

The Burger Court Opinion Writing Database

United States v. Sells Engineering, Inc.

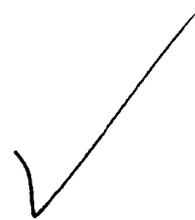
463 U.S. 418 (1983)

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



March 4, 1983

MEMORANDUM TO THE CONFERENCE

RE: 81-1032 - United States v. Sells Engineering, Inc.
81-1938 - United States v. Baggot

Dear Bill and Sandra:

I will take on a dissent for the above.

Regards,

Justice Rehnquist
Justice O'Connor

Copies to the Conference

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: ~~UN~~ 8 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1032

**UNITED STATES, PETITIONER *v.* SELLS
ENGINEERING, INC., ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

[June —, 1983]

CHIEF JUSTICE BURGER, dissenting.

The Court today holds that attorneys within the Department of Justice must seek a court order on a showing of particularized need in order to obtain access to grand jury materials already in the Government's possession for the purpose of preparing a civil suit. In my view, this holding is contrary not only to the clear language but also to the history of Rule 6(e)(3)(A)(i) of the Federal Rules of Criminal Procedure; it also reflects an erroneous assessment of the relevant policies. I believe that, when a grand jury is validly convened and conducted on the request of the Government for criminal investigatory purposes, it is proper and entirely consistent with the Federal Rules of Criminal Procedure for attorneys in the Department of Justice to have access to grand jury materials in pursuing inquiry into civil claims involving the same or related matters. I therefore dissent.

I

Rule 6(e)(3)(A)(i) (hereinafter, "(A)(i)") is straightforward and clear. It provides:

"(A) Disclosure . . . of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—"(i) an attorney for

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Stylistic changes, and changes at: 1, 3, 7-10, 13-17,
20-21, 23-26, 28-30

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 28 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1032

UNITED STATES, PETITIONER *v.* SELLS
ENGINEERING, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June —, 1983]

CHIEF JUSTICE BURGER, dissenting.

The Court today holds that attorneys within the Department of Justice who are not assigned to the grand jury investigation or prosecution must seek a court order on a showing of particularized need in order to obtain access, for the purpose of preparing a civil suit, to grand jury materials already in the Government's possession. In my view, this holding is contrary not only to the clear language but also to the history of Rule 6(e)(3)(A)(i) of the Federal Rules of Criminal Procedure. In addition, the Court's decision reflects an erroneous assessment of the relevant policies, and provides the courts and the Department of Justice with precious little guidance in an area of great importance. I believe that, when a grand jury is validly convened and conducted on the request of the Government for criminal investigatory purposes, it is proper and entirely consistent with the Federal Rules of Criminal Procedure for any attorney in the Department of Justice to have access to grand jury materials in pursuing inquiry into civil claims involving the same or related matters. I therefore dissent.

I

Rule 6(e)(3)(A)(i) (hereinafter, "(A)(i)") is straightforward and clear. It provides:

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Stylistic changes

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 81-1032

Recirculated: JUN 29 1983

UNITED STATES, PETITIONER *v.* SELLS
ENGINEERING, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 30, 1983]

CHIEF JUSTICE BURGER, with whom JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The Court today holds that attorneys within the Department of Justice who are not assigned to the grand jury investigation or prosecution must seek a court order on a showing of particularized need in order to obtain access, for the purpose of preparing a civil suit, to grand jury materials already in the Government's possession. In my view, this holding is contrary not only to the clear language but also to the history of Rule 6(e)(3)(A)(i) of the Federal Rules of Criminal Procedure. In addition, the Court's decision reflects an erroneous assessment of the relevant policies, and provides the courts and the Department of Justice with precious little guidance in an area of great importance. I believe that, when a grand jury is validly convened and conducted on the request of the Government for criminal investigatory purposes, it is proper and entirely consistent with the Federal Rules of Criminal Procedure for any attorney in the Department of Justice to have access to grand jury materials in pursuing inquiry into civil claims involving the same or related matters. I therefore dissent.

I

Rule 6(e)(3)(A)(i) (hereinafter, "(A)(i)") is straightforward and clear. It provides:

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 4, 1983



No. 81-1032 United States v. Sells Engineering, Inc.

