

The Burger Court Opinion Writing Database

Kissinger v. Reporters Committee for Freedom of Press

445 U.S. 136 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 1, 1980

RE: No. 78-1088; 1217 - Kissinger v. Reporters Committee
For Freedom of the Press

Dear Bill:

I join.

Regards,



Mr. Justice Rehnquist

Copies to the Conference

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: FEB 2 5 1980

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 78-1088 AND 78-1217

Henry A. Kissinger, Petitioner,
 78-1088 *v.*

Reporters Committee for Free-
 dom of the Press et al.

Reporters Committee for Free-
 dom of the Press et al.,
 Petitioners,

78-1217 *v.*

Henry A. Kissinger.

On Writs of Certiorari to the
 United States Court of Ap-
 peals for the District of
 Columbia Circuit.

[March —, 1980]

MR. JUSTICE BRENNAN, concurring in part, and dissenting
 in part.

Today's decision explores hitherto uncharted territory in a complicated statutory scheme. I cannot agree with what is to me the Court's crabbed interpretation of "improper withholding" under the Freedom of Information Act (FOIA). At the same time, I am not without some uncertainty about the contours of the "improper withholding" standard. Accordingly, although the result reached by my Brother STEVENS strikes me as the most workable for the present, I write separately to articulate some ideas on this difficult problem.

As an abstract matter, I concur in the Court's view that FOIA's reach should not be conditioned upon the legality of a documents transfer under the Federal Records and Records Disposal Acts. 44 U. S. C. § 2901 *et seq.*; 44 U. S. C. § 3301 *et seq.* These Acts establish a fairly comprehensive scheme for internal records management, one element of which is an administrative process for regulating and enforcing records disposal standards. Thus, the "legality" of a document transfer for purposes of the Records statutes is, in a practical sense,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 2, 1980

Re: 78-1088 and 78-1217 - Kissinger, etc.

Dear Bill:

I am glad to join your opinion for the
Court in these cases.

Sincerely yours,

P. S.
P.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

✓

January 4, 1980

Re: Nos. 78-1088 and 78-1217, Kissinger Cases

Dear Bill,

The changes you propose in your opinion for
the Court are all satisfactory to me.

Sincerely yours,

P. S.
P. S.

Mr. Justice Rehnquist

Copy to Mr. Justice White
Mr. Justice Powell

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 21, 1979

Re: 78-1088 and 78-1217 - Kissinger cases

Dear Bill,

Please join me.

Sincerely yours,



Mr. Justice Rehnquist
Copies to the Conference
cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 17, 1980

Re: No. 78-1088 - Kissinger v. Reporters
No. 78-1217 - Reporters v. Kissinger

Dear Bill:

Please note at the conclusion of your opinion that I did not participate in this case. Thank you.

Sincerely,



T.M.

Mr. Justice Rehnquist

cc: The Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 18, 1980

Re: No. 78-1088 - Kissinger v. Reporters Committee
No. 78-1217 - Reporters Committee v. Kissinger

Dear Bill:

At the end of your next draft of your opinion will you please add "Mr. Justice Blackmun took no part in the decision of this case."

Do I detect an inconsistency between the dates on line 9, page 5 with those on line 6, page 18? On the latter page, line 8, the phrase "subject to information" confuses me. Should the "to" be "of"? Inasmuch as I am staying out, I perhaps have no standing to make this inquiry.

Sincerely,

H. A. B.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 21, 1980

Re: No. 78-1088 - Kissinger v. Reporters Committee
No. 78-1217 - Reporters Committee v. Kissinger

Dear Bill:

I must come back to you again.

At the end of your opinion, would you please note me as taking "no part in the decision of this case," rather than "no part in the consideration or decision of this case." This is what I specified in my note of January 18. I make this point because I was on the bench during oral argument. This, I believe is the distinction between the two forms.

Sincerely,

H.A.B.

/

Mr. Justice Rehnquist

cc: The Conference

December 27, 1979

78-1088, 78-1217 Kissinger

Dear Bill:

In your opinion, you refer several times to the documents having been "wrongfully removed" from the State Department and as being "wrongfully in the possession" of the Library of Congress. See pp. 1, 10, 12, 16.

I must be missing something, as I do not understand why it is necessary to agree either that the documents were wrongfully removed or that they were wrongfully in the possession of the Library.

The District Court did find a wrongful removal, but I do not recall that the Court of Appeals - in its "back of the hand" treatment of Kissinger's appeal - gave this issue any independent consideration. I have not thought that it was necessary for us to consider it. If we did, I would find it quite difficult to conclude - at least on the record before us - that the removal, pursuant to a formal opinion of State Department counsel, of papers thought to be private was wrongful. Nor would I have thought that the Library of Congress wrongfully possessed the documents, having received them by a deed prepared by counsel that presumably was facially valid and that had been made public.

It does make your decision somewhat stronger to concede wrongful removal and possession. This perhaps is what you have in mind. If so, would it not be well to state that you assume this for purposes of our decision, but that we express no opinion on the question.

