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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES DEPARTMENT OF JUSTICE, Petitioner
V. TAX ANALYSTS

CASE NO: 88-782

PLACE: WASHINGTON, D.C.

DATE: April 24, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES DEPARTMENT OF :
JUSTICE, :
Petitioner :
v. : No. 88-782
TAX ANALYSTS :
-----x

Washington, D.C.
Monday, April 24, 1989

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:01 o'clock a.m.

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Petitioner.
WILLIAM A. DOBROVIR, ESQ., Washington, D.C.; on behalf of
the Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

LAWRENCE G. WALLACE, ESQ.

On behalf of the Petitioner

3

WILLIAM A. DOBROVIR, ESQ.

On behalf of the Respondent

19

REBUTTAL ARGUMENT OF

LAWRENCE G. WALLACE, ESQ.

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P R O C E E D I N G S

(10:01

a.m.)

CHIEF JUSTICE REHNQUIST: we'll hear argument first this morning in No. 88-782, United States Department of Justice v. Tax Analysts.

Mr. Wallace?

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE PETITIONER

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

This Freedom of Information Act case reflects the not unique circumstance that the Federal Government is a party to all federal tax litigation, as it is to a number of other categories of litigation, such as Federal Tort Claims Act cases, government contracts, mail fraud prosecutions, FOIA cases, and others that might occur.

Since 1972, the Respondent has published a weekly report of developments in federal taxation for which it charges its subscribers an annual fee of \$595. And since 1979, the Tax Division of the Department of Justice, pursuant to FOIA, has provided to Respondent and other commercial tax services weekly logs of court decisions of which the Department has been informed in

1 federal tax cases.

2 This controversy arises out of 26 weekly
3 requests that Respondent made beginning in November of
4 1984 for the United States district court opinions,
5 orders and decisions in tax cases identified in the log
6 released during the previous week. It apparently
7 occurred to Respondent that the Department of Justice,
8 which receives these orders and decisions as a
9 litigator, might be a either more reliable, or at least
10 more convenient, source of these decisions than the
11 courts issuing them and perhaps part of the convenience
12 would be a less expensive source, since the rather
13 elaborate fee provisions under FOIA are designed in
14 large part to keep the costs down in order to facilitate
15 access to information about what the government is
16 doing.

17 This type of request, whatever its
18 convenience to the requester, is quite inconvenient and
19 burdensome to the government as a litigator. These
20 opinions and orders are not collected in any one place
21 for the government's convenience.

22 They come in in a mass of paper flow and by
23 various routes, and the managerial problem is to get
24 them routed with reasonable promptness to the lawyer
25 assigned or the lawyer now assigned to the case, since

1 there is considerable turnover in the government, so
2 that the government can perform its responsibilities as
3 a litigator in the cases, decide whether to take an
4 appeal if the case has been lost, proceed to enforce the
5 judgment, what have you.

6 These are not used by the Department as a
7 research tool. They are used for purposes of conducting
8 the litigation. So --

9 QUESTION: Mr. Wallace, as far as the
10 inconvenience is concerned, though, the Respondents
11 suggest that maybe that's the way you do it now, but it
12 would be no great inconvenience to simply instruct each
13 attorney in the field that when the court opinion is
14 issued and he forwards a copy to wherever he now
15 forwards it, another copy also be sent to some central
16 repository where you would have all of them. Would that
17 be -- that seems plausible to me. Is there any reason
18 that couldn't be done?

19 MR. WALLACE: By and large, these are
20 received by clerical personnel -- and they come in in
21 the mail in the Department -- whose job it is to
22 identify the proper unit, the proper litigating unit, in
23 the Tax Division, to whom to send the opinions. The
24 attorneys receive them in two or three days time
25 typically. It takes a while to distribute them. If

1 there were routine duplication, which does not occur
2 now, at the clerical level, further delay would be added
3 inevitably. There are backups for these machines. They
4 break down, et cetera. The lawyers are not always
5 present. They do not routinely reproduce these items.

6 There is no repository where they're kept.
7 They're not used, for example, by the bulk of lawyers in
8 the Tax Division itself as a research source. Unless
9 the lawyer happens to be the lawyer on the case or a
10 close colleague who knows of it, they are much more apt
11 to use the loose-leaf services in the library --

12 QUESTION: Well --

13 MR. WALLACE: -- like any other lawyer to
14 find out about recent developments.

15 QUESTION: Maybe you win under the statute,
16 Mr. Wallace, but I don't think you're going to persuade
17 me that it's a whole lot of trouble to -- to set up some
18 system that would have all these things in one place
19 that they could be turned over without -- without much
20 difficulty.

21 MR. WALLACE: It --

22 QUESTION: Is that true or not? I mean, is
23 it beyond the invention of the Department to -- to have
24 each lawyer who gets one of these forward it to a
25 central place, or when it comes in --

1 MR. WALLACE: The Department (inaudible) --

2 QUESTION: -- or the lawyer who sends it --

3 MR. WALLACE: -- the lawyers are spread out
4 over several buildings. There would be delays.

5 It could -- it could be done. Obviously, if
6 Congress ordained it or the Court determined that
7 Congress has ordained it, the Department would comply.
8 But there are cumulative costs to having to comply with
9 requests of this sort.

10 QUESTION: Is the point of all this that they
11 are not agency records?

12 MR. WALLACE: Well, that is one of our two
13 contentions. That is correct.

14 QUESTION: Well, but I mean is -- is that the
15 point you're leading up to, or is this just background
16 recitation? What does it have to do with the statute?

17 MR. WALLACE: Well, it is the -- the factual
18 background of the case, and it has to do with
19 contentions that are being made about why the statute
20 should be interpreted so as to put requesters on an even
21 playing field and that sort of thing, which we think are
22 contentions that are overdrawn.

23 But I'll proceed to the statutory issues in
24 just a moment, if I may just finish this thought --

25 QUESTION: But, Mr. Wallace --

1 MR. WALLACE: -- about the deeper costs that
2 are involved by the cumulative burden of devoting
3 personnel in -- of course, in piecemeal fashion, and
4 devoting reproducing facilities to tasks of this kind.
5 It becomes a cumulative distraction from the conduct of
6 other public business.

7 QUESTION: Mr. Wallace, how -- how many, on
8 the average, opinions are -- of the district courts are
9 we talking about per year?

10 MR. WALLACE: The record shows that there are
11 20,000 tax cases per year, but it does not break that
12 down into district court and other cases, nor does it
13 show how many district court cases might result in
14 numerous orders being issued. The request is for
15 individual orders as well as decisions. But we're
16 --we're talking about a considerable number of tax
17 decisions.

