

# ORIGINAL

In the  
**Supreme Court of the United States**

HENRY A. KISSINGER,

PETITIONER,

V.

REPORTERS COMMITTEE FOR FREEDOM  
OF THE PRESS, ET AL.,

RESPONDENTS.

No. 78-1088

REPORTERS COMMITTEE FOR FREEDOM  
OF THE PRESS, ET AL.,

PETITIONERS,

No. 78-1217

V.

HENRY A. KISSINGER,

RESPONDENT.

Washington, D. C.  
October 31, 1979

Pages 1 thru 72

*Hoover Reporting Co., Inc.*

*Official Reporters  
Washington, D. C.*

546-6666



## APPEARANCES:

DAVID GINSBURG, ESQ., Ginsburg, Feldman, Weil  
and Bress, 1700 Pennsylvania Avenue, N. W.,  
Washington, D. C. 20006; on behalf of the  
Petitioner Kissinger

WILLIAM A. ALSUP, ESQ., Office of the Solicitor  
General, Department of Justice, Washington,  
D. C. 20530; on behalf of the Federal parties

WILLIAM A. DOBROVIR, ESQ., 2005 L Street, N. W.,  
Washington, D. C. 20036; on behalf of the  
Military Audit Project

ROBERT M. SUSSMAN, ESQ., Covington & Burling,  
888 Sixteenth Street, N. W., Washington, D. C.  
20006; on behalf of the Reporters Committee for  
Freedom of the Press

- - -

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
DAVID GINSBURG, ESQ., on behalf of Petitioner Kissinger	4
WILLIAM A. ALSUP, ESQ., on behalf of the Federal parties	26
WILLIAM A. DOBROVIR, ESQ., on behalf of the Military Audit Project	46
ROBERT M. SUSSMAN, ESQ., on behalf of the Reporters Committee for Freedom of the Press	53
DAVID GINSBURG, ESQ., on behalf of the Petitioner Kissinger--Rebuttal	67

- - -



P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1088, Kissinger v. Reporters Committee for Freedom of the Press, et al., and the related case.

Mr. Ginsburg, you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID GINSBURG, ESQ.,

ON BEHALF OF PETITIONER KISSINGER

MR. GINSBURG: Mr. Chief Justice, and may it please the Court: I represent Dr. Henry Kissinger who is the petitioner in 1088 and the cross-petitioner in 1217.

The material facts in this case are not in dispute as it comes here on cross motions for summary judgment.

At the White House and at the State Department, Dr. Kissinger had his secretaries monitor his telephone conversations, take shorthand notes of all that was said and prepare rough typewritten summaries. The practice was specifically approved by senior department officials and by State Department policy. The purpose was to ease the administrative burdens of office by enabling Dr. Kissinger's personal aides without further briefing to implement and follow up what was said or what was agreed. They were used as work aids, and it was these follow-up actions that produced the records which are presently in the department's

files, aid memos and memorandums of telephone conversations, memorandums to the file, other documents which were circulated and filed in the normal course of business in the State Department, and these official records are voluminous.

The notes themselves were not made or kept as records. They do not have the form of records, they were never edited, they contain omissions, they are not accurate. They were never circulated outside of Dr. Kissinger's office. No one other than Dr. Kissinger and his immediate aides had access to them.

QUESTION: You are speaking now of the White House period or both?

MR. GINSBURG: Both the White House period, Mr. Chief Justice, and of the State Department, both periods, were always retained in personal files within his office, never part of either the White House files or the State Department files.

The notes reflect almost all of Dr. Kissinger's telephone conversations, regardless of content. They contain notes of both official and personal matters, some important and some, of course, inconsequential. Inter-mingling was unavoidable, given --

QUESTION: Mr. Ginsburg, how do you know there were omissions? How does anyone know there were omissions?

MR. GINSBURG: Simply by the affidavits that are

in the file in this record by those who have examined the notes, and we have the affidavits in the record in this case.

QUESTION: You mean there were some things that were said on the phone that are not in the notes, is that it?

MR. GINSBURG: Some things that were said in the notes that are said to be not accurate.

QUESTION: I know, but how about omissions? You said there are omissions.

MR. GINSBURG: And omissions.

QUESTION: So there were some telephone conversations that were not noted?

MR. GINSBURG: There were some telephone conversations that were not taken, although almost all as the affidavits in this record show, were taken.

QUESTION: Well, were these omissions deliberate or inadvertent simply because of the difficulties involved?

MR. GINSBURG: Both, Your Honor. What actually happened in this case is that some the Secretary knew, some cases that were purely personal, in the event it was a personal telephone call and no record -- a very personal telephone call and no record was made. But in the normal course every telephone call by aides, by the President,

by whoever it was, the conversation was recorded and the notes were made. These notes were reviewed by Dr. Kissinger, his affidavit is in the record to the effect that there are omissions, inaccuracies in the notes that were taken and there were other omissions.

Of course, had Dr. Kissinger known that these notes might be viewed as official agency records, he would have either put them in proper form for filing or more likely he would have discontinued the practice altogether.

Now, toward the end of his term, Dr. Kissinger decided to donate both his Harvard papers and the papers he accumulated in government service to the United States, and he chose the Library of Congress as the custodian because it had been used as a depository by many other Secretaries of State and, as the government points out, by a great many other Cabinet officers.

The donation process within the department included several steps, each of which was approved by the legal adviser, by the Assistant Secretary for Administration, by the Deputy Under Secretary for Management, and by the Director of the Department's Records Center.

QUESTION: All of them, of course, were subordinate to Dr. Kissinger when he was Secretary of State?

MR. GINSBURG: All of them were subordinates,

Your Honor, all of them, if I may point out --

QUESTION: But none of this really has anything to do with your primary argument, does it?

MR. GINSBURG: It does not, sir.

In a memorandum signed by all of these, Dr. Kissinger was advised that his personal files were freely transferable to the library under the department's regulations. Each signer of the memorandum knew that the notes were in Dr. Kissinger's personal files. The legal adviser gave Dr. Kissinger a formal written opinion confirming the previous oral advice that the notes were not State Department agency records.

QUESTION: Mr. Ginsburg, is the legal adviser an appointee of the Secretary of State or of the President?

MR. GINSBURG: He is appointed by the President and confirmed by the Senate and is a respected member of the bar of this Court.

In that opinion, the legal adviser considered the agency regulations, government practice and then analogous judicial opinions, and he concluded that "these particular papers are personal and may be retained by you when you leave office." But as a precaution to assure that the government's records were complete, the legal adviser recommended that Dr. Kissinger review and make extracts of any discussion of significant policy decisions



or actions not otherwise reflected in the official files, and this was done.

Now, Dr. Kissinger donated all of the papers subject to deeds of gift which restrict access to the collection and these restrictions were designed to protect the classified information in the notes and the other records and the privacy rights. The notes will be made available for public access after twenty-five years but only with the consent of those who participated in the conversations if they are then still living.

After the donations were publicly announced and after the notes and the other papers were transferred to the library, the Reporters Committee filed requests and the Military Audit Project filed requests with the State Department for these records. Both requests were denied. Both denials were made by persons then serving under Secretary Vance.

The grounds for denial were that the notes were not State Department agency records and that the department in any event did not have them in its custody or control. The Military Audit Project and the Reporters Committee then filed separate Freedom of Action suits against the State Department and Secretary Vance and named Dr. Kissinger and the Librarian of Congress as defendants.

On cross motions for summary judgment, the District Court held that the Freedom of Information Act did not apply to notes of the White House period but that the State Department period notes were agency records subject to the Act. The court then ordered Dr. Kissinger and the Library of Congress to return all the State Department notes to that department for processing and release under the Freedom of Information Act.

QUESTION: Was the Librarian a party to the action?

MR. GINSBURG: The Librarian was named as a party to the action, although of course he is not an agency under the Freedom of Information Act and of course neither is Dr. Kissinger as an individual. But the Court of Appeals affirmed, so that as we see it the central issue in this case is whether the Freedom of Information Act gives the Military Audit Project and the Reporters Committee a right of access to documents which the State Department has specifically determined were not its records before any requests for them were filed and records which it does not have and cannot produce.

Now, first the issue --

QUESTION: Whatever the determination of the State Department may have been, wouldn't your argument really be the same if you just eliminated that middle

language and said does the FOIA cover -- impose a duty upon the State Department not to withhold and to deliver records that it does not have?

MR. GINSBURG: I make a point simply to avoid the problem, in order to clarify the issue, Mr. Justice Stewart, that there was proper relinquishment, whatever it was.

QUESTION: Whether or not it was proper, wouldn't your argument be the same?

MR. GINSBURG: Our argument would be the same and I think that it is clear that the act does not apply in these circumstances.

QUESTION: That is what I thought your argument was.

MR. GINSBURG: But our primary submission, and this is a submission with which the government agrees --

QUESTION: Mr. Ginsburg, when an agency makes a determination before any demand is pending or when a demand is made that particular material is not an agency record, what is the review procedure that is available for that other than judicial?

