In the

Supreme Court of the United States

United States Of America, et al.,

Petitioners,

V.

Max Janis,

Respondent.

No. 74-958

Washington, D. C.
December 8, 1975

Pages 1 thru 43

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UNITED STATES OF AMERICA, et al., Petitioners,	:	
v.	:	No. 74-958
MAX JANIS, Respondent.	:	

Washington, D. C.

Monday, December 8, 1975

The above-entitled matter came on for argument at 11:03 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT H. BORK, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, for the Petitioners.

HERBERT D. STURMAN, ESQ., Fierstein & Sturman, 1888 Century Park East, Suite 1500, Los Angeles, California 90067, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in United States against Janis.

Mr. Solicitor General, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT H. BORK

ON BEHALF OF PETITIONERS

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

We are here upon a writ of certiorari to the Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the district court's grant of summary judgment against the United States and did so on the basis of the district court's findings of fact and conclusions of law without any opinion of its own.

The district court granted summary judgment to respondent, both upon his suit for a refund of taxes collected under an assessment and a levy, and also upon the Government's counterclaim for the unpaid balance of the assessment.

The facts underlying this suit are fairly simple. The Los Angeles Police Department prepared an affidavit, somewhat lengthy, designed to show probable cause for a search and obtained from the municipal court judge a warrant directing the search for bookmaking paraphernalia, and in the search that ensued, respondent and one Morris Levine were arrested

and certain property, including $4,940 in cash, was seized.

Shortly after that occurred, the Los Angeles police officer notified a Revenue agent of the Internal Revenue Service of the arrest and of the seizure. There is a Federal tax, of course, on wagers, and since respondent and Levine filed no tax returns for the period in question, the Internal Revenue Service checked the wagering records and calculated the number of days the surveillance of respondent Levine indicated that the wagering activity had gone on, that indicated a period of 77 days.

Working with that information, the Service made an assessment against respondent Levine of about $89,000 plus interest, and pursuant to that assessment the Internal Revenue Service levied upon the cash seized by the Los Angeles police in partial satisfaction of respondent's tax liability.

The State prosecution for respondent Levine for illegal gambling foundered when the same municipal court judge who had issued the warrant granted a motion to quash it on the ground that the supporting affidavit was inadequate to show the reliability of the information passed on by the informants, although it was adequate to indicate the reliability of the informants themselves.

Two years later respondent began this tax refund suit, and as I have said, the Government counterclaimed for the

unpaid balance of the assessment.

Now, the cases hold that a taxpayer claiming a refund or opposing a collection suit has the burden of proving his real tax liability. Respondent presented no evidence upon that issue whatever. He relied exclusively upon a motion to suppress the tax assessment on the ground that the information on which the assessment was based had been illegally obtained in violation of the Fourth Amendment.

The district court accepted that theory and suppressed the assessment, and the Ninth Circuit affirmed, as I say, per curiam and without opinion.

I think the legal theory underlying these decisions below is an extraordinary one, or rather it must be an extraordinary one because it's not articulated in the district court or in the Court of Appeals beyond the statement that the Government's assessment grew out of knowledge. It was ultimately held to have been obtained by a search warrant that did not meet Fourth Amendment standards, a warrant obtained by the Los Angeles police.

How that fact connects with this tax litigation is nowhere explained, and I will attempt to show that there is no adequate connection.

What has happened here is that the court below without analysis or argument have fashioned a sweeping extension of the exclusionary rule. When I say without

argument, I mean without argument by the court. This extension amounts to a new rule that not only may evidence be excluded from judicial proceedings, but that the Government may be required to forego its civil rights, if it knew of its civil rights, only because some other government obtained information under a warrant subsequently held to be inadequate.

QUESTION: What civil rights does the Government have?

MR. BORK: The right to the collection of taxes, Mr. Justice Rehnquist. I meant its rights in a civil litigation.

QUESTION: Oh.

QUESTION: This must have some effect, I suppose, on the activities under the informants statutes where people secretly inform, give information that leads to tax liability. Is that possible?

MR. BORK: I suppose it would be if they had given the information to the Internal Revenue Service, but I don't think it would apply in this situation where the information was given to the Los Angeles Police Department for a criminal investigation, at least not that I know of. There is certainly nothing in the record that suggests any such --

QUESTION: What I am suggesting is the possibility that when a tax assessment or deficiency claim is based upon an informant's information, this case would perhaps have some

implication that the court must inquire, or someone must inquire, into how the informant got his information that he passed on to the Internal Revenue. Is that possible?

MR. BORK: I suppose it's possible, Mr. Chief Justice. I suppose in the case of an informant speaking directly to the Internal Revenue Service, that the Internal Revenue Service would verify the information in some other way before they could collect the taxes.

No, I think you're right, they might make an assessment on the basis of that information which could be hearsay even as a grand jury's indictment could be based on hearsay. And if the assessment resulted in a collection, I think that's correct.

QUESTION: Mr. Solicitor General, would you have a different case if the Internal Revenue Service agents had seized these records and this money directly themselves by a warrant of search.