18 QUESTION: Interim order, discovery orders?
19 What kind of orders?

20 MR. WALLACE: Well, any order that's issued
21 is part of the log, and the request is for anything that
22 appeared on the previous week's log. So, any -- any
23 order that reached --

24 QUESTION: Mr. Wallace, is that the only
25 place where all of these opinions can be found?

1 MR. WALLACE: (Inaudible).

2 QUESTION: Doesn't the Library of Congress
3 have the same thing?

4 MR. WALLACE: The Library of Congress, the
5 issuing courts, of course.

6 QUESTION: I mean, but where all of them are
7 in the same place.

8 MR. WALLACE: The published ones all wind up
9 being published in the Federal Supplement, and the
10 loose-leaf services publish them in advance. There are
11 several loose-leaf services that publish federal tax
12 decisions. Unpublished decisions, which cannot be cited
13 as precedent, usually are not included in these
14 publications. But they all are available in the clerk's
15 office of the various district courts.

16 QUESTION: That's the only place they're
17 available as soon as they are available in the Justice
18 Department. Right?

19 MR. WALLACE: Well, sooner really because --

20 QUESTION: Sooner.

21 MR. WALLACE: -- there is transmittal time.

22 QUESTION: But you have to go around to each
23 one of the courts. But the only single place where
24 they're all present that soon is the Justice Department.

25 MR. WALLACE: That would be correct in -- in

1 the categories of litigation where the government is
2 always a party. But, of course, it's not correct in
3 many categories of litigation where the government is
4 not a party in all of the cases.

5 QUESTION: Mr. Wallace, may I just ask you
6 one other question about your burden argument? Isn't
7 there always some burden on the government in complying
8 with an FOIA request? And if -- if there is, how does
9 this burden -- what -- what is our rule for deciding
10 when a burden is significant enough to be taken into
11 consideration?

12 MR. WALLACE: Well, of course, there is
13 always some burden, but part of the burden of reading
14 the Freedom of Information Act more expansively than
15 Congress intended is that FOIA requests themselves that
16 Congress intended to be honored will be delayed because
17 the limited number of personnel dealing with FOIA
18 requests will be distracted --

19 QUESTION: Yes, but if the request is -- is
20 broader than Congress intended, we'd deny it even if
21 there was no burden involved.

22 MR. WALLACE: Well, that is correct.

23 QUESTION: I'm just wondering if there really
24 is any legal merit to your burden argument.

25 MR. WALLACE: We do not rest on it as a

1 separate legal point.

2 I -- I do want to just amend my answer to
3 Justice Scalia and Justice Marshall by pointing out that
4 the Department of Justice is not really a repository
5 where all opinions are received in one place either
6 because in many instances the opinions and orders go to
7 the United States attorneys' offices rather than to the
8 Department in Washington. In tax cases, this is broken
9 down in a way that's reflected in the record.

10 QUESTION: But does the -- do the Respondents
11 seek production or access to the ones that simply go to
12 the U.S. attorneys' offices?

13 MR. WALLACE: Not in this case, Mr. Chief
14 Justice, because the logs do not reflect that.

15 QUESTION: Mr. Wallace, what do you say an
16 agency record is under FOIA as you understand it?

17 MR. WALLACE: Well, let me, as a preface to
18 answering the question, say we do not think that this
19 case requires the Court to adopt an all-encompassing
20 definition that will cover every kind of case.

21 We start off with the notion that agency
22 records include records generated by the agency which
23 reflect the public business or compiled by the agency in
24 a way that is revealing about how the agency is
25 conducting its public business. But it does not

1 include, for example, library materials that are held by
2 the agency even though those are used in conducting the
3 public business and purchase pursuant to appropriations
4 of funds.

5 We do not think that reproducing those
6 materials, becoming a library referral service, is
7 within the purpose of FOIA.

8 And we do not think that records issued by
9 the courts' decisions or orders or materials issued by
10 the Congress are part of agency records, as we would
11 urge the Court to interpret it under FOIA. FOIA does
12 not define agency records. It does define the agencies
13 that are covered by FOIA, and that definition excludes
14 the courts and Congress which traditionally have
15 controlled the issuance and dissemination of their own
16 opinions and orders. We collect --

17 QUESTION: Well, how does it include
18 probation reports that aren't generated or compiled by
19 the agency, but nonetheless relied on in some sense? I
20 guess we've said they're agency records.

21 MR. WALLACE: Well, we --

22 QUESTION: Or pre-sentence reports.

23 MR. WALLACE: Pre-sentence reports were the
24 ones given particular attention. And the question was
25 uncontested. The Court noted that there was no

1 controversy --

2 QUESTION: Well, we indicated they appeared
3 to be agency records.

4 MR. WALLACE: Yes.

5 QUESTION: They were neither compiled by nor
6 generated by the agency itself.

7 MR. WALLACE: No. That's why I -- I -- I do
8 think we have to be cautious about an all-encompassing
9 definition.

10 The -- the particular reason why we concluded
11 that pre-sentence reports should be treated as agency
12 records is that they were compiled, as the Ninth Circuit
13 said, substantially for use by the Department of
14 Justice. They were furnished to the Bureau of Prisons
15 where, under Department of Justice regulations, they are
16 used in the conduct of public business in making work
17 assignments for the prisoners, counseling them, treating
18 them, in making decisions about security that's needed
19 for particular prisoners, and they are used in making
20 parole decisions.

21 QUESTION: Don't you think that description
22 applies pretty well to a court order directed to the
23 --or court judgment directed to the Department of
24 Justice? Isn't that prepared for the use and direction
25 of the Department of Justice? Isn't it used by the

1 Department of Justice to direct its actions thereafter,
2 much more so than a pre-sentence report it seems to me?

3 MR. WALLACE: There is an analogy there, but
4 it is -- it is used only as a -- the way any litigator
5 would use the opinion or the way any lawyer would, to
6 the extent it's used as a statement of what the law is
7 for guidance in other cases, the same as a reported case
8 in the Department of Justice's law library. Obviously,
9 the orders are issued for compliance by the parties to
10 the case. But that is a -- a routine litigation use
11 that in no way is different for the Department as a
12 litigator than for any other litigator. It's not part
13 of the conduct of public business in the same way that
14 administering the prisons would be. There's an analogy
15 there, but there's also an analogy to the other reported
16 decisions in the library. The -- the case falls in
17 between.

18 What seems to us important is that -- and we
19 developed historical materials on this on pages two and
20 three of our reply memorandum at the petition stage
21 --traditionally the courts have controlled the
22 dissemination of their own opinions and orders. Clerks'
23 offices exist for the very purpose of receiving filings
24 and disseminating court opinions and orders. And the
25 court exercises control over that.

