BLOCKING ACCESS TO GOVERNMENT INFORMATION UNDER THE NEW PERSONAL PRIVACY RULE

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I. INTRODUCTION

This Article addresses a categorical rule proposed by the Department of Justice and adopted by several Circuit Courts of Appeal, which effectively emasculates the ability to obtain critical information under the Freedom of Information Act ("FOIA").[1] This categorical rule defeats the pro-disclosure statutory language and the legislative and case history of the FOIA.

The FOIA mandates that federal agencies "shall make" government information "available to the public."[2] FOIA Exemption 6 allows federal agencies to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[3] Courts balance privacy invasions against public disclosure interests under Exemption 6 to determine whether requested information should be disclosed. Historically, courts have employed what has been termed "derivative use" analysis in weighing Exemption 6 privacy and public interests. Derivative use analysis ascertains how requested information will be used and whether that use will cause invasions of privacy, serve public interests, or both.

The Department of Justice, with increasing success in recent appellate cases,[4] has urged the adoption of a categorical rule under Exemption 6 barring derivative consideration of public interests that are not revealed within the four corners of a requested document. Indeed, the Solicitor General made this specific argument in the most recent Exemption 6 case before the Supreme Court, which involved a request for the names of Haitian "boat people"

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1 5 U.S.C. § 552 (1988).

2 *Id.* § 552(a).

3 *Id.* § 552(b)(6).

4 *See, e.g.*, Reed v. NLRB, 927 F.2d 1249 (D.C. Cir. 1991); Hopkins v. Department of Hous. & Urban Dev., 929 F.2d 81 (2d Cir. 1991).

who had been deported from the United States back to Haiti.[5] The Court decided that case on other grounds and therefore declined to rule on this issue for now.

As set forth in this Article, the courts should not adopt this categorical rule because it eviscerates the public's ability to know about, monitor and correct government misconduct. Often, a particular requested document does not reveal the full nature of government action. Rather, the information contained in that document may be a necessary link to additional information that exposes government misconduct or corruption.

II. THE PURPOSE OF THE FOIA AND THE GOVERNMENT'S BURDEN

To understand fully the rationale behind derivative use analysis, the FOIA's purpose of broad disclosure and the government's heavy burden to justify withholding under Exemption 6 should be examined.

A. *The Purpose of the FOIA Is to Ensure an Informed Citizenry*

The Supreme Court on numerous occasions has enunciated the basic philosophy of broad disclosure under FOIA, as summarized in *John Doe Agency v. John Doe Corp.*:[6]

> This Court repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA. "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." The Act's "basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.' " "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[7]

In keeping with the philosophy of broad disclosure, federal agencies bear the burden of justifying their decisions to withhold re-

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[5] *See* United States Dep't of State v. Ray, 112 S. Ct. 541 (1991).

[6] 493 U.S. 146 (1989).

[7] *Id.* at 151-52 (citations omitted). *See also* Department of Justice v. Tax Analysts, 492 U.S. 136, 141-43 (1989); Department of Justice v. Reporters Committee, 489 U.S. 749, 754-55 (1989); Department of Air Force v. Rose, 425 U.S. 352, 360-362 (1976); EPA v. Mink, 410 U.S. 73, 79-80 (1973).

quested information.[8] The pertinent Senate Report reads:

> Placing the burden of proof upon the agency puts the task of justifying withholding on the only party able to explain it. The private party can hardly be asked to prove that an agency has improperly withheld public information because he will not know the reasons for the agency action.[9]

The Senate Report emphasizes that:

> *It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure* unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. It is important and necessary that the present void be filled.[10]

The Senate Report's "Purpose of Bill" section quotes from James Madison: "Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both."[11]

With respect to Exemption 6 balancing, the Senate Report states that "[s]uccess lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."[12]

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8 5 U.S.C. § 552(a)(4)(B) (1988).

9 S. REP. No. 813, 89th Cong., 1st Sess. 8 (1965). *See also John Doe Agency*, 493 U.S. at 152; Exxon Corp. v. Federal Trade Comm'n, 663 F.2d 120, 126 (D.C. Cir. 1980). In *John Doe Agency*, the Supreme Court noted that:

> There are, to be sure, specific exemptions from disclosure set forth in the Act. 'But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of The Act.' . . . Accordingly, these exemptions 'must be narrowly construed.' Furthermore, 'the burden is on the agency to sustain its actions.'

493 U.S. at 152 (citations omitted).

Likewise, the *Exxon* court stated:

> In Freedom of Information Act cases, . . . the agency claiming an exemption from the duty to disclose information has the burden of proof and the district court should apply that burden with the knowledge that the plaintiff is at a distinct disadvantage in attempting to test the claims alleged by the agency.

663 F.2d at 126.

10 S. REP. No. 813, *supra* note 9, at 3 (emphasis added). *See also* Arieff v. Department of Navy, 712 F.2d 1462, 1468 (D.C. Cir. 1983) ("Providing information 'material for monitoring the Government's activities' is the 'core purpose' of the FOIA.").

11 S. REP. No. 813, *supra* note 9, at 2-3.

12 *Id.* at 3. The language of FOIA has been interpreted by the Retired Chief Judge of the Third Circuit as mandating the Department of Justice to encourage agency compliance with the FOIA. *See* John J. Gibbons, *The Court's Role in Interbranch Disputes*

B. *The Government's Heavy Burden Under Exemption 6*

Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[13] At the House and Senate committee hearings on the bill,[14] representatives of the various government agencies urged that the words "clearly unwarranted," or at least the word "clearly," be deleted from the bill so that *all* invasions of privacy could be prevented.[15] The federal government objected to its "heavy burden" under the clearly unwarranted invasion of personal privacy standard.[16] Congress, however, refused to delete this language, which it considered critical in limiting the scope of Exemption 6.[17] By retaining these words despite these repeated agency efforts, Congress rejected an approach that would have guaranteed blanket protection for all potential privacy invasions. The use of the words "clearly unwarranted," therefore, was "a considered and significant determination."[18] The requirement of Exemption 6 that disclosure be "clearly unwarranted" instructs the courts to "tilt the balance" of privacy and disclosure interests "in favor of disclosure."[19] Thus, "under Exemption 6, the presump-

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Over Oversight of Agency Rulemaking, 14 CARDOZO L. REV. 957, 989 (1993) (citing 5 U.S.C. § 552(d)).

