OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: AMERICAN FOREIGN SERVICE ASSOCIATION, ET AL., Appellants V. STEVEN GARFINKEL, DIRECTOR, INFORMATION SECURITY OVER-SIGHT OFFICE, ET AL.

CASE NO: 87-2127

PLACE: WASHINGTON, D.C.

DATE: March 20, 1989

PAGES: 1 - 60

ALDERSON REPORTING COMPANY
20 F Street, N.W.
Washington, D. C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

AMERICAN FOREIGN SERVICE ASSOCIATION, ET AL., Appellants

v. : No. 87-2127

STEVEN GARFINKEL, DIRECTOR, INFORMATION SECURITY OVERSIGHT OFFICE, ET AL.

Washington, D.C.

Monday, March 20, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:50 a.m.

APPEARANCES:

PATTI A. GOLDMAN, ESQ., Washington, D.C.; on behalf of the Appellants.

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

C O N T E N T S

P R O C E E D I N G S

10:50 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-2127, American Foreign Service Association v. Garfinkel.

Ms. Goldman, you may proceed whenever you're ready.

ORAL ARGUMENT OF PATTI A. GOLDMAN

ON BEHALF OF APPELLANTS

MS. GOLDMAN: Mr. Chief Justice, and may it please the Court:

This appeal arises from a judgment that a statute of Congress is unconstitutional on its face.

Since the district court entered judgment, several events have taken place which have substantially altered the nature of this controversy. In order to place those developments in proper perspective, I want to begin by first discussing the statute, then the district court proceedings. And, finally, the recent developments and the effect that they have on this controversy.

The law at issue in this case, Section 630, is a response to the use of nondisclosure agreements to impose certain new obligations on federal employees. In 1983 President Reagan directed that all federal

employees who have access to classified information must sign nondisclosure agreements or risk lose -- losing their security clearances.

Two provisions in these nondisclosure agreements became particularly troubling to Congress. The first is that the agreements obligated employees not to disclose classifiable information as well as classified information. While employees would know what classified information is, Congress was concerned that the term "classifiable" was so vague employees wouldn't know what their obligations were under the forms.

The second aspect of the forms that concerned Congress was the prior authorization requirement which the appellees applied to disclosures to members of Congress. And here Congress was concerned that it may lose access to information that it needs to carry out its legislative functions.

Congress entered into negotiations with the Executive Branch in an attempt to resolve this controversy, but those negotiations were not satisfactory. Accordingly, Congress passed this law, Section 630, which prohibits the use of funds to require employees to sign the two forms that had been used, as well as any other nondisclosure agreements that contain certain of the same provisions. And there are two

categories of provisions that were banned in Section 630.

The first provisions, the first bans, go to the information that's covered by the forms. Congress' concern was that employees should know what their obligations are under the forms. So Congress did two things. It banned the use of the term classifiable and it specified what unmarked information can be covered by the forms.

If information is not marked, then the employee must know that the information is either classified or in the process of a classification determination. And this provision was a response to the standards that had been offered by Appellee Garfinkel both in hearings before Congress and in several Federal Register notices that attempt to define what this term classifiable meant.

In those definitions offered by Appellee Garfinkel, he stated that employees would be liable if they know or reasonably should know that information is classified. Congress rejected this "reasonably should know" standard and stated instead in Section 630 that the employee must know that unmarked information is covered by the forms.

The second set --

QUESTION: When you say unmarked, that's

material that has not already been classified?

MS. GOLDMAN: Generally, yes. Both in the Executive Order and in the directives that have been issued by Appellee Garfinkel and other agencies, classified information must be marked.

In some instances, marking takes a different form. For example, with oral communications and recordings, instead of a clear marking, there would be a statement that the information is classified and anything should be marked that comes out of that communication.

QUESTION: Ms. Goldman, isn't the dispute about the use of the term classifiable moot now?

MS. GOLDMAN: Yes, in part. It is moot as to all of the employees who received notice that the term classifiable has been deleted from the forms. And everyone agrees that it is moot as to those employees.

There is a dispute, though, as to the proper remedy in that instance and also the extent as to which the mootness permeates the whole case. The Appellees contend that this Court should affirm the district court judgment on grounds of mootness, and we believe that is an inappropriate remedy. But the part of the case that is moot should be vacated as moot. And then the other --

QUESTION: Well, it's hard to see what's left of that at all. I mean, there was -- Garfinkel put a notice in the Federal Register modifying the existing forms. Why isn't that sufficient? What's left?

MS. GOLDMAN: Appellee Garfinkel has placed a notice in the Federal Register, but Appellee Webster has not as to the forms that he is responsible for. And a notice was sent to individual employees who signed the forms, amending their agreements, but not to former employees.

We don't know at this stage of the proceedings the extent to which former employees have not received notice, and that should be something that the District Court can sort out on a remand and decide how much of the case is left and if there's any appropriate remedy. And that's what --

QUESTION: So you don't agree that it's moot then? Across the board at any rate?

MS. GOLDMAN: Certainly not. We agree that the dispute over classifiable is largely moot. But there are two areas of this dispute that we do not --

QUESTION: But don't you -- don't you agree that we don't need to deal -- we don't need to deal with that issue?

MS. GOLDMAN: We certainly do. We think that

the district court should --

QUESTION: Well, we don't need to talk much about it then.

MS. GOLDMAN: It would -- well, the remedy has been an important issue in this case because the Appellees have asked this Court to affirm. And we think that is the wrong thing to do at this stage.

Instead, we ask the Court to vacate the district court judgment and remand this case for the district court to sort out all the recent developments that have taken place and the effect that they have on this case.

In addition, because the district court decided the constitutional questions before deciding the statutory ones fully, we ask this Court to give the district court instructions to follow the correct order on the remand. What we ask the Court to do is instruct the district court that it should first decide the extent to which this case is still a live controversy and then the extent to which there are violations.

And only once it has reached that decision should the district court decide whether there are any violations of the Constitution in the statute as it applies.

QUESTION: Well, Ms. Goldman, does any of the

language in the two new forms now in use actually conflict with any of the requirements of subsection (1) of Section 630?

MS. GOLDMAN: Yes. The language in the new forms has no knowledge requirement at all. The new forms obligate employees not to disclose information that is either classified, whether or not it is marked, or in the process of a classification determination.

But it is not just the forms that are at issue here. It is also the notices that were sent to the employees, since it is those notices that amended the forms that they had signed.

