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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

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WASHINGTON, D.C. 20543

CAPTION: JOHN DOE AGENCY AND JOHN DOE GOVERNMENT AGENCY, Petitioners
V. JOHN DOE CORPORATION

CASE NO: 88-1083

PLACE: WASHINGTON, D.C. ✓

DATE: October 2, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN DOE AGENCY AND JOHN DOE :
GOVERNMENT AGENCY, :
Petitioners :
v. : No. 88-1083
JOHN DOE CORPORATION :
- - - - -x

Washington, D.C.
Monday, October 2, 1989

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 10:03 o'clock
a.m.

APPEARANCES:

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Department of Justice, Washington, D.C.; on behalf of the
Petitioner.
MILTON EISENBERG, ESQ., Washington, D.C.; on behalf of the
Respondent.

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1 7, in Robbins Tire, in Abramson and in Reporters Committee.

2 QUESTION: Mr. Kneedler, do you know anything about how
3 the parties all got this John Doe denomination in the District
4 Court?

5 MR. KNEEDLER: There was the proceeding -- the Court of
6 Appeals granted a motion for the proceedings on appeal to
7 proceed under seal, and as a result of that, the -- the -- we
8 have -- we have continued to comply with the, with the
9 requirement that the agencies be referred to as John Doe
10 Agency and John Doe Government Agency. We have -- we have no
11 objection to disclosing the names of the agencies. We have
12 just continued under that practice because that was the order
13 in the Court of Appeals.

14 QUESTION: The Court of Appeals directed --

15 MR. KNEEDLER: Right.

16 QUESTION: -- that everybody be designated as a John
17 Doe?

18 MR. KNEEDLER: or -- or -- under seal -- under seal, so
19 that -- at least with the names under seal, so that the public
20 would not know.

21 QUESTION: Thank you.

22 MR. KNEEDLER: As I have said, the Court has repeatedly
23 recognized the importance of these law enforcement interests,
24 and after Abramson was decided, Congress in fact built upon
25 Abramson and expanded the coverage of Exemption 7, to ensure

1 that law enforcement information would be protected
2 irrespective of the format in which it was collected.

3 Foremost among the purposes of Exemption 7, as this
4 Court and Congress have repeatedly stated, was to protect the
5 government's case from interference. The circumstances of
6 this case well illustrate the importance of Exemption 7 in
7 this regard.

8 The Freedom of Information Act request was submitted in
9 the context of an ongoing grand jury proceeding. It was
10 submitted by a target of that investigation, and the District
11 Court specifically found that the -- this -- that production
12 of the documents would jeopardize the proceedings. The Court
13 of Appeals --

14 QUESTION: Mr. Kneedler, at the time the request was
15 made here, had the documents in your view been compiled or
16 were they compiled after the request was made?

17 MR. KNEEDLER: The documents were compiled after the
18 request was made, but in our view they were -- they were
19 compiled -- compiled for law enforcement purposes; they were
20 compiled for law enforcement purposes before the request was
21 denied. The sequence of events was that the Freedom of
22 Information Act -- the -- the grand jury -- or the criminal
23 investigation began in 1985. There was a subpoena in 1986, in
24 February, to the corporation.

25 As a result of that, the corporation alerted to the

1 investigation and filed a FOIA request in September of 1986
2 with the John Doe Agency, the auditing agency involved in the
3 case.

4 That agency consulted with the law enforcement agency
5 involved in the case, and on the advice of that law
6 enforcement agency, denied the request on November 18. And
7 then on November 20th, the documents deemed responsive to the
8 FOIA request were transferred from the first agency to the
9 second agency.

10 QUESTION: What constituted the compilation?

11 MR. KNEEDLER: I -- I think -- I think most -- in the
12 sense that the statute uses the term compilation, I think that
13 once the, the Department of Justice, in this -- in the course
14 of this consultation said yes, indeed, these documents are
15 relevant to our investigation, we want them, and don't
16 disclose them, we think at that point the records were, were
17 gathered together or incorporated --

18 QUESTION: The request by the agency to withhold them
19 constitutes a compilation, in your view?

20 MR. KNEEDLER: Well, there are several senses in which
21 they could be. I -- I think -- I think the initial sense --

22 QUESTION: Is that what you are asking us to adopt as
23 the rule?

24 MR. KNEEDLER: Yes. The Court doesn't have to adopt
25 that -- the Court doesn't have to go that far in this case

1 because the records were subsequently transphysically
2 transferred to the second agency, and they are included in a
3 larger collection of documents that the second agency has.

4 QUESTION: Well, one could take the position that you
5 have to physically assemble the documents somehow, I suppose?

6 MR. KNEEDLER: Or, or gather them, take, take them
7 together. That, that would be one possible construction, I
8 suppose, of, of the Act. And here that was done, because the
9 second agency gathered the documents, put them -- put them in
10 its files, which concededly, its files concededly --

11 QUESTION: Well, depending upon the timing. Now, you
12 could read the statute as meaning they have to be compiled
13 when the request is made, I suppose?

14 MR. KNEEDLER: I, I don't think that -- I don't think
15 that construction would be -- would fit with the sense of the
16 statute. This isn't a situation in which there -- in which
17 there should be a race to the documents in the sense of who
18 has a prior lien on them, or something like that. This --

19 QUESTION: When do you say, Mr. Kneedler, they were
20 compiled?

21 MR. KNEEDLER: Excuse me, when?

22 QUESTION: When?

23 MR. KNEEDLER: When. Well, in our -- it is our view
24 that they were compiled at the time that the second agency,
25 through the -- speaking through the Assistant United States

1 Attorney, said yes, those documents are included in the
2 subject matter of our investigation. After the first agency
3 consulted with the second agency.

4 QUESTION: Well, the second is the FBI, is that it?

5 MR. KNEEDLER: Uh, yes. Uh --

6 QUESTION: And the first is DCAA?

7 MR. KNEEDLER: Uh, yes. Yes, that is -- yes.

8 QUESTION: Were they ever compiled by DCAA?

9 MR. KNEEDLER: Yes. DCA -- DCAA retrieved the
10 documents from its files and at that -- consulted with the
11 FBI, and the FBI said yes, those documents are relevant to the
12 -- to the investigation. At that point, the documents took on
13 the status of being compiled for law enforcement purposes. In
14 our view, the statute was --

15 QUESTION: At that point, before the transfer of the
16 document to the FBI?

17 MR. KNEEDLER: Yes. We think that they were compiled
18 even before that. The Court doesn't have to reach that, that
19 question in this case because in any event by the time the
20 District Court was asked to act in this case the documents had
21 been transferred. At that point, at the very least, they were
22 -- they had the status of being compiled for law enforcement
23 purposes in the files of the second agency, and they were no --
24 --they wouldn't have been improperly withheld at that point
25 because the information they contained was compiled by -- by

1 the second agency.

2 QUESTION: Under your approach, though, don't we run
3 into something of an ante litem motem problem? I mean, can
4 the -- the government just undertake this compilation after it
5 knows that the documents are going to be requested?

6 MR. KNEEDLER: Well, as -- as long as, as long as the
7 documents become protected at any period of time, the -- the
8 exemption applies. And that -- and -- and by the same token,
9 if the exemption doesn't apply after a certain period of time.
10 For example under Exemption 7, if a grand jury investigation
11 terminates, then under Exemption 7(A) that exemption would no
12 longer apply, because the documents are -- would no longer be
13 serving the purpose for -- for which they were gathered in a
14 pending proceeding.