MR. GINSBURG: It is the issue, Mr. Chief Justice, of course not all documents in the hands of an agency are records. They do not become records until they are filed as records. The Court was concerned in the

previous case with the definition of records. Records as we see it are simply those documents which are defined as records for purposes of the Federal Records Act which are filed by an agency as its records. So that in this case the issue was clear that they were not filed as records, they could not have been filed as records, they were always kept in the personal files within the office of Dr. Kissinger, never circulated outside of his office, never seen by anyone other than his closest aides. So when we are --

QUESTION: So these are not agency records even if they were still at the State Department?

MR. GINSBURG: Oh, it is clear that they were not records of the State Department. The State Department never treated them as records, never sought to use them as records. There was no declaration that they were records.

QUESTION: Conversely, even if they were once agency records, there is no obligation to turn -- of the State Department to turn over something that maybe once might have been agency records if it does not at the time of the request have possession and/or control of it, is that --

MR. GINSBURG: That is correct.

QUESTION: Is that also your argument?

MR. GINSBURG: I wouldn't say it is all of our

argument because I --

QUESTION: Is that also your argument?

MR. GINSBURG: Yes, that is, sir. That is --

QUESTION: Not your entire argument but that is also your argument.

MR. GINSBURG: That is also our argument, yes, sir.

QUESTION: But you would say -- my brother Stevens asked you -- that even if the records were in the possession of the State Department at this time or if these papers were in the possession of the State Department, they would not be subject to the act because they were not records.

MR. GINSBURG: That is exactly right, sir, they were not records, they were not treated as records, they didn't look like records, no one thought of them as records and no one else saw them.

QUESTION: You don't make the possession argument in your brief, do you?

MR. GINSBURG: Possession?

QUESTION: You say they aren't records subject to --

MR. GINSBURG: We are making the point that --

QUESTION: -- subject to production and hence it is irrelevant to you whether they are in possession of



the State Department or not, at least it is irrelevant for that argument.

MR. GINSBURG: Well, the possession argument comes into this argument simply because these notes are presently in the hands of the Library of Congress and to secure them is not simply a ministerial act of obtaining them from bailee. A lawsuit is required to obtain these documents.

I point out first that the --

QUESTION: And not a lawsuit under the FOIA.

MR. GINSBURG: No, sir.

QUESTION: That is your submission.

MR. GINSBURG: Absolutely.

The requesters in this case rely solely on the Freedom of Information Act and that statute, as this Court has heard repeatedly this morning, gives the District Courts jurisdiction to enjoin agencies from withholding agency records. We submit that the District Court in this case had absolutely no subject matter jurisdiction under the Freedom of Information Act to enter any order in this case.

First, neither Dr. Kissinger nor the Library of Congress is an agency under that act, and the Freedom of Information Act cannot be used to sue private citizens and adjudicate their rights, their substantive rights.

Second, the State Department, of course, is an agency but the question is whether it violated the act by withholding any agency records. The Reporters Committee and the Military Audit Project say that it did on the theory that the Freedom of Information Act imposes a duty on the department to --

QUESTION: Mr. Ginsburg, let me go back just a minute to the point you just made. Supposing that Dr. Kissinger, instead of disposing of the record to the Library of Congress, had sent them to a private warehouse where he had a warehouse where he could pick them up any time he wanted to. Isn't it conceivable under the decision in *Bannercraft* that a Freedom of Information Act court, using I believe what was referred to as its customary equitable powers, could require the warehouse owner to deliver up the records if it concluded that they otherwise satisfied the FOIA?

MR. GINSBURG: I think not, Mr. Justice Rehnquist. Under *Bannercraft*, it is very clear that the Renegotiation Board had those records, they were in the possession and control of the agency, no doubt about it, and this was an action to enjoin the continuation of the procedures in that case, and at that time the Court observed that it could, having jurisdiction, with records in the hands of the agency, the court could, of course,

exercise equitable jurisdiction and do whatever was necessary to protect that jurisdiction.

But in this case the records were never in the hands of the agency as agency records, and presently of course they are in the hands of the Library of Congress. Bannercraft I think has no application here.

QUESTION: Whatever they were, was Dr. Kissinger's gift to the Library of Congress irrevocable?

MR. GINSBURG: It was irrevocable, under a deed of trust.

QUESTION: He could not individually carry out a command to get them back?

MR. GINSBURG: Certainly not. These notes are now owned by the government of the United States, they are in the custody of the Library of Congress.

QUESTION: Well, what had Dr. Kissinger had given the entire records of the State Department to the Library of Congress?

MR. GINSBURG: It would have been a problem --

QUESTION: Would that have been irrevocable?

MR. GINSBURG: No, sir. I think that the question is -- you have used the term "records" and this is I think a problem that the Court must consider here. The moment you use the word "records" when dealing with something that an agency has determined were its records,

and if we are not dealing with records as we are not dealing with records in this case, we are dealing with a claim that they should have been records, that the State Department should have regarded these notes as records, but they didn't and they specifically determined that they didn't.

QUESTION: Well, if they are not records, you never get any further, do you?

MR. GINSBURG: That is exactly right. This is the first issue that I am seeking to address now, is the issue of jurisdiction, not whether they were records. There is a problem, and I will get to that in a moment, to consider that issue if the Court ever reaches it.

But the central issue of this case as we see it is that these were not records, they were not regarded by the State Department as records, never viewed as records, never treated as records, and --

QUESTION: On that point, Mr. Ginsburg, I take it that the case would be the same if instead of saying the Library of Congress, they were in Dr. Kissinger's basement?

MR. GINSBURG: If they were in Dr. Kissinger's basement as personal property --

QUESTION: It would be the same case?

MR. GINSBURG: -- which of course he could have

done at any time --

QUESTION: So the fact that they are in the Library of Congress rather than in his possession is legally irrelevant?

MR. GINSBURG: I don't think it is legally irrelevant except in the sense that --

QUESTION: For this argument, it is?

MR. GINSBURG: To this --

QUESTION: They are not records, wherever they are.

MR. GINSBURG: That's right.

QUESTION: But to what argument would it make a difference whether they are in the Library of Congress instead of in his possession?

MR. GINSBURG: There is no way in which Dr. Kissinger can just reach over to these notes and bring them back into --

QUESTION: Yes, but he is not the agency, as you make a very good point. It is the State Department and the State Department has no control over him.

MR. GINSBURG: Nor has the State Department any control over the Library of Congress.

QUESTION: Right, so if they are with him instead of the Library of Congress, it would be precisely the same legal question?



MR. GINSBURG: It would for this purpose.

QUESTION: I take it, Mr. Ginsburg, that your case --

MR. GINSBURG: For all purposes.

QUESTION: -- rests on the proposition that these -- I will call them materials rather than records -- these materials are Dr. Kissinger's personal property.

MR. GINSBURG: They are indeed and they were so determined by the department.

QUESTION: And that being the case, I take it the record does not show any income tax effect upon his turning them over to the Library of Congress?

MR. GINSBURG: The record doesn't show that, there is nothing in the record that bears any income tax advantage -- is that what you said, sir?

QUESTION: I did.

MR. GINSBURG: No, sir, the record doesn't show that but I can assure the Court that there is none.

QUESTION: Was any available?

MR. GINSBURG: I beg your pardon?

QUESTION: Was any available at the time he made the gift?

MR. GINSBURG: Not to my knowledge.

QUESTION: It well may not have been available under the current version of the code.

MR. GINSBURG: That issue is not here and I don't believe it is part of this case.

QUESTION: Mr. Ginsburg, I take it your argument does go so far as to say that at no time was any of these -- was any one of these papers a record for the purposes of the FOIA, say the minute after the transcription was made?

MR. GINSBURG: Exactly right, that is our argument.

QUESTION: And before any extracts were made for the purposes of the files?

MR. GINSBURG: Yes, they were not created for the purpose of records, they were created for the purpose of advising his immediate aides as to what he had just said so that he didn't have to tell them right away what he had talked about on the phone. They read it and then they spoke with others --

QUESTION: The fact is that is why he created them, so that they wouldn't have to tell anybody.

MR. GINSBURG: Exactly right.

QUESTION: Then it seems to me that is an argument for saying that these papers at least until they have been extracted, to take out the materials relevant to the State Department business, that were critical to the State Department business, would be records.

MR. GINSBURG: No, records do not become records until they are so determined by the -- there is no question in this case, there cannot be a serious question in this case as to the fact did Dr. Kissinger create an adequate record of all of the --

QUESTION: Well, Mr. Ginsburg, you emphasized the fact that Dr. Kissinger went through the procedure that the legal adviser suggested, namely why don't you go through these notes of yours and make sure everything is taken out of them that should have been taken out.

MR. GINSBURG: But the State --

QUESTION: And he proceeded to do that. You would say he didn't need to do that at all because it wouldn't make any difference what was in the papers.

MR. GINSBURG: I think fundamentally that was the position also of the legal adviser, that the records were made as a consequence of the calls that were made immediately after or the file memoranda that were made immediately after the calls were made, and they were put into the records of the department.

QUESTION: Your position really is fundamentally different from that of the United States.

MR. GINSBURG: We differ only --

QUESTION: Well, there is quite a difference. I would assume they would have answered my question

differently, that until there were extracts they were State Department records.

MR. GINSBURG: The position of the United States as I understand it -- Mr. Alsup will be here in a moment --

QUESTION: Yes.

