The Burger Court Opinion Writing Database

Douglas Oil Co. of California v. Petrol Stops Northwest

441 U.S. 211 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 1, 1979

Dear Lewis:

Re: 77-1547 Douglas Oil of Calif. v. Petrol Stops Northwest

I will await John's expression of views on this case.

Regards,

WEB

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 13, 1979

Re: 77-1547 - Douglas Oil Co. v. Petrol Stops Northwest

Dear John:

I join your dissent.

Regards,

WEB

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 31, 1979

RE: No. 77-1547 Douglas Oil of California v.
Petrol Stops Northwest, et al.

Dear Lewis:

I agree.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 30, 1979

Re: No. 77-1547, Douglas Oil Co. v.
Petrol Stops Northwest

Dear Lewis,

Your well-written opinion for the Court is sufficiently narrow as to eliminate any desire on my part to write a dissenting opinion. I shall, however, await any separate writing that may be forthcoming from other quarters. If none appears, I shall acquiesce in your opinion for the Court.

Sincerely yours,

P.S.
1.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 8, 1979

Re: No. 77-1547, Douglas Oil Co. v.
Petrol Stops Northwest

Dear John,

Please add my name to your dissenting opinion.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 31, 1979

Re: No. 77-1547 - Douglas Oil Co of California v. Petrol Stops Northwest

Dear Lewis,

I agree.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 31, 1979

Re: No.77-1547-Douglas Oil Co of California v. Petrol Stops Northwest

Dear Lewis:

Please join me.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 1, 1979

Re: No. 77-1547 - Douglas Oil Company v. Petrol Stops Northwest

Dear Lewis:

Please join me.

Sincerely,

Harry

Mr. Justice Powell
cc: The Conference

LFP
Please join me

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 30 JAN 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–1547

Douglas Oil Company of California et al., Petitioners, *v.* Petrol Stops Northwest et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents two intertwined questions concerning a civil litigant's right to obtain transcripts [1] of federal criminal grand-jury proceedings. First, what justification for disclosure must a private party show in order to overcome the presumption of grand-jury secrecy applicable to such transcripts? Second, what court should assess the strength of this showing—the court where the civil action is pending, or the court that acts as custodian of the grand-jury documents?

I

Respondent Petrol Stops Northwest is a gasoline retailer unaffiliated with any major oil company. In 1973, it operated 104 service stations located in Arizona, California, Oregon, Washington, and several other States. On December 13, 1973, respondent filed an antitrust action in the District of Arizona against 12 large oil companies, including petitioners Douglas Oil Company of California and Phillips Petroleum Company.[2]

[1] "Transcripts" is used herein to refer to the verbatim recordings of testimony given before a grand jury.

[2] Also named as defendants were Continental Oil Company (an affiliate of petitioner Douglas Oil); Gulf Oil Company; Shell Oil Company; Exxon Corporation; Mobil Oil Corporation; Union Oil Company of California;

February 6, 1979

No. 77-1547 Douglas Oil Co. of Calif. v.
Petrol Stops Northwest

Dear Bill:

Thank you for your letter of February 1.

I am making the change on page 18 that you suggest, and think it a good one.

Although I appreciate your thoughts on the jurisdictional question, I think I will leave this for you to deal with in a separate opinion. As you say, the court of appeals did not mention its jurisdiction, and "as usual the parties say not a word about the subject". As I have a court, my disposition is to leave this question - so far as the Court opinion goes - for another case where one may hope that it will have been addressed below and briefed here.

I do appreciate your writing so fully. I regard you as the most authoritative source on federal jurisdiction.

Sincerely,

Mr. Justice Rehnquist

LFP/lab

9/13/78

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 8 FEB 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1547

Douglas Oil Company of California et al., Petitioners, *v.* Petrol Stops Northwest et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents two intertwined questions concerning a civil litigant's right to obtain transcripts[1] of federal criminal grand-jury proceedings. First, what justification for disclosure must a private party show in order to overcome the presumption of grand-jury secrecy applicable to such transcripts? Second, what court should assess the strength of this showing—the court where the civil action is pending, or the court that acts as custodian of the grand-jury documents?

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[1] "Transcripts" is used herein to refer to the verbatim recordings of testimony given before a grand jury.

[2] Also named as defendants were Continental Oil Company (an affiliate of petitioner Douglas Oil); Gulf Oil Company; Shell Oil Company; Exxon Corporation; Mobil Oil Corporation; Union Oil Company of California;

17-19

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

3rd DRAFT

Recirculated: 15 MAR 1979

SUPREME COURT OF THE UNITED STATES

No. 77-1547

Douglas Oil Company of California et al., Petitioners, *v.* Petrol Stops Northwest et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

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[1] "Transcripts" is used herein to refer to the verbatim recordings of testimony given before a grand jury.

