

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1329 & 85-6207

TITLE GERALD J. YOUNG, GEORGE CARISTE, SOL N. KLAYMIC AND NATHAN HELFAND,
Petitioners V. UNITED STATES, EX REL VUITTON ET FILS S.A., ET AL.;
and BARRY DEAN KLAYMINE, Petitioner V. UNITED STATES EX REL.
VUITTON ET FILS S.A., LOUIS VUITTON S.A.

PLACE Washington, D. C.

DATE January 13, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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GERALD J. YOUNG, GEORGE CARISTE, :
SOL N. KLAYMINC AND NATHAN..... :
HELFAND,..... :
Petitioners, :
v. : No. 85-1329
UNITED STATES, EX REL VUITTON :
ET FILS S.A., ET AL.; :
and :
BARRY DEAN KLAYMINC, :
Petitioner :
v. : No. 85-6207
UNITED STATES EX REL. VUITTON :
ET FILS S.A., LOUIS VUITTON S.A. :

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Washington, D.C.
Tuesday, January 13, 1987
The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 12:59 p.m.

1 APPEARANCES:

2 JAMES A. COHEN, ESQ., New York, N.Y.; on behalf
3 of the Petitioners.

4 WILLIAM C. BRYSON, ESQ., Deputy Solicitor General,
5 Department of Justice, Washington, D.C.; as
6 amicus curiae in support of Petitioners.

7 J. JOSEPH BAINTON, ESQ., Specially-Appointed
8 Attorney for United States of America,
9 New York, N.Y.; on behalf of Respondents.

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1 That injunction prohibited, among other
2 things, the manufacture or sale, offering to sell, and
3 aiding and abetting such an offer.

4 The issue -- the injunction was issued in July
5 of 1982. And in December of 1982, Sol Klaymanc sued Mr.
6 Bainton, Joseph Bainton, who was the lawyer for Vuitton
7 in the underlying trademark infringement injunction, for
8 defamation.

9 The source of the alleged defamation was an
10 article which was published in the Wall Street Journal
11 in December of 1982, and at the same time that the suit
12 began, or approximately the same time, payment on the
13 \$100,000 settlement was stopped.

14 QUESTION: (Inaudible.)

15 MR. COHEN: The defamation action was
16 discontinued subsequent to the convictions in this case.

17 In February of 1983, the sting in this matter
18 began. The sting covered a wide number of topics, and
19 by the end of March, Mr. Bainton felt, apparently, that
20 he had sufficient information to apply to the court to
21 be appointed as special prosecutor pursuant to Rule
22 42(b), as well as applied to the court for some
23 extraordinary authority to conduct the sting.

24 QUESTION: Now, he could have done that
25 whether or not he was later appointed by the court,

1 right? I mean --

2 MR. COHEN: Well, I think the answer --

3 QUESTION: You can have a freelance private
4 stinger if he wants to go out and set it up.

5 MR. COHEN: Well, except that it was
6 apparently Mr. Bainton's intention to supervise that.
7 And ethical prohibitions would prohibit him from taping
8 meetings without the consent of all the parties.

9 QUESTION: All right, except for the -- well,
10 but all of this was done before any appointment by the
11 court; is that right?

12 MR. COHEN: All of which was done?

13 QUESTION: What you've just referred to, the
14 beginning of the sting operation.

15 MR. COHEN: Yes, the sting had begun, and
16 there was no taping prior to the application --

17 QUESTION: That's right.

18 MR. COHEN: -- to be appointed as special
19 prosecutor.

20 QUESTION: So all of that could have been done
21 whether -- whether or not he was later appointed by the
22 court, right?

23 MR. COHEN: Without taping, yes.

24 QUESTION: Okay. And he could have taken all
25 that information and brought it to the court --

1 MR. COHEN: Yes.

2 QUESTION: -- or brought it to the U.S.
3 Attorney?

4 MR. COHEN: That's correct, he could have.
5 Absolutely.

6 However, no effort was made to take this
7 matter to the United States Attorney when the
8 information first came into the special prosecutor's, or
9 Bainton's -- Mr. Bainton's possession at that time.

10 The only time that any contact was --

11 QUESTION: Mr. Cohen, help me out on one other
12 -- Mr. Cohen, the thing on the sting. There was taping
13 with a videotape, is that what it was?

14 MR. COHEN: There were videotapes and audio
15 tapes. None -- as far as we know, I have no reason to
16 believe that any taping occurred prior to the time that
17 Mr. Bainton was appointed.

18 QUESTION: Right. But could those tapes --
19 forget for a moment ethical obligation -- did that
20 taping violate any State law or Federal law?

21 MR. COHEN: Not in New York, where most of
22 them took place. They would have violated California
23 law. And the only way that it was permitted in
24 California was by virtue of Mr. Bainton's status as a
25 special prosecutor.

1 Indeed, he contacted a member of the Los
2 Angeles County District Attorney's Office in effect to
3 notify them and to receive, I suppose, advance --
4 advance approval.

5 QUESTION: Why does his status as a special
6 prosecutor exempt him from California State law?

7 MR. COHEN: Because -- I don't -- I don't know
8 that it -- I think that the answer is that the
9 California authorities treated Mr. Bainton as an
10 Assistant United States Attorney.

11 The State law of California prohibiting taping
12 things would not apply to a Federal prosecutor.

13 QUESTION: I see. Regardless of whether he
14 had the court approval? Just flatly --

15 MR. COHEN: I think that's correct, yes.

16 QUESTION: I see.

17 MR. COHEN: United States Attorneys in
18 California are permitted to do --

19 QUESTION: But apart from the California
20 incident, you don't claim there's any violation of law?
21 Just a violation of ethical responsibilities for a
22 lawyer to supervise this kind of an operation?

23 MR. COHEN: That's correct.

24 QUESTION: This isn't wire-tapping you're
25 talking about? Just taping?

1 MR. COHEN: No, it's surveillance-type
2 taping. In a hotel room, they were done. And audio
3 taping on telephones.

4 QUESTION: And the ethical concern is that
5 lawyers aren't supposed to lie; is that it?

6 MR. COHEN: That's among the ethical concerns,
7 yes.

8 QUESTION: What other -- because they often, I
9 know in these trademark infringement situations, they
10 often employ private investigators who take on a role of
11 someone whom they really aren't, and tell a lot of
12 falsehoods.

13 MR. COHEN: Well, that happened in this case
14 too.

15 QUESTION: And is that -- you think all of
16 those activities are ethically improper for a lawyer to
17 permit people working on his side of the case to engage
18 in?

19 MR. COHEN: For a lawyer who's representing
20 the two clients, yes. For a lawyer who simultaneously
21 represents, or purports to represent the -- represent
22 the interests of the United States and at the same time
23 represents a private party; I think that's improper.

24 QUESTION: Oh, that -- I understand your
25 conflict of interest argument. But apart from that, you

1 think that it's wrong for a lawyer in a trademark
2 infringement, or one of these cases, to employ private
3 investigators who use a cover story and a lot of
4 falsehoods?

5 MR. COHEN: No, I don't have a serious problem
6 with that if --

7 QUESTION: I see.

8 MR. COHEN: -- if it's done under proper
9 circumstances. We discuss stings --

10 QUESTION: Right. Really, my bottom line is,
11 I'm just not quite clear on why the sting has much to do
12 with your basic argument?

13 MR. COHEN: Well, I think that it has to do
14 this with it: In a sting, the government, in effect,
15 participates in the crime itself. And it's been --

16 QUESTION: But it isn't a crime.

17 MR. COHEN: Pardon me?

18 QUESTION: My point is, it isn't even a crime.

19 QUESTION: (Inaudible.)

20 MR. COHEN: No, I understand that, Justice
21 Rehnquist. And I'm not suggesting that this Court
22 should -- should in anyway eliminate it from the
23 repertoire of tools that law enforcement personnel use.

