement in an Attorney General opinion that "administrative officers should regard [such opinions] as law until withdrawn by the Attorney General or overruled by the courts * * *."

An OLC opinion does not have the same status. Under 28 C.F.R. § 0.25(a) (1985), OLC has authority only to

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2/ Hearing before the Government Information, Justice, and Agriculture Subcommittee of the House Committee on Government Operations, Review of Nixon Presidential Materials Access Regulations (April 29, 1986).

"prepar[e]" the formal opinions of the Attorney General, but it can "rende[r] informal opinions and legal advice to the various agencies of the Government * * *." Since the opinion in this matter was issued over the signature of the Assistant Attorney General for OLC, it appears to be an "informal opinion."

Nevertheless, while this opinion was not requested by or addressed to the Archivist, it purports to say how the Archivist must act in order to comply with the law. Pursuant to 28 U.S.C. § 516 (1982), the Justice Department would represent the Archivist in any litigation over the issues addressed in the OLC opinion. Therefore, the Department ultimately controls the Archivist's legal position on these issues. Since the OLC opinion is written in mandatory terms, clearly it was meant to affect the Archivist's actions. We believe it is reasonable for the Archivist to conclude that the Justice Department would not support him in litigation if he acted contrary to the opinion.

We also can appreciate why the Archives officials regard the OLC opinion as binding on them through the clearance granted by OMB under Executive Order No. 12291. Mr. Bedell's February 21 letter advised the Acting Archivist that the final regulations "as interpreted in" the OLC opinion were "consistent with Executive Order No. 12291." This language certainly appears to condition OMB's clearance on the Archivist's adherence to the OLC opinion. We note, however, that Mr. Bedell suggested at the April 29 congressional hearing[3]/ that this was not the intent of his letter.

QUESTION 2: To what extent is the OLC opinion inconsistent with the final regulations? What is the significance of these differences?

ANSWER: We believe that the OLC opinion is fundamentally inconsistent with the final regulations, and that this inconsistency precludes the Archivist from following the opinion under the current regulations.

ANALYSIS: As discussed previously, the regulations clearly provide for the Archivist to review executive privilege claims and to make administrative determinations

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3/ See note 2, supra.

(subject to judicial review) on the validity of such claims. Consistent with the plain language of the regulations, Archives officials have advised us that this was, in fact, how they planned to handle executive privilege claims before they received the OLC opinion. Thus, adherence to the opinion would effect a fundamental departure from the process called for by the regulations without actually amending them. We believe this is untenable.

The OLC opinion recognizes that the regulations on their face are inconsistent with its view that the Archivist cannot make administrative determinations on executive privilege claims. However, it asserts that the authority of an incumbent President to direct the Archivist's actions in response to the incumbent's assertion of privilege can be read into the regulations. We believe that the issues of whether the Archivist would be bound to accept any assertion of executive privilege by the incumbent President and whether such a result is implied in the current regulations are largely academic. An incumbent President has never asserted executive privilege with regard to the Nixon materials and we suspect that this is not likely to occur in the future.

The real issues, in our view, relate to the OLC opinion's conclusion that the Archivist must defer to any executive privilege claim asserted by Mr. Nixon. We see no way in which this conclusion can be read into the current regulations. The opinion's theory of incorporating an incumbent President's power to direct the Archivist into the regulations obviously does not apply to a former President, who has no authority over the Archivist. Moreover, the opinion fails to offer an alternate theory, or indeed any explanation, of how its conclusion that the Archivist is obliged to accept Mr. Nixon's claims can be reconciled with the regulations as now written.

It is a settled principle of administrative law that agencies are bound to follow their own regulations. See, e.g., Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); Morton v. Ruiz, 415 U.S. 199, 235 (1974); Local 1219, American Federation of Government Employees v. Donovan, 683 F.2d 511, 515-516 (D.C. Cir. 1982). Even if one accepts that the Archivist could have adopted a policy of deferring to all executive privilege claims asserted by Mr. Nixon, clearly he has not done so in these regulations. In our view, therefore, the Archivist is not free

under the current regulations to adopt the OLC opinion's approach to the treatment of executive privilege claims by Mr. Nixon. In any event, as discussed in response to question 7, we conclude that the approach advocated by OLC is inconsistent with the Archivist's statutory responsibilities and thus cannot be adopted by him.

