ORIGINAL

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THE SUPREME COURT OF THE UNITED STATES

CAPTION: UNITED STATES DEPARTMENT OF JUSTICE, ET AL., Petitioners V. REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

CASE NO: 87-1379

PLACE: WASHINGTON, D.C.

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PAGES: 1 - 56

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Petitioners

v. : No. 87-1379

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al.

Washington, D.C.

Wednesday, December 7, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:59 o'clock p.m.

APPEARANCES:

ROY T. ENGLERT, JR., ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

KEVIN T. BAINE, ESQ., Washington, D.C.; on behalf of the Respondents.

CONTENTS

P R O C E E D I N G S

(1:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1379, United States Department of Justice v. Reporters Committee for Freedom of the Press.

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

ORAL ARGUMENT OF ROY T. ENGLERT, JR.

ON BEHALF OF THE PETITIONERS

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

The question presented in this case is whether an FBI rap sheet is exempt from the mandatory public disclosure provisions of the Freedom of Information Act on the ground that its disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy within the meaning of Exemption 7(C). Our position is that in this case and in many similar cases, the information should be held exempt.

The particular information at issue in this case pertains to a man named Charles Medico and consists of any information known to the FBI or the Justice Department regarding arrests, indictments, acquittals, convictions or sentences of Mr. Medico. The request was made in 1978 and was, in pertinent part, denied by the

Department.

In 1979 the Respondents sued at this point purporting to limit their request to matters of public record. The district court, after examining the records, if any, in camera, upheld the government's position holding after de novo review that there would, indeed, be an unwarranted invasion of personal privacy in this case.

The court of appeals reversed relying primarily on Respondent's purported limitation of the request to matters of public record, which the court of appeals said greatly reduced any cognizable privacy interest. Judge Starr dissented and was joined in dissenting from the denial of rehearing en banc by Judges Bork, Buckley and Sentelle.

Most, though not all, of the records that would be responsive to Respondent's request are records of the Identification Division of the Federal Bureau of Investigation. The Identification Division has some 25 million arrest records that potentially could be affected by the decision in this case. Those records generally come in in the form of fingerprint data submitted by the states in connection with an arrest or some other state proceeding that causes the state to be interested in the identity, fingerprints and criminal

record of an individual. It is generally not the case, because there is no reason for it to be the case, that the states tell the FBI whether this information is public anywhere in the state, and the FBI has never had any reason to ask that information.

By providing centralized access to this compiled fingerprint information on individuals, the FBI makes available to the law enforcement community, which the Identification Division was formed to serve, a great deal of information that could not practically be obtained otherwise. The records that are available in local jurisdictions generally are not indexed by name. They're generally cumulative police blotters and things of that sort that are only useful if you know the precise date that you want to look at in order to find a particular piece of information. They are generally not indexed by name and can't be accessed on that basis.

The point of the FBI's rap sheet system is to make information available on the basis of names, fingerprints and other identifying information. This is, of course, very helpful to law enforcement as it should be, but we think it's equally obvious that it also has a great potential for mischief if this kind of information should be given to someone who doesn't use it responsibly.

QUESTION: Mr. Englert, do you think there's any basis for drawing a distinction between past criminal convictions for which the common law generally supports the notion that is a matter of public record and public interest and arrests or indictments or other criminal investigation information that hasn't resulted in a conviction?

MR. ENGLERT: We certainly do think that there is a basis for drawing such a distinction, Your Honor. And in the balancing process that properly informs the decision under the Freedom of Information Act whether to release this information, of course, one would more readily release conviction information than arrest information. That is not to say that all conviction information should always be released. We don't think it should by any means. But a conviction for murder yesterday obviously raises less of a privacy interest and it has more of a public interest than a conviction for -- or an arrest, rather, for stealing bread 30 years ago.

The court of appeals denied that. We don't see how -- how that can be reasonably disputed.

Now, the Identification Division's records are shared outside of the criminal justice community to some extent. They are shared pursuant to specific statutory

authority either by Congress, which has made the decision that this information should be shared with the nuclear power, securities and commodities industries, as well as the banking industry, or pursuant to state statutes that allow the sharing of information for licensing functions and employment and the like and that has been approved by the Attorney General.

General public access is an entirely different matter. Congress has certainly never passed a statute specific to criminal history records that provide for general public access to these records. We don't contend, on the other hand, before this Court that Congress has ever passed a statute that generally forbids access to criminal information records. The D.C. Circuit once suggested the statute Congress had passed should be interpreted that way, but the D.C. Circuit -- now it apparently takes the opposite view. So --

QUESTION: Do the federal courts have to develop some federal common law on -- on how you -- you measure the public interest and the privacy concerns?

MR. ENGLERT: I think the courts do have to develop -- I wouldn't call it common law, but have to fill in the terms of the very general statute, yes, Your Honor. That --

QUESTION: I thought the whole -- the whole uncerpinning of the First Amendment is that it's really impossible, or at least undesirable, for the government to determine what information is more desirable than other information. And yet, you ask us to make a public interest determination as to whether a particular item of information is more useful to the citizenry than another one. I'm not -- I'm not inclined to want to make that determination.

MR. ENGLERT: Well, Your Honor, I can uncerstand the Court's discomfort in making that determination, but unless the Court is prepared to hold the Freedom of Information Act unconstitutional, there is no doubt that that's the determination --

QUESTION: Or -- or read it the way it has been read by the court below.

MR. ENGLERT: It has been read that way by the court below. We don't think that's an accurate reading of Congress' intent. We don't think it's an accurate reading of this Court's decision in Department of the Air Force v. Rose.

QUESTION: How would you evaluate the public interest? Whether -- whether it would be likely to appear in a newspaper the next day, or whether it's useful to scholars or what? I mean --

MR. ENGLERT: No, Your Honor. We -- we do think this inquiry should be channeled to some extent by looking to the purposes of the Freedom of Information Act itself which is to open the functions of government to public scrutiny. Information about someone who was recently nominated to the Cabinet, for example, is of much greater interest, much greater legitimate public interest, than information about my next door neighbor who lives in quiet anonymity.