1 And that is not the function of the
2 Department of Justice. If there is a problem with the
3 dissemination of opinions and orders by the clerks of
4 the courts, FOIA was not intended to solve that, and
5 doesn't -- it isn't designed to solve that. The fit is
6 not good. There are too many cases in which the
7 Department of Justice or the Federal Government is not a
8 party at all. It -- it can't really solve that problem
9 to turn from the clerks' offices to the Department of
10 Justice in the cases where the government happens to be
11 a party. And there's no reason to think that FOIA was
12 designed to transfer that burden or that function from
13 the clerks' offices to one of the litigators that
14 happens to be the government.

15 QUESTION: Mr. Wallace, what if -- what if
16 the Tax Division relied -- in some sense it at least
17 reviewed and studied and considered a privately produced
18 research report, let's say, by some private research
19 organization that -- from which the public could buy a
20 copy of the report, but a member of the public wants to
21 see the agency's copy. Could that be an agency record?

22 MR. WALLACE: It could be. It might be
23 subject to a work product or other privilege. There
24 might be an exemption.

25 Unlike the typical FOIA case, which involves

1 a question of what will be disclosed to the general
2 public and what will be held confidential to some
3 degree, this case involves publicly available documents
4 that are available at their issuing source.

5 QUESTION: But you wouldn't respond, I
6 gather, that it's enough that the member of the public
7 could go buy it for \$500 at the research institute that
8 produced it.

9 MR. WALLACE: Well, that is a consideration.
10 If -- If what is involved is a copyright problem, they
11 might have to at least get a license from the copyright
12 holder and pay a proper fee. I mean --

13 QUESTION: Well, is that -- is that the
14 meaning of the statute in which it says that unless the
15 materials are promptly published and copies offered for
16 sale? Does that have to be by the agency?

17 MR. WALLACE: Well, we've never faced the
18 question whether that has to be by the agency.

19 QUESTION: Do you have a position on that?

20 MR. WALLACE: I can't say that I've consulted
21 on that, that -- that the face of the statute answers
22 that particular problem.

23 There was a Ninth Circuit decision called
24 Warth against the Department of Justice, which we have
25 mentioned, involving trial transcripts which court

1 reporters do sell for a fee. And the court held that
2 these were not agency records. They're court records.
3 Obviously the fee could be evaded if people could get
4 them from the Department of -- of Justice. Those are
5 --are available for a fee, but not published.

6 And we do think that these provisions on the
7 face of the Act, excluding the obligation to produce in
8 response to a FOIA request if the Department at least
9 has published the materials or made them available in a
10 reading room, have significance for this case because if
11 it's not improper to withhold materials in that
12 circumstance, why should it be improper to withhold
13 court-generated materials that are similarly available
14 at their issuing source? If anything --

15 QUESTION: Because the statute says the one
16 and it doesn't say the other. Isn't that a good enough
17 reason?

18 MR. WALLACE: But it -- well, there -- it
19 doesn't specifically say the other, but it does say that
20 -- that the Department can be ordered to produce only if
21 it is improperly withheld materials.

22 QUESTION: Oh, and you think improperly means
23 a general charge to look into it on the part of the
24 courts to say what's improper and what isn't.

25 MR. WALLACE: Well, the Court --

1 QUESTION: Beyond the exemptions that are
2 specifically set forth.

3 MR. WALLACE: The Court held in GTE Sylvania,
4 where no exemption was applicable, that it was not an
5 improper withholding. There there was an injunction
6 against the dissemination of the material in a separate
7 proceeding. But the Court did rely on that term of the
8 statute in upholding the refusal to comply with the FOIA
9 requests in the face of the injunction. So, it seems to
10 me the Court has crossed that bridge, and it is not
11 necessary to adopt a very expansive view of improper
12 withholding here.

13 We are talking about court-issued opinions
14 and orders available to the public in the normal way
15 from the issuing source which is itself exempted from
16 FOIA. We have directed the requester to where the
17 materials are publicly available from their normal
18 source by furnishing copies of the logs. So, in a sense
19 there -- there isn't withholding at all, let alone an
20 improper withholding. And --

21 QUESTION: Is it fairly comparable that -- to
22 compare a case where you have a conflict between what
23 the statute says and a -- and a proper court order, the
24 court saying one thing --

25 MR. WALLACE: well --

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QUESTION: -- the statute the other?

MR. WALLACE: It's not fully comparable, but there is an analogy which is strongly supported by the fact that even records generated by the Department themselves, if they're available in a reading room or promptly published or published in the Federal Register, are not subject to disclosure. There is an analogy on the face of the statute in addition to this term.

I'd like to reserve the balance of my time for rebuttal, if I may.

QUESTION: Very well, Mr. Wallace.

Mr. Dobrovir?

ORAL ARGUMENT OF WILLIAM A. DOBROVIR
ON BEHALF OF THE RESPONDENT

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

May I first answer the Chief Justice's question as to how many orders and decisions are at issue here?

First of all, of course, we are only seeking final orders and decisions which conclude the case in the district court. We have not asked for interim orders like discovery orders.

As reported by the Judicial Conference of the United States, over the last five fiscal years, the

1 average number of orders and decisions terminating tax
2 cases in the federal district courts is 1,862. And
3 those figures are recited at page three, footnote four
4 of our brief. That works out to about 36 cases a week.

5 QUESTION: We're talking roughly 1,000 a year.

6 MR. DOBROVIR: Eighteen hundred.

7 QUESTION: Eighteen hundred a year.

8 MR. DOBROVIR: I'd like to put this case in
9 context. Let's suppose that Emily Taxpayer who lives in
10 Montana has had a deficiency assessed against her, has
11 paid it, and decides to file suit in the federal U.S.
12 District Court for the District of Montana. Her
13 attorney prepares and files a complaint in the court,
14 obtains a summons from the court, and those, the
15 complaint and summons, are then served on the Attorney
16 General of the United States, and eventually wend their
17 way down to the office of a -- of an attorney in the Tax
18 Division. We -- let's call him Bill Barrister.

19 Now, Mr. Barrister immediately takes those
20 documents and opens an official Department of Justice
21 file with them. It's called the DJ file. He reads the
22 complaint, of course, sends a copy to his counterpart in
23 the Chief Counsel's Office of the Internal Revenue
24 Service, and after consultation prepares an answer,
25 which he sends to Montana. It is filed in the court,

1 and his copy of the answer is placed in the DJ file.

2 Let us suppose that both parties then file
3 cross motions for summary judgment. Ms. Taxpayer's
4 attorney serves his on the -- on Mr. Barrister and files
5 it in court. Mr. Barrister does the same thing.

6 And then finally, the judge issues his
7 decision which is filed in the court and sent to both
8 Taxpayer's attorney and to Barrister, again placed in
9 the DJ file.

