OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1114

TITLE ILLINOIS, Petitioner v.
ABBOTT & ASSOCIATES, INC. ET AL

PLACE WASHINGTON, D. C.

DATE MONDAY, NOVEMBER 29, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

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ILLINOIS, :

Petitioner :

v. : No. 81-1114

ABBOTT & ASSOCIATES, INC. ET AL. :

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Washington, D.C.

Monday, November 29, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:44 a.m.

APPEARANCES:

THOMAS M. GENOVESE, ESQ., Chicago, Ill.;
on behalf of the Petitioner.

RICHARD G. WILKINS, ESQ., Washington, D.C.; on behalf of the United States Department of Justice.

MICHAEL B. NASH, ESQ., Chicago, Ill.;
on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in the case of Illinois versus Abbott & Associates. Mr. Genovese, you may begin whenever you are ready.

ORAL ARGUMENT OF THOMAS M. GENOVESE, ESQ.,
ON BEHALF OF PETITIONER

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

This case involves construction of Section 4F(b) of the Hart-Scott-Rodino Act of 1976 and Rule 6(e) of the Federal Rules of Criminal Procedure. We believe there are two inter-related questions:

First, whether the investigative files or other materials of the United States Attorney General also includes materials covered or encompassed by Rule 6(e);

And second, if so, what is the discretionary standard to be followed by a district court in determining whether to release materials covered by Rule 6(e) pursuant to request by a state attorney general under Section 4F(b).

Very briefly with respect to the facts, in the late 1970's the Antitrust Division of the Department of Justice conducted a complex and lengthy investigation of

the piping and sheet metal industries in Illinois. That investigation focused on conspiracies among competitors in those industries to rig bids on public projects, mostly school projects in the Chicago area.

After the State of Illinois had received notice under Section 4F(a) that it had a potential cause of action, it made a request to the United States Attorney General for all relevant investigative files or other materials under Section 4F(b). In response at that time, we were provided with 19 pages of preliminary memoranda generated long before the grand jury had been transferred to the Northern District of Illinois. Everything else, we were informed, was covered by Rule 6(e), and that the Government would support our request for a court order releasing the materials.

Subsequently the State of Illinois and the Chicago Board of Education filed two class action treble damage lawsuits on behalf of the public entities in the area seeking to recover the overcharges suffered by those entities as a result of the conspiracy.

The criminal actions have long ago terminated. The civil cases are still proceeding with discovery, and in that regard a few of the transcripts in one of the cases may be disclosed to us pursuant to Rule 6(e) because those transcripts were previously

disclosed to the Defendants.

Turning to the first question, I believe it takes great liberties with the very broad expansive language of that statute to conclude that information relating to matters or occurrences before an investigative grand jury is somehow not contained in a prosecutor's files or other materials. We believe the statute plainly includes all materials compiled by an Assistant United States Attorney General to prepare and prosecute his case.

QUESTION: Suppose the Attorney General came back and said, we don't have a transcript of the -- what happened before the grand jury any more. Maybe we had it once, but we don't. But we'll be glad to -- to support your request before the judge. Do you think the standard then when you went to the judge would be Rule 6(e) or would you say, the statute has made this material available to us on a lesser showing?

MR. GENOVESE: Well, I think we first have to address the question of whether it is part of the investigative files or other materials of the Attorney General.

QUESTION: Well, suppose the Attorney General says, we just don't have a transcript any more now, and let's just assume that's correct, that's accurate, he's

telling the truth.

MR. GENOVESE: Okay. Well, I believe the United States Attorney General is supposed to retain custody of the grand jury transcripts and documents. For example, if the documents are no longer in the possession --

QUESTION: You mean they're not in the possession of the court?

MR. GENOVESE: No, I don't believe they're in the possession of the court. They're in the possession of the United States Attorney General.

QUESTION: Well, so you're saying that if a transcript of the testimony is in the hands of the Assistant Attorney General for the Antitrust Division or the Attorney General, you're entitled to it under this statute with no court proceedings at all, but if the same transcript is in the possession of the court you have to make some showing?

MR. GENOVESE: No, Justice Rehnquist. We believe that, first of all, we look at the statute and decide what the Congress intended to cover by --

QUESTION: Do you need to be that elaborate to answer the question?

MR. GENOVESE: No, I just meant to go to the next point, which is that the "extent permitted by law"

language raises the question of by what standard the court should release the materials. The court can authorize the United States Attorney General to turn the information over to a state attorney general.

QUESTION: So that if the material, if the transcript, the physical transcript, is in the possession of the Justice Department, the Justice Department must join you in going to court even though it has physical possession, is that right?

MR. GENOVESE: Yes, that is correct.

QUESTION: You say you don't even need to go to court, do you? That's what I'd like to find out.

MR. GENOVESE: We do not say, we have never said, that it is automatic disclosure upon demand.

QUESTION: Well then, what sort of an inquiry would the court make in that case?

MR. GENOVESE: We believe that the court should inquire, first of all, what reasons for secrecy remain in the transcripts, in the documents.

QUESTION: Where do you get that out of the statute? Where do you get the nature of the court's inquiry from the statutory language?

MR. GENOVESE: By the language "extent permitted by law."

QUESTION: And what do you think that refers

to?

MR. GENOVESE: We believe that refers to Rule 6(e), which indicates that a court may disclose materials preliminarily to or in connection with a judicial proceeding. And we understand the standard under Rule 6(e) to involve a careful assessment of the needs for secrecy and the needs, to the extent they remain, and the compelling interest in disclosure.

