In the

Supreme Court of the United States

THE RENEGOTIATION BOARD, Petitioner.	)	
v.	)	No. 73-1316
GRUMMAN AIRCRAFT ENGINEERING CORPORATION	)	

Washington, D.C.
January 14, 1975

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v.	:	No. 73-1316
GRUMMAN AIRCRAFT ENGINEERING CORPORATION	:	

Washington, D. C.

Tuesday, January 14, 1975

The above-entitled matter came on for argument at 1:19 o'clock p.m.

BEFORE:

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

APPEARANCES:

ALLAN A. TUTTLE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530
For the Petitioner

TOM M. SCHAUMBERG, ESQ., 1019 19th Street, N.W., Washington, D. C. 20036
For the Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-1316, The Renegotiation Board versus Grumman Aircraft.

Mr. Tuttle.

ORAL ARGUMENT OF ALLAN A. TUTTLE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. TUTTLE: Mr. Chief Justice, and may it Please the Court:

This case involves the application of the Freedom of Information Act to certain documents generated within the Renegotiation Board in the course of fulfilling its statutory mandate to eliminate excessive profits from national defense contracts made with the United States.

More specifically, the issue is whether reports of renegotiation prepared by the staff of the regional boards and recommendations prepared by divisions of the statutory boards are intra-agency memoranda within the Exemption 5 to the Freedom of Information Act.

The District Court held that certain reports of renegotiation and division recommendations were final opinions made in the adjudication of cases within the Public Disclosure provisions of the Freedom of Information Act.

The Court of Appeals for the District of Columbia affirmed the judgment of the District Court but added two

holdings of its own.

One was that the regional boards were themselves agencies so that their reports to the statutory board were the final opinions of the regional boards themselves considered as agencies.

The second holding of the Court of Appeals was that the documents sought were identifiable records within Section 552(A)(3) of the Act and they were not exempt under Exemption 5.

Our contention is that these documents, the reports of renegotiation and the division recommendations are intra-agency advisory memoranda within Exemption 5.

In order to determine whether these documents are such interagency memoranda, it is helpful to take a look at the renegotiation process and the role played by the documents sought within that process.

The charter of the Renegotiation Board is to eliminate excessive profits in contracts made with the United States relating to the national defense.

There is no fixed formula for what constitutes an excessive profit.

In fact, Congress rejected the express profit limitations provisions of predecessor statutes and in their place adopted a number of statutory criteria which The Renegotiation Board is required to consider.

In consequence, what constitutes an excessive profit is necessarily a matter calling for the exercise of judgment. This judgment is committed in the first instance to The Renegotiation Board but subject to de novo review by the Court of Claims.

Under these general statutory criteria established by Congress, The Renegotiation Board, as its name suggests, negotiates.

As this Court said last term in the Bannercraft case, the character and entire atmosphere is negotiation.

It is pure bargaining, the kind of bargaining that produces the union employer agreement for the transfer of substantial property from a willing seller to an interested buyer.

The renegotiation process begins when a case is assigned by the Statutory Board to one of the two subordinate Regional Boards.

Cases are divided into Class A and Class B cases. Class A cases are cases where the renegotiable profits exceed $800,000.

All of the documents which we are concerned with here were generated in Class A cases.

In Class A cases, the Regional Board possesses the power only to make recommendations to the Statutory Board concerning the amount, if any, of excessive profits.

After a case is assigned to the Regional Board, a team consisting of an accountant and a renegotiator meets with the contractor, secures the necessary information and prepares a report and recommendation to the Statutory Board.

At the time these documents were generated, that report was called a report of renegotiation and consisted of a part 1(A) prepared by the accountant and a part 2 prepared by the renegotiator.

The part 2 was an evaluation of the contractor under the statutory factors established by Congress, thus a typical part 2 would consider the character of the contractor's business, the capital he employed, the extent of risk he assumed, his contribution to the defense effort, his efficiency and the reasonableness of his costs and profits.

The part 2 would end with the renegotiator's recommendation in the case.

Thus the report of renegotiation might recommend a finding of excessive profits or it might recommend a clearance, that is, a finding of no excessive profits.

Or, finally, if the contractor had agreed to a determination of excessive profits, it might recommend that the Renegotiation Board enter into an agreement with the contractor as to the amount of excessive profits.

If there is an excess profit recommendation, and if the contractor requests it, he is given an opportunity to

meet with a panel of the Regional Board and present his reasons as to why his profit is not excessive.

The panel then would prepare a report and report to the Regional Board. If there is still a recommendation of a finding of excessive profits, the contractor can request a summary of facts and reasons which states the basis of the Regional Board's recommendation.

If no agreement can be reached at that point, the case is forwarded to the Statutory Board.

In the Statutory Board, the case is reviewed by the Office of Accounting and the Office of Review. Typically, in the Office of Review, the reviwer prepares a memorandum expressing his views on the case and the director of the Office of Review would make his comments.