13 5 U.S.C. § 552(b)(6) (1988). The application of Exemption 6 is not limited to files containing "intimate details" and "highly personal" information, and has been expanded beyond a plain reading of "personal and medical and similar files." The application of Exemption 6 includes practically any government information the revelation of which possibly could lead to an invasion of privacy. Department of State v. Washington Post, 465 U.S. 595 (1982).

14 *See, e.g., Federal Public Records Law: Hearings on H.R. 5012-21, H.R. 5237, H.R. 5406, H.R. 5520, H.R. 5583, H.R. 6172, H.R. 6739, H.R. 7010, H.R. 7161 Before a Subcomm. on the House Comm. on Gov't Operations*, 89th Cong., 1st Sess. (1965) [hereinafter *1965 House Hearings*]; *Administrative Procedure Act: Hearings on S. 1160, S. 1136, S. 1758, and S. 1879 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965) [hereinafter *1965 Senate Hearings*]; *Freedom of Information Act: Hearings on S. 1666 and S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963).

15 *See, e.g., 1965 Senate Hearings, supra* note 14, at 36 (1965) (testimony of Edward Rains, Assistant General Counsel, Treasury Department); *id.* at 491 (testimony of William Feldesman, NLRB Solicitor); *1965 House Hearings, supra* note 14, at 56 (1965) (testimony of Fred. B. Smith, Acting General Counsel, Treasury Department); *id.* at 151 (testimony of Clark R. Mollenhoff, Vice Chairman, Sigma Delta Chi Committee for Advancement of Freedom of Information); *id.* at 257 (testimony of William Feldesman, NLRB Solicitor).

16 Department of Air Force v. Rose, 425 U.S. 352, 378 n.16 (1976).

17 S. REP. NO. 813, *supra* note 9, at 9; H. R. REP. NO. 1497, 89th Cong., 2d Sess. 11 (1966).

18 *Rose*, 425 U.S. at 378 n.16.

19 Washington Post Co. v. Department of Health & Human Servs., 690 F.2d 252,

tion in favor of disclosure is as strong as can be found anywhere in the Act."[20] Not surprisingly then, "[t]he legislative history is clear that Exemption 6 [is] directed at threats to privacy interests more palpable than mere possibilities . . . [and] . . . does not protect against disclosure of every incidental invasion of privacy."[21]

The Supreme Court, in comparing Exemption 6 to Exemption 7(C), further confirmed that the policy of disclosure is stronger under Exemption 6 than anywhere else in FOIA.[22] In *Department of Justice v. Reporters Committee*, the Court observed that:

> Exemption 7(C)'s privacy language is broader than the comparable language in Exemption 6 in two respects. First, whereas Exemption 6 requires that the invasion of privacy be "clearly unwarranted," the adverb "clearly" is omitted from Exemption 7(C). This omission is the product of a 1974 amendment adopted in response to concerns expressed by the President. Second, whereas Exemption 6 refers to disclosures that "would constitute" an invasion of privacy, Exemption 7(C) encompasses any disclosure that "could reasonably be expected to constitute" such an invasion. This difference is also the product of a specific amendment. Thus, the standard for evaluating threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files.[23]

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261 (D.C. Cir. 1982) (quoting Ditlow v. Shultz, 517 F.2d 166, 169 (D.C. Cir. 1975)). *See also* Robles v. EPA, 484 F.2d 843, 846 (4th Cir. 1973); Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971); Southern Utah Wilderness Alliance, Inc. v. Hodel, 680 F. Supp. 37, 39 (D.D.C. 1988); Citizens for Envtl. Quality v. Department of Agric., 602 F. Supp. 534, 538 (D.D.C. 1984).

20 *Washington Post*, 690 F.2d at 261. *See also* Kurzon v. Department of Health and Human Servs., 649 F.2d 65, 67 (1st Cir. 1981) ("By restricting the reach of exemption 6 to cases where the invasion of privacy caused by disclosure is not only unwarranted but *clearly* so, Congress has erected an imposing barrier to nondisclosure under this exemption"; withholding is a "rare case" when "the calculus unequivocally supports withholding . . . because Congress has weighted the balance so heavily in favor of disclosure").

21 Department of Air Force v. Rose, 425 U.S. 352, 380 n.19, 382 (1976).

22 United States Dep't of Justice v. Reporters Comm., 489 U.S. 749 (1989). Exemption 7(C) prevents disclosure of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

23 *Reporters Committee*, 489 U.S. at 756 (footnotes omitted). *See also* FBI v. Abramson, 456 U.S. 615, 629 n.13 (1982) ("The distinction [between Exemptions 6 and 7] is meaningful."); Halloran v. Veterans Admin., 874 F.2d 315, 319 (5th Cir. 1989); Fund For Constitutional Gov't v. National Archives and Records Serv., 656 F.2d 856, 862 (D.C. Cir. 1981); Powell v. Department of Justice, 584 F. Supp. 1508, 1528 (N.D. Cal. 1984) ("Exemption 6 is a more narrow exemption"); Congressional News Syndicate v.