QUESTION: May I ask this question. You say that the "extent permitted by law," or whatever the words are, incorporates by reference Rule 6(e). Is that your view?

MR. GENOVESE: Yes.

QUESTION: And if Rule 6(e) contains a particularized need requirement, you must meet it.

MR. GENOVESE: We believe that the particularized need requirement arose in cases involving --

QUESTION: Involving private parties, not public. If it doesn't apply to public parties and you don't have to satisfy particularized need but merely generalized need, then why do you need the Hart-Rodino Act?

MR. GENOVESE: Well, we believe you need the Hart -- well, the Hart-Scott-Rodino Act is designed to

state the Congressional purpose, to state to whom the materials --

QUESTION: It tells the Attorney General what he has to do on your request. And you're saying, well, you've got to go to the court and say, we think 6(e) doesn't prohibit disclosure. And you say it doesn't prohibit disclosure because you don't have to show particularized need. So why don't you just go directly to the court without even citing the statute?

MR. GENOVESE: The statute is an expression of Congressional intent, not only with respect to grand jury materials --

QUESTION: Well, I'm just interested in grand jury materials at this point.

MR. GENOVESE: That's why we need the statute, because the Congress has indicated the intention, the reasons why, for national antitrust enforcement --

QUESTION: Well, do you concede that without the statute you couldn't get these materials under 6(e) without a showing of particularized need?

MR. GENOVESE: That is correct.

Maybe I misspoke, Justice. I'm sorry if I -- could you repeat the question?

QUESTION: If you did not have this statute --

MR. GENOVESE: Yes.

QUESTION: -- and you merely went before the court on a 6(e) motion, would you have to show particularized need?

MR. GENOVESE: We believe that it is not only because we are a public entity, but also because the Congress with respect to this specific matter has indicated an intent that the materials be turned over.

QUESTION: Well, you still haven't answered my question. If there were no Hart-Rodino Act --

MR. GENOVESE: Yes.

QUESTION: -- before the Act was passed, there's an open question as to what showing a public agency such as the Illinois Attorney General must make under 6(e). And I'm asking you --

MR. GENOVESE: Oh, I see.

QUESTION: -- if there were no Hart-Rodino Act, could you get these materials just without showing particularized need.

MR. GENOVESE: I believe that we may be able to do that. But that is a question that --

QUESTION: If that's true, why do you need the statute?

MR. GENOVESE: We need the statute because the statute quite clearly states that in this regard, with

respect to antitrust enforcement by the states, Congress has indicated a compelling need in the balance for determining --

QUESTION: Let me phrase the question differently. Do you think this statute changes the showing otherwise required under Rule 6(e)?

MR. GENOVESE: Yes, we believe that.

QUESTION: Lessens it? Makes it less of a showing?

MR. GENOVESE: Yes, we believe that the showing of need for disclosure has been demonstrated by Congress, has been supplied by Congress; and you balance that against what reasons remain with respect to the particular materials in the file which countervailingly --

QUESTION: You have to do more than just make the motion.

MR. GENOVESE: Pardon me?

QUESTION: You have to do more than just make a motion.

MR. GENOVESE: Yes. We have to demonstrate, I think, the degree of secrecy that remains or should remain.

QUESTION: Well, that's what Justice Stevens was trying -- just what do you have to show?

MR. GENOVESE: We have to show that the materials are relevant to a potential cause of action of the United States -- of the state attorney general, and that the reasons for secrecy are no longer viable.

QUESTION: Is this to save you the time, save the state the time of calling its own grand jury, calling in the same witnesses?

MR. GENOVESE: That is the exact purpose of the statute, to -- Congress did more than simply confer standing on state attorneys general. It wanted to facilitate a coordination, communicative effort between the state and federal attorney generals with respect to local and regional antitrust enforcement. And it believed quite clearly in the legislative history that that could not be done unless sufficient investigational information was made available to the state attorney general.

The problem we have here is that whenever the government brings a criminal antitrust action all or virtually all of the information, certainly all the valuable and significant information, is covered by Rule 6(e). And we believe that the intent of Congress is frustrated by reading the statute so as to require a state attorney general to make the same showing of need as a private litigant in private litigation cases.

QUESTION: On the need for secrecy inquiry of the court, I suppose some of the people most concerned, who might want to oppose the disclosure, would be people who may have been questioned before the grand jury but weren't indicted, for example. They would have no means of obtaining notice, I suppose, that the disclosure was even being sought, would they?

MR. GENOVESE: Justice O'Connor, in this case they were notified. There are, I believe, probably nearly a hundred Respondents in this case. We do not know who they all are. But I understand at the very outset the district court directed the United States Attorney General to notify the parties involved.

QUESTION: Certainly there's nothing in the statute about that --

MR. GENOVESE: I believe that --

QUESTION: -- and we don't really address that problem.

MR. GENOVESE: There's nothing in the statute, but I think the common procedure under Rule 6(e) is to, at least in my experience, is to contact all interested parties, which would include not only witnesses but also defendants in a particular case in which the materials are sought to be used.

We have found in this case that reading the

statute so as not to include grand jury material is not only -- it not only raises the problem in the practical sense of trying to separate out Rule 6(e) from non-Rule 6(e) in a single file of the prosecutor, but also, as we have found in this case, such an interpretation excludes the essence of the information in those files. We believe that is in direct contradiction to what Congress intended when it passed the statute.

