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IN THE SUPREME COURT OF THE UNITED STATES

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OFFICE OF INDEPENDENT :  
COUNSEL, :  
Petitioner :

v. : No. 02-954

ALLAN J. FAVISH, ET AL. :

- - - - -X

Washington, D. C.  
Wednesday, December 3, 2003

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:02 a.m.

APPEARANCES:

PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D. C. ; on  
behalf of the Petitioner.  
JAMES HAMILTON, ESQ., Washington, D. C. ; for Respondents  
Anthony and Moody; on behalf of the Petitioner.  
ALLAN J. FAVISH, ESQ., Santa Clarita, California; on  
behalf of the Respondent Favish.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 02-954, the Office of Independent Counsel v. Allan J. Favish.

Ms. Millett.

ORAL ARGUMENT OF PATRICIA MILLETT

ON BEHALF OF THE PETITIONER

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

In the course of their investigative work, Federal law enforcement officials, of necessity, routinely come into possession of substantial amounts of highly sensitive and highly personal information. Sometimes that information includes graphic death scene and autopsy photographs. Those photographs are taken for the limited and restricted use of law enforcement and public safety officials. They are not freely available to the general public as a matter of law, custom, or practice.

The question presented in this case is whether death scene photographs should be broadly disclosed to the general public under the Freedom of Information Act. They should not. The Freedom of Information Act's purpose is not maximum disclosure, but responsible disclosure, and the publication of death scene photographs goes beyond the

1 bounds of responsible disclosure, because in the terms of  
2 exemption 7(C), production could reasonably be expected to  
3 constitute an unwarranted invasion of the personal privacy  
4 of surviving family members.

5 In ordering the release of four photographs in  
6 this case, the court of appeals recognized that that  
7 substantial intrusion on privacy would occur, but it then  
8 committed three errors in assessing the countervailing  
9 public interest in disclosure.

10 QUESTION: Must there be identifiable family  
11 members to suffer this invasion of privacy? Would it just  
12 be automatic instead? The - a scene like this, you would  
13 assume that there was someone?

14 MS. MILLETT: No, the - the practice of the  
15 Federal Government is that we need to identify the  
16 existence of a survivor. There was a case in the D. C. -  
17 excuse me - District Court, named Outlaw, that I believe  
18 was cited in respondent's brief, where the Department of  
19 Defense had asserted survivor privacy without having first  
20 identified a survivor, and that was held to be  
21 impermissible, and as a matter of practice, because this  
22 is sort of specialized application of privacy interest,  
23 the Government identifies a survivor before invoking it.  
24 But that is often not a difficult job because the types of  
25 records that bring the photos to us, law enforcement

1 records, military records when it's a military service  
2 member who's been autopsied, will often contain, or allow  
3 the identification, of family members.

4 QUESTION: And if you're so unfortunate as not to  
5 have survivors, or to have survivors who don't like you,  
6 the most embarrassing and gory photographs of your body  
7 can be released?

8 MS. MILLETT: Well, Justice Scalia, that has been  
9 the practice after the Outlaw decision of the Federal  
10 Government. It - it's not inconceivable to me that  
11 because you're talking about an objective test, at least  
12 under 7(C) - some of these photographs are held - upheld  
13 under - or withheld under exemption 6, which doesn't have  
14 the same objective test language. It's not inconceivable  
15 that the Government could justify withholding, in a  
16 situation like after the collapse of the World Trade  
17 Center towers, and their substantial amounts of - sorry,  
18 but, for the graphic nature - but partial remains that  
19 can't be matched with particular individuals.

20 But we know that for some significant percentage  
21 of those people, there are a significant percentage of  
22 survivors on a match for match. In that case, I think we  
23 would argue should not be required and that withholding  
24 could be done because we -

25 QUESTION: But only on the assumption that there

1 are survivors?

2 MS. MILLETT: On the assumption that there - a  
3 reasonable - obviously, a reasonable assumption -

4 QUESTION: I don't know why that's necessary. I  
5 don't know why you - you can't say, and I think some  
6 courts have held, have they not, that - that there is a  
7 privacy interest in the - in the person who's died?

8 MS. MILLETT: For the most part, courts have said  
9 that privacy dies with the individual, but again, the  
10 problem in this case is the Ninth Circuit didn't think we  
11 were withholding too little. It rule - it ruled that we  
12 were withholding too much that - and that, in fact, when  
13 there are known survivors, these - these disturbing  
14 photographs still have to be released. And in doing that,  
15 they committed three errors.

16 QUESTION: Before we get to that though, on the  
17 question that was asked, if there are no survivors, given  
18 that the main rule of FOIA is disclosed, unless you fall  
19 under an exemption, and exemptions are to be narrowly  
20 construed, I don't think the - the Government could  
21 suppose, could hypothesize an interest that may or may not  
22 have existed in the decedent when there are no survivors.

23 MS. MILLETT: Well, Justice Ginsburg, that has  
24 been the Government's practice, is to identify a survivor,  
25 but again, I think our position is, because the nature of

1 our world has changed and we now have to deal with  
2 situations involving mass deaths, that we aren't going to  
3 insist when you have a large collection of remains and we  
4 know that for some percentage of those there - there are  
5 survivors, that withholding would still be permissible.

6 QUESTION: But why is that any less of a leap  
7 than saying the deceased - the deceased's privacy is being  
8 invaded? Why is it less of a leap to say that the privacy  
9 - the privacy of the survivors is being invaded? It  
10 doesn't seem to me that it's - it's their privacy that's  
11 being invaded. It's - it's their - their sensitivity,  
12 various other things, but - but it seems to me strange to  
13 speak of their having a privacy interest. Surely they  
14 have an interest in not having their - their - their  
15 relative displayed this way, but I - I wouldn't normally  
16 call that a privacy interest.

17 MS. MILLETT: Well, Justice Scalia, the common  
18 law - a number of common law courts did, and they did -  
19 and we cite - one of the very first common law courts ever  
20 to recognize the right to privacy, in 1895, the Schuler v.  
21 Curtis case, which is cited in our reply brief, found  
22 exactly a privacy interest in the survivors, and it said  
23 it is not the privacy interest of the deceased, because  
24 under the common law tradition, privacy dies with the  
25 individual.

1                   But what's being protected here is the  
2 survivors. It sort of takes three forms, first of all,  
3 their - their memory of the deceased, their ability to  
4 provide a dignified disposition of the body, and the  
5 ability to have seclusion in their grief and repose and  
6 closure. And those concepts packaged together have been  
7 recognized as a privacy right, both at tort law by a  
8 number of courts, and more broadly, by custom and practice  
9 in this country. These types of photographs are not  
10 freely available virtually anywhere. A large number of  
11 states, as we've cited in our brief, prevent their  
12 disclosure or have restrictions on their disclosure.

13                   QUESTION: Well, I guess we're, in this case,  
14 asked to apply FOIA's exemption 7(C) to interpret it  
15 anyway.

16                   MS. MILLETT: Yes.

17                   QUESTION: Right?

18                   MS. MILLETT: Yes.

19                   QUESTION: So that's what we're focused on.

20                   MS. MILLETT: Yes.

21                   QUESTION: And what do you propose as the test?

22                   MS. MILLETT: The test - the test is, as this  
23 Court has - to decide whether a - a invasion of privacy is  
24 clearly unwarranted, you have to weigh and balance the  
25 intrusion on privacy against the extent to which the



1 information disclosed would, in this Court's Reporters  
2 Committees decision, contribute significantly to public  
3 understanding of the operations or activities of the  
4 Federal Government. And in this case, on one side of the  
5 balance is a substantial intrusion on privacy, requiring -  
6 exposing this sort of information out where family  
7 members will see it, encounter it, where they will know  
8 that their - that their loved one has not been buried in  
9 any sense.

