

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1613

TITLE UNITED STATES, Petitioner V. JOHN DOE, INC., I, ET AL.

PLACE Washington, D. C.

DATE January 12, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :  
Petitioner :  
v. : No. 85-1613  
JOHN DOE, INC. I, ET AL. :  
-----x

Washington, D.C.

Monday, January 12, 1987

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 11:02 o'clock a.m.

APPEARANCES:

LOUIS R. COHEN, ESQ., Washington, D.C.;

on behalf of Petitioner

PAUL R. GRAND, ESQ., New York, N.Y.;

on behalf of Respondents

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1 disclose matters occurring before the grand jury and  
2 also prohibiting these same attorneys from referring to  
3 grand jury material in preparing, filing, or litigating  
4 the civil case.

5 The district court denied the protective  
6 order. The Court of Appeals agreed with the district  
7 court as to the complaint, finding that it did not  
8 "quote from or refer to any grand jury transcripts or  
9 documents subpoenaed by the grand jury, and does not  
10 mention any witnesses before the grand jury or even  
11 refer to the existence of a grand jury."

12 But the court prohibited any further access to  
13 grand jury materials by these attorneys without a Rule  
14 6(e) order. We think the latter ruling was error and  
15 that government attorneys who have conducted a grand  
16 jury proceeding and who have been directed to conduct a  
17 civil phase of the dispute need not obtain what we have  
18 called a threshold 6(e) order before they may review  
19 grand jury materials properly in their possession.

20 To begin with, the plain language of the rule  
21 prohibits government attorneys from disclosing matters  
22 occurring before the grand jury without a 6(e) order.  
23 Disclosure occurs when information is revealed to at  
24 least one new person and not, we think, when the same  
25 people review their own memoranda and other familiar

1 materials.

2 The plain language we think is well chosen.  
3 The prohibition of disclosure to new people is what is  
4 needed to serve the repeatedly stated traditional  
5 purposes of grand jury secrecy: to shield witnesses and  
6 the grand jurors themselves from tampering, to prevent  
7 flight, to protect the innocent.

8 That's a list of grand jury purposes that the  
9 Court has stated repeatedly, and none of them, we think,  
10 suggests any reason why, when Department attorneys who  
11 conducted a attorney investigation are available to  
12 bring a civil case, to collect money owed to the United  
13 States on account of the same conduct, and they can do  
14 so without disclosing matters occurring before the grand  
15 jury to any other person, why in that situation the  
16 government should nevertheless have to start a civil  
17 investigation from scratch.

18 One comment the Court of Appeals made on this  
19 was to echo, but really extend, a point that this Court  
20 made in Sells, the concern that civil use of grand jury  
21 materials might inhibit witnesses appearing before the  
22 grand jury from testifying fully and candidly. And I  
23 want to comment on that.

24 It seems to me that that can't be right in  
25 this context. In the first place, I find it hard to

1 imagine a grand jury witness who is not inhibited by the  
2 threat of criminal prosecution and is not inhibited by  
3 the other possibilities for disclosure of his testimony  
4 being inhibited by the fact that he may be sued  
5 civilly.

6 But if he is, it seems to me that it cannot be  
7 the purpose of Rule 6(e) to give such a witness the  
8 false impression that if he testifies in a way that  
9 suggests he may have some liability to the United States  
10 that won't be followed up and the United States won't  
11 attempt to collect.

12 For example, in this case the Assistant  
13 Attorney General in charge of the Antitrust Division  
14 received at the end of the grand jury investigation  
15 extensive memoranda summarizing the investigation and  
16 making recommendations about the future prosecution of  
17 the case.

18 He decided on the basis of that memorandum  
19 that a criminal prosecution should not be brought, but  
20 that the possibility of a civil case should be further  
21 explored, and that civil case was ultimately  
22 authorized.

23 Unless we are to have -- and I don't think the  
24 Respondents are asking for and I see no possible warrant  
25 in Rule 6(e) for -- a rule that the grand jury

1 proceedings are to be entirely sealed off and no  
2 information from them is ever, even in this sense, to  
3 reach anyone who might consider a civil case, in other  
4 words unless we're to have a rule that says the  
5 Assistant Attorney General who decides whether or not to  
6 bring a criminal prosecution may not thereafter decide  
7 whether to bring a civil case, there simply is no  
8 realistic possibility of assuring grand jury witnesses  
9 that what they say may not be used against them  
10 civilly.

11 Now, the Respondents we think would like to go  
12 beyond the traditional purposes of grand jury secrecy  
13 and to make of Rule 6(e) an exclusionary rule. The nub  
14 of the problem, it seems to me, is right there. A bona  
15 fide grand jury investigation is not an unconstitutional  
16 search, and Rule 6(e) is not an exclusionary rule.

17 Respondents of course object that the grand  
18 jury investigation may not be bona fide, that allowing  
19 grand jury attorneys to review civil -- to review grand  
20 jury materials during the civil phase may lead to the  
21 misuse of the grand jury to gather evidence for civil  
22 cases.

23 The Court of Appeals rejected that argument  
24 here, finding no reason to think that the attorneys had  
25 misused the grand jury in this case and no incentive for



1 misuse in any antitrust case, in view of the division's  
2 civil discovery powers.

3 And I can add that I think such misuse is rare  
4 or nonexistent. But in any event, a threshold 6(e)  
5 order, a threshold 6(e) proceeding to determine whether  
6 the same attorneys can participate at all and can review  
7 materials properly in their own possession, is not, I  
8 suggest, the way to deal with any such misuse.

9 Where the attorneys who conducted the grand  
10 jury are also conducting civil discovery and trial, the  
11 proper moment to deal with a claim that the grand jury  
12 gathered evidence that had no bona fide criminal  
13 investigative purpose is when the defendant makes such a  
14 claim in the civil proceedings.

