

In the

Supreme Court of the United States

UNITED STATES OF AMERICA, et al.,
Petitioners,

v.

LaSALLE NATIONAL BANK, et al.,
Respondents.

No. 77-365

Washington, D.C.
March 29, 1978

Pages 1 thru 49

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Respondents.	:	
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Washington, D. C.,

Wednesday, March 29, 1978.

The above-entitled matter came on for argument at
1:17 o'clock, p.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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

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on behalf of the Petitioners.

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North LaSalle Street, Chicago, Illinois 60601;
on behalf of the Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in United States against LaSalle National Bank.

Mr. Wallace, you may proceed whenever you're ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE PETITIONER

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

This is an Internal Revenue summons enforcement proceeding, in which the district court denied enforcement and the Court of Appeals affirmed.

The case presents questions that many of us thought were settled by this Court's decisions in United States v. Powell in 1964, and Donaldson v. United States in 1971; but the questions have stubbornly persisted.

The Special Agent in this case served a summons on the respondents, a bank and its vice president, seeking information involving real estate trusts relating to the affairs of a particular taxpayer who was the subject of his investigation. And, incidentally, the record shows that the taxpayer's attorney has been the counsel for the respondents throughout the case.

Now, the Special Agent's testimony in response to the purpose of the issuance of the summons, in direct response to questions, said that the purpose of his investigation was to

determine tax liabilities for the years under investigation. And when asked what the focus of his own inquiry into the matter was, he said it was to investigate the possibility of criminal violations of the Internal Revenue Code.

The Court of Appeals characterized this testimony as indicating that the record established that the Special Agent testified to the existence of a civil purpose, but that the district court, who observed the demeanor of the witness, discredited that testimony.

Now, while it is not material to the position that we're taking in the case, I do think it's illustrative of the problems we're running into in these cases, that, with all respect, I find it hard, myself, to characterize the holding of the district court this way. What the district court -- there was no contradictory testimony of any kind, the district court was relying, in its findings, solely on the testimony of the Agent with respect to the functions that he was carrying out. And the findings recited by the district court seem to me to be wholly consistent with the Agent's testimony.

And that is in the Appendix to the Petition, referring to the district court's opinion, at the bottom of page 2a of the Appendix to the Petition and the top of page 3a, the district court said:

"It is apparent, however, that this focus and determination" -- namely, that it's an investigation for a

criminal purpose -- "may be arrived at, under certain circumstances, before the actual recommendation for criminal prosecution has been made. In such event the focus and determination has been arrived at at the time of the issuance of the Internal Revenue summons."

And in the district court's view that becomes a summons issued for improper purpose that should not be enforced. And that was reflected by the testimony, where the Agent said, while the purpose of his investigation was to determine tax liabilities, the focus of his inquiry, all consistent with the language used by the district court, was to investigate whether there had been a criminal violation of the tax laws.

The difficulty that we're finding in these summons enforcement proceedings --

QUESTION: Mr. Wallace, before you leave Judge McGarr's opinion, it does say in the next-to-last paragraph that it's apparent that the Agent was "conducting his investigation solely for the purpose of unearthing evidence of criminal conduct."

MR. WALLACE: That is correct.

QUESTION: So then we accept that as -- that's what the Court of Appeals said he found, too, isn't it? What's the difference between Judge Pell and Judge McGarr?

MR. WALLACE: Well, there's no indication that there was any rejection of any of the witness's testimony on the

basis of credibility by Judge McGarr.

QUESTION: Well, to the extent that the witness said it was for some other purpose, when the district court says it's solely for the purpose of criminal proceeding, then he's rejecting the other testimony.

MR. WALLACE: Well, that was the test being used. I recognize that one can characterize this the way the Court of Appeals characterized it, but I find it difficult to find an inconsistency between Judge McGarr's holding and the testimony. And he doesn't in any way reject the testimony, he seems to be saying that so long as the agent admits that the focus of his inquiry is on criminal aspects of the investigation, that shows that there is a solely criminal purpose for purposes of applying the standard that he thinks should be applied under Donaldson.

This doesn't --

QUESTION: Well, how do you expect us to decide the case? Should we assume that the investigation was solely for criminal purposes or not?

MR. WALLACE: Well, that's what I'm trying to get to, if you'll let me do it with a little introductory.

QUESTION: Just tell me yes or no and you get to it pretty fast.

MR. WALLACE: There really -- in the first place I don't think it's the pertinent question, and in the second place

there is no such investigation when an assignment has been made to a Special Agent. That's the short answer, but I'll have to explain it a little bit indirectly.

The difficulty that we're running into in these summons enforcement proceedings, in a number of Courts of Appeals, that have departed from the line of demarcation, that was at least one line clearly established in Donaldson, whether a recommendation has been made by the Department of Justice; and it instead adopted a standard of whether its sole purpose was a criminal purpose or whether the Agent had a firm purpose to recommend prosecution or a fixed purpose to recommend prosecution, is that the inquiry is focusing on the personal purpose of the Agent and his subjective understanding of his assignment rather than the legal purpose of the authorized investigation that has been assigned to him.

An Agent does not select the subject of his investigation. In this case he said he was assigned to investigate the tax liabilities of this particular taxpayer. That assignment was duly made by what would have been the group manager in a large office such as this one; in a smaller office it would be made by the Chief of the Unit.

And our position is that so long as that assignment is duly made, as a tax investigation assignment, and the Agent is carrying out that investigation, there is no meaningful distinction in the Agent's functions between a civil and

criminal purpose of his investigation. The two are not separable.

And the delay that we're running into in summons enforcement proceedings is because the Agents are being called to the stand, cross-examined about their personal understanding of their function, to see if, in some way, they will indicate, sometimes in an appeal to their vanity, about the kind of matters that call for bringing them into it, that this is merely --

QUESTION: Well, Mr. Wallace, --

MR. WALLACE: --- an investigation of criminal conduct.

QUESTION: Mr. Wallace, we do have a case here involving a particular Agent and his --

MR. WALLACE: That is correct.

