

U.S. SUPREME COURT
WASHINGTON, D.C. 20540

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner V. FRANK S. ZOLIN,
ET AL.
CASE NO: 88-40
PLACE: WASHINGTON, D.C.
DATE: March 20, 1989
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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 UNITED STATES, :

4 Petitioner, :

5 v. :

No. 88-40

6 FRANK S. ZOLIN, ET. AL., :

7 -----x

8 Washington, D.C.

9 Monday, March 20, 1989

10 The above-entitled matter came on for oral argument
11 before the Supreme Court of the United States at 1:38
12 o'clock p.m.

13 APPEARANCES:

14 ALAN I. HORGWITZ, ESQ., Assistant to the Solicitor
15 General,

16 Department of Justice, Washington, D.C.; on behalf
17 of the Petitioner.

18 MICHAEL LEE HERTZBERG, ESQ., New York, N.Y.; on behalf of
19 the Respondents.

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P R O C E E D I N G S

1:38 p.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-40, United States against Frank Zolin.

Mr. Horowitz, you may proceed whenever you're ready.

ORAL ARGUMENT OF ALAN I. HOROWITZ
ON BEHALF OF PETITIONER

MR. HOROWITZ: Thank you, Mr. Chief Justice, and may it please the Court:

This summons enforcement case presents two distinct issues. First, the authority of the district court to place a condition on its enforcement order requiring the IRS to return to the court for prior approval of certain uses of a summoned material. And, second, the correctness of the standard applied by the court of appeals in ruling upon Respondents' claim of attorney/client privilege for one of the summoned documents.

I will turn my attention initially and primarily to the first question, which has major implications for the effective conduct of IRS investigations generally.

Respondents here oppose the enforcement of the IRS' summons on the ground that it was not issued in

1 good faith. Specifically, they alleged that the IRS was
2 seeking the summoned documents not for use in its own
3 tax investigation of Ron Hubbard but for the purpose of
4 furnishing the documents to the Department of Justice
5 for use in the defense of a civil damage suit that had
6 been brought against federal officials by the Church of
7 Scientology.

8 After a hearing, the district court
9 emphatically rejected these allegations and ordered the
10 summons enforced. In its order, the court stated, and I
11 quote from page 27(a) at the Appendix to the Petition,
12 "The Church has failed to raise any doubt of the good
13 faith of the IRS in pursuing this summons enforcement
14 proceeding." And the court went on to state that the
15 agent did not issue the summons for an improper or
16 collateral purpose.

17 At the hearing, the court was even more
18 explicit. And, again, I quote from page 45 of the Joint
19 Appendix. "There is not an iota of evidence that this
20 summons is being prosecuted for any reason other than to
21 gather information for the ongoing investigation."

22 Nevertheless, faced with continued entreaties
23 by Respondents' counsel that the IRS' aim in fact was to
24 turn over the summon material to the Justice Department,
25 and also with the government's statement that it had no

1 such intention, the court sua sponte placed a condition
2 on its enforcement order. Namely, the court held that
3 the summoned material could not be disclosed to any
4 other government agency without a prior order of the
5 court.

6 And the court went on to suggest at the
7 hearing that it would issue such an order if the
8 government could demonstrate that the proposed
9 disclosure complied with the confidentiality rules of
10 Section 6103.

11 QUESTION: Mr. Horowitz --

12 QUESTION: Mr. Horowitz, how did that order
13 interfere with the IRS' ability to gather information
14 about its own tax investigation? I -- you know, I had a
15 little difficulty understanding how the government is
16 hurt by that kind of order.

17 MR. HOROWITZ: Well, we recognize, Justice
18 O'Connor, that this particular restriction that was
19 entered in this case is a narrow one and it's fairly
20 benign, in fact, because the government didn't plan to
21 turn over any information to the Justice Department.

22 QUESTION: Yes. So the IRS wasn't hindered at
23 all by that --

24 MR. HOROWITZ: The probabilities were --

25 QUESTION: -- as far as I can see it.

1 MR. HOROWITZ: -- that on the facts of this
2 case -- so it would never have occasion to go to the
3 court and nothing would happen.

4 But -- but it is our contention that the
5 general principle that underlies the district court's,
6 the only way in which its order can be supported by
7 authority, and the principle that was explicitly adopted
8 by the court of appeals is in fact the broad one that
9 has the potential to be extremely damaging to IRS
10 investigations.

11 QUESTION: Mr. Horowitz, let me interrupt you
12 too. You stress that the district court said there is
13 not an lota of evidence of bad faith, harassment, or
14 anything of that kind. What if the district judge had
15 said there's been a lot of evidence offered of bad
16 faith. I think in balance it doesn't carry the day and
17 I want to let the government enforce the subpoena. But
18 just as additional insurance, I'm going to order them to
19 limit its use in this way. Would your argument be any
20 different?

21 MR. HOROWITZ: well, you're hypothesizing that
22 the district court in fact finds that there's legitimate
23 purpose for the summons --

24 QUESTION: It comes down to --

25 MR. HOROWITZ: -- that's being issued?

1 QUESTION: he says, I'm willing to conclude --
2 I've got some doubts in this case. Because sometimes
3 the facts are close. We just heard one where there are
4 good arguments on both sides. And he says, I think the
5 government is -- and balance is correct here. But it's
6 not a case of no iota of evidence because it really
7 doesn't make a difference here. But there are -- there
8 is -- I am somewhat concerned.

9 MR. HOROWITZ: well --

10 QUESTION: would you -- You'd make exactly the
11 same argument, wouldn't you?

12 MR. HOROWITZ: well, that's a somewhat
13 different case. But our position would be the same,
14 that in fact, as the district court --

15 QUESTION: But would you be --

16 MR. HOROWITZ: -- the district court's --

17 QUESTION: Are you better off putting the
18 judge to the absolute choice of saying, Well, I've got
19 enough doubt. I guess I'd better deny enforcement.

20 MR. HOROWITZ: Well, I don't know if --

21 QUESTION: Wouldn't you --

22 MR. HOROWITZ: -- we're better off in a
23 particular case. I mean, it's possible in a particular
24 case the judge might, might find that he needs to deny
25 enforcement because he finds on the facts that there's

1 bad faith where in fact under this scheme that the
2 district court and the court of appeals have adopted ne
3 would in fact enforce the summons.

4 That may be, but the structure that Congress
5 set up for summons enforcement, in our view, does not
6 permit this kind of --

7 QUESTION: Well, I understand --

8 MR. HOROWITZ: -- monitoring of the
9 investigation and obviously our view was --

10 QUESTION: I understand that you're --

11 MR. HOROWITZ: -- that on balance we're better
12 off.

13 QUESTION: -- argument. I just was curious as
14 why you stressed the fact that there was no lota of
15 evidence because --

16 MR. HOROWITZ: well, I --

17 QUESTION: -- in that case it doesn't really
18 make much difference.

19 MR. HOROWITZ: Well, I stress it, I think,
20 because Respondent in their brief has gone on and on
21 about the evidence that was placed before the district
22 court and so I'm suggesting that the district court in
23 fact made such a finding. I mean, the fact is that --

24 QUESTION: Well, but let's assume there are
25 some cases out there where the judge might think there's

1 -- you know, it's a close case. You think he should --

2 MR. HOROWITZ: well --

3 QUESTION: -- In all close cases just simply
4 rule against the government.

5 MR. HOROWITZ: I mean, a close case in what
6 sense? A close case as to whether the --

7 QUESTION: Well, he thinks there is some
8 reason to believe that one government attorney is
9 concerned about the civil action pending in another
10 court and he just isn't a hundred percent sure that
11 there is complete good faith in that sense. And he
12 says, Well, I'll go ahead and let you get the
13 information if you give me your assurance that you're
14 not going to use it improperly.