15 So, what -- what we are saying is that -- is that -- an
16 investigation is a dynamic thing. And on -- at this case the
17 investigation came in, or the FOIA request came in right in
18 the middle, or actually fairly early in the investigation.
19 And it's -- it's not necessarily true that the investigating
20 agency would have all of the information yet in hand. And in
21 fact in this case, the FOIA request may well have alerted the
22 agency to particular documents in its possession that were
23 relevant to the investigation.

24 QUESTION: Mr. Kneedler, why was the transfer to the
25 FBI so promptly made?

1 MR. KNEEDLER: Because they -- because, to, to bring
2 them promptly within the control of the FBI because they were
3 relevant to the ongoing investigation. The -- both the --the
4 -- the agency that had them and the FBI acted responsibly.

5 The -- the two agencies work, work as a team in an
6 investigation like this. The FBI doesn't have the expertise,
7 uh, uh, with the details of every program in which fraud or
8 corruption might arise, and so the FBI has to rely on the
9 expertise of the other agencies, in, in this case the auditing
10 agency. The auditing agency said we want to tell you we have
11 relevant information; and the FBI says you're right, it does,
12 please -- please give it to us and we'll send somebody over
13 for it. And it was done contemporaneously with the denial of
14 the FOIA request.

15 And -- I, I should point out that after the corporation
16 appealed the denial by the, the DCAA through its procedures,
17 that agency stated that the request was being denied because
18 the records were under the control and possession of the FBI.
19 And that acknowledging --

20 QUESTION: That is why I asked -- that is why I asked
21 the question.

22 MR. KNEEDLER: Well -- but there's no suggestion that
23 this was done to, to avoid complying with the FOIA request.

24 QUESTION: There -- there isn't?

25 MR. KNEEDLER: Uh, I am not aware of any -- I mean,

1 that, that argument -- that argument could be made, but not
2 for, not for -- not for any devious purpose at all. The
3 records became -- came, came to the attention of the
4 investigators, they concluded they were relevant and properly
5 included them within the -- within the investigative file.
6 Now, that --

7 QUESTION: I have one other -- I have one other
8 question. Has the grand jury ever, ever acted with respect to
9 the corporation?

10 MR. KNEEDLER: No, the -- I'm informed that the
11 investigation is, is still pending, although all of the
12 documents at issue here were submitted to the -- to the grand
13 jury after -- after they were received by, by the agency.

14 QUESTION: I take it that, in some circumstances, the
15 audit agency could itself assert this exemption, if it thought
16 a fraud had been committed and it was compiling documents?

17 MR. KNEEDLER: Uh, yes --

18 QUESTION: In other words, it is not necessary that the
19 FBI be implicated at all?

20 MR. KNEEDLER: No, no. In this case -- in this case,
21 that makes it especially vivid that the exemption is, is
22 invoked. But under, under established case law, once an audit
23 or, or an -- or a monitoring becomes focused on possible
24 wrongdoing in a, in a specific context, that becomes an
25 investigation. And that may well occur by, by an auditing

1 agency. Therefore, I -- I would just like to urge the Court
2 not, not to suggest, because it wasn't challenged in this
3 case, that the audit was not -- did not have law enforcement
4 purposes. That is not to suggest that every audit conducted
5 by this agency doesn't have law enforcement --

6 QUESTION: Was it necessary in this case to find that
7 it was the FBI's request that triggered the exemption?

8 MR. KNEEDLER: It, it was not, because I think if the -
9 - again that makes it vivid, but if -- but, but even, even if,
10 even if the DCAA had never -- had never consulted with the
11 FBI, that -- after it retrieved the documents, looked at them
12 and said we know these are relevant to this ongoing
13 investigation, and denied it on that ground and then
14 transferred them to the FBI, the same result would obtain
15 because --

16 QUESTION: Well, then, it wasn't the FBI request that
17 triggered the exemption?

18 MR. KNEEDLER: Well, there was consultation between the
19 two. The record doesn't disclose who, who -- who originated
20 the idea or the decision to withhold them. But the denial
21 letter says that on the direction and advise of the Assistant
22 United States Attorney the records were denied. But that is
23 consistent with the relationship of the two agencies in a law
24 enforcement situation.

25 Under Title 28 the Attorney General is given control

1 over criminal investigations. Section 533 directs the
2 Attorney General to appoint officials to -- investigate and
3 prosecute crimes against the United States; the U.S. attorneys
4 have that responsibility. And under Section 516, the
5 Department of Justice is given responsibility to litigate
6 cases involving the United States -- including securing
7 evidence. So those statutory provisions at least mean that
8 when there is a criminal investigation going on, that it is
9 entirely proper that the Justice Department be consulted and
10 that the Justice Department have at least a primary say in
11 whether the documents should be withheld.

12 QUESTION: Mr. Kneedler, it is a very strange result,
13 isn't it, that had the agency complied with the request before
14 consulting with the FBI, or had it decided not to consult, the
15 document would have been openly available to the public.
16 Right?

17 QUESTION: Or, had the request be -- been made before
18 the FBI decided to compile the documents, that -- anybody
19 could have gotten the documents? Right?

20 MR. KNEEDLER: No. Maybe -- maybe I misspoke, but at
21 the time -- at, at the time the request came in, there was
22 already a criminal investigation going on.

23 QUESTION: But the documents hadn't been compiled for
24 that criminal investigation, according to your theory.

25 MR. KNEEDLER: Not at the time the request came in, but

1 at the time it was retrieved, and, and its relevance to the
2 investigation was, was identified, at that point the agency
3 categorized it and included it within the -- within the --

4 QUESTION: But at any time before that, the very same
5 document could have gotten out, so that this, this person was
6 just a couple of days too late, perhaps?

7 MR. KNEEDLER: No, I -- I think what -- presumably,
8 whenever it was requested, at least after the criminal
9 investigation was initiated, whenever it was requested and had
10 been retrieved by the agency, the same result would have
11 followed.

12 QUESTION: If the agency consulted the FBI.

13 MR. KNEEDLER: Well, no, as I , as I -- as I say, that
14 happened in this case and that makes -- that makes it clear,
15 but if the agency on its own said this is relevant to an
16 ongoing investigation, law enforcement investigation, of this
17 corporation, and says -- and this had to do with cost
18 overcharges in a particular year, and they retrieved the
19 records and looked at them and say --

20 QUESTION: What if it had been asked for the day before
21 the investigation was complete -- was, was begun, then there
22 is no doubt that the same document could have been obtained?

23 MR. KNEEDLER: Well, at, at least if an investigation
24 was not begun before there was a response.

25 QUESTION: So, the document just changes its character

1 from, from having, you know, been compiled. And you say
2 compiled means gathered and assembled?

