ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,

Petitioners,

v.

KENNETH MICHAEL JULIAN AND MARGARET J. WALLACE

No. 86-1357

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UNITED STATES DEPARTMENT OF JUSTICE, ET AL., Petitioners, V. KENNETH MICHAEL JULIAN AND MARGARET J. WALLACE : No. 86-1357

Washington, D.C.

Tuesday, January 19, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

ERIC ROBERT GLITZENSTEIN, ESQ., Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10.01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 1357, United States Department of Justice versus Kenneth Michael Julian and Margaret J. Wallace.

Mr. Kneedler, you may proceed whenever you're ready.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.

ON BEHALF OF PETITIONERS

MR. KNEEDLER: Thank you, Mr. Chief Justice, and may it please the Court:

The question in this case is whether copies of presentence reports that are in the possession of the Parole Commission are subject to mandatory release under the public disclosure provisions of the Freedom of Information Act. The presentence reports have long been regarded as highly confidential documents. That confidentiality protects the ability of the probation officers who prepare the reports to obtain information from various sources.

For this reason, the courts have uniformly held that presentence reports are not routinely available to persons who might seek to discover contents for use in litigation. We submit that this governmental privilege permits the Parole Commission to withhold their copies of presentence reports from the general public under Exemption 5 of the Freedom of Information Act.

Respondents concede that presentence reports are

highly confidential documents and that they are almost invariably exempt from mandatory release under the Act. But they submit that because they are the subjects of the presentence reports, the persons about whom the reports were prepared they have a special right under FOIA that isn't shared by any other member of the public to read those reports.

It is our position in this case that that argument is inconsistent both with settled principles under the Freedom of Information Act, and also with settled principles covering disclosure of presentence reports.

QUESTION: Mr. Kneedler, there are provisions of the Parole Commission and Reorganization Act that specify certain types of information in the reports that I guess both sides agree may be deleted or excluded from any report before release.

MR. KNEEDLER: That's right. They can't even be shown to the defendant.

QUESTION: Right. So what is left then in the report that the Government is particularly concerned about protecting after the deletion of those sensitive things?

MR. KNEEDLER: Well, the reports contain a wealth of information concerning the individual's background, but also the background of his family, his relationships with associates, employers. There's a lot of information that is personal both to the defendant and others.

QUESTION: Well, I suppose most of that would be

covered by Exemption 6?

MR. KNEEDLER: It may or may not be. It depends.

QUESTION: I'm just wondering what's left after you take out the sensitive things and take out what Exemption 6 covers.

MR. KNEEDLER: Well, there's also information that's furnished by sources of information that may not be regarded as so confidential that the defendant can't even see that information. If it was that confidential, then that could be withheld under one of the provisions to which you're referring. But there's also a more general desire to maintain confidentiality to encourage sources to come forward. Because as the Administrative Office explained to the Parole Commission when they were considering whether to change their policy, all sources of information are told what they furnish to the probation officer will be shown to the defendant and shown to the attorney for the Government, but that the defendant cannot keep a copy of it. And that it will be disclosed beyond that initial showing only with the consent of the Court. And this affords the sources some sense of protection and confidence that the report that contains their disclosures will not be passed on by the defendant, for example if he gets a copy of it, to third persons who might use it.

QUESTION: What's to prevent him from making a copy for his own use or his counsel from making a copy in these days of copying machines.

MR. KNEEDLER: Well, the rules do not permit that and the standard procedure, Rule 32 C at sentencing, for example, says that the defendant and the counsel for the Government may read a copy of the report. And that's the word that the Rule uses. And when the Rule was proposed, this Court's version of the Rule stated that all copies of the report must be returned to the Court and copies could not be made.

Congress modified that to permit the Court, in its discretion, on an occasional case to let the defendant keep a copy of the report. But Rule 32 specifically says all copies of the report must be returned to the Court. And for the defendant to make a copy of it would be directly inconsistent with that requirement that they be returned.

QUESTION: But the Rule doesn't apply to the Parole Commission, I gather?

MR. KNEEDLER: No, but the Parole Commission from the outset has followed directly parallel procedures. And this makes a lot of sense, because when the Parole Commission Act was passed in 1976, Congress saw it as a continuation of the sentencing process. The Court sets the sentence within a range typically, and then the Parole Commission decides how much of that the defendant will serve.

QUESTION: Yes, but it makes it very hard to argue that it falls under Exemption 3.

MR. KNEEDLER: Well, we submit that it does because Rule 32 specifically provides that the report is to be returned

to the Court upon the completion of sentencing, and obviously the defendant can't get a copy of the report from the Court unless the Court in its discretion permits him to do so. That same authority to withhold, we submit, attaches to the report as it's transferred to the Parole Commission.

Our basic submission in this case --

QUESTION: Do you have any case that upholds your position on Exemption 3?

MR. KNEEDLER: There's no case specifically relating to the presentence reports, no. But the express requirements of Exemption 3 are met in this case. Exemption 3(b) refers to statutes that refer to particular matters to be withheld. This is a statute that refers to particular matters to be withheld, presentence reports, and those are the specific requirements.

Respondents say that because Rule 32 speaks to the Court and doesn't expressly refer to the Parole Commission, that it's not an Exemption 3 statute. Exemption 3(b) does not require that the statute on which withholding rests specifically refer to the agency that happens to be in the possession of the report, and that requirement would make no sense, because the statute speaks to the document to be withheld and reflects an assessment by Congress as to whether that document should be withheld.

QUESTION: Doesn't that exemption also require that either the inability to obtain it be absolute or that the specific standard for making it available be set forth?

