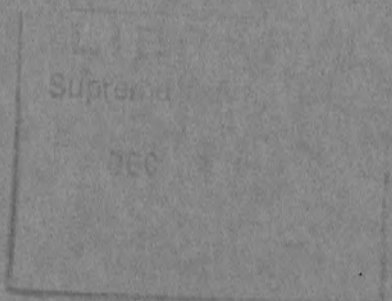


Supreme Court of the United States

October

TERM 1969



In the Matter of:

Docket No. 87

THE UNITED STATES,

Petitioner

vs.

LELORD KORDEL AND
ALFRED FELDTEN,

Respondent.

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ORAL ARGUMENT:

P A G E

Lawrence G. Wallace, Office of the Solicitor
General
on behalf of the Petitioner 2

Solomon H. Friend, Esq.
on behalf of Respondents 18

REBUTTAL ARGUMENT

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Lawrence C. Wallace, Office of the Attorney
General
on behalf of Petitioners 42

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IN THE SUPREME COURT OF THE UNITED STATES

October

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THE UNITED STATES,)	
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Petitioner)	
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vs)	No. 87
)	
LELORD KORDEL AND)	
ALFRED FELDTEN,)	
)	
Respondents)	
)	

Washington, D. C.
November 20, 1969

The above-entitled matter came on for argument at
12:43 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

LAWRENCE G. WALLACE,
Officer of the Solicitor General
Department of Justice
Washington, D. C.
Counsel for Petitioner

SOLOMON H. FRIEND, ESQ.
16 West 61st Street
New York, N. Y. 10023
Counsel for Respondents

1 MR. CHIEF JUSTICE BURGER: Number 87. United
2 States against Kordel and others.

3 Mr. Wallace, you may proceed whenever you are ready.

4 ORAL ARGUMENT BY LAWRENCE G. WALLACE, OFFICE
5 OF THE SOLICITOR GENERAL, ON BEHALF OF
6 THE PETITIONER

7 MR. WALLACE: Mr. Chief Justice, and may it please
8 the Court: This is a criminal prosecution under the Federal
9 Food and Drug Laws. Respondent and Detroit Vital Foods,
10 Incorporated, the corporation of which they were officers,
11 were convicted after a jury trial on five counts of an indict-
12 ment charging them with misbranding of drugs.

13 The corporation is not before this Court in the
14 present petition. The sentences imposed by the District Court
15 are summarized on our brief on Pages 2 and 3.

16 The evidence showed that Respondent Kordel was
17 President of the corporation and the author of books and
18 leaflets promoting its products; and that he traveled across
19 the country delivering lectures which were advertised and open
20 to the public. The writings and lectures claim that specified
21 ailments could be alleviated by the consumption of certain
22 foods and food elements and that the best sources of these
23 was a product offered for sale by the corporation. These
24 products were sold in booths in or near the lecture halls and
25 were also available in health food stores, generally.

1 Respondent Feldten acted as Kordel's assistant,
2 selling products at the lectures and taking orders for ship-
3 ments from Deteroit.

4 The criminal charges were that as to some of the
5 products certain of the books and leaflets constituted part of
6 the labeling and contained false and misleading statements
7 and as to all of the counts on which respondents were con-
8 victed, the product which they claimed to be merely food
9 supplements, were in fact, drugs. Because they were intended
10 by the Defendants to be used for the prevention and treatment
11 of various diseases and health conditions and that the label-
12 ing of these products failed to set forth adequate directions
13 of the uses for which they were intended, as required by the
14 Act.

15 Since the oral representations made in Respondent
16 Kordel's public lectures were relevant in showing the uses
17 for which the products were intended, tape recordings of his
18 public lectures were introduced into evidence by the Govern-
19 ment at the trial.

20 At this point I believe a summary of the relevant
21 procedural chronology will be helpful to the Court. The
22 indictment in this case was returned in the summer of 1963.
23 Previously, in June of 1960 the Government had filed a libel
24 proceeding under Section 334 of the Act to condemn quantities
25 of the corporation's products as misbranded. The co

1 The corporation appeared as claim in this in rem
2 proceeding and filed an answer denying the material allega-
3 tions of the complaint.

4 The parties then served interrogatories upon each
5 other, pursuant to Rule 33 of the Rules of Civil Procedures.
6 The Government's interrogatories were served in January and
7 April of 1961, and sought, among other things, detailed infor-
8 mation about the labeling, testing, manufacture and composi-
9 tion of certain of the products and about Kordel's oral
10 representation concerning the efficacy of these products that
11 were made during public lectures that he made in Detroit.

12 In late January, 1961 shortly after service of the
13 Government's initial interrogatories, the corporation received
14 a notice from the Government, pursuant to Section 335 of the
15 Act, indicating that criminal prosecution of the corporation
16 and of the Respondents was contemplated in part, for the same
17 conduct that was the subject for the libel.

18 The corporation then, in April 1961 moved that the
19 District Court extend its time to respond to the interroga-
20 tories until final disposition of any criminal prosecution
21 that might be brought.

22 The District Court denied this motion in June, 1961
23 holding that there was no certainty when or whether a criminal
24 prosecution would be brought and that there was no prejudice
25 in requiring the corporation to answer the interrogatories

1 since the same information would otherwise become available
2 to the Government in any event, from the trial of the libel
3 proceeding.

4 Pursuant to the Court's order the corporation then
5 filed answers to some of the interrogatories in September,
6 1961 and filed specific objections to others. In subsequent
7 proceedings some of the objections were sustained and some
8 were overruled and the Government withdrew some of the inter-
9 rogatories. The corporation then answered the remaining
10 interrogatories in September 1962.

11 Respondent Feldten subscribed to all of the corpora-
12 tions answers as vice president, and stated that they were
13 true to the best of his knowledge and belief, but that not
14 all of the answers were known to him personally.

15 The libel proceeding thereafter terminated in a
16 consent decree entered in November, 1962. In June, 1962,
17 after services of the interrogatories and after the corpora-
18 tions initial answers, but prior to its supplemental answers,
19 the Food and Drug Administration referred the matter to the
20 Department of Justice with a recommendation for criminal
21 prosecution. The indictment was returned in August, 1963.

