

# 'Background' Briefing Runs Afoul of Law

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A venerable Washington institution known as the "background" press briefing ran afoul of the law yesterday in a court decision that could change the way in which unnamed high government officials slip news to the press.

In a case involving perhaps the most famous unnamed high government official of them all—former Secretary of State Henry A. Kissinger—the U.S. Court of Appeals said such background press briefings are not

protected from disclosure under the Freedom of Information Act.

At issue are about two pages of a 59-page transcript of a press briefing Kissinger gave on the U.S.-Soviet Strategic Arms Limitation talks (SALT) on Dec. 3, 1974. The facts could be reported in the press, but Kissinger's name could not be attributed to the reports under the ground rules that were set up at the time.

However, when former national security aide Morton Halperin filed a request under the Freedom of Information Act for a copy of the briefing

two months later, State Department officials said two pages of the briefing were "confidential"—the lowest security rating—and would not be turned over.

The "confidential" tag was attached although the information had been distributed to nearly 40 reporters—none of whom had security clearances to receive such information, the opinion said yesterday.

To justify the "confidential" label, State Department officials said the mere attribution of the remarks to

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## 'Background' Press Briefing Snagged by Information Law

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Kissinger by name would "damage the national security."

Yesterday's appeals court opinion made clear that whatever "national security" might be involved, the State Department's handling of the case had been improper.

The appeals court did, however, order a lower court to hold an unusual secret hearing at which the State Department could continue its attempts to justify the "confidential" label on a national security basis.

In terming the litigation "an FOIA case with a difference," U.S. Circuit Court Judge Carl McGowan said in the opinion for a unanimous three-judge bench that secret hearing by the lower court judge "will presumably reveal no information that has not already been made known to the world through the press except for an official admission that its source was the then-Secretary of State."

Much of McGowan's opinion, however, was built around the dilemma in which the State Department found itself when it attempted after the fact to classify material after it had already been released for public consumption.

McGowan described the "background" procedure by which the State Department would brief reporters in confidence.

Such a briefing method, McGowan explained, permitted news to get to the public "while simultaneously avoiding the risks allegedly associated with direct quotation of high-ranking government personnel or official attribution of sensitive statements to government sources identified by name."

Although the State Department later abandoned the procedure, tran-

scripts were kept of the particular briefing that Kissinger conducted on the SALT talks. The transcript is what got the department in trouble in this particular case, although the same principle applied by the judges would apparently apply to any notes or remarks during such briefings in the future.

McGowan chastised the State Department for attempting to use the FOI act's exemptions as a shield in this case, saying the courts were being asked essentially to "create" such exemptions for press briefings.

"It seems evident to us that the State Department failed utterly to anticipate and to identify the problems presented by the enactment of the Freedom of Information Act in relation to the background press conference," McGowan said. Agreeing with McGowan were U.S. Circuit Judges J. Skelley Wright and George MacKinnon.

"... Congress has provided no special FOIA exception for the transcripts of such conferences," McGowan added, saying the State Department was asking the court "in effect, to save them from the consequences of that failure by providing an exemption the Congress did not create."

But, McGowan continued, the State Department still should be given a chance to prove its allegation that the attribution of the remarks to Kissinger will harm the national security. The appellate court ordered U.S. District Court Judge June Green, whose ruling in favor of Halperin it essentially affirmed, to hold a secret hearing to hear those claims.

At the time, Green should consider the fact "that the person in question no longer occupies an official position," McGowan added.