QUESTION 3: How does the OLC opinion compare with practice and law regarding the handling of the presidential materials of other Administrations, particularly with regard to executive privilege claims?

ANSWER: Prior to enactment of the Presidential Records Act of 1978, presidential materials were regarded as the personal property of a former President. Former Presidents could dictate the terms and conditions governing access to their materials, thereby exercising control over potential executive privilege matters equivalent to that accorded former President Nixon by the OLC opinion.

The Presidential Records Act of 1978, which will first apply to the materials of President Reagan, makes significant changes in the past practice. The Act will enable a former President to exercise control over public access to materials within the scope of executive privilege for up to 12 years. Thereafter, the former President generally would have to bring suit to restrict public access to his presidential materials on grounds of executive privilege. Essentially, the Presidential Records Act will afford future ex-Presidents less control over executive privilege claims than the OLC opinion would grant Mr. Nixon in two ways. First, a former President's control period under the Act is limited to 12 years. There appears to be no time limit on Mr. Nixon's right to control the Archivist's disposition of his executive privilege claims under the OLC opinion. Second, even within the Act's 12-year control period, the Archivist, rather than the former President, is to make an initial administrative determination on whether particular documents are within the scope of executive privilege. By contrast, the OLC opinion requires the Archivist to accept Mr. Nixon's executive privilege claims even if the Archivist believes that the documents in question are not subject to the privilege.

ANALYSIS: As GSA pointed out in its initial report to Congress under section 104(a) of the 1974 Act, all materials generated and received by a President traditionally have been

treated as his own property, to do with as he wished. Thus, the former Presidents, their heirs or representatives "exerted sole and direct control over the preservation or destruction, release or restriction, location, and use of their Presidential materials."[4/] Nevertheless, the consistent practice going back to Franklin Roosevelt has been for former Presidents to donate their papers to the Government under terms which permit the papers to be made public subject to certain restrictions. As described in the GSA report, the restrictions on public access imposed by these former Presidents have been fairly consistent and are generally similar to the restriction categories in the regulations dealing with Mr. Nixon's materials.[5/] The same observations apply in the case of former Presidents Ford and Carter. The donation agreement of former President Carter, dated January 31, 1981, is illustrative. It recites, at page 2, that:

> "This conveyance does not affect the rights or obligations that I may have as President or former President, or that a President in office may have, to assert and enforce any applicable privilege in respect to confidential portions of the material conveyed."

The Carter agreement contains restrictions on public access, including a restriction on--

> "Confidential communications requesting or submitting advice between the President and his advisers or between such advisers, whether or not such advisers hold or held an official position with the Federal government, as well as any other confidential communications made by or to the President." Annex at page 3.

The restrictions on public access in former President Carter's agreement generally expire on January 20, 2001, or one year after his death, whichever is later. Annex at page 4. Former President Ford's donation agreement, dated

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4/ General Services Administration, Report to Congress on Title I, Presidential Recordings and Materials Preservation Act, P.L. 93-526 (March 1975) (hereafter GSA Report), at page 1.

5/ GSA Report at C-1 and C-2.

December 13, 1976, contains provisions almost identical to those of the Carter agreement. The restrictions on public access in the Ford agreement generally do not extend beyond January 20, 1990.

Since the former Presidents exercised control over their materials, they did not need to assert executive privilege in order to restrict public access. Rather, a general restriction against release of "confidential communications," such as the one contained in the Carter agreement, was effective for this purpose. See in this regard, 44 U.S.C. § 2111 and 2112(c) (1982). Moreover, the former President could control application of such a general restriction to particular documents. The GSA Report notes that several former Presidents established review or screening committees to perform this function.6/ In sum, former Presidents exercised essentially the same plenary control over the administrative disposition of potential "executive privilege" claims as the OLC opinion would provide for Mr. Nixon.