I want to --

QUESTION: You are saying,then, that the Statutory Board doesn't necessarily go along with the Regional Board.

MR. TUTTLE: Oh, that is quite clear. There is no -- I will be developing in a moment what happens in the Regional Board. As far as I have gotten in my description of the procedures, Mr. Justice, I am explaining what the Regional Board does and the most that they can do is forward a recommendation to the Statutory Board.

In the Statutory Board, the Statutory Board has

its own staff, the Office of Review and the Office of Accounting.

As I suggested, these offices prepare memoranda which I wanted to call to the Court's attention because they show that the report of renegotiation, advisory though it is, is not the last recommendation that the board, the Statutory Board receives before it makes its decision.

Now, if there is a recommendation for a finding of excessive profits to the Statutory Board, it is commonly assigned to a division of the Statutory Board consisting of three of its five members.

I'll discuss the division in a moment.

If there is a recommendation for a clearance, that is to say, a finding of no excessive profits, the board may consider the case without referring it to a division.

Now, it is important for the purposes of this case to realize that when the Statutory Board considers the case, it will not limit itself to the discussions or reasoning contained in the Report of Renegotiation or, for that matter, any documents generated by the Office of Review.

The chairman of the Renegotiation Board was deposed in this case and, on this subject, at page 79 of the Appendix he said, "When the recommendation for a clearance of the Regional Board comes up on the board agenda, it simply approves or disapproves the clearance. It does not adopt

any of the memoranda that are before it."

QUESTION: Was there any conflicting testimony or deposition --

MR. TUTTLE: This is uncontradicted testimony and it -- as I will point out in a moment, it is incorporated in the District Court's findings.

QUESTION: How did the District Court rule in the case?

MR. TUTTLE: As an ultimate holding? The ultimate holding of the District Court was that these were final opinions of the Renegotiation Board.

QUESTION: I meant as to the subjects covered by Mr. Hartwig's testimony.

MR. TUTTLE: The District Court, at page 210 of the Appendix, says, "It is important to note that in no case does the board formally adopt the reports or recommendations either of the Regional Board or of its staff. It considers and studies but it does not adopt," and then the District Court quotes from the deposition to support this findings.

This is essentially uncontradicted.

Now, if there is a recommendation of excessive profit findings, the case will be referred to a division and the division will meet with the contractor to prepare their reports and recommendations.

Again, when the Statutory Board considers the case, it won't limit itself to matters discussed in the divisional report. This is at page 81 of the Appendix.

When the board adopts the recommendation of the division, it does just that. It adopts the conclusion or recommendation but it does not adopt the report and then the District Court made the finding that I quoted to Mr. Justice Rehnquist just a moment ago.

If there is a determination of excessive profits, the board will then determine the amount of the profits and, again, if the contractor requests it, he can receive a summary of facts and reasons stating the basis for the board's conclusions.

If agreement can still not be reached -- and, mind you, negotiation is going on all along in the nature of this process, the board will issue a unilateral order determining the amount of the profits.

Now, this is the Statutory Board and only the Statutory Board which could issue such an order.

At the time the order was entered, if the contractor requested it, he could obtain a statement of facts and reasons for the excess profit determination -- if he requested it.

Except for the statement of facts and reasons, at the time this case arose, the Renegotiation Board did not

issue opinions to accompany its orders. Thus in the case of a clearance, that is, a finding of no excessive profits, or an agreement with a contractor, the board would simply enter an order.

Members of the board might differ as to the particular weight to be given to any factor or circumstance. All that was required for board action was agreement as to the results, not necessarily as to the reasoning.

As the then-chairman of the Renegotiation Board, Mr. Hartwig, testified -- and this is at page 100 of the Appendix -- "Many times a board member will agree to a clearance for none of the reasons stated in the staff document. He may have his own reasons. His assistants may have checked out some point that was bothering him that he didn't even bother to discuss with his colleagues. But the important thing is the informality of our procedure whereby we all agree that we agree on the results."

Now, in spite of the uncontradicted evidence that the board did not adopt any of the recommendations before it and did not issue opinions in clearance cases and agreement cases, the District Court and the Court of Appeals held that these documents were final -- that the reports of renegotiation and the division reports were final opinions made in the adjudication of cases.

This was because, in the words of the District

Court, they were the last documents which explained the board's decision.

The premise of these decisions appears to be that boards ought to be writing final opinions and when they don't it is appropriate to treat the most proximate staff document containing the advice followed by the agency as the agency's final opinion.

Now, obviously, agencies under the threat of such treatment will be forced to write opinions to accompany their orders as the Renegotiation Board now does but we think it distorts the function of the Freedom of Information Act to use it to force agencies to write opinions where they didn't ordinarily.

QUESTION: Congress really dealt with that in the Administrative Procedure Act, didn't they, as to --

MR. TUTTLE: And I -- Mr. Justice, I should say, in light of your mention of that, that the Renegotiation Board is explicitly exempted from the Administrative Procedure Act, except for the Public Information sections of it.

