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PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE**

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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543**
UNITED STATES

CAPTION: UNITED STATES DEPARTMENT OF JUSTICE, ET

AL., Petitioners v. VINCENT JAMES LANDANO

CASE NO: 91-2054

PLACE: Washington, D.C.

DATE: Wednesday, February 24, 1993

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES DEPARTMENT OF :

4 JUSTICE, ET AL. :

5 Petitioners :

6 v. : No. 91-2054

7 VINCENT JAMES LANDANO :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, February 24, 1993

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 1:00 p.m.

14 APPEARANCES:

15 JOHN F. DALY, ESQ., Department of Justice, Washington,
16 D.C.; on behalf of the Petitioners.

17 NEIL MARC MULLIN, ESQ., West Orange, New Jersey; on
18 behalf of the Respondent.

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1 PROCEEDINGS

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 91-2054, the United States Department of
5 Justice v. Vincent James Landano. Mr. Daly.

6 ORAL ARGUMENT OF JOHN F. DALY

7 ON BEHALF OF THE PETITIONERS

8 MR. DALY: Mr. Chief Justice, and may it please
9 the Court:

10 This case involves exemption 7(D) of the Freedom
11 of Information Act, which permits the FBI and other
12 Federal law enforcement agencies to protect the identities
13 of confidential sources and also, in the case of criminal
14 law investigations, the information provided by those
15 sources.

16 The specific question presented here is what
17 exactly the FBI must do in district court to establish
18 that a particular source may be treated as a confidential
19 one.

20 Seven of the U.S. circuit courts of appeals have
21 adopted the approach that we urge on the Court today.
22 That is, to allow the FBI to carry its burden by means of
23 a categorical showing in which the FBI shows that each of
24 the documents at issue falls within a category of
25 sources -- for example, State and local law enforcement

1 agencies, for which an assurance of confidentiality is
2 inherently implicit in the normal course of events.

3 On the other hand, the court of appeals in the
4 present case has set down a rigid rule that the FBI cannot
5 invoke exemption 7(D) unless it can provide "detailed
6 explanations relating to each alleged confidential
7 source."

8 We submit that the FBI should indeed be able to
9 proceed on the basis of a categorical showing presuming
10 confidentiality for these types of sources in the absence
11 of an indication otherwise. There are two essential
12 reasons --

13 QUESTION: What types of sources are you
14 referring to again, Mr. Daly?

15 MR. DALY: The categories are indeed broad, Your
16 Honor. For example, in this case the FBI has contended
17 that the individuals who provide information to the FBI in
18 the course of a criminal investigation normally do so with
19 an inherent understanding, an implied understanding of
20 confidentiality.

21 QUESTION: So your contention is that it should
22 be enough to invoke exemption 7 if the FBI shows that the
23 statement made by a particular individual was made to an
24 FBI agent investigating a crime.

25 MR. DALY: That's correct, Mr. Chief Justice.

1 QUESTION: And that would be true even, for
2 example, if the FBI were contacting some State authority
3 in another State to determine somebody's whereabouts, or
4 their criminal record, or anything of that kind.

5 MR. DALY: Very much so, Justice O'Connor,
6 because as the --

7 QUESTION: Even though you wouldn't normally
8 think that would be considered confidential.

9 MR. DALY: I would beg to disagree, Justice
10 O'Connor, because as the declaration in the present case
11 indicates, there is a particular tradition of
12 confidentiality in the sort of information exchanged
13 between law enforcement agencies.

14 When the law enforcement agencies and the FBI
15 exchange information, there is a tacit understanding,
16 which I believe the declaration in the present case said,
17 for example, is reinforced in the daily contacts that FBI
18 special agents have with local law enforcement agencies.

19 QUESTION: Even as to routine information that's
20 a matter of public record in that State.

21 MR. DALY: Well, something like arrest
22 records --

23 QUESTION: It just strikes me that there could
24 well be people who talk to the FBI who don't have that
25 expectation.

1 MR. DALY: Well, I think, Justice O'Connor,
2 what's important is not necessarily the subjective
3 expectation of each individual, and the problem, as we've
4 pointed out, is that to base the rule on the content of
5 the information raises very problematic issues, because
6 certainly when people are contacted, they -- what they
7 know for sure is they're talking to an FBI agent about a
8 matter of criminal law. That's the entire premise for our
9 presentation.

10 An individual, or even a local police
11 department, may not necessarily know what information will
12 be particularly salient, and certainly in many
13 investigations -- after all, the present one involves the
14 murder of a police officer. Even the -- what may seem on
15 the surface to be routine --

16 QUESTION: Well, perhaps the circumstances of a
17 particular investigation would certainly justify the
18 assumption in some cases. For instance, a witness of a
19 gang-related killing or something, I think most people
20 would think those circumstances would give rise to a
21 presumption of constitutionality, but I'm not sure it
22 applies across the board.

23 MR. DALY: Well, I think the important point,
24 Justice O'Connor, is that we need a starting point for
25 this analysis. The problem, as we point out, both in

1 terms of the statutory language and the underlying
2 policies of exemption 7(D) is that you need a realistic
3 starting point because, if one has to rely on the content
4 of the information, of the particular crime that's at
5 stake, the protection that's going to be provided is going
6 to be very unreliable, and that's one of the keys to this
7 case, I think.

8 QUESTION: Well, I mean if you can determine
9 from the particular circumstances that there is a
10 likelihood of the presumption of confidentiality, that's
11 one thing, but I wonder if it should be applied across the
12 board?

13 MR. DALY: Well, Your Honor, I think the main
14 circumstance that we do know is that we know that
15 someone -- say, an individual -- has provided information
16 to the FBI in the course of a criminal investigation.
17 That very fact is very important, because the FBI has a
18 decades-long tradition of maintaining the confidentiality
19 of its records.

20 QUESTION: Does the -- is it a practice at the
21 FBI for any kind of notation to be put in the file in
22 connection with each witness interview as to whether it's
23 confidential or not --

24 MR. DALY: No, Justice O'Connor.

25 QUESTION: Or whether there's been any

1 assurance?

2 MR. DALY: No, Justice O'Connor, and that is one
3 of the key problems here.

4 QUESTION: But I guess you could do that.

5 MR. DALY: It potentially could be done
6 prospectively. We would submit that Congress hasn't
7 imposed such a requirement on the FBI, and that in itself
8 would be a very dramatic departure from the way the FBI is
9 doing business now, and on a practical level as well,
10 this -- the respondent has tried to characterize our
11 position as something new, some change. In fact, this is
12 the way the FBI has been proceeding throughout the history
13 of exemption 7(D) since it was enacted in 1974.