MR. BORK: I think one might, Mr. Justice Powell. There is a suggestion in respondent's brief here that if this assessment is not suppressed, Internal Revenue agents will be free to break into homes and offices.

I find that suggestion mildly humorous because I don't think the Internal Revenue Service has any such intention or perhaps indeed capacity.

But I will suggest in the course of this argument

that it would be unwise to extend the exclusionary rule to civil litigation. But the basis for that suggestion essentially is in the world as we know it and as the courts observe it illegal searches and seizures primarily occur in connection with criminal investigation, and there just isn't much evidence, or any, perhaps, evidence of illegal search and seizure in civil matters.

Should that become common by the Internal Revenue Service or any other agency of Government, and I suppose the time would have come to consider the extension of the exclusionary rule to that class of cases. But as matters stand now we have nothing like that. And it would be a different case, as you suggested.

QUESTION: General Bork, how frequently do we have a situation of this kind where the IRS is using material so obtained from State or local authorities?

MR. BORK: The only thing in the record on that, Mr. Justice Blackmun, is the statement by the police officer here that when it was a large book-making operation, he generally notified the Internal Revenue Service. If it was a smaller one, he did not. He said that was not a departmental policy, and he supposed that some other officers would not notify the IRS, but he would.

As a nationwide matter, I frankly do not know the frequency with which it occurs.

QUESTION: Mr. Solicitor General, suppose the Federal tax people were told or otherwise knew that the information that was being presented to us had been obtained by patently illegal search and seizure. I know you suggest as a general rule you should avoid the exclusionary rule, but what about in the individual case where the officer knows.

MR. BORK: I think, Mr. Justice White, that the issue is always an issue of general deterrence and not an issue of are we upset about this case, because this Court has recognized it is too late to repair the privacy interests of the individual raising the case. All that can be done is to deter the police in the future.

If there were a common pattern and practice by which police in any city or police generally conducted unconstitutional raids for the purpose of handing the information over to the IRS, then I think we would have a different kind of case altogether, and we would have to consider at that point the fashioning of the exclusionary rule when the Internal Revenue Service attempted to benefit by that kind of a practice.

QUESTION: But even if you were going to say that you would exclude evidence on the facts I posed, that is not the case here, I take it.

MR. BORK: That is not all the case here. This case is a case in which all the facts indicate the Los Angeles

Police Department acted in the utmost good faith, obtained a warrant, and the Internal Revenue Service acted in the utmost good faith. And I will suggest, indeed, in a moment that I think it's probably unlikely that the evidence should have been excluded even in a State trial, much less in the Internal Revenue's proceedings.

The crucial element --

QUESTION: Did you say should not have been?

MR. BORK: I will suggest, Mr. Justice Brennan, that when a warrant has been obtained, when the primary purpose of the exclusionary rule has been carried out to force or to get the police before a neutral and detached magistrate and when they make a good faith and bona fide effort to show probable cause and later it is said that there is a procedural defect, indeed, a mistake on the part of the magistrate if you would ask in this case, something didn't satisfy him, it is quite likely the information --

QUESTION: I wonder if that issue is here.

MR. BORK: Well, it's one way to decide this case, as I look at this case.

QUESTION: It's not addressed below, of course.

MR. BORK: Well, the Court of Appeals didn't say anything, Mr. Justice Brennan, and the district court merely had findings of fact and conclusions of law.

As I look at this case, there are so many ways it

could be decided, and I suggest they are all ways it could be decided in favor of the Government, that I would urge upon you a variety of ways to cut this case for decision.

One of them, of course, is the one I just mentioned, because the crucial element in the exclusionary rule is the factor deterrence. Is there a realistic judgment that excluding evidence in a particular class of cases will actually deter police officials or others from illegal searches and seizures, force them before magistrates.

Now, I think deterrence is not usefully applied to people who have acted in complete good faith and turn out to be mistaken in a close case.

QUESTION: Under the holding that we have before us essentially the district court holding, suppose the IRS had come to this information by reading in the Los Angeles Times an account of the motion to suppress in the State courts and then proceeding from that information conducted an investigation. Does this holding insulate the Government? Or would it be subject to the same challenge your friend is making?

MR. BORK: I think that, Mr. Chief Justice, would be subject to the same challenge that my brother is making here. I think this is an extraordinary sweeping ruling which says, I think, that if the Government's knowledge can be traced back through however many links to an illegal search and seizure, the Government is not entitled to have that

knowledge.

QUESTION: Even though that knowledge has become public property by virtue of being reported in a newspaper account of the motion to suppress?

MR. BORK: Well, if it were not the view of the court below and of my brother here that the Government would be foreclosed in such a case, then I think it would be relatively unimportant that the Government was told by a Los Angeles police officer because the Government could have learned of it easily later through the proceedings in the municipal court.

I think it is a very sweeping rule that is being urged upon us. I suppose I could distinguish the case you put, but in honesty I think the rationale below really says if the knowledge derives from illegally seized evidence, it may not be used.

QUESTION: Tell me, Mr. Solicitor General, your emphasis on deterrence, suppose one's view was that the exclusionary rule has other premises, traditional integrity, and so forth?