Congress made a -- recognizing the negotiative character of what they do, they said this is not APA-type adjudication.

We think that that act was not designed to judicialize the operations of agencies which had operated informally before that time.

Moreover, we think that to force agencies to write opinions to accompany every order on pain of having their staff memoranda treated as if they were the agency's final opinion could seriously impair the efficiency of agency decision-making.

As the Court of Appeals for the District of Columbia said in the Sterling Drug case, "It is completely unreasonable to suppose that every agency order can be accompanied by an opinion."

Parenthetically, that Court observed that three to four -- some agencies issued three to four million orders a year.

There is another reason why we think it is illogical to treat "The last document which explains the board's decision" as the agency's final opinion. Whereas, with the Renegotiation Board, the agency receives recommendations from a number of tiers of the hierarchy, there is no reason at all to suppose that it follows the reasoning of the recommendation which is most recent in time.

In my own agency, within the Justice Department, if there is a recommendation to the Solicitor General not to petition this Court for certiorari, there may be in the file a recommendation from the Civil Division recommending no cert, a recommendation from an affected agency, a recommendation from an assistant to the Solicitor General,

a recommendation from the Deputy Solicitor General.

And there is no reason at all to suppose that the Solicitor General, in making his judgment as to whether or not to authorize certiorari if he decides not to petition, would base his decision on the expressions of opinion in the most recent staff document.

He might be listening to the Civil Division or he might have reasons of his own.

Our submission is that the part 2 of the Report of Renegotiation and the division recommendations are intra-agency memoranda within Exemption 5 of the Freedom of Information Act.

QUESTION: Whether or not they are final opinions.

MR. TUTTLE: Well, I think --

QUESTION: You have to prove both, don't you?

MR. TUTTLE: I think that that is -- I think that I have organized my --

QUESTION: You skipped over the identifiable records.

MR. TUTTLE: That is the point, your Honor.

QUESTION: Yes.

MR. TUTTLE: The only reason why we talk about Exemption 5 is that it doesn't -- we don't win the case by proving that they are not final opinions.

QUESTION: That is right. You have to -- because

they are identifiable records.

MR. TUTTLE: Clearly so. So we --

QUESTION: You have to prove that they are not final opinions and that they come within the exemption in 5.

MR. TUTTLE: We have to prove both of those things.

QUESTION: Yes.

MR. TUTTLE: That is why we stress Exemption 5 because it wouldn't do us any good to prove to you that they were not final opinions.

Now, Exemption 5 provides that the Public Disclosure Provisions of the Act do not apply "To matters that are interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

As this Court said in the Mink case, that exemption was intended to incorporate generally the recognized rule that confidential intra-agency advisory opinions are privileged from inspection.

It seems to us that reports of renegotiation are such intra-agency memoranda within this traditional privilege.

The Regional Board where these memoranda are generated possesses no powers of decision in Class A cases. They can only recommend to the Statutory Board. Only the Statutory Board can decide. And in deciding, it gets advice.

It gets advice from the Regional Boards. It gets advice from the Office of Review. But the evidence is that it does not adopt any of the reasoning of any of the advice.

The traditional privilege is recognized in order to promote the frank and open exchange of views and opinions between superiors and subordinates within an agency and it seems to us that that freedom of communication will be jeopardized by a holding which would treat advisory memoranda as the agency's opinion whenever the agency happens to follow the advice.

Moreover, those documents, since they don't contain the actual reasons for the agency's action, would mislead the public as to the basis of decision.

As the Court of Appeals said in the Sterling Drug case, speaking of an agency decision, "The ultimate decision was something more than or at least different from the sum of its parts. Consequently, we doubt the proof of the parts would give an accurate picture of the decision."

We think the same considerations apply to the division recommendations. Again, the uncontradicted testimony is that these documents are not adopted by the agency when it reaches a result.

These documents, too, ought to be protected in order to allow a full and frank exchange of views between the ultimate decision-makers.

As the Court in the Sterling Drug case commented, "Congress expressly indicated that intra-agency communications of thought and opinion are to be protected"and nowhere is that protection more needed than between the ultimate decision-makers of the agencies.

QUESTION: Do you think the Court of Appeals' decision in Sterling Drug and its opinion in this case are entirely consistent with one another?

MR. TUTTLE: No, I don't think they are consistent and, quite frankly, that is why I am quoting from the Sterling Drug case and not from the decision below.

The -- we don't believe that the division recommendations are concurring opinions, either, of the members who make them. They are preliminary expressions of view which are subject to change and conclusive proof of this to my mind is the fact that there are instances where the board will enter a unilateral order which order will differ from the recommendation made by the division and yet the board member whose views were expressed in the division memorandum will not dissent from the board's ultimate order.

Finally, we don't believe that these reports of renegotiation are final opinions of the Regional Board.