QUESTION: What -- what sort of information about him? You will presumably judge whether sexual peccadillos would be the kind of information the public should know in an election or -- or other kind of information would be more important. Right? You -- you would judge. The Justice Department would make that judgment initially and ultimately the courts would make that judgment, what the public ought to know about this individual.

MR. ENGLERT: That's correct, Your Honor.

QUESTION: I don't like it.

MR. ENGLERT: The Justice Department would make that judgment, and the courts reviewing de novo would have to make that judgment. That is we think beyond much rational dispute the task that Congress has assigned to the courts for better or for worse.

If that is, indeed, a task beyond the capability of the courts, then we have a very real problem of inability to protect private information. And I'm not sure that the solution is the one that the court of appeals adopted which is essentially to throw all sorts of things open.

QUESTION: Well, Mr. Englert, do you think the public figure doctrine under libel law has any useful analogies for the Court?

MR. ENGLERT: Yes, Your Honor. That's a very helpful analogy. This Court in cases like Rankin v. McPherson has assigned to the courts the task of determining whether something is a matter of public concern. And this is a task on which the courts are already engaged and long have been engaged. And it is a task on which the courts are engaged in furtherance of the First Amendment not in derogation of the First Amendment.

QUESTION: But it's a task -- there is a more express mandate for, and certainly under Section 7(C) of the Act, isn't there?

MR. ENGLERT: Yes, Your Honor. There is no doubt that Congress intended for better or for worse that courts balance the public interest against the privacy interest.

QUESTION: Is there any indication that they thought the public figure concept should be taken into consideration?

MR. ENGLERT: I'm not aware of any indication by Congress of a relationship between that doctrine and the Freedom of Information Act, but I think it's an obviously helpful analogy when courts do embark on this task.

QUESTION: In construing the section we're talking about?

MR. ENGLERT: Yes, Your Honor.

QUESTION: Should the identity of the requestor be relevant?

MR. ENGLERT: Your Honor, our position most emphatically is, no, it should not, that every requestor has the same rights under the Freedom of Information Act as a general proposition.

There is at least one exception to that rule, as we learned last term in Department of Justice v. Julian, but that pertained to an individual's request for information about himself and was not a suggestion that the -- that in departure from the general Sears Roebuck principle and Robbins Tire principle that that -- and EPA v. Mink principle, that the identity of the requestor is generally irrelevant.

QUESTION: Can the courts look at the purpose for which the information is sought?

MR. ENGLERT: As part of the public interest determination, I -- I think they can not that any one requestor gets it for his purpose and any other requestor doesn't get it for a different purpose.

I think really the most helpful analysis at this point is in a opinion by Judge Leventhal for the D.C. Circuit quite some time ago, Ditlow v. Shultz, in which he pointed out that the legislative history of this Act means -- says that it was meant to open up information to the public, not to select individuals, but that the use to which particular information might be put by that individual is a part of the public interest.

QUESTION: Mr. Englert, the question isn't really or primarily -- it isn't exclusively or even primarily -- whether the courts can look into this or that, but whether the Justice Department can. The primary addressee of the rule that you want us to adopt is the Justice Department. You will be making these decisions. The Justice Department will be making these decisions in evaluating every single Freedom of Information request for this kind of information. The courts will come in now and then only when your decision

is challenged. But you ask us to believe that what Congress wanted is for the Justice Department to determine case by case where the public interest lies in -- in getting -- in getting information.

MR. ENGLERT: Your Honor, the Justice Department --

QUESTION: And now and then you may be wrong, and a court will correct you. But you are sort of to determine -- unlike the libel cases which come into court, here it's the executive that's going to decide what the public ought to know.

MR. ENGLERT: Well, and we would expect to conform to the rule of law, Your Honor, just as newspapers which can cause terrible harm to individuals by making wrong judgments about this sort of thing can try to conform their actions to the rule of law based on what this Court says about what is -- and other courts say about what it is and what is not in the public interest.

This is not a request for discretion, unbridled or otherwise, on the part of the Justice Department. It is merely an assertion that Congress has assigned to the Justice Department and to the courts the task of assessing the public interest in particular disclosures, and that that is the function the Court

should carry out.

QUESTION: Take ABC. A man named ABC was arrested for disorderly conduct in Seattle, Washington. And MNO was arrested for disorderly conduct in Miami. And you decide to give one and not the other. How could you do that?

MR. ENGLERT: Your Honor, with just that information, we -- we ordinarily couldn't. If -- if one is a recent arrest and one is old -- I mean, I would hope we would not give either out, but --

QUESTION: (Inaudible). How could you grant one and deny the other one?

MR. ENGLERT: We -- we should not. We should treat similarly situated people the same.

QUESTION: So, you're going to deny both of them or grant both of them?

MR. ENGLERT: Based just on --

QUESTION: I thought you were going to make a choice between the two.

MR. ENGLERT: We will make choices between different situations involving different facts. We would hope not to have --

QUESTION: What situation?

MR. ENGLERT: -- arbitrary choices --

QUESTION: What situation?

MR. ENGLERT: Well, an example I used earlier. If -- if there was a publicized murder conviction yesterday, there would be very little privacy interests remaining in that compared to an obscure arrest that was never prosecuted for disorderly conduct 30 or 40 or 50 years ago. That's the kind of distinction that --

QUESTION: Well, is it what's important to the person or what's important to the Department?

MR. ENGLERT: Your Honor, the balancing test is between the public interest and the privacy interest of the individual. There's no governmental interest as such --

QUESTION: Well, the public interest is what? Department of Justice. That's the public interest.

MR. ENGLERT: We certainly would hope to act in a manner consistent with the public interest.

QUESTION: So, you're saying the public interest -- we will deny A and grant B.

MR. ENGLERT: In -- in appropriate situations.

QUESTION: In the public interest.

MR. ENGLERT: That's correct, Your Honor.

QUESTION: Wouldn't you have to explain it to somebody?

MR. ENGLERT: It's subject --

QUESTION: First yourself.

