

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES DEPARTMENT OF STATE,

Petitioner, V. MICHAEL D. RAY, ET AL.

CASE NO: 90-747

PLACE: Washington, D.C.

DATE: October 9, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES DEPARTMENT OF :
STATE, :
Petitioner :
v. : No. 90-747
MICHAEL D. RAY, ET AL. :

- - - - - X

Washington, D.C

Wednesday, October 9, 1991

The above-entitled case came on for oral
argument before the Supreme Court of the United States at
11:02 a.m.

APPEARANCES:

KENT L. JONES, ESQ., Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Petitioner.

MICHAEL DEAN RAY, ESQ., Miami, Florida; on behalf of the
Respondents.

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1 PROCEEDINGS

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 9747, United States Department of State v.
5 Michael B. Ray.

6 Mr. Jones.

7 ORAL ARGUMENT OF KENT L. JONES

8 ON BEHALF OF THE PETITIONER

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

11 This case arises under the Freedom of
12 Information Act. Under exemption 6 of the act, which
13 relates to private information and Government records,
14 this Court has twice concluded that it is unquestionably
15 appropriate to redact private names from Government
16 documents produced under the act, for private names reveal
17 nothing about how Government conducts its business.

18 In this case, however, the Eleventh Circuit has
19 concluded that private names in confidential State
20 Department interviews conducted in Haiti in the early
21 1980's should be disclosed.

22 The purpose of these interviews was to monitor
23 Haitian compliance with its then recent undertaking to not
24 harass or mistreat Haitians who are intercepted on the
25 ocean seas by U.S. vessels and return to Haitian ports.

1 After they were returned, certain interviewees
2 were randomly approached by representatives of the
3 Department of State in Haiti. They were assured
4 confidential discussions, and based upon those assurances,
5 frank disclosure of the personal treatment that each
6 interviewee received by the Haitian Government, as well as
7 intimate personal information and descriptions of domestic
8 conditions in Haiti, were obtained.

9 Out of the hundreds of interviews that were
10 conducted, there was only one confirmed case where a
11 Haitian who had been returned by U.S. vessels had been
12 mistreated by its Government.

13 When respondents sought copies of these
14 documents under the Freedom of Information Act, the State
15 Department made them available. But in accordance with
16 the practice approved by this Court in Rose and Reporters
17 Committee, redacted the private names from the documents.
18 The names of the Government officers who conducted the
19 interviews are revealed on the documents and were not
20 redacted.

21 The court of appeals applied a generalized
22 balancing test that compared the public interest in
23 disclosure with the private interest in privacy. The
24 court's --

25 QUESTION: Are you urging the abandonment of the

1 balancing test?

2 MR. JONES: There are applications for the
3 balancing test that we still of course recognize. We
4 think that there is nonetheless a workable rule that
5 Congress adopted under exemption 6 that doesn't require an
6 ad hoc balancing in each case. The legislative history,
7 though, the Senate and House reports under exemption 6
8 made clear that Congress didn't intend that the choice
9 would simply be between full disclosure and nondisclosure.
10 The Senate report specifically says that what was intended
11 was what was described as responsible disclosure. And the
12 report gives specific content to that term.

13 The Senate report indicates that in balancing
14 the public and private interests, what is to be
15 accomplished is an accommodation of the two interests
16 under which, and I quote, "neither is abrogated or
17 substantially subordinated."

18 So the basic thrust of exemption 6, the primary
19 inquiry, is how do you protect both interests. The
20 statutory mechanism that Congress provided for this is the
21 last sentence of Section 552(b). It specifically provides
22 that exempt information can be redacted, but governmental
23 public data can be disclosed.

24 Under exemption 6, we submit that this provision
25 is not simply an available tool, but it is an essential

1 feature of the mutual accommodation of public and private
2 interests that Congress intended. It allows redaction to
3 protect the privacy of the individuals, but it allows
4 disclosure to present Government facts under the act.

5 In fact, the House report at page 11
6 specifically contemplated this result in providing that
7 individualized identifying information should not be
8 disclosed but underlying facts and compilations of
9 statistical information should be. We submit this is the
10 workable rule that Congress intended under the statute.

11 Now, Your Honor, I -- in describing this as a
12 workable rule, it may be simply a quibble, but I do want
13 to suggest that I see a distinction in the Court's cases
14 between workable rules and what this Court has described
15 as categorical rules. A workable rule is one that the
16 Court construes as being the intended result that Congress
17 had when it adopted the statute.

18 A categorical rule has been adopted by this
19 Court in situations where there is room for judgment left
20 in -- for the Court to make an empirical judgment about
21 whether cases will ordinarily or most frequently properly
22 be decided under the statute in one direction.

23 We think this is a workable rule that Congress
24 intended. There is ample evidence of that intent.

25 QUESTION: Your view is that what you describe

1 as a categorical view -- rule is not a workable rule?

2 MR. JONES: Well, I don't want to belabor the
3 point, but as I understand the Court's decision, for
4 example, in Reporters Committee, which of course wasn't a
5 redaction case, it was a disclosure case. The question
6 was whether the document should be produced. So there
7 wasn't this -- the workable rule that we proposed wouldn't
8 have worked.

9 But when the Court adopted a categorical rule in
10 Reporters Committee, it was making a prudential judgment
11 that the interests that Congress intended to protect were
12 sufficiently great in the most similar cases, so -- and
13 that the public interest in disclosure in that instance
14 was sufficiently low that as a categorical rule, all rap
15 sheets would be subject to nondisclosure.

16 Now that's a harder case than we have because
17 we're not talking about nondisclosure. We had disclosed
18 these reports. What we're talking about is simply the
19 identifying information. And in the context of
20 identifying information, the legislative history is quite
21 clear that what was intended to be allowed was production
22 of facts, protection of individual identities.

23 QUESTION: Were there -- aren't there situations
24 such as the names or donors or participants from
25 governmental contracts that might well be revealed to the

1 benefit of the country?