III. TRADITIONAL EXEMPTION 6 BALANCING

Under traditional Exception 6 balancing, privacy interests are examined first, and if a significant privacy invasion is raised, then the public interests in the requested information are considered. Derivative use analysis traditionally is employed on either or both sides of the balance when necessary.

A. *Privacy Invasions Are Examined Fully First*

Because the core philosophy of FOIA is that of disclosure, traditional Exemption 6 balancing first requires an inquiry into whether a FOIA request implicates a substantial invasion of personal privacy. Then, only if such an invasion is implicated, the next step is to evaluate the public interests that may be served by disclosure of the requested information.[24] "If no significant privacy interest is implicated," the inquiry ends and "FOIA demands disclosure."[25] Most courts undertaking traditional Exemption 6 balancing allow for derivative consideration of privacy invasions.[26]

Department of Justice, 438 F. Supp. 538, 541 (D.D.C. 1977). As the court in *Congressional News Syndicate* recognized:

> The difference in breadth [between Exemptions 6 and 7] is attributable to the inherent distinction between investigatory files and personnel, medical and similar files: that an individual's name appears in files of the latter kind, without more, will probably not engender comment and speculation, while, as the Government argues here, an individual whose name surfaces in connection with an investigation may, without more, become the subject of rumor and innuendo.

Id.

[24] National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1805 (1990).

[25] *Id.* (citing Department of Justice v. Tax Analysts, 109 S. Ct. 2841, 2850-53 (1989)). *See also Halloran*, 874 F.2d at 319; Ripskis v. Dep't of Housing and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984); Washington Post Co. v. Department of Health & Human Servs., 690 F.2d 252, 261 (D.C. Cir. 1982); Campbell v. Civil Service Comm'n, 539 F.2d 58, 61 (10th Cir. 1976); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 136 (3d Cir. 1974); Rural Hous. Alliance v. Department of Agric., 498 F.2d 73, 77 (D.C. Cir. 1974).

[26] *See, e.g., National Assoc. of Retired Fed. Employees*, 879 F.2d at 878 ("Where there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain."); Hudson v. Department of Army, Civil No. 86-1114, slip op. at 6 (D.D.C. Jan. 29, 1987) (protecting personal information on the basis that disclosure ultimately could lead to physical harm), *aff'd*, 926 F.2d 1215 (D.C. Cir. 1991); Hemenway v. Hughes, 601 F. Supp. 1002, 1006-07 (D.D.C. 1985).

A small minority of relatively early cases, however, suggested that the threshold production of documents alone must constitute the clearly unwarranted invasion of personal privacy under Exemption 6. For example, then-Circuit Judge Scalia believed that "[a]ccording to the statute, it is the very 'production' of the documents which must 'constitute a clearly unwarranted invasion of personal privacy.' " Arieff v. De-

B. *The Full Extent of Public Interests Are Examined Next*

Under traditional Exemption 6 balancing, courts examine public interests after a significant privacy concern has been identified. This examination frequently involves derivative use analysis of public interests. For example, courts routinely order the disclosure of names or other identifying details contained in government files if public interests would be served by the requester's use of the disclosed names or details and the public interests outweigh privacy concerns.[27]

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partment of Navy, 712 F.2d 1462, 1468 (D.C. Cir. 1983) (quoting 5 U.S.C. § 552(b)(6)). *See also* Disabled Officer's Ass'n v. Rumsfeld, 428 F. Supp. 454, 457-58 (D.D.C. 1977).

[27] *See, e.g.*, Cochran v. United States, 770 F.2d 949, 956 n.9 (11th Cir. 1985) (disclosure of identifying details and disciplinary information on military officer accused of alleged improprieties); *Arieff*, 712 F.2d 1462 (disclosure of information possibly identifying individuals as taking particular drugs for particular diseases); Kurzon v. Department of Health and Human Servs., 649 F.2d 64 (1st Cir. 1981) (disclosure of names and addresses of unsuccessful applicants for research grants from the National Cancer Institute); Columbia Packing Co., Inc. v. U.S. Department of Agric., 563 F.2d 495 (1st Cir. 1977) (disclosure of personnel records of two former federal meat inspectors who were convicted of taking bribes). *See also* Ditlow v. Shultz, 517 F.2d 166, 170 (D.C. Cir. 1975) (disclosure of names and addresses contained in customs declaration forms "would result in less than a substantial invasion of privacy"); Painting Indus. of Hawaii Mkt. Recovery Fund v. Department of Air Force, 756 F. Supp. 452 (D. Hawaii 1990) (disclosure of names, addresses, phone numbers and social security numbers of employees referred to in payroll records); National Ass'n of Atomic Veterans, Inc. v. Director, Defense Nuclear Agency, 583 F. Supp. 1483 (D.D.C. 1984) (disclosure of names and addresses of present and former military service members who participated in an atmospheric nuclear weapons testing program); Norwood v. FAA, 580 F. Supp. 994 (W.D. Tenn. 1983) (disclosure of the identities of former air traffic controllers who had been terminated); National W. Life Ins. Co. v. United States, 512 F. Supp. 454 (N.D. Tex. 1980) (disclosure of the names and duty stations of employees of the United States Postal Service employed in two cities); Disabled Officer's Ass'n, 428 F. Supp. 454 (disclosure of names and addresses of retired disabled military flight officers); Philadelphia Newspapers Inc. v. Department of Justice, 405 F. Supp. 8 (E.D. Pa. 1975) (disclosure of the names of persons who wrote letters recommending parole for a particular prisoner).