MR. ENGLERT: Yes, Your Honor. It's subject to de novo review by the courts. So, obviously we do bear the potential --

QUESTION: And the courts would have to decide as to whether the well-publicized man's good name is more important than the little, ordinary man is.

MR. ENGLERT: As -- as they do, as Justice O'Connor pointed out in public figure cases.

QUESTION: The court will have to do it.

MR. ENGLERT: That's correct.

QUESTION: Hum?

MR. ENGLERT: That's correct. As they also do in --

QUESTION: Then we will have -- we'll have to do that.

MR. ENGLERT: That's correct, Your Honor. As is also done in grand jury cases under Rule 6(e). The courts have a long history of determining whether there is or is not public interest in particular information, and we don't see why this case in which Congress has assigned the courts and the agency that task should be any different from those other cases. Indeed, as the Chief Justice pointed out, the mandate to do so seems to be more explicit in this case than in some of the other cases in which the --

QUESTION: Mr. Englert, has the Department developed any standards or rules that are written out as to what factors might control, I mean, excluding arrests or setting statutes of limitations and that sort of thing? Or is it totally ad hoc?

MR. ENGLERT: It is not totally ad hoc, Your Honor. We do have some processing guidelines at least within the Department of Justice. Now, I'm not familiar --

QUESTION: Are they subject to disclosure pursuant to the FOIA?

MR. ENGLERT: I would certainly think so. I don't --

QUESTION: They're not in the record, though, are they? We don't know what they are.

MR. ENGLERT: As far as I know, they're not in the record. That's right.

QUESTION: Mr. Englert, is -- is there any way under the language of the statute to give you a half of a loaf? The statute in 7(C) says could reasonably expect to constitute an unwarranted invasion of personal privacy.

Now, the Privacy Act considers records that --records that are kept by name. Those -- those are the only records to which the Privacy Act applies.

MR. ENGLERT: Name or other identifying information.

QUESTION: Yes. And I gather that what that -- what that represents is a sense of the Congress that if the thing isn't kept by name, it's not -- it's not going to hurt you anyway. Nobody can find it. It won't be used for an invasion of your privacy or things of that sort.

What about a -- what about a rule that -- that would say if the -- if the information is -- is on record out there before it's given to the FBI or whoever, but is not retained where it is kept by name, it is still considered to be private; but where it's retained by name, it isn't? Do you have any idea how that would work out?

MR. ENGLERT: Well, it's a very helpful rule if applied at a sufficient level of generality. One of the major problems we have with the approach of the court of appeals in this case is that the court of appeals apparently wants us in the name of the Freedom of Information Act to go find out in each and every instance where and how the record is kept, an entirely novel requirement of making the agency do research.

If the point is, however, that because criminal justice records when -- when available at the

original source, which of course they aren't always, are generally not kept by name, that would, indeed, be consistent with at least one indication of the intent of Congress in the Privacy Act which suggests that there is a -- there is a much greater privacy interest in information that can be retrieved by name than in the kind of obscure information that is available on police blotters.

So, I would -- I would welcome that suggestion as --

QUESTION: You're -- you're willing to speculate on the public interest, but not to -- not to make an inquiry as to whether these records you get are being kept by name or not. I don't know why the one is -- is more tedious than the other.

MR. ENGLERT: It's not a matter of tedium, Your Honor. It's a matter of -- of -- one is a question of judgment. We know, often on the basis of information provided to us, that somebody is or is not famous. We know on the basis of the records that his alleged crimes are or are not old. We know that they did or did not result in prosecution, a very important point. What we don't know, with respect to any particular record, is what the disposition practices and what the availability practices are at the -- at the original source.

For example, one of the entries on William Mecico's rap sheet, which was disclosed, shows that he was arrested for suspicion of murder on November 8, 1928. It shows nothing -- no further action was taken on that. How are we supposed to find out the availability of that 1928 record in Wyoming, Pennsylvania? We can always ask, and they can check their archives or something.

But it's a task that we don't think the Freedom of Information Act assigns to us. It does assign to us and assigns to the courts reviewing de novo the task of making judgments on the basis of the available information. It's a very different task.

The primary argument that is made by my opponents here today is there can be no privacy interest in these records because they are, as a general matter, public at the originating jurisdiction. That assigns a meaning to privacy which we don't think is the meaning Congress had for that term.

Exemption 7(C) was passed in 1974 which was a time of extraordinary interest among commentators, courts and Congress in the invasions of privacy that can be occasioned by the widespread release of criminal history information. Congress held hearings on this subject in 1971, 1973 and 1974. At that those hearings,

there was much comment on the invasion of privacy that could be occasioned by disseminating these records even though they may be publicly available at the originating jurisdiction.

Forty-two U.S.C. 3789(g) was passed in 1973. Congress explicitly commanded, as a condition of funding state and local collection of this information, that the security and privacy of this information be maintained.

The Privacy Act was contemporaneous with this amendment to the Freedom of Information Act of 1974. It -- its legislative history, as Judge Starr pointed out in dissent, shows a congressional concern with compilations of data and, as Justice Scalia pointed out, it -- on its face it shows a concern with information that is retrievable by name which decidedly is not, for the most part, the information we're talking about here.

States do compile this information for their own purposes and make it retrievable by name, but as the amicus brief filed by Search Group points out, 47 out of the 50 States have statutes that forbid dissemination of this information.

Now, I should hasten to say Congress has not passed a statute that in terms forbids the dissemination of this information. Congress has only passed a statute that says its law enforcement records are exempt from

disclosure if that disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy.

QUESTION: Congress in the first place has certainly authorized, or at least tolerated, the FBI's collection of all this information in a way where it is accessible where it wouldn't have been if the FBI hadn't collected it.

MR. ENGLERT: Congress has commanded that --that collection in 28 U.S.C. 534. But the disclosure is governed by the Freedom of Information Act. Before 1974, the D.C. Circuit had interpreted Exemption 7 to mean all law enforcement records were exempt, and the general assumption was that all rap sheets were exempt for that reason.