2 MR. JONES: Yes, sir. In fact, our
3 understanding of the workable rule that we think Congress
4 intended is also elaborated by the fact that in the House
5 report at page 6, there are only two examples given of
6 when names would be disclosed. Those two examples are
7 Government employees and their duty stations, and
8 Government officers voting on official orders. In those
9 situations, the names of the individuals directly show how
10 Government conducts its business.

11 By parallel reasoning, the name of a person who
12 is doing the Government's business would also show that.
13 A Government contractor, a person operating under a
14 Government grant -- these are people who are doing the
15 Government's business even though they are still private.
16 And we think that in those instances there would be a
17 public interest in disclosure of the names.

18 QUESTION: Give me some assurance. Do I detect
19 a shift in the Government's position between their first
20 brief and their reply brief?

21 MR. JONES: I am not aware of what you might
22 have in mind. Of course, in responding to specific
23 arguments, we may have highlighted different issues. But
24 --

25 QUESTION: You think they are entirely

1 consistent?

2 MR. JONES: I'm not aware of an inconsistency,
3 Your Honor.

4 Respondents seem to acknowledge that there is
5 such a general rule. They concede that Congress intended
6 that the redaction of private names would occur in what
7 they describe as the majority of cases, at page 27 of
8 their brief.

9 They suggest, however, that there is some
10 exception to the general rule of redaction that should
11 apply here. They claim that the case is outside the
12 normal rule, solely because they can use the names of
13 these individuals to track them down in Haiti, re-
14 interview them, and based upon those additional
15 interviews, determine or form a judgment about whether the
16 Government's initial interview reports are truthful and
17 accurate. And based upon this sole justification, they
18 believe disclosure is required.

19 There is no basis in the record in this case for
20 any assertion that the Government's interview reports are
21 not truthful or accurate. They are -- as the Court can
22 determine by inspecting them, simply recite conversations
23 that occurred in confidence in Haiti. The names are the
24 only thing that have been redacted from them. They
25 describe details that flow from conversations. There is

1 little in the way of interpretative remarks, not to say
2 there is none.

3 But there is no basis for a suggestion that
4 these documents are not truthful. Notwithstanding the
5 lack of a basis, respondents claim disclosure should occur
6 so they could find out. Well, there is no limit to that
7 sort of unworkable proposition. The names in veterans'
8 hospital records, Government employee records, cadet
9 disciplinary reports as in Rose, rap sheets as in
10 Reporters Committee -- all contain names of individuals
11 that theoretically one could go to to inquire -- to find
12 out if the Government's records are truthful or accurate.

13 This is a sweeping interference. It is truly an
14 exception that would swallow the rule. And I want to
15 emphasize in that regard that the rule that we're -- that
16 we do think exists here would be swallowed by a contention
17 that in every case we can find out if it's truthful.
18 Because the purpose of the rule is not simply to reach a
19 result, but it's to reach a workable result in a manner
20 that Congress intended without ad hoc balancing in every
21 instance.

22 This Court has noted the legislative history is
23 replete with references by Congress that they desired to
24 avoid ad hoc balancing and desired to conduct the FOIA
25 under workable rules.

1 Since the Eleventh Circuit decision in this
2 case, the Second and the Third Circuits have already had
3 occasion to consider this exact proposition. In the
4 Hopkins case, the Second Circuit rejected the respondent's
5 claim as too attenuated to be a basis for ad hoc
6 balancing.

7 The Third Circuit agreed with the Hopkins
8 decision in FLRA v. The Navy.

9 QUESTION: Mr. Jones, what is the invasion of
10 privacy here that is unwarranted, caused by the
11 disclosure? The disclosure would show nothing more than
12 that these people were interviewed by Government agents.
13 Isn't that right?

14 MR. JONES: No, sir, the disclosure -- by
15 comparison the FOIA -- litigation generally, this is an
16 exceptionally unusual type of disclosure because it
17 involves, as you would look at the interview reports, it
18 involves details about their personal lives, their living
19 conditions, their poverty, their ambitious to leave their
20 country, their frustrations with their present living
21 situation. This is exceptionally sensitive, personal
22 information.

23 Under the Freedom of Information Act, decisions
24 have considered the privacy interests to be sufficient
25 simply when it would cause a commercial solicitation.

1 This -- there -- I can't think of an analogous instance
2 that would come close to this in terms of the nature of
3 the privacy involved.

4 QUESTION: What I was interested in finding out
5 is whether you were indeed deciding that it was a
6 substantial invasion of privacy upon the basis of
7 something that it will cause, such as a commercial
8 solicitation. You're not relying on that though?

9 MR. JONES: No, sir. Well, I think that you can
10 look -- as Congressman Fascell said, you look to the
11 character of the information. The character of this
12 information is inherently, demonstrably private. It's
13 also, and I think it's appropriate to note this, it's
14 quite politically charged.

15 QUESTION: What if they had asked for the names
16 of the people first? Instead of asking for the documents
17 they just asked, we would like the names of the people who
18 were interviewed.

19 MR. JONES: Well, the -- I believe the --

20 QUESTION: I mean, you know, this happened in
21 the reverse way. You redacted the names and gave them
22 everything that the people had said. What if they had
23 just said, we don't care what they said. We just want to
24 know their names because we want to go talk to them.

25 MR. JONES: Well, just to put this in context,

1 FOIA requires disclosure of documents, not lists. So
2 presumably they would have to ask us for documents that
3 contain such names.

4 QUESTION: Okay.

5 MR. JONES: And our -- and I offer that as a
6 preface because in that context, the name then has a
7 location, has a context.

8 QUESTION: But it's up to you whether you choose
9 to redact the name or redact the contents, right? I mean,
10 you could redact either one, I suppose.

11 MR. JONES: Not at all. No, sir, I don't --

12 QUESTION: What if they said, we want those
13 documents and what we are interested in is the names of
14 the people. So if we redact anything, don't redact the
15 names; redact all of the personal information. We don't
16 care what information they gave you; we just want the
17 names. That's what we're interested in.

