ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1032

TITLE UNITED STATES, Petitioner
v.
SELLS ENGINEERING, INC., ET AL.

PLACE Washington, D. C.

DATE March 2, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner	
v.	No. 81-1032
SELLS ENGINEERING, INC., ET AL.	

Washington, D. C.

Wednesday, March 2, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:10 p.m.

APPEARANCES:

DOUGLAS N. LETTER, ESQ., Civil Division, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

ARLINGTON RAY ROBBINS, ESQ., San Diego, California; on behalf of the Respondent.

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CHIEF JUSTICE BURGER: Mr. Letter.

ORAL ARGUMENT OF DOUGLAS N. LETTER, ESQ.

ON BEHALF OF THE PETITIONER

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

There are two issues before the Court in this case. The first is whether attorneys in the Civil Division of the Department of Justice may have access as of right to grand jury material as attorneys for the government pursuant to Federal Rules of Criminal Procedure, 6(e)(3)(A)(i) and 54(c).

The second issue is what standard the Civil Division must meet to show grand jury material to assisting personnel.

If the Court rules against us on the first issue, then the second issue also concerns what standard the Division must meet for access by its own attorneys.

It is our position that this case does not involve a question of grand jury secrecy, but instead concerns how the Attorney General organizes the Department of Justice.

Briefly, the facts were that Respondents, Sells, Witte, and Sells Engineering Corporation were indicted on a number of counts of tax fraud and fraud against the United States. There were other persons who were also indicted along with them.

Sells and Witte were officers in Sells Engineering Corporation which had contracts with the Department of the Navy

to produce defense systems.

The Defendants moved to quash the indictments making various allegations of grand jury abuse. The main allegation seems to have been at the time they were complaining about an indictment based on hearsay, it appears.

QUESTION: Is the term grand jury abuse a word of art? I noticed it in the opinion of the Ninth Circuit in this case. I was not otherwise familiar with it.

MR. LETTER: I do not think that it is a word of art, Your Honor. I believe in this case, Respondents are the first ones who used it. I believe it is unclear what they mean. As I say, they claim that apparently they thought the grand jury had been used for an improper purpose by the U.S. Attorney's office. I think that is what they mean by abuse.

Even though they made this motion to quash the indictment, Sells and Witte withdrew the motion and pleaded guilty to a count of conspiracy to commit fraud against the government by inhibiting an investigation -- a tax investigation. Shortly before the guilty pleas were entered, the Civil Division of the Department of Justice came into the District Court where the criminal proceedings were pending and sought access to the grand jury materials. The Division sought the materials because it thought that it might need them in order to bring a false claims action against some of the defendants.

As far as other defendants were concerned, one other

defendant pleaded guilty and another defendant was convicted.

In order to avoid any confusion, I think it would be important at this point to look precisely at Rule 6(e) itself. Rule --

QUESTION: Before you do that, can I ask one question about the way the case developed -- about when you say they came in and sought access, by that you mean they filed a motion in court?

MR. LETTER: That is correct.

QUESTION: Did they before doing that ask the United States Attorney in charge of the criminal prosecution just to turn the material over?

MR. LETTER: I do not believe they did.

QUESTION: Now if you prevail in the case they could have done that, we would have avoided all of these issues, is that right?

MR. LETTER: They could have done it for the Civil Division attorneys, correct. But, for the assisting personnel we concede that --

QUESTION: There would have been an argument, yes. But, for the attorneys themselves they could have just asked for it.

MR. LETTER: That is right. And, in fact, they made that argument to the District Court. They said that under the Fifth Circuit decision upon which we were relying the Civil Division attorneys were entitled as a matter of right.

QUESTION: As long as you are interrupted, may I ask --

MR. LETTER: Sure.

QUESTION: It is your position that under your view the Civil Division attorneys could have these grand jury materials as a matter or right. Would you then think that the Civil Division attorney would have to get a court order before disclosing the grand jury materials to support personnel?

MR. LETTER: When you say support personnel meaning the attorney's secretary?

QUESTION: Yes.

MR. LETTER: No, we do not believe so. We think that the secretaries for the Civil Division attorneys must be considered in essence part of the attorneys themselves. A reason for this would be that otherwise it would be very difficult for the attorneys to even make the motion --

QUESTION: How about other people working for --

MR. LETTER: I am sorry?

QUESTION: How about other people working for them?

MR. LETTER: Well, if we are talking about technical personnel like accountants, things like that, then, yes, they would need an order under Rule 6(e)(3)(C)(i), but the secretaries would not because otherwise it would be difficult for the attorneys to even make a motion to the court because if the motion was going to discuss the grand jury material, the attorneys apparently would have to type it themselves, and we do not think that

Congress ever intended such a thing.

QUESTION: That drastic a sanction?

MR. LETTER: Pardon me?

QUESTION: That drastic a sanction?

(Laughter)

MR. LETTER: That would be --

QUESTION: Mr. Letter, straighten me out, please. The grand jury minutes are in the possession of the U.S. Attorney.

MR. LETTER: Correct.

QUESTION: And, a division of the U.S. Attorney wants to see them?

MR. LETTER: When you say division of the U. S. Attorney, a division of the Department of Justice, obviously part of the same organization.

QUESTION: Right. And, they could have gotten it by just asking for it.

MR. LETTER: That is our position, yes.

QUESTION: Well, why did you file a motion?

MR. LETTER: We filed a motion, one, because we wanted access for assisting personnel, and also --

QUESTION: You mean that the minutes are not open to anybody in the office?

MR. LETTER: The minutes are certainly open to the assistant United States attorneys who --

QUESTION: And, anybody in this office?

MR. LETTER: That is correct.

QUESTION: You want to give these notes to somebody outside of the office?

