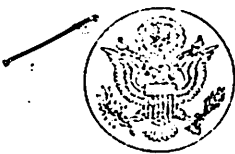


MS



DEPARTMENT OF STATE
ACTION MEMORANDUM

S/S

LIMITED OFFICIAL USE

December 23, 1976

NODIS

TO: The Secretary
FROM: L - Monroe Leigh

Telecons

Problem

There has been quite a lot of press interest in your telecons. See transcript of yesterday's press briefing (Tab 4).

The Washington Post and the New York Times (Tab 5) have publicized my legal opinion to you on the telecons (Tab 6). Bob Funseth has made a copy of the opinion available to the press.

After learning that the telecons are not going to the Library of Congress with your other papers, the American Historical Association's attorney (Bob Herzstein of Arnold & Porter) told Larry that his client would bring a lawsuit with respect to the telecons before the end of the year.

In light of these developments, it is essential that you now focus again on the alternatives available for disposition of the telecons.

Discussion

The principal concern is the lawsuit. The American Historical Association intends to bring suit to assure that the telecons will be preserved. Their second objective would be to seek scholarly

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access to the telecons within a reasonable period. In seeking these objectives, the Association will undoubtedly contend that many or all of the telecons are government records, and that at least some of them reflect government actions or decisions that are not expressed in other government records.

Both the initiation of such a suit and interim court orders during several years of litigation can have very immediate consequences for your use of the telecons. The major concerns are these:

1. The impetus for a suit by the American Historical Association seems to be that you are retaining the telecons in your personal possession instead of depositing them with the Library of Congress or some other institution with an interest in preserving these papers. (The attorney for the Association indicated that he was pleased about the Library of Congress donation, but that it is the fate of the telecons which would lead his client to start litigation before the end of the year.) The filing of a suit in the next week or two will focus more press attention on the telecons. By contrast, depositing the telecons at the Library of Congress could well end press speculation, and also stop the proposed American Historical Association suit -- although there may still be litigation by other groups.

2. If a suit is brought, the first step a plaintiff would take is to secure an interim order to protect the telecons. If the telecons are in your possession, the court might be more likely to order you to deliver the telecons to the court, where they would be placed under seal. Although you would undoubtedly be given access to them, it would not be convenient access. (Also, it is conceivable, though in my opinion not probable, that the court would allow opposing counsel access in some limited fashion.) However, if the telecons were at the Library of Congress, the court (if a suit were filed) would almost certainly allow them to remain at the Library, subject to restrictions on removal.

3. The ultimate outcome of a suit could be affected by the arrangements you have made for the telecons. If they are placed at the Library of Congress under conditions similar to those applicable to your main donation to the Library, a court may be more inclined to conclude that scholarly and government interests are adequately protected, than if the papers are placed in some private vault.

Alternatives

The following alternatives are listed without recommendation, but Larry and I would like to discuss them with you at your earliest convenience.

A. A separate donation to the Library of Congress which precludes disclosure of any telecon that mentions any person still living -- in addition to being closed for 25 years or 5 years after your death, whichever is later. (See Tab 1).

- This would probably head off the American Historical Association suit.
- Even if a suit is brought, it would probably give you convenient access while avoiding a court order that requires the telecons to be delivered to the court.
- It could incline a court toward a final decision in your favor.
- A separate donation would comport to some extent with our earlier statements (Tab 4) which indicated that the telecons would not be covered by the original Library of Congress donation.
- A separate donation based on whether a person mentioned in a telecon was still living, would reflect concern for the privacy and reputations of others.

B. A separate donation to the Library of Congress which would provide a longer period than the first donation -- e.g., 35 years or 5 years after your death, whichever is later. (See Tab 2)

- Increasing the period of nondisclosure beyond 25 years would at first glance appear to increase the protection for the telecons. But since historical groups are interested in future access by scholars, an increase in the time period would be less likely to diffuse a lawsuit.
- An assessment should be made of how sensitive the telecons are in relation to other materials at the Library -- and of whether there are more than marginal benefits in imposing substantial restrictions beyond the 25 years or 5 years after your death formula.

