



DEPARTMENT OF STATE

Washington, D.C. 20520

January 14, 1976

Memoranda of Telephone Conversations Monitored By
Dr. Kissinger's Staff As Assistant to the President

This memorandum addresses the question whether common law and constitutional law support the confidentiality of certain memoranda of telephone conversations monitored by Dr. Kissinger's staff while he was serving as Assistant to the President.

I. The Memoranda are NOT subject to the Presidential Recordings and Materials Preservation Act.

This statute* subjects certain tape records and "Presidential historical materials of Richard M. Nixon" to the control of the Administrator of General Services, subject to specified conditions. The statute was upheld on its face on 7 January 1976 by a three-judge panel of the District Court for the District of Columbia. The case is reportedly on appeal to the Supreme Court.

Specifically, the materials subject to the statute and, therefore, subject to the District Court order of 7 January 1976 are:

1. "all original tape recordings of conversations ***." Sec. 101(a)

* P.L. 93-526, Dec. 19, 1974, 88 Stat. 1695, 44 U.S.C.A., note to Sec. 2107, February 1975 supplement). See attached.

2. "all papers, documents, memorandums, transcripts and other objects or materials which constitute the Presidential historical materials of Richard M. Nixon." (Sec. 101(b)). "Historical materials" are defined in the statute as defined in section 2101 of Title 44 which concerns archival administration, as "including books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings and other objects or materials having historical or commemorative value."

The 1974 statute and the District Court order cover ONLY "materials of Richard M. Nixon." The memoranda now in the custody of Mr. Eagleburger are not such materials for the following reasons:

1. The conversations were not with Mr. Nixon -- but with others with whom Dr. Kissinger spoke. X
2. The conversations, and the memoranda reporting them, never became part of the White House's Central Files which were subject to the directions of the President, and subject to the normal record keeping systems instituted by the White House for "White House records" or for records of Richard M. Nixon.
3. The statute of 1974 was passed to supersede a private contract between Mr. Nixon and Mr. Sampson, Administrator of General Services, because Congress feared, inter alia, that Mr. Nixon might not preserve papers that in the public interest should be preserved. Mr. Nixon, as far as we know, never asserted then, nor asserts now, that records of the telephone conversations involved here were "materials of Richard M. Nixon."

The District Court in Nixon v. GSA cited archival practices frequently as appropriate guides in interpreting the scope of the statute. The archives of previous Presidents do include some materials collected personally by members of the President's staff, but these materials were received as gifts of the donors. For example, the papers collected by Harry Hopkins, in the course of his employment as an

intimate advisor of President Roosevelt, were a gift to the FDR Library. Similarly, the papers of Mr. Harriman, accumulated in both the Roosevelt and Truman administrations, were given to the Truman Library, not the Roosevelt Library, by Mr. Harriman, who made a personal decision to give the papers to the library of the President he chose.

It is not necessary to determine who "owns" the papers for purposes of deciding that the papers are NOT materials of Richard M. Nixon. The papers embody some personal property rights of their author, the literary interest of the originator is protected even if he is a government employee according to respectable authority (see Nimmer on Copyright, Sec. 66 and cases therein cited). The papers clearly are appropriate for the Administrator of General Services to receive should Dr. Kissinger see fit to transfer them. Under Public Law 90-620, Act of Oct. 22, 1956 (44 U.S.C. 2107), the Administrator is authorized to accept "historical materials of [an] official or former official of the Government *** subject to restrictions agreeable to the Administrator as to their use ***." In Nichols v. U.S. 460 F.2d 671 (10th Cir. 1972) the Court upheld the right of the Kennedy estate to donate materials to the Government subject to severe restrictions despite the fact that it was uncertain whether or not the Kennedy estate had "title" to the materials. The Court specifically found that the materials were properly withheld from disclosure under the Freedom of Information Act as "matters that are *** specifically exempted from disclosure by statute."

II. The Memoranda are confidential under both common law and constitutional law doctrines.

The constitutional and statutory context in which public disclosure of information is often posed tends to obscure a more fundamental point; namely, that confidentiality may be legally justified in the absence of a statute, and in the absence of any separation of powers doctrine. The need for confidentiality is not always rooted in the Constitution, but is implied by common law courts where the need

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for confidentiality overcomes the asserted interest in disclosure. To be sure, the need may be buttressed by a constitutional claim, and the description of the claim, by the Court may be couched in constitutional references. The Courts, however, may be creating "constitutional common law."*

In U.S. v. Nixon, the Supreme Court explicitly asserted a nonconstitutional basis for some confidentiality in government, in recognizing:

"The valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion."**

In addition, the Supreme Court in U.S. v. Nixon recognized a constitutional basis for withholding material relating to military or diplomatic secrets.

* See Monaghan, "Constitutional Common Law," 89 Harv. L. Rev. 1 (Nov. 1975).

** 418 U.S. 683, 705 (1974).



Public Law 93-536
 93rd Congress, H. R. 15818
 December 22, 1974

An Act

To amend title 44, United States Code, to redesignate the National Historical Publications Commission as the National Historical Publications and Records Commission, to increase the membership of such Commission, and to increase the authorization of appropriations for such Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 25 of title 44, United States Code, is amended by inserting "AND RECORDS" immediately after "PUBLICATIONS" in the chapter heading.

(b) Section 2501 of such title is amended by inserting "two members of the Society of American Archivists to be appointed, for terms of four years, by the Society of American Archivists; two members of the American Association for State and Local History to be appointed, for terms of four years, by the American Association for State and Local History;" immediately after the last semicolon in such section.

(c) Section 2504(b) of such title is amended by—

(1) striking out "1973" and inserting in lieu thereof "1975"; and

(2) striking out "\$2,000,000" and inserting in lieu thereof "\$4,000,000".

Sec. 2. The chapter analysis at the beginning of title 44, United States Code, is amended by striking out

"25. National Historical Publications Commission"

and inserting in lieu thereof

"25. National Historical Publications and Records Commission".

Approved December 22, 1974.

National Historical Publications Commission.
 Name change.
 44 USC 2501.
 Membership increase.
 88 STAT. 1734
 88 STAT. 1735

Appropriation.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 93-1340 (Comm. on Government Operations).
 SENATE REPORT No. 93-1331 (Comm. on Government Operations).
 CONGRESSIONAL RECORD, Vol. 120 (1974):

Dec. 3, considered and passed House.
 Dec. 12, considered and passed Senate.

