

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

CHURCH OF SCIENTOLOGY OF CALIFORNIA,)

Petitioner,)

v.)

INTERNAL REVENUE SERVICE,)

Respondent.)

No. 86-472

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WASHINGTON, D.C. 20543

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X
3 CHURCH OF SCIENTOLOGY OF CALIFORNIA, :
4 Petitioner, :
5 v. : No. 86-472
6 INTERNAL REVENUE SERVICE, :
7 Respondent. :
8 -----X

9 Washington, D.C.

10 Monday, October 5, 1987

11 The above-entitled matter came on for oral argument
12 before the Supreme Court of the United States at 2:00 p.m.

13 APPEARANCES:

14 MICHAEL LEE HERTZBERG, ESQ., New York, New York; on behalf
15 of the Petitioner.

16 ALBERT G. LAUBER, JR., ESQ., Deputy Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf of
18 the Respondent.

C O N T E N T S

ORAL ARGUMENT OF

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MICHAEL LEE HERTZBERG, Esq.

on behalf of Petitioner

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ALBERT G. LAUBER, JR., Esq.

on behalf of Respondent

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MICHAEL LEE HERTZBERG, Esq.

on behalf of Petitioner - Rebuttal

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

2 2:00 p.m.

3 CHIEF JUSTICE REHNQUIST: We'll hear argument next in
4 No. 86-472, Church of Scientology of California versus the
5 Internal Revenue Service.

6 Mr. Hertzberg, you may proceed whenever you're ready.

7 ORAL ARGUMENT OF MICHAEL LEE HERTZBERG

8 ON BEHALF OF PETITIONER

9 MR. HERTZBERG: Mr. Chief Justice, may it please the
10 Court:

11 The issue in this case is the meaning of the Haskell
12 Amendment. The Haskell Amendment is found in Section
13 6103(b)(2) of the Internal Revenue Code. And it provides that
14 the term, return information, does not include data which is in
15 a form which cannot be associated with or otherwise identify,
16 directly or indirectly a particular taxpayer.

17 The en banc majority of the Court of Appeals below
18 read a reformulation requirement into the Haskell Amendment,
19 but the term, reformulation, appears nowhere in the plain
20 language of the Statute; appears nowhere in the legislative
21 history of the Statute, indeed, does not even appear in the
22 briefs of the Government below.

23 By reading this reformulation requirement into the
24 Haskell Amendment the Court of Appeals in effect held that data
25 that is in Internal Revenue Service files which cannot be

1 associated with, or identify a particular taxpayer must
2 nonetheless be considered return information and generally
3 nondisclosable in response to Freedom of Information Act
4 requests or otherwise, unless it is also, in addition to
5 nonidentification, reformulated. And the problem with this
6 reformulation standard is that it is not articulated in a very
7 precise way in the opinion below. There is very little
8 guidance as to what is meant by reformulation. In fact, as the
9 Court of Appeals en banc majority candidly acknowledge in their
10 opinion, it was easier for them to say what they felt that the
11 Haskell Amendment did not mean, than to articulate precisely
12 what it did mean.

13 And as an example of the imprecision, and the
14 problems that are raised by this reformulation test, the Court
15 of Appeals never specifies in what original form data must be
16 in in tax files before it can be properly reformulated. As the
17 dissent noted, there is information in Internal Revenue Service
18 files in every kind of conceivable stage of development, and
19 yet we don't know in what original form it must originate
20 before it can be reformulated.

21 QUESTION: Well, how about your position, Mr.
22 Hertzberg? I realize you disagree with the Court of Appeals.
23 But would you say that an individual income tax return should
24 be available if the information that allowed you to identify a
25 taxpayer were redacted?

1 MR. HERTZBERG: Your Honor, returns themselves are
2 separately nondisclosable under the statutory scheme. So I
3 don't believe that is an issue that would arise in that
4 context. We are talking about discreet data return information
5 and whether that can be identified with a particular taxpayer,
6 that was what Congress' purpose was.

7 QUESTION: Okay. Well, now where do you and the
8 government differ? I mean, what kind of thing do you say
9 should be available, in a kind of a concrete illustration, and
10 the government says shouldn't be available?

11 MR. HERTZBERG: Sure. Your Honor, we would maintain,
12 and this of course arose in the context of a Freedom of
13 Information Act request, so it's easiest for me to respond in
14 that context.

15 Let us say a Freedom of Information Act request came
16 in and to properly respond to it, some data in the file of a
17 third party taxpayer included some numbers on a piece of paper
18 that were in the file, and that would be somehow comprehended
19 hypothetically within the confines of the Freedom of
20 Information Act request. If those numbers divorced from
21 identifying material, and I will now just give as an example,
22 name, address, or social security number, but by no means the
23 exhaustive list of what could be associated with a taxpayer, if
24 that number were disclosable without any of what I have
25 referred to generically as identifying material, it cannot be

1 linked with a particular taxpayer.

2 We would maintain that it would be disclosable if it
3 came within the term --

4 QUESTION: So supposing the Freedom of Information
5 Act request was for the number of people who had reported a
6 gross income of \$76,855 last year? Now, you would say that
7 should be disclosable?

8 MR. HERTZBERG: I would, Your Honor, if it could in
9 no way be linked to a particular taxpayer, of course.

10 QUESTION: And that the government should have to
11 collect that information for you, in effect?

12 MR. HERTZBERG: Well, that would turn on whether it
13 was a proper request under the Freedom of Information Act. I
14 mean, there are limitations as to what the scope of their
15 search would have to be. But that's a separate question.

16 QUESTION: And is it your understanding that the
17 government would say that is not required to be disclosed?

18 MR. HERTZBERG: And in fact, under the terms, yes,
19 yes, Your Honor. Under the Freedom of Information Act, but I
20 don't want to say, in a broader sense what I'm trying to say, I
21 don't want to overstate it. There is a general principle under
22 the Freedom of Information Act that the Government agencies are
23 not required to search all their files just to come up with
24 some data that is requested. And that is the concept that I
25 was thinking of when I answered your question.

1 QUESTION: Let's stay away from the peculiarities of
2 the Freedom of Information Act, and concentrate on the tax
3 aspects.

4 Is it your understanding that the government in this
5 case says that a Freedom of Information Act request for all
6 taxpayers who report a gross income of a particular figure is
7 not disclosable?