10 I discern no distinction, either theoretical
11 or practical, among those documents. All are filed in
12 court, all theoretically available from the clerk, and
13 all are agency records of the Department of Justice by
14 all of the tests which this Court has -- has --

15 QUESTION: Why do you say theoretically
16 available? Are they not actually available?

17 MR. DOBROVIR: Our experience has been that
18 at least 25 percent of these orders are never obtained
19 by any of the publishers. And there are maybe half a
20 dozen that are interested in tax materials. They're
21 never obtained by any of the publishers, and therefore
22 are never -- never available in the public domain.

23 QUESTION: Well, maybe they're just a little
24 lazy about it. It's much easier to go to the Department
25 of Justice.

1 MR. DOBROVIR: Laziness is not the issue, Mr.
2 Justice Blackmun.

3 QUESTION: Well, this is a commercial
4 enterprise, and --

5 MR. DOBROVIR: We -- we happen to be a
6 nonprofit enterprise, but others are commercial
7 enterprises. And just the -- the -- the difficulties of
8 getting these decisions have resulted in approximately
9 25 percent never being --

10 QUESTION: I'd be --

11 MR. DOBROVIR: -- (Inaudible) to the public.

12 QUESTION: -- interested in knowing really
13 what the difficulties are.

14 MR. DOBROVIR: Take, for example, the list is
15 obtained by my client. Courts are telephoned. The
16 clerk says we have the decision or he says, well, I'll
17 have to find the decision. Sometimes a second telephone
18 call has to be made. The clerk tells you how many pages
19 the --has to find the decision, tell you how many pages
20 it has so you can write the check at 50 cents a page.
21 You write the check. You mail it to the clerk with a
22 letter asking for a copy of the decision. Sometimes the
23 letter is delayed in the mail. Sometimes the clerk gets
24 the letter and sticks it in his file because he's busy
25 with other things. Sometimes the checks don't get

1 cashed, and sometimes the decisions simply don't
2 arrive. In any event, it usually takes a minimum of
3 three to four weeks before any publisher has obtained
4 the decision which the Department of Justice has
5 virtually immediately.

6 QUESTION: It's much easier to put the
7 expense on the United States Government.

8 MR. DOBROVIR: We are prepared -- and I am
9 authorized to say this. We are prepared to pay to the
10 Department of Justice the same 50 cents a page charge
11 that the courts charge if -- if -- because that -- that
12 may well be appropriate under Section 1914 and the
13 Judicial Conference order.

14 QUESTION: Of course, that's not the entire
15 expense the Department undergoes in complying with your
16 request.

17 MR. DOBROVIR: Well, Your -- Your Honor --

18 QUESTION: Is it?

19 MR. DOBROVIR: It is not.

20 But to clarify something that -- that my
21 brother Wallace said, in the record here in the
22 Department of Justice's answers to interrogatories, the
23 -- this sentence appears. "It is normally the function
24 of the trial attorney to see to it that copies of
25 decisions are sent to the appropriate district or

1 regional office of the Internal Revenue Service."

2 That is the point at which, without any
3 particular extra work or without spending more than I
4 suppose the extra three or four seconds to run the xerox
5 machine one more time, the extra copy could be made and
6 could be then sent in the normal interoffice mail of the
7 Department of Justice to the Department of Justice's
8 press room where all publishers have access, or to the
9 Freedom of Information Act reference room which is
10 maintained by the Department of Justice which the public
11 can have access to. There -- the -- I submit that on
12 that scenario, the expense would be minimal.

13 QUESTION: Well, there's always the expense
14 of assembling and providing space and filing and all of
15 that. It's more than just copying.

16 MR. DOBROVIR: Well, there are two answers to
17 that. First the practical answer. Every publisher has
18 its own tray in the Department of Justice press room.
19 Dropping a decision into the tray of McGraw-Hill or the
20 tray of Tax Analysts or the tray of Commerce Clearing
21 House in -- where it would sit with all the press -- the
22 many press releases and other things that the Department
23 of Justice issues which it wishes the press to take and
24 publish, would I submit involve virtually no additional
25 expense.

1 The other answer is found in the legislative
2 history. In 1981 the Department of Justice began an
3 effort to relieve -- the executive branch represented by
4 the Department of Justice began an effort to relieve
5 itself of many of the costs which it argued were making
6 administration of the Freedom of Information Act
7 prohibitive.

8 A number of provisions were proposed in -- in
9 bills that were -- some were -- one was introduced by
10 Senator Hatch on his own. Another was introduced by
11 Senator Hatch at the request of the Department of
12 Justice, and that was S.1751 in the 97th Congress. That
13 bill expressly referred to court records as among the
14 records, public records, that the agencies did not wish
15 any -- any longer to be required to produce under the
16 Freedom of Information Act.

17 Congress considered that. The 98th Congress
18 held hearings before the Senate Judiciary Committee, and
19 the Senate Judiciary Committee issued a report in which
20 it stated that the bill it was reporting did not include
21 the specific relief requested by the executive branch,
22 that is, a complete absolution from having to produce
23 public documents, including expressly, explicitly court
24 records because, the Senate Judiciary Committee said,
25 court records and other things such as press clippings

1 are not easily accessible except through the government
2 agencies.

3 QUESTION: What is the statutory point that
4 this bears on this?

5 Suppose the fact were that these documents
6 were readily available from courts all over the country.
7 Would your position be any different?

8 MR. DOBROVIR: No. Our position --

9 QUESTION: So, why are we talking about it?

10 MR. DOBROVIR: Our position would not be
11 different because Congress has said that for the reason
12 that they discerned, which was that documents are not
13 readily accessible, they refused to give the Department
14 of Justice the specific relief it asked -- asked for
15 meaning, it seems to me, that the Freedom of Information
16 Act, as understood by the Congress and at that time as
17 understood by the Department of Justice --

18 QUESTION: More properly understood by the
19 Senate Judiciary Committee.

20 MR. DOBROVIR: Senate -- right, as understood
21 by the Senate Judiciary Committee. But I would add that
22 the -- the bill that the Senate Judiciary -- one of the
23 bills the Senate Judiciary Committee reported out which
24 did not include the relief the government -- the
25 executive branch had asked for was passed by the Senate.

1 It died in the House, but passed by the Senate.

2 QUESTION: But even if the fact were that you
3 could get these from district courts all over the
4 country within, say, a five-day turnaround time, your
5 position here would still be the same --

6 MR. DOBROVIR: Our position would be the same.

7 QUESTION: -- that you're entitled to them
8 from the Department of Justice.

9 MR. DOBROVIR: Our position would be the
10 same, but we probably wouldn't be here at all. The
11 reason -- the practical reason we are here is because
12 they are not accessible.