14 Even if one were to say that oh, the FBI could
15 change the way it does business in the future, (a) that in
16 itself would be a change that should come from Congress
17 and not the courts, and (b) that would do nothing for the
18 enormous storehouse of information which exists right now.

19 I mean, if the Court were to say, well, it's all
20 well and good, but the FBI has to show us specific
21 circumstances, for most of what's there it simply doesn't
22 exist.

23 QUESTION: Well, how about having to show just
24 the general circumstances surrounding the situation?
25 That's --

1 MR. DALY: I think part of the problem that we
2 have with the respondent's view and with the view of the
3 court of appeals is that they've never told us exactly
4 what circumstances they want to hear, and frankly we have
5 to question how useful the information would be, if one is
6 talking about the physical circumstances -- there was no
7 one else in the room. The door was closed.

8 QUESTION: Well, how about the nature of the
9 crime --

10 MR. DALY: The nature --

11 QUESTION: And the witness' relation to it?

12 MR. DALY: That is something that we will
13 sometimes be able to tell from the face of the documents,
14 but there again, I think one of the keys which we discuss
15 in our brief is the fact that Congress was aware that --
16 what needs reliable protection for sources, and in our
17 view the language of the statute gives great flexibility
18 in this regard. After all --

19 QUESTION: Well, on that point --

20 QUESTION: It could have said that so easily and
21 so explicitly. Congress had the opportunity to say, "All
22 investigatory records of law enforcement agencies." It
23 didn't. It would be so easy to say that, and you say that
24 by simply saying, "all investigatory records of law
25 enforcement agencies provided by confidential sources."

1 You're saying essentially, "provided by confidential
2 sources" means nothing -- virtually nothing.

3 MR. DALY: No, not really, Justice Scalia. You
4 must recall that there are a number of sources that the
5 FBI deals with that wouldn't qualify as confidential at
6 all.

7 There are many published sources -- for example,
8 books and magazines. Wiretaps can be very important
9 source of law information; also, unwitting witnesses who
10 provide information to, for example, an FBI agent
11 operating under cover. Now, those are all sources, in the
12 normal sense of that term, and --

13 QUESTION: You do not treat them as privileged.

14 MR. DALY: No, we do not, because the rationale
15 that we're talking about here just doesn't apply to those
16 kinds of sources. The -- in -- this Court, in CIA v.
17 Sims --

18 QUESTION: Wiretaps -- wiretaps is not provided
19 in confidence, so if you wiretap me that becomes public --
20

21 MR. DALY: It wouldn't nec --

22 QUESTION: But if you come up --

23 MR. DALY: There may be other exemptions.

24 QUESTION: Above board and ask me a question,
25 that doesn't.

1 MR. DALY: There --

2 QUESTION: That's extraordinary.

3 MR. DALY: I don't think so, Justice Scalia,
4 because when you think -- if we wiretap you, obviously
5 without your knowledge, there is nothing in those
6 circumstances from which a reasonable person could assume
7 that there was an assurance of confidentiality.

8 When -- in 1974, when Congress enacted exemption
9 7(D), the language that Congress used in the background
10 was to say that a confidential source is one who provides
11 information under an express assurance of confidentiality,
12 or in circumstances from which such an assurance could
13 reasonably be inferred. You certainly can make no
14 reasonable inference about confidentiality when you're
15 just talking on your phone.

16 QUESTION: -- communicating. How could I
17 possibly have that --

18 MR. DALY: Of course.

19 QUESTION: Exactly.

20 MR. DALY: But that's key, and that's a key
21 limitation.

22 QUESTION: That might be exempt under some other
23 provision.

24 MR. DALY: It certainly might, Justice White,
25 and I certainly wouldn't want to say that wiretaps are

1 something which we generally would give out, but the
2 rationale that we're talking about today would not apply
3 to that at all.

4 QUESTION: What would you generally give out,
5 outside of newspaper clippings? What vast amount of
6 information would be saved by this carefully crafted
7 exemption.

8 MR. DALY: Well, the kinds of information I've
9 just talked about, and also anything --

10 QUESTION: What kind, newspaper clippings and
11 things obtained from --

12 MR. DALY: Things that came --

13 QUESTION: Magazine clippings.

14 MR. DALY: If it weren't subject to some other
15 exemption, something such as information provided by
16 unwitting sources who talked to an undercover agent.
17 Also, anything that the FBI agents themselves do.

18 If they're -- there are plenty of documents that
19 were given out in this case that refer to what the agents
20 themselves were doing. As long as that is the subject of
21 the document and it doesn't relay information that was
22 given to the FBI by a source, then certainly that could go
23 out.

24 QUESTION: Mr. Daly, even on your theory of sort
25 of the implicit understanding that you find inherent in

1 just the relationship between the investigator who
2 identifies himself as such and the subject, aren't there
3 two possible implicit understandings in the absence of
4 anything explicit to the contrary?

5 One may be that yeah, I'm talking to the FBI
6 about a matter which it would be very dangerous to talk
7 about, and I may assume that if they talk with them
8 they're not going to spill the beans on me, but the other
9 understand proceeds, doesn't it, from the fact that most
10 people realize that the Government prosecutes crime in
11 open courtrooms.

12 And if you give evidence to the FBI which tends
13 to incriminate, isn't it reasonable to suppose that you
14 are quite likely going to be called to give that same kind
15 of evidence in a courtroom, and how -- on your theory we
16 ignore the second category, and I don't see how we can
17 ignore that --

18 MR. DALY: I don't

19 QUESTION: Even on your theory of implicit
20 understanding.

21 MR. DALY: I don't think we ignore it, Justice
22 Souter. Even the court of appeals in the present case
23 recognized that there were degrees of confidentiality.
24 There's also a very good discussion of that point by Judge
25 Silberman in the Mary Jones case.

1 QUESTION: Well, there are, but they're never --
2 on your -- maybe I misunderstand your position, but as I
3 understand it, on your position the possibility of there
4 being a lesser degree of confidentiality implicit with
5 respect to a given witness is in all probability never
6 going to be known or investigated.

7 I mean, how are -- if the burden is on the
8 claimant for the information to say well, I ought to know
9 who this is, because this is probably a person who would
10 have understand that he might have to testify, how is that
11 person going to make that case, on your view?