8 MR. HERTZBERG: Yes. Their position, Your Honor, I'm
9 quite certain is that even if the data that you are implicating
10 in your hypothetical Freedom of Information Act request could
11 not be linked with a specific taxpayer, it would nonetheless
12 not be disclosable unless it were reformulated. See, we come
13 back to this reformulation concept, and that's what I am
14 addressing, really.

15 Because this is the whole basis. An additional thing
16 was read into the statute, an additional level of activity, as
17 it were, is required by the government's reading and by the
18 Court's reading of the Statute. The Court said it is not
19 enough that the material not identify a taxpayer, or not be
20 associated with a taxpayer, it must in addition be
21 reformulated.

22 QUESTION: What, to the extent that you can, did the
23 Court of Appeals mean by it being reformulated?

24 MR. HERTZBERG: Well, Your Honor, that is one of the
25 fundamental problems, here, because they were extremely vague.

1 They referred to a composite product. They said, in addition
2 to the fact of non-identification, some alteration by the
3 government of the form in which the return information was
4 originally recorded. I'm quoting, of course, from the Essence
5 of the Holy. That reformulation will typically, typically
6 consist of statistical tabulation or some other form of
7 combination with other data, so as to produce a unitary product
8 that disguises the origin of its components, as in the tax
9 money.

10 QUESTION: I would think the Government would surely
11 say the number of people, certain level of income, would be
12 disclosable.

13 You think it would not?

14 MR. HERTZBERG: I am not sure. Perhaps, Your Honor -
15 -

16 QUESTION: Well, all they do is count. They count
17 and come up with a number and it doesn't even appear in any
18 piece of paper. They just count it.

19 MR. HERTZBERG: Your Honor, then perhaps I
20 misunderstood Chief Justice Rehnquist's question, because I
21 understood him in the hypothetical that he furnished to be
22 asking for the data of that level of income.

23 QUESTION: But if the question was how many people
24 reported an income of \$100,000, you would agree if they just
25 came up with a number?

1 MR. HERTZBERG: Just a number, yes. Yes. Without
2 requiring any data to be disclosed, any specific data other
3 than the number, I would agree.

4 QUESTION: Does any example readily occur to you of
5 things like what we're talking about where you think it should
6 be disclosed and the government doesn't, some kind of concrete
7 case?

8 MR. HERTZBERG: Well, our case.

9 QUESTION: Yes. Yes, that's what I would like to
10 know.

11 MR. HERTZBERG: All right. In this case, the
12 petitioner made a broad request for information in Internal
13 Revenue Service files which mentioned the petitioner, and the
14 part of the Internal Revenue Service's response, which is
15 implicated by this appeal, was the Internal Revenue Service's
16 refusal to search files where there was every indication that
17 there might be references to the petitioner but these were
18 third party tax files, and the government claimed that
19 everything in those files would be return information because
20 they were third party files which had information in them which
21 would be associated with or identify third party taxpayers.

22 So in this very case, the petitioner is being
23 deprived of any chance of obtaining information that the
24 Internal Revenue Service maintains about it because the
25 government says --

1 QUESTION: Can I interrupt you just a minute to get
2 the example.

3 Supposing there's just one tax return with the name
4 of your client in it, a third party tax return. Do you contend
5 you have a right to have access to the information on that
6 return, other than the identity of the taxpayer?

7 MR. HERTZBERG: Yes, if it refers to the petitioner.

8 QUESTION: Are you therefore contending that that tax
9 return at the time of the request is not return information?

10 MR. HERTZBERG: At the time of the request? I think
11 our position, Your Honor, is clearly any information in that
12 return which does not identify the taxpayer --

13 QUESTION: Well, in other words, a part of the return
14 is return information and part is not return information.

15 MR. HERTZBERG: That's right. It's a definitional
16 exception.

17 QUESTION: So is there anything in your view in the
18 concept of return information other than the names of
19 taxpayers?

20 MR. HERTZBERG: Certainly.

21 QUESTION: Or things that will specifically identify
22 a return with a particular taxpayer?

23 MR. HERTZBERG: If I understand the question
24 correctly, anything in the files that the Internal Revenue
25 Service maintains is potentially return information.

1 QUESTION: Well, but potential, I'm talking about at
2 the time of the request, because I'm not talking about
3 subsequent reformulation or -- see, I think there's a big
4 difference between reformulating in response to an FOIA request
5 and reformulation that took place by the government preceding
6 the request when it prepared some statistical study. And
7 putting that to one side, and just saying, at the time of the
8 request, is it your view that everything on a return that would
9 not identify that return with a particular taxpayer is not
10 return information?

11 MR. HERTZBERG: Yes, it is, Your Honor.

12 QUESTION: But if the government just makes a copy of
13 a return in its entirety, and then redacts, crosses out any
14 identifiable information, is that return information, what's
15 left?

16 MR. HERTZBERG: Yes. You mean from a return?

17 QUESTION: Yes. They just copy a return but then
18 strike out anything that's identifying.

19 MR. HERTZBERG: No. I'm sorry. The data that is
20 remaining which does not identify the taxpayer, and if it
21 cannot be associated with the taxpayer, is not return
22 information in our view. And that is consistent with the
23 entire Statutory scheme because Congress was concerned with the
24 improper dissemination of information from the Internal Revenue
25 Service files which could be linked to particular taxpayers.

1 QUESTION: But how do you tell that? Whether
2 information can in fact be linked? I mean, what about a
3 particular individual's report of his gross income for that
4 year? Just the figure of gross income?

5 MR. HERTZBERG: We would maintain that in most
6 circumstances, the Agency would have to agree that just a
7 figure would not identify the taxpayer. You cannot make a
8 request saying, we would like to see John Doe's return. Under
9 that circumstance, anything you received in response to your
10 FOIA request could not possibly not be identified or associated
11 with John Doe because you are getting material in response to a
12 specific request.

13 But that's not our case. If you ask for information
14 about yourself, for instance, or petitioner in this case, and
15 there is information in a taxpayer's file which is responsive
16 to that, and there is no way that it could be linked to John
17 Doe, it's not return information, and that is exactly what
18 Congress was concerned about.

