In the

Supreme Court of the United States

THE RENEGOTIATION BOARD,

Petitioner,

v.

BANNERCRAFT CLOTHING COMPANY, INC., et al.,

Respondents.

No. 72-822

Washington, D.C.
October 17, 1973

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Washington, D. C.

Wednesday, October 17, 1973

The above-entitled matter came on for argument at 1:39 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MRS. HARRIET S. SHAPIRO, Assistant to the Solicitor General, Department of Justice, Washington, D. C. for the Petitioner.

ROBERT L. ACKERLY, ESQ., Sellers, Conner & Cuneo, 1625 K Street, N.W., Washington, D. C. 20006, for the Respondents. Bannercraft Clothing Company, Inc.; Astro Communication Laboratory, a division of Aiken Industries, Inc.

BURTON A. SCHWALB, ESQ., Arent, Fox, Kintner, Plotkin & Kahn, 1815 H Street, N.W., Washington, D.C. 20006, for Respondent David B. Lilly Co., Inc.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 72-822, Renegotiation Board against Bannercraft.

Mrs. Shapiro, you may proceed whenever you are ready.

ORAL ARGUMENT OF MRS. HARRIET S. SHAPIRO

ON BEHALF OF THE PETITIONER

MRS. SHAPIRO: Mr. Chief Justice, and may it please the Court, this case is here on a writ of certiorari to the District of Columbia Circuit Court of Appeals on the petition of the Renegotiation Board. It is a suit under Freedom of Information Act. That act provides that any member of the public is entitled to nonexempt Federal agency records. If a party requesting records does not receive them from the agency voluntarily, he is entitled to sue in the District Court to compel the production of the records.

The plaintiffs are Government contractors who are negotiating to determine whether they must refund excess profits to the Government. They have sued to compel the Board to produce documents relating to their renegotiation proceedings.

The District Court in these Freedom of Information Act suits issued temporary injunctions against the continued conduct of the negotiation procedures pending the resolution of the Freedom of Information Act claims. The Court of Appeals affirmed those rulings. The Government is here appealing on that issue. The merits of the parties' Freedom of Information

Act claims are not before this Court.

In order to evaluate the issues in this case, it is important to understand the natura of the Renegotiation Act proceedings. The Renegotiation Act requires the Board to try to reach an agreement with Government contractors concerning the amount of excess profits they have earned which they should refund to the Government.

The Board is involved in negotiations essentially in offers of settlement rather than in adjudications on the merits of these claims. They attempt to reach settlement by a series of essentially five different negotiating levels within the Board, the regional Board and national Board: , and you negotiate through five levels. The contractor submits statements giving financial statements. The Board then considers the statements, meets with the contractor, and makes an offer in settlement. The contractor is then entitled to a statement giving the basis for that settlement offer in order for him to determine whether he wishes to accept it or to require the Board to negotiate again at a higher level. Of course, at each level the Board may increase or decrease the amount of the offer in settlement.

QUESTION: If the contractors accepts the first level offer, Mrs. Shapiro, is that then binding on the Government?

MRS. SHAPIRO: Yes.

If no settlement is reached within the Board, the

Board issues an assessment, a determination of the amount of the contractor's liability. Then the contractor is entitled to a trial on the merits in the Court of Claims. That trial is de novo. The Government must prove the amount of the contractor's liability, and the proceedings in the Board are simply not relevant to the Court of Claims determination. Of course, the contractor when he gets to the Court of Claims is entitled to use the Court of Claims' discovery procedures.

QUESTION: And may they use these documents?

MRS. SHAPIRO: To the extent that they were relevant and were not otherwise privileged, yes.

QUESTION: They are not work product or anything?

MRS. SHAPIRO: Some of them may be work product and therefore privileged. The Court of Claims' discovery procedures are as broad as the Freedom of Information Act.

QUESTION: They would be adequate for anything not privileged?

MRS. SHAPIRO: Yes.

QUESTION: Mrs. Shapiro, then, is the only real issue here whether this sort of thing has to wait until it gets to the Court of Claims before they are entitled to these documents?

MRS. SHAPIRO: The question is whether or not the Board proceedings can be enjoined.

QUESTION: I am just wondering if all we are talking about substantially is they can't have this kind of discovery

at this stage. However, they can come back in and get it. If they are to have any discovery, they will have to wait until the case, if it does, gets to the Court of Claims.

MRS. SHAPIRO: Yes, sir.

QUESTION: That's really all this is about, isn't it?

QUESTION: Well, I'm not sure that you would say they could have the remedies under the Freedom of Information Act. Then the thing is the administrative proceeding has to go on.

MRS. SHAPIRO: The administrative proceeding has to be concluded. Certainly, the Court of Claims wouldn't be acting under the Freedom of Information Act; they would be acting under their discovery procedures.

QUESTION Mrs. Shapiro, what in your estimation are these particular contractors seeking here? Is it information as to comparative costs with respect to competitors, or something?

MRS. SHAPIRO: That's part of it. Their requests were very broad. What they requested were documents related to the renegotiation procedure, the exact scope of which documents they want, whether or not they are entitled to them is a question in the Court of Claims. But they are very broad requests for documents.

