

In the

Supreme Court of the United States

Department Of The Air Force, et al.,)

Petitioners,)

V.)

Michael T. Rose, et al.,)

Respondents.)

No. 74-489

Washington, D. C.
October 8, 1975

Pages 1 thru 51

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IN THE SUPREME COURT OF THE UNITED STATES

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 DEPARTMENT OF THE AIR FORCE, et al., :
 :
 BARRINGTON D. PARKER, Petitioners, :
 v. : No. 74-489
 :
 REBUTTAL ARGUMENT OF: :
 MICHAEL T. ROSE, et al., :
 DANIEL M. FRIEDMAN, ESQ., :
 Respondents. :
 :
 -----X

Washington, D. C.

Wednesday, October 8, 1975

The above-entitled matter came on for argument at
 1:02 p.m.

BEFORE:

WILLIAM 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:

DANIEL M. FRIEDMAN, ESQ., Deputy Solicitor General,
 Department of Justice, Washington, D. C. 20530,
 for the Petitioners.

BARRINGTON D. PARKER, JR., ESQ., 48 Wall Street,
 New York, New York 10005, for the respondents.

I N D E X

ORAL ARGUMENT OF:

Page

DANIEL M. FRIEDMAN, ESQ., for the Petitioners

3

BARRINGTON D. PARKER, JR., ESQ. for the Respondents

26

REBUTTAL ARGUMENT OF:

DANIEL M. FRIEDMAN, ESQ.

47

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-489.

Mr. Friedman, would you prefer to defer your beginning until after lunch?

MR. FRIEDMAN: I think I would, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Then we will begin that at 1 o'clock and open with your case.

[Whereupon, a luncheon recess was taken.]

MR. CHIEF JUSTICE BURGER: Mr. Friedman, you may proceed whenever you are ready.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN

ON BEHALF OF THE PETITIONERS

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court: The question in this case here on a writ of certiorari to the Court of Appeals for the Second Circuit is whether the Freedom of Information Act requires the disclosures of summaries of proceedings conducted at the Air Force Academy by so-called Honor and Ethics boards or committees. These summaries contain the results and the disposition of proceedings conducted by cadet groups at the Academy for the enforcement of the Honor Code. And the honor code is the principal issue in the case, and I shall refer to it, the proceedings under the Ethics Code are relatively infrequent.

The Government contends that these summaries are exempted from disclosure by two exemptions of the Freedom of Information Act. Exemption 6 which covers personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, and Exemption 2 which covers matters related solely to the internal personnel rules and procedures of an agency.

QUESTION: Mr. Friedman, in your view, does that term "unwarranted invasion" mean that there is a balancing process, that is, to balance the importance of the disclosure to the person asking for it against the potential for injury to the subject?

MR. FRIEDMAN: I would think so, Mr. Chief Justice.

QUESTION: Does the legislative history --

MR. FRIEDMAN: The legislative history does indicate in that phrase Congress did intend there to be a balancing. But I would suggest, Mr. Chief Justice, that on the one side of the equation it probably more accurately might be phrased as the interest to the public, because under the Freedom of Information Act any person can get information, but it is not required for him to show his need for it. I think it's the general public interest, but concerning the public interest, I think it is appropriate to look to the purposes for which the information is sought.

But may I just add by way of preliminary thing

that our first submission is that under this exemption you never reach that issue because, as I shall develop, we think that personnel and medical files are protected against disclosure without regard to making that showing.

QUESTION: Unwarranted invasion of personal privacy modifies only the similar files?

MR. FRIEDMAN: That is our submission, Mr. Justice, that is our submission. And then we go on to say, but in any event, in this case there was a clearly unwarranted invasion.

Now, the Honor Code at the Air Force Academy states, "We will not lie, steal, or cheat, or tolerate among us anyone who does." The Code therefore has two elements; first, the substantive element, the ban on lying, cheating, or stealing, and secondly the toleration clause. And what this means is that the Code imposes an obligation on the cadets not only to observe these requirements themselves, but to report anybody who fails to comply, and in many instances, of course, which you have is a cadet reports that he saw another cadet cheating or was lying or doing something dishonest.

The Code was actually created by the cadet corps, and it's the cadet corps that administers it and enforces it. If a violation is reported to someone known as an honor representative and what they do is each squadron of the cadet corps appoints two honor representatives. They elect them, in fact, so that you have 30 honor representatives whose basic

responsibility is to administer the Code. If an honor violation is reported, an investigation is conducted by a group of three honor representatives. At this investigation they take statements from witnesses, talk to the cadet involved. If as a result of this investigation it appears that there has been a violation of the Honor Code, then a formal proceeding is instituted. A board of eight cadets is appointed, and this board, which is called an Honor Board or an Honor Committee, then conducts a hearing at which the cadet appears as well as any witnesses the cadet wishes to call.

Sworn testimony is not taken. The cadet is informed that he has a right to make a statement or to remain silent and he is also informed that he has the right to call any witnesses he wishes. There is no cross-examination, and counsel is not permitted to be present at the hearing, although the cadet is given the opportunity prior to the hearing to consult with legal counsel in the staff judge advocates office at the Air Force Academy.

This procedure that I have mentioned, of course, is fully consistent with the basic concept that this Code is administered by the cadets and for the cadets. Now, if at the conclusion of a hearing the committee finds the cadet guilty of the alleged violations, and it has to be a unanimous finding, the cadet normally is expected to resign from the Academy. If, on the other hand, they either find the cadet not guilty or they

find him guilty but with something called discretion which means that despite the violation, they feel it's appropriate for him to continue at the Academy, then he returns to the student body.

The hearing is kept confidential. The only people admitted are members involved and a certain number of cadets plus those officers at the Air Force Academy who are directly involved in conducting the proceedings.

QUESTION: The proceedings are not transcribed, though.

MR. FRIEDMAN: The proceedings are not transcribed, Mr. Justice. There is a man called a recorder who makes notes, but the proceedings are not transcribed, and the people are warned at the hearing, admonished is perhaps a better word, that the proceedings are confidential, for obvious reasons, because when a man's honor is at stake, it should be kept confidential.

QUESTION: Mr. Friedman, is there a file of some kind collected?

MR. FRIEDMAN: Only in the sense that the written statements are taken, only in the sense that the written --

QUESTION: What goes into the file?

