

In the

ORIGINAL

Supreme Court of the United States

UNITED STATES DEPARTMENT OF

STATE, ET AL.,

Petitioners

v.

THE WASHINGTON POST COMPANY

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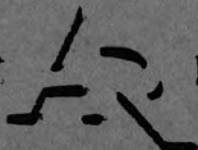
NO. 81-535

Washington, D. C.

March 31, 1982

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Washington, D.C.
Wednesday, March 31, 1982

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 2:02 p.m.

APPEARANCES:

KENNETH S. GELLER, ESQ., Office of the
Solicitor General, Department of Justice,
Washington, D.C.; on behalf of the
Petitioners.

DAVID E. KENDALL, ESQ., Washington, D.C.; on
behalf of the Respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in United States Department of State against the
4 Washington Post.

5 Mr. Geller, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,
8 ON BEHALF OF THE PETITIONERS

9 MR. GELLER: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 This is a Freedom of Information Act case here
12 on writ of certiorari to the District of Columbia
13 circuit. The case involves Exemption 6 of the Act, the
14 personal privacy exemption, which protects against
15 mandatory public disclosure of government documents that
16 meet two criteria. First, the document must satisfy the
17 so-called threshold test by qualifying as a personnel,
18 medical or similar file. And second, if the threshold
19 test is satisfied, it must be shown that disclosure of
20 the document would constitute a clearly unwarranted
21 invasion of personal privacy. This is the so-called
22 balancing test of the exemption.

23 The question presented here involves the
24 proper interpretation of the phrase "similar files" in
25 the threshold test of Exemption 6. And the facts may be

1 briefly stated.

2 In September 1979 the Washington Post
3 submitted an FOIA request to the State Department for
4 any documents indicating whether two Iranian officials,
5 Dr. Ali Behzadnia and Dr. Ibrahim Yazdi, were American
6 citizens. The State Department denied the request on
7 the basis of Exemption 6.

8 After the Washington Post brought suit to
9 obtain the documents, the State Department submitted
10 affidavits from an Assistant Secretary of State saying
11 that in light of the social and political conditions
12 then existing in Iran, which were briefly described, any
13 confirmation or denial by the United States government
14 that either individual is a United States citizen would
15 be likely to cause a substantial threat of physical harm
16 to the individual.

17 The affidavits also listed several recent
18 examples of Iranians who had suffered serious harm
19 because their names had been linked to the United States
20 in official documents.

21 Despite these unrebutted affidavits, the
22 District Court ordered the State Department to comply
23 with the Post's FOIA request, and the Court of Appeals
24 affirmed.

25 The D.C. Circuit held that the government had

1 failed to satisfy the threshold requirement of Exemption
2 6 by showing that the documents requested constituted
3 personnel, medical or similar files. There's no
4 question that this was not a personnel or medical file.
5 The court said that to qualify as a similar file a
6 record must incorporate, and I quote, "intimate details
7 about an individual, information of the same magnitude
8 that is highly personal or as intimate in nature as that
9 at stake in personnel and medical records."

10 The Court of Appeals concluded that the fact
11 of current United States citizenship was simply not an
12 intimate detail. As a result, it ordered release of the
13 documents without reaching the balancing part of the
14 exemption; that is, without considering at all whether
15 in light of the State Department's unrebutted
16 evidentiary submission, disclosure of the documents
17 requested by the Washington Post would constitute a
18 clearly unwarranted invasion of the personal privacy of
19 the individuals named in the documents.

20 QUESTION: If we should agree with you, Mr.
21 Geller, do we send it back for consideration of that
22 element?

23 MR. GELLER: Yes, yes.

24 QUESTION: We don't decide that here.

25 MR. GELLER: That's correct.

1 I think it would be helpful to begin
2 discussion of this case by stating first exactly what is
3 and what isn't involved here, and then by stating
4 exactly what the opposing arguments of counsel are,
5 because I think that respondent's briefs have attempted
6 to obscure the relevant issue.

7 As I just said in response to Justice
8 Brennan's question, the question presented here is not
9 whether the documents requested by the Post can be
10 withheld from the public. Even if this Court eventually
11 agrees with the government as to the correct meaning of
12 the threshold test of Exemption 6, there would still
13 have to be a remand.

14 QUESTION: I'm curious as to why you say there
15 would have to be a remand. Is the balancing test
16 performed on the basis of a lot of facts that would be
17 have to be ascertained at a trial, or is it just the
18 judgment of the court before which the matter is pending
19 that on balance, you know, A wins or B wins?

20 MR. GELLER: Well, the Court of Appeals didn't
21 reach the balancing test. We believe that the balancing
22 test does require a weighing of facts.

23 Now, the facts were submitted to the District
24 Court and both sides moved for summary judgment, and I
25 assume that this Court could reach that question. It

1 wasn't reached by the court below, and the respondents
2 have not suggested as an alternative ground for
3 affirmance that the documents must be disclosed under
4 the balancing test. Neither side has briefed that issue.

5 QUESTION: Well, what facts does the district
6 court weigh?

7 MR. GELLER: It weighs the public interest in
8 disclosure of the documents against the magnitude of the
9 harm, the magnitude of the invasion of privacy of the
10 particular individual involved or named in the
11 documents. And that is often a fact specific inquiry.

12 As I say, here none of the facts were
13 disputed. The State Department's affidavits were not
14 rebutted. The Post moved for summary judgment, as did
15 the government, and the district court granted summary
16 judgment to the Washington Post.

17 Now, the issue before this Court then is
18 simply whether the government should be forced to
19 release these documents without having an opportunity to
20 show the Court of Appeals that disclosure would
21 constitute a clearly unwarranted invasion of personal
22 privacy. In other words, the question here is what sort
23 of documents in government files that relate to specific
24 individuals did Congress intend to make eligible for
25 undergoing this balancing process.

1 Now, it's the position of the government that
2 the threshold test of the exemption was meant only to
3 screen out agency records that don't refer to any
4 specific individual. If an agency document either
5 explicitly or by identifying characteristics does refer
6 to a particular person, then we believe that what
7 Congress clearly had in mind in enacting Exemption 6 was
8 that release of the document would be governed by
9 whether public disclosure would constitute a clearly
10 unwarranted invasion of the person's privacy.