22 In March, 1965 the defendants in the criminal case
23 moved to suppress any evidence obtained by the Government as
24 a result of the corporations answers to the interrogatories
25 in the libel proceeding or in the alternative for a hearing to

1 determine the Government's motive in bringing the civil action
2 and serving the interrogatories.

3 The District Court granted the alternative request
4 for a hearing which lasted three days. The transcript of the
5 hearing set forth in the Appendix from Pages 58 to 290 showed
6 that at the time the civil case was filed the Food and Drug
7 Administration already had evidence, sufficient in its judg-
8 ment to establish all the elements of the criminal violation
9 but had not yet decided whether to recommend criminal prosecu-
10 tion.

11 The agency determined that the in rem seizure pro-
12 ceeding should be commenced promptly in order to prevent
13 harm to the public from continued distribution of the mis-
14 branded drugs and that the interrogatories were designed solely
15 for the purposes of the civil suit and were submitted, as they
16 are, routinely in such suits in an effort to narrow the issues
17 for trial and in the hope of laying the foundation for a
18 motion of summary judgment, possibly inducing the corporation
19 to agree with consent decree by demonstrating the insubstan-
20 tiality of its case, which is what eventually happened.

21 The District Court held on the basis of this hearing
22 that the Governmental decisions to commence the civil suit and
23 to serve the interrogatories were made in good faith and not
24 for the purpose of procuring evidence for a criminal prosecu-
25 tion. And a conviction followed.

1 And while not disagreeing with these findings, the
2 Court of Appeals reversed Respondent's conviction on the ground
3 that the Fifth Amendment privilege against self-incrimination
4 of the individual criminal defendants had been violated by
5 requiring the corporation to answer the interrogatories in the
6 civil proceeding. The Court held that it was constitutionally
7 insufficient; that the government had acted in good faith in
8 the civil proceeding and that none of the answers to the in-
9 terrogatories had been introduced ~~and~~ evidence in the criminal
10 case. It held that the government must also prove that it
11 had not in any utilized, for purposes of the criminal case,
12 information or leads obtained from the answers to the inter-
13 rogatories.

14 In its initial opinion the Court of Appeals also
15 reversed the corporation's conviction but on the government's
16 petition for rehearing it modified its opinion in judgment so
17 as to affirm that conviction on the ground that the privilege
18 against self-incrimination is available under this Court's
19 decision only to natural persons and not to a corporation.

20 A petition for certiorari by the corporation was
21 denied by this Court. A petition for rehearing is presently
22 pending.

23 We contend, first, that the Court of Appeals erred
24 in holding the Respondents' privilege against self-incrimina-
25 tion had been violated. Neither of the respondents had

1 interposed any claim to the seized drugs nor did either of the
2 them have a personal property interest in the drugs. Neither
3 was a party to the civil action; neither of them was obligated
4 or required to answer any of the interrogatories served on the
5 corporation proceeding, and indeed, Respondent Kordel supplied
6 no answers and Respondent Feldten, who did submit answers on
7 behalf of the corporation, stated therein that the truth of
8 the answers was not known to him personally. So, the answers
9 did not constitute admission on his part.

10 And finally, neither Respondent in any way claimed
11 that his privilege was being violated when Respondent Feldten
12 submitted the answers on behalf of the corporation.

13 The explicit language of Rule 33 dealing with inter-
14 rogatories and the decisions implementing the rule, made clear
15 that when a corporation is the party served with interrogator-
16 ies, the corporation is obligated to appoint an agent who,
17 without fear of self-incrimination can furnish such requested
18 information as is available to the corporation. No claim was
19 made in the libel proceeding that answers to any of the ques-
20 tions were not available to the corporation within the meaning
21 of the rule, because the only repositories of the information
22 were individuals who might incriminate themselves by disclosing
23 it.

24 No individual is required under the rule to submit
25 any answer on the corporation's behalf that might tend to

1 incriminate him personally. But the corporation, which under
2 this Court's decision, has no privilege against self-incrim-
3 ination and cannot invoke the privilege of any individual on
4 its behalf, remains obligated under the rules to provide such
5 requested information as is available to it.

6 To the extent that this obligation with the intended
7 risk; the failure of the corporation to comply, might result
8 in a judgment forfeiting the corporation's property, consti-
9 tutes compulsion. It is compulsion of the corporation which had
10 no privilege; not of the Respondents and officers or share-
11 holders of the corporation. To hold otherwise would be to
12 overrule Campbell Painting Corporation against Reid in Vol.
13 392 U.S. and its predecessor decisions, because compulsion of
14 a corporation to provide possibly incriminating information can
15 always be said to amount to compulsion of its individual
16 officers or shareholders. They cannot utilize the corporate
17 form of doing business and yet claim a personal interest in
18 the corporation's property only for purposes of the Fifth
19 Amendment privileges.

20 That is the meaning of this Court's decision and it
21 was error, in our view, for the Court of appeals to hold to
22 the contrary.

23 Q Was there any room to pierce the corporate
24 veil in criminal cases?

25 A Well, I think that that was the issue in

1 Campbell Painting Corporation against Reid. Certainly the
2 dissenting opinion was based on the view that that would have
3 been an appropriate occasion for piercing the corporate veil.
4 That was a closely held corporation.

5 Q It may or may not have been there; but would
6 it ever be?

7 A It would be a departure from the holding that
8 we've had consistently that non-personal entities cannot enjoy
9 a privilege against self-incrimination.

10 Q Would there be, in your view, a violation of
11 the Fifth Amendment if these people had not been doing business
12 in the corporate form that is a partnership and this same
13 thing happened?

14 A Well, they certainly could have claimed a
15 privilege against self-incrimination as individuals, even
16 though they were doing business as a partnership.

17 Q I see. But let's assume the civil action
18 started; interrogatories to the parties, and the threat was
19 if that/they didn't answer them their property would be corporate
20 compulsion.

21 A Well, but that's always a possible sanction
22 under the civil rules. They could have claimed a privilege
23 against self-incrimination providing it was adequately founded
24 as to a particular question, just as Respondent Feldten/claimed
25 in this case --

1 Q Even then to be compulsive wouldn't it have
2 to be that the forfeiture would occur as a result of the
3 failure to answer the interrogatories, rather than the strength
4 of the government's case in the civil suit?

