ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1075 & 83-1249

TITLE CENTRAL INTELLIGENCE AGENCY, ET AL., Petitioners v. JOHN CARY SIMS, ET AL. and JOHN CARY SIMS, ET AL., Petitioners v. CENTRAL INTELLIGENCE AGENCY, ET AL.

PLACE Washington, D. C.

DATE December 4, 1984

PAGES 1 - 43

ALDERSON REPORTING

(202) 628-9300

[illegible] N. W.

IN THE SUPREME COURT OF THE UNITED STATES

- -x

CENTRAL INTELLIGENCE AGENCY, :

ET AL., :

Petitioners :

V. : No. 83-1075

JOHN CARY SIMS, ET AL. :

and :

JOHN CARY SIMS, ET AL., :

Petitioners :

V. : No. 83-1249

CENTRAL INTELLIGENCE AGENCY, :

ET AL., :

- -x

Washington, D.C.

Tuesday, December 4, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 o'clock a.m.

APPEARANCES:

RICHARD K. WILLARD, ESQ., Acting Assistant Attorney General, Civil Division, Department of Justice, Washington, D. C.; on behalf of petitioners in No. 83-1075 and respondents in 83-1249.

APPEARANCES: (Continued)

PAUL ALAN LEVY, ESQ., Washington, D. C.; on behalf of respondents in No. 83-1075 and petitioners in No. 83-1249.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Williard, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF RICHARD K. WILLARD, ESQ.

ON BEHALF OF PETITIONERS IN NO. 83-1075 AND

ON BEHALF OF RESPONDENTS IN NO. 83-1249

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

This case presents the question of whether scientific researchers utilized by CIA during the 1950s and '60s in Project MKULTRA are intelligence sources within the meaning of Section 403(d)(3) of the National Security Act of 1947, and thus exempt from disclosure under Exemption 3 of the Freedom of Information Act.

I am going to argue today, first, that the Court of Appeals incorrectly interpreted the National Security Act, and second, that nothing in the Freedom of Information Act supports or requires the Court of Appeals' interpretation.

Now, the Court of Appeals adopted a two-part test for deciding if a person or institution is an intelligence source under Section 403(d)(3). The first part of the test dealt with the relevance of the information provided by the course to CIA's intelligence function, and the second part of the test dealt with the

need for confidentiality of that source.

The first part of the tes is not an issue here today. The District Court found that CIA could reasonably determine that this research, referring to Project MKULTRA, was needed for its intelligence function, and the Court of Appeals affirmed, and the Respondents did not seek this Ccurt's review of that issue.

The second part of the two-part test is the issue today. The Court of Appeals held that an intelligence source must provide information of a kind that CIA could not reasonably expect tc obtain withcut guaranteeing the confidentiality of those who provide it. It is cur position that this second part of the two-part test created an unwarranted and unreasonable gloss on the plain language of Section 403(d)(3).

The practical consequences of this second part of the test, especially as spelled out by the Court of Appeals in its second opinion in Sims, is to exclude three categories of sources which we believe Congress clearly intended to be covered under the 1947 Act. The first excluded category are cpen sources, pericdicals, radio broadcasts, public speeches, and the 1947 Act's legislative history shcws Ccngress was infcrmed that the bulk if not the majority of our intelligence would be

developed from precisely those kinds of open sources.

The second category excluded by the Court of Appeals' definition are unwitting sources, that is, sources that don't know they are providing information to CIA when they provide information to someone they think may be a trusted confidant or perhaps even a fellow conspirator in their activities. Again, it is hard to see how these sources can be protected under the Court of Appeals definition. Since they don't ever know they are being sources, it is hard to see how they can require a pledge of confidentiality.

Finally, and perhaps most shockingly, the Court of Appeals definition excludes even sources who ask for and receive an express pledge of confidentiality from CIA if either they are, as the Court of Appeals said, unreasonably and atypically leery of cooperating with CIA, or if they are providing the type of information that CIA could have obtained readily and openly from other sources.

The harms of this narrow definition adopted by the Court of Appeals are evident. Among other things, revealing these kinds of sources will necessarily reveal the topics of interest to CIA which it is pursuing, even if it is pursuing those topics of interest by trying to develop information from open sources. More

importantly, in many cases, the inability to preserve the confidentiality of sources will cause them to dry up. As this Court recognized in its opinion in Snepp, providing confidentiality of intelligence sources may be vital to assuring their continued cooperation.

The point of all of this is not that the Court of Appeals was insufficiently school in the craft of intelligence to prepare the correct definition for when confidentiality of intelligence sources is necessary. The point is that in the 1947 National Security Act, Congress assigned that responsibility to the Director of Central Intelligence and not to the courts.