11 Now, considerations such as the intimacy of
12 the particular facts involved, or the public nature of
13 the information, or the fact that the information sought
14 might happen to be located in court records somewhere or
15 in books that were published by someone are not
16 irrelevant. We don't say that those are irrelevant. We
17 say that it be taken into account in the balancing part
18 of Exemption 6 rather than smuggled into the similar
19 files test.

20 QUESTION: Doesn't it seem rather anomalous,
21 though, that information which is contained in
22 admittedly public records would be categorized as
23 information to which the balancing test might apply and
24 which could be withheld?

25 MR. GELLER: I think it would be anomalous

1 perhaps if information that was available to the public
2 could be withheld under Exemption 6, but that's not the
3 question here. The question is simply can we make a
4 specific inquiry into the facts of a particular case
5 under the balancing test, or is any sort of inquiry into
6 the harm to the individual foreclosed totally by the
7 fact that there is a very, very narrow similar files
8 test that is imposed on federal agencies.

9 The Washington Post, on the other hand,
10 embraces the D.C. Circuit's view that a court is
11 precluded from engaging in any balancing unless the
12 information sought not only refers to an individual,
13 specific individual, but also is generically highly
14 intimate; in other words, unless it's the kind of
15 information that virtually everyone would like to keep
16 private about himself.

17 Now, this case I think illustrates the
18 differences between the two approaches very, very well.
19 Most Americans, whether they're naturalized citizens or
20 were born here, would not consider citizenship to be an
21 intimate personal fact. They'd freely disclose it. It
22 is not an intimate detail. But for current residents of
23 Iran, for example, possession of United States
24 citizenship might well be taken to indicate adherence to
25 a particular political philosophical view that's out of

1 favor at the moment, and disclosure of American
2 citizenship --

3 QUESTION: Out of favor where, back home?

4 MR. GELLER: In Iran. And disclosure of
5 American citizenship as to them might not only be
6 embarrassing but dangerous. But the D.C. Circuit's
7 construction of similar files fails to take that at all
8 into account. As long as some item is not considered by
9 the Court of Appeals to be an intimate detail,
10 generically intimate, then the courts and the agencies
11 are precluded from engaging in any balance.

12 Now, perhaps this difference between the
13 Washington Post view of the threshold test and the
14 government's view can be put into even clearer
15 perspective by the following hypothetical. Let's assume
16 that some foreign leader such as Idi Amin or Qadhafi
17 were to announce that he was going to kill every
18 American citizen in his country. And let's also assume
19 that that leader, Quadhafi or Idi Amin or the Washington
20 Post, would then make an FOIA request to the State
21 Department listing 500 people who live in that country
22 and asking whether they're American citizens.

23 Now, I don't think any of us would have any
24 trouble concluding that under those circumstances that's
25 not the sort of information that should be disclosed.

1 It would not pass the balancing test. I think any court
2 would conclude under those circumstances it would be a
3 clearly unwarranted invasion of privacy.

4 What the D.C. Circuit says, however, is that
5 because American citizenship is not generically
6 intimate, then the agency is foreclosed from engaging in
7 the balancing process, and the court is foreclosed from
8 reviewing the agency's determination in a balancing
9 test. The evidence has to be disclosed.

10 Now, where does this intimate details test
11 come from? It certainly doesn't come from the language
12 of the statute which doesn't use the phrase at all. The
13 threshold test of Exemption 6 talks of personnel,
14 medical or similar files. The key question then is when
15 is a file similar to a personnel file or a medical
16 file. And certainly the common denominator is not that
17 the file only contains intimate details about a person.
18 There's a great amount of information in government
19 personnel or medical files that wouldn't be considered
20 generically intimate by anyone: the color of one's
21 eyes, one's sex or height. In fact, citizenship
22 information is almost always found in government
23 personnel files. Yet the D.C. Circuit has told us in
24 this case that citizenship information is not an
25 intimate detail.

1 We think instead that what all personnel and
2 medical files almost by definition have in common is
3 that they contain facts about identifiable, specific
4 individuals, and it's that characteristic that
5 distinguishes a similar file, in our view, and allows
6 the agency and the courts to then apply the balancing
7 test.

8 The D.C. Circuit's notion of intimate details
9 as the determinant of a similar file also doesn't come
10 from the legislative history of Exemption 6. What the
11 legislative history clearly shows is that Congress
12 wanted to protect vast amounts of information about
13 individuals that were stored in government files if
14 disclosure, as the House report put it, would harm the
15 individual.

16 But the House was confronted with the
17 realization that it would be impractical to try to
18 identify in advance every type of government file or
19 every type of document that should not be disclosed. So
20 what the solution was was to pick a broad similar files
21 threshold test so that no item that refers specifically
22 to an individual would be excluded from the exemption,
23 but to rely on the balancing test to screen out which
24 items of personal information should be withheld and
25 which items shouldn't be withheld from the public. Both

1 the House and the Senate reports plainly show that the
2 central part of the exemption, the crucial part, was
3 intended to be the balancing test, not the threshold
4 test. And this Court reached the same conclusion in the
5 Rose case.

6 And the Court of Appeals' interpretation of
7 similar files leads to a number of anomalous results
8 that Congress couldn't have intended. For example,
9 under the D.C. Circuit's approach, information that is
10 part of a government personnel or medical file could be
11 considered for withholding under the Exemption 6
12 balancing test regardless of whether it's generically
13 intimate because it meets the threshold test by being a
14 personnel or a medical file. But the identical
15 information if it's contained in a government file other
16 than a personnel or a medical file, it may be sitting
17 right beside the personnel or medical file, the exact
18 same information, it can't be considered under the
19 balancing test unless it's generically intimate, because
20 if it's not generically intimate, it's not a similar
21 file under their view. And this goes, by the way, even
22 if it could be shown that disclosure of the information
23 would work a clearly unwarranted invasion of personal
24 privacy.

25 And let me give the Court an example of what I

1 mean. Let's assume that one of the individuals involved
2 in this case, Yazdi or Behzadnia, had once applied to
3 the State Department for a job. If he had, he would
4 have filled out a personnel form, and there would be a
5 personnel file on him, and he surely would have been
6 asked on the form whether he was a United States
7 citizen, and somewhere in the State Department's
8 personnel files would be the answer to that question.