81-1938 United States v. Baggot, James E.

Dear Chief:

I'll undertake opinions for the Court in the above two cases.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill", is written below the word "Sincerely,".

The Chief Justice

Copies to the Conference

WJE
P
11

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: MAY 5 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1032

**UNITED STATES, PETITIONER v. SELLS
ENGINEERING, INC., ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

[May —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is under what conditions attorneys for the Civil Division of the Justice Department, their paralegal and secretarial staff, and all other necessary assistants, may obtain access to grand jury materials for the purpose of preparing and pursuing a civil suit. We hold that such access is permissible only when the Government moves for court-ordered disclosure under Federal Rule of Criminal Procedure 6(e)(3)(C)(i) and makes the showing of particularized need required by that Rule.

I

Respondents Peter A. Sells and Fred R. Witte were officers of respondent Sells Engineering, Inc. That company had contracts with the United States Navy to produce airborne electronic devices designed to interfere with enemy radar systems. In 1974, a Special Agent of the Internal Revenue Service began a combined criminal and civil administrative investigation of respondents. The Agent issued administrative summonses for certain corporate records of Sells Engineering. When the corporation refused to comply, the Agent obtained a district court order enforcing the summonses. Enforcement was stayed, however, pending appeal.

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STYLING CHANGED THROUGHOUT.
SEE PAGES: 8, 15, 16, 18

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: MAY 12 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1032

UNITED STATES, PETITIONER *v.* SELLS
ENGINEERING, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[May —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is under what conditions attorneys for the Civil Division of the Justice Department, their paralegal and secretarial staff, and all other necessary assistants, may obtain access to grand jury materials for the purpose of preparing and pursuing a civil suit. We hold that such access is permissible only when the Government moves for court-ordered disclosure under Federal Rule of Criminal Procedure 6(e)(3)(C)(i) and makes the showing of particularized need required by that Rule.

I

Respondents Peter A. Sells and Fred R. Witte were officers of respondent Sells Engineering, Inc. That company had contracts with the United States Navy to produce airborne electronic devices designed to interfere with enemy radar systems. In 1974, a Special Agent of the Internal Revenue Service began a combined criminal and civil administrative investigation of respondents. The Agent issued administrative summonses for certain corporate records of Sells Engineering. When the corporation refused to comply, the Agent obtained a district court order enforcing the summonses. Enforcement was stayed, however, pending appeal.

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

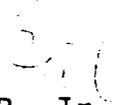
May 12, 1983

Re: United States v. Sells Engineering, No. 81-1032

Dear John:

Thank you for your letter concerning the above case. I will, as you request, drop my citation on page 13 to Abbott's footnote 26. As for the word "strong" on page 24, I have not yet decided whether I would prefer to leave it in. You are certainly right that the phrase itself is not in prior opinions, but I am inclined to consider it a fair characterization of Lewis's test in Douglas Oil. Nevertheless, I may yet decide to delete it in a future draft.

Sincerely,


WJB, Jr.

Justice Stevens

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES 7, 10, 15, 20-21, 24

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: JUN 09 1983

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1032

UNITED STATES, PETITIONER *v.* SELLS
ENGINEERING, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is under what conditions attorneys for the Civil Division of the Justice Department, their paralegal and secretarial staff, and all other necessary assistants, may obtain access to grand jury materials for the purpose of preparing and pursuing a civil suit. We hold that such access is permissible only when the Government moves for court-ordered disclosure under Federal Rule of Criminal Procedure 6(e)(3)(C)(i) and makes the showing of particularized need required by that Rule.

I

Respondents Peter A. Sells and Fred R. Witte were officers of respondent Sells Engineering, Inc. That company had contracts with the United States Navy to produce airborne electronic devices designed to interfere with enemy radar systems. In 1974, a Special Agent of the Internal Revenue Service began a combined criminal and civil administrative investigation of respondents. The Agent issued administrative summonses for certain corporate records of Sells Engineering. When the corporation refused to comply, the Agent obtained a district court order enforcing the summonses. Enforcement was stayed, however, pending appeal.

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 13, 1983

Re: United States v. Sells Engineering, No. 81-1032

Dear John:

I am reluctant, for a number of reasons, to make the change you suggest. I would prefer, if I could, to adhere to the view in my present draft. On the other hand, I can count well enough to see that I don't have the votes for it at present.