24 It is a much different thing, though, when
25 it's used by a private attorney who's simply been given

1 a label, who has no training and no accountability to
2 anyone.

3 So I think that's the difference. And I think
4 that there are also intrinsic problems within it.

5 QUESTION: I can see that's a factual
6 difference. Why does it make any legal difference?

7 MR. COHEN: Why does the fact that a private
8 attorney did it --

9 QUESTION: Yes.

10 MR. COHEN: -- who had the conflicting
11 obligations? Because you can't tell how those
12 conflicting interests influence the investigation and
13 prosecution.

14 There's no way that we can sort through this
15 record and say, well, at this point in time, Mr. Bainton
16 was acting properly in the interests of the United
17 States. And at this point in time, it seemed that he
18 was really acting for Vuitton.

19 QUESTION: But it doesn't matter, as far as
20 the sting is concerned. You've acknowledge he could
21 have done it privately and then handed over the results
22 of it to the prosecutor.

23 MR. COHEN: Well, the difference --

24 QUESTION: It doesn't matter during the sting
25 stage whether he's acting in his own interest or in the

1 government's interest or in his client's interest. It
2 doesn't matter, does it?

3 MR. COHEN: Well, it does matter if you're
4 permitting this person to do things that he wouldn't
5 otherwise be able to do.

6 And that's exactly what happened here.

7 QUESTION: But the point is, he would
8 otherwise be able to do it, as a purely private lawyer.

9 MR. COHEN: He wouldn't have been able to
10 tape, for example.

11 QUESTION: He could hire a detective firm --
12 why couldn't he?

13 MR. COHEN: Because of the ethical
14 prohibitions which exist in our profession.

15 QUESTION: I think you just -- well, I don't.
16 I thought you just said to me it was common in
17 enforcement of this kind of --

18 MR. COHEN: I'm sorry, Justice Stevens. I
19 thought you were positing an example where someone goes
20 out and pretends to be someone else. That's not the
21 taping.

22 There are ethical prohibitions against
23 misrepresentation and deceit. That would arguably cover
24 that kind of conduct.

25 But commonly, these things are done not by the

1 lawyers but by the investigative agencies.

2 QUESTION: Sure, but under the supervision of
3 a lawyer. And that's what you've got here.

4 MR. COHEN: Well, you have a little more than
5 that here, Your Honor. You have Mr. Bainton and his
6 associate, Mr. Devlin, playing a very active role at
7 every point in the proceedings here.

8 This isn't simply, give us a monthly report
9 and a monthly bill. This is an active role in every
10 single step of these proceedings.

11 QUESTION: Is there some reason why
12 misrepresentation and deceit by a lawyer is okay so long
13 as he's a United States Attorney? How does that --

14 MR. COHEN: Well, yes, there is, I think. The
15 answer to that question is that when it's -- I'm sorry?

16 QUESTION: Is that in the canons of ethics? I
17 mean, is there a distinction in the canons on that? I
18 mean --

19 MR. COHEN: Well, there's not a distinction in
20 the canons. But when it's done by the government, we
21 believe, at least, that the government is doing it for
22 one reason and one reason only, in the interest of the
23 public to ferret out crime.

24 When it's done by someone who has two
25 interests, we can't be sure why it's being done. We

1 can't be sure, in effect, how it's being done.

2 The decisions of this Court and other courts
3 which permit stings and other investigative techniques,
4 which have at times been said to create problems or
5 concerns about defendants' rights, and the integrity of
6 the system, have all been involved with a public
7 prosecutor, who was trained, who was accountable, to
8 higher ups in the U.S. Attorney's Office and in the
9 Justice Department.

10 QUESTION: I think, as a matter of original
11 inquiry, that perhaps the standards would be higher for
12 a public prosecutor than for a private attorney?

13 MR. COHEN: Well, you might. Except that we
14 are not concerned, I think, rightfully, that as a
15 general matter public prosecutors will misuse their
16 office in defense of some other client; because there is
17 no other client.

18 In this case, when you have the attorney
19 purporting to represent the interests of the United
20 States, and at the same time, representing that second
21 client who has a very serious interest in the United
22 States' case, we just can't tell. We can't be confident.

23 QUESTION: (Inaudible) had only one client
24 during the sting here. He wasn't representing the
25 United States yet.

1 MR. COHEN: No, that's not true, Your Honor.
2 He was appointed as a special prosecutor on March 31st
3 of 1983. At that point in time, the formal
4 investigation began.

5 Prior to that --

6 QUESTION: Prior to that --

7 MR. COHEN: -- there had just been
8 conversations --

9 QUESTION: -- he had just one client? You say
10 the sting began before he became a special prosecutor?

11 MR. COHEN: Yes, the sting did begin. The
12 evidence that was introduced at trial, though, didn't --
13 was created under the special prosecutor's mandate.

14 And that all -- and that was at a point in
15 time when he was representing the United States and
16 representing Vuitton.

17 QUESTION: But when it gets here, it's the
18 United States as the respondent.

19 MR. COHEN: Well, that's caused some
20 confusion, Your Honor, because --

21 QUESTION: Some confusion?

22 (Laughter.)

23 MR. COHEN: That has caused some confusion,
24 Your Honor. As you obviously know, the government has
25 submitted amicus briefs supporting the notion that the

1 prosecutor should be disinterested.

2 I don't think that the mere labelling someone
3 as a special prosecutor, as a United States Attorney,
4 ought to dispose of this case.

5 It's just -- and this case really illustrates,
6 I think, why not.

7 QUESTION: (Inaudible.)

8 MR. COHEN: I understand that, Your Honor.

9 QUESTION: Well, I have problems with that.

10 MR. COHEN: Well, I meant that I understand
11 that's a fact. I have some problems with it as well.

12 Speaking of the U.S. Attorney, Judge Brieant,
13 who I think was initially sensitive to the possibility
14 that some problems would exist, and also to the alleged
15 magnitude of the case, as it was explained to him,
16 directed Mr. Brieant -- Mr. Brieant; Mr. Bainton, on
17 April 6th to -- which is about five days into the --
18 into the taped portion of the sting, and about five days
19 after he was appointed special prosecutor -- to, quote,
20 fully debrief the United States Attorney.

21 Well, he -- he -- I think, Your Honor, and I
22 have to go back to the transcript to be sure, he
23 directed Mr. Bainton to fully debrief the U.S. Attorney,
24 and said that he wasn't requiring the United States
25 Attorney to come in; that it was simply a suggestion.

1 In any event, I don't think it's important to
2 quarrel over whether he was directed or whether it was
3 suggested. The full debriefing never occurred. Mr.
4 Bainton sent a short, two paragraph letter, which is in
5 the appendix, to Mr. Pedowitz, who was at that point,
6 was chief of the criminal division. And apparently
7 never receiving a reply, contacted him sometime later,
8 and the reply was apparently "good luck".

9 The U.S. Attorney was never fully offered this
10 case. The matter was never referred to the United
11 States Attorney by the District Court.

12 In short, the procedure suggested by the
13 government, that is, the Solicitor General's Office, in
14 their brief, were never complied with in this case.

15 The tapes and the conversations that occurred
16 during the investigation covered a wide variety of
17 topics. They first discussed the defamation action.
18 And there was an apparent attempt on the tapes by Mr.
19 Weinberg to elicit an admission from Sol Klaymenc that
20 in fact the defamation action was frivolous.

21 There was an attempt to discover the financial
22 assets of Sol Klaymenc. It also discussed, in fact --
23 discussed mostly plans to manufacture counterfeit bags
24 in Haiti.

25 Also discussed in the tapes, or stated on the

1 tapes, were suggestions by Weinberg in response to
2 inquiries from one or more of the defendants in this
3 case that in fact the proposed plan to manufacture bags
4 in Haiti and distribute them elsewhere was not illegal.