15 MR. HOROWITZ: well, it's our position that --
16 that he needs to make a determination at the time the
17 summons is issued and not to keep --

18 QUESTION: Well, I --

19 MR. HOROWITZ: -- keep --

20 QUESTION: Well, how does --

21 MR. HOROWITZ: I think if you look --

22 QUESTION: -- that hurt you? That's the thing
23 I don't understand.

24 MR. HOROWITZ: Well, because -- because this
25 idea -- I was going to quote what the -- in response to

1 Justice O'Connor what the court of appeals actually held
2 here, which is that the district court's order in this
3 case created a mechanism whereby the district court
4 court monitor the IRS' use of the summoned documents.
5 This is an appropriate exercise of the district court's
6 discretion.

7 Now, this is an extremely damaging statement,
8 extremely damaging policy for the courts to take because
9 it allows the district courts to issue all kinds of
10 orders that will put various restrictions on the IRS'
11 investigation and require the IRS to keep coming back to
12 the district court --

13 QUESTION: I suppose one could ask
14 rhetorically what harm would an injunction do against a
15 person who claims he's going to obey the law anyway?

16 MR. HOROWITZ: Well --

17 QUESTION: But, still, you're entitled to
18 object to an injunction unless the showings made by law
19 required for injunction are made.

20 MR. HOROWITZ: Well, that's exactly right, Mr.
21 Chief Justice. As we pointed out in our reply brief,
22 there is a presumption that the government intends to
23 comply with the law. And courts cannot go out issuing
24 orders just telling parties that they have to comply
25 with the law.

1 I mean, the problem here is less substantive,
2 especially in this particular case where the judge at
3 least said that he was going to allow the government to
4 make any disclosure that was authorized under Section
5 6103. But the problem is procedural. And this Court
6 has grappled in many different contexts with the various
7 procedures applicable to summons enforcement proceedings
8 and has constantly reiterated the importance of having
9 summary enforcement proceedings once it will not
10 interfere with the IRS' investigation.

11 And it is our view that this kind of regime
12 under which the courts will -- well, maybe issue the
13 summons for now but keep looking to see what the IRS is
14 doing with the information, have the IRS come back if
15 they're going to do something that's a little
16 questionable, overall poses a great threat to effective
17 investigations and one that outweighs the fact that it
18 may be in some case, as Justice Stevens posits, the
19 court may in fact be impelled to deny enforcement for
20 that reason.

21 I think these courts' decisions, in addition
22 to continually emphasizing, as recently as last month's
23 decision in Stuart, the summary nature of IRS
24 investigations also reflect the fact that the summons
25 enforcement scheme has always been understood as one

1 where the district court's role is limited and one that
2 takes place in one slice of time.

3 The district court looks at the IRS' summons
4 when it's issue at the time of the enforcement
5 proceeding and decides at that time whether the summons
6 has been issued in good faith for a legitimate purpose
7 under the statute. And at that point, it decides either
8 to deny or to compel enforcement.

9 The statute that gives the court jurisdiction,
10 gives it authority only to compel enforcement and, of
11 course, to decline to compel enforcement. It does not
12 contemplate --

13 QUESTION: Mr. Horowitz, in a grand jury
14 context do you think the trial judge would have the
15 authority to condition enforcement of a grand jury's
16 subpoena on some kind of protective order? Say it
17 disclosed trade secrets or something like that and say --

18 MR. HOROWITZ: Well --

19 QUESTION: -- to the government that there are
20 limits on what you can do with the material?

21 MR. HOROWITZ: I think that if you're talking
22 about a protective order, say -- let's say trade secrets
23 which is the example you gave --

24 QUESTION: But any kind. Would you take the
25 same absolute position in a grand jury's subpoena you

1 take here, if there's absolutely no limits that the
2 Judge can impose?

3 MR. HOROWITZ: Well, when we say no limits, I
4 mean, obviously the Judge -- there are restrictions on
5 the IRS summons power.

6 QUESTION: Right.

7 MR. HOROWITZ: And that's what the district
8 court looks at.

9 QUESTION: And there are restrictions on grand
10 Jury material, too.

11 MR. HOROWITZ: Yeah. We're talking about the
12 Judge here imposing some new restriction --

13 QUESTION: Right.

14 MR. HOROWITZ: -- that's not authorized by
15 Congress. Now, I take it your hypothetical is a case
16 where if the Judge didn't impose this restriction there
17 would be no confidentiality protection for the --

18 QUESTION: Well, he -- whatever the protection
19 is -- there are cases where Judges have imposed
20 additional restrictions on responses to grand Jury
21 subpoenas. I don't think it's ever come to this Court.
22 I just wonder if the issue is any different. That's
23 really all I'm asking.

24 MR. HOROWITZ: Well --

25 QUESTION: Because there's no statutory -- you

1 know, program for them as there is -- when there is
2 another --

3 MR. HOROWITZ: There is a difference between a
4 restriction and enforcing a summons, and a restriction
5 in which the court retains jurisdiction to keep
6 considering whether the IRS is acting properly. I mean,
7 a judge obviously doesn't have to go just up or down on
8 a summons. It can enforce the summons in part. It may
9 decide that certain documents are not relevant to the
10 IRS' investigation. It may decide that the summons is
11 unduly burdensome in some way and --

12 QUESTION: Right. But any particular document
13 that is produced, that's all the judge can do, is say
14 produce it. He can't --

15 MR. HOROWITZ: That's right.

16 QUESTION: Either yes or no.

17 MR. HOROWITZ: I mean, the judge's role ends
18 at the time he makes -- he makes a decision --

19 QUESTION: Yes.

20 MR. HOROWITZ: -- on whether the summons
21 should be enforced in a particular respect. And this
22 kind of restriction -- in this case, we don't really
23 even understand why -- why -- it's conceivably argued
24 that there should be such a power in the court.

25 The -- unlike the hypothetical that you gave

1 about the grand jury, the material is already
2 confidential. This distinguishes it from all the
3 protective order cases that are cited by respondents.
4 There is no need for the court to go out and protect the
5 confidentiality of the material.

6 QUESTION: Well, what if the -- what if the
7 taxpayer being investigated finds out that the
8 government isn't living up to the rules and they
9 exchange information, or that people who have no
10 business knowing it are seeing it? What's he supposed
11 to do? Go back to the judge?

12 MR. HOROWITZ: No, he's not supposed to go
13 back to the judge. He's supposed to go to a new judge
14 and bring a suit.

15 QUESTION: Go to a new judge?

16 MR. HOROWITZ: Go to a new judge. He's -- in
17 that case, he's claiming that there's been a violation
18 of Section 6103 and he's got remedies for that.

19 QUESTION: (Inaudible) monitoring the IRS'
20 performance?

21 MR. HOROWITZ: No. No. I disagree, Justice
22 White. I mean, he's got his own remedies under Section
23 6103. One of those remedies is to bring a damage action
24 against the government under Section 7431 of the Code.

25 QUESTION: But a judge is going to decide that

1 case.

2 MR. HOROWITZ: A Judge is going to decide it,
3 but a Judge -- that is an independent action in which
4 the -- the agents involved may or may not have to pay
5 damages. But it doesn't act as a prophylactic -- as a
6 prior restraint --

7 QUESTION: But now about getting an order to
8 stop doing what you're doing?

9 MR. HOROWITZ: Well, then he would have to go
10 through the usual hoops of getting injunctive relief.

11 QUESTION: Okay.

12 MR. HOROWITZ: In this case I'm not sure he
13 could get it because of the Tax Anti-injunction Acts.
14 Again, another -- just another manifestation of
15 Congress' particular concern that IRS investigations not
16 be hampered by continual court proceedings that
17 interfere with them in the middle. But I think you have
18 the Anti-injunction Act --

19 QUESTION: What about the Judge saying the IRS
20 can get this information on the provision that they let
21 no one else see it? Nobody else?