MR. FRIEDMAN: I don't know what goes into the file in that sense, Mr. Justice.

QUESTION: Is there a difference when the result is

guilt as against either innocence or with discretion?

MR. FRIEDMAN: The only difference, Mr. Justice, is this, and if I may come just to that in a minute, because I think I should explain what happens. There is no transcript taken, and the record shows that the Honor Committee or the Honor Board doesn't even make a verbatim or a summarized transcript. The only records, as an affidavit in the record states, are brief one-page summaries of what happened. And these summaries state what was found --

QUESTION: Prepared by whom?

MR. FRIEDMAN: Prepared by the recorder of the board.

Now, these summaries in turn are then distributed to each of the cadet squadrons. There are 40 squadrons, and a copy of the summary is distributed to each squadron. If the man is found guilty, the man's name is included. If the man is either found not guilty or there is discretion, the man's name is deleted and he might be shown as Cadet X, Cadet Y, or something like that.

These summaries are then placed upon the bulletin board in each squadron in a file which says on the top of it "Honor Case Summary for Official Use Only."

Now, the reason these -- may I say one other thing. In the case of either not guilty or discretion, not all of the summaries are distributed but only those that it is felt by the board or the honor people would be appropriate as

illustrative cases.

The reason they are distributed to each of the 40 squadrons and discussed with the honor representative in the squadron is that the responsibility for the enforcement of the Code lies with the cadet corps, and therefore it's essential to the cadet corps to know the decisions of these Honor Boards, to know what kind of conduct was deemed to violate the Code, what kind of conduct was deemed not to violate the Code, and what kind of conduct was deemed to violate the order but excused.

So I think it can fairly be said that the summaries are in effect the end product of the Honor Board proceedings, they are in actuality the only record of the proceedings of the board and of its action.

QUESTION: Do I get 40 copies, one for each of the 40 squadrons?

MR. FRIEDMAN: One for each of the --

QUESTION: Does each have its own bulletin board.

MR. FRIEDMAN: Each has its own bulletin board.

QUESTION: What then are distributed throughout the Academy are 40 copies.

MR. FRIEDMAN: Forty copies, plus a few additional to various of the departments that should have this information.

QUESTION: And they are posted for how long?

MR. FRIEDMAN: Generally until the end of the academic

year.

QUESTION: And then what happens?

MR. FRIEDMAN: Then they are destroyed.

But in addition to that there is a master file which is kept for a lengthy period. In other words, in the office of someone who is called the Commandant's Executive for Honor and Ethics there is a file of these summaries which he maintains.

QUESTION: This suit was to gain access to the master file?

MR. FRIEDMAN: To gain access to the summaries.

QUESTION: But with names deleted.

MR. FRIEDMAN: With names deleted.

QUESTION: I gather the court of appeals said there also should be in camera proceedings to see if there should be further reduction.

MR. FRIEDMAN: Well, what the court of appeals in effect, as I will come to in a minute, said was that it recognized that even with these names eliminated there is a great danger that this might redound to the cadet's detriment because of dredging up old things. But then it went on and said that eliminate the name and maybe you can eliminate other identifying material, and with those eliminations, we hope --

QUESTION: Eliminate other identifiable material in an in camera proceeding conducted by the district judge.

MR. FRIEDMAN: By the district judge, which it seems to us is basically inconsistent with the court's previous recognition at several points in its opinion that even elimination of these details won't be enough. And that, of course, was one of the major bases on which the Air Force refused to make these materials available because they said -- at three points in the record it set forth in various affidavits and letters -- they said that even with this material being eliminated, nevertheless this could jog the memories of people who years ago had remembered something and this could redound to a cadet's detriment for the rest of his career. And that's the basic reason we have taken the case to this Court because we think it is important --

QUESTION: May I get back just a step, Mr. Friedman. Is there anything in the record which indicates that for sure all 40 copies at the end of the school year of each of these summaries is collected and destroyed?

MR. FRIEDMAN: No, there is nothing for sure, but all I can say is there is indications they say that in the record, and I was advised that that is in fact the general practice, because --

QUESTION: Is there anything to prevent a cadet, for example, from taking it off the bulletin board and making 39 xerox copies, other than the Honor Code itself?

MR. FRIEDMAN: The Honor Code itself, I would think,

Mr. Justice, plus the fact that I assume the cadets, most of the cadets, at least, are aware of the importance of the Honor Code and the importance of preserving its confidentiality. I suppose a cadet could do that. One would hope that the cadet wouldn't do that.

QUESTION: Aren't the cadets committed some way to keep knowledge of these things to themselves, or not?

MR. FRIEDMAN: Well, it's repeatedly, it's repeatedly urged upon them and stressed that this is for official use only and that the material is confidential.

I thought that the Chief Justice' question was suggesting you might have a bad apple in the barrel who will go out and make copies and distribute them.

It's possible, certainly, Mr. Chief Justice, but I think it's unlikely, and as far as I know there has been no experience along that line at the Air Force Academy.

QUESTION: Mr. Friedman, none of these are in the record, are they, any of these summaries?

MR. FRIEDMAN: No, they are not, Mr. Justice.

QUESTION: I've been sitting here trying to figure what could be in there if you took the name and his connection and all out. What could be in there?

MR. FRIEDMAN: Well, it depends on what you mean by his connection. If you cut out all of the identifying details, there wouldn't be much left of it. But as I understand it --

QUESTION: It could say that a cadet was found smoking marijuana in the basement room in Barracks C. Now, there is nothing identifying in that, would it?

MR. FRIEDMAN: Well, even that if there was a rumor around the Academy. But you might have a very different situation. Suppose what it reported was that a cadet in the 13th Squadron or whatever it's called, cheated at his examination in mathematics IV before in Captain So-and-So's class. And then it seems to me this might be enough to the small group of people connected with the Academy for someone to say, "Oh, that's the fellow who did it. I remember that story."

QUESTION: Don't you think we should have something that we know what we are talking about? I don't know what I am talking about.

MR. FRIEDMAN: Mr. Justice, the problem with having something is that that itself would breach the very confidentiality of the documents to have something. The whole purpose for which we --

QUESTION: But we have to take your word that there might be something in something which you don't know anything about.