19 QUESTION: So if I give \$25 to the Church of
20 Scientology ten years ago, and you come in and ask IRS for any
21 file that mentions the Church of Scientology, they should
22 disclose the fact that an unknown taxpayer gave \$25 to the
23 Church of Scientology according to a return in their possession
24 ten years ago?

25 MR. HERTZBERG: If the Church of Scientology is

1 mentioned in there, and the \$25 donation can be disclosed
2 without any chance that it will identify or be associated with
3 the taxpayer --

4 QUESTION: How does the IRS know whether there's any
5 chance it'll identify me or not?

6 MR. HERTZBERG: Your Honor, this is the kind of
7 determination I think you're alluding to perhaps the informed
8 requester argument that the government makes, this is the kind
9 of decision that agencies make all the time under the Freedom
10 of Information act, and they work in conjunction of course with
11 the de novo review that the Courts have of these determinations
12 to make informed decisions that information will not identify
13 somebody, or under other subsections of the Freedom of
14 Information Act, for instance, like subsections 4, 6 and 7,
15 that they will not constitute unwarranted privacies or lead to
16 furnishing information about investigations that are underway.

17 This is the kind of every day determination that is
18 made by agencies under the exemption statutes of the Freedom of
19 Information Act.

20 QUESTION: May I ask you another question about that
21 hypothetical?

22 There's a return in the IRS files with a \$25 donation
23 to the organization shown on it. Now, at that time, when the
24 request is made, is that return in your view, as you read the
25 Statute, in a form which cannot be associated with or otherwise

1 identify directly or indirectly a particular taxpayer? It's on
2 the page of the return with the name of the taxpayer on the top
3 of it.

4 MR. HERTZBERG: At that moment?

5 QUESTION: It's clearly return information.

6 MR. HERTZBERG: It is return information, Your Honor.

7 QUESTION: If it's return information, then it's
8 exempted from the Statute.

9 MR. HERTZBERG: Except that you cannot divorce in our
10 view the Statute that we're talking about in the Internal
11 Revenue Code from the duty to segregate and delete --

12 QUESTION: Yeah, but there's no duty to segregate in
13 the Internal Revenue Code.

14 MR. HERTZBERG: But it is in the Freedom of
15 Information Act.

16 QUESTION: Now, explain that to me.

17 MR. HERTZBERG: All right.

18 QUESTION: Where in the Freedom of Information Act is
19 there a duty to make something that is return information into
20 something that's not return information?

21 MR. HERTZBERG: Well, I would say that the duty flows
22 from the segregability and deletion requirement of Section
23 552(b) of the Freedom of Information Act which says that,
24 exempt material which can be deleted and segregated -- excuse
25 me -- when exempt material can be deleted from nonexempt

1 material --

2 QUESTION: That's right, but the whole return is
3 exempt when you start from it.

4 MR. HERTZBERG: I'm sorry?

5 QUESTION: But at the time of the request, the whole
6 return is exempt material.

7 MR. HERTZBERG: Yes, but first of all, the Court
8 below, Your Honor, found that the section 6103(B)(2) was a
9 Freedom of Information Act (b)(3) exemption statute, so they
10 must be read together.

11 QUESTION: Inaudible (no mike)

12 MR. HERTZBERG: That's correct. We prevailed on that
13 issue in the Court below, Your Honor, against the vigorous
14 opposition of the government. They did not cross petition, and
15 in fact, the Court of Appeals below found that the two statutes
16 were entirely harmonious.

17 And when we read them in the context of this
18 particular case, you may take return information, Your Honor,
19 which is return information in the first instance, and if it
20 can be deleted from and separated out from other information,
21 which is not exempt information --

22 QUESTION: Yes, but my hypothetical is that the whole
23 tax return is return information.

24 MR. HERTZBERG: Well, Your Honor, tax returns per se
25 cannot be disclosed under Section 6103(a).

1 QUESTION: I understand. But the tax return and its
2 attachments are return information.

3 MR. HERTZBERG: Yes, Your Honor. But the Haskell
4 Amendment is in the definitional section for return
5 information, a distinction is made in the statutory scheme
6 between returns and return information. There is a general
7 prohibition against release of returns and return information
8 in 6103(a). In (b), there are separate definitional sections
9 of return and return information and the Haskell Amendment
10 appears solely in the definitional section for return
11 information.

12 So Congress itself made the distinction. And that's
13 a very critical distinction.

14 QUESTION: Then returns are never disclosable, you're
15 saying, even if you redact them?

16 MR. HERTZBERG: That's correct, Your Honor.

17 QUESTION: So the example we gave, you'd say that was
18 not returnable even if you redacted the names?

19 MR. HERTZBERG: That's correct, if it's a return.

20 QUESTION: If it's a return.

21 MR. HERTZBERG: Yes, Your Honor.

22 QUESTION: So no information that's in the tax
23 returns themselves under your view of the case must be
24 produced?

25 MR. HERTZBERG: That's correct, Your Honor.

1 QUESTION: I see.

2 MR. HERTZBERG: And I'm sorry because I think that I

3 --

4 QUESTION: That's not the answer you gave to the
5 hypothetical.

6 MR. HERTZBERG: I was just going to say. I think I
7 misunderstood the question and I was just going to try to
8 retrench on those very grounds.

9 QUESTION: So you're only seeking information that is
10 in supplementary papers in a file but no information that's in
11 tax returns themselves?

12 MR. HERTZBERG: That's correct, Your Honor.

13 QUESTION: I hadn't understood that before.

14 MR. HERTZBERG: It's my fault I did not make that
15 clear. I misunderstood the question.

16 QUESTION: Including the \$25 contribution on the
17 return to the Church of Scientology?

18 MR. HERTZBERG: If that is in the return, would it be
19 excluded?

20 QUESTION: Yes, in my hypothetical return.

21 MR. HERTZBERG: Yes, Your Honor.

22 So that I can be clear on this, the statutory scheme
23 excludes disclosure of returns, and that is not the issue. We
24 are talking about return information and part of the definition
25 of Return Information in 6103(b)(2) is the Haskell Amendment.

1 And that's all we're talking about.

2 We're talking about apparent information about the
3 petitioner in this case responsive to the Petitioner's Freedom
4 of Information Act request, which is in third party taxpayer
5 files, but not in returns. We are talking about other data,
6 return information.