10 QUESTION: Is that the test that the CADC used in  
11 the Accuracy in Media case involving these same photos?

12 MS. MILLETT: They used a - the same balancing.  
13 They recognized the -

14 QUESTION: So whatever you're proposing, you  
15 think the CADC correctly employed in that case?

16 MS. MILLETT: The - there - with - with one  
17 qualification, which I don't think is a distinction -  
18 don't think it's a distinction that makes a difference.  
19 Certainly on the privacy interest side, they agreed with  
20 us that there's a survivor privacy interest and that that  
21 has to be balanced under this Court's Reporters Committee  
22 standard.

23 Now, the D. C. Circuit has said with - when the  
24 public interest that's asserted is substantial allegation,  
25 or is unsubstantiated allegations of governmental

1 misconduct, that's not enough. They require compelling  
2 evidence of governmental misconduct to overcome the  
3 presumption of regularity. We've articulated the test is  
4 clear as evidence. I don't think in practice there's any  
5 difference. We've employed the clear evidence standard  
6 because that's the standard this Court has adopted for  
7 overcoming a presumption of regularity.

8 QUESTION: I'm - I'm - I'm glad you backed off  
9 from compelling evidence. It seems to me if there were  
10 compelling evidence of Government's misdoing, you wouldn't  
11 need the photographs. If it was already compelling, the  
12 photographs would - would not prove anything additional  
13 and you would - you would reject it for that reason,  
14 right?

15 MS. MILLETT: That may - that may well be. The  
16 compelling - the way the compelling evidence standard  
17 works, as we understand it, and the way the clear evidence  
18 standard works that we propose is not that that means you  
19 get the photographs. It just means that you have  
20 something of weight on your side of the balance. We think  
21 the unsubstantiated allegations of governmental misconduct  
22 are worth virtually none, if no weight -

23 QUESTION: But are the - does the term compelling  
24 interest refer to the allegations that the person seeking  
25 the photographs makes, or the evidence he has supporting

1 his position?

2 MS. MILLETT: It has to be the - the evidence of  
3 governmental misconduct. Empty allegations -

4 QUESTION: Independently of what the - the  
5 photographs themselves would show?

6 MS. MILLETT: That - I mean, that presumably will  
7 not be the evidence, right, you can't just come say that -  
8 that would be sort of boot-strapping to say that the  
9 evidence is the - I have to see that so that I will have  
10 my evidence of your governmental misconduct, which  
11 essentially -

12 QUESTION: Okay, tell me again what - what the  
13 test is as you - you understand it.

14 MS. MILLETT: The - the test - you mean with  
15 respect to unsubstantiated allegations of governmental  
16 misconduct?

17 QUESTION: Yes.

18 MS. MILLETT: That is that the FOIA requester  
19 must come forward with clear evidence of governmental  
20 misconduct on their own, independent evidence on their  
21 own, to have a cognizable public interest to weigh against  
22 the intrusion on privacy that has occurred in this case.  
23 And that is the standard that this - the clear evidence  
24 standard comes from this Court's decisions, which say that  
25 is the quantum of evidence needed to overcome the

1 presumption of regularity and legitimacy that attaches in  
2 this case to law enforcement investigations.

3 QUESTION: Does the Government - does the  
4 Government - as I understand FOIA, the Government has the  
5 burden of proof, the Government presents an exemption and  
6 it is the Government's burden to show that the exemption  
7 applies, not the requester, because going in, am I right  
8 to say, the requester can ask for this information for any  
9 reason or no reason?

10 MS. MILLETT: That - that's - with respect -  
11 until an exemption is triggered, there's no need to have  
12 any reason for your FOIA. You can have a good reason, a  
13 bad reason, or no reason to ask for information, but -

14 QUESTION: So what is the Government's burden  
15 that it has, at least the initial burden is on the  
16 Government to show what?

17 MS. MILLETT: The - the initial burden on the  
18 Government is once an exemption - we have to show that an  
19 exemption is triggered. We have to, in this situation,  
20 identify a cognizable privacy interest which -

21 QUESTION: Now, after you point to which number,  
22 7, you point to 7(C) and that - that - the burden must be  
23 more than just, say -

24 MS. MILLETT: No, that - that's right, in fact,  
25 we get the written steps. We have to identify a

1 cognizable privacy interest and then, before we make a  
2 decision to withhold, we ourselves must make the - must  
3 balance. It's our job to do this balancing before we  
4 invoke an exemption, so we ourselves will then try to  
5 identify if we can from the requester's papers or on our  
6 own what public interest would be served by the disclosure  
7 of these documents.

8           Now, it's not the particular interest of the  
9 requester, but it's the relationship between this document  
10 and serving the public interest that was identified in  
11 Reporters Committee of revealing the operations or  
12 activities of the Government. So in this case, we looked,  
13 we found a substantial privacy interest here, and then we  
14 looked at photographs of a deceased body at a death scene  
15 and in our judgement, these reveal nothing about the  
16 operations or activities of the Office of Independent  
17 Counsel and - and -

18           QUESTION: Ms. Millett, you - you - you say that  
19 you have to show clear evidence of - have clear evidence  
20 of government misconduct. What do you mean by misconduct?  
21 What - what has been brought forward here, at least, are  
22 some disparities in - in various governmental reports,  
23 which suggest that at least there was negligence or  
24 sloppiness in some of the reports. Is that enough to  
25 establish what you mean by governmental misconduct? Or

1 does it have to be some willful cover-up?

2 MS. MILLETT: Justice Scalia, first of all, I  
3 don't think there's any evidence of negligence or  
4 sloppiness here, but if we adopt that -

5 QUESTION: All right, well, we - we'll get to  
6 that, I assume, right? Okay.

7 MS. MILLETT: If we adopt that characterization,  
8 the fact that someone cannot - can identify something more  
9 that they should have been done, or the fact that - that  
10 they disagree with the ultimate result, is not  
11 governmental misconduct. The type of thing that might  
12 rise - that - that might count, is something that was - if  
13 you had evidence that, you know, governmental  
14 investigators had suborned perjury, and you had evidence  
15 in the form of -

16 QUESTION: Willful? Has to be willful?

17 MS. MILLETT: I'm sorry?

18 QUESTION: Has to be willful? It cannot be just  
19 a sloppy job? Why - why isn't that of interest to the  
20 public?

21 MS. MILLETT: I don't - I - I don't think - well,  
22 if - if they've got evidence of a sloppy job, then FOIA  
23 has already worked. They can - the purpose of FOIA is not  
24 - it's not a 60(b) motion to reopen an investigation or to  
25 make us investigate more. It's to see - learn what the

1 Government did and then critique it as much as you like.

2 QUESTION: Okay. Why - why then do you take the  
3 - I'm sorry - why - why do you take the position that to  
4 satisfy the - the - the condition of revealing the  
5 operation of the Government, it's necessarily got to  
6 reveal something to the discredit of the Government? What  
7 if someone came along and said, I think this was a superb  
8 investigation, and the Government is far too modest about  
9 what it has done, and I - I want the country to know?  
10 Would - would that support a claim?