15 Defense counsel, who frequently will have  
16 lived through the grand jury investigation too, will not  
17 be slow to claim that the grand jury gathered evidence  
18 that was not relevant to a proper criminal charge, and  
19 the court, having the same attorneys before it, can  
20 immediately inquire into such a claim and, if it proves  
21 well founded, impose an appropriate remedy.

22 The alternative implicitly suggested by the  
23 Respondents is that the grand jury attorneys should be  
24 required to go to court for a threshold 6(e) hearing,  
25 which would presumably be ex parte, and seek to

1 demonstrate that the grand jury proceedings were  
2 conducted in good faith and did not gather any evidence  
3 that was not properly part of a criminal investigation.  
4 After demonstrating that, presumably they could review  
5 the materials in their own possession.

6 But that approach, a sort of presumption of  
7 irregularity, is not called for by 6(e), is not, we  
8 suggest, an efficient way to get at the truth -- ex  
9 parte hearings to prove a negative rarely are -- and  
10 will not dispose of the matter, because the defendant  
11 will still have the right to make his claim of misuse.

12 Respondents also object --

13 QUESTION: What is your idea of what 6(e)  
14 means?

15 MR. COHEN: We think that 6(e) provides that  
16 those persons who properly have access to grand jury  
17 materials may not disclose them to other people without  
18 a court order. That's what this case is about.

19 QUESTION: Would the court order be routine?

20 MR. COHEN: No. The court order would require  
21 a showing of particularized need under this Court's  
22 decision in Sells.

23 QUESTION: There would be a hearing on it?

24 MR. COHEN: Yes.

25 The question is whether any purpose is served

1 and whether the rule requires this threshold hearing.  
2 Respondents argue that attorneys on the prosecution team  
3 will inevitably disclose the workings of the grand jury  
4 to other people during discovery or trial of a civil  
5 case.

6 That objection, I note, really speaks not to  
7 whether such attorneys should be allowed to review their  
8 materials, but to a contention that they are not -- that  
9 they are not making, whether such attorneys may  
10 participate in the civil case at all. But we think it  
11 is wrong, for two reasons:

12 First, they greatly exaggerate the likelihood  
13 of such public disclosure by misapprehending what it is  
14 that is required to be kept secret. Facts about  
15 persons' conduct do not become privileged merely because  
16 the grand jury has investigated it. What is secret is  
17 the workings of the grand jury, and it is perfectly  
18 possible to draft a complaint, as we did here, that does  
19 not tell anyone about the grand jury, and to conduct  
20 discovery and trial without doing so.

21 QUESTION: Mr. Cohen, I find the phrase "the  
22 workings of the grand jury" less than totally clear as  
23 to just what we're talking about. You know, certainly  
24 if one were to say it takes 23 people to be a grand  
25 jury, it has to be an indictment by a majority, you

1 would say that's the workings of the grand jury. Yet  
2 obviously that isn't prohibited from disclosure.

3 MR. COHEN: No, and that is not what I meant.  
4 Thank you for giving me an opportunity to clarify that.  
5 By the workings of the grand jury, I mean the particular  
6 activities of the particular grand jury, including what  
7 witnesses it heard, what those witnesses testified to,  
8 when it met, what documents it reviewed.

9 But the activities of the grand jury as such  
10 -- to take an example, a pre-existing document which is  
11 subpoenaed by the grand jury does not become immune from  
12 later disclosure merely because it was subpoenaed by the  
13 grand jury, unless its later disclosure would disclose  
14 something about what the grand jury's activities were.

15 QUESTION: Well, what if the government  
16 subpoenaed a whole bunch of documents from a particular  
17 witness before the grand jury. The government didn't  
18 know of any specific document in this group before, and  
19 all of these documents were examined by the grand jury.

20 Now, could a government attorney then go out  
21 and say, well, look, contract such-and-such provided  
22 such-and-such?

23 MR. COHEN: I'm not sure what you mean by "go  
24 out and say."

25 QUESTION: Well, tell it to someone to whom



1 disclosure is not authorized.

2 MR. COHEN: I don't think that the fact that a  
3 particular contract was subpoenaed by the grand jury  
4 makes that contract privileged from future disclosure in  
5 circumstances where the disclosure would not reveal what  
6 the grand jury's activities were.

7 QUESTION: Well, what if a witness is  
8 subpoenaed before the grand jury and the witness says:  
9 On February 5th I met with Joe Jones. Can the attorney  
10 then go out, the government attorney, and disclose to  
11 another person that witness X said on February 5th he  
12 met with Joe Jones?

13 MR. COHEN: No. On the other hand, the same  
14 testimony can be elicited in discovery or in trial in a  
15 context in which it does not reveal the workings of a  
16 grand jury.

17 QUESTION: Mr. Cohen, may I just follow up  
18 with the Chief Justice's question. Supposing they were  
19 drafting a civil complaint and the key allegation was  
20 there was a meeting between two persons agreeing on  
21 prices at a specific time, date, and place; and that the  
22 only evidence the government had of that was a written  
23 document that had been subpoenaed before the grand  
24 jury.

25 Could they file such a complaint without a

1 6(e) order?

2 MR. COHEN: Yes. Again, that complaint does  
3 not disclose anything about the activities of the grand  
4 jury.

5 QUESTION: Even though at least some people  
6 within the government, knowing the full scope of the  
7 government's civil investigation, some people would know  
8 that the only place that information could have come  
9 from was the grand jury?

