

ORIGINAL

Telephone: (202) 554-2345

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MALCOLM BALDRIGE, SECRETARY :

4 OF COMMERCE, ET AL., :

5 Petitioners, :

6 v. : No. 80-1436

7 PETER SHAPIRO, ESSEX COUNTY :

8 EXECUTIVE; and :

9 WILLIAM H. McNICHOLS, JR., ETC., :

10 ET AL., :

11 Petitioners, :

12 v. : No. 80-1781

13 MALCOLM BALDRIGE, SECRETARY OF :

14 THE UNITED STATES DEPARTMENT :

15 OF COMMERCE, ET AL. :

16 - - - - - :

17 Washington, D. C.

18 Wednesday, December 2, 1981

19 The above-entitled matter came on for oral

20 argument before the Supreme Court of the United States at

21 1:30 o'clock p.m.

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1 APPEARANCES:

2 ELLIOTT SCHULDER, ESQ., Office of the Solicitor
3 General, Department of Justice, Washington,
4 D. C., on behalf of Petitioners in No. 80-1436
5 and Respondents in No. 80-1781.

6 DAVID H. BEN-ASHER, ESQ., Essex County Counsel,
7 Newark, New Jersey; on behalf of the Respondent
8 in No. 80-1436.

9 GEORGE C. CERRONE, JR., ESQ., Assistant City
10 Attorney, Denver, Colorado; on behalf of the
11 Petitioners in No. 80-1781.

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C O N T E N T S

ORAL ARGUMENT OF:

PAGE

ELLIOTT SCHULDER, ESQ.,

on behalf of the Petitioners in No. 80-1436

and the Respondents in No. 80-1781

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DAVID H. BEN-ASHER, ESQ.,

on behalf of the Respondents in No. 80-1436

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GEORGE C. CERRONE, JR., ESQ.,

on behalf of the Petitioners in No. 80-1781

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ELLIOTT SCHULDER, ESQ.,

on behalf of the Petitioners in No. 80-1436

and the Respondents in No. 80-1781 -

Rebuttal

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next
in Baldrige against Shapiro and McNichols against Baldrige.

Mr. Schulder.

ORAL ARGUMENT OF ELLIOTT SCHULDER, ESQ.,
ON BEHALF OF THE PETITIONERS IN NO. 80-1436
AND THE RESPONDENTS IN NO. 80-1781

MR. SCHULDER: Mr. Chief Justice, and may it
please the Court, these two cases present the question
whether Congress in the Census Act has prohibited the
disclosure to local government officials of address lists
prepared by the Census Bureau in the course of conducting
the dicennial census.

Baldrige versus Shapiro involves a request under
the Freedom of Information Act for the Bureau's lists of all
street addresses of residential units within Essex County,
New Jersey. McNichols versus Baldrige concerns a civil
discovery request made during a lawsuit challenging the
census results for the Bureau's lists of vacant dwelling
units in Denver, Colorado.

We submit that the different factual postures of
the two cases should not lead to different results. Our
view is that the language, structure, history, and purpose
of the Census Act compell the conclusion that raw census
data in the hands of the Census Bureau relating to

1 particular census respondents, including the address data at
2 issue here, may not be disclosed.

3 My argument will proceed as follows. First, I
4 will give a brief description of the enumeration procedures
5 employed in the 1980 census. Second, I will outline the
6 procedural backgrounds of the two cases. Third, I will
7 explain why the Census Bureau's address lists come within
8 the confidentiality mandate of the Census Act. Finally, I
9 will show that the confidentiality mandate applies
10 regardless of whether the information is sought under the
11 FOIA or under civil discovery rules.

12 QUESTION: Mr. Schulder, will your argument
13 include a discussion of the plain language of the statute?

14 MR. SCHULDER: Absolutely, Your Honor.

15 QUESTION: Perhaps of all the statutes.

16 MR. SCHULDER: The 1980 census, like the two
17 dicennial censuses that preceded it, was conducted primarily
18 through the use of the mails. The Census Bureau mailed out
19 questionnaires for response on or about the census date of
20 April 1st, 1980. Beforehand, the Bureau had compiled master
21 address registers for each of some 300,000 enumeration
22 districts in the country. In urban areas an enumeration
23 district consists of fewer than 325 street addresses.

24 The master address registers are bound books
25 listing separate street addresses for each residential unit,

1 and it includes such information as householders' names, the
2 number of units at that address, whether the unit is vacant
3 or occupied, and the number of persons in each unit.

4 The appendix to the amicus brief filed by the MDL
5 plaintiffs, the Multi-District Litigation plaintiffs,
6 contains a sample copy of the page from -- of a page from
7 the address register, and I refer the Court to that
8 appendix, if the Court is interested in seeing what one of
9 these things actually looks like.

10 The lists of addresses included in the registers
11 were compiled from commercial mailing lists, census postal
12 checks, pre-enumeration canvassing in the field by census
13 personnel, and from direct responses to census
14 questionnaires and to interviews conducted by census
15 employees during the enumeration process.

16 After most of the questionnaires were returned,
17 the Bureau conducted two follow-up procedures to check the
18 status of addresses from which responses had not been
19 received, and to check units that originally had been listed
20 as vacant. The enumerators were instructed not to classify
21 a unit as vacant without verifying that fact through
22 interviews with either the owner or a neighbor.

23 In addition to these follow-up procedures, the
24 Census Bureau gave local government officials an opportunity
25 to review and comment on the Bureau's population and housing

1 tabulations. As part of this local review program, the
2 Bureau provided aggregate information for each enumeration
3 district, including the number of housing units, the number
4 of vacant units, and population figures.

5 In the Shapiro case, Respondent, the executive of
6 Essex County, New Jersey, filed an action under the Freedom
7 of Information Act seeking disclosure of the Census Bureau's
8 address registers for all of the enumeration districts in
9 the county. Respondent Shapiro contended that as part of
10 his participation in the Bureau's local review program, he
11 needed the address registers in order to compare the
12 Bureau's address lists with the county's lists, and thereby
13 to determine whether the Bureau had counted all of the
14 housing units within Essex County.

15 The Bureau claimed that the Census Act bars
16 release of all raw census information relating to particular
17 census respondents, including lists containing addresses of
18 buildings in which individuals reside. And the Bureau
19 further claimed that this information was therefore exempt
20 from disclosure under Exemption 3 of the FOIA.

21 The district court in an oral opinion held that
22 the Census Act does not bar disclosure of Census Bureau
23 address lists to local government officials seeking to
24 participate in the local review program. The court ordered
25 the Bureau to disclose its address lists to Respondent

1 Shapiro and his agents. The court further ordered that the
2 lists were to be edited as far as possible to delete
3 information other than street addresses. Finally, the court
4 directed that Respondent's agents be sworn to observe the
5 confidentiality requirements of the Census Act.

6 The third circuit affirmed without opinion.

7 QUESTION: More or less deputizing them as federal
8 employees.

9 MR. SCHULDER: That's correct, Your Honor.

10 In McNichols, after the Census Bureau submitted to
11 Denver officials its working figures for each enumeration
12 district as part of the local review program, Denver
13 challenged the Bureau's vacancy figures, claiming that its
14 own vacancy estimates were much lower. Denver requested the
15 Bureau to produce address lists of all vacant housing units
16 within the city, so that the city could determine the
17 validity of the Bureau's data. The Bureau refused to turn
18 over the requested information, contending as it did in the
19 Shapiro case that its address lists of housing units are
20 subject to the confidentiality provisions of the Census Act.

21 Petitioner McNichols, the Mayor of Denver, then
22 filed an action claiming that the Bureau had substantially
23 undercounted Denver's population in reliance on its
24 allegedly arbitrary and unreasonable vacancy figures.
25 Denver requested discovery of the Bureau's updated address

1 registers. The Bureau again responded that this material
2 was confidential. The district court, however, ruled that
3 Denver needed the address registers in order to mount a
4 meaningful challenge to the Bureau's vacancy figures, and
5 did order the Bureau to disclose either the address
6 registers themselves or an address list of vacant units
7 derived from the registers.

8 The Bureau was directed to delete the names and
9 other information that might identify census respondents.

10 QUESTION: Did that request fix a time frame with
11 respect to the vacancy?

12 MR. SCHULDER: Well, the district court did stay
13 its order pending appeal, but it did provide -- I don't
14 believe there was any specific time frame. I don't
15 recollect.

16 QUESTION: Well, isn't it obvious that a property
17 might be occupied in December and vacant in March or January?

18 MR. SCHULDER: Well, the critical date, Your
19 Honor, insofar as the dicennial census is concerned, is
20 April 1, 1980, which was the date on which everyone was
21 supposed to have been counted, and as we mentioned in our
22 opening brief in Shapiro, or -- no, I believe in --

23 QUESTION: I am now addressing myself to the
24 request, not to the April 1st date of the Census Bureau.
25 Did the request fix a narrow time frame, or was it addressed

1 to April 1st?

2 MR. SCHULDER: The actual request by the
3 petitioners in McNichols was for a list of the follow-up
4 address registers that had been compiled by the Census
5 Bureau. Those registers, as far as I am aware, were
6 directed as ascertaining the status of individual housing
7 units as of April 1, 1980, the census date.

8 The Tenth Circuit reversed the district court's
9 discovery order in McNichols. The court noted that public
10 cooperation with the census depends to a great extent upon
11 the government's promise to keep census information
12 confidential, and it held that both the language and history
13 of the Census Act established that Congress intended, and I
14 quote, "both a rigid immunity from publication or discovery
15 and a liberal construction of that immunity that would
16 assure confidentiality."

17 Our argument, in a nutshell, is that the language,
18 structure, history, and purpose of the Census Act's
19 confidentiality provisions all point to the conclusion that
20 the Census Bureau may not reveal raw census data relating to
21 individual census respondents, including address lists. We
22 have developed these points at length in our briefs, and
23 will not repeat them in detail here. However, I would like
24 to highlight some key themes.