QUESTION: Mr. Genovese, would you mind addressing how you think that the particularized need standard would require the state to do more than inquire into relevance and the need for secrecy? What else would that do as a practical matter in increasing the state's burden?

MR. GENOVESE: As a practical matter, 4F(b) was designed to disclose to the Attorney General before he filed a case whether he had a case and to assist him in bringing the action. It's very important before you embark on an action of this magnitude.

QUESTION: No existing judicial proceeding, in other words?

MR. GENOVESE: Right. And so it would be very difficult in almost every instance, particularly where there's been a grand jury investigation, for the state attorney general to state to the court with any great

degree of particularity the information that he needs to carry out the intent of Congress. And as a result of that, he would have to file suit, he would have to undertake discovery first, and attempt to show a particularized need two or three years later.

Nor do we believe that the language "upon request" in the statute was meant to limit or define the materials which are disclosable. We believe instead that it only states the initiation of a process of disclosure, speaking again not only of grand jury materials but of all materials in the file, which may involve work product, trade secrets and so forth.

For example, in the Colonial Chevrolet case the bill of particulars was placed under seal by the district court. Upon the request of the state attorney general, the United States Attorney General could not have -- would not have been empowered to turn the bill of particulars over. Yet the law permits disclosure of bills of particulars and -- but it requires a court order.

Another common situation is where in a government civil enforcement action the defendants insist that the record be placed under seal of court. Upon the request of the state attorney general, the federal attorney general lacks the power to disclose.

But a court order will permit that disclosure, because the law permits it.

QUESTION: Mr. Genovese, in respect to Section (b) of Section 15f, which is the one we're talking about, I take it. Do you think the phrase "permitted by law" refers only to the strictures that cases may put on disclosure of grand jury testimony? Do you think, for instance, that it prevents the Attorney General of the United States from ever saying, no, we don't choose to divulge this to you, state attorney general?

MR. GENOVESE: Well, I think it entitles the United States Attorney General to raise within the context of Rule 6(e) remaining interests in secrecy which he may have or may want to assert --

QUESTION: Supposing that what you're seeking isn't grand jury testimony, but notes of an interview that the Government took, not under a subpoena but just with a witness, and the Attorney General says, I just want to protect this witness, I'm not going to turn it over to you. Can he do that under the statute?

MR. GENOVESE: If the law permits it he could.

QUESTION: Well, what law do you turn to to decide whether it permits it?

MR. GENOVESE: In a situation where, for

example, a proffer, the Government is apparently unsure whether that is covered by Rule 6(e). Of course, in this case the United States Attorney General has made the determination that it ought to be disclosed. In a situation where he felt that shouldn't be the case, we might be dealing with an informant's privilege or some other kind of privilege, and in that situation again we would have to look to see if the privilege, work product, whatever it is, is -- how that weighs against the Congressional desire, intent, very strong intent that these materials be made available to a state attorney general so that he can pursue his own actions.

QUESTION: Well, there you leave open the possibility that the Attorney General and the state attorney general would be almost adversaries, I suppose, and the Attorney General would raise the question of work product, and then what, some court would have to decide that?

MR. GENOVESE: It could happen that on occasion the state attorney general and the United States Attorney General could be adversaries with respect to a particular matter.

QUESTION: What sort of a court proceeding would you have to resolve that?

MR. GENOVESE: I think that in a situation

where materials have not been disclosed it could be a mandamus action. It could be -- for example, it could be a Rule 6(e) proceeding where it's grand jury materials. It could take place within the confines of a civil case which has already been filed by a state attorney general. I think it would depend on the nature of the material at stake.

We believe the decision of the Seventh Circuit, the reasoning of the Seventh Circuit, is in grave error as well, for one particular reason: It essentially concluded that a state attorney general's need for the disclosure of the investigative material is the same as a private litigant's need. That reasoning, if applied to all the materials in Rule 6(e), effectively means that a state attorney general is only entitled to what -- the same materials he received before the statute was passed and, oddly enough, to the same materials which any private party could obtain.

In essence, what that means is Section 4F(b) is a nullity; it doesn't add anything to the law. The Congressional intent is simply ignored by that sort of conclusion.

QUESTION: Well, it would certainly leave you with access to the Attorney General's files that weren't submitted to the grand jury, that he wouldn't otherwise

have to give you.

MR. GENOVESE: Well, I would believe that that may very well be disclosable to a private party. If there is no reason why a private party could not get it, then I would assume a private party could obtain it as well.

QUESTION: Well, but I think the Attorney General has had a policy of not disclosing to anybody, hasn't he?

MR. GENOVESE: No, I don't believe that's -- I'm not sure if the Attorney General has a policy with respect to that.

CHIEF JUSTICE BURGER: We'll resume there at 1:00 o'clock, counsel.

(Whereupon, at 12:00 noon, the argument in the above-entitled matter was recessed, to reconvene at 1:00 p.m. the same day.)

AFTERNOON SESSION

(1:00 p.m.)

CHIEF JUSTICE BURGER: You may continue, counsel.

ORAL ARGUMENT OF RICHARD G. WILKINS, ESQ.,
ON BEHALF OF THE U.S. DEPARTMENT OF JUSTICE

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

Section 4F(b) of the Hart-Scott-Rodino Antitrust Improvement Act embodies a Congressional determination that, in order to promote state-sponsored litigation as a vital aspect of national antitrust enforcement policy, the United States Attorney General should to the full extent permitted by law disclose to the states any investigative files or other materials that are or may be relevant or material to a potential state antitrust enforcement action.