In these circumstances--5 to 4 on the case, but 3 to 2 on a collateral issue--could we not agree simply to reserve the issue whether a particular attorney may keep the materials with him when he goes on to the civil side of a matter? I propose to drop Part III-C altogether. I could also add a footnote at some convenient location (at the end of the paragraph running from p. 11 to 12, for example) expressly reserving the point. You might, of course, want to write a concurrence on the point if you think it worthwhile.

My thinking is that this would at least salvage a majority on the issues presented in this case. I believe the Rules Committee is already considering amendments to Rule 6; indeed, they held up only because we granted cert in this case. Perhaps, given the three-way split in the Court, it would be as well to hand the ball back to them. If you and Byron are agreeable to this suggestion, I will check it with Thurgood and Harry before proceeding.

Sincerely,



WJB, Jr.

Justice Stevens
cc: Justice White

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 16, 1983

Re: United States v. Sells Engineering, No. 81-1032

Dear Thurgood and Harry:

John and Byron have raised some problems with this case as a result of the Chief's dissent. They are now of the view that, although Rule 6 does not permit disclosure of grand jury materials to new attorneys working on a civil suit, it does allow the same individual attorney who handles a prosecution to continue to retain and use the materials when he himself works on the civil side. They have asked me to alter Part III-C accordingly. I am still of the view expressed in my current draft--that any civil use, even by the same persons, requires a court order.

It appears that we have worked out a compromise, agreeing simply to reserve the question as not presented by this case. This will allow the Rules Committee to revive its consideration of amendments to Rule 6, held up pending decision of this case.

I have agreed to omit Part III-C altogether. I will also drop a footnote expressly reserving the same-attorney issue, and I am trying to come up with a few other textual alterations intended to render the opinion neutral on the issue that divides me from John and Byron. According to the grapevine, neither John nor Byron intends to write separately on the point, although neither has said so directly one way or the other.

I thought it best to inform the other members of the majority before going forward. I hope this course meets with your approval. I will proceed unless I hear from you to the contrary.

Sincerely,



WJB, Jr.

Justice Marshall
Justice Blackmun

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES 1, 8-10, 12-16, 20-23

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: JUN 18 1983

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1032

UNITED STATES, PETITIONER *v.* SELLS
ENGINEERING, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is under what conditions attorneys for the Civil Division of the Justice Department, their paralegal and secretarial staff, and all other necessary assistants, may obtain access to grand jury materials, compiled under the direction of other Justice Department attorneys, for the purpose of preparing and pursuing a civil suit. We hold that such access is permissible only when the Government moves for court-ordered disclosure under Federal Rule of Criminal Procedure 6(e)(3)(C)(i) and makes the showing of particularized need required by that Rule.

I

Respondents Peter A. Sells and Fred R. Witte were officers of respondent Sells Engineering, Inc. That company had contracts with the United States Navy to produce airborne electronic devices designed to interfere with enemy radar systems. In 1974, a Special Agent of the Internal Revenue Service began a combined criminal and civil administrative investigation of respondents. The Agent issued administrative summonses for certain corporate records of Sells Engineering. When the corporation refused to comply, the Agent obtained a district court order enforcing the summonses. Enforcement was stayed, however, pending

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 28, 1983

Re: United States v. Sells Engineering, No. 81-1032
United States v. Baggot, No. 81-1938

Dear Chief:

I am making no response to your latest draft in Sells. I do have a few minor changes of my own, which I hope to circulate tomorrow morning. I see no reason why these cases cannot come down on Thursday.

Sincerely,

Bill
WJB, Jr.

The Chief Justice
Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES 1, 7, 21

From: Justice Brennan

Circulated: _____

Recirculated: JUN 29 1983

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1032

**UNITED STATES, PETITIONER *v.* SELLS
ENGINEERING, INC., ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

[June —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is under what conditions attorneys for the Civil Division of the Justice Department, their paralegal and secretarial staff, and all other necessary assistants, may obtain access to grand jury materials, compiled with the assistance and knowledge of other Justice Department attorneys, for the purpose of preparing and pursuing a civil suit. We hold that such access is permissible only when the Government moves for court-ordered disclosure under Federal Rule of Criminal Procedure 6(e)(3)(C)(i) and makes the showing of particularized need required by that Rule.