25 First, examination of the language and structure

1 of the Act reveals Congress's purpose to erect a wall of
2 confidentiality for identifiable individual census data.
3 Section 8(b) of the Act provides that the Bureau, or the
4 Secretary of Commerce and his agents, which in this case
5 essentially means the Census Bureau, may disclose numerical
6 tabulations and statistical materials, but there is a very
7 important limitation placed upon that disclosure.

8 Even numerical tabulations and statistical
9 materials may not be disclosed if that disclosure would
10 reveal information reported by or on behalf of any
11 particular census respondent. This limiting language serves
12 the same essential purpose as the confidentiality provisions
13 that are contained in Section 9(a) of the Census Act.

14 Section 9(a)(1) of the Act prohibits the Secretary
15 of Commerce and his agents from using information furnished
16 under the Act for any purpose other than the statistical
17 purposes for which it is supplied.

18 The local governments in these cases have asserted
19 that they are entitled to the address lists because they
20 wish to use those lists for statistical purposes. But the
21 Census Act provides that only the Secretary and his agents
22 may use information furnished under the Act, and then only
23 for statistical purposes. There is no provision for use of
24 this material outside the Census Bureau.

25 And I might add that in a 1937 report by the

1 Director of the Census Bureau to the Secretary of Commerce,
2 the Director noted that it was then the practice of the
3 Bureau not to -- not to employ any outside individuals for
4 the purpose of tabulating the Bureau's statistical
5 information.

6 QUESTION: Mr. Schulder, I have great problems
7 with the danger of somebody's address being turned loose.

8 MR. SCHULDER: I will turn to that a little bit
9 later, Justice Marshal.

10 QUESTION: All right, fine.

11 MR. SCHULDER: In any event, even if disclosure to
12 local officials challenging the census may be deemed a
13 statistical purpose, our submission is that disclosure is
14 nevertheless barred under other provisions of the Census
15 Act. Section 9(a)(2) of the Act bars any publication
16 whereby the data furnished by any particular census
17 respondent can be identified. The local governments in
18 these cases have argued that the Census Act bars only
19 disclosures that would identify individual census
20 respondents, and that they seek not names but merely
21 addresses. But this contention ignores the language of
22 Section 9(a)(2) which prohibits the Secretary from making
23 any publication that could identify the data furnished by
24 any particular establishment or individual.

25 QUESTION: Mr. Schulder, if we go along with you

1 on your desired broad interpretation of 9(a)(1), aren't we
2 in effect making (a)(2) and (a)(3) superfluous?

3 MR. SCHULDER: Not necessarily, Your Honor. The
4 point of all of these provisions in Section 9(a) is that
5 Congress wanted to make it clear and meant to leave no room
6 for doubt that all raw census data within the hands of the
7 Census Bureau could not be disclosed to outside persons.

8 QUESTION: So even if they overlap, it is in your
9 favor.

10 MR. SCHULDER: That is absolutely correct.

11 QUESTION: First to (1), would you say that if the
12 court ordered the Census Bureau to turn over an address
13 list, would the Census Bureau be making use of that address
14 list within the meaning of 9(a)(1)?

15 MR. SCHULDER: We submit that the disclosure of
16 this information would come under the term "use".

17 QUESTION: Would be a use? Would be a use?

18 MR. SCHULDER: That's correct, and one that is
19 inconsistent with the whole purpose and statutory scheme.

20 QUESTION: Then of course Justice Blackmun would
21 be right. If that is a use, then you don't need anything
22 else.

23 MR. SCHULDER: That's correct.

24 QUESTION: And then under Number (2), would you
25 tell me -- maybe this overlaps Justice Marshall's question,

1 but how is the disclosure of an address list -- does that in
2 any way come within (2), any particular establishment or --
3 how does that relate to any individual?

4 MR. SCHULDER: Well, the --

5 QUESTION: How does it relate -- how does it make
6 any publication whereby the data furnished by any particular
7 establishment or individual under this title can be
8 identified? How, by looking at an address list, could you
9 identify the source of the address?

10 MR. SCHULDER: The point is that this particular
11 provision does not only bar disclosures that could lead to
12 identification of the source of the information. It bars --

13 QUESTION: That is what it says.

14 MR. SCHULDER: No, it bars -- it bars any
15 disclosure that could lead to identification of the data
16 furnished by any particular establishment or individual. It
17 doesn't go solely to identifying names of census respondents.

18 QUESTION: Well, then, what you are saying is that
19 it really precludes all disclosure, because any disclosure
20 would include some data that came from somebody.

21 MR. SCHULDER: Well, precisely. Our point is that
22 any --

23 QUESTION: It is a rather strange way to write
24 that kind of a --

25 MR. SCHULDER: Well, that may be true. These

1 particular provisions of the statute were developed in the
2 early part of this century. Some of them were added at
3 different stages along the way, but the point of the
4 statutes and the legislative history bears this out, is that
5 each time that an additional provision was added to the
6 Census Act, Congress made it clear that it was attempting to
7 tighten the confidentiality provisions.

8 QUESTION: I thought that all would be consistent
9 with the view that they were attempting to avoid the
10 disclosure of individual responses, the copy of the census
11 report and that sort of thing.

12 MR. SCHULDER: That's true, but that -- that's
13 true in part, but --

14 QUESTION: This language surely reads that way.

15 MR. SCHULDER: Well, street address information is
16 recorded on individual responses.

17 QUESTION: Right. Right.

18 MR. SCHULDER: And the mere fact that the local
19 governments in these cases have asked --

20 QUESTION: But giving a list of addresses doesn't
21 really tell you anything about what was in the response
22 other than the fact that that address obviously was --

23 MR. SCHULDER: Well, except for the fact that each
24 of the addresses that are listed disclosed the fact that
25 those addresses contain residential dwelling units.

1 QUESTION: But it doesn't necessarily indicate
2 that a particular address was learned through a response.
3 It might have also been learned by the census taker going
4 out and looking at the building.

5 MR. SCHULDER: Well --

6 QUESTION: Isn't that true?

7 MR. SCHULDER: That's true, but --

8 QUESTION: And if all you give is a bunch of
9 addresses, how does that tell anybody who just has that list
10 which ones were provided by individual responses, and which
11 ones were obtained by observation?

12 MR. SCHULDER: Well, the point is that most of the
13 information here, most of the street addresses were actually
14 either confirmed --

15 QUESTION: But you can't tell from the list which
16 ones were.

17 MR. SCHULDER: You can't -- no, that's true, that
18 you can't.

19 QUESTION: But under the instructions given to the
20 census takers, would they have been justified in listing an
21 address as occupied by simply looking, say, at a number
22 plate on a door and saying, there's a building, it must
23 have --

24 MR. SCHULDER: Absolutely not, Justice Rehnquist.
25 The enumerators were specifically instructed, and the record

1 in the McNichols case bears this out, that before they could
2 list an address as vacant, they had to confirm that
3 information either with a neighbor or with the owner of the
4 property in question. So there was information even as to
5 vacant units that was derived from responses to inquiries
6 conducted by census employees.

7 Section 9(a)(3) of the statute prohibits anyone
8 other than sworn officers of the Department of Commerce or
9 the Census Bureau to examine individual reports. The local
10 governments contend that they do not wish to examine the
11 individual census reports, which they agree may not be
12 disclosed, but the address registers are a compilation of
13 address data that appear on individual reports. In many
14 cases, addresses are added to the registers solely as a
15 result of the reports, and the reports, as I indicated
16 earlier, also verify address information obtained by the
17 Bureau from other sources.

18 It is hard to believe that Congress meant on the
19 one hand to prohibit examination of raw information in
20 individual reports and on the other to permit the
21 examination of the same information after it is transferred
22 to a different piece of paper. Section 9(b) --

23 QUESTION: Well, unless their interest was in
24 protecting individuals from having their own private
25 information disclosed. They don't want to know -- The

1 individual presumably has an interest in not being
2 identified as the source of any information, and it seems to
3 me that interest is protected by a literal reading of the
4 statute.

5 Isn't there a difference between knowing whether I
6 told the census taker something and having the census taker
7 report the fact?

8 MR. SCHULDER: It may not be possible to, as you
9 indicated earlier, Justice Stevens, to ascertain --
10 certainly the address registers don't indicate the
11 particular source of the information, and as I will develop
12 a little bit later, the whole purpose underlying these
13 provisions would be undercut by any type of exceptions to
14 the confidentiality provisions that the local governments
15 propose in these cases.

16 Section 9(b) confirms the broad scope of these
17 confidentiality protections that are contained in 9(a) of
18 the Census Act. Section 9(b) refers to the provisions of
19 9(a), and I quote, "relating to the confidential treatment
20 of data for particular individuals and establishments," and
21 the whole theme of erecting a wall of confidentiality is
22 underscored by other provisions in the Act.

23 For example, Section 1 of the Act, the
24 definitional section, has a very broad definition of
25 respondent that defines a respondent as any individual,

1 organization, or entity that reports information or on
2 behalf of whom information is reported.

3 Section 6 of the Act provides that to the extent
4 possible, the Census Bureau is to obtain information from
5 sources other than individual respondents. The purpose of
6 that provision was to limit the burden on respondents for
7 having to respond to census inquiries.

8 It seems to me difficult to believe that Congress
9 meant to subject the information obtained from other sources
10 to disclosure merely because it may have been obtained from
11 other sources. It would be inconsistent with the purpose of
12 reducing the respondent burden and heightening the privacy
13 protections of the Act to say that information obtained from
14 other sources could be disclosed, whereas information
15 obtained only from the census respondents themselves could
16 not be disclosed.

17 The legislative history of the Census Act, of the
18 FOIA, and of the Privacy Act also support our reading of the
19 statute. The history of the Census Act shows that over the
20 years Congress has continuously tightened the
21 confidentiality protections of the Act. Early in this
22 century, in 1909, Congress provided the first explicit
23 provision that is the forerunner of Section 9(a), which was
24 applicable only to industrial establishments and mining
25 establishments.

1 That provision prohibited the Secretary from using
2 information obtained under the purposes of the Act and of
3 permitting anyone other than the sworn employees to examine
4 the reports.