MR. GINSBURG: -- is that it depends on the United States' interpretation of the legal adviser's memorandum. The government as I understand it suggests that Mr. Lee intended to make the excerpting process a condition of the transfer of the records. This as we see it -- the opinion is in the record for all to see -- it seems to be absolutely clear that this was not his intention, that he determined on the basis of an analysis of the State Department's own regulations that Dr. Kissinger had an absolute right to retain these notes within his files, and that he did and he determined that these were his personal papers. But he said as a matter of precaution, leaning over backwards, you, Dr. Kissinger, look through your files to determine whether this should be done. Dr. Kissinger didn't do it himself, he had Mr. Eagleburger do it, the Deputy Under Secretary for Management, and that was done.

QUESTION: But if the Secretary of State is talking on the telephone and making agreements or making plans or making proposals that his colleagues ought to know about,

he should communicate them and he has one of two ways of doing it, I suppose. One, he can take his time and communicate them orally and he doesn't need to keep any records, I suppose, or he can do it the way he did, he made notes and had them extracted and communicated. Now, if he didn't do either he wouldn't be doing his job, would he?

MR. GINSBURG: He has done his job --

QUESTION: I know, but he wouldn't be doing his job if he didn't do either, if he didn't communicate, if he chose --

MR. GINSBURG: He would be in violation of the State Department regulations.

QUESTION: Yes. If he chose to communicate in a certain way, namely not orally but by writing, and if the only thing there was that you -- if there were ten recordings or ten transcriptions of telephone conversations that had never been extracted and there they were and they contained important information that had never been communicated, why would you say that is not a State Department record?

MR. GINSBURG: There is a moment of time at which those -- the moment between the time when the records, when these notes were made and before they were turned over to anyone, it is conceivable that there was some issue but



that issue is not in this case. What happened in this case is that everyone, that the totality of the information in the records, in those notes was immediately transferred to the rest of the department and then by reason of that memorandum prepared, memorandum of conversations and these became the records and they are the records.

QUESTION: Even if one assumes that these are agency records, don't you also argue that these petitioners or the plaintiffs below have no private cause of action under the FIOA?

MR. GINSBURG: I do indeed, sir.

QUESTION: Are you going to address that? You are sort of running out of time. You have talked a lot about whether or not they are records.

MR. GINSBURG: I am running out of time.

QUESTION: It is a very substantial additional argument.

MR. GINSBURG: It is.

QUESTION: That is your first argument, it is Roman One in your brief.

MR. GINSBURG: It is indeed. Well, we say that what the court below did in this case is clear, which is to create a private right of action. Under the Freedom of Information Act, if the records or if the notes are in the possession of the agency, they must be provided, but here

they were not. The court attempted to create a private right of action by exercising its general equitable jurisdiction under *Cort v. Ash* in order to retrieve these records. It seems to us absolutely clear, as you read the Freedom of Information Act, that this cannot be done, the Congress was explicit in the case, that the records may not be withheld from an agency, agency records may not be withheld, and it seems to me absolutely clear in these circumstances that a private right of action cannot be constructed contrary to the legislative intent of the Freedom of Information Act, contrary it seems to us under the Federal Records Act.

There is absolutely a right of action in the government to retrieve these notes in the event of need. It is very clear that under the Federal Records Act the Attorney General on the instance of the Administrator of the General Services Administration and of the Secretary involved in this case, the Secretary of State, to retrieve these, to bring an action under section 3106, 44 U.S. Code, section 3106. There is no doubt about the government's right in this case.

The issue in this case is whether private requesters may insist that this action be done and --

QUESTION: And if there is no such action, that is the end of the case, isn't it?

MR. GINSBURG: That is the case in our view, and I would like to reserve the rest of my time for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Ginsburg.  
Mr. Alsup.

ORAL ARGUMENT OF WILLIAM A. ALSUP, ESQ.,  
ON BEHALF OF THE FEDERAL PARTIES

MR. ALSUP: Mr. Chief Justice, and may it please the Court:

The federal respondents' threshold submission is the same as Dr. Kissinger's threshold submission, and that is that the Freedom of Information Act does not require an agency to retrieve documents it once possessed but no longer possesses at the time a request is made under the FOIA. That submission, if correct, is dispositive of the case --

QUESTION: Is this because, Mr. Alsup, that material that is not in the possession and control of an agency cannot by definition be an agency record? That was the argument that the government made in the previous case.

MR. ALSUP: Correct.

QUESTION: And that is --

MR. ALSUP: It is a combination -- in response to a comment that Justice Stevens made, I would like to make it clear that it is because the agency cannot withhold

what it does not possess, and we also think that the word "withhold" and made available lends meaning to the words "agency records."

QUESTION: In the previous case, you didn't bend at my brother Stevens' suggestion. You said that material that is not in the possession and control of an agency cannot be an agency record by definition.

MR. ALSUP: Well --

QUESTION: Do you take a different position in this case?

MR. ALSUP: I take the same position, and the position is that these words modify each other and that you have to look at that entire sentence in its totality to see that what Congress said was that the agency has to turn over those documents that are under its possession and control. That is what it meant by agency record and that is what it meant by withhold, and we don't really see any useful purpose in trying to distinguish between in parts, the sentence is very narrow, and say this might be an agency record but it is not being withheld because it is --

QUESTION: In the last case, you did see a very real need for it or you wouldn't have made that argument unless it felt they needed to.

MR. ALSUP: Well, we do make the further

distinction concerning whether or not a document is a record under the Federal Records Act.

QUESTION: Well, it used to be a record and it used to be an agency record, but if it is no longer in the possession and control of the agency it is not by definition an agency record. That was the government's argument in the previous case.

MR. ALSUP: Well, with the modification -- not even modification but comments that I have made, we accept that statement.

QUESTION: He had an alternative. Your colleague had an alternative, that they could not be commanded by anyone to give up the possession of something they didn't possess, even assuming it was a record.

MR. ALSUP: That is correct.

QUESTION: That was his alternative argument.

MR. ALSUP: I believe that is correct.

Well, our primary submission is dispositive even if the court were to hold that these secretarial notes were records under the Federal Records Act, which is an entirely different scheme, and we think that primary submission is dispositive and the court doesn't even have to reach the issue of whether or not it was a record under the State Department's records management program.

Contrary to our primary submission, however, the



32 courts below held that the FOIA does require an agency to  
34 retrieve those documents it no longer possesses where it  
36 used to be or may still be a record under the Federal Records  
38 Act.

31 Now, in the event the Court, this Court rejects  
33 our primary submission, we urge the Court to reject the  
35 analysis used by the District Court and the Court of Appeals  
37 concerning what is and is not a record under the Federal  
39 Records Act. And it is to this question of what is and is  
41 not a record under the Federal Records Act, with the Court's  
43 permission, that I would like to turn.

44 QUESTION: May I just ask one question, because I  
46 did think there was a difference in your theory in this case  
48 than in the other. I thought your argument here was that  
50 even if they were agency records, they had not been with-  
52 held and therefore there was no problem. But are you taking  
54 the position that they are or are not agency records?

56 MR. ALSUP: Now, let me make sure I understand  
58 your question. Are you referring to agency records within  
60 the FOIA or within the Federal Records Act?

62 QUESTION: Well, let's take it in two steps. First  
64 of all, assuming that some of them were unextracted, some of  
66 them are records within the meaning of the Federal Records  
68 Act, would they therefore be records within the meaning of  
70 the FOIA even though they are at the Library of Congress?  
72

MR. ALSUP: This is a difficult question and I know we have stumbled over it perhaps but let me answer it this way: First, there would be no withholding because they are --

QUESTION: That is what I understood your argument to be so that is why I am --

MR. ALSUP: I think that is clear and everyone agrees we are making that argument.

QUESTION: Right.

MR. ALSUP: We also think that the words "withholding" and "made available" lend meaning to what Congress meant by agency record which appears in that same sentence and therefore it is conceivable that the Court might also hold that these same documents are not agency records.

QUESTION: Well, I know that it is conceivable that we might hold. I am trying to find out what the government's position is. I can think of a lot of things that we might hold. I am asking you very narrowly and very specifically, assume that they are records within the meaning of the Federal Records Act, perhaps they are not producible because they are not being withheld. If they are over at the Library of Congress and they are records within the meaning of the Federal Records Act, are they or are they not in the government's view records within the meaning of the FOIA?

52 MR. ALSUP: All right. If they are records within  
54 the meaning of the Federal Records Act, they remain federal  
53 records within the meaning of the Federal Records Act even  
55 though they are at the Library of Congress. Now, that --

51 QUESTION: That doesn't answer my question.

50 MR. ALSUP: I know. Your question is whether or  
10 not they are agency records within the meaning of the FOIA.

18 QUESTION: Yes.

11 MR. ALSUP: I have to say that I think that our  
10 argument is that they are not records within the meaning of  
12 the FOIA even though I don't think the Court needs to reach  
14 that issue because of the clear availability of the word  
13 "withhold."

15 QUESTION: Then why do you make all of this argu-  
11 ment about the Federal Records Act?

10 MR. ALSUP: Well, because --

9 QUESTION: That whole argument is completely un-  
8 necessary to your position.

1 MR. ALSUP: I disagree with that. The court below  
6 found it very important that these were records within the  
2 meaning of the Federal Records Act.