MR. BORK: Well, I think it has been suggested, Mr. Justice Brennan, that those other, particularly judicial integrity, interests run just about parallel with deterrence so that the analysis turns out to be much the same. And, indeed, if judicial integrity meant that evidence of this

sort could not be used in this tax litigation, then I would really suppose that you would have to overrule Harris v. New York, Calandra, Peltier, because those are all cases in which evidence of this sort gets used in some way. And if judicial integrity means that under no circumstances may anything happen because of --

QUESTION: I guess those are all three cases in which I dissented, weren't they?

MR. BORK: True, Mr. Justice Brennan.

QUESTION: What was the case that Harris relied upon? Walden or --

MR. BORK: Walder.

QUESTION: I don't think Justice Brennan dissented in that case.

MR. BORK: No, but I do recall .. same as Walder or not.

QUESTION: I wasn't here when Walder was --

MR. BORK: That's what I mean.

In any event, I think this rule, one of which I urge that when a warrant has been sought in good faith with a good faith attempt to show probable cause, that there ought not to be exclusions. It would obviously go beyond this case, it would go to criminal cases. And there is a basis for a decision like that. For example, Aguilar v. Texas notes that a magistrate's mistake is not to be taken as seriously as a

police officer's mistake when he acts without a warrant. And there is the observation in Peltier that if the purpose of the exclusionary rule was to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge or may be properly charged with knowledge that the search was unconstitutional under the Fourth Amendment.

QUESTION: Are you suggesting that in the legendary language of Justice Cardozo it is the blunder of the magistrate, not the blunder of the constable?

MR. BORK: I think that is certainly much of what is involved here, Mr. Chief Justice. We had a police officer make a good faith attempt to put as much information as he could in, and a magistrated accepted it.

QUESTION: Surely you would be contending for the same position if there had been no warrant, would you not?

MR. BORK: If there had been no warrant?

QUESTION: Yes.

MR. BORK: Oh, in this case? I was just offering one -- I would, indeed, because I think there is no deterrence here, but I was offering one way to cut the case.

The other way to cut the case is that this is a civil litigation and for the reasons I have discussed earlier I think there is no reason to extend the exclusionary rule into civil litigation when we know in this class of case

there is no evidence that there is anything to deter, and in Calandra, of course, it is noted that the standing requirement is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in the imposition of a criminal sanction.

Now, it may be that Camara v. Municipal Court comes close to saying that the exclusionary rule, or that warrants can be required in civil cases. However, that, of course, resulted in a criminal prosecution.

And I have suggested earlier that indeed if one began to see a pattern of unlawful searches and seizures in the enforcement of civil liability, that it might become necessary to consider the extension of the exclusionary rule to civil cases. But that is not the case here.

QUESTION: Whatever Camara may or may not have hinted at, has that not been swallowed up by Harris and Calandra and the other cases you referred to?

MR. BORK: Well, in a sense it had, Mr. Chief Justice. I was just suggesting that there is a suggestion in Camara that even if it were a purely civil case, a warrant might be required in that context. And I was merely suggesting that I am not trying to draw --

QUESTION: It's an odd way of putting it, Mr. Solicitor General.

MR. BORK: I will try to straighten the observation.

The warrant could be required in that context, but that was a criminal prosecution, the opinion also noted, so I don't think it's a direct holding that the exclusionary rule or the warrante requirement might always be used in civil cases. But I am willing to recognize the possibility that in a variety of kinds of civil cases, if you get unlawful searches and seizures as a pattern, one might extend the exclusionary rule to that kind of case.

QUESTION: There is no necessary connection between it. You would say the Fourth Amendment applies in the civil context.

MR. BORK: Yes.

QUESTION: But not the exclusionary.

MR. BORK: We don't need the exclusionary rule at present, Mr. Justice White, I am suggesting, because we have no pattern of unlawful searches and seizures to enforce civil liability.

QUESTION: But you wouldn't suggest that the Fourth Amendment is designed only to protect against -- only to protect criminal defendants.

MR. BORK: No, no. I didn't mean to suggest that at all; if I did, I misspoke.

QUESTION: And that even if you couldn't exclude evidence in a civil case, you could sue for damages if there

had been an illegal search or seizure.

MR. BORK: That is true.

But here if we are talking about deterrence realistically, it seems to me bad enough to apply the exclusionary rule to Los Angeles police behavior in this case. It seems to me a little short ludicrous to apply the exclusionary rule to the Internal Revenue Service in this case. I can't imagine what it is that the Internal Revenue Service is expected to do differently in the future. I cannot imagine what behavior of the Internal Revenue Service is to be modified.

The only result here is that respondent escapes paying taxes that other people in respondent's position must pay. The deterrent rationale here has reached a vanishing point.

There is one aspect of respondent's brief not discussed in ours and I should mention it briefly. He raises a Fifth Amendment point at the end of his brief, the argument being apparently that for respondent to meet his burden of proof to establish his tax liability, he would have to incriminate himself because short of saying he was not engaged in bookmaking, he would have to say, "I was engaged in bookmaking, but I didn't make that much money."

