OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1938

TITLE UNITED STATES, Petitioner
v.
JAMES E. BAGGOT

PLACE Washington, D. C.

DATE March 2, 1983

PAGES 1 thru 41

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IN THE SUPREME COURT OF THE UNITED STATES

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v. No. 81-1938

JAMES E. BAGGOT

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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 2:11 p.m.

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner

SAMUEL J. BETAR, JR., ESQ., Chicago, Illinois; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.

ON BEHALF OF THE PETITIONER

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

This case which is here on the government's petition to the Seventh Circuit presents a question concerning court authorized and court supervised disclosure of grand jury materials to the Internal Revenue Service pursuant to Rule 6(e) of the Rules of Criminal Procedure.

Several issues were litigated below, but we confined our petition for certiorari to a single issue, not because we agree with the Court of Appeals' decision regarding all of the other issues, but because we wanted to present the Court with the issue of greatest importance administratively and the issue that reflects a long-standing practice of many years in the issuance of Rule 6(e) orders by district courts.

The case arises out of a special grand jury investigation of commodity futures trading transactions before the Chicago Board of Trade. The grand jury was investigating related criminal violations of the Commodities Exchange Act and of the Internal Revenue Code and was assisted by Internal Revenue Service agents as well as other personnel to help in the analysis of the information that was being secured.

The grand jury proceedings itself with respect to Mr. Baggot culminated in a guilty plea, which was accepted -- a plea of guilt to misdemeanors for violations of the Commodities Exchange Act, violations that involved participation in rigged commodity trades that produced substantial paper losses, which he deducted in preparing his tax return, and yet he recovered most of those losses in the form of cash kickbacks from his trading partners. So, the guilty plea was based on a theory of violations that have implications for tax purposes.

After some preliminary proceedings which are not important for purposes of what is before this Court, the United States Attorney sought disclosure at the request of the chief of the Examination Division of the Internal Revenue Service of the grand jury materials for their use by the Service in determining whether there was a deficiency in Mr. Baggot's tax return. And, the question we have presented is a question that arises under Rule 6(e)(3)(C)(i) whether the disclosure that was requested here that would be permitted in the absence of authorization by the Court is disclosure that would be directed by a court preliminarily to or in connection with a judicial proceeding.

The answer is to be secured principally from analysis of the language in legislative history of this provision as it was reenacted with a textural rearrangement in 1977. Before proceeding to that, I wish to make a few observations to put the question in some perspective in assessing the language in

legislative history.

The first is, perhaps the too obvious point, that we are not dealing here with a situation that involves any taint or impropriety on the part of the government. The investigation of the grand jury was conducted as it was authorized to be conducted, and the participation of the Internal Revenue Service agents was in no way improper. It is specifically provided for in Rule 6(e), and, as a matter of fact, because this grand jury investigation commenced before the recent amendment of Rule 6(e) -- the 1977 amendment, there was an order by the court authorizing the Internal Revenue Service agents to participate, to assist the grand jury and the United States Attorney in analyzing the evidence that was being secured. And, no use for any other purpose was attempted to be made of this information except upon application to the court to secure the proper court order under Rule 6(e).

So, we are not dealing with any sort of taint or improper conduct from that standpoint. Nor, is there a basis in this case for what has been referred to as abuse of the grand jury, whether or not it is a term of art.

The fact that there had been a guilty plea accepted in the case certainly indicates that the grand jury was not being used as a subterfuge for a non-criminal purpose. Nor, on the face of it is there any injustice in the idea that when evidentiary materials have come forth which indicate not only a violation of

criminal law but also a deficiency in the payment of taxes that are owing. Nor, there is certainly no injustice in taking steps to see to it that those taxes are paid by Mr. Baggot as they would be by any other taxpayer.

From the standpoint of what seemed to be the concern of Congress in 1977 when it recodified this Rule, a concern that a safeguard be included against a cat's paw type of use of the grand jury to obtain evidence for civil purposes and only for civil purposes in ways that were not authorized to the agencies to obtain their evidence --

QUESTION: Mr. Wallace, I notice the way you put that. I would suppose you would think you could use the grand jury for dual purposes as long as you had a bona fide criminal investigation going on that you could conduct a parallel civil investigation using grand jury material?

MR. WALLACE: That is my understanding.

QUESTION: That is the government's position?

MR. WALLACE: It is also my understanding of what this Court said in Proctor & Gamble. It said much the same thing in a case called United States against Kordel, 397 U.S. 1, where the complaint was made the other way around that the civil investigation was being used to secure information that would be used in the prosecution --

QUESTION: Has it not some times happened that information from one of the civil -- one of the non-criminal divisions

not secured by discovery but just their own investigation, then might be referred to the Criminal Division for prosecution when some lawyers in the Division make a judgment that there is criminal conduct involved?

MR. WALLACE: It happens quite frequently, and I believe it is the duty of those lawyers when they see evidence that a crime has occurred to turn it over to the prosecuting attorneys --

QUESTION: Is it not a fact that they might be violating some federal statute if they didn't, is that not so?