5 QUESTION: Mr. Schulder, how far did the recent
6 legislation in Congress go which was designed to authorize
7 release of data to state or local government officials? Did
8 it get out of committee?

9 MR. SCHULDER: I don't believe it did, Your
10 Honor. We have referred to it in our reply brief in the
11 Shapiro case.

12 QUESTION: Yes, but I wasn't sure how far it had
13 progressed in the Congress.

14 MR. SCHULDER: I don't believe it had gotten out
15 of committee.

16 In 1919, Congress enacted additional legislation
17 that is the forerunner of Section 8(c) of the Act. That
18 legislation provided essentially that information could not
19 be used to the detriment of any respondent or other person
20 to whom the information related. Now, that might lead
21 someone to argue that since Congress inserted a specific
22 provision forbidding use to the detriment of any individual,
23 that Congress thereby recognized that certain information
24 could be disclosed, but the point of fact is that the
25 legislative history of this provision in 1919 specifically

1underscores the fact that Congress did not mean by this
2provision to imply that there was any kind of disclosure
3permitted under the Act.

4 QUESTION: To what extent, if any, is the
5confidential status of this information based on the
6proposition that the Census Bureau must get on with the job,
7and do it within a reasonable time after the cutoff date?

8 MR. SCHULDER: Well, I was just about to address,
9Your Honor, the basic purposes of these provisions. The
10first purpose, of course, is to protect the privacy of
11census respondents, but the confidentiality mandate of the
12Census Act goes beyond ordinary privacy considerations.
13Much of the census information that is being sought in this
14case or that is collected by the Census Bureau is not
15inherently private. It is the sort of information that an
16individual could gather by walking down the street and
17making inquiries, as we indicated in our opening brief in
18Shapiro at Pages 34 to 36.

19 The point is here, though, that the major purpose
20of these confidentiality provisions, and this is borne out
21by the case law examining the statute and by the legislative
22history, is that the confidentiality mandate of the Act is
23meant to assure the public that the information they submit
24will be kept secret, and by doing this, Congress sought to
25encourage public cooperation with the census.

1 Without that public cooperation, the ability of
2 the Census Bureau to collect information --

3 QUESTION: When I get this form, I want to be sure
4 that what I give them will be confidential, but once I get
5 the form I know that my address is not confidential, don't
6 I? Because my address is on it.

7 MR. SCHULDER: Well, you know that the Census
8 Bureau has ascertained --

9 QUESTION: And the postman and everybody else who
10 handled it.

11 MR. SCHULDER: That's correct. Well, the point I
12 am making is that not --

13 QUESTION: But nobody else can get that? You are
14 protecting me from disclosing my address.

15 MR. SCHULDER: No, other sources may be able to
16 get that information, but my point is --

17 QUESTION: Maybe it is for sale.

18 MR. SCHULDER: That's correct, but the point --

19 QUESTION: In any town you can buy an address
20 list. Right?

21 MR. SCHULDER: Correct.

22 QUESTION: So what is so confidential about it?

23 MR. SCHULDER: The problem is that if the
24 information -- if this sort of information were disclosed by
25 the Census Bureau, if this Court were to hold that the

1 Census Act allowed the disclosure of this particular
2 information, which is information relating to particular
3 individuals, and information that is confirmed by particular
4 individuals in the course of the census process --

5 QUESTION: And what they bought on the public
6 market.

7 MR. SCHULDER: But the information is --

8 QUESTION: Isn't that true?

9 MR. SCHULDER: In some cases, that's correct, but
10 in many cases the information is corrected or updated by
11 direct responses to the census itself. The point is that
12 the public is not going to -- the public, if it hears of a
13 decision of this Court mandating broad disclosure of even
14 this type of information, the public is not going to be
15 sophisticated enough to differentiate between one form of
16 disclosure and another, and Congress recognized this in
17 erecting these broad confidentiality provisions of the
18 Census Act.

19 QUESTION: Are all of these communications, are
20 the forms sent addressed to a person by name or in some
21 instances is it to the occupant of 1370 Osceola Avenue?

22 MR. SCHULDER: I am not certain about how the
23 address --

24 QUESTION: Can the Census Bureau conceivably have
25 the names of every person in the United States in relation

1 to a particular street address before they conduct the
2 census?

3 MR. SCHULDER: It probably does not, Your Honor.

4 QUESTION: So in many cases it must go to the
5 occupant of a particular address.

6 MR. SCHULDER: I would think that that would
7 probably occur in at least a number of cases, sure.

8 QUESTION: And what they are trying to find out,
9 among other things, is the identity of the occupant of the
10 particular named address.

11 MR. SCHULDER: Or whether the address is occupied
12 at all.

13 QUESTION: Is that in this case? I thought this
14 case was limited to addresses only.

15 MR. SCHULDER: Well, there are two cases, Justice
16 Marshal. The Shapiro case from New Jersey involves a list
17 of all residential addresses within Essex County, New Jersey.

18 QUESTION: Any names?

19 MR. SCHULDER: Well, the district --

20 QUESTION: No.

21 MR. SCHULDER: The district court's order provides
22 or directs that to the extent possible names or other
23 identifying information should be deleted.

24 QUESTION: Right. I thought that's what the case
25 was about.

1 MR. SCHULDER: The second case, the one from
2 Denver, the McNichols case, involves a disclosure order
3 directed at vacant housing units within the city of Denver.

4 QUESTION: Then neither involves names, as I
5 understand it. Would you agree that if the addresses are
6 not protected from disclosure by the statute, that it would
7 be a proper interpretation of FOIA to require the government
8 to delete the names? I think the lower court said that.

9 MR. SCHULDER: I believe that would be true.

10 QUESTION: So the only question then is whether
11 the addresses are confidential, and the question of whether
12 it is a pain in the neck to have to straighten out the list
13 is irrelevant, because I assume there would be some burden
14 involved.

15 MR. SCHULDER: Well, we have made the point that
16 there would be a burden --

17 QUESTION: Yes.

18 MR. SCHULDER: -- but we don't defend on that
19 ground. We simply point it out to the Court.

20 QUESTION: The bottom line issue is whether a bare
21 list of addresses which has been obtained in this way is
22 disclosable or not, isn't it.

23 MR. SCHULDER: That's correct, and I think at this
24 point it is worth making the point that disclosure of this
25 information could conceivably have harmful effects to

1 individuals who have cooperated with the census process.

2 QUESTION: Might it also not have harmful effects
3 in that we get the 1980 dicennial census in 1988, too?

4 MR. SCHULDER: Of course, that is another of the
5 problems involved in this -- in this and other cases that
6 have raised questions concerning the conduct of the census,
7 but I do want to make the point that disclosure that certain
8 buildings are used as residences, may be used to the
9 detriment of individuals who are occupying buildings that
10 are zoned for commercial use only, or that are occupying
11 multi-unit structures that are in an area that is zoned only
12 for single-unit use, and similar --

13 QUESTION: Or that are illegal aliens?

14 MR. SCHULDER: Excuse me?

15 QUESTION: Or that are illegal aliens?

16 MR. SCHULDER: Well, the information provided here
17 might eventually lead to disclosure of the fact that the
18 occupants of the premises are in fact illegal aliens, or are
19 welfare recipients who don't necessary quality for benefits,
20 and numerous other --

21 QUESTION: How could that follow from just giving
22 an address out? I don't understand. Giving an address
23 doesn't tell you how many people live there, or anything
24 about --

25 QUESTION: Or their citizenship.

1 MR. SCHULDER: Well, giving an address will reveal
2 how many units are at a particular location, because there
3 is a separate address listing for each unit, so if the
4 registers provide, for example, five units with the same
5 address, that will reveal to local officials that there are
6 in fact five dwelling units within that building, and in an
7 area which might be zoned for two or only one unit, it would
8 reveal a violation of a zoning ordinance.

9 QUESTION: Couldn't they also get that from a
10 private firm?

11 MR. SCHULDER: Oh, they certainly might be able to
12 get that information from a private firm, but --

13 QUESTION: Well, isn't it available in every city?

14 MR. SCHULDER: But there is no Census Act with
15 confidentiality provisions that applies to private firms.
16 The Census Act applies to the Secretary of Commerce and his
17 agents, including the Census Bureau. This Court in St.
18 Regis recognized the fact that census information in the
19 hands of the Census Bureau is immune from discovery. It is
20 because of the statute and because Congress recognized the
21 need for confidentiality that we are in this Court today.

22 QUESTION: And presumably likewise the plaintiffs
23 here could have gone out and bought anything for sale on the
24 open market.

25 MR. SCHULDER: Oh, no question about that, Your

1 Honor, and in fact the plaintiffs were, I am sure, able to
2 develop their own address lists based on tax, local taxes
3 and various other local government activities. There is no
4 question that they had numerous other sources for the same
5 information.

6 One of the points we are trying to make here is
7 that each of these local governments is trying to carve out
8 a special exception, a special narrow exception to the
9 Census Act's confidentiality mandate. For example,
10 Respondent Shapiro argues that unlike the petitioners in
11 McNichols, he should be entitled to disclosure of address
12 lists, because those lists will not reveal the occupancy
13 status of a building.

14 The McNichol petitioners, on the other hand, claim
15 that disclosure of addresses of vacant dwellings is
16 permissible because that information supposedly concerns
17 non-existent persons. These approaches demonstrate the
18 unworkability of a policy providing for a limited, piecemeal
19 disclosure. The next case that may come down the road will
20 seek yet another exception to the confidentiality provisions
21 of the Act.

22 Exceptions of this sort would undermine the
23 confidence of the public in the security of census
24 information in the hands of the Census Bureau, and in the
25 long run would reduce census accuracy by deterring numerous

1 persons from cooperating in the census. We submit that our
2 construction of the statute, unlike that of the local
3 governments in these cases, is both workable and consistent
4 with the language and history of the statute.

5 Because the Census Act absolutely bars disclosure
6 of the information at issue here, there can be no exceptions
7 of the sort urged by the local governments, regardless of
8 whether the information is sought under the FOIA or under
9 civil discovery rules, and regardless of the motives of the
10 particular local government seeking the information.