5 And I just would wish to emphasize that those
6 kinds of lulling statements occur, not in the context of
7 a heroin conspiracy or a cocaine conspiracy, something
8 that it is beyond any doubt at all is wrong, and you
9 don't need to be told that it is not, this occurs in the
10 context of an injunction which had very specific, proper
11 business purposes, to protect Vuitton's trademark
12 rights.

13 In that context, suggesting to someone, as
14 Weinberg did time and time again, that the plan that
15 they were discussing, and the scheme, if you will, that
16 was afoot, would not violate the injunction is
17 particularly offensive.

18 The interests that the special prosecutor
19 labored under here were not only the duty to Vuitton.
20 In fact, there was another client, Fendi, who was also
21 apparently a very expensive trademark, because Mr. --
22 Mr. Bainton also represented Fendi. And in fact, in
23 discharging Mr. Rochman, who was originally a defendant
24 in this case, from his civil obligations for Vuitton as
25 attorney for Fendi, Mr. Bainton discharged Mr. Rochman

1 as well.

2 And that's contained in a letter that is also
3 in the appendix.

4 There's the \$100,000 judgment against Sol
5 Klayminc and the family companies, including Barry
6 Klayminc. That was -- as I say, payment was stopped on
7 that with about \$81,000 left to pay.

8 There's a \$750,000 judgment against petitioner
9 Young. Petitioner Young was involved in a case in
10 California in 1981, in which he agreed to an injunction
11 prohibiting him from manufacturing, selling, offering to
12 sell, counterfeit Louis Vuitton bags.

13 As a part of that agreement, there was a
14 liquidated damages provision of \$750,000 that would only
15 become due and owing if Young violated that injunction.

16 In addition to that, there's a personal
17 interest the special prosecutor had, because he was a
18 defendant in a defamation action which was begun before
19 the sting.

20 QUESTION: Mr. Cohen, let me read you, if I
21 may, a sentence from the Second Circuit opinion, and ask
22 you if that describes -- Judge Lombard's opinion says:
23 The fact that Sol Klayminc had brought suit against
24 Bainton and the New York Courts alleging harrassment and
25 other acts is entitled to no weight as the suit was

1 clearly frivolous. It was never pressed, and was
2 finally dismissed by consent.

3 Is that the suit you're referring to?

4 MR. COHEN: That is the suit, Your Honor. And
5 the fact that it was frivolous -- and I'm not qualified
6 to say whether it was frivolous, and with all due
7 respect to Judge Lombard, I don't think that he is
8 either -- there is -- there is nothing -- there is
9 nothing that prevents or has been explored, Mr. Bainton
10 from being concerned about that.

11 The suit was for two a quarter million
12 dollars. Somebody hired a lawyer to represent him. The
13 matter was discontinued after a claim of prosecutorial
14 immunity.

15 Now, whether or not it was frivolous is really
16 not the point. What we're really talking about here is
17 an appearance of a conflict of interest.

18 And I think it clearly existed when the
19 prosecutor is a defendant in a suit such as that brought
20 before any prosecution. His law firm was also defendant
21 in that action.

22 QUESTION: So your major -- you rely chiefly
23 on the conflict on the prosecutor having another client?

24 MR. COHEN: Yes, Your Honor, that's correct.

25 QUESTION: But you do -- do you argue in brief

1 that a private attorney should never be appointed, no
2 matter who he is?

3 MR. COHEN: Well, we've taken a couple of
4 different positions in the brief.

5 QUESTION: Well, how about the answer to my
6 question, yes or no.

7 MR. COHEN: The answer is that except in a
8 serious contempt, the answer is yes.

9 QUESTION: Yes. Well, do you abandon that?

10 MR. COHEN: No. For a serious criminal
11 contempt, the private attorney for an underlying party
12 should never be appointed.

13 QUESTION: Well, no, but how about any private
14 attorney?

15 MR. COHEN: Oh, no, no, no. We don't -- Your
16 Honor, I'm sorry, I misunderstood your question.

17 We do agree with the Solicitor General's
18 position that it would be permissible under Rule 42(b)
19 to appoint a private, disinterested attorney.

20 QUESTION: Whether he's ever had -- been in a
21 criminal court in his whole life?

22 MR. COHEN: Well, on the contrary, Your Honor,
23 there's lot of former prosecutors out --

24 QUESTION: Well, I know, I know. But so your
25 answer is that the court may appoint a private attorney.

1 MR. COHEN: A private, disinterested attorney,
2 yes.

3 QUESTION: And need not refer it to the U.S.
4 Attorney at all?

5 MR. COHEN: No, we happen to agree that the
6 proper procedure of considering separation of powers
7 concept should be to at least refer it to the executive
8 branch.

9 QUESTION: Well, if you appoint a private
10 attorney who's not representing one of the plaintiffs,
11 how does the attorney get paid?

12 MR. COHEN: Well, Your Honor, the
13 administrative office of the United States court has a
14 fund which has been used to pay disinterested private
15 attorneys before on a few occasions.

16 QUESTION: As a matter of course?

17 MR. COHEN: Apparently, yes, Your Honor.
18 There's the lodging that Mr. Bainton put in, a letter
19 that he sent to the administrative office of the courts;
20 and there are conversations that the Solicitor General
21 office -- Solicitor General's office has had with the
22 general counsel of that unit.

23 And apparently, there is a fund from which to
24 pay. Now, the fund is not overwhelming in amount. And
25 it hasn't been tapped that frequently. But it has been

1 tapped in at least three occasions that we know of.

2 QUESTION: And it's not sure to be there next
3 year.

4 MR. COHEN: No, but nor are lots of other
5 funds, Justice Scalia.

6 QUESTION: But to the extent that the court
7 has to rely on that fund to any attorney that it
8 appoints, the court's in not much better shape than it
9 is in having to rely on the United States Attorney?

10 MR. COHEN: Well --

11 QUESTION: It's at the mercy of another
12 branch, right?

13 MR. COHEN: I think that's true, Justice
14 Scalia. But to the extent that the courts will always
15 have to depend on another branch's muscle, if you will,
16 they're always at that mercy.

17 The U.S. Attorney's manual, for example, and
18 the Justice Department, by their very presence here, I
19 think, demonstrates the proper respect due to courts.

20 And I think that those kinds of concerns,
21 whereas I don't say that they're completely frivolous, I
22 just think they're not very real.

23 The interesting part of this case is that if
24 Mr. Bainton had been a real Assistant United States
25 Attorney he would be subject to prosecution under 18

1 U.S.C. 208(a), which is the conflict of interest statute
2 that Congress has passed in order to prevent just this
3 sort of thing.

4 If I may, I'd like to reserve the rest of my
5 time for rebuttal.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
7 Cohen.

8 We'll hear now from you, Mr. Bryson.

9 ORAL ARGUMENT OF WILLIAM C. BRYSON, ESQ.,
10 AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

11 MR. BRYSON: Mr. Chief Justice, and may it
12 please the Court:

13 I am representing one of the two parties which
14 is calling itself the government in this case.

15 For clarification, of course, Mr. Bainton is
16 the special prosecutor. I'll refer to him as the
17 special prosecutor, and I'll refer to the positions that
18 the Department of Justice is arguing before the Court as
19 the government's position.

20 Now, the government's position in this case is
21 a little different from the position taken by either of
22 the other two parties.

23 Basically, it can be summarized in four
24 propositions.

25 First, that ordinarily it is the United States

1 Attorney who should prosecute serious contempts.

2 Second, that in some special cases -- and we
3 think that for practical reasons, this is going to be a
4 very limited class -- but in some special cases, it is
5 appropriate for the court to appoint a private attorney
6 to prosecute a criminal contempt.

7 Third, that that should be done, if at all,
8 only after the United States Attorney has been given the
9 case for consideration and has declined the prosecution.

10 And fourth -- excuse me -- that the attorney
11 for the opposing party in a civil case should never be
12 the party who is appointed to prosecute a criminal -- a
13 serious criminal contempt.