QUESTION: Well, do you challenge the requirement in the new forms that the employees consult or confirm the classification status of material when they are uncertain?

MS. GOLDMAN: Our complaint has not reached the new forms since they weren't part of the --

QUESTION: Do you have any problem with that requirement?

MS. GOLDMAN: Yes. To the extent that it violates subsection (1) we do have a problem with that requirement. But, again, that would be something that would have to be sorted out on remand. We would have to amend our complaint to encompass the new forms as well

as the old and specify that those duties also violate the knowledge requirement of subsection (1).

QUESTION: Well, isn't that precisely what lets an employee know?

MS. GOLDMAN: Yes.

QUESTION: Making an inquiry?

MS. GOLDMAN: But the employee doesn't know exactly when that obligation to make an inquiry arises. And Appellees' brief demonstrated -- demonstrates how open-ended those requirements are. Appellees define this reason to know standard as any doubt -- if any employee has any doubt that information might be classified, then he or she must check and consult to see whether it is.

At other places in Appellees' briefs they state that reason to know means uncertainty. If an employee is uncertain as to the classification status, he or she must check.

Our concern is that these duties to consult will apply to a wide range of unclassified information where the employee doesn't know that he or she should --

QUESTION: Well, has the reason to know regulation or standard ever been applied to any of the members of your organization?

MS. GOLDMAN: I don't believe it has. At this

point the --

QUESTION: Would you think it's right for a decision then?

MS. GOLDMAN: Yes, we do think it is right because these individuals have signed a contract that first said classifiable and now has been amended to say know or reason to know something is classified. And by being obligated by that standard, employees are chilled from making a whole range of disclosures of unclassified information as well as information that might properly be classified.

QUESTION: And you don't agree with the amici here that know includes reason to know?

MS. GOLDMAN: Well, in the context of this case, Congress said know when a reason to know standard was before it. So, Congress decided that there were two standards, and it chose one of them.

If -- if it's really correct that there is little difference between the two, then I would ask -- the next question would be how can it possibly be unconstitutional then for Congress to say know instead of reason to know if the two may be so close in what they mean.

QUESTION: Ms. Goldman, what in your view is here on the merits or that ought to be decided either

under terms of the statute or under terms of Constitution?

MS. GOLDMAN: At this point we're not asking the Court to decide any of the merits of either the statutory or constitutional argument. We think there's a controversy. We think there are violations. But because of all of the recent developments and the different ways that the parties have construed them, we think the district court should decide in the first instance what is at issue, what violations exist today, what remedies are appropriate. And then, and only then, if there are violations of the Constitution.

QUESTION: Why is all that necessary if you're so sure that know -- and it seems to make sense to me -- that know doesn't mean reason to know? If that is obvious, then whether the district court ruled upon it or not, it's obvious. And so long as there is that one problem, the constitutional issue has to be reached, doesn't it?

MS. GOLDMAN: Well, initially we had taken the position that it was clear on the face of the forms that there was a violation there and this Court should reach the statutory and constitutional issues.

QUESTION: But you've abandoned that?

MS. GOLDMAN: Well, there's so much

disagreement in all of the briefs that have been filed in this case, and confusion, if not on our part, on the part of many of the other people who have filed briefs that --

QUESTION: Well, it's scarcely a useful -- a useful use of an hour of the Court's time simply to send a case back to the district court.

MS. GOLDMAN: Well, the reason that we're here, Your Honor, is because once the developments took place the Appellees asked this Court to affirm the district court judgment and not to vacate it.

And, also, we have a district court judgment that is a sweeping ruling that this entire statute is unconstitutional on its face. So, whatever developments took place, whatever challenge -- changes that took place, the district court had decided that there would be no compliance with Section 630, it didn't matter, the entire statute was unconstitutional.

QUESTION: Well, why don't you challenge that ruling here?

MS. GOLDMAN: Well, we have and we're prepared to argue that. And this Court certainly can reach that since in our view there's a live controversy in violations.

Let me turn then to the district court

proceedings.

QUESTION: Then, I must have misunderstood your answer of a moment ago because I thought I'd asked you what on the merits, so to speak, either statutory or Constitutional, is before us. And I thought you said in fact nothing. But that wasn't a correct understanding of what you said.

MS. GOLDMAN: It is before the Court, and we believe the Court can decide it. There's a question of what might be the best remedy in this situation. We've become convinced maybe the best remedy isn't for the Court to decide it.

QUESTION: But you are suggesting we really shouldn't decide anything, we should just send it back and have the district court sort things out. But, of course, we could but you think we shouldn't.

MS. GOLDMAN: You can certainly do -- decide the case or send it back. I think it's --

QUESTION: Well, what's your position? I mean, what do you prefer? What are you urging us to do?

MS. GOLDMAN: We initially urged the Court to decide --

QUESTION: Well, what are you urging us to do now?

MS. GOLDMAN: We think the right thing to do

at this stage is to send it back and have the district court pass on all the recent --

QUESTION: And decide nothing?

MS. GOLDMAN: I think this Court should decide two things about the district court decision. And they are, that the district court followed the wrong approach by deciding the constitutional questions before the statutory ones, and that instead what the district court should do on remand and should have done initially is decide exactly in what respects the Appellees were violating Section 630. And then decide whether those violations implicated constitutional questions, whether the statute as applied to those violations was unconstitutional.

The second thing that we want this Court to decide, as the Court certainly can decide, is that the district court erred in the method of analysis it applied because it assumed that the President has exclusive authority over all national security and foreign affairs matters. And that is in error.

Instead, the district court should have looked to the shared powers that Congress has in this area under the Constitution, and to the method of analysis employed by this Court in Nixon v. the Administrator of General Services. And under that test the Executive

Branch, which is challenging the statute, must introduce evidence that there is some impairment --

QUESTION: Ms. Goldman, we don't ordinarily correct district court opinions as if it were some sort of a test. We -- we decide relatively concrete issues.

MS. GOLDMAN: Well, we believe this case is concrete, and there is a live controversy. There are violations on the face of the new forms and on the notices that have been sent, and that the Court can decide these questions.

But in the posture of this case, as complicated as it has become, it may be more appropriate to send the case back to the district court to first -- to decide these questions in the first instance.

QUESTION: May I just ask this? In putting to one side the problems of remedy and notice, but just the question of what statutory violations you contend are there -- if you go back to the district court, you know. The only one, am I correct, is that there is a difference between reason to know and to know within the meaning of Section 1?