11 Under the FOIA, if a particular matter is exempt
12 from disclosure, the FOIA simply does not apply, and the
13 needs of a requester are irrelevant. Similarly, under the
14 civil discovery rules, privileged matter is not
15 discoverable. In the Census Act, as we have argued, and as
16 we argue more fully in our brief in the McNichols case,
17 Congress established an absolute privilege barring official
18 disclosure of raw census data relating to individual
19 respondents.

20 Thus, Congress has already struck the balance, and
21 there is no occasion to balance a party's need for this
22 information against the public's need to preserve
23 confidentiality in a particular case.

24 Finally, even if the needs of the particular
25 requesters here were relevant, they are not sufficient to

1 overcome the important public policy against disclosure. As
2 I indicated at the outset of my argument, in its local
3 review program, the Census Bureau provided local governments
4 with aggregate statistical information on housing,
5 vacancies, and population for each enumeration district, and
6 as I pointed out earlier, enumeration districts constitute
7 very small geographical units within urban areas, less than
8 325 street addresses.

9 Now, the local review program was established to
10 enable local officials to provide information to the Bureau,
11 and was not intended to provide local governments with an
12 opportunity to conduct what would amount to an internal
13 audit of the Bureau's operations.

14 There is no reason why Essex County and Denver
15 could not have participated in the local review program in a
16 meaningful way without access to confidential census
17 information.

18 For the reasons I have stated today and those
19 articulated in our briefs, we submit that the Court should
20 reverse the judgment of the Third Circuit in Shapiro and
21 affirm the judgment of the Tenth Circuit in McNichols.

22 I would like to reserve the balance of my time for
23 rebuttal.

24 CHIEF JUSTICE BURGER: Mr. Ben-Asher.

25 ORAL ARGUMENT OF DAVID H. BEN-ASHER, ESQ.,

1 ON BEHALF OF THE RESPONDENT IN NO. 80-1436

2 MR. BEN-ASHER: Mr. Chief Justice, and may it
3 please the Court, the issue before this Court is one of
4 first impression, and it is most properly framed as
5 follows. Is a bare list of undifferentiated street
6 addresses in the possession of the United States Bureau of
7 the Census absolutely privileged from disclosure and
8 furnishing under the Freedom of Information Act. Our
9 position is that Title 13 does not provide a blanket of
10 confidentiality for all census materials, but rather is
11 restricted exclusively to barring disclosure of information
12 which would identify any individual census respondent. That
13 is the conclusion which has been reached by the Third
14 Circuit, by the concurring opinion of Judge Stevens in the
15 Second Circuit in Carey versus Klutznick, and by the
16 district courts of Colorado, New York, and New Jersey.

17 What the county of Essex is not seeking in this
18 case is access to vacancy information, to use information,
19 to occupancy information, or as to units, and it is not
20 seeking discovery, and it is not seeking at this juncture to
21 challenge the validity of the census. Rather, the county's
22 purpose is to ascertain what addresses, if any, have been
23 overlooked by the Bureau, with the result that those
24 addresses would not have been canvassed, and any persons
25 residing within those addresses would not have been

1 included, and the census resulting in an undercount.

2 The starting point in the analysis of this request
3 of necessity must be the Freedom of Information Act, and
4 that is a statute which stands high in the hierarchy of
5 various legislative enactments in this area. The clear
6 mandate of that statute is full public access to government
7 records, subject only to very carefully delineated
8 exceptions, which must be narrowly construed and which the
9 government has the burden of establishing in every case.

10 QUESTION: What do you make of the colloquy
11 between Mr. McCloskey and Ms. Abzug on the floor during the
12 '74 amendments about the census information?

13 MR. BEN-ASHER: The 1974 amendments, Your Honor,
14 were fairly narrow.

15 QUESTION: It is on Page 18 of the government's
16 brief.

17 MR. BEN-ASHER: The emphasis there, Your Honor,
18 was assuring that the Freedom of Information Act would not
19 involve further incursions into whatever privileges and
20 confidentiality was established by the exception to the
21 Census Act, and that is the theme which runs throughout the
22 entire legislative history. Well, there has been a certain
23 narrowing of the exception. It has always been a carefully
24 constructed one, so as to avoid a ban on all census data,
25 which would have been a rather facile means of accomplishing

1 that result had it been intended by Congress, but rather, a
2 focusing on how that information might be damaging to an
3 individual, and to what extent it might reveal his or her
4 identity.

5 The thrust of the Freedom of Information Act is to
6 create, in effect, a presumption that information is
7 disclosable to the public because it is so critical to the
8 public's participation in the governmental process in a
9 democracy as the nature of government --

10 QUESTION: Did you submit to the order of secrecy
11 upon counsel?

12 MR. BEN-ASHER: No, Justice White. That order was
13 by the court --

14 QUESTION: I take it if you win, I mean, if your
15 submission is accepted, the information that was requested
16 is public information.

17 MR. BEN-ASHER: That is correct. It is our
18 position that that --

19 QUESTION: Although in both instances the -- in
20 both cases there was an order of secrecy imposed, wasn't
21 there?

22 MR. BEN-ASHER: That's correct. It is our
23 position that that order was not required, though it is
24 authorized because Section 23 of the Census Act expressly
25 provides that local government officials may be sworn in to

1 the extent that they are assisting the Bureau.

2 QUESTION: But not sworn by the federal courts.

3 MR. BEN-ASHER: No, they would take an oath in the
4 Bureau not to reveal information, to which oath various
5 consequences would attach.

6 QUESTION: And directed by the federal courts.

7 MR. BEN-ASHER: It might be directed in a
8 discovery context, or in a Freedom of Information Act
9 litigation context, but certainly not if Freedom of
10 Information Act requests were honored directly by the
11 governmental agency.

12 QUESTION: Would it be of any value to, let us
13 say, a real estate operator, to find out all the vacant
14 houses on April 1st in Newark, New Jersey, or any other
15 place? Conceivably, would that be of some value to a real
16 estate operator, or developer?

17 MR. BEN-ASHER: It conceivably could be. Vacancy
18 information is not sought by the county of Essex in this
19 case, and there is --

20 QUESTION: Could they get it under the same
21 procedure that you are suggesting here? Could a real estate
22 man say, I want this information for my own use?

23 MR. BEN-ASHER: It is our position that vacancy
24 data would not be included within the category of
25 information that discloses information about individuals,

1 but I would concede that it goes further towards reaching
2 that line than does the bare address information, which is
3 undifferentiated as to use or occupancy, which is being
4 sought by the county.

5 QUESTION: How is it being protected if it were
6 given to your clients? Is it then -- is there any
7 protection for the secrecy of that information after it is
8 released by the Census Bureau?

9 MR. BEN-ASHER: Under the district court's order
10 herein, yes. Under the position for which we contend it
11 would not be protected beyond --

12 QUESTION: How long do you think that
13 realistically that would be effective, to keep it out of the
14 hands of real estate speculators, contractors wanting to
15 renovate vacant houses, or speculators wanting to buy vacant
16 houses?

17 MR. BEN-ASHER: It would not be effective, and it
18 should not be effective because the data on its face does
19 not provide any information as to individuals, and that is
20 the prescription in the exceptions to the Census Act. By
21 the same token, as perhaps I will discuss later, much of the
22 block data which is published by the Census Bureau as part
23 of its decennial census reveals as much as if not more
24 information that could be utilized in that manner, presuming
25 some kind of herculean investigatory effort on the part of

1 members of the public who might choose to treat information
2 in that manner, but it would not be a manner which would be
3 harmful to individual census respondents or to the
4 confidentiality purposes of the statute.

5 The primary purpose of Congress, as this Court has
6 enunciated in enacting the Freedom of Information Act, was
7 to assure that government would not attempt to hide its
8 mistakes, and that is precisely the purpose which the county
9 in this case is attempting to avoid, to engage in this
10 process and meaningfully participate in the review process
11 so as to help assure that there will not be an undercount in
12 such a critical area in which the Constitution has directed
13 enactment of this statutory scheme for the purposes --

14 QUESTION: Did the government raise any theme of
15 in pari delicto against Essex County about hiding mistakes?

16 MR. BEN-ASHER: Did the government make an
17 allegation that Essex County had --

18 QUESTION: Yes, that Essex County had also made
19 some mistakes in the past?

20 MR. BEN-ASHER: I don't recall any such
21 allegation. In fact, when local review figures were
22 submitted by the county without the benefit of the address
23 lists in the first stage of local review approximately
24 30,000 individuals were added to the count for Essex County.
25 So, disclosure under the Freedom of Information Act is the

1 general rule. The exception is one which the government
2 must establish under its burden, and it must do so in a de
3 novo trial, in which there is an opportunity to challenge
4 and obtain judicial review of their determinations.

5 The Census Act itself, which is at the heart of
6 the determination which this Court must make, is one which
7 must be examined in the context of the recognition that it
8 is the interest of the citizenry as opposed to the interest
9 of the Bureau which is primary, and that the confidentiality
10 provisions of the statute were enacted precisely for the
11 purpose of ensuring that there would be an accurate census
12 and that individual would participate in that census.

13 Section 9, 9(a) of that statute is one which is
14 exclusively directed towards affecting the activities of
15 Census Bureau personnel. That is, that they should not
16 engage in abuses with that information when it is in their
17 hands, such as using it for personal gain, not that it
18 should affect the public. That section has nothing to do
19 with disclosure. Even the petitioners concede in their
20 court of appeals brief that 9(a)(1) is not intended to
21 create standards and criteria for release of information to
22 the public.

23 This Court has directed itself and concurred in
24 that conclusion in the St. Regis case, and the express
25 introductory language to 9(a) indicates that. If in fact

19(a)(1) were construed to apply to the citizenry, then
2citizens could only use published census data to the extent
3that it was not used for non-statistical purposes, and that
4is not a workable standard, and it is not one that the
5Congress conceivably could have intended once information
6was in the hands of the public.