MR. KNEEDLER: No.

QUESTION: What's the specific standard here?

MR. KNEEDLER: There are actually three separate subparts to Exemption 3. Exemption 3(a) refers to situations in which the report can be withheld in the manner that leaves no discretion. Exemption 3(b) has two alternatives. One, the statutes that refer to particular criteria, and the other in the alternative, the statute can refer to particular matters to be withheld. Those are in the alternative.

In this case, we're relying on the part of the statute that refers to particular matters to be withheld, presentence reports. That part does not require that the statute also contain criteria. What Congress was aiming at was narrowing the categories of information that could be withheld. And what it said is, well, if the statute specifically tells the administrator how to decide what to withhold, that's an exemption 3 statute. Or as here refers to a particular document.

And Rule 32 specifically refers to presentence reports.

QUESTION: Doesn't that last exemption have to be absolute, that is, matters to be withheld. Doesn't it mean matters to be withheld absolutely?

MR. KNEEDLER: Well, if that were true, it would be redundant with respect to Exemption 3(a) which does require that it be absolute and that there be no discretion. Exemption

3(b) for instance in the CIA v. Sims, which was a 3(b) statute case, the Court recognized that the Director of the CIA had the discretion to release information that he was charged with protecting, and that was committed to his discretion, and that did not undermine the 3(b) status of the report.

And 3(b) is particularly apt in this case we think because Congress specifically focused on the question, really the question in this case, whether the subject of the report should have a right to receive a copy of that report. And Congress, like this Court, in promulgating the rule decided that he should not.

Our basic submission in this case, though, is that these reports are protected by Exemption 5 of the Freedom of Information Act. Exemption 5 refers to inter or intra agency memorandums that would not be available by law to a party in litigation with the agency. And the Courts have uniformly held, as I mentioned before, that presentence reports are not routinely available to persons seeking to discover them for use in pending litigation.

QUESTION: But I guess there is a split of authority on whether they are inter-agency or intra-agency memorandums. Is that right?

MR. KNEEDLER: There's not a split of authority on that question. Respondents argue that they are not covered by that. The Court of Appeals in this case, although respondent Julian argued that, the Court of Appeals didn't address it, and

the District of Columbia Circuit, in the Durns case, held that they are. And we think that that's pretty clear in this case.

The phrases inter agency and intra agency memorandums, as we see it, was designed to refer to materials that are kept internal to the Government. And as the D.C. Circuit said in the Ryan case which is really the leading case on construing this phrase, there's no indication that Congress intended those to be rigidly exclusive terms, but rather were intended to encompass materials that are incorporated into the deliberative process of the agency.

And here we think that's particularly clear because Congress has in effect recognized that the probation officer prepares the report for the Parole Commission as well as the Court, directed the probation officer to furnish it to the Court, and directed the Parole Commission to consider the report as part of its deliberative process. In fact, it's really the most basic document traditionally that the Parole Commission and the Bureau of Prisons rely upon.

QUESTION: Mr. Kneedler, you can't say that just incorporating it into the deliberative process is the criterion. You can get a memorandum from the National Association of Manufacturers that the agency considers, and --

MR. KNEEDLER: Right. It can't be just something volunteered by an outsider. But here, Congress has effectively made the probation officer part of the deliberative process by directing that he furnish the report that he has made to the

Parole Commission.

QUESTION: Do you think it could encompass an NAM memorandum if the law required the agency to consider NAM memoranda?

MR. KNEEDLER: Well, I think it would depend on whether the statute effectively made the NAM part of the Government's decisionmaking process. It would be one thing if they said, consider as under the APA, an agency would typically have a duty to consider comments submitted by any outsider. We're not arguing that.

What we are arguing is where the entity outside the Government submits something to the agency, effectively as an agent of the Government, not as an outsider, then Exemption 5 applies. As we cite in our brief, there are cases from four or five circuits that have uniformly held that submissions by outside consultants or experts that are retained by an agency in a particular occasion to submit reports to an agency in connection with some project, that those reports are covered by Exemption 5. Because Congress recognized that the deliberative process occasionally requires an inclusion of materials obtained from outsiders.

QUESTION: But the are in those consultant cases, the consultants are really working for another agency in any case. They are part of the executive branch.

MR. KNEEDLER: Well, not necessarily. In a number of cases we've referred to, these are private persons who are in

effect part of the agency. This is on intra agency rationale, the outside consultants are really part of the agency for that purpose because it's necessary for the agency to use their services in connection with a deliberation.

As we point out in our brief, this view is also reflected in the background of FOIA itself. Both as this Court recognized in Weber Aircraft for example, the Machin Privilege which protects reports concerning aircraft accidents, the Machin Privilege was specifically considered by Congress and one that Congress intended to make applicable under Exemption 5.

Well, in Machin itself, the witness statements that were involved were statements of outsiders. They were not statements of -- perhaps some of them were but the principal focus was on a report that was not submitted by a person in the agency.

And other privileges under Exemption 5 such as the work product privilege, it would be odd to cut the privilege off depending upon whether the person submitting a statement was in the Government or outside. So there are a number of privileges where the agency might have to rely on some materials submitted from outside, and for that purpose, the submitter is regarded as part of the agency.

With respect to the further requirements of Exemption 5, as I've said, I think now eight circuits have made clear that presentence reports are not routinely available to persons

seeking them in civil discovery. And the test under Exemption 5 is whether a document is routinely or normally available to a person on civil discovery. Not whether it might be made available to a person who has a special connection with it or a special interest in it, or a special need for it.