This is because Regional Boards are not agencies within the meaning of the Adminiatrative Procedure Act.

Section 551(1) of the Administrative Procedure Act

defines an agency as any authority of the United States including an authority within an agency.

This definition is hardly self-defining.

We think the Senate Report written to a company, the legislation, is more helpful. That explains that an authority is an agency, even an authority within another agency, when it has the power to take final and binding action.

Now, the Regional Boards clearly have no such power to take final and binding action in Class A cases. Therefore, they are not agencies.

We think this is confirmed by the 1974 Amendments to the Freedom of Information Act which Mr. Justice Brennan spoke of this morning. That act imposes a host of new duties and obligations on administrative agencies.

It requires, for instance, the publication of quarterly indices of opinions. It requires annual reports to Congress.

We think it is clear that Congress did not intend that subordinates within an agency should make these reports to Congress or publish these indices. Thus, the conferees on the bill, when they were explaining the term "agency" which had been amended in the act and expanded to include the Postal Service essentially, stated, "Expansion of the definition of agency is intended to broaden the [illegible]

of the Freedom of Information Act but it is not intended that the term 'agency' be applied to subdivisions, offices or units within an agency."

This language, we think, is simply confirmatory of what we believe to be the correct view of Section 551(1) that the Regional Boards are not agencies because they don't possess the power of decision and that the reports of renegotiation, which are the Regional Boards' recommendations to the Statutory Board, are not the final opinions of an agency entered in the adjudication of the case.

For these reasons --

QUESTION: Mr. Tuttle, do you rely --

MR. TUTTLE: Yes.

QUESTION: That is, so far as the exemptions go, the statutory exemptions, are you relying only on number 5?

MR. TUTTLE: We are relying solely on Exemption 5, Mr. Justice.

QUESTION: Mr. Tuttle, I am just curious. What is the government's interpretation of -- and I am looking at Exemption 5 -- "Other than an agency in litigation with the agency"? What is the "Other than an agency"? What does that have reference to?

MR. TUTTLE: I confess, Mr. Justice, I was not able to determine what that particular language was added for. It is clear that the exemption was generally designed

to incorporate the traditional privilege and in some of the drafts, earlier drafts, that language did not occur.

I regret I don't know the answer to that.

QUESTION: I think we have had litigation before us here between, say, Commerce, the Census Department and FTC. I recall a case like that. Would it be something like that?

MR. TUTTLE: I wouldn't -- I would only be speculating, I'm sorry, I --

QUESTION: You don't know if there is any legislative history behind that? It must mean something but it is rather odd language, isn't it?

MR. TUTTLE: It is odd language and I am sorry I don't know the answer to your question.

QUESTION: Would not intra-government conflict be certainly one of the classic cases that would fit 5? Two different agencies of government taking different positions, as Justice has sometimes disagreed with the Power Commission or what-not?

MR. TUTTLE: Yes. Well, I --

QUESTION: I can't think of any others.

MR. TUTTLE: No, I -- I -- I just don't --

QUESTION: Well, at least the section refers to documents that would be available to a party -- that would not be available to a party litigating with an agency.

MR. TUTTLE: That is correct, sir. That is the essence of the --

QUESTION: And just forget the other-than-the-agency.

MR. TUTTLE: That -- well, certainly, that is not involved in this case and the essence of it is whether a party would be able to receive it under traditional discovery principles and, of course, as this Court has recognized in the Mink case, those -- this privilege has been recognized before the passage of the Freedom of Information Act and that is the operative provision of Section 5.

If there are no further questions, I'd like to reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Schaumberg.

ORAL ARGUMENT OF TOM M. SCHAUMBERG, ESQ.,

ON BEHALF OF RESPONDENTS

MR. SCHAUMBERG: Mr. Chief Justice and may it Please the Court:

In 1967, in response to the promulgation of the Freedom of Information Act, the Renegotiation Board itself enacted new regulations which provided that the board would henceforth make its opinions available to the public.

Despite those new regulations issued by the board, the board did not issue any opinions to the public. It was

not until 1970, as a result of the first decision by the Court of Appeals in this case, that the board was forced to recognize that so-called "statements of facts and reasons are, in fact, final opinions."

The Court of Appeals so held and the Renegotiation Board did not seek any further review of that determination.

Similarly, in 1971, as a result of the District Court's opinion on remand, the board was also forced to admit that its summaries of facts and reasons are opinions which must be made available under the Freedom of Information Act and under the regulations promulgated by the board.

When the case was back in the District Court, therefore, the question was one of definition of what constitutes final opinion within the procedures of the Renegotiation Board.

Having just heard the argument, it would appear that the board has never issued an opinion and has never recognized that it has issued an opinion but, in fact, it has and it has recognized so by making these earlier documents available to the public.

Therefore, the issue that is now before this Court, as it was in the District Court, is one of definition: What constitutes a final opinion?