MR. WALLACE: I would not want to go that far, but an argument could be made to that effect. But, it certainly is a common practice not only for attorneys within the Department of Justice but in the agencies and departments to do that. And, this Court has many times referred to the fact that the Internal Revenue Service refers matters to the Department of Justice for criminal prosecution. It has been a criterion used in cases dealing with the enforcement of Internal Revenue summonses which are to be used prior to these referrals and not subsequently. But, the discussion always assumed that it was a proper function to make the referrals to criminal prosecution when evidence of wrong-doing was found.

The fact is many statutes impose law enforcement duties, both criminal and civil, on attorneys and others for the government. And, while I do not wish to denigrate the concern that Congress had in the safeguard that it wanted to provide that the

grand jury not be subverted to uses wholly for a civil purpose. I think the danger of that can easily be exaggerated.

From where I stand within the government, the complaint that we hear most of the time from the departments and agencies is that they cannot get the U. S. Attorneys to use the grand jury as often as they would like to pursue the criminal violations that the departments and agencies think they have uncovered because grand juries are time consuming and resources are limited and the use of the grand jury has to be rationed. While we do not in any way advocate not observing the safeguard that Congress intended in this Rule, we do not think there is a great danger that the United States Attorneys are subject to manipulation for use of the grand jury for civil purposes. In most instances, they have all they can do to use it for all of the criminal cases that might warrant its use. That is the experience we are having these days, at least.

The other -- before we proceed to the language and legislative history at issue here -- the other perspective that I think is useful to keep in mind is whether the application that was made by the Internal Revenue Service here poses any of the dangers to the integrity and efficacy of the grand jury process itself that this Court has observed from time to time.

We set forth on pages 31 and 32 of our brief, the five standards of the Rose case that this Court twice approved. Because the grand jury proceeding had been completed here and particularly

because it had been concluded with a guilty plea, it is only the fourth of these standards that could possibly have any relevance here, the encouragement of free and untrammeled disclosure by witnesses, by persons who have information with respect to the commission of crimes, or as the Court said in Proctor & Gamble, to encourage all witnesses to step forward and testify freely without fear of retaliation.

There are two possible impediments to look toward under this criterion. One is whether the danger of personal liability might discourage a witness from testifying freely, and that seems unlikely in this context if a witness, even himself not the target, were to disclose that he was a party to tax fraud, or engaged in tax fraud himself. Regardless of whether that information could be disclosed to the IRS for civil purposes, it could possibly lead to criminal proceedings against that witness for tax fraud.

It is hard to see that there is a substantial additional deterrent placed on the witness if he knows that it might also lead to an assessment of a tax deficiency against him for collection purposes.

With respect to the possible retaliation from employers or other persons because the witness disclosed a wrong-doing that he knew about, this is something that has already been disclosed in the grand jury to attorneys for the government, and because under 6(e) the further disclosure would be under the protection of a court order and would be requested by the United States

Attorney himself who has an interest in protecting witnesses against retaliation. Protective provisions could be included in the court order. There could be deletions made from what is disclosed. There is because of the participation of the court --

QUESTION: Mr. Wallace, why do you say that it would always be at the request of the United States Attorney? Couldn't the IRS go in independently and ask for it?

MR. WALLACE: They do not have authority to go into court -- into the district courts. They have to ask the Department of Justice to handle that for them. They lack the statutory authority to do that. It is not that they would not have authority under the Rule.

QUESTION: I see. Since I have interrupted you, what about an independent agency, like the Federal Trade Commission or the Labor Board. They cannot get any of this material, can they?

MR. WALLACE: Well, they could request it. Of course, the judge himself would be aware of any sensitive material of this sort, and the United States Attorney could participate. There are cases that have held that requests by administrative agencies for materials to be used in an administrative hearing are not within the coverage of 6(e). We do not think the correctness of those cases is really at issue here.

QUESTION: As I read your brief, you assumed those cases were correctly decided?

MR. WALLACE: We have assumed it for purposes of

argument, but I do want to caution the Court that the lower courts are by no means unanimous on this. There is a very recent decision by the District Court in the Northern District of Oklahoma, which I should bring to the Court's attention, United States against Robert Sutton, Civil Docket No. 1069B, in the Northern District of Oklahoma, which upheld the propriety of a Rule 6(e) order giving the Department of Energy materials from a grand jury investigation of failure to observe price controls on gas which would be used in an administrative hearing in the Department of Energy, and which subsequently have been put to use in a civil enforcement proceeding by the Department of Energy to disgorge the unlawful profits that were secured. But, that is not a de novo proceeding of the kind that you have in a tax case in the court. It is a proceeding on the administrative record with deference to the findings of the agency.

That is in our view an open question that need not be decided in this case. We have here a request for materials to determine a tax deficiency which then would be contested in either the Tax Court or the District Court or the Court of Claims in a de novo proceeding in which the findings would be made judicially -

QUESTION: Unless the taxpayer paid his bills. Unless --

MR. WALLACE: Well, unless the taxpayer pays the bills. But, of course, any case could be settled even after it is brought. We are dealing here with a provision textually which speaks to preliminarily to or in connection with a judicial

proceeding. If the preliminarily to language is to have any independent meaning or use, there has to be some time prior to the actual instigation or certainty that litigation will be instituted, that it will apply to. We think that in this context the legislative history might clearly ratify what had been a long-standing practice under Rule 6(e) particularly with respect to disclosure under court order of these materials to the Internal Revenue Service for their use for determining tax deficiencies, something that to the best of our ability to ascertain it has been done hundreds of times every year under Rule 6(e) in district courts, usually ex parte without any recorded decision and since long before litigation about this kind of thing became fashionable and there were reporded cases.