MR. FRIEDMAN: It's more than my word, Mr. Justice. It's statements by two officers at the Air Force Academy.

QUESTION: That makes it two officers of the Air Force Academy.

MR. FRIEDMAN: And the assistant to the Secretary of the Air Force and the court of appeals.

QUESTION: If you give me one example, I might be able to understand what we are talking about.

MR. FRIEDMAN: And the court of appeals. If I may refer you, Mr. Justice, to page 11A and 12A of the appendix to our petition for certiorari where the court of appeals, in dealing with this problem, stated that a person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information. For example, the senior officer and ex-cadet might upon reading a summary or a reference to it realize for the first time that a man under his command had once been the subject of Academy discipline. It would be cold comfort to the junior officer to be told that his chief had always known the fact anyhow, although he had long forgotten it, or had never made the ultimate connection among various bits of knowledge until the article jogged his recollection.

QUESTION: Whose testimony is it that says that it does specifically mention the group that the man belongs to? Nobody.

MR. FRIEDMAN: There is nothing in that, but --

QUESTION: Suppose they said an Air Force cadet did something, how does that apply to -- how could that revive anybody's rumor?

MR. FRIEDMAN: I don't think that that's what they

are seeking, Mr. Justice. They are seeking these summaries with, as they describe it, the names and identifying details deleted. Well, to make the document effective, to make the document effective so that it will show nothing that would permit the identity of the cadet to be discerned, that would in effect eliminate all of the stuff.

What they want to find out, they say, is to find out precisely how this Code in application has dealt with these concepts of lying, cheating and stealing.

QUESTION: Wouldn't we have a better case if the district judge looked at it in camera, took out what he thought should be taken out and then we looked at it?

MR. FRIEDMAN: You might have a better case, but we don't think that is what the statute requires.

QUESTION: We would have a case that we know something about what we were talking about.

MR. FRIEDMAN: I think the Court does know, Mr. Justice, on the basis of the affidavits explaining how and why the release of this information would and could have a very serious consequence upon the future careers of these cadets. That is, when we are talking about personal privacy, it seems to me the essence of it is to protect the publication of this information. This is privacy. These are men, some of them, who many years ago when they were relatively young got into a scrape, they did something bad.

QUESTION: It wasn't many years ago, because the Air Force Academy wasn't there many years ago.

MR. FRIEDMAN: It could be 15 or 20 years ago. The Air Force Academy started in 1955. So this is a man who is now in the middle of his career and suddenly something like this comes out -- or a junior officer, it happened two or three years ago perhaps, and at that point it was all taken care of, it was forgiven, and now lo and behold it suddenly is brought up again. That's the problem. That's the problem that we are dealing with.

QUESTION: Mr. Friedman, how many cadets are there at the Air Force Academy?

MR. FRIEDMAN: About 4200. Roughly a thousand a class.

QUESTION: And do I understand that all 4200 would know the name and circumstances of an Honor Code violation where the individual was found guilty?

MR. FRIEDMAN: Yes. Yes.

QUESTION: So there are 4200 people who know the facts.

MR. FRIEDMAN: Because in the case of guilty, each of these summaries would be distributed and placed on the bulletin board in each of the squadrons.

QUESTION: Does the Honor Code purport to impose an oath of confidentiality forever on graduates of the Academy?

MR. FRIEDMAN: No, it does not purport to do that. But I think the essence of the Honor Code is that you will behave as an honorable individual and that you normally would not disclose these. We can't be sure, we can't be sure that some years later someone won't disclose this. But it seems to us that is inherent in the nature of the system.

But what we are concerned about is making public information that would joggle memories, as the court of appeals said, that could lead people who had long since forgotten about this to recall it to memory. And that's the thing that is concerning us.

QUESTION: Since I have interrupted you, do the military services still have things called 201 files?

MR. FRIEDMAN: I don't know. I suspect so. I suspect so.

QUESTION: Would this summary be contained in an individual's 201 file if he happened not to have been found guilty but said to be one of these discretionary cases?

MR. FRIEDMAN: No, it would not, Mr. Justice. It would not be put in his personnel file, but it would be put in the general reading file, the general file of all of these things.

But we don't think the fact that it's in his 201 file necessarily means it's not a personnel file within the meaning of the statute.

Let me, if I may, get to our first legal argument, which is that these are personnel files and that the statute does not permit -- require a showing that the disclosure of either personnel or medical files would constitute a clearly unwarranted invasion of personal privacy. Even though as I have indicated to Justice Powell, this material is not included in the technical personnel file, we think it is part of the personnel file because it deals with the conduct, the discipline, the activities of an individual. This is the record. This is the only record of this man's behavior.

Now, --

QUESTION: It would have a bearing, I suppose, at time of his graduation on his assignment. Would it be available for that purpose?

MR. FRIEDMAN: Presumably if he is found not guilty or with discretion, I suppose it shouldn't have any, but I just don't know, because this is all again kept confidential within the Air Force Academy. I just don't know.

Now, the language that I have referred to is "personnel and medical files and other files the disclosure of which would constitute an unwarranted invasion of personal privacy."

QUESTION: It may not be important, but that word is "similar".

MR. FRIEDMAN: Similar file, I am sorry, Mr. Justice.

QUESTION: That may be important.

MR. FRIEDMAN: The legislative history of this statute which we have discussed at considerable length in our reply brief indicates that the first bill -- there were a number of early bills, but there were two basic bills in the 88th and the 89th Congress which culminated in the Freedom of Information Act -- the first bill had no provision at all exempting personnel files, medical files, or similar files. And it apparently was on the assumption that most of these files were protected by other statutes. But at the hearings on this bill there was complaint by a number of witnesses that there were vast quantities of Government files which contained a lot of personal information and that should be protected, and they specifically referred to personnel files and medical files.

And following that hearing, the Senate added an amendment to the bill which is set forth at the bottom of page 6 of our reply brief, and as originally drafted, the amendment provided an exemption for personnel files, medical files, and similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. And the committee report on that bill stated that -- it's quoted at the top of page 7 -- "In an effort to indicate the types of records which should not be generally available to the public, the bill lists personnel and medical files." And then it said, "Since it would be impossible to name all such files, the

exception contains the wording 'and similar records the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.'"