11 MS. MILLETT: Well, Justice Souter, let me be  
12 very clear. We're talking here about the allegations of  
13 misconduct because that is the public interest that is  
14 asserted. One might be able to -

15 QUESTION: Right, but if misconduct - my - the  
16 reason I'm raising the question is, if misconduct does not  
17 have to be shown, I suppose that would have a bearing on  
18 the degree of misconduct in a case like this that would -  
19 that would suffice.

20 MS. MILLETT: Well, a public interest has to be  
21 identified at some point, and the problem with this case  
22 is, or the problem -

23 QUESTION: No, but what about my question for a  
24 minute?

25 MS. MILLETT: Right.

1                   QUESTION: Why is - why is it an illegitimate  
2 public interest for somebody to come along and say, I want  
3 to make the Government look good. They are hiding their  
4 light under a bushel. I - I want the people to know how -  
5 how fine they've done. Why is that not a - a possible  
6 legitimate objective under the statute?

7                   MS. MILLETT: Well, I think that - that - that is  
8 sort of nothing more than - than a desire to show what the  
9 Government did in this investigation, transparency in  
10 government interest, which is the point of FOIA. But once  
11 you've come to an - applying an exemption, you're going to  
12 need something more on your side than just serving the  
13 general interests that FOIA itself advances, because  
14 otherwise, the exemption doesn't work as an exemption.  
15 You have to want - want something more than transparency  
16 in government.

17                   Now, it may not be that you have to show  
18 misconduct. You might be able to do it because there's  
19 some other sort of acute public interest that's going to  
20 outweigh it, but I think in the end, the public interest  
21 in making the Government look good or telling the  
22 Government - tell the public more about what the  
23 Government did is never going to be enough to outweigh the  
24 privacy interests of individuals. You can do that with  
25 the substantial amounts of disclosures that have already



1 been made.

2 I would like to reserve the balance of my time  
3 for rebuttal.

4 QUESTION: Very well, Ms. Millett.

5 We'll hear from you, Mr. Hamilton.

6 ORAL ARGUMENT OF JAMES HAMILTON

7 FOR RESPONDENTS ANTHONY AND MOODY

8 ON BEHALF OF THE PETITIONER

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

11 There are five basic reasons why the privacy  
12 interest at issue in this case should be protected.  
13 First, the Foster family seeks to protect their own,  
14 wholly legitimate privacy interests. The privacy  
15 interests here of the family are to be free from seeing  
16 these photographs on television and in grocery store  
17 tabloids, to be free from the knowledge that these  
18 photographs are displayed in virtual perpetuity on  
19 ghoulish Web sites that show death and carnage, to be free  
20 from the harassment by the media that inevitably will  
21 follow if these photographs are released.

22 Second, while FOIA privacy protection is  
23 broader, there is significant common law authority that a  
24 survivor's right of privacy is violated by showing  
25 photographs of deceased loved ones. The Restatement of

1 Torts recognizes this, so does Reid v. Pierce County, a  
2 1998 decision by the Supreme Court of Washington, en banc,  
3 which allowed a cause of action for displaying the autopsy  
4 photographs of former Governor, Washington Governor, Dixie  
5 Lee Ray, at cocktail parties.

6 Third, every FOIA case that has examined the  
7 issue has found that in appropriate circumstances,  
8 survivors have a proper - a privacy interest. The Ninth  
9 Circuit and the D.C. Circuit did so in the cases involving  
10 these photographs. There is a 1987 opinion in the D.C.  
11 Circuit of Badhwar v. Air Force that does so regarding  
12 autopsy reports, and Justice Ginsburg joined in that  
13 opinion.

14 QUESTION: Mr. Hamilton, assume we agree with you  
15 on all of that. We haven't heard anything about the other  
16 - the other half of the inquiry, and that is what the  
17 public interest is in - that might overcome that - that -  
18 that privacy interest. I'm sure the other side is going  
19 to - is going to talk about that, the - the alleged  
20 discrepancies in the reports and whatnot. Can - can you  
21 shed some light on that?

22 MR. HAMILTON: Well, Justice Scalia, we think  
23 that there is no public interest on the other side. We  
24 think as - as counsel for the Solicitor General has said,  
25 that there's a strong evidence test for showing that there

1 is government - government misconduct where that is the  
2 allegation of the public interest, which is the situation  
3 here. A - a number of courts have said that the test  
4 should be compelling evidence. The D.C. Circuit has done  
5 that in several cases. The Fourth Circuit has done it.  
6 Other circuits have come to other standards in - in terms  
7 of what the public interest should be, but it must be  
8 something that is strong, that is not insubstantial.

9           Secondly, in determining what the public  
10 interest is, the Court must be aware that there have been  
11 five investigations, five investigations of Mr. Foster's  
12 death, and all of them have found that he died by suicide.  
13 These investigations have released over 3,000 documents  
14 over -

15           QUESTION: Yes, but it seems to me that the -  
16 arguably, the interest in disclosure might not challenge  
17 the ultimate conclusion, but rather they might contend -  
18 want to show that one of the team of investigators was  
19 totally incompetent, and it was necessary to have three or  
20 four other investigations to reach the correct result. I  
21 don't think the ultimate conclusion necessarily answers  
22 the - the claim that there may be some public interest in  
23 how the investigation was conducted.

24           MR. HAMILTON: Well, Justice Stevens, the - 7(C)  
25 requires a balancing, and when you have this balance, you

1 have to weigh whatever the public interest is against the  
2 privacy interest. And here, where there have been five  
3 investigations, where the reports are voluminous, where  
4 the documents released and the photographs already  
5 released are voluminous, it is very difficult to see what  
6 the public interest is in getting these photographs, which  
7 would grossly invade the privacy of the family. The other  
8 point on the public -

9           QUESTION: Well, let - let's take a particular  
10 item of evidence, I mean, like the - the autopsy report  
11 that Mr. Favish claims was - was - was altered, that the  
12 word neck was white - whitened out and head was written in  
13 instead to - to cover the fact that the bullet exited the  
14 neck rather than the head. Now, you know, what - what he  
15 and other conspiracy theorists would say is, the fact that  
16 five investigations came up with the same conclusion just  
17 shows the extent of this - this conspiracy, you know.  
18 They're not going to be satisfied by the mere fact that -  
19 that you had five separate groups. They're going to say,  
20 oh, all the worse, all the worse, this - this conspiracy  
21 is so widespread. Well, how do you respond to that?

22           MR. HAMILTON: Well, I think the first response I  
23 would make is that it is a difficult argument to make that  
24 Judge Starr conspired with members of the Clinton  
25 administration to protect that administration.

1 (Laughter.)

2 MR. HAMILTON: Judge Starr - Judge Starr's report  
3 was quite thorough, it was over 110 pages. He answered  
4 this question about the - the - the medical report. The  
5 medical report was somewhat inconsistent, but certainly,  
6 when you look at the autopsy reports, when you look at the  
7 - the - the photographs themselves, it is clear that the -  
8 there - there was a - an exit wound in the back of the  
9 head. There was no -

10 QUESTION: He might have been protecting Newt  
11 Gingrich. Did you ever think of that?

12 MR. HAMILTON: I - I beg your pardon?

13 QUESTION: Mr. Starr might have been protecting  
14 Newt Gingrich. We really - we really don't know.

15 (Laughter.)