MR. LETTER: We wanted to give them to the Civil Division attorneys in Washington, D. C.

QUESTION: Well, that is in the United States Department of Justice.

MR. LETTER: That is correct, within the Department of Justice --

QUESTION: You did not want to give them to anybody outside of the United States Department of Justice?

MR. LETTER: We did. We also wanted to give them to personnel from the Department of the Navy to help analyze this technical material, and that we definitely needed the court order for.

QUESTION: You do not ever give anything to the Navy without a court order?

MR. LETTER: Under Rule 6(e) --

QUESTION: I do not care about any Rule. Is it normally done?

MR. LETTER: No, it is not done --

QUESTION: We are not dealing with 14 or 15 different animals. We are dealing with one, the United States government. You did not want to give it to anybody outside of the United States government, did you?

MR. LETTER: No, Your Honor, we certainly did not.

QUESTION: It just looks to me like a law suit that just is a little unnecessary.

MR. LETTER: As far as the attorneys for the government, we agree, Your Honor.

QUESTION: Well, why did you file the motion?

MR. LETTER: We filed the motion because, as I say, we had to to show it to the Navy personnel.

QUESTION: And, the only reason we got this case is because you filed a motion.

MR. LETTER: As far as why we have an appeal is because Respondents objected to the disclosure.

If we can go back a moment, as I say, it would be important to look exactly at what the Rule provides. Rule 6(e) sets a general practice of grand jury secrecy. However, it sets up exceptions.

Rule 6(e)(3)(A)(i) provides access as of right, meaning without a court order to attorneys for the government in the performance of their duties.

Rule 54(c) then defines attorneys for the government as authorized assistants of the Attorney General and authorized assistants of the United States Attorneys.

Rule 6(e)(3)(A)(ii) provides that personnel assisting the prosecutor in enforcing criminal law can have access as of right to the material.

QUESTION: In other words, the United States Navy, even though they have alot of lawyers is not charged with enforcing the criminal law of the United States?

MR. LETTER: That is correct, Your Honor.

QUESTION: If they see, or know, or have information on a criminal case, they can work only through the Department of Justice, is that it?

MR. LETTER: That is correct, Your Honor. Only the Department of Justice and United States Attorneys have the authority to bring criminal proceedings.

And, in fact, I might add, the Department --

QUESTION: Could the Navy have brought an action to see these minutes?

MR. LETTER: Could the Department of the Navy have done so?

QUESTION: Yes.

MR. LETTER: If they did, they would have had to seek --

QUESTION: Is there anything in the statute that prevents them from doing it?

MR. LETTER: No, under Rule 6(e)(3)(C)(i) --

QUESTION: They could have?

MR. LETTER: -- they could have. There would be some question, I suppose, whether they could appear in court without the Department of Justice. The Department of Justice could seek it on their behalf -- their lawyers. The Department of Navy

attorneys cannot appear on court on their own behalf.

QUESTION: Mr. Letter, do you think the words, "attorney for the government" as used in (3)(A)(i) that you just read to us have the same meaning as the words, "attorney for the government" in the general rule of secrecy provision about who can go into the grand jury?

MR. LETTER: I think that there are two ways of looking at that, and I think either one supports our position.

One is that they do not mean precisely the same thing. Rule 6(d), I think, is what you are referring to which sets out who can be in the grand jury room.

Clearly, Rule 6(e) cannot mean that only attorneys who were in the grand jury room can have access to the grand jury materials. The reason I say that is a situation often happens where a Department of Justice attorney handles a presentation to the grand jury, and then that attorney leaves government service. Now, obviously, a new attorney has to be appointed in order to handle the criminal prosecution. It is clear under Rule 6(e) that the new attorney who was not in the grand jury room and since at the time he had nothing to do with handling the grand jury probably should not have been in the grand jury room, could nonetheless have access to the grand jury materials in order to prepare the criminal case.

Another way of looking at it is to say that the sections do mean the same, and there is nothing in Rule 6(d) that would

prohibit a Department of Justice, Civil Division attorney from sitting in during a grand jury presentation. Now, that is not the practice of the Department of Justice, mostly because we wish to avoid any appearance that a grand jury is being used for civil purpose.

QUESTION: Is Rule 6(d) set out somewhere in your brief?

MR. LETTER: No, it is not, Your Honor.

As I have pointed out before, Rule 6(e)(3)(A)(ii) provides access by assisting personnel, assisting in the criminal law enforcement --

QUESTION: I am sorry. I just do not understand your answer. You say, no matter how you answer it it is still consistent with your view?

MR. LETTER: Right.

QUESTION: My question still is what do you think the correct answer is? What do the words, "attorney for the government" mean when you are talking about the attorneys who may be present in the grand jury room? Does that include Civil Division personnel?

MR. LETTER: I believe it can. I do not think that there is anything in the Rule 6(d) or its legislative history that we have been able to locate that would say that a Civil Division attorney could not sit in, so I believe it could. I would like to emphasize, though, that would not be the Department of Justice practice to do that.

QUESTION: Why not?

MR. LETTER: As I say, we would like to avoid any appearance of impropriety -- any appearance that we were using the grand jury for a purely civil purpose. That would be the only reason.

QUESTION: That is not a bad reason.

MR. LETTER: I agree.

(Laughter)

QUESTION: That has traditionally been the policy and the practice of the Department of Justice, has it not?

MR. LETTER: That is correct, Your Honor.

Rule 6(e)(3)(B) then puts a limit on the use that assistant personnel can make of the grand jury material. They can only use the material to assist in the prosecution. They cannot turn around and take that information back to their agencies.

Rule 6(e)(3)(C)(i) then provides for release pursuant to court order preliminary to or in connection with the judicial proceeding. And, that is the section under which we would seek access for assisting personnel from the Department of the Navy.