In looking at the legislative history before --

QUESTION: Mr. Wallace, can I interrupt you right there? Can you tell me what the clearest written evidence of that long-standing practice is?

MR. WALLACE: Well --

QUESTION: I do not really -- I do not see it documented here.

MR. WALLACE: We do not have it documented. It is hard for us to document it. We have found forms in the Internal Revenue Service regional manuals -- forms indicating how 6(e) orders should be applied for.

We do have in this particular legislative history,

the very thing I was about to turn to, testimony before the House Committee which is the only one that held hearings that while it doesn't document it completely, it does indicate that this has been the general practice. I think the Committee report takes on new meaning if read in light of this testimony which I would like to now turn to -- testimony by Judge Becker of the eastern district of Pennsylvania, who was really the star witness at these hearings, and I say that advisedly because Congress was not in this instance satisfied with the draft of the Rules that the Advisory Committee had submitted, and instead rebuilt its own draft on the basis of testimony and again and again Judge Becker's testimony was referred to.

Just to give the Court a flavor of what it was that the Committee was building on, I would like to read a few paragraphs --

QUESTION: Where do we put our finger on that, Mr. Wallace?

MR. WALLACE: It is in the hearings that we have cited in our brief. We do not have it reprinted for you, which is why I want to read it to the Court.

QUESTION: Oh, very well.

MR. WALLACE: I am reading from page 36 of the printed report of the House hearings, and this is during Judge Becker's testimony. He says, "I will say this" -- and this is as close as I can come to answering Justice Stevens' question -- "that in my district all of the 6(e) orders or most of the 6(e) orders have

been in IRS cases. We have them in IRS cases because the IRS has requested the 6(e) order for its own protection." This has been in order to enable the IRS attorneys to participate in assisting the U. S. Attorney as well as then submitting another request that the materials be turned over, and he gets to that as I go on. "When you are dealing with agency access" -- and I am reading from Judge Becker again -- "the problem is not the problem of later prosecutions but the problem of later civil use. The agencies feel that if they had a 6(e) order they are protected against claim of abuse in the event they later use the information civilly. In response to a question posed about the question of later civil use, the case law in that area, which includes the 1956 grand jury case, which Mr. Seigel referred to, the Seventh Circuit Case, and my Pflaumer case, have made the availability of later civil use by the agency turn on the question of bad faith in pursuing the grand jury investigation.

If the Court finds that the grand jury was really a subterfuge to obtain this information for the agency or for civil use, then the Court has the power to say you cannot use it civilly. You cannot proceed against this individual.

On the other hand, if the Court finds that there was no bad faith, then they can use it civilly. There are investigations such as the one Mr. Seigel described where they pursue a criminal tax investigation with the aid of the IRS. If the investigation was in good faith or for a valid criminal purpose,

and it does not turn up in the final analysis sufficient evidence of criminality, I think the prevailing case law is that it can be used civilly if there was no bad faith.

In light of that and there were repeated references to the IRS in his testimony and other testimony and repeated references to his other opinion, the Hawthorne case as well as the Pflaumer case, he was a witness because he was the author of two of the more extensive opinions at the time. In light of that, there is added significance to the portion of the Senate Committee report based on these same hearings because the Senate relied on these hearings and did not conduct its own hearing that we have reproduced on pages 28 and 29 of our brief in which they said quite explicity there was no intent to preclude the use of grand jury developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper assuming that the grand jury was utilized for the legitimate purpose of the criminal investigation. And, then at the conclusion of the paragraph the two cases cited are Proctor & Gamble and Hawthorne.

The Hawthorne citation which we have discussed in some detail in our brief takes on added significance in the fact that Judge Becker repeatedly referred to it. It is his opinion and in context it is suggestive that Judge Becker's views themselves were being endorsed including the views that he gave to the Committee in testimony. And, the citation of Proctor & Gamble is

on pages 683 and 84 which is only the concluding paragraph of the opinion. It is not the portion of the opinion that is generally looked at, but it is the portion that approves of the civil use of the grand jury materials in this particular anti-trust investigation because there was no finding that the grand jury proceeding was used as a short cut to goals otherwise barred and more difficult to reach.

The Court was quite explicit in saying what was occurring here, that the suit was filed on the heels of a grand jury investigation in which no indictment was returned. The government is using the grand jury transcript to prepare the civil case for trial, and appellees who are defendants in that suit desire the same privilege. It was denied to them partly on the rationale that there was nothing wrong with the government's doing that and that a private party, and the Court was very careful to limit its discussion to a private party, has to make a showing of particularized need in those circumstances even though obviously the government which needed the materials pretty much in whole because the civil suit was the mirror image of the criminal prosecution that aborted --

QUESTION: Mr. Wallace, under your view what was the purpose of Congress putting in this preliminary to language at all?

MR. WALLACE: Well --

QUESTION: Which you have not really mentioned very

much in this argument.

MR. WALLACE: They did not specify what the purpose was. The language was carried over from the earlier draft of the Rule, of the 1946 draft, where it was really designed for a somewhat different purpose. It was designed to be a means of bringing court supervision into the picture because defendants were trying to interview grand jury members to get information with which to attack the grand jury's constitution, or what occurred before the grand jury.