3 MR. KNEEDLER: It means gathered, gathered together,
4 assembled --

5 QUESTION: And that is the only thing it can mean?

6 MR. KNEEDLER: Well, it can mean -- well, it -- I
7 suppose it could mean shuffling documents together in a file.

8 QUESTION: Suppose I say he compiled a wonderful
9 pitching record, you know, a particular athlete compiled a
10 wonderful pitching record. Do you think that would describe
11 his -- I don't know, getting -- cutting out of newspapers --

12 MR. KNEEDLER: No, no, no.

13 QUESTION: -- and a lot of pitching records of other
14 pitchers and, and gathering them all together?

15 MR. KNEEDLER: No, no, what I -- and that's --

16 QUESTION: It means he produced it, right, didn't he?
17 He accomplished it himself. Can't it bear that meaning?

18 MR. KNEEDLER: It could bear that meaning, but, but
19 looking at it in the context of, of what FOIA is, is aimed at,
20 which is -- which is, I think, the, the important thing,
21 these, these were records that were categorized by both the
22 FBI and DCAA as being relevant to the law enforcement
23 investigation.

24 QUESTION: Mr. Kneedler, there's another requirement
25 for this exemption, and namely it has to interfere, be

1 reasonably understood to interfere with a --

2 MR. KNEEDLER: Right, and that's --

3 QUESTION: -- and if these documents had been requested
4 before any investigation had been started, it would be awfully
5 hard to say it was interfering with the investigation.

6 MR. KNEEDLER: Right. So, so under, under -- under
7 either that specific requirement of 7(A) or the threshold --

8 QUESTION: Well, what was the reasonable -- what was
9 the reasonable possibility of interference with an
10 investigation here? The, the requesting party must have had
11 copies of them already.

12 MR. KNEEDLER: Well, we don't know what it had -- we
13 don't know what it had copies of. A lot of -- a lot of the
14 documents --

15 QUESTION: Well, they were the, they were the -- they
16 were the parties to the correspondence, initially.

17 MR. KNEEDLER: That is true, but, but in the -- a lot
18 of the documents, a very substantial amount of the documents
19 in a case such as this by an auditing agency like DCAA, are --
20 all, all of the audit work papers that the agency itself
21 generates. It could involve, in, in, in a typical case it
22 could involve interviews with witnesses, it could involve --

23 QUESTION: So, it involved more documents than just the
24 initial correspondence?

25 MR. KNEEDLER: Oh, absolutely. And the initial

1 correspondence is in the record. The -- the Respondent has
2 the initial correspondence. He is just trying to look behind
3 at the information that he doesn't have. If he already had
4 these documents he wouldn't be requesting -- it wouldn't be
5 requested.

6 QUESTION: I don't understand this exchange. Are you
7 asserting that in addition to meeting -- to meeting D, you
8 have to meet A?

9 MR. KNEEDLER: No, no, what --

10 QUESTION: You wouldn't have to show that these
11 documents could reasonably be expected to interfere with
12 enforcement proceedings. You wouldn't have to show that, if -

13 - MR. KNEEDLER: If one of the other exemptions --

14 QUESTION: -- if the one you are arguing applied: D.
15 That is what we're arguing about.

16 MR. KNEEDLER: No, we are arguing principally A here,
17 not D. We are arguing interference with the -- with the
18 ongoing investigation.

19 QUESTION: Oh, you are not arguing -- well, for that
20 you don't have to show it was compiled, do you? You don't
21 have to show that it was compiled by a criminal law
22 enforcement authority. A doesn't require compilation by a
23 criminal law enforcement authority.

24 MR. KNEEDLER: Not by a criminal law enforcement
25 authority, but --

1 QUESTION: So, what are we arguing about this for?

2 MR. KNEEDLER: No, but the, the threshold, it, it has -
3 - the, the -- all of Exemption 7 has an additional threshold,
4 which is that the Act doesn't apply to records or information
5 compiled for law enforcement purposes. And then each of the
6 subparagraphs follows. There is separate requirement for a
7 law enforcement investigation agency.

8 QUESTION: I see.

9 QUESTION: I thought it always had to be compiled for
10 law enforcement purposes --

11 MR. KNEEDLER: Yes, that's -- that's true.

12 QUESTION: -- plus, it has to meet A, B, C, or D.

13 MR. KNEEDLER: Right, and the protection against any,
14 any suggestion of, of overreaching or abuse is to check to see
15 whether the particular record or information satisfies one of
16 the (inaudible) of harms that Congress was concerned about.

17 In, in -- in Abramson this Court said, in, in
18 construing this exact compiled-for-law-enforcement-purposes
19 provision, said it is critical that the compiled-for-law-
20 enforcement requirement be construed to avoid the release of
21 information that would produce the undesirable result
22 specified. And -- in other words, the Court said that the
23 exemption has to be construed in a coherent manner, so that, so
24 that information the Congress was especially concerned about
25 wouldn't fall between the cracks.

1 And I think it is significant in this regard that
2 Congress in 1986, after Abramson, amended Exemption 7(A) and,
3 and -- to provide not simply that records compiled for law
4 enforcement purposes, but also information compiled for law
5 enforcement purposes, could be withheld. And it was the
6 absence of the word information that was of significance to
7 the dissenters in Abramson because the Act at that point only
8 referred to records.

9 And in fact the pertinent Senate report, as this Court
10 recognized in, in Reporters Committee, was one prepared in
11 1983, specifically endorses Abram -- Abramson and says that
12 these amendments which were intended to ease the burden of law
13 enforcement agencies were "intended to ensure that sensitive
14 law enforcement information is protected under Exemption 7
15 regardless of the particular format or record in which -- in
16 which the record is maintained."

17 So, it is obvious that Congress was endorsing the view
18 that this Court took in Abramson, that it is necessary to
19 focus on whether the information that is at issue would
20 produce, as long as it is categorized or identified for law
21 enforcement purposes, would produce one of the six enumerated
22 harms.

23 QUESTION: What did the District Court -- excuse me.

24 QUESTION: Abramson was five to four decision, as so
25 many are. Is what you have just said the answer to this

1 question? Could those of us in the dissent in Abramson vote
2 in your favor here --

3 MR. KNEEDLER: Yes.

4 QUESTION: -- and be consistent with that?

5 MR. KNEEDLER: Yes. That is what I was attempting to
6 say. That the addition of the word information -- the absence
7 of the word information was of particular relevance to the
8 dissenters in Abramson, as I read those opinions, and Congress
9 expanded the definition specifically to include information.
10 And here, there is, is no doubt that the information contained
11 in these records is now compiled by the FBI. Now, copies of
12 several -- of some pages of the documents were retained by
13 DCAA when the entire batch was sent to the FBI, but that
14 doesn't detract from the fact that the information has the
15 status of being compiled for law enforcement purposes.

16 QUESTION: Mr. Kneedler, do you think the District
17 Judge made the findings that there was -- that you asked for,
18 in regard to subsection A, B, or C? Is there a finding that
19 the records could reasonably be -- a disclosure could
20 reasonably be expected to interfere with enforcement
21 proceedings?

22 MR. KNEEDLER: Well, what the District Court said was
23 that the -- that the -- that production of the records or
24 information would jeopardize, could reasonably be expected to
25 jeopardize the grand jury investigation.

1 QUESTION: I don't understand that.

2 MR. KNEEDLER: Well, I -- I think -- I --

3 QUESTION: What does that mean in practical terms? How
4 could the disclosure of these records interfere with the grand
5 jury proceedings?

6 MR. KNEEDLER: I think -- I think by grand jury
7 investigation the District Court meant the entire
8 investigation under the control of the Assistant United States
9 Attorney, which included the submission of these, these
10 documents to the grand jury. I mean, these documents were
11 submitted some time ago, the investigation is ongoing, and the
12 Vaughn index and interrogatories that were prepared in this
13 case were submitted under, under seal. They are filed with
14 the clerk of this Court. That -- the Vaughn index explains in
15 considerable detail how the disclosure of these records would
16 interfere with the, with the investigation.