And we submit that under the two-court affirmance doctrine with the District Court having clearly found that

these documents are final opinions of the board because they have all of the indicia of final opinions, with the Court of Appeals having affirmed that decision as not being clearly erroneous, it is clear that these documents constitute final opinions and the arguments that have just been made are factual arguments, trying to show that because of the procedures of the board, these documents are not final opinions.

Now, turning for a moment to the findings of the District Court that Mr. Justice Rehnquist asked about:

At the point in the District Court opinion where the Court said that the board does not adopt the division reports and the Regional Board reports, what the District Court was saying -- and I'd like to refer the Court --

QUESTION: Can you give us a page there?

MR. SCHAUMBER: Yes, in the petition, that is at page 28a.

QUESTION: The Appendix to the petition.

MR. SCHAUMBER: Yes, sir. In the first paragraph of page 28a, the last sentence, the District Court said that the gist of Mr. Hartwig's testimony concerning renegotiation procedures follows and there then followed three or four pages of the nature of the testimony of Mr. Hartwig.

Turning then to page 37a of the same Appendix, the last paragraph, that is the finding of the District

Court. It says, "It is unrealistic to claim that because board members might have different reasons for approval of the division's recommendation, the report of the division upon which its recommendation is based is not a final opinion.

QUESTION: Can you really say that that is strictly a question of fact?

MR. SCHAUMBERG: I think you have to go back to the previous paragraph on page 37a.

It says, "It appears to the Court that in this type of case, the division report, rather than the unilateral order, is the crucial and final document."

The report contains a consideration of the statutory factors, explains the reasons for the division's recommendations and gives the facts on which the reasoning rests.

I think that is a finding of fact and I think the way the District Court reached that finding of fact is by referring to the statement of facts and reasons.

I'd refer the Court to the joint Appendix, page 35.

QUESTION: In that paragraph, this is the essence of a final opinion, has the ring of a finding of law, doesn't it?

MR. SCHAUMBERG: I think that sentence can be read either way. I think the Court arrived at it --

QUESTION: I am getting back to my Brother Rehnquist's question to --

MR. SCHAUMBERG: I understand.

QUESTION: -- to whether this is really just a finding of fact.

MR. SCHAUMBERG: I won't say it is just a finding of fact. I think it was arrived at by --

QUESTION: Well, if it is not --

MR. SCHAUMBERG: Pardon?

QUESTION: Does the two-court rule apply except where, clearly, there is agreement between the two courts on what concededly are fact findings?

MR. SCHAUMBERG: I think that would be correct, that it is only when it is concededly a finding of fact.

The Court of Appeals treated these findings as findings of fact and I would now like to turn to the statement of facts and reasons which appears at page 35 of the Joint Appendix.

QUESTION: Before you leave that, when you say the Court of Appeals treated them as findings of fact, here we have something like 10 or 11 pages -- more than that --a dozen pages. Some of them are fact-finding. Some of them are mixed and some of them would strike me, at least, as being pure statement of the legal conclusions so a generalization by the Court of Appeals doesn't really fit every line and every sentence in that opinion, does it?

MR. SCHAUMBERG: Well, in that case I would refer

the Chief Justice to the brief of the board to the Court of Appeals.

Before the Court of Appeals, the Board argued that the principle issue before that court is what constitutes a final opinion?

There was no Exemption 5 question. There were no agency questions. It was strictly a question of whether the documents in issue constitute final opinions and in response to that argument, which was also the argument that we held before the Court of Appeals, the Court of Appeals said that it could not find the findings below clearly erroneous and therefore, affirmed that opinion and then went on into the alternative holdings.

QUESTION: The clearly erroneous will apply to all the findings, true findings of fact but for nothing else.

MR. SCHAUMBERG: Of the District Court.

QUESTION: But it is quite clear, isn't it, as Mr. Tuttle has conceded in his argument that for the government simply to prove that they are not final opinions doesn't enable it to prevail in this lawsuit.

It has got to also bring them under an exemption.

MR. SCHAUMBERG: Quite correct.

QUESTION: So, surely, the government, unless it was rather poorly represented in the Court of Appeals, wouldn't have been arguing only that these are not final opinions.

I am not saying the government is never poorly represented.

MR. SCHAUMBERG: I would not like to comment on that, except I would refer you to the record below.

The other side of the coin, however, is that we can prevail by simply prevailing on the question of whether these documents constitute final opinions.

QUESTION: In an adjudication.

MR. SCHAUMBERG: In an adjudication. There is no issue in this case, unlike the previous case, that the board adjudicates cases which are before it for the determination of excess of profits.

QUESTION: No, but you are saying that these documents you want are all -- all parts of these documents you want are parts of an adjudication.

MR. SCHAUMBERG: That is correct.

QUESTION: And if it is true that no member of the board may have relied on any of the reasons given in these documents to decide the case, how could you say that these documents, or any one of them, is a part of an adjudication?

MR. SCHAUMBERG: Well, the assumption is simply not correct, according to this record.