14 QUESTION: Mr. Bryson, could I ask about
15 number two? Where does the court get authority to
16 appoint a special prosecutor?

17 MR. BRYSON: Well, I think there are two
18 answers to that, Your Honor. First, Rule 42(b) does
19 contain a reference -- it's a very cryptic reference, to
20 be sure. But it is a reference to the notion that
21 either the U.S. Attorney or an attorney appointed by the
22 court can handle criminal contempts.

23 It does not specify what that attorney is to
24 do, other than to take part in the notice-taking process.

25 QUESTION: Well, let's --

1 MR. BRYSON: But in any event, contemplates
2 the participation of a private attorney in some respect.

3 QUESTION: But doesn't that --

4 MR. BRYSON: Our second answer -- I'm sorry.

5 QUESTION: Go ahead. Doesn't that contravene
6 the Constitution, which requires that --

7 MR. BRYSON: Well, I don't think so, because
8 my second answer is that I think criminal contempt is a
9 different animal in some important respects from the
10 typical criminal offense.

11 And we believe that it is inherent, even if
12 there were no Rule 42(b), it is inherent in the power of
13 the courts to enforce their judgments that they are not
14 wholly dependent on the executive branch to enforce
15 those judgments.

16 They have --

17 QUESTION: Isn't this person an officer? An
18 officer?

19 MR. BRYSON: We don't believe he is an
20 officer. We believe he would fall in the Buckley v.
21 Valeo sense, more in the category of an employee.

22 But even -- excuse me -- if he were --

23 QUESTION: Is a regular prosecutor not an
24 officer?

25 MR. BRYSON: Well, we believe he is not an

1 officer but an employee. That is to say, his task, his
2 responsibilities here, are not so broad.

3 QUESTION: A United States Attorney is --

4 MR. BRYSON: I'm sorry. And United States
5 Attorney, yes.

6 QUESTION: He is an officer?

7 MR. BRYSON: That's right.

8 QUESTION: But this individual who does the
9 same thing is not?

10 MR. BRYSON: Well, he does, Your Honor, I
11 think do the same thing, because he is limited in
12 several very important respects.

13 First of all, he doesn't have the breadth of
14 responsibility for deciding who is to be prosecuted. He
15 has been given an assignment to pursue a particular
16 case. In this sense, he's more like an Assistant United
17 States Attorney.

18 And second, he is only given one case. He is
19 not given the task of deciding throughout the world of
20 potential criminal offenses, which ones to pursue.

21 QUESTION: Well, I'm glad you haven't made the
22 argument that your brief made. I have real troubles if
23 he is an officer, because you handled that -- the
24 government handled that quite readily in the brief by
25 simply saying that the Constitution authorizes the

1 appointment of officers by the courts.

2 MR. BRYSON: Well, that, I think, Your Honor,
3 would only be so if we accept that Rule 42(b) is a
4 legislative delegation to the courts of the authority to
5 --

6 QUESTION: Well, Rule 43(b) I don't think
7 helps you, because Rules 43(b) was never passed by the
8 Congress.

9 MR. BRYSON: Well, that's right. And that's
10 one of the --

11 QUESTION: The Constitution requires that the
12 Congress may by law vest appointment in the court.

13 MR. BRYSON: That's correct, and that's one of
14 the problems.

15 QUESTION: And Rules 43(b) has never been
16 enacted by the Congress.

17 MR. BRYSON: That's correct.

18 QUESTION: So that argument's wrong?

19 MR. BRYSON: Pardon?

20 QUESTION: So that argument's wrong?

21 MR. BRYSON: Well, I think, Your Honor, the --
22 there is some force to the argument. And I think -- I
23 recognize your point.

24 I think there is some force to the argument
25 that the appointments clause does not get in the way of

1 -- show a constitutional disposition against -- this
2 kind of appointment.

3 Because if Congress had, for example, more
4 specifically designated the special prosecutor as being
5 someone who could be appointed, then we would be beyond
6 appointments clause problem.

7 So -- excuse me -- it's not a constitutional
8 problem. At most, it's a question of the degree of the
9 specificity of the authorizing statute.

10 But beyond that, I think it's important to
11 point out some of the practical problems that this kind
12 of conflict of interest creates.

13 We point out in the brief that the statutes
14 and regulations which Congress has imposed on regular
15 Department of Justice employees establish a Federal
16 policy against just this kind of conflict of interest.

17 We think it's a general policy. We think it's
18 a policy that this Court ought to apply to this kind of
19 conflicting representation where the United States and a
20 private party are both being represented by the same
21 attorney.

22 Section 208(a) was pointed out. Section 528
23 of Title XXVIII states that conflicts of interest will
24 not be permitted in cases in which the United States --
25 an Assistant United States Attorney is carrying forward

1 a prosecution.

2 And that statute directs the government to
3 pass particular regulations dealing with conflicts of
4 interest. And among those regulations is one that would
5 apply directly in this case, Section 735-4, stating that
6 if an organization has a substantial interest in the
7 outcome of a case, and that organization is one with
8 which the attorney is allied in the personal -- in some
9 personal sense, that the attorney is disqualified from
10 proceeding with the prosecution or investigation.

11 Now, the practical problems here are very real.

12 QUESTION: (Inaudible) addressed to this
13 situation, Mr. Bryson?

14 MR. BRYSON: Well, I think it would be
15 addressed, Your Honor, to a situation where, for example
16 --

17 QUESTION: He's in the ABA, or the ABA has an
18 interest in the outcome; that's what that sounds like.

19 MR. BRYSON: Well, I think it would clearly
20 apply, Your Honor, to a case where, for example, if I
21 continued to represent a private party, and that private
22 party had an interest in the outcome of a lawsuit in
23 which I was the prosecutor, that would clearly be
24 covered.

25 Now, there might be closer questions dealing

1 with organizations such as the ABA, but clearly, in a
2 case like this, that regulation would cover a
3 prosecutor, and the prosecutor would be disqualified
4 from proceeding with the investigation or prosecution.

5 Now, as a practical matter, there are special
6 problems in this kind of case, one of which is, for
7 example, mention was made of Mr. Young.

8 Mr. Young is one of the defendants who
9 apparently had some assets, and he had a \$750,000
10 judgment which was subject to execution if he were
11 convicted.

12 Well, that is an enormous incentive to choose
13 Mr. Young as one of the defendants to prosecute, as
14 opposed to, for example, using Mr. Young as a witness
15 against some of the other defendants.

16 Similarly, in current times, when there is a
17 specific Federal statute prohibiting trademark
18 infringement, the Section 402 of the contempt statutes
19 comes into play, and that statute provides that a fine
20 can either go to the -- the victim or to the United
21 States.

22 Obviously, the attorney for the victim is
23 going to have an interest to see to it, to urge the
24 court, to have the fine paid to the victim as opposed to
25 the United States.

1 QUESTION: Well, Mr. Bryson, what you say I
2 don't doubt makes a good deal of sense in the abstract.

3 But if we adopt your position that people with
4 a conflict of interest can't be appointed special
5 prosecutors, that it first have to go to the United
6 States Attorney, the court is left without any realistic
7 way of enforcing an injunction or prosecuting a
8 contemner, unless the U.S. Attorney approves.

9 MR. BRYSON: Well, Your Honor, I have a couple
10 of answers.

11 First of all, I think almost invariably the
12 United States Attorney will prosecute such cases.
13 That's the policy of the Justice Department as set out
14 in the section of the U.S. Attorney's manual that we
15 have -- we have quoted in the brief.

16 Second, there is a fallback in the
17 availability of administrative office funds.

18 And third -- and I think this is not an
19 insignificant factor -- there are law firms that are
20 willing to offer services on a pro bono basis, which
21 happens on a regular -- regular -- from time to time, in
22 cases in which, for example, a mandamus action is
23 brought against a judge, and none of the parties is
24 prepared to defend the judge.