17 And this Court in, in other contexts has recognized a
18 number of ways in which that might happen. In, in Robbins
19 Tire, for example with witness statements, the Court
20 recognized that premature disclosure of witness statements
21 could lead to intimidation or correction of the stories of
22 witnesses. The disclosure of --

23 QUESTION: We don't have that -- danger here, do we?

24 MR. KNEEDLER: Well, I mean, I can't -- yes, I, I --
25 there -- the Assistant United States Attorney in a public

1 affidavit in, in support of a stay did say that the -- that
2 the records might disclose the identities of witnesses, and
3 there is always the possibility that witnesses' testimonies --
4 witnesses' testimony could be coached in a way that would
5 interfere with an investigation. The disclosure of the
6 records would also show the direction and, and strategy of the
7 investigation. It would show what documents the government
8 had and, perhaps more significantly, what it didn't have.

9 QUESTION: It wouldn't show the direction or strategy
10 of the -- of the investigation unless you were foolish enough
11 to tell the person when the person got them that these had
12 been compiled for law enforcement purposes. If you didn't
13 tell them that they were part of the investigation file the
14 person wouldn't have any more reason to believe that this was
15 part of the investigation than any other document received
16 under FOIA.

17 MR. KNEEDLER: Well, I think in the typical case,
18 precisely because the FBI and DCAA do work as a team, or the
19 FBI and whatever agency work as a team, the requestor could
20 reasonably expect that the -- that the records in the hands of
21 one of the agencies either are or soon will be part of the --
22 part of the investigation.

23 QUESTION: Maybe, but it wouldn't, wouldn't indicate
24 the direction of the investigation. You don't know whether
25 the investigators --

1 MR. KNEEDLER: Well, it would show what records --

2 QUESTION: Records they had --

3 MR. KNEEDLER: -- the government had at its, its
4 disposal.

5 QUESTION: That is so, but so, so would any FOIA --
6 any FOIA request. So every document that you turn over fits,
7 fits the definition of A, then.

8 MR. KNEEDLER: But that has been one of the principal
9 purposes of protecting what -- of Exemption 7(A), which is
10 designed to prevent premature discovery, as was particularly
11 recognized in, in Robbins Tire -- discovery that precedes the
12 time that it is provided for under the rules of the applicable
13 proceeding.

14 QUESTION: Mr. Kneedler, I am still interested in the
15 word compiled now. The prologue to 7 speaks of records
16 compiled, but later on 7(D) uses the same terminology, it says
17 in the case of a record compiled. Now, under the Freedom of
18 Information Act, a record can mean a single document, can't
19 it, a single -- unlike files, it means a single piece of paper
20 is a record. Right?

21 MR. KNEEDLER: Well, not necessarily a single piece of
22 paper. It could mean a document which would have a number of
23 --

24 QUESTION: Yes, but it could mean a single piece of
25 paper, too, couldn't it?

1 MR. KNEEDLER: It could mean, yes.

2 QUESTION: Now, how do you compile a single piece of
3 paper, except in the sense that I used the word compile?

4 MR. KNEEDLER: Well, I, I, I think that's one of the -
5 - the -- that's a good example of why the word compiled has to
6 be given a meaning that comports with the overall purposes of
7 the statute, which is that once a particular document has
8 become the subject matter or included in the subject matter of
9 the investigation, that it is compiled.

10 QUESTION: It may mean produced. Why wouldn't that be
11 in accord? If, if you interpret compile the way you just
12 have, would you -- would you say that a document that is
13 exempt under 7(D) would lose its status after the
14 investigation is terminated and the compilation is broken up?

15 MR. KNEEDLER: Well, not -- when, when you're speaking
16 -- when you're speaking of a confidential source, which is
17 what D does, that protection extends -- in fact, it is one of
18 the principal purposes. It has to extend beyond the time of
19 the investigation.

20 QUESTION: I, I agree with that, but I don't know how
21 you could extend the extension beyond the break-up of the
22 criminal investigation if the only thing that causes it to be
23 a record compiled is the gathering together of it for a
24 criminal investigation.

25 MR. KNEEDLER: But, but one of --

1 QUESTION: I think you are shooting yourself in the
2 foot.

3 MR. KNEEDLER: D will terminate as soon as the
4 compilation is eliminated.

5 MR. KNEEDLER: No, the investigation terminates, but
6 under this Court's decision in Abramson, once the documents
7 are originally -- or become compiled, attain the status of
8 being compiled for law enforcement purposes, at that point,
9 they continue their protection even beyond that point, and it
10 is critical that they do so.

11 QUESTION: Mr. Kneedler, what is the difference between
12 compiled and filed?

13 MR. KNEEDLER: Compiled and filed?

14 QUESTION: Yes.

15 MR. KNEEDLER: I think in many cases there may not be
16 any. I think the work -- word -- I think the word filed --

17 QUESTION: Well, why did they use filed here?

18 MR. KNEEDLER: Uh, I'm, I'm not sure why they did. I
19 think compiled has a -- compiled h as a broader connotation
20 that suggests the categorization of the records, rather than
21 the physical act of putting them in a file.

22 QUESTION: Before you sit down, I would like to get
23 back to the Chief Justice's question. Who asked for the John
24 Doe designation?

25 MR. KNEEDLER: It is my understanding that the

1 Respondent asked for it.

2 QUESTION: Your understanding. Do the records show it?

3 MR. KNEEDLER: Uh, uh, yes, I, I think it does. I, I'm
4 sorry, I don't specifically recall. I think it was the
5 Respondent.

6 QUESTION: You don't think it is important as to who
7 asked for it?

8 MR. KNEEDLER: We have no objection to, to lifting it,
9 and, and, we never have, particularly with respect to our, our
10 agencies.

11 QUESTION: I don't see how you can have any objection
12 does (inaudible) in any record.

13 MR. KNEEDLER: Well, we have no -- we have no objection
14 to disclosing the names of, of the particular agencies.

15 QUESTION: But the government did ask for it, didn't
16 it?

17 MR. KNEEDLER: I don't think we -- I don't think we
18 asked for the -- I could be wrong, but I don't think we asked
19 for the, for the protection of the, of the two agencies,
20 because we would not normally care about the -- about the
21 disclosure of the identity agencies.

22 If there are no further questions, I will save the
23 balance of my time for rebuttal.

24 QUESTION: Mr. Eisenberg.

25 Would you enlighten us, Mr. Eisenberg, what you know

1 about the designation requirement of John Does in this case?