An effort was made to bring all of this under court supervision. It was simply carried forward and takes on whatever additional meaning can be found in the context of the policies being approved in this Committee report and the response to the testimony at the hearing. They did not really state what criterion they meant to use by the words preliminary to. But, they did indicate that they were knowledgeable about the fact that 6(e) orders had traditionally been used to turn over materials to the IRS for tax assessment purposes.

There has to be --

QUESTION: That is a rather broad purpose. There are all sorts of stages that the IRS goes through. Do you say that your position covers all of those stages?

MR. WALLACE: Our position covers the use, yes, at any stage of an IRS investigation to determine --

QUESTION: So, if in connection with an audit of a tax

return they want the material, they can get it?

MR. WALLACE: Well, we would take that position --

QUESTION: Or even if they have not decided on an audit, if they are just reviewing -- if they are just looking at a return, just looking at a return, and maybe they wanted to decide whether to do it or not.

MR. WALLACE: If there has been a grand jury investigation conducted that is related to tax --

QUESTION: So, anything the IRS wants to do is preliminary to litigation, I think.

MR. WALLACE: If the grand jury materials are relevant to a tax investigation, then there is a sufficient likelihood that a deficiency will be assessed and that litigation will ensue that the standard is met as we understand it.

QUESTION: But, litigation will ensue only if the taxpayer chooses to have it ensue?

MR. WALLACE: That is correct.

QUESTION: That is entirely within his discretion?

MR. WALLACE: It is always within the discretion of one side to a controversy to agree to the position that the other side is taking, if the IRS has made a deficiency assessment.

QUESTION: Mr. Wallace, one other question. Could Mr. Baggot have made a similar request for these grand jury materials under your theory and obtain them?

MR. WALLACE: Well, I think that is very similar to

the situation in Proctor & Gamble where this Court did distinguish between the particularized need a private party must show and the fact that it was proper for the government to be using the materials without any showing of a particularized need to be using the entire transcript for criminal law enforcement purposes. And, in the Douglas Oil case precisely --

QUESTION: That would not have -- Proctor would not have permitted use of the grand jury minutes by IRS people.

MR. WALLACE: No, it would not, but it permitted them --

QUESTION: Without a court order --

MR. WALLACE: Without a court order, but it did permit the use by government attorneys for civil law enforcement purposes of the entire grand jury materials without a showing of particularized need, and the Douglas Oil opinion very carefully referred to the fact that it was a private party's request that was being considered there.

QUESTION: Mr. Wallace, in a sense, if particularized need has to be established by the government, we do not know that, that is part and parcel of the other case, but if it does, then isn't the inquiry about preliminary to judicial proceedings part and parcel of that same test, in effect. The closer it is to a judicial proceeding or the more involved it is with it, the more the particularized need has been established. Isn't kind of part of a the same inquiry?

MR. WALLACE: Well, I do think that in the context of

showing of particularized need that a private party must make, the eminence of the court proceeding is what enables the private party to show that the kind of particularized need the court has specified to impeach a witness, to --

QUESTION: All right. If the government is held to a particularized need standard of some kind, the same might be true.

MR. WALLACE: Well, we, of course, have taken the position that it is not --

QUESTION: Yes, I know.

MR. WALLACE: -- although the question is premature in this case. But, the need that the government has is the mirror image for civil enforcement proceedings of what was needed to conduct the grand jury investigation of the criminal violation here just as it was in Proctor & Gamble.

QUESTION: Of course, Proctor & Gamble did not need to deal with a particularized need of the government. It dealt with a particularized need of the defendant.

MR. WALLACE: But it did approve the fact that the government was using the materials in toto and said that there was no impropriety there, therefore, not a basis for the defendant to claim a right to the same thing.

CHIEF JUSTICE BURGER: Mr. Betar?

ORAL ARGUMENT OF SAMUEL J. BETAR, JR., ESQ.

ON BEHALF OF THE RESPONDENT

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

Court:

I read with interest and pleasure the tribute to the late Justice Fortas that was recently presented to this Court. Solicitor General Lee remarked, that Justice Fortas warned that the Court should be chary of overreaching. He quoted Justice Fortas thusly, "The Courts may be the principal guardians of the liberties of the people. They are not the chief administrators of its economic destiny."

The government argues in its briefs that they need this material so they can protect the public fist, the public revenue. We have no quarrel with the duty of IRS to collect taxes, but there is nothing to collect here.

We are not here to decide the most efficient or the most expeditious way for IRS to collect those taxes. I think we are here for a very narrow purpose to decide whether under the facts of Baggot the government may pay sufficient showing to penetrate the historic rule of grand jury secrecy.

What the Court of Appeals did in this case was balance the competing public interests, that of grand jury secrecy against a civil tax examination, and they properly held for grand jury secrecy.

The Court recognized that a liberal disclosure policy would facilitate tax collection, but they decided that the interest in grand jury secrecy outweighed that.

This case arose, Your Honors, from a letter that was

sent by an IRS civil examination head to the United States Attorney, and he requested grand jury testimony -

QUESTION: Who was that?

MR. BETAR: His name was --

QUESTION: No, but what was his office?

MR. BETAR: He was chief of the Civil Audit Division in Chicago, Your Honor.

