ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1616

TITLE UNITED STATES, Petitioner v.
WEBER AIRCRAFT CORPORATION, ET AL.

PLACE Washington, D. C.

DATE January 11, 1984

PAGES 1 thru 37

ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.

IN THE SUPREME COURT OF THE UNITED STATES

- -x

UNITED STATES, :

Petitioner :

v. : No. 82-1616

WEBER AIRCRAFT CORPORATION, :

ET AL. :

- -x

Washington, D.C.

Wednesday, January 11, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

SAMUEL A. ALITO, JR., ESQ., Washington, D.C.;
on behalf of Petitioner.

JACQUES E. SOIRET, ESQ., Los Angeles, Calif.;
on behalf of Respondent.

C O N T E N T S

- - -

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll hear arguments first this morning in United States against Weber Aircraft Corporation. Mr. Alito, you may proceed whenever you're ready.

ORAL ARGUMENT OF SAMUEL A. ALITO, JR., ESQ.,

ON BEHALF OF PETITIONER

MR. ALITO: Mr. Chief Justice and may it please the Court:

This case concerns the continued existence of an important part of the Armed Forces program of aiation safety. Specifically, the issue is whether statements made in confidence to military aviation safety investigators must be disclosed under the Freedom of Information Act, even though those statements would be privileged in civil discovery.

When an Air Force plane is involved in an accident, two separate investigations are generally conducted. The first is called a safety investigation and, as the name implies, its sole purpose is to prevent future accidents. Witnesses are advised that their statements will be used exclusively for purposes of safety and will be kept confidential. In addition, Air Force members and employees are assured by regulation that their statements will not be used against them in

administrative or disciplinary proceedings.

Under present practice, the safety investigation compiles a two-part report. The first part contains facts except for those facts derived from confidential statements. This part of the report is disclosed under the Freedom of Information Act. The second part contains confidential statements as well as the findings, analysis and recommendations of the safety investigation. This part is not disclosed.

Within the Air Force, the safety report is used, of course, for safety purposes and is distributed strictly on a need to know basis. In addition, to the extent practicable all identifying details are removed.

At the same time, a second, separate investigation is also conducted. This is now called an accident investigation, but at the time in question here was termed a collateral investigation. Its purpose is to collect and preserve evidence for all purposes other than safety, for use in courtsmartial and administrative and judicial proceedings, in litigation and other purposes.

Statements given by witnesses to the first investigation, to the safety investigation, are not disclosed to the accident investigation, but a list of the witnesses is provided. Therefore, the second,

accident investigation will generally interview the same witnesses and is required to do so by regulation as soon as possible. This entire report is disclosed to the public. The other military services follow similar procedures.

For more than 20 years now since the D.C. Circuit's decision in Machin versus Zucker, statements made in confidence to military aviation safety investigators have been privileged in civil discovery, and Respondents have not challenged the validity or scope of that civil discovery privilege.

In hundreds of cases, Air Force safety --

QUESTION: Do they concede its validity, Mr. Alito?

MR. ALITO: I don't believe they expressly concede its validity, but I don't read their briefs as challenging the availability of that.

QUESTION: While I have you interrupted, are we going to have to decide, whatever is the scope of the Machin privilege, whether it's valid as a matter of civil discovery law?

MR. ALITO: I don't believe so, Justice Brennan.

QUESTION: Why not? We've never addressed that, have we?

MR. ALITO: The Court of Appeals assumed the validity of the statement and the question really before this Court is whether -- excuse me --

QUESTION: Have we ever addressed the validity under federal civil discovery law of the Machin privilege?

MR. ALITO: I don't believe the Court has. But the issue decided by the Court of Appeals and that we brought here was whether these statements would be subject to disclosure under the Freedom of Information Act, assuming that they would be privileged in civil discovery.