4 QUESTION: If we accept the argument of the United  
3 States government made in the previous case that as a matter  
5 of definition under the FOIA nothing can be an agency record  
1 that is not in the possession and control of the agency, then

32 that is the end of this case, isn't it?

33 MR. ALSUP: That is correct.

34 QUESTION: And that is the very argument that the  
35 government made in the last case and you are shying away from  
36 it in this case.

37 MR. ALSUP: Oh, no, absolutely not.

38 QUESTION: Then why didn't you just answer that --

39 MR. ALSUP: Well, I think I --

40 QUESTION: -- it would be easy, whether they ever  
41 were records or whether they are still records for purposes  
42 of the Records Act, they are not for purposes of the FOIA  
43 because they are not in the possession and control of the --

44 MR. ALSUP: Well, if I may, we clearly argue --  
45 and I think I haven't said this very well, but we are clearly  
46 taking the position that whether or not it is a record under  
47 the Federal Records Act or under Justice Stevens' possibility  
48 that agency records mean something special in the FOIA, if  
49 the agency does not have possession and control -- wait, let  
50 me finish this -- if the agency doesn't have possession and  
51 control, there is no violation of the FOIA. Possession and  
52 control is an essential requirement before the agency is re-  
53 quired to produce under the FOIA.

54 QUESTION: Yes, but that could be for two quite  
55 separate reasons. One is there could be no withholding or,  
56 two, it could be because they are not agency records, and  
57

53 you keep muddling them.

54 MR. ALSUP: Well, I don't think I am able to give  
55 much clearer answer than what I have. As I understand our  
56 argument, first there would be no withholding.

57 QUESTION: Right.

58 MR. ALSUP: And you agree with that. Second, it  
59 may or may not be agency records, we don't think it is  
60 necessary -- under the FOIA -- we don't think it is necessary  
61 to determine that issue.

62 QUESTION: But you are saying that issue does not  
63 depend on whether or not they are records within the meaning  
64 of the Federal Records Act, and yet you have argued at great  
65 length the meaning of the Federal Records Act, as though --  
66 and I had the impression from your brief that that would be  
67 dispositive in this case on the issue of whether or not they  
68 were records within the meaning of the FOIA, but apparently  
69 I was wrong.

70 MR. ALSUP: No. We believe that an agency is re-  
71 quired to produce under the FOIA any document which is a  
72 record under the Federal Records Act and is in its possession  
73 and control. Now, let's go over those three elements. A  
74 record under the FRA, possession and control. If any of  
75 those three are missing, then the agency does not have to  
76 produce it and there is no withholding.

77 Now, it is a separate question and a nice question,



52 but we think a theoretical question as to whether or not  
54 agency record means something, that if it is not in its  
53 possession and control it continues to be an agency record,  
55 and I think where I haven't been very clear is I am simply  
51 saying I don't think that is necessarily an issue in this  
50 case; whether a document is a record under the Federal  
18 Records Act, however, is an issue in this case.

18 QUESTION: When your colleague in the previous  
19 case argued that it wasn't an agency record because it wasn't  
16 in possession and control, so let's forget this no withhold-  
12 ing business or at least just use the withholding to shed  
14 light on what is in an agency record.

13 MR. ALSUP: Well --

15 QUESTION: That is what Mr. Geller said but his  
11 bottom line was that this is not an agency record for FOIA  
10 purposes. That was his bottom line.

8 MR. ALSUP: Well --

8 QUESTION: Yours is -- you say now we don't even  
12 have to think about whether it is an agency record if you  
14 are not withholding it.

16 QUESTION: Well, there is nothing inconsistent be-  
18 tween those two positions, between saying (a) I choose to  
19 answer it, and (b) you don't have to answer it.

21 MR. ALSUP: That's correct, it is not inconsistent.  
22 I understood Mr. Geller to say that you don't have to make a

32 distinction between what is and is not an agency record be-  
34 cause the words "withhold" and "made available" in agency  
36 records should all be read together.

38 QUESTION: He certainly suggested to us that if we  
40 agreed with him, we should approach the case and the words  
42 you use would be talking about what is an agency record and  
44 your conclusion would be, if you agreed with him, this is not  
46 an agency record. That was his submission.

48 MR. ALSUP: Well, I don't disagree with that sub-  
50 mission.

52 QUESTION: Good.

54 MR. ALSUP: Well, with the Court's permission, I  
56 would like to address the question of whether or not these  
58 were or were not records under the Federal Records Act be-  
60 cause that was the question which was of great concern in  
62 the courts below and they concluded that they were records  
64 under the Federal Records Act.

66 We think that the District Court made a fundamental  
68 error in deciding for itself what is and is not a record  
70 under the Federal Records Act and it --

72 QUESTION: That is 44 U.S.C. 3301, on page 5 of  
74 your brief?

76 MR. ALSUP: That's correct. That was first enacted  
78 in the Records Disposal Act, that same definition, that was  
80 in 1943, that same definition was then incorporated into the  
82

32 Federal Records Act in 1950.

34 QUESTION: Mr. Alsup, we have interrupted you a  
36 great deal and I hesitate to do it again, but just to aid my  
38 understanding of your argument, we do not reach this issue  
40 if we accept your first argument, is that correct?

42 MR. ALSUP: That's correct. In fact, the Court  
44 could simply hold that the Act does not reach documents  
46 which are not in the possession of the agency --

48 QUESTION: Right.

50 MR. ALSUP: -- and that would be the end of the  
52 case. Now, this secondary issue would only be reached in  
54 the event the Court were to say there is a duty to retrieve  
56 documents which are records under the Federal Records Act.

58 The definition under 33, section 3301 defines a  
60 record to be one which is preserved among other things and  
62 only to be those things which are preserved or appropriate  
64 for preservation as evidence of the organization, functions,  
66 policies, decisions, procedures, operations or other activi-  
68 ties of the government.

70 We think the words "appropriate for preservation"  
72 there is the key. The District Court underscored that  
74 language in its opinion, indicating that it felt that these  
76 notes were appropriate for preservation. We think that the  
78 legislative history of that section makes it clear that it's  
80 the agency, not the courts, which makes the decision whether  
82

or not something is appropriate for preservation as a record.

Under the Federal Records Act, the scheme that is contemplated is that agencies will adopt records management programs and they will make the decision in the first instance whether some material should or should not become an agency record and thereby -- or federal record and thereby subject to the strictures of the Records Disposal Act which prohibit any disposal of such a record without the approval of the archivist.

On the other hand, if it is not designated as a record, it remains non-record material, and even though that is the property of the United States in our view, it is not a federal record.

Now, we believe that the District Court and the courts below disregarded this approach to the act by simply assuming that these documents were records under the Federal Records Act without making an inquiry into the State Department's regulations to determine whether or not the agency itself had classified them as records on the one hand or non-record materials on the other.

We do agree, however, with the District Court that these documents, when they were created, were not the personal property of Dr. Kissinger but were the property of the agency. They may have been non-record material or they may have been records, but the agency would make that determination

38 by applying its records management program.

39 If we accept that analysis of the Federal Records  
40 Act, we believe that a remand to the District Court would be  
41 necessary in order to determine whether or not these particu-  
42 lar notes were or were not non-record material or were or  
43 were not, to put it conversely, records under the Federal  
44 Records Act.

45 QUESTION: What would make them property, the fact  
46 that government employees and government materials went into  
47 their construction?

48 MR. ALSUP: Not principally. The principle deter-  
49 minant under the cases that we have cited in our brief is  
50 whether or not they were prepared within the scope of employ-  
51 ment of the employee, and here that clearly was the case.  
52 These were -- with the possible exception of those notes  
53 that have nothing to do with the State Department's business,  
54 the bulk of these would have been clearly prepared in the  
55 scope of Dr. Kissinger's employment and that would have made  
56 them the property of the United States.

57 QUESTION: Well, it is said that Mr. Truman, when  
58 he was President, dictated every night a diary of the day's  
59 events. Assuming that was done and it was also said that  
60 he frequently referred back to these things with respect to  
61 conversations he had had with Cabinet officers or various  
62 other people -- now, these were all made with government



52 facilities, they certainly had a relationship to his job,  
54 would that make those diary tapes government property?

53 MR. ALSUP: Not necessarily. In some cases a nice  
55 question would be presented of whether or not something like  
51 that was made within the scope of employment. For example,  
50 if the President had written a letter to a personal friend,  
18 I think most people would agree that is not within the scope  
18 of employment. There are intermediate cases in the gray  
13 area where it is not as clear.

12 QUESTION: My question assumed that there could be  
12 a mix in these, there might be something about his opinion  
14 of the music critic of the Washington Post on what she had  
13 said about -- what he said about his daughter's musical  
15 abilities, on the other hand there might be some comments  
11 about what he had directed the Attorney General to do or  
10 what he had told the Secretary of the Interior not to do.  
9 Now, when you once segregated them, would that make them  
8 partially government property?

1 MR. ALSUP: Not necessarily. Again, the test would  
8 be whether or not the act of writing the letter was some-  
2 thing that was --

4 QUESTION: This is not a letter, this is a tape  
2 recording, a dictated diary.

5 MR. ALSUP: -- whether that act would have been  
1 within the scope of his employment.

52 QUESTION: Well, his conversation with the Attorney  
54 General or Secretary of his Cabinet would surely be within  
56 the scope of his employment, wouldn't it?