Back to the facts of this case, the District Court put off the hearing on the motion for several days. In the interim the Defendants pleaded guilty. Then, the District Court heard from both sides, and it determined that the Respondents had withdrawn their grand jury abuse allegations. Nevertheless, the

District Court concluded that there was no evidence of grand jury abuse.

The Court, therefore, granted the motion permitting access. The Respondents appealed, and the Court of Appeals reversed.

I would like to set out up front why the Civil Division needs the grand jury material. The Division often receives referrals from United States Attorneys, Criminal Division, FBI, when there has been criminal conduct, and it is possible that there would be a civil fraud action.

It gets this material obviously long before any civil case is filed, and it uses the material for screening purposes. Very often, the Civil Division attorneys will look at the material and decide that there is no false claims action here and so they will drop the case. They will not use Department of Justice resources in further investigation.

Thus, this access to the grand jury material really leads to better governmental practices, because it means that the Department does not have to file premature civil fraud complaints which would obviously be --

QUESTION: Mr. Letter, I take it, then, the government does not follow the practice of many private civil litigants of simply filing a law suit and getting rather extensive discovery to decide whether the law suit should have been filed?

MR. LETTER: That is precisely correct, Your Honor, but --

QUESTION: Is that what all the fighting is about here because I had the impression from reading the briefs that if the government were precluded from doing what it did here it could have filed a civil action for fraud, gotten very extensive discovery and presumably gotten everything it could have gotten from the grand jury?

MR. LETTER: Not entirely, Your Honor, but let me go through that. First of all, we believe -- the Civil Division believes it is a very serious matter to bring a fraud complaint by the Department of Justice against a corporation. So, we would like to avoid that unless we have very solid evidence to support such a complaint. So, we are very reluctant to just file a complaint in order to get civil discovery.

Civil discovery is not going to be adequate because we are talking about obtaining grand jury transcripts for much of this material -- much of this material is grand jury transcripts. This is not material that is in the hands of the Defendants.

QUESTION: Are those originals, then, that are before the grand jury of which the Defendant has no copy or anything?

MR. LETTER: The Defendant might have a copy of some of it, but if it is some other witness, there is no guarantee that the Defendant has copies of --

QUESTION: Well, but the witness would have a copy, wouldn't he?

MR. LETTER: The witness might have --

QUESTION: You could depose a witness as well as a party in your civil action.

MR. LETTER: It is possible. But, some of the witnesses certainly might not have requested transcripts. In any event, we might be able to get much of the material from discovery. Obviously, there is some problem of delay, but that would require the Department of Justice to duplicate the investigation that it just did for the criminal proceedings. And, that is why we do not see that there is any evidence that Congress intended to force the Department to use its limited resources in a way to duplicate this massive investigation. And, in this case we are talking about thousands of hours in investigatory work. And, so, while it might be possible to get much of this material, it would cause an enormous amount of work, and the sad thing would be, once we gathered the material, we may then decide that there is no false claims action that should be pursued and we would drop it.

That is why, as I say, the screening process leads to better governmental practices. We would also, then, use the material to prepare the civil case, and I think I have gone into that a little already. The point there is we want to avoid duplication of an investigation already done.

This practice of access as of right by Civil Division attorneys is a well-established practice going back many years. It is also not limited to the Civil Division in U. S. Attorneys

offices and other divisions within the Justice Department. Attorneys with civil responsibilities have routinely had access as a matter of right to the grand jury material.

Our position is that this is what the law says, and that the Civil Division is entitled to access as of right under 6(e)(3)(A)(i). As this Court has said many times, let us start with the plain language of the statute. Here the plain language definitely supports us in two ways.

The first is 6(e)(3)(A)(i) says that attorneys for the government in performance of their duties may have access. The Department of Justice, Civil Division attorneys are attorneys for the government as Rule 54(c) defines them, and they are performing their duties. Under regulation the Civil Division attorneys are authorized to bring False Claims Act actions.

QUESTION: But, of course, the question is whether their duty is duty under criminal law.

MR. LETTER: That is right, and that is where the next -- plain language helps us again.

If we look at Rule 6(e)(3)(A)(ii) and Rule 6(e)(3)(B) both of them have a crucial clause that was added in 1977 that is missing from Rule 6(e)(3)(A)(i) and that is, assisting personnel may have access to grand jury material in order to assist the government attorney in enforcing federal criminal law. That section is not in 6(e)(3)(A)(i). And, so the fact that that is not there evidences Congress' intent that the performance of the

attorney for the government's duties not be limited to criminal law.

QUESTION: It could have been a lot more clear though, couldn't it?

MR. LETTER: As with many provisions, yes.

QUESTION: Well, what about revealing the material to support personnel in a non-criminal case?

MR. LETTER: Then we would go to Rule 6(e)(3)(C)(i) --

QUESTION: And have to show particularized need?

MR. LETTER: We do not think that particularized need is the --

QUESTION: I know, but you would have to go to another section?

MR. LETTER: Right, we do have to go to another section.

QUESTION: You would not treat the supporting personnel as part of the lawyer?

MR. LETTER: That is right. When you say supporting personnel, maybe -- I want to make absolutely clear -- We are saying the attorney's secretary is part of the lawyer. I am not sure if that is what you were asking.

QUESTION: What about the -- What is the section you mentioned that does not have this -- that do have the limiting phrases in?

MR. LETTER: 6(e)(3)(A)(ii) --

QUESTION: (ii) --

MR. LETTER: 6(e)(e)(B) --

QUESTION: And, what does that (ii) say?

MR. LETTER: It is reprinted in the back of our brief at page 2A, and it says, "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law."

QUESTION: Well, that would include a secretary, would it not?