Notwithstanding this evident policy, evident Congressional policy of disclosure, the court below declined to allow the State of Illinois access to 5500 pages of grand jury transcripts that are relevant to two class action lawsuits filed by the state under Sections 4 and 5 of the Clayton Act. It did so based on two propositions:

First, it doubted whether Section 4F(b) included grand jury materials in the possession of the Attorney General; and second, it concluded that the statute had no impact on its balancing test under Rule 6(e) of the Federal Rules of Criminal Procedure as to whether it should allow those materials to be used in another judicial proceeding.

Neither proposition, we believe, is sound.

Section 4F(b) by its clear terms reaches any investigative files or other materials within the possession of the Attorney General. These words, if they're given their ordinary contemporary common meaning, clearly reach and include grand jury materials.

Respondents contend --

QUESTION: That assumes, of course, that they're in the possession of the Attorney General.

MR. WILKINS: Exactly. Rule 6(e) by the express terms, express provision of Rule 6(e), commits grand jury materials to the custody of the Attorney General. Those grand jury materials will always be in the custody of the Attorney General by the express provisions of Rule 6(e).

QUESTION: Where is that cited in the briefs, Mr. Wilkins?

MR. WILKINS: I'm not aware that that is cited in the briefs.

QUESTION: It's Rule 6(c), in any event?

MR. WILKINS: Rule 6(e).

QUESTION: 6(e).

MR. WILKINS: It's Rule 6(e)(1) under "Recording of Proceedings." It says: "The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the Government unless otherwise ordered."

QUESTION: But the Attorney General isn't free to deal with these materials like he might some other materials.

MR. WILKINS: No, he isn't.

QUESTION: He's the custodian.

MR. WILKINS: Exactly, he is the custodian. But to say that Section -- that because he is mere custodian that they aren't in his files is to confuse the reach of 4F(b) with the standards or the way that he may actually disclose those materials.

The second ground upon which the court below based its decision is equally unsound. The court in effect concluded that Section 4F(b) has no impact on its discretionary determination under Rule 6(e) of whether it should release those materials. It therefore --

QUESTION: Mr. Wilkins, on that point, do you agree that there -- what is your position on my question as to whether the statute amended the standards under Rule 6(e)?

MR. WILKINS: Justice Stevens, we do not believe that the statute necessarily amended or, as Respondents state, repealed Rule 6(e). We believe the essential nature of the test of --

QUESTION: Does it modify the standard?

MR. WILKINS: It modifies the standard as applied to state attorney generals. The compelling and particularized need standard we believe does not --

QUESTION: Would you agree, then, that before the statute was passed the state attorney general had to meet the particularized need showing?

MR. WILKINS: I'm not certain, because I don't know whether that test would apply to private -- would apply to a public official.

QUESTION: In part of your brief you argue that Congress in effect adopted pre-existing law; they legislated with knowledge of what the law was with respect to the state attorney generals' right of access. And now you're saying even you don't know what the law was.

MR. WILKINS: No, I'm stating that the

compelling and particularized need test had been developed and applied only to private parties. Whether or not that particular test would apply to a public -- to a state attorney general which is seeking this material as a law enforcement official for a public use or to further the public interest, whether he would have to meet that test without Section 4F(b), I am uncertain.

QUESTION: Well, if he doesn't have to meet that test, then he doesn't need the statute.

MR. WILKINS: No, we believe, whatever the standard would be appropriate without the statute, we believe that Section 4F(b) is a weighty Congressional policy in favor of disclosure that a court should properly consider in the Rule 6(e) balance, and because of that weighty consideration the compelling and particularized need test is not a proper standard.

QUESTION: Then you say it does amend -- you say it does amend, it silently amends the 6(e) standard with respect to state attorney generals?

MR. WILKINS: In a way, although it doesn't really amend the standard. The standard under the jurisprudence of this Court has always been a balancing test. You balance the need for disclosure against the interests of secrecy. It hasn't amended that. All it

has done is demonstrate -- is create a Congressional declaration of policy.

QUESTION: You think the words "to the extent permitted by law" were intended to make a change in the law?

QUESTION: They were to the extent that Congress was aware that, for example, there is Rule 6(e) that permits a court to make this kind of a balancing determination.

QUESTION: You certainly couldn't order they intended to change a rule that they weren't even aware of.

MR. WILKINS: Congress was clearly aware that Rule 6(e) existed. A statement that is heavily relied upon by the Respondents is a statement of Senator Abourezk on the floor of the Senate, where he replied that the Attorney General can't turn over materials on a mere request. The Senate was clearly aware that there was a Rule 6(e). While there may not have been extensive discussion of it, Congress was clearly aware, and yet the House report nevertheless stated that these materials were to be turned over unless they were specifically prohibited.

QUESTION: You don't think it's a fair summary of the legislative history to say that Congress felt,

well, whatever 6(e) requires, it still requires?

MR. WILKINS: No, I don't think that that's a clear -- that's a fair -- The court below threw out, as we said, Rule -- or Section 4F(b) and failed to take it in consideration in its balancing test under Rule 6(e). We believe that the two provisions must be read in harmony and there is a way to do so.

In passing on a state's request for grand jury material under Rule 6(e), a court should not utilize the compelling and particularized need test because this fails to give significant weight to the Congressional determination that's inherent and embodied in Section 4F(b). Section 4F(b) represents Congress' dual determination that: one, state antitrust enforcement actions are vital to the national antitrust enforcement policy; and, two, full disclosure and cooperation of federal investigatory files is essential to aid the states in performing this function.