16 QUESTION: May - may I ask -

17 MR. HAMILTON: Justice -

18 QUESTION: - the - I wanted to ask this question  
19 of the Government, didn't have the opportunity. The  
20 Government says there were three errors made by the Ninth  
21 Circuit. I assume the district court, under the  
22 Government's test, does have substantial discretion even  
23 if we - if we adopt the test the Government wants us to  
24 adopt. And my question is whether or not, rather than  
25 simply reverse and remand - and reverse, we have to remand

1 for the district court to do this under the proper test?

2 MR. HAMILTON: Well, I would hope - I would hope,  
3 given the full record here, that this Court would not  
4 remand, that this Court would decide this issue. It has  
5 been, Justice Kennedy, 10 years since -

6 QUESTION: I - I understand, but as a - as a  
7 legal matter, if the Ninth Circuit didn't apply the proper  
8 test and if the district judge has to exercise discretion  
9 in the first entrance - instance - whether or not we have  
10 to remand even if we adopt the Government's argument?

11 MR. HAMILTON: I - I believe that on the record  
12 before the Court, the Court can decide that there is no  
13 valid public interest here, and that the interest of - the  
14 privacy interest of the Foster family greatly outweighs -

15 QUESTION: So you want us to do that weighing?

16 MR. HAMILTON: I - I certainly do. I want this  
17 case to end at this Court, Justice Kennedy. It has been  
18 10 years and it is time to give this family some peace.

19 QUESTION: That was the initial position of the  
20 district court, wasn't it? In the - in the first round,  
21 didn't the district court uphold the exemption?

22 MR. HAMILTON: The - yes, Justice Ginsburg.

23 QUESTION: So the district judge - what - I don't  
24 recall what standard the district court applied in the  
25 first instance, but it was the Ninth Circuit that - that

1 said, district court, you have to look at these and  
2 disclose the ones that aren't, whatever that series of  
3 adjectives is.

4 QUESTION: Yes. That - that's my concern. Is  
5 there evidence that the district court used the standard  
6 that the Government now argues for in the first - when he  
7 - when the - Judge Keller first looked at this case, did  
8 he adopt basically what the Government is asking us to  
9 adopt?

10 MR. HAMILTON: Not - not exactly. No, he did not  
11 adopt a - a clear evidence test, but the district court in  
12 the first instance, in his first decision, did weigh the  
13 public interest against the privacy interest and found  
14 that as to all of the photographs, the privacy interest  
15 prevailed.

16 I would like to - I would like to return to the  
17 - the family's privacy interest and make one more point,  
18 which is that law and tradition treat the moment  
19 surrounding death as special, private family matters. A  
20 family generally has the right to decide how to conduct  
21 its leave-taking and how to dispose of the body of a loved  
22 one with dignity. At a funeral, a family may choose  
23 whether a coffin is open or is shut, and they have that  
24 choice even if the deceased person was a public official.  
25 Here, the Foster family decided that the coffin be shut,

1 and to effectively open it now by disclosing the  
2 photographs would be an unconscionable invasion of the  
3 family's privacy interest.

4 In the Reporters Committee brief, the contention  
5 was made that the invasion of sorts here would be minimal  
6 and would impose no meaningful additional harm. That  
7 assertion is just simply wrong, and those claims ignore  
8 the potent and the moving declarations submitted in this  
9 case by Ms. Anthony and Ms. Moody. These declarations  
10 express what any family in the circumstance would feel,  
11 and they show why law and tradition treat death as a  
12 private, family matter.

13 Mr. Foster's sister, Ms. Anthony, in her  
14 declaration, recounted her nightmares and heart-pounding  
15 insomnia each time she has seen the leaked photograph of -

16 QUESTION: Thank you. Thank you, Mr. Hamilton.

17 Mr. Favish, am I pronouncing your name  
18 correctly?

19 ORAL ARGUMENT OF ALLAN J. FAVISH

20 ON BEHALF OF RESPONDENT FAVISH

21 MR. FAVISH: Yes, Chief Justice, thank you.

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

23 I can think of no clearer definition of the  
24 phrase, personal privacy, as Congress used it in exemption  
25 7(C) than what this Court said about that phrase in the



1 Reporters Committee case when it cited the work of former  
2 Solicitor General Charles Fried and other noted scholars  
3 on what the definition of privacy is: the right to control  
4 information about yourself. That's what I base this case  
5 on. I want you to stick with what you said on that point  
6 in 1989.

7 QUESTION: The issue wasn't before the Court.  
8 There were no family members. It was an individual, so it  
9 was natural for the Court to address it.

10 MR. FAVISH: Justice Ginsburg, the definition of  
11 privacy as intended by Congress in exemption 7(C) was  
12 before the Court in Reporters Committee, and this Court -

13 QUESTION: But the - the Court didn't have a case  
14 that involved, say, for example, what was presented in the  
15 Challenger case. It didn't come here, but it did go to  
16 the district court and the D. C. Circuit.

17 MR. FAVISH: I agree -

18 QUESTION: Are - are you saying that Reporters  
19 Committee showed that that decision was wrong?

20 MR. FAVISH: No. I - I agree with you that  
21 Reporters Committee did not involve death-related  
22 documents, if that's what you're saying. I agree on that  
23 point. But Reporters Committee gave only one definition  
24 of privacy as intended by Congress, and that definition  
25 should apply to all circumstances in which FOIA requests

1 may come up.

2 QUESTION: There's a tradition going back  
3 thousands of years in human life. You can go back to  
4 Antigone, Euripides, every major religion, respect for the  
5 dead, respect for survivors, and that runs through every  
6 religion, through Greek myth, tragedy, and why isn't that  
7 important enough to human life to believe that Congress  
8 also intended to encompass that?

9 MR. FAVISH: I believe it is an important  
10 interest, but Congress left no indication that it intended  
11 for that interest to be protected by the privacy language  
12 in exemption 7(C).

13 QUESTION: Well, if the history is totally  
14 silent, why wouldn't we assume that Congress intended to  
15 recognize something so deep in human nature?

16 MR. FAVISH: Well, the - the legislative history  
17 isn't totally silent.

18 QUESTION: No, I mean if they said, no, no, we do  
19 not intend to respect this sacred tradition, fine. But I  
20 bet they didn't say that, and for good reason.

21 MR. FAVISH: They did not say that, but they did  
22 talk about personally identifying details and government  
23 agencies where person -

24 QUESTION: Are you reading from the legislative  
25 history?

1                   MR. FAVISH: From the legislative history, which  
2 is at page -

3                   QUESTION: Why don't you use the text of the  
4 statute?

5                   MR. FAVISH: Yes.

6                   QUESTION: I would - I would think that your  
7 response to - to Justice Breyer would be that the - that  
8 the word privacy is not a - the normal way of - of  
9 expressing those concerns for respect for the dead.

10                  MR. FAVISH: I agree, I agree, and that's why I  
11 cited what this Court did in Reporters Committee, and  
12 those concerns are valid and those concerns should be made  
13 to Congress in an attempt to get them to add another  
14 exemption to the FOIA, if that's what the Government and  
15 the Foster respondents want. We know that -

16                  QUESTION: You've heard - you've heard Mr.  
17 Hamilton mention aspects of how the revelation of  
18 documents, pictures of the dead, can injure a survivor.  
19 Why isn't the word privacy broad enough at least to cover  
20 that?