7 So, it is our position that it is irrelevant
8whether or not there is a statistical purpose on the part of
9an inquirer under the statute. Alternatively, if Section
109(a) does require a statistical purpose, it is clear that
11the purpose of Essex County in this case is statistical in
12nature because it is directed towards enhancing the accuracy
13of the enumeration, the precise goal for which the Bureau
14was created.

15 Whatever the meaning of Section 9, it describes
16Section 8 as the exception to its prohibitions, and because
179 does not prohibit the disclosure of this information we
18need not reach the question as to whether Section 8 permits
19it. Rather, the authorization section here for this
20disclosure is the Freedom of Information Act, but Section
218(b) does require the disclosure of statistical materials,
22and any reasonable reading of that term semantically must
23conclude that the address lists are indeed statistical
24materials.

25 QUESTION: Mr. Ben-Asher, how about Section

1 9(a)(2), though, that refers to the data that is furnished
2 to the Census Bureau?

3 MR. BEN-ASHER: Justice O'Connor, our reading of
4 9(a)(2) is that it applies only to the Bureau, but that we
5 must carefully examine its content --

6 QUESTION: Well, of course --

7 MR. BEN-ASHER: -- because it helps us interpret
8 the meaning of 9 -0-

9 QUESTION: New Jersey, of course, is going to the
10 Bureau to get the information, and therefore we run into the
11 problem. The Bureau may not release it, and data must mean
12 something other than names of individuals, I suppose.

13 MR. BEN-ASHER: Yes, and certainly the county does
14 not contend that, as the government represents, that it is
15 limited to individuals. The interpretation of 9(a)(2), to
16 the extent that that language helps us construe the meaning
17 of the prohibitions in 8(b) is critical to the case, you are
18 correct, and it is our position that in referring to that
19 data, Congress intended to bar the disclosure of information
20 which would identify any particular individual.

21 The government argues that 9(a)(2) means that what
22 is prescribed as the disclosure of identifiable data
23 relating to individuals. Well, of course, all census data
24 relates to individuals, but that test is more amorphous and
25 more unworkable and less in keeping with the legislative

1 intent than is the test for which we contend and which
2 appears more in keeping with the language of the statute on
3 its face.

4 Our test presents no greater difficulty in
5 application, but of course that is not the only standard.
6 The Congressional intent is the standard.

7 QUESTION: Would you state again what your test is
8 under 9(a)(2)?

9 MR. BEN-ASHER: Our test is whether the data
10 reveals -- whether it identifies a particular individual,
11 and that is the theme that runs throughout the legislative
12 history and the language of 9 --

13 QUESTION: Whether it identifies a particular
14 individual, and not whether it identifies a particular
15 individual as the source of the data.

16 MR. BEN-ASHER: No. The source is not the focus.
17 And the location of the data in the records is not the basis
18 for the inquiry. The question is as to what it discloses,
19 what the nature and content of that data is.

20 QUESTION: Is that perhaps a little bit of a
21 distortion of the plain language when it says the data
22 furnished by an individual?

23 MR. BEN-ASHER: There are difficulties that all
24 the parties have with the plain language of the statute
25 here, not only because it is vague, but because some of its

1 literal interpretation leads to absurd results. For
2 example, as you point out, if what was precluded was
3 information that was submitted by an individual, then in
4 fact the Bureau would be incapable of publishing its
5 decennial census, because that --

6 QUESTION: Other than it is permitted to do so by
7 another section.

8 MR. BEN-ASHER: Well, the authority section here
9 is 8(b), and that includes the standard for which we
10 contend. If the -- by the same token, the United States
11 contends that our position is that if the information
12 appears on any document other than the report itself, that
13 it is disclosable. But of course again that is not our
14 position. We are focusing on the content of the information
15 as opposed to its location, and St. Regis dealt, Justice
16 O'Connor, with the point you raise as to the meaning of
17 9(a)(2). I think the reference in the St. Regis case by
18 this Court to that statute is even a narrower reading than
19 the one for which the county contends, because there it was
20 characterized as referring to the name or identity of those
21 furnishing information being revealed.

22 The Bureau implies that if information can lead to
23 further information about an individual, it would be barred
24 under the meaning of the exception to the Census Act.

25 QUESTION: May I interrupt you once more? It

1 seems to me your reading of the section means you lose,
2 because under your reading, as I understand it, if some of
3 the addresses on the list were furnished by an individual,
4 that would be data relating to a particular individual, and
5 as you read the statute that is the end of the case.

6 MR. BEN-ASHER: No, any data which is submitted by
7 an individual is not prohibited from disclosure. It is only
8 if it identifies an individual. I think we have made that
9 clear throughout our brief and my argument.

10 QUESTION: But it doesn't say that, does it?

11 MR. BEN-ASHER: Neither does the statute expressly
12 utilize the language which the Bureau is contending for, but
13 what we are attempting here to do and what the Court's duty
14 to do is to construe the language in a common sense way in
15 light of the legislative history and its practical
16 application, and what we have said is that if that section
17 is applied mechanically, it would bar our information, but
18 it would also bar the Bureau from publishing the forms which
19 it generally publishes as a result of the decennial census.

20 QUESTION: Let me get to one point. You want all
21 of the addresses that they have, period.

22 MR. BEN-ASHER: What we are asking for, Justice
23 Marshal, is the comprehensive master address register which
24 the Bureau maintains as it exists at the time of a request
25 under the Freedom of Information Act.

1 QUESTION: And what is on that list?

2 MR. BEN-ASHER: What is on that list are a number
3 of items which are correctly characterized by the
4 government, but we are not seeking all of the items on that
5 register. We are only seeking what is found in Column 2 and
6 3 of the sample master address register which is attached to
7 the multi-district litigation brief, which is that showing
8 the number of a lot and the street name of the lot. That is
9 exclusively what we have sought throughout this case.

10 QUESTION: Isn't that list available in Essex
11 County?

12 MR. BEN-ASHER: There are various versions of
13 lists that are available from various sources, but what has
14 not been available to this point is the Bureau's address
15 list, and that is the one that the government correctly
16 characterizes as being at the core of the census process.

17 QUESTION: You want the government's list rather
18 than the list.

19 MR. BEN-ASHER: We don't want the list. We want
20 the list as it has been redacted to remove all material,
21 literally every source of material and nature of material
22 other than the addresses themselves.

23 QUESTION: Then you do want something that they
24 have.

25 MR. BEN-ASHER: Oh, without question, and which

1 only they have.

2 QUESTION: And some of their work.

3 MR. BEN-ASHER: Which is --

4 QUESTION: Some of their work.

5 MR. BEN-ASHER: Well, I don't know what degree of
6 work is --

7 QUESTION: It is some of the work of the Census
8 Bureau.

9 MR. BEN-ASHER: It has been compiled by a number
10 of sources.

11 QUESTION: Well, how do you get it on a sheet
12 except by work? The Bureau put it on a sheet, didn't they?

13 MR. BEN-ASHER: It did, and it gathered that
14 information from a number of sources.

15 QUESTION: Now I am getting worried, because as I
16 understand it Congress wants to protect everything that they
17 did.

18 MR. BEN-ASHER: Well, there is nothing to --

19 QUESTION: And I thought all you wanted was
20 something that somebody else gave them. But now I find you
21 want what they did, and that to me is a problem.

22 MR. BEN-ASHER: It is information that was given
23 to them by postal inspectors.

24 QUESTION: But that to me is a problem for you,
25 which is, what you want is their work.

1 MR. BEN-ASHER: Well, to the extent that human
2 effort is involved in mechanically collecting these
3 addresses, that's correct. It's from a number of sources.
4 It is pre-collected in effect and represents a passive
5 effort of the Bureau to a certain extent, but it is our
6 contention that that is not the test. The ultimate question
7 under the Act is whether the data identifies individuals,
8 and that it does not do here. Their list of street
9 addresses will not disclose the identity of an individual
10 who provided information, the identity of the people who
11 live there, how many live there, whether anyone lives there,
12 whether there is a dwelling there, whether it is used for a
13 residential purpose, whether it is vacant or occupied.

14 None of that information is being sought by us.
15 The information being sought is entirely innocuous. It
16 tells us nothing about individuals, and it is disclosure
17 which should not discourage the public from participating in
18 the census, and of course their attitude is critical, but no
19 -- it can't be reasonably assumed that individuals are
20 encouraged to participate --

21 QUESTION: Couldn't an individual assume that if
22 you this year disclose my address, the next year you will
23 disclose something else?

24 MR. BEN-ASHER: Only if this Court holds in our
25 favor and it is prepared next year to hold that further

1 information is permissible.

2 QUESTION: Then the person could say that we want
3 confidentiality, and we will cooperate provided what we do
4 is confidential, and this Court says, well, all of it is
5 confidential but your address, and next time this Court
6 says, all is confidential but your name, and then the next
7 is, all is confidential but your occupation.

8 MR. BEN-ASHER: Well, clearly information --

9 QUESTION: I am talking about, a person -- don't
10 people think that once you begin to give up something, you
11 -- you know, the old finger in the dike business?

12 MR. BEN-ASHER: I think that it is reasonable
13 conclude, Mr. Justice, that individuals participate in the
14 census not because they are sure that there will be no
15 census data whatsoever disclosed to the public in the course
16 of the census, but that they will be not identified or
17 penalized. It would be paranoic for an individual to
18 unrealistically speculate that because a federal bureau has
19 the designation of the property on which he may live --

20 QUESTION: Do you agree that Congress doesn't
21 agree with you?

22 MR. BEN-ASHER: There is nothing in the
23 legislative history to indicate that they do anything but
24 agree with us in terms of the standard as to identifying
25 individuals.

1 QUESTION: I thought it was clear from the
2 legislative history that they intended to protect all of the
3 confidentiality they could protect in the Census Bureau.

4 MR. BEN-ASHER: That is a result which they could
5 have brought about very easily by simply prescribing the
6 release --

7 QUESTION: But was that their purpose in mind?

8 MR. BEN-ASHER: No, the purpose of the Congress
9 was to preclude the disclosure of individually identifiable
10 data which would be harmful to an individual.