After Menard v. Mitchell, the assumption was that 28 U.S.C. 534, which provides for cancellation of the exchange with states, if the information is misused, was an Exemption 3 statute. The courts in the District of Columbia held that repeatedly. They held again that this information was not accessible.

Now, we're in an era in which the only question left seems to be invasion of privacy, but we should not let the pendulum swing all the other way, as the D.C. Circuit has in this case, and say because

Congress hasn't explicitly forbidden the disclosure of this information in all instances, it should be made available in virtually all instances.

Now, Respondents do say that there is a particular public interest in this case because there are connections to a corrupt Congressman and a defense contractor allegedly dominated by an organized crime figure. The problem with their argument on the facts of this case is that it relies on too many tenuous inferences.

The information requested is about Charles Medico, not Daniel Flood. Daniel Flood was a member of Congress who was the subject of Mr. Schakne's investigation, but Mr. Schakne didn't request information on Flood. This is about Charles Medico. Charles Medico is a principal of Medico Industries, but there is absolutely nothing in the record to suggest any connection between Charles Medico and organized crime other than having brothers who were allegedly connected to organized crime. To say that everything about Charles Medico should be made publicly available and is a matter of great public interest just on those facts carries matters way too far.

We are discussing 7(C) not Exemption 6 here. There is a difference between those two exemptions.

Under Exemption C what we have to show is the disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy as opposed to our burden under Exemption 6 to show that disclosure would constitute a clearly unwarranted invasion of personal privacy.

Congress in 1974 in passing Exemption 7(C) and in 1976 in broadening Exemption C intended to put an additional thumb on the scale against disclosure of law enforcement records.

All our position has to be to be upheld here is reasonable, a reasonable expectation. Respondents disagree with us about whether there would be an unwarranted invasion of personal privacy in this case.

QUESTION: Is reasonable expectation is that no one would find the criminal conviction that is spread on the public record in wherever it is spread? It's so hard to get there from that language. That is his reasonable expectation, that nobody would find it because although it's in the public record there, it's hard to find.

MR. ENGLERT: I think that's a very reasonable expectation on the part of the individual, Your Honor. There are --

QUESTION: And you would call that an

expectation of privacy. It may be a reasonable expectation, but you would describe that as an expectation of privacy?

MR. ENGLERT: Well, again, Your Honor, I think --

QUESTION: That a public record won't be discovered.

MR. ENGLERT: I think this is what Congress meant by the term "privacy" and I think that's evident from the sources we cite in the middle pages of our brief in which Congress in the Privacy Act in particular and in 42 U.S.C. 3789(g) did refer to this interest as a privacy interest.

I think that's also suggested by the courts in the Washington Post case and by Judge Lombard's concurrence in the court below in the Washington Post case where Judge Lombard pointed out that citizenship information, although publicly available somewhere, could be difficult to locate, and that that was important. And this Court in reversing the D.C. Circuit's judgment that the information had to be disclosed said that the fact that the information was publicly available somewhere is not decisive, but may be a factor to be considered under all the circumstances.

If I may, I'd like to reserve the remainder --

QUESTION: (Inaudible). Suppose we agree with you that the court of appeals used the wrong balancing test. That's essentially what you're saying, isn't it?

MR. ENGLERT: Principally, yes.

QUESTION: Would we remand? I guess we would, wouldn't we?

MR. ENGLERT: Your Honor, that's obviously within the discretion of the Court. We would like the Court to resolve this case.

QUESTION: Oh, I'm sure you would, yes.

(Laughter.)

QUESTION: But would we normally do that, to make our own assessment of the facts under a -- the right rule?

MR. ENGLERT: It would be rare. On the other hand, it's rare that this Court would be remanding to a case that claims it is unable to perform the task that has been assigned to it.

Thank you.

QUESTION: Thank you, Mr. Englert.

Mr. Baine?

REBUTTAL ARGUMENT OF KEVIN T. BAINE

ON BEHALF OF THE RESPONDENTS

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

One of the interesting things about this case that hasn't been mentioned this afternoon is that the government concedes that we would be entitled to any information about any financial crimes concerning Charles Medico. Indeed, in making that concession, the government didn't distinguish between convictions and arrests, and so the government concedes that on the facts of this case, we would be entitled to certain information pertaining to Mr. Medico's criminal record. The question is how the government can draw the line between financial crimes and other crimes.

The facts of the case are important. Robert Schakne was assigned by CBS News to investigate allegations of corruption that had been made against Congressman Daniel Flood who was at the time Chairman of the House Appropriations Committee. The U.S. Attorney was conducting an investigation that ultimately led to Flood's indictment on charges of perjury, bribery and conspiracy to solicit illegal campaign contributions from potential government contractors. Flood eventually pled guilty to the conspiracy charge.

In the course of his investigation, Schakne learned that Flood had been instrumental in arranging Defense Department contracts for a company called Medico Industries. And Schakne also learned that the

Pennsylvania State Crime Commission had found that Medico Industries was a legitimate business that had received government contracts but that was dominated by organized crime figures.

At that point Mr. Schakne understandably figured he was onto something. A powerful Congressman was being investigated by the federal government for corruption in connection with his dealings with potential government contractors. And one of the government contractors that he had been dealing with was found by the Pennsylvania State Crime Commission to be dominated by organized crime figures. So, Schakne pursued the story.

He didn't simply report what he read in the crime commission report, although he certainly could have done so, and if he had done so, Charles Medico never could have complained that his privacy had been invaded. Instead, Mr. Schakne sought to confirm the facts and to find out all the facts.

So, he filed a Freedom of Information Act request with the Department of Justice asking for the criminal records about the people -- the criminal records of the people who ran Medico Industries, the four Medico brothers, William, Charles, Phillip and Samuel. He asked separately for convictions, for

sentences, for indictments and arrests.

Now, the government has claimed the privacy exemption.

QUESTION: May I ask you how much of this information was in -- incidentally, was the Pennsylvania Crime Commission a private organization or a public organization?

MR. BAINE: I believe it was a public state commission.

QUESTION: I see. And how much of their -- how much of this information was in their public report?

