Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers

Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980)

Henry Kissinger served as national security advisor to the president and as Secretary of State during the Nixon and Ford administrations. During this time, his secretaries kept notes on the content of his telephone conversations. These notes were kept in Kissinger's personal files in his office until he ordered them to be removed to an estate in New York in the fall of 1976. Kissinger subsequently deeded the files to the Library of Congress with the condition that they not be made publicly available for many years. Kissinger left office in January 1977.

In 1976, several Freedom of Information Act (FOIA) requests were made to the State Department for portions of the telephone records. The legal advisor to the State Department denied the requests on the grounds that the records were not agency records (but rather were part of Kissinger's personal files) and were not under departmental control. The Government Archivist, supported by the legal counsel for the General Services Administration, subsequently asked Kissinger for permission to review the files to determine whether they included government records, but Kissinger declined.

The Reporters Committee for Freedom of the Press and others filed a lawsuit in federal district court requesting enforcement of the FOIA requests and release of the records. The court ordered the Library of Congress to turn the records over to the Department of State for inspection. Kissinger appealed, but the circuit court affirmed the trial court while exempting records from his service as a presidential advisor. Both sides appealed to the U.S. Supreme Court, which unanimously affirmed the lower courts on the records relating to his time as presidential advisor. A 5–2 majority reversed the lower courts on the status of the records from his time as Secretary of State, concluding that those records also did not have to be transferred to the State Department.

The core of the decision turned on the interpretation of the requirements of the FOIA and the Federal Records Disposal Act. These statutes were designed to regulate how the executive branch handled its records and to facilitate public access to government documents. Congress and the Nixon administration disagreed about how accessible such documents should be. Both President Nixon and his advisor Kissinger sought to keep their papers out of public hands. In this case, that meant physically removing the records out of agency custody. The courts were forced to decide both whether these sorts of documents properly belonged to the government and whether Congress had provided private individuals with adequate tools for recovering them. For the Court's majority, the government had few legal resources for recovering files that had been removed from its immediate custody.

Why should transcriptions of Kissinger's phone calls be regarded as agency records? Why can Congress override executive officials in determining how to manage executive-branch documents? Should the Court interpret these statutes as finely tuned compromises to be preserved or as broad restrictions on the executive branch? Could Congress take control of the papers of a presidential advisor, if it chose to do so? Could Congress mandate that the Secretary of State record all phone conversations and send a copy of those records directly to a congressional committee?

JUSTICE REHNQUIST, delivered the opinion of the Court.

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The Archivist did request return of the telephone notes from Kissinger on the basis of his belief that the documents may have been wrongfully removed under the Act. Despite Kissinger's refusal to comply with the Archivist's request, no suit has been instituted against Kissinger to retrieve the records under [the Federal Records Act].

Plaintiff requesters effectively seek to enforce these requirements of the Acts by seeking the return of the records to State Department custody. No provision of either Act, however, expressly confers a right of action on private parties. Nor do we believe that such a private right of action can be implied.

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The legislative history of the Acts reveals that their purpose was not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole. . . .

Congress expressly recognized the need for devising adequate statutory safeguards against the unauthorized removal of agency records, and opted in favor of a system of administrative standards and enforcement. . . . Thus, regardless of whether Kissinger has violated the Records and Records Disposal Acts, Congress has not vested federal courts with jurisdiction to adjudicate that question upon suit by a private party. That responsibility is vested in the administrative authorities.

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The plaintiff requesters contend that even though the Federal Records and Records Disposal Acts do not contemplate a private right of action, the Freedom of Information Act (FOIA) nevertheless supplies what was missing from those Acts -- congressional intent to permit private actions to recover records wrongfully removed from Government custody. We are, however, unable to read the FOIA as supplying that congressional intent.

The FOIA represents a carefully balanced scheme of public rights and agency obligations designed to foster greater access to agency records than existed prior to its enactment. . . . We find it unnecessary to decide whether the telephone notes were "

agency records" since we conclude that a covered agency -- here the State Department -- has not "withheld" those documents from the plaintiffs. We also need not decide the full contours of a prohibited "withholding." We do decide, however, that Congress did not mean that an agency improperly withholds a document which has been removed from the possession of the agency prior to the filing of the FOIA request. In such a case, the agency has neither the custody nor control necessary to enable it to withhold.

In looking for congressional intent, we quite naturally start with the usual meaning of the word "withhold" itself. The requesters would have us read the "hold" out of "withhold." The act described by this word presupposes the actor's possession or control of the item withheld. A refusal to resort to legal remedies to obtain possession is simply not conduct subsumed by the verb "withhold."

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The conclusion that possession or control is a prerequisite to FOIA disclosure duties is reinforced by an examination of the purposes of the Act. The Act does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained. . . .

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The FOIA does render the "Executive Office of the President" an agency subject to the Act. The legislative history is unambiguous, however, in explaining that the "Executive Office" does not include the Office of the President. The Conference Report for the 1974 FOIA Amendments indicates that "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President" are not included within the term "agency" under the FOIA. [Journalist William] Safire's request was limited to a period of time in which Kissinger was serving as Assistant to the President. Thus these telephone notes were not "agency records" when they were made.