Apart from this concern, I think your opinion is quite good, and if we can resolve this difference I expect to join you. I have thought it prudent, however, to make sure that Forsham is written consistently.

2.

I am sending this letter only to you, hoping that
you can enlighten me.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 9, 1980

78-1088 Kissinger v. Reporters
78-1217 Reporters v. Kissinger

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

lfp/ss

cc: The Conference

RP 9/16-19

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 20 DEC 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-1088 AND 78-1217

Henry A. Kissinger, Petitioner,
 78-1088 *v.*
 Reporters Committee for Free-
 dom of the Press et al.
 Reporters Committee for Free-
 dom of the Press et al.,
 Petitioners,
 78-1217 *v.*
 Henry A. Kissinger.

On Writs of Certiorari to the
 United States Court of Ap-
 peals for the District of
 Columbia Circuit.

[January — 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Freedom of Information Act vests jurisdiction in federal district courts to enjoin an "agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U. S. C. § 552 (a)(4)(B). We hold today that when a document requested under the FOIA is wrongfully in the possession of a party not an "agency," the agency which received the request does not "improperly withhold" those materials by its refusal to institute a retrieval action. When an agency has demonstrated that it has not "withheld" requested records in violation of the standards established by Congress, the federal courts have no authority to order the production of such records under the Freedom of Information Act.

I

This litigation arises out of Freedom of Information Act requests seeking access to various transcriptions of petitioner

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated:

Recirculated: 21 DEC 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-1088 AND 78-1217

Henry A. Kissinger, Petitioner.)

78-1088

Reporters Committee for Free-
dom of the Press et al.

Reporters Committee for Freedom of the Press et al., Petitioners

Tetrahydro-

Henry A. Kissinger

On Writs of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit.

[January - 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Freedom of Information Act vests jurisdiction in federal district courts to enjoin an "agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U. S. C. § 552 (a)(4)(B). We hold today that when a document requested under the FOIA is wrongfully in the possession of a party not an "agency," the agency which received the request does not "improperly withhold" those materials by its refusal to institute a retrieval action. When an agency has demonstrated that it has not "withheld" requested records in violation of the standards established by Congress, the federal courts have no authority to order the production of such records under the Freedom of Information Act.

三

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Supreme Court of the United States
Washington, D. C. 20543

W

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

See next pg

January 4, 1980

Re: Nos. 78-1088 and 78-1217 - Kissinger Cases

Dear Potter, Byron, and Lewis:

I have received from each of you suggested changes in the second proposed draft opinion in this case, and believe that all can be accommodated. Potter's was by telephone, and simply requested the deletion of the language "and as held by a third party under a claim of right" from the penultimate sentence in the second full paragraph on page 12. I acceded on the spot, agreeing with him that although in this case, as we state elsewhere in the opinion, the documents are held under a claim of right, we need not depart from strict neutrality in the statement of our holding as to whether or not Kissinger's acts were or were not lawful.

Byron's comments were made by a letter of December 21st, and I have incorporated, verbatim, the three suggested changes he made regarding the characterization of the telephone notes. As I understand the proposed changes, they simply make more precise the description of that with which we are dealing --- summaries and transcripts of notes or telephone notes, rather than the actual shorthand notes or tapes themselves. I am also rephrasing the second sentence of the first paragraph of the opinion to read as follows, which I think accommodates both Byron's suggestions and is consistent with Potter's request:

"We hold today that even if a document requested under the FOIA is wrongfully in the possession of a party not an 'agency,' the agency which received the request does not 'improperly withhold' those materials by its refusal to institute a retrieval action."

Lewis' suggestions were made in a letter of December 27th, and I hope the change in the first paragraph described immediately above will accommodate his concern about not deciding whether or not the documents were in fact wrongfully removed. Although we do state that we don't decide the question on page 9 of the present circulation, the fact that

each of the three of you has expressed what seems to me to be a similar concern about making it crystal clear that we do not decide the issue of wrongful removal has convinced me that the statement on page 9 is not sufficient, and therefore the addition to the first paragraph on page 1 will be made in the next circulation in hopes that it will nail down that proposition.

In addition, to make it even clearer, I would propose to add at the end of the paragraph now ending on the fourth line of page 9 the following:

~~X~~ "We need not, and do not, decide whether the telephone notes are agency records, or were wrongfully removed, for even assuming an affirmative answer to each of these questions the FOIA plaintiffs were not entitled to relief." *Same ?
on p 12*

I also intend to add as a new sentence at the end of § B on page 16 the following:

"Bannercraft, supra, of course held that Congress intended federal district courts to retain traditional equitable jurisdiction in connection with FOIA actions. But historic equitable practice has long recognized that a party does not improperly withhold a document sought pursuant to a subpoena by his refusal to sue a third party for its recovery. Amey v. Long, 9 East 473, 103 Eng. Rep. 653 (1808)."

Sincerely,

W

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell

* I think this meets my objection - tho I've suggested to Bill that he add a note near beginning making it clear that we are ^{merely} assuming "wrongful" conduct.