MR. LETTER: Yes, that would. I am sorry, when you --

QUESTION: Is the --

MR. LETTER: The prosecutor's secretary, we would say, would be included under 6(e)(3)(A)(i).

QUESTION: I know what you said, but if you want to talk plain language, it seems to me that (ii) would apply to revealing the materials to a secretary.

MR. LETTER: When we look at the legislative history --

QUESTION: That would be one of the personnel that you, a lawyer would think would be necessary to carry out your duties.

MR. LETTER: I think the legislative history of 6(e)(3)(A)(ii) shows that that is not what Congress was talking about. Congressional concern --

QUESTION: Well, then, you have to get something besides plain language.

MR. LETTER: For secretaries, certainly. That is

obviously not the main part of our argument here. We are concerned --

QUESTION: But (ii) was limited to criminal --

MR. LETTER: That is right.

QUESTION: -- investigations --

MR. LETTER: That is correct, Your Honor.

QUESTION: -- which does not apply here at all.

MR. LETTER: That is right.

If I could go back a moment when Justice Blackmun pointed out that the plain language could have been clearer certainly. But, again, we think that supports us because this practice has been in existence for many years, and there is certainly no indication anywhere in the language or the legislative history that Congress meant to disapprove it in any way.

QUESTION: Mr. Letter, this case is related, of course, in a sense to the next one, the Baggot case. And, normally for the IRS, for example, or another administrative agency to get access to grand jury materials in a civil matter, the court has to find that it is preliminary to a judicial proceeding. Now, if you are correct in your view that any civil litigation attorney has automatic access without a court order to the grand jury documents, then it no longer becomes necessary to consider whether it is preliminary to a judicial proceeding and presumably it would give IRS, in effect, everything it wanted in Baggot without any court order?

MR. LETTER: No, it would not, Your Honor. We are talking here about access by Civil Division attorneys only. If they wanted to show it to IRS personnel --

QUESTION: How about IRS lawyers?

MR. LETTER: IRS lawyers, same thing. Remember --

QUESTION: What do you mean, same thing?

MR. LETTER: The same thing as any other IRS personnel for these Rules because --

QUESTION: But not Tax Division lawyers?

MR. LETTER: No, Tax Division lawyers --

QUESTION: I thought an IRS lawyer was a government lawyer.

MR. LETTER: No, Rule 54(c) specifically defines attorney for the government, and it says, assistants of the Attorney General and assistants of the United States Attorneys. So, Congress has drawn the line between the Department of Justice and other agencies. So, while an IRS attorney is clearly an attorney who is employed by the United States government, under the Rules he is not an attorney for the government.

So, automatic access by the Civil Division does not affect the Baggot case because --

QUESTION: Wouldn't it likely do so indirectly? They just go to you and say, look we have got a problem here. You folks get into to it and --

MR. LETTER: We cannot reveal the information to them.

That would be a violation of the Rules, and we could be placed in contempt. We could only get the information to them pursuant to a court order under Rule 6(e)(3)(C)(i). Again, this is if we are talking about a use for civil purpose.

It is important to note, we are not talking about release for public purposes. We are talking about release as of right to remain within the Department of Justice. And, only through court order would we seek any other kind of release.

QUESTION: Well, I assume the government could restructure a little bit and use Civil Division attorneys to staff these things like IRS investigations.

MR. LETTER: I do not think Civil Division attorneys could conduct an IRS investigation, Your Honor. That is not what -- The Department of Justice has certain functions which are to provide representation to the government in court.

QUESTION: Is there any other way IRS can operate in the courts except through the Civil Division?

MR. LETTER: In the United States District Court they operate through the Tax Division of the Department of Justice and through the United States Attorneys, I believe.

QUESTION: That is what I thought.

MR. LETTER: Right.

I would like to briefly touch on what, I think, is our most telling point, which is one that the other side has largely ignored, and that is the dual responsibility of the Department

of Justice. The Department of Justice has both civil and criminal responsibilities. Attorneys within the Department of Justice can be assigned civil responsibilities or criminal responsibilities or both at any time by the Attorney General. And, in fact, in many cases, both in smaller United States Attorneys offices and in a number of divisions of the Department of Justice, many attorneys operate every day on those dual responsibilities.

The result of the order here, all that it would be is that it would force the Attorney General to restructure the Civil Frauds Unit and combine it with criminal fraud -- the Criminal Fraud Unit, and under the Proctor and Gamble decision the attorneys then would clearly have access as of right to the grand jury material. So, that all the decision does here and all Respondent's position does is interfere with how the Attorney General is going to organize the Justice Department.

If the Court has no further questions at this point, I would like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Robbins.

ORAL ARGUMENT OF ARLINGTON RAY ROBBINS, ESQ.

ON BEHALF OF THE RESPONDENTS

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

I would like to take a moment and say something I was not going to say till later, but I want to get something very much in focus. We are talking here about a vestige of the power

of the absolute monarch, one of the few that remains in this country.

We are talking here about the ex parte subpoena power of the grand jury that can make you come forthwith and answer anything that they depend to ask on you about any nook and cranny they wish to explore without any protection --

QUESTION: Always subject to the Fifth Amendment, of course.

MR. ROBBINS: No, not subject to the Fourth and not subject to the Fifth and not subject to Invasion of Privacy, Your Honor. That is what we are talking about. It has got to be defined very narrowly, very precisely.

QUESTION: You mean a person cannot invoke the Fifth Amendment before the grand jury?

MR. ROBBINS: Not really, because they can give you immunity, either use or transaction, and make you answer. Now, that is a different question.

QUESTION: Well, they can invoke the Fifth Amendment, but then our cases have held that the immunity is a whole equal law.

MR. ROBBINS: I am sorry. Let me clarify it. You cannot be convicted by the testimony you would give, but they can make you answer, Your Honor. And, that is what is important. There are things you may not want to answer.