QUESTION: Well, there certainly is a broader request than under the practice prevailing before the Freedom of Information Act certainly, all of the post World War II,

immediately post World War II renegotiations, is this not correct?

MRS. SHAPIRO: That's right, yes. These documents are not documents which the Renegotiation Board ordinarily supplies.

QUESTION: But you can't describe them any more definitively than in these broad terms?

MRS. SHAPIRO: Well, not really.

This Court held in Aircraft & Diesel Equipment Corp. v. Hirsch that these proceedings were not to be enjoined even when in that case the contractor alleged that he had been unable to participate effectively in the proceedings because he did not have information upon which the Board had relied. The Court nevertheless found that Congress had intended the entire negotiation ending with the adjudication was supposed to be completed without judicial interference.

QUESTION: Mrs. Shapiro, may I interrupt you once more? I notice in your footnote 6, page 5 of the Board's brief -- this gets back to my Brother Blackmun's question -- that Astro asked for copies of the recommendations contained in the renegotiation report prepared by the staff, all records, analyses, determinations, opinions, reports, or summaries bearing upon the renegotiation of its profits. Bannercraft wanted all communications between governmental agencies regarding Bannercraft's performance of its contracts, and the

disposition of renegotiation procedings. Lilly sought the recommendations contained in the report, material supplied by other governmental agencies, and all intra-agency memoranda and written communications consisting of recommendations and/or analyses prepared by personnel or members of the Board.

That's quite everything, isn't it?

MRS. SHAPIRO: It's very broad.

QUESTION: And if you got in a discovery proceedings in the Court of Claims if the case got there, might you not have trouble on the breadth of that as a matter of discovery?

MRS. SHAPIRO: Well, certainly, you would have trouble on the breadth of that in the Court of Claims. You would also have a great deal of trouble on the breadth of that in the Freedom of Information Act.

The effect of the decision below is to alter the ruling of this Court in Aircraft & Diesel Equipment Corp. v. Hirsch at least to the extent permitting temporary injunctions against Board procedures while Freedom of Information Act questions were litigated.

Our contention is that this is a misinterpretation of the Freedom of Information Act. The Freedom of Information Act was not designed to permit courts to review agency rulings on the scope of discovery in pending proceedings. The Freedom of Information Act was specifically intended to change the rule that had existed before that those properly

and directly concerned had a greater right to agency records than others. Instead the Freedom of Information Act indicated that all members of the public have an equal right to the use of agency records regardless of the use that they intend to make of them.

The contractors here claim that the special use they wish to make of these records entitles them to a special remedy. But what the Act says is that all members of the public have an equal right to a prompt resolution of their claims of entitlement to documents. Congress provided a very specific remedy to protect the specific right which they established. And in that remedy, they emphasized the importance of speed. They provided that suits to compel the production of documents should be given priority on the District Court's docket and expedited in every way.

If the remedy which the court below found is permitted, it will tip the balance that Congress established. Instead of making the Freedom of Information Act claims promptly determined, instead it will become a very effective tool for delay, for once people in the position of the contractors here have obtained a stay of the proceeding which threatens them, they have no interest in the prompt resolution of their claims under the Freedom of Information Act. Instead, their interest is entirely in delaying the resolution of these claims and therefore delaying the continuation of the

administrative procedure which could affect them adversely. Even if stays are rarely granted, the existence of the jurisdictions to grant the remedies will encourage litigation. This is a possible means of obtaining a delay of the agency action.

We therefore contend that the issuance of injunctions against agency,continuation of agency proceedings, is not consistent with the purposes of the Freedom of Information Act, and that the court below expanded on the Act and acted legislatively rather than judicially. Certainly Congress could have concluded that specific uses to be made of the information justified specific protections. They could have concluded that the interests of those involved in agency proceedings were so important that it was appropriate to require the court to review agency rulings on the scope of discovery in pending proceedings. We contend that the Act simply doesn't do so, that if it had intended to change the traditional allocation of responsibilities between agencies and courts, they would have said so clearly. And there is no indication of any such intent. We do not believe that the issuance of injunctions in these cases was consistent with the traditional equitable power to maintain the status quo, because in this case it was not a situation in which a court has acted to stay agency action while it determines the validity of that agency action. Instead what they did was to stay the agency proceedings while

they reviewed the validity of collateral agency action. In effect, they stayed the Renegotiation Board proceedings while they reviewed the Board's determination of the proper scope of discovery. And this is certainly not a traditional exercise of equitable power.

In sum, as this Court recognized last term in Environmental Protection Agency v. Mink, the Freedom of Information Act provides a workable formula which carefully protects and balances all interests. The Act protects the public interest in prompt access to Government records. It also protects the public interest in minimal interference with efficient Government operations.

The specific remedy that they provided is an important part of this balance. The additional remedy that the court below added upsets this careful balance and it does it not in order to achieve the purposes of the statute to the prompt availability of Government records, but instead to give the contractors a specific benefit in their negotiations with the Board. This is simply not consistent with the purposes of the Act.

The court below nevertheless found that the District Court had properly exercised -- not only that it had jurisdiction to enjoin agency proceedings under the Freedom of Information Act, but that it had properly exercised this jurisdiction since, unless the proceedings, renegotiation proceedings, were

enjoined, the contractors would be irreparably injured if they were compelled to negotiate without the information they wanted, since there was no review as such of the proceedings in the Court of Claims.