It is difficult for courts to obtain evidence and make studied judgments as to when sources should or should not be kept confidential. Courts can be abusive in the way they determine these issues, as was the District Court in the Fitzgibbon case which we cite in our briefs, where the Court decided that it could second guess the judgment of the Director of Central Intelligence as to whether events had sufficiently changed in the Dominican Republic so that sources there who were once confidential would now be proud to have been associated with CIA.

In addition, even if the courts make the right determinations as to whether sources should or should

not be kept confidential, these sources may not trust that the courts will make the right decision in their cases, especially when the passage of time may cause the concerns of the intelligence source to be somewhat less appreciable, much as is the situation in this case, where many of the sources are 20 or 30 years old.

In conclusion, it is our position that Section 403(d)(3) means what it says when it says that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, and this plain language of the statute is totally inconsistent with the second part of the two-part test crafted by the Court of Appeals.

Further, we believe that nothing in the Freedom of Information Act changes this interpretation of the National Security Act. Exemption 3 of the Freedom of Information Act incorporates by reference certain other statutes that provide for withholding of particular kinds of information. Once you decide that Exemption 3 applies to a partaicular statute, then it is thew underlying statute and not the Freedom of Information Act that determines whether or not a particular kind of information can be withheld.

That was the approach followed by this Court in its recent decisions in Exemption 3 cases such as

Baldrige v. Shapiro and Consumer Product Savety Commissicn v. GTE Sylvania. That is the approach we are asking the Court to apply tcday.

With regard to Section 403(d)(3), Congress and the Courts of Appeals have ccnsistently regarded Section 403(d)(3) as an Exemption 3 statute, and that that conclusicn has nct beer changed by the 1976 amendments to Exemption 3. As amended, Exemption 3 provides that a statute is -- provides exemption from disclosure if it refers to particular types cf matters to be withheld, and Section 403(d)(3) certainly does that by referring to particular types of matters, intelligence sources and methods.

QUESTION: How about the requirement that requires that the matters be withheld from the public in such a manner as to leave nc discretion on the issue? Don't your opponents contend that it doesn't meet that test?

MR. WILLARD: It is not clear, Justice Rehnquist, but if that is their contention, it is clearly wrong because Exemption 3 has two subparts, Subpart A and Subpart B. Subpart A refers to statutes that leave nc discretion with regard to withholding information, and we are not contending that 403(d)(3) falls under Subsectin A.

Subsection B, however, provides two alternative tests for qualifying as an Exemption 3 statute. One is whether the statute establishes partaicular criteria for withholding, and we are not claiming to fall under that. The second half of Subpart B, though, refers to statutes that refer to particular types of matters to be withheld.

QUESTION: A and B are disjunctive.

MR. WILLARD: That is correct, Justice Rehnquist. And that conclusion is reinforced by the legislative history of the 1976 amendments which at one point specifically refers to Section 403(d)(3) as a statute which is intended to be covered under Exemption 3.

QUESTION: Mr. Willard, if your view is correct, do we need still to give some objective definition for what is an intelligence source? Do we need to give content to that term at all?

MR. WILLARD: Justice O'Connor, I don't think that is really an issue presented in this case because as I stated at the outset, the first part of the two-part test, that is, whether the source provides information that relates to CIA's intelligence functions, is a part of the test that we met in this case. The District Court found we had met it on the

record, the Court of Appeals affirmed, and that is not here.

It is our position, however, that is the only inquiry. That is, once the courts decide that a source is an intelligence source, there is no basis for going on and adding additional steps to the test.

QUESTION: And you think the decision of the Director to authorize disclosure carries with it no component of reasonableness in making the determination?

MR. WILLARD: We believe the determination, once it is decided that a source is an intelligence source, to disclose or not to disclose that source is a determination which was given by Congress in the 1947 Act to the Director of Central Intelligence and is not a decision which is subject to judicial review.

What is subject to judicial review under the Freedom of Information Act is the Director's decision to classify someone as a source. If the Director tries to claim that someone who has not provided intelligence-related information is a source, that is subject to review and overruling by the courts.

QUESTION: But you don't want us to attempt to give any framework or description of the content of intelligence source in this particular case.

MR. WILLARD: I don't believe that is necessary, Justice O'Connor, because the definition, the first part of the two-part test applied by the Court of Appeals was applied in this case, properly in our view, and held that these sources were intelligence sources.

QUESTION: Well, your position is a source is a source is a source, and if the thing was in fact a source, we don't need any four-part test to decide whether or not the source gave information.