In the first place that is not in issue here. This question here and the decision below is entirely about the fact that the Government learned of respondent's activities

because of a search later held to be unlawful.

And I would also point out that in this case the statute of limitations, both Federal and State, have run. If this case goes back for trial, there is no possibility respondent could incriminate himself. He was arrested on November 30, 1968. The longest California statute is three years. The Federal statute is five. Indeed, it is not shown that he meets the other requirements of the Federal statute.

I should point out to the Court that insofar as this is a generalizable problem and not really a problem relating to this respondent, the tax court makes a regular practice of deferring civil litigation until either the criminal trial, if there is one, has been held and those proceedings are closed, or until the statute of limitations has run. So that the taxpayer is not put to the choice of incriminating himself or giving up his money. And the Third Circuit Court of Appeals in the Ianelli case, Ianelli v. Long, 487 F. 2d 317, at 318 has specifically authorized the practice and indeed said it would be an abuse of discretion if a district court refused to put a civil litigation over so that the respondent will not be put to that kind of a choice.

I don't think that's in the case here, but respondent has raised it and I thought I would mention it.

QUESTION: Is that practice written down anywhere?

MR. BORK: No, this is a judicial practice. It's

not written down.

QUESTION: Not a rule of the court or anything?

MR. BORK: Of the tax court? I gather not.

QUESTION: But in the Third Circuit citation that you gave us, is it cited there that it is the practice of the tax court?

MR. BORK: The Third Circuit said the district court was understandably -- no, this doesn't discuss the tax court, Mr. Justice Stewart. This is the Third Circuit's direction to the district court.

QUESTION: District court for a refund.

MR. BORK: Yes. And he says proceedings should be deferred until the conclusion of the related criminal proceedings or until the running of all applicable statute of limitations, and if that's refused and is arbitrary, it will be cured by the appellate court.

So I think there is no Fifth Amendment issue in this case, and I mention that merely to meet a point raised by the respondent.

For the reasons I have discussed, the United States asks that this case be reversed and remanded for trial.

QUESTION: General Bork, just as a matter of curiosity, is there any income tax aspect of Mr. Janis' problems?

MR. BORK: I believe this is entirely an excise tax, Mr. Justice Blackmun.

QUESTION: I gather so, but I am asking is there any income tax assessment levied against him that is --

MR. BORK: There is none now that I know of. If the question is was one levied, the answer is no.

QUESTION: To the extent you argue that the exclusionary rule should not apply to civil cases generally at this juncture in our experience, do you understand that there are Courts of Appeals cases to the contrary other than this one?

MR. BORK: I do.

QUESTION: And is it a fairly general view in the Courts of Appeals?

MR. BORK: I think they are split. Our brief discusses that, and I think they are split in the Court of Appeals.

QUESTION: What do you understand to be the basis of the Courts of Appeals' application of the exclusionary rule to civil cases?

MR. BORK: Well, some of them, as our brief suggests, have invoked the dictum in Silverthorne. The essence of the provision is not that evidence so acquired shall not be used --

QUESTION: But they have chosen from our prior cases rather than reflect what the experience in that circuit may be with respect to the performance or behavior of the Internal Revenue Service?

MR. BORK: These aren't entirely tax cases. And

furthermore, there is no practice -- the Suarez case, for example, which is cited in footnote 14, page 37 of our brief, is a case involving -- it's a tax case, but it was a police raid and it was not -- it was like this case in that sense, but it was not a case of the Internal Revenue Service fomenting the raid or carrying it on itself, and there was no indication that we are tired of an Internal Revenue Service practice. None of that at all.

I think these are cases which are badly reasoned, and in the same footnote we give the cases in the Court of Appeals that go the other way and I think are better reasoned cases.

I should like to reserve any time I have left for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Sturman.

ORAL ARGUMENT OF HERBERT D. STURMAN

ON BEHALF OF RESPONDENT

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

Before commencing with my argument, I would like to clear up one thing which I believe is in doubt right now. And that is the Solicitor referred to this case as being decided on a motion for summary judgment. The record is very clear that the plaintiff had made a motion for summary judgment in this case . That motion was denied in April of 1972. In

February of 1973 this case came to trial in the Federal district court. All parties had an opportunity to present any evidence that they desired. Accordingly, although the case was tried on stipulated facts and exhibits which were submitted by speculation, all parties were represented, all parties were in a position to submit any additional evidence that the parties had.

QUESTION: How would that affect the basic proposition that is presented in this case?

MR. STURMAN: It would affect the basic proposition because the Government has chosen to rely solely on its certificate of assessment. It has not sought to introduce any other additional evidence, any untainted evidence. It has not sought to put anyone on the stand who could attest to the fact that perhaps the plaintiff was a bookmaker, that perhaps the plaintiff was engaged in bookmaking activities. It relies solely upon its certificate of assessment which in turn is based solely upon evidence obtained in violation of the taxpayer's fourth amendment rights. And I think it is significant because as a former government counsel, I know that had I tried that case I might have put a lot more evidence into the record and tried to put evidence into the record. But here we have a naked certificate of assessment.