The Presidential Records Act of 1978, Public Law 95-591, 92 Stat. 2523 (November 4, 1978), made fundamental changes in the future treatment of presidential materials, to be effective for the materials of the Reagan Presidency. See Public Law No. 95-591, § 3, 92 Stat. 2528. This Act added a new chapter 22 to title 44, United States Code (1982). It provides that the United States shall retain complete ownership, possession, and control of presidential records. 44 U.S.C. § 2202. Upon the conclusion of a President's last term of office the Archivist is to assume responsibility for the custody, control, preservation of, and access to such presidential records. 44 U.S.C. § 2203(f)(1). The Archivist is under an affirmative duty to make such records available to the public as rapidly and completely as possible, consistent with the other provisions of the Act. Id.

Under 44 U.S.C. § 2204, the outgoing President can specify a time period, not to exceed 12 years, during which access may be restricted for certain categories of information, including "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers * * *." The Archivist must honor

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6/ GSA Report at page B-5.

such restrictions until the earliest of the following events: the former President waives the restriction; the restriction period specified by the former President expires; or upon a determination by the Archivist that a record has been placed in the public domain through publication by the former President or his agents. 44 U.S.C. § 2204(b)(1). During the restriction period, the Archivist is to determine, after consultation with the former President, whether a particular record or portion thereof qualifies for restriction. 44 U.S.C. § 2204(b)(3). Under 44 U.S.C. § 2204(e), a former President may seek judicial review of a determination by the Archivist that he believes violates his rights or privileges.

Once the restriction period no longer applies, presidential records are subject to disclosure under the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982), except that the "deliberative process" exemption from disclosure in 5 U.S.C. § 552(b)(5) does not apply. See 44 U.S.C. § 2204(c)(1). The Presidential Records Act thus allows for a period of up to 12 years in which a former President may restrict his records on what would amount to executive privilege grounds. The congressional intent is that once this period expires, a former President could only pursue an executive privilege claim through a judicial action initiated to prevent disclosure. See 124 Cong. Rec. 36844 (1978) (remarks of Senator Percy).

As indicated above, the Presidential Records Act provides for considerable administrative deference with respect to executive privilege claims by future ex-Presidents, but only for a period of up to 12 years. After expiration of this period, the only statutory mechanism for restricting access to presidential materials is a determination by the Archivist to withhold certain records under the FOIA. Since the deliberative process exemption does not apply, denial of an FOIA request could not be based on a generalized interest in preserving the confidentiality of presidential communications. Executive privilege claims could still be asserted in two non-statutory ways. The former President could bring suit against the Archivist alleging a violation of his constitutional right of executive privilege. Also, the legislative history of the Act indicates a recognition that the incumbent President could assert a constitutionally based executive privilege claim over the records of a former President. See 124 Cong. Rec. 34895 (1978) (remarks of Representative Preyer).

The Presidential Records Act thus affords a future ex-President much less deference in terms of a time-line than the open-ended period of deference the OLC opinion would afford to Mr. Nixon. Also, unlike the approach taken in the OLC opinion, the Presidential Records Act does not accord absolute deference to a former President even within the period of restricted access. Instead, the Archivist is to make a formal administrative determination (subject to judicial challenge by the former President) on whether particular records fit a restricted category. For example, the Archivist could review and decide whether certain records qualify as confidential communications under 44 U.S.C. § 2204(a)(5), or whether a former President has waived the restriction by his own use of a record, as provided in 44 U.S.C. § 2204(b)(1)(B).

QUESTION 4: Under the OLC opinion, Mr. Nixon's claims of executive privilege with regard to materials about to be made available to the public are not subject to review by the Archivist. What would happen if such a claim were to be made? Could the Archivist challenge the claim in court? Could anyone else? What is the Archivist's role in reviewing presidential papers as contemplated by the opinion?