10 MR. COHEN: Well, that's of course not the  
11 case here.

12 QUESTION: No, that was no question. The  
13 specific person who drafted the complaint had no other  
14 source of information except the grand jury transcript  
15 or grand jury document. Could he file such a  
16 complaint? You say yes.

17 MR. COHEN: Yes. Now, we have to prove our  
18 case, and we have to prove our case by admissible  
19 evidence, and we have to prove it by disclosable  
20 evidence. But such a complaint could be filed, and to  
21 the extent necessary civil discovery could then be  
22 conducted.

23 And the whole case could, as indeed this case  
24 could --

25 QUESTION: Let me just follow up. Supposing

1 in the pretrial discovery in the civil case the  
2 defendant asks the government in substance, what is the  
3 source of -- what is the evidence supporting that  
4 allegation or something.

5 Could they answer that interrogatory without a  
6 court order? Identify the witnesses who can so testify  
7 or the documents which will support that allegation?

8 MR. COHEN: Again, I think the answer is  
9 usually yes, they could, because it ought to be possible  
10 to frame an answer to that question that does not  
11 identify the grand jury proceedings as the source of  
12 that information.

13 QUESTION: Just identifies the name of the  
14 person who happened to be a witness and the government  
15 had never talked to except in that --

16 MR. COHEN: But it doesn't identify him as a  
17 witness.

18 QUESTION: I assume that the civil division  
19 lawyer or the criminal division lawyer assigned to the  
20 civil division who's working with someone else in that  
21 division. How could he possibly not be disclosing to  
22 the person that he's working with that he has all sorts  
23 of information that this person must assume came from  
24 the grand jury?

25 MR. COHEN: We don't --

1 QUESTION: He says witness X will say thus and  
2 such, right. So his colleague says, how do you know  
3 that? He says, well, you shouldn't ask.

4 MR. COHEN: It's our position that if we need  
5 to bring in another lawyer with litigating  
6 responsibility and that lawyer has to learn matters  
7 occurring before the grand jury, we need a 6(e) order to  
8 do that.

9 QUESTION: Well now, that happened in this  
10 case, as I understand it, according to a letter to the  
11 Clerk of this Court, without a court order.

12 MR. COHEN: Something a little different from  
13 that happened in this case. At the end of the grand  
14 jury -- excuse me.

15 At the end of the civil investigation, a  
16 memorandum prepared by the two attorneys who had  
17 conducted the grand jury and who also conducted the  
18 civil investigation was forwarded to the various  
19 personnel in the Department who had supervisory  
20 responsibility for these two people and this  
21 litigation.

22 Most of those personnel were the same people  
23 occupying the same positions as they had occupied during  
24 the criminal phase, and they had been within the circle,  
25 so to speak, during the grand jury investigation stage



1 of the proceedings.

2 Two of those people were new replacement  
3 people. The Antitrust Division considered whether it  
4 needed a 6(e) order for disclosure to those people and  
5 concluded that it did not, the theory being that when  
6 the litigating attorneys have proper access to grand  
7 jury materials they should be able to report to the  
8 senior supervisory personnel in the Department, who have  
9 no litigating responsibility but reviewing  
10 responsibility for lots of cases, without obtaining a  
11 6(e) order, because otherwise every time we change  
12 Attorney Generals or Assistant Attorneys General we'll  
13 have to go to court and get a whole lot of what should  
14 then be routine 6(e) orders.

15 QUESTION: Do you defend that position here in  
16 the face of Sells Engineering?

17 MR. COHEN: I think that it raises a special  
18 question that the Court need not reach in this case.  
19 The question that we brought before the Court is whether  
20 the same people, the litigating attorneys, may continue  
21 to have access to the grand jury materials.

22 In this case, there were two further  
23 disclosures, which were not considered by the court  
24 below. I might add that I think that they were palpably  
25 harmless both to the public interest and to the

1 defendants.

2 But I suggest that, if there is to be a  
3 challenge to those two further disclosures, it ought to  
4 be initiated below. If the Court were to rule that we  
5 can't make those further disclosures to senior  
6 supervisory personnel, we will live with that. That's  
7 not a terribly important problem for us.

8 I might come back to the subject of documents  
9 and just make clear one thing. After the grand jury  
10 investigation was terminated in this case, the Antitrust  
11 Division issued proper civil investigative demands under  
12 the Antitrust Civil Process Act. The Respondents  
13 reserved all their rights, but told us, one formally and  
14 two informally, that we already had the documents under  
15 the civil investigative demands.

16 We believe that we now hold all of the  
17 documents that we hold pursuant to proper CID's and not  
18 pursuant to grand jury subpoena at all.

19 QUESTION: But did they formally respond by  
20 identifying the documents in response to the CID? At  
21 least two of them I think did not.

22 MR. COHEN: Well, all three said, we have  
23 previously supplied all of the documents covered by the  
24 CID.

25 QUESTION: Do you think that's an adequate

1 response to the statutory demand?

2 MR. COHEN: We accepted it under the  
3 circumstances.

4 QUESTION: Formally, on the record?

5 MR. COHEN: Well --

6 QUESTION: Does the record disclose there's  
7 been full compliance with the CID's, in other words,  
8 full responses to them?

9 MR. COHEN: We issued CID's that we considered  
10 were valid.

11 QUESTION: I understand.

12 MR. COHEN: We issued them saying to the  
13 Respondents, you may respond by indicating that you have  
14 previously supplied documents that are covered by this  
15 CID. And all three of the Respondents did that, and I  
16 believe that we wrote them back acknowledging that.

17 One of the Respondents did it formally,  
18 saying, we are complying and what we understand is  
19 happening is that, instead of your shipping our  
20 documents back to us at the end of the grand jury and  
21 our making them available a second time, we are simply  
22 leaving them with you.