C. Include the telecons under the original donation to the Library of Congress. (See Tab 3)

- This would provide most of the advantages of Alternative A.
- It would leave unexplained why the telecons were not included in this donation in the first place.

D. Maintain our current position, leaving open the possibility that the telecons would go to the Library in the future.

- A lawsuit will probably be brought in the next week or so, and retaining the telecons in your personal possession will probably give rise to the difficulties discussed above -- particularly a court order that would give the court (or some government institution) interim possession of the telecons.

- It would emphasize our position that the telecons are personal papers and, barring an unfavorable court decision, would help reinforce the principle that an official is entitled to maintain personal records of his official conduct.
- An assessment should be made of how sensitive the telecons are, and of whether there are overriding advantages in not depositing these papers at the Library of Congress.

Recommendation:

That you meet with Larry and me on Friday.

Approve _____ Disapprove _____

Date _____

Time _____

Attachments:

- Tab 1. Draft Second Deed of Gift (Alternative A).
- Tab 2. Draft Second Deed of Gift (Alternative B).
- Tab 3. Original Deed of Gift.
- Tab 4. Excerpt from yesterday's press briefing.
- Tab 5. Recent newspaper articles on your papers.
- Tab 6. Mr. Leigh's legal opinion on the telecons.

Drafted by:
L:MDSandler:be *MS*
12/23/76 x22149

Concurrence:
M - Mr. Eagleburger (substance)

SECOND DEED OF GIFT
AND AGREEMENT

Henry A. Kissinger hereby donates to the United States of America, to be held and administered by the Library of Congress and its officials as part of a collection of the papers of Henry A. Kissinger, papers consisting of transcribed secretarial notes of his telephone conversations. In implementing this gift and as conditions to its donation, Henry A. Kissinger and the Library of Congress agree to the following:

1. The terms and conditions of the Deed of Gift and Agreement executed on November 12, 1976 by Henry A. Kissinger and the Librarian of Congress ("First Deed of Gift") are hereby incorporated by reference and extended to the present gift, except as provided in paragraph 2 below.

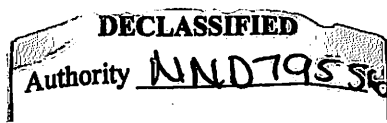
2. In addition to the period of time described in paragraph 4 of the First Deed of Gift, a paper shall not be available for public access if it mentions any person still living.

Witnessed and agreed to, this ____ day of December, 1976.

Henry A. Kissinger

Accepted and agreed to on behalf of the Library of Congress, this ____ day of December, 1976.

Daniel J. Boorstin
Librarian of Congress



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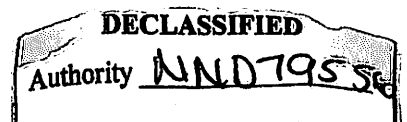
2. Instead of the period of time described in paragraph 4 of the First Deed of Gift, the applicable period shall be 35 years after the date of this Deed of Gift and Agreement, or five years after the death of Henry A. Kissinger, whichever is later.

Witnessed and agreed to, this ____ day of December, 1976.

Henry A. Kissinger

Accepted and agreed to on behalf of the Library of Congress, this ____ day of December, 1976.

Daniel J. Boorstin
Librarian of Congress



DEED OF GIFT AND AGREEMENT

Henry A. Kissinger hereby donates to the United States of America, to be held and administered by the Library of Congress and its officials, as a gift to the nation, a collection of the papers relating to his years of government service and other periods of his life ("the Collection"). The Collection shall contain the papers described in a schedule to be prepared and attached hereto. In implementing this gift and as conditions to its donation, Henry A. Kissinger and the Library of Congress ("the Library") agree to the following:

1. Purposes. This Deed of Gift and Agreement are undertaken in order to assure --

- (a) That the Collection may be preserved for future historical and public use.
- (b) That national security information is protected.
- (c) That Henry A. Kissinger may have access to the Collection, so that he may prepare a historical account of his years in government, and so that he may in the future give information

and testimony that may be requested of him concerning his years in office.