ANSWER: Under the OLC opinion, the Archivist has no review role once Mr. Nixon has asserted a claim of executive privilege; he could not challenge Mr. Nixon's claim administratively or in court. A party seeking access to materials in connection with a pending judicial proceeding could challenge Mr. Nixon's claim in that proceeding. While it is less clear that a party seeking access for general purposes could challenge such a claim, there probably would be some judicial recourse.

ANALYSIS: The OLC opinion, as we read it, does not affect the Archivist's review process up to the point at which notice is given of the proposed opening to public access of an integral file segment of the Nixon materials. However, should Mr. Nixon respond to the notice by asserting executive privilege with regard to any or all of the documents contained in the file segment, the Archivist has no role left except to assure continued withholding of the documents from public access. Thus, under the approach taken in the OLC opinion, an assertion of executive privilege by Mr. Nixon effectively creates a new category of restricted materials similar to the

categories specified in sections 1275.50(a) and 1275.52(b) of the regulations. The OLC opinion clearly means to preclude the Archivist from mounting any challenge to a claim of executive privilege in any forum. Other parties, however, may be able to contest a claim of executive privilege by Mr. Nixon as discussed below.

It seems clear that executive privilege claims could be challenged by parties seeking to obtain Nixon presidential materials under the so-called "special access" provision of the 1974 Act. This provision, contained in section 102(b), makes the Nixon materials available, subject to any rights, defenses or claims of privilege, "for use in any judicial proceeding or otherwise subject to court subpena or other legal process."[7/] Presumably the forum for such a challenge would be the pending judicial proceeding for which special access was sought.

It is less clear what judicial review would be available to parties seeking access for historical research or a generalized interest in disclosure. It appears that most materials potentially subject to executive privilege claims would not be Federal agency records subject to disclosure under the FOIA. Cf., Ricchio v. Kline, 773 F.2d 1389 (D.C. Cir. 1985), and section 1275.70 of the Archivist's regulations. The Ricchio court affirmed the dismissal of an FOIA action seeking access to transcripts of the Nixon tapes, holding:

> "In the Materials Act [the 1974 Act] Congress provided a comprehensive, carefully tailored and detailed procedure designed to protect both the interest of the public in obtaining disclosure of President Nixon's papers and of President Nixon in protecting the confidentiality of Presidential conversations and deliberations. * * * We conclude that the proper method by which the appellant

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7/ The GSA had issued special access regulations to implement section 102(b). See our response to question 6 for a discussion of prior special access cases under these regulations. Such access would now be covered by section 1275.34 of the Archivist's current regulations.

> Ricchio may seek disclosure of the Watergate Force transcripts of the Nixon tapes is by proceeding under the Materials Act and that she cannot proceed under the [Freedom of] Information Act." 773 F.2d at 1395.

Thus, while the language of section 105(a) of the Act does not expressly grant jurisdiction for this purpose, it might prove broad enough to accommodate an action by a private individual seeking access to the Nixon materials. In the alternative, it is possible that a party seeking access to Nixon materials over a claim of executive privilege might appeal the Archivist's refusal to make such records available under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1982). See in this regard, American Friends Service Committee v. Webster, 720 F.2d 29 (D.C. Cir. 1983).

In sum, it seems to us likely that a party seeking access to Nixon materials could bring suit to challenge a claim of executive privilege. At the same time, it is uncertain precisely what the forum would be or what standard of review would apply.

QUESTION 5: The OLC opinion seems to contend that an incumbent president may assert a claim of executive privilege with respect to the Nixon materials. Is there any precedent for such a claim?

ANSWER: While an incumbent President would have the constitutional right to assert a claim of executive privilege with respect to the Nixon materials, it is our understanding that this has never happened in the almost 12 years since Mr. Nixon left office.

QUESTION 6: The Archivist's regulations comprise the sixth set of public access regulations under the 1974 Act. This particular set was published as proposed regulations on March 29, 1985. At what points in the tortuous history of the promulgation of these regulations has the Archives, the Justice Department or OMB taken the position that Mr. Nixon or a successor President could make a claim of executive privilege covering these materials that could not be reviewed by the Archivist? At what points have the Archives, the Justice Department or OMB taken the opposite position? Has either Justice or OMB previously questioned the basic structure of the regulations?