Now, we think in the light of that committee report and the language as originally drafted, Congress intended the disclosure requirement to modify only similar matters and to provide an unqualified immunity for personnel files and medical files.

When Congress finally enacted the Freedom of Information Act, they changed that language to the present language in the bill, and what they did was eliminate the commas, combine personnel and medical files into one category and substitute for the word "similar matter" the word "similar files." Again, the legislative history that we have quoted shows that Congress wished to protect the confidentiality of personnel and medical files. And we don't think this change in language was intended to make any change in the basic design, the basic purpose which led to the insertion of this provision, in order to protect the confidentiality of personnel files and medical files. Congress in effect made a judgment that the disclosure of personnel and medical files necessarily would constitute a clearly unwarranted invasion of personal privacy, and then went ahead and recognized the other files which contained similar damaging material and it therefore provided an additional exemption for those of the similar files

whose disclosure would have this serious impact upon personal privacy.

QUESTION: The committee report from which you read was on a predecessor bill, is that right?

MR. FRIEDMAN: That was on the predecessor bill, yes, Mr. Justice. But I may refer you to page 9, the material we have quoted in the middle of the page which is the report on the final bill which in discussing the general purposes of the Act pointed out that while they are enacting a broad philosophy of freedom of information, it was necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records.

So we think once again this reflects basic congressional intent and philosophy to protect the privacy of personnel and medical files.

QUESTION: Are you arguing that these summaries more are personnel files?

MR. FRIEDMAN: That is correct.

QUESTION: And then alternatively, if they are not, anyway they are similar files.

MR. FRIEDMAN: That is correct.

The significance of the distinction is if they are personnel files and if the Court agrees with our responsiveness, our analysis of the statute, that's enough. That's enough to

prove --

QUESTION: Because that implies that if personnel files, they are files the disclosure of which would constitute a clearly unwarranted invasion.

MR. FRIEDMAN: Yes, that Congress itself has made the judgment that personnel and medical files -- and, of course, if the --

QUESTION: You read this really personnel and medical files and similar files the disclosure of which also would constitute a clearly --

MR. FRIEDMAN: Yes. Of course, if the respondents are right, if the respondents are right that you have to make the showing with respect to the disclosure of personnel files, you would also by the same token have to make the disclosure with respect to medical files. And of course there is a well-recognized privilege for communications between patient and doctor.

QUESTION: Mr. Friedman, these files you are talking about are those in this honor man's office? Are those the ones you are talking about?

MR. FRIEDMAN: That's right. It's the summaries contained in the file in the Honor Executive's office, and it's the same material that has been distributed to the squadrons.

QUESTION: How can that be a personnel file?

MR. FRIEDMAN: Because, Mr. --

QUESTION: It doesn't involve personnel.

MR. FRIEDMAN: Because it more than just involves personnel, it deals with the individual cadet involved. It is the record, it is the only --

QUESTION: It's the record of all of the guys that have been brought up.

MR. FRIEDMAN: Yes.

QUESTION: Not any one.

MR. FRIEDMAN: But it's individual records. It's the record relating to the --

QUESTION: There is no personnel file there on Joe Blow.

MR. FRIEDMAN: No, there is no personnel --

QUESTION: But Joe Blow has a personnel file someplace else in the Academy.

MR. FRIEDMAN: He does. But in terms of the basic policy, in terms of the basic policy of exemption 6, we think that Congress did intend this kind of material to be treated as a personnel file because its disclosure would have this adverse impact.

QUESTION: But that sounds a little bit like bootstrapping. How do you define personnel file, or rephrase it to include this within it? I mean, it isn't in a man's 201 file, and if you were to presumably go through the man's file entirely, you wouldn't find this in it. Isn't that correct?

MR. FRIEDMAN: That is correct. But nevertheless, there is a file, there is a file in the Academy which contains these summaries relating to the individual cadets. And it seems to us this deals with personnel. This is the only record showing what has happened to this man in terms of his Honor Board experience.

QUESTION: What about Civil Service Commission records of adverse action proceedings or summary court-martial proceedings. Would those all be personnel files under your definition?

MR. FRIEDMAN: I would think within the definition of exemption 6, yes, within the definition of exemption 6, I would say yes.

QUESTION: Mr. Friedman, I am still not clear. I understand there is a central file but where the officer remains in the service, let's say he's on duty in the European theater, there is a personnel file there, whatever its number might be. Will there be a copy of this summary in that?

MR. FRIEDMAN: No. No.

QUESTION: No.

MR. FRIEDMAN: There will not be a copy of the summary in that file.

I would like to reserve the --

QUESTION: Is there any explanation in the record that would shed light on that that it was omitted from the

conventional personnel file for reasons of protecting the confidentiality in an extra measure? Anything like that?

MR. FRIEDMAN: There is nothing in the record to indicate that, but I would assume so, Mr. Chief Justice, because once the man has been found not guilty or once discretion has been exercised, as far as the Air Force is concerned, he has a clean slate. And they don't want this to follow him. Indeed, the danger is, the concern is that years later this thing will suddenly be dredged up. And that's all spelled out, the concern is all spelled out, as I indicated, in the opinion of the court of appeals, in the various items in the record, and we believe that that shows that even if this is viewed as a similar file, nevertheless the effect of disclosing it would constitute a clear invasion of personal privacy.

QUESTION: Mr. Friedman, do I understand now that the Government is no longer relying on exemption 2?

MR. FRIEDMAN: No, we are relying, Mr. Justice. I am sorry if I gave the wrong impression, Mr. Justice. We are relying on exemption 2, and we have discussed exemption 2 both in our main brief and in our reply brief. We think these are also covered by exemption 2. But exemption 6 has been the major focus of this litigation in this Court, and that's why I have dealt with it in oral argument.

QUESTION: Is there any concern that if you continue

to lose this case, as the Government has lost it thus far, the Honor Code system is destined for destruction?

MR. FRIEDMAN: There is concern, as indicated in the record, that the essence of this is confidentiality, and the toleration clause in particular under which cadets feel obligated and do report violations, may might be very reluctant to report violations if all of this stuff came out. I mean, I think the Code operates, the basic rationale and the basic procedure and method on which the Code operates, is that it is being kept confidential. This is a matter within the cadet corps, this is not going to be made public.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.
Mr. Parker.