5 A Well, that is true; there might be some
6 question as to whether the mere failure to answer the inter-
7 rogatories and the possible sanctions

8 Q Well, that is not automatic at all. That
9 isn't automatic at all, that you lose your suit because you
10 refuse to answer.

11 A It certainly is not, especially if you have
12 a well-founded claim of privilege as the basis for your
13 refusal.

14 Q I suppose many civil cases have been lost
15 because of the disinclination of the defendant in the civil
16 case to answer some question which might incriminate himself;
17 is that not so?

18 A To the best of my belief it is so. But, as
19 I said, the extent that there was compulsion under the civil
20 rules in this case, it was compulsion on the corporation which
21 has no constitutional privilege not to be compelled to submit-
22 ting incriminating information. That's what the Court has
23 held at this time.

24 Q It could easily happen in a tax -- civil
25 tax case where defendant might assert the Fifth Amendment, but

1 he would take the risk of jeopardizing his case, possibly, by
2 doing so, and he might suffer the consequences.

3 A That is correct, Your Honor.

4 It was an in rem proceeding, the corporation being
5 the claimant was the other party.

6 Q The corporation was the claimant.

7 A We have also addressed our brief to the
8 broader concern which seems to underlie the decision at the
9 Court of Appeals: the question of fairness in the administra-
10 tion by government agencies/ⁱⁿthis and other fields of their
11 responsibilities under statutes which provide for the possi-
12 bility of both civil and criminal remedies against offending
13 corporations or individuals.

14 Our brief discussed the practices and experience with
15 several agencies and articulates some general criteria, which
16 has seemed to us to be suggested by the leading cases in this
17 field:

18 And we also discuss the matter/^{to}which I would now
19 like to turn: our contention that there was no unfairness in
20 the administration of the Food and Drug Laws in this hearing.

21 There was in the first place, an important need to
22 protect the public from harm here, as is frequently true at
23 Food and Drug or in securities broad cases, for that matter.
24 By commencing the civil proceedings promptly, it was/^{at}the very
25 least, reasonable for the responsible officials to decide that

1 this protection of the public should not await determination
2 of whether a criminal prosecution would also be appropriate,
3 let alone final disposition of any criminal proceeding that
4 might be instituted.

5 Moreover, it was important to proceed to judgment in
6 the condemnation case because Congress has, for good reasons
7 referred to in our brief, provided in Section 334 of the Act
8 set forth at Pages 26 and 7 of our brief, that the Government
9 must obtain a favorable judgment in a forfeiture case before
10 it can proceed by multiple seizures against additional quan-
11 tities of the drugs being marketed elsewhere.

12 The interrogatories served on the corporation were
13 found after a hearing to have designed in good faith for the
14 legitimate purpose of expediting civil suits and judgments.
15 The questions asked were relevant to the issues in the civil
16 proceeding, even though the Court of Appeals seemed to believe
17 that some of them were not, apparently because it did not
18 appreciate the bearing of Respondent Kordel's oral represen-
19 tations at the public lectures on the theory of the Govern-
20 ment's civil case, which depended on proof of the uses for
21 which the product was being marketed by the corporation were
22 intended.

23 In their brief, Respondents suggest a lack of fair-
24 ness because the Government could have utilized an alternative
25 procedure seeking interim injunctive relief instead of the

1 libel in rem. But the same interrogatories would have been
2 in
3 equally relevant/establishing the governments case in an
4 injunctive proceeding.

5 Moreover, the judgment in an in rem proceeding pro-
6 vides more effective protection of the public because it
7 enables the Government expeditiously to present further dis-
8 semination of the misbranded drugson anyone holding them for
9 sale.

10 A final indication of the Government's fairness in
11 this case is to be found in the fact that shortly after service
12 of the interrogatories and prior to the corporation's answer-
13 ing of them, the Government notified the corporation, pursuant
14 to Section 335 of the Act, that criminal prosecution of Res-
15 pondents and the corporation was being considered. Respondents
16 could not judge whether providing answers to the interrogator-
17 ies on behalf of the corporation might tend to incriminate
18 them. And, indeed, the not-very revealing answers actually
19 furnished set forth in the Appendix, suggests that this con-
20 sideration did not escape their attention.

21 Q Was that notice of the criminal proceeding
22 required by the statute --

23 A It is required by the statute: Section 335,
24 Title XXI, Your Honor.

25 We do not rest, however, on a contention that the
Government learned nothing from these answers and matters as to

1 which it is generally difficult to sustain a burden of proof
2 such as the Court of appeals here employs.

3 Our position is that because the interrogatories
4 were used properly and fairly in a good-faith civil suit for
5 the legitimate purposes of that suit there is no more reason
6 for preventing the Government from basing a criminal investi-
7 gation from information it learned thereby than there would be
8 for preventing it from basing an investigation on information
9 legitimately revealed in the course of any other good-faith
10 civil procedure, whether between private parties or similarly
11 involving the Government as a party.

12 Exclusionary rules in their various connotations
13 have, after all, been held by this Court to be required only
14 where otherwise relevant and competent evidence has been il-
15 legally or improperly obtained. In our view it would ill-serve
16 the cause of justice for the Court now to depart from that
17 principle.

18 We therefore ask that the judgment below be reversed.

19 Q Do you consider that there are any kinds of
20 cases where the so-called corporate privilege is -- or so-
21 called, is involved; or the absence of a corporate is involved
22 where the rationale of the Court of Appeals' decision here
23 could be brought into play? What sort of a case do you en-
24 vision, if any?

25 A Well, the case has been relied upon in

1 litigation in securities fraud cases, for example. I've been
2 informed by the staff of the Securities and Exchange Commis-
3 sion. I think that the food and drug and securities areas
4 are the ones in which the problem is most likely to arise be-
5 cause there the areas in which the Government agencies most
6 frequently find it necessary to proceed quickly with civil
7 proceedings before a determination can be made as to whether
8 criminal prosecution is warranted.

9 Q Well, I didn't make myself clear.

10 What elements are not present case that would have
11 justified the Lower Courts, that would have been necessary to
12 justify the Lower Court's decision, in your view?

13 A Well, surely the result would have been
14 justified if the in rem proceeding had been brought in bad
15 faith, merely as a device for securing evidence to be used in
16 the criminal proceeding or as an improper instrument of
17 criminal investigation. I think that if the hearing had shown
18 that; if there had been a finding to that effect, then the
19 results would have been justified, although we can't accept
20 the rationale that the violation was of the Fifth Amendment
21 privilege against self-incrimination.