We believe this is incorrect in both the Aircraft case, and in Lichter v. United States this Court recognized that the renegotiation procedures were designed to be very informal and that they were not to be adjudications with discovery, formal discovery. They are not subject to the Administrative Procedures Act. They are designed to help the defense effort by obtaining rapid settlement in procurement matters and they are not designed to help the contractors get a more favorable settlement than they might be entitled to by an adjudication on the merits.

So the contractors are not entitled to the most favorable settlement that they could reach if they were negotiating with full information. What they are entitled to is a full and fair hearing in the Court of Claims on the merits of their liability. And that is what is provided in the Renegotiation Act.

Furthermore, the fact that the review in the Court of Claims is de novo does not mean that there is any irreparable injury if they don't get the information before. If they are not satisfied that the Board determination is fair, they may get a determination in the Court of Claims. And at that point

the prior Board procedures are irrelevant. In one sense they are in a better position than they would be if there was a review proceeding in the Court of Claims, since the Court of Claims does not need to consider whether there is substantial evidence to support the Board's procedures and they need not show that they received any prejudice from the Board's procedures.

In short, the Board procedures can impose no continuing disadvantage on the contractors. And therefore, the enjoining of those procedures was improper.

I would like to reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mrs. Shapiro.

Mr. Ackerly.

ORAL ARGUMENT OF ROBERT L. ACKERLY ON BEHALF OF RESPONDENTS BANNERCRAFT CLOTHING COMPANY, INC.: ASTRO COMMUNICATIONS LABORATORY, A DIVISION OF AIKEN INDUSTRIES, INC.

MR. ACKERLY: Mr. Chief Justice, and may it please the Court, I would like to at the outset note sharp disagreement with a couple of statements of Government counsel.

First, the regulations of the Board as they were amended last November, November of 1972, in fact provide that from now on a contractor on request will get all of the information, I believe, that Bannercraft asked for and most of

the information that the other contractors asked for. For example, in 32 C.F.R., section 1472.7, the regulations of the Board now provide that a contractor may have on request the performance information. That is, the performance evaluation of other agencies of Government, or, in the case of a subcontractor-prime contractor relationship, the performance information provided by prime contractor on the level of performance of the subcontractor.

QUESTION: Do those regulations just apply to future cases or to yours, too?

MR. ACKERLY: I don't know, your Honor. I think the Board --

QUESTION: Well, let's assume they did apply to your case and that you could get all of this information that you wanted right now, what would be left of this case?

MR. ACKERLY: Well, assuming that the Board complies fully with their own regulations and with the further decision of the Court of Appeals in Grumman Aircraft this summer, I think there is nothing left of this case.

QUESTION: What's Grumman got to do with it?

MR. ACKERLY: Well, Grumman decided in July of --

QUESTION: I take it your point was that there are new regulations which give you everything you want.

MR. ACKERLY: Yes, sir. New regulations, yes, as implemented by Grumman. The Grumman decision simply says --

QUESTION: Well, you haven't got much of a point based on the regulations, then, because I suppose Grumman is just a court decision.

MR. ACKERLY: Grumman is a decision of the United States Court of Appeals for the District of Columbia which only relates to one portion.

I might direct the Court's attention to section 1480.5 of the regulations. There are 15 categories of documents that are now made available by the Renegotiation Board that were not made available when we first filed this lawsuit. They do include agreements determining excessive profits, orders determining excessive profits, statement of facts and the reasons issued by the Board, and so on.

Now, at the bottom of that section it says this --

QUESTION: Well, have you gone back and sought these materials you want under these new regulations?

MR. ACKERLY: We have not gone back to seek them and the Board has not made them available. We have exhausted our remedy, if the Court please. We have no remedy left at the Board level.

QUESTION: Not even under their new regulations?

MR. ACKERLY: No, sir. We filed our request for information to the secretary. That was denied. We went to the Board. The Board denied our request. There is no time period that I know of within which we could go back and ask

for reconsideration.

QUESTION: You normally would, I suppose, if there had been a change of the regulation in your favor.

MR. ACKERLY: Well, I think this is a change in the regulation in our favor, but for some reason the Board --

QUESTION: If it falls generally in the area of a procedural regulation as this does, normally new procedures apply to pending cases.

MR. ACKERLY: I am not sure of the Board's point of view, your Honor, but I would assume if the Board wanted to, they could have communicated -- they gave us some documents which were worthless, and the District Court so found. They could have simply responded further to our request that was pending before the Board and said, "We are going to make available these documents." We may or may not have had an issue left before the District Court. If we had one, it would have been very narrow, I submit, because the only issue left, really, is the issue which was decided by the Court of Appeals in Grumman.

Of course, I can't predict how the Board is going to apply the regulations, but I assume that if the Board complied with the spirit of the regulations as implemented by Grumman, that we would have very little remaining at issue. But these documents are not only available under the Freedom of Information Act, but they are critically important to the conduct of

renegotiation. And there again --

QUESTION: Why didn't you say that when you renegotiated -- didn't have them in 1950, and renegotiations, it seems to me, went off pretty successfully?