ANSWER: It is our understanding that the 1986 OLC opinion represents the first instance in which any agency or party has taken the position that Mr. Nixon or a successor President could make a claim of executive privilege that could not be reviewed by the Archivist. The GSA and the Archives have consistently taken the opposite position with reference to such claims by Mr. Nixon, at times with the support of the Justice Department. As far as we can determine, OMB has never previously taken a position on this issue or on any issue relating to the basic structure of the regulations. The Justice Department at various times has raised questions about particular provisions of the regulations but has never before questioned their basic structure.

ANALYSIS: The first set of proposed regulations under the 1974 Act, submitted by GSA to Congress in March 1975, adopted the basic approach that the Archivist (or at that time the Administrator of GSA) would review and make final administrative determinations concerning executive privilege claims. The GSA Report states, at page B-1:

> "Under this Act, the Government, rather than a former President, his heirs or close associates, will make decisions regarding access to a President's materials. This fact, coupled with the need to make available the full truth about Watergate, makes the establishment of an objective system for reviewing these materials of primary importance."

The initial regulations provided that no integral file segment would be processed and opened for public access until 90 days following the effective date of the regulations. During this 90-day period the GSA Administrator would receive, evaluate and decide claims of privilege. The GSA Report, at pages G-31 and 32, describes this provision of the regulations as follows:

> "* * * this provision reflects an administrative procedure in which the Administrator is committed to an affirmative role in considering and rendering the final administrative determination on the claim. Upon receipt of a claim, the Administrator will require the immediate segregation and examination of the specified materials so that he might consult

> with other Federal agencies, including the Department of Justice, to evaluate the legal validity of the claim. The Administrator will then notify the claimant of his decision, which is the final administrative determination on the claim.
>
> "When that determination is adverse to the claimant, the Administrator will prohibit public access to the pertinent materials for at least 30 days from the claimant's receipt of the Administrator's decision. During this period, the claimant has an opportunity to pursue whatever additional remedies, presumably judicial review, that may be available to prevent public access before his alleged right or privilege is violated. Absent judicial restraint, pertinent materials that have been processed will be open for public access at the end of the 30-day period."

While the subsequent versions of the regulations have differed in some respects, all are consistent with the basic approach reflected in the March 1975 version under which executive privilege claims would be reviewed and decided administratively.

Moreover, the Archivist has on several occasions made administrative decisions concerning claims of executive privilege asserted by former President Nixon in the context of "special access" cases where the Nixon materials were sought in connection with pending litigation. We have reviewed records pertaining to three such cases during the period 1978 to 1983 in which the Archivist conducted detailed research and evaluations in response to claims of executive privilege asserted by Mr. Nixon with respect to many documents for which discovery was sought. Mr. Nixon's claims of executive privilege were sustained in some instances but were rejected in many others.

In the first two cases, considered by the Archivist in 1978 and 1979,[8]/ Mr. Nixon asserted executive privilege with respect to 41 documents.[9]/ The Archivist accepted Mr. Nixon's claim for 12 documents and rejected his claim for 21 documents. His claims as to the remaining 8 documents were accepted in part and rejected in part. The Archivist generally upheld Mr. Nixon's claim of executive privilege where the documents involved confidential communications reflecting advice to the President and had not been subject to prior disclosure. In those cases where executive privilege was rejected, this was almost always because the Archivist determined that the documents or portions thereof involved only factual information; had already been released by Federal agencies pursuant to the FOIA; had been discussed and quoted in congressional hearings and reports; or had already been the subject of judicial rulings denying a claim of privilege by the Government.

In the third case,[10]/ considered in 1983, the Archivist rejected all of Mr. Nixon's executive privilege claims, which covered approximately 270 documents. In a letter to Mr. Nixon's attorney dated August 11, 1983, the Archivist

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[8]/ The litigation involved was A. Ernest Fitzgerald v. Alexander P. Butterfield, et al., Civ. No. 74-178, U.S.D.C. D.D.C., and Cities Services Helix, Inc. v. United States, and National Helium Corp. v. United States, Nos. 138-75 and 158-75, Ct. Cl.