QUESTION: Doesn't that put the basic issue in sharper relief.

MR. STURMAN: It does put the basic issue into relief very clearly.

The Government's position appears to be that, number one, the exclusionary rule should not be applied in a civil case, and primarily that the rule should not be applied because it will not constitute a deterrent. Additionally, as mentioned in the Government's brief, the Government contends that notwithstanding the fact that the exclusionary rule may be applied, the Federal tax assessment retains his presumption of validity and as such the taxpayer has a further burden in order rebut this presumption of validity.

With all due respect to the Solicitor General, I believe that the deterrence argument is really here in this case. Our record establishes that the Los Angeles police officer who had arrested the taxpayer had contacted the Internal Revenue Service as a matter of his policy, as a matter of police procedure. He testified that --

QUESTION: I thought he denied that it was a policy of police procedure; it was just his individual.

MR. STURMAN: He said it was his police procedure, I believe, your Honor.

QUESTION: It was his.

MR. STURMAN: His police procedure.

QUESTION: But it wasn't under the rules and regulations of the police department.

MR. STURMAN: It is not under the rules and regulations of the police department.

QUESTION: What happens if the police was very friendly with a reporter and tells him, "You know, I arrested So and So. He is a bookmaker." He gave him all the facts, and the reporter gave it to the IRS.

MR. STURMAN: Your Honor raises an interesting question which is precisely what happened in the Suarez case in the tax court. The Internal Revenue Service obtained the information in that case from the newspaper. The newspaper article was printed, the Internal Revenue Service then went to see the police department. And the tax court in Suarez held that since the proposed assessment was based solely upon illegally obtained evidence, the assessment was stripped of its presumption of validity, therefore the Government had the burden of coming forward with untainted evidence in order to establish the assessment.

QUESTION: And that's your position. Once it's illegally -- the Fourth Amendment rights are violated, there is no way it can ever be used.

MR. STURMAN: That is not my position, your Honor.

Our case is based on a very careful record, and our record clearly establishes that the assessment was based solely upon illegally obtained evidence.

QUESTION: That assumes it was illegally obtained.

The Government doesn't agree it was illegally obtained.

MR. STURMAN: The Government in its petition for certiorari conceded that the evidence was illegally obtained. Now the Government has taken somewhat of a lesser,conciliatory position.

However, I would like to address myself to one thing the Chief Justice stated about that. And that is that the blunder of the magistrate is what we have here as opposed to the blunder of the law enforcement official.

I don't think we have that at all. If you read that affidavit that the law enforcement official submitted, the affidavit clearly shows that law enforcement official was familiar with the Aguilar case because he details with particularity the credibility of his informant. But he has nothing in there with respect to the underlying circumstances which gave rise to the informant's tip.

QUESTION: What if we were to decide that we wouldn't par search warrants in civil proceedings the way we did in Aguilar and Spinelli in criminal proceedings?

MR. STURMAN: I'm not sure I understand the question.

QUESTION: OK. Aguilar and Spinelli were direct appeals in criminal proceedings, and there the court went into some detail as to whether the affidavit properly supported the issue in civil warrant. They were criminal cases. What if we were to decide in this case that in a civil proceedings we

wouldn't go behind the warrant, we would say that the Fourth Amendment was sufficiently complied with when you have taken your evidence before a neutral magistrate and we won't worry about whether the affidavit was sufficient in the light of the criminal holdings in Aguilar and Spinelli.

MR. STURMAN: What your Honor is suggesting is a different standard for the admissibility of evidence in a civil case as opposed to a criminal case.

QUESTION: Right.

MR. STURMAN: Well, I think what you would be doing here is you would say that the Fourth Amendment, you would be giving a criminal greater dignity than a civil taxpayer.

QUESTION: You could put it the other way around and say that where you are going to impose criminal sanctions on a citizen, you will hold the Government to a higher standard than when you are simply trying to collect back taxes.

MR. STURMAN: It's the same Fourth Amendment applying to all people, there is no doubt about that.

Now, I would assume that if you have a violation of a person's Fourth Amendment rights, that that violation should be the same where rights are violated, whether it be for criminal purposes or whether it be for civil purposes.

QUESTION: What about the Walder case followed by the Harris case, for example? Those were both criminal cases,

weren't they?

MR. STURMAN: I believe, your Honor, they were.

QUESTION: And the evidence, even though concededly obtained initially in violation, nevertheless it was admissible in the criminal case for impeachment.

MR. STURMAN: For impeachment purposes. Yes, your Honor. But there is a difference between impeachment purposes and taking that evidence and using that evidence as the sole basis for a civil tax assessment.

A civil tax assessment can have the same effect as a threat of incarceration, or actual incarceration. The Government has very powerful tools in the levying procedure and the assessment procedure, but if this Court were to reverse this case, I really think that the potential effect could be catastrophic. And here is why:

The court in essence would be giving a license to all law enforcement officials to violate constitutional rights where crime which would give rise to tax liability is involved. And a law enforcement official knowing that his evidence, although insufficient for a criminal prosecution, may nevertheless be used for civil tax liability may very well go after that evidence. And if the object of the rule is to deter, we want to deter that type of conduct.