The following cases are examples of name and address disclosure in the labor context under Exemption 6: FLRA v. Department of Navy, 958 F.2d 1490 (9th Cir. 1992) (disclosure by federal agencies of their employees' home addresses to the unions that were the exclusive representatives of the employees' bargaining units); International Brotherhood of Elec. Workers Local Union No. 5 v. HUD, 852 F.2d 87 (3d Cir. 1988) (disclosure of payroll records including employees' names, addresses, and social security numbers); Department of Navy v. FLRA, 840 F.2d 1131 (3d Cir.) (disclosure of names and addresses of bargaining unit members), *cert. dismissed*, 488 U.S. 880 (1988); Department of Air Force v. FLRA, 838 F.2d 229 (7th Cir.) (disclosure of home addresses of employees to union), *cert. dismissed*, 488 U.S. 880 (1988); Department of Health & Human Servs. v. FLRA, 833 F.2d 1129 (4th Cir. 1987) (disclosure of names and addresses of bargaining unit employees), *cert. dismissed*, 488 U.S. 880 (1988); American Fed. of Gov't Employees, Local 1760 v. FLRA, 786 F.2d 554 (2d Cir. 1986) (disclosure of employee addresses to union); International Brotherhood of

IV. The Categorical Rule Barring Derivative Use Analysis Proposed By the Department of Justice

After the Supreme Court's decision in *Department of Justice v. Reporters Committee*,[28] the Department of Justice has sought a categorical rule barring derivative use analysis of public interests under Exemption 6.

A. *Reporters Committee and Its Progeny*

Reporters Committee involved FOIA requests from the news media for access to any criminal history records, also known as "rap sheets," maintained by the FBI on certain persons alleged to have participated in organized crime and engaged in improper dealings with a corrupt congressman. By holding that rap sheets are entitled to protection under Exemption 7(C), the Supreme Court established the proposition that agencies may engage in "categorical balancing" in favor of nondisclosure.[29]

Under this new approach, which was not even requested by the Solicitor General, it may be determined "as a categorical matter" that a certain type of information always is protected under an exemption "without regard to individual circumstances."[30] With respect to privacy considerations, the Court stressed that "both the common law and the literal understanding of privacy encompass the individual's control of information concerning his or her person."[31] The Court thus found a "significant privacy interest" in the nondisclosure of records of a private citizen's criminal history, "even where the information may have been at one time public."[32] With respect to public interest considerations, the Court stated that the purpose of FOIA was to "shed[ ] light on an agency's performance of its statutory duties"[33] and information, such as a rap sheet, which does not "directly" reveal the activities of the government, "falls outside of the ambit of the public interest that the FOIA was enacted to serve."[34]

Since *Reporters Committee*, the Department of Justice has seized

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Elec. Workers Local 41 v. HUD, 763 F.2d 435 (D.C. Cir. 1985) (disclosure of names of employees listed on payrolls); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971) (disclosure of names and addresses of employees eligible to vote in certain elections).

28 489 U.S. 749 (1989).

29 *Id.* at 776-80 & 777 n.22.

30 *Id.* at 780.

31 *Id.* at 763.

32 *Id.* at 767.

33 *Id.* at 773.

34 *Id.* at 773, 775.

on the Supreme Court's language in that decision and has urged the courts, as a categorical matter, to disallow derivative use analysis on the public interest side of Exemption 6 balancing.[35] The Department of Justice has argued that such an analysis does not focus properly on what public interests are revealed "directly" by the requested documents. This argument has been successful in recent appellate cases and a trend is emerging.[36]

In *Reed v. NLRB*,[37] the D.C. Circuit recently ruled that Excelsior lists containing the names and addresses of employees eligible to vote in representation elections should not be disclosed under Exemption 6 to a FOIA requester who planned to use the lists to correct alleged misrepresentations made by the NLRB to employees. The *Reed* court held that the information requested was "exclusively private" and that the requester's purpose was "irrelevant."[38]

The Second Circuit, in *Hopkins v. Department of Housing and Urban Development*,[39] recently ruled under Exemption 6 that "disclo-

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[35] Ironically, the government previously relied on derivative use analysis to justify withholding information for past FOIA requests. *See* Fund for Constitutional Gov't v. Nat'l Archives, 656 F.2d 856 (D.C. Cir. 1981) (access to records of Watergate Special Prosecution Force (WSPF) denied under Exemption 7(C) where the government contended that revelation of the information gathered by the WSPF was not in the public interest and would force investigated individuals to defend their conduct despite never being prosecuted); Columbia Packing Co., Inc. v. United States Dep't of Agric., 563 F.2d 495 (1st Cir. 1977) (a meat packing company, investigated for bribing two federal meat inspectors, was denied access to records of meat inspectors' individual careers, family relations, and financial and medical records under Exemption 6 where government claimed release was not in the public interest and would violate inspectors' privacy); Congressional News Syndicate v. Department of Justice, 483 F. Supp. 583 (D.D.C. 1977) (government contended that the release of information on recipients and donors of campaign funds in connection with the "Townhouse Operation" of the Watergate scandal were exempt under Exemption 7(C) because the release of information was not in the public interest and the "aura of Watergate" was such that release of individuals' names connected with the Watergate investigation would result in "an implication of criminality and political corruption").

[36] A recent district court decision, however, counters this current appellate trend. *See* International Diatomite Producers Assn. v. Social Sec. Admin., No. C-92-1634-CAL, 1993 WL 13728 (N.D. Cal. April 28, 1993) (applying derivative use analysis for public interest side of Exemption 6 balancing where requester sought Social Security numbers, individual benefits, claims, and reports of income of workers in diatomite industry to determine if the government agencies were protecting the workers).

[37] 927 F.2d 1249 (D.C. Cir. 1991).

[38] *Id.* at 1251-52. One district court decision has followed the direction of the *Reed* court. *See* Center for Auto Safety v. National Highway Traffic Safety Admin., 809 F. Supp. 148 (D.D.C. 1993) (holding that there was insufficient public interest in the disclosure to consumer groups of the names and addresses of individuals who complained to the National Highway Traffic Safety Administration about auto safety problems where the complainants had strong privacy interests).