22 Q Well, what case in this Court would be --
23 aside from Fifth Amendment problems, put those aside -- and
24 what case in this Court do you suggest would preclude the
25 Government from bringing a civil suit deliberately for the

1 purpose of using compulsory processes for civil suits to
2 gather evidence for a criminal case?

3 A I don't think there is a precise holding to
4 that effect, but there certainly is in the Proctor and Gamble
5 case, concerned ---

6 Q Would that be a constitutional question?

7 A I need not rise to that level in order to ---

8 Q Well, did it --

9 A -- in order for it to be prepared in a
10 Federal prosecution, of course. But we believe that it would
11 present a question under the Fifth Amendment's due process
12 law.

13 Q Well, a --- surely Proctor and Gamble's
14 talk was determined on the policy of the statute.

15 A That is correct.

16 Q And that position in some of these cases be
17 open to the public and therefore, a in camera grand jury.
18 That seemed to turn rather on the policy of the statute.

19 A Well, that is correct and I --

20 Q I think it's rather likely that the motion
21 is a due process problem; constitutional due process. Is there
22 no case where this Court has ever said that?

23 A Well, it announced to a form of the due
24 process violation if the specified criminal --

25 Q Constitutional due process.

1 A -- if the specified procedures in a criminal
2 case are not followed as they were intended to be followed and
3 with safeguards provided from securing criminal evidence else-
4 where in the Bill of Rights.

5 Q Yes, but what possibility --

6 A I don't think that civil interrogatories of
7 the sort provided for in the Civil Rules would necessarily
8 pass muster in the ordinary processes of criminal procedure.

9 Q We're postulating no Fifth Amendment problem.
10 We are postulating no Fifth Amendment issue, so what other
11 Bill of Rights provision is violated by using the civil pro-
12 cesses for this purpose?

13 A Well, there may well be no constitutional
14 violation in that situation. All we say in our brief is that
15 it seemed to us that the due process clause provided the more
16 appropriate framework for considering this issue than the self-
17 incrimination provision of the Fifth Amendment in this case.

18 We didn't mean to concede that the due process clause
19 would be violated in such a situation.

20 I'd like to reserve the balance of my time, please.

21 MR. CHIEF JUSTICE BURGER: Mr. Friend.

22 ORAL ARGUMENT BY SOLOMON H. FRIEND, ESQ.

23 ON BEHALF OF THE RESPONDENTS

24 MR. FRIEND: Mr. Chief Justice and may it please the
25 Court: Before addressing myself to the two basic arguments of

1 the Solicitor, I'd like to take just a moment to highlight
2 certain critical, salient facts which I think were minimized
3 by the Solicitor's presentation which support our contention
4 that there here is involved an extraordinary example of unfair
5 inquisitorial authority exercised by the Food and Drug Ad-
6 ministration in a manner which we contend is abhorrent to
7 civilized procedures in the administration of criminal justice.

8 Q Do you rely on any statutory prohibition
9 against what's called unfair?

10 A Your Honor, yes, I do. I would rely upon the
11 McNabb doctrine that this Court and the Federal Courts have
12 supervision over the fair administration of criminal justice,
13 which as I understand, the Government's argument rises to the
14 level of a constitutional right of due process.

15 Q Didn't the Court Below decide this on the
16 question of constitution?

17 A It would appear that they decided the ques-
18 tion on two grounds, one of which they articulated out, I
19 believe, ^{more} specifically than the second ground, and the Solicitor
20 apparently agrees with that. First on the Fifth Amendment and
21 secondly, because of some of the cases which they cited in
22 their statement of what actually had occurred and the complete
23 and total comingling of a civil function and the criminal
24 investigation by the same individual at the same time, that
25 that somehow moved the Court to rely upon certain cases which

1 they did rely upon to support the ultimate decision of --

2 Q Are you relying on the constitutional point
3 or the other; or both?

4 A Both, Your Honor; both, Mr. Justice Black.

5 Q And your argument is that if something a
6 Court thinks is unfair is prohibited by law?

7 A I would say it's violative of the constitu-
8 tional due process and also comes within the authority of
9 this Court to supervise the fair administration of justice
10 under the McNabb Rule.

11 Now --

12 Q While we have you stopped for a moment, Mr.
13 Friend, suppose you tried the civil case and in the civil
14 case, instead of eliciting these answers by discovery the
15 same questions were put to the individual officers here
16 involved; would you have at that time a choice to decline to
17 answer on Fifth Amendment grounds? Or answer as they did?

18 A I think, Your Honor, the answer to that
19 question is that at that point there would have been a choice
20 which they could make, if they had testified they would have
21 been deemed to have waived their privilege.

22 In the instant case they sought relief in the form
23 of a protective order and then were ordered -- that is to say,
24 as they would argue, the co-poration, which happens to be the
25 same two individuals -- the corporation was ordered to answer

1 the questions.

2 Q Well, how is that different from having a
3 question put, refusal made in the courtroom sitting on the
4 witness chair; other than on Fifth Amendment grounds, and then
5 having an order from the Court directing you to answer the
6 question?

7 A Mr. Chief Justice, in all the -- there are
8 cases which say that if it is neither; that if the Government
9 does not have under contemplation the bringing of a criminal
10 case, then there are occasions which say that while the defen-
11 dant must answer the question in the civil case, in the
12 case of fairness and to avoid abuse, the Government may not use
13 those answers in the criminal case.

14 Q Well, assuming -- and against the background
15 of the Fifth Amendment problem.

16 A MNo, Mr. Justice White. The cases go on the
17 broader theory that it is inherently unfair to either defendant
18 in a civil case to try and get the Government's evidence by
19 use of the Federal Rules of Criminal Procedure where there is
20 a threatened criminal case or a pending criminal case and for
21 the Government to propose interrogatories to the defendant to
22 try to get the defendant's defense or evidence which will
23 support the prosecution.