18 MR. JONES: Well, that may be their desire, but
19 exemption 6 was clearly intended to work just the opposite
20 result. Again, the House report states quite clearly that
21 what we're supposed to do is produce the underlying facts,
22 produce compilations of information, but we're not
23 supposed to disclose identifying personal information.

24 QUESTION: Yes, but you are not identifying --
25 producing identifying personal information if you give

1 none of these personal details; all you give is the name
2 of the person. This was a person who was interviewed. Is
3 that personal information?

4 MR. JONES: It is personal information. It is
5 his name and it puts it in a context. He was interviewed
6 upon return from Haiti.

7 QUESTION: And you think that would be an
8 unwarranted invasion of privacy, to say that so-and-so was
9 interviewed by the Government?

10 MR. JONES: Yes, particularly in this context.
11 I think it would be in most contexts if not all, but
12 particularly here where the nature of the interview was a
13 person was asked voluntarily to cooperate in confidence on
14 Haitian soil in providing information to U.S. agents about
15 Haitian governmental action, as well as domestic
16 conditions generally in Haiti.

17 Indeed, it's hard for -- it's hard to imagine a
18 person that could come before this Court with a greater
19 claim to privacy than a foreign national who cooperated
20 voluntarily and in confidence with our State Department
21 officers in providing sensitive political information as
22 well as private, personal information about the government
23 of the foreign country.

24 QUESTION: Mr. Jones, can I ask you a question I
25 want to be sure that I get out before the time is up? Is

1 there any question in your mind about whether these are
2 similar files within the meaning of exemption 6? I know
3 nobody argues it, but are there any other cases in which
4 files that are not indexed or maintained by the agency, by
5 the identity of the person who is the subject of the file,
6 have been held to be similar files by this Court?

7 MR. JONES: I think that passports as the -- I
8 mean, the similar files case was The Washington Post case.

9 QUESTION: Right, but that they asked for the
10 information about identified people there.

11 MR. JONES: Okay. Well, the general -- to
12 answer your question directly, I think Washington Post
13 makes it quite clear that these are similar files. They
14 do contain personal information that -- I've detailed it
15 at length -- that would qualify under the standard of
16 Washington Post. It hasn't been addressed below. No --
17 neither the district court nor court of appeals addressed
18 it, and I don't believe it's --

19 QUESTION: It isn't immediately apparent to me
20 that this fits within the definition of the statute, that
21 I just thought I should let you know that it's probably -
22 -

23 MR. JONES: Your Honor, I think it is only
24 immediately apparent after reading the Washington Post
25 case.

1 QUESTION: Which involved files that were
2 maintained under the names of the person named in the
3 request, which is not the case here.

4 MR. JONES: That's correct, but the standard
5 that the Court drew on was from the House and Senate
6 reports which describe generally documents that contain
7 personal identifying information. So we are well within
8 the legislative standard and certainly within the
9 Washington Post decision on that particular issue.

10 I do want to mention that there are two other
11 provisions of the statute that reinforce the conclusion
12 that this Court expressed in Reporters Committee that
13 private names need not be disclosed. Section 552(a)(2) of
14 the act provides that names may be redacted from published
15 orders if the disclosure would constitute a clearly
16 unwarranted invasion of privacy. Thus, the standard for
17 redaction in that setting is identical to the standard
18 under exemption 6.

19 The House report at page 8 explains that private
20 names are properly redacted in -- under 552(a)(2) where
21 they, quote, "have no bearing or effect on the general
22 public." Private names inherently have no bearing or
23 effect on the general public, especially randomly selected
24 Haitians who were interviewed by the State Department have
25 no inherent bearing or effect on the public.

1 Section 552(a) (3) also emphasizes that the focus
2 of FOIA is on the interests of the general public because
3 it provides for disclosure to be made to any person. Now
4 the Court has interpreted that language to -- frequently
5 to conclude that the individual purposes of requesters are
6 not to be given weight in deciding whether disclosure is
7 warranted.

8 The original purpose of the act was to move away
9 from the preexisting standard of APA Section 3, which had
10 provided for disclosure based upon the individual needs of
11 the requester.

12 QUESTION: Although you do use the individual
13 needs for determining whether there's a public interest, I
14 presume.

15 MR. JONES: I don't follow your question, but I
16 --

17 QUESTION: I don't know how you can decide
18 whether the invasion of privacy is unwarranted in the
19 sense that there is no sufficient public interest in the
20 disclosure without inquiring into what use would be made
21 of the information. That does require -- public interest
22 inquiry requires you to advert to the usefulness of the
23 information, doesn't it?

24 MR. JONES: I don't believe so, but even if that
25 were correct, it wouldn't have implications for this case.

1 I don't believe that's correct because Congressman
2 Fascell, as we mentioned, says that under FOIA, what's
3 relevant is the character of the information. And this
4 Court under 552(a)(3) has often said that the particular
5 purposes, which is another way of saying the intended uses
6 of an individual requester, are not entitled to weight in
7 determining whether disclosure is warranted under the act.

8 QUESTION: But the character of the information
9 -- it's important information or unimportant information
10 on the basis of what -- you know, whether it can cause the
11 public to do something that it would not otherwise do.
12 It's information about, you know, misdoings within the
13 Government, which would lead to congressional
14 investigations or lead to correction of those misdoings.
15 I don't know how you run a public interest analysis of the
16 information without focusing on how useful is the
17 information, what can it be used for by the public.

18 MR. JONES: Well, Justice Scalia, the stage of
19 the discussion that you're addressing isn't reached in
20 this case because this is a redaction case. What you are
21 describing is the situation where the redaction doesn't
22 solve the problem; it doesn't provide a workable rule
23 because, as in Reporters Committee, redaction would not
24 protect privacy because they sought specific records. And
25 in that situation, you do have little choice but to either

1 apply an ad hoc balancing or a categorical rule based upon
2 general likelihoods of the balancing of the interests.

3 We don't have that kind of disclosure problem
4 because we have a redaction case, just like Rose was, and
5 precisely of the type that Congress understood would exist
6 in which the intended result is you redact the private
7 information. You disclose everything else; you don't have
8 to do an ad hoc balancing.