23 The other two interposed various --

24 QUESTION: What I have in mind --

25 MR. COHEN: -- argumentation, but then said,

1 you have all the documents.

2 QUESTION: I don't remember the terms of the  
3 statute well enough, but say you serve an interrogatory,  
4 you're entitled to a sworn answer that so and so is the  
5 case. When you serve a CID, aren't you entitled to some  
6 kind of a sworn response that there's been a complete  
7 delivery of everything demanded? And do you accept a  
8 phone call from a lawyer saying, you've got it all, as  
9 sufficient?

10 MR. COHEN: Not a phone call. We are entitled  
11 -- we are entitled to a certificate. We in this  
12 instance accepted letters. We got a certificate from  
13 one and accepted letters from the other two saying, you  
14 have all the documents that you've asked for.

15 The other point I wanted to make under this  
16 head is that the problems that could arise during  
17 discovery and trial are, we suggest, problems that not  
18 only may, but must, be left to be dealt with in  
19 particularized 6(e) proceedings or other appropriate  
20 proceedings in the court where the civil case is  
21 pending.

22 They cannot be solved by requiring the  
23 government attorneys to obtain a threshold 6(e) order  
24 giving them access to their own materials, because that  
25 order would not in any event authorize them to make



1 disclosure to any other person.

2 Let me spend a moment in the second question  
3 in this case. We did seek and obtain a 6(e) order for  
4 purposes of conferring with the Civil Division about  
5 whether it would be appropriate to bring a 6e) -- excuse  
6 me -- to bring a False Claims Act case here.

7 The Court of Appeals vacated that order on the  
8 ground that we could not possibly show particularized  
9 need because we had the Antitrust Civil Process Act and,  
10 although it might be hard to do so, we could duplicate  
11 all that testimony.

12 It said that may be expensive and it may take  
13 some time, but the Supreme Court has told us in Sells  
14 that time and expense can play no part in our analysis.  
15 We think that was just a straightforward and obvious  
16 error.

17 We accept the proposition that we may not have  
18 a 6(e) order solely in order to save time and expense.  
19 But that's quite a different proposition from saying  
20 that time and expense drop entirely out of the equation,  
21 so that, even in a situation where, as here, the time  
22 and expense are prohibitive in relation to the use that  
23 we want to put the materials, we are denied a 6(e) order  
24 and therefore the ability to consult.

25 I'd like to save my remaining time for

1 rebuttal.

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

4 We'll hear now from you, Mr. Grand.

5 ORAL ARGUMENT OF

6 PAUL R. GRAND, ESQ.,

7 ON BEHALF OF RESPONDENTS

8 MR. GRAND: Mr. Chief Justice and may it  
9 please the Court:

10 The government has today argued to the Court,  
11 as they did in their reply brief, an issue which is not  
12 presented in this case. The question on which this  
13 Court granted certiorari is not whether a prosecutor may  
14 simply sit in his office and review grand jury materials  
15 in the abstract.

16 At issue before this Court is whether the  
17 prosecutor who conducted the grand jury investigation  
18 may use the grand jury's secret materials to prepare and  
19 litigate a civil case without first obtaining a Rule  
20 6(e) order.

21 Every time the civil use of grand jury  
22 materials has come before this Court, from Procter &  
23 Gamble through Douglas Oil, Baggett, and Sells, this  
24 Court has limited disclosure in order to preserve grand  
25 jury secrecy. It has done so because the grand jury's

1 purposes and functions can only be carried out if the  
2 grand jury is protected by secrecy.

3 There are affirmative mischiefs, three  
4 particular affirmative mischiefs, that this Court noted  
5 in United States versus Sells, which mischiefs have been  
6 previously noted in prior cases, all of which will come  
7 to pass in this case, some of which have already come to  
8 pass.

9 For example, unauthorized disclosure of grand  
10 jury material we say will necessarily occur if a  
11 prosecutor is permitted to use the grand jury's  
12 materials wholesale to bring a civil case. In fact, as  
13 we learned last Friday with the letter from the  
14 Solicitor General to Your Honors, such disclosures have  
15 already taken place.

16 Well after the conclusion of the grand jury  
17 investigation, grand jury materials were improperly  
18 disclosed to attorneys in the Justice Department who had  
19 nothing to do with the criminal investigation. This  
20 kind of improper disclosure, we submit, is inevitable if  
21 the determinative question is going to be who you are,  
22 rather than the use you are making of the materials.

23 QUESTION: Mr. Grand, I have not yet seen that  
24 letter. Could you just very briefly summarize it?

25 MR. GRAND: I can't, Your Honor.

1 QUESTION: What materials was it that you say  
2 were disclosed?

3 MR. GRAND: I can't answer that. This is a  
4 letter from the Solicitor General to Your Honors in  
5 which it acknowledges that after the termination of the  
6 criminal phase of this case there were unauthorized  
7 disclosures within the Department of Justice of matters  
8 occurring before the grand jury.

9 I do not know what those were. They are  
10 concededly matters occurring before the grand jury.

11 QUESTION: Thank you.

12 MR. GRAND: And if you don't have a copy, Your  
13 Honor, I'll be happy to hand you.

14 Indeed, it was the risk of just this kind of  
15 improper disclosure that led the Second Circuit when it  
16 ruled in this case to rule that grand jury materials  
17 should not be automatically available to a prosecutor  
18 for use in civil litigation.

19 The Second Circuit noted that there were  
20 additional risks, risks to disclosure to paralegals and  
21 to secretaries, to new co-counsel who may come onto the  
22 case to assist the prosecutor in the civil phase.

23 And finally, it seems to me no one could  
24 seriously argue that the prosecutor's study of each  
25 witness' grand jury testimony the night before the



1 prosecutor intends to take the civil deposition of that  
2 witness will not increase the risk of improper  
3 disclosures during the questioning of those witnesses.