7 QUESTION: Now, the Freedom of Information Act
8 doesn't have any standing requirement, does it? It's not as if
9 you would have to ask about information concerning you in other
10 people's files. Supposing you just want to go in and ask for
11 information about someone else in third party files?

12 MR. HERTZBERG: Your Honor, you couldn't do that
13 without implicating, associating and identifying material,
14 because if you name somebody else, and you get a response, then
15 any information you get in response to the request which named
16 a taxpayer would clearly always be identified with that
17 taxpayer or associated with that taxpayer.

18 And that's why in our case, the Petitioner never said
19 we want to know what's in files of such and such person or such
20 and such organization about ourselves. They said we want
21 information in Internal Revenue Service files about ourselves,
22 and as it turns out, there is apparently a good chance of
23 considerable information about the Church of Scientology of
24 California being in third party files.

25 But the Church presumably, the Petitioner here, if

1 the kind of process which is undergone by agencies all the time
2 under the Freedom of Information Act is indulged in, will never
3 be able to associate anything they receive in response to their
4 request with a particular taxpayer. They won't know what file
5 it came from, if the agencies and the courts supervise the
6 process. And that is one of the real problems here with the
7 interpretation of this reformulation test that was imposed by
8 the Court of Appeals. Because it would play havoc with the
9 Freedom of Information Act insofar as it applies to the
10 Internal Revenue Service.

11 QUESTION: Mr. Hertzberg, I think where I get
12 confused in this whole matter as far as your presentation is
13 concerned is how to properly relate the Freedom of Information
14 Act provision that says reasonably segregable portions of a
15 record shall be provided with the exemption provision for
16 return information, together with the Haskell Amendment.

17 Now, the Haskell Amendment says that the term, return
18 information, doesn't include data in a form which can't be
19 associated with the taxpayer. I assume that means already in a
20 form which cannot identify the taxpayer. If it's already in
21 that kind of a form, then it simply isn't exempt, as I read it,
22 from the Freedom of Information Act. I don't see that you can
23 read the Freedom of Information Act as importing some
24 affirmative duty to redact and to go out and search for things.

25 That's where I get confused. It's either exempt or

1 it isn't by looking at the definition of "return information"
2 as amended by the Haskell Amendment.

3 Am I right?

4 MR. HERTZBERG: I don't agree, Your Honor.

5 QUESTION: No?

6 MR. HERTZBERG: The phrase in the Haskell Amendment
7 says that data which doesn't identify and can't be associated
8 with a taxpayer is not return information. And in our view,
9 when you read the two statutes together --

10 QUESTION: If it's already in that form, then it is
11 not exempt; it's disclosable.

12 MR. HERTZBERG: Well, you know, the government's
13 position and the Court of Appeals' position below was that even
14 a piece of information or data in a file which in its original
15 form is not combined with any identifying material is also
16 still return information. They would maintain that that can't
17 be disclosed.

18 We think that as with many of the other exemptions
19 for the Freedom of Information Act having to be narrowly
20 construed, having to be read in favor of the broad mandate of
21 the Freedom of Information Act to disclose, if you can take
22 data which may be combined with other data which does identify
23 and reasonable segregate it from that identifying data, and
24 delete the identifying data, it must be disclosed under the
25 Freedom of Information Act.

1 And the implication of not reading it that way is the
2 following. There is no duty to reformulate files for the
3 Internal Revenue Service or any other agency. They would have
4 blanket immunity virtually from the Freedom of Information Act
5 if the reformulation test which was imposed in the Court below
6 is affirmed here. Because they will be able at their own
7 discretion to either reformulate or not reformulate files. The
8 IRS has a penchant for labeling things, return information.

9 QUESTION: No, but Mr. Hertzberg, you overlooked
10 something in Justice O'Connor's question. She said, already in
11 a form. And there, if they have their own reasons for making
12 up studies and reformulating things, you have no objection to
13 that, do you?

14 But unless they've done that, and unless it can be
15 looked at without identifying a taxpayer, how can you get
16 around the plain language of the Statute?

17 MR. HERTZBERG: Well, Your Honor, we think that the
18 plain language supports our position. As I understand your
19 comment, when you say, if it's in a form, means it's original
20 form.

21 QUESTION: Already in a form. I think Justice
22 O'Connor put it very well, and that's what the Statute says, in
23 a form. And I suppose that means at the time the request is
24 made.

25 MR. HERTZBERG: We would maintain that, in a form,

1 means, and could mean nothing more than in the manner of, that
2 if it's disclosable in a manner which does not identify, we
3 think that's a plausible reading which cannot be associated
4 with a taxpayer or identify the taxpayer.

5 If it means more than that, I don't know why it does
6 not mean the action in conjunction with the Freedom of
7 Information Act, data which is in one form which can be
8 reasonably segregated from other data which identifies and
9 released after deletion.

10 QUESTION: Then it includes everything, of course.
11 Because you can always redact.

12 MR. HERTZBERG: I'm not sure if I understand when you
13 say, that would include everything? Data which does identify a
14 taxpayer or could be linked with a taxpayer could not be under
15 any circumstances disclosed.

16 QUESTION: No, but you can always redact whatever it
17 is necessary to preclude identification with a particular
18 taxpayer. Sometimes you have to take the name and address off,
19 and --

20 MR. HERTZBERG: Yes, you could. And that is what
21 Congress was --

22 QUESTION: -- sometimes you've got to take a little
23 bit more off. But you always end up with something that would
24 be disclosable, I would think.

25 MR. HERTZBERG: Not always, because if it cannot be

1 reasonably segregated, then it doesn't have to be disclosed.
2 If it would require the Agency to completely reformulate the
3 document, it would not have to be disclosed under the
4 principles of the Freedom of Information Act. But if it can be
5 reasonably segregated from identifying material, we maintain
6 that it would have to be released. Otherwise, it would be
7 conferring blanket immunity on the Internal Revenue Service to
8 maintain their files in their sole discretion to either allow
9 for the release or prevent the release of particular data in
10 their files.

11 QUESTION: Well, why don't you say that you could
12 take an actual return and redact any identifying materials and
13 then give the return to the requester.

14 MR. HERTZBERG: Your Honor, Congress exempted
15 returns.

16 QUESTION: Well, I know, but you have to read it with
17 the Freedom of Information Act, you tell us. So here's a
18 return and here's a piece of paper with identifying material in
19 it that can be redacted.