22 MR. HOROWITZ: I think, Justice Marshall, that
23 would absolutely be erroneous for the court to do that.

24 QUESTION: Would be what?

25 MR. HOROWITZ: The court does not have the

1 power to do that. There are -- Congress has set up very
2 specific limitations --

3 QUESTION: So -- so it's all right for the IRS
4 to give it to the newspapers?

5 MR. HOROWITZ: It's not all right for the IRS
6 to give it to the newspapers because Congress --

7 QUESTION: Well, suppose --

8 MR. HOROWITZ: -- has provided that it does
9 not.

10 QUESTION: -- that the court says IRS
11 shouldn't get this but you shall not release it to the
12 newspapers?

13 MR. HOROWITZ: Well, that's essentially what
14 we have in this case, the same kind of order. The IRS --

15 QUESTION: And you say that's wrong?

16 MR. HOROWITZ: That's right. The court is
17 telling the IRS that you can't do something that the IRS
18 already is not allowed to do. There is no purpose for
19 such a --

20 QUESTION: Does the IRS have the right to turn
21 over confidential material to the newspapers? Where did
22 they get it from?

23 MR. HOROWITZ: No. They do not have that
24 right. That's the point I'm trying to make. That
25 Congress has already decided that that material is

1 confidential. And there is no reason for the court to
2 enter a new order under penalty of contempt --

3 QUESTION: I don't see why a court doesn't
4 have a right to control its own orders rather than to
5 have the IRS control the court's discretion.

6 MR. HOROWITZ: well --

7 QUESTION: Do you understand what I mean?

8 MR. HOROWITZ: I understand what you're
9 saying. But I think this just goes back to the basic
10 point that the Chief Justice made, which is that the
11 courts cannot go out running around issuing orders
12 telling various litigants to obey the law that's already
13 out there. There are procedures for enforcing the laws
14 and they don't include having courts --

15 QUESTION: what is a procedure to stop the IRS
16 from giving this information to the Justice Department?

17 MR. HOROWITZ: The procedure is the procedures
18 provided for enforcing Section 6103, which is largely at
19 Section 7431, Damage Action.

20 QUESTION: Damage action?

21 MR. HOROWITZ: Yes.

22 QUESTION: Have you ever seen one of those?

23 MR. HOROWITZ: Yes, I have.

24 QUESTION: You're sure?

25 MR. HOROWITZ: In the Barrett case that's

1 pending in this Court there is one.

2 QUESTION: You've seen one?

3 MR. HOROWITZ: I've seen several of them,
4 actually. And probably some of them will percolate up
5 here sooner or later. The fact is that that is the
6 mechanism that Congress --

7 QUESTION: Do you --

8 MR. HOROWITZ: -- chose to enforce --

9 QUESTION: I thought I hadn't seen one I --

10 MR. HOROWITZ: Well, we've been trying to
11 spare the Supreme Court from this --

12 QUESTION: I was in another position; I didn't
13 see it either.

14 MR. HOROWITZ: The statute, I think, was
15 enacted in 1976. Section 7431. Well, let me give an
16 example in a different context.

17 If there was a Freedom of Information Act suit
18 that was brought and -- and the requestor claims that
19 he's entitled -- that there's no exceptions applicable
20 -- he's entitled to the documents and the government has
21 to turn them over under the FOIA, surely the judge's
22 role in that kind of a suit is to look at the Freedom of
23 Information Act and decide whether the information is
24 protected or whether it should be disclosed.

25 It's not the judge's business to find out what

1 the requestor plans to do with the information after he
2 gets it. It's not the judge's concern whether the
3 requestor is planning to use it to get more information
4 to run some extortion scheme, or something. That's just
5 not the judge's province in that kind of suit.

6 It's up to the judge to decide, under the
7 standards set forth in FOIA, whether the information is
8 to be disclosed. And when the judge has made that
9 determination, he either orders the information
10 disclosed or not.

11 And then he is done. He doesn't tell the
12 requestor, okay, I'm going to give you the information
13 but you come back here every six months and I want to
14 make sure that you're not using it for some --

15 QUESTION: Are you aware of cases in which
16 enforcement has been denied?

17 MR. HOROWITZ: Enforcement of IRS summons?

18 QUESTION: Yes.

19 MR. HOROWITZ: Yes. There have been many
20 cases where an IRS summons was denied. And --

21 QUESTION: But you don't advertise them a lot,
22 right?

23 (Laughter.)

24 MR. HOROWITZ: I think I'd like to mention one
25 other policy point that's involved here in addition to

1 the delay that can occur. Actually, the delay can occur
2 at two stages. If these kinds of restrictive orders are
3 permitted, we think (a) that it will cause additional
4 delay at the initial summons enforcement stage where, as
5 opposed to the normal fairly summary proceeding where
6 litigants occasionally are challenging whether there's
7 bad faith or good faith and whether the summons should
8 be enforced, there will be a whole additional set of
9 litigation over what sort of restrictions are
10 appropriate for which documents. They are appropriate
11 and possible appeals from that kind of litigation.

12 And also, of course, down the road you have
13 the problem of where the IRS is required to come back to
14 the court for permission to make the particular use
15 that's been restricted. Even if the Court agrees with
16 the IRS that the disclosure, or whatever it is, is
17 permissible, it's still a serious problem because the
18 investigation is halted in the middle, the IRS has to
19 run back to the court. As you know, they have to get a
20 court date. They can't just walk in that morning. And
21 the whole thing is halted for a period of time.

22 Second, at least in the 6103 context, most of
23 the disclosures that are going to be sought by the IRS
24 in this connection -- or, many of them anyway -- are
25 going to come under Section 6103(k)(6) which is

1 disclosures that are necessary for law enforcement
2 purposes for the IRS investigation.

3 I think in order for the IRS to persuade the
4 court that the disclosure is necessary for that purpose,
5 it's going to have to give a little bit of a roadmap of
6 its investigation to the court to explain why the
7 disclosure is necessary. And that obviously can inhibit
8 the success of the investigation if that kind of
9 information is provided to the target, a problem that
10 this Court alluded to in the U'Brien case.

11 I think I should turn briefly now to the
12 attorney/client question, if there are no further
13 questions on the summons issue.

14 The question here is whether the tape
15 recording of a meeting between certain church officials
16 and their counsel is protected by the attorney/client
17 privilege because the government did not prove by
18 evidence independent of the communications themselves
19 that the meeting was in furtherance of a crime or fraud.

20 The IRS here produced as evidence that the
21 crime-fraud exception applied a partial transcript of
22 the tape that had been furnished by an informant. And,
23 in addition, because this tape had actually been in the
24 possession of the IRS for a short time, and an IRS
25 official had listened to the tape, the IRS also

1 proffered the affidavit of an IRS agent describing the
2 contents of the tape.

3 The court of appeals held that this
4 highly-probative evidence cannot be considered in
5 determining the applicability of the crime-fraud
6 exception because it is not independent of the
7 communications itself -- themselves.

8 The result of the court of appeals rule is
9 that there are going to be cases where the court knows
10 to an absolute certainty that the communications are not
11 privileged. Nevertheless, it will be bound to deny
12 probative evidence to the factfinder on grounds of
13 attorney/client privilege.

14 This rule leads to a perverse result --

15 QUESTION: Mr. Horowitz, can I -- do I
16 understand your position correctly? You do not deny
17 that you need some prima facie evidence before you go in
18 camera? You -- You don't assert that you can just come
19 into the judge and say, you know, we suspect that this
20 is not really a privileged communication. We want you
21 to look it over in camera.

22 MR. HOROWITZ: well, let me say two things,
23 Justice Scalia.

24 First of all, this case itself doesn't involve
25 in camera inspection at all because the government

1 already has --

2 QUESTION: Right.

3 MR. HOROWITZ: -- the nonindependent evidence
4 from these other sources I just mentioned.

5 QUESTION: Right.

6 MR. HOROWITZ: In that case, we recognize that
7 the district court has discretion to deny in camera
8 review. If the government just came in and said, we
9 want you to look at the documents in camera with nothing
10 else, -- I'm not saying they couldn't do it, but I
11 suspect the judge would deny it. And I don't think we
12 would have any grounds for complaining.