2 ORAL ARGUMENT OF MILTON EISENBERG

3 ON BEHALF OF THE RESPONDENT

4 MR. EISENBERG: Your Honor, we, the corporation,
5 requested that the records be sealed after an affidavit was
6 filed by the Assistant United States Attorney which -- a
7 public affidavit in the FOIA case, which disclosed for the
8 first time, by name, the subject of a grand jury
9 investigation. And because we didn't know what was going to
10 come after that affidavit -- it turns out that is the only
11 affidavit on the facts ever submitted in this case. But
12 because we didn't know what was coming next, we asked under
13 Rule 6(e), that the records in the case be placed under seal.
14 We did not ask for this designation of the caption, and have
15 never thought it made any difference whether the defendant
16 agencies are identified by their name or by some John Doe
17 reference --

18 QUESTION: Well, how about the name of your client?

19 MR. EISENBERG: We do -- we do not, since the
20 government has also just volunteered that the grand jury
21 investigation is continuing, we do not believe that the
22 client's -- the subject of the investigation's name should be
23 identified in the caption or in --

24 QUESTION: You don't think litigation in federal courts
25 under FOIA is a matter of, of public -- public notice?

27

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1 MR. EISENBERG: Your Honor, I don't want to make an
2 issue of this because, in fact, this is a public corporation
3 which has disclosed in numerous SEC filings all of the details
4 with respect to this investigation of which it is aware. From
5 documents like the affidavit in this case, there is no secret
6 of who the corporation is and -- but the reason -- I just want
7 the Court to understand that the only reason we had for
8 requesting that the -- any portion of the case be kept in
9 confidence was because the initial affidavit for the first
10 time disclosed the name, by name, that this corporation was
11 under grand jury investigation and under Rule 6, there's
12 specific provision for placing under seal matters affecting
13 the grand jury.

14 QUESTION: Thank you.

15 QUESTION: But, but you have no objection to the
16 disclosure of the name of the company now?

17 MR. EISENBERG: Your Honor, we -- the, the name of the
18 company has been disclosed in the media. It has been
19 disclosed --

20 QUESTION: Well, but do you have any --

21 MR. EISENBERG: in SEC proceedings. I --

22 QUESTION: Suppose we asked you if we could amend the
23 caption to the --

24 MR. EISENBERG: Yes, I have no objection to the Court
25 amending the caption, if it finds that more efficient or

1 useful in the Court's discussion of the case or decision in
2 the case.

3 QUESTION: If we have a lot of cases called John Doe v.
4 John Doe it will be hard to refer to them, you know.

5 [Laughter]

6 MR. EISENBERG: Yes, Your Honor, but there are -- there
7 are quite a few of them already, I believe.

8 We have wandered somewhat from the record in this case
9 in the course of the government's presentation of the facts.
10 I would like to emphasize, as I just have, that there is only
11 one affidavit on the facts in the record in this case. And it
12 appears on page 60 and 61 of the joint appendix. It's an
13 affidavit submitted by an Assistant United States Attorney,
14 named Sean O'Shea, who was the grand jury attorney. And it
15 states all the facts that were in this record when the
16 District Court made its decision and when the Court of Appeals
17 made its decision, with one qualification. There were a
18 number of exhibits attached to the government's answer to the
19 complaint, which are also in the record.

20 And all that he says about the facts is that the
21 documents in this case were removed from the DCAA by the FBI
22 for the purpose of presenting them to a grand jury, that the
23 documents were compiled by the DCAA. There is no statement in
24 this affidavit or in any subsequent affidavit that they were
25 ever compiled by the FBI or recompiled by the FBI, or that

1 they were compiled by the DCAA for any law enforcement
2 purpose. It is clear from the affidavit that they were
3 compiled in the normal routine of the agency's performance of
4 its oversight functions, in this case, reviewing contractor
5 charging practices under government defense contracts.

6 There is no suggestion in this affidavit or in any
7 other affidavit that the DCAA was cooperating in a law
8 enforcement investigation with the FBI at any time. What the
9 record establishes, and this now is mainly through the
10 exhibits and some affidavits that were submitted after the
11 court decisions in connection with stay motions and the like,
12 is that these documents were generated in 1978 by the DCAA in
13 connection with one of these routine government contract
14 audits, that they were in the DCAA's files for eight years
15 after that, in fact in dead storage. The first response to
16 the request to the DCAA for the documents is give us more time
17 to locate them; they are very old. Obviously, they were not
18 being used for any law enforcement purpose at that time. They
19 were used for archival purposes. They were sitting in the
20 dead files of the DCAA.

21 There is no suggestion any place in this record that at
22 any time after they were retrieved from dead storage and
23 withheld from the requestor, the corporation, that they
24 assumed a law enforcement purposes in the DCAA's possession.
25 What the DCAA said when they denied production of the

1 documents was the FBI, in fact an Assistant United States
2 Attorney, whom they designate by name, Mr. Milton, has
3 directed us to withhold these documents. Therefore, we can't
4 give them to you.

5 And in a later -- and, and there is in the record the
6 letter from the DCAA to the same Assistant U.S. Attorney\, in
7 which they say to the U.S. Attorney, since you have now
8 directed us to withhold these documents and you have
9 possession of them, will you handle this appeal that the
10 corporation is filing. No indication of any cooperation,
11 joint effort, consultation. This was the FBI saying to the
12 DCAA, don't comply with this FOIA request. We don't want you
13 to give any of these documents to this corporation, and then
14 seizing them from the DCAA and saying, in the affidavit they
15 filed, we are going to present them to a grand jury; therefore
16 for that reason, because these are going to be grand jury
17 materials, you should not disclose them to this corporation.

18 That is --

19 QUESTION: Assuming that all happened, though, the way
20 you said, and I don't doubt it, Mr. Eisenberg, how, how does
21 that advance your case?

22 MR. EISENBERG: I, I think it, it, it should be
23 decisive, Your Honor, because the critical time in any case
24 for determining whether documents have been compiled for a law
25 enforcement purpose has to be the time the documents are

1 requested or, at least, the time when the request is denied by
2 the agency.

3 QUESTION: Why is that so? It is certainly not the
4 case for classified documents, for example. It is well
5 established that you can classify a document after the request
6 is made and then decline the request on the basis that it is
7 classified. Why should this be any different?

8 MR. EISENBERG: Well, then, it's -- it's the very
9 differences, Your Honor, between Exemption 1 and Exemption 7,
10 that I think make it clear why that should not be the case
11 under Exemption 7. Under Exemption 1, which applies to
12 documents relating to national security, the exemption
13 incorporates by reference an executive order. The
14 classification of documents depends on what the executive
15 order permits and provides for. Those documents contain state
16 secrets. It makes no difference to their status when or for
17 what purpose they were generated, or where they are located.

18 QUESTION: But just because something is classifiable
19 under the executive order does not mean that it is classified.
20 Many things that are classifiable are not classified.

21 MR. EISENBERG: Yes, Your Honor, but the --

22 QUESTION: Isn't that right? And you acknowledge that
23 you can classify them after the FOIA request and then deny the
24 request, saying this is a classified document.

25 MR. EISENBERG: That is all, all true, Your Honor, under

1 Exemption 1, but the reason for it is that the executive order
2 incorporated specifically into the statutory exemption
3 provides that documents may be classified or reclassified
4 after a request is made under FOIA.

5 QUESTION: Well, Mr. Eisenberg, doesn't the statute for
6 Exemption 7 give the agency a ten-day period, which can be
7 expanded if needed, in order to respond and in order to
8 determine whether the records should be compiled for law
9 enforcement purposes?

10 MR. EISENBERG: I -- I'm not sure that the ten-day
11 period is in order to determine whether the documents should,
12 at some point after the request, be compiled, but --

13 QUESTION: Well, that is an interpretation one could
14 place upon the statute, isn't it?

15 MR. EISENBERG: Yes, yes. Your Honor, that such
16 interpretation could be placed on it. But nothing happened
17 here within that ten-day period to suggest that --

18 QUESTION: But that isn't the -- that certainly isn't
19 the interpretation the Court of Appeals embraced. The Court
20 of Appeals said they either had to be initially compiled for
21 law enforcement purposes, when they were first created. Do
22 you defend that rationale?