21                  MR. FAVISH: That's not the way this Court  
22 defined it in Reporters Committee. That's not the way  
23 I've seen it defined anywhere else except a few  
24 aberrational cases, which by the way -

25                  QUESTION: Well, one - one of the - one of the

1 definitions that I think we instinctively assume is the  
2 very simple one that Justice Brandeis used, the right to  
3 be let alone. That is at the - at the heart of a lot of  
4 privacy thinking in our law, and the right to be let  
5 alone, I suppose, would encompass at least two things  
6 relevant in this case. One is the right not to be  
7 assaulted by these photographs, which will be very  
8 upsetting. That is - that's certainly not being left  
9 alone when - when you have to go through that.

10           And the second consequence, I would suppose, of  
11 publication is simply even in the narrowest definition of  
12 privacy, even apart from the Brandesian sense. If these  
13 things are going to be published, the family is going to  
14 be subject to intrusive inquiries again. People are going  
15 to ask them for comments on it. They're going to go to  
16 their house again and take a picture of the front of the  
17 house. Why aren't these interests, which at this time in  
18 our history I think do tend to fall with - within the  
19 concept of privacy, easily encompassed by the - the sense  
20 of privacy in the exemption?

21           MR. FAVISH: The right to be let alone was not  
22 the sole expression of the definition of privacy in that  
23 article. In fact, in Reporters Committee -

24           QUESTION: Well, nothing it - I - I'm not  
25 suggesting - your - I mean, your argument is based upon

1 the fact that there has to be one narrow definition of  
2 privacy encompassed by this word, and no other. You've  
3 gone back to a case in which we were talking about the  
4 interests of the living, and you say it can't be anything  
5 more than that. Why do you make the assumption that  
6 privacy is such a circumscribed concept in the exemption?

7 MR. FAVISH: Well, the word privacy, if it's  
8 going to be meaning the right to be let alone in its  
9 broadest sense, I suppose anything that could be  
10 considered a tort then would be considered a violation of  
11 somebody's privacy right.

12 QUESTION: Mr. Favish, do - do we have any case  
13 law that suggests that the exemptions to the Freedom of  
14 Information Act are to be narrowly construed?

15 MR. FAVISH: Well, sure, this Court's decision in  
16 Rose, Department of Air Force, there are many cases -

17 QUESTION: Isn't that your - isn't that your  
18 response to why you should not think that privacy means  
19 the right to be let alone?

20 MR. FAVISH: Exactly.

21 QUESTION: Or anything beyond its narrowest  
22 meaning?

23 MR. FAVISH: I - I -

24 QUESTION: I assume that that's your argument?

25 MR. FAVISH: Yes, absolutely. That's established

1 that these are to be narrowly construed, and that was a  
2 part of the legislative intent of Congress to have the  
3 exemptions clearly delineated, specific, so that there  
4 would be clear standards. In fact, that was the - the  
5 reason for the Freedom of Information Act being enacted in  
6 1966, because the prior enactment was allowing the  
7 Government to take ambiguous language and cover every  
8 document with it.

9           So if you are going to come up with another  
10 definition of privacy, it has to fit within that  
11 legislative intent.

12           QUESTION: Are you saying that this Court,  
13 because of the definition in Reporters Committee, has  
14 already recognized that it's got to be the individual that  
15 is in the photograph and families are out of it? That it  
16 - that - that's - so you would - you would say the D. C.  
17 Circuit was wrong, the district court in the Challenger  
18 case, which involved the voices of the people?

19           MR. FAVISH: Okay. Two - two parts to your  
20 question. First, as to your first part, based on what  
21 this Court did in Reporters Committee, I'd say privacy in  
22 this context is the right to control information about  
23 yourself. If the survivors have no information in that  
24 photograph or document, they have no privacy interest  
25 here. With regard to the Challenger case, the D. C.

1 Circuit in Challenger did not reach this issue. The sole  
2 issue they decided was whether or not the threshold had  
3 been met in this exemption (C) case, which was whether the  
4 file was a personnel, medical, or similar file.

5 QUESTION: Yeah, but it went back to the district  
6 court.

7 MR. FAVISH: The district court made the decision  
8 that there was a privacy interest, but it wasn't the D. C.  
9 Circuit that made that decision, and the D. C. -

10 QUESTION: But in - in any event, you would say  
11 that district court decision was off-limits because this  
12 was a case of survivor grief, no information about the  
13 survivors?

14 MR. FAVISH: Yes, I would. And I'd like to point  
15 to two cases, one of which has already been cited to you  
16 in the brief by the Silha Center, one of the amicus, and  
17 that's Cordell v. Detective Publications. It's a Sixth  
18 Circuit opinion from 1969. And also, a case that hasn't  
19 been cited to you yet is a Federal district court case  
20 called Young v. That Was The Week That Was, and that's at  
21 312 F. Supp. 1337. The beauty of these two Federal cases,  
22 they're both from 1969, which is just three years after  
23 Congress first enacted FOIA, just a few years before they  
24 put the privacy phrase in exemption 7(C). They talk about  
25 the common law definition of privacy and -

1 QUESTION: Well, if - if they were decided in  
2 1969, why are they not in your brief?

3 MR. FAVISH: Well, I didn't - I filled up my 50  
4 pages and I didn't address this specific issue, other than  
5 citing Reporters Committee.

6 QUESTION: Well, on - on - on Reporters  
7 Committee, maybe you'll disagree, but what I think is - is  
8 - is the key language is in roman IV, where the Court  
9 says, to begin with, both the common law and the literal  
10 understandings of privacy encompass the individual's  
11 control of information concerning his or her person. It  
12 doesn't say consists of or is defined, it says encompass.  
13 The Court couldn't have been more careful to use a word to  
14 say that this is - that it includes. It doesn't say it's  
15 exclusively confined to.

16 MR. FAVISH: I - I -

17 QUESTION: I - I just think that's a very unfair  
18 reading of that sentence. Now, if you have something  
19 else.

20 MR. FAVISH: No, well, then I look at - well,  
21 first of all, I generally agree with what you just said.

22 QUESTION: I - you - you agree that that is -  
23 that's the key sentence that we're talking about.

24 MR. FAVISH: Yes, and - but I don't - I disagree  
25 that it's unfair, because then I look at what was cited by



1 the Court, and all these scholarly articles talk about the  
2 right to control information about yourself. And I see  
3 nothing else in the word privacy from the common law,  
4 other than a minority of aberrational cases, and certainly  
5 nothing in the legislative history that would come up with  
6 this relational tort, this survivor privacy -

7 QUESTION: Well, but that's what we were involved  
8 with. It - it's not our style to say, now we have before  
9 us the question of whether there is this - privacy  
10 includes control of the individual's information about  
11 himself. Now, of course, there are many other  
12 definitions, but we - we don't write opinions that way.

13 MR. FAVISH: Right. I agree, but if you look at  
14 the scholarly articles that you cited, none of them  
15 endorse this survivor privacy theory. They talk about  
16 privacy as the right to control information about yourself  
17 exclusively.

18 QUESTION: Well, Mr. Favish, now, the court below  
19 didn't really rest on that ground, did it? I mean, you -  
20 you didn't - the court below didn't think that privacy  
21 was limited to this - to the deceased?