[39] 929 F.2d 81 (2d Cir. 1991).

sure of information affecting privacy interests is permissible only if the information reveals something *directly* about the character of a government agency or official."[40]

The Second Circuit,[41] the Seventh Circuit[42] and the Eleventh Circuit[43] have held that the disclosure of names and addresses of government employees to unions which represent them is categorically barred under Exemption 6. For example, in *FLRA v. Department of Defense*,[44] the Eleventh Circuit held that the names and addresses of the employees, in isolation, "say nothing about a federal agency's character or function, [and therefore] under *Reporters Committee*, the public interest side of the balance here carries little weight."[45]

B. Department of Justice v. Landano

In the most recent Supreme Court FOIA case, *Department of Justice v. Landano*,[46] the Court addressed whether FOIA mandated a categorical presumption that all sources supplying information to the FBI in the course of a criminal investigation are confidential sources and, thus, exempt from disclosure under Exemption 7(D).[47]

Landano concerned FOIA requests for information the FBI had compiled in the course of its investigation of a police officer's murder. The Department of Justice contended that the Court's prior FOIA decisions "make it clear that where a generic 'categorical' showing is legally sufficient to establish the applicability of an exemption, the FOIA imposes no requirement of individualized

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40 *Id.* at 88 (citation omitted).

41 *See* FLRA v. Department of Veteran Affairs, 958 F.2d 503, 511-12 (2d Cir. 1992).

42 *See* Department of Navy v. FLRA, 975 F.2d 348, 355 (7th Cir. 1992).

43 *See* FLRA v. Department of Defense, 977 F.2d 545, 548 (11th Cir. 1992).

44 *Id.*

45 *Id.* (footnote omitted). The categorical rule continues to be adopted in Exemption 7(C) cases. *See, e.g.*, Landano v. Department of Justice, 956 F.2d 422, 430 (3d Cir.), *cert. denied*, 113 S. Ct. 197 (1992) (under Exemption 7(C), inmate not entitled to the names of persons who were interviewed as part of his criminal investigation because those names did not reflect "directly" on agency conduct); Safecard Servs., Inc. v. SEC, 926 F.2d 1197, 1206 (D.C. Cir. 1991) ("We now hold categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure.").

46 113 S. Ct. 2014 (1993).

47 Exemption 7(D) prevents disclosure of "records of information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552 (b)(7)(D) (1988).

proofs."[48] The Department of Justice also argued that there was an "inherently implicit" assurance of confidentiality when a source contributes information to an FBI investigation, thereby mandating a categorical presumption that all sources contributing to an FBI investigation are confidential and protected under Exemption 7(D).[49]

While the Court in *Landano* did not give the Department of Justice the "universal" categorical presumption it desired, the Court nevertheless did allow significant categorical government withholding under Exemption 7(D) with little showing. If the character of the crime and the relationship of the witness to the FBI are sufficient to determine that the source cooperated with an implied assurance of confidentiality, then a categorical presumption under Exemption 7(D) is warranted.[50] *Landano* thus adds some support to the judicial trend embracing categorical rules barring access to government information.[51]

C. United States Department of State v. Ray

The most recent Supreme Court case to address Exemption 6 is *United States Department of State v. Ray*.[52] In *Ray*, the Supreme Court was asked to decide whether certain FOIA requesters—an immigration attorney and certain political asylum applicants—were entitled to the names of certain Haitian "boat people" who had been denied political asylum in the United States and had

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[48] Petitioner's Reply Brief at 8, Department of Justice v. Landano, 113 S. Ct. 2014 (1993) (No. 91-2054). *See also* Petitioner's Brief at 23-24 n.17, Department of Justice v. Landano, 113 S. Ct. 2014 (1993) (No. 91-2054) [hereinafter *Landano* Petitioner's Brief].

[49] Such a presumption would effectively eliminate access to any government documents that are "confidential," as there would be no way for a requester to gain access to information to rebut the presumption of confidentiality. *Landano*, 113 S. Ct. at 2021.

[50] *Id.* Perhaps equally important is the revelation by the Department of Justice that the agency views "individualized, source by source showings" for government exemptions under FOIA as "nothing other than a judicially engrafted addition to [FOIA] itself." *Landano* Petitioner's Brief, *supra* note 48, at 24.

[51] Pursuant to the direction of the *Landano* Court, the Second Circuit modified its prior categorical presumption barring access to law enforcement records under Exemption 7(D) and instructed a district court to reconsider its decision barring access to government information relating to a murder. Oliva v. Department of Justice, 996 F.2d 1475 (2d Cir. 1993). In *Oliva*, the Second Circuit stated that the *Landano* decision rejected "adminstrative practicality" for "a more particularized analysis to determine whether or not documents should be exempt under 7(D)." *Id.* at 1477. Whether the Second Circuit will also follow *Landano*'s direction allowing for categorical presumptions where the character of the crime and the witness's relation to it are sufficient to infer confidentiality is unclear at this time.