25 The judge can be defended on a pro bono basis

1 by a law firm that the judge selects.

2 So --

3 QUESTION: Mr. Bryson, what's the oldest case
4 you have that gives the courts authorities to cite for
5 criminal contempt without a statute and on -- with their
6 own appointment of a prosecutor for violation of one of
7 their orders, as opposed to for, you know, contempt that
8 occurs in front of them, an insult to their dignity, an
9 obstruction of their processes, but just disobeying one
10 of their judgments?

11 What's the oldest case you have that allows
12 the court some inherent power to punish for this?

13 MR. BRYSON: Well, the McCann case would fall
14 into that category. Most of the cases -- the problem
15 is, most of these cases have involved very small
16 contempts. And the degree to which somebody is
17 participating as a special prosecutor is on a very
18 limited basis.

19 In McCann, it may not have gone much beyond
20 simply the notice stage, which was authorized -- was
21 subsequently authorized by Rule 42(b). But certainly
22 McCann and some of the other cases of about that age
23 that are cited in Mr. Bainton's brief would fall
24 generally into that category.

25 And that's from the middle thirties.

1 Thank aou.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
3 Bryson.

4 Mr. Bainton, we'll hear from you now.

5 ORAL ARGUMENT OF J. JOSEPH BAINTON, ESQ.,
6 ON BEHALF OF THE RESPONDENTS.

7 MR. BAINTON: Mr. Chief Justice, and may it
8 please the Court:

9 The Chief Justice's last question indicates to
10 me that the Court is focussing on the real issue
11 presented by this case, and that is, how are the Federal
12 courts going to enforce their orders?

13 This Court, in its decision, among others, in
14 Gompers and Debs has long recognized -- we agree,
15 petitioners agree, and the Solicitor General agrees --
16 that if the judiciary is to maintain its status as a
17 coequal branch of government, it has to have the ability
18 to enforce its orders.

19 QUESTION: How does Congress enforce its
20 orders?

21 MR. BAINTON: Through the executive branch,
22 Your Honor. But that -- Your Honor, that is not -- that
23 is not what this Court held in Gompers. That's not what
24 this Court held in McCann -- excuse me, in In re Debs.

25 I think that if a Federal court is going to be

1 able to maintain its status as an equal branch of
2 government, it simply has to be able to enforce its
3 orders.

4 This Court has consistently held that, and no
5 one has contended to the contrary.

6 So I suggest that the real issue is, how do
7 you do that? And the only -- and the historical answer
8 to that question, and the oldest --

9 QUESTION: How long have we consistently held
10 that?

11 MR. BAINTON: 1911, Your Honor.

12 QUESTION: Older than the thirties?

13 MR. BAINTON: 1911 is the oldest I have, which
14 is Gompers, Your Honor. The first appointment is In re
15 Debs, which was decided by this Court in 1895.

16 The Rule 42(b) was enacted in 1946. Now, in
17 Professor Orfields -- who was the reporter to the
18 advisory committee on the Federal Rules treatise -- he
19 indicated that the advisory committee and therefore
20 presumptively this Court, in enacting Rule 42(b), meant
21 to codify prior existing practice.

22 And the prior existing practice was described
23 in the Second Circuit's decision in McCann v. New York
24 Stock Exchange.

25 In that case, the Second Circuit held that it

1 was not only allowable, but the preferred practice, in
2 cases such as this one, for the Court to specially
3 appoint the attorney for the civil litigant aggrieved by
4 the disobedience of the Federal court order.

5 Now Rule 57 of the Federal Rules of Criminal
6 Procedure also comes into play to the extent that it
7 says, in substance, any -- that -- excuse me, as it says
8 in substance that all prior practice is not excluded.

9 To the extent that the Court does not find
10 adequate authority to do what it did within Rule 42(b),
11 which is what the District Court found in both opinions
12 and the Second Circuit, we suggest that the power
13 question can be resolved ultimately by reference to the
14 All Writs Act.

15 So I don't think that there is a serious
16 question as to whether the court has the power to do
17 what it did in this and other cases.

18 Of course, it can't exercise this power in a
19 way that deprives a defendant of his due process
20 rights. And that is the question that is really
21 presented by this case.

22 What has -- what this Court I think has to do
23 is balance the interests of an independent judiciary
24 against the risk that this process might somehow
25 compromise the rights of a defendant.

1 In that balancing process, I think the most
2 important factor for the Court to take into account is
3 the very special role that the District Court judge
4 plays in these cases.

5 As Mr. Bryson pointed out, the decision to
6 prosecute, to continue the prosecution, is not reposed
7 with the District -- excuse me, with the civil
8 litigant's lawyer.

9 The decision in this case, and Musidor and
10 McCann and the others, confers no right on a civil
11 litigant. As a result of the Second Circuit's opinion,
12 no civil litigant can go to a District Court judge and
13 say, I have a trademark, I have an injunction, and I
14 have what I think is evidence of probable cause of a
15 violation of that injunction. I want a criminal
16 prosecution.

17 That decision rests completely within the
18 discretion of the District Court judge. And that's
19 important. And I think that answers most, if not all,
20 of the arguments raised both by the petitioners and the
21 Solicitor General.

22 There exists within our system of justice a
23 series of systemic safeguards that we think adequately
24 protect any possible compromise of the defendant's right
25 to a fair trial; not a perfect trial, a fair trial.

1 As this Court held in Marshall v. Jerrico,
2 there is not a constitutional right to a completely
3 unbiased prosecutor. In that case, the Court used the
4 phrase, too remote and insubstantial.

5 And that's what I most respectfully suggest
6 the complaint's about this practice are, too remote and
7 insubstantial.

8 There has been no claim that anything that
9 occurred in this case, or any other case to my
10 knowledge, was improper, was different than the U.S.
11 Attorney under different circumstances might have done.

12 QUESTION: Mr. Bainton --

13 MR. BAINTON: Yes, sir.

14 QUESTION: -- let's take a very important and
15 massive court decree, like the old AT&T decree, which
16 was essentially the structure for our telecommunications
17 industry for decades.

18 Do you think the Court could have just been,
19 in effect, legislature, judge and jury by enforcing that
20 decree through appointing its own prosecutors to
21 investigate whether AT&T was abiding by all the
22 constraints?

23 Doesn't that trouble you as far as separation
24 of powers is concerned?

25 MR. BAINTON: Your Honor, if I'm not mistaken,

1 I believe that case was brought by the Justice
2 Department, wasn't it?

3 QUESTION: Well, that's right.k

4 MR. BAINTON: What you're saying is, by
5 analogy, if a private party had sought the same sort of
6 relief, and obtained it?

7 QUESTION: That's right, that's right. It
8 could have been brought by a private party, and you
9 could have had a massive decree like that. Isn't there
10 some problem about -- I mean, it's fine to have judicial
11 independence.

12 But I thought that there were checks and
13 balances, and that all of the branches sort of depend on
14 one another to a degree.

15 MR. BAINTON: Your Honor, I don't know that --

16 QUESTION: You're saying that we have the
17 right to make the judgment and to enforce it.

18 MR. BAINTON: That's correct, Your Honor. It
19 is your job to decide what your judgment means. And if
20 you -- and having done that, you have to enforce that.

21 Let me give you an example, if I may, going to
22 the old law school example of Blackacre.

23 The Federal District Court Judge says, Mr.
24 Bainton, you can have possession of Blackacre. I go to
25 Blackacre, and the person there is standing there with a

1 shotgun and says, if you step across that border, I'm
2 going to blow your brains out.

3 I go back to the District Court judge. He
4 sends me to the U.S. Attorney. The U.S. Attorney says,
5 you know, that's terrible. The judge said you're
6 entitled to have possession of Blackacre. But I'm very
7 busy. We have a big cocaine trial in this district. I
8 don't have anybody to help you.

9 I go back to the District Court judge and say,
10 judge, I haven't got possession of Blackacre. What are
11 you going to do about it?