11 QUESTION: Mr. Ben-Asher, on that point, after the
12 St. Regis paper case, in which this Court said that certain
13 copies of census reports kept by a business establishment
14 could be -- were not immune from judicial process, Congress
15 in effect overruled this Court's holding, did it not? And
16 it indicated when it did that that it changed this Court's
17 ruling to add further protection of privacy.

18 Now, let me read you from the Senate report, and
19 then ask you to comment on that, where it explained that it
20 was doing this to ensure that the authority of the Secretary
21 of Commerce to furnish statistical tabulations or other
22 material to public and private entities does not extend to
23 any material which might disclose information reported by or
24 on behalf of any respondent.

25 Isn't that a pretty clear statement?

1 MR. BEN-ASHER: I think the language of the
2 statute is even clearer. The amendment was a very narrow
3 one, directed towards precluding disclosure of a very narrow
4 category of information. The holding of this Court in St.
5 Regis was a broad one, to the effect that 9(a)(1) and the
6 9(a) sections applied only to the government, and that the
7 statute did not generally clothe census data with
8 confidentiality.

9 The response of the Congress could have -- I see
10 that my time is up, unless I may complete my response.

11 QUESTION: Well, I think you can respond to my
12 question, if you would, Mr. Ben-Asher.

13 MR. BEN-ASHER: Congress when it accomplished that
14 1962 amendment did not rethink or clarify the fundamental
15 nature of the exception in the statute, as it could have
16 easily by simply prescribing release of any census data.
17 Rather, its response was a very narrow one, to indicate that
18 census reports themselves in the hands of individuals could
19 not be the subject of process by courts and agencies.

20 QUESTION: Thank you.

21 CHIEF JUSTICE BURGER: Mr. Cerrone?

22 ORAL ARGUMENT OF GEORGE J. CERRONE, JR., ESQ.,

23 ON BEHALF OF THE PETITIONERS IN NO. 80-1781

24 MR. CERRONE: Mr. Chief Justice, and may it please
25 the Court, the government's counsel has indicated to the

1 Court the general chronological order of events in the
2 McNichols case. If I may, I would add only very briefly to
3 his description.

4 One of the very important things that happened
5 during the census or just subsequent to the actual census
6 day in Colorado as well as all through the nation is what
7 was enumerated or described as a local review program. This
8 local review program has been mentioned by the government as
9 being an opportunity wherein the local governments and local
10 officials can participate in the review of the census.

11 One of the things that is in the record, and which
12 I feel obligated to bring forward to the Court, is the fact
13 that whether or not and to what extent living units were
14 vacant could not be discussed was not an issue in the local
15 review program.

16 Subsequent to that, the city and county of Denver
17 did file our action, and have made our request, but prior to
18 making our request, we had a hearing before the district
19 court on our application for a preliminary injunction. At
20 that hearing, we presented evidence showing very clearly, I
21 believe, that the total count of the population of the city
22 and county of Denver was too low, and the total count of the
23 vacancy units, that is, the living units in the city and
24 county of Denver was too high, and that there was a causal
25 connection between the too high vacancy rate and the too low

1 population count. In other words, they didn't count people
2 who lived in these what they felt were vacant units.

3 The district court, after having heard this
4 testimony, and having heard all of the rest of it at the
5 application for a preliminary injunction, issued its order
6 which was very restrictive, and obviously it issued its
7 order under Rule 26. It indicated that we could only have
8 lists of units that the -- of addresses of units, living
9 units which the Bureau deemed to be vacant on census day,
10 and no other, that these lists or whatever it was that this
11 information was kept on could be -- should be redacted to
12 eliminate all reference to the source or the respondent who
13 provided whatever information led to the conclusion or the
14 deduction that the unit was vacant --

15 QUESTION: Is that order in the joint appendix,
16 Mr. Cerrone?

17 MR. CERRONE: Yes, Your Honor, it is -- the order
18 is also in our petition. I believe it is both in the joint
19 appendix and in our petition.

20 The order is very clear also that there shall be,
21 as this Court has indicated a problem this morning, or this
22 afternoon, there shall be no what is referred to as
23 secondary disclosure, that once this information is in the
24 hands of officials or employees of the city and county of
25 Denver who, incidentally, must be sworn to the same oath as

1 are the employees of the Bureau who also are subject to the
2 contempt powers of the court because the court made this
3 order specifically applicable to them and ordered that it be
4 served upon each and every one of them.

5 QUESTION: You made a discovery request.

6 MR. CERRONE: Yes, Your Honor.

7 QUESTION: And so your position is different from
8 your colleague from New Jersey?

9 MR. CERRONE: Yes, Your Honor, insofar as the --

10 QUESTION: You don't claim that the information is
11 available to the public.

12 MR. CERRONE: Your Honor, we claim that the
13 information is available under --

14 QUESTION: Is available to a litigant and
15 discoverer.

16 MR. CERRONE: Yes, Your Honor, we do.

17 QUESTION: Well, what do you do with the discovery
18 after you have got it on paper? Where does it go?

19 MR. CERRONE: Your Honor, once we are provided
20 with the information regarding what they deduced to be
21 vacant units, what we intended to do and what we told the
22 court we were going to do, and what we asked the court to
23 order them to do in cooperation with us, is to compare -- to
24 go out and ascertain whether or not those units were
25 actually vacant.

1 Our information and our evidence at trial was that
2 there weren't as many vacant units as they deduced to be --

3 QUESTION: How long after April 1st, 1980, on an
4 average, would that litigation process take place, on the
5 present scale?

6 MR. CERRONE: Your Honor, if they would have
7 complied with the order, which was made on September 17th,
8 it would have been about four or five months. There is no
9 question about the fact that it is going --

10 QUESTION: Well, they didn't comply with the
11 order. I am talking about the situation that realistically
12 exists now.

13 MR. CERRONE: There is no question, Chief Justice,
14 that it is going to be an awful long time, probably some
15 time in 1982, depending upon how long all of these
16 proceedings take. But, Your Honor, the testimony also at
17 the trial was to the effect that these kinds of facts can be
18 determined subsequent to the day in which you are trying to
19 determine the existence of the fact. In fact, Your Honor,
20 our witnesses, which were generally the appraisers and
21 assessors of the city who conducted our own small survey,
22 testified to the fact that that is what most governments do
23 in any event. We determine facts which pre-existed the time
24 in which we determine them.

25 There is no question it is going to be difficult,

1 but, Your Honor, we have already shown in a preliminary
2 fashion that there is a problem in the city and county of
3 Denver, and that that problem has got to be resolved, and
4 the reason it has got to be resolved is because we are
5 dealing with such a fundamental constitutional right,
6 namely, the right to vote.

7 QUESTION: Well, just as a guess, if you know,
8 about how many vacant units or alleged vacant units would
9 you think would exist in Denver as of April 1, 1980? A
10 hundred? Five hundred?

11 MR. CERRONE: Your Honor, the figures that they
12 have were 16,000. There are 223,000 --

13 QUESTION: Sixteen thousand. Now, how long is it
14 going to take you to develop the historical facts with
15 respect to each one of these with witnesses and cross
16 examination and so forth?

17 MR. CERRONE: The testimony --

18 QUESTION: Would you say maybe a day for each
19 residence?

20 MR. CERRONE: No, Your Honor. The testimony in
21 the trial court was that it would -- assuming that
22 everything got ginned up and so forth, and was prepared
23 properly, that it would take five to seven weeks. That is
24 the actual going out and determining --

25 QUESTION: Whose estimate was that?

1 MR. CERRONE: Pardon?

2 QUESTION: Whose estimate was that?

3 MR. CERRONE: That was the estimate of the city,
4 and the estimate of the Bureau was very similar.

5 QUESTION: Of 16,000 units?

6 MR. CERRONE: Yes, Your Honor. Most of these
7 units, Your Honor, are normally and usually in apartment
8 buildings, and those areas where there is an aggregation, in
9 the core city. We are not talking about the suburbs, or
10 where you can go down just a nice row of houses and start
11 counting little children and so forth.

12 QUESTION: But isn't it quite possible that in the
13 course of that litigation New Mexico, or Nebraska, or Utah
14 might seek to intervene, saying that if Colorado is going to
15 hold onto a seat or gain two seats, we run the risk of
16 losing one seat or only gaining one seat, and that that sort
17 of legal issue is going to be floating up and down in the
18 case, too?

19 MR. CERRONE: Your Honor, first of all, with
20 respect to the Colorado case, there is no way that we can
21 gain the number of persons required to change the
22 apportionment of the 435 seats in Congress. But to answer
23 your question fully, it may very well be that as a result of
24 our success, other localities may feel that they should
25 challenge the census in a like fashion that we have, and it

1 is possible that the numbers may be such that it will result
2 in such a consequence.

3 My answer, Your Honor, is very simple, that if in
4 the event that there was a miscount in New Mexico, or if
5 there was an undercount in New York, or wherever it happens
6 to be, then that has got to be corrected.

7 The question that was posed by one of the Justices
8 earlier regarding -- regarded the expediency, and the Chief
9 Justice also mentioned the time which it would take us to do
10 this, but also the uses to which the census data are put,
11 and we all know that in 1982 we are going to have a national
12 election for the House of Representatives, and in fact in
13 Colorado we have a governor's race and so forth, that
14 obviously these kinds of data are going to be used for those
15 purposes.

16 QUESTION: How? You say you couldn't come up with
17 enough extra numbers to get Colorado another seat.

18 MR. CERRONE: Yes, Your Honor.

19 QUESTION: So is it really just a question then of
20 where you draw the lines?

21 MR. CERRONE: That is one of the problems. Yes,
22 Your Honor. Because, for instance, if --

23 QUESTION: Well, I didn't know that census data
24 necessarily was binding on courts in apportionment suits.

25 MR. CERRONE: Your Honor, every suit that I am

1 familiar with --

2 QUESTION: Is it? Is it?

3 MR. CERRONE: There is no requirement under the
4 Constitution --

5 QUESTION: Not in our cases.

6 MR. CERRONE: There is no --

7 QUESTION: Our cases don't say that apportionment
8 suits are necessarily governed by census figures.

9 MR. CERRONE: There is no requirement in the
10 Constitution or the statutes or any case of this Court with
11 respect to whether or not states must use federal census
12 data for reapportionment, but the fact of the matter is that
13 every one of them do, and the reason that they do is because
14 it is the only game in town.