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The RCFP requesters nevertheless contend that if the transcripts of telephone conversations made while adviser to the President were not then "agency records," they acquired that status under the Act

when they were removed from White House files and physically taken to Kissinger's office at the Department of State. We simply decline to hold that the physical location of the notes of telephone conversations renders them "agency records." The papers were not in the control of the State Department at any time. They were not generated in the State Department. They never entered the State Department's files, and they were not used by the Department for any purpose. If mere physical location of papers and materials could confer status as an "agency record" Kissinger's personal books, speeches, and all other memorabilia stored in his office would have been agency records subject to disclosure under the FOIA. . . .

Accordingly, we reverse the order of the Court of Appeals compelling production of the telephone manuscripts made by Kissinger while Secretary of State and affirm the order denying the requests for transcripts produced while Kissinger served as National Security Adviser.

JUSTICE MARSHALL and JUSTICE BLACKMUN took no part in the decision of these cases.

JUSTICE BRENNAN, dissenting in part.

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Although I agree that the Records Acts cannot be neatly interpolated into FOIA, I part company with the Court when it concludes that FOIA does not reach records that have been removed from a federal agency's custody. If FOIA is to be more than a dead letter, it must necessarily incorporate some restraint upon the agency's powers to move documents beyond the reach of the FOIA requester. Even the Court's opinion implies -- as I think it must -- that an agency would be improperly withholding documents if it failed to take steps to recover papers removed from its custody deliberately to evade an FOIA request. Beyond that minimal rule, I would think it also plainly unacceptable for an agency to devise a records routing system aimed at frustrating FOIA requests in general by moving documents outside agency custody with unseemly haste.

Indeed, I would go further. If the purpose of FOIA is to provide public access to the records incorporated into Government decisionmaking, then agencies may well have a concomitant responsibility to retain possession of, or control over, those records. But, as with so many questions that the Court must resolve, the difficulty is where to draw the line. . . . To suggest the elements of such a test, however, is to expose how ill-suited a court is to define them adequately. It is Congress which has the resources and responsibility to fashion a rule about document retention that comports with the objectives of FOIA.

Although one might hope that Congress will soon address this problem, we must decide the case currently before us. I have little difficulty concluding that records which should have been retained for FOIA purposes may be reached under FOIA even though they have already passed beyond the agency's control. . . .

JUSTICE STEVENS, dissenting in part.

. . . . The decision today exempts documents that have been wrongfully removed from the agency's files from any scrutiny whatsoever under FOIA. It thus creates an incentive for outgoing agency officials to remove potentially embarrassing documents from their files in order to frustrate future FOIA requests. It is the creation of such an incentive, which is directly contrary to the purpose of FOIA, rather than the result in this particular case, that prompts me to write in dissent.

In my judgment, a "withholding" occurs within the meaning of FOIA whenever an agency declines to produce agency records which it has a legal right to possess or control. . . .

Everyone seems to agree that the summaries of Dr. Kissinger's State Department telephone conversations should be considered "agency records" subject to disclosure under FOIA if they were

"agency records" under the definitions set forth in the Federal Records Act (FRA). The parties disagree, however, as to the proper application of that Act to the facts of this case. The requesters argue that the summaries were "records" under the FRA because they were documents "appropriate for preservation" by the agency. . . . Dr. Kissinger, on the other hand, argues that the summaries were personal papers which he could dispose of at will under the FRA and which were never subject to disclosure under FOIA. The Government takes an intermediate position, arguing that the summaries were "agency records" only to the extent that they contained significant information that was not reflected in other agency records.

I cannot accept Dr. Kissinger's argument that the summaries are private papers. As the District Court noted, they were made in the regular course of conducting the agency's business, were the work product of agency personnel and agency assets, and were maintained in the possession and control of the agency prior to their removal by Dr. Kissinger. They were also regularly circulated to Dr. Kissinger's immediate staff and presumably used by the staff in making day-to-day decisions on behalf of the agency. . . . Under these circumstances, I find it difficult to believe that none of the summaries was "appropriate for preservation" by the agency. . . .

The second question to be considered is whether the State Department continued to have custody or control of the telephone summaries after they were removed from its files so that its refusal to take steps to regain them should be deemed a "withholding" within the meaning of the Freedom of Information Act. As I stated at the outset, I do not agree with the Court that the broad concepts of "custody" and "control" can be equated with the much narrower concept of physical possession. In my view, those concepts should be applied to bring all documents within the legal custody or control of the agency within the purview of FOIA. Thus, if an agency has a legal right to regain possession of documents wrongfully removed from its files, it continues to have custody of those documents. If it then refuses to take any steps whatsoever to demand, or even to request, that the documents be returned, then the agency is "withholding" those documents for purposes of FOIA.

In this case, I think it is rather clear that the telephone summaries were wrongfully removed from the State Department's possession. Under these circumstances, the State Department's failure even to request their return constituted a "withholding" for purposes of FOIA.

The third and most difficult question is whether the State Department's "withholding" was "improper." In my view, the answer to that question depends on the agency's explanation for its failure to attempt to regain the documents. If the explanation is reasonable, then the withholding is not improper. . . .

Accordingly, I believe the District Court had jurisdiction under FOIA to determine (a) whether the telephone summaries were in fact agency records and (b) if so, whether the State Department's failure to seek return of the documents was improper. . . .