MS. GOLDMAN: There are two violations that exist. One is the difference in the knowledge -- the knowledge standard.

QUESTION: Yes.

MS. GOLDMAN: And the other is the prior authorization requirement. We had argued that the forms apply a prior authorization requirement to disclosures to members of Congress. The new forms and the notices --

QUESTION: And that's a violation of subparagraph (4)?

MS. GOLDMAN: Yes. I didn't get to that when I was explaining --

QUESTION: That it interferes --

MS. GOLDMAN: -- the statute, but there are two subsections that prevent nondisclosure agreements from imposing a prior authorization requirement on disclosures that employees have a right to make to members of Congress.

QUESTION: But, now, isn't it -- isn't it argued by one of the briefs that such a prior authorization requirement already exists and that, therefore, the statute really didn't change the law?

MS. GOLDMAN: I think it's the reverse. That employees have rights through other statutes. And all that Section 630 did is preserve the rights that exist from some other source.

What Section 630 says is that if an employee has the right to give information to Congress, nondisclosure agreements cannot require that employee to

obtain permission before exercising that right. And on that point there is no dispute. All of the parties agree that that's the reading of the term.

QUESTION: But then there may be no statutory violation -- there may be no second statutory violation then?

MS. GOLDMAN: There may or may not be. The district court did not focus on the prior authorization requirement because the Appellees were using the two forms that are listed by number in Section 630. There -- we had put some evidence in the record, but the district court made no findings on that point. And it has become more important since the Appellees discontinued using those two numbered forms because now we must look at the forms to determine the extent to which they violate each of the subsections in the law.

QUESTION: Your jurisdictional statement presented just -- question one was the constitutional issue, wasn't it?

MS. GOLDMAN: Yes, it was.

QUESTION: And now you say we shouldn't decide it? I mean, that's what we noted probable jurisdiction on.

MS. GOLDMAN: We --

QUESTION: Have you changed your mind since

you filed your jurisdictional statement?

MS. GOLDMAN: We believe --

QUESTION: That wouldn't be a crime, of course.

MS. GOLDMAN: We did change our mind.

QUESTION: Yes.

MS. GOLDMAN: In our opening brief we also asked the Court to reverse.

QUESTION: Yes.

MS. GOLDMAN: It was in our reply brief that we backtracked and we said the Court should either reverse or vacate and remand.

QUESTION: (Inaudible.)

MS. GOLDMAN: Yes. After reading the six other briefs that were filed in this case it became clear that there is a lot of confusion about what has happened since the district court judgment and the impact that it has on this case.

And most of what the briefs rely on is not in the record in this case, but in forms that have been developed since and briefing materials, notices that have been sent out.

QUESTION: That's all a lot of confusion, and it's terribly inconvenient and all of that. But -- but isn't it correct that unless we are satisfied that there is doubt as to whether any inconsistency exists between

the statute and the forms -- unless there is doubt on every one of these issues, we ought to reach the Constitutional point, shouldn't we?

MS. GOLDMAN: We certainly believe there's enough on this record for the Court to reach all of the --

QUESTION: That's not what I'm asking. It seems to me to avoid reaching the constitutional point, we have to be satisfied that there is doubt whether any -- any -- item on these forms fails to comply with the statute.

MS. GOLDMAN: Well, the Court would certainly have --

QUESTION: To put it more specifically, if I think that know does not mean reason to know, there is a clear discrepancy between the forms and the statute and we're going to have to reach the constitutional issue.

MS. GOLDMAN: We agree with you.

QUESTION: Why should I send it back if I think know cannot mean reason to know? What possible basis would there be to send it back?

MS. GOLDMAN: The only basis would be that the parties and the amici that have filed briefs have viewed that term differently and have relied on evidence that's not in the record. And if this Court would want to have

the district court sort it all out, that would certainly be appropriate.

We believe that there's plenty here for the Court to decide, but it may be that you would choose not to.

QUESTION: You've still got ten minutes left. Do you want to speak to the merits on the possibility that the Court may choose to decide the merits?

MS. GOLDMAN: Certainly.

QUESTION: Before you -- I just wanted to say one thing. Isn't it true that there might be quite a difference in the constitutional issue whether we're just focusing on Section 1 or the entire statute?

MS. GOLDMAN: Well, that --

QUESTION: The district court didn't focus on Section 1, as I remember.

MS. GOLDMAN: Well, that was the problem with the district court opinion. The district court didn't focus on any of the provisions. The district court assumed that there was a violation of this law because the Appellees used certain numbered forms that are listed by number in the statute.

The district court didn't focus on particular violations. And the fundamental error here in the district court opinion is that it is a sweeping

declaration of unconstitutionality without looking at the particular pieces of this statute and deciding whether they impair the Executive Branch in some way, based on evidence in the record, and if they do, whether there is some overriding need for the statute.

QUESTION: But we could reverse that and send it back and say, look at it piece by piece.

MS. GOLDMAN: And that's --

QUESTION: If they're wrong about that. And if they're right about that, we affirm them.

MS. GOLDMAN: That is what we're asking this Court to do.

QUESTION: That's what I thought you originally asked. But I don't see why it's changed.

MS. GOLDMAN: That is what we want this Court to do, is look at the approach that the district court took and -- and explain exactly why it is in error.

And let me explain what evidence was in the record below on this point because I think it illustrates how erroneous that decision was.

In challenging the statute below, the only evidence that the Appellees introduced was an affidavit by Appellee Webster. And that affidavit makes two assertions.

The first is that disclosures of classified

intelligence information may harm national security. And the second is nondisclosure agreements may assist the Executive Branch in preventing those disclosures.

We have no dispute with either of those propositions. But they don't shed any light on the particular provisions of Section 630. In fact, that affidavit says nothing about a knowledge standard, a prior authorization requirement for Congressional disclosures, or the term classifiable.

The district court didn't rely on any evidence, that evidence or any other. He decided that the President has exclusive authority over national security information and that Congress has no role to play in regulating disclosure of national security information.

In fact, the focus in the district court was on the term classifiable. And the same district judge who decided this case declared that term unconstitutionally vague two months after he issued this decision. He enjoined the use of this term, although he decided Congress has no power to do the same.

The first error, therefore, in the district court decision is the assumption that Congress has no power in this area. And once it's recognized that Congress has numerous powers under the Constitution,

such as the lawmaking power, the appropriations power, the power to regulate the land and naval forces, et cetera, then it becomes clear this is an area of shared powers and the proper test is the one set forth in Nixon v. GSA.