MR. BAINE: They reported specifically that William Medico had been arrested for murder, that he had been convicted --

QUESTION: Did they tell --

MR. BAINE: -- of bootlegging, and another offense --

QUESTION: Did they tell -- did they tell where -- where and when?

MR. BAINE: They did not specify what jurisdiction.

QUESTION: I was just wondering if maybe you could have gone directly to your source.

MR. BAINE: We would have if we could -- if we could have. We did not know where to go, and that's

precisely why we made the request of the Justice Department.

The government, as I say, has claimed the privacy exemption, but in two respects --

QUESTION: Mr. Baine? Mr. Baine?

MR. BAINE: Yes.

QUESTION: Do you think there's a difference in the balance between unadjudicated arrests or indictments and convictions?

MR. BAINE: I think that there is little or no privacy interest in either a conviction or an arrest. I think distinctions can be drawn between the two, but I don't think the distinctions relate to the concept of privacy. The government apparently would concede that convictions are less private than arrests. I would maintain that there is little or no privacy interests in either.

I would like to address both convictions and arrests in some detail, but the difference, if there is one, is that people can draw perhaps unfair inferences from arrests.

QUESTION: Yes, it can put people in a very false light if you base information on arrests I think.

MR. BAINE: That can happen, but I don't think we can assume that that would be true in every case.

It's one thing for states or legislatures to say we're going to err on the side of protecting people who have been arrested but not convicted, so we're going to adopt a blanket rule that says arrests records will not be available to the public or they will not be given out in response to Freedom of Information Act requests. But, of course, the United States Congress has not done that. It has considered a number of pieces of proposed legislation that would have prohibited the dissemination of arrest records. And --

QUESTION: Well, but it has left the language in 7(C) rather general, whether it constitutes an unwarranted invasion of personal privacy, and conceivably some antiquated arrest records might well be an unwarranted invasion.

MR. BAINE: Well, I think it depends on your concept of privacy. We say that neither a conviction record nor an arrest record can be private because whether it's a conviction record or an arrest record, it is in fact public somewhere, and it is by its nature public. An arrest is an official act. A law enforcement official makes an arrest. There is no attempt to make it secret. It is recorded in a public way, and although --

QUESTION: What if a conviction has been

expunged by the state?

MR. BAINE: Then it's not covered by our lawsuit. We have excluded from this lawsuit any records that are not a matter of public record. And, therefore, if something has been expunged or sealed, we don't want it. It may be that if an arrest record is expunged, the person could say at that point I now have a legitimate expectation of privacy in that arrest record. We wouldn't necessarily concede that, but we don't choose to litigate it in this case. And so, we have excluded from our request -- excluded from the complaint in this lawsuit any expunged records, any sealed records, anything like that.

We are limiting our request to records that are, number one, by their very nature public because all of these records we're talking about are by their nature public. And we have limited our request in another way. If it's not a matter of public record somewhere, it's not covered by the lawsuit.

QUESTION: Is the expectation of the subject of the report relevant to privacy interests? The fact that you may or may not expect that something would be released -- is that relevant?

MR. BAINE: I don't think the person's subjective expectation as to whether the Justice

Department would respond --

QUESTION: Well, your -- your reasonable expectation of what the press might find. Is that relevant?

MR. BAINE: I think the question is whether there is a reasonable, legitimate expectation that you're going to be able to keep something secret.

QUESTION: Well now --

MR. BAINE: The government --

QUESTION: -- an -- an arrest record that's in some remote village or town is certainly harder for the press to get than if it just goes to Washington, D.C.

MR. BAINE: I don't think the question is simply one of assessing how likely it is that someone is going to find it. I think when you are convicted of a crime --

QUESTION: Doesn't that bear on reasonable expectation of privacy?

MR. BAINE: I don't think so. I think the test -- I think when you are convicted or when you're arrested something very public has happened to you. It's public in fact and it's public by its nature.

QUESTION: Well, is it --

MR. BAINE: I don't think it can ever become private.

QUESTION: Is it public all over the United States if it happens some small -- some small --

MR. BAINE: I'm sorry. I didn't --

QUESTION: Is it public all over the United States if it happens some remote place from your own home?

MR. BAINE: It is not known all over the United States, but it is by nature not private, it is public.

I think that the question -- we're interpreting the word "privacy." And we're not just interpreting a word that's used in a statute, we're interpreting a concept that Congress has borrowed, a concept that has been used in the common law, a concept that has some grounding in the Fourth Amendment and other areas of constitutional law. And I don't think -- and I think that when you're defining the word "privacy," you have to be a little bit careful. You can't just say we -- we can define it the way we want it for this case. We're dealing with a concept --

QUESTION: In other words, it's just irrelevant to the individual's expectation that there is a central index in Washington, D.C. that records crimes all over the country. That's irrelevant to an individual's expectation of privacy. That's what you

want us to believe.

MR. BAINE: It is -- it is irrelevant to whether or not there is a substantial privacy interest in our view because --

QUESTION: May I ask on that? That means you don't have to balance it all so that if you get under this statute, if I understand you correctly, a credit reporting agency or at a closing of a loan or a real estate deal or a neighbor is wondering about somebody coming in next door -- all of those people would just automatically get full information about the -- whatever is at the FBI, they have a right to get it.

MR. BAINE: If there is no --

QUESTION: Routinely.

MR. BAINE: If there is no privacy interest whatsoever, that result --

QUESTION: Which is your position.

MR. BAINE: -- would follow.

The Court doesn't have to hold in this case that there can never be a privacy interest in any criminal record, arrest, conviction or sentencing.

QUESTION: But that's your position, isn't it?

MR. BAINE: I think that's correct.

QUESTION: So, you think that -- that routinely these various agencies that have some kind of

inquiry about people can routinely go to the FBI and get their full rap sheet all over the country for their entire lives.

MR. BAINE: I think Congress has left -- has created precisely that situation.

QUESTION: Why would they want to do that?

MR. BAINE: Well, they didn't do it affirmatively; they did it by not writing an exemption.