I

Respondents Peter A. Sells and Fred R. Witte were officers of respondent Sells Engineering, Inc. That company had contracts with the United States Navy to produce airborne electronic devices designed to interfere with enemy radar systems. In 1974, a Special Agent of the Internal Revenue Service began a combined criminal and civil administrative investigation of respondents. The Agent issued administrative summonses for certain corporate records of Sells Engineering. When the corporation refused to comply, the Agent obtained a district court order enforcing the summonses. Enforcement was stayed, however, pending

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 12, 1983

Re: 81-1032 - United States v. Sells

Dear Bill,

I shall await the dissent.

Sincerely,



Justice Brennan

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 10, 1983

Re: 81-1032 -

United States v. Sells Engineering

Dear Bill,

I hope you can accommodate John, for you
will also be accommodating me.

Sincerely,



Justice Brennan

cc: Justice Stevens

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 17, 1983

Re: 81-1032 -

United States v. Sells Engineering, Inc.

Dear Bill,

Please join me.

Sincerely yours,



Justice Brennan

cc: The Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 9, 1983

W.B.
Justice Brennan
5/10/83



Re: No. 81-1032 - U.S. v. Sells Engineering, Inc.

Dear Bill:

Please join me.

Sincerely,

JM
T.M.

Justice Brennan

cc: The Conferencd

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 20, 1983

Re: No. 81-1032-U.S. v. Sells Engineering, Inc.

Dear Bill:

I am still with you.

Sincerely,

T.M.
T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 17, 1983

Re: No. 81-1032, United States v. Sells Engineering, Inc.

Dear Bill:

Please join me.

Sincerely,



Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 17, 1983

Re: No. 82-1032, United States v. Sells Engineering, Inc.

Dear Bill:

I am pleased that you were able to work out a compromise in this case. I still feel that your approach is the better one, and correct, but I certainly go along with the proposed changes.

Sincerely,

Justice Brennan

cc: Justice Marshall

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 20, 1983

Re: No. 81-1032, United States v. Sells Engineering, Inc.

Dear Bill:

I am still with you in your circulation of June 18.

Sincerely,



Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 6, 1983

81-1032 United States v. Sells Engineering, Inc.

Dear Bill:

I will await the dissent.

Sincerely,



Justice Brennan

lfp/ss

cc: The Conference

June 9, 1983

81-1032 United States v. Sells Engineering

Dear Chief:

You may want to take a second look at fn. 6, p. 19, 20 where you make the distinction between "government attorneys" and "support personnel".

I assume that personnel (e.g., secretaries) who work directly with government attorneys necessarily would have access to the same information available to their "bosses". I find the lines drawn in the note a bit confusing. I would think some clarification is needed - particularly with respect to "support personnel", and the distinction between access to civil and criminal matters.

Your opinion is excellent, and my guess is that you have a substantial chance of attracting a Court.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 9, 1983

81-1032 United States v. Sells Engineering

Dear Chief:

Please join me in your dissenting opinion.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 9, 1983

Re: No. 81-1032 United States v. Sells Engineering, Inc.

Dear Bill:

I will await further writing in this case.

Sincerely,



Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

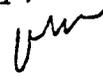
June 10, 1983

Re: No. 81-1032 United States v. Sells Engineering, Inc.

Dear Chief:

Please join me in your dissenting opinion.

Sincerely,



The Chief Justice

cc: The Conference

NOT REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 6, 1983

Re: 81-1032 - United States v. Sells
Engineering

Dear Bill:

Apart from two flyspecks, I am prepared to join your opinion.

On page 13, it seems to me it might be better to omit the citation to footnote 26 of the Abbott opinion. The footnote merely quotes from the House Report which in turn quotes from Procter & Gamble and therefore really does not provide any additional support for your proposition.

In a similar vein, on page 24, line 4, I am really not sure that the word "strong" is supported by Abbott or the other cases. Perhaps you should simply omit the word "strong."

If you have a "strong" feeling that I am wrong about either of these thoughts (or both of them), I will nevertheless join your opinion.