MR. WILLARD: That is exactly right, Justice Rehnquist. That is our position, and we believe the second part of the two-part test is totally illegitimate because the first part resolves whether or not the source was a source, and the second part was created out of thin air and has no support in the language of the statute.

QUESTION: Is there a difference, in your view, between intelligence and information?

MR. WILLARD: Yes, Mr. Chief Justice, there is.

QUESTION: What do you think it would be?

MR. WILLARD: Intelligence, within the meaning of the National Security Act, pertains to CIA's functions. That is, CIA is authorized to gather foreign intelligence and to engage in foreign intelligence and

counterintelligence activities. It must have a nexus to national security and foreign affairs.

Information that does not have some nexus to CIA's statutory mission under the National Security Act is not intelligence information.

QUESTION: Well, I can understand it better if you said that all information is not intelligence, but all intelligence is information.

MR. WILLARD: Well --

QUESTION: It is merely a special kind of information, isn't it?

MR. WILLARD: That is correct in part, Mr. Chief Justice. In addition, however, CIA's intelligence mission includes not only gathering information but also engaging in operations. For example, in the context of this case --

QUESTION: What does that -- you categorize that as intelligence?

MR. WILLARD: Well, we believe it can be categorized as intelligence, but --

QUESTION: Overt activities of some kind?

MR. WILLARD: Those activities are intelligence activities under the National Security Act, in our view.

QUESTION: But you do agree that information

is the broader term of -- intelligence in the sense of securing information, really makes the two of them synonymous up to that point, does it not?

MR. WILLARD: That is correct, Mr. Chief Justice, especially where it deals with CIA's national security mission. My point was that if a source of information has nothing to do with CIA's statutory mission under the National Security Act, then it wouldn't qualify as an intelligence source under that act.

But again, as I said, that is not really an issue in this case because there is no dispute at this point with regard to our meeting the first part of the two-part test. The question is really was there any basis for the Court of Appeals to create the second part of the two-part test, and our position is there was not.

This conclusion is reinforced by and not undermined by the CIA Information Act of 1984 which was addressed in Respondents' supplemental brief. As we have pointed out, that act was passed premised on the understanding that much information in CIA was exempt from disclosure because it was either classified or because it was intelligence source information under Section 403(d)(3), and therefore, the legislative

history of that recent statute simply confirms our understanding, and that is that the term intelligence source in Section 403(d)(3) should be given a broad meaning, an that all intelligence scurces are subject tc protection under the Freedom of Information Act.

Mr. Chief Justice, if there are no further questions from the Court at this time, I will reserve my remaining time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Levy?

ORAL ARGUMENT OF PAUL ALAN LEVY, ESQ.

ON BEHALF OF RESPONDENTS IN NC. 83-1075

AND PETITIONERS IN NO. 83-1249

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

This is a case under the Freedom cf Information Act in which the Respondents seek the disclosure of declassified records concerning a series of research projects conducted by American scientists between 1952 and 1966 addressed to a variety of topics principally related to drugs and behavioral modification, and the only issue is whether these researchers were intelligence sources.

The CIA invokes Exemption 3, which was amended in 1976 to overrule this Court's decision in Robertson

and allow withholding only of matters which are specifically exempted pursuant to certain kinds of statutes. And we do agree that CIA's claim -- we do not say the CIA is making a claim under Exemption 3A, but rather under Exemption 3B, and particularly, the prong of 3B which allows withholding pursuant to statutes which refer to particular types of matters to be withheld.

There is another exemption which is important to this case, and that is the national security exemption, Exemption 1, permitting the withholding of classified information. Exemption 1 is important for two reasons: first, because it would prevent the occurrence of the parade of horribles the CIA has said would result from the decision of the Court of Appeals below. Exemption 1 is not applicable here because the CIA has not invoked it and in fact declassified the records, including the names contained in the records

The second reason it is important is because --

QUESTION: May I ask, Mr. Levy, would Exemption 1 protect open sources?

MR. LEVY: Exemption 1 could protect open sources if disclosure of those open sources would show the CIA's interest in the particular subject, would

lead -- would show that the CIA is using that particular open source and therefcre cause the pecple who put infcrmation into that open source to withhold the infcrmation that the CIA really wants.

QUESTION: I thought you described it as protecting classified information. I may be -- I dcn't have Exemption 1 in frcnt of me right now, but it is broader than prctecting classified information.

MR. LEVY: And on that basis, the CIA could make a claim under the relevant Executive Order that disclosure of the source would lead to damage to the national security and could therefore classify the name.

QUESTION: I see, but what about just the plain language of intelligence source? Why doesn't that cover open sources?