4 QUESTION: Well it might increase the risk,  
5 but certainly studying it by itself does not amount to  
6 to disclosure, does it?

7 MR. GRAND: I agree with Your Honor that the  
8 mere abstract study in the office does not increase the  
9 risk of disclosure. But that is not the issue in this  
10 case. Those are not the facts of this case.

11 In this case, from the district court through  
12 the Second Circuit to here the government has readily  
13 conceded that it has used grand jury materials so far to  
14 frame and draft each paragraph of the complaint. They  
15 will have to use those same grand jury materials in  
16 order to respond to interrogatories that we will ask.

17 QUESTION: Well, okay, let's stop. In  
18 drafting a complaint, you don't ordinarily set out with  
19 great specificity facts and exhibits. I mean, you plead  
20 generally.

21 I don't see why it isn't possible to draft a  
22 complaint without disclosing grand jury materials  
23 whatever that phrase may mean.

24 MR. GRAND: I think, Your Honor, you've just  
25 hit on the key point. Yes, it is certainly possible to

1 draft a complaint without quoting from grand jury  
2 transcripts, and it is possible to draft a civil  
3 complaint without naming the grand jury as its source.

4 But I don't think anyone would argue with the  
5 proposition that a complaint that follows a grand jury  
6 investigation such as this one is a summary of the  
7 substance of what took place in that grand jury. Now,  
8 if the disclosure of a summary of the grand jury's  
9 investigation is not a disclosure of matters occurring  
10 before the grand jury, then what we have succeeded in  
11 doing is totally redefining what is matters occurring  
12 before the grand jury.

13 QUESTION: Well, supposing the complaint  
14 alleges that some time during the year 1985 the  
15 defendants met and conspired to fix prices, and actually  
16 there was testimony before the grand jury that on  
17 particular dates particular defendants met at a  
18 particular place. The complaint doesn't go into that  
19 detail.

20 Is that "disclosing" what went on before the  
21 grand jury?

22 MR. GRAND: I think it is unquestionably  
23 disclosure of grand jury materials.

24 QUESTION: What does that phrase mean?

25 MR. GRAND: Let me address that. If you look

1 at the rule itself, the rule itself uses that phrase.

2 QUESTION: Yes.

3 MR. GRAND: It forbids disclosure of matters  
4 occurring before the grand jury. If the phrase meant  
5 only that it is impermissible to disclose transcripts or  
6 to disclose "material," first of all, the rule could  
7 have said as much; and secondly, there would have been  
8 no reason for a prohibition or to impose secrecy on  
9 interpreters or grand jurors, because they don't have  
10 transcripts anyway.

11 Secondly, if what the rule was only intended  
12 to guard against was the disclosure that the grand jury  
13 was the source, the rule could have said that. But  
14 instead, the rule as drafted by Congress I believe was  
15 drafted in as broad a frame as possible: "matters  
16 occurring before the grand jury."

17 And the reason for that was to incorporate the  
18 whole substance of what goes on before the grand jury  
19 --

20 QUESTION: Yes, but the fact --

21 MR. GRAND: -- for the simple reason of  
22 protecting the function of the grand jury.

23 I'm sorry.

24 QUESTION: The fact that a conspiracy took  
25 place on a certain date is not a matter occurring before

1 the grand jury. The matter occurring before the grand  
2 jury is the fact that someone testified that the  
3 conspiracy took place on a certain date.

4 MR. GRAND: That is correct.

5 QUESTION: Well, if that's correct then your  
6 answer to the Chief Justice was wrong.

7 MR. GRAND: I don't think so. The only source  
8 of that information in the hands of the government is  
9 the grand jury. There could be other sources of that  
10 information to the government. The government had other  
11 sources available to it here, for example the ACPA.

12 But -- and so that the record should be clear  
13 in this court, there has been no attempt on the part of  
14 my clients in any way to suppress the facts.

15 QUESTION: I understand, but you're going to  
16 answer my question? I still don't understand how it is  
17 a matter occurring before the grand jury that a  
18 conspiracy took place on a certain date.

19 MR. GRAND: What is a matter occurring before  
20 the grand jury is the fact of the investigation of that,  
21 the determination that that took place.

22 QUESTION: The fact that that was brought to  
23 the attention of the grand jury, right?

24 MR. GRAND: Yes.

25 QUESTION: So you can use those facts as much



1 as you like, so long as you don't disclose that those  
2 facts were presented to the grand jury, isn't that  
3 correct?

4 MR. GRAND: I think it's that last jump --

5 QUESTION: I didn't think it was a jump.

6 QUESTION: It's a jump. It's a question of  
7 who's making the jump.

8 MR. GRAND: Well, if it is not disclosing  
9 matters occurring before the grand jury to paint with a  
10 broad brush, to summarize the facts learned by the grand  
11 jury, then it will be equally permissible for the  
12 government midway through a grand jury investigation to  
13 issue a press release that simply says there was a  
14 conspiracy going on, to use your words, Justice Scalia.

15 Or it would be permissible for a grand juror  
16 to lean over the fence and tell his neighbor, look what  
17 I know.

18 QUESTION: The only reason that would not be  
19 permissible is that, given that manner of disclosure, it  
20 is evident that -- it is evident that what is being  
21 disclosed is not merely the fact of the conspiracy, but  
22 that the grand jury was told about the fact of that  
23 conspiracy.

24 It is in essence the disclosure of the fact  
25 that it was given to the grand jury that's the nub of

1 the matter, isn't it?