QUESTION: Well --

MR. BAINE: There are a lot of things that are not exempt under the Freedom of Information Act.

QUESTION: Well, it's a question of how one construes the word "privacy" in this exemption.

MR. BAINE: Yes.

QUESTION: Well, your -- your saying then that Exemption 7 was primarily directed to the records of the FBI itself that weren't made public, and those there would be a privacy interest in if the FBI has put together something that isn't of record anywhere. But when it comes to the Identification Section -- it's just a collection of records that you say are public elsewhere -- then it's just an up or down thing.

MR. BAINE: Well, I want to emphasize that I am not resting my entire argument on the -- the mere happenstance that something happens to be public

somewhere. I'm -- we're relying more upon the nature of the information.

A conviction is a public event. It is a public fact in a person's life. There may be a lot of facts in the FBI's records. There may be facts on the rap sheet that are not by their nature public. But the fact of a conviction is public, and it can never become private.

QUESTION: When you say public, just what do you mean? Do you mean it's -- it's of record somewhere where anyone can walk in off the street and look at it?

MR. BAINE: I mean it doesn't concern the person's private affairs. The legislative --

QUESTION: Well, that -- well, go ahead. I asked you.

MR. BAINE: The House and Senate reports of the -- of the -- of the Freedom of Information Act don't say a lot about these exemptions. But they do contain references to intimate details of a person's life, highly personal facts, private affairs.

Now, in the Department of State case against the Washington Post, this Court did suggest in dictum that information doesn't have to be intimate in order to be covered by the privacy exemptions, but surely the information has to concern one's private affairs as

opposed to the public's business.

The critical fact here is that convictions and arrests are the public's business. And you don't have to rely simply upon the fact that it happens to be in a public record. We all know that the -- that the steps -- the formal steps in the criminal process are by their nature public.

When -- consider what we're talking about here. Representatives of the public pass criminal laws for the protection of the public. Public officials, police officials, make a determination that a crime has been committed and that there's probable cause to believe that someone committed. So, they make an arrest. Members of the public sitting in a grand jury return an indictment. A public prosecutor prosecutes the case before a judge, in front of members of the public sitting as a jury, and then, when we're talking about convictions, the public issues its formal condemnation of the individual for breaking the criminal law. That's what a conviction is. How can a conviction ever be private? It is the public's formal condemnation of the person.

QUESTION: Well, Mr. Baine, I think even Mr. Englert doesn't suggest that criminal convictions are going to be sustained as private information very often.

I think the concern probably focuses or -- on arrests and indictments and other information short of a corviction, con't you suppose?

MR. BAINE: Well, if that is the government's position, I think the government should respond to the portion of our request that asks for convictions by either saying there are no convictions or there are convictions, here they are. The government has acknowledged that certain categories of crimes we would be entitled to information about, but they won't tell us whether there are any convictions in Charles Medico's records. So, convictions are a part of this case.

QUESTION: You are not relying on the court of appeals raticnale then which -- which was that it cannot be covered by this privacy exemption if it is a matter of public record because some state or some body has decided that this is a matter that the public ought to knew about.

MR. BAINE: Well, I agree --

QUESTION: You are not relying on that theory.

MR. BAINE: I agree with much of what the court of appeals said. What the court of appeals said is that the states in general have made determinations that these are matters of public interest, and that's why --

QUESTION: All right, but -- but you say that some things may be public -- published by a state which you -- you would considered still covered by the public interest if -- by a privacy expectation if, indeed, it's not the kind of a matter that -- that you think the public ought to know about.

MR. BAINE: I just don't think the Court has to -- has to fight that battle in this case. There may be --

QUESTION: Well, I might like to because it's a lot easier to figure out than the -- than the line you're giving us. I --

MR. BAINE: I must confess that the line I'm giving you is dictated in part by what this Court said in Department of State against the Washington Post case. The opinion in that case does contain some suggestions that the mere fact that something happens to be contained in a public record somewhere will not necessarily be dispositive.

I'm trying to deal with that fact, and I'm trying to recognize that there may well be aspects of a person's private affairs that happen to be on a record that is available somewhere, and that may not necessarily transform that basically private fact into a basically public fact. But we're talking about criminal

convictions, criminal sentences, indictments, arrests which are inherently by their very nature public facts.

Corgress has had the opportunity and it has corsidered on numerous occasions whether or not it should adopt legislation to prohibit the dissemination of arrest records. Congress has never passed such a law. The fact is that there may well be reasons to pass such a law. It may well be that a judgment would be made that in many cases unfair inferences might be drawn from arrest records in cases that did not result in convictions.

But apparently some people think that it's not always unfair to draw inferences from arrest records. We don't prohibit from -- employers from asking prospective employees about whether they've been arrested.

QUESTION: And, of course, the unfairness doesn't really turn on whether it's a violation of privacy or not.

MR. BAINE: Exactly. I think the unfairness doesn't -- the fact that it may be unfair in a particular case doesn't mean that it's private in that case. And it certainly doesn't mean that it's generally private.

The government suggests that the fact that

somehow this information is contained in a data bank makes a difference. There is no question that government data banks can present issues of privacy. Sometimes the government can collect so much information about an individual's private life, that it puts it all together and it enables someone who has access to that to put together a profile that reveals a great deal about the person's private life, about his spending habits, about his interests, about his personal relationships.

But we're not asking the government for all of the information that it has about Charles Medico. We have limited our request to information that is by its nature public. That information does not become private simply because it's transported from some courthouse in Pennsylvania to a building in Washington, D.C. The information remains inherently public.

The fact that it is now a little bit easier to find the information may be a convenience to Robert Schakne. That's one of the reasons I think for the Freedom of Information Act, to make information accessible. But it doesn't make information private.

Our position in this case is simply this. As a general matter, an individual has no substantial privacy interest in his criminal record. We don't think

he has any privacy interest in his criminal record. But all the Court has to recognize is that as a general matter, there is little or no privacy interest in one's criminal record.