13 I think naturally any time you're going to ask
14 the district court to do something like that, you're
15 going to have to come in with some sort of reason to
16 make the judge do it.

17 QUESTION: Well, that's -- that's comforting.
18 But you're not willing to admit that the district court
19 can't do it?

20 MR. HOROWITZ: I guess I'm not. It seems to
21 me if the district court did do it and in fact found
22 that the documents proved crime or fraud, I don't think
23 that would be reversible on appeal. I don't think you
24 could get the attorney/client privilege reinstated on
25 the ground that the district court shouldn't have looked

1 at them in the first place.

2 QUESTION: Well, that may be true. But
3 wouldn't you say that if there was nothing except a -- a
4 suspicion by the government, or by anybody else, that
5 the crime -- crime-fraud -- fraud exception would be
6 met the Judge would have a legal duty not to look.
7 Wouldn't he have to respect the privilege? He or she
8 have to respect the privilege?

9 MR. HOROWITZ: Well, I'm not sure how to
10 answer that, Justice Stevens. It seems to me
11 unrealistic to assume that the government would have no
12 evidence of that. I suppose if it had absolutely no
13 reason other than some --

14 QUESTION: So, basically as a practical matter
15 the question is how much evidence --

16 MR. HOROWITZ: Yes.

17 QUESTION: -- does the government need.

18 MR. HOROWITZ: Yes. How much of it. And
19 that, I think, is a hard question to answer. It's
20 largely --

21 QUESTION: And what --

22 MR. HOROWITZ: -- in the discretion of the
23 court.

24 QUESTION: And what is your position? Because
25 I think I have the same difficulty Justice Scalia did in

1 reading your brief. You seem to be saying they don't
2 really need anything. But I think you've kind of
3 acknowledged they need something.

4 MR. HOROWITZ: Yes. I think as a practical
5 matter they need something. But I --

6 QUESTION: Then how do we define --

7 MR. HOROWITZ: -- don't really know where to
8 draw the line. So --

9 QUESTION: And that's the question. How do we
10 define that something?

11 MR. HOROWITZ: Well, I don't know.

12 QUESTION: But not as a legal matter, just as
13 you still keep on saying. As a practical matter they
14 need something here.

15 MR. HOROWITZ: Well, I'm willing to say --

16 QUESTION: You still won't concede --

17 MR. HOROWITZ: -- they need something. You
18 know, the counsel never wants to concede anything, but
19 it seems to me that this court --

20 QUESTION: Have you noticed that --

21 MR. HOROWITZ: -- would probably be mistaken
22 in looking at documents with no reason to suspect crime
23 or fraud other than the government begging them to look
24 at them. So, --

25 QUESTION: And your position is --

1 MR. HOROWITZ: But I don't know how to draw
2 the line exactly and it's not an issue an issue in this
3 case.

4 QUESTION: I see. Your position is that,
5 whatever the line is, that you met it in this case, and
6 if you can meet that line, you can look at the document
7 to be sure that there -- I mean to be satisfied or
8 something.

9 MR. HOROWITZ: Though, in this case --

10 QUESTION: That's basically what --

11 MR. HOROWITZ: As I said, in this case we
12 didn't even -- we're not really -- well, we did ask for
13 in camera review if the court --

14 QUESTION: Yes.

15 MR. HOROWITZ: -- in fact wasn't persuaded by
16 what we submitted. But we submitted a lot of
17 nonindependent -- proffered, at least, a lot of
18 nonindependent evidence without the court ever having to
19 look at the documents in camera. And the court of
20 appeals -- under the court of appeals' rule none of the
21 --

22 QUESTION: Yes.

23 MR. HOROWITZ: -- this is in probative of --

24 QUESTION: Does the IRS still use outside
25 people to get this information?

1 MR. HOROWITZ: which information?

2 QUESTION: Electronic.

3 MR. HOROWITZ: which information, Justice
4 Marshall?

5 QUESTION: Electronically, does the IRS still
6 shop it out for private people to do it?

7 MR. HOROWITZ: I don't know. This tape
8 recording was made by the Respondents themselves. This
9 is not a wiretap. I don't know the answer to your
10 question.

11 I'd like to reserve the remainder of my time.

12 QUESTION: Very well Mr. Horowitz.

13 Mr. Hertzberg.

14 ORAL ARGUMENT OF MICHAEL LEE HERTZBERG

15 ON BEHALF OF RESPONDENTS

16 MR. HERTZBERG: Mr. Chief Justice, and may it
17 please the Court:

18 I believe that the -- addressing, first, the
19 crime-fraud issue -- I believe that the government has
20 effectively conceded that there is a need for some
21 independent evidence -- an independent evidence rule, as
22 it were -- before a court may upon a mere incantation of
23 the words crime-fraud review privileged communications
24 between an attorney and a client for which a privilege
25 has already been established.

1 If I understood counsel's answers to the
2 questions posed by Justice Scalia and Justice Stevens,
3 he said there has to be some sort of evidence, there has
4 to be some sort of reason submitted by the government.

5 QUESTION: But the issue is simply whether
6 that evidence can be the communication itself, which the
7 government has gotten ahold of in some other fashion.
8 Why can't that evidence be the communication itself?

9 MR. HERTZBERG: It should not be the
10 communication itself because otherwise, in the first
11 instance, a party -- whether it be the government or an
12 adverse civil litigant -- could come into court and just
13 ritualistically intone the terms crime-fraud with
14 respect to privileged communications, and under the
15 scenario which the government outlines --

16 QUESTION: No. I think you're leaving out a
17 step. I think Justice Scalia and I are both assuming
18 that without just coming into court and referring to the
19 privilege the government has legitimately acquired
20 possession of a privileged communication which it had a
21 right to look at. Could it then go ahead and ask the
22 Judge also to look at it to make this determination?

23 MR. HERTZBERG: It should not be able to.
24 First, let me just make it clear that in this particular
25 case there is no record to show that the government

1 legitimately obtained the particular communications
2 which are at issue in this case. There was no
3 determination made about that below. That was not the
4 issue below.

5 QUESTION: No. But the trial judge or the
6 court of appeals -- I can't remember which -- assumed
7 that they may well have had it legitimately but,
8 nevertheless, said we don't care about that, we cannot
9 look inside this --

10 MR. HERTZBERG: Well, in fact, Justice
11 Stevens, the trial judge over our objections did look at
12 the massive excerpts from the tape recordings, which are
13 the communications in this particular case, and in fact
14 found that they did not establish a prima facie case of
15 crime or fraud.

16 So, the district court in this case, in an
17 ironic twist, over our objection, did look at the
18 communication. The court of appeals, however, said that
19 the district court should have initially considered
20 independent evidence only to determine whether there was
21 communication in furtherance of a crime or fraud.

22 And we think that that test, which was
23 enunciated by the Ninth Circuit, and which as we have
24 demonstrated in our briefs is in practice employed in
25 one form or another by many courts of appeals and

1 federal district courts throughout the country, is the
2 proper approach.

3 The -- the analysis should not turn on whether
4 fortuitously the government or an adverse civil party
5 has managed to get privileged communications, and has
6 them, and can submit them to the court along with an
7 allegation of crime-fraud.

8 There has to be a standardized, methodical and
9 logical approach before the analysis can be made.

10 QUESTION: But what is the standard, though,
11 when you need independent evidence? Is it a probable
12 cause standard or a preponderance of the evidence, or
13 what?

14 MR. HERTZBERG: Your Honor, the courts have
15 given slightly different formulations. The Second
16 Circuit apparently does use a probable cause standard.
17 The Ninth Circuit, without elaboration referred to --
18 and all the courts, of course, refer to the prima facie
19 test. We submit that the prima facie test in the
20 general sense in which that term is used means a case --
21 a prima facie showing -- a case which is enough to
22 support a directed verdict if unrebutted.