QUESTION: Well, assume it were true. Assume it were true.

MR. SCHAUMBERG: Well, if these were all staff documents, such as those that come out of the Office of Accounting or the Office of Review --

QUESTION: Well, is there any contrary evidence that some members might vote the way they did for some reason not contained in any of the documents?

MR. SCHAUMBERG: Theoretically, that is possible.

QUESTION: Well, it might be the critical vote in a case.

MR. SCHAUMBERG: In the case that was examined during the course of the deposition, and I think Mr. Tuttle misspoke somewhat, the division consisting of three of the five board members wrote two memoranda, one representing the views of two members of the division and one representing the views of the dissenting members of the division.

It then went before the full board in a meeting and the decision came out four to one so in that case, it is just as easy to assume that the dissenting member of the division continued to be the dissenting member of the full board.

He is, in both instances, a Presidentially-appointed member of the Renegotiation Board.

QUESTION: Well, the reasons given in the staff documents are only part of the adjudication if you assume that those are the reasons upon which the adjudication by

the board is based.

MR. SCHAUMBERG: But these are not staff documents, Mr. Justice. These are documents prepared by board members themselves.

QUESTION: All right, but they are documents presented to the full board.

MR. SCHAUMBERG: By the board members themselves.

QUESTION: By some of them.

MR. SCHAUMBERG: That is correct.

QUESTION: By just a division of them, or --

MR. SCHAUMBERG: Three out of the five.

QUESTION: Yes. So there is no -- you do have to assume that those are the reasons on which the adjudication is based before you can say these documents are part of an adjudication.

MR. SCHAUMBERG: That is correct.

QUESTION: Well, wouldn't it at least be -- if it is written by a board member, a statutory board member, it would be at least a concurring opinion, as the District Court pointed out.

MR. SCHAUMBERG: We would so argue and in the case we just cited, it would either be a concurring or a --

QUESTION: A dissenting.

MR. SCHAUMBERG: -- a dissenting opinion, yes. But even if the full board --

QUESTION: Unless he was talked out of it in conference.

MR. SCHAUMBERG: Unless he was talked out of it, yes. Now, the Minutes of the Board, which were discussed during the course of the deposition merely said the board accepted the recommendation of the division.

There is no indication whatsoever in the Minutes of the board that there was an extensive discussion, an exhaustive analysis of the reasons why each board member voted the way he did.

They simply have a Minute which reflects the fact that either -- depending on what kind of a case it was, whether it came from the Regional Board or whether it came from a division, the board accepted the recommendation.

QUESTION: It never accepts the report.

MR. SCHAUMBERG: That is not in the Minutes. That is the --

QUESTION: No, but they don't accept the reports.

MR. SCHAUMBERG: Expressly, they do not and I would suggest that American Mail Line is perhaps the extreme case where a body said, we are making this decision for reasons which we are not going to tell anybody, but they are contained in a secret report.

That is a unique instance. I think it is not asking too much to consider this adoption as well because

even though the board does not go into an extensive analysis or -- the fact that it does not, it can be presumed that the reasons that they did decide the case the way they did is for the reasons that were set before them, particularly in the case of the division report.

On the question of whether one starts with an analysis of the exemptions in the act or the pro-disclosure requirements, there can be no question today that the Congress was very eager that the Freedom of Information Act be a pro-disclosure document.

There had been many years of experience with the previous Section 3 of the APA and Congress as well as the public was very dissatisfied with the results and as a consequence, the Freedom of Information Act was enacted.

In fact, Congress has spoken twice, having recently amended the act and I think we can all assume that Congress emphasized the importance of this act to the public so in making the analysis of a Freedom of Information Act request, one must begin with the pro-disclosure requirements of the act and we suggest that in this case, if this Court holds that the documents do constitute final opinion, the Court need go no further.

The Court of Appeals held -- and the government has also argued -- that final opinions and intra-agency memoranda are mutually exclusive so, unlike the board, we

only need to win on that one point, namely, that these documents do constitute final opinions.

QUESTION: But doesn't that very position somewhat circumscribe the definition that you can give to final opinions since, if they are mutually exclusive with staff documents, presumably you have got to be pretty sure that it was something that was adopted either expressly or by implication by the decision-making authority.

MR. SCHAUMBERG: I think that is correct and I think the District Court so found and I think it stated its reasons for finding that these documents are the final opinions.

We must remember that there is no document that -- at least at the time this case was brought, which emanates from the board and is called a "final opinion."

If we were arguing before this Court right now as to whether or not statements of facts and reasons are final opinions, many of the same arguments could be made. They are, those documents are actually generated by the staff, whereas the documents we are talking about now, for instance, the division reports, are actually written by Division Board members.

So it is a question of definition. The board has conceded, during the six years of this litigation, that statements of facts and reasons are opinions, summaries of facts and reasons are opinions.

And now the only two questions left are whether division reports are opinions and whether reports of the Regional Board are opinions.