I am getting ahead. You develop your cwn argument. That is one of the things that troubles me.

MR. LEVY: I will try to reach that point. I will reach that point.

The second reason Exemption 1 is important is because Congress determined, and it was an issue important enough to override President Ford's veto in this regard, that even when the most sensitive naticnal security information is involved, the courts must review

the Agency's determination de novo.

The statute invoked by the CIA as a 3B statute is one part of one provision of the National Security Act codified as Selction 403(d)(3). That provision, in the process of allocating responsibilities for the various national security tasks among the various national security and defense agencies, gave the Director of Central Intelligence the responsibility, and I am quoting, "for protecting intelligence sources and methods from unauthorized disclosure." And yet, the construction the CIA would put on that statute is that any person --

QUESTION: Where is that exact language found, Mr. Levy, in the statute, protecting -- is it 403(d)(3)?

MR. LEVY: It is 403(d)(3). It is at the very end of 403(d)(3). It is the third "provided" in clause 3.

QUESTION: Thank you.

MR. LEVY: The construction the CIA would put on that statute is that any person who supplies the CIA with any information that is useful to its task, whether or not that information is intelligence, is an intelligence source. Thus, as the CIA itself concedes, the New York Times and Pravda would be intelligence

sources within the meaning of the statute.

The transcript of today's argument, if the CIA desired to read the transcript in the furtherance of its intelligence function, the reporter who prepared the transcript would be an intelligence source within the meaning of the statute.

This is clearly not the kind of intelligence source that Congress had in mind.

QUESTION: You mean it would not be available, then, or it would be available, which? How would you categorize that?

MR. LEVY: The CIA, under the CIA's construction of the statute, the reporter would be an intelligence source --

QUESTION: Yes.

MR. LEVY: -- and therefore exempt from disclosure.

QUESTION: And what's your view?

MR. LEVY: Our view is Congress could not have had the reporter who prepares the transcript or indeed these researchers in mind when it used the term "intelligence source."

QUESTION: Suppose there were a very secret meeting held in the White House -- and if for my hypothetical we will put ourselves back some years --

and at that meeting it is rumored that Einstein, whc is no longer living, was present, and that Werner von Braun was present, and five or six, all of the people involved in the development of the hydrogen bomb, and that this meeting lasted for a full day and then a half a day, and somehow or another the information comes out that leads someone to ask for the minutes of that meeting and the names of the persons present.

Would you think that even the identificatcn of the names of the persons present would give no information to our adversaries that was important to the national security?

MR. LEVY: It would give information damaging to the national security and therefore could be classified.

But the question is whether the persons present were intelligence sources.

QUESTION: Well, I should think that if ycu had Albert Einstein and Werner von Braun, that you wouldn't have much of an argument over that, would ycu?

MR. LEVY: Well, I'm not sure that Congress, when it used intelligence source, had the intelligence portion --

QUESTION: They don't -- they don't call Einstein and Werner von Braun when they talk about the

tax code, do they?

MR. LEVY: They are talking about national security information, and it --

QUESTION: Maybe a new, special kind of a bomb or whatever.

MR. LEVY: They might -- it depends -- I guess I am not sure I understand the Court's hypothetical.

Is the Court asking whether Einstein is an intelligence source, or is the Court asking whether somebody who reports the --

QUESTION: I just want your view on whether anyone can walk into the CIA and say we want that information about that meeting.

MR. LEVY: No, they certainly cannot walk in and ask for the information because that information would certainly be classified because release of the information would certainly cause damage to the national security, and the CIA would be entitled to classify it.

QUESTION: Could it classify it under 3B?

MR. LEVY: But the question is are these people who are discussing a method of warfare intelligence sources within the meaning of the statute? Exemption 3B does not have to bear the full burden of protecting all of the national security interests of the United States or all of the national security interests

of the CIA, for that matter. There are other portions of the national security scheme available for that purpose.

The CIA -- there is no question that names like that need to be concealed but there are other ways to conceal those names, and yet the CIA asks for an all-embracing definition, admitting full well that they don't intend to withhold all of those names, and that there is no reason to withhold all of the people who would be called intelligence sources under their construction of the statute. Rather, they say they have an absolute and unreviewable discretion to decide whether any of this vast category of intelligence sources can be disclosed, and ask the Court to rely on their reasonable exercise of this discretion within the overbroad definition.