20 MR. HERTZBERG: Because the general prohibition in
21 the Statute, Your Honor, would act as an absolute withholding
22 under the Freedom of Information Act as well. The (b)(3)
23 exemption says that if a statute precludes something from being
24 disclosed, it can't be disclosed. And the way 6103 is
25 structured, Congress specifically exempted returns from

1 disclosure, although it did not make the same provision for'
2 return information.

3 I'd like to save the rest of my time for rebuttal,
4 please.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hertzberg.
6 We'll hear now from you, Mr. Lauber.

7 ORAL ARGUMENT OF ALBERT G. LAUBER, JR.

8 ON BEHALF OF RESPONDENT

9 MR. LAUBER: Mr. Chief Justice, may it please the
10 Court.

11 I'd like to begin by giving my answer to a couple of
12 questions that came up during the first argument. It is
13 important to keep returns and return information distinct in
14 ones mind to the extent one can with these abstract phrases.

15 Return is basically the Form 1040 and the attached
16 Schedule A, Schedule B, Schedule C, Schedule D, the return
17 itself. And those are protected absolutely from disclosure.
18 The Haskell Amendment does not apply to them, and they cannot
19 be disclosed even in redacted form.

20 Return information is basically everything else as we
21 see it in the taxpayer's audit file, except for the return.
22 There might be a report of the examining agent showing the
23 results of his audit. There might be a protest from the
24 taxpayer protesting the proposed deficiency of the agent once
25 set up. There could be internal IRS correspondence about the

1 nature of the taxpayer's claims. There can be a Notice of
2 Deficiency issued by the IRS to the taxpayer proposing an
3 increase in his taxes. There could be a tax bill billing the
4 taxpayer for a tax deficiency.

5 All those other things are return information because
6 they are data that are either furnished to, collected by,
7 prepared by the IRS in connection with the determination of
8 that person's tax liability. Now, the point is, a lot of the
9 numbers on the return will find their way into the rest of the
10 file because if you audit somebody's charitable contributions,
11 you'll put down in your report what those contributions were.

12 The point is, all the little numbers on the return
13 will find their way into all the other documents that are
14 called return information in the file. And that gives a
15 concrete example of what the Chief Justice asked about. What
16 we're saying is all those other documents are immune from
17 disclosure. They're saying, except for the return, you have to
18 redact all those other documents: the revenue agent's report,
19 the tax bill, notice of deficiency, and then disclose them in
20 redacted form.

21 Now, Justice White asked a question about would the
22 IRS have to disclose in response to a request how many people
23 earned income of \$45,212? The answer is, no. The IRS cannot
24 be required, nor can any agency, to create a new document by
25 doing research for the taxpayer, and saying okay, we think

1 based on our records, there were 572 returns filed of that
2 sort.

3 QUESTION: That's because of the Freedom of
4 Information Act?

5 MR. LAUBER: That's because of the FOIA, there's no
6 requirement for an agency to create a document. If there were
7 no list in the files when the request came in, listing the
8 number of guys who had returns with that amount of income, you
9 wouldn't have to create such a list. What they would say you
10 would have to do is disclose every piece of return information
11 of people who had that amount of income, removing their names.

12 QUESTION: Well, let's suppose that there is a
13 document in the file that's not a return, but by anybody's
14 definition, that document has return information in it?

15 MR. LAUBER: Well, the document is return information
16 if it is a document created by the IRS in connection with the
17 determination of liability.

18 QUESTION: Yes.

19 MR. LAUBER: It's not just the numbers but the
20 document itself is return information.

21 QUESTION: Well, it's got some identifying
22 information in it, and it is return information. Now, is it
23 your position that the government would have to redact that
24 document to eliminate the identifying information?

25 MR. LAUBER: No. As Justice O'Connor said, once it

1 starts life as return information, it stays that way forever.

2 QUESTION: Yes, it's just a like a return. You don't
3 have to redact a return. This is return information and is
4 exempt.

5 MR. LAUBER: Yes. And that's a very good point,
6 because if petitioners are right in their redaction, why did
7 Congress say, you can't disclose returns even if they are
8 redacted, when the same numbers are on the other stuff in the
9 file, and they said it has to be. It doesn't make any sense.

10 QUESTION: Well, the statute exempts return
11 information.

12 MR. LAUBER: Right.

13 QUESTION: And just like it does returns. And if
14 returns aren't redactable, I would suppose other documents that
15 are return information don't have to be redacted either.

16 MR. LAUBER: That is our position. And we make that
17 point in pages 25 and 26 of our brief.

18 I think Justices O'Connor and Stevens hit on the key
19 point in the case, which is where do you get this redaction
20 requirement. Where does it come from.

21 Here we have these documents like a revenue agent's
22 report that is return information. Now, what is it that causes
23 the IRS, requires it to redact it to turn it into something
24 that is not return information? Where does this requirement
25 come from?

1 It can't come from Section 6103. it says nothing at
2 all about redaction. Now, significantly in Section 6110 which
3 was enacted in the same bill as 6103 governs the disclosure of
4 redacted private letter rulings and background file documents.
5 It does have a redaction requirement in it. And although it
6 was enacted in the same bill as our Statute, there's no
7 redaction requirement in 6103. And I think that's quite a
8 telling distinction.

9 Rather, petitioner gets the redaction requirement not
10 from the Taxpayer Privacy Act, but from the FOIA, which
11 requires that reasonably segregable portions of documents be
12 released, once you redact them to remove the FOIA exempt
13 material. But this is really just circular reasoning, when you
14 come right down to it.

15 The FOIA redaction requirement only comes into play
16 when you have a document that is subject to FOIA, whereas here
17 you have a document that is exempt from FOIA, as these tax
18 related documents are, you never get to the redaction
19 requirement. I mean, you can't argue that FOIA requires you to
20 redact a document to cause it to lose its exemption 3 status.
21 It's just circular reasoning.

22 I think that's what this Court --

23 QUESTION: Are you defending the Court of Appeals
24 decision in this case?

25 MR. LAUBER: I think that does it for us.

1 QUESTION: Sir? Is that right?

2 MR. LAUBER: Yes. They're relying entirely --

3 QUESTION: Are you defending --

4 MR. LAUBER: What they want is redaction of

5 individual taxpayer information. They had to get that from

6 somewhere.