It's important to realize that the very most significant and indeed probably the only useful parts of our antitrust investigatory files, our criminal antitrust investigatory files, are included in the grand jury materials.

QUESTION: Mr. Wilkins, is that true after the passage of this statute would authorize the civil

investigative demands?

MR. WILKINS: Yes. The civil investigative demands are still used only for civil investigations.

QUESTION: But is it not true that if you accumulated a lot of information pursuant to a CID and you got the consent of the people from whom you got the information, that would be voluminous material in your files that you --

MR. WILKINS: That would be voluminous, yes. But the grand jury, the antitrust grand jury, is used in criminal matters. The CID is not. So when the state requests information regarding a criminal investigation, it still would be grand jury material and not CID material.

QUESTION: But the statute is not limited to criminal material. Section 4F(b) applies to all your files.

MR. WILKINS: Right. But another provision of the Hart-Scott-Rodino Act under Title I makes CID materials -- they're only disclosable with consent of the party.

QUESTION: With the consent of the party providing the material. But if you get that consent, all that material would then have to be turned over.

MR. WILKINS: Exactly.

QUESTION: That could be a lot of material.

MR. WILKINS: It could be a lot of material. Moreover, not only does the standard fail to recognize the weighty Congressional policy in favor of disclosure, but as stated it was developed and applied by this Court solely to requests by private parties. A request under the auspices of Section 4F(b) is not made by a private party, but by a state law enforcement official, who Congress has found to be an ideal and effective spokesman for the public in antitrust matters.

Moreover, any concerns regarding possible abuse or misuse of grand jury materials in this context must be mooted, because the Attorney General himself is a law enforcement official, well aware of the crucial role the grand jury plays in our criminal justice system.

A proper consideration of the concerns and policies furthered by both Section 4F(b) and Rule 6(e) would lead the Court to adopt the following standard. At the conclusion of a criminal proceeding, a state under the auspices of Section 4F(b) may normally obtain antitrust grand jury materials on a showing of relevancy, provided that a continued interest in grand jury secrecy is not shown to prevail in the particular case.

Without sacrificing either, this standard gives full credence to the interests and policies protected by both Section 4F(b) and Rule 6(e). The standard allows the state to obtain the vast majority of useful materials in the file, thus furthering the policy inherent in Section 4F(b). It does so, moreover, without unduly impinging on the interests protected by Rule 6(e).

As we've stated, Rule 6(e) is a balancing test. Section 4F(b) is a weighty consideration on the need for disclosure side of that balancing test. Moreover, this Court has made very clear in its prior precedents that as the need for secrecy decreases, the justification a party must show to obtain disclosure decreases also.

At the conclusion of criminal proceedings, the only interests that remain are protection of the innocent accused and the functioning of future grand juries. While these are weighty considerations, they do not compel nondisclosure in this context because disclosure --

QUESTION: How about the possibility the Government might want to bring civil action?

MR. WILKINS: Which government would want to bring a civil action?

QUESTION: The United States.

MR. WILKINS: The United States could use the grand jury materials in a civil action, in this Court's prior decision in --

QUESTION: No, but would that be a reason that the Attorney General might not want to turn over as of that point to state attorneys general the transcript of the grand jury?

MR. WILKINS: It's possible that would be a consideration, but our current position is that we would fully cooperate and turn over materials after the conclusion of the criminal proceeding, notwithstanding that we had a parallel civil action.

QUESTION: Under the Act, when the Attorney General turns something over like grand jury materials, is there any stricture on its use?

MR. WILKINS: There can be strictures on their use imposed and protective orders imposed by the court. For example, how many copies can be given to the attorney general, who it can be --

QUESTION: Does he have to give them back?

MR. WILKINS: Yes, that's commonly a requirement, that it has to be returned.

QUESTION: To whom they may disclose it?

MR. WILKINS: To who, who within his own

office he may disclose it to. Commonly, it cannot be disclosed to other parties in the litigation.

QUESTION: Can they be used for taking depositions?

MR. WILKINS: Yes, they could be used for taking depositions.

QUESTION: Well, that makes it pretty public, doesn't it?

MR. WILKINS: Not necessarily.

QUESTION: Well, if you ask -- if you're going to ask somebody a question and then you say, well, did you really answer, answer the same way before the grand jury.

MR. WILKINS: It would become public at that point. But at that point you must remember, Justice White, that the grand jury transcript would become public at that point even under the compelling and particularized need test, because at the time you're taking a deposition you could show compelling and particularized need, have the transcript, and use it in a similar fashion.

QUESTION: You mean that's all it takes to show particularized need for a private plaintiff?

MR. WILKINS: Many of the cases demonstrate that that is sufficient.

QUESTION: No case from this Court.

MR. WILKINS: Cases from this Court indicate -- for example, this case in -- this Court in Douglas Petrol Stops cited with approval the Seventh Circuit's decision in Sarbaugh, State of Illinois v. Sarbaugh. In that case --

QUESTION: Procter & Gamble and the leading cases from this Court addressing that inquiry certainly don't suggest that that result should obtain.

MR. WILKINS: No, but if you read the decisions of this Court, the continuing line and progression -- for example, the Dennis case is only factually distinguishable, for example, from Pittsburg Plate & Glass --

QUESTION: Well, what's the big hassle about, then?