QUESTION: This was in connection, then, with an audit?

MR. BETAR: Well, no. That is what I am getting to. He requested these grand jury testimony and these documents to determine whether there is civil tax liability. They were going to have an examination to see if there should be a deficiency.

QUESTION: But, he was in the process of auditing?

MR. BETAR: No, sir, he was not.

QUESTION: He was deciding whether to audit?

MR. BETAR: Well, to be honest with you, what happened is the U. S. Attorney choned this information out of the Civil Tax Audit Division. What had happened, Your Honor, was there were three different requests for disclosure, all of which were denied by the Court below.

Then what happened is the United States Attorney transferred over to the chief of the Civil Audit Division matters of public record. And, there is nothing wrong with that. He sent over the information, the plea sentencing transcript, and the day that they took the plea. He, then, said, oh my goodness, it looks

like there might be something here, and he sent a letter back and said, would you please send us anything that you might have that would bear on the civil tax liability of this taxpayer.

His letter is appended to our brief, Your Honor.

QUESTION: Do you know how the matter ever got to the chief of the Audit Division?

MR. BETAR: By virtue of the fact that the U. S. Attorney sent the matters of public record to him. They did not have an independent audit going against this taxpayer.

Now, it is important to remember that the taxpayer, Mr. Baggot, did not plead to any tax-related violation. He plead to two commodity violations, and that information is set forth at page 3A in our appendix. There is no tax-related violation, and the Solicitor General is wrong when he says that there was. There were two commodity violations for bid rigging or what they call wash trades.

Now, one reason the government does not qualify under the preliminary to exception arises from the unique statutory provisions of IRS. Congress provided that IRS has no right or no ability to initiate litigation over a civil tax liability. That right belongs exclusively to the taxpayer.

Even if IRS wanted to go to court and sue somebody for paying their taxes, they cannot do it by statute. The procedure arises thusly. Normally, not in this case, an examination takes place of a return, and IRS decides whether they may compute a

proposed deficiency. If they decide there is a proposed deficiency, a preliminary notice of that proposed deficiency is sent to the taxpayer, and he then has an opportunity to come in and talk to that examiner and settle or pay, or he can appeal within the IRS administrative procedure to their appeals office.

If he is unsuccessful there in negotiating and if he does not want to pay, IRS then issues what is called a 90-day notice of deficiency and that officially determines the amount of the deficiency. A letter goes out to the taxpayer, and it says, you owe "X" number of dollars, and you have got 90 days to pay it or else.

That letter of deficiency, that 90-day --

QUESTION: The or else being to go to the Tax Court?

MR. BETAR: No, sir.

QUESTION: Either to pay it -- With a 90-day letter either to pay it or go to the Tax Court.

MR. BETAR: No, it is not or go to the Tax Court because if the taxpayer decides not to go to the Tax Court, Justice Blackmun, IRS can go seize his assets.

But, what happens with that 90-day letter, that notice of defiency, it triggers the right of the taxpayer to initiate litigation. He has two choices. He can go to the Tax Court and ask them to redetermine that deficiency, or he can pay the amount owed, then file a suit in the federal district court for a tax refund.

QUESTION: He has to file a claim for a refund first?

MR. BETAR: Pardon, sir?

QUESTION: He has to file a claim for a refund first?

MR. BETAR: Yes, sir. You are right. I was just talking about the triggering of the litigation.

The only, as I said, only the taxpayer has the right to file suit and that is because IRS does not have any need for litigation. If the taxpayer does not go to court, the Internal Revenue Service determination is final and an assessment was made.

Now, the Solicitor General Wallace said, oh, we are here to find out about an assessment. We are a long way of an assessment. We are not any where near an assessment.

Now, if the taxpayer does not pay what the assessment says, IRS can seize and sell his assets without a court order. In General Motors Leasing, this Court said that a tax assessment is given the force of a judgment.

Now, here the first step has not been taken yet. There has not been an examination. There is no proposed deficiency. There is no notice of deficiency, and there is no assessment. All we have is the desire, the bear, naked desire of IRS to see if there is a tax liability.

Now, the government motion here sought disclosure for use preliminary to or in connection with a judicial proceeding relating to the tax liability of the Respondent. There is no tax liability. There is not even a proposed tax liability. The

Seventh Circuit, I think, rightly held that Mr. Baggot's possible tax liability was too embryonic, was too speculative, and was too uncertain --

QUESTION: Well isn't it possible for any one of us to have a "tax liability" that we do not even know about?

MR. BETAR: I would certainly hope that I would know about mine, Mr. Chief Justice. I suppose that is possible under certain interpretations that IRS might make, yes sir.

QUESTION: It is almost unknowable at a certain stage. If you are using the term, I take it, in a narrow sense that a liability which has been at least asserted or suggested by someone.

MR. BETAR: At least suggested. We do not even have that, Your Honor.

QUESTION: But you agree that any one of us could have a tax liability without knowing it?

MR. BETAR: As I say, I suppose that is possible.

QUESTION: In other words, the --

MR. BETAR: But that is certainly --

QUESTION: -- Internal Revenue might take a different view of the way we have treated an item and say that it is not capital gain, it is income.

MR. BETAR: Yes, sir. I understand, and I agree with that, but that is certainly not our situation here.

At best we have --

QUESTION: But it goes to the meaning -- perhaps the

meaning of this preliminary aspect, does it not?