[2] Also named as defendants were Continental Oil Company (an affiliate of petitioner Douglas Oil); Gulf Oil Company; Shell Oil Company; Exxon Corporation; Mobil Oil Corporation; Union Oil Company of California;

5, 7, 14, 15, 16, 19

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 18 APR 1979

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1547

Douglas Oil Company of California et al., Petitioners, *v.* Petrol Stops Northwest et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents two intertwined questions concerning a civil litigant's right to obtain transcripts [1] of federal criminal grand jury proceedings. First, what justification for disclosure must a private party show in order to overcome the presumption of grand jury secrecy applicable to such transcripts? Second, what court should assess the strength of this showing—the court where the civil action is pending, or the court that acts as custodian of the grand jury documents?

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[1] "Transcripts" is used herein to refer to the verbatim recordings of testimony given before a grand jury.

[2] Also named as defendants were Continental Oil Company (an affiliate of petitioner Douglas Oil); Gulf Oil Company; Shell Oil Company; Exxon Corporation; Mobil Oil Corporation; Union Oil Company of California;

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 1, 1979

Re: No. 77-1547 - Douglas Oil Co. of California v. Petrol Stops Northwest

Dear Lewis:

In accordance with our telephone conversation earlier this week, I am writing to express a couple of ideas in connection with your opinion in this case. You now have a Court for the opinion without me, and one of my concerns is extremely minor -- I would probably join the opinion whether or not you accepted it, but I have a feeling that you feel pretty much the same way about the thing as I do, and therefore would not be unreceptive to it. The second concern, though not minor to me, seems at first blush almost entirely collateral to the issues briefed by the parties and treated by you in your opinion for the Court.

First, the relatively minor concern which relates only to a phrase appearing on page 18. The first full sentence on that page now reads:

> "Even the court's comparison of the criminal indictment and the civil complaints did not indicate unambiguously ~~that the~~ grand jury transcripts would be pertinent to the subject of the Arizona actions . . ."

what if any portions of the

Previously, on page 8, you have referred to the recognition in our previous cases that in some situations "justice may demand that discrete portions of transcripts be made available for use in subsequent proceedings" (emphasis supplied). I have some fear that the far more general quoted language from page 18 in the opinion may expand the scope of availability of grand jury testimony beyond the test from our prior cases contained in the quoted language on page 8. I think the bounds of this test would be more readily retained if, in the quoted sentence on page 18, you would delete the words "that the" which now appear immediately before the words "grand jury transcripts" and substitute for them the phrase "what, if any, portions of the", or some similar phrase to make clear that grand jury transcripts are not simply to be turned over en bloc.

My second concern is that of our jurisdiction in this case, which I suppose all concede would rest on 28 U.S.C. § 1254 giving us jurisdiction over "cases in the Courts of Appeals". But in order for us to have jurisdiction, the case must be properly "in" the Court of Appeals, see Liberty Mutual Life Insurance Co. v. Wetzel, 424 U.S. 737 (1976), and therefore there is some need to find out how the case proceeded from the District Court to the Court of Appeals. Unfortunately, the Court of Appeals' opinion makes no mention of its jurisdiction, and as usual the parties say not a word about the subject.

United States v. Proctor and Gamble, 356 U.S. 677 (1958) was a civil action brought by the government against a number of defendants, and as I read the opinion the efforts to discover the grand jury minutes on behalf of all the defendants except Colgate-Palmolive Co. were originally made under Rule 34 of the Rules of Civil Procedure. 356 U.S., at 678. The District Court granted the motion, and the government deliberately took a default for failure to produce the requested minutes in order to obtain a review of the discovery ruling in connection with an appeal from a "final decision" of the

District Court pursuant to 28 U.S.C. § 1291. It is my understanding that the case law in this area holds that with the rarest of exceptions, an order granting or refusing discovery is not itself appealable before trial, but can only be assigned as one of the errors upon which reversal is urged after final judgment in the District Court. Thus if in this case the discovery motions originally commenced in the civil proceedings in Arizona to which you refer on pages 4-5 of your opinion had been pressed to final conclusion in the District Court there, a ruling either for or against the petitioners would not have been reviewable on appeal separately from a judgment on the merits following trial of the case.