[52] 112 S. Ct. 541 (1991).

been deported back to Haiti. The State Department had stated publicly that its personnel had gone to Haiti and interviewed several hundred returned Haitians ("returnees"), none of whom, according to the State Department, claimed that they had been persecuted after their return. The Immigration and Naturalization Service, in later Haitian political asylum hearings, cited these interviews as evidence that returnees are not harmed on return to Haiti and on that basis deported other Haitians. The FOIA requesters sought the names of the returnees contained in the interview reports so that they could be located and contacted. The requesters wanted to contact the returnees to determine whether United States officials were accurate in stating that the returnees had not been persecuted, for the purpose of ascertaining whether United States officials were monitoring properly Haiti's compliance with a treaty not to persecute the returnees, and to ensure fair and consistent political asylum proceedings in the United States.[53]

The Solicitor General argued in *Ray* that any derivative inquiry into the public interests for the names of the returnees should be rejected. Specifically, the Solicitor General maintained that under the *Reporters Committee* analysis, the public interest in obtaining information under Exemption 6 must be revealed "directly" by the documents themselves. The Supreme Court characterized the Solicitor General's argument as follows: The " 'derivative use' of requested documents is entirely beyond the purpose of the statute and . . . we should adopt a categorical rule entirely excluding the interest in such use from the process of balancing the public interest in disclosure against the interest in privacy."[54]

In a decision authored by Justice Stevens, the Supreme Court declined consideration of such a categorical rule, at least for the time being, because in the view of the Court:

> There is no need to adopt such a rigid rule to decide this case . . . because there is nothing in the record to suggest that a second series of interviews with the already-interviewed returnees would produce any relevant information that is not set forth in the documents that have already been produced. Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy. Accordingly, we need not address the question whether a "derivative use" theory would ever justify release of information about private

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53 Respondents' Brief, at 30-36, United States Dep't of State v. Ray, 112 S. Ct. 541 (1991) (No. 90-747).

54 *Ray*, 112 S. Ct. at 549.

individuals.[55]

The *Ray* Court nevertheless made a derivative inquiry into potential invasions of privacy resulting from further interviews of the returnees. The Court looked beyond the contents of the interview reports and noted that the disclosure of the returnees' names could subject them or their families to "embarrassment in their social and community relationships" because the returnees could be identified as persons who cooperated with the State Department.[56] The Court further noted that there was a "danger of mistreatment" and a possibility of "retaliatory action" against returnees should their names be disclosed.[57] The interview reports in and of themselves did not address the possibility of embarrassment, danger or retaliatory action. Rather, the Court made a derivative examination of State Department declarations filed in the FOIA lawsuit to come to its conclusion that "significant" privacy interests were at stake.[58]

Justice Scalia's concurring opinion in *Ray*, joined by Justice Kennedy, highlights the inconsistency of the majority opinion:

> The Court today pointedly abstains from deciding the derivative-use issue . . . . I am content with that. It seems to me, however, that since derivative use on the public-benefits side, and derivative use on the personal-privacy side must surely go together (there is no plausible reason to allow it for the one and bar it for the other) the Court should have been consistent in its abstention. It should not . . . have discussed such matters as the "retaliatory action that might result from renewed interest in [the interviewees'] aborted attempt to emigrate," and "the fact that respondents plan to make direct contact with the individual Haitian returnees identified in the reports."[59]

The concurring opinion concluded that the "majority does not . . . refute the persuasive contention that consideration of derivative uses, whether to establish a public interest or to establish an invasion of privacy, is impermissible."[60]

Although the concurring opinion in *Ray* is correct that derivative analysis on the privacy and public interest sides "must surely go together," the analysis should be permitted equally, rather than excluded on both sides, as set forth below.

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55 *Id.* at 549-50.

56 *Id.* at 548.

57 *Id.*

58 *Id.*

59 *Id.* at 551 (Scalia, J., concurring) (quoting *id.* at 548).

60 *Id.* at 550 (Scalia, J., concurring).

V. Derivative Use Analysis Should Be Employed on Both Sides of Exemption 6 Balancing

A. *Derivative Use Analysis of Privacy Invasions*

Given that the law commands disclosure if the government demonstrates no substantial invasion of privacy under Exemption 6, a full and derivative inquiry of privacy interests is warranted. Many times the production of documents itself will not constitute a significant invasion of privacy, but the production will lead to other acts or events that will substantially threaten privacy interests.

The Solicitor General inadvertently, but properly, urged the Supreme Court in *Ray* to implement a derivative use analysis with respect to invasions of privacy: "The purpose for which respondents seek this information adds further to the assault upon the privacy values protected by the Act. Respondents seek these names and addresses so that they can go to Haiti, track down the interviewed Haitian citizens and 'check what happened'. . . ."[61]

The *Ray* Court, without expressly acknowledging the fact that it was conducting a derivative examination of privacy interests, correctly studied what would be done with the names of the Haitian returnees if this information was disclosed. The production of the names alone did not constitute an invasion of privacy; however, the fact that the FOIA requesters planned to interview the returnees on the subject of persecution, once they learned the returnees' names, raised privacy concerns. To ignore such derivative privacy concerns could very well lead to the "clearly unwarranted invasions of privacy" Exemption 6 was designed to prevent. Indeed, the principal sponsor of the 1974 amendments to the FOIA stated that "deletion of names and identifying characteristics of individuals would in some cases serve the underlying purpose of Exemption 6."[62]

The *Ray* Court perhaps gave undue weight to the derivative privacy interests at stake. The feared invasion of privacy was that the FOIA requesters would contact the Haitian returnees once their names were disclosed and then would attempt to interview the returnees about possible persecution in Haiti. Although such interviews potentially could implicate privacy concerns, a phone call, mail solicitation, or even a visit by the FOIA requesters could be ignored or refused by the returnees like any other unwanted

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61 Petitioner's Brief at 30, United States Dep't of State v. Ray, 112 S. Ct. 541 (1991) (No. 90-747) [hereinafter *Ray* Petitioner's Brief].

62 Department of Air Force v. Rose, 425 U.S. 352, 375 (quoting 120 Cong. Rec. 17,018 (1974)).

solicitation.[63] Furthermore, such interviews attempted by private citizens with no power over the returnees is less intrusive than the behavior of the State Department in conducting essentially the same interviews with the same individuals.