MR. BETAR: Yes, sir. In that regard -- Now, there was a dissent in this case by Judge Pell, and I am willing to accept the definitions that Judge Pell gave for preliminary to. He said, preceding the main business or lying before, or leading to. Now, I suggest to the Court that the main business of a tax examination is the calculation of a deficiency. That is not a judicial proceeding. The calculation is an administrative function, and it is not preparatory to a law suit.

QUESTION: Mr. Betar, supposing the government had just that IRS had continued to investigate and not sought the grand jury material at this time. How far along before the filing of a deficiency notice or beyond that you say they would have to be before they could request the grand jury material and have it comply with the preliminary to requirement?

MR. BETAR: First of all, I would correct you because when you say continue to investigate, they have not conducted any investigation of this taxpayer. They first made their request for these materials in March of 1978. That is over five years ago, Your Honor. And, they have not yet conducted their own investigation, and I am getting to their power. They have enormous power --

QUESTION: Let me change my question --

MR. BETAR: I will get specifically to your question. It is cited in our brief, Professor LaFave testified before the

House Committee that was considering the 1977 amendments to the 6(e) rule, and the concern was not as Solicitor Wallace says, the concern was if we give administrative agencies this information for criminal purposes as they are allowed to do, the concern was that there would be leakage back to those agencies so that they would use it for unrelated civil purposes.

When questioned about that, Professor LaFave said unless it was a matter most critical to their undertaking and unless they could demonstrate that they had no other comparable way of obtaining this evidence, they could not get to the evidence under the preliminary to exception.

QUESTION: So, does that, then, embody both kind of a showing of particularized need, your answer, as well as the description of when it would be preliminarily to?

MR. BETAR: Yes, sir. I think it is a two-prong test. Number one, is it preliminarily to, which involves the balancing of a competing interest among other things, and the second test is particularized need, which has been set forth by this Court.

QUESTION: Well, you have never -- I would not mind the rest of the answer to Justice Rehnquist's question about when in this process would the government be entitled to seek these materials because they have reached a stage preliminary to litigation? When in a tax case would the government ever be entitled to these --

MR. BETAR: I do not know if ever, Your Honor. That

is what I am saying. I suppose -- I do not want to say that the preliminary --

QUESTION: Would you have to wait until the taxpayer sued them till they knew that the taxpayer had brought --

MR. BETAR: No, sir, but I think at a minimum they would have to use their own investigative procedures --

QUESTION: When is that?

MR. BETAR: They have done nothing in this case, and --

QUESTION: That is not the question --

MR. BETAR: I do not know when that is, Your Honor. I do not know when that is. I don't think that we can -- I think we can --

QUESTION: It isn't late enough now any way, it isn't -- That stage has not been reached in this case.

MR. BETAR: Certainly not in this stage, and I do not think --

QUESTION: It may be they would never be able to --

MR. BETAR: That is right, Your Honor.

QUESTION: Certainly if Mr. Baggot filed a petition to the Tax Court the point has been reached, has it not?

MR. BETAR: Perhaps --

QUESTION: But not as a preliminary --

MR. BETAR: -- I would say yes. That would be in connection with --

QUESTION: With litigation, but there would never be

any preliminary to for the IRS?

MR. BETAR: I would not say never because, I was taught a long time ago that that is a bad, bad word --

(Laughter)

QUESTION: Counsel, let me give you a --

QUESTION: That is not the way you win arguments.

QUESTION: There is a man that pleads guilty to embezzling a million bucks --

MR. BETAR: Yes, sir.

QUESTION: -- during the calendar year of 1981, and Internal Revenue looks at his income and he reported a gross income of $2.50, would that entitled IRS to move then?

MR. BETAR: Not under those facts alone. If they see that in the newspaper, they can certainly start their own Internal Revenue Service investigation. They have massive powers. They have subpoena powers --

QUESTION: When could they go for the grand jury minutes?

MR. BETAR: If there were grand jury minutes in that case, I do not think they could go for them unless they have shown that they have used their own powers.

QUESTION: I would assume that a man who pleads guilty to embezzling a million dollars that there are grand jury minutes.

MR. BETAR: If you are talking, Your Honor, about a criminal case, they can have them.

QUESTION: Well, I cannot imagine the man pleading guilty to anything but a criminal case.

MR. BETAR: But, you said he plead guilty to embezzlement, not to income tax violations. If we are talking about civil purposes, the primary reason for the grand jury, and it is in the Fifth Amendment, is that it is an accusatory body to bring criminal matters, felony criminal matters. It is not to be used for civil matters. This Court said in Proctor & Gamble, it would be flouting the purpose of the law if it were used solely for civil matters.

I will go along with Justice White who asked Solicitor General --

QUESTION: Well, this is not solely. The man has pleaded guilty. It was used to get him to plead guilty, so that is the criminal part. That is over with.

MR. BETAR: I understand that.

QUESTION: That is over with.

MR. BETAR: That is over with, but they still had no right to those grand jury minutes. What they do if they do that is they circumscribe the intent of Congress when it is an improper use of the grand jury.

QUESTION: Well, suppose finally this is referred to the Department of Justice. It goes to the Tax Division, maybe sent downstairs to the Criminal Division -- if it is still downstairs -- then what? You mean the Criminal Division or the Tax

Division cannot use it?