The reason I go into this amount of detail about something which didn't happen here is that I think that the better procedure is probably to move in the civil action for discovery, where possible, although I agree with you that it was not possible here (your footnote 17). It seems to me that one of the reasons why it is preferable is because there will be less piecemeal appeals of interlocutory orders such as those pertaining to discovery if the discovery is largely relegated to the civil proceeding. However, here the plaintiffs in the civil action did go to the District Court which had supervised the grand jury proceedings, and sought production from that court rather than from the court in which their civil treble-action was pending. The question in this connection which I find very troubling, which none of the parties and none of the lower courts address, and which you do not treat in your opinion, is just what sort of a proceeding was this in the District Court, and how were petitioners able to obtain appellate review of it in the Court of Appeals for the Ninth Circuit? Granted that it is probably not desirable to discourse at large on appealability of this type of order generally, the opinion has to decide that this particular order was properly reviewable in the Court of Appeals.

It was obviously not a garden variety John Doe v. Richard Roe adversary proceeding when it commenced, although as you point out on page 6 of your opinion the defendants in the civil action did intervene in the proceedings in the grand jury court, and they certainly had standing under Warth v. Seldin, 422 U.S. 490, 499 (1975) to do so. But supposing, as just as easily might have happened, the District Court having custody of the grand jury proceeding had refused the civil plaintiff's application for production of the testimony: Could they then have obtained [illegible] appellate review of the District Court's denial of their ex parte request?

Your opinion for the Court in Nixon v. Warner Communications, 435 U.S. 589 (1978) had to deal with a similar factual situation, although it turned more on the nature of the proceeding in the District Court than on the method of appellate review. There the criminal proceeding had long since terminated, as you observed in footnote 14, just as it has terminated in this case. I presume that a total stranger might some day walk in off the street, and simply demand access to an exhibit in a completed criminal case (Warner Communications) or grand jury testimony (the present case). If he were to make a written application, I suppose the District Court would put it on its miscellaneous docket, and if the applicant had no connection at all with the proceedings the court would, at least in the case of the grand jury testimony, deny the application.

If the application was made to the District Court having custody of the grand jury records, I am not sure that one would say that the order of the District Court denying access to grand jury testimony in a totally completed criminal case was a "final decision" within the meaning of 28 U.S.C. § 1291. The only other alternative that occurs to me as a means by which the losing applicant could challenge the decision of the District Court would be by seeking a writ of mandamus in the

Court of Appeals. I don't know all of the questions, say nothing of the answers to them; but I would like to see some reference in your opinion to the basis of our jurisdiction in this particular case, which necessarily turns on the basis of the jurisdiction of the Court of Appeals. Was this an appeal from a "final decision", or was it in substance if not in form an application for a writ of mandamus by the petitioners? Unfortunately, none of the parties nor the lower courts offer any help, but as I have indicated earlier it is a jurisdictional question which we must inquire into on our own motion if we have any doubts. I think it would be perfectly reasonable to say in this case that the Court of Appeals for the Ninth Circuit was justified in treating the intervenor's notice of appeal as a petition for a writ of mandamus to the District Court, and that the case was "in the Court of Appeals" for purposes of 28 U.S.C. § 1254 for that reason, or that the District Court's order allowing production of the grand jury transcript was a "collateral order" within the meaning of Cohen v. Beneficial Life Insurance Co., 337 U.S. 541 (1949), and therefore appealable for that reason. I think you make a very persuasive case for the proposition that the grand jury court should generally defer to the civil court as to the ultimate decision of what portions of the transcript, if any, should be released, but I also think that this approach may compound the problem of appealability. Two Courts of Appeals' opinions have taken differing views of this question, both making some good points, I think. Baker v. United States Steel Corp., 492 F. 2d 1074 (1974)(CA 2); State of Illinois v. Sarbaugh, 552 F. 2d 768 (1977)(CA 7).

Except for the first suggestion made in this letter, I have no quarrel with your substantive analysis of the problem at all. I do feel quite strongly that the issue of jurisdiction must at least be discussed, and that conceivably

the question of appealability may have to be factored into which procedure is more desirable than the other. For the present, I have no desire to circulate these views to the Conference if you can find some way to accommodate them. If you conclude that you can't, I will probably write separately on the jurisdictional point, and concur at least in the result (and perhaps in the opinion) as to the nonjurisdictional issues.

Sincerely,

Mr. Justice Powell

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 12 FEB 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1547

Douglas Oil Company of California et al., Petitioners, *v.* Petrol Stops Northwest et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February —, 1979]

MR. JUSTICE REHNQUIST, concurring.