23 We're comfortable enough with that
24 definition. And the government failed to --

25 QUESTION: -- probable cause?

1 MR. HERTZBERG: Excuse me, Your Honor?

2 MR. HERTZBERG: You're not comfortable with
3 the Second Circuit's standards?

4 MR. HERTZBERG: Oh, I'm sure that there is --
5 if anything, it may be a higher standard, and I would be
6 equally if not more comfortable with it. I'm not urging
7 one standard or another because in this case at every
8 stage the government failed -- in the district court,
9 with the court looking at the communications and the
10 independent evidence, in the court of appeal, with the
11 court -- the Ninth Circuit panel determining that the
12 government had not even made out a prima facie --

13 QUESTION: Well, but if --

14 MR. HERTZBERG: -- case of illegality.

15 QUESTION: If we sustain the government's
16 position here, the case would go back to the Ninth
17 Circuit for them to review the district court's
18 determination, I suppose.

19 MR. HERTZBERG: That's --

20 QUESTION: That the tapes themselves -- so,
21 it's not as if the thing were totally moot. The
22 government says that your argument is inconsistent with
23 our opinion a couple of years ago in the Bourjaily case.

24 MR. HERTZBERG: We don't see any such
25 inconsistency at all. In fact, if anything, Justice

1 Rehnquist, we think that the Bourjaily case supports us.

2 In that case this Court merely determined that
3 the showing the preliminary evidentiary determination by
4 a district court judge on the co-conspirator hearsay
5 exception under Rule 801 could be made by looking at the
6 hearsay statements themselves. This Court did not reach
7 a question of whether it could be made exclusively by
8 looking at those statements, but it said they could be
9 considered.

10 QUESTION: Well, does --

11 MR. HERTZBERG: And this Court--

12 QUESTION: The government here is asking for
13 nothing more than consideration along with whatever
14 evidence is --

15 MR. HERTZBERG: However, Justice Rehnquist,
16 the foundation for this Court's decision in Bourjaily
17 was referenced to Rule 104(a) of the Federal Rules of
18 Evidence. And that Rule provides that in making
19 preliminary evidentiary determinations a court may look
20 at any evidence except privileged communications.

21 And we are, of course -- we fall within the
22 privilege. These -- These tapes which are at issue in
23 this case were found to be privileged communications.
24 So, the 104(a) exception --

25 QUESTION: Well, how -- how do you know

1 whether they're privileged communications, though, if --
2 if -- before you decide this challenge in one way or the
3 other, because the crime-fraud exception says it's not
4 privileged if there is crime-fraud involved?

5 MR. HERTZBERG: Well, Your Honor, in this
6 way. Because we were able to establish without
7 submission to the court in camera below in the district
8 court that these documents were presumptively
9 privileged. And then the burden shifts -- when somebody
10 comes later on, as the government did, the burden shifts
11 to the opponent of the privilege.

12 And they carry a serious burden here to try to
13 strip the privilege. And that's the analyses. This is
14 not just a concurrent mix necessarily. In the first
15 instance, these communications --

16 QUESTION: Well, what's the authority for --
17 for that line of progression that you're -- first, a
18 claim of privilege or prima facie? And then the burden
19 shifts? Does that come from one or more of our cases?

20 MR. HERTZBERG: Your Honor, I'm not basing
21 this on a particular case.

22 QUESTION: What are you basing it on?

23 MR. HERTZBERG: I'm basing it on what happened
24 in this case.

25 QUESTION: Well, but maybe -- maybe we could

1 have some higher authority than that.

2 MR. HERTZBERG: Well, Your Honor, I don't have
3 -- I'm not sure that there's an authority that
4 specifically addresses the order in which the
5 crime-fraud exception is applied on a claim of
6 privilege.

7 But in very many cases it is undisputed that
8 communications are protected by the attorney/client
9 privilege, save for the possibility that they may be
10 subject to the crime-fraud exception and that the
11 crime-fraud exception will strip them of the privilege.

12 For instance, when the government's subpoenas
13 for documents from an attorney office for a grand jury,
14 for example, they rarely will say these were not
15 communications in confidence between the attorney and
16 the client. They will assert -- they will in effect
17 concede that but for their claim of the crime-fraud
18 exception the documents are privileged. And that's what
19 I'm referring to in this particular instance.

20 QUESTION: Mr. Hertzberg, I'm -- I'm not sure
21 what -- what you would require by way of prima facie
22 evidence. Suppose the advice is given at a meeting in
23 which a third party is present and the government has
24 testimony from the third party saying this wasn't just
25 legal advice; they were in fact planning -- planning the

1 fraud. Would that be enough?

2 MR. HERTZBERG: Yes.

3 QUESTION: Because he was there and he
4 overheard it?

5 MR. HERTZBERG: Yes.

6 QUESTION: But if you had a tape of it, that
7 would be no good?

8 MR. HERTZBERG: No.

9 QUESTION: What sense is there in that
10 distinction? I can't understand that at all.

11 MR. HERTZBERG: Well, I'll tell you what the
12 difference is. Your Honor's question turns on the
13 fortuity of the government happening to have the tape
14 here.

15 QUESTION: And the other one turns on the
16 fortuity of somebody happening to have been present. I
17 mean --

18 MR. HERTZBERG: If there was a witness -- If
19 there is a witness, the witness confirms -- I suppose --
20 backing up for one moment, Your Honor.

21 I suppose the witness might not be able to
22 testify absent independent evidence.

23 QUESTION: Well, that would seem more logical,
24 I must say.

25 MR. HERTZBERG: Yes. I was too quick to -- to

1 agree with --

2 QUESTION: You wouldn't let the witness in
3 either?

4 MR. HERTZBERG: No, I would not, because if
5 the rule is to be served --

6 QUESTION: Well, what kind of evidence do you
7 want of -- that the fraud exists?

8 MR. HERTZBERG: The kind of evidence that
9 invariably the government or civil parties have anyway.
10 That there was some wrongdoing. I mean, presumably the
11 government is not conducting a grand jury investigation
12 or allegations made in a civil case in a vacuum.
13 They're not taking -- randomly accusing somebody of
14 wrongdoing.

15 They have some evidence that there was
16 wrongdoing going on, and they have prima facie evidence
17 or reason to believe that the attorneys may have
18 furthered the wrongdoing. And they make the allegation
19 of the crime-fraud exception.

20 But the government cannot go around and -- and
21 I do not understand counsel to suggest that they could
22 randomly without any basis in fact suspect that an
23 attorney/client communications between -- confidential
24 communications were in furtherance of a crime-fraud.
25 And that's all the prima facie case requires. It only

1 requires that the mere invocation of the words
2 crime-fraud be supported by some factual underpinning
3 before --

4 QUESTION: But what if the government has in
5 its possession the things that you're claiming are
6 privileged, and it's perfectly evident from examining
7 those documents that there was crime and fraud afoot?

8 MR. HERTZBERG: Well, if we're addressing this
9 case in particular, Justice Rehnquist, I think that at
10 the least there would have to be a question on remand
11 about whether the government was rightfully in
12 possession of the -- of the tapes. And I think that's a
13 question that wasn't reached and need not have been
14 reached under the prevailing --

15 QUESTION: Well, and certainly not raised by
16 any party to this case.

17 MR. HERTZBERG: But what we're saying is that
18 the independent evidence test serves a very logical
19 purpose. It balances the need for relevant evidence
20 with the need for society to --

21 QUESTION: Why do you need an independent
22 evidence when the government is in possession of the
23 documents for which the privilege is claimed and the
24 documents themselves plainly -- just have crime and
25 fraud written all over them?