QUESTION: Well, there are lots of things you may not

want to answer. That does not mean the government cannot ask.

MR. ROBBINS: True. But my point is, protection from the Fourth and Fifth are extremely limited here more than anywhere else in this subpoena power without an attorney and without telling you what the relevancy is or telling you what they are investigating. I just want you to be in focus here very precisely the exact power we are talking about.

And, now, to use it for civil? That is the question we are talking about in this case.

Now, I am going to go to my argument.

QUESTION: Suppose we had only one person as they once had, just one Attorney General of the United States. Is he supposed to have logic-tight compartments so that over on the one side of his brain he puts the information about criminal and on the other side of his brain the civil?

MR. ROBBINS: That is a totally false argument that they raise.

QUESTION: There was a time when we had only one Attorney General of the United States.

MR. ROBBINS: I am not disputing that, Your Honor. But, the issue they raise is a totally false one. The issue is not, why are you interfering with the organization of our Department. That is not the issue.

The issue is can any one attorney in the Department of Justice or U. S. Attorney use these materials for civil purposes

without a court order in advance. That is the issue, not whether it is a Civil Division, the Tax Division, the Anti-Trust Division or the Criminal -- well the Criminal, of course. But, any attorney for civil purposes without first getting a court order. That is the issue here, not the organization.

The government has asked you to visit with them in a place that I call procedural ivory tower. I would like you now to go on a tour with Respondents and the illustrious amici in this country that have filed in this case. A tour that took you in the briefs very quickly through the contemporary constitutional grand jury and explored what is actually going on and the abuses that are actually occurring.

I am not going to belabor that here. The briefs are resplendent with it and not just ours, four others from accross the country.

I would like you today to visit with me to another place, one that Justice Brennan has some personal knowledge of. That is the case 25 years ago called Proctor and Gamble, a case that the government relies on very heavily.

Now, I want to bring you forward from there to this case. I want to show you that this case is the third leg of an executive triad which the net result is to vest the total custody of the grand jury in the executive. And, I want to explore with you why that will happen in this case.

First, why are we leaving the procedural ivory tower?

Because this case and Baggot that follows poses three questions to you which the government has classified as procedural, which the government has said we should decide based upon legislative intent, which we will explore, too, which the government wants you to decide in the ivory tower. Respondents and amici say that these three questions pose a far more fundamental question, a far more substantive question, whether the grand jury subpoena should be used as an ex parte, dual purpose discovery tool by the executive to conduct civil as well as criminal investigations. I am talking about that power I just described.

QUESTION: You say the government wants us to decide the case on the basis of legislative intent.

MR. ROBBINS: Yes.

QUESTION: On what basis do you want us to decide it?

MR. ROBBINS: I want you to decide it on a constitutional ground and grounds, Your Honor. And I --

QUESTION: Is that argued in your brief?

MR. ROBBINS: Yes it is, and I will get to that.

We have here twin levels of concern. The first is in this case. The second is this case and Baggot.

In this case, they are asking you to give them automatic access without court supervision under 6(e)(3)(A)(i) -- without court supervision, number one.

Number two, they are asking you to apply a rationally related test, they say, to support personnel that they would not

otherwise classify as untechnical like secretaries and so forth.

The issues are broader than that. Once you make that ruling were you to deem it, you have just decided to test the entire government for practical purposes were actually related, relevancy --

QUESTION: What would be your position about secretaries in the Criminal Division? Can the lawyers let the secretaries see the materials?

MR. ROBBINS: Your Honor, I suppose, as a practical matter, that might happen. I do not think it should.

QUESTION: Otherwise, they would have to do all of their own typing, wouldn't they?

MR. ROBBINS: I suppose so. But I am not, really not focusing on the Criminal Division because there is a certain amount of practicality, I have to concede, that is involved in the Criminal Division. But, I would say that that should be done with utmost care for the very reasons the government argued in Proctor and Gamble, which I will give to you -- the utmost care.

Now, why are we concerned in this case with the government getting automatically without court supervision or approval or were actually related no test at all? Because --

QUESTION: Don't they already have it?

MR. ROBBINS: They have it as a criminal --

QUESTION: You keep saying they are trying to get it. I thought they had it.

MR. ROBBINS: As a criminal custodian in a temporary way as assistant to the grand jury. Whittaker said in Proctor and Gamble, "This is not the property of the Justice Department or the U. S. Attorney. It is the property of the court and the grand jury." Now that a concurring opinion, but he was the only one who said anything about it in that decision.

QUESTION: Well, who has custody of the copies of the grand jury minutes?

MR. ROBBINS: The prosecutor has that, Your Honor, wearing his criminal hat.

QUESTION: I thought -- I do not know what kind of hat he had on, but he had it.

(Laughter)

MR. ROBBINS: But he is wearing a criminal hat, and that is the point. Your Honor, we are talking about --

QUESTION: He sees through the same eyes, doesn't he?

MR. ROBBINS: Pardon?

QUESTION: He sees through the same eyes whichever hat he has on.

MR. ROBBINS: That is true. And, I cannot unring the bell. That is very true. But the point is, how can he use it thereafter for civil purposes. You have to go back and see how he got it for criminal purposes and why he got it for criminal purposes before you decide he should be able to go on and use it for anything else. That is a very clear line that must be drawn,

and that is the line I want to be sure that you understand needs to be drawn, Your Honor.

Let me go back, if I might, to our concerns with regard to the civil side of this. The attorney for the government can concurrently develop a civil case and has been doing so, which I will demonstrate, as Justice Brennan may well recall in Proctor & Gamble was an issue there.

He can marshal evidence for a civil case if he has to answer to nobody with regard to the use of that evidence and automatically apply it.