QUESTION: But there is no statutory requirement, of course, that the board issue any final opinions at all. It is exempt from the other sections of the Administrative Procedure Act.

MR. SCHAUMBERG: There is a provision in the Renegotiation Act which does state that the board will provide a statement of facts and reasons to the contractor if he requests it.

QUESTION: Yes, in his case.

MR. SCHAUMBERG: That is correct.

QUESTION: And that is not what you are claiming here, is --

MR. SCHAUMBERG: No.

QUESTION: -- that you want a statement of facts in your case, is it?

MR. SCHAUMBERG: No, we do not.

QUESTION: You don't claim under that.

MR. SCHAUMBERG: No. But we are claiming that -- we are claiming under the board's regulations, the board promulgated the regulations which say that it will make the final opinions available to the public.

Congress didn't say that. The board did. These

are their regulations that we are claiming under.

Turning for a moment to the Regional Boards, the Court of Appeals went into an analysis of whether or not the Regional Boards themselves are agencies and its analysis commences with a consideration of Soucie versus David, which was also a decision of the Court of Appeals for the District of Columbia.

In the recent enactment of the Amendments to the Freedom of Information Act, the Congress specifically accepted the reasoning of Soucie versus David in determining that the Office of Science and Technology is an agency for purposes of the Freedom of Information Act.

We merely say this to suggest that the reasoning of the Court of Appeals which begins with an analysis of Soucie deserves great weight in this Court but the Court need not even reach this question.

If, as the District Court did, this Court finds that the Regional Board reports constitute the opinions of the Statutory Board, as did the District Court, there is no need to get into the question of whether the Regional Boards are agencies.

It is only if the Court does not adopt that determination of the District Court that we get into the question of whether the Regional Boards are themselves agencies and whether their documents should be disclosed to

the public.

Turning now to a consideration of Exemption 5, as Counsel for the Board has pointed out, if this Court determines that the documents are not final opinions, that they are concededly identifiable records, in which case they would still be available to the public unless they fit within Exemption 5.

An analysis of Exemption 5 commences, I believe, with Kaiser Aluminum versus the United States. In Kaiser, the court there, and that was the Court of Claims, Justice Reid sitting by designation, spoke about the "consultative functions of government" and suggested that intra-agency memoranda which contained such information should not be made available to the public.

What is very important to note, though, is that in the Kaiser Aluminum case, the document in question was prepared by a confidential assistant to the liquidator of war assets.

Unlike this case where we are talking about documents, at least in the case of division reports which are generated not by the staff but by the decision-makers themselves, namely, the members of the board or the documents generated by the members of the Regional Board.

Turning next to Environmental Protection Agency versus Mink, it, too, considered the one type of document

which constitutes the consultative, deliberative, advisory functions of government which are contained in intra-agency memoranda but it also spoke about factual information contained in identifiable records.

Now, this Court, in Mink, suggested that the District Court give the agency an opportunity through oral testimony to show that the documents should not be disclosed.

Well, the oral testimony in this case served only to convince the District Court that the documents should be disclosed.

Now, we suggest that the reason they should be disclosed -- and this is now with regard to Exemption 5 -- is because they are principally factual in nature and we refer the Court in that regard to page 35 and the following several pages of the Joint Appendix where we have shown the statement of facts and reasons which was issued to Grumman during the course of its renegotiation process.

The argument we have made in our brief is that the documents in issue before this case seemed to look exactly like the document reproduced at pages 35 and following.

Of course, we have to say "seem" because we have never seen the documents but during the course of Chairman Hartwig's deposition, we asked, in each instance, "Would you please describe this document? Would you please describe this document?" and as he did so, he would go through the

statutory factors, which begin at page 37, and, indeed, the words "character of the business, extent of the risk assumed, capital employed, contribution to the defense effort, efficiency," these are all the same headings which are both in the statement of facts and reasons as well as in the documents which are now in issue and we point this out, not in connection with the argument that these, therefore, constitute final opinions of the board, but to show that they are factual documents.

I think it is very important to note that the government has never taken issue with our contention that these documents contain factual information.

We have made that argument in our principal brief and neither in its brief or in the reply brief has the government ever tried to suggest that these documents are not factual in nature. They may, indeed, have some advisory information in them but I think Mink made it very clear that to the extent that such information is segregable from the factual information, the document must be made available to the public.

In conclusion, I would simply like to mention that there is no conflict whatever between the decisions below and this Court's decision in Bannercraft.

Grumman is not presently involved before the Renegotiation Board and we are here as a member of the public.

What is important is that the Renegotiation Board, in determining whether a contractor has or has not realized excessive profits, compares the contractor with other contractors who are producing the same product or are involved in the same processes as that contractor.

Well, in order for a contractor to bargain effectively and make his presentation to the board meaningful, he must have some idea of what he is being compared to and the only way he will get that information, because it is not available anywhere else, is from the board's opinions or, if we call them identifiable records, it is the factual information that the board sets forth in these documents and only by having access to these documents will this bargaining process be meaningful.