7 QUESTION: Are you defending then the Court of

8 Appeals decision? Is that the reasoning?

9 MR. LAUBER: I think that was what Judge Scalia,

10 then-Judge Scalia, reasoned. He said you can't import this

11 redaction requirement into the Statute. He then gave an

12 interpretation of what this in a form language means.

13 QUESTION: What about the --

14 MR. LAUBER: -- which I'll get to now, if you like.

15 QUESTION: I was hoping you would get to it.

16 MR. LAUBER: I think the best place to start is from

17 Senator Haskell's introduction of this thing on the floor. It

18 was introduced --

19 QUESTION: You don't need this argument, do you?

20 MR. LAUBER: I'm sorry?

21 QUESTION: You don't need the reformulation argument?

22 MR. LAUBER: Well, I think it will inevitably be true

23 that most of the documents covered by that exemption will be

24 reformulated. And that's what Senator Haskell was plainly

25 thinking about when he introduced this amendment on the floor.

1 QUESTION: Okay. Go ahead, go ahead.

2 MR. LAUBER: He said introducing it, "the purpose of
3 this amendment is to insure that statistical studies and other
4 compilations of data now prepared by the IRS and disclosed by
5 it to outside parties will continue to be subject to disclosure
6 to the extent allowed under present law." And the ensuing few
7 sentences, Senator Haskell uses the phrase, "statistical
8 studies and compilations of data" now fewer than six times.

9 He referred moreover to studies and compilations that
10 were now prepared by the IRS, that is, prepared as of 1976, and
11 disclosed by it to outside parties at that time. Now, these
12 remarks by the amendment's sponsor are the only explanation of
13 its purpose. It was a floor amendment adopted without a roll
14 call vote. The entire history of it is one-third of one page
15 in the Congressional Record.

16 All we have to go on is what Senator Haskell said.
17 The only other remark was the floor manager's remark, that said
18 --

19 QUESTION: We've got the language.

20 MR. LAUBER: We have to kind of come to that last
21 because the language is the most difficult part. The floor
22 manager said it might not be entirely necessary, but good idea,
23 I'll be happy to take it to conference.

24 QUESTION: He said the idea was to confirm an
25 existing practice of the IRS?

1 MR. LAUBER: That seemed to be his intention,
2 exactly.

3 And what petitioners here are asking, they're not
4 asking for a compilation of data, or a statistical study.
5 They're asking for individual tax documents out of peoples'
6 audit files, a redacted version.

7 This kind of stuff was not redacted and disclosed by
8 the IRS in 1976. It was exempt under prior Treasury
9 Regulations. Now, I think the limited purpose Senator Haskell
10 announced for his amendment on the floor is reflected perfectly
11 well in the text. Because it says, "return information
12 excludes data in a form which cannot be associated with a
13 particular taxpayer." And clearly, if you have reformulated
14 data into a statistical study compilation, it is then in a form
15 that cannot be associated with a particular taxpayer.

16 QUESTION: But it might also be in such a form even
17 though it hadn't been so-called reformulated.

18 MR. LAUBER: Well, that's right. Now, I think if you
19 didn't have Senator Haskell's remarks on the floor, all you had
20 to go on was the phrase, in a form, one could imagine a
21 document that would be return information that would be
22 collected in connection with a liability.

23 QUESTION: Exactly.

24 MR. LAUBER: And not be a compilation. For example,
25 say a newspaper story about bible tax shelters.

1 QUESTION: Right.

2 MR. LAUBER: Say an agent was auditing somebody who
3 had a bible tax shelter, and he cut out the things in the
4 newspaper, didn't mention the taxpayer, just some article and
5 stuck it in the file. That, I think, you could say was in a
6 form that could not be associated.

7 QUESTION: Right.

8 MR. LAUBER: But I think that reading should be
9 rejected in favor of Judge Scalia's reformulation test, because
10 of Senator Haskell's remarks. He was talking about studies
11 and compilations of data. And I think to treat the words, in a
12 form, as meaning a reformulation, is most consistent with the
13 sponsor's remarks in introducing his amendment.

14 QUESTION: Well, but the sponsor also referred to the
15 tax model, and as I understand it, before 1981, at least, the
16 tax model included material that was actual nonaggregated tax
17 return information, and it was routinely furnished.

18 MR. LAUBER: Okay. I have a long answer to that
19 question.

20 There are two parts. First of all, what the tax
21 model was back then, and secondly, why it doesn't help the
22 petitioners.

23 The tax model is kind of a misnomer. What it is is
24 actually raw data. It's a compilation of data that was drawn
25 from a stratified sample of about 100,000 individual tax

1 returns. It was basically a pile of numbers on a computer
2 tape. For every return that was chosen for the sample, there
3 were about 150 what they call fields or like entry boxes, where
4 you would put the numbers for that sample.

5 About 30 of these entry boxes did not correspond at
6 all to numbers or line items on a return. Rather, they were
7 computed amounts reflecting economic concepts like expanded
8 income or capital gains tax at fifty percent rate. This is all
9 in the description of the tax model the IRS put out for 1976.

10 Most of the other entry boxes on each sample did
11 correspond roughly to line items on a return like salaries and
12 wages, salaries and wages. But there were a number of
13 exceptions from that. First of all, the numbers on the return
14 would be corrected for mathematical errors and to eliminate any
15 internal inconsistencies on the taxpayer's return. And then
16 entered onto the tax model. A number of the items on the
17 taxpayer's return might be combined before transferring them to
18 the tax model. For example, if a taxpayer reported a bonus or
19 a director's fee as miscellaneous income, that would be added
20 back to wages and salaries and combined with it before it was
21 put onto the tax model. So it would be different treatment
22 from the return.

23 And finally, some items would be treated differently
24 on the tax model for economic reasons than they were shown on
25 the return. For example, an earned income credit which was

1 shown on the return as a tax payment was shown on the model as
2 a reduction in tax liability.

3 So basically, in 1976, the tax model was a
4 compilation of data many of whose entries were lifted verbatim
5 from tax returns with all identifiers removed. But there also
6 was some reformulation of the data by the IRS.

7 QUESTION: Are you saying that the pre-1981 versions
8 of the tax model are reformulated in fact within the meaning of
9 the opinion of the Court of Appeals below?