QUESTION: What interest does the policeman in Los Angeles have in seeing that the Federal Government gets its

proper tax revenues?

MR. STURMAN: Well, your Honor, he has a very close interest. He has a close interest for several reasons. In this particular case --

QUESTION: Is it different from yours or mine to see that everybody pays his fair share of taxes?

MR. STURMAN: His interest is to prevent crime, which is a commendable interest. However, there are many ways of skinning a cat, and one of the ways of preventing crime is through the use of the civil processes of the Internal Revenue Service.

QUESTION: You mean the way they got Al Capone back 30 or 40 years ago.

MR. STURMAN: I didn't say that. That was a criminal case, I believe. I'm talking about the threat of a civil tax assessment,of a jeopardy assessment, of a levy, of a seizure of property. This is a very, very powerful governmental weapon, and these law enforcement officials know it, and in fact the Federal Government knows it. The Federal Government has all these task forces today coordinating with local law enforcement agencies. For example, the Bureau of Narcotics coordinates with police officers throughout the United States, and as part of that coordination the Internal Revenue Service is involved because of the narcotics tax.

So there is a very close cooperation between State

and Federal agencies. The object is to prevent crime, and one of the ways of preventing crime is through the use of the Internal Revenue Service.

QUESTION: Maybe the object is also to collect income taxes from a very lucrative source as far as narcotics are concerned.

MR. STURMAN: The object is to collect income taxes, and the collection process is commendable, but the collection process can be within the framework of the Constitution.

QUESTION: The IRS might well be criticized as being less than diligent if it didn't pursue narcotics income, might it not?

MR. STURMAN: There is no doubt that the IRS should pursue narcotics income. There is no doubt that the IRS should pursue a bookmaker's income. But let's look at what we really have in this case. We have a situation where a taxpayer's Fourth Amendment rights were violated by a governmental agency, not the United States of America, but a local governmental agency.

QUESTION: The Los Angeles Police Department.

MR. STURMAN: The Los Angeles Police Department.

All right. Now we have the Internal Revenue Service as a result of this violation imposing tax liability against the taxpayer. And the Internal Revenue Service is saying that even though our evidence is legally obtained under the Fourth

Amendment, which apparently was conceded in petitioner's brief and now I am not so sure, even though it was illegally obtained, even if the court were to apply the exclusionary rule, nevertheless there is a superior burden which attaches to a civil tax assessment.

QUESTION: When you say that the evidence was illegally obtained, I take it there has been no trial of the action that the Government might bring against your client yet.

MR. STURMAN: The evidence was obtained by the Los Angeles Police Department.

QUESTION: What I meant,has any action that the Government seeks to bring against your client yet been tried?

MR. STURMAN: Yes. This case right here.

QUESTION: I thought you were the plaintiff in this case.

MR. STURMAN: We are the plaintiff in this case. What is happening here is we as the plaintiff have sued for approximately a $5,000 refund. The Internal Revenue Service as a matter of policy has denied our claim for refund and has also filed a counterclaim where it is seeking to collect approximately $85,000 with interest.

QUESTION: Did the Government have an opportunity to proffer its evidence and so forth at the trial, or did it --

MR. STURMAN: That is precisely the first point I

made when I stood up here and wanted to correct something for the record, that this was not on a motion for summary judgment.

QUESTION: But it doesn't have to have been on a motion for summary judgment for the matter to have gone off on a motion to suppress, or the effect of granting of a motion to suppress rather than a full trial on the merits.

What I am interested in is do we know from this record precisely what evidence it was that the Government would have used against you? And how do you relate that particular evidence to the unlawful search and seizure?

MR. STURMAN: All right. We know exactly what evidence is involved. The evidence that was involved is approximately $5,000 in cash which the Government seized. The further evidence is bookmaking markers, bookmaking paraphernalia, upon which the Government made its determination that the taxpayer was engaged in bookmaking activities for a 5-day period and they arrived at his daily gross for that 5-day period. They then discussed with the Los Angeles Police Department a period of surveillance, and they made a determination that the taxpayer had been engaged in bookmaking activities for a 77-day period, and they averaged out his daily gross in order to arrive at the excise tax, which is a percentage of the gross volume of activity.

QUESTION: That is all set out at the top of page 5A of the district court's opinion, or it is summarized.

MR. STURMAN: Yes, your Honor.

QUESTION: Those computations aren't "evidence" in the normal understanding of the word.

MR. STURMAN: What we have here, your Honor, is an excise tax based on bookmaking activities. All evidence that the taxpayer was a bookmaker was illegally obtained evidence. All evidence of bookmaking activities was obtained in violation of the taxpayer's Fourth Amendment rights. So we have a naked assessment derived at from figures which the Revenue Service got from the Los Angeles Police Department who had obtained that information as a result of a defective search warrant.

Am I being responsive to your question?

QUESTION: When you say something is derived from figures that were obtained from the Los Angeles Police Department, I don't think of "figures" being admissible in trial in the ordinary evidentiary sense.