13 QUESTION: Mr. Dobrovir, suppose that all of
14 the orders in tax cases were also sent to, let's say,
15 the U.S. Tax Court here in Washington and were available
16 there, and by interagency understanding, the Department
17 of Justice and the Tax Court agree that any public
18 requests would go to the Tax Court. Is that enough?

19 MR. DOBROVIR: I --

20 QUESTION: Or you're still entitled to get it
21 from the department that you want to get it from, no
22 matter what.

23 MR. DOBROVIR: As a practical matter, that
24 would be enough. Whether under the statute --

25 QUESTION: Well, does it meet the statutory

1 requirement in your view?

2 MR. DOBROVIR: I would say no. I would -- I
3 -- unless -- well, I would say this, that it might
4 satisfy the provision that -- that Justice Kennedy
5 mentioned earlier, that a document is publicly available
6 and offered for sale.

7 The OOMB in administering the -- in issuing
8 regulations on the 1986 amendments to the Act which
9 dealt with the question of cost, has indicated that it
10 encourages departments to contract with commercial
11 services to make available documents that it is required
12 to make under the -- make available under the Freedom of
13 Information Act. And if it had done so in this case and
14 they were promptly available for publication, I think we
15 probably would not be here either.

16 Let me turn to the agency record --

17 QUESTION: May I ask you one other practical
18 -- is your problem -- I mean, I understand you represent
19 a tax service, but wouldn't -- wouldn't the same issue
20 be presented in all sorts of other specialized areas of
21 the law, such as Social Security or antitrust or
22 criminal law, that -- that the services could more
23 conveniently get them from a centralized place and
24 expedite their work?

25 MR. DOBROVIR: Yes.

1 QUESTION: Maybe that's good. I'm not --

2 MR. DOBROVIR: Yes.

3 QUESTION: But there's really nothing special
4 about the fact this is a tax case.

5 MR. DOBROVIR: Nothing special about the fact
6 that this is a tax case. There are other bodies of law
7 which are Federal Government law in which the government
8 is always a party. And I think the principle we are
9 contending for here would apply to every one of those
10 bodies of law. Tax --

11 QUESTION: And presumably there's the same
12 difficulty in getting all the opinions as promptly as
13 you wanted them.

14 MR. DOBROVIR: I would have to assume so.

15 QUESTION: Yes.

16 MR. DOBROVIR: I will say this that tax law
17 is something that touches every American, and I think is
18 of more general importance and interest to all Americans
19 than most other areas of law which have -- which are
20 somewhat more specialized. But I don't rely on that
21 either.

22 QUESTION: I think specialists in other areas
23 of the law might disagree.

24 [Laughter.]

25 MR. DOBROVIR: I don't rely on that, Mr.

1 Justice Stevens.

2 QUESTION: Yes, yes.

3 MR. DOBROVIR: Let me turn to the agency
4 records issue. This Court has had to deal with that
5 question with respect to three kinds of documents:
6 pre-sentence reports in the case of U.S. v. Crooker and
7 U.S. v. Julian; consultants' records that the agency
8 never got, as in Forsham; and White House records that
9 were stored at the agency, but which were never
10 controlled or used by the agency in pertinent part here,
11 and that was the Kissinger case.

12 The Court has looked to five characteristics
13 in those cases to determine what -- whether the
14 documents were agency records. First of all, does the
15 agency possess them? Secondly, does the agency freely
16 control them, or does some other entity exert control
17 over the papers that the agency has? Third, does the
18 agency use the papers in the course of its public
19 business? Fourth, does the agency incorporate the
20 papers in its own files? And fifth, do the papers
21 include information about the agency's operations?

22 And I suggest that if any -- all five of
23 those questions are asked with respect to court records
24 here, the answer is yes. Obviously, the Department of
25 Justice Tax Division possesses them. Obviously, it

1 controls its copies. It sends copies to the Internal
2 Revenue Service. It sends copies all around the
3 Department of Justice. When an -- if an appeal is to be
4 -- is to be considered, copies go up to the Solicitor
5 General's Office in the Department of Justice.

6 QUESTION: Now, why do you say that these are
7 materials which are not promptly published and copies
8 offered for sale under the services of various
9 commercial publishers?

10 MR. DOBROVIR: We are one of those publishers.

11 QUESTION: Uh-hum.

12 MR. DOBROVIR: And our experience based on
13 our --

14 QUESTION: But you do have a statutory
15 provision that says if materials are promptly published
16 and copies offered for sale, it just doesn't apply.

17 MR. DOBROVIR: The point is they are not
18 promptly published or completely published and offered
19 for sale. As I said, 25 percent of them are missed by
20 everybody, and a lot of them are obtained only after
21 considerable delay. So, I would suggest that under
22 those standards -- under -- under those tests, these
23 documents are not promptly published and offered for
24 sale.

25 If the Department of Justice were to pick a

1 chosen instrument, for example, and say, okay, we are
2 going to give you, publisher X, a copy of every one of
3 these decisions and you can promptly offer them and
4 publish them for sale -- publish them and offer them for
5 sale, and then we're off the hook, that would satisfy
6 that provision of the statute. The Department has not
7 done so.

8 QUESTION: Or if they dropped a copy in the
9 reading room --

10 MR. DOBROVIR: Which is what we asked them to
11 do.

12 QUESTION: -- one way or the other, which is
13 what you asked.

14 MR. DOBROVIR: If they dropped a copy in the
15 reading room, that would take care of it.

16 QUESTION: Going back through my list of five
17 questions, if I may, both the Department of Justice and
18 the Internal Revenue Service use these documents in
19 their business. As the agent -- as the -- as the -- as
20 the Petitioner's brief admits, "It tells the agency how
21 they may act." Nothing could be more involved than the
22 agency's business than an order from the court that
23 tells it how it may act.

24 Fourth, the Department of Justice
25 incorporates the decisions into its permanent files, the

1 DJ file, which is then in turn subject to elaborate
2 record keeping, retrieval and, disposal regulations; a
3 regulation that's in the record covers some 160 pages.

4 And finally, it provides information for the
5 public about agency operations. Every one of these
6 decisions will at least reflect what the agency -- what
7 -- what the decision is. It will reflect what the
8 agency has done.

9 QUESTION: Well, you don't -- that isn't why
10 -- really why you want the records -- the opinions,
11 though. You don't -- you don't want to learn anything
12 about the agency. You want to get the opinions to find
13 out what the courts did.

14 MR. DOBROVIR: Insofar as we are an --

15 QUESTION: Isn't that -- Isn't that right?

16 MR. DOBROVIR: Insofar as we are an agent for
17 the public, it is important for the public to know what,
18 for example, the Internal Revenue Service does with
19 respect to taxpayers.