But this approach of adopting the broadest possible construction of the statute, coupled with total discretion on the part of the Agency to decide whether disclosure in any particular instance would be consistent with the reasons for secrecy, is inconsistent with the purposes of the FOIA and of the 1974 and 1976 amendments which require disclosure of records unless Congress has made a basic policy decision that matters of this kind could or should be withheld, and the act

requires courts to review the Agency withholding decision, construing the exemptions narrowly, and the mere fact that an exemption has held to satify exemption 3B does not mean that it must not also be determined that the matter is specifically exempted by that statute, and the courts are still required to apply the panoply of procedural protections provided by 552(a), de novo review, burden on the Agency to justify its actions.

By this means the courts determine whether the withholding action of the Agency conforms to the congressional judgment that this is one of the sorts of matters to be withheld.

QUESTION: What do you say that a court should review in answering the question about whether the Director has acted to protect intelligence sources? Would you say you review was the action of the Director reasonable?

MR. LEVY: The question of whether any particular person is an intelligence source is to be reviewed de novo.

QUESTION: Well, but what is wrong with the government's definition? It is a question of fact. If the person gave information to the CIA, he was an intelligence source.

MR. LEVY: But when Congress -- Congress did not say source of information. It said intelligence source. Intelligence is a narrower term than information.

QUESTION: How do we know that other than from the statement of the Chief Justice?

MR. LEVY: And the concession of my opponent, I believe.

QUESTION: I mean, is this established dictionary definition?

MR. LEVY: Well, I am not adverting to any dictionary. Whenever Congress spoke of intelligence sources, they were speaking and looking at the legislative history cited by defendants. They spoke of the sort of persons who wouldn't provide good information absent confidentiality.

Whenever the legislative history spoke of the need to protect sources, they referred to the need to provide confidentiality in order to get the information, and the need to provide an assurance to the sources, the intelligence sources it was describing in order to get them to give information.

QUESTION: But the Court of Appeals didn't even settle for what you have just defined now. It said that in some circumstances, even where assurances of

confidentiality were given, that person was nonetheless not an intelligence source.

Do you support that part of the Court of Appeals opinion?

MR. LEVY: We do, although that part of the Court of Appeals opinion is not required to decide this case because in this case the District Court found that almost all of the principal researchers did not get assurances of confidentiality, and those who did get assurances of confidentiality, according to the District Court's finding, we agree were reasonably given guarantees of confidentiality.

Byt --

QUESTION: Those are all questions that are reviewable by a court.

MR. LEVY: The question of whether there was an assurance of confidentiality is a question of fact which can be established.

QUESTION: Yes, but -- and the reasonableness of the assurance, that is reviewable by a court.

MR. LEVY: The question of the reasonableness of the assurance is reviewable but subject to the Halperin rule applied by the Court of Appeals in this case, that is to say, giving substantial weight to the expertise of the Agency given the kinds of

considerations that go into the determination of whether the confidentiality was required.

Now, I believe that the Court of Appeals was correct in leaving open the possibility that there could be an assurance of confidentiality that was not required. For example, if in ordering the transcript of today's argument the CIA were to provide an assurance of confidentiality to the reporter, we won't tell anybody that we have bought the transcript from you, now, that might be so plainly unnecessary a guarantee of confidentiality that despite the fact that the CIA can claim that it is needed for its intelligence function, that person would not be an intelligence source.

But the substantial weight standard takes care of most of the problems that the CIA refers to.

Moreover, to the extent that the CIA is concerned that there is a court looking over its shoulder and deciding whether or not confidentiality was required in the particular instance, that is a cost which is imposed by the doctrine of de novo review, which is applied not only to intelligence sources, but to the most sensitive of national security information. The deployment of nuclear weapons, whether that is properly classified is a question reviewed de novo pursuant to Exemption 1.

Certainly if we can trust the courts to do that, we can trust the courts to review subject to the substantial weight standard, the necessity of providing assurances of confidentiality.

QUESTION: If that is what Congress intended.

MR. LEVY: Yes, indeed.

But since we have the legislative history which shows continuous reference to intelligence sources in the context of where you wouldn't get the information or at least wouldn't get good information, in the case of an open source, an open source may well be an intelligence source within the meaning of the statute if confidentiality of the CIA's reference to that source is needed to make sure that it is good information, for example, the obscure Eastern European technical journal cited in the CIA's brief.

But there is no evidence that these researchers, with a very few exceptions, were such sources, that is to say, that either that they couldn't get good information or that they would refuse to be involved with the CIA and provide research services to the CIA without a guarantee of confidentiality.

QUESTION: You are going to have to help me a little more on your -- when is an open source within and when is it not within Exemption 3?