ORAL ARGUMENT OF BARRINGTON D. PARKER, JR.

ON BEHALF OF THE RESPONDENTS

MR. PARKER: Mr. Chief Justice, and may it please the Court: As the Deputy Solicitor General has indicated, this case presents for the Court's consideration the scope of two of the Freedom of Information Act's exemptions -- exemption 6 relating to personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, and exemption 2 which pertains to matters related solely to the internal personnel rules and practices of an agency.

The documents sought are case abstracts of adjudications by the Air Force Academy's Honor and Ethics Code Committees.

QUESTION: Case abstracts, Mr. Parker, that's synonymous with summaries, as Mr. Friedman has used the word?

MR. PARKER: Yes, sir, it is.

These abstracts are sought with all names as well as all other identifying references deleted. The documents will be used in connection with a study of due process at the nation's service academies being conducted under the auspices of the New York University Law Review.

Now, the documents --

QUESTION: Mr. Parker, under the auspices?

MR. PARKER: Well, the plaintiff is a former member of the NYU Law Review. The two other -- I'm sorry, the respondent is a former member. The other two respondents are former editors-in-chief of the Review.

QUESTION: When you say auspices, I take it --

MR. PARKER: I mean in connection with their -- I didn't mean to suggest that it was -- well, the work was being done in connection with their work for the Review.

QUESTION: All right. Your use of the word "auspices" confused me a little bit because in his published --

MR. PARKER: I'm familiar with that disclaimer, yes, sir.

QUESTION: It does state, "The publication does not indicate adoption of views expressed here by NYU, the New York University School of Law, or the New York University Law Review or its editors."

MR. PARKER: Yes, sir, I understand that.

QUESTION: Just so we understand what the word "auspices" means there.

MR. PARKER: Yes, sir.

QUESTION: The complainants are not officers of the Law Review presently, are they?

MR. PARKER: No, sir. They were at the time, at various stages during administrative proceedings.

QUESTION: Is Mr. Pedowitz still a party?

MR. PARKER: Pardon me?

QUESTION: Is Mr. Pedowitz still a party?

MR. PARKER: Yes, sir.

The documents have been sought for the sole purpose of determining the substantive content of the Academy's Honor and Ethics Code as the Code has been applied on a case-by-case basis at the Academy.

QUESTION: Is there any question of mootness in this case? Nobody mentioned in the briefs I saw, but what you just said certainly suggests there might be.

MR. PARKER: No, sir, there is not. All the empirical source material -- to back up a moment, the study

has been published, but pursuant to an arrangement with the New York University Law School, all of the empirical source material which reflects really hundreds and hundreds of man-hours of work, investigations, interviews, and so forth, will be collected and maintained at the New York University Law School. And anyone who is interested in the documents substantiating underlying certain conclusions in the study can refer to the source material which will be on file.

If these case abstracts are produced, and to the extent they are, they will be on file there also.

QUESTION: But this study has been published, has it not?

MR. PARKER: Yes, sir, that's correct.

QUESTION: Without, obviously, any reliance on these documents.

MR. PARKER: Well, there is discussion of -- that was one of the major problems, in terms of the timing of this, the publication of the study. They had to go to publish it before the adjudicative process had ended. But I would also like to stress that, of course, there is no standing requirement under this Act --

QUESTION: No, I'm not talking about standing; I'm talking about mootness.

MR. PARKER: Documents are to be made available to any person.

QUESTION: Mootness, not standing. The requests were made for the purpose of this study, were they not?

MR. PARKER: The Second Circuit solicited views on that question, and both our responses and the responses of the Government are part of the record, and neither of us believe that the controversy was moot.

QUESTION: So long as you continue to want the information, I take it, that's sufficient to give you standing to go into court under the Freedom of Information Act.

MR. PARKER: That's correct, your Honor.

QUESTION: Is there an allegation somewhere that you continue to want it after this study was completed?

MR. PARKER: The record clearly indicates that there is a continuing interest on the part of the respondents in these documents.

QUESTION: In your view, Mr. Parker, does the term "unwarranted", modifying either intrusion or some word to that effect, require a balancing process, as I inquired of Mr. Friedman so as to measure the reasons for which the information is sought or, as has been suggested, is everyone who makes an inquiry on exactly the same footing no matter what his purpose may be?

MR. PARKER: I believe, your Honor, that the primary focus of the Act is public access to information. In connection with this exemption, I believe there is support

in the legislative history for the approach that the reason for which documents are sought may be considered. But the primary focus there is, with respect to exemption 6, simply is there an invasion of privacy and, if so, how great.

QUESTION: What, then, does the term "unwarranted" mean? It indicates that they thought there were some kinds of intrusions that would be warranted and some that would not be warranted.

MR. PARKER: I believe that the unwarranted language is designed to authorize the court to look at the seriousness of the likelihood that somebody's privacy will be invaded. And as I will explain in a moment here, I think, in connection with the disclosure of these abstracts, there is no reasonable probability that anybody's privacy will be invaded.

QUESTION: How about the balancing on the other side, under the unwarranted clause, do you look at the "conception of the importance of the need" that's asserted by the plaintiffs? I mean, if it were just idle -- if someone came in and admitted it was just idle curiosity and not to write a Law Review article, would that perhaps require a different outcome in one case than another under the unwarranted clause?

MR. PARKER: I don't believe so. I think that the reason for which documents are sought, given the scheme and the philosophy of the Freedom of Information Act, are secondary

and even tertiary considerations.

QUESTION: Mr. Parker, might not 6 be interpreted as implying that there is an invasion of personal privacy, so Congress found, on the disclosure of personnel and medical or similar files, and that there has got to be some justification for that invasion. Congress already has determined that disclosure would involve an invasion. And isn't "unwarranted" perhaps --

MR. PARKER: I certainly don't believe and I would not concede that there is any realistic kind of invasion of personal privacy when we are talking about disclosing --

QUESTION: But we may not -- I am just wondering if the Congress didn't make that conclusion.

MR. PARKER: I don't believe that that was their concern.

The case abstracts which are sought would be used for the purposes of simply documenting the substantive content of the Honor Code to show what back patterns or what conduct has been thought to amount to lying, cheating, stealing, or tolerating.