MR. ACKERLY: Well --

QUESTION: At least we thought they did.

MR. ACKERLY: Well, the Freedom of Information Act, if the Court please, I submit is an important national policy which should be read in conjunction with all existing statutes, and it's clearly applicable to the Renegotiation Board. There is no argument there. The Renegotiation Board should not be permitted to ignore its responsibilities under the Freedom of Information Act and continue the negotiations. Because the importance of these documents comes down to this:

QUESTION: Have any of your clients pursued relief as a member of the general public as distinguished from a contractor in renegotiation?

MR. ACKERLY: No, your Honor, and I -- well, there is only one group that I know of, not our clients, but only one group that I know of, and that's a group of Georgetown students. Their request resulted in the decision of the Court of Appeals in Fisher v. Renegotiation Board. 473 F2d 109 It is unlikely that any public interest group would request documents from the Board except maybe a group of law students or an affected contractor. I think in some sense we are in there

not only in our own behalf, but in the concept of a private attorney general. We are suggesting that the Renegotiation Board must follow the Freedom of Information Act. That seems like a very reasonable and plausible proposition. And the court below found that the Renegotiation Board was not following the Freedom of Information Act. And the simple question is: Should they be allowed to proceed with renegotiation?

Now, as the Court of Appeals --

QUESTION: Mr. Ackerly, the Freedom of Information Act gives you plenty of remedy as a private attorney general or as a citizen. I mean, going to District Court and making the Board comply with the Freedom of Information Act, that is not a reason by itself for staying the administrative proceeding, I would think.

MR. ACKERLY: Well, precisely, if the Court please, your Honor is correct. There is plenty of relief in the Freedom of Information Act. However, there is nothing in the Freedom of Information Act that says that the court does not have a general equity power to consider whether the renegotiation should stay for a short period of time, the renegotiation process, but it seems clear on the face of it, and I submit on the face of the regulations now it's abundantly clear, that they are ignoring their responsibilities under the other Act. This is just a traditional exercise of the equity power where, as I think we established, irreparable injury can accrue by

virtue of the Board's refusal to follow the statute. The Board has been told in numerous cases that they must follow the statute. There are several Federal court decisions and appellate court decisions instructing the Board to follow the statute, and now they have done so in their regulations. We don't suggest that there is any authority in the Freedom of Information Act to grant this type of an injunction, but we say that when the failure of an agency to follow its own regulations or follow the statute is brought to the attention of the court, the court does have general equity power, which can be exercised only in very limited circumstances.

I wish to point out that as this Court has held and as the Court of Appeals in the District of Columbia has held repeatedly, where there is judicial review of the agency process, the court should not entertain interlocutory appeal except in very rare, special circumstances. We have no quarrel with that. The NLRB cases, the other agency cases where there is statutory review, there you get review in the Court of Appeals of a denial of due process or denial of procedural or substantive errors. We don't get that here.

Counsel said in response to you, Mr. Justice Rehnquist, that if we agree with the first level of renegotiation, is the Government bound? They are not bound. The statutory Board can at any time -- and they have done this to me on more than one occasion -- set aside an agreement with a Regional Board,

at least after a conference with the renegotiator, and assign the case to itself and go through the entire process all over again. And understand, we get no understanding of what the Board is doing until after the fact.

Let me try to explain. We have a meeting with the Regional Board. The Regional Board writes us a letter,and it's shown in the exhibits to our complaint, asking Bannercraft for $1,400,000. We then ask for a summary of facts and reasons. It was after the fact that they gave us their reasons, and we co-ld take it or leave it. It is after they have made their judgment. Then we go to the statutory Board and the same procedure obtains.

QUESTION: You say that even if you decided to pay over the $1,400,000 they asked you for, the statutory Board might still have transferred the case to itself and imposed a higher amount?

MR. ACKERLY: They absolutely have that authority, and they have done it. I have a hearing coming up in November before the Board following an agreement with the Regional Board, yes, sir. The statutory Board has that authority in the regulations. They can reassign the case to itself at any time.

After the statutory Board makes its determination, then you get, if on request, a statement of the reasons for the statutory Board action. But there is no further negotiation. You either pay it or you don't.

Now, the result is a summary where the Regional Board told us we had been compared with other contractors as they are required to in their own regulations and where they said the procurement information indicated a lack of adequate competition. We wrote and asked for these documents. We wanted to get the documents that supported the contentions of the Regional Board. For example, in 1967 Bannercraft performed four contracts, two primes and two subs. We took the subcontracts on the same price or less than the prime. Now, if the Board did not renegotiate the prime but renegotiated us on the same price, then we are being penalized for efficiency. We have a right to examine that.

Now, I think the Board would give us that information. I sincerely believe under their regulations they would give us that information. Maybe they don't want to apply these regulations retroactively. But when they tell us we have been compared with other contractors and refuse to tell us who they are, when they say that procurement information, procurement documents indicate a lack of adequate competition and refuse to give us the procurement documents, there is not much we can do by way of renegotiation except to say, "Look, we still think we are efficient and we still think that if you will compare us with these primes under whom we perform subcontracts, we can establish that. That's really all we have asked for.