MR. LEVY: If confidentiality, under the Court of Appeals construction of the statute, if confidentiality is required for the CIA to make effective use because the information -- either because they wouldn't be able to get the subscription because the person who sends out the journal would say, oh, the CIA, no, they don't get one, or because the person who make up the magazine know that the CIA is looking at the magazine and therefore moderate, control the information that goes into it, confidentiality is then required for the CIA to make use of that --

QUESTION: Well, what if the CIA just doesn't want certain other parties to know that this is the area which it examines to get certain kinds of information? Maybe information will continue to flow, but it would disclose the direction of our discovery if we had to --

MR. LEVY: That may well be exempt as an intelligence method.

QUESTION: As an intelligence method?

MR. LEVY: The method by which the CIA is conducting --

QUESTION: They read the want ads in the New York Times and they get some very valuable information, but they don't want others to know that is a source of information, that would just be an open source, but you

would say there is no protection of that, I think. Or they listen to a bartender in London who talks about certain subjects.

MR. LEVY: If they listen to a bar --

QUESTION: That would be covered by your first example, but say there are certain sources they just don't want outsiders to know that they use those sources because that would reveal something about their methods of gathering intelligence?

MR. LEVY: By the very definition of the hypothetical, it would reveal an intelligence method and is therefore exempt from --

QUESTION: Or their areas of interest, it would reveal their areas of interest perhaps.

MR. LEVY: If it would reveal their area of interest, then that would be classifiable, because revealing an area of CIA interest could cause damage to the national security by preventing --

QUESTION: I don't know how you classify New York Times want ads.

MR. LEVY: You classify --

QUESTION: And that's what you'd have to do under Exemption 1, I think.

MR. LEVY: You classify the fact that the CIA uses the want ads, assuming that it is not -- everybody

doesn't know that in fact the CIA looks at the New York Times want ads.

The argument about guaranteeing confidentiality and the Court of Appeals requiring the breaking of the promise of confidentiality also assumes that the CIA makes guarantees of confidentiality, but the CIA in its very -- in its brief on the institutions questions, makes it clear that they reserve the right on any occasion to disclose an intelligence source if for any one of a number of reasons they believe that it is appropriate to do so.

This, for example, here two-thirds of the institutions were disclosed by the CIA despite their position, first, that the institutions were intelligence sources, and despite their position that the disclosure of the institutions would lead to the disclosure of the principal researchers. Indeed, the District Court found that six of the principal researchers received either implicity or explicit guarantees of confidentiality. Yet the CIA disclosed institutions at which five of those principal researchers were working.

The CIA also disclosed the principal researcher engaged in the most sensitive of the MKULTRA projects involving the administration of drugs to unwitting subjects.

So both because the perception argument based on the Court of Appeals requiring perhaps the breaking of an unnecessary promise, and because rarely will courts override a CIA definition that a guarantee was in fact necessary, the Court of Appeals we think was right in saying that you should leave open the possibility that reviewing de novo subject to the substantial weight standard, you could require the CIA to disclose an intelligence source despite the fact that the source was provided an assurance of confidentiality.

Now, the CIA also attacks the Court of Appeals decision because it would require the disclosure of many matters which are required, plainly required in the national interest to be kept secret. But the fundamental objection to that is that the CIA would have 403(d)(3) carry the full burden of protecting national security intelligence.

403(d)(3) is part of a statutory scheme, other parts of which are also devoted to protecting national security information, the national security exemption, the intelligence methods provision, 403(g) pertaining to CIA employees.

But the CIA also errs in treating the Court of Appeals appeals construction as if it were a statutory definition contained in the Internal Revenue Code. The

formulation of the Court of Appeals and the inquiries required by the Court of Appeals construction of the statute in this case were not intended to be applied to most persons involved in the kind of CIA operations cited in the CIA's brief, the secret agents, the recruiters of other intelligence sources. The Court of Appeals was very clear in it opinion at pages 10a and 11a of the appendix to the petition that these inquiries would not be applicable in the run of the mill intelligence source case. The reason for the construction was that this was a peripheral case.

Now, the District Court said we don't need to make a definition of an intelligence source because this is so clearly beyond what Congress had in mind. The CIA insisted that there must be a definition. The Court of Appeals came up with a definition. We think it is basically a workable definition, but the Court doesn't have to decide that that is an appropriate construction of the statute in order to affirm the result below.

Rather, because of the unique facts of this case, because these were domestic scientific researchers in a declassified program, no indication, with a few exceptions who are to be withheld, that there was any desire for confidentiality, the documents destroying the program were destroyed, and so the only way we can find

cut the details of the program are to talk to the researchers and find out what they did. And finally, inscfar as Congress has ever addressed the question cf the MKULTRA researchers and the files -- not the researchers, excuse me, but the MKULTRA files, it has said that it desires that MKULTRA files be available for review. It cautioned that MKULTRA files were not to be treated as cperational files.