9 QUESTION: I must say that I don't see the
10 distinction you're drawing between redaction and refusal
11 to disclose the document in its entirety. You are saying
12 there's a different test for whether you can refuse to
13 turn over the whole document than there is for refusing to
14 turn over portions of the document?

15 MR. JONES: Yes, sir. As I mentioned at the
16 outset, Congress anticipated an accommodation under which
17 neither interest is abrogated or substantially
18 subordinated, that is implemented at the first stage by
19 protection of the private information, as the Court did in
20 Rose.

21 If privacy -- if there's not a possibility of a
22 mutual accommodation because of the nature of the request,
23 as when you ask for the personal -- when you ask for the
24 records about a named individual, then it's necessary to
25 go into the balancing problem that you've been describing.

1 The -- I'm sorry.

2 QUESTION: I don't understand this.

3 MR. JONES: Well, if I knew exactly how to help
4 you, I certainly would, but --

5 (Laughter.)

6 MR. JONES: This Court has often stated that
7 great nations should keep their words. We think this is
8 such a case. The statutory method for accommodating the
9 competing and equally important public and private
10 interests is redaction of the private names, disclosure of
11 the public information. We think the State Department
12 properly accommodated those interests.

13 I would like to reserve the balance of my time
14 for rebuttal.

15 QUESTION: Very well, Mr. Jones.

16 Mr. Ray, we'll hear from you.

17 ORAL ARGUMENT OF MICHAEL D. RAY

18 ON BEHALF OF THE RESPONDENTS

19 MR. RAY: Mr. Chief Justice, and may it please
20 the Court:

21 The preliminary question in a (b) (6) balancing
22 test is, is the privacy interests, if any at stake, a
23 substantial privacy interest. So I would like to take a
24 second to look at the text of the actual reports in this
25 case so we can see exactly how private these interviews

1 were. And I submit to you that these interviews were not
2 private but that they were totally public.

3 For example, these documents appear in the
4 record below at entry 45. On page 80, quote, "Blank took
5 embassy official to a large house near the village market,
6 where large numbers of people soon gathered. As word
7 spread of the presences, many returnees came forward to be
8 interviewed."

9 Page 81, quote, "Several of the villagers
10 suggested that embassy official next go to a community
11 called Grand Paque several miles from Jean Dani. Once
12 there, embassy official waited at a large house while
13 several people went out to look for those known to be
14 returnees. Within the hour, about 20 migrants had come
15 forward to be interviewed. While interviewing the
16 returnees, villagers of all ages gathered to stare at the
17 unexpected event."

18 Page 90, quote, "Embassy official, department
19 official, were escorted through the village by numerous
20 children and directed to a small hut where the villagers
21 gathered to stare at the visitors. Word was passed to
22 known migrants, and they arrived from their work in the
23 field after 20 minutes."

24 And the last one at 82, quote, "On the return to
25 Jean Dani, several people stopped the embassy car to be

1 interviewed. Three saw the car coming and crossed a large
2 irrigation ditch to get to the car." End of quote.

3 This I submit shows a totally different picture
4 from what the Government claims at page 7 in their reply
5 brief, quote, "The inherently sensitive nature of the
6 State Department's efforts to monitor human rights
7 practices at Haiti provides undeniable justification for
8 conducting these interviews in confidence." These
9 interviews were not conducted in confidence. They were
10 conducted out and open on the streets of these little
11 villages and hamlets and mud-thatched houses where many,
12 many people in those towns knew what was going on and knew
13 who these people were.

14 It's also evident from the record that people in
15 these villages knew who these people were when they left
16 Haiti and when they came back and when they were
17 interviewed. So I would submit that the privacy interests
18 at stake in this case is as the district court found, de
19 minimis. However, assuming that this Court finds that
20 there is significant or substantial privacy interests,
21 then I believe that this Court, in applying the balancing
22 test, would certainly find that the public interest in
23 disclosure far outweighs any privacy interests.

24 QUESTION: Mr. -- go ahead.

25 QUESTION: Do you think Judge Gibson correctly

1 applied the balancing test in this case?

2 MR. RAY: Yes, I do.

3 QUESTION: I'll ask you the question I asked Mr.
4 Jones. Do you think the Government has shifted its
5 position at all between its original brief and its reply
6 brief?

7 MR. RAY: I'm not sure what you mean by that
8 question, so I'm not sure how to answer it. But to answer
9 your previous question as to whether I believe -- whether
10 the Government is abandoning the balancing test, I believe
11 that they are. The Government alleges here that there is
12 no public interest because names in and of themselves do
13 not shed light on Government conduct, and therefore the
14 Government, they claim, does not even have to address
15 whether there is a privacy interest in this case.

16 I would submit that that is a suggestion that
17 this Court abandon the balancing test. And --

18 QUESTION: Mr. Ray, I'm concerned about whether
19 there is any limiting principle in the Eleventh Circuit's
20 holding here. It reads as though any time there is an
21 allegation that the requested information might lead to
22 further knowledge about Government affairs, that that's
23 enough. What do you think the limiting principle is under
24 the Eleventh Circuit's holding?

25 MR. RAY: I believe that the Eleventh Circuit

1 performed the balancing test here, and in doing so, the
2 limits are, as in this case, when the Government uses the
3 information that is requested for public purposes, then
4 the public interest is heightened. And the specific uses
5 in this case which the Government uses that information,
6 these reports, are for -- what they have done already is
7 they have interdicted 22,000 Haitians on the high seas,
8 and they have used these reports specifically to send
9 those people back to their country. They have used these
10 reports to create advisory opinions in every Haitian's
11 asylum claim in all the immigration courts throughout the
12 United States. And they are still doing that today in
13 1991.

14 To say that if you are afraid to go back to your
15 country because you fear you'll be mistreated for having
16 left illegally, that claim is unfounded. However, as
17 State Department official Eaves swore to the contrary.
18 This information, he said, was old and outdated and of no
19 value to an asylum claim.