20 QUESTION: Well, I know, but that isn't why
21 you want them.

22 MR. DOBROVIR: Well, we want them only -- we
23 are really a surrogate for the public. We take them
24 -- we don't want them for our own purposes.

25 QUESTION: Well, for \$500 a crack--

1 MR. DOBROVIR: We publish them.

2 QUESTION: For \$500 a crack you want it for
3 the public.

4 MR. DOBROVIR: Which covers our costs. We're
5 a nonprofit organization --

6 QUESTION: Well, you just don't --

7 MR. DOBROVIR: -- Justice White.

8 QUESTION: You just don't publish them for
9 nothing.

10 MR. DOBROVIR: That's quite right. We have
11 to cover our costs --

12 QUESTION: Well, supposing the President
13 sends over a directive to the Department of Justice to
14 do something. Now, that certainly meets the test of
15 telling the agency what to do. But yet, that doesn't
16 become a Department of Justice record, does it?

17 MR. DOBROVIR: I think it would. I think it
18 would. Once that document is released by the President,
19 the -- unless the White House insists on exercising some
20 kind of control over it and -- and restricting its
21 dissemination. If it did that then, of course, there
22 would be another question.

23 QUESTION: Well, then -- then you're saying
24 It just includes a great deal of what you might call
25 secondary records that don't originate with the agency

1 at all, but just happen to come to rest in the agency.

2 MR. DOBROVIR: Well, the test that this Court
3 adopted in the Forsham case, looking to the Federal
4 Records Act, was documents that the agency receives in
5 the conduct of its public business. Those are agency
6 records. That's one -- one test for them.

7 QUESTION: Well, does every agency have to
8 become a -- a library for the public? Does it have to
9 turn over its library collection in this same fashion?

10 MR. DOBROVIR: Not as such. No, by no means.
11 The --

12 QUESTION: Why not? Under your definition,
13 it would certainly fit.

14 MR. DOBROVIR: Well, each --

15 QUESTION: The agency assembles some books
16 for use by its attorneys. Now, why -- why aren't you
17 entitled to go in there and make use of them under your
18 definition?

19 MR. DOBROVIR: There's no bright line test.
20 I think you have to look at each one -- each kind of
21 document on its -- on its own facts. Mere library books
22 -- well, for example, I guess the -- the easiest example
23 for something that isn't an agency record is if the
24 agency library has a copy of "War and Peace," which
25 agency lawyers may read in their leisure time. That

1 would not be, I don't think, an agency record. Other
2 library materials which -- which -- which -- which are
3 used --

4 QUESTION: Don't give away too much here now.

5 (Laughter.)

6 MR. DOBROVIR: Thank you, sir.

7 QUESTION: You have a close case, I mean, one
8 that --

9 QUESTION: How about the Department -- the
10 Department has a data base called Lexis, doesn't it?

11 MR. DOBROVIR: Juris.

12 QUESTION: Juris, yes, Juris. Well, how
13 about that?

14 MR. DOBROVIR: I'm not familiar enough with
15 it except to know that it has a name. I would give --
16 the -- an example that I think is more apt. The card
17 catalog for the Department of Justice library probably
18 would be an agency record. Among other things, it's
19 created by the agency. That kind of makes it easier.

20 QUESTION: Let me go back to the contents of
21 the library a minute. I agree that "War and Peace"
22 probably isn't if it's for leisure reading. But what
23 about library materials that are accumulated to help the
24 agency conduct its regular business: law reviews,
25 opinions of state courts, tax materials and all that

1 sort of stuff?

2 MR. DOBROVIR: Well, to --

3 QUESTION: That would be just like this,
4 wouldn't it?

5 MR. DOBROVIR: I suppose a distinction can be
6 made that they have no unique relationship to the agency.

7 QUESTION: Yes, but using your five factor
8 formula and -- and in trying to get a workable
9 definition, can you give us a definition that would
10 exclude those and include what you want?

11 MR. DOBROVIR: Well, they don't -- in their
12 --in their -- unless, for example, there's -- they've
13 been marked up and written over by Department of Justice
14 attorneys --

15 QUESTION: Doing their regular -- they may
16 have a privacy exemption or something like that, but
17 assume there's no exemption applicable.

18 MR. DOBROVIR: Assuming there's nothing like
19 that, they're not -- they're not marked up and therefore
20 contain no particular input from the Department of
21 Justice --

22 QUESTION: Well, I think they would be even
23 better if they were marked up. Then it would be a
24 stronger case.

25 MR. DOBROVIR: Well, if they are, then I

1 think that's -- they're more closely agency records,
2 yes.

3 QUESTION: Yes.

4 MR. DOBROVIR: But if they're not marked --

5 QUESTION: Oh, I see. I'm with you.

6 MR. DOBROVIR: I would, yes, they are more
7 --they would be agency records because they reflect the
8 operations of the agency. If they aren't marked up,
9 then in their pristine, unmarked-up form, they would not
10 --they would not have any -- they would not reflect the
11 operations or functions of the agency, the test that Mr.
12 Justice Brennan mentioned in his dissent in Forsham and
13 which was adopted in another context in the Reporters
14 Committee case that was decided a little while ago.

15 QUESTION: And they also are published and
16 available for sale presumably --

17 MR. DOBROVIR: That's right. They're --

18 QUESTION: -- by a publisher.

19 MR. DOBROVIR: They're also published and
20 available.

21 And also, there -- there may well be
22 copyright problems. The Copyright Act might conceivably
23 be an exemption 3 statute. That (Inaudible).

24 QUESTION: You could say with respect to Fed.
25 Supplement that in it, it contains court decisions

1 directing the Department of Justice how to conduct
2 itself.

3 MR. DOBROVIR: Yes, it does. Yes, it does,
4 but in the form in which they are published by the West
5 -- by the West Publishing Company, they -- they are not
6 in any way unique to the Justice Department. And -- and
7 that's the toughest case. I have to admit. That's --
8 that --that -- that is one where, depending on how they
9 are used by the Department of Justice attorneys, they
10 may very well -- those portions of those documents could
11 conceivably be agency records.

12 QUESTION: The books are available for sale
13 to --

14 MR. DOBROVIR: They are available for sale
15 and therefore probably wouldn't be -- wouldn't --
16 wouldn't be covered by the Freedom of Information Act.

17 QUESTION: Well, let me make sure I
18 understand your position on available for sale. Do you
19 read that as applying to available for sale by anyone or
20 available for sale by the agency that you're making the
21 demand on?