QUESTION: Are those cases where the defendant after incarceration is suing to get some change in his status and requests through discovery a copy of this report?

MR. KNEEDLER: No, the cases that we've relied upon have generally been where third parties have sought copies of the reports, either in connection with pending civil litigation or in some cases in criminal litigation where the defendant has sought the report of a Government witness or a codefendant.

But again the test under Exemption 5 is whether they would normally be available.

QUESTION: But one would think though, just as a matter of off the top of the head so to speak, that if the sort of suit was brought that I described, that probably this would be available to a plaintiff suing the Government.

MR. KNEEDLER: Well, it depends. In the sort of case, you're describing it may be. For example, if the defendant is suing the Government in a way that relates to the presentence report and he could make a showing of special particularized need for the report, he could obtain a copy of it then.

QUESTION: But why shouldn't that defeat Exemption 5?

MR. KNEEDLER: Because the subject of the report just like any member of the public could get a copy of the report only upon a showing of special need. It's not routinely handed out as a matter of course.

QUESTION: Well, nothing is routinely handed out in litigation. I mean, you have to go through the discovery process.

MR. KNEEDLER: That's right. But I mean, it's not routinely made available. It is privileged and the person seeking the document in the litigation with the agency would have to show a special need for it. That he couldn't obtain the information from some other --

QUESTION: Well, then are you saying then that for the number of Section 5 or subsection 5 privilege to attach, it's enough that in the litigation where the person would ultimately obtain discovery, they have to make a showing that they need it?

MR. KNEEDLER: Well, that's the general rule under Exemption 5. In fact, under Grolier, the Court faced a very similar situation. There the argument was made that a court in previous litigation involving the subsidiary of Grolier, itself, the requester, had ordered the disclosure of the particular documents on the ground that the plaintiff there had made a showing of particularized need. And the argument was made then in the FOIA case that that prior order demonstrates that the document shouldn't be withheld because it had been

ordered disclosed in discovery.

The Court said no, that isn't the test. The question is whether it would be routinely available, not the question of whether it would be made available upon a special showing.

And in this case, the only times that the defendant sees a copy of his presentence report are where Congress has in effect deemed him to have made a special showing.

QUESTION: Well, Mr. Kneedler, do you take the position that the Parole Commission may not give a copy to the defendant if it chooses to do so?

MR. KNEEDLER: No, we don't. We don't take that absolute position. And that was the subject of our filing in the Crooker case. And we continue to abide by that position. And that's the se are agency records. We do acknowledge that.

But by the same token, we think that the Parole Commission is not obligated to turn them over to the defendant.

QUESTION: Could the defendant possibly get a copy under the Privacy Act?

MR. KNEEDLER: No. The Privacy Act permits an agency to exempt certain systems of records from the provisions of the Privacy Act. And in this case, the Parole Commission and also the Bureau of Prisons have exempted the files containing the presentence report from the Private Access provisions of the Privacy Act. And it seems to us to be quite anomalous if the defendant has no private right of access under the Privacy ACt, which was designed for that purpose, that he should be able to

invoke the public access provisions of the Freedom of Information Act to obtain a copy of the report.

And going back to the question you asked, Justice O'Connor, it seems to us that where the document really has a dual status, it's an important essential document for the Court and an essential document for the Agency, it makes no sense for the Parole Commission, either voluntarily or for it to have to under FOIA to disclose a document that the Court would not disclose.

And therefore the Parole Commission has tried to reach a harmonious approach in this area, whereby it will not release a copy of the presentence report to the defendant if the Court wouldn't do it. Otherwise, they would be working at cross purposes. And there's no indication at all in the legislative history of the Parole Act that that was somehow prohibited to the Parole Commission, that it had to routinely dispense with the confidentiality of reports.

QUESTION: Mr. Kneedler, can I ask you a question. Supposing, just looking at the language of Exemption 5, supposing the inmate brought some kind of an action against the Parole Commission claiming he was entitled to more of a hearing given certain information based on certain information that was in his presentence report, and that the presentence report was clearly relevant to the charges he made, and that what he needed to see was not part that could have been withheld from him but would have been ordinarily disclosed to him, would that

not routinely be made available in a case like that?

MR. KNEEDLER: Well, I think no. I mean, the test is whether he would have a special need for it.

QUESTION: Well, the need is it's relevant to the lawsuit, that's the special need.

MR. KNEEDLER: It's relevant but the question --

QUESTION: Which is generally the test in any discovery proceeding, it's got to be some showing of relevance.

MR. KNEEDLER: But it's quite clear that presentence reports are not generally available.

QUESTION: But also you don't have an awful lot of litigation between inmates and the particular agency having custody of it. But when there is litigation between the inmate and the agency and it relates to something in the report which he had a right to see but not keep earlier, why wouldn't that routinely be made available. That's what I want to know?

MR. KNEEDLER: Well, what might happen is that the Court might readily find that he has a special interest in it, and a special need to see it because the litigation relates directly to the presentence report.

QUESTION: But the fact that it's needed in litigation would in those facts constitute the kind of special need that you're talking about?

MR. KNEEDLER: Yes, because that directly parallels his right to read the report at sentencing and again prior to his parole hearing. Congress determined that because the

presentence report is the basic document, he has a special need to see it. But he can't keep it. He has to give it back again.

QUESTION: The special need arises out of his status as a litigant.

MR. KNEEDLER: No, his special need arises out of the fact that he presentence report is placed in issue in the case concerning him in particular.

QUESTION: Right.

MR. KNEEDLER: He might have a suit against the Parole Commission or the Bureau of Prisons that does not relate to his presentence report.