QUESTION: -- particular investigation. And Justice Stevens asked you a while ago about whether, in view of Judge McGarr's finding that the investigation was solely for criminal purposes, in which he suggested that the Court of Appeals had upheld as not clearly erroneous, what hypothesis do we go ahead on in this case? And the table of organization of the IRS, I don't think is very helpful to answer that.

MR. WALLACE: Well, I'll have to differ with you, Mr. Justice, I think it makes all of the difference, because both the district court and the Court of Appeals proceeded on

the erroneous premise that the test here -- and I'm referring back to Judge McGarr's opinion, page 2a of the Appendix to the Petition, this was the next thing I was getting to -- that he said, in the first full paragraph on that page:

"The Court recognizes that civil and criminal investigations may go forward side by side before a determination of the ultimate focus of the investigation is made." And that is quoted virtually word for word by the Court of Appeals on page 8a, in apparent agreement that that is the starting point of the legal analysis here.

But it is not --

QUESTION: Mr. Wallace, he said that's what may happen, and later on he says what did happen in this case, which is something different.

MR. WALLACE: What I'm trying to tell the Court is that there's no such thing as a civil and criminal investigation going on side by side, in the way the Internal Revenue Service proceeds. It's merely a matter of nomenclature whether you say that the Special Agent's assignment is to determine whether fraud penalties should be assessed against the taxpayer or whether there have been criminal violations of the Internal Revenue Code.

QUESTION: But would this Court not be as free as the Court of Appeals would have been to say that, absent contrary testimony, some affirmative testimony pointed to by

the district judge, his finding on this subject was clearly erroneous? Is that not one of the alternatives open?

MR. WALLACE: It is an alternative open, but I think that this is not a matter of the clearly erroneous finding, this is a matter of an improper legal standard being applied to the question of enforcability of an Internal Revenue summons.

And I think that this is clarified very helpfully for us by a recent analysis by the Second Circuit Court of Appeals, which we had set out in the Appendix to our Reply Brief, an opinion written by Judge Friendly on behalf of that Court, in a case called United States v. Morgan Guaranty Trust. And, as he points out at the bottom of page 12a of the Appendix to our Reply Brief:

"We start" -- and I think this is quite accurate -- "from the premise that investigations of taxpayers that would develop evidence of criminal but not of civil tax liability must be rare; indeed, petitioners have pointed to none."

As we specify in our brief, when tax fraud is found, that is evidence that supports a determination that a 50 percent fraud penalty should be added to the liability otherwise due. And the Internal Revenue Code is quite specific that that kind of a fraud penalty is a tax within the meaning of the Code, that's Section 6659(a)(2) of the Code, and that a determination that a fraud penalty is owing is a part of what

must be specified in the statutory notice of deficiency. That is the effect of Section 6671 of the Code. And it's the statutory notice of deficiency that culminates from a tax investigation undertaken by the Special Agent.

And there's no way that his --

QUESTION: Well, how did Judge McGarr rule wrong?

MR. WALLACE: By not understanding that there's no way to differentiate the civil and criminal aspects of the --

QUESTION: Did the government lawyer explain it to him?

MR. WALLACE: He may not have sufficiently.

QUESTION: Well, if he didn't, what are we going to do? Are we going to say the judgment is wrong?

MR. WALLACE: Well, that is the question presented in our petition that was granted by this Court, and that is the question that needs deciding, because the Courts of Appeals are going in many disparate directions here, and many tax investigations are going --

QUESTION: Well, what are you going to tell us, to show that he was wrong?

MR. WALLACE: Well, that's the purpose of my argument.

QUESTION: Well, Judge Friendly's opinion would have had no trouble with Judge McGarr's finding, would it?

QUESTION: That's right.

QUESTION: It simply would have said, "I can accept it as not clearly erroneous, and, nonetheless, they are not

???? entitled to that, to subpoena the court's rights."

MR. WALLACE: That is correct. Because the summons should have been enforced. That is exactly what the Second Circuit would have held on the basis of Judge McGarr's findings, which is why we're here. The Circuits are not deciding these cases in the same way, and we're having lengthy inquiries of Special Agents that ultimately seem to us to have a much deeper purpose.

QUESTION: Well, I know one thing -- it's not in this record; but I know what you say wasn't a rule in 1965. Because in a case in the Second Circuit there were two Agents sitting in the same office, one in civil and one in criminal, on the same man. Has that changed?

MR. WALLACE: There are Revenue Agents and Special Agents who specialize in different aspects of the investigation. The Revenue Agent, as -- all this was recognized in the Court's Donaldson opinion, when it said that the mere bringing in of the Special Agent does not convert it into an improper use of the summons. The Revenue Agent is a specialist in determining liability other than the 50 percent addition to tax, that is the fraud penalty; and the Special Agent is someone trained to investigate for fraud and to see whether a 50 percent addition to the tax liability should be made. In other words, he has one-third of the responsibility for determining the possible deficiency in the tax payment.

And that is specifically what Section 7602 of the Code authorizes Agents of the Service to issue summonses for, to determine tax liability, which, as I just explained to the Court, includes, in the definitions of the Code, liability for fraud penalties.

QUESTION: Mr. Wallace, let me just -- see if I understand your position. Isn't the government arguing that even if Judge McGarr is 100 percent right, the investigation really could be characterized as 100 percent criminal. Nevertheless, no recommendation for prosecution had been made, therefore, there's a pure simple rule that we can apply under some similar case; that's your argument, isn't it?

MR. WALLACE: That is our position. That is correct, but I would not quite characterize it that way, because there is no such thing as a 100 percent criminal in this sense.

QUESTION: Well, you can assume there is, and you'd make the same argument, wouldn't you?

MR. WALLACE: Well, I can't assume that there is, because it's unrealistic, it's not the purpose for which the investigation was --

QUESTION: Well, it's theoretically possible, isn't it? That there could be an absolutely detailed determination of tax liability, but some lacking, some shortage of evidence on intent. And you're looking for some corporate minutes or

something. There could theoretically be such a case, and you'd say you could still enforce the summons if there's no recommendation. That's your position, isn't it?