24 And as a matter of fact, in the cases cited on our
25 brief -- in our brief, under the anti-trust laws and as well as

1 under the Internal Revenue Service laws. The case United
2 States against Linen Supply Institute of Greater New York, the
3 Government had moved to extend its time and sought a protec-
4 tive order, just as we did, from being required to answer
5 interrogatories which had been propounded to it by the defen-
6 dant in the civil case. And argued the very same argument
7 which we make -- at least one of the arguments which we make
8 here -- namely that the Federal Rules of Civil Procedure
9 should not be used by either side where there is a criminal
10 case pending so as to draw from the use of the Federal Rules
11 information that they would not be entitled to under the
12 Criminal Rules.

13 Now, we don't say, and nor did the Court find -- in
14 fact the Court of Appeals specifically held that the Government
15 may bring a civil and a criminal case simultaneously if the
16 statute so provides.

17 But as we read the Court of Appeals holding they
18 are saying: strike a fair balance between the needs of the
19 Government to obtain answers to interrogatories to pursue its
20 remedy civilly. While that would be sufficient; they could
21 use the answers in the civil case; They should not be allowed
22 to use those answers in the criminal case.

23 They may bring their criminal case, but they should
24 not be allowed to use those answers, because then we have a
25 virtually uncontrolled situation where both sides --

1 Q Well, I gather this is really an argument
2 that -- to the extent that there may be discovery in a
3 criminal prosecution, it may be only that discovery which the
4 criminal rules permit. You can't use the civil rules to make
5 discovery in the criminal case or vice versa; is that it?

6 A That would be our position, Mr. Justice
7 Brennan.

8 Q Well, what would you say, though, if the
9 interrogatories here had not been signed by either one of these
10 two men, but had been signed by someother officer of the
11 corporation?

12 A Our position would be that if the Government
13 had at that time a pending criminal procedure they should not
14 seek to elicit through the use of interrogatories in a case
15 which is identical to the criminal case.

16 Mr. Justice White, the civil case was identical with
17 the counts in the criminal case.

18 Q I know, but in the criminal case -- let's
19 assume that they had a criminal case going and they subpoenaed
20 the files of the corporation; not the files of the individual
21 defendant, but the files of the corporation. I suppose they
22 could get them; couldn't they?

23 A Well, I would agree with Your Honor that
24 they could under the White case --

25 Q Well, they were getting no more -- putting the

1 Fifth Amendment aside, they were getting no more by getting
2 corporate evidence than they could get in the criminal case.

3 A Well, I most respectfully disagree with that
4 suggestion, Mr. Justice White, because even the District Court
5 found, and the Court of Appeals made express findings with
6 respect to this point that what they sought was not corporate
7 documents; that what they sought was admissions concerning
8 activities of Kordel.

9 Now, as Your Honor will recall, the Solicitor made
10 the point that the acts which misbranded these drugs were
11 books which had been written by Kordel; lectures which he had
12 given. There wasn't anything intrinsically wrong with the
13 label itself; the drug was not adulterated; there was not a
14 nonsafe or poisonous substance being sold.

15 And what they did is that they chose to pierce the
16 corporate veil themselves by the interrogatories which they
17 answered.

18 Q Who answered?

19 A The other defendant in this case, Mr. Feldten.

20 Q Did Kordel answer?

21 A Kordel did not sign the interrogatories but
22 the Court of Appeals says that he undoubtedly and definitely
23 participated in a decision to answer the questions which they
24 were required to do after the Court had required them to answer
25 the questions --

1 Q Did he claim any immunity on the grounds of
2 the Fifth Amendment?

3 A Mr. Justice Black, when the motion for a
4 protective order was made before the District Court in the
5 civil case, while they did not plead the Fifth Amendment, the
6 motion for the protective order clearly spelled out the
7 dilemma which confronted the two officers of the corporation.

8 Q Well, did they claim immunity under the
9 Fifth Amendment?

10 A They did not claim the Fifth Amendment; they
11 claimed that evidence to be given in the case -- they did not
12 spell out the Fifth Amendment in those terms. They said,
13 however, that incriminating information would be --

14 Q Well, then they didn't claim it; did they?

15 A Well, I would say they did not claim it in
16 the technical sense but I do not suggest that that constituted
17 a waiver.

18 Q I understand that; I understand that. That's
19 not what I was asking for, though. Did they claim it?

20 A They didn't claim it specifically, but their
21 failure to have claimed it, in my judgment, would not be a
22 waiver because of the form in which they did ask to be excused
23 from answering the questions.

24 Now --

25 Q Let me ask you a question: Suppose the civil

1 case started; no criminal case in contemplation or investiga-
2 tion, and the testimony in the trial on the civil case satis-
3 fied the prosecutor that there was a criminal case which should
4 be made out and then he got an indictment after the disposi-
5 tion of the civil case, would you make these same claims?

6 A I would not make that argument under those
7 facts, Your Honor, and I do not believe that those facts would
8 have moved the Court of Appeals to reverse.

9 Q Then does the constitutional question you are
10 arguing depend upon the motivation of the prosecutor in press-
11 ing the civil case first?

12 A Mr. Chief Justice, I do not believe that a
13 pursuit of the motive of good faith or the lack of good faith
14 is a fruitful inquiry, for this reason: In every case where
15 there is a criminal case pending or threatened that's parallel
16 to a civil case it can always be argued by the Government that
17 at least one of the motives in serving the interrogatories is
18 to lay the groundwork for summary judgment or narrow the issues
19 and indeed, the filing of the civil case under the Food and
20 Drug law is a relatively simple and commonplace function.

21 As a matter of fact, what happened in this case is
22 after they filed this civil case they did nothing to protect
23 the public interest, either by an injunction -- and of course,
24 if they had all the evidence anyway which they say that had, to
25 bring a criminal case, they most certainly could have moved in

1 with a temporary restraining order to restrain shipment which
2 would have dried up the source of the materials, they wouldn't
3 have had to make ^{multiple} seizures.

4 Secondly, they never made multiple seizures. The
5 case was settled by a consent decree containing an exculpatory
6 clause which they admitted that nothing within that civil case
7 would be deemed as an admission against the premise that they
8 violated the law.

9 Then, by using the interrogatories -- the answers
10 for the interrogatories, and I would like to talk about that
11 for a moment -- by using the interrogatories they accomplished
12 exactly that which they said would not be implied by the entering
13 of the consent decree, namely: an admission of guilt or evidence
14 or leads from evidence concerning guilt.