QUESTION: And it wouldn't be routinely available because it wasn't relevant.

MR. KNEEDLER: Well, it might still be relevant, and even under the Civil Discovery Rules, it doesn't have to necessarily be admissible. It just has to perhaps lead to other information.

QUESTION: I just can't imagine a trial judge turning down a request to see a report that he had a right to see earlier in a discovery situation.

MR. KNEEDLER: Well, the Court might well take that into account in deciding whether the defendant should be able to see it. But I would expect for example in a case like that that the Court again would not just hand him a copy of the report. I think the Court would probably parallel what

happened before when the defendant tried to see the report. Let him read it, let his lawyer in this private civil suit read it, but not let him retain a copy of it.

QUESTION: Even if it was going to be an exhibit in the lawsuit?

MR. KNEEDLER: Well, if it was an exhibit in the lawsuit, then the Court would be deciding that it should be admitted, but in terms of discovery. And all we're talking about is handing it over to the defendant.

QUESTION: Well, tell me something else, what really is the Government seeking to protect from -- I just have a difficult time understanding what it is the Government doesn't want to turn over to somebody that has already seen the material.

MR. KNEEDLER: It's the question is turning over the document itself.

QUESTION: Yes, I understand that.

MR. KNEEDLER: It's the difference between the hard copy and --

QUESTION: Or making a Xerox copy. But what's the big deal? That's what I don't quite understand.

MR. KNEEDLER: There are several considerations here. First in terms of what it could mean to the defendant if he has the entire hard copy of the report. As the Administrative Office stated in its submission to the Parole Commission, he has all the information at his finger tips. He can brood about

it, he can pore over it, he can look for things that may be wrong or look for persons to retaliate against. That's much different than simply having a recollection of something he might have read.

Beyond this, if he has an actual copy of the report, there's no inhibition against his handing the report out to third parties. And this was again one of the principal concerns that the Administrative Office explained to the Parole Commission on behalf of the judges who are part of the Probation Committee of the Judicial Conference, and also on behalf of probation officers.

They were afraid that sources of information would be more reluctant to cooperate with a probation officer if the formal embodiment of their comments were freely distributed to third parties.

QUESTION: Mr. Kneedler, as I glance at the Grolier case, it looks to me as if what the Court was saying there was where you're having a claim of work product privilege, and the Court has overcome that privilege in an earlier litigation. That does not mean that it's routinely available.

But there it's very much of a case by case thing. You know, you have a claim of work product. How much does the other side need it. And here I don't see any counterpart to the work product privilege that's asserted.

MR. KNEEDLER: Well, the principle under Exemption 5 is a general one that this Court has stated on three or four

occasions. It's stated in Weber Aircraft and in Sears. The test is whether whatever the privilege is, whether it would be routinely available or not.

QUESTION: But there isn't any privilege here on the Government's side, as I see it.

MR. KNEEDLER: Oh, there is. There is a Governmental privilege. It's actually quite similar to the Machin privilege in Weber Aircraft which is a privilege to maintain the confidentiality of the information to encourage sources to cooperate with the Government. That privilege applies to the subject of the report as well as to third parties.

QUESTION: And this is a Governmental privilege that's recognized in litigation?

MR. KNEEDLER: Yes. There are a number of cases in which the Courts have declined to release their own copies of presentence reports to people who want them precisely for use in pending litigation.

QUESTION: Mr. Kneedler, once you give them a copy of it to look at it, is somebody in there with him as he's looking at it?

MR. KNEEDLER: The practices vary from district to district. In some cases, as I understand it, the defendant looks at it in chambers and the judge may be present. In others, it's furnished to him at the probation office where the probation officer may or may not be present.

QUESTION: Is he allowed to take it to his office?

MR. KNEEDLER: Some districts would give it to the defense counsel and allow the defense counsel to arrange for the way in which it would be disclosed.

QUESTION: Well, then all the things you're worried about would have happened.

MR. KNEEDLER: Not necessarily because there's --

QUESTION: You're afraid that he'll show it to somebody.

MR. KNEEDLER: Well, and not just show it but distribute it. He might show it to someone, he might distribute it. Sources of confidential information they might feel much more secure if they knew that the presentence report was going to remain confidential as opposed to being distributed.

QUESTION: I don't see how it can possibly be confidential once you show it to him.

MR. KNEEDLER: No, confidential not just from the defendant but to the world at large. And if you give a copy --

QUESTION: Well, but the defendant can talk to the world at large.

MR. KNEEDLER: He can but there's a big difference as far as the probation officers are concerned, as far as they see it from the defendant being able to show an actual copy and just being able to recount what his recollection is. Frankly, there's a greater deniability on the part of sources of information if the defendant does not have an actual hard copy.

QUESTION: That's a lot of speculation.

MR. KNEEDLER: Well, in a FOIA case, the test is not whether the privilege that is recognized elsewhere is thought to be wise or not. FOIA takes the privileges as they are found, and applies them through Exemption 5, and in this case, we submit that Exemption 5 does incorporate the privilege.

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

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kneedler.

We'll hear now from you, Mr. Glitzenstein.

ORAL ARGUMENT OF ERIC ROBERT GLITZENSTEIN, ESQ.

ON BEHALF OF RESPONDENTS

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

Much of the Government's argument seems to be contending that unless Congress has in some way required it in a statute other than the Freedom of Information Act that presentence reports be disclosed to prisoners who are otherwise entitled to see them before sentencing and parole hearings, that it needn't provide copies of those reports.

But that stands the entire concept of the Freedom of Information Act on its head. The whole purpose of the FOIA was to essentially require the Government to make available to requesters Federal agency records, unless the Government can point to a specific exemption which authorizes the Government to withhold that information.

