Department of Justice

JOINT STATEMENT

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BEFORE

THE

SUBCOMMITTEE ON CRIMINAL JUSTICE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

GRAND JURY REFORM - H.R. 3340

ON

JUNE 4, 1986

Mr. Chairman and Members of the Subcommittee:

It is a pleasure to be here today to discuss the complex and critical issue of access to grand jury information as it affects the government's ability to fight fraud and abuse. While the secrecy of grand jury deliberations is a hallmark of our judicial system, unnecessary restrictions on the ability of government attorneys to use grand jury information can seriously frustrate civil and administrative law enforcement efforts. In fact, the decisions of the Supreme Court in United States v. Sells Engineering, Inc., 103 S. Ct. 3133 (1983) and United States v. Baggot, 103 S. Ct. 3164, have exactly that effect. Consequently, Mr. Chairman, as a part of its anti-fraud initiative, the Administration has proposed an amendment to Rule 6(e) of the Federal Rules of Criminal Procedure to permit attorneys enforcing civil laws to have access to grand jury information. Agency attorneys could also have access to grand jury information upon a showing of substantial need. Mr. Chairman, the Administration's bill, introduced as H.R. 3340, is one of the most important law enforcement initiatives pending before the Congress.

As we will explain at greater length in my testimony, the Sells and Baggot decisions have had a significant deleterious effect on our attempts to deter complex, economic crime and to

protect the federal Treasury. In an era of growing financial and legal sophistication, we can ill afford artificial restrictions on sharing information by the government's overworked attorneys and investigators. This Congress rightfully has made anti-fraud legislation a major priority, and it is a priority which this Administration shares -- as demonstrated last year by the Attorney General's submission of the Department's eight-bill, anti-fraud package. Continued restriction on access to grand jury materials will inevitably frustrate our anti-fraud efforts.

Before proceeding with a discussion of these important issues, we note that the amendment to Rule 6(e) is only one part of our multi-faceted, anti-fraud initiative. Several other Administration bills are pending before Congress. Most notably, our False Claims Act amendments -- second only to grand jury reform in their importance to our anti-fraud effort -- is presently receiving consideration from the full House Judiciary Committee. The bill, recently introduced by Congressman Glickman as H.R. 4827, contains several needed improvements including amendments which clarify that a civil standard of scienter and burden of proof are appropriate in civil fraud cases, and provisions that strengthen our powers to investigate civil fraud cases.

The amendments to Rule 6(e) contained in H.R. 3340 are the product of lengthy study and careful deliberation. It has been

nearly three years since the Supreme Court's decision in Sells effectively closed off access to grand jury material by government attorneys enforcing civil laws. Since that time, Sells has seriously interfered with our economic enforcement capabilities in all areas -- including procurement fraud, antitrust and tax fraud. These amendments are an extremely important legislative change which Congress should adopt to aid in our civil economic crime enforcement effort.

On June 30, 1983, in a sharply divided, 5-4 decision, the Supreme Court ruled that Department of Justice attorneys handling civil cases are not among the "attorneys for the government" who are entitled to grand jury material under Rule 6(e) of the Federal Rules of Criminal Procedure. United States v. Sells Engineering, Inc., 103 S. Ct. 3133 (1983). Therefore, they may not obtain grand jury materials that pertain to their cases without a court order; and such an order may be granted only upon a showing of "particularized need." The Court further held that the "particularized need" standard was not satisfied by a showing that non-disclosure would cause lengthy delays in litigation or would require substantial duplication of effort.

In a lengthy dissent, Chief Justice Burger demonstrated that the majority's analysis was inconsistent with the legislative history underlying Rule 6(e) and effective law enforcement. The dissent also correctly analyzed the harmful effect of the

decision:

> . . . it is inevitable that countless meritorious civil actions will never be investigated or prosecuted, unless the Attorney General routinely assigns civil fraud lawyers to help work up criminal fraud cases. On its face, this process will be a wasteful practice in terms of use of the time of Department lawyers.

103 S. Ct. 3133 at 3164 (Burger, C.J. dissenting).

In a companion case, United States v. Baggot, 103 S. Ct. 3164 (1983), the Court further limited federal law enforcement ability by narrowly defining the purpose for which disclosures may be made. It held that agency proceedings, such as civil tax audits, are not "preliminary to a judicial proceeding," and thus, no court order may ever be secured in such cases, no matter how compelling the need.