9 Now, if the Washington Post had submitted the
10 request they submitted in this case, and if the State
11 Department had found that answer in its personnel file,
12 there's no question that it would have satisfied the
13 threshold test by being in a personnel file, and the
14 question would then be does it pass the balancing test.
15 And a court in considering the State Department's views
16 on that issue would have to consider the unrebutted
17 affidavits in this case.

18 But because the information sought by the
19 Washington Post in this case, if it exists in the State
20 Department at all exists in something other than a
21 personnel file, the D.C. Circuit has held that no
22 balancing can be done, no inquiry can be made into
23 whether it would work a clearly unwarranted invasion of
24 personal privacy.

25 Now, I'd like to end by making a point that I

1 alluded to earlier, but I think it's important enough to
2 repeat; and that is that a broad reading of the term
3 "similar files" in Exemption 5 will not result in the
4 withholding of trivial or innocuous low privacy
5 information in government files.

6 Despite the impression that the Washington
7 Post and the newspaper amici have tried to create, the
8 government's interpretation of "similar files" here
9 would not result in wholesale nondisclosure of
10 information that should be made public.

11 The Court should keep in mind, as I said
12 earlier, that even if something qualifies as a similar
13 file under a threshold test, a federal agency still
14 can't withhold the information unless the agency also
15 determines first if the information refers to a specific
16 individual; second, that disclosure of that information
17 would invade that individual's privacy; and third and
18 most important, that any such invasion of personal
19 privacy would be clearly unwarranted in view of the
20 public interest in disclosure.

21 That's a very, very difficult burden for a
22 federal agency to meet; and any determinations it makes
23 in this area is of course judicially reviewable. But in
24 contrast to the D.C. Circuit's test, at least disclosure
25 decisions under this approach would be made on the basis

1 of rational criteria such as the possibility of harm to
2 the individuals involved and not on the basis of whether
3 the information happens to be in one file rather than
4 another, or whether someone might consider it to be
5 generically intimate.

6 Now, what we ask here is that we be given the
7 opportunity to show that the information related to
8 specific individuals requested by the Washington Post
9 would constitute a clearly unwarranted invasion of
10 personal privacy before the State Department is forced
11 to release that information to the public.

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

14 CHIEF JUSTICE BURGER: Very well.

15 Mr. Kendall.

16 ORAL ARGUMENT OF DAVID E. KENDALL, ESQ.,

17 ON BEHALF OF THE RESPONDENT

18 MR. KENDALL: Mr. Chief Justice, and may it
19 please the Court:

20 I waited expectantly for my brother Geller to
21 tell the Court what District Court Judge Robinson found
22 in this case. Since he didn't do so, I'm going to have
23 to do so, because we come to this Court having won a
24 judgment in the district court and having sustained that
25 judgment on appeal.

1 Now, as the respondent in this Court, under
2 the settled precedents of this Court we can defend the
3 judgment of the Court of Appeals if there is any ground
4 on which it can be sustained. And I want to make quite
5 clear at the outset we are defending that judgment not
6 only on the ground that the Court of Appeals was correct
7 in its similar files analysis, but also on the ground
8 that Judge Robinson's balancing test was correct, even
9 though the Court of Appeals held that superarrogatory on
10 the facts of this case.

11 The government has consistently ignored what
12 the district court did, but I want to emphasize that its
13 conduct of the balancing test, which we submit was
14 correct, is an alternative ground on which we rely,
15 because if this Court were to reverse the opinion of the
16 Court of Appeals, it would have no effect on the outcome
17 of this litigation unless you also find that Judge
18 Robinson was wrong.

19 QUESTION: Well, we could send it back to the
20 Court of Appeals, I take it, and tell them to review
21 Judge Robinson's finding.

22 MR. KENDALL: I think to do that, Justice
23 Rehnquist, you would have to find that Judge Robinson's
24 conduct of the balancing test was wrong and would change
25 the outcome of the court below?

1 QUESTION: Why? Why? Why? Why? What if the
2 Court of Appeals had agreed with the -- had gotten to
3 the -- gotten to the balancing test. They would have
4 had to review the question of whether the district court
5 was right.

6 MR. KENDALL: They would, Mr. Justice White.

7 QUESTION: Well, why should we do that in the
8 first instance?

9 MR. KENDALL: You do because that is a ground
10 on which the decision of the court below may be
11 sustained.

12 QUESTION: Oh, I know, but we don't have to --
13 we don't have to listen to a respondent's alternative
14 ground.

15 MR. KENDALL: That's correct, Mr. Justice
16 White. That is an --

17 QUESTION: We're entitled to, and you're
18 entitled to present it, but we don't have to.

19 MR. KENDALL: That's quite true. We're
20 submitting two grounds here. I just want to make plain
21 that we think the Court of Appeals was right, but we
22 also think Judge Robinson was right in his conduct of
23 the balancing test.

24 This case arises out of our request for
25 Department of State records that would indicate whether

1 or not these two Iranian officials, Dr. Ali Behzadnia
2 and Dr. Ibrahim Yazdi, were currently U.S. citizens.

3 Now, it is not correct that the Saunders
4 affidavit submitted by the government was unrebutted in
5 the district court. We contended on our cross motion
6 for summary judgment first of all that the information
7 at issue was plainly a matter of public record. We
8 submitted a memorandum setting forth the applicable
9 statutes and regulations, and that memorandum and the
10 affidavit of our legal researcher is uncontroverted.

11 QUESTION: But you didn't go after the public
12 record.

13 MR. KENDALL: Excuse me, Mr. Justice Blackmun.

14 QUESTION: You didn't seek out the public
15 record.

16 MR. KENDALL: We did not seek -- we were not
17 able to find this information because there are 95 --

18 QUESTION: It's a big job.

19 MR. KENDALL: -- Federal naturalization
20 courts. We'll lose one tomorrow in the Canal Zone.
21 There are about 300 state courts. We were not able to
22 find it, but of course, the difficulty of locating a
23 public record is one of the reasons the FOIA was enacted
24 in the first place, to make access to public --

25 QUESTION: Is that clear in the legislative

1 history?

2 MR. KENDALL: I believe it is, Mr. Justice
3 Blackmun, in the discussions particularly as to the
4 first parts of the Freedom of Information Act.

5 QUESTION: It's totally irrelevant of course,
6 but I take it this information was of great concern to
7 the Washington Post?