B. Derivative Use Analysis of Public Interests

1. The Rationale

Derivative public interest examination under Exemption 6 is critical because the Department of Justice's proposed categorical rule, under the rubric of promoting administrative convenience, contravenes the FOIA's pro-disclosure purposes.[64] Although information released pursuant to a FOIA request sometimes may reveal the full nature of government conduct, in far more cases it will not. In those cases the information may be a necessary link to additional information, part of a larger puzzle where the pieces must be carefully searched out and assembled. The end result often is the exposure of government action, ineffectiveness or misconduct. Yet, under the categorical rule, if a requested document must be used to acquire other information about government conduct, then it need not be disclosed. This outcome would lead to absurd results. For example, if two sets of documents, read in conjunction, would uncover government misdeeds, but neither individually established any conclusive wrongdoings, then pursuant to this rule neither document should be produced.

The public interests in shedding light on official conduct depend primarily on what citizens know about official conduct, not on how the knowledge is gained. If the requested information could enable the public to gain such knowledge about government conduct, the public has a cognizable FOIA interest in the release of the information. The fundamental problem with the Department of Justice's proposed categorical rule is that it asks the right question at the wrong point in the Exemption 6 analysis. The Department of Justice's concern is about how a release of information would enable a FOIA requester to gain knowledge about official

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[63] *See* Riley v. National Fed'n of the Blind of North Carolina, 487 U.S. 781, 788-89 (1988); Shapero v. Kentucky State Bar Ass'n, 486 U.S. 466, 477 (1988); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983); Consolidated Edison Co. v. Public Serv. Comm'n of New York, 447 U.S. 530, 542 (1980).

[64] The Supreme Court rejected administrative convenience as the sole basis to create an anti-disclosure presumption in Exemption 7(D) cases. *See* United States Dep't of State v. Landano, 113 S. Ct. 2014 (1993). The Second Circuit has followed the Supreme Court's direction that Exemption 7(D) requires "a more particularized analysis." Oliva v. Department of Justice, 996 F.2d 1475, 1477 (2d Cir. 1993).

conduct, not whether the release would enable the requester to gain the knowledge. This concern is better addressed as a factor affecting the privacy side of Exemption 6 balancing.

2. Freedom of the Press

The press traditionally has used information in government documents as a springboard to uncover additional information, to direct questions to government officials, and to conduct follow-up interviews with the individuals affected. The resulting articles on how government carries out its functions have created public responses ranging from appreciation of government's successes to demands to have abuses remedied. These articles serve the FOIA's central purpose—to enable the public "to decide *for itself* whether government action is proper."[65]

A few examples of investigative journalism which have been aided by derivative use of information obtained through freedom of information laws or other public sources are provided below:[66]

> • After three military helicopters crashed in 1987 during routine night flights in Orange County, California, one reporter [for the *Orange County Register*] investigated the suspicious pattern. Military authorities initially maintained that there was no common cause to the crashes, but the reporter's investigation proved otherwise. After interviews established that all of the pilots who crashed had been wearing night-vision goggles, the reporter . . . made extensive FOIA requests for detailed accident reports and military data. Using the names provided in those reports, he interviewed families of crash victims, pilots, engineers and military officials to uncover the fact that obsolete night-vision goggles had led to at least 56 crashes and 130 deaths nationwide. In addition to winning a Pulitzer Prize, [his] series led to a congressional investigation, new safety regulations designed to ensure the safety of military aviators, and improved equipment.[67]
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> • A . . . Pulitzer Prize-winning series [in the *Atlanta Journal-Constitution*] uncovered the deaths of fifty-one children and the abuse of countless others while under the "protection" of Geor-

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65 Washington Post Co. v. Department of Health and Human Servs., 690 F.2d 252, 264 (D.C. Cir. 1982).

66 These examples and some of the First Amendment analysis that follows derive from an Amici Curiae brief submitted by the law firm Nixon, Hargrave, Devans & Doyle in *Ray*. *See* Brief Amici Curiae of American Newspaper Publishers Association et al., United States Department of State v. Ray, 112 S. Ct. 541 (1991) (No. 90-747) [hereinafter Brief Amici Curiae].

67 Brief Amici Curiae, *supra* note 66, at 22-23 (citing Humes, *Death in the Dark*, ORANGE COUNTY REGISTER, Dec. 4, 7, 8, 1988).

gia's child welfare system. The stories documented the utter failure of the system to keep track of the children under its care, many of whom lived in dangerous and appalling conditions and suffered preventable deaths or serious physical and emotional damage. Ironically, [the reporter of this series] found that long-standing confidentiality laws, ostensibly designed to protect the privacy of children, forbade the release of information—even about dead children—which could have saved them or others from brutal beatings and death. As a direct result of the public outcry following this series, Georgia appropriated several million dollars to reform its child welfare system, inquiries by prospective foster parents quadrupled, and volunteerism increased at an overtaxed charity hospital caring for abused and drug-addicted babies and children.[68]

- Another Pulitzer Prize-winning report [in *The Indianapolis Star*] exposed physicians in Indiana who had been found liable for malpractice several times, yet continued to practice medicine and were never disciplined by the responsible state agency. The repeated malpractice of these doctors resulted in dead as well as crippled and deformed patients who, due to Indiana's laws, were compensated for only a fraction of their subsequent medical costs.[69]

- [Reporters] of *The Orlando Sentinel* wrote a series in 1989 that explored the consequences of Florida's policy of relieving prison overcrowding by releasing inmates back into society before their sentences had expired. The reporters cross-referenced computerized prison records with publicly available criminal history records to disclose that nearly a third of those inmates released early had committed new crimes while they still would have been serving time for the old crimes, but for the early release policy. If they had not been able to identify those inmates released through the prison records, the reporters never would have been able to show the impact of Florida's early release policy. As a result of the series, 55 of Florida's 67 sheriffs joined in a lawsuit challenging the early release policy.[70]

The above articles succeeded because the reporters obtained enough additional information to get behind the facts released by government authorities. Without the ability to obtain names or other identifying details from the government resulting from derivative use

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68 *Id.* at 21-22 (citing Hansen, *Suffer the Children*, ATLANTA JOURNAL-CONSTITUTION, June 4-10, 1989).