20 I believe here this information that we request
21 has been used in such public fashion that the public
22 interest is so heightened above just any request
23 whatsoever to monitor some Government conduct. Here this
24 information is used daily in the courts, the Federal
25 courts, in the immigration courts, in advisory opinion, to

1 send Haitians back to their country, to deport them, to
2 deny their asylum claims.

3 So that I believe is the -- are the factors that
4 the Eleventh Circuit use in their balance to conclude that
5 the public interests outweighed any privacy interests.

6 QUESTION: Well, so is the census data used
7 daily in all sorts of contexts by Congress, by the
8 executive branch, and so forth. And I suppose you could
9 run the same argument, that you are entitled to double-
10 check that the Government employees who collect all this
11 census data were doing it correctly because this is
12 enormously important information.

13 MR. RAY: But the Government I don't believe has
14 not used the census information to send back 22,000 people
15 on the high seas or to deport them or to deny their asylum
16 claims.

17 QUESTION: Not for that particular purpose, but
18 for other purposes that are just as important, such as
19 deciding where Government funds will be allocated, where
20 more poor people are located, where -- you know, all sorts
21 of important matters. How do you distinguish the census
22 material?

23 MR. RAY: I don't distinguish it. Perhaps that
24 should be disclosed.

25 QUESTION: You think you would be able to get

1 the tense of the census material, too?

2 MR. RAY: If they were equally as important,
3 then the public interest and the balancing test would --
4 that is the workable formula that Congress intended that
5 has worked fine ever since 1966 when the Freedom of
6 Information Act was enacted.

7 QUESTION: Because it's important that you be
8 able to double-check the Government?

9 MR. RAY: It's important to know whether or not
10 these people are being mistreated and that asylum claims
11 are being decided fairly. And then when 22,000 people are
12 stopped on the high seas, that they are being sent back
13 for reasons that are true and correct.

14 QUESTION: So you have to double-check -- the
15 public has the right to double-check the work that the
16 Government has done in assembling any information that is
17 important information?

18 MR. RAY: Not any information. But in this
19 particular case, we have to double-check because the
20 Government has abandoned its interview program
21 specifically because it's said it's too costly and time
22 consuming.

23 QUESTION: Mr. Ray, on that point, isn't that
24 apparent from the text of the documents that have been
25 provided to you, even if you don't know the names of the

1 people who were involved?

2 MR. RAY: No, it's not because as the Eleventh
3 Circuit said, there's also a great public interest in
4 knowing whether or not the Government is telling the truth
5 about fulfilling its obligations.

6 QUESTION: Well, if you make two assumptions,
7 one, that the Government is telling the truth, and
8 secondly, that you don't really have an opportunity to
9 interview -- re-interview these people, will the names add
10 anything at all to your knowledge about what the
11 Government is doing?

12 MR. RAY: Yes. Under the law, under the Freedom
13 of Information Act, even if we find out that the
14 Government is telling the truth, we still have a right to
15 that information, to determine for ourselves.

16 QUESTION: In other words, your entire purpose
17 is to verify the accuracy of the information and to --
18 also to re-interview to find out if they would have had a
19 different result if they had conducted additional
20 interviews?

21 MR. RAY: Well, no. That is the public interest
22 in this case. However, I have other purposes myself for
23 use of this information in immigration proceedings in the
24 immigration courts of this country. However, what you
25 stated is correctly, I believe, the public benefits to the

1 release of this information.

2 QUESTION: Mr. Ray, if you could make the same
3 argument you're making about the Government's preparation
4 of affidavits for search warrants, that you want to go
5 around and make sure the Government is truthfully quoting
6 these people who are supplying probable cause. Perhaps
7 that's all perfectly consistent what you are saying. But
8 it would be quite an expansion of the Freedom of
9 Information Act.

10 MR. RAY: I'm sorry. I'm not sure I understand
11 what you're saying. It would be an expansion of the
12 Freedom of Information Act?

13 QUESTION: Yes. I don't think it's been used
14 for that purpose before, anymore than it's been used for
15 the purpose that you are now trying to use it.

16 MR. RAY: Well, there have been many cases where
17 names have been released, specifically in reference to the
18 release for monitoring Government compliance. And one
19 example is Justice Scalia's opinion in Arieff case where
20 he stated that the core of the Freedom of the Information
21 Act is to monitor Government compliance.

22 We tried to get other names in this case on our
23 own, apart from these 582 persons that the Government had
24 alleged to have interviewed upon their return. I have
25 filed requests for seven or eight boatloads, names and

1 addresses and other identifying information, of Haitians
2 who were interdicted on the high seas. And the Government
3 has refused to provide that information. So I can't go in
4 another way to find out that information.

5 And people who were stopped on the high seas --
6 it's ironic -- the Haitians who were stopped on the boats
7 specifically are not promised any confidentiality
8 whatsoever in spite of about a 7-year effort by the United
9 Nations to attempt to get Immigration to promise these
10 people confidentiality.

11 Yet, in those cases, and they are both -- well,
12 one is on appeal now because the Government has asked for
13 a stay in the Eleventh Circuit and it was granted because
14 the Government argued that the issues are identical, even
15 though no confidentiality was promised. And that case is
16 Ray v. Immigration & Naturalization Service, 89-288 Civil,
17 Judge Ryskamp.

18 And there's another case where two other
19 boatloads of names and addressees were requested where no
20 confidentiality was promised. And that is still pending,
21 and that is 90-1721, Civil, Judge Davis. And these are
22 both in the Southern District of Florida in the U.S.
23 district court.

24 So the issue, I think, which that shows is that
25 the Government is really trying to argue is not to protect

1 confidentiality and privacy, but rather to protect their
2 own confidentiality. And the Freedom of Information Act
3 only is designed to protect individual privacy, and not
4 Government privacy.

5 I think it is important to point out also that
6 the only evidence in the record to show the privacy
7 interests at stake here are the declarations of three
8 State Department employees. And the first one by a Mr.
9 Eaves specifically states that the release of the
10 requested information in this case would cause possible
11 embarrassment.