12 MR. DALY: Well, I think we have two answers
13 there, Justice Souter, and first of all I would have to
14 take issue with the notion that a person who thought that
15 he might have to testify, or even that he would probably
16 have to testify, such a person could still have an implied
17 assurance of confidentiality to an important degree.

18 This case doesn't expressly pose the issue of
19 waiver, but several of the lower courts --

20 QUESTION: Well, he could have, but if he
21 doesn't say -- if he says something, then you're not
22 resting on implication. He says, I don't want to get
23 involved, and the agent says, don't worry, you won't have
24 to be, just tell me what you know, then you're not resting
25 on your implication, but if the person says nothing, I

1 suppose it's reasonable to expect that the individual knew
2 that he might have to give evidence.

3 MR. DALY: I don't think that's so at all, and I
4 think it's important to remember that when Congress was
5 enacting 7(D) it specifically stated that confidentiality
6 was not to be limited to express confidentiality, and
7 that, I think, is one of the key problems with
8 respondent's view.

9 Essentially, what they're asking for is that if
10 you -- if the FBI is required to make this fact-specific
11 showing, and not even knowing what circumstances are going
12 to satisfy most district courts, what we're probably going
13 to be left with as the only way that we can reliably
14 protect confidentiality is expressed confidentiality, but
15 Congress didn't say that.

16 Congress said that they wanted to protect
17 sources who receive express assurances of confidentiality,
18 or who provided information under circumstances in which
19 an implication of confidentiality would naturally follow.

20 QUESTION: Well, how about my --

21 QUESTION: You said Congress said that. Where
22 did Congress say that?

23 MR. DALY: That's in the legislative history,
24 Judge -- Justice Scalia.

25 QUESTION: Well, specifically who said it?

1 MR. DALY: That was in the conference committee
2 report --

3 QUESTION: How many people are on that
4 committee, do you know?

5 MR. DALY: I can't give you the exact number.
6 as we've pointed out, that conference committee report was
7 a fairly key juncture of the legislation because there
8 were changes made in the conference committee before it
9 was finally enacted by Congress, but to return --

10 QUESTION: I think I'm still left with the
11 problem that I raised, and that is, on your theory I'm not
12 quite sure how the claimant for the information is ever
13 going to be in a very good position to say, oh, well, this
14 is a person -- we offer to prove, for example, that this
15 is a person who would not have reasonably expected
16 confidentiality.

17 MR. DALY: We acknowledge, Justice Souter, that
18 it's going to be very difficult for them to make such a
19 showing. I'd like to get to that. I want to answer,
20 actually, the other part of your question that I don't
21 think I got to yet, which is the notion that a person who
22 thinks that he might be called upon the testify later
23 would necessarily not have an implication of
24 confidentiality, and we would take strong issue with that.

25 This case doesn't expressly involve the issue of

1 waiver, but that's another issue that the courts have
2 dealt with extensively. One of the leading cases is the
3 en banc decision of the First Circuit in the Irons case.

4 In that case, that court recognized that there
5 are degrees of confidentiality, and merely because someone
6 is called upon to testify, there may be much about that
7 person's involvement with the FBI that remains
8 confidential. We don't always know, even after a person
9 testifies, everything about what he told the FBI. There
10 may be important things left.

11 As Judge Bryer concluded for the court there,
12 that residuum of confidentiality is itself extremely
13 important, and so therefore I'd say to you first of all
14 that a person who talks to the FBI merely knowing that he
15 might eventually be called upon to testify could indeed
16 still have a very strong implied assurance of
17 confidentiality because his normal expectation, and the
18 normal expectations I think of all citizens based on the
19 FBI's long practice of maintaining its record so carefully
20 and so confidentially, is that that information is not
21 going to be made generally available to the public, as it
22 is under FOIA.

23 No. Instead, the FBI's going to treat the
24 information with care, use it for certain purposes, it may
25 wind up involving testimony, but that does not mean that

1 there's no legitimate expectation of confidentiality
2 within --

3 QUESTION: Indeed, even if there were -- even if
4 you required an assurance of confidentiality, an explicit
5 assurance, you couldn't give an assurance of
6 confidentiality that would tell the person he wouldn't
7 have to testify.

8 MR. DALY: That's correct.

9 QUESTION: It would be impossible.

10 MR. DALY: That's correct, Justice Scalia.

11 QUESTION: Which would make the provision a dead
12 letter.

13 MR. DALY: Exactly.

14 QUESTION: But at least in that case you would
15 have a perfectly good argument for your degree of
16 confidentiality. You would say, well, the confidentiality
17 at least extends beyond that point which came out in
18 testimony, so you would have an easy way of applying your
19 criterion that there are degrees of confidentiality, and
20 that degree would be determined by the extent to which the
21 confidentiality was invaded by public testimony.

22 MR. DALY: Yes, but far more typically this
23 issue is raised by plaintiffs saying hypothetically
24 someone might testify, or might think that they might have
25 to testify, and therefore there's no confidentiality, and

1 that, we think, is simply not the case.

2 The problem is that on a practical level the
3 proof that would necessarily be needed under the court of
4 appeals ruling usually isn't there. What we have is the
5 fact that someone provided information to the FBI, we know
6 that it was in the course of a criminal investigation. We
7 think that the proper starting point is that there is an
8 implied assurance of confidentiality in that sort of
9 encounter.

10 And I'd also remind the court that I think the
11 language of the statute itself gives us a very important
12 point here, and that particularly involves the 1986
13 amendment to exemption 7(D). Prior to that time, the FBI
14 would have to show that the release of a record at issue
15 would result in the disclosure of a confidential source,
16 or information from a confidential source.

17 Congress changed that in 1986 to say that we
18 need only show that the release could reasonably be
19 expected to have such a result. 4 years ago in a
20 Reporters Committee, this Court recognized the
21 significance of that language, and in particular its
22 relationship to the notion that the Government may
23 frequently make its showing by means of categorical
24 showings and not by item-by-item, or as in this case,
25 source-by-source showings.

1 Think, for example, of what is, I'm afraid, a
2 typical document in question, an FBI interview report with
3 a witness. That report may begin that special agent Mary
4 Jones spoke to John Smith of 123 Main Street on February
5 24th. Smith related the following information.

6 And the document may then go on to give the
7 information, giving nothing about the circumstances of the
8 interview, but also giving nothing that would indicate
9 that the normal presumption of confidentiality shouldn't
10 apply, and the question is, what is the FBI to do with
11 that?