8 MR. KENDALL: We had printed a story saying
9 that Yazdi was -- that the INS, which is in the Justice
10 Department, not the State Department, had confirmed that
11 he was in fact an American citizen. We were seeking to
12 learn whether there had in the very recent past been any
13 renunciation of that citizenship which would have been
14 possessed in a record by the State Department.

15 QUESTION: Let me go back to this weighing
16 process. There have been some examples given. It would
17 help me if you could respond to this hypothetical.

18 Suppose any one of these dangerous
19 dictatorships -- you pick him out -- announces that any
20 citizens of that country within the boundaries of who
21 have relatives who are in the United States who work for
22 the United States government will be put into
23 concentration camps for the obvious purpose of
24 blackmailing.

25 Now, certainly public payrolls are, generally

1 speaking, matters of public record. Do you say the
2 government could not withhold that information so as to
3 protect those employees if there are some employees from
4 extortionate blackmailing efforts, since we know that
5 with Nazi Germany that happened regularly?

6 MR. KENDALL: Mr. Chief Justice, if that kind
7 of a requirement were announced by a foreign country as
8 a matter of policy, I think the government's response
9 under the Freedom of Information Act would be an
10 executive order which would classify such information,
11 and then the government would be able to rely on
12 Exemption 1, the national security exemption. So I
13 think that that would be the response in such a
14 hypothetical case.

15 QUESTION: Well, then, are you saying that
16 tomorrow an executive order could be entered classifying
17 all information relating to these two gentlemen and that
18 would close the matter?

19 MR. KENDALL: I don't think so, Mr. Chief
20 Justice, and that relates to the balancing test as it
21 was conducted in the district court. One of the -- and
22 I disagree that the Saunders affidavit was unrebutted.

23 One of the points we had made was that the
24 Washington Post had already published a story three
25 months before the Saunders affidavit was executed

1 stating that Yazdi was an American citizen. This we
2 attach as Exhibit 4 to our summary judgment memorandum.
3 It appears in the Joint Appendix at pages 35 to 38. It
4 appeared -- it was by Post reporter Bill Branigan and
5 ran on October the 4th.

6 If I could just read the two lines of
7 particular moment in that article. "According to the
8 U.S. Immigration and Naturalization Service, Yazdi was
9 admitted as a permanent U.S. resident in July 1962 and
10 became a naturalized American citizen on March 19,
11 1971. The agency said Yazdi had not yet renounced his
12 U.S. citizenship."

13 Now, the point we made to Judge Robinson was
14 we had already run a story stating that Dr. Ibrahim
15 Yazdi was naturalized and remained a U.S. citizen. We
16 had given our source, a government agency, the INS. If
17 we could get the State Department records that we sought
18 and if they confirmed the INS report, all we could do
19 would be to run a similar story.

20 QUESTION: No. It would be a little
21 different. It's a little different from the Washington
22 Post saying somebody's an American citizen and the State
23 Department saying that somebody's an --

24 MR. KENDALL: Mr. Justice --

25 QUESTION: There is a slight difference.

1 MR. KENDALL: Mr. Justice Marshall, I agree
2 with that, but our story here quoted INS. My point was
3 that the first story --

4 QUESTION: There's a difference between INS
5 and the State Department on citizenship.

6 MR. KENDALL: There is a difference, but I
7 would submit it's a difference without very much import
8 here, because both INS and --

9 QUESTION: Well, why did you want it?

10 MR. KENDALL: Well, we wanted it as --

11 QUESTION: If it didn't have any import, why
12 did you want it?

13 MR. KENDALL: We wanted it to make sure that
14 Yazdi was still an American citizen. One of the ways
15 you can lose your citizenship is to renounce it at an
16 embassy abroad. What happens then is then the consular
17 official will certify that fact and send a certificate
18 of loss of nationality back to the Justice Department.
19 That's required by statute. And then the Justice
20 Department sends it to the Court of Naturalization. So
21 we thought that this renunciation might have happened in
22 the interim.

23 QUESTION: Mr. Kendall, on page 20 of your
24 brief you have a sentence in bold type that came as a
25 shock to me when I read it: "Information is not private

1 simply because its disclosure might lead to
2 embarrassment or even physical harm."

3 Does that -- does that state the position of
4 the Washington Post: regardless of physical harm,
5 information is not private?

6 MR. KENDALL: Justice Powell, we submit that
7 that does not make information private.

8 QUESTION: What does it make it?

9 MR. KENDALL: It makes it either endangering
10 or embarrassing, not private.

11 QUESTION: Well, let's not talk about
12 embarrassing because politicians embarrass each other or
13 try to all the time, but putting someone in physical
14 danger goes rather far, doesn't it?

15 MR. KENDALL: Mr. Justice Powell, we think
16 that the legislative history is clear here, that various
17 other cases are --

18 QUESTION: That Congress intended, intended
19 that public information -- that information be made
20 public that would endanger the life or safety of
21 American citizens or foreign persons who had been here?

22 MR. KENDALL: We think that is quite a
23 different question than the question of a privacy
24 interest. We believe that in the district court we met
25 our burden of showing that that information would not in

1 fact be endangering. But there are many kinds --

2 QUESTION: I was going to say I thought the
3 privacy issue was a second issue in this case. Perhaps
4 we don't get to it. The first issue is a similar test.

5 MR. KENDALL: That's correct.

6 QUESTION: But if you reach the privacy issue,
7 as you argue that we should, how do we dispose of that
8 particular argument?

9 MR. KENDALL: Well, I think that you do so in
10 light of the evidence of, in this record, a prior
11 Washington Post story citing an official government
12 agency stating that Yazdi was and remained a U.S.
13 citizen.

14 QUESTION: But that's arguing that
15 republication would not endanger the individual. The
16 point I'm making, if it would endanger the safety of an
17 individual, are you contending on the balancing test
18 that the information nevertheless should be released?

19 MR. KENDALL: No. On the balancing test if
20 the information were such that there was a legitimate
21 expectation of privacy, on the balancing test
22 endangerment would be one of the things weighed in that
23 balance. We're contending here, however, that because
24 of the way the process of naturalization has been
25 established by Congress, because every part of that

1 process is held open to public scrutiny, because the
2 records of it are required by statute to be public that
3 there is no expectation of privacy, and that the Court
4 of Appeals was correct in holding on that basis that
5 these were not similar files; in other words, that the
6 threshold requirement of Exemption 6 was not met.