12 Would cause possible embarrassment does not meet
13 the burden of proof under Exemption (b)(6) which requires
14 what would result would be a clearly unwarranted invasion
15 of privacy. The other two affidavits submitted do not
16 even talk at all about personal privacy. They only
17 address issues of foreign policy and national security.
18 And as this Court has already ruled, those issues are no
19 longer before this Court.

20 So even by the own Government's evidence
21 presented in this case, they have not meant their burden
22 of showing that the privacy interests, if any in this
23 case, would constitute a clearly unwarranted invasion of
24 privacy.

25 QUESTION: Well, the State Department commonly

1 uses very gentle terms when referring to other regimes, do
2 they not? So possible embarrassment in State Department
3 terminology may be something that's really rather grave.

4 MR. RAY: Well, I think it's very important in
5 the context of the Freedom of Information Act, especially
6 because in the past, the Government has gone before
7 Congress and has unsuccessfully attempted to have Congress
8 write out the (b) (6) exemption requirement and to allow
9 the Government to only have to show that a privacy
10 interest could be infringed upon, rather than that it
11 would be or clearly would be. And they were unsuccessful.
12 And therefore, as this Court recognized in the Reporters
13 Committee, there is a very distinct difference between
14 Exemption 7(C) and (b) (6).

15 So I think in this context you have to look
16 specifically at what the Government has proffered for
17 their argument as to why they have met the burden. And
18 they haven't met it here. It's just simply not met.

19 I believe the Government is trying to create a
20 new exemption that does not exist under the law. The text
21 of the Freedom of Information Act is very clear at 552,
22 subsection (d), where it states, "This section does not
23 authorize withholding of information or limit the
24 availability of records to the public, except as
25 specifically stated in this section." And there is no

1 such --

2 QUESTION: Mr. Ray, do you agree with the
3 Government that the criterion for withholding an entire
4 document is different from the criterion for withholding a
5 portion of it, for redacting? That there's a different
6 test for the two?

7 MR. RAY: I don't believe so. I think in each
8 case, you perform the balancing test after you determine
9 that there is a privacy interest involved. You then look
10 to see if there's a public interest. And you weigh and
11 consider the two and decide which one outweighs the other,
12 no matter whether it's a hole document or part of a
13 document.

14 However, I do know that if a part of a document
15 can be segregated -- it's nondisclosable -- then the
16 Government has the duty to do that and disclose the part
17 that is segregable.

18 And this Court has recognized also what the
19 statute says. Many of the Justices here have recognized
20 in prior decisions that unless Congress under the Freedom
21 of Information Act has created a specific exemption, that
22 this Court will not read one into the law, which the
23 Government is asking them to do today.

24 Justice O'Connor recognized that in her dissent
25 in the Abramson case. Justice Scalia recognized that in

1 his dissent in the John Doe case, as well as Justice
2 Blackmun in his majority opinion in that case. So there
3 is no categorical exemption.

4 However, I would submit that even if this Court
5 were to buy the Government's argument that there should be
6 a new rule of derivative use, that we have met our burden
7 of proof under that standard. Because contrary to the
8 Government's assertion in its brief that the only
9 information redacted here are the names, it is clear by
10 looking at -- and that's in the last page of the rely
11 brief -- it is clear by looking at the reports themselves
12 that there are other factors, other information that has
13 been deleted here as well, such as addresses and places
14 where people lived.

15 Now, there is no indication from these reports
16 that the Government ever went to any prisons to see if
17 anyone were incarcerated as a result of having left their
18 country illegally. If anyone were likely to have been
19 persecuted, it would seem to me that the most likely place
20 to look to find out whether they were persecuted or not,
21 would be in a jail.

22 And in fact, Chief Judge James Lawrence King in
23 the Southern District of Florida, in the case of HRC v.
24 Civiletti, 503 F.Supp. 442, the Southern District of
25 Florida in 1980, recognized specifically in that case

1 there was much evidence presented of the State
2 Department's manner of interviewing returnees. But the
3 fact that the State Department did not check with prisons
4 made their methods fatally inadequate. And I would
5 suggest that that's another factor here which shows why
6 there is such a large public interest in obtaining these
7 names, so that we can verify the fate of these returnees.
8 Because the Government has not done so.

9 QUESTION: Let me interrupt there because I want
10 to be sure I understand your argument. Is it not apparent
11 from the face of the document that you've examined that
12 they did not interview anyone in prison?

13 MR. RAY: I cannot tell that because at some
14 points there are several pages that are left blank, and I
15 have no idea what is included in there. There are other
16 places specifically where I can tell for sure that what
17 has been omitted are names of addresses and places. If
18 you want any examples, I have them all here. But it's in
19 there.

20 If you look at those documents, they have left
21 out other information, such as names -- other than names,
22 such as addresses and names of towns. And I have no idea
23 what they have left out. Page 20 of those documents at
24 record reference 4520, 21, 22, 23 and 19. The whole pages
25 are empty. Who knows what was left out? We're just asked

1 to take the Government at its word.

2 The affidavit by I believe Mr. Melton of the
3 State Department, when he says conditions have so changed
4 in Haiti that these reports are no longer of any value,
5 well, then why did the State Department stop following up
6 and checking to find out what the fate of these returnees
7 is? And since they don't know, then how can they send
8 advisory opinions to the immigration courts today in 1991,
9 like you'll see in the respondent's brief in appendix 1a
10 saying that we know these people don't have any fear that
11 they are going to be mistreated when they go back because
12 we did interviews in 1982 and '83. How would they know?
13 It's just simply not possible.

14 So the Government has not done an effective
15 follow-up. We are here. We are the follow-up program.
16 We are the only way to determine whether these people's
17 fate is as the Government states. And whether the
18 Government is telling the truth or not, we certainly have
19 cause to question that, and we certainly have the right
20 under the Freedom of Information Act to find that out.

21 I would just state also that when the persons
22 who are not promised not confidentiality aboard the
23 interdicted vessels are brought back to Haiti, their names
24 aren't protected in confidence. In fact, the record shows
25 that when they are sent back to the dock in Haiti, their

1 names are given on 11 lists to the Haitian authorities.
2 And immediately after that, an embassy official sits in on
3 interviews with these individuals with the Haitian police,
4 the Haitian Red Cross, the Haitian military, and the
5 Haitian executive department.