I would like to stress that the case abstracts in an unedited form, which includes the names and the salient facts are posted in 40 different locations around the Academy and they are available for inspection and discussion among thousands of cadets and also the employees or administration,

at least, and the faculty of the Academy. And I submit there is nothing in the record which indicates that because of any Air Force regulation cadets are proscribed from talking about these matters among themselves or among non-Academy Air Force officers later.

QUESTION: But this is only for one year.

MR. PARKER: Pardon me?

QUESTION: It's only for one year, isn't it?

MR. PARKER: That they are posted?

QUESTION: Yes.

MR. PARKER: Yes, sir, but they are --

QUESTION: And they are not available to the general public after that.

MR. PARKER: That's right, they are not available --

QUESTION: And they are not available to any of the other cadets after that.

MR. PARKER: I don't believe that's the case. It's my understanding of the record here that the case files which are collected in the master binder are available for review by the cadets at any time. So you have there really a historical collection of these abstracts, not simply for one year.

QUESTION: Any cadet or just those involved with the --

MR. PARKER: Any cadet, I believe, who is interested

in how the Academy is functioning.

QUESTION: Let's assume that is not so. Does that change your case? Let's assume, as Mr. Justice Marshall suggests, let's assume that they are not available after --

MR. PARKER: After one year.

QUESTION: Yes. Assume that they are not available generally.

MR. PARKER: I don't believe that changes the case at all.

QUESTION: And they are not available to the general public when they are posted either, are they?

MR. PARKER: That's correct.

QUESTION: Or even to cadets generally.

MR. PARKER: They are available to cadets generally when they are posted. That's why they are posted. The facts --

QUESTION: Are they posted in areas where members of the general public visiting the Academy couldn't read them?

MR. PARKER: I don't know -- I don't believe the record clearly indicates that. The Government in its reply brief has indicated that these bulletin boards are not available to the public generally. And I'm not sure exactly what that means.

QUESTION: Doesn't it mean that they aren't available to the public?

MR. PARKER: I don't believe it means they aren't

available to the public, period, or at any time. I'm just --

QUESTION: Isn't that similar --

MR. PARKER: -- doubtful as to what that means.

QUESTION: I agree it is somewhat ambiguous, but is that not to be read as meaning it's not available to the general public.

MR. PARKER: I don't believe the record supports that, and I did not so read that statement.

QUESTION: Is there any indication in the record that anyone outside has ever had access to?

MR. PARKER: No. And by the same token there is no --

QUESTION: Either way.

MR. PARKER: -- there is no indication of the other way.

Now, these Honor and Ethics abstracts are not personnel files. The Air Force's own regulations sharply distinguish between medical and personnel files on the one hand and files similar to personnel files on the other hand and state that files relating to disciplinary matters are to be considered similar files and are to be disclosed so long as there is no unwarranted invasion of personal privacy.

QUESTION: Well, looking to governmental practices in general, Mr. Parker, in the Department of the Interior, Department of Justice, or anywhere else where you have

a personnel file presumably on every employee, and there is limited access to that personnel file, of course, as we know. If the employee was cited by a superior and subjected to certain charges and an administrative hearing were held and that was washed out and he was cleared, would that not go into his personnel file? I am speaking now of general practices in Government.

MR. PARKER: It could.

QUESTION: It's a personnel action, isn't it, whether he's cleared or whether he's not cleared?

MR. PARKER: Yes, sir. But we insist that the fact that these case abstracts might initially have been contained in a file which was labeled a personnel file is not dispositive in view of the wide intra-agency distribution that takes place thereafter.

QUESTION: Well, it is not uncommon for one agency, let us say, the Department of the Interior, to ask for access to the personnel file of an employee, a lawyer, in the Department of Justice. I take it you are familiar with that as a common governmental practice.

MR. PARKER: That's right.

QUESTION: And the reason might well be that the Department of the Interior is thinking about hiring this man on their own staff. They certainly would make an evaluation of any adverse charges or adverse disciplinary actions, would

they not? They take that into account.

MR. PARKER: Presumably.

QUESTION: For me it's pretty difficult to separate charges of this kind from personnel records, personnel files.

MR. PARKER: I think that unless that separation is made, the texture of (b)6 becomes completely open-ended because you are then talking about a situation where theoretically a relationship with personnel matters can make any document such as the ones here, which were widely disseminated and disseminated for instructive and didactic purposes, a personnel file. And I just don't believe that's what Congress intended when it enacted exemption 2, and I think the legislative history would tend to support me on that.

I think when we talk about a personnel file, as the term is generally used, we talk about the file that's maintained in the personnel office of an employer or an agency. It's a file that contains an employee's application, his attendance record, the results of a Civil Service exam, or something, or information.

QUESTION: Tell me, Mr. Parker, do you take the position that the fact that these summaries, abstracts are posted on 40 bulletin boards to be seen by 4200 cadets in and of itself takes it necessarily outside the reach of 6?

MR. PARKER: I do, your Honor.

QUESTION: Just the fact of such a broad distribution.

MR. PARKER: When Congress enacted exemption 6, it was concerned with protecting intimate information about an individual which could be correlated with that individual.

Now, once you open up the file and take documents out and post them, I think that consideration has been vitiated.

QUESTION: Do you read the "unwarranted" language as modifying "personnel and medical files", too, as well as similar files?

MR. PARKER: Yes, sir.

QUESTION: You'd have to to give the answer you did to Justice Brennan.

MR. PARKER: Yes, sir. The qualification "clearly unwarranted invasion of personal privacy" modifies "personnel files, medical files," as well as "similar files."

QUESTION: If you are wrong on that point, then it would seem to me that Congress has given a flat exemption to personnel files and that the fact that personnel files might have been publicized in some other way gives no indication that Congress would want the exemption to be less applicable in that situation.

MR. PARKER: That's a hypothetical question and that would be correct, your Honor. But let me stress that the legislative history of exemption 6, if we are focusing not on earlier versions or earlier drafts or comments on earlier

versions, but the final House and Senate reports indicate that Congress did not intend a per se exemption for medical and personnel files.

We quote from the legislative history on page 13 and 14 of our brief, but Congress said, and I think their intent is stated here quite clearly, that while the exemption is intended to cover detailed records on an individual which can be identified as applying to that individual, the exemption, not any particular clause in the exemption, but the exemption itself does not apply to factual matters, such as the facts concerning the awards of a pension or benefit or to statistical type information.