15 Now --

16 Q Mr. Friend, may I just ask -- suppose that
17 there had been no proceeding against the individuals, either
18 a civil case or in the criminal case. But the defendant in
19 each, the civil and the criminal case had been the corporation
20 only, would you be making this same argument?

21 A Your Honor, the corporation was the defendant
22 involved.

23 Q I know it was, along with the individuals
24 But suppose it was the sole defendant in the civil case and
25 the sole defendant in the criminal case.

1 A Sir, I would not make the argument on Fifth
2 Amendment grounds but I would make the argument under McNabb
3 or under reasonable and fair administrative procedures --

4 Q And under the rules, I guess?

5 A And under the rules; I think it's Rule 41 --

6 Q And you think, then, that the Court of
7 Appeals was wrong, then in affirming the judgment against the
8 corporation?

9 A The Court of Appeals -- I do. As a matter of
10 fact I have a petition for rehearing of denial of a petition
11 for certiorari as to the corporation which was filed in June
12 and which is still pending before the Court. And one of the
13 arguments we made on the petition for rehearing is that if
14 we're right on this other point of unfairness. That is to say
15 if the Court of Appeals is sustained on grounds broader,
16 perhaps than what they specifically articulated, then that
17 would justify a reversal of the Court of Appeals affirmance
18 in respect to the corporation. And I suspect that perhaps
19 that's one of the reasons why our petition or motion for re-
20 hearing is pending, because there is a relationship between
21 these two cases.

22 Q If we have to decide this on the basis of the
23 facts, would you mind telling me upon what moral principle
24 you rely? Biblical or religious principle that you rely on?

25 A Well, I don't know, Mr. Justice Black, if I

1 could slot it into any one of those categories, but I think
2 I would rely upon the principle that was stated in U. S.
3 against Boyd: "That no court should decree a discovery which
4 will tend to convict a person or a corporation of a crime.

5 'Q But that was a Fifth Amendment question.
6 That wasn't --

7 Q That wasn't on the basis of fairness. As my
8 brother says, that's the Fifth Amendment.

9 A As I read Boyd, Mr. Justice Brennan, the
10 holding of Boyd or the language in Boyd is somewhat broader
11 than the Fifth Amendment. Indeed, it goes to the point that
12 there is even a possible Fourth Amendment violations as an
13 unreasonable search and seizure and that the District Court --

14 Q But did not this Court in the Boyd case,
15 emphasize with great particularity that it was private papers,
16 the kind of papers that were being seized and cited a British
17 from a couple of hundred years before, "That man's private
18 papers are amongst his dearest possessions." Something like
19 that.

20 Now, you don't have private papers here, do you?

21 A Mr. Chief Justice, the case did deal with
22 private papers. There was language in the Boyd case which the
23 District Judge in our case, who ruled against us on this
24 motion for suppress, by the way, suggests that the Boyd holding
25 is broader than the Fifth Amendment or private papers, in that

1 it's basically unfair; it's violative of the public policy
2 which is rooted -- this is their language -- "rooted in
3 historical and settled concepts of Anglo-Saxon criminal juris-
4 prudence that a defendant or prospective defendant should not
5 be required to disclose evidence to sustain the prosecution
6 against him in a criminal case or his evidence of defense". And
7 in the Fair case and any number of cases that make the point
8 that this is not a matter of Fifth Amendment. It borders on
9 the possible violation of a privilege of self-incrimination
10 and that the issue is also whether the methods employed in
11 obtaining such information shows such offense that the evidence
12 should be inadmissible, apart from Fifth Amendment considera-
13 tion.

14 Q Now, in determining it on fairness, what I
15 am interested in is what's my standard; what guides me if no
16 constitutional provision and no law?

17 A Well, Mr. Justice Black, I think the standard
18 here would be when one views the facts, no different from what
19 the standard was in the McNabb case or the Rea case.

20 Q What happened here, and I think this should be
21 stressed, is that the interrogatories were prepared by Mr.
22 Josh Randolph of the Food and Drug Administration at the same
23 time that he prepared a notice notifying the defendants -- all
24 the defendants, including the corporation, that their investi-
25 gation revealed defendant's responsibility for criminal

1 violations of the Act.

2 Now, this notice is just that; it didn't say we
3 have it under consideration. It says, "our investigation"
4 -- this is on Page 1-A of our appendix in our brief --
5 "Investigation by this administration indicates your respon-
6 sibility for violation of the Act" and then they spell out the
7 violations.

8 Now, the same individual who was investigating --
9 and this was Mr. Randolph's testimony -- he was in charge of
10 the investigation in the criminal case and he was in charge
11 of preparing the interrogatories in the civil case.

12 Q Did that notice get delivered before
13 interrogatories were answered?

14 A The notice was sent out on December 29th;
15 they were received on January the 15th. The interrogatories
16 were received on January the 9th. They were virtually simul-
17 taneous.

18 Q Well, had the interrogatories been answered
19 by the 15th?

20 A No, sir. The interrogatories were answered
21 in September but -- because the motion had been made in the
22 meantime to stay the answering of these interrogatories. But
23 what happened was when he got the answers he then made a recom-
24 mendation -- the second recommendation to indict the -- that
25 the defendants be indicted and to refer the matter to the

1 Department of Justice. This, within a matter of week or two.

2 But as the record shows, in discussing the matter
3 with the Food and Drug Administration official in Detroit --
4 Mr. Randolph being in Washington, he made it a point of
5 telling the FDA official in Detroit who was handling the civil
6 case on the local scene to be sure to send him the answers
7 to the interrogatories and when he said he would, and did,
8 he then called Mr. Fowler in Detroit and told Mr. Fowler that
9 he would like to send out another notice of criminal viola-
10 tion which is the fourth notice which was sent out, which
11 now broadened the first three -- they actually sent three out
12 almost at the same time, but the fourth one was sent out after
13 they had the answers and a second recommendation was made to
14 indict these defendants.

15 Q I think I may have diverted you from respond-
16 ing to Mr. Justice Black's question about the standards that
17 he utilize.