In that case, this Court said that the party challenging a statute, or the branch challenging a statute, must show that it impairs their ability to carry out their constitutional functions. Here the Executive Branch has not made any showing that it is impaired by the terms in Section 630. The only evidence was the Webster affidavit that didn't go to the particular terms in Section 630.

And it's unlikely that the Executive Branch could make such a showing, given the nature of this statute. Section 630 --

QUESTION: I know, but the requirement of knowledge means that the Executive Branch has to put UP with the negligence of employees.

MS. GOLDMAN: Not necessarily.

QUESTION: Not when they're dealing with classified information?

MS. GOLDMAN: Well, not necessarily for two reasons. First --

QUESTION: Well, not necessarily. But ever?

MS. GOLDMAN: I don't believe so, because Section 630 only goes to terms in nondisclosure agreements. A reason to know standard may not be imposed through a nondisclosure agreement under this law.

Section 630 does not deal with the larger question of whether employees can be punished if they disclose information when they have reason to know it may be classified through some other authority. Congress did not limit the Executive Branch's ability to decide who can have a security clearance or who can have access to certain sensitive information.

QUESTION: (Inaudible) you can't use these kinds of contracts?

MS. GOLDMAN: Congress was very concerned about these contracts. Three million employees --

QUESTION: Why shouldn't -- why shouldn't the government say, please be careful?

MS. GOLDMAN: Well, that's not the question here. The question is whether Congress can make a decision that certain obligations should not be imposed.

QUESTION: (Inaudible) Congress thought that the Executive Branch couldn't do anything about negligent employees who were dealing with classified information.

MS. GOLDMAN: Well, that's not --

QUESTION: Don't use any money to get after these people.

MS. GOLDMAN: That's not exactly correct because under Section --

QUESTION: Is it partly correct or not at all?

MS. GOLDMAN: It is correct in that Congress limited certain obligations under nondisclosure agreements. If an employee knows that information is classified, he or she can be punished under the agreements for negligence.

QUESTION: (Inaudible.)

MS. GOLDMAN: Then he or she can only be punished if the Executive Branch is using some other authority. The contracts cannot be the basis for the punishment.

QUESTION: What other authority if the person has already left the service? I mean, the advantage of these contractual agreements is that it continues to bind the person after he's left.

How are you going to punish him administratively when he's left?

MS. GOLDMAN: Well, there may not be --

QUESTION: There may not be any way to -- to punish the negligent employee.

MS. GOLDMAN: If the employee has left.

QUESTION: Right.

MS. GOLDMAN: But the concerns that are raised in the Executive Branch brief here is access to the national security information.

QUESTION: Well, they've had access already in the past. Then they leave the government and you're saying there's -- or, Congress has said there is no way the President can require these people to be careful about what they thereafter say. Isn't that what it comes down to?

MS. GOLDMAN: Well, if they know, they have all the obligations of the agreements.

QUESTION: If they know. But they don't have to be careful.

MS. GOLDMAN: If -- if the Executive Branch would have some other stick, for example, a new position, the Executive Branch would certainly have control over whether --

QUESTION: Boy, that will fix them. We won't rehire you after you've left.

QUESTION: Well, though, I don't think that's a fair reading of the statute anyway. The statute is broader than these particular agreements, any policy or contract. I mean, so the government couldn't even

enforce a policy of disciplining people who were careless.

MS. GOLDMAN: Well, the statute does use the term policy, but the legislative history in this area is clear that Congress was concerned with contracts. And in this instance we believe it would appropriate -- it would be appropriate to construe the term policy in accordance with the entire legislative history --

QUESTION: To construe the word policy by just erasing it?

MS. GOLDMAN: Well, it doesn't say rules or regulations or executive orders and it's not exactly clear on that point.

QUESTION: But it's broad language.

MS. GOLDMAN: We don't think it should be --

QUESTION: Any other nondisclosure policy, form or agreement, if such policy, form or agreement -- it didn't just say agreements.

QUESTION: You're not really suggesting that that (inaudible) on the Executive is in any interference at all with his ability to execute the clause?

MS. GOLDMAN: Well, there may be some --

QUESTION: Just can't deal with -- you just can't do anything about negligent employees?

MS. GOLDMAN: Well, that's not what this

statute does, but if it did, Congress --

QUESTION: (Inaudible) Justice Stevens has just read me something that sounds like --

MS. GOLDMAN: Congress would certainly be entitled to make a judgment that where information is not marked, the Executive Branch should bear the burden of insuring employees know rather than those employees of checking --

QUESTION: Are you saying that Congress may forbid the Executive Branch from taking action against non-knowing but negligent employees? That he has that kind of power.

MS. GOLDMAN: Well, the test that would be applied would be the balancing test. There may be some instances where --

QUESTION: Why?

MS. GOLDMAN: -- it would tie the Executive Branch's hands.

QUESTION: Get to the question more definitely. Justice White asked you a particular question. I think it can be answered yes or no.

QUESTION: Wasn't that the Constitution machine to make Congress keep -- forbid the Executive Branch from dealing with negligent employees?

MS. GOLDMAN: Yes, it may, unless the

Executive Branch can show that its hands are tied under the test in Nixon v. GSA. And then those aspects, those instances where the statute would do that would be unconstitutional.

I would like to save some time for rebuttal.

QUESTION: Very well, Ms. Goldman.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF RESPONDENTS

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

I would like to take a few moments at the outset to summarize what the government's position is in this case, with respect to the proper disposition.

Contrary to Appellants' view, we don't believe that there is a need to remand this case to the district court. We think the judgment can and should be properly affirmed. This Court reviews judgments, not opinions of lower courts, and in this case we believe that the judgment below sustaining the forms against the challenge brought by the Appellants was correctly entered.

The Appellants have argued this case as if -- as if the issue were our challenge to Section 630. That's not the issue before the --

QUESTION: So you don't want us to reach the Constitutional issue either?

MR. KNEEDLER: We don't think it's necessary to do so because in our view the forms that they have challenged comply with the statute. We aren't suggesting sending it back. In our view, the forms comply with the statute.

QUESTION: You want us to try the case right up here (inaudible)?

MR. KNEEDLER: I don't think it's a need to try the case. This Court has often --

QUESTION: You want us to do what the district court didn't do.

MR. KNEEDLER: Well, this Court is accustomed, when a lower court decides a constitutional question, to first looking at a statutory question in reviewing the judgment.