23 MR. EISENBERG: Your Honor, I not only defend it, I
24 defend it happily and heartily, but that is --

25 QUESTION: Well, that certainly eliminates this

1 construction that you just said was one possible reading of
2 the rule.

3 MR. EISENBERG: Your Honor, we have to put the Court of
4 Appeals' opinion in its proper context, and that depends on
5 the posture of the case when it was considered by the Court of
6 Appeals. The government did not present any Exemption 7
7 argument to the Court of Appeals. The government's argument
8 in the Court of Appeals was that Exemption 3 protected these
9 documents from disclosure, because Rule 6(e) is a statute for
10 Exemption E purposes. And because these are now grand jury
11 documents, Exemption 3 is the exemption that the Court of
12 Appeals should focus on in determining whether they should be
13 withheld. That is what the Court of Appeals did.

14 QUESTION: Yes, but the Court of Appeals certainly
15 addressed the -- the requirement as to -- of the documents
16 being compiled.

17 MR. EISENBERG: Your Honor, it addressed it because the
18 District Court, without making any determination that these
19 documents had ever been compiled for law enforcement purposes,
20 relied on Exemption 7 for his conclusion that their disclosure
21 would interfere with the grand jury proceedings.

22 QUESTION: Well, that is the decision the Court of
23 Appeals was reviewing.

24 MR. EISENBERG: It, it reviewed that decision, Your
25 Honor, but I think in fairness --

1 QUESTION: Then something is wrong.

2 MR. EISENBERG: Well, let me, let me -- I want to make
3 a full response to the Court's question, because that is a
4 decision the Court must decide, this Court must decide,
5 whether to affirm or reverse.

6 The government, relying on Exemption 3 in the Court of
7 Appeals, could make all of the same arguments for not
8 disclosing these documents because they were grand jury
9 materials, without having to meet any threshold requirement.

10 And since they had made no record in the trial court
11 and there was no record in the Court of Appeals suggesting
12 remotely any of the things that have been suggested in the
13 Supreme Court as the factual basis for such a determination,
14 the, the government had a way of defending the withholding of
15 the documents that avoided entirely the issue that Justice
16 White has directed attention to: whether they were compiled
17 for law enforcement.

18 Having made that tactical decision and lost on the
19 Exemption 7 justification advance in the -- I'm sorry, lost on
20 the Exemption 3 justification advanced in the Court of
21 Appeals, I don't think that adds any weight to the argument --
22 to the attempt now to relitigate the same factual issue,
23 whether, because these documents were presented to a grand
24 jury, we should now focus on Exemption 7. They didn't rely on
25 Exemption 7 in the Court of Appeals --

1 QUESTION: Well, that is the question presented in
2 their petition for certiorari.

3 MR. EISENBERG: Yes, Your Honor, and we --

4 QUESTION: And the Court of Appeals passed on it.

5 MR. EISENBERG: No, Your Honor, the Court of Appeals
6 did not pass on it.

7 QUESTION: I thought the Court of Appeals did pass on
8 the Exemption 7.

9 MR. EISENBERG: Oh, it considers Exemption 7, Your
10 Honor, in this context: It says that the trial court relied
11 on Exemption 7. The trial court did not make any
12 determination, any finding, with regard to whether the records
13 were compiled. That finding is essential for Exemption 7 to
14 have any application.

15 Obviously, in this case, they weren't compiled for law
16 enforcement purposes. They were eight years old. They were
17 compiled prior to and independently of any law enforcement
18 investigation. They were in the dead files of the DCAA when
19 they were requested. They were not taken by the FBI or for
20 presentation for any purpose until after that request --

21 QUESTION: Mr. Eisenberg, in your brief in opposition
22 to the petition for certiorari, your reasons for denying the
23 writ -- you give three reasons: There is no conflict in the
24 Court of Appeals, the facts here are unique because the
25 records were eight years old and the decision faithfully

1 adheres to the language of the statute's legislative history.
2 Now, our cases require that if you are going to make a point
3 that we can't reach the question presented by the, by the
4 Petitioner, you must make it in your brief in opposition or it
5 is deemed waived.

6 MR. EISENBERG: We, we're not suggesting that you can't
7 reach the point, Your Honor. We are suggesting only that the
8 Court of Appeals did not make the broad ruling that Justice
9 White --

10 QUESTION: Well, here is a section in the Court of
11 Appeals opinion that is headed up, Application of FOIA
12 subsection (b)(7). And it goes right ahead and concludes that
13 the (b)(7) is not available.

14 MR. EISENBERG: Yes, Your Honor, and I am giving you
15 the reason that the Court of Appeals gave. The reason the
16 Court of Appeals gave is that the only evidence in this record
17 is that these documents were compiled by the DCAA. That no
18 record exists for any finding that they were subsequently or
19 at any other time compiled or recompiled --

20 QUESTION: Hold it there. That unless they were
21 compiled at -- eight, eight years ago for some law enforcement
22 purposes, they couldn't be compiled later for that purpose.

23 MR. EISENBERG: No, Your Honor, what the Court of
24 Appeals said on that subject is that merely taking records
25 that are not exempt under any of the statutory exemptions in

1 the Freedom of Information Act and co-mingling them with a
2 investigative file was not a basis for saying that those non-
3 exempt records had acquired the exemption that applied to
4 other records in that exempt file. In so stating, all the,
5 all the court of appeals was doing, in Judge Winter's opinion
6 was paraphrasing this Court's decisions in Abramson and -- and
7 Robbins. It was not making new law.

8 QUESTION: The Court of Appeals says that -- that a
9 government entity cannot withhold materials requested under
10 FOIA on the ground that materials that were not investigatory
11 records when compiled have since acquired investigative
12 significance.

13 MR. EISENBERG: Yes, Your Honor, and it goes on to
14 quote the Robbins and Abramson language construing the same
15 compiled-for-law-enforcement-purposes language.

16 QUESTION: That is really an argument -- that, that is
17 your argument on the merits really, why, why the government
18 shouldn't prevail in its interpretation of Rule 7.

19 MR. EISENBERG: Yes, Your Honor, it is our argument on
20 the --

21 QUESTION: So, you are defending against the question
22 presented in the Petition.

23 MR. EISENBERG: That, that's right. We are not
24 suggesting that the Court can't reach the question. We are
25 suggesting that on the record in this case there is only one

1 answer to that question. And the answer is that on the record
2 in this case, there is absolutely no evidence that these
3 documents were compiled for law enforcement purposes by the
4 DCAA or thereafter by any other agency. The --

5 QUESTION: So, so say -- you suggest that if the
6 records show that the FBI requested these records and said to
7 the agency, please find these records, we think they might be
8 relevant, and the agency says well, here they are, and the FBI
9 says they are relevant, send them over, you would say there is
10 then evidence of, of their being compiled for law enforcement
11 purposes?