We would submit that it is quite plain that neither of the two exemptions relied upon by the Government here, Exemptions 3 or 5, are applicable to requests by the subjects of presentence reports for copies of material they have already been permitted to see pursuant to not one but two statutory directives.

QUESTION: Mr. Glitzenstein, the fact that the request is by the subject of the report is it conceded that that's irrelevant? I mean, if you're right that the subject of the report can get it, anybody can get it. Isn't that so?

MR. GLITZENSTEIN: Your Honor, I believe that Exemption 6 was crafted to deal precisely with the distinction between first party and third party requests. The phraseology of that Exemption states that information shall not be released, or may not be released if in fact the disclosure of the information would create an unwarranted invasion of personal privacy.

I would submit it is quite plain that when personal information is released to the individual who is the subject of the information, there cannot in the language of the exemption be an unwarranted invasion of personal privacy. However, if a third party seeks access to that information, there may very well be an invasion of personal privacy subject to that particular exemption.

QUESTION: Well, that's true as far as personal privacy is concerned, but as far as exposing the identity of

people who spoke about the individual were, what they said, and other such matters, that could be obtained not only by the defendant but by anybody, presumably.

MR. GLITZENSTEIN: I think again, it would depend upon an analysis of the particular exemption involved. For example, if one were dealing with confidential sources, then one would look at whether Congress has in some way exempted confidential source information not only from the defendant but from the world at large. And we would submit that it's quite clear, as we have conceded in this case, and I think as two circuit courts have now held, the confidential source material clearly can be withheld not only from the defendant but from the rest of the world as well.

QUESTION: But if it has to go to the defendant, it has to go to the rest of the world, isn't that right, except for those personal matters that relate only to the defendant. That arguably could be kept out from the rest of the world under 6. But all the other stuff about confidential sources, if the defendant can get it, anybody can get it.

MR. GLITZENSTEIN: I believe that's basically our argument, yes, Your Honor.

I think it's conceivable if I might just amend that partially that there could be in some instances a Governmental privilege. I don't think one exists here, that protects disclosure from third parties but not necessarily from first parties, depending upon the kind of Governmental interest that

was being articulated.

I don't think this qualifies as such a privilege as I will indicate in my remarks in a moment. But I think it's conceivable that justice Exemption 6 may turn on whether the exemption would apply depending upon who the requester is, it is conceivable that there is privileges that are crafted by the courts for discovery proceedings could turn on the nature of the requester.

But I would say as a general rule that you're absolutely right that release of information to one party would involve release of information to the world at large.

I just have a few remarks about the Exemption 3 claim. Because I believe it helps to put in perspective why the Government is really overreaching in this case in an effort to argue that these particular documents are exempt from their subjects. As we have argued in our brief, Exemption 3 was amended in 1976 for the precise purpose of very carefully narrowing the kinds of statutory schemes that would qualify as withhold statutes under the particular exemption.

As it is now crafted, as Mr. Kneedler pointed out, it only covers information that specifically is exempted from disclosure by statute providing that the statute either a) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or b) establishes particular criteria for withholding or refers to particular types of materials to be withheld.

In crafting that language, the legislative history of the amendment makes it quite clear -- and this is how it's been largely construed by the courts -- particular documents cannot be withheld unless Congress has in some way told an agency how to exercise its discretion in order to release or withhold that information. And thus where a statute does not tell an agency in some way to withhold material from a requester, the exemption does not apply.

We would submit in this case it is quite clear that as to three specific categories of information which are sometimes contained in presentence reports, Congress made that determination quite explicit. And thus under Section 4208(c) of the Parole Act, the Parole Commission is authorized to withhold from everyone, including subjects of the reports, material revealing sources of confidentiality obtained under a promise of confidentiality as well as two other specific categories of information.

That clearly reflects Congress' judgment that that kind of information could occasion some harm if released. It is just as clear that as to other portions of presentence reports which may otherwise be shown to the prisoner, then there is no harm that Congress foresaw in the disclosure of that information, and it did not direct the Parole Commission to decline to release that particular information.

In fact, the Chairman of the Parole Commission has himself recognized that in various documents that we have

included in our brief, as well as documents attached to the Government's Petition for Certiorari.

QUESTION: Mr. Glitzenstein, do you concede that a court would not be required to give the defendant a copy under Rule 32?

MR. GLITZENSTEIN: That's correct, Your Honor. Rule 32(c)(3)(e) specifically gives the courts the authority to disclose copies, or I think in the language of that provision, to require return to the Court. But I think that helps our case here. Because Congress did not adopt that provision when it enacted the provisions of the Parole Act.

Tellingly, it adopted virtually every other portion of Rule 32(c) verbatim, when it enacted the Parole Act, including almost precise parallels for the three categories of data including confidential sources that may be withheld. But it did not include the requirement that is contained in Rule 32(c)(3)(e). The conclusion seems inescapable therefore that that was a purposeful deliberate determination by Congress to essentially authorize the Parole Commission to release copies of the reports.

And as the Chairman of the Parole Commission himself has said, the fact that the Parole Commission is authorized to withhold confidential sources suggests that in response to FOIA requests, "in cases where there is confidential material which is not to be shown to the defendant, such material can be withheld under the FOIA, as well." He went on to say that

giving prisoners copies of presentence reports that they have already been permitted to read will pose, "no threat to the willingness of confidential sources to come forward because the probation officer can still guarantee confidentiality under the FOIA."