QUESTION: Your position is, I take it, as I understand it, that the government is nct entitled tc protect the identity of those people to whom inquiries are being made?

MR. LEVY: Of these people, given the unique character of their research, the circumstances under which the research was undertaken, the fact that the CIA no longer has any interest in concealing the fact cf its interest in the MKULTRA program or, indeed, the methcds by which the MKULTRA --

QUESTION: Ycu are saying that they have nc interest, but they are asserting one, aren't they?

MR. LEVY: They are asserting only an interest in protecting the identities of the researchers.

QUESTION: Ncw let me take you back to my hypcthetical.

Suppose we substitute for these nameless

people Albert Einstein, Werner von Braun, and a whole array of specialists in these fields. You say that the government is not entitled to protect the identity of those people when it would be clear to almost any other country that if we were talking to these people, there must be something like the atom bomb or the hydrogen bomb, or a refinement of it, in the works.

MR. LEVY: They could be protected, but not as intelligence sources. They could be protected because they are discussing classified information, they could be protected because identification here by --

QUESTION: Well, then, are you saying they have just gone about it the wrong way?

MR. LEVY: No. Here, by contrast, they don't claim an interest in protecting the details of the MKULTRA program. They say all we care about is the names of the researchers, and we say that the researchers are not intelligence sources, and unlike the Einstein example, there is no additional reason to prevent them from being disclosed. In the Einstein example there are clear, there are several additional reasons to not disclose the information.

I would like to address very briefly the question of the institutions which was raised in our cross petition.

The CIA's principal argument in that regard is that disclosure would lead to the identification of the principal researchers who were intelligence sources.

Now, we accept the argument in principle. Assuming that they are intelligence sources, and assuming that disclosure of the institutions would lead to the identification of the researchers, that is enough reason to allow the names of the institutions to be withheld.

The problem is in the application of that principle to the facts in this case because the CIA never carried its burden of showing, a burden which it has under 552(a)(4)(B), the burden of sustaining its action.

Although its brief says over and over that the Director of Central Intelligence has made a judgment that disclosure would lead to the identification of the principal researchers, there is no evidence in the record to show that the Director of Central Intelligence made that judgment, nor is there any evidence in the record to show that the Director of Central Intelligence believes, or that there is reason to believe that disclosure of the institutions would lead to the identification of the principal researchers. The affidavits never say that, and all we say is that the

CIA is required its burden of proof.

Moreover, the CIA has identified two-thirds of the institutions, including those for five of the six principal researchers who got guarantees of confidentiality. There is apparently -- they apparently did not believe that identification of those institutions would lead to the principal researchers, and there is no indication that the undisclosed institutions are any different than the disclosed institutions, institutions like the National Institutes of Health, Stanford University, large institutions.

Now, if the CIA could show or had shown that the undisclosed institutions were different, that these were small operations where simply by knowing the name of the operation you should figure out, or a sophisticated observer could figure out that these are the people who were the principal researchers, coupled with the determination that the principal researchers are exempt from disclosure, this would be a different case.

But the CIA has not made the demonstration in this case.

If this Court has no further questions --

CHIEF JUSTICE BURGER: Very well.

D you have anything further, Mr. Willard?

ORAL ARGUMENT OF RICHARD K. WILLARD, ESQ.

ON BEHALF OF PETITIONERS IN NO. 83-1075 AND

ON BEHALF OF RESPONDENTS IN NO. 83-1249 -- Rebuttal

MR. WILLARD: Yes, Mr. Chief Justice.

I would like to start with the issue raised in the cross petition which I have not previously addressed.

There is no disagreement on the legal theory here. As Mr. Levy admits, they agree that if the dislosure of an institution could lead to the identification of a researcher, and if we can withhold the researcher's identity, then we ought to be able to withhold the information about the institution.

What he challenges is the factfinding of the District Court. He claims the evidence in the record is insufficient to support the finding of fact by the District Court, affirmed by the Court of Appeals, that such a disclosure could be expected to occur.

We think that just common sense establishes that the disclosure of institutions could establish the identity of the researchers, or create a risk of that under the facts of this case. Let's keep in mind that the District Court had before it a very extensive record, including elaborate answers to interrogatories providing detailed facts about each of these MKULTRA

projects. All of the documents were declassified, with only the names of the researchers and institutions deleted.

Under those circumstances, it is not hard for the jigsaw puzzle to be completed if something is turned over.