QUESTION: (Inaudible) also, we aren't accustomed to having respondents ask us to affirm on different ground than saying I'm sorry but we think that somebody else should decide it first.

MR. KNEEDLER: Well, that's obviously within -- within the Court's authority and discretion. But we don't -- we don't think that it's necessary to do so here with respect to the questions of statute

construction that are raised. We think this Court can address those as well as the district court.

But -- but the point I was making is that Appellants brought this suit to challenge the nondisclosure agreements, two in particular, 4193 and Form 189, on their face. As part of their challenge, they invoke Section 630.

But the question before this Court is whether those forms are invalid, or were invalid -- they've now been superseded -- whether those forms were invalid on their face and therefore should be enjoined under Section 630.

QUESTION: How can a form be invalid on its face?

MR. KNEEDLER: Well, for, for example, with respect to the question of disclosures to Congress, the form states that unauthorized disclosures are barred and the employee undertakes never to make an unauthorized disclosure.

Now, in our view that is certainly valid because, for example, the Appellants would argue that their members have a First Amendment right to petition Congress through divulging classified information without going through channels. Our position is that the First Amendment does not confer any such right. But

if it did, that presumably would be an authorized disclosure within the meaning of the form.

So, the disagreement about whether there is a substance of right is not really in this case.

QUESTION: The form just refers the employees to a law library.

MR. KNEEDLER: Well, it refers them -- these employees are not -- receive a lot of instruction as to what their obligations are. These forms were intended to embody and in fact codify obligations that employees have from independent sources. From the class --

QUESTION: Well, how does -- how does the one thing you've referred to so far, that you're not allowed to make any unauthorized disclosures -- how does that help anyone if -- if -- if that simply means that you check through all possible applicable laws and regulations and the Constitution and decide whether or not a particular disclosure is authorized?

MR. KNEEDLER: Well, in fact, for employees it's far easier than that. They can check with -- they can check through channels to see whether a particular disclosure is authorized, and that's exactly how the regime for regulating classified information within the Executive Branch is intended to work.

The President has control, as this Court said

in Egan last term, over classified information. The instrument of his exercise of control over that is the Executive Order 12356, and each of the Agencies that acministers classified information has rather specific instructions and guidelines that they furnish to employees to tell them what their obligations are.

And, in fact, a paragraph of the agreements at issue here, in the forms the employee acknowledges that he's been briefed as to what his obligations are. And, for example, in the specific instance of disclosing information to Congress, it's clear and has been for a long time, that a disclosure to a member of Congress is like a disclosure to anyone else.

The recipient is not authorized to receive it unless he is determined to have a need to know that particular information. It's not enough that he may be trustworthy as a general matter. He has to be determined to have a need to know. And that is a standard that is set forth in the Executive Order itself through which the President has regulated the access to classified information.

QUESTION: But is Congress bound by the Executive's determination in that respect?

MR. KNEEDLER: Congress is not bound in several respects, but it is -- let me explain my answer.

It's certainly not bound with respect to its own internal handling of classified information. The second question would come if Congress itself wanted to obtain classified information from the Executive Branch. That could be done through a request or a subpoena.

The judgment as to whether that information would be furnished to Congress would be made by the person who has custody of it or a person to whom that authority has been delegated. For example, in the CIA, that authority is vested in the Director of Central Intelligence.

QUESTION: But suppose Congress says, "We don't want to be at the mercy of the Director of the CIA when we want this kind of information; we want it right now"?

MR. KNEEDLER: Well, I think that's another way of saying that Congress doesn't like a national security or state secret privilege that has long been recognized in the Executive Branch.

QUESTION: But, you know, a privilege is not necessarily something that can't be overridden by Congress.

MR. KNEEDLER: In this particular case, we believe this is a privilege that cannot be overridden by

Congress because it is a privilege that derives directly from the constitutional authorities of the President under Article II of the Constitution.

QUESTION: Well, then you do say that Congress could not by statute pass a law that's saying -- that says any time we want something from the Director of the CIA if the appropriate committee votes for it by a majority, the Director is going to have send it over? If that's contrary to the Executive Order, Congress can't do that.

MR. KNEEDLER: No, that wouldn't be contrary to the Executive Order because if the Director of Central Intelligence determines that that information should be furnished, then it's an authorized disclosure.

QUESTION: But supposing the Director determines it shouldn't be furnished?

MR. KNEEDLER: Well, that is -- that is an example of the give-and-take between the political branches that frequently goes on.

QUESTION: And supposing it gets to a point of impasse? You say that an act of Congress will not prevail over an Executive --

MR. KNEEDLER: Not necessarily. It may be that after there -- that after there has been a disagreement between the two branches that it would be

determined that Congress' need for the particular information --

QUESTION: But who determines that? I mean, Congress thought it determined it itself when it said, under the following circumstances the Director of the CIA shall furnish us information, and those circumstances are now complied with.

MR. KNEEDLER: Well, but --

QUESTION: Why shouldn't that be the last word?

MR. KNEEDLER: Well, presumably the Director of Central Intelligence is not going to withhold information under the statute like that --

QUESTION: But by my hypothesis he does withhold it.

MR. KNEEDLER: Well, then -- then, if he does, then the committee concerned would -- would bring contempt proceedings against the Director or -- or if a court action were possible, that could be pursued.

But let me back up a minute. That question --

QUESTION: Wait a minute. And you think that that court action would be valid? You -- you are, as I understand what you've said so far, you are not asserting that in law Congress cannot demand that from the Executive and get it. You do not assert any legal privilege for the Executive to withhold information from

Congress.

MR. KNEEDLER: Oh, no. I'm saying there is a Constitutionally-derived privilege. How -- how --

QUESTION: which is enforceable in the courts?

MR. KNEEDLER: Well, there may be a political question, doctrine problem, or something if a lawsuit was brought in that circumstance. I didn't mean to suggest that the court should lightly entertain a dispute between the Congress and the Executive Branch with respect to seeking information in situations --

QUESTION: Assume the dispute gets here. An Executive officer obeys -- obeys the President, does not turn the information over. He is prosecuted under a statute that Congress has passed. Prosecuted. We get a special prosecutor in to prosecute him.

(Laughter.)