Now, how long should the stay be in this case? There needn't be extensive delay in a case like this. In the first place, with the change in regulations and the status of Grumman -- and I understand the status of Grumman to be this, that a petition for rehearing by the Government was denied, the mandate is issued. I thought it was final. Late yesterday afternoon I heard by telephone that the Government has filed a motion to recall the mandate. Now, whatever degree of finality that takes away from the case, that is its present posture. The case will never rise again, even of the Renegotiation Board, and this case can never arise with an agency that has statutory judicial review.

QUESTION: How about the case, say, with the Renegotiation Board where you obtain an injunction at the renegotiation proceedings and you fight out your Freedom of Information Act case in the District Court and that is appealed by the losing party in the Court of Appeals. Certainly you are looking at a year or two in that process, aren't you?

MR. ACKERLY: In this case, your Honor, yes. But the rules have been clarified. We have several decisions relating to the Renegotiation Board, and the Board has recognized these in their regulations.

QUESTION: But presumably this is a principle of some general application and it isn't completely foreclosed that somebody will get in a dispute with the Board in the future

about some fine point of their regulation and then you will have to litigate the Freedom of Information Act.

MR. ACKERLY: I doubt that any district court -- and we show in our brief that district courts have not entered injunctions automatically. They have denied injunctions in similar circumstances depending upon the Board's response to the Act. A district court is unlikely to grant an injunction where the distinction is on two or three documents as against a broad denial.

Understand what the Board gave me, and charged me for it, was a stack of documents with everything blanked out, as I think we say in our brief, which are just mimeographed forms of the Board. And then they move to dissolve the injunction. That went before a different judge who looked over the documents and denied the motion to dissolve. Two judges examined the Bannercraft documents, plus the Court of Appeals. They found it was an absolute refusal to comply. A minor dispute over one small document or two documents would not result in a district court entering this type of injunction, I'm sure. And certainly it wouldn't apply under the decisions of this Court to any agency --

QUESTION: What in the way of a principle of general or wide importance is now involved in this case in light of the new regulations?

MR. ACKERLY: Of general or wide importance, I think

there is very little. For this contractor it's extremely important because before we go to the Court of Claims, a final order is entered. We must post a bond equal to 100 percent -- it's almost like a judgment, it's immediately collectible, if the Court please. The final order is not the result of a breakdown in negotiations. It has the effect of a final judgment of a court. We must post a bond of 100 percent of the amount of the determination in Government bonds with the Court of Claims to prevent collection.

So at each step of the agency process and in the Court of Claims, the demand can be raised or lowered. Therefore, if we don't have a fair opportunity to negotiate with the Board and reach agreement, we go to the Court of Claims fully informed, we run the risk of having that million four go to a million seven. We don't have an opportunity to make a fair judgment.

But this is not an earth-shaking case. This is not a case of even great precedential value, in my judgment, because it would only apply to agencies like the Board, and I am not sure that there are very many that don't have statutory review, and, secondly, it probably won't come up with the Board.

I do want to make one quick reference to Aircraft & Diesel Equipment Corp. which counsel has raised. That case, in my judgment, affirms the authority of a district court to issue an injunction, because what the Court said was, the

district court had no jurisdiction in equity since the appellant had a complete remedy at law. Now, the complete remedy at law that this Court was talking about was this: Aircraft was a subcontractor. Its prime contractors were withholding money from Aircraft at the direction of the Government, based upon a renegotiation claim. This Court said to Aircraft, "See your prime contractor. And we know of no reason why all of the issues that you have raised before this Court could not be raised in litigation with your prime contractor."

Now, this Court would not have gone to the length of saying that you have an adequate remedy at law if they didn't recognize the inherent equity jurisdiction of the district court to, under limited circumstances, issue a very temporary stay. And I emphasize, if the Board had gone back and complied with Grumman, if the Court please, the first Grumman decision had been entered before this preliminary injunction was entered. The Board didn't --

QUESTION: When you say temporary stay, Mr. Ackerly, you are talking about whatever time it takes to resolve the Freedom of Information Act issue, whether that can be done by simply the use of already established precedents or whether it may take another district court and Court of Appeals decision.

MR. ACKERLY: It conceivably could, but that's always

subject to the discretion of the court. The court can always say that the plaintiff is not proceeding diligently, and therefore we dissolve the injunction. And that's an inherent power of the court. The courts do not necessarily have to entertain delay. The Freedom of Information Act cases get priority on every calendar by the Act itself. And if they feel that a plaintiff is delaying, that court has inherent power to dissolve the injunction.

But I am suggesting that if the Board complies with its own regulations, these cases will not arise. I can't conceive of a district court granting this type of injunction if there is substantial compliance. Here, your Honor, there was no compliance. And I think that is clearly the distinction.

QUESTION: But the fact remains that what was decided below is an important matter, that you can enjoin an administrative agency as a way of enforcing Freedom of Information Act claims.

MR. ACKERLY: I would disagree with that a little bit, your Honor.

QUESTION: Well, they did enjoin it, didn't they?

MR. ACKERLY: They did, sir.

QUESTION: And the Government's argument here is they could not have, they could not have done it.

MR. ACKERLY: That is correct.