Law enforcement efforts have been frustrated by the inability to share grand jury materials with Department of Justice civil attorneys or with agencies that contemplate using those materials in administrative or regulatory proceedings. Such proceedings could include debarments, suspensions, civil penalty assessments, tax audits, revocations of security clearances, and other serious situations where one would think that the government would be duty-bound to notify the public of hazards to their health or well-being.

The impact of Sells and Baggot has been profound. First,

the prosecutor is precluded from providing civil Department of Justice attorneys or agency authorities with sufficient information to determine whether they should investigate potential violations of the law. Then, if the civil attorneys or agencies do learn of the allegations from non-grand jury sources, they must duplicate virtually the entire criminal investigation -- an effort which may not be feasible or, at best, will cause substantial delays and require needless expenditure of effort, time and money. In one instance alone, Civil Division attorneys expended four staff-years to reconstruct a complex, economic fraud case. While a precise "damage assessment" is impossible, it is believed that the United States has lost millions of dollars as a result of current restrictions on the ability to share grand jury information for civil enforcement purposes.

An excellent example of the disastrous effect of Sells is presented by a recent decision of the Second Circuit in a case entitled In Re: Grand Jury Investigation, 774 F.2d 34 (2d Cir. 1985), decided on September 24, 1985. The case involved bid rigging and price fixing by American companies in the U.S. government-financed sale of a product to a foreign government. Following a grand jury investigation, the Antitrust Division concluded that criminal prosecution would not be appropriate, but that a civil prosecution under the False Claims Act should be pursued. After unsuccessfully attempting to obtain meaningful consultation with the Civil Division without using or disclosing

grand jury materials, the Antitrust Division obtained an order under Rule 6(e)(3)(C)(i) permitting it to share certain limited portions of its fact memos discussing the case. Following review of this information and consultation between the two divisions, the government concluded that civil action was warranted. However, the strictures of Sells may have frustrated the government's ability to proceed with its civil remedy.

In balancing the government's need for the information against the need for grand jury secrecy, the Second Circuit concluded that because the government could have duplicated the investigation through other means (the use of the Antitrust Division's authority to issue civil investigative demands), the government had not met the high showing of "particularized need" required and, hence, the information should not have been shared; this, despite the extremely limited disclosure that actually took place. In effect, the Court concluded that wherever the government can, theoretically, duplicate a complex grand jury investigation--even if only at great, and effectively prohibitive, expense--it fails the "particularized need" test. The result in this case is particularly shocking in that the Court did not reach this conclusion in a case of first impression, but in the context of concluding that the district court judge abused his discretion in granting the 6(e) order. If the standard set in this case becomes the prevailing law, the civil side of the government will never gain any access to grand

jury information.[1]

Moreover, the entire concept of an artificial distinction between the civil and criminal responsibilities of the Department of Justice is illogical and counterproductive. The Attorney General, as the nation's chief law enforcement officer, is necessarily responsible for pursuing both civil and criminal remedies. Yet, the logic of the Sells decision requires the Attorney General and his top aides, to somehow "compartmentalize" their knowledge. Each United States Attorney, as the senior law enforcement official in each judicial district, faces the same dilemma. In fact, the separation of the Department into civil and criminal divisions, in addition to promoting greater specialization, protects grand jury secrecy by limiting the sharing of grand jury information. It is thus ironic that the strictures of Sells might be evaded by simply merging all the Department's attorneys into one, large "civil and criminal" division.

The Sells court left open the question of whether the same attorney who conducted the criminal prosecution could also conduct the civil phase of the litigation. 103 S. Ct. 3133 at 3141, n. 15. The Second Circuit did not address whether the prosecutor should be disqualified from the civil case, but it did

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[1] Recently, on May 27, 1986 the, Supreme Court granted the government's petition for a writ of certiorari in this case.

prohibit him from having any further access to the information. In effect, the court left open the door for him to handle the civil proceeding, but only if he "could independently recall the details of 250,000 pages of subpoenaed documents or the details of testimony by dozens of witnesses." 774 F. 2d at 40. Here, too, the result of applying the Sells rationale leads to an illogical conclusion -- that is, the size of the criminal investigation may determine whether the same attorney can legally and practically continue to represent the United States in all related proceedings.

A typical situation which exhibits the crippling effect of Sells on our enforcement efforts involves a major defense contractor which reported its own misconduct. The ensuing grand jury investigation involved the DCAA auditors, their work papers and the company's records -- making the government's assessment of damages off limits from the civil attorneys. We are now faced with a statute of limitations problem and a qui tam action[2] which requires our action within the month.