MR. KNEEDLER: Well, it may be on a particular case that this Court would hold that the President's claim of privilege is valid. In United States v. Nixon, which dealt with deliberative privilege -- deliberative process privilege, this Court weighed the computing interests and determined the information had to be turned over. But it was careful to point out that the case did not involve state secrets types of --

QUESTION: what happens in this prosecution

that I just posited? Would you -- do you assert that there is a -- that the prosecution would not be able to proceed because of the President's privilege not to turn over the information?

MR. KNEEDLER: Our initial position I think would be yes, that the prosecution could not proceed. But if --

QUESTION: I thought that's what this case was all about.

MR. KNEEDLER: But -- but no, I think it's not, because what we have at issue here is not -- is not a statute by which Congress speaks to the Director of Central Intelligence. He's not asking the President nor the person immediately responsible to the President to furnish information.

What Congress is purporting to do is to put a barrier, an obstacle, between the Director of Central Intelligence, in this example, and lower ranking employees and saying the lower ranking employees can basically circumvent the Director of Central Intelligence's decision of whether to furnish the information or not by going directly to Congress with the particular information.

That's all that has to be decided in this case. And I think in the example that Justice Scalia

was describing, depending on the circumstances, yes, indeed, I think that the President, under -- under what this Court said in United States v. Nixon, would in appropriate circumstances have the authority to withhold the information.

But that's not what's at issue here. What's at issue here is an attempt by Congress to take that decision away from the President in the first place, and to allow it to a lower-ranking employee to decide whether he's going to run to Congress with classified information where the appropriate authorities in the Executive Branch haven't even had a chance to pass on the question of whether the information should be furnished or not.

MR. KNEEDLER: But, Mr. Kneedler, if the information is by hypothesis classified, I didn't read the act of Congress involved in this case as saying that an employee could run to Congress with it.

MR. KNEEDLER: Depending on how subsections (3) and (4) are read. If subsections (3) and (4) were read broadly, they could -- they could be read to say that an employee has a right to take even classified information to Congress.

Now, as Ms. Goldman has pointed out, the parties and the others who have filed briefs in this

case are in agreement that it doesn't confer a new right to furnish information -- classified information to Congress.

QUESTION: Well --

MR. KNEEDLER: That it refers one to some other source.

QUESTION: The statute doesn't -- wouldn't -- It forbids using money to enforce these --

MR. KNEEDLER: It's written as --

QUESTION: That certainly wouldn't -- it didn't purport to forbid the Central Intelligence Agency from firing a person who furnishes this information without authorization.

MR. KNEEDLER: Well, again, it would depend on how the statute were read. As Justice Stevens was pointing out, it is written in rather broad terms. Barring the expenditure of money to implement or enforce a policy or agreement -- conceivably it could be read to prohibit even firing somebody because that would be implementing or enforcing a policy.

QUESTION: It takes money to fire somebody.

MR. KNEEDLER: Yes. I mean, we would -- we would -- we would certainly hope that either as a matter of statutory construction or constitutional law that the hands of the Director of Central Intelligence or the

Secretary of State, or whoever else is responsible for the classified information, wouldn't be put in the position where he would have to tolerate either negligent disclosures or disclosures -- disseminations of information by people who don't have authority. And that's our problem with this statute.

QUESTION: Mr. Kneedler, can I -- I understand the problem on Section 1. But turning to Sections 3 and 4 for a second, is there anything in this record to tell us to what extent, if any, there are some policies out there that directly or indirectly obstruct information flowing to Congress?

MR. KNEEDLER: Is this --

QUESTION: Isn't there a need for some findings on that?

MR. KNEEDLER: No, I think not. First of all, this complaint only challenges the forms. It doesn't challenge any policies. Again, this is a lawsuit brought to challenge two particular forms.

QUESTION: Right.

MR. KNEEDLER: Not policies. So, the policies that may -- to which this form may refer one, are not part of this case. This is just a question of whether the forms are valid on their face. And it is the general policy in most departments and agencies --

QUESTION: But even so, do these forms on their face interfere with the right of Congress to obtain Executive Branch information in a secure manner, and so forth?

MR. KNEEDLER: They do not -- they do not on their face because, again, they only prohibit this --

QUESTION: Well, then -- then, on their face, their is no violation of 3 or 4.

MR. KNEEDLER: That's right. And that's why we say the judgment should be affirmed as to subsections (3) and (4).

QUESTION: But, at the very least, there is no Constitutional issue to decide with respect to (3) and (4) on the present state of the record.

MR. KNEEDLER: That is -- that is correct. Because only unauthorized disclosures are prohibited. We say that no -- that no --

QUESTION: Right.

MR. KNEEDLER: -- no furnishing of information is permitted. The other side might disagree. But the forms themselves simply refer one to whatever --

QUESTION: So, if we were to affirm the district court on the theory, you say we would not affirm the district court's reasoning with respect to --

MR. KNEEDLER: No. All -- again, it's just

the judgment --

QUESTION: Because we don't agree --

MR. KNEEDLER: -- that is before the Court.

QUESTION: I understand that.

MR. KNEEDLER: But, again, let me reiterate that this reading of the statute we think would properly be informed by the serious constitutional questions that would be presented if -- if there were a statute passed that purported to allow any lower-ranking employee in the Executive Branch to take it upon himself to divulge information to Congress.

The Federalist 64 that we quoted at page 43 in our brief and the early experience with President Washington in furnishing information to Congress about the Jay Treaty, demonstrate an early understanding that the Executive was permitted to withhold information from Congress where the President determined that that was the proper thing to do.

And it surely can't be, for example, that the First Congress could have passed a statute requiring some lower-ranking person to turn over the information about the Jay Treaty that the President had personally declined to furnish.

And that's the issue in this case. It's not the ultimate question of whether the President or the

Secretary of State will furnish information to Congress, but whether they will be deprived of the opportunity to even pass on that question.

QUESTION: Well, Mr. Kneedler, I take it you must have urged the district court to take the action that he did.

MR. KNEEDLER: No. Our first position was that -- was to urge statutory grounds why the -- this precise argument I'm describing here with respect to unauthorized disclosures.

QUESTION: Made that to the district court?

MR. KNEEDLER: We made that to the district court. And --

QUESTION: And in effect you're saying that anything about sections (3) and (4) are just not right?

MR. KNEEDLER: I don't think that's -- I don't think it's a question of rightness. I think the Appellants brought this suit as a challenge to the forms, and we're saying the forms are valid. And, therefore, the judgment denying them relief should be affirmed.

QUESTION: What about (1)?