18 A I would answer Mr. Justice Black this way:
19 That the standard is a standard which depends upon the facts
20 in any given case. I'm not asking this Court nor --

21 Q What is the standard when you get to the
22 facts? Is it a natural law standard; something that's above
23 the law?

24 A I would say it's a standard of fairness in
25 the administration of criminal justice.

1 Q Who is to define the standards?

2 A I would say the Court should decide on the
3 basis of the facts; whether, under our form of free government,
4 whether drawing upon the concepts of criminal jurisprudence
5 which have come up to us through the ages; whether it is in-
6 herently unfair --

7 Q Through the ages you say?

8 A Through the ages, yes, Mr. Justice Black.
9 Well, the Boyd case which is still as vital as it was in the
10 19th Century, seems to require that the courts who decide some
11 of these cases under the McNabb case --

12 Q Well, suppose it was decided on the Fifth
13 Amendment?

14 A Well, I think the technical holding of Boyd
15 was the Fifth Amendment and the Fourth Amendment, as I read the
16 cases.

17 And the District Court here apparently felt that
18 it's even broader than that in that it is something unfair in
19 requiring a defendant in a civil case to answer --

20 Q What's unfair if somebody has violated the
21 law and you have no legal standards which says it's not --
22 what's unfair about the Government trying to get the facts,
23 even asking the defendant -- who violated the law. Outside
24 of the provisions of the constitution, what's unfair about it?

25 A Well, what is unfair about it, Mr. Justice

1 Black, is that where there is a civil case he is faced with
2 what I would call a cruel trilemma.

3 Q What?

4 A A cruel trilemma. He must either, and the
5 Court of Appeals made this point. He then is confronted with
6 three alternatives: he can answer the question as a lie, in
7 which manner you can be guilty of perjury --

8 Q Well, of course, the law doesn't assume that
9 a man would lie.

10 A That was true, but that's one of the alter-
11 natives which/shouldn't be required to select.

12 The second one is --

13 Q Well, he's always required to do it if he's
14 asking for protection by something where he's guilty.

15 A Well,--

16 Q When the only way he could get out would be
17 to lie, I guess. That would always be the way.

18 A Well, then he could claim --

19 Q But, absent some special privilege granted
20 him under the constitution, how can we get at what's fair?
21 So as to make it a law, natural law?

22 A I think the problem, Mr. Justice Black here
23 is that the Government is arguing a very technical and very
24 mechanical interpretation of the Fifth Amendment.

25 Q Well, that's different.

1 A That is a different question, but it's
2 related to the question which Your Honor asked me.

3 Q I don't see that it is. Because that is the
4 Fifth Amendment which we are sworn to obey and enforce.

5 A Well, McNabb was not decided on any con-
6 stitutional provision as I recall the McNabb. It was
7 decided on the basis that it was inherently unfair --

8 Q That was decided, was it not, under the
9 general Federal Rules of Criminal Procedure and I should think,
10 in answer to Mr. Justice Black we are, of course, sworn to
11 uphold and enforce the constitution, but there are also our
12 statutes and with particular reference to this case, there are
13 Federal Rules of Civil Procedure created, promulgated and laid
14 down by this Court and I suppose that they have some relevance
15 too, and they are laid down for civil cases and the very
16 specific standard which, it seems to me, you can refer to in
17 case is those Federal rules of civil procedure having to do
18 with interrogatories in pretrial discovery that are made for
19 civil cases explicitly-- the rules laid down by this Court --
20 and are not to be used or taken advantage of or for abuse and
21 wrong use in criminal cases.

22 And you don't need to refer to the Bible or morality
23 or anything else, you simply --

24 Q I agree with my brother about the rules. But
25 which rules. I have heard nothing from you about any rules.

1 Which rules sets up the standard of defense?

2 MR. JUSTICE STEWART: Rule 33 and others.

3 MR. FRIEND: I thank you, Mr. Justice Stewart.

4 There are rules as I -- now I understand the point. There are
5 rules in the Federal Rules of Civil Procedure, which allows
6 certain forms of discovery. On the other hand, there are --

7 Q Is there one which forbids what was done
8 here?

9 A I would say that the Federal Rule of Criminal
10 Procedure which incorporates the McNabb Rule, and I believe it
11 is 41-B, into the Federal Rules of Criminal Procedure --

12 Q I never knew that before.

13 A The rule I'm referring to, has the effect,
14 Mr. Justice Black, as I read the rule, of granting the Court
15 authority to supervise the fair administration of/criminal
16 and --

17 Q What is that?

18 A I believe it's 41-B.

19 Q That's a search and seizure.

20 A Your Honors, may I point out in that connec-
21 tion of fairness, that in the instant case an official of the
22 Food and Drug Administration testified that it was the routine
23 practice over the past 38 years for the Food and Drug Adminis-
24 tration to file interrogatories and then take the answers to
25 those interrogatories and use them in the criminal case at the

1 very time that the FDA was considering a criminal case --

2 Q Didn't the constitution put a barrier up
3 which was a protection for all of the citizens in saying that
4 the question might not need to be one which is bound to in-
5 criminate you, but if it has a tendency to intimidate you you
6 do not need to answer. You can't be forced to answer; isn't
7 that protection?

8 A That's a protection. Now, they seek to deny
9 us --

10 Q How can you have a better protection than
11 that? An absolute right to refuse to answer.

12 A Except, Mr. Chief Justice, that in this case
13 they would deny us that protection because they say, techni-
14 cally the interrogatories were directed to the corporation
15 which doesn't enjoy the privilege. And we say and the Court
16 held, below that Kordel was the dominant personality; the
17 corporation was merely a device, an instrumentality to which
18 he sold his products; that the interrogatories were directed at
19 his activities.

20 And since they chose to get this information about
21 him by asking the corporation the questions, in effect, since
22 they had reached the corporate veil in the questions that they
23 asked, they shouldn't be permitted to repair that breach to
24 deny Kordel his Fifth Amendment privilege. And --

25 Q Well, hadn't he assented?

1 A That was, I believe, Your Honor, in answer
2 to your question --

3 Q Had he asserted it? You said they denied
4 him the privilege. And I based that on the question: Did he
5 assert it?

6 A He did not assert it, but I think a more
7 complete answer, Your Honor, would be that he did not waive
8 it, either, because of the motion that was made at the time
9 to excuse him -- excuse the corporation from being required to
10 answer the question.