QUESTION: Mr. Glitzenstein, now you could say the same thing with respect to the Rule. Could you give me some reason why it makes sense to allow the Parole Commission to do what the court is specifically forbidden from doing. It's such an odd thing to specifically forbid the Court from turning it over, but then when the Court gives it to the Parole Commission, allowing the Parole Commission to turn it over. And if I have a statute that arguably prevents the Parole Commission just as it prevents the Court, I'm inclined to read the law to make some sense.

Now, tell me why it makes any sense to allow the Parole Commission to do it when the court can't?

MR. GLITZENSTEIN: First of all, Your Honor, I would like to just emphasize that I think that clearly is what Congress did both in the plain language of the two statutes by not adopting Rule 32(c)(3)(e) and in legislative history of the Parole Act where it authorized independent determinations.

QUESTION: You're saying Congress is privileged to make no sense if it wants to, and I agree with you. I agree with you. If that's what they said, that's fine. But let's assume that I want to try to make it make sense. Now, why

would it make sense to allow the Parole Commission to turn it over?

MR. GLITZENSTEIN: I think the reason it makes sense is when you look at the purpose of Rule 32(c) was essentially to give the Court control over that document up until the end of the sentencing process. There have been cases from this Court including Williams v. New York, other cases which have talked about the need for the sentencing judge to supervise the sentencing process. And I think what Congress was saying was that up until the sentencing judge completes sentencing, then the sentencing judge could essentially exercise that kind of supervision and control over all of the documents that come before the Judge and are used in the sentencing process, perhaps to prevent unnecessary delay if he believes that a particular defendant will take the presentence report and do things with it that the judge may not like.

But whatever the reasons, what I think Congress was doing was splitting this up and saying, up until the time of sentencing you are using the report exclusively, and you can keep control of the materials that are being used. But once it goes to correctional authorities and it takes on entirely different kind of significance and is used in totally distinct kinds of determinations, then we want the Federal Statutes, including the Parole Act and other relevant statutes to kick in and to control the way in which these reports are used and disseminated.

And I think in keeping that in mind, it's crucial to focus on the fact that presentence reports are not only used in parole determinations by the Parole Commission, but as our brief points out, they are used in a whole host of correctional decisions the second that that prisoner walks through institutional doors. It's used to determine the kind of institution that person will be put in, the nature of the security that will be imposed, furloughs, what sorts of rehabilitation and correctional systems will be put into place. Virtually every aspect of the prisoner's day to day life will be impacted perhaps by the presentence report.

And what Congress was saying was since that is the case we do not want the sentencing Court and its use of this report and control of the report under Rule 32(c) to have a continuing bearing upon what the Parole Commission does with that document and what other correctional authorities do with that document.

QUESTION: All those good things you've just said, those good uses all relate to use by the particular defendant. It's very strange for Congress to serve those purposes by saying the document shall be available to the world at large under the Freedom of Information Act, which doesn't require any particular showing of need. It doesn't have to be the particular defendant. It's anybody in the world.

That's a strange place to further that policy.

MR. GLITZENSTEIN: Well, first of all, Your Honor,

again, I think that Congress did focus on the need of the particular defendant in passing the Parole Act, where Congress specifically required that the document be made available to the prisoner, it did not impose any limitations.

But secondly, and I think the more general answer is, the exemptions to the FOIA apply to any Federal agency record that a Federal agency happens to have ink its possession. And the Government has conceded since the Crooker case that these presentence reports are Federal agency records. And therefore the only way to analyze pursuant to Congressional intent, whether the document may be withheld in a particular circumstance, is by analyzing whether a specific exemption might apply.

And as I mentioned before when one is looking at giving out documents of this nature to the world at large, then Congress intended the Exemption 6 privacy analysis to be the kind of test that would be applied by courts in applying the FOIA exemptions. And just like any other personal information that might be involved in any determination made by an agency, medical records, social security records, Veterans Administration records, the Exemption 6 test was crafted for precisely that purpose.

And I think that is the way in which courts should analyze this kind of case as well as other kinds of cases in which an individual may be permitted to obtain access to some material, but the world at large would not necessarily be in a

position to do so.

QUESTION: Mr. Glitzenstein, do you concede that some lower courts have recognized a sort of privilege against disclosure to third parties generally of these presentence reports?

MR. GLITZENSTEIN: Your Honor, I think it is clear that some lower courts have in some instances withheld copies of presentence reports from third parties trying to obtain them from sentencing courts. And I think that it is very important to look carefully at what those courts said. Because it is useful in analyzing why Grolier, why Weber, and the other cases that this Court has decided under Exemption 5 are inapplicable.

In those cases, the Courts began their analysis, and again, this is sentencing courts, usually codefendants were attempting to obtain copies of other peoples' presentence reports by specifically saying, that the usual rule when a defendant is trying to obtain his or her own presentence report is created by Rule 32 and the Parole Act, and first parties ordinarily permitted to obtain copies of their presentence reports without showing any special need, without demonstrating that they have any overriding interest in obtaining that information just by showing that it's relevant to the proceedings.

Then those Courts, and again, I'm referring precisely to the cases that are cited by the Government, Figurski, Hancock, Charmer Industries, go on to say that because Rule 32

and the Parole Act do not say anything about third party access, then we, the sentencing courts, must craft our own rules. And in crafting our own discovery rules, we will take a number of factors into account. One of the factors we will take into account, as those cases indicate, is the Court's desire to exercise control over the documents, because we deem them to be Court records and that they will stay court records.