QUESTION: And if you say there is nothing left of

this case, if you in effect say it's moot --

MR. ACKERLY: I didn't say it was -- I said if they comply with their own regulations and with Grumman, it might be --

QUESTION: Let's assume that they do comply with -- if you went back and asked them, they would comply with their own regulations and with Grumman, and you could get what you wanted. Would there be anything left of the case? And if there weren't, why, you would say the Court of Appeals opinion would be set aside, wouldn't it?

MR. ACKERLY: No, I say if they complied with the Freedom of Information Act, the very basis for the injunction disappeared, the injunction would be dissolved. I don't think there is any quarrel with that. I don't think there is any quarrel with that at all.

QUESTION: And the opinion of the Court of Appeals set aside.

MR. ACKERLY: I don't think that would have to be set aside if the injunction was -- The question here on jurisdiction, clearly the District Court had equitable authority to enter this injunction. It only applies to an agency which does not otherwise have statutory review. This is a very peculiar agency. Most agencies do have statutory judicial review. It does not apply to any of those agencies under decisions of this Court and a consistent line of cases in the

Federal courts. So it's a peculiar type of agency, number one.

Number two, there was a flat defiant refusal to comply with any portion of the Freedom of Information Act by the Board. I am sure this had a tremendous impact on the district court judge. His equitable authority I think is confirmed by Aircraft & Diesel. We did not have an adequate remedy at law here. The final action of the Board does have severe consequences to a contractor, and should we let the agency completely refuse to comply with a public policy of Congress and yet go ahead with renegotiation which has severe penalties to the contractor? The district court said no. The Court of Appeals said no.

I must say that on the equities of the case, I think if it's examined carefully, I think this Court will agree that in this case on its peculiar facts, on the complete defiant refusal of the Board to make any real pretext to comply with its important public policy, the district court's judgment was correct.

MR. CHIEF JUSTICE BURGER: Actually, you are using some of Mr. Schwalb's time now.

MR. ACKERLY: I'm sorry. I was waiting for the light.

MR. CHIEF JUSTICE BURGER: I think something happened there.

MR. ACKERLY: I'm sorry.

MR. CHIEF JUSTICE BURGER: Mr. Schwalb.

ORAL ARGUMENT OF BURTON A. SCHWALB ON BEHALF OF RESPONDENT DAVID B. LILLY CO., INC.

MR. SCHWALB: Mr. Chief Justice, and may it please the Court, directing myself to the point that has been raised by the Court and by counel and mainly by the Government, namely, why is this case here and what is this prevailing issue that warrants our consideration, perhaps the best way for me to put it is not to paraphrase it, but to quote one sentence in the Government's brief because I think if any one sentence in the brief states the issue that warrants the case being here, it's this one.

Referring now to page 15 of the Government's main brief, I quote, about three-quarters of the way down the page: "Accordingly, this is not a situation where Congress has utilized the broad equitable jurisdiction that inheres in courts and where the proposed exercise of that jurisdiction is consistent with the statutory language and policy, the legislative background and the public interest."

The reason why this statement is important is that the Freedom of Information Act is silent on the question of whether or not a plaintiff, suing under that Act, can also enjoin an agency which is proceeding with a procedure to which the documents requested relate. What he would do in a situation where a court is given equity power in one respect

under a statute and the statute is silent as to any other powers that that district judge now vested with at least partial equity can do, what can he perform? And I think this is why the Government must have felt that this issue was important, namely, Federal jurisdiction under a statute creating at least some equity jurisdiction under the circumstances but not stating just how far that jurisdiction goes.

Now, if indeed the test is, as it seems to be, as the Government has set out and as the cases seem to set out, that when a statute is silent, you don't assume that there is no further remedy of jurisdiction. You look at the legislative history of the policy of the public interest, et cetera, to see whether or not that extra power should be implied in the Act, namely, implying it or reading it in or inferring it, or whatever. Does it serve a public interest? Does it serve a purpose that Congress had in mind? Because if it does, it should be read in, and there is many a case so holds. And I think this is why the Government has formulated the issue as it has on page 15, talking about legislative history, purpose, and public interest, because its conclusion is that what the district court did below was contrary to the legislative history, to the purpose, to the public interest, and therefore that kind of an injunction should not be implied, because it undercuts rather than furthers congressional policy.

If that is the main issue, which I think it is, then

I want to address myself to that in the few minutes that we have left because I think the equities are clear. The Government counsel has said they are not contesting the matter on the right to documents. That is something that is still left for the district court. I think the equities are things that are better left to the district court. They have been faced once on a preliminary injunction, they will be faced again if the court case goes back.

The legislative history is something that this Court very recently explored in the EPA v. Mink case, and I don't intend to spend much time in identifying it. There are basically three documents that I would like to refer to.

The Freedom of Information Act as it now is was Senate bill 1160 in the 89th Congress, First Session, and the Senate report No. 813 that accompanied that bill said on page 7 as follows:

"Requiring the agencies to keep a current index of their orders, opinions, et cetera, is necessary to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agency. The change will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way in which to discover it."

The House report which was May 1966 report in the Second Session of the 89th Congress, report No. 1497, says very much the same thing, namely: "A purpose to prevent a citizen from losing a controversy with an agency."