MR. WALLACE: Well, it is -- it has to be put in context. The Special Agent --

QUESTION: Well, every time you say it has to be put in context, you're saying you've got to have a factual hearing, unless you've got a full --

MR. WALLACE: No, I agree with the position, but it has to be understood in the context of two points. One is the statistics that we've cited in our brief on page 20, that show that very substantial sums of fraud penalties are assessed as a result of these investigations, without recommending -- in cases in which no recommendation for criminal prosecution is made. It's very difficult to anticipate which of these investigations will fall into that category.

The second point, and a point I think is very well made again in Judge Friendly's opinion for the Second Circuit, again on page 12a, is that it's not up to the Special Agent to decide whether a case will be referred for criminal prosecution to the Department of Justice. He does not have the authority to decide, he's not the responsible official to decide that. We're cross-examining these Special Agents about whether they have a firm purpose to recommend criminal prosecution, but that isn't the same thing as a determination that in all but

form a recommendation of criminal prosecution will be transmitted to the Department of Justice.

The Agent, in determining, after his investigation is concluded, whether to recommend prosecution, consults with his group manager, whose recommendation will go along with his, either agreeing or disagreeing with it, and I am told that in a substantial percentage of the cases the group manager's greater experience in discussing the case with the Special Agent will change the Special Agent's mind about whether to recommend criminal prosecution in a particular case.

We don't have figures on that, the Internal Revenue Service does not have figures on that. After that takes place, if the Agent's purpose, if the Agent's conclusion to recommend criminal prosecution survives that, it then goes to the Chief of the Intelligence Division's district office, who has the authority to put an end to it right there, if he disagrees with it. That's a relatively small percentage of cases that got that far, and then he puts an end to it -- there are cases where he puts an end to it.

If he decides to carry it forward, he does not have the authority to transmit it to the Department of Justice, his only authority is to send it to the regional council, with the recommendation that it be transmitted to the Department of Justice with a recommendation for criminal prosecution.

The regional council we do have figures on, and those

figures show that in fiscal year 1976 the regional council declined to refer 14 percent, 14.6 percent of the cases that reached that far, over to the Department of Justice; 349 he declined, and 2,037 he did refer. In 1977 the percentage was 10.9 percent.

Now, the question necessarily arises: What of the cases in which the Agent had a firm purpose to recommend criminal prosecution, but the evidence that he had at that time that his purpose became fixed was not sufficient to persuade his superiors to recommend criminal prosecution to the Department of Justice. What investigatory tool is available under the statutory scheme for such cases under the holdings of the Courts of Appeals, that say that the Agent's purpose is what's controlling as to whether the summons is available?

The summons is the only investigatory tool that the Agent has; other than that, all he can do is present his credentials and ask for voluntary disclosures of information, which banks and other -- employers in other institutions are increasingly reluctant to make because they're afraid of being sued if they don't have compulsory process.

There's no compulsory process available to the Agent, except the Internal Revenue summons. If the Agent has a firm purpose in mind, several Circuits have held he can't use that process. That leaves nothing available but a grand jury subpoena.

QUESTION: In Reisman v. Caplin, Mr. Wallace, had there been a recommendation for criminal prosecution?

MR. WALLACE: There had not. There was, in that case, a dictum which I'll be happy to refer to, because -- the dictum did not refer to whether there was a criminal purpose as being something improper. What the dictum in fact said, on page 449 of Volume 375 U.S.:

"The witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution."

That's a more careful formulation of what is loosely called "for a criminal purpose". It reminds me a little of --

QUESTION: Well, it's not called for a criminal purpose, is it, it's called for a purpose of a criminal prosecution.

MR. WALLACE: Yes -- well, for use. For use in a criminal prosecution.

QUESTION: Yes, not for a criminal purpose. That's not the test.

MR. WALLACE: To obtain evidence for use in a criminal prosecution.

But the point is, the Revenue Agent, the Special Agent not only does not have authority to determine whether the recommendation will be made to the Department of Justice,

he also does not have the authority to determine what will be included in the notice of tax deficiency that has to, under the statute, be sent to the taxpayer 90 days before the tax can be assessed, so the taxpayer has an opportunity to contest it during those 90 days in the Tax Court.

Then, again, it's up to his superiors to determine whether that notice of deficiency should include a 50 percent addition to tax because of fraud penalties. Anything that the Special Agent can find out in the course of his investigation that indicates criminal violations of the tax code of a fraudulent nature is supporting evidence by which his superiors can make the determination more accurately, whether that deficiency notice should include the 50 percent fraud penalty.

So there's no way of differentiating the Special Agent's functions in getting that evidence between evidence that's needed in order to carry out the civil assignment and evidence that would show a criminal violation of the Code.

And the purpose of the Reisman dictum and its preservation in Donaldson I think is quite accurately stated by the Second Circuit and by Judge Friendly, is to assure that the summons is not being used to trench on the authority of the Grand Jury or to broaden the government's right to discovery in criminal proceedings.

In other words, that the summons is not being used after its civil purposes are spent, which is --

QUESTION: You know, Mr. Wallace, the dictum in Reisman really could be read to refer to criminal prosecution other than for violation of the Revenue Code. It would clearly be --

MR. WALLACE: Well, if it's used for some collateral purpose, --

QUESTION: It would clearly be --

MR. WALLACE: -- that's what the Powell case was about, what they called abuse of process, using it for something other than an investigation of tax liability. And of course that would be improper, but there's nothing of that kind in this case.

QUESTION: I realize that. Why is it improper, even after recommendation for prosecution has been made, if the Agent is really trying to check up on a violation of the Revenue Code?

MR. WALLACE: It might not. We have a footnote in our brief suggesting that it might not be improper in that circumstance if the information so received is insulated from the Department of Justice, you know, and from use by the Department in its prosecution. But we don't, as a matter of fact, do that. As a matter of Internal Revenue practice, summonses are not issued once the notice of deficiency has been sent. The summonses are used to investigate up to the point of determining what should be in the notice of deficiency.