MR. BETAR: If there is a criminal case, Your Honor, the matter becomes public knowledge. There is testimony. It is public knowledge --

QUESTION: At that stage, they may not be sure whether there is criminal liability, but on the hypothesis Justice Marshall suggested to you, there surely is an incipient potential civil liability for tax on the million dollars.

MR. BETAR: Okay, and I am suggesting incipiency is not enough. I think at a minimum you need a controversy, a case or a controversy at the administrative level. At the administrative level, under that you really have nothing. In your mind you know pretty well if this guy only reported $2.50, he has got a big tax liability if he embezzled a million. But, technically as far as the Rule is concerned, as far as IRS procedures are concerned, there is nothing determined until there is a notice of deficiency.

QUESTION: Well, couldn't the IRS get the U.S. Attorney's work papers who handled the case before the grand jury?

MR. BETAR: No, sir.

QUESTION: They could not get that?

MR. BETAR: No, sir.

QUESTION: They get it every day. It is work papers.

MR. BETAR: If the work papers are the direct product of the grand jury, I would still stick to my answer. No, sir, Justice Marshall. If the work papers are generated outside of

the grand jury, yes, they can get them.

QUESTION: Mr. Betar, you rather reluctantly conceded that if a law suit had been filed, for instance, by the taxpayer, then the government could establish that it was preliminary to the judicial proceeding, but the Rule says that if it is preliminary to or in connection with a judicial proceeding, certainly then it would be in connection with?

MR. BETAR: Yes, ma'am.

QUESTION: Right, so preliminary to means something else otherwise it would not be there. So, you have got to back up beyond the filing of a suit obviously.

MR. BETAR: Yes.

QUESTION: And the question is at what point? After the filing of a deficiency notice?

MR. BETAR: I do not think we can draw a bright-line test. I have thought a great deal about this. The easy answer, I think, is if you file a deficiency notice that should be a sufficient time for them to come in and say it is preliminary to. But, what I think will happen if this Court establishes that kind of test is IRS will run right around end. And, they will crank out -- it will be an open invitation for them to crank out deficiency notices just like popcorn.

So, I think what you have to do is take it on a case-by-case basis, use the flexibility of the court. It is a discretionary matter -- 6(e) is a discretionary matter. It is not

mandatory, and I think you have to talk about the tests that were set forth in Douglas Oil and balance the competing interest against the relevant circumstances and against the standards that were set and see if --

QUESTION: On an ad hoc basis, case by case?

MR. BETAR: Yes, sir. As I say, I do not think you can establish a bright-line test here.

QUESTION: That is pretty unsatisfactory, isn't it, from the standpoint of any effective administration of the system, and you surely ought to be able to come in here and suggest something better than that to us.

MR. BETAR: Justice O'Connor, I think my answer lies with Congress and they way that they set forth that statute.

QUESTION: I think it lies with us in interpreting it.

MR. BETAR: No, I do not, because the Seventh Circuit said that they would not fashion a special judicial exception to 6(e) for the benefit of IRS. And, that is what the government is asking you to do here. And, Justice White put his finger on it in his question earlier. They are not saying, well at this point we have established preliminary to. They are saying everything is preliminary to. They are asking for automatic access.

QUESTION: You say just the reverse. The logic of your position is just the reverse. Until litigation actually occurs, they are never going to get it.

MR. BETAR: No, sir, what I am saying is that what

Congress said because of --

QUESTION: Congress must have meant something by preliminary to.

MR. BETAR: Yes. What they said, number one, it takes a court order. Number two, they said they did not want any leakage back. Number three, they said --

QUESTION: Unless it is preliminary to, you cannot even get a court order.

MR. BETAR: Oh, yes, you can. That is what the Rule says, Your Honor. That is what the Rule says. You can have disclosure preliminary to or in connection with.

QUESTION: But you have to reach that stage before you can even get a court order. You have to reach the state of being preliminary to litigation.

MR. BETAR: Yes, sir.

QUESTION: And, your position suggests -- the logic of your position is that you never reach that stage in a tax investigation.

MR. BETAR: No, I am saying that that stage may be reached at some critical stage within IRS procedures, but I cannot define -- but we certainly have not reached it in Baggot.

QUESTION: And, you say you never could define it except on a case-to-case basis?

MR. BETAR: Yes, sir.

QUESTION: Well, I do not want to get you mixed up

on the prior case, but if your position is correct, and if the government loses Sells, the Civil Division could never get grand jury matters for the purpose of determining whether to bring litigation.

MR. BETAR: Your Honor, I am not qualified to speak to the facts of Sells. But, again, never is a bad word. I think if the Civil Division, one, showed that it was preliminary to, and number two showed a particularized need --

QUESTION: All the Tax Division, all the Civil Division would say, we are investigating. We do not know whether we are going to sue or not.

MR. BETAR: Then, I do not think that is sufficient. An investigation is not sufficient.

QUESTION: In their own investigation aside from the grand jury they would have to have reached a decision to litigate. They have not filed yet, and they may just want to confirm. That would be your position in Sells, I think.

QUESTION: And you would force the government to file suit against people with less than adequate preparation perhaps, which would put people in a worse position.