6 I submit that that's further evidence that what
7 the Government's interest here is is not interest in
8 protecting the privacy of these individuals.

9 And also if it's true as the Government states
10 that not one of these people -- or I've heard now that
11 perhaps there was one who was mistreated -- if no one was
12 mistreated, then why on earth would they be afraid to come
13 forward and admit what they said previously? And not only
14 that, they could always say no. They don't have to talk
15 to use if they don't want to.

16 But all we're asking for is the same information
17 that has already been given to the Haitian police and the
18 Haitian military and the Haitian Red Cross and the Haitian
19 executive. We're asking for names that have already been
20 given to the only people, if there are any, who likely
21 would be persecutors.

22 There is no means to verify this claim. There
23 is no other avenue where we can go to find out by some
24 other means whether this is true or not. The Government
25 states in its brief that cooperation with the United

1 States is not often liked and these people might be
2 treated if the -- oh, I'm sorry -- if the Government finds
3 out they spoke to them.

4 Well, again, I would just submit that if no one
5 was mistreated as the Government says, then I would think
6 the Government of Haiti would honor these people and
7 praise them for being such positive supporters of the
8 government.

9 QUESTION: Mr. Ray, let me be sure I understand
10 the point you are making about the Haitian police and the
11 Haitian executive have all of this information. You say
12 they have all these names? Are there some reports that
13 indicate they were present during interviews? I didn't
14 quite understand what the argument was.

15 MR. RAY: The Haitian military, Red Cross,
16 police, and executive have the names of the 22,000
17 Haitians who were brought back on the boats. And the
18 Government has admitted that the 582 people they
19 interviewed, that the names of those people were obtained
20 from these interdiction lists.

21 QUESTION: But we don't have any reason to
22 believe that the Government of Haiti knows which one of
23 the 500-some odd were interviewed?

24 MR. RAY: Well, we do, I believe, based on the
25 fact of the manner in which these interviews were

1 conducted totally out in the open, in the hamlets and in
2 the villages, where these interviews were done so publicly
3 that many, many people in those villages know who they are
4 and it's no secret.

5 One other important thing is that one of the
6 documents released in this case, it's called a fact sheet,
7 and it's for use as far as telling interviewers how to
8 question these interviewees. And one of the things that
9 it states in there is be sure and ask these people whether
10 or not they have been treated by, quote, unquote, "the
11 civilian militia."

12 Now the Government has admitted in its brief
13 that the Tonton Macoutes, the secret policy in Haiti, were
14 at the time of Duvalier, the relevant time to this case,
15 that they were the civilian enforcers of the law. So the
16 interviewers have been instructed to specifically ask
17 these people if they have been mistreated by the civilian
18 enforcers of the law. This is in the fact sheet, the
19 guidelines.

20 However, if you look at the actual reports
21 themselves, I believe I found in only one place any
22 reflection that anybody was ever asked if they were
23 mistreated by anyone other than government officials. And
24 that is another basis, I would submit, to show how
25 unreliable these studies are. Because the people who are

1 most likely to mistreat these individuals, if anyone, are
2 the civilian enforcers of the law, as the Government has
3 recognized. So there's no question about that. However,
4 the Government -- there's no evidence that they even
5 bothered to ask these people if they were mistreated by
6 these persons. Yet they ask the Court to take their word.
7 They ask the American public to take their word.

8 And many, many of these documents show that a
9 large scheme of the State Department is to disseminate
10 these results to the public, to the media, even to
11 Congress. And these documents, if you look at them,
12 specifically state that in great detail how they have a
13 need to target audiences in Miami and Washington and in
14 New York where there are many Haitians, in order to dispel
15 the notion in their minds that when Haitians return to
16 Haiti, they are going to be mistreated.

17 And the same documents which state the
18 Government's need to inform the people in these areas,
19 state that they know that these conceptions are not true
20 because the State Department has done these interviews.
21 Again, for all the reasons that I've submitted, these
22 interviews are just not accurate.

23 And again, we don't have to prove the
24 Government's wrong here, or that they are not telling the
25 truth. We have just shown -- I hope I have shown to you

1 -- how important these public interests are and how many
2 questions there -- that have been raised by the
3 Government's own reports as to whether or not their
4 conclusions really are true.

5 It is true that -- I don't remember the exact
6 quote -- something like, great nations like great men must
7 be able to be taken at their word, and I believe that also
8 applies to our State Department, because we are talking
9 here not about one person's case or one person's right;
10 we're talking about perhaps the fate of the 22,000 people
11 who were stopped on the high seas who have been sent back.
12 And there is evidence that shows that they were sent back
13 specifically because of these studies and the alleged
14 results of these interviews.

15 The Government also claims in the reply brief,
16 page 7, that they are afraid the authorities will get the
17 names of these returnees. Well, they already have the
18 names of the 22,000. And I would submit that for all the
19 reasons already shown about how public these interviews
20 were, that it's no secret who these people were.

21 Also, the Government talks over and over about
22 the pledge of confidentiality, the promise of
23 confidentiality. Again, the only evidence are the three
24 affidavits. When you read each of those three affidavits,
25 they use practically the same language, that there was an

1 understanding of confidentiality. What was that
2 understanding? I don't know. When you read the
3 individual reports themselves, nowhere in there does it
4 say how this confidentiality promise came about.

5 I believe it was The Washington Post case which
6 said -- versus The State Department that said a mere
7 promise of confidentiality cannot be something just to
8 hide information behind. There is nothing in the text of
9 these reports which gives any indication of why
10 confidentiality was promised or that anyone specifically
11 asked for it. There may have been one person that asked
12 for it. I don't want --

13 QUESTION: Was this the basis for the Ninth
14 Circuit's decision, that there hadn't been any commitment
15 on confidentiality?

