

Court Blocks Access to Kissinger Calls

3/4/80

By Fred Barbash

Washington Post Staff Writer

The Supreme Court yesterday sided 5 to 2, with Henry A. Kissinger in his efforts to block public access to records of telephone conversations he made while directing U.S. foreign policy.

In its ruling, the court significantly expanded the government's ability to keep things secret. Government officials, the court said, can dispose of otherwise publicly available records without being challenged for access to them under the Freedom of Information Act.

Justices John Paul Stevens and William Brennan, who dissented, said

the decision in effect gives agencies the power to conceal "embarrassing" documents simply by transferring them outside their control.

Using the Freedom of Information Act, reporters, scholars and others had sought from the State Department transcripts of telephone conversations Kissinger prepared while serving as President Nixon's national security affairs adviser and secretary of state.

In the last months of his tenure, Kissinger had the materials transferred from the State Department to Nelson Rockefeller's estate in New York in October 1976. Over the next two months, he sent the records to the Li-

brary of Congress with the stipulation that the public could not see them for 25 years or five years after Kissinger's death.

That transfer, the court ruled yesterday, placed the transcripts off-limits to the public. Once an agency (in this instance, the State Department) has transferred or disposed of records, it relinquishes its obligations under the Freedom of Information Act to make them available, Justice William Rehnquist wrote for the majority.

The materials cease being official "agency" records subject to disclosure under that law, and while the government may go to court to seek their re-

turn, private parties may not, Rehnquist wrote.

Rehnquist was joined by Chief Justice Warren Burger and Justices Potter Stewart, Byron White and Lewis Powell. Justices Thurgood Marshall and Harry Blackmun did not participate for reasons they did not disclose.

Brennan and Stevens concurred with parts of the opinion but strongly dissented from the critical portion, saying it would allow the use of subterfuge to avoid disclosure.

The decision "creates an incentive for outgoing agency officials to remove potentially embarrassing docu-

See KISSINGER, A7, Col. 1

Court Blocks Access to Kissinger Calls

KISSINGER, From A1

ments from the files in order to frustrate Freedom of Information Act requests," Stevens wrote. He added that it "exempts documents that have been wrongfully removed from an agency's files from any scrutiny whatsoever under the Freedom of Information Act."

According to legal experts on the Freedom of Information Act, an official wanting to shield materials under yesterday's ruling could transfer them to the control of someone or some place not covered by the act. That could include a private home or the Library of Congress.

The Freedom of Information Act, designed to combat government secrecy, was passed in 1966 and was amended in 1974. It does not apply to Congress.

The decision was a major victory for Kissinger in his dispute with the Reporters Committee for Freedom of

the Press, columnist William Safire, historians, political scientists and others, all of whom sought access to the transcript in 1976. They contend the records were improperly transferred from the state department.

While in public office, Kissinger had his secretaries either tape or take verbatim notes of all his phone conversations. He has said his purpose was to have "work aids to ease administrative burdens" and to alert him and his aides to conversations requiring follow-up action.

Rehnquist said it was not necessary for the court to rule on whether Kissinger broke the law by transferring the records. Once they were transferred, however, only another government agency could sue to bring them back. No agency did so.

It was the second Supreme Court ruling in the last two weeks to expand government ability to protect information. On Feb. 19, the court gave the CIA and other agencies dealing with

sensitive information the power to place strong restrictions on release of information by employes and former employes.

In another Freedom of information Act ruling yesterday, the court said records of government contract recipients are off-limits to the public.

The case involves a controversy over a government-financed study of diabetes treatments done by a private contractor, the University Group Diabetes Program.

After results of the study were released, a national association of physicians involved in diabetes treatment—the Committee on the Care of the Diabetic—sought access to the study's raw data, contending that the federal financing subjected the private group to the Freedom of information Act.

In its decision yesterday, the court disagreed. Justice Rehnquist wrote the 7-to-2 opinion. Justices Brennan and Marshall dissented.