Now, it happens that increasingly the returns of many of the summonses are not made until after the notice of deficiency is issued, because of all these proceedings about whether the summons is enforceable or not.

But we came to the Court in the hope of restoring the situation to getting returns of the summonses prior to the issuance of the notice of deficiency.

I'd like to reserve the balance of my time, if I may.

MR. CHIEF JUSTICE BURGER: That's a bright line that all the Courts of Appeals would readily understand, would it not be?

MR. WALLACE: Yes, I believe so.

MR. CHIEF JUSTICE BURGER: Mr. Cushner.

ORAL ARGUMENT OF MATT P. CUSHNER, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

First I'd like to respond to counsel's arguments before I make my presentation.

Counsel indicated in his opening that the finding of Judge McGarr was suspect, in view of the fact there seemed to be no contradiction in the testimony.

I think, viewing the Appendix that's been filed with the Court in this case, particularly page 52, we find Mr. Perry testifying exactly opposite to the testimony of Mr. Olivero,

or Special Agent Olivero, concerning his purpose with respect to the issuance of the summons.

Special Agent Olivero met with Mr. Perry and at the time testified that he had no civil purpose, Mr. Perry testified to that conversation.

It seems anomalous that we be in front of the Supreme Court arguing an evidentiary question that's been decided by the district court after hearings and witnesses, viewing their demeanor, being reviewed by the Court of Appeals for the Seventh Circuit, the Seventh Circuit finding in a unanimous decision that there was more than adequate support in the record to the findings of the court below.

QUESTION: Well, but if Judge Friendly is right, you aren't here arguing an evidentiary question, because, in his view, even if the evidentiary question is resolved in your client's favor, you still lose.

QUESTION: Yes.

MR. CUSHNER: I think that is correct. I think that if an Internal Revenue summons may be issued solely in aid of a criminal investigation, and that's authorized not only by the statute but is constitutionally permissible, then the evidentiary question will not make any difference. I think that's --

QUESTION: Well, putting it another way, if the bright line -- if the line -- and we'll later decide whether

that's a bright line -- is when the recommendation is made to the Department of Justice for prosecution. If that's the line, then that's the end of the case, isn't it?

MR. CUSHNER: Yes, if that is the line. But --

QUESTION: It doesn't make any difference what was in the mind of the AGent.

QUESTION: That's right.

MR. CUSHNER: Well, I would agree, if that is the line.

The problem is, if that is the line, what is the reason for judicial review, and what is the distinction between the investigation before the recommendation or after the recommendation? If the summons is proper before a recommendation, why is not proper afterwards? No criminal prosecution is necessarily an essay after the issuance of a recommendation to the Department of Justice.

QUESTION: Well, you're assuming that there's a bright line in fact at all times in the mind of the inquiring Agent, as there is a bright line if we draw the line there.

MR. CUSHNER: No, I suggest in this case there was such a line. I think we are not talking about generally all the summonses that are issued all over the United States in every case. I think this is a most peculiar case with the most peculiar set of facts that has been found that way.

QUESTION: Well, what if you had a situation where some people involved or with knowledge of the inquiry had as

their objective the prospect of a criminal prosecution and others did not? How -- what about that?

Would that taint the whole summons because someone in the Internal Revenue Service thought that there was a criminal liability here?

MR. CUSHNER: Well, Mr. Chief Justice, I don't think it's because someone in the Internal Revenue Service thought there was a possibility or thought there was a criminal violation, I think it is the Agent who is conducting the investigation, and it is the Agent who is issuing the summonses here in question, it is that Agent who we must look to to determine the type of investigation that is being conducted.

It is the Agent who wishes the summons, and it is the Agent who conducts the investigation. And the fact that the Internal Revenue Manuals may prohibit him from doing certain things that may otherwise be in excess of the statutory powers or, for that matter, unconstitutional, does not necessarily meant that all government employees or, for that matter, all Special Agents follow those.

I think the testimony is uncontradicted when the Special Agent was asked on the stand whether he had even read in totality his Manual of Procedures, the Special Agent said he had not; and when questioned as to particular procedures that were mandated in that Manual, he said that he did not follow them and would not follow them when, what he called

home ground rules were to the contrary.

I think what we have in this particular case was a Special Agent running an investigation for purposes far in excess of whatever the statutory grant may be, and certainly in an unconstitutional manner.

I think he --

QUESTION: How can that injure your client?

If he didn't have any authority.

MR. CUSHNER: Well, I think that this is a most peculiar type of case also because of the nature of the record sought. We have here records sought that a part of an Illinois land trust, a very peculiar way to hold title, the identity of the trustee and the beneficiaries is very closely knit, if the -- for instance, if the legal and equitable title holder being the bank were sued, the bank would be -- or if a tort was committed on that land, the bank would be sued. The beneficiaries are required to bear the cost of the defense of the suit, and ultimately bear whatever tort there is.

So we have a most difficult problem in that: whose privacy? Whose records? Who's the right person to object to the --

QUESTION: Well, let me --

MR. CUSHNER: If they sought records from the bank --

QUESTION: Let me give you a hypothetical case.

A man forges documents and promotes himself from fourth

assistant janitor to a Regional Council of Internal Revenue, and serves you with a subpoena. How are you injured?

MR. CUSHNER: Well, I think, Justice Marshall, any time I'm served with legal process I have a right to inquire as to whether that legal process is really legal.

QUESTION: Yes, you can inquire. But if it gets him, how are you hurt?

MR. CUSHNER: Well, I think anybody who is required to comply with legal process, which is in fact not legal is hurt. I think it's our liberties, our --

QUESTION: Well, as I understand, if a man in government gets as much as he can get legally, but is prevented from doing anything with it, there's no way, as I understand it, that an investigator on the civil side can participate on the criminal side, in Internal Revenue.