1 MR. HERTZBERG: Well, first, let me remind the
2 Court that in this case they did not and they were found
3 not to -- not to have --

4 QUESTION: No?

5 MR. HERTZBERG: -- not to have.

6 QUESTION: well, but -- but that finding has
7 not been reviewed by the Ninth Circuit.

8 MR. HERTZBERG: Well, it has in part because
9 the Ninth Circuit found --

10 QUESTION: well, let's not get into -- into
11 those side issues. What's your answer to my question?

12 MR. HERTZBERG: Your Honor, we would say that
13 the salutary effect of the independent evidence rule in
14 those rare instances where a party happens to have the
15 confidences to begin with -- and that would be extremely
16 rare -- normally when the party is seeking access to the
17 attorney/client communications, they don't have them to
18 begin with.

19 But in those rare, rare instances, as by
20 happenstance occurred for instance in this case, the
21 purpose of the rule is better served by still requiring
22 that there be a prima facie showing at the outset.

23 QUESTION: But not --

24 MR. HERTZBERG: To satisfy the court --

25 QUESTION: -- where you can't rely on the

1 documents at all even though the documents virtually
2 scream fraud? Is that your position?

3 MR. HERTZBERG: That the court should not look
4 at them, in the first instance. Yes, that is our
5 position. In those rare instances. Again, I want to
6 stress that it is not -- it is far from normal -- it is
7 highly unusual to contemplate a situation where a --
8 whether it's a government or a civil party -- is seeking
9 the court's process to obtain documents that they have
10 already.

11 We do not want -- we don't think the court
12 should give an advantage to a party that manages to get
13 within its possession before a determination by a court
14 of the privileged communications. This could encourage,
15 for instance --

16 QUESTION: well, there could be an incentive
17 -- it could be at fault. There's certainly -- you can't
18 say conclusively that in effect the other party has a
19 privileged communication means that it acquired it by
20 fault.

21 MR. HERTZBERG: Not necessarily. But I think
22 that if this Court had a different rule for that
23 particular unusual circumstance, it might encourage
24 situations -- particularly in the civil arena where
25 major corporations are litigating against each other.

1 and there could be an inducement for a corporation to
2 try to -- if it were a disaffected employer or otherwise
3 -- to get confidential communications from the other
4 side and then feel all they have to do is holier
5 crime-fraud and the court can start going through the
6 entirety of the communications.

7 So, we think that that would be -- for
8 purposes of uniform application, there should be some
9 quantum, which we maintain to be the prima facie
10 showing, of crime or fraud to support that allegation
11 before in camera review can be sought.

12 I want to turn to the other issue that is
13 raised by the government. And that is the question
14 about the order of this Court. We believe that that
15 order is well-supported by the inherent power of Article
16 III courts to insure that their process is not abused.

17 It is fundamental. It comes from as long ago
18 as the Gumbel v. Pitkin decision of this Court in 1888,
19 though the Powell case which specifically in the context
20 of summons enforcement actions warned that it is the
21 process of the Court that is being sought to enforce a
22 summons by the Internal Revenue Service, and courts
23 should not allow that process to be abused.

24 QUESTION: In the Stuart case issued just a
25 few years -- a few weeks ago, Counsel, we said that once

1 the IRS shows that it's entitled to the order, that's
2 the end of the matter.

3 MR. HERTZBERG: I -- I read that, Your Honor.
4 However, respectfully, the Stuart case presented a very
5 far and different issue and was not -- I think that that
6 one statement that's you've extracted, Justice Kennedy,
7 certainly not made in the context of the issue that's
8 before this Court on the protective order that was
9 issued below.

10 What the government seems -- the government,
11 by the way, has really retreated, as I understand their
12 oral argument, from the premise of their brief -- the
13 question presented in their brief.

14 In the brief, and the question on which they
15 sought and obtained certiorari in this Court, was the
16 argument that district courts are wholly without
17 authority under any circumstances whatsoever in summons
18 enforcement proceedings to take any steps to make sure
19 that their process is not abused.

20 They said enforcement or denial, there's no in
21 between. Now, they start their argument off today by
22 quibbling about the record below. Did we make a
23 sufficient showing?

24 Well, the district court, notwithstanding the
25 language which my learned opponent quoted to the Court,

1 the district court did find that we had raised a real
2 fear that the five documents which we were enforcing
3 through the summons would be turned over to the
4 government and possibly then given to civil attorneys
5 for the Department of Justice. And he articulated that
6 fear in the record.

7 And the Ninth Circuit reviewed, looking for
8 abusive discretion, specifically reviewed the record --
9 and it was an ample record that was before the court --
10 there was a hearing and there was considerable testimony
11 to substantiate what the court of appeals decided was a
12 real fear that information purportedly being sought
13 under authority of the summons might be used for an
14 improper purpose and disseminated improperly later on.

15 And the result was what my colleague calls now
16 the narrow order or the fairly benign order of the
17 court. And we think it was extremely narrow.

18 All it does is say to the government you can't
19 use those five documents that I'm giving you for any
20 purpose other than -- reference to the Department of
21 Justice for criminal prosecution, which is the premise
22 on which you came to this court in the first place. Or,
23 you must obtain an order of this court.

24 It didn't say you can't communicate with other
25 government agencies. It didn't say you can't go out in

1 the world and look for witnesses and talk to them and --

2 QUESTION: well, what if it had?

3 MR. HERTZBERG: -- proceed with an
4 investigation.

5 QUESTION: what if it had? Are there limits
6 on the court's power in this regard to enter protective
7 orders?

8 MR. HERTZBERG: That's, I think, a fairly
9 broad question. It's hard for me to say that there
10 couldn't be some limits, but those limits are not in our
11 case. I don't think we need reach that question,
12 Justice O'Connor. I think that the --

13 QUESTION: well, but we have to write the
14 opinion and you're arguing that there should be a rule
15 that gives the district court some authority to control
16 the IRS. So, we're certainly entitled to inquire what
17 the dimensions of the rule are that you're proposing.

18 MR. HERTZBERG: Well, I think that -- I think
19 that the dimensions of the rule are that, as I -- as I
20 can formulate them, that the Court can fashion an order
21 when it feels that the record warrants it to insure that
22 its process is not abused. Within those parameters, it
23 has that inherent power.

24 And the government -- as long as there is no
25 indication that -- I would add this. As long as there

1 is no indication that it would interfere with the
2 investigation of the government. And there has been no
3 such real argument made in this case by the government.

4 QUESTION: What kind of evidence? I suppose
5 you'd say there would have to be a record made before
6 the district judge, there must be some evidence of some
7 danger or risk of disclosure? The judge just can't say,
8 I don't trust the IRS and (inaudible).

9 MR. HERTZBERG: Well, presumably he would have
10 a factual record which would warrant applying --

11 QUESTION: What kind of facts?

12 MR. HERTZBERG: I think the kind of facts --

13 QUESTION: Absent concrete evidence and here
14 are these other (inaudible).

15 MR. HERTZBERG: Yes. The kind of record that
16 was adduced in this case, Justice White. And a record
17 that would be reviewed by a court of appeal for abuse of
18 discretion.

19 QUESTION: (Inaudible) believe that raising a
20 real valid doubt about the veracity and trustworthiness
21 of the testimony in this --

22 MR. HERTZBERG: Yes. The district court felt
23 we had and the court of appeals felt we had -- and
24 called it a wise exercise of control and exercise of
25 discretion.

1 And that record -- I don't want to get too
2 much into the record -- but in a very brief hearing that
3 we were afforded, there was an undisputed record of
4 constant communication between the Department of Justice
5 civil attorneys engaged in non-tax related litigation in
6 Washington against the Church of Scientology. On the
7 telephone constantly --

8 QUESTION: Mr. Hertzberg, on page 26A of the
9 petition for certiorari where it's Judge Hupp's ruling
10 on a motion for reconsideration, he says when the
11 government asked him to reconsider his order
12 conditioning -- he says, "Since the entire basis of the
13 summons proceeding was to obtain material for a tax
14 investigation, the court thinks it reasonable to
15 restrict the use of the material for that purpose unless
16 a criminal prosecution is administered."