2 MR. GRAND: I suggest to Your Honor that when  
3 the prosecutor is the person who is disclosing the  
4 matter in a civil complaint, you have exactly the same  
5 inference that flows, particularly when all of the  
6 witnesses and all of those subpoenaed to produce  
7 documents know that they've only been subpoenaed by the  
8 people who were running the grand jury.

9 QUESTION: But your trouble is he's no longer  
10 "prosecutor" in the civil case. What you are saying is  
11 that if a lawyer is in the grand jury qua prosecutor and  
12 then he comes out as a lawyer qua civil attorney, he  
13 must forget everything that happened in the grand jury.  
14 Isn't that what you're saying?

15 MR. GRAND: I'm not saying that, Your Honor.

16 QUESTION: I hope not.

17 MR. GRAND: I think that the question -- I  
18 think that, first let me say that the question of  
19 disqualification I don't think is before the Court in  
20 this matter. However, it seems to me --

21 QUESTION: Well, how can he forget that the  
22 conspiracy happened on such a date? He can't ever  
23 forget that. But don't you want him to forget it?

24 MR. GRAND: If I may, I believe, Your Honor,  
25 that the question of whether a particular prosecutor in

1 a particular case should be disqualified will be a  
2 function of how much that prosecutor learned in the  
3 grand jury, what his participation was, the relatedness  
4 of the civil case to the criminal case, the remoteness  
5 in time, all of which are questions more properly  
6 addressed to a district court, but none of which exist  
7 in this case, where the issue presented is can the  
8 prosecutor use, not simply remember in his head, but can  
9 the prosecutor use grand jury materials, testimony from  
10 several dozens of witnesses, I think is the phrase, and  
11 documents to prepare and litigate this case.

12 QUESTION: That the conspiracy occurred in May  
13 of '84?

14 MR. GRAND: I believe he cannot use the fact  
15 that the conspiracy occurred --

16 QUESTION: Well, he must forget that?

17 MR. GRAND: -- in May of '84 --

18 QUESTION: He must forget that?

19 MR. GRAND: I mean, if you're asking me am I  
20 arguing about whether he can use his own memory, I'm not  
21 arguing that. I will be happy to if you'd like me to.

22 QUESTION: I don't see how you can get behind  
23 it.

24 MR. GRAND: In this case, this case that's  
25 before the Court, I don't think the question of the

1 prosecutor's memory has arisen. However, however, if  
2 this case is to go forward, if the two prosecutors are  
3 still in the Antitrust Division, if those two  
4 prosecutors are assigned to this case, then in light of  
5 the concessions that have been made in this and in the  
6 lower courts that grand jury materials were used by  
7 them, then I think they would have to be disqualified.

8 QUESTION: You are in trouble with another  
9 point. The antitrust lawyer handles civil and criminal  
10 cases, isn't that true?

11 MR. GRAND: That is true.

12 QUESTION: That's your real problem.

13 MR. GRAND: Well, Your Honor --

14 QUESTION: Because he is not -- as an  
15 antitrust lawyer, he is not automatically a prosecutor.

16 MR. GRAND: The matter, this case, was  
17 referred by the AID agency to the Antitrust Division in  
18 1981. A choice was made then to present the matter to  
19 the grand jury, even though subject matter jurisdiction  
20 over the whole question of the sale of this commodity  
21 that is sold nowhere in the United States was raised at  
22 the outset.

23 The ACPA, the Antitrust Civil Process Act, was  
24 just as available in 1981, indeed passed after Procter &  
25 Gamble. The ACPA was passed, and the legislative



1 history of that statute suggests it is to be used in  
2 cases where it is not clear that a criminal violation  
3 has taken place.

4 So I agree with you that the Antitrust  
5 Division has this dual function, but they have more than  
6 one set of tools with which to perform that function.  
7 And what we are suggesting is that when they are using  
8 -- when they're preparing a civil case, then they have  
9 to rely on civil materials. When they're preparing a  
10 criminal case, they have to rely on --

11 QUESTION: Mr. Grand, can I interrupt with,  
12 maybe it's a stupid question. I'm sorry. On the issue  
13 of what is a matter, disclosing a matter occurring  
14 before the grand jury, supposing there is an elaborate  
15 investigation and all of the evidence supporting the  
16 conclusions that the government lawyers draw are derived  
17 from the grand jury proceeding, and they return an  
18 indictment which spells out the charges in detail.

19 Is the indictment a disclosure within the  
20 meaning of the statute? And if not, why is a civil  
21 complaint a disclosure if they're word for word the  
22 same? They used to return them at the same time  
23 frequently.

24 MR. GRAND: I believe that there's no question  
25 that an indictment surely is a disclosure of matters

1 occurring before the grand jury. However, that is a  
2 permitted disclosure because it is part of the attorney  
3 for the government's performance of his duties to  
4 enforce the criminal law and therefore it is a permitted  
5 use and disclosure.

6 I think your question raises another  
7 interesting point, Your Honor, and that is this. This  
8 case is unusual in the sense that there was a grand jury  
9 investigation that resulted in no indictment. Most  
10 cases that are investigated by the grand jury result in  
11 indictments.

12 When there is an indictment, then the  
13 indictment exists from which a civil complaint can be  
14 framed. If there is a trial thereafter, the trial  
15 material exists and grand jury secrecy does not have to  
16 be --

17 QUESTION: Well, if they return the two  
18 pleadings simultaneously, they file an indictment and a  
19 civil complaint simultaneously, are both permitted  
20 disclosures or are both -- or is it true that neither of  
21 them is a disclosure within the meaning of the rule? Or  
22 do you say one is a disclosure and the other is not?

23 They're word for word the same in the charging  
24 paragraphs.

25 MR. GRAND: To me they would both be

1 disclosures, there's no question about it.