12 The judge says, well, can't help you. The
13 U.S. Attorney can't -- the U.S. Attorney has to act as a
14 check and balance. And although my order is plain and
15 clear and in no way ambiguous, it won't be enforced.

16 Your Honor, I think that the courts have to
17 enforce their orders. They have to have the ability to
18 enforce their orders.

19 QUESTION: Mr. Bainton, with your very good
20 example of Blackacre, wasn't the remedy one of
21 ejectment, which was enforceable by an executive
22 officer?

23 He didn't have to go back to court to enforce
24 an ejectment order.

25 MR. BAINTON: Your Honor -- Your Honor, when

1 -- when the executive branch declines to enforce a court
2 order, rightfully or wrongfully, a court must be able to
3 see that that order is given force and effect.

4 What happens when -- I'll give you another
5 example -- what happens when someone subpoenas some
6 tapes from the White House, and the subpoena is not
7 complied with. And the -- and the Attorney General
8 says, we're not going to seek to enforce that order.

9 QUESTION: Mr. Bainton --

10 MR. BAINTON: Surely the District Court must
11 be able to compel the production of those tapes under
12 those circumstances.

13 QUESTION: Suppose either you or the judge
14 asked the prosecutor to appoint somebody here. Could he
15 have appointed you? Could the prosecutor have appointed
16 you in this case?

17 MR. BAINTON: The Attorney General could have,
18 Your Honor, yes. Not the U.S. Attorney. The Attorney
19 General.

20 QUESTION: What are you -- what is he going to
21 do with that conflict of interest statute?

22 MR. BAINTON: Oh, I'm sorry, I see your
23 question.

24 QUESTION: Yes. He couldn't have appointed
25 you?

1 MR. BAINTON: I don't think, Your Honor --

2 QUESTION: He couldn't have. Do you agree?

3 MR. BAINTON: No, I don't agree, Your Honor.

4 QUESTION: Well, how could he, and -- and just
5 violate the statute?

6 MR. BAINTON: Your Honor -- Your Honor, I
7 don't think that the -- that there is a conflict of
8 interest. The interests of the civil litigant in this
9 case were coterminous, no more and no less, than that of
10 the District Court; and that is, that the court's order
11 be enforced.

12 QUESTION: (Inaudible) against the court, not
13 the individual.

14 MR. BAINTON: I'm sorry, I didn't hear you.

15 QUESTION: Contempt is against the court.

16 MR. BAINTON: Yes, but the --

17 QUESTION: Not the individual.

18 MR. BAINTON: -- we're talking about
19 interests, though, Justice Marshall. And the interests
20 --

21 QUESTION: And you only had one interest?

22 MR. BAINTON: I had one interest, and that is
23 that the court order be obeyed.

24 QUESTION: Your client.

25 MR. BAINTON: Pardon me, sir?

1 QUESTION: Your client.

2 MR. BAINTON: No, that is not correct, sir.

3 That is not correct. My client -- the court's
4 interests, and my interests, are simply that court
5 orders be obeyed.

6 QUESTION: You still had the same client.

7 MR. BAINTON: That's correct, sir.

8 QUESTION: But you're arguing for the client
9 now or the court?

10 MR. BAINTON: No, Your Honor, I --

11 QUESTION: Well, I just want to know which hat
12 you have on.

13 MR. BAINTON: Your Honor, there is no question
14 --

15 QUESTION: You're wearing two hats.

16 MR. BAINTON: -- as to which hat I'm wearing.
17 And the record in this case is pristine in the sense
18 that I have, rightly or wrongly, represented the United
19 States of America from the time of my appointment. The
20 --

21 QUESTION: (Inaudible) pristine.

22 MR. BAINTON: Your Honor, as to who I appeared
23 for, I'm sorry, I respectfully disagree; that is the
24 word I chose to use.

25 There has been no question at any stage in

1 this proceeding that it was other than a criminal
2 proceeding. Which is required, at least under the
3 Second Circuit's decision in McCann.

4 QUESTION: Mr. Bainton, would the case be
5 different if your client had both a claim for damages,
6 because of a lot of trademark infringement and the like,
7 which would be enforceable by a civil contempt, as well
8 as the criminal proceeding? Would then there be a
9 conflict?

10 MR. BAINTON: No, sir. That's true in every
11 case, and there's no practical conflict. And let me
12 explain why if I may.

13 The burden of proof in any criminal case is
14 obviously proof beyond a reasonable doubt. In a civil
15 case, it's --

16 QUESTION: No, but in that case, if you
17 represented both the court's interest in enforcement
18 and your client's interest in obtaining money, would it
19 be proper for you to agree to dismiss the criminal
20 charges if there were full payment of all damage claims?

21 MR. BAINTON: Your Honor, I couldn't agree to
22 do that. That is not within the special prosecutor's
23 power. And that's the point I made earlier.

24 QUESTION: Well, agreed, maybe -- enter into
25 an agreement by which you, in exchange for the payment

1 of whatever the amount the damages were or alleged to
2 be, you agreed to recommend to the court that they would
3 be -- the criminal charges would be dismissed.

4 MR. BAINTON: You're saying, would that create
5 -- potentially create a conflict of interest?

6 QUESTION: Yes.

7 MR. BAINTON: Yes. It would potentially
8 create a conflict of interest. I suppose. I think I
9 can't say that it doesn't.

10 But I think that what you've got to do in
11 deciding this case is, again, to determine whether there
12 is a risk that the entitlement to the defendant of a
13 fair trial will be compromised.

14 And whether or not this case is going to be --
15 whether my recommendation would be accepted or rejected
16 by the District Court rests in its discretion.

17 And I think it's fair to say that in these
18 cases the District Courts generally look at
19 recommendations of special prosecutors with respect to
20 the disposition of a criminal matter, including its
21 commencement. Some look differently --

22 QUESTION: Well, let me change the example a
23 little bit. Supposing the settlement was, in addition
24 to not recommending, you also agree that you will not
25 offer in evidence the results of the sting operation.

1 You just wouldn't call that to the court's attention.

2 MR. BAINTON: I couldn't do that.

3 QUESTION: That would be a conflict of
4 interest.

5 MR. BAINTON: That would be unethical. When --

6 QUESTION: You think you have an obligation to
7 the judge to disclose all evidence that you have in your
8 possession?

9 MR. BAINTON: I think I have an -- had and
10 continue to have an unqualified obligation to the United
11 States of America to give it the best representation of
12 which I am capable.

13 QUESTION: What if your client said, I really
14 think you're being too hard on this particular
15 adversary. I really don't think it's in our best
16 business interest in the long run to go forward with
17 these kinds of contempts because of customer relations,
18 one thing or another.

19 What would you do then?

20 MR. BAINTON: Well, then, I'd have to make a
21 decision. I'd have to ask whether or not to be relieved
22 from the prosecution because there was no fund left to
23 pay me.

24 That's what I'd have to do. I could not
25 abandon my ethical obligation to my client because I was

1 no longer getting paid. I could asked to be relieved.
2 If I was relieved, then I suppose one of these other
3 solutions, if they were possible, would come into play.

4 But I don't think I could throw the case, if
5 you will. The -- there is an analogy, I think, in civil
6 practice, everyday of the week, because lawyers take
7 oaths to obey the law, they produce documents in civil
8 litigation that are terribly prejudicial to their client.

9 QUESTION: Let me ask you one other question,
10 if I may.

11 What would your ethical obligation be if your
12 private client went bankrupt and there just weren't
13 funds to pay your privately? Then what would you do
14 then?

15 MR. BAINTON: Your Honor, once accepting the
16 engagement, I think I'm bound to see it through to its
17 conclusion unless excused by the District Court judge.
18 I don't think there's any question about that.

19 And that's no different than appearing in any
20 Federal action. Once you appear on behalf of a party,
21 you're in the lawsuit unless, in the exercise of its
22 discretion, the District Court judge lets you out.