12 Certainly we seem not to be able to meet the
13 court of appeals test requiring specific circumstances
14 regarding the interview, but as a practical starting point
15 we submit that, yes, based on common sense and based on
16 the FBI's tradition of confidentiality there should be the
17 starting point that should be used by both the FBI and a
18 reviewing court that yes, there is an implication of
19 confidentiality there.

20 QUESTION: When was this policy first
21 challenged, in what court of appeals or in what --

22 MR. DALY: Well, it certainly goes back to the
23 Lame decision in the Third Circuit which we discussed.

24 QUESTION: When was that?

25 MR. DALY: That was 1981, I believe.

1 Unfortunately, the Lane decision was followed by further
2 Third Circuit decisions which seemed to create some
3 confusion, at least in our view, even early on.

4 QUESTION: So how many circuits have dealt with
5 it?

6 MR. DALY: Eight circuits have dealt with it
7 expressly. Seven come in our favor. The Third Circuit
8 stands alone as coming out squarely against us on this
9 issue. The Ninth Circuit in the Wiener case that we have
10 discussed --

11 QUESTION: Do you remember what the earliest
12 district court's decisions were that upheld your view of
13 exemption 7?

14 MR. DALY: I'm not sure, Justice White, when the
15 early district court decisions were. I know the case that
16 we all now look to as being the seminal case in the area
17 is the Seventh Circuit's ruling in Miller v. Bell, and
18 that came in 1981, fairly shortly after the amendment went
19 into effect.

20 The FBI has taken a consistent position on this.
21 Of course, before 1974 the issue didn't arise because of
22 the very broad exemption that they had under exemption 7,
23 but after the amendment was passed in 1974, you can see,
24 for example, we cite the 1975 memorandum by Attorney
25 General Levy which recites that confident -- that we would

1 normally be able to withhold identities in this --

2 QUESTION: So before '74 there was no question
3 about --

4 MR. DALY: No, and --

5 QUESTION: None at all.

6 MR. DALY: And since 1974, the FBI has
7 consistently taken the position that this presumption of
8 confidentiality has to be the starting point.

9 QUESTION: And every court up until now has
10 agreed with you.

11 MR. DALY: Well, as I said, you can go back to
12 the earlier Third Circuit decisions. We think there was
13 some reason for doubt even within the Third Circuit
14 because of different decisions, but apart from the Third
15 Circuit, yes, we've been prevailing all along.

16 I think it's important also --

17 QUESTION: Mr. Daly, you say as a first step at
18 least they should -- what's the second step? What does
19 the person who wants information, what does he do when the
20 FBI says well, presumptively in the absence of other
21 indication, as you put it, this is confidential? What do
22 I then do as the requester?

23 MR. DALY: We readily acknowledge, Justice
24 Scalia, that it's a very difficult point, and there would
25 be very, very few cases in which the presumption can be

1 rebutted. We think that's appropriate, because indeed,
2 this sort of implied confidentiality is the norm. There
3 may be a few cases --

4 QUESTION: Well then don't describe it as a
5 first step. I mean, you're really just closing the door,
6 as a practical matter.

7 MR. DALY: As we've noted in our brief, there
8 may be some rare cases, and we admit that they're rare, in
9 which the presumption may be rebutted. This happened in
10 Miller v. Bell itself. The Seventh Circuit found an
11 unusual circumstance in which a particular witness was
12 known of and disavowed from the start any notion of
13 confidentiality.

14 We admit that it's going to be rare, Your Honor,
15 but we also think it's important to recognize that the
16 policies of exemption 7(D) require protection of
17 confidential sources, and if we are to use the approach of
18 the Third Circuit, we won't be able to do that.

19 QUESTION: I don't mind if the result is rare.
20 I -- it strikes me as rare that the requester even has the
21 tools to challenge. How do I know what the circumstances
22 are? I just have to trust you to say that the
23 circumstances are such that it was provided under an
24 assurance of confidentiality, don't I?

25 MR. DALY: That, unfortunately, is often the way

1 things wind up working under FOIA, because the plaintiff
2 never has the documents to begin with.

3 Certainly, if there's any particular reason to
4 think that the circumstances are unusual, if the plaintiff
5 could articulate something, then perhaps that would
6 justify in camera review. That's always available, and as
7 we mentioned in our reply brief there was a recent Tenth
8 Circuit case in which we invoked this theory and the Tenth
9 Circuit deemed it appropriate to look at the documents and
10 they said, yes, we've determined that's right.

11 I think in the absence of some articulable
12 reason to think that there was something unusual going on,
13 then yes, you should keep to the presumption that there is
14 an implied confidentiality here.

15 QUESTION: Mr. Daly, you gave some examples
16 earlier of, say, an undercover agent talking to people,
17 and there you would agree that there's no presumption of
18 confidentiality. Can we tell from the materials you filed
19 in this case that that is not what happened in this case,
20 that some of these people whose interviews are not being
21 disclosed were simply undercover agents talking to people
22 who had no idea they were even FBI agents?

23 MR. DALY: If one looks at the files in this
24 case one can tell that we have not withheld in that
25 circumstance. One can look at the documents and tell that

1 information is from a source, and --

2 QUESTION: Do you have to look at the documents
3 to tell that?

4 MR. DALY: Oh, I think so, yes. We would have
5 to look at the documents.

6 QUESTION: Well then, how would the requester
7 know whether it was an undercover agent or just a regular
8 interview?

9 MR. DALY: Certainly, the requester wouldn't
10 know initially.

11 QUESTION: Do you identify those cases in which
12 it is a regular interview as opposed to an undercover
13 agent? I couldn't find it right here, but I remember when
14 I read the briefs I had the impression that I couldn't
15 tell whether this might have been somebody who just was --
16 had a discussion with an FBI agent who was not even known
17 to be an FBI agent.

18 MR. DALY: The entire theory that we are
19 advancing in this case would simply not apply, and we
20 would not --

21 QUESTION: I know the theory wouldn't apply, but
22 the documents that you file in the district court
23 supporting your refusal to produce don't tell the judge
24 whether he might not have been an undercover agent, as I
25 read them. Am I wrong on that?