(d) That rights of privacy and the reputations of other persons may be protected for a reasonable time.

2. Papers in the Collection; Government Approval. The Collection shall consist of (a) personal papers of Henry A. Kissinger ("Personal Papers"), and (b) copies of government papers of which there is an original or record copy in government files ("Government Papers"). The Personal Papers shall include handwritten notes, private letters, papers dating from Henry A. Kissinger's years at Harvard University, and similar materials. The copies of Government Papers are those which Henry A. Kissinger worked on or reviewed during his government service, and which authorized officials have approved for inclusion in the Collection. Preexisting government privileges with respect to copies of Government Papers in the Collection shall not be affected by this gift.

3. Delivery of Papers. Personal Papers in the Collection will be delivered to the Library within three months after the date this Deed of Gift and Agreement is signed. Copies of Government Papers to be included in the Collection will be delivered to the Library after they are reviewed by government officials with authority over the records, to assure that no original or record copies are included in the Collection, and will be delivered to the Library within three months after the date this Deed of Gift and Agreement is signed. Following each delivery of papers to the Library, the Library shall send to Henry A. Kissinger a written acknowledgment of the delivery.
4. Future Public Access to Personal Papers. Personal papers shall be made available for public access, but not until 25 years after the date of this Deed of Gift and Agreement, or until five years after the death of Henry A. Kissinger, whichever is later.

5. Future Public Access to Copies of Government Papers. The copies of Government Papers in the Collection shall be available for public access, but not until the period of time provided in paragraph 4 has elapsed; however, such papers shall not be available for public access unless the originating agency has determined that a paper contains no classified or restricted information.

6. Use by Henry A. Kissinger. Henry A. Kissinger shall have unrestricted access to all papers in the Collection during his lifetime. The Library shall make available to Henry A. Kissinger working space where he may use the Collection and other materials of the Library. A research assistant or assistants engaged by Henry A. Kissinger shall be given access to the Collection, provided they have appropriate and current government-approved security clearances.

5. Future Public Access to Copies of Government Papers. The copies of Government Papers in the Collection shall be available for public access, but not until the period of time provided in paragraph 4 has elapsed; however, such papers shall not be available for public access unless the originating agency has determined that a paper contains no classified or restricted information.

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7. Use by Others During Interim Period.

Until the period described in paragraph 4 has elapsed, access to the Collection shall be limited (a) to such employees of the Library as may be jointly approved by the Librarian of Congress and Henry A. Kissinger; (b) to persons who have received the written permission of Henry A. Kissinger; and (c) after the death of Henry A. Kissinger, to persons who have received the written permission of a committee to be named in Henry A. Kissinger's will. Henry A. Kissinger shall, during this period, be promptly notified by the Library of Congress of any requests, claims, or legal actions relating to papers in the Collection. No person may have access under this paragraph to any classified paper in the Collection unless he has an appropriate and current government-approved security clearance commensurate with the classification of the paper.

8. Additions. Henry A. Kissinger may in the future donate additional personal papers and materials to be added to the Collection. Such additional personal papers and materials shall be governed by this Deed of Gift and Agreement. Their delivery shall be accompanied or preceded by a letter or statement signed by Henry A. Kissinger, and the Library shall send to Henry A. Kissinger a written acknowledgment of each delivery.

Witnessed and agreed to, this 12th day of November, 1976.

Henry A. Kissinger

Accepted and agreed to on behalf of the Library of Congress, this 12th day of November, 1976.

Daniel J. Boorstin
Librarian of Congress

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DEPARTMENT OF STATE

DPC 239

TRANSCRIPT OF DAILY NEWS BRIEFING
WEDNESDAY, DECEMBER 22, 1976, 12:50 P.M.

(ON THE RECORD UNLESS OTHERWISE NOTED)

MR. FUNSETH: Fred Brown will be the Duty Officer beginning today through December 28th. You can wish him a Merry Christmas at 965-1867.

You should have in front of you a press release entitled "U.S. Reconstruction Assistance to Lebanon."