12 MR. EISENBERG: If, if that happened, if the FBI
13 initiated the request because it had some reason to believe
14 that, I would not say that merely removing otherwise non-
15 exempt files would --

16 QUESTION: But if all of that happened then the
17 compilation requirement would be satisfied?

18 MR. EISENBERG: No, Your Honor. That would not be a
19 compilation. That would be taking files from one place and
20 relocating them to another place. Let me -- let me give you -

21 - QUESTION: Well, why shouldn't we give the word
22 compiled its ordinary meaning, which certainly could encompass
23 gathering up and assembling some records and sending them over
24 to the FBI? I, I mean, that would certainly be a plain,
25 ordinary meaning of the word compiled.

1 MR. EISENBERG: Well, the, the government cited us to
2 Webster's New Collegiate Dictionary for what it claimed were
3 the ordinary meanings of the term to compile. None of the
4 definitions they cited included to seize, to transfer, to take
5 custody of, to remove or to co-mingle. And none of the
6 definitions --

7 QUESTION: How about to gather up and assemble?

8 MR. EISENBERG: Not in Webster's. They did find in the
9 third -- in the reply brief, which we have not been able to
10 respond to, they did find the third definition in Random
11 House, the definition of compile as meaning gathering, for
12 which the example given is the example Justice Scalia
13 suggests. Compiling data, that is the example given. Random
14 House says that the definitions in its dictionary are listed
15 in a prescribed order. The ordinary usage of the term is
16 listed first, in speech or in any other usage. And the more
17 rare, archaic, technical usages are listed thereafter. This
18 is the third or fourth usages. And it -- and it, it's
19 compiling data that is the example. It is not simply
20 relocating documents from one place to another place.

21 They could -- the, the Congress could have said
22 gathered up, it could have said used for law enforcement
23 purpose, it could have said obtained for law enforcement --
24 there are so -- obtained for law enforcement purpose. There
25 are so many words it could have used. But it chose one that

1 has a very precise meaning, I have discovered since this case
2 was briefed, in all of the dictionaries we have consulted.
3 And it is not the equivalent of what the FBI did in this case,
4 whether they did it on their own initiative, in consultation
5 with, or because they wanted to thwart the corporation's
6 access to these records.

7 QUESTION: Mr. Eisenberg, it is your position that if
8 these records were originally engendered, or to use some word
9 other than compiled, --

10 (Laughter)

11 QUESTION: -- put together, by DCAA eight years ago,
12 and clearly, at that time, they were not for law enforcement
13 purposes, they can never later attain the status of being
14 compiled for law enforcement's purposes?

15 MR. EISENBERG: No, Your Honor, that -- that's --
16 there is some law to that effect, but that position is not the
17 position we have taken in our brief. Because within the --
18 there are cases like Crowell & Moring, for example, in which
19 the audit report itself is the impetus for the law enforcement
20 investigation. And it is still within the agency's possession
21 and control. Obviously, that is a totally different situation
22 than that in which the documents are not being used at any
23 time by the agency for law enforcement purposes. So I am not
24 saying that there has to be an FBI removal in order for all
25 agency documents to meet the threshold requirement.

1 QUESTION: Well, could, could an agency that is not
2 engaged in law enforcement compile documents which later would
3 be said to be compiled for law enforcement purposes because
4 the FBI or some other law enforcement agency needs them to
5 prosecute someone?

6 MR. EISENBERG: Well, I -- it -- it's very hard to deal
7 with that in the abstract, without specific facts and
8 documents --

9 QUESTION: It, it could -- you don't rule it out -- you
10 don't rule it out in the abstract?

11 MR. EISENBERG: But the court of appeals did not rule
12 it out in the abstract; we do not rule it out in the abstract.
13 But in this case, there is no evidence that that ever
14 happened. And based on --

15 QUESTION: Is, is the answer you gave to the Chief
16 Justice consistent with the rationale of the Court of Appeals?

17 MR. EISENBERG: I -- I it's entirely -- consistent.
18 Let me --

19 QUESTION: It seems to me that it isn't, because I
20 thought the Court of Appeals said they were created before the
21 investigation and that ends the case.

22 MR. EISENBERG: That's what the Court of Appeals said,
23 Justice Kennedy, in finding that these documents were compiled
24 by the DCAA for non-law enforcement purposes. It does not say
25 that, because of that, they either could subsequently or

1 could not subsequently be recompiled by any other agency,
2 including the DCAA, for law enforcement purposes. What they
3 say is that there is no evidence, there is no record in this
4 case, there is no argument in this case, there is no issue in
5 this case as to whether that happened, because the government
6 never asserted that.

7 QUESTION: Mr. Eisenberg, I don't think that is a fair
8 reading of the opinion. They say the documents were compiled
9 in '78 by this agency, seven years before any law enforcement
10 agency got involved. And then it says, they were thus not
11 compiled for law enforcement purposes within the meaning --
12 they, they say that is enough to --

13 MR. EISENBERG: By that agency, the DCAA. That is the
14 finding that they are making.

15 QUESTION: No, that's not. They were thus not
16 "compiled for law enforcement purposes" and are not exempted
17 by subsection (b)(7).

18 MR. EISENBERG: Your Honor, if it has --

19 QUESTION: So they were not compiled by anybody is what
20 their holding is.

21 MR. EISENBERG: And that is why I think context and
22 posture is so important. There was no argument in the Court
23 of Appeals by the government --

24 QUESTION: Well, I understand your point there.

25 MR. EISENBERG: -- that they'd been, so the court --

1 QUESTION: But, but their reasoning is that since they
2 were compiled by a non law enforcement agency for a non-law
3 enforcement purpose, and that' all the record shows, that's
4 the end of the ball game. That's what they say.

5 MR. EISENBERG: On this record, in light of these
6 arguments and the government's position in the Court of
7 Appeals, yes. Not for all purposes, under all circumstances,
8 in other cases where a different record is made.

9 QUESTION: This is a good deal less significant than we
10 thought it was, I suppose, when we granted cert --

11 (Laughter)

12 MR. EISENBERG: I, I, I -- I'm honored --

13 QUESTION: We are just reviewing whether they were,
14 indeed, gathered, right? You are willing to say you can
15 gather them; they just weren't gathered here. Is that it?

16 MR. EISENBERG: Your Honor, I am honored to be here at
17 the first argument of the first day of the Court's new term,
18 but I have no idea why this case should lead off the Court's
19 new term.

20 (Laughter)

21 MR. EISENBERG: It has no significance on the record in
22 this case as the construction of these key words. We point
23 out in our brief that the government demeans Professor Howe's
24 compilation of the Holmes-Laski Letters in his famous work by
25 comparing it to what the FBI did in this case when it removed

1 custody of these documents from the DCAA.

2 But let us, let us assume for a moment that instead of
3 publishing this historic work, what Professor Howe did was
4 this: He learned that someone else was on the trail of
5 Justice Holmes' letters. So first, he directed Justice Holmes
6 not to disclose them to someone else or anybody else. And
7 then he appeared in Justice Holmes' chambers and removed the
8 letters from Justice Holmes so that no member of the public
9 could thereafter have access to them.

10 We might call such high-handed conduct by many names,
11 but I don't think any of them would be compilation. Without
12 sugarcoating it, that is just what the FBI did in this case.
13 By doing that, they thwarted the administrative process in
14 this -- in all FOIA cases, and they did it without any of the
15 justifications in an executive order, such as apply to
16 Exemption 1 cases, which specifically authorize that kind of
17 process.