1 MR. DALY: I'm not sure that we specifically
2 addressed in the affidavit the notion of --

3 QUESTION: I don't think you do.

4 MR. DALY: No, but the entire theory that we
5 presented simply wouldn't apply, and we would not --

6 QUESTION: I understand your theory would not
7 have --

8 MR. DALY: We would not have used it --

9 QUESTION: But it seems to me --

10 MR. DALY: In that particular --

11 QUESTION: The papers that you are arguing are
12 sufficient would prevent disclosure of the cases which you
13 say -- in cases where you say there should be disclosure.

14 MR. DALY: That presupposes that we would be
15 misrepresenting --

16 QUESTION: No, you're not misrepresenting, you
17 just file something to say you should presume
18 everybody's -- basically, you've said everybody we talk to
19 should be presumed to be a confidential informant.

20 MR. DALY: No, we've said more than that. We
21 said that these are people we talk to in the course of a
22 criminal investigation --

23 QUESTION: Right.

24 MR. DALY: And that those people have a
25 legitimate expectation of confidentiality because of those

1 -- that circumstance.

2 QUESTION: You didn't say that as to the
3 particular, you said that's our general practice.

4 As I understood the paper, you were basically
5 describing a general practice which would generally
6 support -- when the practice applies, would generally
7 support confidentiality, but under that umbrella it seems
8 to me you're going to pick up all these cases in which you
9 think there should be disclosure.

10 MR. DALY: Well, I can represent to you, Justice
11 Stevens, that we would not be doing that, and we view that
12 as inconsistent with the representation that we made in
13 the court.

14 QUESTION: But my problem is -- I'm not
15 questioning your good faith, of course, but my problem is,
16 how -- I can't tell whether a requester could tell whether
17 you'd done that or not, and requesters tend to be
18 suspicious, of course. Maybe I'm not making my point
19 clear.

20 MR. DALY: Perhaps we could -- we could make a
21 specific recitation that we would not invoke this theory
22 in the circumstance where the information was given to an
23 undercover agent, but we think that is there in what we
24 said, because our theory that we do expound just simply
25 wouldn't apply in a case like that.

1 QUESTION: Well, I understand your theory in
2 this Court wouldn't, and so forth, but I'm concerned about
3 the particular case where you file this boilerplate
4 affidavit which seems to me is so broad that it would
5 cover every interview.

6 MR. DALY: We don't view this affidavit as
7 covering those instances, Justice Stevens.

8 QUESTION: But my problem is, I don't know how
9 the district judge or the requester could tell by reading
10 the affidavit that maybe some zealous FBI agent had used
11 it inappropriately --

12 MR. DALY: I still --

13 QUESTION: Without saying anything false,
14 because there's no false representation in it.

15 MR. DALY: I think there would be something
16 inherently false in that, because the theory that we
17 discuss in that affidavit would simply not be applicable
18 to an undercover source.

19 I'd like to reserve the remainder --

20 QUESTION: If you have an ongoing undercover
21 source, someone who is still undercover, and the request
22 is for the production of that statement, is there another
23 exception in section 7 that you could and likely would
24 invoke in order to maintain the confidentiality of the
25 record?

1 MR. DALY: Certainly, if there were an ongoing
2 investigation, exemption 7(A) of the FOIA would apply, and
3 as to the identity but not the content of the information,
4 exemption 7(C).

5 Thank you, Mr. Chief Justice.

6 QUESTION: Very well, Mr. Daly. Mr. Mullin,
7 we'll hear from you.

8 ORAL ARGUMENT OF NEIL MARC MULLIN

9 ON BEHALF OF THE RESPONDENT

10 MR. MULLIN: Mr. Chief Justice and may it please
11 the Court:

12 The FBI offers essentially three arguments in
13 support of its nearly irrebuttable presumption. One is
14 its claim that as a factual matter the FBI's presumption
15 mirrors the relationship between itself as an agency and
16 its sources. That is, what my adversary just said holds.
17 In the context of a criminal investigation, sources expect
18 confidentiality, typically, and typically the FBI assures
19 it. I call that the setting argument.

20 The second argument is a pragmatic argument.

21 QUESTION: Call it the what?

22 MR. MULLIN: The setting. That is, in the
23 setting of a criminal investigation, confidentiality is
24 inherent.

25 The second argument is that -- is what I'm

1 calling a pragmatic argument, which is that the FBI --
2 that if the presumption that the FBI seeks here today is
3 not granted there will be some sort of administrative or
4 adjudicative havoc, that the FBI is not prepared to come
5 forward with case-specific proofs in the event this Court
6 affirms the Third Circuit, that the FBI doesn't maintain
7 records of confidentiality.

8 Even though confidentiality is so important, the
9 FBI tells us, they maintain no records, so that an agent
10 in 1952 doesn't know whether in 1946 a source was assured
11 confidentiality -- no records.

12 Third is a textual claim that the 1986
13 amendments and their history provide a statutory basis for
14 the presumption. This argument is somewhat of a moving
15 target. In their reply brief the FBI seems to shift from
16 the affirmative posture of its main brief that the 1986
17 language provides a textual basis for its presumption to a
18 claim -- a more cautious claim that FOIA simply doesn't
19 preclude a presumption.

20 The FBI's claim that in the setting of a
21 criminal investigation virtually all witnesses typically
22 require confidentiality doesn't ring true in the context,
23 for example, of this case. Before the criminal trial of
24 the matter underlying this case, numerous FBI
25 investigative reports prepared by the FBI were turned over

1 to my client. I was not the trial lawyer.

2 In those discovery documents, the names of 41
3 law enforcement personnel were revealed, 31 witnesses were
4 revealed by name, and 16 of them by address. The fact
5 that some of these witnesses testified at trial appears in
6 press clippings in the disclosures that the FBI made to
7 me.

8 Indeed, the Hudson County Prosecutor's Office
9 that worked --

10 QUESTION: And your point is that that shows
11 that there was no assurance of -- but they couldn't give
12 an assurance of confidentiality that they wouldn't be
13 compelled to disclose some matters in the course of --

14 MR. MULLIN: Exactly.

15 QUESTION: Well then, there's no such thing as
16 an assurance of confidentiality if you insist that it be
17 absolute.

18 MR. MULLIN: No, I don't insist that it be
19 absolute, Your Honor.

20 QUESTION: Well, this is in the course of
21 litigation that they turned it over. They just didn't
22 say, hey, you want these names -- here. It was in the
23 course of a discovery request filed with them, is that
24 right?

25 MR. MULLIN: I think -- yes, that's right.

1 Well, if confidentially means even people who
2 get up in front of public -- in front of trials, in front
3 of juries, in front of cameras and newspapers, then I'm
4 wrong and the FBI's right. That's what confidentiality
5 means.