58 MR. ALSUP: The conversation itself would be, but  
59 whether or not in the late hours in the evening if the  
60 President dictates a tape about that day's events, that is  
62 not necessarily within the scope of the President's role as  
64 President. It might be. That is perhaps a much tougher  
66 case than we have now. But these were clearly -- in the  
68 present case, Dr. Kissinger's notes were clearly prepared  
70 within the scope of his employment as Secretary of State.

72 QUESTION: You do not accept the opinion of the  
74 legal adviser?

76 MR. ALSUP: With respect to the question of whether  
78 or not these were personal property when created, we believe  
80 that the legal adviser was incorrect. We believe that those  
82 were the property of the agency. We do, however, accept that  
84 part of the legal adviser's opinion which seemed to say that  
86 at the end of the usefulness of those notes, after the ex-  
88 tracts were prepared, if they were properly prepared, then  
90 because they would be non-record material under the records  
92 management program, the agency would be free to dispose of  
94 that property by allowing Dr. Kissinger to retain it.

96 QUESTION: I understood you to say that you thought  
98 the agency should make this decision rather than the courts.

52 MR. ALSUP: That's correct.

54 QUESTION: And the agency in this case certainly  
53 through its legal adviser seems already to have made it.  
55 So by virtue of what right does the Solicitor General say  
51 that it thinks the agency decision is incorrect?

50 MR. ALSUP: Well, let's take an extreme case, a  
18 more extreme case. Let's say --

17 QUESTION: Let's take this case.

15 MR. ALSUP: Well, I think I can answer that by  
18 saying what if Dr. Kissinger had given all of the records of  
12 the State Department to the Library of Congress. Well,  
14 clearly in a case like that, even if the legal adviser had  
13 somehow approved that, the State Department would want to  
15 bring a retrieval action and say we have changed our mind,  
11 the legal adviser no longer believes that these were the  
10 personal property of Dr. Kissinger but rather that these  
8 were the property of the agency itself. We do believe that  
9 the agency itself can change its mind and go after --

7 QUESTION: Well, what about this case? How about  
6 this case? As I understand, the State Department doesn't  
5 want these records.

4 MR. ALSUP: So far as this record discloses, the  
3 State Department has not made a final determination whether  
2 to bring a retrieval action for the recovery of the notes,  
1 that is correct.

31 QUESTION: Well, has it asked for them back?

32 MR. ALSUP: It has not asked for them back. In the  
33 record there is an agreement --

34 QUESTION: Well, I will put it this way: Do you  
35 think that you are representing the views of the State Depart-  
36 ment?

37 MR. ALSUP: Yes.

38 QUESTION: Which means that the State Department  
39 through you is asking that these notes be reviewed in the  
40 hands of the Library of Congress to see if they have been  
41 fully extracted?

42 MR. ALSUP: No. No. The procedure that now is  
43 outstanding is that there is an agreement with Dr. Kissinger  
44 and the federal parties that allows a sampling of these  
45 documents to be undertaken for the State Department to make  
46 a determination of whether it believes some of these are or  
47 are not records. When that is completed, if the State  
48 Department has decided that these were records under the  
49 records management program, at that time it would take ap-  
50 propriate action to seek the return --

51 QUESTION: Seek the return or just get them ex-  
52 tracted?

53 MR. ALSUP: Well, it might have either alternative.

54 QUESTION: What is your position on that?

55 MR. ALSUP: The State Department specifically would

52 like to reserve both possibilities and we don't take a posi-  
54 tion in this case as to whether or not these are or are not  
53 records.

55 QUESTION: Well, I think it is rather important  
51 that you take a position for purposes of the Freedom of In-  
50 formation Act. If all the State Department is interested in  
10 is making sure they have been properly extracted and that the  
18 official business is taken out of them, they have copies of  
13 it. That doesn't mean that all of the papers need to be re-  
10 turned, does it?

12 MR. ALSUP: That is correct.

14 QUESTION: Because I take it your position is that  
13 once they get back to the State Department they are FOIA  
15 papers.

11 MR. ALSUP: Once they were back in their possession  
10 then --

0 QUESTION: Yes or no?

8 MR. ALSUP: That's correct. Once they are back in  
1 the possession of the --

6 QUESTION: I think it makes quite a difference on  
2 what position you take for purposes of this lawsuit.

4 MR. ALSUP: Mr. Justice, the problem is this: The  
3 State Department does not know what these documents look like.  
5 They have not seen but a limited sample, and it is simply not  
1 in a position at this point to draw a conclusion which would



32 would reverse the position that the legal adviser took.

54 QUESTION: I know, but there is always --- if they  
33 want a sample of them and they do sample them, which they are  
55 now doing, and they decide that they should be reviewed and  
31 further extracts made, they can do that -- perhaps they can  
30 do that, but does that mean they have to have the papers re-  
18 turned to them?

16 MR. ALSUP: Not necessarily. It might be done at  
13 the Library of Congress.

16 QUESTION: In which event they never would be FOIA  
12 papers except to the extent they were extracted.

14 MR. ALSUP: That is correct.

13 QUESTION: You referred to these negotiations that  
15 are going on, discussions or whatever term you want to use.

11 MR. ALSUP: Well, at the time of the District  
10 Court's order, an agreement was filed with the court which  
9 advised the court that the federal parties were making an in-  
8 spection of a limited sample of the notes at the Library of  
7 Congress and that they therefore would make a decision at  
6 some point in the future when that review was completed as to  
5 whether or not the State Department felt that any of these  
4 were records and therefore would seek their return.

3 QUESTION: Is it possible that will dispose of the  
2 issues in this case?

1 MR. ALSUP: It would not dispose of it. Even if

52 the State Department were to say that they wanted some small  
53 percentage of the documents back, we are convinced that the  
54 plaintiffs in this case would insist on full return, it  
55 would not dispose of the case.

56 QUESTION: Mr. Alsup, I just want to make one thing  
57 --- call one thing to your attention. At page 21 of your  
58 brief, you said, "We agree with the courts below that the  
59 FOIA applies to at least all records within the meaning of 44  
60 U.S.C. 3301." You've departed from that position here. Do you  
61 think you really mean to depart from that position?

62 MR. ALSUP: All records within the meaning of 3301  
63 which are in the possession and custody of --

64 QUESTION: No, no, it isn't qualified in your brief.  
65 You say unequivocally, because you argued no withholding  
66 first, you recall that in your brief. Then you say in the  
67 summary of argument in part two of your brief, "We agree  
68 with the courts below that the FOIA applies to at least all  
69 records within the meaning of 44 U.S.C. 3301."

70 MR. ALSUP: I don't think that is a fair construc-  
71 tion, Mr. Justice, for this reason. We made it very clear  
72 in our first argument that possession and control is a sine  
73 qua non of --

74 QUESTION: Of withholding.

75 MR. ALSUP: --- of withholding and of whether --  
76 well, perhaps we didn't make it as clear as the oral argument  
77

52 now suggests we should.

57 QUESTION: Well, we should not accept this as a  
53 literal statement of your position then?

55 MR. ALSUP: Well, it is the second of our arguments,  
51 that we meant to say by that that, of course, that applies  
50 only to those records which are in the possession and control  
49 of the --

48 QUESTION: Your first argument was you don't have to  
47 decide what agency records are because in all events there  
46 has been no withholding. Your second argument was, well,  
45 these are not agency records because they are not records  
44 within the meaning of the Federal Records Act. That was your  
43 second argument.

42 MR. ALSUP: Well, rather than --

41 QUESTION: You really want to withdraw this conces-  
40 sion, in other words?

39 MR. ALSUP: We will stand by whatever we said in  
38 our brief, so I don't want anything I have interpreted to be  
37 a concession from the statements that we have made in either  
36 our Forsham brief or the Kissinger brief.

35 Thank you.

34 MR. CHIEF JUSTICE BURGER: Mr. Dobrovir.

33 ORAL ARGUMENT OF WILLIAM A. DOBROVIR, ESQ.,

32 ON BEHALF OF THE MILITARY AUDIT PROJECT

31 MR. DOBROVIR: Mr. Chief Justice, and may it please  
30  
29  
28  
27  
26  
25  
24  
23  
22  
21  
20  
19  
18  
17  
16  
15  
14  
13  
12  
11  
10  
9  
8  
7  
6  
5  
4  
3  
2  
1

the Court:

In this case, the Secretary of State chose to record and communicate to his aides in the conduct of his office in part by causing the preparation of verbatim transcripts of his business telephone conversations. The issue is whether public rights under the Freedom of Information Act can be defeated by the Secretary's removal of these documents from the State Department building prior to his departure from office.

QUESTION: Well, perhaps the first question is whether there is a private cause of action available here. Will you address that at some point?

MR. DOBROVIR: I will address it now in response to your question, Mr. Chief Justice.