[9]/ This figure and the following figures include only documents as to which Mr. Nixon opposed disclosure based at least in part on executive privilege. He objected to disclosure of additional documents on other grounds. Also, the figures may include some duplication due to the same documents appearing in more than one file.

[10]/ This case involved litigation identified only as Barr v. Palmby and Williams v. Continental Grain Co., which apparently concerned the so-called "Russian grain deal." We understand that the litigation was settled before production of any of the Nixon materials was required.

noted that he had been "provided very little in the way of justification or rationale as to why the claim [of executive privilege] should be accepted for all the documents at issue." The Archivist went on to point out, among other things, that many of the documents were widely available and whatever need for confidentiality may once have existed had eroded over time. He concluded, in summary, that "the argument for disclosure is easily preponderant in the present case."

It is our understanding that the Archivist consulted with the Justice Department in the cases discussed above and that Justice supported the approach taken by the Archivist with respect to the executive privilege determinations.

QUESTION 7: How does the OLC opinion comport with congressional intent that the 1974 Act "provide the public with the 'full truth,' at the earliest reasonable date, of the abuses of govenmental power" of the Watergate period? (See S. Rept. 94-368, 121 Cong. Rec. 28610 (1975).)

ANSWER: We do not believe that the OLC opinion can be reconciled with the congressional intent underlying the 1974 Act or, indeed, with the Archivist's responsibilities under the terms of that Act. In our view, the rationale of the opinion also suggests that OLC may not allow the Archivist to carry out fully his responsibilities under the Presidential Records Act of 1978.

ANALYSIS: OLC contends that the Archivist's duty when confronted with an executive privilege claim by Mr. Nixon must be analyzed in terms of how an incumbent President should respond to such a claim by a former President. It concludes that, generally, the incumbent President should accept the claim without challenge even if he does not believe that executive privilege applies. Therefore, the Archivist likewise must accept any executive privilege claim asserted by Mr. Nixon.

We believe that this analytical framework is fundamentally wrong. The Archivist does not stand in the shoes of the incumbent President in responding to Mr. Nixon's claims, nor does he operate in a vacuum. Instead, he must address such claims as an officer of the United States charged with specific statutory responsibilities as defined by the mandates of the 1974 Act. This, of course, requires consideration of not

just the need to protect Mr. Nixon's opportunity to assert executive privilege, but also the needs specified in section 104(a)(1) and (6) of the Act "to provide the public with the full truth * * * of * * * 'Watergate'" and "to provide public access to those materials which have general historical significance * * *."

The OLC opinion cannot withstand scrutiny in this context. We do not understand how the opinion's rule of automatic deference to any claim of executive privilege is required to protect Mr. Nixon's "opportunity to assert" such a claim--which is all the statute requires--even if this statutory need is viewed in isolation. The approach taken in the regulations of withholding disclosure of documents for which the Archivist rejects such a claim in order to enable Mr. Nixon to obtain judicial review seems to meet this need fully. Moreover, the OLC opinion does not seek in any way to accommodate the public access needs that are also specified in the statute.

The lack of any effort to balance the competing needs in the statute is most clearly illustrated by the opinion's assertion that the Archivist must accept a claim of privilege by Mr. Nixon even if he "does not believe that the documents fall within the scope of the privilege." This is patently inconsistent with the statute and could seriously undercut its operation. While evaluation of executive privilege claims can be a difficult task, there are some standards to apply. In Nixon v. Administrator, the Court reaffirmed that the scope of the privilege is "limited to communications 'in performance of [a President's] responsibilities * * * of his office' * * * and made 'in the process of shaping policies and making decisions' * * *." 425 U.S. at 449. The Court also noted that "[t]he expectation of the confidentiality of executive communications * * * has always been limited and subject to erosion over time after an administration leaves office." Id. at 451.