22 MR. FAVISH: Neither the district court nor the  
23 Ninth Circuit -

24 QUESTION: No.

25 MR. FAVISH: - accepted that.

1           QUESTION: And so I assume you may want to  
2 address the other arguments in the case.

3           MR. FAVISH: Certainly. If you do -

4           QUESTION: Do you defend the approach taken  
5 otherwise by the courts below?

6           MR. FAVISH: No, I don't. And if you do get to a  
7 second step where you are going to be balancing whatever  
8 privacy interest you might find here against the public's  
9 interest, then you have an overwhelming - an overwhelming  
10 case that's been established showing that there was  
11 government misconduct here, at least negligence. And I  
12 talk about the government conduct on two separate levels.  
13 One, there was government conduct in investigating Mr.  
14 Foster's death, finding out what happened to him. Second,  
15 there was government conduct in reporting about that death  
16 and the investigation to the public. The primary  
17 reporting agencies here were the Fiske and Starr OICs.

18           Now, with regard to the first area of government  
19 conduct, the investigation as to finding out what  
20 happened, it's just educated guesses that the public can  
21 make about whether there was any negligence here. But  
22 with regard to the second area of whether or not the  
23 reporting conduct by the Government was at least  
24 negligent, we know to a 100 percent certainty that there  
25 was at least negligence, because we know that - let me

1 talk about what Justice Scalia talked about, the autopsy  
2 report.

3 To be more correct, Your Honor, it was a - a  
4 report by the only doctor to view Mr. Foster's body at the  
5 park. It was not the autopsy report. It was a two-page  
6 document. Page 2 talked about the death-shot being mouth  
7 to neck. Mr. Hamilton stated that Mr. Starr dealt with  
8 that in his report. That's not true. Mr. Starr ignored  
9 page 2 of the Haut report. That's one of the problems  
10 here. We talk about these different investigations.  
11 Well, nobody investigated that language on the Haut  
12 report. Nobody investigated the FBI -

13 QUESTION: Explain how the - the four documents  
14 that we're concerned with don't talk about - none of them  
15 show head and neck, so I don't - we - we hear only about  
16 those four documents, right? Because the district court  
17 and the Ninth Circuit said, right, not all ten but only  
18 those four? And none of those four have anything to do  
19 with head and neck.

20 MR. FAVISH: I - I - I'm - I'm not sure I follow  
21 your question. I - I understand that all 10 photos are at  
22 play here because -

23 QUESTION: Well, that - that's what I'd like  
24 clarified, because I thought that we are reviewing a  
25 decision that the Government has asked us to review, which

1 said, Government, disclose four photographs.

2 MR. FAVISH: My understanding is that the  
3 petition that was granted by the Government had, as its  
4 question presented, was the Office of Independent Counsel  
5 correct in withholding all of these photographs? And  
6 under the -

7 QUESTION: But the court below said yes with  
8 respect to six of them So how do we get to review that?

9 MR. FAVISH: Yeah, the -

10 QUESTION: Didn't you cross-petition on the six?  
11 I thought you cross-petitioned.

12 MR. FAVISH: Yes, I did, and that's being held  
13 over.

14 QUESTION: That's the answer.

15 QUESTION: Right.

16 MR. FAVISH: So I believe all 10 photos are at  
17 play here in what decision you come up with, because the -  
18 all the issues presented by all three petitioners are  
19 subsumed under the question presented in the petition that  
20 you granted.

21 QUESTION: I'm worried about - suppose you won. I  
22 take it the police investigate hundreds of thousands or  
23 millions or crimes every year, and in those investigations  
24 they may investigate people whom they later conclude are  
25 innocent, perhaps again hundreds of thousands of millions

1 of them And, of course, there might, in respect to those  
2 people, be lots of newspapers or others who would like to  
3 have the police records about people found to be innocent.

4 Now, what would protect these thousands or  
5 hundreds of thousands of innocent people from having the  
6 police investigation of them displayed on the front page  
7 of their local paper if you were to win this case?

8 MR. FAVISH: Well, if I was one of those people  
9 that you're talking about and -

10 QUESTION: Yes, well -

11 MR. FAVISH: - and there's information about me  
12 in the document, I have a privacy interest in the  
13 document, is what my position is.

14 QUESTION: Well, if you - but suppose you won  
15 this, if you won it, then you and everybody else, let's  
16 say millions of people, you don't mind perhaps, or not  
17 enough, you don't mind enough, but a lot of people would  
18 mind having a police report about them on the front page  
19 of the local paper.

20 MR. FAVISH: Well, then, in that case -

21 QUESTION: Now, what is it that - if you win, I  
22 don't see that those people would have any protection  
23 whatsoever.

24 MR. FAVISH: The protection would be in the  
25 balancing that's done to see -

1           QUESTION: The balancing would be that the police  
2 had found them innocent, and it's not that hard if you win  
3 this, where there have been five investigations, for  
4 somebody to say, oh, there was a police cover-up, they  
5 weren't really innocent.

6           MR. FAVISH: I -

7           QUESTION: And if there are two investigations,  
8 they'll still say it, and there'll always be something  
9 that isn't perfect about the investigation, so they'll  
10 have a peg to hang their hat on.

11          MR. FAVISH: Under the balancing, all the factors  
12 must be taken into account. We have an almost unique  
13 situation here of a deputy White House counsel, public  
14 official, very close to the President of the United  
15 States, who was under investigation at the time, there  
16 were documents related to that investigation in Mr.  
17 Foster's office, that is why Kenneth Starr and Robert  
18 Fiske investigated this. We're talking about the highest  
19 levels of government where there's a mysterious death by  
20 gunshot. This is not one of the cases that you pose a  
21 hypothetical about. This is something unique and -

22          QUESTION: But I don't see how you can confine it  
23 to uniqueness. Why doesn't everyone in every hometown in  
24 America have a - a very significant interest in whether  
25 their police department is adequately investigating and

1 evaluating reports of homicide. Of course they have an -  
2 an interest in that.

3 MR. FAVISH: I -

4 QUESTION: Every - everyone in - in - in any  
5 Federal district has an interest in whether the United  
6 States Attorney and the FBI and so on are investigating  
7 serious crimes, and I - I don't see how you can confine  
8 this to what you call the unique case.

9 MR. FAVISH: I - I'm not saying it would be  
10 confined. I'm saying that this is what sets those other -  
11 this case apart from the others. But in principle,  
12 unless it falls within one of the exemptions, then that  
13 information would have to be made public -

14 QUESTION: So -

15 MR. FAVISH: - under the FOIA as it currently  
16 exists.

17 QUESTION: But here's the - I think one of the -  
18 the - one of the things that's bothering Justice Breyer,  
19 and it's bothering me, if we accept as broad a principle  
20 as you argue for, is this: that one of the things that -  
21 that most police investigators learn very early on is that  
22 when they investigate a crime and they investigate a  
23 suspect, the suspect's old friends and enemies come  
24 forward, and the latter frequently even up some old  
25 scores.

1           The amount of misinformation that is  
2 intentionally communicated to law enforcement officers is  
3 enormous. They have to evaluate that, and it seems to me  
4 that that kind of misinformation is - is - is going to  
5 come very close to the front page in most cases if - if a  
6 principle as broad as yours is accepted.

7           MR. FAVISH: Well, first of all, I believe in the  
8 FOIA, in exemption 7, there is an exemption for ongoing  
9 investigations, so much of what you're talking about -

10           QUESTION: Well, yeah, but the - the problem for  
11 the person being investigated who is ultimately exonerated  
12 is going to be the same the day after the investigation is  
13 - is over. So that - that doesn't answer the problem

14           MR. FAVISH: Yeah. Now, I'm just talking about  
15 the privacy exemption in 7(C). Now, I don't know in your  
16 hypothetical whether there would be other exemptions to  
17 prevent disclosure in those situations. I'm not  
18 commenting on that. Now, with regard - yes.