Respectfully,



Justice Brennan

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 12, 1983

Re: 81-1032 - United States v. Sells
Engineering

Dear Bill:

Please join me.

Respectfully,



Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 10, 1983

Re: 81-1032 - United States v. Sells
Engineering

Dear Bill:

After reading the Chief's dissenting opinion and reflecting further about this case, I have come to have some doubt about the position you take in part III-C at pp. 23-24 of your opinion.

My principal experience in this area has been with antitrust cases. I know that on many occasions, government antitrust attorneys have conducted a grand jury investigation with the primary purpose of bringing a criminal proceeding, but always with the possibility in mind that there might also be a civil proceeding after the criminal prosecution has ended, or even that pretrial negotiations might result in the dismissal of an indictment or the refusal to indict. I have never thought that, as long as the original investigation seriously contemplated a criminal proceeding, it was improper for the same group of lawyers to use the raw material they had assembled in conducting a subsequent civil case on the same matter. I think the Chief's dissenting opinion relies primarily on cases of this kind.

I remain convinced that only the lawyers who are actively developing the criminal case should have access to the grand jury investigation while it is taking place; no government attorney should be in the grand jury room solely to gather material for a civil suit. In addition, I believe that the lawyers who have run the grand jury should not be free to turn over the materials to other lawyers to conduct tax investigations and other civil proceedings. However, it does seem somewhat artificial to me to take the position that the lawyers who have the utmost familiarity with the

entire grand jury record cannot continue to make use of it themselves without a court order.

I would propose that you modify Part III-C on pages 23-24 to acknowledge that Rule 6(e) does impose some limits on the distribution of Justice Department work among various attorneys:

"The Government contends that the Court of Appeals' construction of (A) (i) restricts the authority of the Attorney General to distribute the Justice Department's work as he sees fit among its attorneys. This may be true to some extent, but it reflects the intent of Congress that criminal and civil investigations be substantially separate. The drafters of Rule 6(e) surely did not contemplate that attorneys with exclusively civil responsibilities would have access to grand jury investigations. Cf. Fed. R. Crim. P. 6(d). Indeed, the Government acknowledges that the Attorney General's discretion to assign the civil and criminal aspects of a given matter to different attorneys would not warrant the presence in the grand jury room of an attorney interested solely in the civil matter. Brief for United States 24, n. 19.

"Once the criminal proceedings have concluded, Rule 6(e) does not permit lawyers who have not participated in the criminal investigation to have access to the grand jury materials without a court order. But it would be artificial, and inconsistent with the understanding of the drafters of Rule 6(e), to take the position that the lawyers who have personally taken part in grand jury proceedings may not subsequently have access to those materials if they are called upon to participate in related civil litigation. Such access was common practice, as the antitrust cases cited in the dissent indicate, and it should inform our construction of Rule 6(e). We draw the line at the attorney's own use of the grand jury materials, however. If he finds it expedient for purposes of civil litigation to disclose such

information to other attorneys--in the Civil Division or otherwise--who have had no connection with the criminal investigation, he would be required to obtain a court order pursuant to the provisions of the rule, just as he would be required to do if the civil matter were to be handled by lawyers from an administrative agency."

I am sending a copy of this letter to Byron, because we have talked about this case, though I do not know if it reflects his views.

Respectfully,



Justice Brennan

cc: Justice White

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 13, 1983

Re: 81-1032 - United States v. Sells
Engineering

Dear Bill:

Unless Byron sees a problem with dropping part III-C and adding a footnote, your proposal is certainly acceptable to me. A few other language changes may also be necessary.

Respectfully,



Justice Brennan

cc: Justice White

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 20, 1983

Re: 81-1032 - United States v. Sells
Engineering

Dear Bill:

Thank you for accommodating my concerns. I agree with all of the changes that are reflected in your fourth draft circulated on June 18.

Respectfully,



Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 9, 1983

No. 81-1032 United States v. Sells Engineering
No. 81-1938 United States v. Baggot

Dear Bill,

I may eventually join both of these
opinions, but for now I will wait for the
additional writing before deciding.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 10, 1983

Re: No. 81-1032 U.S. v. Sells Engineering, Inc.

Dear Chief,

Please join me in your dissenting opinion.

Sincerely,



The Chief Justice

Copies to the Conference

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