69 *Id.* at 22 (citing Hallinan and Headen, *A Case of Neglect: Medical Malpractice in Indiana*, THE INDIANAPOLIS STAR, June 24-26, 1990 at 1).

70 *Id.* at 23 (citing Holton and Vosburgh, *Crime Before Its Time*, THE ORLANDO SENTINEL, Aug. 13-16, 1989).

public interest analysis under Exemption 6, the press will present only incomplete information to the public.

3. The Policies of the FOIA and the First Amendment

The relationship between the FOIA's policies and those of the First Amendment also work against the Department of Justice's categorical rule. The FOIA and the First Amendment both have as their basic purpose the assurance of an "informed citizenry vital to the functioning of a democratic society."[71] The categorical rule thwarts this purpose and creates an irrebuttable presumption of nondisclosure.

The Supreme Court has rejected this course in the judicial access area, holding that categorical privacy rules cannot overcome the principle of openness. In *Press-Enterprise Co. v. Superior Court*,[72] the Court recognized the importance of jurors' privacy rights, but struck down a trial court's decision that closed voir dire proceedings to the public and press based upon a generalized notion that those privacy rights overcame the value of openness. Similarly, in *Globe Newspaper Co. v. Superior Court*,[73] the Court discussed the privacy rights of child victims of sexual crimes, but held that those interests could not justify a categorical rule denying access to criminal proceedings. Moreover, in *Waller v. Georgia*,[74] the Court used a Sixth Amendment rationale to strike down another impermissibly broad rule of secrecy premised on privacy notions.

The Department of Justice's categorical rule suffers from the same problem as the broad rules of secrecy struck down in the judicial access cases. The categorical rule leads to the restriction of the free flow of information based upon generalized privacy concepts. The Supreme Court has blocked this result in judicial access cases, and the courts should do the same under Exemption 6, especially in light of the FOIA's strong disclosure bias.

4. The Solicitor General's Concerns

The Solicitor General in *Ray* raised several points in support of the argument that a categorical rule should be established barring any derivative inquiries into public interests for information under

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[71] FBI v. Abramson, 456 U.S. 615, 621 (1982) (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978)).

[72] 464 U.S. 501 (1984).

[73] 457 U.S. 596 (1982).

[74] 467 U.S. 39 (1984).

Exemption 6 balancing. Each of these points is addressed by traditional Exemption 6 balancing, as set forth below.

The Solicitor General first argued that the courts cannot look to the "derivative use" for information because to do so would entitle each requester to omnibus access to all information: "All . . . a requester would be required to do is frame his request in terms of a desire to contact the individuals involved and interview them as part of an investigation into the accuracy of the government's records and the fairness or effectiveness of the administration of those governmental programs."[75] Yet, under traditional Exemption 6 balancing, the courts are required first to analyze privacy interests and then to weigh any such interests against public interests in disclosure. If significant privacy interests outweigh public disclosure interests under derivative use analysis, withholding is proper. The traditional balancing approach under Exemption 6 fully takes into account all interests.

The Solicitor General next argued in *Ray* that the "derivative use" for information could not be considered under Exemption 6 because such an analysis was "flatly inconsistent with the holding in *Reporters Committee*."[76] Nonetheless, critical language from *Reporters Committee* undercuts this argument:

> In this case—and presumably in the typical case in which one private citizen is seeking information about another—the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.[77]

The *Reporters Committee* Court thus afforded the opportunity in certain cases for disclosure of information concerning individuals under traditional and complete derivative Exemption 6 balancing when that information "sheds light" on government conduct.

The Solicitor General further argued in *Ray* that derivative inquiries of public interests are improper under Exemption 6 because the courts may not look to the specific needs of FOIA requesters.[78] The Solicitor General is correct that the courts should focus on the greater public interests in disclosure under Exemption 6, rather than looking exclusively to the FOIA requesters' interests in the information at issue. Nevertheless, the requesters are part of the public, and

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75 *Ray* Petitioner's Brief, *supra* note 61, at 22.

76 *Id.* at 23.

77 Department of Justice v. Reporters Comm., 489 U.S. 749, 772 (1989) (citation omitted).

78 *Ray* Petitioner's Brief, *supra* note 61, at 25.

their use for requested information should be included within the framework of the public interests.[79]

The Solicitor General finally suggested to the *Ray* Court that "[a]n approach that turns upon a proposed use for the government records, rather than on the intrinsic informational value of the records, would introduce unworkable speculation and complexity into the application of Exemption 6."[80] Yet, the "requirement that the agency support its decision to withhold with reasonable authority places a duty on the agency" to analyze many factors in sustaining its burden.[81] Moreover, it is by no means easier to determine the "intrinsic information value" of documents than the public interests supporting disclosure.

VI. CONCLUSION

The courts should reject the categorical rule barring derivative use analysis of public interests under Exemption 6. Exemption 6 balancing not only should take into account derivative use examination of invasions of privacy, but also derivative use analysis of public disclosure interests.

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79 *See* American Fed'n of Gov't Employees, Local 1760 v. FLRA, 786 F.2d 554 (2d Cir. 1986); Arieff v. Department of Navy, 712 F.2d 1462, 1468 (D.C. Cir. 1983); Ditlow v. Schultz, 517 F.2d 166, 172 n.21 (D.C. Cir. 1975).

80 *Ray* Petitioner's Brief, *supra* note 61, at 26.

81 *See* Local 598 v. Department of Army Corps of Eng'rs, 841 F.2d 1459, 1463 (9th Cir. 1988).