In that connection, I think it's useful to quote from Charmer Industries, one of the cases principally relied upon by the Government, which says, right at the outset, that notwithstanding any secondary uses, the presentence report is a court document and is to be used by non-judicial Federal officials and others only with permission of the Court. Went on to say that in light of the nature of the presentence report as a Court document, designed and treated principally as an aid to the Court, we conclude it would not properly be disclosable without authorization by the Court to third parties.

I think two things become quite clear. One is that if there is any kind of recognition of confidentiality, it involves third parties and not first parties. And secondly, those cases are in large measure dependent upon an argument which the Parole Commission now concedes it is no longer making. And that is the sentencing courts' continuing control over the materials.

In essence, what the Parole Commission is doing is using cases which recognize perhaps a certain kind of

confidentiality but with very precise contours and based upon certain presuppositions and saying, we are going to take those cases and expand the privilege far beyond the contours that those cases themselves recognized. That is, in cases involving first parties as opposed to third parties, and in cases involving Parole Commission discovery proceedings as opposed to situations where the sentencing court is itself the party in control.

QUESTION: Is there any case which you have found in which a court has said a third party may get a presentence report after the conclusion of the sentencing process?

MR. GLITZENSTEIN: There are cases I know that have indicated that presentence reports may upon a substantial showing of need be disclosed. I cannot recall whether those were after sentencing or before sentencing. In some of these cases, as I indicated --

QUESTION: But that's under the specialized need standard.

MR. GLITZENSTEIN: That's correct, Your Honor. I think every court which has looked at third party access has said that in order to give out a presentence report to a third party, there must be some demonstration of specialized need. Again, the reasons why the Court said that are totally inapposite here. One reason being the control of the sentencing court over the document forever, and the second reason being the need to protect privacy of the subject of the

report.

But I think it is fair to say that courts will be reluctant to give these documents out because they are so personal. And because they have so much sensitive information about the defendant to give them out to third parties without a substantial showing of need. By the same token, it is quite clear that Congress has specifically said that when you have first parties, there need be no showing of need.,

In fact, the case we cite in our brief, which I think answers Mr. Kneedler's arguments quite effectively is Rone v. United States, a Seventh Circuit Case, in which the Court reviewed amendments to Rule 32(c), as well as the Parole Act that was adopted in 1976 and said these cases not only give prisoners a right to get access to these documents by initiating an FOIA request, they go even further than that. They impose an affirmative duty on sentencing courts and on the Parole Commission to come to the defendant and say, this is material that we may very well rely upon in making a sentencing determination or in making a parole decision, and therefore, you have a right to see that document.

So these cases go beyond the routinely available standard in that sense. They in fact declare, as well as the statutes that Congress crafted, that prisoners and defendants have an affirmative right to have these documents made available to them.

And it is therefore difficult for us to see how the

Government can argue that these are not routinely available to prisoners in discovery proceedings.

The final point that I would like to make, or one of the final points I'd like to make about the Government's analysis, is that it would cut against the grain of what this Court said in the Federal Open Market Committee v. Merrill case. In which this Court in the process of recognizing a certain kind of discovery privilege, stated that it would, "hesitate to construe Exemption 5 to incorporate a civil discovery privilege that would substantially duplicate another FOIA exemption."

Here, it is quite clear that any conceivable interest the Government has in withholding these documents is adequately, more than adequately met by other exemptions. As I noted above, we concede the Ninth Circuit held, the First Circuit has held, that confidential source material constitutes an Exemption 3 statute under the Parole Act, and can be withheld.

By the same token, any legitimate privacy interest clearly could be met through the contours of Exemption 6, and by applying that Exemption. And so it's also quite possible that other exemptions would apply to specific portions of the reports.

But it is quite clear that the Government's presentence report privilege is certainly not needed because of the other FOIA exemptions. In addition, it would do something

that would have very untoward effects on Exemption 6 and the rest of the FOIA. In effect what it would do as we read their approach to Exemption 5, is prevent individuals from ever using the Freedom of Information Act to obtain their own personal information, because the more sensitive, the more personal the information, it seems quite clear the more the Government would be able to argue that it is note quote unquote routinely available to third parties in discovery proceedings.

And that could then be used under Exemption 5 to prevent first parties from obtaining access to their own reports and their own documents. And in that connection, I think it's quite important to focus on the fact that Congress itself saw the FOIA as a tool for obtaining first party information, that is, individuals getting their own records.

Contrary to the suggestion by Mr. Kneedler, Congress did not only look at the privacy act as the vehicle for obtaining first party information. In fact, in 1984, Congress amended the Privacy Act for the specific purpose of saying that just because information is not exempt under the Privacy Act does not mean it would not be available under the FOIA. And the legislative history says we see both of these statutes in appropriate circumstances as vehicles for obtaining personal information.

QUESTION: Mr. Glitzenstein, the argument you just made that there are other protections which would keep away from the public or from any requester information that impinges

upon some privacy right or some other Governmental interest, you can always make that argument under Exemption 5, can't you?

I mean, you can always say, what do you need Exemption 5 for if it's really private, Exemption 6 will cover it. If it's going to disclose informants, the Criminal Information exemption would cover it. You can always run that argument, and you would just read Exemption 5 out of the Statute.

For some reason, the Statute says if it's an interagency or intra agency memorandum, regardless of whether these other interests are impinged or not, it won't be provided.

MR. GLITZENSTEIN: Your Honor, I think if one looks at the classic Exemption 5 privileges which the courts early on incorporated into the Exemption and the ones that are highlighted in the legislative history, one would have to come out a different way on that.