QUESTION: May I be sure I understand your argument here? Are you saying it is wrong for him to do this?

MR. ROBBINS: Yes, I am saying it is wrong.

QUESTION: And saying -- For years and years the Anti-Trust Division used to run grand juries and sometimes they would indict and sometimes they would not, then they would bring a civil proceeding after.

You are saying all of those civil proceedings were improperly brought if the information was obtained in a criminal investigation that then aborted?

MR. ROBBINS: The question was raised in a sense in Proctor & Gamble.

QUESTION: Right, and I am just wondering how you answer that.

MR. ROBBINS: And, I will answer it this way. The Court

ducked the issue and the buck stops here. You now have that issue before you. It has not been before this Court until now --

QUESTION: Is it the thrust of your argument that if we had a similar situation and the Anti-Trust Division ran a grand jury, decided the evidence was not strong enough to indict, but that they thought they should bring a civil proceeding, could they or could they not bring a civil proceeding, in your view?

MR. ROBBINS: Of course, the allegations in that case were they never brought it for criminal in the first place, or if they did --

QUESTION: Well, my hypothetical was rather clear. I am trying to understand what your position is.

MR. ROBBINS: My position is that they should not be able to use the grand jury for civil purposes, and I must say that Proctor & Gamble does raise -- I am going to give you a little gimme here. Proctor & Gamble does raise and Anti-Trust raises a little different level, because Anti-Trust is not the traditional civil situation. When you are talking about the Sherman Act, you are talking about a twin level of enforcement. One is injuctive relief for the purpose of restraining a wrong that is going on in a civil arena. That is one that I do have to say falls in this quasi-criminal category, perhaps.

But that is not the collection of money.

QUESTION: Do you think a fraud claim is less criminal than an anti-trust civil case?

MR. ROBBINS: I think we are talking here about the collection of money, and I think a fraud claim is less than -- for this reason. Because injunctive relief is a civil remedy, it is not a criminal remedy. And because the way the courts and the law are structure in the common law system, you do it in the civil arena. But it is really a criminal concept. It is really saying, do not do that. That is wrong. That is against the law, and we are going to enjoin you from ever doing that any more. But, they do it in the civil arena. That is the only gimme I will give you on that, Your Honor.

QUESTION: Well, how about a gimme on the single-damage action by the government in the civil anti-trust case, just damages?

MR. ROBBINS: You mean versus the double damages?

QUESTION: Well, I think the government can only get single damages.

MR. ROBBINS: No, they can get double damages.

QUESTION: Do they get double? Okay, whatever the government gets --

MR. ROBBINS: In a civil courts claims action.

QUESTION: No, I mean in an anti-trust case.

MR. ROBBINS: All right.

QUESTION: Would you say that that is beyond the rule if the government uses its criminal anti-trust investigation materials to bring a civil action to recover damages in an anti-

trust case?

MR. ROBBINS: Yes, because we are talking about compensating somebody to make him whole. That is what we are talking about there. That is different than from restraining and from doing an ongoing wrong. There is a clear distinction between those two.

QUESTION: If I make the distinction, I do not see how in the world it applies to your case.

MR. ROBBINS: Well, I am not trying to apply it to my case other than the fact --

QUESTION: How it applies to your reasoning?

MR. ROBBINS: Well, Your Honor, the give me that I made was an injunction aspect of it to prevent an ongoing wrong which was criminal itself. That is the only give me I made.

QUESTION: If it is an ongoing wrong that is criminal in itself, why did the government abandon its criminal anti-trust prosecution?

MR. ROBBINS: Are you talking about Proctor & Gamble?

QUESTION: No, I am talking about your hypotheticals. The hypothetical was that the government either gives up its criminal anti-trust prosecution or -- Now you say that it is an ongoing criminal wrong. I would think the government would again prosecute criminals.

MR. ROBBINS: Well, if you prosecute criminals you are going to send somebody to jail or impose a fine, one of the two.

or a cease and desist order which gets into the quasi area. But, if you are going to go for injunctive relief, you are forcing them to stop doing what they are doing in a sense.

Look, you asked in a hearing the other day, where is the bright line. That is not the bright line, Your Honor. We are in a gray area there. That is not the bright line, and I cannot give you all of the answers absolutely, and I do not think you can decide them absolutely there either without a give and take situation.

The second level of concern we have is combining Baggot and this case. In Baggot they are saying the IRS is doing this preliminary to the judicial proceeding when they are doing a tax investigation. That is the case you are going to hear argued next.

How you decide that, coupled with the rationally related aspect of their question here. If you decide rationally related is fine and administrative proceedings are preliminary to judicial proceedings, and, therefore, they get it under 6(e)(3)(C)(i), then we have an administrative agency in there using the grand jury, this forthwith subpoena power, the power of the absolute monarch to collect taxes. Is that what we want? Are we going to use that kind of a power to collect taxes?

Now, we really have here an issue of the ex parte power dual use of the grand jury. This issue is squarely joined in our briefs. It is squarely joined, whether you know it or not. They have cited Proctor & Gamble, which was a dual use case that I want

to talk about. And, in the Baggot brief at page 12 of the summary of their argument, read it. You know what they tell you? The government states there that it has been a very effective way for agencies to perform its dual enforcement programs. They say there that the agency assistance must be bought, bought by delivering up the fruits of the investigation.

They say there that if you do not do that the IRS will threaten to stop providing that assistance. Do you know what they say there? They say there that the 6(e) amendment in 1977 which Congress said very clearly should not be used for civil purposes, they say wipe it out. That is what they say there. That issue is joined.

Let me talk about this triad that I mentioned. The first leg is Proctor & Gamble. Proctor & Gamble is important to the government for the purposes of the triad because the government says that Proctor & Gamble said that private parties are the only ones that have to show particularized and compelling need, while the government hides behind it and uses it for civil purposes any and every way it desires. That is the first leg of the triad.