Now, in the 88th Congress, the prior Congress, the Senate had a similar bill. In fact, I think, but I can't represent it as exactly the same. Basically the same bill came up in the 88th Congress -- in the Senate, but I think it was passed too late to go to the House, so it was renewed in the 89th. But the Senate report No. 1219 which accompanied the bill in the 88th Congress, at page 3, said very much the same thing. They were talking about the old Administrative Procedure Act, 3, which permitted disclosure but only if it wasn't in the public interest. They were decrying the fact that the public interest exceptions or notion was being used to shield disclosure rather than an aid, and said as follows:

"Retention of such an exception" -- they were talking now about that section 3 exception, in section 3(a) -- "is therefore inconsistent with this section's general objective of enabling the public readily to gain access to the information necessary to deal effectively and upon equal footing with the Federal agencies."

QUESTION: This just took away the discretionary right of the agency to deny under the old Act, made it available to citizens unless the agency could meet its burden

of --

MR. SCHWALB: I think it went far beyond that. It not only limited disclosure to those documents which directly affected a person who was in a litigative process --

QUESTION: I am talking about the particular section of the legislative history you just read from the report on the bill that wasn't passed. Is that still your answer to the question?

MR. SCHWALB: Well, I am not sure. I may have misunderstood your question. I thought the point was did that merely give to all citizens what had theretofore been available only to litigants under the Administrative Procedure Act. And my answer is yes, it did that, except it went farther. In other words, the restrictions with respect to what kinds of documents would be given, the matter of burden of proof, the acceleration on court dockets, the whole notion of a speedy and full disclosure by government agencies was endemic to this statute which began rolling in the 88th Congress and had some 10 or 11 years of administrative history behind it.

QUESTION: You don't suggest the Freedom of Information Act would give you anything more than what you would get under discovery in the Court of Claims?

MR. SCHWALB: That's right, your Honor. There is a specific provision in the Freedom of Information Act which relates it to the rules of discovery, and it --

QUESTION: Sure. So that you won't get any more than the discovery rules of the court would give you.

MR. SCHWALB: Well, that may not be so, because, for example --

QUESTION: I thought you just said it was.

MR. SCHWALB: Well, at least that, for this reason: There is an element of relevancy or materiality in terms of discovery under the Federal rules and certainly in court claims. The element of relevancy and materiality is not a prerequisite under the Freedom of Information Act. Consequently, there may be --

QUESTION: Well, then, I must say you certainly wouldn't ask for an injunction against an agency proceeding in order to get documents that weren't relevant, would you?

MR. SCHWALB: Clearly not. Clearly not.

What we are saying here is that this language in these three reports shows a legislative purpose to do what? To permit someone in a controversy with an agency, because that language is right there, not to be hindered or not to lose that controversy because he can't deal on an equal footing or cannot deal effectively, cannot deal efficiently, or doesn't have the kind of information that the agency has. That is exactly what the injunction below did. It was geared to putting these respondents in a position where they could deal on that more equal footing, more efficiently, more knowledgeably,

and not run the risk of losing the controversy.

Now, this perhaps goes to the matter of legislative history. Is the injunction, or are the injunctions below so contrary to this legislative history of policy that the court should assume that Congress would not have intended it and this violates that legislative history. We say simply, no, that Congress was anticipating the need of a litigant, because they used words that involved litigants. We know that there is an acceleration provision, litigants often need information quickly. Lilly did below. This case was brought only on the eve of being forced to an election of how to proceed without even an acknowledgement that the Renegotiation Board had received our request for documents.

Now, there is, I would like to call the Court's attention, in the moment I have, to a related 1972 report on House Committee on Government Operations, No. 92-1419. Now, I am not suggesting that a House report in 1972 is dispositive of what Congress intended or must have assumed in 1966. But this very lengthy report which is cited in our brief undertakes in some 90 pages to discuss the purpose of the Act as it was, and more important, how it operated in the six-year period between 1966, July 1966, when the bill was first passed, and 1972. And without reading in detail, I might point out that on page 19 there is a reference to the fact that the regulations of agencies promulgated under the statute have not been

effective in obtaining or requiring the voluntary compliance during this period of years.

QUESTION: What would you say if the Renegotiation Board wrote into its rules of procedure, if it has some, as I take it it does, the very terms of the Freedom of Information Act?

MR. SCHWALB: I think that's there already by implication.

QUESTION: All right. Let's assume this. And then you demanded something under paragraph so and so of these rules. And it was refused. Now, normally, what is your remedy when you lose on an effort to get discovery?

MR. SCHWALB: Well, I have to answer the word "normally" in two separate contexts because I think there is going to be a norm depending on what the context is.

Let's take a norm in a situation where there is no review of that procedure anywhere, that is, no subsequent procedure somewhere down the line where the propriety of that action can be reviewed, studied, analyzed, passed upon, and which might result in a reversal and a remand to cure. That's situation (a).

Situation (b) is,where that arises, that the administrative process under law takes us through step by step by step and ultimately whether it be to a district court or to a court of appeals such as the labor situation, for example,

where a court of appeals, or whatever the reviewing tribunal is, could look at the procedure.

Now, taking the first one first, a document is asked for under the rules. The agency, let's assume on this hypothesis, violates its own rules, which by implication could break the Act.