78-1088, 78-1217

1/7/80

Supreme Court of the United States

(On ^{Memorandum} ~~Memorandum~~ Pluck)

, 19

Leurs -

The circulated draft
of Kissinger will contain,
on p. 9, the added dis-
claimer sentence about
which we spoke on the
telephone Friday
evening

WHR

1,2,6,8,9,10,13,16

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 8 JAN 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-1088 AND 78-1217

Henry A. Kissinger, Petitioner,
 78-1088 v.

Reporters Committee for Free-
 dom of the Press et al.

Reporters Committee for Free-
 dom of the Press et al.,
 Petitioners,

78-1217 v.

Henry A. Kissinger.

On Writs of Certiorari to the
 United States Court of Ap-
 peals for the District of
 Columbia Circuit.

[January —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Freedom of Information Act vests jurisdiction in federal district courts to enjoin an "agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U. S. C. § 552 (a)(4)(B). We hold today that even if a document requested under the FOIA is wrongfully in the possession of a party not an "agency," the agency which received the request does not "improperly withhold" those materials by its refusal to institute a retrieval action. When an agency has demonstrated that it has not "withheld" requested records in violation of the standards established by Congress, the federal courts have no authority to order the production of such records under the Freedom of Information Act.

I

This litigation arises out of Freedom of Information Act requests seeking access to various transcriptions of petitioner

PP 18420

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Stevens.

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 21 JAN 1980

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-1088 AND 78-1217

Henry A. Kissinger, Petitioner,
 78-1088 v.

Reporters Committee for Free-
 dom of the Press et al.

Reporters Committee for Free-
 dom of the Press et al.,
 Petitioners,

78-1217 v.

Henry A. Kissinger.

On Writs of Certiorari to the
 United States Court of Ap-
 peals for the District of
 Columbia Circuit.

[January —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Freedom of Information Act vests jurisdiction in federal district courts to enjoin an "agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552 (a)(4)(B). We hold today that even if a document requested under the FOIA is wrongfully in the possession of a party not an "agency," the agency which received the request does not "improperly withhold" those materials by its refusal to institute a retrieval action. When an agency has demonstrated that it has not "withheld" requested records in violation of the standards established by Congress, the federal courts have no authority to order the production of such records under the Freedom of Information Act.

II

This litigation arises out of Freedom of Information Act requests seeking access to various transcriptions of petitioner

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

5th DRAFT

Recirculated: 29 FEB 1980

SUPREME COURT OF THE UNITED STATES

Nos. 78-1088 AND 78-1217

Henry A. Kissinger, Petitioner,
 78-1088 v.

Reporters Committee for Free-
 dom of the Press et al.

Reporters Committee for Free-
 dom of the Press et al.,
 Petitioners,

78-1217 v.

Henry A. Kissinger.

On Writs of Certiorari to the
 United States Court of Ap-
 peals for the District of
 Columbia Circuit.

[January —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Freedom of Information Act vests jurisdiction in federal district courts to enjoin an "agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U. S. C. § 552 (a)(4)(B). We hold today that even if a document requested under the FOIA is wrongfully in the possession of a party not an "agency," the agency which received the request does not "improperly withhold" those materials by its refusal to institute a retrieval action. When an agency has demonstrated that it has not "withheld" requested records in violation of the standards established by Congress, the federal courts have no authority to order the production of such records under the Freedom of Information Act.

I

This litigation arises out of Freedom of Information Act requests seeking access to various transcriptions of petitioner

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 27, 1979

Re: No. 78-1088 and 78-1217 - Kissinger v. Reporters Committee

Dear Bill:

Although my thinking may change after I get back into this case, I presently plan to dissent from parts IIB and C of your opinion. I will get to it as soon as I can.

Respectfully,



Mr. Justice Rehnquist
cc: The Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: Feb 15 '80

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 78-1088 AND 78-1217

Henry A. Kissinger, Petitioner,
 78-1088 *v.*

Reporters Committee for Free-
 dom of the Press et al.

Reporters Committee for Free-
 dom of the Press et al.,
 Petitioners,

78-1217 *v.*

Henry A. Kissinger.

On Writs of Certiorari to the
 United States Court of Ap-
 peals for the District of
 Columbia Circuit.

[February —, 1980]

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

As the Court recognizes, the respondent requestors are entitled to prevail in this FOIA action if the State Department "has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'" *Ante*, at 12. The Court assumes, without deciding, that "agency records" have been requested and then concludes that no such records have been "withheld." The Court states, and I agree, that an agency cannot "withhold" documents unless it has either custody or control of them. It then goes on, however, to equate "custody" and "control" with physical possession, holding that FOIA is simply inapplicable to any "document which has been removed from the possession of the agency prior to the filing of the FOIA request." *Ante*, at 13.¹

I cannot agree that this conclusion is compelled by the plain language of the statute; moreover, it seems to me wholly

¹ The Court states that "[i]n such a case, the agency has neither the custody or control necessary to enable it to withhold." *Ante*, at 13.