10 MR. LAUBER: I think. Some of the items were. Some
11 items just came over line for line, some would be changed, and
12 new items would be added to the tax models. So I think it was
13 arguably a reformulation under Judge Scalia's test.

14 But what ever one calls it, it doesn't help the
15 petitioners here for three reasons: first of all, the tax
16 model was plainly a compilation of data. Indeed, Senator
17 Haskell described it as a compilation of data on the floor when
18 he referred to it.

19 QUESTION: But what if he were wrong? Supposing it
20 was simply a copy of somebody's return with the name taken off?
21 Say they just used a sample return or something like that, but
22 it didn't identify any taxpayer. It had already been put in
23 that form at the time without any reformulation, compilation.
24 It clearly would be covered by the language of the Amendment,
25 wouldn't it?

1 MR. LAUBER: Well, the tax model we think is covered
2 by the language of the Amendment, because we think it is in a
3 form --

4 QUESTION: I mean, it would be even if it were not a
5 compilation. I don't see why you have to get into all this
6 argument about compilations?

7 MR. LAUBER: Well, because that's what Senator
8 Haskell said his amendment was meant to do was to protect the
9 continuous exposure --

10 QUESTION: Well, I understand that. But I'm saying,
11 assume he's wrong, and assume there was a regularly disclosed
12 piece of paper that was a copy of Mr. Average Taxpayer's
13 return, but with his name taken off of it, so nobody could
14 identify it with Mr. Average Taxpayer.

15 That would be disclosable, wouldn't it?

16 MR. LAUBER: Well, the return would not be.

17 QUESTION: No, but this tax model, which is some
18 thing's used for some other purpose, just happens to be a copy
19 of an anonymous taxpayer's return? Why wouldn't that -- at
20 least it wouldn't be return information because of the language
21 it doesn't identify --

22 MR. LAUBER: No. We agree that the tax model is
23 disclosable.

24 QUESTION: And would be even if it were not a
25 compilation. That's what I'm trying to say. I don't see why

1 the argument about compilations is even necessary.

2 MR. LAUBER: You mean if you only had one, rather
3 than 100,000 of these things?

4 QUESTION: Yeah.

5 MR. LAUBER: Okay. I think I'd agree with you about
6 that.

7 But the key thing is, it must be an existing thing.
8 there's no redaction requirement. That's the next point. The
9 tax model was something IRS already prepared. It was right
10 there in the file as is. You didn't have to redact it in order
11 to make it something to be disclosed. And they want redaction.
12 The things that do not currently exist in disclosable form, but
13 we have to put them into disclosable form.

14 And the third point is that the tax model had been
15 prepared by the IRS, and disclosed by it to the public for at
16 least ten years before 1976. It therefore fit exactly within
17 Senator Haskell's reference to documents that were now prepared
18 by the IRS and disclosed by it to third parties.

19 QUESTION: Yes, but take the other side of the coin.
20 Supposing there is in a lot of files a mimeographed commentary
21 on people who make deductions by make contributions to the
22 Church of the Scientologists. I mean, say we found a lot of
23 trouble with these taxpayers, and we wanted you to follow a
24 special procedure when you're auditing returns with this kind
25 of a deduction. It's a general thing, it doesn't identify

1 and in a lot of files. Now, that clearly would be disclosable?

2 MR. LAUBER: Yes. That's correct.

3 But the key thing is, that would not be in an
4 individual taxpayer's audit file. There might be --

5 QUESTION: Why is that?

6 MR. LAUBER: Well, that's how we keep our records,
7 basically. I mean, what you would have there would be like a
8 general scientology file, or a general petroleum industry file,
9 with guidelines for examiners about how to conduct audits of
10 that kind of tax shelter or that kind of taxpayer. And those
11 files would be searched in response to a FOIA request, and such
12 things would be disclosed because they are not collected by the
13 IRS in connection with the particular taxpayers' liability.
14 They are general instructions about how to audit a class of
15 people.

16 And that would be disclosable, too. But you see,
17 that wouldn't even be return information. You don't even need
18 the Haskell Amendment for that because it wouldn't even be
19 return information.

20 QUESTION: Well, I was thinking of a possible case
21 where copies of those instructions got in one agent's file in
22 connection with his audit work. He just, he got a copy of them
23 and he stuck it in that file. And couldn't it be return
24 information?

25 MR. LAUBER: Well, theoretically. You see, this

1 whole case began with the question about what is a proper scope
2 of the search. And the IRS has just miles and miles and miles
3 of file documents. And their position was all the individual
4 audit files of particular named taxpayers we don't need to
5 search, because the way we keep our records, there should be
6 nothing in there but return information.

7 And it would simply be impossible to go rummaging
8 through all those files looking for some, one little study that
9 somebody kind of found its way into a file by mistake. That
10 study would appear somewhere else, and you'd look for it there.
11 But Judge Scalia clearly held in the panel opinion below that
12 if the IRS can produce affidavits on remand that a whole group
13 of individual audit files, for example, have nothing but return
14 information in them, they don't even have to be searched. And
15 that is the only practical way to administer the Privacy Act.

16 You can't go looking for a needle in a haystack
17 through files that are not meant to contain things like
18 compilations of data or studies.

19 Now, there are a lot of very kind of technical
20 textural arguments which we have made in our brief. And I'm
21 not going to go through those things -- they're pretty
22 complicated -- one by one. They're drawn from various
23 subsections of the statute we're construing. But the bottom
24 line is as follows:

25 Judge Scalia, writing for the majority below,

1 concluded that petitioner's construction produces nine
2 illogical or bizarre consequences at various points in the
3 Statute, whereas his construction, which we embrace, produced
4 only two.

5 Judge Wald, in dissent, had a different count. She
6 tallied up the score as only being 5 to 3 in the Government's
7 favor. But all ten judges on the en banc Court agreed that as
8 a matter of pure textual analysis, our position is superior to
9 petitioner's, demonstrably superior to petitioner's.

10 The defense response to that problem was to say that,
11 well, normal principles of textual analysis should be kind of
12 called off here, or given less importance because the Haskell
13 Amendment was a last minute floor thing that kind of made a
14 mess of the statute. And we think that kind of agnostic
15 approach just is unacceptable. The statutory law consists of
16 the words that Congress enacts. And you can't bypass the
17 logical meaning of those words or the logical inferences from a
18 text on the theory that Congress didn't know what it was doing,
19 or was acting hastily or carelessly.

