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William Alsup, Esquire
Assistant to the Solicitor General
Department of Justice
Washington, DC 20530

Dear Mr. Alsup:

Subject: Henry A. Kissinger v. Reporters Committee for the Freedom of the Press, et al.; Reporters Committee for the Freedom of the Press v. Henry A. Kissinger, et al., Nos. 78-1088 and 78-1275, respectively, United States Supreme Court

The General Services Administration appreciates the opportunity to review and comment upon your draft of the Government's brief proposed for submission to the Supreme Court in the above-captioned cases. We have reviewed the draft carefully. Regretably, we conclude that significant segments of the brief reflect highly erroneous interpretations of law and fact, and that, as presently drafted, its submission would cause extreme and unnecessary harm to the records program of GSA's National Archives and Records Service (NARS), and would be contrary to public policy. We also note that the present draft represents a radical departure from the Department of Justices's public and non-public position on this litigation in the past. Therefore, we urge that you redraft the brief in a manner consistent with the views previously espoused by the Government.

Two premises highlighted the Government's "middle-ground" position in the past: First, with rare exception the Freedom of Information Act does not require an agency to retrieve and grant access to records no longer within its custody; and second, the trial judge's grant of summary judgment to plaintiffs prematurely stripped the interested executive branch agencies of the ability to attempt to resolve the ongoing controversy over the Kissinger telephone transcripts through the mechanics of the Federal Records and Records Disposal Acts. While each of these arguments is just as valid today, the draft brief unnecessarily weakens the first premise and destroys the second by introducing for the first time the concept that the transcripts are neither records nor personal papers, but non-record materials, the disposition of which is at the complete discretion of Dr. Kissinger.

The draft brief maintains that the telephone transcripts are neither agency records, as the Reporters Committee contends, nor personal papers,

as Dr. Kissinger contends. Rather, they represent a third unique species of documentation, non-record materials. We suspect that your characterization of these transcripts as non-record materials was intended as a modified continuation of the Government's "middle-ground" position in the litigation. We submit, however, that officially characterizing these materials as non-record portends far graver consequences to NARS and its government-wide records management program and responsibilities than would a judicial determination that these particular documents are personal papers. Before we describe these consequences, however, let us synopsize the reasons for our conclusion that significant portions of the present argument distort the relevant facts and law.

First, the brief includes a detailed examination of Federal records statutes from the beginning of the republic to the present day. It focuses on efforts to hold down Federal records to manageable numbers. It concludes that in addition to the Records Disposal Act, which requires the approval of the Administrator of General Services before an agency may dispose of its records, certain provisions of the Federal Records Act permit each agency to dispose of portions of its documentation by declaring these materials non-record. It is this portion of the brief that we find most troublesome, indeed frightening. Using the description of the Kissinger transcripts contained in your brief, this interpretation would grant each agency head the unfettered discretion to dispose of documents "made in the course of . . . official duties, using government employees and materials, for the purpose of recording agency business and assisting him and other government employees in discharging their official responsibilities . . . ." He would do so merely by declaring these documents non-record.

The widespread adoption of this scheme would be catastrophic to a vital purpose of the Federal Records Act that the brief ignores. This is the preservation of materials determined to be permanently valuable or archival. Frequently, the most valuable records are those that an agency head or his subordinates would prefer be hidden, or even destroyed. What could be a better tool for these purposes than to declare that the very same statute which has as its purpose the preservation of valuable records also permits their whimsical destruction?

The Federal Records Act was never intended to be a substitute for the Records Disposal Act. While the former is partially concerned with the problem of too many records, this is generally to be dealt with by avoiding the creation of unnecessary records and by invoking the disposal provisions of the Records Disposal Act at the earliest reasonable

time. In this respect, the draft brief is restating Dr. Kissinger's oft-cited argument that because the Federal Records Act did not require the creation of the transcripts in the first place, it permits their unmonitored disposal. This position is begging the question. It raises a false issue that the Government must reject. The transcripts were created. They continue to exist. They relate to the business of the State Department, and uniquely document that business. They may be disposed of only in accordance with the law expressly designed to provide for the disposition of these and comparable materials, i.e., the Records Disposal Act.

Second, the brief supports its contention that the transcripts are non-record by relating them to working papers and similar documentation that NARS has stated in its regulations are non-record. This position distorts the nature of the materials in question. While NARS does recognize that working papers are generally non-record, its regulations pertain to materials which are transitory or preliminary to the creation of records. Agency documents that are systematically created, systematically filed, systematically communicated, systematically preserved and systematically disposed of are not working papers or preliminary notes. They are records.

In a similar vein, the brief relies upon the definition of records that governs Federal Records and Records Disposal Acts. It states repeatedly that records are defined as materials "appropriate for preservation," and that it is within the discretion of each agency head to determine which materials are "appropriate for preservation." In addition to ignoring the Administrator's role in regulating what materials are "appropriate for preservation," the brief also ignores an examination of the words which precede the quoted phrase in the definition of records. Records are defined as documentary materials "preserved or appropriate for preservation." [Emphasis added.] Surely, the materials at issue in the present controversy have been systematically preserved, making academic the question of whether they are "appropriate for preservation."