This press release summarizes the results of the visit of Ghassan Tueini, who is, as you know, the personal emissary of President Sarkis.

The statement lists those officials who participated in the talks. It reaffirms U.S. Government support of the territorial integrity, sovereignty, and national unity of Lebanon.

It makes the point that the U.S. Government is planning a PL. 480, Title I, Food Aid Program for Lebanon of \$20 million, subject to appropriate consultations with the Congress.

This will be in addition to the total of \$19 million in humanitarian aid which we have already provided

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Q He is getting a little more specific. He is specifying today two or three possibilities for this British presence. And what I am asking you -- perhaps you don't -- I don't think you know what he said today -- but you certainly know that he has been to see the Secretary.

Are these British ideas, British-American ideas, or what?

A It is a Richard mission, and essentially the British are going to be discussing possible new ideas in Africa. But we have been in the closest of consultation with the British, as they prepared for this mission, both in London and in Washington. But the mission itself is a British mission, it is not a joint U.S.-British mission.

Q Can I ask you about another subject?

A Yes.

Q The papers, the Secretary's papers, which are going to the Library of Congress, could you clarify for me what is going there and what is not? What is going to be withheld and what will happen to those papers, and whose property are they, and so forth?

A There are no official papers -- it is not correct to say any official papers are being withheld. Not all official papers are included in the collection that was presented to the Library of Congress.

There are more documents that remain in the State Department. In any case, there are no original documents being transferred to the Library of Congress. They are only copies.

Q Now, what are the documents? Leaving aside now original and copies, what documents, original or copies, are not being -- in what category do they fall, the papers that are not going to the Library of Congress?

A There are no official papers being excluded. The only thing that has not been sent that are personal papers of the Secretary are the transcribed secretarial notes of his telephone conversations.

Q All right, that is the only group.

A Yes.

Q Those transcribed secretarial notes are notes of conversations with what -- foreign officials, newsmen -- I don't know.

A They are as I described them. I do not know how complete they are.

Q All right, let me back up. Is the State Department taking the position that the transcribed notes of the Secretary's conversations with newsmen are his personal property?

A The position of the Legal Adviser, which he supports with legal precedents, as well as regulations of the OMB, and this judgment has been supported by the Justice Department, is that secretarial notes of telephone conversations are personal papers and are not official papers.

Q All right. Is there a precedent for a Secretary of State having a secretary record conversations that the Secretary of State is having with newsmen? Has anyone else done that before, do you know?

A I do not know that necessarily it is correct as you have described it, that he has transcripts of the conversations with newsmen. I do know that practically every senior official in this town, as well as in many private organizations, and who knows maybe even news organizations, have their secretaries listen on telephone calls to make notes of possible actions. I do not think this is an unusual practice.

Q All right. And in those cases, you are confident, or Mr. Leigh is confident, or the Justice Department is confident, those transcripts, or those notes are the personal property of the resident of the office.

A Of the Secretary.

Q Of the official.

A And may be retained when he leaves office.

Q May be retained when he leaves office. Okay.

Are they within the reach of the Freedom of Information Act?

A No, not his personal papers.

Q Are they classified documents?

A No.

Q Then, on what basis -- just private property?

A On the judgment that they are personal papers.

Q Now, when the secretary -- and I am talking about the woman with the stenographic pad -- takes those notes, is she working for the United States Government, or is she working for the Secretary as a private individual?

A She is working for the United States Government.

Q And still they are personal?

A Yes. And again I would cite that this is a common practice in the Federal Government for Cabinet Officers and senior officials to have secretaries make notes of telephone conversations.

Q Let me ask one last thing, and I will let up on the subject.

Are conversations with foreign officials -- Ambassadors, visiting Ministers -- are they similarly recorded by the Secretary's secretary?

A I do not know how complete it is, but obviously that would be included.

Q And those are his personal possessions.

A The telephone conversations, right.

Q And one last thing, you can give me no instance of any previous Secretary of State who operated this way, can you?

A I cannot give any -- I do not know of any Secretary that has not operated that way.

Q Secretary of State.