22 MR. DOBROVIR: Well, the way I read the Act,
23 it's available for sale by the agency.

24 QUESTION: Yes. Well, then these others
25 --that's no answer to all these other examples then --

1 MR. DOBROVIR: That's -- that's right.

2 QUESTION: -- because these opinions are
3 available for sale just as the Fed. Supplement is
4 available for sale.

5 MR. DOBROVIR: These opinions are available
6 for sale in another format and in a way that does not
7 relate them to the business of the Justice Department in
8 any particular manner.

9 QUESTION: You mean -- you mean the agency
10 couldn't hire -- couldn't -- couldn't automatically, the
11 way courts do, say we're going to have an official
12 reporter of our opinions and let that person as a
13 private matter commercially publish them and offer them
14 for sale?

15 MR. DOBROVIR: I would -- I would say -- as I
16 said --

17 QUESTION: Gee, I thought that's precisely
18 what that exemption was meant for?

19 MR. DOBROVIR: As I said before, I think
20 that's what -- that would comply and OMB has -- has
21 suggested that. I think that would comply because
22 they're acting as --

23 QUESTION: So, why doesn't that cover F.
24 Supp.?
25 It covers --

1 MR. DOBROVIR: Because they're acting as the
2 -- as the -- as the agency's agent. The agency
3 designates, as I said, a chosen instrument. It says
4 you're going to do this for us, and the publisher says,
5 okay, I'll do this for you.

6 QUESTION: So, that would cover F. Supp. I
7 would presume.

8 MR. DOBROVIR: No. F. Supp. -- F. Supp.
9 Isn't getting the decisions from the Department of
10 Justice at all. It gets them I gather from the -- from
11 the judges, and it acts as nobody's agent. It is a
12 publisher acting on its own behalf selling -- selling --
13 selling books to the public at large. And as I said,
14 there might well be copyright problems in terms of
15 exemption three.

16 QUESTION: But other than copyright, if I buy
17 your case, you're telling me I have to -- I have to buy
18 Freedom of Information requests for F. Supp. and I
19 suppose a compendia of tax opinions, indeed, your own
20 publication. Right? We -- we could -- the Justice
21 Department would presumably have to respond to FOIA
22 requests for your own publication.

23 MR. DOBROVIR: I don't think so because our
24 publication isn't anything that within its four corners
25 is a document that reflects the operations and functions

1 of the agency.

2 QUESTION: It has all these opinions that
3 --that govern the -- the operation of the agency.

4 MR. DOBROVIR: And a lot of other -- and a
5 lot of other material as well.

6 QUESTION: But I -- I thought that's the
7 whole reason why you wanted it. The only reason you
8 want this is because it shows the operations of the
9 Department. Now, you can't say that once it's published,
10 it doesn't reflect the operation of the Department.

11 MR. DOBROVIR: Well, of course, it does.

12 QUESTION: That just eats up your case.

13 MR. DOBROVIR: Of course, it does.

14 And as I said, there's no bright line test
15 here. Right now, of course, I would -- I would -- I
16 would -- I would retreat to the -- to the -- to the
17 lawyer's last refuge which is that isn't this case.
18 This case we're dealing with documents that are, in
19 fact, incorporated in the Department of Justice's files,
20 and I think that would be another -- another distinction
21 between the books on the library shelves and the
22 documents we're dealing with here. The books on the
23 library shelves are not incorporated in the Department
24 of Justice's files. They are not punched and stamped
25 and placed in a DJ file and passed around the Department

1 for -- for use in the particular -- In the particular
2 situation in which they are -- in which the Department
3 of Justice is using them.

4 QUESTION: Once -- once again, all of those
5 are on file in the Library of Congress, are they not?

6 MR. DOBROVIR: Not to my knowledge, Justice
7 Marshall.

8 QUESTION: You don't know whether or not.

9 MR. DOBROVIR: I do not believe that the
10 Department -- that the Library of Congress obtains from
11 anywhere the initial edition of the issuance of the --
12 the copy of the opinion as issued by the Court.

13 QUESTION: They have Fed. Supp.

14 MR. DOBROVIR: It gets Fed. Supp. like
15 everyone else.

16 QUESTION: Well, why -- why do you say they
17 don't have anything else?

18 MR. DOBROVIR: Well, they have Fed. Supp.,
19 and presumably they'll have CCH --

20 QUESTION: Your answer is you just don't know.

21 MR. DOBROVIR: -- and Prentice Hall, but they
22 won't get the opinions in the format in which we are
23 asking for them.

24 QUESTION: You just don't know. That's your
25 answer.

1 MR. DOBROVIR: That's right. I don't know.

2 QUESTION: Oh, I suppose the lawyers in the
3 Department of Justice -- the tax lawyers -- are using
4 Prentice-Hall all the time, aren't they?

5 MR. DOBROVIR: I'm sure they are.

6 QUESTION: It's much easier to use
7 Prentice-Hall than to -- than to go look around a lot of
8 files.

9 MR. DOBROVIR: Not --

10 QUESTION: Now, I suppose Prentice-Hall would
11 be subject to --

12 MR. DOBROVIR: They're not using
13 Prentice-Hall in the same way that they're using the
14 decisions when they get them and before they appear in
15 Prentice-Hall some two or three months down the road.

16 QUESTION: Well, I don't know. His tax
17 lawyer -- his tax lawyer is trying to figure out what he
18 should do. So, he looks at Prentice-Hall and reads a
19 lot of cases.

20 MR. DOBROVIR: He also looks at the decision
21 that his friend, Mr. Barrister, down the hall just
22 handed him a copy of saying --

23 QUESTION: That may be.

24 MR. DOBROVIR: -- look what the district
25 court is doing here.

1 QUESTION: That may be. That may be.

2 MR. DOBROVIR: That's the decision we want --

3 QUESTION: Well, I know. I know.

4 MR. DOBROVIR: -- not the Prentice-Hall
5 decision.

6 QUESTION: I know, but what if you did?

7 MR. DOBROVIR: What if we did want
8 Prentice-Hall?

9 QUESTION: I would suppose that the
10 Department would have to give it to you under your
11 definition.

12 MR. DOBROVIR: Well, there -- there is sort
13 of a practical reason why. I mean, the law -- the law
14 doesn't deal with trifles, but it also should not deal
15 with absurdities. I think it's unlikely in the extreme
16 that any --

17 QUESTION: You mean it's like the Federal
18 Supplement. It's unlikely you'd ever want to get it.

19 MR. DOBROVIR: It's unlikely that anyone
20 would go to the Justice Department under the Freedom of
21 Information Act to try to get a copy of something out of
22 the Federal Supplement, wait 10 days and pay 10 cents a
23 page.

24 QUESTION: But if you did -- but if you did,
25 you'd be entitled to it, I take it, under your --

1 MR. DOBROVIR: I'm not saying we would, and
2 I'm not saying we wouldn't. It would depend on a lot of
3 facts that -- that aren't involved in this case here.