Because, for example, deliberative process privilege, which specifically was designed to protect drafts, working papers, other kinds of documents shedding light on the deliberative process, I think much of that material, and the courts have made it clear that much of that material would not necessarily be withholdable under other FOIA exemptions. By the same token, attorney client material, attorney work product doctrine material, the two other core privileges that the Courts have incorporated into Exemption 5, I cannot see how

those would for the most part be withholdable under other exemptions.

And so I think it is quite consistent with Congress' intent to see whether or not a particular withholding that the Government is interested in really goes to those kinds of core Governmental interests that could not be protected under other exemptions. Because as this Court said in Federal Open Market Committee v. Merrill, Congress drafted other exemptions of the FOIA for the precise purpose of incorporating certain other kinds of discovery privileges which were known to criminal and civil discovery.

And therefore, it would really subvert the whole purpose of Congress drafting those other specific exemptions to lock stock and barrel put everything into Exemption 5. In a sense, I think the Government's argument threatens to really sweep up all those other exemptions and to either make them irrelevant or worse, to essentially undercut the kinds of tests for example under Exemption 6 that Congress really wanted the courts to apply in making those kinds of determinations.

And so I think that the only way really to avoid that kind of hazard in really reading the rest of the exemptions out of the statute is by doing what the Ninth Circuit did and that is by recognizing that Congress can effectively say that particular documents are not subject a discovery privilege and that particular individuals are entitled to receive access to those documents, and thus Exemption 5 should not apply to those

materials.

The last point that I would like to make involves the fact that the Government's argument under Exemption 5 reads another entire area of the law out of discovery, and that is the law of waiver. The notion being that in basic discovery cases when the Government or some other party is arguing a privilege applies, it is generally held that when your forfeit confidentiality of the material, then you are no longer able to argue that that information should be withheld from a party in subsequent proceedings.

And I think in response to Justice Marshall's inquiries, it is my understanding that not only prisoners and their lawyers generally allowed to look at these documents, it is my understanding that the Parole Commission in most sentencing courts actually allow the prisoners and their attorneys to take notes from the copies of the documents. So if one were really concerned about passing along information of that nature to third parties, clearly taking verbatim notes from the copies that are already provided the prisoners would involve that kind of a harm.

And that is why the Parole Commission in the documents that we cite in our briefs has said that we do not see any incremental harm, quite frankly, in giving out copies of documents that prisoners were already allowed to see on several occasions and even take verbatim notes of.

I don't mean to suggest, I want to make it clear,

that we think there is a genuine risk that prisoners will take these reports and given them out to the world at large. These contain very sensitive information about prisoners' family backgrounds, psychological characteristics, and there's no evidence o the record that prisoners are simply waiting to give this incredibly sensitive personal information out.

But if that was a concern, that is a concern which this particular exemption claim would not do anything to prevent. As a result, for these reasons, we believe that it is quite clear that the Ninth Circuit was correct, both in its application of the FOIA exemptions, and its determination that there were no significant Governmental interests to be protected by withholding copies of presentence reports, and we therefore ask the Court to affirm the Ninth Circuit decision.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Glitzenstein.

Mr. Kneedler, you have three minutes remaining.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.

ON BEHALF OF PETITIONERS - REBUTTAL

MR. KNEEDLER: Thank you, Mr. Chief Justice. There are several points I'd like to make.

First, the privilege at issue here is not a privacy privilege as respondents repeatedly suggest. The reason why, and we point this out in our reply brief and a number of cases say this, the reason why courts do not disclose presentence reports to parties seeking to discover them in litigation is

not the privacy of the defendant, that may be subsumed. But the overreaching rational is the Governmental interest, the Governmental privilege in protecting the free flow of information to the Government, to the probation officers. That rationale applies equally to giving a copy of the report to the subject of the report as it does to third parties.

Also, the nature of the privilege requires that it be as absolute as possible, so that the sources of information will have confidence that their information will be tightly held. And in fact, as the Administrative Office pointed out to the Parole Commission in the rulemaking proceeding, sources of information are specifically told that their information will be only shown to the defendant and not made available to third parties.

QUESTION: Well, it's not really absolute. This exemption is not mandatory. The Government, even if we agree with you that the exemption applies, the Government need not invoke it.

MR. KNEEDLER: No, it's but that's true of a lot of privileges. The Government may choose not to.

And related to that is the second point I wanted to make. Respondents make something of the point that the cases we rely on refer to disclosures by the sentencing court, and not the Parole Commission, and somehow they are different considerations or different uses by the Parole Commission. First of all, the use is essentially the same. The presentence

report is the essential document on which the sentencing decision is made, the parole decision is made and incarceration decisions are made.

But beyond that, the purposes of the privilege are precisely the same in both contexts. The purpose of the privilege is to protect the integrity of the document by securing the information from the sources. That purpose applies equally to whether disclosure is made by the Parole Commission or by the sentencing court, and in fact, the probation officer makes the report for the Parole Commission as well as the sentencing court.

The third point I want to make is that respondents are arguing for an exception to a general privilege under Exemption 5 of the Freedom of Information Act, an exemption which they essentially concede applies to members of the public. Exemption 5 as Judge Wald said in her dissenting opinion in Durns permits no such distinction between the requesters unlike Exemption 6.

But more importantly, if there was any doubt about the existence of a special exemption, it's dispelled by Rule 32(c) in which Congress focused on the precise question here, whether the subject of the report has a right or should have a right to get it, Respondent's position would completely undermine that decision.

CHIEF JUSTICE REHNQUIST: Your time has expired, Mr. Kneedler.

The case is submitted,

(Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

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I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the U.S. Supreme Court.

Date: 1/19/88

Margaret Daly

Official Reporter

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