In this case, if Charles Medico had any substantial privacy interest in his criminal record to begin with, he lost it when he became a defense contractor with the help of corrupt Congressmen, and if he had any privacy interests left in his criminal record at that point, he lost it when the Pennsylvania Crime Commission issued a report saying that his company was dominated by organized crime. At that point, if not before, the public had a legitimate interest in knowing all there was to know about Charles Medico's criminal record and about the criminal associations of all of the people --

QUESTION: Do you -- do you agree entirely with the -- with the balancing test the court of appeals thought was applicable?

MR. BAINE: I don't agree entirely. I don't agree --

QUESTION: What do you disagree with?

MR. BAINE: On the privacy side of the balance, I don't agree that the government has to determine whether in each case the particular

jurisdiction from which the records came makes those records publicly available. The fact is we know that these records are publicly available in virtually every jurisdiction. I don't know of any jurisdiction that doesn't make them --

QUESTION: What about on the public interest side?

MR. BAINE: On the public interest side, we disagree with the court of appeals to this extent. The court of appeals said it's impossible to judge the public interest in a particular request, and all you can do is balance the general interest underlying the Freedom of Information Act, on the one hand, against the specific reason or the specific privacy interest.

I don't know how you'd conduct such a balance to balance a general public interest, on the one hand, against a very specific private interest. It seems to me when you're conducting this balance, you're really trying to find out whether the information that the requestor is driving at is basically private or basically public.

QUESTION: Well, the -- of course, the government challenges the -- the court's balancing test. If we agree -- if we agree with the government, I guess we also agree with you.

MR. BAINE: Well, we disagree on the outcome.

QUESTION: (Inaudible).

MR. BAINE: And --

QUESTION: I know, but what would we do? If both sides agree that the court of appeals applied the wrong test, do we remand or what?

MR. BAINE: We agree with the court of appeals result, and there would be no point in a remand because although the court of appeals said we don't think you have to look at the particular reason for the request, it went ahead and applied our test anyway. And it said we win under any test. It said when you look at the particular request here, the government is completely unable to explain to us how this information would not promote the basic policy of FOIA, namely, to inform people about the affairs of government. I think the court of appeals has answered the question under any test.

And if you agree with my way of looking at things, you have to affirm. I don't think either of us is seeking a remand. I don't think there's any point in a remand at this point.

QUESTION: You say informed about the affairs of government. You're trying to inform yourselves about the affairs of this individual. What does it tell you

about the FBI?

MR. BAINE: It doesn't tell you anything about the FBI. It tells --

QUESTION: What functions of the government does it tell you about?

MR. BAINE: It tells you about whether the Defense Department is giving contracts to organized crime. It tells you about whether or not a Congressman is arranging government contracts for a company that's dominated by organizec crime. And I think the public has an interest in the answers to both of those questions.

QUESTION: I thought those had already been answered in the Pennsylvania Crime Commission report.

MR. BAINE: Well, I'm not -- one of the reasons behind FOIA is to enable the public to find out for itself what the facts are and not necessarily to rely upon some crime commission report from Pennsylvania.

What it said was that the company was dominated by organized crime figures. Some people are a little bit careless when they talk about whether a company is dominated by organizec crime figures, and they didn't give a lot of detail. Mr. Schakne was interested in detail. He wanted to find out for sure whether or not there was something to this report and,

if so, just what there was.

The government is really espousing a view of privacy here which says that if something is embarrassing, it's private. As the court of appeals said, that argument simply proves too much. There are many things that are embarrassing, but they're not at all private.

We say that there has to be a reasonable expectation of privacy before someone can claim a privacy interest. That's basically what's required under the Fourth Amendment cases. That's what's required under the common law cases involving invasion of privacy. And we can think of no other reason why, when the Court is construing the concept of privacy in the Freedom of Information Act, it should adopt any different test.

I think it's somewhat surprising that in -- in the government's reply brief, they seem to reject that test. They seem to reject the notion that the test is whether or not there's a reasonable expectation of privacy. Now, we think that is the test, and we think there is no legitimate expectation of privacy in one's criminal record.

And, of course, I want to emphasize again we're not dealing in this case with criminal records in

the abstract. We're dealing with the criminal records of a man named Charles Medico, a principal of a defense contractor that got its contracts with the help of a Congressman convicted of conspiracy to solicit illegal campaign contributions from government contractors, a principal of a government contractor that was found to be dominated by organized crime. And those facts reduce any legitimate expectation of privacy that Mr. Medico might have had in his criminal record.

When the Pennsylvania Crime Commission came out, Mr. Medico should have expected the attention of prosecutors, the FBI, congressional committees and the like. To suggest that a reporter's request for his criminal record at that point was an intrusion into his right to be let alone I think simply ignores the facts.

Now, the government concedes that there's a public interest in finding out whether Charles Medico had been convicted or even arrested of a financial crime. But nowhere does the government explain to us why the public has an interest in that kind of information but not information on other kinds of crimes. Why, for example, would the public have an interest in knowing whether Charles Medico was arrested for a financial crime but not in knowing whether or not he had been arrested or even convicted of murder, racketeering, tax

evasion, mail fraud, or weapons violations? We're dealing with a contract that -- contractor that sold missile parts and tank parts to the federal government.

We say that given the relationship of the Mecicos to Congressman Flood and given the fact that their company had been found to be dominated by organized crime, the public was entitled to know whatever there was to know about the criminal associations of these people. As the court of appeals put it -- and we agree with the court of appeals on this point -- it's surely up to the citizenry, once informed, to determine the relevance of whatever criminal record there may be.

The government's position is, yes, there's a public interest in knowing what kind of people these were. Yes, there's a public interest in knowing whether or not they were convicted of financial crimes, but we, the government, will decide or the court will decide, based on an in camera submission, how probative or significant a particular piece of information is.

We say that's wrong. We say it's wrong because the whole idea of FOIA is to give information to the public and to let the public decide for itself whether its government is functioning as it should. That's not to say that it's always up to the public to

make the final assessment of the public interest. But when, as in this case, there is concededly a legitimate public interest in certain type of information, namely, information about a person's criminal history, the public should have the opportunity to take a look at the information and to weigh the significance of each particular piece of information.