11 Now, what they say Kordel should have done: they
12 admit Kordel himself had the Fifth Amendment privilege, and he
13 didn't have to answer. But they say, and this is the crux of
14 their case -- they say that the corporation should have appoin-
15 ted a third party, some agent, to answer the questions and,
16 in effect what they're saying is, and of course the corpora-
17 tion could act through a human being -- they're saying that
18 Kordel, who himself had a privilege not to answer, should have
19 appointed an agent and then supplied him with the information
20 to answer the questions which he himself would have been
21 privileged to withhold.

22 And they go so far as to say that there is an
23 agent available, why isn't the corporation the attorney, who
24 happens to be me, that what I should do is sign the answers to
25 the interrogatories on behalf of the corporation.

1 but the only way that I could get the information available
2 to the corporation is by asking my client, Mr. Kordel, the
3 President of the corporation as to whom they sought admis-
4 sions.

5 Q Well, were you his lawyer at that time?

6 A Yes, I was.

7 Q Did you advise him of that?

8 A I advised him at that time, Your Honor, and
9 we did file a motion to be excused from answering the questions
10 temporarily, pending the outcome of the criminal case.

11 And when the Judge -- Judge Levin in the District
12 Court, heard the argument, the Government represented to the
13 Court, and this is in the record, that there was no certainty
14 when or if ever; whether or if there would ever be a criminal
15 case; and the Court said,--

16 Q You don't take the prosecutors words for that --

17 A Well, I found that in this case, Mr. Justice
18 Black, but what happened is: of course, there might never be a
19 case if the answers to the interrogatories didn't reveal
20 evidence to support their position. But if they had a case,
21 they should have brought it; they didn't need the admissions,
22 either to lay the basis for summary judgment or to press forward
23 on the case before it, because if they had all of this evidence
24 they can go back and retry the case without too much diffi-
25 culty.

1 Q Mr. Friend, I have one question.

2 A Yes, sir.

3 Q If you don't mind. It's not clear to me what
4 use was, in fact, made of the material that was acquired by
5 means of this pretrial discovery in the civil litigation.
6 What use was made of that material in the subsequent criminal
7 trial?

8 A The Court of Appeals answered that question
9 and I'd like to refer the Court to, not only what the Court of
10 Appeals said, but the actual transcript.

11 On Page 142 and 43 I asked a question of the witness
12 as to whether they anticipated difficulty in proving inter-
13 state commerce with respect to the principal product known as
14 Korleen.

15 And the answer was that they did have difficulty
16 proving interstate commerce with respect to Korleen manufacturer
17 by a different manufacturer, but in respect to the manufacturer
18 that was involved in this case, they wouldn't have such diffi-
19 culty, because they had the answers to the interrogatories.

20 Secondly, the fact of the matter was that these
21 answers to the interrogatories, which they say was not
22 necessary to get the indictment, was brought into the grand jury
23 room as part of one file which they -- for which they have put
24 both the civil and the criminal aspects and the results of
25 their investigation and that appears on Page 192 and 193,

1 where I ask the witness: "Isn't it true that you used to assist
2 you in your testimony with the grand jury, almost all of the
3 papers that were in that one file which are combined in the
4 civil and the criminal case."

5 ANSWER: "I reviewed the entire file before I went
6 before the grand jury. Yes, sir. I had it with me and I used
7 it in preparing for the grand jury. Yes, sir."

8 Q That was for the indictment?

9 A That was for the indictment.

10 Q My question was directed to the trial.

11 A That was prior to the trial, but with respect
12 to the interstate commerce, when we identified the manufac-
13 turer of the Korleen, that evidence was introduced into the
14 trial, not in the form of an answer to the interrogatory;
15 that's true, but the information which we delivered. And the
16 final answer is that the Court of Appeals lays great stress
17 on this, it had been a practice of the FDA for 38 years --
18 a practice, by the way, which has received a great deal of
19 criticism in the Administrative Law Review Journal and other
20 members of the Food and Drug Bar.

21 A practice whereby they bring a relatively simple
22 procedure to follow a civil case, do nothing to protect the
23 public, either by summary judgment, multiple seizures or what
24 have you, and then put everything into one case, into one
25 file and then indict the person. And this is what happened

1 here and the rights would inure to the benefit of the corpora-
2 tion under these circumstances, as well as the individuals,
3 because it's invariably unfair and abhorrent to the form of
4 criminal procedure which we would like to see in our land, to
5 allow the Government to use --

6 Q Where do you get that standard? "Because
7 it's abhorrent to use" --

8 A I believe I got that from, Mr. Justice Black,
9 from a dissenting opinion of Mr. Justice Douglas in the Abel
10 case, U. S. against Abel and I feel that --

11 Q Does that refer to this problem?

12 A It's a related problem in that the Court
13 then was dealing --

14 Q It's a view of something that happened in
15 that case; wasn't it?

16 A If you will recall in that case --

17 Q I think I agreed with him if I'm not mistaken.

18 A I believe you did, sir.

19 Thank you very much, Mr. Chief Justice.

20 MR. CHIEF JUSTICE BURGER: You have two minutes,
21 Mr. Wallace.

22 REBUTTAL ARGUMENT BY LAWRENCE G. WALLACE,

23 ASSISTANT TO THE SOLICITOR GENERAL, ON

24 BEHALF OF THE PETITIONER

25 MR. WALLACE: The Government did not make multiple

1 seizures eventually in this case and in administering the food
2 and drug laws the government tries to avoid making multiple
3 seizures of products that are not harmful in themselves.

4 But the availability of multiple seizures has a
5 sanction after a misbranding case, a favorable judgment is
6 procured in a forfeiture proceeding, can serve as an induce-
7 ment to get a consent decree that will eliminate the mis-
8 branding which we were seeking to do in this case, and not to
9 forfeit someone's property, that in the absence of the mis-
10 branding, should be allowed to be disseminated.

11 The record does not show to what extent Kordel and
12 the corporation should be considered to be alter egos. in the
13 situation that was involved here, but it does show that the
14 corporation never made any claim that the information requested
15 was not available to it, within the meaning of Rule 33,
16 because only Kordel knew the information and he didn't want to
17 disclose it. The corporation never made that claim.

18 Thank you.

19 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wallace.
20 The case is submitted, gentlemen. Thank you for your sub-
21 missions.

22 (Whereupon, at 1:45 o'clock p.m. the argument in the
23 above-entitled matter was concluded)