MR. WILKINS: Because the state --

QUESTION: It doesn't sound like much of a hurdle anyway.

MR. WILKINS: Now, it is a hassle to this extent: The state needs this information. Under a Congressional determination they should have this information at the very outset to determine whether or not they should even --

QUESTION: If you're going to have to go to

court, you're going to have to go to court anyway. You don't suggest you don't have to go to the judge.

MR. WILKINS: No, we don't.

QUESTION: So you're going to have to go to court and get him to rule on it. If there's an objection and an argument about it, it's going to take some time anyway.

MR. WILKINS: Yes, but it does frustrate Congress' determination that the state should have this material at the very outset.

QUESTION: What does? What does?

MR. WILKINS: Requiring the state to meet a compelling and particularized need test.

QUESTION: Well, why not if it -- it isn't very compelling and particularized if all you have to do is say, we need it for a deposition, we need it to impeach or --

MR. WILKINS: You nevertheless have to have already brought a legal proceeding, and Section 4F(b) proceeds on the assumption that the states will have that information before they bring that proceeding.

QUESTION: Could the Federal Government put limits such as this, that you may use the substance of this testimony but you may not disclose the name of the person who gave it? Or could they delete that from the

material before they delivered it to the state?

MR. WILKINS: You mean, could we make that and then turn it over? I'm not certain --

QUESTION: Suppose they made a claim and some showing to the district judge in camera that the life of the witness might be jeopardized. This wouldn't be true in most class action cases, but it might be in a drug conspiracy case.

MR. WILKINS: Certainly we could, pursuant to a court order, we could certainly make those kinds of -- we could make those kinds of deletions to preserve interests in grand jury secrecy, certainly. But we could not do that sua sponte on our own and then turn it over. It would have to be under the direction of the court.

QUESTION: May I ask one other question? In a proceeding where the attorney, state attorney general, seeks access to a grand jury transcript, who gets notice of that proceeding?

MR. WILKINS: Who gets notice of --

QUESTION: Yes. I assumed -- does anybody get notice other than the United States Department of Justice and the state attorney general?

MR. WILKINS: My understanding is that the common practice under Rule 6(e) is to notify other

parties involved, who are implicated or involved before the grand jury.

QUESTION: Grand jury witnesses and defendants in the criminal case, that sort of thing.

MR. WILKINS: Yes. Thank you.

CHIEF JUSTICE BURGER: Mr. Nash.

ORAL ARGUMENT OF MICHAEL B. NASH, ESQ.

ON BEHALF OF RESPONDENTS

MR. NASH: May it please the Court:

If I can begin by addressing myself to Mr. Justice Stevens' question concerning particularized need, and Mr. Justice White. I understood the state attorney general to state in the beginning that he had recently filed with Judge Layton in the district court a request, according to particularized need, for some of the transcripts of some of the witnesses having appeared before the grand jury, and that he told him at that time that some of the Defendants had possession of those transcripts already.

So it seems to me that an important consideration here is the fact that there is no evidence in this record and there is nothing in the legislative history to indicate that the particularized need test or so-called particularized need test is frustrating the antitrust enforcement that Congress has mandated in the

Hart-Scott-Rodino Act, or that indeed the law enforcement efforts of any county or state are somehow being frustrated by that test.

All that test is is a determination of whether or not there is a need for that particular transcript or those particular minutes.

QUESTION: Does it require a pending lawsuit? Does the state attorney general have to have filed an antitrust action already in order to establish a particularized need?

MR. NASH: No. Under 4F(b) there must be an action brought for the state attorney general to request the materials under 4F(b). Under 6 --

QUESTION: Well, the response that was given this morning was that the particularized need standard did require, in the cases that have applied it, a pending suit, not just the application to the court under Rule 6(e).

MR. NASH: In 6(e), 6(e), the disclosure provisions are subject to there being a current judicial proceeding or preliminary to a judicial proceeding. It's my understanding that later in this term or the next term this Court may decide that question. There is a court -- Baggett, which will be argued, which will address that exact question, how far do you have to go

to be preliminary to a judicial proceeding.

QUESTION: Under the Rules of Civil Procedure, I don't suppose it's any superhuman feat to file a lawsuit.

MR. NASH: None.

If I can get back to the question, the issue here is solely whether or not the attorney general is entitled to grand jury minutes automatically under 4F(b). The issue is not whether or not he's entitled to grand jury minutes.

In this case the state attorney general sought the entire grand jury minutes, not just the transcript of witnesses who testified, but also the documents and any other minutes that may have taken place before the grand jury. What they sought was wholesale disclosure.

The only thing that 4F(b) says is that disclosure is available to the extent permitted by law. And 6(e) since its promulgation by this Court and Congress in 1946 has stated that that governs, 6(e). And all that that test says is, tell us what you need and why you need it, and we will then balance that need against the reasons for secrecy.

In the context of the argument that was presented here, it is assumed that under 4F(b) that the request will not be made until after the criminal

proceeding and after the investigation is completed. There's nothing in 4F(b) to say that the state must wait until that time.

So that if Your Honors believe or should decide that 4F(b) somehow modifies 6(e), there's no necessity in 4F(b) that the criminal proceeding have been completed or that the investigation be completed.

QUESTION: You think, then, that 4F(b) just wasn't intended to work any change with respect to grand jury minutes?

MR. NASH: Exactly. Senator Abourezk stated exactly that in answer to Senator Hruska's question, and he said there very, very directly and very frankly --

QUESTION: Well, what did it do? What range did 4F(b) have if it doesn't affect grand jury minutes?