6 QUESTION: Well, I mean, people tell me things
7 sometimes, and say keep it confidential, and I often tell
8 my wife. I don't feel I'm breaking a -- I mean --

9 MR. MULLIN: Exactly.

10 QUESTION: You know, but I don't blab it around.

11 MR. MULLIN: And if I -- Your Honor, and if I'm
12 a source, and I tell the FBI to maintain confidentiality,
13 what I mean is, you can tell law enforcement people as
14 needed, but please, don't tell the people over there that
15 want to kill me or harass me. I want anonymity.

16 In the case of an entity, Your Honor, which is
17 also covered by 7(D), it may not mean anonymity, it may
18 mean, I need secrecy. Sure, everybody knows that the New
19 York Police Department is a source of the FBI, but don't
20 reveal my operational secrets.

21 And in the parlance of the congressional
22 discussion of 7(D) and 7 broadly, in that parlance, in
23 that usage, it became clear that what Congress was talking
24 about was anonymity, confidentiality in the sense I'm
25 talking about. Director Webster, Director Casey appeared

1 there -- they were worried about people who feared that
2 detriment would come to them.

3 QUESTION: Why couldn't they use the word,
4 anonymous, then, rather than confidential?

5 MR. MULLIN: They used the word, "confidential"
6 in order to broaden the category from "informer," which
7 was in the original draft. They used the word
8 "confidential" to show they weren't just considering paid
9 informants or cloak-and-dagger informants in the
10 traditional sense, so they chose the word, "confidential."

11 Would that they had used a phrase such as they
12 used in the debate interchangeably with confidential
13 source. You know, would that they had used the phrase,
14 anonymous or some element of secret, and we wouldn't be
15 here today.

16 I agree to you there is some element of
17 ambiguity in the phrase, "confidential source," that
18 requires us to look at the congressional debate, just as
19 this Court in Abramsom looked at the usage of the
20 word, "record" in the congressional discussion in order to
21 determine its meaning.

22 In the real world, as in this case -- this case
23 involved a police killing, and what I'm telling the Court
24 is people came forward freely, openly, wanting to help.
25 Those that didn't want to get involved, to use an

1 expression, didn't get involved. They didn't give
2 statements at all.

3 But those that chose to get involved in this
4 very serious crime as witnesses came forward, provided
5 their names and addresses, testified at trial -- in the
6 real world there is no invariable setting. This is the
7 point I'm trying to make.

8 While sources will require anonymity or degree
9 of secrecy of information, the average witness to some
10 discrete aspect of a crime, having made the difficult
11 threshold decision to get involved, does not thereafter
12 typically require some sweeping confidentiality.

13 QUESTION: Well, we're talking, I guess, about
14 two different suppositions. One is the supposition that
15 you advanced to us just now based on your own experience.
16 The FBI says something different. How do we evaluate
17 that?

18 MR. MULLIN: Well, there's great difficulty in
19 evaluating, because the FBI has not provided this Court,
20 or Congress for that matter, with a record. The FBI
21 hasn't told us what percentage of sources want
22 confidentiality in the narrow sense, what percentage of
23 sources need some kind of anonymity, which entities
24 require some level of secrecy.

25 Mr. Daly stands up and tells -- in response to,

1 I believe it was Justice O'Connor's question, no, we keep
2 no records of confidentiality, we make no notation.
3 That's not in the record. That's not here, and it's not
4 in the Congressional Record, because Congress was not
5 grappling with the problem Mr. Daly brings to this Court
6 in 1981, '82, '83, '84. Congress was not confronted by a
7 law enforcement community that said, gee, it's going to be
8 difficult, if not impossible, to prove a source
9 confidential.

10 In all those pages of Congressional Record, the
11 FBI has not cited to this Court one phrase suggesting that
12 problem was what Congress was grappling with when it
13 drafted exemption, redrafted it in 1986. No, Your Honor,
14 there is no evidentiary basis, and no basis in the
15 Congressional Record, for justifying, supporting this
16 sweeping presumption. There is no basis for this Court to
17 conclude that that presumption nears reality.

18 QUESTION: Well, Mr. Mullin, it seems to me the
19 Third Circuit went pretty far in requiring case-specific
20 proof here, and I'm just wondering if a considerably
21 lesser evidentiary showing wouldn't suffice. For
22 instance, what's investigated here is a gang crime, and
23 it's logical that witnesses are going to be nervous about
24 exposing their identity.

25 MR. MULLIN: Sure. If a witness --

1 QUESTION: Do you defend the precise holding of
2 the Third Circuit here on its requirements?

3 MR. MULLIN: I am burdened by the formulation
4 used by the Third Circuit. It's a difficult burden to
5 defend it in that precise formulation, but --

6 QUESTION: Yes. I just wonder if they haven't
7 gone too far, and whether some much lesser showing might
8 not suffice and still be case-by-case.

9 MR. MULLIN: I think what's happened here, Your
10 Honor, is that because this presumption took hold
11 throughout the circuits actually much later than might
12 have been suggested in the brief of the FBI, the
13 development of the common law, if you will, of
14 exemption 7, has been truncated. The courts have not been
15 struggling with the issue you speak of and trying to
16 devise methods of proof.

17 I think that if this Court will condemn,
18 disapprove this sweeping presumption, it will necessarily
19 open up a practical process of developing workable rules.
20 Your Honor suggested what might be a factually based or
21 grounded presumption. Suppose someone knowingly gives
22 inculpatory information about a known organized crime
23 figure? Certainly in those circumstances, where there is
24 a known, substantial threat of detriment, there should be
25 a presumption of confidentiality, arguably.

1 QUESTION: But how would one know all that just
2 from a record of the interview?

3 MR. MULLIN: Well, I think the FBI should tell
4 us, or tell Congress what is in its records. I suspect
5 the FBI takes detailed notes, Your Honor --

6 QUESTION: Well, you say tell Congress. Now
7 you're talking about, what, amending the statute again?

8 MR. MULLIN: Your Honor, I hope it doesn't come
9 to that. What I'm suggesting is that the FBI probably has
10 a higher level of detail in its files than it suggests
11 here. Why? When Director Webster testified before
12 Congress, he provided hundreds of detailed examples of the
13 circumstances surrounding interviews with sources where in
14 they requested anonymity or secrecy, or expressed those
15 fears. Where did the director get those literally
16 hundreds of detailed examples, if not from the FBI's
17 records?