19           QUESTION: Neither - neither do I, in fact.

20           QUESTION: Mr. Favish, here's - here's my - I  
21 mean, one - once you get past the first - the first issue,  
22 whether the privacy exemption at all covers this, if you  
23 assume it does cover it, you have relatives here who are  
24 going to be very much - very much harmed by - by this, as  
25 is shown by the mere fact that they've conducted this



1 lengthy litigation. It's lasted how long, and I'm sure  
2 it's been expensive.

3 Now, what is the interest on the other side? If  
4 - if you - if you had a plausible case that - that these  
5 investigations reached the wrong conclusion, I'd say,  
6 yeah, that's a pretty significant governmental interest.  
7 But I don't see that here. I - you - you - you've just  
8 demonstrated some foot faults in - in each of the  
9 investigations. Oh, this - this investigation made this  
10 mistake, this other investigation made the other mistake.  
11 Who cares? I mean, you really think that that is a matter  
12 of - of significant moment for - for the country, that  
13 there was an isolated mistake in - in one and another of  
14 the investigations? Who cares?

15 MR. FAVISH: Justice Scalia, I would not  
16 characterize them as foot faults. I think these are major  
17 omissions of significant evidence that pointed away from  
18 the Government's official conclusion, and what it  
19 establishes is that the government reports are not  
20 trustworthy. I agree that in the end those reports may be  
21 correct and it was suicide in the park.

22 Again, like I said earlier, I can just make  
23 educated guesses about that. I'm not saying that it was  
24 definitely something other than that, but I am saying that  
25 when you have a high-level government official involved in

1 this kind of investigation, and then you have so many  
2 investigations by the Government, apparently to get it  
3 right, that it took so many, you have a public interest  
4 here, unlike almost any other case I could imagine.

5 QUESTION: Well, why should the high level of the  
6 victim make that much difference?

7 MR. FAVISH: As opposed to just an innocuous  
8 neighbor down the street, perhaps.

9 QUESTION: Well, say a - a public interest in  
10 something that happens in Albuquerque, New Mexico, maybe  
11 the assistant to the mayor is shot.

12 MR. FAVISH: Because we're dealing with somebody  
13 who was working close to the President of the United  
14 States and we're talking about the Freedom of Information  
15 Act, whose primary purpose is to allow the people to be a  
16 check on government, not only to -

17 QUESTION: Well, but - but why - why wouldn't  
18 that be just as true of this incident, hypothetical  
19 incident in Albuquerque as the Vince Foster slaying?

20 MR. FAVISH: Well, it very well might be with  
21 regard to city or state government and states have their  
22 own open records acts, and as we heard before, some of  
23 them prohibit death photos, but they do that by  
24 legislation. We know that the State of Florida did that  
25 in response to amicus Teresa Earnhardt's plea. That's

1 what should be done here if they want the Federal  
2 Government to follow the lead of the state legislatures  
3 here.

4 It's not for the courts, with all due respect,  
5 to rewrite the FOIA exemption, so I - I'm not disagreeing  
6 that that's a valid concern, but the way -

7 QUESTION: Well, you're - you're - you're getting  
8 away from the hypothetical. The hypothetical, if you - if  
9 you insist on taking this line, could be refined so that  
10 we assume New Mexico has exactly the same statute and has  
11 interpreted exactly the same way. Then you have to answer  
12 the hypothetical.

13 MR. FAVISH: Oh, absolutely then. If - if the  
14 balancing is done and you're talking about a law like FOIA  
15 where the primary purpose is to allow the people to ensure  
16 that their government is honest, because that's the heart  
17 of our democracy and we're talking about the integrity of  
18 our law enforcement agencies, I can think of no higher  
19 public interest than what's being asserted here. And  
20 again, all of this is going to have to be -

21 QUESTION: So - so - so then it doesn't just turn  
22 on the fact that it's Vince Foster and that - and the  
23 Chief Justice's point is - is that this was going to apply  
24 to every police department, every - every local government  
25 in the country that has an act like this?

1           MR. FAVISH: Well, in principle, yes. How the  
2 balancing would come out in each individual case would  
3 depend on the ad hoc balancing, but the principles would -  
4 would be the same if the law is the same, I agree.

5           QUESTION: When a person goes to work for the  
6 Government, on top of everything else, he even loses a  
7 private right to bury the body. I mean, I'm speaking  
8 metaphorically, but, I mean, there are a lot of  
9 disadvantages in government, and you're saying one of the  
10 things would be that after death there is no protection,  
11 even to see that that body is buried and the photographs  
12 disappear for the - for the -

13           MR. FAVISH: Well -

14           QUESTION: It would just go on forever.

15           MR. FAVISH: Well, we're not talking about  
16 interfering with the - the burial process.

17           QUESTION: No, I know. I'm speaking  
18 metaphorically. I have Antigone in my mind.

19           (Laughter.)

20           MR. FAVISH: Again, as I read the FOIA exemption  
21 7(C), the privacy exemption, Congress has not legislated  
22 that the Government is allowed to withhold death  
23 photographs under this privacy exemption. If we think  
24 that's a good public policy to enact, we should get  
25 Congress to hold hearings on it and we'll find out all the

1 yeas and the nays and that's how good legislation comes.

2 And that's what should be done here and -

3 QUESTION: What does privacy cover without that?

4 Are you suggesting that there be a catalog A to Z of - and

5 the - and the word privacy within the meaning of 7(c)

6 covers, and that's -

7 MR. FAVISH: Oh, in terms of what Congress might

8 do or what this Court might do?

9 QUESTION: No, in terms of - the Court has no

10 leeway unless Congress has such a catalog and this is one

11 of the enumerated items -

12 MR. FAVISH: Well, we know that Congress used the

13 phrase, personal privacy, in the statute, and now the

14 debate is over what did they mean by that. And

15 apparently, people are scribbling words, Alice-in-

16 Wonderland-like definitions to words, and if we go down

17 that route -

18 QUESTION: But it's not very Alice in Wonderland-

19 like to take the Brandeis definition that started this

20 all.

21 MR. FAVISH: What I like about the Brandeis

22 article is -

23 QUESTION: I think it's Alice in Wonderland-

24 like.

25 MR. FAVISH: What I like about the Brandeis

1 article is the section of that article that was cited by  
2 this Court in Reporters Committee. The Brandeis article  
3 was one of the six scholarly articles. Now, keep in mind,  
4 the Brandeis article, 1890, was maybe the earliest trying  
5 to come up with a definition of privacy, so the language  
6 isn't as precise as what, for instance, former Solicitor  
7 General Fried came up with in his seminal 1966 article,  
8 also cited by this Court.

9           So I would say that the best definition that  
10 provides the clearest workable standard is the right to  
11 control information about yourself, and again, on the  
12 second point here, I - I won't go down the litany of  
13 things that are in the brief talking about how there was  
14 misconduct, at least negligence with regard to reporting  
15 this case, but once I've established that, which I have, I  
16 think that the Government can no longer be trusted to  
17 filter the raw evidence to the people in this case, and I  
18 don't see how in a democracy that depends on the integrity  
19 of its law enforcement agencies in a case where you've had  
20 - well, by the way, there haven't been five  
21 investigations. For instance, the Senate Whitewater  
22 Committee stated out the outset of its two-day hearings  
23 they're not looking into whether Mr. Foster committed  
24 suicide or not. That's in the record. Look at ER 603 and  
25 those pages.