MR. CUSHNER: Well, I'm not sure I understand your question, Justice Marshall. This --

QUESTION: Was the injury here on the civil side?

MR. CUSHNER: No, this was a Special Agent from the Intelligence Division, which is now known as the Criminal Enforcement Division. There was no cooperating Agent from the Audit Division in this particular case.

I think Judge McGarr recognized the mere fact that there was no audit Agent did not preordain the result that in fact was reached.

QUESTION: Well, that could be a reason for that sentence about them going side by side.

MR. CUSHNER: It could be.

QUESTION: Well, this, I take it that all we've got is a question of statutory construction here, isn't it?

MR. CUSHNER: Well, I think that --

QUESTION: There isn't -- there's no constitutional issue involved.

MR. CUSHNER: Well, I think there is a constitutional issue involved. I think that if the Court reaches the statutory question and says that the statute does in fact authorize the issuance of a summons such as the instant summonses, solely made of a criminal investigation, we run into the problem of Abel vs. United States. I think Justice Frankfurter succinctly stated the issue in that case, where the question before the Court was the use of an administrative warrant for the purpose of gathering evidence, or the alleged purpose --

QUESTION: Well, I know, but you might have a constitutional objection to a sentence in a criminal investigation, but that hasn't got anything to do with how the statute is to be construed, does it?

MR. CUSHNER: Well, it's not a matter of construing the statute, it's a matter of --

QUESTION: Well, suppose somebody had a Fifth Amendment objection to complying with a summons, could he make it?

MR. CUSHNER: Of course he could.

QUESTION: Well, if you construe the statute as -- well, you're not losing your constitutional protection just because of the statute.

MR. CUSHNER: I think we lose our constitutional protection if the Supreme Court orders the compliance with summonses issued solely in aid of a criminal investigation. I don't think that the statute authorizes that, but if the Court should find that the statute authorizes the issuance of a summons solely in aid of a criminal investigation, forcing people to comply with such summonses I feel is unconstitutional. But if the Court finds it to be constitutional, the argument is moot.

QUESTION: What provision of the Constitution would be violated?

MR. CUSHNER: To be frank with the Court, I cannot point to a specific provision. Justice Frankfurter did not point to a specific provision. I don't think any of the courts have, even --

QUESTION: Well, a lot of people in criminal cases are served with subpoenas to produce evidence, and you don't think you're violating the Constitution just because you're subpoenaing evidence in a criminal case; and if somebody has some objection to a subpoena, that he can find some constitutional basis, he can make it.

MR. CUSHNER: I agree. If a warrant for search-and-seizure is issued in order to get --

QUESTION: Or if you subpoena somebody to produce records that he thinks will incriminate him.

MR. CUSHNER: Either a grand jury or a warrant for search-and-seizure, those --

QUESTION: So what's -- what would be so strange about --

MR. CUSHNER: Because this --

QUESTION: -- construing the statute? Suppose Congress had said in plain black-and-white that these summonses are available in criminal investigations as well as any other?

MR. CUSHNER: I think then we would have a very clear-cut question of whether or not it's constitutional to authorize a Special Agent to --

QUESTION: Well, what would your argument be? You say you can't think of some constitutional provision.

MR. CUSHNER: My argument --

QUESTION: You'd just cite Abel?

MR. CUSHNER: No, my argument -- I would cite Abel, and my argument would be that the Special Agent is being authorized by the statute to conduct a grand jury without the protections that are afforded by a grand jury.

The grand jury is made up of citizens, when they vote to determine whether or not a true bill shall issue, they sit

there alone and deliberate. It isn't a man charged with a constitutional --

QUESTION: Well, he can't indict anybody, he would still have to go to the grand jury.

MR. CUSHNER: Well, speaking of the grand jury, the counsel has cited to the Court statistics as to how much in the way of fraud penalties are gotten. I think the more interesting statistic, if it were available, would be: How many grand jury subpoenas are actually issued in tax fraud prosecutions? Almost none are ever issued. I mean, there are no statistics on it, but factually there are none almost issued.

The fact of the matter is that by the time the Special Agent is finished developing these cases, turned them over to the Department of Justice, and the Department of Justice then referring them down to local U. S. Attorney's office for presentment to a grand jury, the grand jury has almost no work to do. They don't issue grand jury subpoenas. Warrants of search-and-seizure don't issue.

These summonses are in fact being used as substitutes for warrants of search-and-seizure, and substitutes for grand jury subpoenas.

QUESTION: But if Congress has authorized it, what difference does it make?

MR. CUSHNER: Congress can authorize something that

could be unconstitutional.

QUESTION: But I think that --

MR. CUSHNER: But, being subjective, I don't think they have authorized it.

QUESTION: But if Congress has authorized it, -- this
? is just the question I guess Justice Hart. asked -- what is the constitutional objection to it, so long as you retain your right to object on Fifth Amendment grounds to a particular request, and that sort of thing?

QUESTION: Well, a third party wouldn't have many constitutional rights to assert. These are third-party summonses, and --

MR. CUSHNER: Exactly.

QUESTION: -- the decisions are that the bank, when the bank gives up a lot of stuff that might incriminate the bank's customer, nobody can raise that. The bank can't, because it's, because it's not its constitutional rights that are being invaded, and the customer can't because it's not his material that's being summoned.

MR. CUSHNER: I think you're correct, Justice Stewart. I think that's the problem that was faced by the people in Miller. There was --

QUESTION: But doesn't Donaldson say that the real party at interest can intervene, you know, in a proceeding where bank records are summoned that really aren't the bank's --

MR. CUSHNER: I think you're right. That I think intervention becomes a meaningless right if the defenses, both constitutional and statutory are taken away. I fail to see the purpose of judicial review. If the summons power of the Internal Revenue Service is unfettered, I fail to see the purpose of the Congress, when enacting the statute, in enacting judicial review.

QUESTION: Well, supposing that the summons is served on the bank, your client comes in under Donaldson, intervenes, and is permitted to raise any Fifth Amendment or self-incriminating objections that he has; what more is he entitled to under the Constitution?