Since the recognition of this privilege in the Machin decision, Air Force safety investigators in hundreds of cases have compared the statements made by the same witnesses regarding the same accidents to these two separate investigations and, not surprisingly, this comparison has disclosed, human nature being what it is, that the statements made to the safety board, which are made under promises of confidentiality, frequently contain valuable information that is not disclosed to the accident board.

Indeed, it is of course for precisely this reason that --

QUESTION: Are the witnesses testifying under

oath to the accident board, Mr. Alito?

MR. ALITO: Air Force members and employees testify under oath in the accident investigation, but not in the safety investigation.

QUESTION: And what, do they swear to tell the truth, the whole truth, and nothing but the truth?

MR. ALITO: I assume they do, Justice Rehnquist.

QUESTION: Well then, isn't it odd that they would tell more to the safety board than to the accident board, if they have taken the oath in their testimony to the accident board?

MR. ALITO: Well, I don't think it's odd. I think that's human nature. People will protect themselves when there's a possibility that their statements may be used against them. When they are supplying information solely for the purpose of preventing injury to their colleagues, they will be more forthcoming if they are protected against any possible use of those statements against them.

Perhaps it's unfortunate, but I think that that is a well recognized fact of human nature.

QUESTION: Is it a possibility that there might be better questions in one inquiry than in the other?

MR. ALITO: I think that's unlikely, Mr. Chief Justice. Both boards are composed of experienced rated officers and commanders are required by regulation to make all necessary technical expertise available to both boards. So I think there is no basis for concluding that the questions asked by the first board are better than the questions asked by the second board.

And in addition, since the safety investigation precedes the accident investigation, if the safety investigator happened to ask a particularly -- excuse me -- the safety investigation happened to ask a particularly good question and the witness remembered it, he might well volunteer that information when he was questioned later by the accident board.

QUESTION: Mr. Alito, does the record show that these witnesses whose statements are being withheld actually were promised confidentiality?

MR. ALITO: I believe it does, Justice Blackmun. I think that both of the lower courts found that confidentiality had been offered. I don't believe that Respondents raised that issue below, but if they did raise it I think it was rejected by both of the lower courts.

In any event, there was an uncontroverted affidavit filed in district court, which is reproduced

in our joint appendix, in which the responsible Air Force official claims that these statements had been obtained under pledges of confidentiality, and as far as I am aware there has been no factual refutation of that.

In any event, that was certainly not the basis for the Court of Appeals' decision. The Court of Appeals' decision was certainly based on the presumption that these were confidential witness statements.

The information that is contained in these confidential statements has contributed to a dramatic improvement in military aviation safety. It is really no exaggeration to say that in many instances it has saved lives, it has prevented the loss of valuable aircraft, and it has contributed to the national defense.

Now, in the present case an Air Force officer, Captain Richard Hoover, was seriously injured when he ejected from his plane. He sued Respondents, who are the manufacturers and designers of some of the ejection equipment, and they then sought release of the Air Force reports.

The Air Force disclosed the entire accident report and the factual portions of the safety report, but under the Machin privilege withheld the confidential

witness statements. Respondents then filed Freedom of Information Act requests and ultimately brought suit. The district court upheld the Air Force under exemption 5, but the Ninth Circuit reversed. Assuming that the statements would be privileged in civil discovery, the court nevertheless concluded that exemption 5 did not incorporate the Machin privilege.

As I said, then, the issue before the Court is whether these confidential statements must be disclosed under the Freedom of Information Act, assuming that they would be privileged in civil discovery. But it's important to recognize that if statements of this sort are available under the Freedom of Information Act, then the civil discovery privilege is effectively abolished because litigants like Respondents will always be able to get those statements under FOIA.

Let me stress at the outset that protecting documents like this would not in any way undermine the purpose of the Freedom of Information Act, because at least from a perspective looking forward the issue in this case, unlike some Freedom of Information Act cases, is not whether a certain type of information will or will not be available to the public.