QUESTION: But it's money, you say. They got money, actual physical money.

MR. STURMAN: They've got money plus they had notations in order to determine the volume of bookmaking.

QUESTION: And they proposed to introduce this money at trial?

MR. STURMAN: No, they proposed to introduce -- and they did introduce -- what is found on the last page of the

appendix. And that is the only piece of evidence proffered by the Government, other than the evidence which was stipulated to in the pretrial conference order.

QUESTION: This certificate of assessments and payments?

MR. STURMAN: That is correct, your Honor.

QUESTION: Well, they certainly didn't seize that from your client, did they?

MR. STURMAN: No. The certificate of assessment and payments is really the Government's bill, so to speak. It's what they contend the taxpayer owes.

QUESTION: What is there about the certificate of assessments and payments, which is the only thing that was in evidence that was illegally seized?

QUESTION: Don't you say the whole assessment is the product of an illegal search?

MR. STURMAN: The information contained on this certificate of assessment and payments is derived completely as a result of the search which violated the taxpayer's Fourth Amendment rights.

QUESTION: OK, there is a third step, really,in your reasoning. First, the Los Angeles Police seize something illegally from your client. Then the Federal officials got hold of it, but they didn't use that itself, or they used that simply to compile the information in the evidence they actually

did seek to use. So you have got a fruit of the poisonous tree problem, it seems to me, rather than a direct use of evidence illegally seized. That's Suarez, isn't it?

MR. STURMAN: That is the Suarez case, your Honor.

QUESTION: That's Suarez that you may not base the assessment that you make on illegally obtained evidence.

MR. STURMAN: That is correct, your Honor. The Suarez case says we have to weigh on the one hand the tax collection process and on the other hand we have to weigh the constitutional rights of individuals. And the Suarez case in the tax court, which is basically a pro-Government court, found that the tax collection procedure --

QUESTION: It depends on whether you win or lose.

MR. STURMAN: I stand corrected, your Honor.

QUESTION: They do decide for the taxpayer on occasion.

MR. STURMAN: They did decide for the taxpayer and they found that the constitutional rights were paramount.

QUESTION: Mr. Sturman, can I go back to one of the statements you made some time ago. As I understood you, you expressed the view that you were not taking what might be called a per se position, you were not saying that all illegally obtained evidence must be excluded so far as IRS is concerned. Or stated in the affirmative, you were suggesting that the IRS under some circumstances could use illegally obtained evidence.

Would you suggest some examples of when that would be proper, in your judgment?

MR. STURMAN: I would suggest, your Honor, that there may very well be situations where the Internal Revenue Service has on its own sufficient evidence and that there is also other evidence which is illegally obtained and the use of the illegally obtained evidence would not sufficient taint the assessment.

But I would suggest that on this record the entire assessment is based solely upon the legally obtained evidence.

QUESTION: Suppose in this case the Los Angeles policeman had not tipped the IRS but the IRS had discovered the fact that this evidence was available through its own independent sources and had gone to the L.A. police. I think that question was put to you earlier. Does that make any difference?

MR. STURMAN: In my view, no, your Honor, it would not make a difference.

QUESTION: But I still can't quite visualize a specific case that you would agree that the IRS may properly use illegally seized evidence, seized illegally by, as you say, an officer of either the State or Federal Government.

MR. STURMAN: Your Honor, perhaps I was not responsive to your question. I don't think the IRS should be able to use any illegal evidence. What I am saying is that

if a portion of the assessment is predicated upon illegally obtained evidence and a sufficient portion of the assessment is predicated on other evidence, then the assessment should stand.

QUESTION: You are saying that if there is sufficient evidence independent of the illegally seized evidence to support the assessment, the assessment would stand.

MR. STURMAN: That is correct, your Honor.

QUESTION: That would be true in any case involving the exclusion of illegally seized evidence.

MR. STURMAN: That is precisely our position here.

QUESTION: So again you are standing on a view that if the Government has to rely on illegally seized evidence, in every case, that would not be permissible under the Constitution.

MR. STURMAN: That is correct, your Honor.

QUESTION: There is one further thing and that is illegally obtained evidence in a civil case will have a much more detrimental effect against the victim than if it were to get into evidence in a criminal case, and the reason being because of the difference of burdens of proof. In the criminal case the Government has to prove beyond a reasonable doubt. Here the Government has a presumption of validity in its assessment and only has to prove by a preponderance of the evidence. So the admission of the illegally obtained evidence

is more detrimental to the civil litigant than it is to the criminal litigant because of the different standards in burden of proof.

QUESTION: Is that any more than saying $89,000 in taxes is always painful with your legitimate business man or part of the Mafia.

MR. STURMAN: It's painful, your Honor, there is no doubt about that.

QUESTION: That doesn't get us very far, does it?

MR. STURMAN: But the point is pain as a consequence of one governmental agency using illegally obtained evidence from another governmental agency --

QUESTION: How can the Internal Revenue Service deter or influence the conduct of the Los Angeles police?

MR. STURMAN: Very easily. How can we deter? Because, as I mentioned before, we have the task force, we have the close governmental cooperation, and the Los Angeles police works very closely with the Bureau of Narcotics.