When the State Department denied the records on January 18 -- and that is a date which I ask the Court to remember -- it said we deny access to these records on the grounds that they are not agency records because they were personal records and also on the ground that they are no longer in the possession of the department, they are in the Library of Congress. That denial we submit -- and I will present our theory with respect to that -- was a withholding within the meaning of the Freedom of Information Act. On that basis, there was a cause of action, a cause of action arose under the Freedom of Information Act.

52 QUESTION: Well, surely at that time the Attorney  
54 General of the United States, acting independently, or the  
53 Administrator of GSA, operating independently, perhaps could  
55 have commenced a lawsuit. Do you agree with that?

54 MR. DOBROVIR: Could have. Indeed, as the record  
50 reflects, the Archivist of the United States on January 18,  
10 the same date that the State Department denied access to the  
15 records, was also denied by Secretary of State Henry  
14 Kissinger, acting as Secretary of State, access to the  
10 records to inspect them for the purpose of determining  
12 whether or not they were records that ought to remain within  
14 the government's record system.

13 QUESTION: The Archivist is a subordinate of the  
15 Administrator of GSA, is he not?

11 MR. DOBROVIR: Yes, he is. We assume he was act-  
10 ing within the authority granted him by his superiors. The  
3 point is that the Secretary of State categorically denied  
8 him access to these records, claiming that they were personal  
1 records.

8 I will argue the question of the District Court's  
2 power and the question of the cause of action. Mr. Sussman  
4 will argue the question of whether the records are agency  
3 records. I would only say here that we agree with the con-  
5 cession made by the Solicitor General that they were agency  
1 records in their inception. We disagree with him when he



says that they could at a later date or did at a later date not become -- lose that character as agency records.

I refer to January 18 and I told the Court what happened on that date. The petitioner was still the Secretary of State on January 18, and it was in his capacity as Secretary of State that the department under his supervision, under his supervision by statute, denied access to these records. The denials were based on the claim that they were his personal property. His refusal of access to the Archivist was based on the claim that they were his personal property.

QUESTION: You said there was an additional basis.

MR. DOBROVIR: With respect to the Archivist, that was the only basis. With respect to the Freedom of Information request, the additional basis was that he had already transmitted them to the Library of Congress.

We start with the proposition that when a federal government official acts in performing the duties of his office, he is presumed to act for the agency. The petitioner was Secretary of State and was not acting as a private individual when everything at issue here occurred. He created the records when he caused them to be written down, when he preserved them, and he preserved them as he thought they were appropriate for preservation and in so doing I think he was acting for the agency of which he was the agent and for

which he was a fiduciary.

It was as Secretary of State that the agency denied the first Freedom of Information request for these documents, and it was as Secretary of State that he by statute had custody of the department's records, that prima facie these records were State Department records at all times that he was Secretary of State and insofar as he purported to transfer them to the Library of Congress, they remained nevertheless the property of the Department of State through the constructive possession -- a phrase used by Mr. Geller earlier in the Forsham case, the government accepts constructive possession -- through the constructive possession of Secretary Kissinger.

Accordingly, very simply, these documents remained in the possession and in the control of the Department of State at the time when both Freedom of Information requests were filed.

QUESTION: Mr. Dobrovir, suppose I am Secretary of State and I have a file in my office in which I keep copies of correspondence to personal friends which I have written saying, no, I can't come out and visit you this week but maybe two weeks from now, and it is separate from State Department record transactions and other things. Are those FOIA records?

MR. DOBROVIR: No, sir, those are personal records,

52 by your description of them. By the description of these  
54 records, however, as the Solicitor General says, they were  
53 agency records and all flows from that in our view.

55 The conversations, after all, were not held with  
54 Mrs. Kissinger, they were held with Presidents, they were  
50 held with foreign ambassadors, they were held with other  
10 officials of the department. They were circulated to Dr.  
18 Kissinger's immediate aides, as Dr. Kissinger's lawyer here  
1A has told us, for the purpose of implementing and following  
18 up the determinations. There is no way in which these could  
12 be anything other than agency records.

14 Now, our position is that as Secretary of State,  
13 Henry Kissinger had a duty to his principal, the Department  
15 of State, not to prefer his own personal interests to his  
11 principal's interests. He was aware from the very beginning,  
10 from January of 1976, when the first Freedom of Information  
8 Act for any of the records, those in that case White House  
8 records, was submitted. There was a question as to whether  
1 or not these documents were agency records or were personal  
9 files. Nevertheless, he made the determination, a determin-  
2 ation which we submit was in conflict with the interest, an  
4 interest he was aware of, of the agency that they were his  
2 records and not the agency's records.

5 QUESTION: Well, there are a lot of presidential  
1 libraries that are in trouble, aren't there?

MR. DOBROVIR: The Presidency has always been considered a different animal. We now have statutes that take care of those problems. The Presidential Materials Act of 1978 will now regulate the question of Presidential records. This Court now has to determine the status of records of agency heads, Cabinet officers, because this is a unique kind of case.

A subordinate official would not be in the position that the Secretary of State was in to make the determination on his own. A subordinate official would have had to have submitted to all the normal procedures that the Department of State has in order to get a determination that the records were personal records and not State Department records. Dr. Kissinger ---

QUESTION: Mr. Dobrovir, you are down to a little more than one minute and we haven't heard very much about the private cause of action, at least I haven't.

MR. DOBROVIR: Well, it is as simple as this: The documents were denied, the denial of documents creates a private cause of action because it is in the circumstances of this case a withholding. The government makes a very technical argument that the documents are not in the possession of the agency, there is no withholding. Here the possession of Dr. Kissinger, the right of access, the right to exclude others from access by normal definitions of possession was

the possession of the Department of State. There was therefore in our view a withholding and therefore there was a cause of action, like any cause of action.

QUESTION: Do you think this situation meets the criterion of something enacted especially for the particular class of people seeking the information?

MR. DOBROVIR: No, the statute was enacted for the benefit of the public at large, anyone, any person, they need not be a citizen of the United States, has a right to seek access under the Freedom of Information Act, and everything that happened here created that cause of action.

I believe I have used up my time.

QUESTION: May I just clarify one thing. You don't argue at all that there is a private cause of action under the Federal Records Act, you merely claim that your rights under the FOIA give you the right to bring this action?

MR. DOBROVIR: That's right, Mr. Justice Stevens.

MR. CHIEF JUSTICE BURGER: Mr. Sussman.

ORAL ARGUMENT OF ROBERT M. SUSSMAN, ESQ.,

ON BEHALF OF THE REPORTERS COMMITTEE FOR

FREEDOM OF THE PRESS

MR. SUSSMAN: Mr. Chief Justice, and may it please the Court:

I would like to if I may return to the threshold issue in this case, the question of whether documents which



32 were agency records at the time of their removal and were  
34 so we argue removed unlawfully, are agency records within  
33 the meaning of the Freedom of Information Act and therefore  
35 are subject to judicial relief within the terms of that act.

31 It is true that we are here before the Court today  
30 not under the Federal Records Act. We believe that is a  
18 statute for the government to enforce. We are here instead  
18 under the Freedom of Information Act, a statute which  
12 creates right on behalf of private citizens who seek to ob-  
10 tain records of the United States government.

12 Our primary submission, and a submission which we  
14 believe controls the resolution of this case, is that if the  
13 transcripts were removed unlawfully from the Department of  
15 State, they remain records. On the other hand, we believe  
11 that if the transcripts were removed lawfully pursuant to  
10 statutes and regulations, they lost their record statute  
3 status and the act ceases to apply.

6 I think we have to start with the text of the  
1 Freedom of Information Act.

6 QUESTION: The relevant test is not whether or not  
2 they were records but whether or not they were "agency  
4 records." You would agree with that, wouldn't you?

3 MR. SUSSMAN: That is absolutely true, although we  
5 do argue that --

1 QUESTION: Your argument is the same, that they were

52 agency records and remained agency records if they were  
54 wrongfully removed from the agency?

53 MR. SUSSMAN: That is absolutely our argument.

55 QUESTION: That is your argument.

51 MR. SUSSMAN: Our argument is that the act on its  
50 face applies to agency records. If the document has been  
18 unlawfully removed, it preserves its legal status as an agency  
18 record, therefore it is within the coverage of the act. I  
11 think it is significant that Congress in enacting the Freedom  
18 of Information Act specified nine exemptions and defined  
12 them very clearly for determining when documents which fit  
14 the definition of records could not be produced by federal  
12 agencies. It did not -- and I think this is very key -- it  
15 did not create an exemption for documents which are agency  
11 records in every respect but happened not to be in the  
10 physical custody of the agency.

8 QUESTION: Well, what if one makes a demand on an  
8 agency for a record which doesn't fall within any of the  
1 exemptions but which was destroyed lawfully under the Federal  
6 Records Act?

2 MR. SUSSMAN: Then I think the act no longer ap-  
4 plies.

3 QUESTION: Let's say it was stolen, quite unlaw-  
5 fully --

1 MR. SUSSMAN: Then the act would apply.

52 QUESTION: -- it simply isn't there. It doesn't  
57 exist so far as the agency goes.

53 MR. SUSSMAN: Well, the agency quite obviously  
55 does not --

51 QUESTION: It was stolen and taken to Timbuktu,  
50 how can the agency possibly comply?

18 MR. SUSSMAN: The agency cannot produce what it  
18 does not have, and if the document is physically unavailable,  
11 if there is no physical way that the agency can retrieve  
16 the document and provide it to the FOIA requester, then ob-  
12 viously it is not withheld. The agency doesn't have the  
14 capacity to produce the document.