1           So we're also looking at a situation with regard  
2 to the Fiske and Starr offices using FBI agents as part of  
3 their investigation, where the FBI did the initial  
4 investigation with the Park Police. That's all in the  
5 record. There's a conflict of interest there when you  
6 have FBI agents participating in an examination of what  
7 they already did.

8           So to call this five separate investigations is  
9 highly misleading, and I think that the only investigation  
10 that will matter in this case is the one that the people  
11 can do directly by seeing the raw evidence for itself,  
12 because for whatever reason, and I don't impugn the  
13 motives of Judge Starr or anybody else, I have no personal  
14 knowledge that he actually wrote the report. He had  
15 lawyers in his office. I don't know what the mechanics  
16 was. I want to make that very, very clear.

17           I just want it to be known that we know  
18 objectively, and it's undisputed, there were major pieces  
19 of evidence omitted from the Fiske and Starr reports that  
20 point to something other than the official conclusion, not  
21 just little details, because those things, I agree, can be  
22 explained sometimes. We're talking about major, major  
23 issues, and those are spelled out in the brief in detail  
24 for you.

25           QUESTION: Mr. Favish, are there any other

1 Federal statutes that use the term privacy?

2 MR. FAVISH: There is the Privacy Act enacted in  
3 1974, and there is a definition which talks about  
4 personally identifying details, and I don't have that at  
5 hand right now, but it's consistent -

6 QUESTION: You don't think that covers relatives  
7 who are deceased?

8 MR. FAVISH: I don't think it enacts a definition  
9 that gives somebody a privacy interest in a document -

10 QUESTION: I don't either.

11 MR. FAVISH: - which has no information about  
12 them, and I think that's indicative also. And my one last  
13 point has to do with what the Ninth Circuit did here in  
14 addition to the reasons I've already explained. They  
15 basically said that it isn't the release of the photos  
16 that will cause the harm, it's what's going to be done  
17 later, media intrusion and so forth, which I think  
18 violates what Justice Scalia said in his concurrence in  
19 the Ray case about the derivative uses.

20 Now, Ray was an exemption 6 case, but it focused  
21 on the word that's common to both exemptions, constitute,  
22 would the release or production constitute the invasion of  
23 privacy? What the Ninth Circuit came up with really  
24 violates what Justice Scalia said in his concurrence in  
25 Ray, with which I - I agree wholeheartedly.



1 QUESTION: Do you think the Ninth Circuit is  
2 bound to agree with Justice Scalia's concurrence?

3 (Laughter.)

4 MR. FAVISH: I - I -

5 QUESTION: You just think they would be well  
6 advised to do so.

7 (Laughter.)

8 MR. FAVISH: I think they would be well advised  
9 to have at least noted what Justice Scalia said and  
10 compare it to what they were doing, and if they had done  
11 that, they would see that what they did was wrong on that  
12 score. And that's really all I have. I thank you.

13 QUESTION: Thank - thank you, Mr. Favish.

14 Ms. Millett, you have four minutes remaining.

15 REBUTTAL ARGUMENT OF PATRICIA A. MILLETT

16 ON BEHALF OF THE PETITIONER

17 MS. MILLETT: Thank you, Mr. Chief Justice.

18 Justice Breyer, you hit the nail on the head when you said  
19 that if this type of investigation isn't enough, what's  
20 going to happen in the routine case? This is the gold  
21 standard for law enforcement investigations, and if in  
22 this case, the fact that someone can think of something  
23 more that should have been said, something more should  
24 have been done, something more should have been revealed,  
25 then in the run-of-the-mill routine law enforcement case,

1 there will be little protection left for privacy.

2           And the problem won't be just that this  
3 information will end up on the front page of the New York  
4 Times, but under the 1996 amendments to the FOIA, if - if  
5 the Government anticipates three or more requests for  
6 information, we're obliged to post the information on our  
7 Web sites for photographs taken after 1996 - November  
8 1996. You won't need to go to findadeath.com You can go  
9 to DepartmentofDefense.gov to find pictures of - the 50  
10 pictures that are routinely taken during autopsies of  
11 military office - officials killed overseas.

12           Justice Kennedy, you had asked about the remand,  
13 whether a remand was necessary. It is not in this case.  
14 On pages 56A through 59A of the petition appendix, the  
15 district court, before being redirected by the court of  
16 appeals, we think erroneously, ruled that the - the  
17 pictures should be withheld applying a less demanding  
18 standard than the one that we approached, that it just  
19 balanced the allegations of misconduct against the privacy  
20 interest, and concluded that the privacy interest still  
21 outweighed, assuming that - that just allegations count  
22 for something on the public interest side.

23           So if this Court agrees with the Government's  
24 position or requires anything more than allegations of  
25 misconduct, there'll be no need to remand. It's also not

1 a discretionary decision, it's a de novo review. The  
2 balancing is undertaken in the first instance, but it's  
3 reviewed de novo by the court of appeals and de novo by  
4 this Court.

5 Justice Scalia, you talked about this doesn't  
6 sound like privacy. Well, privacy is a language that has  
7 been used by not all, but a number of common law courts  
8 that are cited in our opening and reply brief. And this  
9 Court's interpretation of the concept of privacy under the  
10 Freedom of Information Act has gone far beyond what tort  
11 law would protect. There - I don't know that there's any  
12 court case that would suggest that rap sheets should be  
13 public records, like rap sheets would be protected under  
14 privacy conceptions in common law, so it would be  
15 extraordinary in this case to decide that the language  
16 Congress employed, personal privacy, is intended to be  
17 interpreted more narrowly than it has, at least at some -  
18 at some courts at common law.

19 Justice Scalia, you also asked about narrowly  
20 construing the exemptions. It's - I agree that there are  
21 cases that say that, but in John Doe Agency v. a John Doe  
22 Corporation, this Court made clear that these exemptions  
23 still have to be interpreted in a way that allows their  
24 exempt - the purposes of the exemptions to be served. And  
25 in a - and they should not be construed in the non-

1 functional manner. If law enforcement is to become the  
2 instrument - in the eyes of the public, the law  
3 enforcement, the Federal Government, will be the  
4 instrument of these types of disclosures and causing this  
5 type of pain to families that is likely to have a chilling  
6 effect on people's willingness to provide information to  
7 law enforcement.

8           You asked about other statutes, and we discussed  
9 the Privacy Act statute. The Privacy Act statute doesn't  
10 apply to survivors, but that's because the language is  
11 specifically different. The Privacy Act talks about -  
12 defines the - the records that are covered in terms of  
13 information about an individual and information that - to  
14 that pertains to the individual. It has a sort of very -  
15 and it has to be information contained in a system of  
16 records that - where information can be retrieved by an  
17 individual identifier. It's a very narrow and specialized  
18 definition. It's exactly the type of definition that  
19 Congress would have used if it wanted a more narrow  
20 approach. Thank you.

21           CHIEF JUSTICE REHNQUIST: Thank you, Ms. Millett.  
22 The case is submitted.

23           (Whereupon, at 10:58 a.m., the case in the  
24 above-entitled matter was submitted.)

25