4 QUESTION: I wish you would say you would or
5 wouldn't because I -- I find it very difficult to adopt
6 a principle that's going to allow people to request F.
7 Supp.

8 Why can't you say that whether it's an agency
9 -- whether a general -- whether a reference work is an
10 agency record or not can hinge upon whether the agency
11 is the only one that has that reference work?

12 MR. DOBROVIR: I think that --

13 QUESTION: If it's Black's Law Dictionary,
14 it's not an agency record. There's nothing
15 distinctively agency about it. But if it's a reference
16 work compiled by the agency, that only the agency has
17 and nobody else does, it is.

18 MR. DOBROVIR: I would agree with that. I
19 would agree with that.

20 QUESTION: Well, what would be the basis in
21 the statute for accepting that distinction?

22 MR. DOBROVIR: There isn't any basis in the
23 statute because the statute doesn't define agency
24 record. This Court has to define agency record. And I
25 think it can define it in the way that Justice Scalia --

1 Justice Scalia mentioned.

2 Let me quickly talk about the GTE v. Sylvania
3 case and improperly withheld.

4 Our position is that except with -- with the
5 very narrow exception of documents that the agency
6 cannot produce either because there is a court order or,
7 for example, because it has been destroyed, improperly
8 withheld means any withholding that is not countenanced
9 by one of the nine exemptions. GTE Sylvania talks about
10 the fact that the agency has no discretion -- had no
11 discretion in the matter. It was not the agency's
12 decision to withhold. In effect, the -- the -- the
13 question of withholding or not had been taken out of the
14 agency's hands entirely by the federal district court in
15 Delaware. That is, therefore -- and as this Court said,
16 the concerns -- the concerns Congress had in passing the
17 Freedom of Information Act, to wit, to -- to curb
18 unbridled agency discretion, were not present in GTE
19 Sylvania because the agency had no discretion to
20 exercise at all.

21 A similar case would be if, unfortunately,
22 documents that were agency records happened to have been
23 burned up in a fire. There is no discretion. The
24 agency can't withhold or not withhold. It's physically
25 impossible. And --

1 QUESTION: Isn't it -- Isn't it true that
2 when the -- the Justice Department gets all these
3 opinions, they don't keep those opinions in one file.
4 They pass them out to their own. The only thing --
5 record that's really made is what they give you. They
6 give you a list of them all.

7 MR. DOBROVIR: They --

8 QUESTION: That's the only agency record that
9 --

10 MR. DOBROVIR: Well, we say, of course, that
11 the decision itself is an agency record because of the
12 way it is received and the way it is used.

13 QUESTION: No, but it isn't made there.

14 MR. DOBROVIR: No, but as Forsnam -- Forsham
15 and Kissinger indicate be -- simply being created by the
16 agency is not the only test.

17 My time has expired.

18 QUESTION: Thank you, Mr. Dobrovir.

19 Mr. Wallace, do you have rebuttal?

20 REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE

21 MR. WALLACE: Yes. Thank you, Mr. Chief
22 Justice.

23 We have to be concerned here not merely with
24 publishers' requests, but with requests of law firms,
25 academic researchers. Some of the law firms may be Tax

1 Analysts subscribers. And, of course, if we receive Tax
2 Analysts publication, the lawyers in the Department use
3 the analysis that Tax Analysts has furnished.

4 I think that this Court's decision 33 days
5 ago in describing the purposes of FOIA and the
6 limitations on those purposes goes far toward providing
7 the answer in this case, the decision in the Reporters
8 Committee case involving rap sheets. The basic policy
9 of FOIA, the Court said, was focused on the citizen's
10 right to be informed about what the agency is doing,
11 what the government is up to, not to receive information
12 that may be accumulated in the agency's files or other
13 resources that reflects what somebody else has done, in
14 that case information about a private citizen.

15 And quite tellingly, the Court quoted with
16 approval, among various commentators about the act a --
17 a comment in the Harvard Civil Rights and Civil
18 Liberties Law Review after saying that the Act was
19 designed to expose official conduct to public scrutiny,
20 and the two sentences quoted, with apparent approval by
21 the Court from this comment, was that no statement was
22 made in Congress that the Act was designed for a broader
23 purpose, such as making the government's collection of
24 data available to anyone who has any socially useful
25 purpose for it.

1 For example, it was never suggested that the
2 FOIA would be a boon to academic researchers by
3 eliminating their need to assemble on their own data
4 which the government has already collected.

5 QUESTION: Is it your position that
6 responding to the request would not shed any light on
7 the conduct of the government agency?

8 MR. WALLACE: It -- it does in the sense that
9 any decision of the courts reflects whether the position
10 of the litigants are adopted or rejected, just as if the
11 court's decision said we believe we have to reject the
12 government's position on the authority of our precedent
13 in Perkins v. Parker. Perkins v. Parker would shed
14 light on what the government did in this case and why
15 did it litigate this case in the face of Perkins v.
16 Parker.

17 But it's -- it's basically a court document
18 reflecting what the court has done in the case, and it's
19 being requested for that --

20 QUESTION: It's also -- if you added them all
21 up, it would show how many cases the government won and
22 how many they lose, how good the lawyers they've got.

23 MR. WALLACE: That is correct. There are
24 research purposes for which it can be used, but it is
25 not being requested for any purposes peculiar to the

1 government's use of it.

2 QUESTION: That's irrelevant, Mr. Wallace.
3 We've never held -- no court has ever held, as far as I
4 know, that the purpose of the -- in fact, that's what we
5 made clear in Julian, as a matter of fact, once again.

6 MR. WALLACE: But there's no -- there's
7 nothing in the way the government --

8 QUESTION: And --

9 MR. WALLACE: -- is compiling or keeping them
10 that sheds any light on government business.

11 QUESTION: That -- that quote that you read
12 that says there's nothing in the history of the Act that
13 indicates that one of its purposes was to be a boon to
14 academic researchers, that may well not have been one of
15 its explicit purposes, but you don't deny that that has
16 been one of its major effects.

17 MR. WALLACE: Where properly applied.

18 QUESTION: Where properly applied.

19 MR. WALLACE: Where properly applied, but
20 it's not to get information that the government has
21 assembled that doesn't show what the government is
22 doing.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
24 Wallace.

25 The case is submitted.

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(Whereupon, at 11:01 o'clock a.m., the case
in the above-entitled matter was submitted.)

CERTIFICATION

Anderson 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. 88-782 - UNITED STATES DEPARTMENT OF JUSTICE, Petitioner V. TAX ANALYSTS

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BY Judy Freilicher
(REPORTER)

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