MR. CUSHNER: He's entitled, if he's going to be prosecuted under the laws of the United States to be prosecuted in conformance with those systems of justices that have grown up in this country: the grand jury and the warrant of search-and-seizure. I don't think that Congress has ever authorized the agencies of the United States to conduct this type of criminal investigation.

The purpose of enacting this statute with which we're dealing here is to determine really correct tax liability. There's been no finding in this case that in the investigation being conducted by the Special Agent it even relates to tax. You know. This is a very peculiar case based on the peculiar facts within this case, and I don't think it really presents a

question other than the way it's been presented to the Court, -- other than the way it's been presented to the Court -- that lends itself to these kinds of arguments.

The Special Agent has been conducting an investigation, it's unclear as to whether or not he's conducting an investigation even of tax liability. They say, they quote various cases saying that there have not been tax prosecutions which don't involve the payment of a penalty or a tax. Well, such is not the case. The recent case in the Seventh Circuit of Devarco, which didn't deal with the underpayment of a tax or the overpayment of a tax, but merely the misstating of where income comes from.

There are many cases in which the Internal Revenue Service can investigate taxpayers that has nothing to do with the collection of a tax. And I think Devarco is just one example of it.

I think that the personal purpose of the Agent is really not the issue; it's not the personal purpose generally. The purpose of this Agent in issuing the summons was solely in aid of a criminal investigation; not a criminal tax investigation with the possibility of a civil tax penalty, but a criminal investigation. And that's the problem that we face.

I think even the Donaldson case gives us some guidance. I think Donaldson very clearly stated that the

issuance of a summons solely in aid of a criminal investigation is not a proper purpose.

In Donaldson, the real issue before the Court was intervention, whether Mr. Donaldson had sufficient interest in the records to intervene. The Court decided against it. But Mr. Donaldson also raised, going through the Manual, going through the Code of Federal Regulations, the general duties of the Intelligence Division to prosecute and to advance criminal cases.

And the Court, I think, correctly stated that the mere fact that these may be the duties doesn't inextricably lead to a criminal prosecution, and the Court did not want to deny the Internal Revenue Service because of these provisions the right to issue summonses.

Neither did the district court nor the Court of Appeals in this case. The finding was wholly consistent with the finding in Donaldson. The finding in this case is not merely that the Agent was going ahead with a legitimate investigation.

The point of the findings below is that this was not a legitimate investigation in furtherance of any statutory duty or any statutory right that this Agent may have had pursuant to the statute.

If judicial review is to have any viability in the summons cases, the mere fact that taxpayers or people summonsed

may exercise their right to judicial review does not mean that judicial review somehow becomes something disrespectful of the processes or something that a taxpayer or a person summonsed should not avail themselves of. It was provided for just to prevent this type of abuse.

The mechanical application that the petitioners urge upon the Court will do nothing to stop these abuses. If the only rule is merely that an Agent has not recommended to his superiors, and his superiors to the Department of Justice, that criminal prosecution be recommended and instituted, the only thing a Special Agent need do is hold off on that recommendation, as they do now, until the criminal case is completed, then turn it over, once again have it reviewed by Regional Council, determine whether there's sufficient evidence to support a prosecution, and turn it over to the Department of Justice.

There's nothing magical about that recommendation. The only thing about that recommendation is that it is clear to all, once that recommendation is made, that the obvious focus, the obvious purpose, the obvious end of that investigation is solely criminal in nature.

The government --

QUESTION: Mr. Cushner, would you perhaps -- maybe I'm awfully dense on this, but why is it an abuse to, for the Agent to take the statute as it reads and just say, "I can go

out and get some information, it may help me prosecute this man"; what in the statute makes that an abuse? You kind of assume that, and I know Donaldson seems to, but I'm not quite sure I understand why.

MR. CUSHNER: I think it's an abuse because the statute was passed for a specific purpose. I don't think the purpose of the statute is to allow the agent to conduct a grand jury. I think the Agent is permitted under the statute to issue summonses in aid of determining correct tax liability, in aid of determining whether or not incorrect tax liability may lead to criminal prosecution under the Internal Revenue Code.

QUESTION: But how do you respond to Mr. Wallace's argument that tax liability is a broad enough concept to include fraud penalties? And all these things may end up in fraud penalties.

MR. CUSHNER: I agree they may end up in fraud penalties, and that's --

QUESTION: And is that a tax liability?

MR. CUSHNER: That is a tax liability. But that --

QUESTION: Then why doesn't it come right within the language of the statute?

MR. CUSHNER: It does come within the language of the statute, but that is not the facts that are before the Court. That was not the finding of the district court, nor was that

the findings of the Court of Appeals below. They said that the Special Agent had done nothing more than focus his inquiry on the criminal activities of the taxpayer; not criminal tax activities of the taxpayer, but the criminal activities of the taxpayer.

When the Special Agent was questioned as to whether or not he was using the summons to investigate possible 18 United States Code 1001 violations, that is, false statements to the government, he said he wasn't, but now that we had mentioned it, he would make such inquiry. It's clear that a summons cannot be issued in order to determine whether or not violations of the criminal statutes under 18 United States Code exist; but the Agent stated on the stand, under oath, that now that we had suggested it to him, that's what he would in fact do.

QUESTION: You seem to be assuming all the way through your argument, Mr. Cushner, that there is a bright and clear line when an inquiry moves from a civil into a criminal. But isn't it a realistic fact that many, many inquiries start out, both in the tax field and other areas, -- fraud against the government -- start out on a purely civil liability basis and move on and become criminal prosecutions?

MR. CUSHNER: I think you're correct, Mr. Chief Justice. But I --

QUESTION: And the Agent, you suggested three times now that the Agent is in fact given the powers of a grand jury. Well, he has no such powers. His recommendations don't have to be accepted. The grand jury's recommendations do. They become an indictment.

MR. CUSHNER: But the indictment can be withdrawn, and has been withdrawn in many cases.