7 QUESTION: Well, where do you get the
8 expectation of privacy? That sounds like Fourth
9 Amendment language.

10 MR. KENDALL: It's drawn from many cases. The
11 Court here when it was construing Exemption 6 in Rose
12 talked of the implication of similar privacy values when
13 it was talking about the honor and ethics files of the
14 Air Force Academy.

15 The cases, though, the Court of Appeals cases
16 that we cite in our brief have made quite clear, I
17 think, that privacy expectations are critical in
18 determining whether something qualifies for Exemption 6,
19 because the --

20 QUESTION: Are there any cases from this Court
21 other than Rose that you rely on for the "expectation of
22 privacy?"

23 MR. KENDALL: The Rose case is the only case
24 construing Exemption 5. We have to look basically
25 there. We think that precedents from privacy cases and

1 other constitutional cases of this Court, such as Paul
2 v. Davis, Cox Broadcasting Corporation v. Cohen, provide
3 useful and instructive analogies.

4 QUESTION: Well, I would think that a
5 personnel file, for example, has a great deal of
6 information that no one would have much expectation of
7 privacy, if that's the proper test, because a typical
8 personnel file has a person's date of birth, date of
9 marriage, date of divorce sometimes, when you are sworn
10 in at the Army, when you're admitted to the bar -- a lot
11 of factors are facts of public record. And yet no one
12 denies that a personnel file has to go through this
13 balancing test.

14 MR. KENDALL: That's exactly right, but what
15 comes out at the end of the balancing test, of course,
16 according to this Court's construction of Exemption 6 in
17 Rose is that all of that information as to which there
18 is no expectation of privacy would be disclosed.

19 QUESTION: Right.

20 MR. KENDALL: Couldn't be withheld.

21 QUESTION: But you have to defend here the
22 Court of Appeals' reasoning that you don't even get to
23 the balancing test because it's not a "similar file."

24 MR. KENDALL: That's correct, but there the
25 Court of Appeals' reasoning reasoned that as to

1 citizenship information, given the public nature of the
2 process, it's a quite different kind of fact about you
3 than many other facts that may be in government
4 records. That process is public from inception to the
5 very end.

6 QUESTION: So is your date of birth, so is
7 your date of marriage, so is the date on which you're
8 admitted to the bar.

9 MR. KENDALL: Well, Mr. Justice Rehnquist, I
10 think if those facts were requested from the government
11 -- a government agency, and they didn't come from
12 personnel files, they would not qualify as similar
13 files. They qualify as similar files in your
14 hypothetical simply because they are in personnel
15 files. Congress has explicitly made personnel files one
16 of the things as to which you've got to apply the
17 balancing test.

18 QUESTION: But then what is the link, what is
19 the justem generis factor that you apply to get a hold
20 of similar files when you're dealing with, a) medical
21 files, and b) personnel files?

22 MR. KENDALL: I think the best -- it's hard to
23 give a description that is very concrete because so many
24 possible kinds of facts may be encompassed. I think the
25 best test is that of this Court in Rose. It asked of

1 these Air Force Academy disciplinary files are similar
2 facts or similar privacy values implicated. The Court
3 also quoted the legislative history which indicated that
4 Congress had in mind intimate facts and personal details
5 about an individual.

6 The legislative history of Exemption 6 in both
7 the House and the Senate is similar in that it quotes
8 some kinds of files, and then it refers to in one house
9 intimate details, in the other highly personal facts.
10 And I think that's the best you can do as a threshold
11 definition. And I think given that threshold definition
12 the Court of Appeals was clearly correct in saying that
13 as to naturalization files, those simply do not
14 implicate the same kind of values, they don't relate to
15 a person's family, medical condition, drinking habits,
16 finances, religious practices and many other things.
17 They are generically public.

18 QUESTION: Well, I frankly don't follow your
19 suggestion that a naturalization file is all that
20 different from a personnel file. Doesn't a person make
21 an application to be naturalized?

22 MR. KENDALL: He does, and under, I believe
23 it's 8 U.S.C. 14-1841, that naturalization petition is a
24 matter of public record.

25 QUESTION: As is --

1 MR. KENDALL: If you know where to look for
2 it. As is a birth certificate if you know where to look
3 for it.

4 QUESTION: Are we dealing here with the
5 naturalization file or just the fact of citizenship?

6 MR. KENDALL: Justice O'Connor, we're dealing
7 basically with the latter. In framing an FOIA request,
8 of course, you can't simply ask a question; you've got
9 to ask for records. Our request was please give us any
10 reference you have indicating whether or not now these
11 two men are U.S. citizens. That is a question that
12 could have been answered over the phone yes or no.

13 So it would not -- we don't even know all the
14 records that the State Department might have. And in
15 our request letter of September the 11th we indicated
16 that if the records we requested contained any other
17 information, that information could be redacted. All we
18 wanted was that indicating whether or not at that time
19 the two men were citizens.

20 QUESTION: Is it your position that this would
21 expose these people to no danger whatever, or that even
22 if it does expose them to danger, you're entitled to it?

23 MR. KENDALL: Mr. Chief Justice, I can't say
24 because I don't know whether it would expose them to no
25 danger. We do know, however, that these books we've

1 cited in our suggestion that certiorari was
2 improvidently granted to contain statements from high
3 State Department officials as to the very information we
4 seek.

5 This book, "Mission To Iran," was published by
6 William Sullivan, our last ambassador to Iran who was
7 released last November, and in his book he says at page
8 200, which we quoted in our brief, "Ibrahim Yazdi, an
9 Iranian immigrant to the United States, lived many years
10 in Houston and acquired U.S. nationality."

11 Likewise, the other book, also published last
12 November, "Inside The Iranian Revolution," written by a
13 current State Department employee, director of the
14 Emergency Operations Center, had a similar statement
15 about Yazdi.

16 QUESTION: So you have two journalist sources.

17 MR. KENDALL: They are journalist sources, Mr.
18 Chief Justice, but they are in a --

19 QUESTION: Aren't they more reliable than the
20 government for your purposes?

21 MR. KENDALL: That is true, and we submit that
22 they are reliable. That makes all the more -- that, it
23 seems to me, undercuts the government's prediction of
24 likely harm. We don't think, and Judge Robinson didn't
25 think that on the facts of this case there was a

1 sufficient showing of harm -- of likelihood of harm to
2 withhold the information.