18 I suggest that it is not worthy of credence when
19 the FBI tells us here that they don't have records that
20 can satisfy a more -- a higher level of specificity.

21 The law has been unsettled in this area.
22 Certainly one reading Vaughn v. Rosen in 1974 would not
23 predict the Dow case some years later. Vaughn seemed to
24 suggest that the agencies would be required to submit a
25 high level of specification in defending exemptions.

1 And then there was Lame in 1981, and there was
2 Keeney in 1980, a Second Circuit case that seemed to echo
3 the Third Circuit's rule, and there was the Dearing
4 Milliken case in 1977 that said, whether or not a source
5 is confidential is a question of fact.

6 Is it possible that the FBI, in the face of an
7 unsettled body of law, took the most aggressive approach
8 and said we'll follow the majority rule even before it was
9 a majority rule and didn't keep records in the event this
10 Court should some day resolve this unsettled body of law
11 by saying no, this presumption has no basis in this
12 statute, this presumption has no factual basis?

13 That proposition is not worthy of credence. I
14 submit that the FBI obeyed the law in the Third Circuit,
15 as they had to, and that the FBI made case-specific
16 determinations, at least within that circuit and that,
17 given the unsettled nature of the law, the FBI kept
18 accurate records such as the director relied on, such as
19 the DEA relied on when it submitted numerous detailed
20 examples of circumstances surrounding interviews.

21 QUESTION: Mr. Mullin --

22 MR. MULLIN: Yes.

23 QUESTION: I take it that -- there are two parts
24 to the exemption. The first part is you can keep out
25 information that could reasonably be expected to disclose

1 the identity of a confidential source. The second part
2 is, in the case of information compiled by a criminal law
3 enforcement agency you can keep out not only the
4 information that will disclose the identity, but all of
5 the information.

6 MR. MULLIN: That's right.

7 QUESTION: Now, it's pretty clear what the
8 reason --

9 MR. MULLIN: Yes, sir.

10 QUESTION: For that, isn't it? We don't want to
11 take a chance --

12 MR. MULLIN: That's right.

13 QUESTION: That any snippet of information you
14 might provide might enable the requester who, in some
15 cases is a very dangerous person --

16 MR. MULLIN: That's right.

17 QUESTION: Behind bars in prison who files a
18 FOIA request.

19 MR. MULLIN: That's right.

20 QUESTION: We don't want to take the chance --

21 MR. MULLIN: That's correct.

22 QUESTION: Of some piece of information that
23 means nothing to us meaning a lot to him and enabling him
24 to identify a victim.

25 MR. MULLIN: That's correct.

1 QUESTION: Now, is it in accord with that
2 prophylactic approach to this statute to handle it the way
3 that you're suggesting, to require the FBI in each case --
4 and in some case they can't come up with the necessary --
5 well, we made a mistake, somebody dies. Too bad.

6 MR. MULLIN: Your Honor, a number of answers. I
7 think that's a very, very weighty question, and when I
8 make the argument here I'm not unaware of the dangers that
9 exist for informants.

10 Fortunately, 7(D) is not the only way Congress
11 dealt with that problem. 7(F), as you know, was expanded.
12 if an informant's, or confidential source's, or anybody's
13 life or safety is threatened in any way, it could
14 reasonably be expected to be threatened, all the FBI has
15 to do is check off 7(F) and there's no danger to life or
16 safety.

17 QUESTION: Make them prove that just the way
18 you're making them prove this. I mean, can they adopt a
19 categorical rule in the case of any request from violent
20 people in prison? We're going to assume that any names we
21 give them, or any information we give them might help them
22 to get somebody. You wouldn't let them do that.

23 MR. MULLIN: No. I think you're raising a
24 weakness in the text of this statute. I think it's
25 important that courts remain very sensitive to the dangers

1 here. Whatever this Court rules, it must remind them of
2 the dangers here. Workable rules that are based in fact
3 have to be developed so that groups of witnesses, groups
4 of sources can be analyzed, so that presumptions that are
5 factually based can be utilized.

6 Well, that's exactly right. The FBI didn't
7 present this problem to the legislature. They presented
8 the mosaic problem but not this problem, and now they are
9 presenting a problem they sat silently about. In 1981,
10 '83, '84, they didn't mention this problem to Congress,
11 not once, even though they brought the Lane decision to
12 the attention of Congress.

13 QUESTION: Because they thought it meant --
14 maybe it's because they thought it meant what they now say
15 it means. They thought it enabled them to say
16 categorically of course this information was proven. Isn't
17 that a possible explanation of why they said nothing?

18 MR. MULLIN: Respectfully no, Your Honor,
19 because the FBI premises its categorical argument on case
20 law that arose after Lane, especially Reporters Committee,
21 the '86 case, so I don't think that the categorical
22 approach to the -- I don't think the exemptions that were
23 in jurisprudence had developed to a point in 1981 when
24 Lane came down to where the FBI would have anticipated a
25 categorical --

1 QUESTION: -- circuit case that --
2 MR. MULLIN: Miller v. Bell.
3 QUESTION: Was that 1980?
4 MR. MULLIN: That was 1981, I believe.
5 QUESTION: 1981. Well, that was -- that
6 sustained the view of the FBI.
7 MR. MULLIN: That's correct.
8 QUESTION: And so why should it think it had a
9 problem?
10 MR. MULLIN: Well, I should think they'd have a
11 very great problem, Your Honor, with such a deep split in
12 the circuits. The Seventh Circuit adopted the approach
13 they urge here in '81, and in '81 the Third Circuit
14 explicitly adopted the approach it took in my case, the
15 Landano case.
16 It would seem to me that in those circumstances
17 if the FBI really thought this was a problem they would
18 have brought that split in the circuits to the attention
19 of Congress. In a Congressional Research Report that was
20 put into the record by the sponsors of the 1986
21 amendments, which I've cited in my brief, the research
22 group says that "this amendment to exemption 7 is not
23 intended to overrule any specific case, or any specific
24 line of authority," and I've quoted that in my brief.
25 That means Lame, according to that --

1 QUESTION: Who said that?

2 MR. MULLIN: That was the CRS, Your Honor, the
3 Congressional Research Service.

4 QUESTION: Did it speak as to the intent of
5 Congress?

6 MR. MULLIN: No, but it was put into the record
7 by one of the sponsors, Your Honor. Excuse me.

8 On page 38 in my brief, Senator Leahy, a co-
9 drafter and co-sponsor of the '86 amendments to exemption
10 7, referring to the proposed substitution of "could
11 reasonably be expected" for the language "would," put into
12 the record the Congressional Research analysis which said,
13 "The proposed amendment does not appear to be prompted by
14 any particular case or line of cases that have enunciated
15 a contrary standard of the degree of risk of harm that
16 must be shown to justify assertion of exemption 7(A) (D)
17 or (F)."