18 After an FOIA request is filed, by the explicit terms
19 of the executive order, a document may be classified or
20 reclassified. That is not the case with respect to any of the
21 other exemptions, and the fact that they had to say in an
22 executive order documents can be classified or reclassified.
23 This -- there is nothing about compiling or recompiling in
24 Exemption 7 means that -- if they had just said classified,
25 they would not have assumed that classify meant classified or

1 reclassified. You wouldn't have to use both words if the
2 government's interpretation of Exemption 7 have merit.

3 If I may borrow a phrase from the government's Reply
4 Brief, it would trivialize Exemption 7's threshold test, to
5 equate the conduct in this case with the compilation of
6 information or records for law enforcement purpose. Despite
7 the focus on semantics and grammar in briefs, the argument
8 between the corporation and the government is not just over
9 words. What the government really is concerned about is the
10 ability of the subject -- of a subject of an investigation to
11 obtain any information, any evidence that might be useful to
12 the subject of the investigation which he could not obtain
13 prior to or unless he is indicted under the federal rules of
14 criminal procedure.

15 It's because of those provisions in Exemption 7 that
16 the President vetoed the 1974 bill, that the Attorney General
17 testified, strenuously opposed it, and the FBI was apoplectic.
18 Prosecutors much prefer a system under which they can carry on
19 their investigations with two, three or, in this case, over
20 four years, this investigation, we are told, has been in
21 progress, while the subjects are on standby, and then make
22 whatever disclosures the federal rules permit in the 70 days
23 between arraignment and trial, and as close to trial as they
24 can make it in any particular case.

25 As North v. Walsh, which we discussed in our

1 supplemental brief, points out, the Department of Justice has,
2 in fact, again proposed an amendment which would prohibit use
3 of the FOIA as a discovery device. But Congress has not
4 adopted that amendment. And what it adopted, over the
5 strenuous objections of the Department of Justice in 1974,
6 which is language which contains no such limitation. Having
7 failed before Congress, the government would like an
8 interpretation of Exemption 7's threshold requirement from
9 this Court that would nullify its significance. But to
10 prevail in this case the government must stretch the facts
11 beyond recognition, write its own dictionaries and rules of
12 grammar, and convince the Court to rewrite the language of the
13 statute and its legislative history, since, in our view, there
14 is also no record in this case.

15 QUESTION: Thank you, Mr. Eisenberg. Your time has
16 expired. Mr. Kneedler, do you have rebuttal?

17 MR. KNEEDLER: I do, Mr. Chief Justice.

18 QUESTION: You have four minutes.

19 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

20 ON BEHALF OF THE PETITIONERS

21 MR. KNEEDLER: Thank you. There are several points I'd
22 like to bring to the -- to the Court's attention in, in the
23 discussion that is focused on the word compiled. I think it
24 is important to understand what Congress was driving at and
25 what it -- what the responsible agencies understood Congress

1 to be driving at. Because, as this Court said in Abramson,
2 Exemption 7 is, is an exemption of substance and not one of
3 technicalities.

4 The first -- the first thing I want to point out is a
5 passage from the Attorney General's memorandum, page 6 of the
6 Attorney General's memorandum on the 1974 amendments to FOIA,
7 which is discussed in the District Court's opinion in Hatcher,
8 which is discussed in the briefs, and it's the same page of
9 the Attorney General's memorandum that was discussed by this
10 Court in footnote 5 of Abramson. And there the Court says --
11 or there the Attorney General, in explaining the recently
12 enacted -- amendments, states that although ordinarily records
13 used in monitoring agencies would not -- or activities, would
14 not be covered by Exemption 7, it then continues to say except
15 where the purpose for which the records are held and used by
16 the agency becomes substantially violation oriented, i.e.,
17 becomes refocused on preventing, discovering or applying
18 sanctions against non-compliance with federal statutes or
19 regulations.

20 So here we have a contemporaneous construction of the
21 statute by the Attorney General in a memorandum that this
22 Court has relied upon and agencies have relied on ever since,
23 saying that the status of records, once they become refocused
24 on a -- on an exemption, is relevant.

25 The second thing is, in the legislative history Senator

1 Philip Hart of Michigan, who was the sponsor of the amendment,
2 described the threshold in the same sort of pragmatic terms in
3 the same passage, another portion of which the Court discussed
4 in Robbins Tire. The -- Senator Hart said that the amendment
5 is broadly written, but he wanted to point out that the
6 material cannot be exempt merely because it can be
7 categorized, he used that word, as an investigatory file. You
8 also have to prove one of the six harms. But he did use the
9 word categorized, which is exactly the concept that we are
10 trying to -- explain is what the -- what the amendment refers
11 to.

12 And then he says in broad terms, the amendment -- the
13 exemption would apply whenever the government's case in court,
14 a concrete prospective law enforcement proceeding, would be
15 harmed by the premature release of evidence or information not
16 in the possession of known or --

17 QUESTION: Mr. Kneedler, if you read it that broadly
18 really -- your reading is that records or information in the
19 possession of a law enforcement agency if it meets any other -

20 - MR. KNEEDLER: No, it has -- it has -- it has to be
21 focused on a particular, under, under 7(a) it would have to be
22 focused on a particular law enforcement proceeding or
23 investigation.

24 QUESTION: I understand, but as long as it is in the
25 possession of an agency and meets some --any of the six other

1 requirements, you would say it had been compiled.

2 MR. KNEEDLER: It, it would have to be -- it would have
3 to be in the possession for law enforcement purposes.

4 QUESTION: Well, I understand.

5 MR. KNEEDLER: In other words, in, in DCAA they would
6 have a lot of information but once it becomes refocused --

7 QUESTION: Right, but compiled means in possession of,
8 I think in your, your definition?

9 MR. KNEEDLER: No, it doesn't -- well, compiled,
10 compiled, compiled means --

11 QUESTION: In your view, could anything in the
12 possession of the agency for law enforcement purposes that
13 meets these requirements not be compiled within the meaning of
14 the statute?

15 MR. KNEEDLER: No, there -- there , there also has to
16 be an affirmative designation or selection of the document, or
17 listing, identification of the document as germane to the law
18 enforcement investigation. And that, and that is exactly what
19 happened here in response during the ten-day period when the
20 agency had to decide whether to release it or, or keep it. It
21 concluded that it was relevant to the investigation. So that
22 is the length that is necessary.

23 QUESTION: So under your theory, an agency could issue,
24 the FBI could issue a notice to all agencies in the government
25 saying X corporation is under investigation, we are interested

1 in what kind of -- what kind of -- FOIA documents this
2 corporation is trying to get in, in anticipating defense of
3 this suit. Therefore, whenever you get a FOIA request from
4 this corporation let us know and we want to, we want to see
5 the document, because it is relevant to our investigation.

6 MR. KNEEDLER: No, it -- it -- it's -- first of all, a
7 court may be able to examine those facts and see whether it is
8 sufficiently relevant to a concrete, focused investigation.
9 And secondly, the harms that Exemption 7 are designed to
10 protect against is the principal protection against an
11 overbroad application of the exemption.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kneedler. The
13 case is submitted.

14 (Whereupon, at 11:04 o'clock a.m., the case in the
15 above-entitled matter was submitted.)

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No. 88-1083 - JOHN DOE AGENCY AND JOHN DOE GOVERNMENT AGENCY, Petitioner V.

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