MR. NASH: It affects -- well, the Antitrust Division manual spells out other types of information which the Government has available. It spells out, for instance, that before immunity will be granted to a witness in an antitrust investigation, that there must be a proffer made by that witness, that that proffer must be reviewed in Washington, D.C., at the Antitrust Department headquarters, and that --

QUESTION: They gather an awful lot of information just outside the grand jury, I suppose.

MR. NASH: There's a great deal of information available, and we should not consider the fact that only 19 pages exist in this case --

QUESTION: What did Congress think it was doing in 4F(b)? Was all this non-grand jury information --

MR. NASH: Yes.

QUESTION: -- available before the Act was passed, or wasn't it?

MR. NASH: No.

QUESTION: The Attorney General would just withhold it?

MR. NASH: Well, the Attorney General had it within his discretion to make it available or not to make it available.

QUESTION: So 4F(b) removed that discretion.

MR. NASH: Absolutely. It makes it a mandate.

QUESTION: Well, what would you think if the Attorney General had a series of regulations that dealt with the availability of his investigative files aside from grand jury, and everybody agrees those regulations were within his authority to issue under the controlling statutes. In short, they had the force of law. Do you think this 4F(b) was intended by saying "to the extent

permitted by law" to recognize that those regulations would govern, or not?

MR. NASH: I'm not sure to recognize those regulations, but it mandated the availability of those materials to a state attorney general.

QUESTION: Despite the regulations?

MR. NASH: Despite the regulations.

QUESTION: Which had the force of law.

MR. NASH: Pardon me?

QUESTION: Which had the force of law.

MR. NASH: Well, I don't know that those regulations existed beforehand. There is some reference in the legislative history to the dissatisfaction of various state attorney generals and their special assistants --

QUESTION: No, but you have to, in order to reach those non-jury files that the Attorney General used to refuse to turn over pursuant to a regulation, you would have to get rid of the regulation. You'd have to override the regulation. You'd have to say 4F(b) was intended to override it.

MR. NASH: It does. That would be my --

QUESTION: Why doesn't it override 6(b)?

MR. NASH: Pardon me?

QUESTION: Why didn't it override 6(b)?

MR. NASH: Well, there's no reference to 6(e) in the --

QUESTION: 6(e), yes.

MR. NASH: -- in the efforts. In the Congressional efforts there's no reference to 6(e). There's no intimation in the legislative history that Congress was somehow dissatisfied with the way that the 6(e) balancing process was working. There's no evidence in the Congressional record that Congress somehow sought to change 5(e).

In the past when the Court, when this Court or Congress has sought to change grand jury, the availability of grand jury, they have done so specifically. In Rule 16 of the Federal Rules of Criminal Procedure, there are provisions for the disclosure of generally described materials.

But then 16 goes down and specifically makes the availability of grand jury statements of defendants available. Prior to 1970 -- 1966, when that amendment was enacted, promulgated in the rules by this Court and sent to Congress, a defendant in a criminal case was required to make a particular showing of need. Congress changed that specifically, and they mentioned grand jury materials specifically.

When they changed, when they enacted, when

Congress enacted Title 18, Section 3500, the so-called Jencks Act, it spoke generally to various materials that were available, and then they went specifically and mentioned grand jury materials specifically. So that what you have there is an indication that Congress, indeed this Court through its rule promulgation powers, sought to affect grand jury materials, they did so directly.

QUESTION: I take it the submission of your colleagues on the other side is that 4F(b) amended, in effect amended 6(e) --

MR. NASH: I think --

QUESTION: -- which is the statute, which is the statute.

MR. NASH: Yes, yes. I think that that's the position that they take. But they seem to ride on the Congressional motivation for passing 4F, that because Congress decided that --

QUESTION: Well, that may be, but their submission is that 6(e) wasn't the same animal after this, after 4F(b), as it was before.

MR. NASH: That's correct. That's, I believe, their submission.

In a chart that Senator Abourezk prepared for an explanation to the Senate of the differences in the

House version of the bill and the Senate version of the bill, he divided the categories -- or he divided the legislation into categories. And with reference to grand jury materials, which he specifically listed in the left-hand column of his chart, he said that the House version, which included 4F(b), the legislation before the Court, had no comparable provision for access to grand jury materials.

During the course of the debate in the Senate there was, in the words of one commentator, "fierce opposition" to the possibility that grand jury materials would be disclosed. That opposition consisted of Senators Laxalt, Tower, Allen, Hruska and others, and they voiced strong objection to the question of availability of grand jury material, not to whom it was going to be disclosed but to the fact it was going to be disclosed.

Senator Allen went so far as to introduce an amendment to the Senate version of the bill that included 4F(b). That was defeated, but the fact that he went to that effort to introduce into the Senate 4F(b) and was an objector, a strong objector, to the disclosure of grand jury materials shows that Congress was aware of the distinction between investigative files generally and grand jury materials specifically.

The question really, in dealing with any change, gets down to the importance and the significance of the grand jury as a body. This Court when it changed Rule 16 in 1966, the Congress when it enacted Section 3500, dealt with that concept directly and specifically, and that was a recognition of what the grand jury is.

In the staff interview that the Antitrust Department lawyer might have with a potential witness, he's probably represented by counsel. He can walk out of the room. He can refuse to answer a question. In the grand jury he's in a secret room, literally, with 24 or 25 strangers, without a lawyer -- an intimidating sight at best. And he can't walk out of that room. He must answer the question.