20 Another factor, I think, that cuts against the
21 Petitioner's position is the way the Haskell Amendment was
22 adopted. As we've explained, the general definition of return
23 information excludes literally billions of documents in
24 individual taxpayer files all around the country. They would
25 be immune from disclosure. Petitioner's theory is that all

1 these documents become disclosable after being redacted by
2 virtue of the Haskell Amendment.

3 Their interpretation, therefore, is to really turn
4 the statute upside down. Because you'd be making billions of
5 documents --

6 QUESTION: Well, I take it they do not say you need
7 to redact a return, and then deliver the rest of the return?

8 MR. LAUBER: Right, but the return may be only one of
9 70 documents in that file.

10 QUESTION: Right. Is this a new position of their's
11 or?

12 MR. LAUBER: No, they've agreed -- well, they don't
13 highlight it because it's bad for their argument, but they've
14 agreed all along because of the way the statute's drafted, the
15 Haskell Amendment only applies to (b)(2), that is, return
16 information. It does not apply to returns. They agree with
17 that, but they have not made a big deal of it, for good
18 reasons.

19 So what they're saying is this floor amendment had
20 the effect of converting all these billions of documents that
21 under the Committee bill would have been absolutely protected
22 into potentially disclosable documents by virtue of redaction.
23 And I think that's quite implausible because if you look at how
24 their thing was adopted. It was on the floor without debate
25 without even a roll call vote. And only two Senators even

1 discussed it.

2 It just seems very unlikely that Congress would have
3 brought about this huge change in the scheme of the committee
4 bill without something more than this kind of, ho hum well, it
5 might be a good idea, let's send it to conference. It just
6 doesn't sound like the kind of language Congress uses when
7 their vastly reconstructing a Committee proposal.

8 Finally, I'd like to make a point about this Court's
9 decision in Baldrige v. Shapiro. This was the case that held
10 that raw census data is absolutely immune from disclosure under
11 FOIA. The Census Act provided, much as our Statute provides,
12 that Census data and information were to be kept confidential.
13 And the Court held that the Census Act was an Exemption 3
14 Statute, and that all census data were protected from
15 disclosure thereunder. And the Court expressly rejected the
16 argument, "that the confidentiality provisions protect raw data
17 only if the individual respondent can be identified." That's
18 455 U.S. at 355.

19 The Court clearly rejected any notion of redacting
20 raw census data to remove the name or other identifiers of the
21 census respondents. The Court held the data is absolutely
22 protected. And that shows, I think, how you treat redaction
23 under an Exemption 3 Statute. If information is protected
24 under FOIA Exemption 3, as census data was there, and is tax
25 information is here, its simply not covered. It's exempt from

1 FOIA. You don't go and redact it in order to make it subject
2 to FOIA by kicking it out of the Exemption 3 status.

3 Thank you.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lauber.

5 Mr. Hertzberg, you have three minutes remaining.

6 ORAL ARGUMENT OF MICHAEL LEE HERTZBERG

7 ON BEHALF OF PETITIONER - REBUTTAL

8 MR. HERTZBERG: The Baldrige case is fairly
9 illustrative of a different kind of statute and a dispositively
10 different kind of result was reached in that case because the
11 statute itself was a blanket prohibition against the release of
12 census data. The analogy, if there would be one, between the
13 Baldrige census data statute and our case would be if the
14 Census Data Act provided that raw census data which does not
15 identify or cannot be associated with the person furnishing the
16 data is not census data. That would be the proper analogy.

17 That's what makes our case different from Baldrige,
18 and that's why you cannot ignore the Freedom of Information Act
19 read in conjunction with the Haskell Amendment. The Haskell
20 Amendment says something that is not return information if it
21 doesn't identify. In the Census Statutes, this Court found
22 without question, a blanket prohibition against disclosure.
23 That is a classic Freedom of Information Act (b)(3) withholding
24 language. This category of materials under no circumstances
25 will ever be disclosed. That's an easy case.

1 But when it says, this category of materials will not
2 be disclosed unless it cannot be identified with or associated
3 with a person, you have an absolutely different situation. And
4 that's why we cannot ignore, as the Government would here, the
5 Freedom of Information Act, because the two statutes must be
6 read together as the three judge panel below said. And the way
7 they are read together is that the blanket prohibition, the
8 (b)(3) Freedom of Information Act withholding prohibition
9 pertains to return information.

10 But the Haskell Amendment tells us that return
11 information does not include data which does not identify or
12 cannot be associated with the taxpayer, and that is where the
13 deletion and reasonable segregability provision of the Freedom
14 of Information Act applies. And it applies to everything. It
15 applies under Exemption 1 to National Security documents.
16 There can be a document, and if there is a portion which does
17 not comprise --

18 QUESTION: Why doesn't it apply to a return?

19 MR. HERTZBERG: Your Honor, Congress, for reasons
20 that I cannot discern from the legislative history and which
21 was specifically not referred to by my colleague here, made a
22 distinction between returns and return information in the
23 Statute.

24 QUESTION: I know, but return information is also
25 exempt if its identified .

1 MR. HERTZBERG: Yes, that's correct, Your Honor.

2 QUESTION: All right. Here's a document that
3 identifies and is return information. It's identifying return
4 information, but it would be very easy to redact it. And you
5 say the redaction has to take place.

6 MR. HERTZBERG: With a return?

7 QUESTION: No. Return information that's identified?

8 MR. HERTZBERG: Return information because that's
9 exactly what the plain language of the Haskell Amendment -- the
10 Haskell Amendment says if it doesn't identify, it's not return
11 information.

12 QUESTION: Well, it is identifying in the form that
13 you find it in the file, absolutely identifying, just like the
14 return is.

15 MR. HERTZBERG: Yes, Your Honor. That may be
16 correct, but the Freedom of Information Act provides that if
17 you can release something which can be segregated and which
18 cannot be specifically withheld, it must be released. And the
19 "in a form" language, we maintain that the in a form language
20 can refer to that exactly.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hertzberg.
22 The case is submitted.

23 MARSHAL WONG: The Honorable Court is now adjourned
24 until tomorrow, at 10:00 o'clock.

25 (Whereupon, at 2:55 p.m., the case in the above

1 entitled matter was submitted.)
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C E R T I F I C A T E

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