MR. KNEEDLER: Well, as to (1) the only form -- the only two forms that they challenged in this case, 4193 and 189, don't present this question. The -- those

forms as they were in effect at the time this statute was passed, referred to classified or classifiable information in addressing the substance of the information that is subject to the forms.

After the -- after the concern about classifiable, those forms were amended in September of 1988 to substitute -- to delete the word classifiable and to substitute in its place the information to which that term was always intended to apply, which is information that's marked classified, unmarked classified information such as oral communications, or information that's in the process of a classification determination.

That substitute language that is put into the forms themselves, likewise, does not address the knowledge issue. The question as to 4193 and 189 -- the question of --

QUESTION: You say it doesn't address the -- it does address the -- it says if it's that kind of information, whether it's known to be or not. How do you say that doesn't address it?

MR. KNEEDLER: Well, I think that -- I think the information that is the subject of the forms is something that should be objectively ascertainable, and I think that's what -- that's what paragraph 1 of those

forms is directed to. Objectively ascertainable so that every employee who handles that information is subject to the same responsibilities with respect to it, whether or not he knows that it's classified.

QUESTION: Whether or not he knows it. So why doesn't that contradict (1)?

MR. KNEEDLER: Well, the standard of care is not addressed in the form. It's addressed in the regulation. Insofar as 189 is concerned, it was promulgated by the Director of the Information Security Oversight Office. It's not a separate regulation that says if an employee discloses information that is the subject of the form that he knows to be classified or has reason to know.

Then, in those circumstances, the regulation would attach liability.

QUESTION: What about -- did Congress in the -- in taking action, did it require the knowledge issue to be put in the form?

MR. KNEEDLER: No, it's a negative. The funds can't be used for a form that applies to information other than that that is marked classified or that the employees knows is --

QUESTION: But they didn't put any knowledge limitation on it.

QUESTION: Only the form is being challenged (inaudible)?

MR. KNEEDLER: That's our position. And the question of -- the question of if an employee makes a negligent disclosure, in our view, that is a question of enforcing the form. Not enforcing the form -- excuse me -- enforcing the regulation. And that's a question that would be raised -- that would be at a time an enforcement action was brought?

QUESTION: So you just don't think the Constitutional issue as being here or -- or on the knowledge part?

MR. KNEEDLER: The Court can affirm the judgment below. I think yes. As to -- as to these two forms without that.

QUESTION: And do we look at the old forms, not the new ones?

MR. KNEEDLER: That's -- that is actually all that's before this case because the complaint only challenges 4193 and Section 189.

Now, I'd like to make -- one -- clarify one thing. On the 4193 in a paragraph other than the one that describes the information that's subject to the form, there is a pre-publication review paragraph that -- in form 4193 that also exists in 4355 that does

obligate the employee -- it's a snap sort of requirement. It obligates an employee with access to Sensitive Compartmented Information to -- to ascertain whether -- or to have it reviewed to see whether -- whether it can be released.

And in that section there is a reference to the reason to believe -- that an employee has to check if he has reason to believe that certain information he wants to disclose is derived from SCI.

But we view that as just one set of -- one subset of the larger question of a prepublication review requirement and Appellants did not focus or challenge in the district court on prepublication review. They challenged it primarily on the -- challenging these two forms on their face.

QUESTION: Mr. Kneedler, I just don't understand the logic of your assertion that the regulation somehow alters the problem. It seems to me if the form itself says this kind of information you will be liable if you disclose. Classified or classifiable. Period. It says nothing about knowledge.

What that means to me is if you disclose it, you're liable. Now you come up with a regulation that says, well, you won't be liable if you didn't have any reason to know that it was classified or -- well, that's

very nice, and that makes the form more liberal although still not liberal enough to comply with the statute, it seems to me.

But I don't know how you can say that the form itself does not speak to knowledge. It doesn't say anything about knowledge. But what it says when it doesn't mention knowledge is that your knowledge doesn't matter.

MR. KNEEDLER: Well, I think that's a question of enforcing the obligation under the form. And the statute speaks both in terms of implementing and enforcing. Appellants brought this challenge primarily to the implementation of the forms.

They were really saying that -- that 4193 and 189 have to be suspended altogether because those forms were named by number in the statute. That was really the basis of their challenge in the district court primarily.

Those forms have since been superseded. But, again, the form on its face did not -- did not say that. I think it's a question of its just being unaddressed. And if in a particular application of the enforcement policy, it was applied against somebody who disclosed something he had reason to know but didn't have subjective knowledge, then that would be a question

to be litigated then.

QUESTION: Mr. Kneedler, if I understand you correctly, just viewing the judgment below very narrowly is just passing on the two forms challenged in the complaint.

If we were to affirm on the theory you recommend, they could immediately file another lawsuit challenging the the new forms on the theories that -- on the basis that they're advocating today.

MR. KNEEDLER: That is -- yes, I think that's largely correct. I mean, there may be some issues --

QUESTION: Then it really doesn't make an awful lot of difference whether -- assuming we do one of the two things, whether we affirm on your theory or we vacate and remand on their theory, and let them litigate in this case. I mean, they really come down to pretty much the same.

MR. KNEEDLER: Well, they may. Although it seems to us that there's a real value in putting this litigation to an end. I mean, we -- we were concerned about this statute, particularly in the early periods, because on its face it seemed to bespeak a Congressional intent to lift a lot of controls over classified information, which we were concerned could send disturbing signals not only to Executive Branch

employees but to foreign nations who share intelligence and other information with us. And so --

QUESTION: The only thing I'm suggesting is that your theory of affirmance does not necessarily put the litigation in a broader sense to an end.

MR. KNEEDLER: Well, it -- it may or may not, depending on -- depending on what happens. The Appellants had an opportunity to amend the complaint to challenge 4355 presumably after it was issued in March of '89 -- excuse me -- March of '88 and didn't joint issue on that.

But you may be right as to that. But in terms of interpreting this particular statute, to the extent this Court would feel that it would be in as good a position as the district court on remand to decide exactly what the statute means, that's something that -- that could be done now --

QUESTION: Because even in that word -- we're interpreting the next year's status. This is just a one-year appropriation.

MR. KNEEDLER: Right. In fact -- although I'm saying 630, in fact it's Section 619.

QUESTION: Yeah.

MR. KNEEDLER: Which was enacted -- or, it came into effect after these two forms that were

challenged were superseded.