2 QUESTION: And one is permitted and one is  
3 not.

4 MR. GRAND: One is permitted and one is not.  
5 Now, one can avoid that dilemma by having the complaint  
6 drafted from the indictment after the indictment is  
7 published. But it is clear that the disclosure of the  
8 indictment is a permitted disclosure because it is in  
9 furtherance of the attorney's fulfillment of his duties  
10 to enforce the criminal law.

11 QUESTION: I suppose under your view of the  
12 situation it might be an unauthorized disclosure if the  
13 government attorneys tried to duplicate getting the  
14 information in the civil case, because they would have  
15 to rely on information disclosed before the grand jury  
16 to know who to subpoena and what evidence to request.  
17 Would your argument take you that far?

18 MR. GRAND: We have not -- we do not feel that  
19 the issues in this case require us to go that far.

20 QUESTION: Well, it certainly sounds like your  
21 argument would lead you to that result.

22 MR. GRAND: Certainly other attorneys could do  
23 that, and in this case, as long ago as 1981, the Justice  
24 Department could have made the choice based on the  
25 reference from the AID agency, to look into the matter

1 on a civil basis.

2 QUESTION: Your argument just leads to the  
3 inevitable conclusion that the Justice Department has no  
4 choice. They have to proceed first in a civil case. I  
5 mean, that's the sum and substance of where it would  
6 lead.

7 MR. GRAND: I don't think so, Your Honor, for  
8 the following reasons. As I was saying to Justice  
9 Stevens, this situation that we have before the Court  
10 today arises relatively rarely. It arises only in the  
11 case where there has not been an indictment.

12 In that situation, the government cannot in  
13 our view use grand jury materials to bring a civil  
14 case. But it is only in that situation.

15 Now, there are many instances where the  
16 government of the United States functions very  
17 effectively -- indeed, one might say that the Securities  
18 and Exchange Commission with its parallel system of  
19 investigations is having a very good year. They are not  
20 inhibited by the fact that they are unable to use grand  
21 jury materials to conduct their own civil  
22 investigations.

23 QUESTION: Well, if your argument is right,  
24 then the Court of Appeals was clearly wrong when it said  
25 there is no particularized need here for the government,



1 because they can go out and duplicate the discovery on  
2 their own, because under your view they couldn't. So if  
3 you're right on the first argument, then the court was  
4 certainly wrong in saying there was no particularized  
5 need, wasn't it?

6 MR. GRAND: I don't think so, Your Honor.

7 QUESTION: I don't see how you can have it  
8 both ways.

9 MR. GRAND: Well, there was no attempt in  
10 November of 1984, when the government sought a 6(e)  
11 order ex parte, there was no attempt by the government  
12 to make any showing of particularized need to reveal  
13 grand jury materials. Instead, what they went into the  
14 district court and said is they wanted to disclose all  
15 of the grand jury materials in order to seek the advice  
16 of the civil division.

17 For that, the Second Circuit said they had not  
18 shown particularized need. And under the decisions of  
19 this Court, they clearly had not.

20 QUESTION: It would not make any difference to  
21 your analysis, Mr. Grand, I take it, that the prosecutor  
22 may have known completely about what a witness was to  
23 testify to and having gone over the testimony word for  
24 word before the witness ever testified before the grand  
25 jury?

1 MR. GRAND: Not in this case, in light of the  
2 way the issues have been framed and the concessions  
3 made. I might, Your Honor, point to --

4 QUESTION: So what you're really --

5 MR. GRAND: Excuse me. In Baggett, which --

6 QUESTION: What you're really arguing for is  
7 not just non-disclosure. You're arguing for immunity.

8 MR. GRAND: No, I'm not.

9 QUESTION: Well, I don't see how.

10 MR. GRAND: Most respectfully, I'm not.

11 QUESTION: I don't see how you can escape that  
12 if the prosecutor knew about it without recourse to the  
13 grand jury and before the grand jury ever sat.

14 MR. GRAND: Then I agree with you. I thought  
15 you were addressing a different point. You see, in  
16 Baggett one of the issues in the Baggett case was  
17 whether or not an interview conducted by a prosecutor  
18 pursuant to a grand jury subpoena was grand jury  
19 materials.

20 And the Seventh Circuit held it was and those  
21 are part of the materials for which there was a failure  
22 to show that --

23 QUESTION: You agree then that if the  
24 prosecutor knew of a particular piece of testimony or of  
25 a document without recourse to grand jury subpoena, then

1 it would not be disclosure for him to talk about it?

2 MR. GRAND: My understanding is that that  
3 accurately states the broad status of the law on that  
4 subject. If the prosecutor comes by information  
5 independent of the grand jury, it's not covered by grand  
6 jury secrecy.

7 QUESTION: Mr. Grand, about your proposition  
8 that it doesn't really inhibit the government very much  
9 to have to conduct a separate civil proceeding. You say  
10 the SEC, for example, is not inhibited by the fact that  
11 it has no criminal authority, it just proceeds  
12 separately.

13 Isn't it the case -- it used to be and I  
14 assume it still is -- that once a criminal investigation  
15 is afoot, a civil investigation by the SEC or by anybody  
16 else stops unto the criminal investigation is  
17 completed? Doesn't it?

18 MR. GRAND: I'm smiling only because I wish it  
19 was still the case.

20 QUESTION: It's not still the case?

21 MR. GRAND: It's not still the case, and we  
22 have a number of clients who are suffering because of  
23 it. The SEC goes right on doing its investigation  
24 without any regard to what's happening in the grand  
25 jury.

1 I might also point out something else, Your  
2 Honor, and that is in December the ACPA, the Antitrust  
3 Civil Process Act, was amended in order to make it  
4 available for investigation of false claims.