Third, the brief accepts the contention of Dr. Kissinger that the Eagleburger extracts fulfill the statutory and regulatory requirements of maintaining essential documentation of agency activities or transactions. The Eagleburger extracts do not come close to fulfilling these requirements. Your brief alludes to a sample examination of the transcripts conducted by a State Department representative and a NARS representative shortly before the trial judge granted the plaintiffs' motion for summary judgment. Each of the representatives prepared himself for the review

by first studying corresponding Eagleburger extracts and other pertinent materials within the State Department files. Although the results were never made known to anyone other than a few necessary persons in State, CSA and Justice, the sampling proved conclusively that the majority, if not almost all, of the transcripts were State Department records, and that their substance was hardly reflected in the Eagleburger extracts or other State Department records. Having this knowledge, it would be irresponsible, perhaps even unlawful, for the Government to now contend that these materials are non-record.

Fourth, the brief maintains that the recent trend has been to give agency heads increasingly greater discretion over the treatment of their agencies' documentation. To the contrary, the trend since the enactment of the Federal Records Act in 1950, has been to temper agency discretion by placing greater responsibility and authority in the Administrator. For example, in 1970, the Congress amended the Records Disposal Act to require agency heads to get the approval of the Administrator before they could dispose of agency records; in 1976, it amended the Federal Records Act to give the Administrator significantly greater authority in monitoring the records management practices of all agencies; in 1978, it amended the Federal Records Act to increase the authority of the Administrator with respect to the accessioning of permanently valuable records into the National Archives; and also in 1978, it amended the Records Disposal Act again to require the mandatory application by all agency heads of NARS' general records schedules.

Fifth, the brief suggests that NARS forfeited its potential authority to dictate a contrary disposition of the transcripts by failing to regulate their retention. This contention ignores NARS' extraordinary efforts to exercise its prerogatives in this matter, as evidenced by documents cited in the brief, and the continued rebuffs by State Department officials seeking to keep our archivists out of the picture. To be sure, the examination of the transcripts mentioned above occurred only after the Justice Department had filed an opposition in the District of Columbia to Dr. Kissinger's motion for summary judgment. It is amazing how the position reflected in the draft brief differs from the Justice Department's position at that time, and we daresay we are at a loss to explain the radical change in policy.

Our last point concerns the discussion of the transcripts created while Dr. Kissinger was an adviser to President Nixon exclusively. While we don't question the inapplicability of the Freedom of Information Act to these materials, we are convinced that the Presidential Recordings and Materials Preservation Act, which places custody and control of the Presidential historical materials of the Nixon administration in the

Administrator, is applicable. To this end, we have begun negotiations with Dr. Kissinger's counsel about the possible settlement of this issue without our having to refer it to the Justice Department. We are concerned that the wording of the draft brief, including its failure to mention the possible application of the Presidential Recordings and Materials Preservation Act, may undermine our present negotiations and disqualify the Justice Department from representing our interests in the future.

We noted previously that we foresaw far graver consequences from the Government's reliance on the "non-record" theory than even from a judicial determination that the transcripts in question are personal papers, as advanced by Dr. Kissinger. We hope that this outline of our problem with the draft brief has better illuminated these consequences. Basically, we cannot tolerate a situation in which the disposal of significant agency documentation is governed by conflicting standards, especially when the implementation of the first standard may result in the loss of many of our most valuable records. The brief suggests that the harm associated with this interpretation of the Federal Records Act is mitigated by the applicability of the Freedom of Information Act to similar materials while they remain in agency custody. The Freedom of Information Act may very well serve as a means of assuring agency accountability, but it is not intended nor will it ever serve as a substitute for historical research. Moreover, the records of greatest historical value are more often than not exempt from mandatory disclosure under the FOIA.

On the other hand, an ultimate judicial determination that the Kissinger telephone transcripts are personal papers will only bear on this single body of materials which, in any event, are assured of preservation by his donation of them to the Library of Congress. Such a "loss" would be minimal when compared to the potential losses that would accrue if the Government adopts the overboard concept of non-record materials advanced in the brief.

While its conclusions about the Federal Records and Records Disposal Acts disturb us, we are bouyed by the fact that the brief itself notes that most of its conclusions about these statutes are gratuitous to the Government's position about the outcome of this litigation. To be sure, you may delete the entire discussion of non-record materials without impacting significantly on your conclusions and recommendations. This would be consonant with the Government's previous position in this

controversy. Although GSA has stated and continues to believe that the Government should accept the ruling of the lower courts, or remain silently neutral, we understand that there may be extraordinary circumstances in this case which dictate an alternative position. Under these circumstances, we could support a position along the lines of the Coverment's amicus brief filed in the Court of Appeals. Again, we urge your reconsideration along these lines.

Of course, we are prepared to meet and discuss these matters at any time. Please call Steven Garfinkel at 566-1460 to make the necessary arrangements.

Sincerely,

(Signed) ALLIE B. LATIMER

ALLIE B. LATIMER
General Counsel

cc: Michael Cardozo
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