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VIA FACSIMILE AND FIRST-CLASS MAIL

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Ladies and Gentlemen:

This is in reference to former Secretary of State Henry Kissinger's telephone transcripts, currently located at the Library of Congress. We appreciated your prompt response to our letter dated January 25, 2001 and your willingness to meet with us on February 15, 2001 to discuss the government's proposed procedures for recovering the transcripts (which were originally proposed by Secretary of State Muskie in 1980 and will be referred to herein as the "Muskie Plan"). We have carefully considered your proposal, and we have concluded that we cannot agree to its terms for two principal reasons.

First, we think that it is premature to discuss the procedures for reviewing the individual telephone transcripts before they are returned to the government. As outlined in our draft complaint (circulated on January 25, 2001), the telephone transcripts are government-owned

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records and were improperly removed from the State Department by Mr. Kissinger. Accordingly, federal law requires that the State Department and the Archivist take action to recover the telephone transcripts. This retrieval must precede the implementation of any review process for categorizing the transcripts. Although it is not contemplated by federal law, we would have no objection to Mr. Kissinger retaining a complete set of the telephone transcripts at the Library of Congress for his own use.

Equally important, the Muskie Plan places the government in the untenable position of implementing review procedures that are fundamentally at odds with governing federal law and would not ensure the most complete recovery of the transcripts. We do not believe that the public interest would be served by agreeing to a process that, in several important respects, would treat these transcripts differently from other State Department materials. Once the transcripts are returned to the State Department, they should be subject to the review procedures established by governing statutes as well as State Department and other applicable federal regulations.

By way of example, the definitions of "official business and record value," "official business but nonrecord value," and "personal and private" contained in the Muskie Plan are inconsistent with the definitions set forth in governing federal statutes and regulations. See, e.g., 44 U.S.C. § 3301; 36 C.F.R. §§ 1220.14 & 1222.34. In addition, contrary to federal law, the Muskie Plan (at page 7) permits summaries of the transcripts to be transferred to the State Department instead of original or duplicate transcripts. Under the Muskie Plan (at page 4), the State Department would not even be permitted to retain a list of all of the telephone transcripts.

In sum, federal law mandates that the government take action to recover the transcripts and, once recovered, that the appropriate agencies review them pursuant to existing legal requirements. We can only agree to a process that is faithful to governing federal law. That being said, we would not oppose any decision by the State Department, after appropriate review, to return to Mr. Kissinger any transcripts of purely personal conversations. While we are sympathetic with your reluctance to ask Mr. Kissinger to agree to a process that differs from the plan to which he previously consented, we do not believe that the government can ignore its legal obligations based upon the anticipated objections of a former Secretary of State. Moreover, in light of the fact that a federal court and the Justice Department have concluded that the telephone transcripts were not Mr. Kissinger's personal property (see Office of Legal Counsel Memorandum of Jan. 13, 1981, at 2 n.1 & 8), we would think that Mr. Kissinger would now agree to allow the government to recover its own property and to review the transcripts in accordance with federal law.

We also emphasize the practical importance to the State Department of recovering these transcripts. Some of the transcripts very likely contain classified information and thus should be stored in the State Department or other secure environment.

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In addition, in recent years, the Secretary of State has issued directives relating to the declassification of information on human rights abuses in Chile and Argentina. Pursuant to these directives, records in the State Department have been searched for relevant material (and are still being searched with respect to Argentina). If the transcripts — which are likely to contain information related to these matters — had been in the custody of the State Department, they would have been among the records searched for this important material.

Please let us know if you would like to discuss this matter further. In any event, please contact us to let us know how you intend to proceed, so that we can determine whether litigation will be necessary to ensure recovery of the telephone transcripts.

Sincerely,



Lee H. Rubin  
Craig Isenberg

cc: Kate Martin  
(General Counsel, National Security Archive)