The statute envisions that the Archivist will apply the expertise of his office to research and evaluate the Nixon materials from these perspectives. This is precisely what the regulations contemplate and, as discussed in response to question 6, what the Archivist has done with respect to Mr. Nixon's past executive privilege claims. The Archivist has sustained some of these claims, particularly in the years shortly after Mr. Nixon left office. However, he has also

rejected many, including numerous claims asserted over documents which clearly did not fall within the scope of the privilege. The OLC opinion would put an end to this process.

Finally, we believe that the OLC opinion on the Nixon materials does not bode well for implementation of the Presidential Records Act of 1978 with reference to the materials of future ex-Presidents. The foundation for the OLC opinion's approach to the Archivist's duties under the 1974 Act is its conclusion that an incumbent President "should" defer to a former President's claim of executive privilege. It is notable that OLC does not base this view on any constitutional or statutory mandate. Instead, this seems to be essentially a statement of OLC's policy view on how executive privilege claims asserted by former Presidents should be handled.

The OLC opinion finds this view to be "strongly indicate[d]" by the Supreme Court's conclusion and reasoning in Nixon v. Administrator. As discussed in more detail previously,[11/] the OLC opinion notes that a former President's privilege would be of little value if it were dependent on ratification by the incumbent, who might not be sensitive to the need to protect the confidentiality of the former President's communications or who might even be antagonistic to the former President and seek political advantage in the disclosure of his communications. We agree that these considerations underlie the Supreme Court's conclusion in Nixon v. Administrator that a former President must be granted a right to assert executive privilege independent of the incumbent President. However, these considerations do not support the conclusion that the incumbent should defer to claims of privilege asserted by his predecessors where the incumbent does not believe that the claim of privilege is well founded. On the contrary, the Court in Nixon v. Administrator noted that Presidents Ford and Carter did not support Mr. Nixon's executive privilege claim as to the 1974 Act, and observed that their lack of support detracted from the weight of Mr. Nixon's claim because--

> "* * * it must be presumed that the incumbent President is vitally concerned with and in the best position to assess the

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11/ See pages 7-8, supra.

> present and future needs of the Executive Branch, and to support invocation of the privilege accordingly." 433 U.S. at 449.

Therefore, we read Nixon v. Administrator as indicating that the incumbent President should exercise his own judgment, supporting a former President's claim of privilege only if he considers it to be justified. Clearly, lack of support by the incumbent President does not, under the rule of Nixon v. Administrator, prevent the former President from pursuing his claim in the courts.

In any event, we do not understand OLC's willingness to impose its viewpoint on the Archivist virtually without regard to the statutory framework in which the Archivist must address executive privilege claims and, by its own admission, without regard to the merits of the claim. In effect, the OLC opinion treats executive privilege as a concept which knows no temporal limits and is subject to review and evaluation only by the courts.

We see no reason to believe that OLC would depart from this approach in advising the Archivist on how to carry out his functions under the Presidential Records Act. As noted previously, this Act requires the Archivist to determine the applicability of confidentiality restrictions to particular documents even within the initial restriction period. Once the restriction period has expired--not later than 12 years after a President leaves office--the Act virtually requires the Archivist to reject (subject to possible judicial challenge on constitutional grounds) executive privilege claims which are based only on a generalized interest in the confidentiality of presidential communications. The Archivist could not carry out either of these responsibilities if constrained by the rule established in the OLC opinion in this case.

QUESTION 8: Were there any communications between Mr. Nixon, his agents or his former subordinates and the Archives, OMB or the Justice Department with regard to the final regulations?

ANSWER: The Archives received formal written comments in response to its proposed rulemaking from an attorney representing Mr. Nixon and an attorney representing Dr. Henry Kissinger. From the information available to us it

appears that there were no other direct communications on the regulations between Mr. Nixon, his agents or his former subordinates and the Archives, OMB or OLC. However, it has been reported in the press that Mr. Nixon's attorneys met with Justice Department officials outside of OLC and that these officials later met with Mr. Cooper of OLC.