3 Now, these books are not dispositive, but if
4 you're going to assume that a regime is so irrational to
5 visit harm on one of its people because that person is
6 an American citizen, it seems to us highly unlikely that
7 they would distinguish in a nicely discriminating
8 fashion between books written by a former ambassador to
9 Iran and a current high State Department employee and
10 what we would print on the basis of State Department
11 records.

12 So to answer your question, I can't say for
13 certain, but we think that the government's claims of
14 possible harm have got to be taken with great skepticism
15 here. The INS released the information --

16 QUESTION: And if you're wrong you'll just say
17 oops, we were wrong. You're willing to take the risk.

18 MR. KENDALL: Well, there's no very good
19 answer --

20 QUESTION: I mean you've already published the
21 story, right?

22 MR. KENDALL: Exactly. Based upon what INS
23 has said.

24 QUESTION: And you've got all of this, so what
25 do you need more for? Because they haven't done it to

1 them yet?

2 MR. KENDALL: Mr. Justice Marshall, I think
3 that fact cuts in our favor. We want to know whether
4 Yazdi has in fact renounced his citizenship.

5 QUESTION: On that point, would that document
6 be a matter of public record if he had?

7 MR. KENDALL: Yes, it would. It's required by
8 8 U.S.C. 1501 that the certificate of loss of
9 nationality be transmitted from the State Department to
10 the Justice Department. The Justice Department
11 regulations we quote require that in the case of a
12 naturalized citizen to be transmitted back to the
13 Naturalization Court.

14 Now, the affidavit of our researcher, Paul
15 Wolfe, Paul deWolfe, which the government admits is
16 uncontroverted, indicates that the practice of the
17 courts is invariably to put the loss of citizenship --

18 QUESTION: Well, what if with the transmittal
19 letter there was a request to keep this in camera?
20 Would there be anything to prohibit the district court
21 clerk from doing that, and just filing it in his desk
22 drawer with the permission or letter from the chief
23 judge or something saying we've been requested to do
24 this; we'll just keep it private.

25 MR. KENDALL: There is nothing in the

1 regulations that would authorize that. The statutes are
2 --

3 QUESTION: Is there anything that would
4 prohibit it is my question.

5 MR. KENDALL: I don't think there's anything
6 that prohibits --

7 QUESTION: If there is in fact danger to a
8 man's life, it is conceivable that that might be done,
9 isn't it?

10 MR. KENDALL: Well, I think, though, that
11 you'd only be addressing half the danger. The danger to
12 the man's life would be the naturalization petition,
13 which has been granted. Presumably it would not be the
14 renunciation petition.

15 QUESTION: No, but it would prevent one from
16 finding out whether in fact he had renounced, because
17 conceivably he might have told someone wherever he is I
18 renounced my citizenship. Maybe he's telling the truth
19 and maybe he isn't. But you want to find out whether it
20 would be if that weren't the case. And I'm suggesting
21 that possibly he could have renounced, and it might not
22 be a matter of public record. Maybe that's why you
23 can't find it.

24 MR. KENDALL: Well, as I say, there is no --
25 there is nothing in the regulations that would authorize

1 such in camera --

2 QUESTION: No. But the question is whether it
3 would prohibit it.

4 MR. KENDALL: I don't know of any direct
5 prohibition in the --

6 QUESTION: So then we can't be positive that
7 it's a matter of public record.

8 MR. KENDALL: We can't be positive, but given
9 all that the public records require, given the
10 consistent treatment of INS --

11 QUESTION: But this is not, presumably, a
12 normal case by hypothesis, if the government is to be
13 believed. I don't know whether they are or not. There
14 is something exceptional about this particular
15 individual that requires exceptional protection of this
16 particular fact.

17 MR. KENDALL: But the protection that would be
18 required here, Justice Stevens, under the government's
19 own theory would not be a question of the renunciation
20 of citizenship protection. It would be, and again,
21 under the Saunders affidavit itself, the fact Yazdi was
22 an American citizen. And there is certainly nothing --
23 the statute affirmatively declares that that record will
24 be kept public. So under their theory, to protect Yazdi
25 what you need to do is get rid of the entire file, and

1 that they can't do by statute. There is a prohibition
2 as to that.

3 QUESTION: Now, even the dates might be
4 terribly crucial here. Suppose, for example, that one
5 of these men had renounced his citizenship by a letter
6 to the government, the Secretary of State or whomever,
7 in which he made a strong attack on the former regime of
8 the Shah and renounced his citizenship on that grounds.
9 That would make him a hero in Iran today. On the other
10 hand, if he renounced -- if he gained his citizenship
11 after the revolution, that wouldn't make him much of a
12 hero in Iran today, would it?

13 MR. KENDALL: From what I know about the
14 Iranian situation, that is correct, Mr. Chief Justice.

15 QUESTION: But you still maintain that the
16 government isn't entitled to try to protect these people
17 from that risk.

18 MR. KENDALL: Mr. Chief Justice, the
19 government is bound by the Freedom of Information Act.
20 In this case I think that the issue has been joined as
21 to the possible danger to Yazdi. They have lost that
22 issue in the District Court before Chief Justice -- or
23 before Judge Robinson. They're trying to relitigate the
24 question here. He applied the balancing test and found
25 the affidavit and submissions in support of our motion

1 for summary judgment persuasive.

2 QUESTION: Mr. Kendall, there's a second
3 individual involved, is there not?

4 MR. KENDALL: There is. Dr. Ali Behzadnia.

5 QUESTION: You've referred only to the
6 disclosures about Dr. Yazdi and have not referred to Dr.
7 Behazdnia.

8 MR. KENDALL: That's correct, Justice
9 O'Connor. The story that the Post ran concerned only
10 Dr. Yazdi. We have submitted an article from the Iran
11 Times indicating Dr. Behzadnia was in Michigan. All
12 this record reveals is that there is uncertainty as to
13 his whereabouts. But the argument we would make would
14 apply equally to Dr. Behzadnia. There is no showing,
15 and the government's affidavit doesn't make any showing
16 that he is in any peculiar circumstances.

17 QUESTION: Did the district court finding
18 extend to him as well?

19 MR. KENDALL: The district court finding
20 extended to both me in the order that the district court
21 entered on March 11, 1980.

22 This case --

23 QUESTION: Mr. Kendall, how do you understand
24 the government to characterize the similar records that
25 are entitled to the balancing test? How would they

1 describe them? They disagree with the Court of Appeals'
2 characterization of such records. How do you think they
3 described them?