QUESTION: And if the board simply decides to not produce any more documents, you would be in the same position in your bargaining and yet you would have no claim under the Freedom of Information Act.

I mean, if it is just because the board has reduced a number of things to writing that are identifiable documents that you have your claim.

MR. SCHAUMBERG: That is correct and because the Congress has seen fit to enact the Freedom of Information Act.

QUESTION: If they wanted to do it all on the

telephone, you are out of luck.

MR. SCHAUMBERG: That is correct. But Congress, in enacting the Renegotiation Act, hoped to achieve a system where contractors would finally agree with the board and the more information the contractor has going into the negotiation with the board, the more satisfied he will be at the end of that negotiation that he has had a fair shot before the board and will not go to the Court of Claims.

QUESTION: Why did Congress exempt the Renegotiation Board from the Administrative Procedure Act, then, if they felt the way you say they do?

MR. SCHAUMBERG: I don't think the two are inconsistent. They exempted the board from the Administrative Procedure Act because they gave the contractor a de novo opportunity, either in the Tax Court or now in the Court of Claims.

But that is not to say that Congress would not like to have had the process before the board, although not an APA-type hearing, to have been meaningful from the contractor's point of view so he would not seek the de novo determination.

In other words, the more information the contractor has, this will not change his bargaining power. He has no power before the board but if he has more information available to him, he will be able to present a more

meaningful case to the board and, hopefully, this will cause the board to make a more reasonable determination of whether or not he has had excessive profits.

Well, in summary, we would like to suggest that the board itself promulgated the regulations which require it to publish its final opinion and we respectfully suggest that the Court of Appeals' opinion which affirmed the District Court properly held that the documents in issue are final opinions and even if they are not, they are identifiable records which are not exempt under Exemption 5.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Tuttle? You have about six minutes.

REBUTTAL ARGUMENT OF ALLAN A. TUTTLE, ESQ.

MR. TUTTLE: Just a few more points, Mr. Chief Justice.

I'd like to address myself first to the observation that the reports of renegotiation are factual. I think it is true that they contain and they are based upon factual information but I think, even by the example of the statement of facts and reasons -- which is what we have in the record here -- it is obvious that what is involved is an assessment and a selection and an organization of facts to recommend a certain conclusion.

These are based upon filings by the contractors.

The filings themselves would contain the factual information upon which the recommendations are made and those filings would be factual information, not within Exemption 5.

Exemption 5 applies only to the evaluative material, even if it involves evaluation of facts and I think that it is clear that what we have here is an evaluation and an organization of facts for the purpose of recommending a conclusion.

I wanted to say that the District Court's opinion on the subject of whether these documents were final opinions, it seems to me that that conclusion is very much a conclusion of law and quoting slightly further along in the opinion from the point at which Mr. Schaumberg did, on page 37a of the Appendix, where the Court speaks of divisional reports and recommendations as final opinions, the Court says, "It is unrealistic to claim, because board members might have different reasons for the approval of a division recommendation that the division report is not a final opinion."

The Court recognizes, in its own legal inferences from the facts in the record that board members may and do have reasons other than the reasons stated in the recommendation which comes to us. I think it is --

QUESTION: How about the argument that the reports at least represent the views of at least one member?

MR. TUTTLE: Well, I think in the first place, it is somewhat anomalous to refer to them as concurring opinions in

circumstances where there is no majority opinion, certainly not in my mind, what the common understanding of the concept of a concurring opinion is.

I gave an example which --

QUESTION: Well, people concur in per curiam opinions.

MR. TUTTLE: Yes, it --

QUESTION: Or a per curiam order, summary orders.

MR. TUTTLE: It could be if it were the expression of the decision-maker made after the decision had been made. What makes these documents different is that they are recommendations prepared prior to the time the decision-makers make the decisions and those are subject to change.

I gave an example of the possibility of a change where there would be a final order which would differ from the division recommendation.

I was not referring to the particular case that Mr. Schaumberg called attention to in the deposition and I didn't mean to suggest to the Court that I was but these views are subject to change and I think that is what makes them something other than concurring opinions.

QUESTION: Just to make it quite clear, you do agree, I take it, that if these are opinions, you must disclose them.

MR. TUTTLE: We agree that if they are opinions --

QUESTION: And that these three items in A(2) are exclusive -- and that the exemptions are mutually exclusive.

MR. TUTTLE: Well, I would say mutually exclusive vis-a-vis the Fifth Exemption. It is conceivable to me that there might be a trade secret problem or something like that, where there would be something that would constitute an opinion and still be exempt but insofar as this case is concerned for the purpose of your analysis, I do concede, yes, that they are mutually exclusive.

The only reason that I haven't focused on that is, as Mr. Justice Rehnquist has said, is that it wouldn't win the case for me to convince you of that.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:13 o'clock p.m., the case was submitted.]