We are talking here about a kind of information that witnesses simply will not divulge

unless confidentiality is assured, and this is demonstrated by the Air Force parallel investigation with almost scientific precision. The accident investigation serves as a sort of control group. As I said, a witness to an Air Force accident is generally questioned twice, first by the safety board and then by the accident board. The safety board promises confidentiality; the accident board does not.

If the safety board could not make those promises of confidentiality, then the statements they receive would be essentially the same as the statements already received by the accident board and already available to the public, and therefore the public would not have any more information than it has at present, but those responsible for military aviation safety would have significantly less.

In our view, neither the language of the Freedom of Information Act nor the statute nor the legislative history supports this senseless result. First, the statutory language. Exemption 5, of course, protects inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. And what this means, as the Court has explained on a number of occasions, is that exemption 5 protects those

documents normally privileged in civil discovery.

Here, as I stated, the Court of Appeals correctly assumed that these statements would be privileged in civil litigation.

QUESTION: Mr. Alito, may I ask one question. Which of the two investigations takes place first?

MR. ALITO: The safety investigation -- well, let me qualify that, Justice Stevens. The two investigations take place at essentially the same time, but the safety investigation has priority in examining witnesses and in examining tangible evidence.

QUESTION: It would seem to me -- I'm just thinking out loud -- that in response to your argument that the net result will be the same if you cut out the confidential investigation, that you'd get the other anyway, isn't it conceivable that the second investigation might omit some areas of questioning that they explored in the first, that they might not have if they just were starting from scratch?

MR. ALITO: I don't see that there's any reason to believe that the questioning in the second investigation will be appreciably different from the first. The second -- the interviews by the accident board, as I said, are required by regulation to take place as soon as possible after the witnesses are

released by the safety investigation. And I am informed that in appropriate cases witnesses have even been permitted to refresh their recollection by reviewing their statements to the safety investigation before they testify to the accident board.

So, while of course it's always possible that two questioners will not ask the same questions and that one will omit an important question asked by the other, I don't think there's any reason to believe that that will occur in many instances under this setup.

QUESTION: Do the officers who conduct the accident investigation have access to the safety investigation report at the time they conduct the investigation?

MR. ALITO: No. They have access to part one of the safety investigation.

QUESTION: Just the public part?

MR. ALITO: Which is the public part. And they have access to a list of witnesses, so they can interview the same witnesses. But they are always different people and they do not have access to the confidential information.

QUESTION: Mr. Alito, at the time this Freedom of Information Act suit was brought the United States had not been joined as a party to the litigation brought

by Hoover?

MR. ALITO: I believe the United States was originally a party and was dismissed.

QUESTION: So that the analogy, then, if the United States was not a party at the time this suit was brought would be a kind of third party discovery, whether the United States could have been subpoenaed to produce this stuff as a third party that wasn't in the litigation?

MR. ALITO: I am not completely sure of the chronology. I believe that the requests for discovery were made before the United States was dismissed, and I believe the district court expressed -- I know that the district court said that he was inclined to deny those discovery requests. I don't believe that Respondents pressed their discovery requests. They then turned around and filed a Freedom of Information Act suit.

QUESTION: But the assumption of the district court and the Court of Appeals was that those requests would have been properly denied?

MR. ALITO: That's correct.

QUESTION: What if a witness -- a witness, is he subject to contempt or some penalty if he doesn't show up? Is there a subpoena power?

MR. ALITO: There is not subpoena power.

Members and employees of the Air Force may be ordered to testify before these boards.

QUESTION: If they don't they're shot at dawn?

(Laughter.)

MR. ALITO: I don't know what the question is.

QUESTION: Well, is there some sanction? What if somebody says, I just don't want to answer that question, it's too embarrassing?

MR. ALITO: I assume there is a sanction for refusal to obey a lawful order. I could not tell you exactly what the punishment would be in this instance.