QUESTION: But they become an indictment. But the Agent's recommendations may be accepted or rejected by his superiors.

MR. CUSHNER: I think that's correct. I don't think, though, that Mr. Wallace or anyone else can ever point to a case in which a Revenue -- in which a Special Agent has developed an adequate criminal case in which that recommendation has been declined, nor should it be.

The point is whether or not the Special Agent may conduct solely a criminal investigation. The Court has found -- these are the facts that determine the thrust of this case. The Court has found that this Agent wasn't looking for, attempting to find, investigating anything other than the criminal activities of the taxpayer. And whether the Agent may be authorized to do that or not is not the question. Is the Agent authorized to issue a summons in furtherance of those activities? And that is what is impermissible.

I don't think any court has ever held --

QUESTION: You mean impermissible under the statute or under the Constitution, which?

MR. CUSHNER: I don't think any court has ever held that it's permissible under either; and I think it's impermissible under either the statutory construction of 7206 or the Constitution.

QUESTION: Suppose I'm a U. S. Attorney, and a grand jury is in, and I'm investigating a particular person, and I haven't filed charges against him but he's certainly my target, so I issue a subpoena to him to come and testify, and to bring some records. And I tell him -- he shows up, and I tell him, "You're a target", give him a warning. Is there anything unconstitutional about that?

MR. CUSHNER: Just, if I understand your question, Mr. Justice, that the U. S. Attorney has caused a grand jury subpoena to issue? I don't think there's any constitutional infirmity in that.

QUESTION: And summonsed him to come and testify.

MR. CUSHNER: I think that's the proper use of a grand jury subpoena. Yes.

QUESTION: Yes. And so there's nothing wrong with using the subpoena in connection with a criminal investigation?

MR. CUSHNER: Absolutely not. Grand jury subpoena is the proper tool to be used.

QUESTION: Well now, suppose the statute in this case had said on its face that up until the time a reference for a criminal prosecution has been made, summonses may issue as the statute says?

MR. CUSHNER: Then I think that they would not be unconstitutional on its face, it would be unconstitutional as applied, if you allowed a Special Agent to conduct a solely criminal investigation and issue a summons in furtherance of it.

I think there's nothing wrong with making a --

QUESTION: But only because you think it's side-tracking a -- it's an end run around the grand jury?

MR. CUSHNER: I think it's not only running an end run around the grand jury, I think, by using a summons solely in ad of --

QUESTION: I know, but you could certainly make the same objections to the Agent as you could to a grand jury, and furthermore his lawyer is with him.

MR. CUSHNER: First of all, you can't always make the same objections, grand juries are empaneled for specific purposes, the grand jury is subject to abuse and at times you can get minutes of the grand jury. When a Special Agent interviews especially third parties, often that is lost for all times. Those notes of interview go into his investigative file and it's never discoverable by any defendant, a criminal

defendant is almost never aware of which --

QUESTION: What about a taxpayer, can he take his lawyer with him?

MR. CUSHNER: Yes, he can.

QUESTION: And if he's worried at all, he does, doesn't he?

MR. CUSHNER: Sometimes.

QUESTION: Or his accountant. He doesn't have to go alone, anyway, like he does to the grand jury.

MR. CUSHNER: He doesn't have to, there are instances when they do go alone. There are instances when they do go alone and are not adequately warned.

QUESTION: Not by his lawyer?

MR. CUSHNER: Always warned by the lawyer.

[Laughter.]

MR. CUSHNER: I think that even the citation of the Court to the -- to Judge Friendly's opinion really begs the issue. Judge Friendly first, on page 10a of the Appendix, cites right out of Donaldson and states: "When so read, the dictum comes into proper focus as applicable to the situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes."

Then after quoting that language from Donaldson, which distinctly disapproves an investigation solely for criminal purposes, analyzes the holding in Donaldson and would

seem to indicate that you can issue a summons solely for criminal purposes.

I don't think Donaldson ever approved that. I don't think Judge Friendly ---

QUESTION: You said 10a?

MR. CUSHNER: I mean 10a of the Appendix in the Reply brief.

QUESTION: Well, I have 10a of the Reply Brief and I can't find what you're talking about.

MR. CUSHNER: On the top of the page, there's the end of the quotation from Donaldson, which starts -- which has a semi-colon in the second line and then starts, "When so read".

QUESTION: Yes. Thank you.

QUESTION: And of course it's the government's position that there is no such thing. Under 7602, an investigation solely for criminal purposes. And that the Court in Reisman perhaps and in Donaldson misapprehended the factual facts of life when it assumed that there was such a thing.

MR. CUSHNER: Well, I think as Mr. Justice Rehnquist pointed out during the initial argument in this case that the citation to the Manual of Procedures, the general makeup of the Internal Revenue Service, is very little help in deciding any individual case, particularly this individual case.

Even Judge Friendly found, before he made his analysis of Donaldson, that the case at issue before Judge Friendly did not involve an investigation solely for criminal purposes, but found exactly to the contrary, that in fact there was a joint investigation going on that was concerned with, in fact, the civil violations of --

QUESTION: Well, isn't it true that if they get to the criminal prosecution, they can use the grand jury subpoenas?

MR. CUSHNER: That is correct, Justice Marshall.

QUESTION: But it's the same thing, the U. S. Attorney has got them right in his desk drawer.

MR. CUSHNER: I agree.

QUESTION: And you're not brought into the grand jury, you're brought into the U. S. Attorney's office and questioned.

MR. CUSHNER: That's not always the case. That is sometimes the case.

QUESTION: Sometimes the case, yes.

But defense counsel doesn't have any subpoena.

QUESTION: No.

MR. CUSHNER: Well, defense counsel often does not have these subpoenas, but the defense counsel may at time reach the minutes of the grand jury, may at times attack the abuse of the grand jury. And I don't think that's present.

Also the grand jury historically has been set up to protect the stand between the power of the government and the citizens with respect to the accusatory process. I don't think that such guarantees or assurances rest with the Special Agent conducting a criminal investigation. I think that's wherein the constitutional abuse lies, even assuming we can get past what I feel to be the statutory infirmities, the conduct of the Special Agent in this case.