23 I don't think is any different from any other
24 case in that respect.

25 QUESTION: What in your view would be the

1 objection to saying, the private attorney should not be
2 appointed, especially for one of the parties, unless the
3 United States Attorney refuses the case?

4 MR. BAINTON: I have no -- utterly no problem
5 with that, sir. In this case --

6 QUESTION: That it should first be presented
7 to the United States --

8 MR. BAINTON: As a matter of good practice,
9 not necessarily of constitutional law. I don't think
10 the Constitution requires that. I think that good
11 practice suggests it.

12 It occurred in this case, I'd like to point
13 out, not once but twice.

14 Mr. Cohen, in his remarks, suggested that the
15 debriefing never occurred. That, the record
16 demonstrates, is utterly untrue.

17 I produced to the United States Attorney every
18 scintilla of information --

19 QUESTION: So you think --

20 MR. BAINTON: -- I had at the time --

21 QUESTION: So the United States Attorney, you
22 think, in effect if not expressly, in effect declined
23 prosecution?

24 MR. BAINTON: No, sir, I think he expressly
25 declined the prosecution not once but twice. Judge

1 Brieant, as the record shows, on the eve of trial, again
2 called the United States Attorney's office, and again
3 offered them -- not ordered them, but offered them --
4 the opportunity to try the case, and they declined.

5 So the U.S. Attorney expressly declined to
6 prosecute this case not once but twice.

7 Now, in --

8 QUESTION: Prior to your appointment?

9 MR. BAINTON: No, sir. No, sir.

10 QUESTION: Was it ever offered to him prior to
11 your appointment?

12 MR. BAINTON: No, sir, it was offered to him
13 on the day of my appointment; literally on the day.

14 QUESTION: On the day. By whom?

15 MR. BAINTON: At Judge Brieant's request, I
16 delivered to the U.S. Attorney the affidavit submitted
17 in support of my -- in support of the application for my
18 appointment.

19 And Your Honor, that affidavit contained every
20 bit of information about this case that I then knew.
21 And when the U.S. Attorney had that affidavit --

22 QUESTION: Had you already been appointed?

23 MR. BAINTON: Yes, sir, I had. By -- by --
24 for a duration of a number of hours.

25 And as the -- as Mr. Cohen correctly stated --

1 QUESTION: But you would have no objection if
2 the judge had said, well, I -- we should give the U.S.
3 Attorney first crack before you're even appointed?

4 MR. BAINTON: Yes, sir. But contrary to what
5 the Solicitor General said, I know of my own personal
6 knowledge of four cases, three in the Central District
7 of California and one in the Southern District of New
8 York, within the last eight to ten months, when the U.S.
9 Attorney has, on each occasion, been offered this
10 opportunity, and has declined, and I have been
11 appointed.

12 So the statement by the Solicitor General that
13 this Court can assume that the Justice Department will
14 regularly prosecute this case is at least inconsistent
15 with my personal experience.

16 QUESTION: Just to keep the record straight,
17 did you give those records to the U.S. Attorney or to
18 his assistant?

19 MR. BAINTON: I gave them to the head of the
20 criminal division of the U.S. Attorney's office.

21 QUESTION: That's what I thought.

22 MR. BAINTON: Which I thought was the
23 appropriate.

24 QUESTION: Well, you did say you gave them to
25 the U.S. Attorney. I wanted to get the record straight.k

1 MR. BAINTON: No, that's correct, Justice
2 Marshall.

3 QUESTION: Not that it matters.

4 MR. BAINTON: That's correct. I gave it to
5 the head of the criminal division; not to the U.S.
6 Attorney himself. You're correct. I apologize for the
7 misstatement.

8 Assuming --

9 QUESTION: Mr. Bainton.

10 MR. BAINTON: Yes, sir.

11 QUESTION: I like the notion that we have the
12 power not just to render judgments but to enforce them
13 as well.

14 What happens when, after your appointment, you
15 come in try the case, and we say, six years? All right?

16 MR. BAINTON: Who's we? This Court or the
17 District Court?

18 QUESTION: Judges.

19 MR. BAINTON: Okay.

20 QUESTION: A Federal court. It gives the --
21 on the contempt citation, it gives the defendant six
22 years, or whatever. And nobody arrests him. The U.S.
23 Attorney just says, you know, it's too much. Or I'm too
24 busy. My people are out doing other things. Nothing
25 happens.

1 Now, do we have authority to appoint somebody
2 to arrest and incarcerate him as well? I mean, wouldn't
3 that follow from your notion that somehow we have to be
4 self-contained; otherwise we're not real judges?

5 Aren't we ultimately dependent on the
6 executive anyway?

7 MR. BAINTON: In that example, I think as a
8 practical matter, you're absolutely correct. But I
9 think there is a qualitative, Justice Scalia, between
10 setting up a court order -- an entirely court-maintained
11 prison system and enforcing a court's order.

12 Federal courts, certainly in the desegregation
13 cases, have run school districts.

14 QUESTION: I understand that.

15 MR. BAINTON: So -- so, you know, but it's --

16 QUESTION: But the notion that somehow the
17 effectiveness of the courts, the notion that somehow
18 it's dependent upon the other branches is not
19 inconceivable, is it?

20 MR. BAINTON: But your example, sir, I most
21 respectfully suggest, is largely speculative.

22 The likelihood of the marshall service
23 declining to incarcerate someone, I most respectfully
24 submit, is slim or none.

25 The likelihood of an already overburdened U.S.

1 Attorney's office to say, I haven't got the personnel to
2 prosecute this case is a real problem. That is a
3 problem that has prompted this rule of law.

4 And, while conceptually you're right, Justice
5 Scalia, --

6 QUESTION: Well, maybe that's because --

7 MR. BAINTON: -- I think the real problem
8 you've got to deal with is the one that was dealt with
9 by the Second Circuit.

10 And I'd most respectfully suggest, the one you
11 pose is never going to occur.

12 QUESTION: Maybe that's because the United
13 States Attorney thinks that of all the violations of law
14 out there, the flouting of this particular court order
15 is not the most serious that should engage the time of
16 either his people or the courts.

17 Now, why do our matters have to go to the top
18 of the prosecutorial agenda necessarily? What isn't
19 that violation of law one that ought to be put on the
20 list for the United States Attorney like all the other
21 ones?

22 It's a violation of law.

23 MR. BAINTON: Because the interests of the
24 judiciary, and the enforcement of its orders, are
25 different, Justice Scalia, than the legitimate and

1 proper interests of the justice -- of the executive
2 branch.

3 This Court cannot compel the executive branch
4 to prosecute any criminal regardless of how heinous his
5 conduct. That's implicit in the notion of separation of
6 powers.

7 But if this is going to be a coequal branch,
8 it has to support its orders. And to answer the
9 question I posed, why is the agenda different, as the
10 District Court found in this case, orders of this type
11 are routinely ignored.

12 As a result, the case load of the District
13 Court, which it has to deal with -- there is no way that
14 the District Court can prevent trademark owners from
15 filing lawsuits such as the civil lawsuit from which
16 this case arises -- they want to stop the flood of
17 cases. They want their orders respected.

18 Because when Federal court orders are obeyed,
19 then unnecessary civil contempt proceedings won't
20 occur. The interest of the District Court is in people
21 obeying the order.

22 And the order is no magic. The order says,
23 defendant, thou shalt do what Congress has already told
24 you to do under the Trademark Act.

25 QUESTION: Mr. Bainton, may I --

1 MR. BAINTON: Yes, sir.

2 QUESTION: What if you had a different kind of
3 crime, shortage of U.S. Attorneys to prosecute, and the
4 prosecutor tells a victim, we just don't have enough
5 lawyers to keep this case on the docket.

6 And the victim says, well, I've got a lawyer
7 and I'll pay him if he can handle the prosecution.
8 Would there be any problem with that?