MR. BETAR: Justice O'Connor, you are getting me into the Sells case, and I do not know the Sells case. The only thing I know about Sells is that if this Court accepts any lessened standard of particularized need that they opt for in Sells, i.e. rationally related, and if this Court adopts the position that

they are taking here and giving administrative agencies automatic access to grand jury materials, you signal the death bell of the grand jury because there would be no more secrecy at all. Secrecy will be gone, and the vital function of the grand jury as a criminal accusatory body in the criminal justice system will be devastated.

QUESTION: You think if the government wins in this case, the law will have been substantially changed?

MR. BETAR: Yes, sir. I think --

QUESTION: And, that practice will have to be --

MR. BETAR: I think the law will be changed. The practice will change. Fifty percent of the test for disclosure is gone -- the preliminary to. The judge's action below will be purely ministerial. They want automatic access. They will render the --

QUESTION: You don't think the testimony that your opponent referred to is the least bit meaningful about the use of grand jury minutes by agencies?

MR. BETAR: I am not sure what you have. If you are talking about what he says, oh, it has been routine and we have done this all. Your Honor, that is certainly not true. He talked about Judge Becker, and what I suggest you do is look at the Pflaumer case and look at the Hawthorne case, both of which were written by Judge Becker --

QUESTION: You think Mr. Wallace is wrong and also Judge Becker?

MR. BETAR: No, I did not say Judge Becker was wrong. Just hear me out, please.

If you remember, Justice Stevens asked Mr. Wallace can you document it. And he said, no we cannot. Judge Becker agonized over those two decisions. He talked about how unclear 6(e) was. He asked this Court to clear up the confusion created by 6(e), and that is what lead to the 1977 amendments. And those 1977 amendments said, yes, give it to IRS for criminal purposes, but when that access is gone, it stays with the U. S. Attorney and they have to come in for an order under the preliminary to or connection with exception before they can have any of this material.

That was the whole purpose of the 1977 amendment, and there was not any routine disclosure at all. The preliminary to rule has remained unchanged since it was promulgated in 1946. Mr. Wallace is right when he says there is nothing in the history or nothing in the Advisory notes that gives you any indication what Congress thought about. All they said in the Advisory notes is we intend to continue the traditional practice of grand jury secrecy.

And I suggest to this Court -- and they cited three cases, none of which had anything to do with disclosure to an administrative agency. And, I suggest to this Court that the traditional practice of grand jury secrecy did not include turning the stuff over to IRS to use for civil purposes.

If it did, it was changed by the 1977 amendment.

QUESTION: You certainly have broadened your position already. You are saying, then, that as far as some agency outside the Department of Justice is concerned, preliminary to litigation is utterly meaningless?

MR. BETAR: No, sir.

QUESTION: You generally say, you may not turn this material over to an agency for civil purposes.

MR. BETAR: That is right. Even in Judge Becker's --

QUESTION: That was your position. Well, that means there is no preliminary to at all.

MR. BETAR: Your Honor, even in Judge Becker's opinion in Hawthorne, which the government relies on, he said if the IRS -- and we are talking about IRS there -- had access for criminal purposes, their future access -- those were his words -- would follow as though there had been no access at all.

That gets difficult, and the Chief Justice asked a question earlier. He said, well how can he take it out of this side of their mind and put it over in the other side of their mind. And, the quick answer is, they cannot, but I think Congress was trying to do the best they could to see that they would so there would not be any abusive practices in the grand jury.

Another thing I would like to speak to is he said his experience is that U. S. Attorneys cannot be manipulated. I was a federal prosecutor, both with the Anti-trust Division and the Strike Force for ten years, and I have been handling grand jury

matters for another 18 years. Manipulation is as easy as an IRS saying to the United States Attorney, subpoena the records from this bank. It may have nothing to do with his Title 18 investigation, but it would certainly help the civil investigation.

As a normal matter, a U. S. Attorney could care less, and I use that very advisedly, about tax violations. He is interested in Title 18 violations. For example, let's take an extortion case, or let's take a bribery case. His questions are who did you pay, and how much did you pay him, and why did you pay him. If a witness knows that IRS is going to be listening at the door and get all of those grand jury secrets, he is going to be very reluctant to speak, and that goes to the fourth reason for secrecy, the impact on the testimony of witnesses should be full and frank. Because he does not have any problem saying maybe, or at least he has reached a point saying, alright I am involved in a crime, and I will tell you about this bribery. I paid this public official.

But, if he thinks IRS is going to carry his house and his car away, he is going to be very reluctant to talk about that. And, that holds over to all grand jury actions that involve money. What you are doing is giving IRS a partnership in the grand jury proceeding, and I suggest that traditional grand jury history and secrecy as set forth by this Court in many, many cases, Colandra and U. S. v. Johnson, Blair, and Proctor & Gamble, and Pittsburgh Plate Glass, never contemplated such a thing.

Let me make one more point. General Motors filed an amicus brief here, and if you will look -- I have the page marked, but I cannot -- there is a long footnote, I think it is page -- it is footnote 18. IRS asked General Motors for all kinds of documents, and they said, we will give them to you. We kept copies. You do not need a 6(e) order. Here you are government --

CHIEF JUSTICE BURGER: We will look at footnote 18, counsel.

MR. BETAR: Thank you, Your Honor.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:15 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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UNITED STATES, Petitioner v. JAMES E. BAGGOT

81-1938

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