17 Now, that sounds just -- it doesn't sound from
18 that -- perhaps there's something else -- he was moved
19 particularly by any showing in this case, but just the
20 idea that the IRS shouldn't disobey the law.

21 MR. HERTZBERG: Now, Justice Rehnquist, our
22 Joint Appendix --

23 QUESTION: Well, are you saying this doesn't
24 say what I just read to you?

25 MR. HERTZBERG: Well, you -- I -- I was

1 confused. I thought you said 26A.

2 QUESTION: That's exactly what I said -- 26A
3 of the petition for certiorari.

4 MR. HERTZBERG: Right. Yes. Well, what he's
5 referring to, Justice Rehnquist, when he says reasonable
6 is the record, which is reflected at Joint Appendix page
7 67. There are the court's concerns articulated. At
8 page --

9 QUESTION: Well, but I think that it's very
10 difficult to read that sentence that way. It starts
11 out, "Since the entire basis of a summons proceeding was
12 to obtain material for a tax investigation, the court
13 thinks it reasonable." It doesn't say any reference to
14 the facts shown here. It's just the idea if you're
15 getting this material for a tax investigation, you ought
16 to follow the rules.

17 MR. HERTZBERG: Justice Rehnquist, in context
18 -- with all due respect, in the context of the record
19 that was adduced, what the court is saying there is that
20 because the government said they wanted it for a tax
21 investigation and because my order would allow the
22 government to use it for that proper purpose but not for
23 an improper purpose, I am imposing the restriction.

24 That is -- That is precisely the context of
25 that remark by the court. And it's further amplified --

1 QUESTION: Well, that just means that I'm
2 going to make the government obey the law.

3 MR. HERTZBERG: Well, but it's more than that,
4 Justice White. Because in this case, as both courts
5 below found -- as both courts found below, there was
6 ample reason to believe in this *sul generis* case, as the
7 district court stated --

8 QUESTION: What page of the Joint Appendix are
9 you --

10 MR. HERTZBERG: Page 67.

11 QUESTION: All right.

12 MR. HERTZBERG: The colloquy there,
13 particularly that of the court. The court misspoke on
14 the third line where it says, "The IRS and the United
15 States in general carrying on litigation." He meant the
16 IRS and the Church of Scientology.

17 QUESTION: Mr. Hertzberg, what did --

18 MR. HERTZBERG: Could I just add one thing,
19 please?

20 QUESTION: All right.

21 MR. HERTZBERG: I just want to stress as
22 emphatically as I can, that the issue before this Court
23 is the inherent power of the court. Not the strength of
24 the record. The government lost below on the strength
25 of the record. The stark issue that they posed by the

1 petition is, is the court under any circumstances --
2 strong record or not -- permitted to issue this kind of
3 order?

4 And I don't think that this Court should be
5 reviewing the record in that context. The only question
6 that the Court was asked to resolve by the government is
7 does the court have the power, assuming there is a
8 sufficient record. As the courts below found --

9 QUESTION: As it happens, that's what my
10 question goes to. That happens exactly to be it.

11 Section 552 of the Administrative Procedure
12 Act authorizes a court to order the production of
13 records from an agency. The same section says that
14 agencies don't have to turn over law enforcement
15 investigatory records if they would, among other things,
16 endanger the life or physical safety of a law
17 enforcement officer.

18 Now, suppose a court has a refusal by the FBI
19 to turn over some information on the ground that it
20 would -- it would endanger witnesses or law enforcement
21 agents. And the requestor happens to be someone who has
22 mob connections. And the court says, well, gee, I don't
23 really know whether it would endanger or not. But, just
24 to be sure, I'll order the production of the documents.
25 But you shouldn't give them to anybody else. Or, it

1 puts some other condition on them.

2 Do you think a court has inherent power to do
3 that?

4 MR. HERTZBERG: If -- yes, it does. If --

5 QUESTION: Is that right? Under the APA? Do
6 you know any court that's ever done it under the APA? I
7 always thought the choice was you either turn it over or
8 you don't turn it over. If you have enough doubts, you
9 don't turn it over. You can't say, we'll turn it over,
10 but --

11 MR. HERTZBERG: I would distinguish -- I can't
12 cite a case, Justice Scalia --

13 QUESTION: No, I don't think -- I don't think
14 --

15 MR. HERTZBERG: But I would distinguish the
16 hypothetical --

17 QUESTION: Trust me. I bet you there aren't
18 any.

19 MR. HERTZBERG: Okay.

20 QUESTION: Now, why is this different from --
21 here you have a statute that's -- that's in most
22 respects similar. Why is it different from the --

23 MR. HERTZBERG: It's different because the
24 Internal Revenue Service comes to the district court for
25 enforcement of the summons. The summons cannot be

1 enforced without the authority of the district court.

2 And, for instance, the statutes under which
3 the Internal Revenue Service must move to get summons
4 enforcements -- those are 7402(b) and 7604(a) of the
5 Internal Revenue Code -- say, by appropriate process the
6 district court may enforce a summons.

7 The IRS must come to the district court and
8 the moment that they do, and the moment the concept of
9 appropriate process is implicated, at that time we
10 submit that the court has inherent power, if it is
11 satisfied by the showing made before it, as it was in
12 this case, to insure that his process is not abused
13 later on.

14 And the government has not demonstrated any
15 way -- the quibble with the record, but I submit again
16 that's not the issue before this Court. The legal issue
17 before this Court is, is the Court -- does it have that
18 inherent power or is it utterly without that inherent
19 power?

20 QUESTION: You've told me why this
21 distinguishes your case from the Freedom of Information
22 Act. Why can't you say the same thing under FOIA? We
23 want to make sure that our process isn't abused. We are
24 -- we are compelling the agency to produce these
25 documents, as we're authorized to, and we want to be

1 sure that this process isn't abused. So, we're telling
2 you don't turn over the name to the mob on pain of being
3 in contempt.

4 MR. HERTZBERG: I'm not -- I must say I'm not
5 following the -- the --

6 QUESTION: well, I'm just saying the principle
7 that espousing would whenever the court issues an
8 injunction or any sort of order for the obtaining of
9 records. Are you prepared to say that it is that
10 generally applicable? That whenever, under any statute,
11 a court has the authority to compel the production of
12 records it may condition the receipt of those records?

13 MR. HERTZBERG: I don't see why it wouldn't
14 have that power. Pursuant to the inherent power of the
15 court, I don't see why it would not. If it has adequate
16 reason to believe that its process could be abused, I
17 don't see why it would not. On the --

18 QUESTION: well, if Congress (inaudible) they
19 could impose the confidentiality and say what's going to
20 happen if you break the law. Why shouldn't the judge be
21 able to supplement that statutory regime?

22 MR. HERTZBERG: The court is not supplementing
23 it, Justice White. The court is in fact aiding and
24 seeing to it that that statute and other statutes are
25 obeyed.

1 The statutory scheme not only in 6103 but, for
2 instance, such as in 7206 of the Internal Revenue Code
3 which sets forth the precise narrow grounds on which a
4 summons may be issued by the Commissioner of the
5 Internal Revenue Service, implicates a valuation by the
6 district court as to whether the summoned material is
7 going to be used for a proper purpose. And the
8 government must go to the district court and it must say
9 we want enforcement.

10 And by the way, the interests -- what we're
11 suggesting we think also strikes a perfect balance --
12 the government is saying it's all or nothing. The --
13 the -- in effect, with their argument, at worst for us
14 there would have to be a remand to the district court if
15 it was without power to issue the protective order that
16 it did to determine whether it wants to deny enforcement
17 under the circumstances.

18 But we think the kind of order that was
19 well-reasoned and entered into this case strikes a
20 perfect balance. It gives to the Internal Revenue
21 Service the materials it sought for the summons purposes
22 that it wanted it. But it insures, when it feels that
23 there's a danger that it might be abused, and it at the
24 same time insures that the court's process will not be
25 abused and that the summons materials will not be used

1 for an improper purpose.