4 MR. KENDALL: I have some difficulty knowing
5 what their position is, but I don't think it in fact
6 differs very much from ours. As a definitional matter
7 it seems to me about the best you can do on the similar
8 files question is to say that something will qualify and
9 be treated as a similar file for purposes of possible
10 withholding under Exemption 6 if it implicates the same
11 kinds of personal privacy values --

12 QUESTION: Well, is that different from the
13 Court of Appeals said?

14 MR. KENDALL: I don't believe it is. I think
15 the Court of Appeals --

16 QUESTION: Well, I thought the government was
17 disagreeing with the standard the Court of Appeals
18 applied to that question.

19 MR. KENDALL: They are, but you asked me what
20 their test is. I think it's very much like what the
21 Court of Appeals did, and I think it's very much like
22 what this Court found in Rose.

23 QUESTION: So you think they're really just
24 disagreeing on the facts with the application of the
25 standard as to whether this is a similar record.

1 MR. KENDALL: I believe that's correct. I
2 don't think that definitionally there is very much
3 disagreement, because if you look at the language used,
4 whether the emphasis is on intimate or personal, the
5 thing that makes files potentially like medical or
6 personnel files is the intimacy or the personal detail
7 of those files. The government has what is a very --

8 QUESTION: Well, do you think the government
9 is suggesting that if in any particular file there's
10 something that's embarrassing or dangerous or
11 "personal," then automatically it's a similar file?

12 MR. KENDALL: Exactly. I think their
13 threshold requirement would be so expansive as to let
14 any fact, no matter how publicly known, be a matter of
15 withholding. And I think that would completely destroy
16 the threshold requirement that Congress has enacted in
17 Exemption 6, and I think it would also distort the shape
18 of the FOIA in a very significant fashion.

19 This Court has always emphasized when it
20 reviewed the legislative history of FOIA that the
21 exemptions were made exclusive, that they were to be
22 construed narrowly, and it was the government's burden
23 to show that information qualified under a particular
24 exemption. Given the government's theory, we would back
25 in the old days of Section 3 of the Administrative

1 Procedure Act which let a government agency withhold
2 information, any kind of information, simply for good
3 cause shown.

4 For all these reasons we believe that the
5 Court of Appeals' judgement should be affirmed or that
6 the Court should dismiss here as improvidently granted.

7 CHIEF JUSTICE BURGER: Very well, Mr. Kendall.

8 Mr. Geller, do you have anything further?

9 ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,
10 ON BEHALF OF THE PETITIONERS

11 MR. GELLER: Just a few things, Mr. Chief
12 Justice.

13 I hope I made the government's position
14 clearer to the Court than I apparently made it to Mr.
15 Kendall.

16 QUESTION: And to me.

17 MR. GELLER: And to you, Justice White.

18 The government's position on the threshold
19 test is that any document that refers to a specific
20 individual is a similar file. What the Washington Post
21 says --

22 QUESTION: Any -- any document.

23 MR. GELLER: Any document in the government's
24 files that mentions a particular individual is a similar
25 file. Now, all that means is that you then go on to the

1 balancing test, which is a very difficult test for the
2 government to meet. But what the Washington Post says,
3 it is not --

4 QUESTION: So you really just take out the
5 word "similar."

6 MR. GELLER: No.

7 QUESTION: You just say any other file that
8 mentions an individual.

9 MR. GELLER: Well, that is how we -- that is
10 what we think is the common denominator, what it is that
11 Congress meant when it referred to personnel or medical
12 files. Those are files that almost by definition refer,
13 mention the names of specific individuals. There are a
14 lot --

15 QUESTION: Yes, but they have particular kinds
16 of information about them.

17 MR. GELLER: And that -- well, but not all,
18 all medical and personnel files are filled with only
19 intimate details. That was the point that I made in my
20 opening argument. There's a lot in a medical or
21 personnel file that is not intimate at all. So it is
22 not the fact that a detail is intimate that's the common
23 denominator; it's the fact that it refers to a specific
24 --

25 QUESTION: Well, it's not much of a -- it's

1 not much of a threshold determination then, I take it.

2 MR. GELLER: We don't think -- we think --

3 QUESTION: It really is an empty, almost an
4 empty gesture.

5 MR. GELLER: I think -- I think not, Justice
6 White. There's a lot of information in government files
7 that doesn't refer to any individuals, and that would
8 not even pass the threshold test.

9 What Congress said, by the way, and what this
10 Court said in the Rose case is that the crucial test is
11 the balancing test, and that Congress did not intend
12 large amounts of information to be screened out from
13 even reaching the balancing test by the threshold test.
14 But that's what the Washington Post's test would do.

15 I should point out that we're dealing here
16 with a class of information. This Court's decision in
17 this case will only affect information that, a) does not
18 contain intimate details within the meaning of the D.C.
19 Circuit's test, but, b) the government could show would
20 constitute a clearly unwarranted invasion of personal
21 privacy if it were released. Because after all, if we
22 couldn't even meet the balancing test, then regardless
23 of the decision in this case, the information would have
24 to be released, and it would be of only academic
25 importance whether it had to be released because it

1 didn't pass --

2 QUESTION: Well, would you file -- would it --
3 any file that mentioned any person who is now alive or
4 dead or what?

5 MR. GELLER: I would think that it would have
6 to be a live person.

7 QUESTION: Would it be the person about whom
8 you would want to do the balancing test in?

9 MR. GELLER: Yes.

10 QUESTION: Or could it be a different person?

11 MR. GELLER: No. I would think it would have
12 to be the person about whom --

13 QUESTION: Why, if it just has to mention a
14 name?

15 MR. GELLER: It has to mention a name, but it
16 has to -- these are two parts of the same exemption.
17 They have to be related to each other. And we think --

18 QUESTION: Well, Mr. Geller, is this to
19 suggest all we need say is all "similar files" mean is
20 identify by name a given individual?

21 MR. GELLER: A particular individual.

22 QUESTION: Therefore, vacate and send back to
23 the --

24 MR. GELLER: To the D.C. Circuit.

25 QUESTION: -- Court of Appeals to apply the --

1 MR. GELLER: That's correct. I mean Mr.
2 Kendall says we're trying to relitigate the question
3 here. We'd like to have one appellate determination of
4 our argument that this would be a clearly unwarranted
5 invasion of personal privacy.