QUESTION: You mean the Bureau of Narcotics might say to the Los Angeles police, "If you continue getting defective warrants, we are not going to cooperate with you on the narcotics traffic?

MR. STURMAN: No, the Bureau of Narcotics may say to the Los Angeles police, "Get him under any circumstances," and this may seem harsh, but the Bureau of Narcotics are

comprised of people who want to stop the narcotics traffic, and oftentimes the end justifies the means, and law enforcement officials' conduct should be deterred. One of the ways of deterring that is by applying the exclusionary rule in this case because if the exclusionary rule is not applied, then what we have here is a situation where every law enforcement official who is involved in preventing crime which involves tax-producing conduct, will go out to get his evidence under any circumstance. He will get the evidence for the simple reason that if he can't use that evidence at his level in a criminal prosecution, the evidence may be turned over to the Internal Revenue Service so he will be in essence accomplishing indirectly what he can't accomplish directly.

QUESTION: Wouldn't it be more to his own advantage, though, to see that the evidence was obtained legally if his responsibility is primarily criminal rather than civil?

MR. STURMAN: Of course, it would be to his advantage. But there are situations where the evidence is difficult to come by.

For example, in this affidavit we have here, we don't have a blunder by a magistrate. We have a blunder by a police officer who detailed very carefully the reliability of the informant but had no reference whatsoever as to what the underlying basis of the tip was.

Well, maybe there was no underlying basis. Maybe

the fact was the taxpayer was engaged in bookmaking activities was casually overheard in a neighborhood bar, as pointed out in Spinelli.

QUESTION: Does that strike you as a gross miscarriage of justice that a warrant should issue on that basis?

MR. STURMAN: You see, I don't think that's the issue.

QUESTION: Does it strike you --

MR.STURMAN: Are you talking to me personally or as an advocate?

QUESTION: I'm talking -- well, as an advocate. I have no right to talk to you personally, I don't think.

MR. STURMAN: All right. Here is what I think we have here. We have a situation where you have the initial determination as to whether or not evidence was illegally obtained.

The next question is if it's illegally obtained, should it be excluded because of the deterrent effect?

And the final question is we exclude it in criminal cases, should we exclude it in civil cases?

I think that what we have here is a situation where no matter what the views of the various Justices are, if the evidence is illegally obtained in the first place, it's got to be excluded, assuming a deterrent effect can be found. And I think that the area of reform, so to speak -- and I am

now getting back to your question -- is on whether or not the evidence was initially illegally obtained in the first place. It was clearly illegally obtained under Aguilar. It was clearly illegally obtained under Spinelli. But I cannot control the eight members of this Court as to whether it is clearly illegally obtained today.

Thank you very much.

QUESTION: Did the Suarez case go to any court of appeals, go any further?

MR. STURMAN: Not to my knowledge, your Honor.

QUESTION: Are there any additional tax court decisions that follow Suarez?

MR. STURMAN: There are several others. There is, of course, this case, and in addition to that --

QUESTION: This is a district court case.

MR. STURMAN: Pardon me?

QUESTION: This did not come from the tax court, this case?

MR. STURMAN: This came from the Federal district court.

QUESTION: Court of appeals.

MR. STURMAN: I'm sorry. It started in the Federal district court, your Honor.

QUESTION: My question is directed to the inquiry as to whether or not Suarez has been consistently followed in

the tax court.

MR. STURMAN: In the tax court itself?

QUESTION: Yes.

MR. STURMAN: I don't know that. I would believe that it would have to be because I think the full panel of the tax court had heard that case, so it would be followed in the tax court. There are, however, other circuit courts that have gone along with the contentions advanced by the taxpayer today and there are numerous other opinions. There is only one case, which really creates a conflict, and that's Compton v. United States.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Solicit General, you can plan on resuming at 1 o'clock.

(Whereupon, at 12 o'clock noon, the Court recessed to reconvene at 1 p.m. the same day.)

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, you may continue.

REBUTTAL ARGUMENT OF ROBERT H. BORK

ON BEHALF OF APPELLANTS

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

I just wish to clarify one point.

The Government thought that a summary judgment had been entered here because on pages 10a and 11a of our petition for certiorari we reproduced the district court's order which enters judgment. The Government had not thought that there was a trial because the record shows only a discussion of the legal point, and we thought respondent had not had an opportunity to put in his evidence.

Now, the district court does refer to this on page 9a of our petition for certiorari as a trial, and if respondent is correct a about this and if we should prevail here, then the proper disposition would be to remand the entry of a judgment for the United States.

But I think the situation is ambiguous and should the Government prevail, I think the remand should be for disposition by the trial court. Let the trial court decide whether or not respondent had a chance to put his evidence in.

QUESTION: Disposition of the tax claims.

MR. BORK: The tax claim, precisely, Mr. Justice Rehnquist.

If there are no questions, I conclude my presentation, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Thank you, Mr. Sturman.

The case is submitted.

(Whereupon, at 1:03 p.m., the argument in the above-entitled matter was concluded.)