I would also like to emphasize that the Senate report, the final Senate report, reaches precisely the same conclusion. The Senate report indicates that while highly personal health, welfare, or selective service records would be generally nonavailable, factual matters, for example, the award, again, of a pension or a benefit, should be disclosed.

Now, under the Government's per se approach here --

QUESTION: May I interrupt you, Mr. Parker?

MR. PARKER: Yes, sir.

QUESTION: Where would you draw the line as to medical files, now, putting personnel files aside? Where would you draw the line on the medical side as to what is warranted and what is unwarranted?

MR. PARKER: I would admit that a much higher showing would be required to look into a medical file, but by the same token there could be valuable statistical or factual information in medical files which could and should be disclosed and that disclosure would involve no invasion of personal privacy, and it certainly would not involve a clearly unwarranted one.

QUESTION: The medical file.

MR. PARKER: Suppose, for example, someone was interested in the geographical radius from which people came to a particular Public Health Service hospital. Now, that's in a medical file. That is information which I think could and should be disclosed and wouldn't compromise anyone's personal privacy. And if you take a look at the legislative history of the 1974 amendments, Congress squarely recognized that kind of a situation and said, We don't intend a per se exemption for any of these subsections under (b) of the Freedom of Information Act. We want courts --

QUESTION: As a matter of fact, I think geographical information might be -- it never has been regarded as confidential even though it's part of a medical file.

MR. PARKER: Under the Government's approach, once it's labeled medical file, you can't get in it regardless of whether it's -- it can't be disclosed regardless of whether it's considered confidential or not.

QUESTION: Well, I want to know just how far you go. Does the fact that the cadet might have had mumps in his childhood, is this capable of being divulged under exemption 6?

MR. PARKER: I think I might have some problems with divulging that Cadet John Smith had mumps at age 12, but it might be very useful to know that 5 percent of the cadets at the Academy never had mumps, or information of that type.

QUESTION: But you don't know whether they would refuse to give that information in the context of this case, do you?

MR. PARKER: No, we don't.

But I would like to point out and direct your Honor's attention to the Privacy Act of 1974 which specifically says that statistical and factual information can be disclosed from personnel files once written assurances are given that the information is to be used for scientific or scholarly purposes and after identifying names and references are deleted.

So here we have Congress in 1974 looking at a problem which I suggest was quite similar to the one which we are facing, and they said, let's let this factual information be made available.

QUESTION: All they really said was the Privacy Act wouldn't prohibit being made available.

MR. PARKER: Yes, sir.

QUESTION: That's neutral information, though, isn't it?

MR. PARKER: These sanitized case summaries are neutral information.

QUESTION: We don't know that yet, of course.

Now, let me put this hypothetical to you. Suppose a charge came in that a cadet who was a member of the football squad had accepted a bribe in connection with a game and it was sufficiently documented so that it triggered an inquiry, and that inquiry was held over a period of time, I would assume it would take time, and he is totally cleared. Now, then, if that had occurred during the football season, it might well be that the player would be put on the bench during that period. Even if you sanitized, as you put it, if you sanitized that report, could not a sophisticated sports writer, noticing that this man was out of three successive games for no specifically announced reason, put together that this sanitized file meant that the particular player was the man accused of taking the bribe?

MR. PARKER: That's possible, but, your Honor, that's exactly the kind of analysis that the district court can and should undertake in connection with its in camera review, and they can ask those same questions and sit down with the Academy and see if those associations could be made, and on the facts that you just put to me, that's likely to be the kind of summary that won't be disclosed.

But when we are talking about whether a cadet was

asked to resign for cribbing in 1957, that is the kind of summary from which those associations would be for all intents and purposes impractical.

QUESTION: Now, if district judges are going to get into that exercise that you describe, they are liable to have a good many litigated cases waiting their turn while they are perusing these files.

MR. PARKER: I don't believe that this case presents any particular burden or any particular complexity in that regard, and I would like to emphasize that the 1974 amendments add a segregable records provision and an in camera review provision which provides in camera review with respect to all -- provides that a district court may conduct such a review with respect to all exemptions, and in addition it says that when you have segregable records or disclosable records mixed with nondisclosable ones or nondisclosable portions of the record, they should be looked at in the essentially factual or ... should be disclosed.

QUESTION: You are suggesting that at least under that provision, some file that's admittedly a personnel file and that you would concede is a personnel file, nevertheless could be submitted to the judge and paged through and anything in the personnel file that wouldn't necessarily invade privacy could be disclosed.

MR. PARKER: Yes, sir, and that's what Congress said

and authorized.

QUESTION: And that would be true even if prior to that provision a personnel file meant a personnel file and was not disclosable.

MR. PARKER: No, I wasn't talking in terms of the amendments, I was talking in terms of the legislative history of the Act as it was initially passed. Congress said that essentially statistical or factual information in personnel files could be --

QUESTION: So you say that from the very outset under exemption 6 you should be able to page through an admitted personnel file and extract the materials from that that wouldn't invade any privacy in the view of the judge.

MR. PARKER: Yes, sir. The legislative history is quite clear on that, I believe.

QUESTION: Even with respect to a medical file?

MR. PARKER: The --

QUESTION: I assume your point has to be good with respect to medical files, too.

MR. PARKER: Yes, sir, it is. The Solicitor General in his brief emphasized the files such as those maintained by HEW and the Veterans Administration which are essentially personal in nature, and the legislative history of exemption 6 indicates that when Congress decided that essentially factual information could be disclosable from files, it had precisely

those files in mind. And we cite this history in our brief.

QUESTION: You cite the 1974 provision that you are relying on in your brief?

MR. PARKER: Yes, sir, I believe we do. In any event, it's 5(a)(a) --

QUESTION: Page 15 of your brief, I think.

QUESTION: Mr. Parker, does this record in any way relate to the Honor Codes in the other service academies?

MR. PARKER: No, it doesn't. This case pertains exclusively to the Air Force Academy.

QUESTION: ... that the three systems are the same. I don't know this. I take it ...

MR. PARKER: I'm not -- I don't believe all of the service academies have a toleration clause, but the other elements are essentially the same.