15 QUESTION: Yes, but if somebody sues, and says
16 Denver -- if somebody in Denver sues and says we are
17 underrepresented here as compared with the other districts
18 in our state, they aren't necessarily stuck with the census
19 figures.

20 MR. CERRONE: Your Honor --

21 QUESTION: It would be awfully convenient to have
22 them.

23 MR. CERRONE: This Court in Burns versus
24 Richardson has held that in those events where there is a
25 controversy in the apportionment, and in the event that

1there would be a controversy as to the numbers that are in
2every case submitted by the federal census, other parties
3challenging those numbers can come up with their own numbers.

4 QUESTION: Right.

5 MR. CERRONE: But, Your Honor, we don't have those
6other numbers. We were told, and the record will show,
7prior to the census not to conduct our own --

8 QUESTION: Well, you can do your own census. You
9can do your own census.

10 MR. CERRONE: We can do our own census in 1990,
11Your Honor, but we can't do our own census in 1980.

12 QUESTION: You can do your own census for purposes
13of a reapportionment suit.

14 MR. CERRONE: We can do our own census, Your
15Honor, but not as of April 1, 1980, Number One, and Number
16Two, Your Honor, we do not have the capabilities that the
17federal Census Bureau has. I want to make it clear that we
18do not disagree with everything they said in their census
19for the city and county of Denver. We do not disagree as to
20the number of housing units. We do not disagree as to where
21the municipal boundary is. There are a number of things
22that they did right. They didn't count or they didn't
23deduce the correct number of vacant units. They didn't
24count everybody.

25 QUESTION: You can make your own count on

1 vacancies.

2 MR. CERRONE: Yes --

3 QUESTION: You can make your own count on
4 vacancies and say, we came up with 10,000 and the Census
5 Bureau came up with 16,000, and they are just wrong.

6 MR. CERRONE: Your Honor, I -- you are absolutely
7 correct, and this was brought out in the briefs for the
8 government.

9 QUESTION: Incidentally, in Burns and Richardson,
10 does my memory serve me correctly? Didn't we approve the
11 use of registered voters as the basis there for Hawaiian
12 apportionment?

13 MR. CERRONE: Your Honor, I can't recall exactly
14 right at the moment.

15 QUESTION: Well, I think I ought to remember.

16 MR. CERRONE: Your Honor, to continue, the issue
17 -- the question was raised as to whether or not we don't
18 conduct our own census. The fact of the matter is, we don't
19 have the wherewithal to do it. We didn't gin up to do it.
20 It would cost us probably more to get to the point where the
21 Census Bureau is now -- I really don't know how much of a
22 cost. We have no evidence as to that. But the very fact
23 that they --

24 QUESTION: Well, you have never ginned up to do
25 it, I take it.

1 MR. CERRONE: No, we haven't.

2 QUESTION: And in 1970 there was no lawsuit.

3 MR. CERRONE: In 1970, Your Honor, we weren't
4 aware -- or our awareness of the fallibility and peccability
5 of the Census Bureau wasn't as high as it is today, after
6 having looked into it, and after having suspected for one
7 reason or another in 1980 that they didn't do their job
8 properly, we did become aware. Not only did we become
9 aware, but 50, 60 other jurisdictions have become aware.

10 There are, as I understand it, at least 50 cases
11 now in a consolidated case, consolidated by the U. S. Panel
12 of Multi-District Litigation in the district in Baltimore,
13 in Maryland.

14 Justice Stevens asked earlier to address the plain
15 language of the statute. I will address the plain language
16 of the statute, Justice Stevens, by saying that there is
17 nothing in that statute that is applicable to a court except
18 how Congress amended the Act with respect to respondent
19 retaining copies, and that is the only place where there is
20 any mention as to restrictions on judicial disclosure.

21 QUESTION: You are not making any claim under FOIA
22 then.

23 MR. CERRONE: No, we are not.

24 QUESTION: In other words, you contend there is
25 just no privilege whatsoever.

1 MR. CERRONE: Well, Your Honor, that is one of the
2 legs upon which our --

3 QUESTION: If that is your point about no mention
4 of courts.

5 MR. CERRONE: That is one of the legs of our
6 argument, Your Honor, but we would go further, and I think
7 we brought this out in our brief, that -- and as the
8 district court held, that it is obvious that there was some
9 sort of intent and purpose of Congress in enacting this
10 entire scheme in the statute, and that in view of that, that
11 -- and the district court held that the purposes and intent
12 of the statute can be maintained by having a discovery order
13 that recognizes the purposes and intent of the statute, and
14 that is what the district court did.

15 It has been -- I could characterize it as a
16 qualified privilege. I can characterize it as coming under
17 the government reprot doctrine, all of which has gone into
18 the brief. What I want to say today, however, is that the
19 district court recognized, and I think that it was correct
20 in recognizing that the intent and purpose of the statute
21 has to be maintained, if for no other reason, for the public
22 perception.

23 Public perception is --

24 QUESTION: Well, you are saying, well, sure, this
25 information is covered by Section 9, confidentiality, but

1 the Congress didn't want to keep it from being discovered in
2 litigation as long as the court entered a proper order that
3 would protect the secrecy of it.

4 QUESTION: So long as -- so long as two things,
5 Justice White. Not only that the court order a proper
6 protection order --

7 QUESTION: So you disagree with your colleague
8 from New Jersey, or do you, that Section 9 reaches --
9 protects this information, or not?

10 MR. CERRONE: Fortunately, Your Honor, for my case
11 I don't think it matters.

12 QUESTION: You can say, assume that it does. The
13 court amply protected it.

14 MR. CERRONE: Yes.

15 QUESTION: How long do you think it could remain
16 protected, once it is part of a deposition or other pretrial
17 discovery?

18 MR. CERRONE: Your Honor, it will not be a part of
19 a deposition. What was ordered by our district court was
20 that these lists be provided to our people, who have already
21 been sworn to secrecy, and that they use these lists to go
22 out and check the vacancies.

23 QUESTION: And this would be an in camera analysis
24 by the judge and the -- presumably the lawyers in opposition?

25 MR. CERRONE: Your Honor, the district court also

1 suggested -- he recognized that he couldn't order -- I think
2 he could have ordered, but he did not order, but he
3 suggested that the Bureau go along with us, have somebody
4 come along with our people when they go out there and check
5 as to whether or not it is vacant, and that would increase
6 the speed at which this can be done.

7 QUESTION: How long do you think it would be
8 before the Denver Post and the other newspaper out there
9 would be in court either as an intervenor or plaintiff to
10 stop this pernicious secrecy?

11 MR. CERRONE: Your Honor, I don't think that --

12 QUESTION: Do you think that might have a tendency
13 to slow up the whole litigation process?

14 MR. CERRONE: No, Your Honor. As I was starting
15 to say with Justice White, there are two conditions under
16 which this information was made available to us, not only
17 the protective orders, but the fact that we had shown in an
18 application on preliminary injunction in which one of the
19 issues is the likelihood of success, we showed that we had
20 something there. We showed that it wasn't a frivolous
21 action, that we were -- that the purposes of our asking for
22 this information were the same purposes for which it is used
23 by the Census Bureau, that is, ensuring an accurate count of
24 the people of the city and county of Denver.

25 QUESTION: You could show that the taking of a

1 census was not a traditional First Amendment place where
2 people gather to discuss public issues, too, I suppose.

3 MR. CERRONE: Yes, Your Honor, I suppose we can.

4 QUESTION: It is sort of ironic, I suppose. Under
5 your opponent's reading of the statute, they couldn't rebut
6 your case by putting in their own list of vacant places,
7 either, could they? I suppose they couldn't use the
8 information in court in order to defend the accuracy of
9 their own results.

10 MR. CERRONE: Your Honor, it goes right to the
11 issue of the case in total. The issue of our case is
12 whether or not their list of vacancy units is correct. The
13 court has given them the opportunity to come along with us
14 to verify it. If their list is correct, it is correct. If
15 it isn't, then we are going to --

16 QUESTION: Well, going along with you doesn't
17 necessarily answer the question whether it was vacant on
18 April 1st of 1980, of course.

19 MR. CERRONE: Your Honor, as I have indicated
20 earlier, it is going to be difficult, and especially in view
21 of this protracted litigation, but it can be done and it
22 must be done. It must be done because, as the Court knows,
23 this case and especially in our locality, in our region, has
24 gotten an awful lot of publicity. The public perception has
25 been mentioned before, and I think that the public will be

1able to distinguish when this Court has approved a discovery
2order with all the protections that are involved. I don't
3think that the press is going to mislead them, and I think
4that they are intelligent enough to make the distinction.
5But they also know that the city and county of Denver
6believes that its people were not correctly counted.

7 QUESTION: Counsel, the trouble with me is, you
8want to keep the names confidential, you do and the
9government does. So you go out and you find that this house
10which the government said was vacant on April 1 wasn't
11really vacant, it was occupied by John Jones. Now, there is
12his name right out in the public.

13 MR. CERRONE: Your Honor, and that is exactly, I
14believe, why the district court required that our people be
15deputized in the words of Justice Rehnquist, that is, sworn
16to the same type of secrecy that the regular Bureau people
17are, because that is exactly what this fellow is going to
18do. That is, the employee of the city and county of
19Denver. He is going to find out that Johnny Jones lived
20there, and he is going to take Johnny Jones' name and give
21it to them. And he is going to hopefully forget it.

22 But in any event, as many protections in that
23process that are possible have been made by the district
24court.

25 Your Honor, the last point I would like to make to

1 the Court, or observation I would make to the Court is, with
2 respect to the St. Regis case, which has been mentioned
3 earlier, the St. Regis case developed on the facts, as we
4 all know, that suddenly the FTC wanted to have respondent
5 retain copies of census reports. This had never happened
6 before. There was never, at least insofar as we can tell,
7 an occasion where another branch of government wanted to
8 have these kinds of things which are retained by the
9 respondents.