They also say that Proctor & Gamble stands for the proposition that automatic access has been approved by this Court. Nonsense. And I want to take you through that. But, first, on this triad, what is it? It is Proctor & Gamble. It is a 1977 6(e) amendment, and it is Sells and Baggot if you grant them what they want, they have full and complete and total executive

control of the grand jury.

The active agency participation was decided -- it may not be constitutional -- but it was decided in the 1977 amendment of 6(e) that any agency personnel for any reason can be brought in without a court order and without court supervision.

Secondly, the dual purpose subpoena power, that is the issue here.

Third, easy, wholesale access to all of it, that is at issue here.

Fourth, civil administrative proceedings being preliminary, too, that is an issue in Baggot. Restricted private party access, but, of course, just private party access under particularized and compelling, that was in Proctor & Gamble, so the government says. And, of course, they proceed to use it in cases like Saconni Vacuum and so forth as they desire with a very limited and restrictive capability of defending against it as far as the other side is concerned, because they hover and hold it all here and let it be looked at in camera, et cetra, while they use it to refresh witnesses and witnesses, by the way, which without attorney being present were asked leading questions who framed their answers in that context and then became married to them, not in the adversary proceeding. And then they are stuck with them later for they are inconsistent and their credibility is gone.

What we have got here is the camel's head went under

the tent when the prosecutor came into the grand jury. In the 1977 6(e) amendment, the whole camel went in. The government says, we are watching the chicken coop, the fox, and we will let you know if we are going to let you have materials or not, and we will eat them whenever we want.

And, besides that, the government says we the executive, we monitor the grand jury and we run the show and we are the tail wagging the dog. That is what the government says.

Proctor & Gamble is the first leg of this triad. It held that civil use was okay. It held that particularized and compelling need must be applied to grand jury materials because of the necessity of retaining the secrecy doctrine that came into the Constitution with it.

What was the real focus in Proctor & Gamble? The certified question was very narrow, whether good cause requires Rule 34 production by government for grand jury testimony. Very narrow. There were prior motions two years ago -- before, I should say -- two years before, where Proctor & Gamble tried to suppress and tried to get returned and argued that it was wrong for them to have it and all of that. They were denied by Judge Moradelli who thought, gee, government cannot be wrong -- denied by Moradelli.

Two years later he was accusing the government of having a plan. That is in Volume 50, Case 51 of the 1957-58 up in the library. Look at Moradelli's decision in the case below. It came straight up to this Court under the Expediting Act.

Now, look at the brief of American Association of Soap Manufacturers. It tells you precisely the dual purpose that was going on down there in that case.

There were alot of other issues that the majority ducked because it could not reach agreement, I suggest. Perhaps Justice Brennan can tell you better. But, there were three dissents. Harlan, Burton, and Frankfurter said, hey, why are we disturbing that sound discretion. Look at this one-reason opinion of the trial court. Besides that, the government is a recalcitrant party, and they will not cooperate. Why are we disturbing that.

Whittaker said, hey, there is civil discovery that is going on here, and that is not right.

QUESTION: Are you referring to Justices of this Court who have written opinions by their last names only?

MR. ROBBINS: Yes, Your Honor. Am I making a mistake?

QUESTION: As far as I am concerned, you are.

MR. ROBBINS: Well, I am saying Justice Whittaker, and I --

CHIEF JUSTICE BURGER: Please refer to them as Justice Whittaker or Justice Harlan.

MR. ROBBINS: I am sorry. I thought I was saying that.

Justice Whittaker said that civil discovery use should be limited for both sides. It was not discussed by the majority at all.

Justice Whittaker said that possession and property is not that of the Justice Department. It is in the court. It was not discussed by the majority at all. Justice Whittaker said that equal discovery treatment should be applied. It was not discussed by the majority at all.

The thing that was not discussed by anybody was under what process of procedure should the government be able to get this material. But, what process of procedure should the attorneys for the government be using it. That was not the issue here because that was the issue two years earlier, and it did not come up on appeal. It just wasn't. And, this Court had a hard time coming to grips with the one thing they did decide or two. Look at the major issues they did not want to try to wrestle with or could not wrestle with at the time. It was a strongly divided Court. It was clearly a dual purpose grand jury case situation. It was the first leg of the triad because, as far as the government is concerned, it said nobody else out there can have this material but us except on a particularized and compelling need.

Now, the government argued that because they argued the Rose five reasons for grand jury secrecy. The Rose five reasons they argued emphasized the fourth. The fourth reason being for witness protection and with the emphasis on because future grand juries will be ineffective unless we preserve the secrecy of this material.

Now, I do not think there is any question that that

stood for the proposition of secrecy and it applied to all concerned, but that is not how the government has been applying it.

Now, the government was in a role reversal situation. They were the ones that argued secrecy. They were the ones urging Rose 4, and they were the ones talking about the future of the grand jury. They were the ones that suggested the words compelling necessity. Look at their brief.

Now, let's talk about the 1977 Rule 6(e), if I can for a moment. This is the second leg of the triad. They urged that Congress ratify their continuing automatic access which nobody ever gave them in the first place, subselliantial. Nobody ever gave it to them in the first place. They say that the 1977 amendments that the Congress ratified it. They say so because of lack of parallel construction between (A)(1) and (A) double toothpicks. That is how they argue it.

First, the only and single issue addressed in the 1977 hearing -- 1976 hearings on 1977 -- was whether or not there should be technical personnel. There was a coloquy between Professor Wayne LeFave and Congresswoman Holsmith that is very telling. It was under the original draft of the Advisory Committee with regard to -- including under the term, attorneys for the government -- technical personnel as they deem necessary all in the performance of the attorney's duties. And she says, isn't there a possibility that, for example, an IRS agent will be confused about what the duties are, and he will think it is

duty to do civil work? And, Professor Wayne LeFave said, "That is a legitimate concern. Maybe the language ought to be changed to make this clearer than it is." And that is exactly what they did.