If -- going back to Justice Scalia's question. If the Court should conclude that there is an irreconcilable conflict between the forms on their fact and the statute, and that the statute has to be read to tie the Executive's hands in disciplining or taking other action against somebody who makes a negligent disclosure of something he should know is classified, then we do believe the statute would be unconstitutional for the reasons that were alluded to by several members of the Court.

There are a number of reasons why we think this is so. Perhaps the most explicit comes from Article II of the Constitution itself, which obligates the President to take care that the laws be faithfully executed. And care suggests caution, and in the area of national security information it suggests the utmost caution. And that obligation of care is properly passed on to the persons who assist the President of the United States in foreign relations and national security matters and entitle him to insist that the lower-ranking employees who have access to national security information have to exercise the utmost care.

And, in fact, that was the premise of this Court's decision in --

QUESTION: Mr. Kneedler --

MR. KNEEDLER: -- in Snepp and Egan and other cases.

QUESTION: -- are you suggesting that the term take care that the laws be faithfully executed means that the President should execute them cautiously?

MR. KNEEDLER: No. What I'm saying is that the President has an obligation to be circumspect -- has an obligation that fits -- that fits the subject matter. And when we're talking about the subject matter of national security information, he has an obligation to exercise the care and to see that his subordinates have exercised the care that is appropriate to the circumstances.

And, as I say, in Snepp, the Court recognized that an intelligence agent's position was one of high trust and fiduciary obligation by virtue of his assuming that position. And as an aspect of that, such an employee is briefed as to what his obligations are, and someone who is experienced in operating in this field is not going to be at sea in determining what information he can disclose and what he can't.

And we think that it would greatly disrupt the constitutional structure for Congress to be in a position to tell the President that he cannot take

action against someone who carelessly discloses information that is in -- in fact touches on the national security and does so without even checking with the appropriate authorities in the government to see whether the information is in fact subject to being protected.

In fact, that was the theme of the Snepp decision, which was that an employee properly should err on the side of caution and check with the agency where he was employed before he discloses the information. And we think that that is exactly what the Constitution requires itself.

And although this case can be disposed of on statutory grounds, we would urge the Court to bear clearly in mind the substantial Constitutional problems that would be raised with both -- with respect to both paragraphs 3 and 4 of this statute, and paragraph 1, if the statute were allowed to be applied in a way that would disrupt the President's control over national security information.

Let me say, too, that the -- that the -- going back on the question of furnishing information to Congress. We're not suggesting that the President or the Director of Central Intelligence, or other officials, are going to lightly withhold information

from Congress.

Our point is that it's a question of cooperation between the branches. And 50 USC 413, which we've cited in the brief, which provides for the Director to share information with the Intelligence Committees is exactly the sort of cooperative arrangement through official channels, with decisions being made by the appropriate officials in the Executive Branch.

That's -- that's exactly the way we think things should operate. In fact, the Constitution itself suggests exactly that arrangement because it assigns to the President the responsibility to furnish information to Congress concerning the state of the union, which would necessarily include classified information within the Executive Branch. It assigns that power to the President.

Now, when you have other -- other functions assigned to other agencies of the government, by statute maybe different questions arise. But where the subject matter is one that is vested in the President directly by virtue of the Constitution itself, as Commander-In-Chief, as the sole organ of the nation in foreign affairs, then the President has to -- has to have unimpeded control over the information within the

Executive Branch.

And that's what we think this case is ultimately about. Just as the Commander-in-Chief has to be able to command people, subordinates, in the Executive Branch, so too does the head of the Executive Branch in the area of national affairs have to have that responsibility. And control over national security information in the Executive Branch is merely one subset or one part of the President's overall responsibility for the conduct of the national security within the Executive Branch.

That's something quite different from the power of Corgress addressing something to the President to request information or to command that the President perform certain substantive duties. But in terms of the responsibility for keeping his own house in order and for the performance of the jobs by his own subordinates in whom he has to trust -- have the utmost trust, then we think that Congress cannot disrupt the arrangement that the Constitution assigns.

And the First Congress recognized this by --

QUESTION: But, Mr. Kneedler, I just can't -- I can't avoid interrupting you with this thought. The Constitution also gives Congress the power to provide for a navy and for the armed forces, and so forth, and

often classified information is highly relevant to their task.

MR. KNEEDLER: Yes. And -- and the arrangements that have been worked out between the branches are that the Executive Branch shares through proper channels an enormous amount of classified information.

QUESTION: But, of course, the constitutional question is suppose the Executive decides not to share some information that Congress thinks it needs. That's -- that's what we --

MR. KNEEDLER: Well, and the Congress has the power of the purse ultimately by saying, if you want an Army, you'd better furnish the information that enables us to consider that question intelligently. And that is exactly the way the framers of the Constitution contemplated that questions concerning the national security would be resolved. By cooperation between the branches.

And our concern with this statute, at least the impulse behind it, is that it -- it seems as an effort to sweep aside all of the controls within the Executive Branch and the deliberate procedures for sharing information and, instead, to radically change past practices and allow employees to take matters into

their own hands.

QUESTION: Thank you, Mr. Kneedler.

Ms. Goldman, you have one minute remaining.

REBUTTAL ARGUMENT OF PATTI A. GOLDMAN

ON BEHALF OF RESPONDENTS

MS. GOLDMAN: I think it would be useful if I explained what we challenged and what's relevant now in this issue of compliance.

We challenged the Executive Branch's noncompliance with Section 630 because the Executive Branch required employees to sign the forms listed in Section 630. At least 49,000 of those forms were signed during the ban.

The Executive Branch is arguing now that it is complying with Section 630, and the question is what's happened with those 49,000 people. How have those forms been brought into compliance, either through the Notice or by having those employees sign the new forms?

And that is why the subsections of Section 630 are now essential for the government's compliance argument. There is no longer a violation only if those forms comply with all of the provisions of Section 630.

I want to close with just one observation, and that is the effect that this judgment has had on the cooperation that Mr. Kneedler says is so essential

between the branches. The district judge, by declaring that the Executive Branch has such sweeping power, has impeded the kind of accommodation that should take place in this kind of a controversy. And we hope that if this Court wipes that decision off the books, that -- that the accommodation would follow.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Goldman.

The case is submitted.

(Whereupon, at 11:50 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

No. 87-2127 - AMERICAN FOREIGN SERVICE ASSOCIATION, ET AL., Appellants V.

STEVEN GARFINKEL, DIRECTOR, INFORMATION SECURITY OVER-SIGHT OFFICE, ET AL.

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

BY alan friedman

(REPORTER)