18 QUESTION: I think it's fair to conclude from
19 that that Senator Leahy agreed with the Congressional
20 Research Service, don't you think --

21 MR. MULLIN: That's often the case --

22 QUESTION: And probably not much else.

23 MR. MULLIN: Well, one thing we can say, that
24 not once did Congress consider this problem, and I'm
25 talking about all the Senators and all the Congressmen.

1 They didn't hear about this proof problem or this
2 administrative problem, and because they didn't hear about
3 it, they didn't address it.

4 The language in exemption 7 that was as modified
5 in 1986 was not directed at this problem. The FBI
6 therefore has a very difficult textual problem. Even when
7 this Court adopted a categorical approach to exemption
8 7(C), still it sought a textual basis in the "could
9 reasonably be expected" language, as it did in Grolier, as
10 it did in Robbins. This Court has always sought a textual
11 basis.

12 QUESTION: The Seventh Circuit in Miller
13 presumably ruled for the FBI on the basis of the statute
14 as it existed before 1986.

15 MR. MULLIN: Of course.

16 QUESTION: So I mean, are you suggesting that
17 unless the Government can make its case through the 1986
18 amendments, it must fail completely?

19 MR. MULLIN: I'm suggesting that the Government
20 must show this Court a textual basis in FOIA as amended in
21 '86. Why? Because this Court has held that unless
22 exemptions are clearly delineated in the statute, then
23 they will not be honored.

24 Can anyone -- I'm sure the FBI would not contend
25 before you today that -- would not deny that their

1 presumption expands the exemption 7(D), gives it a much
2 broader impact, but this Court has said that if an
3 exemption is not clearly delineated, it doesn't exist, and
4 this Court has said --

5 QUESTION: Well, then the --

6 MR. MULLIN: The exemption should be narrowly
7 construed.

8 QUESTION: The courts of appeals such as the
9 Seventh Circuit and the ones that followed were simply
10 wrong, then, in your view.

11 MR. MULLIN: Yes. Yes. I feel a little bit
12 like the guy who said the emperor has no clothes on. I'm
13 saying it. The emperor has no clothes on.

14 QUESTION: We --

15 MR. MULLIN: All these circuits are wrong.

16 (Laughter.)

17 QUESTION: We have in fact said that,
18 Mr. Mullin. We haven't always behaved that way, though,
19 you must admit that.

20 MR. MULLIN: Yes, I do.

21 QUESTION: That our cases --

22 MR. MULLIN: Yes, I do.

23 QUESTION: Don't always square with that noble
24 sentiment that we've expressed.

25 MR. MULLIN: Well, I think I've covered most

1 everything. I suppose I should close on --

2 QUESTION: -- overruled a majority of the courts
3 of appeals.

4 MR. MULLIN: I know it wouldn't, and my
5 inclination is to stop while I have the illusion that I'm
6 ahead.

7 (Laughter.)

8 MR. MULLIN: Thank you very much for your time.

9 QUESTION: Thank you, Mr. Mullin. Mr. Daly, you
10 have 2 minutes remaining.

11 REBUTTAL ARGUMENT OF JOHN F. DALY

12 ON BEHALF OF THE PETITIONERS

13 MR. DALY: Thank you, Mr. Chief Justice.

14 I think it's important to keep in mind, as this
15 Court has frequently noted, that the Congress intended for
16 it to be governed by workable rules. That is not simply a
17 matter of administrative convenience or burden. It really
18 goes to the heart of what the policy of exemption 7(D) is
19 all about.

20 What's at stake here is very important. It's
21 the FBI's practical ability to protect confidential
22 sources, and contrary to what respondent says, it is
23 altogether very frequently the case that we simply do not
24 have the sort of detailed information about circumstances
25 of particular interviews, and even beyond that, I think

1 it's important to remember that Congress recognized that
2 the public needs to have some certainty, some real
3 assurance that the FBI is able to protect a confidential
4 source.

5 That won't exist if this issue winds up being
6 decided on an ad hoc basis by judges who are frequently
7 approaching the issue years after the fact, if we have to
8 rely on showing the physical circumstances such as whether
9 the door was shut or not, and also if we have to rely on
10 the content of the information, if we have to say district
11 judges saying, well, a murder investigation is sensitive,
12 but some other Federal crimes and Federal criminal --
13 Federal financial crime isn't. That's not going to give
14 us a sort of workable rule.

15 QUESTION: Could I ask you, let's just assume
16 that all that was involved here was how you should operate
17 in the future. Would it really be any burden to you to
18 tell every witness that, even if he didn't ask for it,
19 you'd say, this is confidential.

20 MR. DALY: I think that could be a significant
21 burden, because it would change the way the FBI does
22 business, and --

23 QUESTION: Well, it may be, but what would be
24 burdensome about it?

25 MR. DALY: The -- to be honest, Justice White,

1 I'm not prepared today to talk about how that would
2 involve day-to-day law enforcement activities, because
3 that's an issue -- that's -- it's a legislative issue. If
4 Congress wants to change the way the FBI does business,
5 then it may do so. I can only tell you --

6 QUESTION: Well, that's hardly an answer to my
7 question. You just don't know what the answer is, I
8 guess.

9 MR. DALY: Well, the FBI has assured me that it
10 would indeed change the way that they do business. It
11 would not only impose a practical burden, but could also
12 change the interaction between witnesses and the FBI, and
13 of course, Congress hasn't done that, and of course --

14 QUESTION: It might make the witness shut up if
15 you told him what he said was confidential.

16 MR. DALY: It's possible, and it would do
17 nothing for our concerns about existing records.

18 Thank you, Mr. Chief Justice.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Daly.
20 the case is submitted.

21 (Whereupon, at 1:52 p.m., the case in the above-
22 entitled matter was submitted.)
23
24
25

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:

United States Department of Justice, Et AL., Petitioners

v. Vincent James Landano Case No.: 91-2054

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

BY *Lona M. May*

(REPORTER)