The other thing that is important is Richard Thornberg, acting Deputy Attorney General, gave testimony to that Committee -- and I am addressing these two witnesses because I think their testimony is critical. Thornberg told the Committee, giving two examples, it would be our policy to always get a 6(e) order. And, the clearest example I can give you is if there is a civil fraud action and we cannot make the case criminally, and we have to go after it civilly, we will come in and get a 6(e) order. Then, he contrasted that, of course, the prototype here is the IRS with the agency involved and we would also have to get a 6(e) order for the agency.

I submit to you that is the Sells case, civil fraud and IRS, Sells I and Sells II. That is what is involved. And, the issue here is should they get a 6(e) order. Look at that testimony. It is very telling in that respect.

Now, I would like to talk briefly just about duty. Duty is a limiting word. It is duty in the criminal context of the Federal Rules of Criminal Procedure, Rule 6(e), which was designed purely for a criminal function. We are talking here about the client, the function, and the duty of the Department of Justice which is all over the place. Duty is anything from HUD, EPA, special assistant to the grand jury to civil fraud to

Tax Division to anti-trust. It is every duty you can imagine a lawyer performs.

So, we are talking about the client, function, and duty, not titles. Isn't the duty of an agency attorney equally as important in the collection of taxes or SEC or otherwise as the duty of the Justice Department when he is doing the same thing. It is not titles that is involved. It is duty, client, and function.

I have already addressed what I believe to be a fake issue, so I will leave that one alone.

Let me talk briefly about attorney abuse. Attorney abuse is claimed here, not just IRS abuse. If you go to the Statement, Part B of our red brief, you will see there that none of that could have happened without the active participation and assistance of the U. S. Attorney's office. Subpoenas were issued. Every witness virtually was diverted to an intelligent IRS agent for examination and interrogation.

In one situation where the record on the affidavits and transcript in these proceedings, the record demonstrates that the AUSA participated in diversion of a witness to the IRS agent when there was not really a grand jury panel that was ever going to hear it any way, because he says himself the first time we intended to schedule anything was March, and this was going on in January, and the old panel had terminated. That is in Part B of the Statement.

They accuse us of a blunderbuss assault. Yes, do you

know what a blunderbuss is? A large bore, an old-fashioned weapon with a big muzzle when loaded with a lot of ball is very effective at close range. I accept that definition, and those balls all hit their mark, and they will not touch them with a ten foot pole because that statement is documented to affidavits of the government and transcript 99 percent.

The sixth reason for secrecy, very important here. One more to add to Rose. It was said by Justice Whittaker, to eliminate the temptation to conduct grand jury investigations as a means of ex parte procurement of direct or derivative evidence for use in a contemplated civil suit. Add it to the other five, because there is a ground swell out there that is begging you to add it. The lower courts, many of them have come down with that. The Seventh and the Ninth in Baggot and here -- excuse me, Miller, Baggot in the Seventh -- and the Ninth here have said it. And, there are many courts and legal commentators that have said it. Add it.

QUESTION: But the grand jury is still here.

MR. ROBBINS: The grand jury is still here?

QUESTION: Right.

MR. ROBBINS: Yes. I am simply saying add it to one of the standards to be looked at for the purpose of protection of secrecy doctrine.

Secrecy has a constitutional dimension. This Court said in 1943 in Johnson, it is indispensable. In 1956 in

Costello, "A body of laymen acting in secret." In 1959 in Pittsburgh, "Secrecy is part of the modus operandi of the grand jury." In 1979, "It's proper functioning depends upon it." It went into the Bill of Rights as a citizen protection. It was utterly dependent upon secrecy because before secrecy it was absolute power of the monarch --

CHIEF JUSTICE BURGER: Your time has expired now, counsel.

MR. ROBBINS: Thank you very much, Your Honor.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Letter.

MR. LETTER: I have several brief points.

ORAL ARGUMENT OF DOUGLAS N. LETTER, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. LETTER: First, I just want to point out, Mr. Robbins talked about the policies of grand jury secrecy being implicated. Our position in no way interferes with grand jury secrecy because as Justice Marshall has pointed out a couple of times, the government already has the grand jury material. We are talking about giving it from one Department of Justice attorney to another Department of Justice attorney.

Witnesses testifying before the grand jury are not concerned that their testimony will be seen by one Department of Justice attorney as opposed to the one in the office next door. What this Court has said in the Pittsburgh Plate Glass case is the concern is that the witness' employer or the target in the

in the investigation will see it. I cannot emphasize strongly enough, we already have the material, and it is just given from one attorney to another.

Second, we are relying on the majority opinion in Proctor & Gamble. The concurring opinion of Justice Whittaker I do not think helps Mr. Robbins very much, but we are looking at the majority opinion, pages 683 and 684 that Mr. Robbins apparently is ignoring, and I think that they are directly on point.

Finally, in further answer to Justice O'Connor's question earlier, in the Baggot case we are seeking -- the IRS seeks the information for tax assessment purposes. The Department of Justice, Tax Division does not do tax assessment purposes. If the Department were going to get into that that would have to be arranged by Congress which could obviously take care of any problems at that point. So, I do not think that that is a problem here.

Does the Court have any further questions?

Thank you.

CHIEF JUSTICE BURGER: Thank you gentlemen.

The case is submitted.

(Whereupon, at 2:09 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#81-1032
UNITED STATES, Petitioner vs. SELLS ENGINEERING, INC., ET AL

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY _____

(REPORTER)