9 MR. BAINTON: Yes, if the judge is going to
10 appoint him.

11 QUESTION: No, the --

12 MR. BAINTON: I think that -- I think that the
13 -- and there is provision, happens all the time in
14 securities fraud cases when representatives of the SEC
15 are specially appointed by the Attorney General to
16 prosecute criminal securities cases or criminal
17 anti-trust cases.

18 QUESTION: Well, stick with my hypothetical.

19 MR. BAINTON: So that provision is there.

20 QUESTION: Stick with my hypothetical.

21 MR. BAINTON: It's never been used in the way
22 you suggest, sir, but it could be.

23 QUESTION: But stick with my hypothetical for
24 a minute. What would be wrong, if anything, with just
25 doing that? Would there be any ethical problems?

1 MR. BAINTON: Who is doing it?

2 QUESTION: Well, either the judge or the U.S.
3 Attorney says, we don't have enough lawyers to go
4 around. We will designate you attorney for the
5 government for the purpose of this case, even though we
6 know you are the attorney for the victim, and your
7 particular interest in it is remedying the wrong of the
8 victim?

9 MR. BAINTON: Well, the answer to the question
10 really depends -- depends in large part on who does it.
11 The court doesn't have the power to do it, under
12 separation of powers.

13 QUESTION: Well, assuming power, would there
14 be any ethical objection to such an arrangement?

15 MR. BAINTON: If the Attorney General were to
16 do it.

17 QUESTION: Because it seems to me it's quite a
18 close parallel. Because you have the same relationship
19 with the victim of this wrongdoing as in my hypothesis
20 the lawyer would have with the victim of the ordinary
21 street crime?

22 MR. BAINTON: I think -- I think under the
23 statute cited by the Attorney General there might -- it
24 would be unlawful for the Attorney General to make such
25 an appointment --

1 QUESTION: Well, let me put it differently.

2 MR. BAINTON: -- because it would be a
3 violation of the statute.

4 QUESTION: What if Congress passed a law and
5 said, we think this is a good way to get a lot of
6 backlog out. We would recommend a procedure. This
7 would be done on a routine basis.

8 I think you'd suggest that's a good idea.

9 MR. BAINTON: The -- the -- there are two
10 parts to the answer to that question, sir.

11 The first part is, the only person who could
12 make such an appointment is the Attorney General of the
13 United States.

14 Secondly, the conflict of interest statute
15 cited by the Solicitor General would make such an
16 appointment as a proposition of statutory law by the
17 Attorney General unlawful and therefore improper.

18 Now, the next question, I suppose, is, suppose
19 that statute didn't exist, that statute was not a bar to
20 such action by the Attorney General, would there be an
21 ethical problem?

22 I don't think so.

23 QUESTION: (Inaudible) was the way crimes were
24 prosecuted at the time of the Constitution.

25 MR. BAINTON: That's correct, sir.

1 QUESTION: There weren't a lot of U.S.
2 Attorneys around. The typical prosecution was by the
3 victim's attorney.

4 MR. BAINTON: That's correct.

5 I'm running out of time. I would like to talk
6 briefly about the request that this Court exercise its
7 supervisory powers to change the practice under Rule
8 42(b).

9 We think that that is very ill-advised,
10 because this Court writes the criminal rules of
11 procedure. This -- an advisory committee exists, and
12 neither the petitioner nor the Solicitor General has
13 offered any reason to depart from the usual practice
14 under 18 U.S.C. Section 3771.

15 In other words, if you conclude that this
16 practice doesn't violate the due process rights of
17 defendants, generally, or more particularly, the
18 defendants in this case, but you nonetheless say, maybe
19 this -- maybe there's a better way.

20 And I'm an optimist. I'd always like to think
21 there's a better way. I most respectfully suggest that
22 neither petitioners nor the Solicitor General have
23 offered you one, and I personally don't know of one.
24 But perhaps it exists.

25 Then there's a procedure so this Court can

1 draw upon the collective wisdom of scholars, of
2 practicing lawyers, of U.S. Attorneys and of lower
3 Federal judges.

4 And I think that practice should be followed
5 by this Court, if it's so inclined, and it would be a
6 mistake to exercise its supervisory powers in the
7 context of this case.

8 I believe two other points and I'm done.

9 I believe Justice Blackmun asked Mr. Cohen
10 about the State law of California with respect to the
11 taping. In the District Court's opinion at 592-748, it
12 discusses a line of Ninth Circuit cases which say that
13 it would be unconstitutional for the State of California
14 to proscribe the manner in which Federal law enforcement
15 officers can conduct an investigation.

16 And therefore, it would be improper for
17 California to tell the FBI or any other Federal law
18 enforcement officer that it cannot engage in one-way
19 electronic eavesdropping.

20 In its opinion the Ninth Circuit said that
21 that construction of the statute was ridiculous, and
22 therefore rejected it.

23 And finally, I'd like to emphasize that
24 Justice Scalia's point about the investigation, the
25 remarks about -- the remarks by petitioners about the --

1 about the impropriety of the investigation, I think, are
2 the largest red herring in this case.

3 Justice Scalia, I believe you're absolutely
4 right when you say that this is what happens in
5 investigations of trademark counterfeiting everyday of
6 the week.

7 The only thing that Judge Lasker's order
8 changed from what would occur on a garden variety case
9 is, we have videotapes and audio tapes of what was said.

10 We have, I most respectfully submit, the best
11 evidence of what occurred on those occasions. And that
12 can do nothing but to protect the legitimate interests
13 of the defendants in this case.

14 Thank you.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
16 Bainton.

17 Mr. Cohen, you have one minute remaining.

18 REBUTTAL ARGUMENT OF JAMES A. COHEN, ESQ.,

19 ON BEHALF OF THE PETITIONERS

20 MR. COHEN: Thank you. I'll speak quickly.

21 First of all, with all due respect, Justice
22 Rehnquist, the system in this country at the time of the
23 Constitution was a system of public prosecution.

24 Not only that, for the past 100, 150 years,
25 the system in England has been a system of public

1 prosecution at least as it would apply to this kind of
2 case.

3 In England, the police, not the victim, hire
4 the private attorney to manage -- to prosecute the case.

5 Second of all, it is simply not true that Mr.
6 Bainton went to the U.S. Attorney a few hours after the
7 appointment.

8 He was appointed on March 31st, and the tapes
9 began to run. And they ran from March 31st until April
10 6th. That's when the letter went out to the United
11 States Attorney.

12 Thirdly, if you examine the appendix at pages
13 103 to 106, you'll see letters in which the hats, as you
14 said, Justice Marshall, kept changing between the
15 special prosecutor hat and Vuitton's hat, in terms of
16 making deals with Rochman, and then the lodging, which
17 we filed with the clerk of the court, at pages L36 and
18 L39, the same hat sort of switched -- I should say;
19 well, it doesn't matter -- with respect to Mr.
20 Pariseault, who was also bargained with, depending on
21 whose interests were at stake at that particular time.

22 Finally --

23 CHIEF JUSTICE REHNQUIST: Your time has
24 expired, Mr. Cohen.

25 MR. COHEN: Thank you.

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CHIEF JUSTICE REHNQUIST: The case is
submitted.

(Whereupon, at 1:56 p.m., the case in the
above-entitled matter was submitted.)

CERTIFICATION

Person Reporting Company, Inc., hereby certifies that the
attached pages represents an accurate transcription of
electronic sound recording of the oral argument before the
same Court of The United States in the Matter of:

#85-1329 - GERALD J. YOUNG, GEORGE CARISTE, SOL N. KLAYMINC AND NATHAN HELFAND, Petition
V. UNITED STATES, EX REL VUITTON ET FILS S.A. ET AL.; and

#85-6207 - BARRY DEAN KLAYMINC, Petitioner V. UNITED STATES EX REL. VUITTON ET FILS S.A.
LOUIS VUITTON S.A.

and that these attached pages constitutes the original
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