I don't understand Respondents or the Court of Appeals to have made a serious effort to reconcile their interpretation of exemption 5 with the statutory language that I just discussed. Instead, they look past the statutory language to the legislative history. That is the heart of their argument.

And yet what is curious is that even there they do not find any positive support for their argument. On the contrary, all the evidence in the legislative history indicates that Congress meant what it said when it enacted exemption 5. Both the House and the Senate reports state that the purpose of exemption 5

was to protect those documents normally privileged in civil discovery, and of course as I said the statements here were assumed to fall into that category.

Now, it's true that both reports specifically mention a couple of exemptions, but there is absolutely no reason to believe that those passing references were intended to constitute an exhaustive list of the incorporated privileges.

In addition to all of this, there is even specific evidence in the legislative history that Congress focused on the desirability of protecting the very type of statements involved in this case. When the hearings were held on exemption 5, that provision would not have protected statements of this sort. It was limited to documents dealing solely with matters of law or policy.

At the Congressional hearings a number of witnesses pointed out that these statements were then privileged in civil discovery and should not have to be disclosed. Congress thereafter amended exemption 5 to protect those documents not routinely disclosed in civil litigation, and Congress accomplished this by recasting exemption 5 in language similar to exemption 7 as it was then framed.

Respondents argue that these statements must

nevertheless be disclosed because these facts do not conclusively establish that Congress had the Machin privilege specifically in mind when it amended exemption 5. But this argument really turns the usual rules of statutory interpretation upside-down.

Respondents are arguing that exemption 5 must be construed in a way that is contrary to the legislative history, not because there is positive evidence supporting their interpretation in the legislative history -- excuse me. They are arguing that exemption 5 must be construed in a way that is flatly contrary to the statutory language, and they make the argument not because there is positive evidence supporting that interpretation in the legislative history, but because in their view the legislative history fails to show with sufficient clarity that Congress meant what it said.

This is really one of the oddest methods of statutory construction ever advanced. The basis for this method of statutory construction is dictum in this Court's decision in Merrell. But neither the Merrell dictum nor the holding in that case supports their conclusion.

In Merrell the Court noted that it is not clear that exemption 5 incorporates every known civil

discovery privilege, and the Court also observed that any claim that a privilege other than the two specifically noted in the legislative history was incorporated into exemption 5 would have to be viewed with caution.

The apparent basis for this observation as we read the opinion was the recognition that Congress dealt with certain civil discovery privileges in other exemptions and may have intended to modify their scope. But here the Machin privilege does not substantially duplicate any other FOIA exemption, and I think that it is unreasonable to read the caution prescribed by Merrell as requiring that exemption 5 be construed in a way that is contrary both to the statutory language and to all of the affirmative evidence in the legislative history.

QUESTION: Mr. Alito, does the legislative history reflect that the consideration by Congress of these safety investigations and the request for making an exemption for them was addressed really to the exemption 7 provisions, rather than exemption 5? And of course, as exemption 7 turned out it was limited to law enforcement investigations.

Now, would a fair reading of the legislative history indicate that that's the context in which the

safety investigations were discussed?

MR. ALITO: The references by the Justice Department did not mention any specific privilege as I recall, any specific exemption. The references by the Defense Department did refer to exemption 7, but I think that that actually supports our argument because, as I noted, Congress amended exemption 5 by recasting it in language similar to exemption 7 as it was then framed.

At the time of the hearings, both exemptions 5 and 7 read very differently than they do now. As I said, exemption 5 applied to documents "dealing solely with matters of law or policy" and exemption 7 concerned documents compiled for law enforcement purposes, except to the extent available by law to a private party.

What Congress did was to amend exemption 5 to protect documents that would not be available by law to a private party in litigation with the agency, which is language very similar to the language in exemption 5, as Justice Powell observed in his opinion in the Robbins Tire & Rubber case.