QUESTION: I don't hypothesize that at all. I just say that you claim that it has.

MR. SCHWALB: All right. Then I think we have basically what would be a Service v. Dulles type operation, namely, the agency has as part of its rules an obligation to do A, B, and C. It has violated those rules, and that would be --

QUESTION: Supposing it hadn't violated the rules. The question is whether normally a discovery dispute, whether the main proceeding may be held up while you settle the discovery dispute.

MR. SCHWALB: Yes, but in the situation in my second context where we have review, the courts haven't said there is no jurisdiction and no power. They have said that the evil that you are concerned about, the alleged wrong, might very well become moot, might very well be taken care of later on. Therefore, why invoke the power of the court? Why clutter its dockets? Why cause the conflict and the tension between court and agency when it might be a moot situation? Ordinarily

discovery points sometimes can be looked at as not all that critical. But I think it makes a difference on whether or not people like these respondents have a right to say to anybody after the fact, "We were not given the right that a statute or a regulation or a combination gave us. Cure the defect by putting us back in the status quo ante so we will be in as good a shape as we would if the agency had complied." In renegotiation it can never happen.

MR. CHIEF JUSTICE BURGER: Your time is consumed now, Mr. Schwalb.

Do you have anything further, Mrs. Shapiro?

REBUTTAL ORAL ARGUMENT OF MRS. HARRIET S. SHAPIRO ON BEHALF OF THE PETITIONER

MRS. SHAPIRO: The legislative history that counsel pointed to indicating that under the Freedom of Information -- one of the intents of the Freedom of Information Act was to prevent people from losing a controversy with an agency on the basis of secret information is discussion on a section of the Act which requires the indexing of agency opinions and essentially agency case law, the end product of the administrative actions. That section requires not only the indexing of these materials, but it also provides that none of the materials that is required to be indexed and has not been indexed may be relied upon as a precedent against anyone who hasn't been informed of these secret laws.

This is quite a different situation from the situation that is in this case, and in fact there was a specific provision for this specific problem in the Act that you simply can't rely on that information, on those decisions.

Also, the contention that the fact that there is no statutory review of the renegotiation procedures here means that in this case there is jurisdiction under the Freedom of Information Act to enjoin agency procedures, this is just an incorrect analysis, I believe. I think whether or not there is jurisdiction to review agency procedures goes to the question of the propriety of the exercise of jurisdiction under the Freedom of Information Act. It doesn't go to the existence of that jurisdiction.

The Sixth Circuit, in the Sears, Roebuck case, found that there was no jurisdiction to enjoin agency proceedings against the NLRB. They also mentioned that there would be review of the NLRB procedures later. But the question is really jurisdiction, not the exercise of jurisdiction.

I don't agree that it's clear that the contractors are entitled to any of the information that they have asked for. The Grumman case that they referred to, the petition for rehearing has been denied, but the Government's petition for certiorari hasn't expired, and it would settle some of the issues. It wouldn't settle all of them. The fact that performance information is available under the regulations

now doesn't necessarily mean that the performance information supplied earlier in Bannercraft would be, since under the new regulations when the Board asks the various contractors to supply the information to the Board, the request indicates that this information will be made available to the contractor. Before, the request indicated that it would be kept confidential. So there is a question of protecting an assurance of confidentiality.

The only other point I had was that once the statutory Board makes a final determination, the contractor can still make a compromise offer and that may be considered, it will be considered by the Board. The Board's action doesn't become final until it makes an order.

QUESTION: Mrs. Shapiro, do you agree that the Freedom of Information Act is implicitly part of the discovery rules of the Renegotiation Board?

MRS. SHAPIRO: I certainly agree that the principles --

QUESTION: If in the course of a proceeding you demand from the Board in connection with particular litigation certain documents covered by the Freedom of Information Act which you allege are relevant to the proceedings, would you think that the Freedom of Information Act to that extent is part of the discovery rules?

MRS. SHAPIRO: The Board's regulations do contain the Freedom of Information Act, you know, the documents be made

available under the Freedom of Information Act --

QUESTION: So the question is whether if you have a dispute over discovery, the proceeding must be halted until you settle it.

MRS. SHAPIRO: That's right.

QUESTION: It really doesn't have to be put in the context of what the Freedom of Information Act intended.

MRS. SHAPIRO: Well, it does, because the Freedom of --

QUESTION: But even if it did not, it may be that the normal rules of how to settle a discovery dispute might mean that you lose the case. What if the rule were that you do enjoin the main proceeding while you settle the discovery dispute, wholly aside from the Freedom of Information Act, you might be in trouble here.

MRS. SHAPIRO: Well, if the rule were --

QUESTION: For example, what if the plaintiff here brought a mandamus action in a Federal court saying that the official of the Renegotiation Board had flatly refused to do his duty under his own discovery rules, which included the Freedom of Information Act.

MRS. SHAPIRO: Well, I believe that under Aircraft and Lichter v. U.S. the Court has said that you don't enjoin Renegotiation Act proceedings.

QUESTION: O.K.

MR. CHIEF JUSTICE BURGER: Mrs. Shapiro, thank you.

and gentlemen.

The case is submitted.

(Whereupon, at 2:39 p.m., the case was submitted.)