We recently filed a civil fraud case for several million dollars based upon allegations of mispricing in Department of

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[2] The "qui tam" provisions of the False Claims Act, 31 U.S.C. 3730, give citizens the right to bring suit on behalf of the United States where they have uncovered fraud not known to the government. The Justice Department then has 60 days to step in and take over such cases.

Defense contracts. To give you an idea of the disparity in investigative resources, our civil case has one and one-half file drawers of documents. We believe the grand jury has perhaps 100 file cabinets of documents that we are prohibited from seeing. In yet another similar multi-million dollar defense contractor case, Sells has forced us to delay filing suit while we conduct our own limited investigation, and wait for the criminal investigation to be completed. Because of this delay, the statute of limitations may have expired on a portion of our case.

With respect to the impact of Baggot, a recent case provides perhaps the most dramatic example of the mischief resulting from the Court's holding. A grand jury, investigating possible criminal tax offenses by a major corporation, subpoenaed between 200,000 and 300,000 pages of documents. Approximately 33,000 hours of IRS staff time were expended in the organization and analysis of this material. Over 100 witnesses testified before the grand jury and the transcript of their testimony exceeded 30,000 pages. Subsequently, in order to pursue a civil tax investigation against the corporation, involving a potential income tax liability of $300,000,000, an application for a Rule 6(e) order was filed with the court. The order was denied for reasons similar to those later announced by the Supreme Court, greatly hampering further investigative efforts.

These are but a few illustrations of the adverse affect on

the public fisc of the restrictions on access to grand jury information created by Sells and Baggot. The added burden on the resources of the Justice Department and of other affected agencies is also enormous.

Nor is this a civil liberties issue. Efforts to deny access to grand jury material is nothing more than an attempt to disrupt cooperation and coordination of the government's criminal and civil remedies. It is counterproductive in the extreme, and, as a practical matter, impossible to run wholly separate criminal and civil investigations. The investigator and the auditor who have worked on a criminal matter are the only ones in a position to help civil attorneys evaluate the potential merits of a civil case. New auditors and investigators cannot hope to duplicate efficiently complex investigations so that decisions on whether to proceed civilly on the myriad of investigations that begin as criminal matters can be timely made.

The proposed legislation is not intended to allow civil attorneys to direct criminal prosecutors to undertake grand jury investigations or direct their course. The federal courts remain available to police the strictures of Rule 6(e) and to apply sanctions where necessary. Therefore, legal procedures to police Rule 6(e) are more appropriate than a broad prophylactic rule.

Accordingly, in its proposal, the Administration recommends

amendments to Rule 6(e) designed to overcome the impediments caused by Sells and Baggot to the government's ability to pursue important non-criminal remedies. The amendments will (1) permit disclosure of grand jury materials without a court order to Department of Justice attorneys for civil purposes (a practice which was exercised prior to Sells); (2) expand the types of proceedings for which other Executive departments and agencies may gain court-authorized disclosure to include not only "judicial proceedings," but also other matters within their jurisdiction, such as adjudicative and administrative proceedings; and (3) reduce the "particularized need" standard for court-authorized disclosure to government agencies to a lesser standard of "substantial need" in certain circumstances. The amendments also resolve the issue left unanswered by Sells by permitting the same criminal prosecutor who conducted the grand jury investigation to present the companion civil case.

Finally, we would remind the Subcommittee that the amendments, in no way implicate any constitutional safeguards. The Sells and Baggot decisions were based upon the legislative history and policies underlying a procedural rule -- Rule 6(e) -- not on the Constitution. The defendant's right to the protection of the grand jury indictment process pre-dates 1787 and is incorporated in the Fifth Amendment, but the details of the system's operation clearly can be adjusted by Congress. The issue, then, is one of striking a proper balance between the

competing concerns of grand jury secrecy and the government's law enforcement responsibilities. Grand jury secrecy is in the government's interest, and in fact is essential to effective law enforcement. Therefore, we respectfully submit that this Department is best suited to represent, balance and protect these interests.

In conclusion, that Sells has seriously impaired our civil law enforcement activities is clear beyond contradiction. The case for amendment is equally clear. That concludes my prepared statement, Mr. Chairman. We would be happy to answer any questions the Members of the Subcommittee might have.