I join the Court's opinion because I agree with its conclusions on the merits of the issue of the availability of the grand jury transcripts to these private treble-damage action plaintiffs. I do not feel that the Court can leave entirely unnoticed, however, the total absence of any reference by either of the parties or by the Court of Appeals to the basis upon which that court took jurisdiction of the petitioners' "appeal" from the order of the District Court granting access to the grand jury minutes. At the same time, I am handicapped in formulating a view of my own on the subject, because of the absence of any assistance from the parties or any consideration of the question by the Court of Appeals or by this Court. But in order for us to have jurisdiction over the case, the case must be properly "in" the Court of Appeals for purposes of 28 U. S. C. § 1254. *Liberty Mutual Life Insurance Co.* v. *Wetzel*, 424 U. S. 737 (1976). And it may well be that the availability to the losing party of a right to appeal an order such as this may be a factor in deciding whether the proceedings should ultimately be treated as part of the discovery in the court in which the treble-damage action is pending, or as a separate proceeding in the court which conducted the grand jury proceeding.

This case is not like *United States* v. *Procter & Gamble*, 356 U. S. 677 (1958). In *Procter & Gamble* the defendants in a

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 30, 1979

Re: 77-1547 - Douglas Oil Co. v. Petrol Stops Northwest

Dear Lewis:

Potter's note prompts me to add my compliments with respect to the first sixteen pages of your opinion. However, I am still not persuaded that the district judge abused his discretion. Indeed, I think it is a mistake for an appellate court to find an abuse of discretion simply because it would have decided an issue differently. I shall therefore prepare a dissent limited to this aspect of your holding.

Respectfully,

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: FEB 2 '79

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1547

Douglas Oil Company of California et al., Petitioners, *v.* Petrol Stops Northwest et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February —, 1979]

MR. JUSTICE STEVENS, dissenting.

Although I join all but the last six paragraphs of the Court's opinion, I cannot agree with the conclusion that the District Judge sitting in the Central District of California should not have granted access to the grand jury transcripts subject to the conditions stated in his order. More fundamentally, I do not share the Court's readiness to review the District Judge's exercise of his broad discretion in this matter in the absence of any allegation of egregious abuse on his part and in the face of the confirmation of his conclusion by the Court of Appeals.[1]

Before he acted, the District Judge allowed petitioners to participate as real parties in interest in order to explain their

[1] The Court of Appeals affirmed the determination of the District Judge on the basis of the record before him showing the similarities between the indictment to which petitioners had pleaded no contest and the complaint in the treble-damages case. But the Court of Appeals went even further. On the basis of additional submissions by the parties on appeal, the Court of Appeals made a further finding of relevance premised on discrepancies between the bill of particulars filed by the Government in the criminal case and recent deposition testimony of petitioners' employees in the civil case. 571 F. 2d 1127, 1130–1131. Accordingly, the decision of the Court second guesses not only the District Judge's determination as affirmed by the Court of Appeals on its own terms, but also a second *de novo* determination by the Court of Appeals based on additional information.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

2nd DRAFT

Recirculated: FEB 9 '79

SUPREME COURT OF THE UNITED STATES

No. 77-1547

Douglas Oil Company of California et al., Petitioners, *v.* Petrol Stops Northwest et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February —, 1979]

MR. JUSTICE STEVENS, with whom MR. JUSTICE STEWART joins, dissenting.

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pp. 1-3

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: MAR 6 1979

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1547

Douglas Oil Company of California et al., Petitioners, *v.* Petrol Stops Northwest et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February —, 1979]

MR. JUSTICE STEVENS, with whom MR. JUSTICE STEWART joins, dissenting.

Although I join all but the last nine paragraphs of the Court's opinion, I cannot agree with the conclusion that the District Judge sitting in the Central District of California should not have granted access to the grand jury transcripts subject to the conditions stated in his order. More fundamentally, I do not share the Court's readiness to review the District Judge's exercise of his broad discretion in this matter in the absence of any allegation of egregious abuse on his part and in the face of the confirmation of his conclusion by the Court of Appeals.[1]

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pp. 1-2

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

4th DRAFT

Recirculated: MAR 14 1979

SUPREME COURT OF THE UNITED STATES

No. 77-1547

Douglas Oil Company of California et al., Petitioners, *v.* Petrol Stops Northwest et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March —, 1979]

MR. JUSTICE STEVENS, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, dissenting.

Although I join all but the last nine paragraphs of the Court's opinion, I cannot agree with the conclusion that the District Judge sitting in the Central District of California should not have granted access to the grand jury transcripts subject to the conditions stated in his order. More fundamentally, I do not share the Court's readiness to review the District Judge's exercise of his broad discretion in this matter in the absence of any allegation of egregious abuse on his part and in the face of the confirmation of his conclusion by the Court of Appeals.[1]

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