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EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET

OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

DATE:

TO: KEN CRIBB

August 13, 1985

FROM: MIKE H

RALPH TARR HAS DIS-  
CUSSED THIS WITH THE  
A.G. I NEED TO  
DISCUSS W/YOU.

M.

OMB FORM 38  
Rev. Aug 73

involved, I believe it  
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The final regulations are here for E.O. 12291 review. We took no action on the NPRM, and gave no adverse comments during the comment period. (The prior regulations had been revoked in response to a December 1983 District Court decision invalidating them under Chadha -- legislative vetoes of the prior rules had been exercised on three separate occasions.)

Given Jack Brooks' passionate stance both on Nixon (you will recall that he was a moving force on the Watergate Committee) and on the "independence" of the Archives, as well as the possibility that he and others may allege White House involvement in a continuing Nixon "cover up," I am obliged to alert you to possible political concerns over any a meeting.

Nevertheless, unless you disagree I will go ahead with an exploratory meeting with Archives personnel, because of several serious substantive problems (some of constitutional proportions) with these rules:

o Adequacy of review time.

Only 30 days are provided for review before public disclosure. Notice of disclosure is given only to the President, former President Nixon, the staff member whose files are to be disclosed, and others mentioned in such



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August 13, 1985

MEMORANDUM

TO: Joe Wright  
Dennis Thomas

FROM: Mike Horowitz **MW**

SUBJECT: Nixon Papers Regulations

Notwithstanding the sensitivities involved, I believe it essential to set up an early meeting with White House Counsel (Hauser & Roberts; Fielding is disqualified), Justice (Tarr), State (Sofaer) and representatives of the National Archives and Presidential Libraries, regarding the final regulations to implement the Presidential Recordings and Materials Preservation Act (P.L. 93-526) ("Act"). (Preliminary discussions have been held with all but the latter.)

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files who are on a registry maintained by the Archivist. Given the volume of the files already reviewed and, thus, imminently releasable -- 1.5 million pages occupying 628 cubic feet, to which there is no index or document locator system -- both former Nixon White House employees and the incumbent President will have difficulty reviewing the papers for purposes of asserting claims of privilege.

o Executive Privilege.

Material possibly privileged on deliberative process or other grounds has not been segregated. Initial screening (by archivists who may not be expert on the historical period or the relevant issues) only divides the material into six other specified categories (e.g., classified, law enforcement investigatory, trade secrets, privacy.) Significantly, any claim of privilege appears to be subject to final determination by the Archivist. Thus, an incumbent President's claim of executive privilege could be subject to final review by the Archivist, an executive official who is himself subject to Presidential control. Perhaps even more importantly, due in part to the low level of initial review, White House or Cabinet documents that (as often occurs) were mistakenly not classified may be inadvertently released, with potentially disastrous foreign relations/national security consequences.

o Security.

There are no copies of the files. The Archivist's proposal to provide originals to the media and public raises serious procedural and security questions; theft, alteration or destruction may be difficult to prevent under the procedures in these rules.

A meeting with the Archivist should explore whether some type of phased disclosure period should be provided to ensure adequate review opportunity to interested parties, including the Government. I understand that the Nixon people and the Archivist are on the verge of an agreement; however, we must insure that adequate Executive Branch review (for executive privilege as well as erroneous non-classification) is also safeguarded. This appears to be required by the Act itself -- which emphasizes that the regulations must take into account the need to "prevent general access ... to information relating to the Nation's security" and 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 ... materials." (The term "privilege", in fact, was added to the Act by the House Committee on Administration expressly "to recognize the legitimacy of executive privilege as stated in [U.S. v. Nixon 418 U.S. 683 (1973)].")

If an impasse is reached with the Archivist, I will of course report so that a Senior Staff decision can be made as to a final Administration position on the regulations.

cc: Ken Cribb  
Dick Hauser  
Abe Sofaer  
Ralph Tarr