And the fact that Congress when it's changed or this Court when it's directed itself to grand jury has done so specifically is a recognition of that distinction and that difference.

QUESTION: Well, if you concede that Congress meant to give some help to state attorneys general by the provisions of 4(b) and you say that the phrase "investigative files or other materials" doesn't include grand jury testimony, is there some way of telling from this record just how much help that would be?

I mean, does the Attorney General typically

have files which shed all sorts of light on a particular suit but aren't grand jury testimony?

MR. NASH: The only ones that know what the Government possesses is the Government. According to the record in this case, prior to the filing of the briefs in this Court they supplied the state attorney general what they describe as 19 pages. After filing of the briefs by Respondents in this case, which called into question first of all whether or not the Government had made available to the state all the materials they might have, two or three more pages were made available to the state attorney general.

There are materials which would normally be available -- staff interviews. When the Government says that primarily the grand jury is used to investigate antitrust offenses, they point to a comment by Assistant Attorney General Kauper in 1975 that they don't use the FBI in these cases, they use staff interviews.

Well, those staff interviews are discoverable. What about economic expertise that might not be available to the states but is in the possession of the United States? That would be available. Various analyses of antitrust problems would be available. All kinds of materials are available.

The Government says in the Antitrust Division

manual that it retains discretion to determine in some cases whether some of those materials, which are clearly within the definition of investigative files and other materials, that they retain the discretion.

QUESTION: Was that manual statement made after the enactment of 4(b)?

MR. NASH: Yes. 4(b) was enacted in 1976 and the manual was published, I believe, in August 1979.

QUESTION: So then you understand the Government, the United States Government, to take the position that saying that the Attorney General shall make available to the state attorney general to the extent permitted by law allows the United States Attorney General some discretion, even though it's not grand jury?

MR. NASH: They may allow them certainly some discretion, and there are areas that readily come to mind -- the confidential informant, this Court's decision in Roviaro. But it seems to me that they can't on the one hand say, we only gave them 19 pages so Congress must have meant grand jury materials, and then on the other hand not identify what they didn't give them, because there was no identification that, wait a minute, we're withholding some stuff to the extent permitted by law. They said they gave them everything.

The fact is that after Respondents' brief was filed, that at least two or three more pages, according to the State of Illinois' reply brief, were made available to them in September of this year.

But there's no -- our system of justice is based on an adversary system, and I don't think that between the State of Illinois and the Government of the United States you have this adversary flavor. I know there was a question earlier, but truthfully, according to the manual -- and I don't know who looked at that beforehand amongst the State of Illinois lawyers -- there were some materials that the Government says in the manual they retain the discretion to give or not to give.

It seems to me that the State of Illinois should pursue that before saying to this Court, you should include grand jury materials in this general phrase because we only got 19 pages.

I think that the important point to be made when you get down to the nitty-gritty, as they say, is there is a distinction between grand jury materials and other materials. There is a distinction and there is a uniqueness about the grand jury system and the institution of the grand jury, and when Congress or this Court have dealt with that question they have dealt with

it specifically, not by implication.

The State of Illinois and the Government would have this Court believe that merely because the Congress passed legislation which was directed at antitrust violators and authorized the filing of parens patriae actions which had previously not been allowed, that that was an indication that 6(e) was to be changed. When you get to the question of changing 6(e), you get to all sorts of other questions which 4F does not address itself to.

There is nothing in 4F to indicate a Congressional dissatisfaction with the way that the court's discretion is working. There is nothing in 4F to determine that the courts in determining the amount of disclosure, the time of disclosure, and the conditions of disclosure, as the rule enunciates, is somehow inadequate or is somehow frustrating the antitrust efforts of the State of Illinois. And this Court should not adopt that position, that Congress by implication, without any reference to grand jury at all, changed the law.

Indeed, the reference is the opposite. Senator Abourezk's comment stating that materials could not be turned over absent a court order, that the only materials that could be turned over under 4F(b) were

those that had been provided the Government voluntarily -- those are his words. Those are the words that he used to silence the critics of the disclosure of grand jury materials, Senator Hruska, Senator Allen, Senator Laxalt, and Senator Tower and others.

Thank you.

CHIEF JUSTICE BURGER: You have a minute and a half remaining.

REBUTTAL ARGUMENT OF THOMAS M. GENOVESE, ESQ.,
ON BEHALF OF PETITIONER

MR. GENOVESE: Very quickly, I think there's a tremendous gap between what Congress was attempting to accomplish when it passed Section 4F(b) and how Respondents interpret the statute. Congress wanted the states to have valuable information prior to the institution of a lawsuit, because Congress understood that in order to have local and national antitrust enforcement it was essential that the states, and because the states lacked the resources, it was essential the states have this information in order to bring these kinds of cases.

Respondents' interpretation I think creates a kind of inverse relationship between need and disclosure. The more significant and valuable the information in the Government's file, under the

Respondents' interpretation, the less likely that it could ever be produced to a state attorney general. And the reason for that is that it is only the significant and valuable information which is presented to an investigative grand jury. What is left is uninformative, whether it's 19 pages or however many, and it could also be misleading and grossly inaccurate to a state attorney general who has to make a decision of whether he's going to undertake the resource drain of filing these kinds of actions in accordance with Congress' intent.

Are there any questions?

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:34 p.m., the case in the above-entitled matter was submitted.)

* * *

CERTIFICATION

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