QUESTION: Mr. Parker --

QUESTION: Your study involved here involves only the Air Force Academy.

MR. PARKER: The study involved all the service academies.

QUESTION: Oh, it did. I see.

QUESTION: Mr. Parker, my understanding is that an officer who has been found guilty by the Honor Board may, if he elects, have a hearing before an officer review board and thereafter may have an adversary hearing before a court-

martial. Are the records of those two hearings public?

MR. PARKER: I don't know the answer to that, your Honor. The record herein --

QUESTION: There is nothing in the record on that point.

MR. PARKER: -- I don't believe reflects that.

I would finally like to suggest that under the procedures set forth by the court of appeals here, no clearly unwarranted invasion of personal privacy is likely to occur. Now, as we have said, we have requested these files with all names as well as all other identifying references deleted. The district court initially held that the disclosure of these files would involve no clearly unwarranted invasion of personal privacy. The court of appeals held that the petitioners had not proved that the exemption applied to the summaries, and remanded the case for an in camera inspection; if the summaries could be successfully redacted or sanitized, they they were to be produced. If they could not be, or to the extent they could not be, then they were not required to be produced.

I would like to finally emphasize that this procedure, as authorized by the Second Circuit, is consistent, fully consistent, with the Act and with its amendments, and it forecloses any reasonable possibility that there would be an invasion of personal privacy.

MR. CHIEF JUSTICE BURGER: You have about two or three

minutes left, Mr. Friedman.

REBUTTAL ARGUMENT OF DANIEL M. FRIEDMAN

ON BEHALF OF THE PETITIONERS

MR. FRIEDMAN: I expect my time might have expired, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: We have extended both your times.

MR. FRIEDMAN: Oh, thank you.

I have three points that I would like to make, rather briefly. First, with reference to what happens to these summaries, whether they are available for members of the public to see, I would like to invite the Court's attention to page 187 of the record where in an affidavit of General Galligan, who is the Commandant of Cadets, he states in the middle of the page that these case summaries --

QUESTION: What page?

MR. FRIEDMAN: Page 187.

QUESTION: Thank you.

MR. FRIEDMAN: Which is an affidavit by General Galligan who is the Commandant of Cadets at the Air Force Academy. In the middle of the page he says, "These case summaries and records are not handled indiscriminately at the United States Air Force Academy." He said, "The sole purpose in providing copies to the cadet squadrons, faculty departments, and mission elements is to provide guidance and instruction."

So I think it's pretty clear from this that these things are not generally thrown around the Academy that anybody who happens to walk in can see what's going on.

QUESTION: What's a mission element?

MR. FRIEDMAN: Mission?

QUESTION: Mission element.

MR. FRIEDMAN: Oh, that's some military phrase which I take it means a particular group that is handling some kind of program at the Air Force. It might be a particular flight training or something like that.

Now, secondly, with respect to the 1974 amendments, which Mr. Parker has relied on, the Government, as is not surprising in these Freedom of Information Act cases, takes a somewhat different view of the effect of those amendments than he does, and I won't go into it at any length. We have discussed these amendments in a lengthy footnote beginning on the bottom of page 14 of our brief, and we don't think that these 1974 amendments override the specific exemptions. We don't think if these particular files are exempt that under the 1974 amendments Congress now intended people to search through them and decide what parts are disclosable and what parts are not. In fact, the history shows that this was intended to be procedural in nature and merely to reflect the existing case law.

And if I may just say one more thing in closing --

QUESTION: You say the amendments have changed no rule of law at all --

MR. FRIEDMAN: That's what we think the legislative --

QUESTION: -- as far as disclosability is concerned.

MR. FRIEDMAN: As far as segregating out disclosable and nondisclosable things. I think with certain matters it did, but where you have a situation where, as we claim, the whole file is nondisclosable, we don't think the amendments did this.

And if I might just say one thing in closing, Mr. Parker referred to the purposes of exemption 6 which was to protect against disclosure of intimate details of a person's life that he would not want to have disclosed. We say that's precisely what making public these summaries would do.

Thank you.

QUESTION: But, Mr. Friedman, I don't see how the Government could really object if a district court looked at a personnel file and said, This kind of information has just been put in here to conceal it and this is not the kind of information that is normally part of a personnel file.

MR. FRIEDMAN: But we have no question, Mr. Justice. We have indicated in our brief we have no question that a court could examine something in camera to determine whether it's a personnel file or a medical file.

QUESTION: What if they looked at these summaries

and say they are not a personnel file? They are not in the personnel file, they are kept somewhere else, and they say these are not a personnel file because -- for all sorts of reasons.

MR. FRIEDMAN: I would think if the court were to hold that these are not personnel files but are something else, that would be done thing. But I don't think under this --

QUESTION: That's part of the argument.

MR. FRIEDMAN: The argument, as I understand it, Mr. Justice, the argument as I understand it is not that the court should examine in camera to determine if it's a personnel file, but to examine it in camera to see whether or not by excising certain material it can now be safely disclosed.

QUESTION: I don't know if they go that far, but I would think a fortiori they would say they could examine it to determine if it's a personnel file.

MR. FRIEDMAN: Yes, but I think if they find that it is a personnel file, I think that's the end of the inquiry. Whereas they would take it one step beyond and say it can be sanitized.

QUESTION: I understand that, yes.

QUESTION: If the court found that it was not a personnel file, then the judge would have a further step, would he not, to determine whether or not it was a similar file.

MR. FRIEDMAN: Yes. Well, I don't think there is any

question that these are, if not personnel, similar files.

The court of appeals so treated. And then you would have the further step, I suppose, of determining whether the disclosure of this material would result in an unwarranted invasion of personal privacy.

QUESTION: And this is a weighing process.

MR. FRIEDMAN: Yes.

QUESTION: Mr. Friedman, may I ask counsel whether the briefs contain a citation to the study which I now understand has been completed?

MR. FRIEDMAN: Yes, there is a citation --

QUESTION: In the red brief?

MR. FRIEDMAN: In our brief, I know. Yes. It's at page III of the index of our brief and it's cited at page 5 of our brief.

QUESTION: Thank you.

MR. FRIEDMAN: Under the caption Rose, et cetera, et cetera.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
The case is submitted.

[Whereupon, at 2:10 p.m., the argument in the above-entitled matter was concluded.]