A I would say, in a general sense, it is my understanding that most senior officials in Washington do follow this practice.

Q Bob, on the same point, some personal papers were included in the collection donated to the Library of Congress.

A That is correct.

Q What is the basis for the Secretary's decision not to include these telephone conversations?

A The personal papers that were included, I think, had direct relation to decisions that were made. I do not believe that -- and I want to check on this -- but I do not think that the telephone conversations themselves record any specific actions or decisions that were taken on foreign policy questions.

Q Bob, let me just pin this down, what you are saying about the secretaries listening in. Are you saying that on every conversation that the Secretary of State makes, there is someone listening on an extension, noting, transcribing what is happening?

A I cannot say on every conversation.

Q But usually when the Secretary of State

is speaking on a phone, there is a secretary listening on an extension and transcribing?

A Usually.

Q And isn't it usually the case, in fact, isn't it always the case, that the party to the conversation is not advised that what he thinks is a conversation with the Secretary of State is a conversation being transcribed without his knowledge for the personal retention of the Secretary of State as a private American citizen?

A I am not aware that in each conversation that this statement is made, but, again, I think most people assume that when they are talking to someone like a cabinet officer, there is a good chance that an aide or a secretary is listening in on the call and making notes for any possible follow-up action.

Q I am not so sure that everybody is that sophisticated.

A In fact, this is not the first time this has been mentioned. You know, this subject came up at least a year ago on this practice.

Q So I take it if the Freedom of Information

Act was filed, the State Department would resist surrendering these -- ?

A In fact, that was the basis of the Legal Adviser's determination. There was a request under the Freedom of Information Act, which was not granted, based on this legal determination.

Q But you would not argue national security?

A No. The argument is based --

Q Personal rights.

A -- personal papers.

Q Bob, there must be numerous occasions in which Secretary Kissinger has conducted official business over the phone with Ambassador Dobrynin and Ambassador Dinitz, and such. Under what possible construction would those be regarded as non-official, private, personal papers?

A Why don't we make available the text of the Legal Adviser's opinion, and see how many questions that answers?

Q Does it address that kind of question?

A I think it does. And I will have that available this afternoon.

Q None of the instances that Bill is describing, in none of those instances, are those papers, copies or originals, going to the Library of Congress?

A No secretarial notes of telephone conversations, none of those are included.

Q Nor will they go to any archive or -- ?

A And I must say that as near as I can determine, this kind of paper has never been included by any other Secretary of State when he has transferred his documents.

Q Nor will they remain at the State Department?

A No.

Q At some convenient time, they will leave the building.

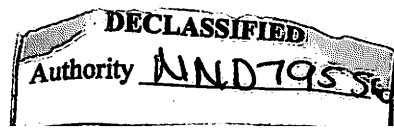
A They belong to the Secretary.

Q And he can use this material in writing his memoirs and selling his remembrances commercially.

A That is correct.

Q I am just curious. Are you saying that Secretary Rogers, Secretary Rusk -- they followed the same practice, and that they retained all of these secretarial notes of telephone conversations?

You described it as a common practice. I am



just wondering whether the practice is common to this Administration of the last eight years, or did it precede it?

A I think you will have to ask the people concerned directly.

Q So that the common practice relates only to what is current.

A It is my understanding that this common practice certainly began in Washington before Henry Kissinger came here, that Henry Kissinger did not introduce the practice in American society, either in government or in non-government, of secretaries or staff aides listening in on telephone conversations and making notes for possible action.

Q But you don't know, as a fact, whether Secretary Rogers did or Secretary Rusk?

A No. You would have to ask them specifically.

Q Does the Legal Adviser's opinion discuss the question of a person filing a Freedom of Information request for the transcript of his own conversations with the Secretary. Is that what was at issue?

A Let's wait until we --

Q It is a question of whose words.

A Yes.

Q Mr. Funseth, do you have any assessment on the Egyptian-Lebanese -- sorry, Egyptian-Syrian political comment?

A No.

Q Nothing?

A No.

Q All right, sir, thank you.

[The briefing terminated at 1:10 p.m.]