2 We would think, actually, that the government
3 would be in favor of this. It historically poses the
4 question of whether there has to be summons denial or
5 not. And, in fact, the government says that there are
6 instances where summons are denied. We think that if
7 their all-or-nothing test is adopted, perhaps there will
8 be more denials of summons, because district courts will
9 then be without the option of deciding that they can
10 take a middle ground, as the court did in this case
11 under the circumstances which were well-warranted.

12 QUESTION: Well, a judge can say that
13 (inaudible) statute?

14 MR. HERTZBERG: Well, Your Honor, that
15 question subsumes that the court just did this
16 automatically in a vacuum, and it did not.

17 There was a record, and it does -- it does
18 perhaps subsume that. Perhaps that is exactly what is
19 necessary, that district courts admonish or remind the
20 government of what their obligations are.

21 QUESTION: (Inaudible) it would seem where
22 they could punish (inaudible).

23 QUESTION: That's correct. That's right. And
24 we feel that that would be well-warranted under the --
25 and so did the Ninth Circuit, under the circumstances of

1 this case.

2 QUESTION: Counsel, if we can go back to the
3 crime-fraud exception for a moment.

4 MR. HERTZBERG: Yes.

5 QUESTION: Is it your position that the
6 government simply submitted excerpts of the tape and,
7 therefore, it's not in a position to complain that it
8 was error for the court not to listen to the whole tape?

9 MR. HERTZBERG: That I don't think is the
10 issue before this Court, Justice Kennedy. But, in fact,
11 what happened was -- that is not the reason we say that
12 the court could not hear the whole tape.

13 To answer your question, that is not the
14 reason why the court couldn't hear the whole tape. We
15 submit that without --

16 QUESTION: But you think that on this record
17 the failure to listen to the whole tape is properly
18 before us?

19 MR. HERTZBERG: It is not. It is not before
20 you. That issue was not reached by the Ninth Circuit
21 below because --

22 QUESTION: Because on the excerpts were
23 submitted?

24 MR. HERTZBERG: Because -- for two reasons.
25 Because the Ninth Circuit did not review the

1 government's -- the issue of the government's belated
2 submission relying on the whole tapes. And it relied
3 only -- it only looked at the independent evidence.

4 QUESTION: I understand that.

5 MR. HERTZBERG: And it did not find, even
6 under the independent evidence test, sufficient -- it
7 did not find sufficient allegation of wrongdoing, of
8 illegality. And it didn't go beyond that.

9 QUESTION: Thank you, Mr. --

10 MR. HERTZBERG: The issue of the entire --

11 QUESTION: Mr. Hertzberg, your time has
12 expired.

13 Mr. Horowitz, you have seven minutes.

14 REBUTTAL ARGUMENT OF ALAN I. HOROWITZ

15 ON BEHALF OF PETITIONERS

16 QUESTION: Mr. Horowitz, can I ask you a
17 question before you get started because it's, you know,
18 been troubling me ever since you sat down.

19 The statute says by appropriate process such
20 attendance, testimony, production of books, papers, and
21 records. Do you think a trial judge would have the
22 authority to allow a responding party to produce
23 summaries rather than original documents? Say, he asked
24 for all the accounting records of General Motors or
25 something. They could say, well, we'd like to give

1 summaries. And then set up a procedure for verifying
2 the summaries?

3 MR. HOROWITZ: My immediate reaction is no.

4 QUESTION: That wouldn't be --

5 MR. HOROWITZ: I don't think they do. And I
6 don't think that has anything to do with the language in
7 the statute by appropriate process. They're just
8 talking about the court's ability to bring other parties
9 before the court or to enforce its order of --

10 QUESTION: Or production of books, records,
11 papers, or other data?

12 MR. HOROWITZ: Well, that's the way --

13 QUESTION: You would say --

14 MR. HOROWITZ: -- the way the court can compel

15 --

16 QUESTION: But you said they could not
17 substitute an Interrogatory or summary procedure, or
18 something like that?

19 MR. HOROWITZ: No, I don't think so.

20 QUESTION: Okay.

21 MR. HOROWITZ: Getting back to what I said
22 before, there's a summons there and if the IRS is
23 entitled to enforcement, the court is supposed to compel
24 enforcement of the summons, not change it. And there
25 has been litigation on that kind of subject.

1 I'd like to talk briefly about this idea of
2 abuse of process because it seems to me this is just the
3 core of Respondents' argument. Is that the notion the
4 courts have an inherent authority to prevent abuse of
5 their process basically gives them carte blanche in
6 whatever sort of order they want in a case like this.

7 We don't deny there's inherent authority to
8 control abuse of process, but there's nothing like that
9 going on here. This is discussed at great length by
10 this Court in Powell case and follows through in
11 subsequent summons enforcement cases.

12 We know what abuse of process is in this
13 context and it is the issuance of a summons in bad faith
14 for an illegitimate purpose that is not encompassed by
15 the congressional grant of authority and the other is
16 sort of power criteria.

17 If the court were -- If the IRS were to get a
18 summons under the circumstances where it did not satisfy
19 those criteria, that would be an abuse of the court's
20 process, and the court is entitled to protect itself
21 against that. And that's why there is a summons
22 enforcement proceeding.

23 In this case, and in most cases, the court
24 looked at those criteria and it found -- and it found
25 quite unequivocally that there was no bad faith. That

1 the IRS was entitled to enforcement of its summons.

2 That ends the abuse of process inquiry, and it
3 does not give this kind of carte blanche for the court
4 to go out there to see what the IRS is going to do with
5 the documents down the road.

6 And I should mention, I guess, that all
7 through summons enforcement law you see that the court
8 does not really take it upon itself to worry about what
9 the IRS does with documents down the road.

10 In the LaSalle case, of course, there was a
11 great controversy over whether the summons should be
12 enforced there because of the danger at that time
13 information would immediately infringe on criminal
14 discovery and the role of the grand jury because there
15 had already been a criminal referral in effect.

16 But, of course, in the typical IRS
17 investigation where there is no criminal referral in
18 effect, documents are furnished to the IRS pursuant to a
19 summons and then later on down the road, a year later, a
20 year and a half later, the case may be referred to the
21 Justice Department for criminal prosecution.

22 And that information that came through the
23 summons goes to the Justice Department at that point.
24 And there's nothing wrong with that. That doesn't show
25 abuse of the court's process or bad faith, or anything

1 like that.

2 The idea of the summons enforcement proceeding
3 is to decide at that time whether the summons should be
4 enforced.

5 As far as the benignness of this particular
6 restriction, we think the real problem here is that
7 there is no way to draw a line between the kind of
8 restriction that the court imposed here and much broader
9 and more intrusive restrictions.

10 If the court has the authority to monitor the
11 IRS' investigation, as the Ninth Circuit says, then
12 there will be other -- a lot of litigation and a lot of
13 other restrictions that are very damaging.

14 Just to quickly summarize the attorney/client
15 issue. Of course, we don't concede that there is any
16 independent evidence requirement. When I was induced to
17 concede that the district court would have to at least
18 have some evidence before it made an in camera
19 inspection, there's certainly no reason why that
20 evidence has to be independent in the sense that
21 Respondent was talking about.

22 Neither the court of appeals nor Respondents
23 have given any reason why there should be such a rule,
24 and we suggest that there shouldn't be one. But, again,
25 the issue in this case is whether the court is precluded

1 from ever looking at so-called nonindependent evidence
2 before it decides whether the attorney/client privilege
3 should be taken away because of crime-fraud.

4 Thank you.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

6 Horowitz.

7 The case is submitted.

8 (Whereupon, at 2:37 o'clock p.m., the case in
9 the above-entitled matter was submitted.)
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CERTIFICATION

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No. 88-40 - UNITED STATES, Petitioner V. FRANK S. ZOLIN, ET AL.

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