5 Rule 6(e) on its face, is a general rule of  
6 secrecy. The exceptions are for limited and specific  
7 purposes. Grand jury materials have never been freely  
8 available for civil litigation because secrecy is so  
9 essential to the functioning of the grand jury.

10 The rule does not single out attorneys for the  
11 government for any special mention except in connection  
12 with their duty to assist the grand jury in enforcing  
13 the criminal law. When the phrase "attorney for the  
14 government" appears in the rule, it is either in  
15 connection with that specific duty or the attorneys for  
16 the government are treated exactly the same as  
17 stenographers, interpreters, and the grand jurors  
18 themselves.

19 The rule binds all present to secrecy. It has  
20 no provision for general civil use. As this Court held  
21 in United States against Sells Engineering, Congress  
22 intended (a)(1) to have the same limitations on use that  
23 are explicit in (a)(2), and (a)(2) specifically  
24 prohibits government personnel from using grand jury  
25 material in civil litigation.



1 But since a prosecutor will need assistance in  
2 the civil phase of a complex case, the government now  
3 finds it necessary to totally rewrite the language of  
4 (a)(1). As a consequence, the government is now arguing  
5 in this Court that an attorney for the government in  
6 (a)(1) means not only attorneys who participated in the  
7 criminal investigation, but also secretaries and also  
8 paralegals, whether or not those people had been hired  
9 or assigned or had anything to do with the criminal  
10 investigation.

11 I respectfully submit that if Congress had  
12 intended secretaries and paralegals to be included in  
13 (a)(1), it would have been easy enough to draft them  
14 into the provision.

15 To me, the danger of what is threatened here  
16 is a kind of dual danger. The government is arguing  
17 that review is not use, and then they are also arguing  
18 that so long as they disclose only a summary, without  
19 quotation marks and without naming the grand jury as the  
20 source, they have made no disclosure of grand jury  
21 materials.

22 If that were the case, then the grand jury --  
23 the government alone would be able to determine what  
24 constitutes disclosure of grand jury materials and we  
25 will have established a very dangerous precedent, which

1 I fear will effectively end grand jury secrecy and the  
2 effective functioning of the grand jury.

3 I want to close on one note, and that is that  
4 if this Court permits prosecutors to use grand jury  
5 materials to litigate civil cases without a court order,  
6 then the government will overrule this Court's decision  
7 in Sells merely by the way it assigns its attorneys.

8 Thank you.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
10 Grand.

11 Mr. Cohen, do you have something more? You  
12 have three minutes remaining.

13 REBUTTAL ARGUMENT OF

14 LOUIS R. COHEN, ESQ.

15 ON BEHALF OF PETITIONER

16 MR. COHEN: Yes, a couple of points, Mr. Chief  
17 Justice.

18 First, it would, we believe, have been  
19 possible to bring and try a civil case in this matter  
20 without public disclosure that there had ever been a  
21 grand jury investigation of this conduct. That's true  
22 notwithstanding the proceedings on the issues that are  
23 now before us.

24 There was no disclosure of the subject matter  
25 considered by the grand jury, and it is very possible

1 that no reference to the grand jury need ever have been  
2 made.

3 The Respondents made that a little more  
4 difficult, because they filed a brief in the Second  
5 Circuit which identified the industry and the foreign  
6 country involved, but that was the first and only public  
7 disclosure of those two facts. And without that, it  
8 would have been possible to avoid any connection between  
9 this case and the grand jury at all.

10 Second, the problem -- substantially all of  
11 the problems to which Mr. Grand refers are, as was  
12 suggested, problems that would arise whenever a  
13 prosecutor who has memory of a grand jury is allowed to  
14 participate in a civil case.

15 We don't think the problems are real, but in  
16 any event they go to a point that he neither makes nor  
17 could find support for in Rule 6(e), which is the  
18 question of disqualification.

19 Conversely, as I said before, they are  
20 problems that would not be solved by the kind of  
21 threshold 6(e) order that is at issue here, which would  
22 not in any event permit such disclosure.

23 QUESTION: Mr. Cohen, what about disclosure to  
24 secretaries and such? Is that at issue here?

25 MR. COHEN: I don't think it should be. For

1 31 years when the rule referred only to disclosure to  
2 attorneys for the government, I think it was assumed  
3 that the attorneys for the government would occasionally  
4 have to get their memoranda summarizing a grand jury  
5 typed, and that the secretary operating under the  
6 supervision of the lawyer was an extension of the  
7 lawyer.

8 I want to respnd to the assertion that there  
9 was no showing of particularized need with respect to  
10 the -- I'm sorry.

11 QUESTION: I'm sorry, I know you want to go  
12 on. But let me press on. 3(a)(1) says "an attorney for  
13 the government," but 3(a)(2) says "such government  
14 personnel as are deemed necessary to assist an attorney  
15 for the government in the performance."

16 The rule seems to envision attorneys being  
17 different from those who are necessary to assist the  
18 attorney. So permitted disclosure to an attorney would  
19 seem not automatically to embrace disclosure by the  
20 attorney to a secretary.

21 MR. COHEN: It doesn't embrace disclosure by  
22 attorneys to other people who are assisting them, such  
23 as economists and accountants. And the Court in Sells  
24 summarized the reason why 3(a)(2) was added to the  
25 statute, and it was not to cover secretaries, but to



1 cover other kinds of personnel.

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

4 The case is submitted.

5 (Whereupon, at 11:59 a.m., oral argument in  
6 the above-entitled case was submitted.)  
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# CERTIFICATION

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

#85-1613 - UNITED STATES, Petitioner C. JOHN DOE, INC., I, ET AL.

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BY Paul A. Richardson

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