10 When this case came to this Court almost 18, 20
11 years ago, this Court held that Congress didn't provide for
12 that, therefore they have to be resolved. That same
13 situation exists in this case. No one really dreamt, as it
14 was brought up by some of the questions that I have
15 answered, in '70 and in '60 that we would, that is, the
16 localities would be so aware that there is a problem with
17 the Census Bureau. No one anticipated that in learning that
18 there was a problem, that we would start asking for
19 information such as this, least of all Congress. This is
20 the identical situation. This statute which restricts the
21 truth, this privilege must be strictly construed, just as it
22 was in St. Regis, and in the event that Congress doesn't
23 feel that it is correct, in the event that Congress feels
24 that this is a hole in the dike, that a finger must be
25 pushed, then it is up to them as they get into St. Regis to

1 fill it.

2 Thank you, Your Honor.

3 CHIEF JUSTICE BURGER: Do you have anything
4 further, Mr. Schulder?

5 ORAL ARGUMENT OF ELLIOTT SCHULDER, ESQ.,

6 ON BEHALF OF THE PETITIONERS IN NO. 80-1436 AND

7 THE RESPONDENTS IN NO. 80-1781 - REBUTTAL

8 MR. SCHULDER: Mr. Chief Justice, I would like to
9 make several brief points. Counsel for Essex County has
10 attempted to argue that if our interpretation of the Census
11 Act is correct, then the Census Bureau has no authority to
12 disclose even the statistical information that it normally
13 does after conducting the dicennial census.

14 Well, the point is that Section 8(b) of the Act
15 specifically provides authority for disclosure of
16 tabulations and statistical materials, so long as those
17 disclosures do not refer to information reported by or on
18 behalf of individual respondents.

19 Now, the test that we have proposed for
20 interpreting the confidentiality mandate of the Census Act
21 can be found at -- summarized at Page 17 of our brief in
22 McNichols. And basically what that test is, under the Act,
23 only aggregate statistical information may be disclosed, and
24 even then the information may not be disclosed if those
25 statistical figures may disclose information reported by or

1 on behalf of an individual respondent.

2 This interpretation is supported by the opinion of
3 the Attorney General that we have cited in a footnote on
4 Page 30 of our brief in Shapiro. In that opinion, the
5 Attorney General addressed an inquiry concerning the
6 disclosure of names and addresses of certain employees in an
7 upstate New York city, and also names and addresses of
8 people who the Census Bureau had found were illiterate. The
9 latter group of names and addresses were sought by
10 educational and other public service institutions that were
11 attempting to conduct a literacy campaign.

12 The Attorney General's opinion indicated that the
13 Census Bureau felt its obligation to preserve the secrecy of
14 this sort of information to be so strict that it would not
15 disclose even statistical information in certain
16 communities, if that information would lead an individual to
17 identify the particular establishments or individuals that
18 the information related to.

19 Next, I would like to point out and underscore
20 what I attempted to say earlier, that even a bare list of
21 addresses such as is being sought by Essex County could be
22 harmful to individual respondents, because the address lists
23 that are maintained by the Bureau refer not to commercial
24 properties but to residences, so that if a commercial
25 property contained a residence, and the Bureau discovered

1 this in the course of the census, that address would be
2 listed on the Census Bureau's address lists.

3 Now, the address on the county's -- the county may
4 not have a residential listing for that particular address.
5 Therefore, the disclosure of this information would identify
6 particular units that are being used for residential
7 purposes that the county or local government may not know
8 about, and such use may be in violation of local housing
9 codes or zoning ordinances.

10 QUESTION: In the McNichols case, suppose they
11 filed an affidavit or a series of affidavits which showed
12 that 100 percent of the houses you declared vacant were
13 actually occupied on April 1. How would you go about
14 disputing that?

15 MR. SCHULDER: If that information were brought to
16 the attention of the Census Bureau in the course of the
17 conduct of the local review program that I described
18 earlier, and if the information were sufficiently broken
19 down into enumeration district totals, so that the Census
20 Bureau could check the city's figures against its own
21 figures, then presumably the Census Bureau would be able to
22 correct its figures in line with what the city had found.

23 QUESTION: Suppose they did not.

24 MR. SCHULDER: Suppose that the Bureau did not
25 correct its own figures?

1 QUESTION: Yes, and disputed them. And disputed
2 the city's figures. How would that be resolved? In a court?

3 MR. SCHULDER: Well, we don't necessarily concede
4 that there is any room for judicial review of the census
5 process.

6 QUESTION: I thought that was where you were going
7 to end up.

8 MR. SCHULDER: Well, the narrow issue in these
9 cases, of course, is one of --

10 QUESTION: I mean, that is your position, that you
11 can't just -- you can't get in court on it.

12 MR. SCHULDER: Well, we agree with Judge Merritt's
13 decision in the Sixth Circuit case, Young versus Klutznick.

14 QUESTION: It is just tough tacos.

15 MR. SCHULDER: Excuse me?

16 QUESTION: Tough tacos. Ask Justice Rehnquist.
17 He will tell you what it means.

18 (General laughter.)

19 MR. SCHULDER: Perhaps, yes.

20 QUESTION: Well, you have to take that position,
21 because under your reading of the statute, which may be
22 right, you couldn't put in countervailing evidence on
23 specific locations, I don't think.

24 MR. SCHULDER: I believe that that is probably
25 correct.

1 QUESTION: So you almost have to take the position
2 that this sort of issue doesn't belong in Court.

3 MR. SCHULDER: That would be a use that would be
4 barred by the statute under our reading. That is correct,
5 Your Honor.

6 QUESTION: Doesn't it go even beyond the statute?
7 Doesn't it come down to the question of, under the
8 Constitution, what entity is charged with conducting the
9 census, the executive branch, the legislative branch, or the
10 judicial branch?

11 MR. SCHULDER: Well, I believe that is correct.
12 The Constitution specifically provides that the dicennial
13 census shall be conducted in a manner that Congress shall
14 direct and Congress has provided in the Census Act for the
15 conduct of the census by the Secretary of Commerce and his
16 delegates, in this case the Census Bureau.

17 QUESTION: How do the plaintiffs get into court
18 here?

19 MR. SCHULDER: Well, the plaintiffs in Essex
20 County filed a Freedom of Information Act lawsuit.

21 QUESTION: How about Denver?

22 MR. SCHULDER: In Denver, they brought a
23 preliminary injunction action --

24 QUESTION: Under what?

25 MR. SCHULDER: I don't have the statute in mind

1 QUESTION: Well, does the Census Act itself invite
2 suits by either public agencies or private parties?

3 MR. SCHULDER: No, no, absolutely not, Your Honor.

4 QUESTION: Couldn't they proceed under any, as you
5 would under any denial of a person to supply information
6 under discovery, under the rules?

7 QUESTION: But you have got to be in court first.

8 QUESTION: What was the cause of action?

9 MR. SCHULDER: Well, it was a lawsuit for
10 declaratory and injunctive relief.

11 QUESTION: For what? Is there some implied cause
12 of action under the census statutes, or what?

13 QUESTION: On Page 8 of the appendix, you've got
14 about -- you've got from A to I reasons, none of which are
15 too --

16 QUESTION: Well, I just thought -- apparently the
17 government doesn't raise any -- no one raises any objection
18 to the parties being informed.

19 MR. SCHULDER: That's correct.

20 QUESTION: Rights guaranteed by Article 1, Section
21 2, Clause 3 of the Fifth Amendment, on Page 8.

22 QUESTION: Your opponent in the Tenth Circuit case
23 didn't challenge your right to challenge a discovery order
24 in the court of appeals before final judgment.

25 MR. SCHULDER: That's correct. The case went up

1 on interlocutory appeal that was --

2 QUESTION: Certified.

3 MR. SCHULDER: Certified.

4 QUESTION: Was there a preliminary injunction?

5 Yes, there was.

6 MR. SCHULDER: A preliminary injunction was not
7 ever issued. The case is still pending technically in the
8 district court at the preliminary injunction stage.

9 QUESTION: Well, apparently they have gone to it
10 in part at least on a claim for judicial review of
11 administrative action. That is the allegation in the
12 complaint.

13 QUESTION: Mr. Schulder, I guess your case is a
14 little more difficult, isn't it, in the McNichols situation,
15 where we are dealing with possibly, anyway, only a qualified
16 privilege as far as a judicial discovery order is concerned.

17 MR. SCHULDER: Well, we don't believe so, Justice
18 O'Connor. Our position is that the Census Act establishes
19 an absolute privilege, and in fact the advisory committee
20 notes to the Federal Rules of Evidence seem to indicate that
21 there was an absolute privilege established by the Census
22 Act.

23 QUESTION: Even though Congress didn't expressly
24 say so --

25 MR. SCHULDER: That's correct.

1 QUESTION: -- although it does in many instances.

2 MR. SCHULDER: That's correct. Well, counsel for
3 Denver points out that the only specific language in the
4 Census Act that actually immunizes Census Bureau or census
5 information from discovery and lawsuits is the legislation
6 that was enacted after St. Regis that discusses retained
7 copies by census respondents, but if his theory is correct,
8 that would mean that copies of individual reports could be
9 discoverable if they were in the hands of the Census Bureau,
10 and that simply cannot be the case, and the Court in St.
11 Regis made it quite clear that census information in the
12 hands of the Census Bureau simply was not discoverable in
13 any judicial or administrative proceeding.

14 Thank you very much.

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

17 (Whereupon, at 2:58 o'clock p.m., the cases in the
18 above-entitled matter were submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the

Supreme Court of the United States in the matter of:

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL., v. PETER SHAPIRO, ESSEX COUNTY EXECUTIVE; and WILLIAM McNICHOLS, JR., ETC., ET AL v. MALCOLM BALDRIGE, SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

NO. 80-1436 & 80-1781

and that these pages constitute the original transcript of the proceedings for the records of the Court.

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