QUESTION: Well, your client still has his guarantee of the right to be indicted before a grand jury before he can be held to answer.

MR. CUSHNER: If the grand jury is left with nothing to do, I think the guarantee of indictment by a grand jury is rendered rather meaningless. An indictment by a grand jury after the Special Agent, in the abuse of his process, gathers all the evidence that a grand jury would historically gather, the grand jury has nothing to do but vote a true bill.

QUESTION: Does it really make any difference whether the U. S. Attorney comes in with the evidence all there before the -- and presents it to the grand jury, or summonses witnesses and they present the same evidence to the grand jury as to whether or not the grand jury is going to indict?

MR. CUSHNER: I think that would have to be decided on a case-by-case basis. But if there was no difference, we

could dispense with the grand jury and turn all the government agencies loose with the subpoena power that is now resting with the grand jury. But that isn't the case.

The grand jury historically has a place in our criminal system of justice --

QUESTION: But it's protection for the defendant, it's not that it has the power to subpoena him, I would think, but that it is required that he be indicted before he can be held to stand trial.

MR. CUSHNER: Well, before he's indicted, the grand jury also historically has performed the function of gathering the evidence through subpoena.

QUESTION: But this isn't necessarily a help to him.

MR. CUSHNER: It may not be a help, but at least it's in conformance with the constitutional guarantees. Not every --

QUESTION: The constitutional guarantee is that you cannot be tried criminally in the federal courts except by indictment of a grand jury. That's the constitutional guarantee.

MR. CUSHNER: That's correct. But prior to indictment, the Constitution, I think, comprehends or at least anticipates that the grand jury performs a function, and hopefully that function will be a meaningful one.

I think that if the Special Agent is allowed to usurp

that authority --

QUESTION: It's not a function generally welcomed by a person who is subsequently indicted by a grand jury.

MR. CUSHNER: I don't think anybody who receives a grand jury subpoena welcomes it.

[Laughter.]

QUESTION: Well, if a man shoots a police official or someone else in the presence of 12 Bishops, the grand jury inquiry isn't very meaningful, either, is it?

MR. CUSHNER: No, it's not very meaningful. And --

QUESTION: The grand jury is not universal absolute protection against being charged, is it?

MR. CUSHNER: No, but the facts here are not ones where some tax offense occurred in the presence of 12 Bishops, and here the Agent has --

QUESTION: Well, they may have been -- the offense may have occurred in the presence of the LaSalle National Bank.

MR. CUSHNER: I think in addition the type of records that are being summonsed here would contra-indicate any sort of tax purpose to the summons. The records that are peculiar to an Illinois land trust are not necessarily those which would be relevant to an inquiry of a person's tax return or whether a person has committed a crime with respect to that tax return.

As we point out in our brief, the records of an Illinois land trust basically consist of the trust agreement, which is a standard form, standard in all banks in Illinois, and the letters of direction, either to take title, issue, sign a mortgage, those kinds of things. Not necessarily relevant.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

You have three minutes left, Mr. Wallace.

REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WALLACE: There's no basis in this case for counsel's suggestion that the finding was that there was a criminal violation -- a criminal investigation here that may be unrelated to tax liabilities. The Court of Appeals specifically says on page 5a of the Appendix to the Petitioner,

"Special Agent Olivero was conducting an investigation of the federal tax liabilities of John Gattuso."

And the district court says "respondents contend that Special Agent Olivero was in fact conducting an investigation of criminal violations of the Internal Revenue Code by John Gattuso."

The Miller case, which has been referred to involved an attempt to challenge a grand jury subpoena rather than an Internal Revenue summons. It may be rare, but it was an

instance of the use of the grand jury subpoena in a tax investigation, and, as has been pointed out, the procedural protections available to the taxpayer in an Internal Revenue summons situation in many ways compare favorably to those available in the grand jury subpoena situation, especially with the enactment of Section 7609 of the Code, which allows intervention in third-party summons proceedings.

Obviously the indictment, if there is to be one, has to be returned by the grand jury, and evidence developed in civil investigations, as the Court indicated in United States vs. Kordel, in the course of a Food and Drug Administration question raising the same issue, evidence developed in civil investigations legitimately can later be presented to a grand jury. And is pertinent to a grand jury.

The one suggestion made on page 12a of the Appendix to the Reply Brief by Judge Friendly of the possibility of a wilfully false statement having nothing to do with liability, is not something that ordinarily could be anticipated at the time the Special Agent commences his investigation.

Ordinarily, the wilfully false statement that a tax investigation would be concerned with is concealment of the source of income, which is a common way of concealing deficiencies.

And whether a prosecution should later be brought, even though it turns out that no additional liability is involved, is not something that can be determined at the outset in deciding

whether to follow up an investigation to see whether the source of income has been concealed.

It can't be known at that point whether that will indicate, in a particular case, that there is additional tax liability.

And finally I want to say that what we're faced with here is a situation in which the cases that suggest the most serious problems of fraud, where the Special Agent may think this is likely to be a case where a criminal recommendation will eventuate, are the cases where there are difficulties in getting summonses enforced and pursuing the investigations. Whereas the more marginal cases that the Special Agents are involved in, where they may not have much of a notion at the beginning that this is likely to show a serious fraud are the ones where there's no basis for saying that they have a firm purpose that they're going to recommend a criminal prosecution.

And we're finding that the sole investigatory tool of the Internal Revenue Service is being denied early-on in an investigation in the more serious cases, leaving us with only the alternative of presenting unripe investigatory files to the U. S. Attorneys and to clutter up grand jury proceedings where many of them would be weeded out in the normal course of the Internal Revenue investigations, after the evidence is developed and reviewed by superiors is made.

MR. CHIEF JUSTICE BURGER: Your time has expired

now, Mr. Lawrence.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:18 o'clock, p.m., the case in the
above-entitled matter was submitted.]

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