13 QUESTION: So how can anybody withhold something  
15 that he doesn't have?

11 MR. SUSSMAN: Well, I think the word "have" has to  
10 be construed broadly --

9 QUESTION: Well, it is --

8 MR. SUSSMAN: -- and I think this is an important  
1 point. The agency does not have unlawfully removed records  
6 in a sense that those records are in its physical possession.  
2 That is to say, the State Department could not go down to  
4 the basement of the Department of State and get these tran-  
3 scripts. However, there is another plane on which we can  
5 approach the problem, and we can think of possession not  
1 merely as physical possession but as legal possession, and we

53 would submit that an agency certainly has what it owns and  
54 its ownership rights certainly do not turn on the physical  
55 location where records are kept.

55 We would say -- and I think this case illustrates  
56 it quite plainly -- that if an agency owns a document, it has  
57 a legal right to reduce that document to possession at any  
58 time. It is the owner of the document, therefore it has the  
59 means of producing the document under the Freedom of Informa-  
60 tion Act and it can provide it. And I think this case illus-  
61 trates that perfectly.

62 Mr. Kissinger was Secretary of State at the time  
63 the Freedom of Information Act requests were made, therefore  
64 he had it well within his means and power to produce these  
65 documents if in fact they were owned by the department.  
66 Even after Mr. Kissinger was Secretary of State, I think you  
67 had exactly the same situation. The department --

68 QUESTION: On the 18th of January they were already  
69 in the possession of the Library of Congress, were they not?

70 MR. SUSSMAN: They were already in the possession  
71 of the Library of Congress, that's true.

72 QUESTION: Well, if he demanded their return, could  
73 he secure their return in his individual capacity after he  
74 had made the gift which the government says is an irrevocable  
75 gift, or Mr. Ginsburg did?

76 MR. SUSSMAN: I think, Your Honor, he could have

52 done it in either capacity, as Secretary of State he could  
54 have said to the Library of Congress, I have now reexamined  
53 the law, I have been advised by those who have construed the  
55 Federal Records Act that these documents were not my personal  
51 property, therefore I had no authority to remove them and  
50 therefore I had no authority to donate them to you, and I  
18 think they ought to be returned.

18 QUESTION: Well, is that a fact, that someone did  
11 advise him that they were no longer --

10 MR. SUSSMAN: Well, nobody --

12 QUESTION: The facts are just the contrary, aren't  
17 they?

13 MR. SUSSMAN: Well, he was advised by the legal  
15 adviser that they were not, but I think the question we are  
11 looking at right now is the question of withholding and the  
10 question of whether an unlawfully removed document is within  
8 the power of an agency to retrieve. And my point is that  
6 it would have been very simple for Mr. Kissinger, assuming,  
4 contrary to the facts, that he did conclude, reassess his  
2 opinion, decide that these documents were indeed records,  
and it would have been very simple for him in his capacity as  
Secretary of State to go down to the Library of Congress  
and say these are department records, a request for them  
has been made under the Freedom of Information Act, my deed  
of gift to you I believe is superseded by that, I would like



32 the records back and I would like to make them available to  
34 an FOIA requester. And it is in that sense that I think  
36 that one has to conclude that these transcripts were within  
38 legal control, the legal control of the Department of State  
40 at the time the FOIA --

42 QUESTION: What if he said those very words to the  
44 library and the library said we are awfully sorry but I  
46 think you are ill-advised right now, you gave these to us  
48 and we are going to keep them until the court tells us to  
50 give them back?

52 MR. SUSSMAN: Well --

54 QUESTION: Could Mr. Kissinger, as Secretary of  
56 State, or Mr. Kissinger personally have the -- would he  
58 under any relevant statute have a cause of action against  
60 the library?

62 MR. SUSSMAN: I think that -- let me answer the  
64 question in two ways. I think that the State Department  
66 would have a cause of action, as awkward as it sounds, under  
68 the Federal Records Act --

70 QUESTION: Through whom?

72 MR. SUSSMAN: Through the Attorney General.

74 QUESTION: Well, the State Department could not  
76 become a party by itself, it would have to get the Attorney  
78 General to file a lawsuit.

80 MR. SUSSMAN: That's true, but --  
82

52 QUESTION: And the Attorney General would have to  
53 agree with him.

54 MR. SUSSMAN: The Attorney General would --

55 QUESTION: I am not sure I understand your posi-  
56 tion that these records are retrievable just at the request  
57 of the State Department. As a matter of fact, they aren't.

58 MR. SUSSMAN: Well, let me reframe it slightly.  
59 Let me say this, that if a document continues to be owned  
60 by an agency, the agency we would say is under a duty under  
61 the Freedom of Information Act to procure that document to  
62 the extent it can.

63 QUESTION: But the law says that a party to get  
64 them back if they are illegally possessed by somebody else  
65 is the Attorney General.

66 MR. SUSSMAN: But we don't even need to reach that  
67 question because short of bringing a lawsuit, there are  
68 actions that the State Department could have taken but didn't  
69 take in this case to procure the return of the notes. We  
70 don't know what the Library of Congress would have said if  
71 the State Department had --

72 QUESTION: The question though now is whether the  
73 State Department is withholding any records.

74 MR. SUSSMAN: Well, I do believe that --

75 QUESTION: And if the only way it can get the  
76 records is to win a lawsuit, first convince the Attorney  
77

53 General to sue and then to win it, are they withholding  
54 records now?

52 MR. SUSSMAN: I think that the State Department is  
55 withholding records if it has failed to take all steps within  
51 its power to procure the return of those records.

30 QUESTION: So on that basis if you win, what is  
10 the judgment?

18 MR. SUSSMAN: Well, the judgment --

11 QUESTION: What is the order, turn them over?

10 MR. SUSSMAN: The judgment I think is precisely  
12 the judgment entered by the court below and that is an order  
14 to the State Department to go out and to repossess from the  
13 Library of Congress to the extent the library is willing to  
15 provide the documents and the transcripts.

14 QUESTION: If you were the adviser of the State  
10 Department, how would you proceed, go across the street and  
8 ask them for them?

8 MR. SUSSMAN: That is exactly what I would do.

1 QUESTION: And if the library said we're awfully  
9 sorry, then you would go to the Attorney General?

2 MR. SUSSMAN: I would certainly do that and I  
4 would do that not only under the Freedom of Information Act,  
3 I would do that under the Records Act itself because the  
5 Records Act imposes a mandatory duty on the part of an agency  
1 to retrieve unlawfully removed records.

QUESTION: The Attorney General is the enforcer of that and there have been all sorts of cases deciding what is or is not owned by a person. Isn't that ultimately left to the judgment of the Attorney General, whether a record has been unlawfully removed?

MR. SUSSMAN: If there are no Freedom of Information Act requesters, the issue is left to the Attorney General, but if --

QUESTION: Well, why should that make any difference?

MR. SUSSMAN: Well, it should make a difference for this reason, that independent of what is or is not done, under the records statute, citizens have a private cause of action under the FOIA to obtain records, and we submit that that cause of action, the records which are covered by the act and are not within the exemptions, that cause of action should not and cannot be conditioned on whether the Attorney General does or does not choose to exercise his prosecutorial discretion.

QUESTION: You are suggesting that an FOIA suit could be used to secure judicial review of every single decision by an agency to dispose of a non-record record once it thinks that it has served its purposes. All you would have to do is file an action and say that they made a mistake and they were dead-wrong in deciding that this

document has served its purposes and that the officer may take it away with him.

MR. SUSSMAN: Let me say that I think that 9,9999 of every 10,000 such suits would be frivolous because it would be very clear that the record-keeping decision of the agency was a lawful one and that the documents were worthless.

QUESTION: So your answer is yes, that is exactly what an FOIA case could be used for?

MR. SUSSMAN: That's right, but I don't think that that is a result that we ought to be fearful of or concerned about because there is a very clear and very comprehensive statutory framework for removing documents from public to private property --

QUESTION: And for retrieving them?

MR. SUSSMAN: And for retrieving them, but I come back to the point I made before and that is that we are not only concerned in this case with the government's record-keeping decisions under the records statutes, we are concerned with the rights of the public under the Freedom of Information Act, and what we are asking from the Court is to recognize the remedy that an FOIA requester has when a document otherwise subject to the act has been unlawfully removed from agency custody, and we submit that the FOIA is a free-standing statute, and if a document which is



otherwise a record has been removed from agency custody unlawfully, then we don't believe that a prosecutorial discretion decision by the Attorney General or the agency head can cut off the public's rights under the act. And it is for that reason that we think that the Court in an FOIA case to reach the question of whether the removal was lawful.

QUESTION: Well, if he wouldn't want to be bound by the Attorney General's decision, perhaps you could get judicial review of his decision. That doesn't mean you shouldn't have to seek his decision first.

MR. SUSSMAN: Your Honor, I would submit that there is no reason why you would have to go to the Attorney General for --

QUESTION: Well, under the normal rule is to exhaust your administrative remedies.