So I think that if anything the Defense Department's references to exemption 5 tend to show that Congress was listening carefully to what the Defense Department recommendation was. But our essential argument is that the protection of these privileges

follows from the statutory language, and since there is -- whatever else one may say about the legislative history, it certainly does not clearly show that Congress had a contrary intent, and therefore the statutory language controls.

QUESTION: Do you think that courts generally have given the statutory language in Section 5 its literal meaning, or has there been some indication, not only in this Court, in others, that we have to be careful about applying it as it appears to be written?

MR. ALITO: I think the Court has expressed the view that exemption 5 may be unclear in ways that are not related to this case. But I see nothing unclear about it insofar as it applies here. It protects documents that would not be available by law to a party other than an agency in litigation with an agency.

Weber Aircraft Corporation and the other Respondents are parties other than an agency. These documents would not be available to them by law in litigation with the agency, the Court of Appeals assumed, and they have not contested that. So I fail to see that there's any ambiguity in the language insofar as it applies here.

And certainly there can't be a claim that this is properly dealt with in another FOIA exemption,

because I see no other exemption that is related in any substantial way to the privilege at issue here.

QUESTION: Mr. Alito, you rely a good bit on the D.C. Circuit's Machin case, don't you?

MR. ALITO: Yes.

QUESTION: Am I correct in my impression that there the court held that the Air Force mechanic's factual statements were not privileged?

MR. ALITO: That's correct, Justice Blackmun.

QUESTION: How do you distinguish that from Captain Hoover's statements here, he being an employee of the Air Force?

MR. ALITO: Captain Hoover was a person who was involved in the accident and he made a statement under promises of confidentiality, because of course he had a good deal to gain or lose depending upon the nature of his statements.

In Machin or Machin, the Air Force mechanics were people who examined the wreckage after the accident took place, and what they discovered was in the nature of the facts that would now be placed in part one of the safety report. They were simply disinterested technical people who were examining the tangible evidence, and they really had nothing identifiable to gain or lose by shading their statements one way or the other.

I think the court's reference to private parties in that case was meant, as I think your question suggests, to distinguish between the statements of people who testify under pledges of confidentiality and people like the mechanics, who simply provide factual information and would now be placed in part one of the safety report.

In conclusion, the statements involved here fall within the plain language of exemption 5. Everything in the legislative history indicates that Congress intended to protect documents of this sort, and requiring the disclosure of statements like this would not serve the purposes of FOIA because it would not make any more information available to the public or to the press than is available already. It would simply mean less information for those people trying to prevent military aircraft crashes.

We therefore ask that the judgment of the Court of Appeals be reversed.

CHIEF JUSTICE BURGER: Mr. Soiret.

ORAL ARGUMENT OF JACQUES E. SOIRET, ESQ.,
ON BEHALF OF RESPONDENTS

MR. SOIRET: Mr. Chief Justice, may it please the Court:

The materials at issue before this Court are

two witness statements and a life science report that are ten years of age, that have previously been released.

The Freedom of Information Act represented a dramatic legislative mandate and in our view a substantial reversal of the previous policy with respect to how Government agencies were to treat the materials with which they had cognizance. The principal objectives of this full disclosure I don't think need be gone into in oral argument. They're set forth very clearly in Justice White's -- the Court's opinion through Justice White in the Mink case.

Our position in this case is simply this: that the materials at issue here are not included within exemption 5. They are purely factual.

Pursuant to Justice Blackmun's question a moment ago drawing the distinction between the mechanic's report in Machin and Captain Hoover's reports here, I don't think that there is a distinction. The mechanics of course don't simply look at the evidence. One of the things that they are required to do is to determine whether there have been maintenance or installation errors. You may characterize those as factual or not. We presume that they were given the same promises of confidentiality during their portion as

were the rest of the witnesses.

In reviewing the legislative history of exemption 5, I think we first have to look to what I consider to be, at least Respondents do, the lead case, and that's the Mink case, because that gives us the guidelines as to what we are to do to determine and what the Circuit Courts are to do.

QUESTION: Why wouldn't you look first at the language of the statute?

MR. SOIRET: I think if you do look at the language of the statute, the Court reflected in Merrell that in order to determine the scope and what it means you have to make an examination of the legislative history. When the statute says you don't have to turn over in litigation with the agency not required by law, what does that mean? The Court in Merrell said we have to examine the legislative history to make that determination.

So I think you do look squarely at the statutory language, but then you must determine whether or not that, the Machin privilege, is assumed into exemption 5.

QUESTION: What is it that you think is unclear about the statutory language? It says "memoranda or letters which would not be available by

law to a party in litigation with the agency"?

MR. SOIRET: It is not so much, Justice Rehnquist, that it's unclear. It's what meaning does it have. In Merrell, the same language was at issue and this Court said we must examine the legislative history to see what "available by law" means, and that's exactly what the Ninth Circuit did in Weber, and that's what I believe this Court did in Merrell. It searched the legislative history.

QUESTION: You say it's "available by law" that's unclear and that needs refinement by looking at the legislative history?

MR. SOIRET: It needs a determination to see what is it that Congress meant when it used the words "available by law". What did it mean?

The same common sense approach which was referenced in Mink and the no wooden formula caveat which that opinion contains are very useful. Exemption 5 does not incorporate a privilege for witness statements and factual reports.

The Government argued in the Merrell case that 5 incorporated several discovery privileges besides the executive predecisional or deliberative privilege and the attorney privileges. The Court in its opinion said it's not clear that 5 incorporates all of these

privileges, and Justice Stevens in his dissent indicated that the Court admirably recognizes the danger of incorporating all of the known discovery privileges.

QUESTION: Counsel, the Court of Appeals did assume that the statements were not discoverable in civil litigation under Machin?

MR. SOIRET: The Court of Appeals made that explicit assumption.

QUESTION: And you didn't file, I guess, a cross-petition?

MR. SOIRET: No, we did not.

QUESTION: So do we then have to make the same assumption for purposes of this case?

MR. SOIRET: For the purposes of this determination, I think you have to be guided by the assumption that the Ninth Circuit made, and that assumption of course is arguendo, because they then went into the examination of the legislative history and found the Government's position wanting.

QUESTION: Yes, but do you concede that Machin is good law?

MR. SOIRET: I concede that the Machin case established a privilege prior to the Freedom of Information Act. Subsequent to the Freedom of Information Act, in that context, I do not concede it's

good law at all, because I think the Freedom of Information Act absolutely dispenses with the basis upon which the privilege in Machin was grounded, and I'll get to those comments in a moment.

QUESTION: Is there anything in the legislative history that suggests that Congress explicitly intended to modify that holding of the Court of Appeals?

MR. SOIRET: There is tremendous legislative history, Mr. Chief Justice, which reflects not only with respect to number 5, but with respect to exemptions 7 and 3, that Congress very specifically gave us legislative history to indicate to us that they had no intention of incorporating this Machin decision in exemption 5.

Just a last word on Merroll. Our understanding of the Merroll decision is the Court, after making a review of the legislative history, both houses, found support in that legislative history for the qualified commercial information privilege which the Court found in that case. And analysis of the privilege, or any other privilege, as the Court said, must be viewed with caution.

If it's a privilege other than those recognized in the legislative history which the Court

reviewed, we ought to look at it with caution. And it's the Respondent's position that the caution ought to become in the nature of a red alert when the privilege which is being offered for consideration is one based on an efficiency of the agency, public interest standard, which is the identical standard that was swept away by the Freedom of Information Act.

We believe that the privilege here is a pre-- that is, Machin -- is a pre-FOIA privilege for non-Government witness statements, announced in 1963. And a review of the Machin rationale for that decision indicates that it is absolutely counter and directly contrary to the Freedom of Information Act and the cases of this Court which interpreted that Act.

So Merroll says to us, let us look at the legislative history and what does it tell us specifically about the exemption at issue. It is our position that exemption 5 has nothing to do with Machin, never did, neither in its original form nor in its amended form, as the Solicitor General's Office points out. However, we disagree. We certainly concede it was amended, but it was amended, we believe, because it had to deal with the question of should the agency disclose or withhold documents not purely law or policy, but those which contained mix documents. That is the reason

in our view for the amendment of exemption 5. It had nothing to do with Machin.

A review of the legislative history for exemption 5 will reveal, we believe, no member of Congress ever referred to a Machin privilege nor was it suggested, nor indeed under exemption 5 did the Government ever even assert that it ought to be included.

Congress specifically refused to attach any viability to the Machin privilege in this context. During the Senate hearings both the Department of Defense and the Justice Department specifically asked Congress to give them relief and to give them under amendment 7 the governmental investigation exemption, a Machin privilege. And during those hearings they argued before the Congress that there wasn't a provision protecting the material.

What material? The Machin-type privilege aircraft accident material in the context of exemption 7. They specifically requested that relief.

In addition, in addition to the testimony before both houses of Congress, there were written comments which were sent to the House and the Senate. The Departments of Defense and Justice asked for the Machin privilege to be incorporated into 7.

Congress refused and left exemption 7 exactly the way it was, and refused to provide to them the specific protection that they asked for, and they left it only for the investigation files and confidential material for law enforcement purposes.

The Government suggests in its brief that Machin was discussed during discussions concerning amendment 5. We pointed out in our brief that we believe that position to be in error and the legislative history in our belief indicated that it was 7 to which these discussions were concerned.

The Government's reply brief makes a curious point. It appears to admit that the discussions took place with respect to 7, but nonetheless suggested that Congress must have amended number 5 to reflect the Government concerns. I just don't think that there's any support whatsoever in the legislative history for that position.

And we don't only have to look to see that the Government refused to amend exemption 7 to give the Government -- Congress to amend exemption 7, to give the Government that which they're seeking. In addition to going to Congress to exempt these materials under 7, the Government has gone to Congress twice and requested specific legislation pursuant to exemption 3, which

allows the Government to withhold material if there is a specific statute authorizing the withholding; has gone to Congress and twice requested specific authorization, both in 1980 and 1983, and requested that there be statutory language passed allowing a Machin-type privilege so that the material such as at issue in this case could be withheld.

In 1980 the Department of Defense sent a request for legislation and draft legislation to the Congress. It was never acted on by either house. In 1983 the Executive Branch sent to the Senate proposed legislation which found its way into the defense authorization bill without debate, but when the House and Senate Conference Committee got together the matter was struck out in its entirety and deleted and sent back for further study. The legislative history reflecting that further study is reportable to the Congress on January 15th of 1984.

That, we believe, is the legislative history review that the court engaged in in the Merroll case in order to determine whether or not the materials were available by law to a party in litigation with the Government. There isn't any legislative history to support whatever that the 1963 opinion of Circuit Judge Washington was intended to be incorporated in exemption

5.

The legislative history we believe is quite to the contrary. We note in footnote 2 of the Merroll decision Justice Stevens pointed out that it was indeed curious that the agency there before the Court sought relief under exemption 4 and was turned down, and the Court in its majority opinion found that relief appearing in exemption 5.

We have a very similar situation in this case. Justice and the Department of Defense have gone to Congress under two other exemptions and tried to get the protection which they know in our view is not available to them under number 5. So in addition to the legislative history, which we think is clear that there just wasn't any intent, it's not one of the enunciated privileges of attorney-client, work product, the executive predecisional privilege, or the qualified confidential commercial privilege which the Court found in Merroll from a review of the legislative history.

In addition, there are some analogous materials which I think are helpful in determining, did the Court intend a Machin-type discovery to be included. The Court will recall that after its decision in FAA versus Robertson the Congress reversed that particular case specifically, and what was really at

issue here, the identical type of aircraft investigation materials that are available in this case, only under the cognizance of the Federal Aircraft Administration, the identical type material.

And the Court -- and the Congress in short order reversed that particular holding of the Court, although it was an exemption 3 case, and said that it would not permit the Federal Aircraft Administration to withhold aircraft safety information because it felt it was in the efficient interest of the agency and was in the public interest. They simply --

QUESTION: I'm still confused, going back to the original question that I asked. If you felt that the material involved in this case is exactly the type that the Machin court would have released, why was no cross-petition filed, then, when the Court of Appeals said it's covered by the Machin privilege?

MR. SOIRET: Well, because the Court of Appeals indicated a remand and said the material that we were seeking would be released subject to the remand, and a decision was made not to file a cross-appeal.

QUESTION: But when it came up here then we're faced with this problem, of course.

MR. SOIRET: That's true, Justice O'Connor. It was a tactical decision not to do that.

In addition to the FAA versus Robertson situation, Congress has made other clear indications of its intent, and it mandated the National Transportation Safety Board in the Independent Safety Board Act to direct that the information be released, the identical type of information that the Air Force seeks to withhold in this case, information which concerns itself with safety and safety investigations.

We think that the legislative history review which is called for in Merrell and which I believe is a cornerstone of the Ninth Circuit Court opinion in this case, a review of that legislative history will indicate that there isn't any support for the idea that a Machin-type privilege is one which ought to be included into exemption 5. Indeed, a review of the legislative history of the other exemptions in which the Government has sought protection indicates quite to the contrary.

For these and the reasons set forth in our brief, we believe the opinion of the Ninth Circuit should stand.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Alito?

REBUTTAL ARGUMENT OF SAMUEL A. ALITO, JR., ESQ.,
ON BEHALF OF PETITIONER

MR. ALITO: I have several very brief points.

First, as a factual matter I think it is not true, as Respondents state, that the issue of the life sciences report is before the Court. We specifically did not petition on that issue. That is at page 8, footnote 9, of our petition.

Second and much more importantly, Respondents concede that for purposes of this argument the statements at issue would be privileged in civil discovery. Yet they nevertheless argue that these documents must be turned over to them under the Freedom of Information Act. We fail to see what possible sense this argument makes.

They are themselves litigants in a suit and they are seeking these documents for purposes of discovery. It just doesn't make any sense for documents to be privileged in civil discovery, yet available to litigants under the Freedom of Information Act.

I think in argument Respondents have again reiterated this very odd method of statutory construction. Without making any serious effort to reconcile their interpretation with the statutory language, they argue that the statements must nevertheless be turned over because the legislative history in their view fails to show with sufficient clarity that Congress meant what it said in exemption

5. This is not the way statutes are usually constructed.

And finally, I think it makes no sense to argue that the Defense Department requests for clarifying legislation in this area have elicited any Congressional skepticism about the validity of the Machin privilege. In the Ninety-Sixth Congress, with only a one-day hearing the House Committee reported out favorably a measure much broader than the issue, the question at issue here. But unfortunately that measure died because the term of Congress expired shortly thereafter.

In the present Congress the Senate, without conducting any hearings, passed the measure that would have provided equivalent relief, but no such provision was contained in the House bill and the conferees deferred passage pending the submission of some explanatory material.

Certainly, I think one cannot read any Congressional skepticism about the need for protecting these statements into those actions. And I think it is also well settled that an agency's requests for clarifying legislation should not elicit adverse inferences, for otherwise agencies would hesitate to do that and the task of clarifying statutory ambiguities

would rest even more heavily on the Judiciary than it does at present.

Thank you.

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

(Whereupon, at 10:51 a.m., oral argument in the above-entitled matter was submitted.)

* * *

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:

#82-1616 - UNITED STATES, Petitioner v. WEBER AIRCRAFT CORPORATION, ET AL.

---

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

BY _____

(REPORTER)