16 MR. RAY: Which decision are you referring to?

17 QUESTION: Was the basis for the decision of the
18 court below -- Eleventh Circuit, I'm sorry -- was the
19 basis for the decision that there had not been a pledge of
20 confidentiality?

21 MR. RAY: No. In fact, I believe the Eleventh
22 Circuit says that they took note of the claim that the
23 Government had promised confidentiality.

24 QUESTION: And they accepted that as being true?

25 MR. RAY: They accepted that.

1 QUESTION: Well, I don't think that we are going
2 to go back and review whether there was or wasn't. We are
3 probably going to decide on the basis that they did. Did
4 they disbelieve the Government's assertions about the
5 possibility of these individuals being persecuted by
6 Haiti?

7 MR. RAY: I don't believe they disbelieved it,
8 but they felt that the -- they stated specifically that
9 they felt that the question as to whether or not the
10 Government's conclusion to the contrary was true or not
11 was certainly of great or significant public interest, and
12 that the release of the names and other identifying matter
13 in this case would lead to the truth in that matter.

14 QUESTION: Did they disbelieve that the
15 interviews were at least private? I mean, did they rely
16 on the fact that the interviews had been conducted in the
17 open, as you say they were?

18 MR. RAY: I don't believe they ever mention that
19 anywhere in their opinion. However, if you look at the
20 actual reports themselves, you can see that very readily,
21 practically on every page.

22 I guess I've pretty well said everything, and I
23 would just ask this Court to affirm the decision of the
24 Eleventh Circuit below.

25 Thank you.

1 QUESTION: Thank you, Mr. Ray.

2 Mr. Jones, do you have rebuttal?

3 REBUTTAL ARGUMENT OF KENT L. JONES

4 ON BEHALF OF THE PLAINTIFF

5 MR. JONES: Just one item. There is a
6 suggestion by respondents that there is only a minimal
7 privacy interest involved here, and I just want to point
8 out that the court of appeals found the privacy interest
9 at issue here to be quite significant, but --

10 QUESTION: (Inaudible).

11 MR. JONES: -- But apparently on an ad hoc
12 basis, did not think it was significant enough here.

13 QUESTION: Mr. Jones, would you comment on your
14 opponent's argument that the 22,000 names are available
15 and therefore, unless one of these reports described
16 mistreatment, there really isn't much concern about the
17 identity getting back to the Haitian Government, as I
18 understand it. They already know the names of these
19 people and they certainly wouldn't be upset if somebody
20 was interviewed and said we didn't get mistreated. That's
21 what I guess all these people said.

22 Is there an interest in keeping this information
23 from the Government of Haiti? If so, what is it?

24 MR. JONES: Separate and apart from the personal
25 interest in the privacy associated with the intimate

1 detail, is there an interest in protecting this
2 information from the Haitians?

3 QUESTION: Right.

4 MR. JONES: Keeping the information from the
5 public including the Haitian Government? Yes, there is.
6 There are two parts to your question. What is this 22,000
7 and 500? Twenty-two thousand is simply everybody that's
8 been returned. That doesn't tell anything.

9 QUESTION: So they of course know who those
10 people are.

11 MR. JONES: They certainly do, just as we would
12 now who's returned on our shores.

13 QUESTION: And the concern about mistreatment
14 would be that if you had fled the country and tried to get
15 over here, you might be disloyal, and so forth, to Haiti?

16 MR. JONES: The purpose of the interviews was
17 simply to find out whether they were being mistreated.
18 And the reason we wanted to find out was because we have
19 an undertaking under United Nations' protocols to allow
20 refugee status to people who, if returned, would be
21 mistreated.

22 So that was the basis for our inquiry. The
23 Haitian Government would have no basis for knowing who we
24 spoke to. The court of appeals specifically concluded
25 that the information was held confidential by the State

1 Department. The --

2 QUESTION: If you only gave the names of those
3 who provided -- all of the reports show that they weren't
4 mistreated?

5 MR. JONES: There was one reported, confirmed
6 instance of mistreatment.

7 QUESTION: So you could withhold that name, I
8 guess, and provide the others.

9 MR. JONES: Well, Your Honor, in addition to the
10 private nature of the information, which exists with
11 respect to all 500, we also believe that with respect to
12 all 500 there is an undeniable wisdom in the caution that
13 the State Department exercises in conducting these
14 interviews in a confidential matter, because we cannot
15 guarantee the safety or assure that a composition of
16 future governments in Haiti or in other countries. And --

17 QUESTION: What do you say about the allegation
18 that the interviews were not conducted in a confidential
19 manner?

20 MR. JONES: Well, I would say that there are two
21 courts below that have found to the contrary. And I would
22 also suggest that there's evidence in the record that
23 we've supplied, in addition to the three affidavits, which
24 of course are rather substantial evidence. There is
25 additional evidence which supports that.

1 QUESTION: What you were saying a moment ago, if
2 I understand it, was that if you cannot assure
3 confidentiality, the ones who would describe mistreatment
4 will never talk to you.

5 MR. JONES Well, that is -- it is a prudential
6 consideration of the Department that to obtain cooperation
7 in foreign affairs, we need to be able to have reliable
8 assurances of confidentiality. But what I'm talking about
9 also is the fact that we can't protect these people, we
10 can't predict what future governments' reactions may be
11 about their voluntary cooperation with the United States.

12 In the 1974 amendment in the conference
13 committee report on the 1974 amendments -- to FOIA, the
14 committee talks about the unique insight that the State
15 Department has in matters respecting confidentiality in
16 matters concerning foreign affairs.

17 This is a unique insight based upon, I suppose,
18 centuries of concern about the need to protect
19 confidentiality in foreign interviews conducted on foreign
20 soil. We think that is an important part of the privacy
21 component, but notwithstanding that, there is the inherent
22 private nature of the details of the individuals' lives,
23 which is itself sufficient under FOIA litigation.

24 If there are no further questions, I am
25 finished.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jones.

2 The case is submitted.

3 (Whereupon, at 12:02 p.m., the case in the
4 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: 90-747

United States Department of State, Petitioner -v- Michael

D. Ray, et al

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

BY *Lona M. May*

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