When the court decides that issue on its own on the basis of an in camera submission, the adversarial process is compromised. In this case the party advocating the public interest is at a disadvantage. Once again, that's not to say you can never have in camera review. But I think in camera review is a singularly inappropriate way to resolve issues of the public interest. I think it's difficult enough for the court to weigh what the public interest is in any of these cases, but to do it on its own without any help from the public itself I think is especially difficult.

It's going to be awfully difficult for a court to sit there and speculate on its own looking at each piece of information how the public might use this fact, that fact and that fact. That's what the district court did. It said, as the government says, there is a public interest in general in this kind of information in this kind of case, but taking a look at the particular facts

that are in the sealed envelope, we don't think those facts are particularly relevant to the story that Mr. Schakne might want to do.

I think the court of appeals had it right when it said that kind of a judgment is a judgment for editors or for members of the public, but not for judges. A particular piece of information that is seemingly unimportant to the judge may be very important to the person who requests it and very important to the public, very important to the people who have a fuller understanding of the facts.

And even the fact that there is no significant crime in Charles Medico's past may be of legitimate interest in a case like this. The Pennsylvania Crime Commission raised serious questions about this company over whether it was suitable and fit to be a government contractor. If those questions were unfounded or if they were exaggerated, the public had an interest in knowing that. And, of course, if the record shows that there are only minor offenses in Charles Medico's criminal past, disclosure of that fact is not going to cause any serious embarrassment to a person who has already been linked to organized crime in an official report.

QUESTION: Mr. Baine, I'm not sure just what

-- what -- what do you want the court to take account of for purposes of the language "an unwarranted invasion of personal privacy." What -- what kind of things would you let the court take into account to determine whether, assuming you've come across something that -- that is personal privacy, there would be an unwarranted invasion of it? Wouldn't the court have to get into some of these kinds of areas?

MR. BAINE: I think the court does have to ask and perhaps the Justice Department has to ask the requestor why do you want this information. And if the requestor, as in this case, can articulate a legitimate public interest, that has to be weighed. I don't think the Court in this case has to write a treatise explaining everything that might be a conceivably important public interest. But no one disputes -- the government doesn't even dispute -- that the public interest that we've articulated is a legitimate one.

And so, once you have a legitimate public interest and a very minimal privacy interest, if any privacy interest, I say that the requestor is entitled to the information and the Court should not do what the district court did and what the government would ask this Court to do, go through the records page by page, line by line, and decide what's probative and what's not

probative, what's significant and what's not significant. I think that's wrong because it imposes a tremendous burden on the Justice Department and on the courts, but I think it's wrong more importantly because I think those judgments are judgments that the public should be able to make on their own once they're given the relevant facts.

Thank you.

QUESTION: Thank you, Mr. Baine.

Mr. Englert, you have three minutes remaining.

REBUTTAL ARGUMENT OF ROY T. ENGLERT, JR.

MR. ENGLERT: Thank you, Your Honor.

It may well be true that convictions should be disclosed a very substantial portion of the time. We do not concede, as Mr. Baine suggested, there can never be a privacy interest in convictions.

Let me just give you a hypothetical Freedom of Information Act request. Please give me all publicly available records on convictions of Jean Valjean. And we find out that many, many years ago he was convicted of stealing some bread. It seems to me he still has some substantial residuum of a privacy interest in that record.

A ruling by this Court that there's no expectation of privacy in compiled criminal history

records would come as a very great surprise to the states. Mr. Baine says every jurisdiction makes them available. That may be true. It's also true that every jurisdiction sharply restricts their availability in compiled form. To say that they should be available in compiled form because every state makes them available in uncompiled form is quite contrary to the actual policy of the states.

According to Mr. Baine, the world is divided into things that are public and things that are private, and never the twain shall meet. It doesn't work that way. Bankruptcies are fundamentally public events. But under the Fair Credit Reporting Act, they can't be reported after seven years. Chief Justice Rehnquist gave an example in his Kansas lectures of the license plates of someone who parks at a bar every night. Those are certainly available to the public, and yet we would think there was some kind of invasion of privacy if the government came to that bar every night and recorded the license plates.

QUESTION: Excuse me. I don't understand why you think the Jean Valjean thing is so obvious. What --what -- what if the thing that's hidden in my past is that I am really Adolf Hitler and I think nobody is -- is going to know that? Would I have a privacy right in

--in somebody not finding that out simply because it's virtually impossible for them to find it --

MR. ENGLERT: The answer to the question, Your Honor, is --

QUESTION: -- (inaudible) question of public record?

MR. ENGLERT: -- yes, you would have a privacy interest.

QUESTION: A privacy --

MR. ENGLERT: There would be a countervailing public interest of enormous magnitude. That's why our position that embarrassing facts are what Congress intended to protect doesn't prove too much.

QUESTION: So --

MR. ENGLERT: It only proves that you always consider these interests and take into account the countervailing interest on the other side.

QUESTION: Is there any difference in your estimation between an expectation of privacy and an expectation of non-discovery? The two are the same.

MR. ENGLERT: For purposes of this statute, I think they're very similar. This Court emphasized in Washington Post the language from the House report that Congress intended in Exemption 6 to protect against the disclosure of files whose disclosure might harm the

individual. That's what Congress meant by privacy in this statute.

Not everything as to which there is no reasonable expectation of privacy should be disclosable under the Freedom of Information Act. The fact that the police can search garbage cans under this Court's decision in California v. Greenwood I hope does not mean that everything they find is automatically disclosable to the public without more under the Freedom of Information Act. I think the citizenry retains some information --some interest in preventing widespread and indiscriminate public disclosure of things even though the police may be entitled to look at them.

Mr. Baine says the public would have an interest in this information if it shows that Charles Medico has no significant record. I doubt that Charles Medico would welcome public inquiry into his past criminal record.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Englert.

The case is submitted.

(Whereupon, at 2:58 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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No. 87-1379 - UNITED STATES DEPARTMENT OF JUSTICE, ET AL., Petitioners V. REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

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BY alan friedman

(REPORTER)