6 QUESTION: You mean you want that in the Court
7 of Appeals you suggest.

8 MR. GELLER: That's what -- we would be happy
9 to have this Court announce that it would be a clearly
10 unwarranted invasion. We think it would be improper for
11 this Court without adequate briefing -- I don't -- I did
12 not read the Washington Post brief in this case to raise
13 that alternative ground for affirmance.

14 QUESTION: Well, Mr. Geller, do you -- I take
15 it you do not agree with the District Court either.

16 MR. GELLER: That's correct. The District
17 Court found that we met the similar files test.

18 QUESTION: Well, I know, but they didn't agree
19 with you on --

20 MR. GELLER: Yes. We disagree, obviously,
21 that disclosure of this information would not constitute
22 a clearly unwarranted invasion of personal privacy.

23 QUESTION: And do you think -- if we agree
24 with you, what should we do with it?

25 MR. GELLER: If you agree with the government

1 on?

2 QUESTION: If we agree with you on the similar
3 files issue.

4 MR. GELLER: Well, we have suggested the case
5 should be remanded to the Court of Appeals for a
6 determination of whether the balancing test has been
7 satisfied.

8 QUESTION: You haven't -- have you -- you
9 haven't briefed that issue here.

10 MR. GELLER: We briefed that issue in the
11 Court of Appeals. The Court of Appeals --

12 QUESTION: I know, but you haven't briefed it
13 here.

14 MR. GELLER: No. The only --

15 QUESTION: So you don't think we should even
16 deal with that.

17 MR. GELLER: We have not -- that's correct.
18 But I don't think that Mr. Kendall should be allowed to
19 get away without answering the Chief Justice's
20 question. The Chief Justice asked whether the
21 Washington Post test in this case takes any account of
22 the fact that someone might be harmed by the release of
23 this personal information, and the answer I heard had
24 something to do with balancing, which I didn't
25 understand.

1 The question -- the upshot of the D.C.
2 Circuit's test which the Washington Post embraces in
3 this case is exactly that. The fact that someone might
4 be harmed is irrelevant if, if the information is not an
5 intimate detail, because then it can't meet the
6 threshold test, and you never have to reach the
7 balancing test.

8 QUESTION: I took his answer to mean that
9 that's the law and that's the end of it.

10 MR. GELLER: That is another answer that he
11 gave, Mr. Chief Justice, that the President could -- at
12 the moment the FOIA has nothing to say about the
13 matter. It can be dealt with. The President could
14 issue some executive order. Perhaps Exemption 1 would
15 then cover the situation.

16 QUESTION: But, counsel, did the district
17 court when it applied the balancing test consider the
18 danger to the individual?

19 MR. GELLER: I assume it did. The district
20 court did not write an opinion.

21 QUESTION: You assume it did?

22 MR. GELLER: Yes. Well, we don't know what --

23 QUESTION: And rejected it.

24 MR. GELLER: We must assume that. It was
25 presented to the district court.

1 QUESTION: All right. And then if we sent it
2 back to the Court of Appeals, would it have to apply the
3 clearly erroneous standard?

4 MR. GELLER: That is an interesting question,
5 Justice O'Connor. I'm not sure that I've seen any case
6 law on what the standard is. It is in a sense and in
7 some ways a factual determination, and perhaps the
8 clearly erroneous standard would apply. But that is not
9 something that I have seen litigated.

10 QUESTION: I don't see where even if you won
11 up here you'd gain anything.

12 MR. GELLER: Well, we would gain the
13 opportunity to have an appellate resolution of the
14 question of whether the disclosure of this information
15 would be a clearly unwarranted invasion of personal
16 privacy.

17 QUESTION: And would you say that even a
18 congressional act that, for instance, required certain
19 employees to file certain public information statements
20 or reports would fall in the similar files category, so
21 that the court has to balance whether that ought to be
22 released to the public?

23 MR. GELLER: If the government would withhold
24 that information, which is very likely -- we're only
25 talking here -- obviously the government can release

1 the information under the FOIA. We're talking about a
2 case that the government has decided not to release
3 because it believes it would constitute a clearly
4 unwarranted invasion of personal privacy.

5 The fact that it relates to --

6 QUESTION: But you would say technically it
7 was a similar file.

8 MR. GELLER: We would say it's a similar file,
9 and the fact that it is public or is required to be
10 filed publicly would be very, very weighty in terms of
11 how the balancing test should come out, and it would
12 almost certainly have to be disclosed. But that's a
13 separate question from saying that the government is not
14 even entitled to make its argument that it would be a
15 clearly unwarranted invasion of personal privacy.

16 Now, just one or two more things, if I may.
17 Justice Powell asked a question about whether harm is
18 something the Congress was concerned about, physical
19 harm, when it passed Exemption 6. And the answer that I
20 heard is that the legislative history is clear that
21 Congress didn't mean to include that.

22 And I would refer the Court to the House
23 report which is quoted at page 19 of the government's
24 brief in which the House says that, "The limitation,
25 Exemption 6, provides a balance between protection of

1 the right to privacy and the preservation of the
2 public's right to government information by excluding
3 those kinds of files, the disclosure of which might harm
4 the individual." So we agree with Mr. Kendall that the
5 legislative history is clear.

6 And just finally in response to Justice
7 Stevens' question, the regulations do provide that when
8 an American citizen expatriates himself that the State
9 Department is to send the record to the INS, which is to
10 send the record to the Naturalization Court. As Mr.
11 Kendall said, there's nothing in the regulation that
12 prohibits keeping that information secret when it's
13 filed; but there is another answer as well, and that is
14 that the regulation doesn't provide any time limit
15 within which the State Department has to forward the
16 information to the INS or the INS has to forward the
17 information to the Naturalization Court.

18 So it might well be -- we don't know whether
19 the INS in fact gave the information to the Washington
20 Post that they suggest -- but it might well be that the
21 INS was totally unaware if in fact Mr. Yazdi had
22 expatriated himself, if in fact he was a citizen to
23 begin with.

24 Thank you.

25 CHIEF JUSTICE BURGER: Thank you, gentlemen.

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UNITED STATES DEPARTMENT OF STATE, ET AL. v. THE WASHINGTON POST COMPANY
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BY Sharon Lynn Connelley

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