A good example of this appears on page 59 of the Joint Appendix, which is a document describing one of the MKULTRA research projects, Subproject 146. The name of the institution and the researcher is deleted, but the document says that the researcher has recently retired from his position as Chief of Pathology, and goes -- of the institution, which was deleted, and goes on to say that he is a world reknowned plant pathologist.

Now, even at a fairly large institution like Stanford or Harvard there may not be very many world reknowned plant pathologists. It doesn't require much common sense to see that the District Court's finding of fact here that the disclosure of these institutions could identify the researchers can be amply supported in the evidence in this record, and if the Court reviews all of the evidence in the record about each of these projects, I think the Court will come to share that conclusion.

In addition, the argument has been raised about a sort of estoppel argument. Since we disclosed two-thirds of the institutions, why don't we disclose the rest of them? That argument we think has no force, and in fact, is pernicious. If the government could be estopped by making a partial disclosure and thus held responsible for disclosing additional information, it would have a chilling effect on voluntary disclosures under the act.

Now, whether Admiral Turner made the correct decision in 1977 or '78 to disclose some of the institutions, I don't know. Perhaps some of those institutions that were disclosed could in fact lead to the identification of the researchers. But it is not our burden today to justify the disclosures that were made. It is to justify the information that was withheld. And this kind of estoppel argument being used against the government, if credited, would have a chilling effect on the kind of voluntary disclosures that go on every day under the Freedom of Information Act because we would be afraid if we disclosed some information voluntarily, that that would be held against us, and we would have to disclose some other information we didn't want to.

For that reason, we think the arguments raised

in the cross petition should be rejected.

If I could return briefly to a couple of points that were raised with regard to the principal issues in this case, the Respondents seem to be arguing that Section 403(d)(3) should not be given its plain language meaning because we can protect intelligence sources when we have to under the classification exemption, Exemption 1, or maybe because they are methods rather than sources.

This is simply an illegitimate form of argument under the Freedom of Information Act. Each provision in the act stands on its own feet. If we qualify under Exemption 3, we qualify, even if another exemption might also be available in some cases. That is precisely the argument Respondents are making that was rejected by this Court in FBI v. Abramson where the Court held that the availability of possibly an Exemption 6 argument should not distort the way Exemption 7 was interpreted under that case.

It is our position here, too, the fact that something might also be a method as well as a source, or might also be classifiable, doesn't keep it from being a source within the plain language of Section 403(d)(3).

The question was raised, well, why should Congress care more about protecting intelligence sources

and methods under 403(d)(3) than other kinds of classified information, under (b)(1) which are subject to, it is alleged, a more intensive kind of judicial review? We don't know. That's the plain language of the statute, and it is not necessary that Congress in enacting various statutes over a period of time always act from a coherent pattern. But a good reason might be that intelligence sources and methods are like the goose that lays the golden egg: if those are endangered or compromised, then additional disclosures will not occur.

Our country has always treated intelligence sources and methods as the most highly sensitive kind of classified information or of national security information because when they are compromised, it compromises our ability to learn future intelligence. That is amply demonstrated in the legislative history of the 1947 Act. This Court has frequently remarked upon it in its decisions such as Snepp and Haig v. Agee, that the confidentiality of intelligence sources is of preeminent importance.

So if it is necessary for us to justify what Congress did in its plain language, there is the justification.

Finally, with regard to the ability to protect

open and secret sources, 403(d)(3) is not limited to secret intelligence sources. It talks about intelligence sources generally. In the hearings that led up to the 1947 Act, the testimony was quite clear, the testimony which was cited at page 16 of our petition, quoted there by General Vandenberg, who had been the director of CIA's predecessor operation, said that he thought roughly 80 percent of intelligence should normally be based on open sources, including books, magazines, technical and scientific surveys, photographs, commercial analyses, newspapers, and radio broadcasts.

So it is our position that Congress quite clearly intended that the term "intelligence sources" would comprehend both open as well as secret sources, and that in giving the Director of Central Intelligence the authority to protect intelligence sources and methods from unauthorized disclosure, it was intended to be interpreted broadly, and that there is no basis for the second part of the two-part test created by the Court of Appeals in this case.

Unless there are any further questions, that will conclude my argument.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

We'll hear arguments next in Dean Witter Reynolds v. Byrd.

(Whereupon, at 11:51 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1075 - CENTRAL INTELLIGENCE AGENCY, ET AL., Petitioners v. JOHN CARY SIMS, ET AL. and
#83-1249 - JOHN CARY SIMS, ET AL., Petitioners v. CENTRAL INTELLIGENCE AGENCY, ET AL.

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

BY Paul A. Richardson

(REPORTER)