MR. SUSSMAN: I don't think that we are talking about administrative remedy because the administrative remedy under the FOIA is a request to the agency to produce withheld records. That is the only administrative remedy that the act provides, and that is what we did. We went to the State Department and we said we would like to see the transcripts of Mr. Kissinger's telephone conversations, and that request was denied. At that point, we think that we had a right to a judicial remedy under the statute because that is the mechanism that Congress chose for vindicating

32 public rights in those situations.

34 QUESTION: Was any request ever made of the  
35 Attorney General to get into this matter that you are aware  
36 of?

37 MR. SUSSMAN: Not by the FOIA requesters, and I  
38 can't speak with absolute authority about the State Depart-  
39 ment. I believe that it also never made a request.

40 QUESTION: Nor GSA?

41 MR. SUSSMAN: GSA I don't believe has also asked  
42 the Attorney General to bring suit, although it should be --

43 QUESTION: Of course, I suppose that the Depart-  
44 ment of Justice, which is headed by the Attorney General,  
45 has a position in this lawsuit that is directly contrary to  
46 yours that this isn't an FOIA -- that this isn't any longer  
47 the business of an FOIA lawsuit in the posture of this case.

48 MR. SUSSMAN: That is indeed their position and I  
49 would submit that if there were a judicially created duty  
50 on the part of the State Department to seek the return of  
51 these records, the Justice Department might be somewhat  
52 more sympathetic to our problem.

53 The one issue that I have not discussed is the  
54 question of whether these documents are records. I will try  
55 to be very brief about it and simply say that we think the  
56 issue turns on, first, the Federal Records Act themselves  
57 and, secondly, GSA regulations, because GSA is the agency

32 that Congress has selected to implement the records statute,  
34 and, third, State Department regulations, and as we have  
36 demonstrated in our briefs, we think that these transcripts  
38 are plainly, very plainly records under all three bodies of  
40 law.

42 I believe my time is up --

44 MR. CHIEF JUSTICE BURGER: No, not yet.

46 MR. SUSSMAN: It is not? Okay. Well, I would be  
48 happy to continue a little while longer. Let me turn first  
50 to the definition of records in the records statute.

52 We have a rather fundamental and direct quarrel  
54 with both the government and with Mr. Kissinger on that  
56 point. They make the argument that individual agencies have  
58 broad discretion under the Records Acts to determine when  
60 documents concededly relating to public business are records  
62 and when they are non-records.

64 We don't think that it is logical or sensible to  
66 adopt that reading of the records statute. Our reason is  
68 this: The records statute contains a very detailed, a very  
70 specific procedure for transferring documents relating to  
72 public business from public to private custody. The agency  
74 must list those documents on a schedule, submit it to the  
76 Archivist, and it must determine before it lists those  
78 documents on the schedule that the documents have no longer  
80 use for the current transaction of government business and  
82

52 they have no long-term value either to other agencies of the  
54 government, to the government as a whole or to the general  
53 public.

55 Now, the interpretation of the Records Act proposed  
51 by the government would allow an individual agency by the  
50 simple expedient of classifying a document as a non-record  
18 material to exclude it entirely from the archival process,  
19 in which case the careful, detailed uniform and consistent  
11 scheme adopted by Congress for making archival decisions  
10 would be bypassed completely.

12 With that, I would like to close. I think that  
14 that is a compelling reason in and of itself why the inter-  
13 pretation of the act offered by the government should not be  
15 accepted.

11 Thank you.

10 MR. CHIEF JUSTICE BURGER: You have a few minutes  
8 left, Mr. Ginsburg. You have three minutes.

8 ORAL ARGUMENT OF DAVID GINSBURG, ESQ.,

1 ON BEHALF OF KISSINGER -- REBUTTAL

0 MR. GINSBURG: Mr. Chief Justice, and may it  
2 please the Court:

4 The Military Audit Project counsel said that the  
3 Solicitor General had conceded that these notes were agency  
5 records in their inception. This is an issue to which  
1 Justice White addressed himself earlier. I simply wish to

32 correct the record. The Solicitor General can speak for him-  
34 self, but he said that they would be regarded as non-record  
33 materials.

35 I make the simple point that if they are non-  
31 record materials, then of course they are not subject to the  
50 Freedom of Information Act which applies only to records.  
13 This is a problem that has to do with the Federal Records  
19 Act and not with the Freedom of Information Act.

11 Now, the implications of the argument that the  
16 Court has just heard from the Reporters Committee should be  
12 clearly understood. The first, that the claim is that the  
14 Freedom of Information Act can be used not only to obtain  
12 records in the custody and the possession and the control  
15 of an agency, but as a basis for requiring the return to an  
14 agency of materials that it had relinquished before the  
10 request was made.

6 QUESTION: Do you think there would be a differ-  
8 ence possibly, Mr. Ginsburg, between the authority of the  
11 Attorney General to pursue records and retrieve them by  
13 replevin and the obligation of the State Department to deal  
15 under the act with records of papers that they no longer  
17 possess?

19 MR. GINSBURG: I think there is no doubt that if  
21 the Attorney General's authority was invoked under the  
23 Federal Records Act and the claim was both by the  
25



52 Administrator of General Services and the Attorney General  
54 and the Secretary of State referring the issue to the Attorney  
53 General, he has plenary power under the Federal Records Act  
55 to pursue the matter. That is a problem of ownership, the  
51 problem of whether it is initially a record is simply a  
50 different matter and a different statute.

10 QUESTION: And that would still leave to be decided  
18 whether, assuming they were owned by the State Department  
12 and therefore properly back in State's possession, whether  
16 they were agency records under the FOIA.

12 MR. GINSBURG: That would still leave that issue  
14 to be determined, Your Honor. In this case, it is clear  
13 that these were never records and were never treated as  
15 records, but the implication is one that we would be able to  
11 use this statute as a basis for requiring the return of  
10 material that has already been relinquished, it would be  
8 required as a basis to obtain materials which an agency had  
8 determined were not its records, it would mean that private  
1 Attorneys General would now be implied under the Freedom of  
6 Information Act so as to supplement in a sense the activi-  
2 ties of the Attorney General under the Federal Records Act,  
4 and finally it would also mean, if this approach to the  
3 Freedom of Information Act were taken, that private citizens  
3 might be able to use the Freedom of Information Act not only  
1 against agencies of the United States but also against

52 private citizens and also against institutions that were not  
54 agencies under the Freedom of Information Act.

53 Thank you.

56 QUESTION: Mr. Ginsburg, is it correct under your  
57 submission that -- say, an agency became aware of an impend-  
58 ing FOIA request before it was filed, that the person who  
18 had custody of all the records that might be the subject of  
18 the request could simply take them home and keep them until  
1A after the request had been filed and then they would avoid  
1B compliance.

12 MR. GINSBURG: We have considered that problem,  
14 Your Honor. It seems to us that all of those facts could  
13 be established and the person in a sense were aggrieved,  
15 that there would be a basis for a remedy I think as suggested  
14 in other cases that the Court has recently considered under  
10 the Administrative Procedure Act. If there was a --

8 QUESTION: If there was a lawless removal?

8 MR. GINSBURG: And the person was aggrieved. If  
1 there was a grievance --

6 QUESTION: You see, your opponent here argues that  
2 that is in substance what happened here, and I am not saying  
4 he is right, but he argues that there was a lawless removal  
3 and they were in effect put in the basement of the people  
5 rather than kept -- and so is the case different?

1 MR. GINSBURG: I think there is no --

QUESTION: On the central issue.

MR. GINSBURG: Under the facts of this case, there is clearly not a lawless removal. But assume for the moment that --

QUESTION: Well, do we have to -- the question really is do we have to decide whether or not it was a lawless removal? You see, once you concede that a lawless removal does not defeat the FOIA request, then it seems to me that we may have a duty to decide whether or not there was a lawless removal.

MR. GINSBURG: Your Honor, it seems to me that the only possible remedy that could be invoked -- this is an issue conceivably for amendment of the statute -- but the only possible remedy that could be invoked presently under the law as we know it would be the equivalent of a review under the Administrative Procedure Act if one could show injury, if one could show damage of some sort and that there was a basis for --

QUESTION: There would be an FOIA cause of action, that is your submission, whether removal was lawful or lawless?

GINSBURG: Under the --

QUESTION: Under the existing FOIA. Isn't that your argument?

MR. GINSBURG: It would be.

QUESTION: And if that is true, then there is no -- if you are correct, then there is no need to inquire whether or not the removal was lawful or lawless.

MR. GINSBURG: Exactly right, sir.

QUESTION: That would be up to the Attorney General and it would be a discretionary act?

MR. GINSBURG: This certainly would be our submission. That is not something he could mandamus the Attorney General to file a suit. It would be discretionary within the power of the Attorney General.

QUESTION: Mr. Ginsburg, I don't mean to prolong it, but I also don't want to leave with a misunderstanding of your position. I think you have agreed with me that in the case I pose if someone aware of a pending request takes all of the documents home and keeps them in his basement, that there would be no FOIA claim against that agency?

MR. GINSBURG: That is my view, sir.

QUESTION: All right.

MR. GINSBURG: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:31 o'clock p.m., the case in the above-entitled matter was submitted.)

- - -



1979 NOV 7 PM 4 47

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE