

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES OF AMERICA, . Criminal No. 92-181-01  
vs. . Washington, D.C.  
DEBORAH GORE DEAN, . August 12, 1993  
Defendant. . 3:20 p.m.  
.....

TRANSCRIPT OF PRETRIAL CONFERENCE  
BEFORE THE HONORABLE THOMAS F. HOGAN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: MARK BATTIS, ESQ.  
ROBERT O'NEILL, ESQ.  
PAULA SWEENEY, ESQ.  
Office of Independent Counsel  
444 North Capitol Street, N.W.  
Washington, D.C. 20001

FOR THE DEFENDANT: STEPHEN VINCENT WEHNER, ESQ.  
513 Capitol Court, N.E., Suite 200  
Washington, D.C. 20002

OFFICIAL COURT REPORTER: ANNELIESE J. THOMSON  
6814 U.S. Courthouse  
3rd and Constitution, N.W.  
Washington, D.C. 20001  
(202) 842-5069

(Pages 1 - 33)

7/93

PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

## P R O C E E D I N G S

(Defendant present.)

1  
2  
3 THE CLERK: Criminal No. 92-181, United States of  
4 America v. Deborah Gore Dean. We have Paula Sweeney, Robert  
5 O'Neill, Mark Batts for the United States, Stephen Wehner for  
6 Ms. Dean.

7 THE COURT: All right.

8 MR. O'NEILL: Good afternoon.

9 MS. SWEENEY: Good afternoon.

10 MR. WEHNER: Good afternoon.

11 THE COURT: Good afternoon, counsel.

12 For the record, we had an informal pretrial conference  
13 yesterday in chambers with the presence of Ms. Dean as well as  
14 her counsel and the Independent Counsel's Office to have a report  
15 to the Court about the pretrial review done by counsel and  
16 Ms. Dean as to documents to be offered in the trial, and there  
17 was a report to the Court in chambers that they had made  
18 substantial progress and agreed to approximately half the  
19 documents without having the authenticating witness called.

20 Other issues remained to be resolved, and the Court  
21 allowed more time for the parties to do that, together with the  
22 suggestion that was being made to the Court that certain  
23 documents, particularly a calendar and the materials in the  
24 calendar, admissibility or not under the decision made by the  
25 Court of Appeals in this case as well as on the Supreme Court

1 Braswell decision, remain to be decided.

2           Additionally, there was going to be a little further  
3 review of any of the other arrangements which had to be made to  
4 make sure we have the necessary equipment to attempt to try the  
5 case in a more expeditious fashion, such as a visual presenter  
6 and other such matters.

7           We had reviewed as well at the pretrial conference in  
8 chambers just various procedural matters, nonsubstantive areas of  
9 putting the case in, again, in a more efficient manner.

10           All right, let me hear then where we are. Perhaps  
11 Mr. O'Neill will start or Ms. Sweeney.

12           MR. O'NEILL: Yes, Your Honor, thank you. After  
13 leaving your chambers yesterday, Your Honor, we drafted a letter  
14 to Mr. Wehner that we were not able to give him until this  
15 afternoon, so he hasn't had an opportunity to look through it  
16 yet, but that letter details the stipulations, at least our  
17 understanding as to which ones we agreed to. He will look over  
18 it and make sure that we agree on all of these.

19           There are, I'd say, almost close to two-thirds of the  
20 documents, Your Honor, Mr. Wehner has stipulated to the  
21 authenticity of. And just so the record is clear, Your Honor, he  
22 has reserved his, his rights and objections as to the relevancy  
23 of any of these and whether we can use them at trial. It's as  
24 to, most of these are business and government records, so what  
25 he's stipulated to is our ability to admit those without calling

1 the custodian witnesses.

2 Now he's also reserved his hearsay objections to that,  
3 and I just want to be clear that we're all on the same footing  
4 here, that, for instance, some of the ones he stipulated were,  
5 there were a couple documents in Mr. Mitchell's handwriting, and  
6 those, obviously, would have to come in, the best way would be  
7 through a co-conspirator hearsay exception. Now clearly, we  
8 would have to show that there's a conspiracy and that  
9 Mr. Mitchell was a co-conspirator to get them in, so he's  
10 reserving those objections.

11 And I just want to be clear that as to business  
12 records, it's different. The custodial witnesses won't have to  
13 be called, and if they are, in fact, business records, they come  
14 in that way, but he, of course, reserves his relevancy objections  
15 as to those.

16 THE COURT: All right.

17 MR. O'NEILL: And that's -- and Mr. Wehner's here,  
18 obviously, to enter his side.

19 We just want to make that clear so we don't have any  
20 problems with that later on and so that we can prepare the  
21 necessary stipulations for Mr. Wehner as to the various documents  
22 that he's agreed to.

23 THE COURT: All right. And then Ms. Dean should also  
24 sign any stipulations. All right.

25 MR. O'NEILL: Fine, Your Honor.

1 THE COURT: Did you accomplish anything else today as  
2 to any other areas that we didn't go into yesterday? Was there  
3 anything else arranged, any other agreements or anything else  
4 that went forward in the case?

5 MR. O'NEILL: Your Honor, there's also, in terms of the  
6 documents, there were a number of documents, several of which we  
7 believe Ms. Dean had written, and she has stipulated to those,  
8 and so we've drafted a stipulation to that effect. Again, we  
9 gave it to Mr. Wehner right prior to the hearing.

10 THE COURT: All right.

11 MR. O'NEILL: Mr. Wehner will be looking through it and  
12 making whatever adjustments need be made on it.

13 THE COURT: Okay.

14 MR. O'NEILL: And we'll try to get together on that.

15 THE COURT: All right. Are we ready to proceed then?  
16 It seems to me the rest of the business today would be basically  
17 a consideration of this production of, of the calendar materials.  
18 Let me see if I have the list of the exhibits so I can refer to  
19 that one specifically.

20 And it's the issue raised in chambers concerning the  
21 proof of the production of that document, I think that is, starts  
22 with Exhibit 5, and then it goes through -- that's the Dean  
23 calendar -- Exhibit 8-HH, and a series of Mr. Mitchell's  
24 calendar. All right, so basically it's Exhibit 5, the 1985 Dean  
25 calendar, and then subparts thereof contained in the next series

1 of exhibits through 8-HH.

2 MR. O'NEILL: That's correct, Your Honor.

3 THE COURT: All right. And the government's proffer  
4 is, Independent Counsel's proffer is to prove that, you would  
5 call an FBI agent to say that there had been a subpoena issued  
6 and as a result of that, he obtained this document, Ms. Sweeney?

7 MS. SWEENEY: Yes, Your Honor. Yes, Your Honor. Your  
8 Honor, we believe that that procedure is the procedure that was  
9 set forth in Dean 2 at pages 1210 and pages 1211.

10 In that case, following the first Dean case, which  
11 held that Ms. Dean was a custodian of the government records, the  
12 second case reaffirmed that decision and goes on to say, "The  
13 Independent Counsel may employ the method outlined in Braswell  
14 to authenticate and introduce at trial the government records it  
15 obtained from Dean."

16 Going down a little further, "This procedure allows the  
17 Independent Counsel to introduce testimony that the documents are  
18 HUD documents and that they were produced by the agency in  
19 response to a subpoena. This method of authenticating the  
20 documents preserves Dean's right against self-incrimination."

21 And again, the Court repeats that language in the last  
22 paragraph. And that is how we're proposing to offer these  
23 documents into evidence, Your Honor.

24 THE COURT: All right. Just to also make clear for the  
25 record is in the pretrial conference yesterday in chambers,

1 Independent Counsel indicated they're not offering any parts of  
2 the information -- I don't know if defendant, I think defendant  
3 agreed to that, but I want to make sure -- that would be subject  
4 to the remaining objection of these, under Judge Gesell's order,  
5 these purely personal matters or that would be more prejudicial  
6 than probative, according to how the Court of Appeals looked at  
7 what the judge was saying, I take it, but that those areas are  
8 not coming in at this time on direct evidence in the government's  
9 case at least.

10 MS. SWEENEY: Well, Your Honor, the government's  
11 case -- the government's proffer at this point is to put in the  
12 entries that are listed in the exhibit list.

13 THE COURT: In the calendar.

14 MS. SWEENEY: The calendar entries.

15 THE COURT: But nothing else in the other materials  
16 that were seized or produced? Weren't there some other documents  
17 and writings produced?

18 MS. SWEENEY: Yes, Your Honor. We have not included  
19 the other materials on our exhibit list.

20 THE COURT: All right. And your proffer is that you  
21 would put on a government agent, is that right, or the process  
22 server, I'm not sure quite which one, or the individual who  
23 received the records?

24 MS. SWEENEY: We propose to put on the individual who  
25 received the records, who would state that a subpoena was, a

1 subpoena sought HUD records that were generated during Ms. Dean's  
2 employment at HUD and that in response to that subpoena, these  
3 calendars were produced.

4 THE COURT: Without saying who produced them or  
5 creating an official entity or anything who produced them?

6 MS. SWEENEY: Yes, Your Honor.

7 THE COURT: Just saying, "In response to a subpoena, I  
8 received the following records"?

9 MS. SWEENEY: "I received the following records from a  
10 custodian of HUD records."

11 THE COURT: And then is there anyone else or is it  
12 stipulated that they're in her handwriting, that they are her  
13 records, in essence, created while she was at HUD?

14 MS. SWEENEY: Ms. Dean has not stipulated to the  
15 handwriting on the calendars, Your Honor.

16 THE COURT: All right. I mean, is there anyone coming  
17 in to say they are what they look to be?

18 MS. SWEENEY: Well, Your Honor, I believe that the  
19 Court of Appeals was really indicating that by offering the  
20 testimony which I just proffered --

21 THE COURT: That was sufficient?

22 MS. SWEENEY: -- the government would authenticate the  
23 documents, and therefore they would be admissible.

24 THE COURT: Footnote 7 is what it was referring to.

25 MS. SWEENEY: Yes, Your Honor.



1 THE COURT: And the footnote said, "The Independent  
2 Counsel could use a witness capable of recognizing and  
3 identifying the documents as HUD records to authenticate them,"  
4 and you think it's sufficient -- perhaps I'm confusing two  
5 thoughts -- but you think it's sufficient just to introduce  
6 someone who said that I received these after having a subpoena  
7 served on a custodian of these HUD records, and that these were  
8 what were given to me?

9 MS. SWEENEY: Yes, Your Honor.

10 THE COURT: As opposed to having someone else come in  
11 saying, "I worked at HUD during this time frame in the office  
12 next to Ms. Dean -- or whatever -- and I recognize these  
13 documents as her official business calendar she kept in her  
14 desk"?

15 MS. SWEENEY: Yes, Your Honor. The Court of Appeals  
16 describes that as an alternate procedure but seems to anticipate  
17 that the procedures are, are, in fact, alternate procedures and  
18 that one is as good as the other.

19 We believe that when the witness testifies that a  
20 subpoena was issued directed at records obtained and generated  
21 during the course of Ms. Dean's employment at HUD, that that  
22 really is the basis for authenticating the documents and that  
23 that really is what is anticipated both by Braswell and then by  
24 the Court of Appeals in this case when it's applying Braswell.

25 And, Your Honor, we do not believe that that procedure

1 or that method in any way implicates the protection against  
2 self-incrimination, which is a very limited one that's recognized  
3 by Braswell and recognized by the Court of Appeals in this case  
4 when it extends Braswell to government records.

5 THE COURT: All right. Thank you, Ms. Sweeney.

6 Mr. Wehner, No. 1, I take it, as to the stipulations,  
7 you're waiting for them to look them over, and if they're  
8 appropriate, we'll just get those executed in the near future,  
9 and then secondly, I'll hear you as to the Braswell issue then.

10 MR. WEHNER: Thank you, Your Honor. I have received  
11 the stipulations that I'm sure 90 percent of them will be agreed  
12 to. The only reason I say 90 percent is because I haven't had  
13 the opportunity to review them in detail, but I'm sure as a  
14 general matter, Judge, we have agreed to stipulate. That's not a  
15 problem. I think Mr. O'Neill is right that it's approximately  
16 two-thirds of the documents at issue.

17 Judge, the documents that do remain at issue are  
18 significant, however, in the legal implications that they carry  
19 with them, and I would like to respond to Ms. Sweeney's argument  
20 in a bifurcated fashion.

21 THE COURT: All right.

22 MR. WEHNER: I would like to respond in the first  
23 instance to her statement that they have, that I think she said  
24 that nothing personal was contained in the exhibits they wished  
25 to introduce.

1           Now, Judge, I've read these, and I would like to read  
2 to Your Honor some of the entries that you will see in these  
3 documents. Exhibit 5, November 27, "Trivial Pursuit, Tom's  
4 house."

5           December 12, "Jim Watt Reception, Capitol Hill Club."

6           July 25, Exhibit No. 7, "Dinner with Richard."

7           July 20, "Cookout, Janice's house."

8           July 20, "Linda Chavez Reception."

9           Exhibit No. 8, April 17, which is Good Friday on the  
10 calendar, "Bartending lessons."

11           August 3, 5:00, "Flashback."

12           August 6, a picture of a skull and cross bones.

13           August 28, 6:30 to 8:30, "Mayflower, Reagan Revolution  
14 Reception."

15           Judge, these calendars are full of personal notes of  
16 Ms. Dean that are capable of the worst possible inferences from  
17 any number of jurors that are going to be sitting in this  
18 courtroom. I don't want to have to go through these page by  
19 page, Judge, but we object to them in their entirety because of  
20 Judge Gesell's and based upon Judge Gesell's prior ruling that,  
21 one, personal matters can't be introduced. They would not be  
22 admissible. They would not be relevant. They would be overly --  
23 they don't survive the 403 test.

24           Secondly, we were unable to appeal from the decision of  
25 the trial court holding that these records were governmental

1 without a contempt citation. We -- and I'll put on the record  
2 now that we intend to appeal that issue if this trial results in  
3 a conviction as to the initial conclusion that these calendars  
4 are government records in part for the reasons I've just outlined  
5 here to Your Honor. I don't think the Independent Counsel can  
6 make a showing from the witness stand that these are government  
7 records. The Court concluded they were government records. I  
8 think, frankly, the Court was wrong, and we will be appealing  
9 that issue if appropriate in this case.

10 THE COURT: When you say you couldn't appeal, explain  
11 that to me. You mean when Judge Robinson had the case before the  
12 grand jury, you're talking about?

13 MR. WEHNER: Yes, sir.

14 THE COURT: And if you refused to produce them on those  
15 grounds --

16 MR. WEHNER: Ms. Dean would have had to have suffered  
17 contempt citation.

18 THE COURT: And then you could have appealed the contempt  
19 order?

20 MR. WEHNER: Correct. And we weren't willing to do  
21 that. But the law, however, is clear that we do have the right  
22 to appeal that post the use of the documents in the criminal  
23 trial.

24 THE COURT: All right.

25 MR. WEHNER: At least that's the way I read the law,

1 and I'm sure the Court of Appeals will correct me if I'm  
2 mistaken, but that's what I've read when we looked at the issue.

3 THE COURT: But you're saying that Judge Robinson ruled  
4 that these had to be produced as --

5 MR. WEHNER: Government documents.

6 THE COURT: -- government records?

7 MR. WEHNER: Yes, sir. And I submit to the Court if  
8 you look at them and you look at the entries, they're not  
9 government records. They're personal calendars.

10 Now I don't want to overstate my case to the Court,  
11 because there is one calendar that does not fall within that  
12 broad category I just described. It happens to be a calendar  
13 that possibly, I'll put it this way, has better arguments for  
14 being a government record than the others.

15 I don't feel compelled to point that out at this point,  
16 but there is one that might be a government record if closely  
17 scrutinized by Your Honor. I feel strongly that the others are  
18 not.

19 THE COURT: When you say the others are not, you're  
20 saying, like, the entire '85 or '86 or '87 calendar?

21 MR. WEHNER: Yes, sir.

22 THE COURT: No matter what the entries therein are, it  
23 would not be a government record?

24 MR. WEHNER: No.

25 THE COURT: In other words, she is going to some type

1 of coinsurance briefing on a certain day.

2 MR. WEHNER: You know, Judge, that is a real, that is a  
3 real tough issue, and I don't know that any court has ever  
4 precisely addressed that.

5 THE COURT: All right.

6 MR. WEHNER: I believe that there are fifth amendment  
7 protections to entries in a calendar, to all entries in a  
8 calendar which is primarily personal in nature to the entire  
9 calendar. There, however, is a line of argument to be made that  
10 a business entry in a personal calendar is not personal, and I  
11 recognize that line of argument.

12 But it seems to me -- and I'm, I don't know what Your  
13 Honor's practice is, but I carry a calendar in my briefcase, and  
14 it's got everything in it, and yet it doesn't have everything in  
15 it. It has some things in it, and everything gets changed, and  
16 nothing gets done, and the dentist appointment gets canceled.  
17 I'm never where the calendar reflects I was. First of all, it's  
18 notoriously inaccurate, but secondly, it has every -- it has  
19 doctors appointments for me when I, you know, go to a doctor,  
20 clearly personal material, but it also says "United States v.  
21 Dean", you know, on a specific date and specific time.

22 Now I would argue and I think I can strongly argue that  
23 that type of calendar is a personal calendar. It's certainly not  
24 meant for anybody to look at. It's clearly not meant for anybody  
25 to rely on. It's meant for me to look at and figure out where

1 I'm supposed to be and what I need to do next week.

2           So I would argue to the Court that they're all personal  
3 in that respect, recognizing that there's a counterargument to be  
4 made that the entry, "Wehner," you know, "fourth floor court-  
5 house," is a professional or a business entry.

6           THE COURT: All right. That's your first challenge to  
7 the materials that are personal --

8           MR. WEHNER: Right.

9           THE COURT: -- and additionally have prejudicial effect  
10 outweighing any probative value, even if they can be produced or  
11 proven the way the government has suggested.

12           MR. WEHNER: Right.

13           THE COURT: Are you going to challenge the method of  
14 proving them as well?

15           MR. WEHNER: Yes, sir.

16           THE COURT: All right.

17           MR. WEHNER: That testimony as proffered is clearly not  
18 sufficient to satisfy the Federal Rules of Evidence as to  
19 authenticity, as to relevancy, as to any exception to the hearsay  
20 rule. They're hearsay by definition. They don't satisfy the  
21 rules of evidence. The fact that an FBI agent serves a subpoena  
22 and gets documents in return doesn't satisfy the rules of  
23 evidence. I think I, that's about as simple as I can state it.

24           And I don't think the Court of Appeals intended to  
25 lessen the protections in a criminal trial of the fifth amendment

1 by writing this opinion and saying you don't have to satisfy the  
2 rules of evidence in order to introduce documents at issue in  
3 this case. I think that my objection after that evidence was  
4 proposed is properly sustained by Your Honor. There -- I'll  
5 leave that there.

6           Secondly, Judge, if that's the evidence that's put on,  
7 that's not what happened, and I would like that to be absolutely  
8 clear on the record. Those documents weren't produced to an FBI  
9 agent. Those documents were in a courtroom, were picked up by  
10 Bruce Swartz, who is the No. 1 assistant to Judge Arlin Adams,  
11 and they were sitting in a box in a courtroom, and Judge Robinson  
12 ruled these are government documents, and Bruce Swartz walked  
13 over and picked them up.

14           There was no FBI agent in the courtroom that I recall.  
15 I stand corrected on that, because I don't, again, don't want to  
16 misrepresent it, but I do remember who picked them up.

17           Secondly, Judge, the subpoena wasn't served on a  
18 custodian of records of HUD. The subpoena was served on an  
19 attorney who agreed to accept service for Deborah Dean.

20           Now that's a far cry from a situation where you have,  
21 as is encompassed in Braswell admittedly, a custodian of  
22 records at a corporation. The treasurer of General Motors,  
23 custodian of those financial records, the subpoena gets served on  
24 him in his custodial capacity to produce records, he then becomes  
25 a target. He says you can't use the act of production; the Court



1 says yes, but the FBI agent can testify that he served the  
2 subpoena on the custodian of records and the custodian produced  
3 the documents.

4           That also happens to be true testimony in that  
5 scenario, because that's precisely what happened, and that's what  
6 the Court of Appeals envisions here, Judge. And to call it  
7 something other than what it is, I think, begs the question,  
8 because this is not a statute that we're talking about. This is  
9 the fifth amendment we're talking about. It's a constitutional  
10 right that can't be violated by the government in a criminal  
11 trial, and to allow the government to avoid the constitutional  
12 question by fictionalizing testimony, Judge, is error.

13           THE COURT: Isn't that what the Court of Appeals says  
14 to do, though? I think they're just analyzing -- analogizing it,  
15 rather, to Braswell inappropriately. I mean, it says, "The  
16 Independent Counsel may employ the method outlined in Braswell  
17 to authenticate and introduce at trial the government records it  
18 obtained from Dean. Although the Court in Braswell did not  
19 allow the government to use act of production evidence, it did  
20 suggest that the government could 'offer testimony . . . from  
21 the process server . . . and from the individual who received the  
22 records -- establishing that the corporation produced the records  
23 subpoenaed.'" "

24           Then they go on, "This procedure allows the Independent  
25 Counsel to introduce testimony that the documents are HUD

1 documents and that they were produced by the agency in response  
2 to a subpoena. This method of authenticating the documents  
3 preserves Dean's right against incrimination."

4           In other words, I agree that because of the way the  
5 records were produced, because of the legal tussle over whether  
6 they could be produced or not and they were ordered by a court to  
7 be produced, you don't have the clean-cut situation perhaps  
8 evidenced in Braswell, where there was a corporate executive  
9 who was responsible for maintaining these records and he was the  
10 one subpoenaed and he did hand them to the FBI agent, and here  
11 you have to produce a witness, whoever it may be, maybe it would  
12 be the counsel, whoever it would be, that would say these records  
13 were turned over by a custodian from HUD in response to a  
14 subpoena, and the reason for that would be the Court has already  
15 determined, the District Court has already determined that they  
16 were government records and that she was a custodian of the  
17 records and that therefore it would not be a lie to say these  
18 were turned over pursuant, you could say, to court order or a  
19 subpoena to the Independent Counsel's Office by a custodian of  
20 the records.

21           I'm not sure where under the, because of Dean 2, it's  
22 violating Ms. Dean's fifth amendment rights if it was done that  
23 way. I was not, as I asked Ms. Sweeney about, aware that that's  
24 all they were going to do to prove that they were the Dean  
25 calendar and that Dean put the entries in there, as opposed to

1 someone else. I assumed perhaps someone else was going to come  
2 along and say that they had seen that calendar and recognized it  
3 and that, you know, they recognized it as materials that she kept  
4 on her desk that she worked with or something to that effect.

5 But I'm not sure I see your argument that because a  
6 situation here developed as a result of an argument over the  
7 production of the documents, that therefore this Independent  
8 Counsel can't prove these as approved by a procedure in  
9 Braswell, even if it means -- I'm not sure it shows creating a  
10 legal fiction, as just not going into the details of how they  
11 were actually produced before the jury to preserve her fifth  
12 amendment right.

13 MR. WEHNER: Judge, that may well be, and frankly, you  
14 make a better case for the introduction of those records under  
15 Braswell than the Independent Counsel does. If they can put  
16 that testimony on and that satisfies Braswell, more power to  
17 them, but it's not incumbent upon us to agree to letting them put  
18 an agent, testify on the stand to things that didn't occur in  
19 order to satisfy Braswell. They've got facts that they have to  
20 deal with, and either the facts they put on satisfy the rules of  
21 evidence in Braswell and don't violate Ms. Dean's  
22 constitutional rights or they don't.

23 But I'm not going to agree to let someone testify to  
24 events that didn't occur and somehow say, "Okay, we stipulate,  
25 yes, Judge, that's what happened," and let these critical

1 documents come in without the government having to satisfy their  
2 burden.

3           Maybe they will put Mr. Swartz on the stand to testify  
4 that he picked up those documents; I don't know, but the proffer  
5 that Ms. Sweeney gave doesn't persuade me that they're admissible  
6 under Braswell.

7           Ignoring the fact that the proffer certainly doesn't  
8 satisfy me that they -- not that I have to be satisfied, but I  
9 think it clearly doesn't satisfy the Federal Rules of Evidence as  
10 to admissibility, as to relevancy, as to any exception to the  
11 hearsay rule, the testimony that Ms. Sweeney proffers is that  
12 they're documents received from HUD, and my response to that is  
13 so what? I've looked at 500,000 documents from HUD.

14           THE COURT: All right. I appreciate that.

15           Ms. Sweeney, do you want to respond briefly to that,  
16 both as to the personal nature of some of them that may have a  
17 403 balancing issue and secondly as -- or the personal nature  
18 overall, I think that's been decided by another court, and as to  
19 the Braswell methodology for introducing and satisfying the  
20 evidentiary requirements to prove that these are what they say  
21 they are, that is, Ms. Dean's personal -- or Ms. Dean's notes,  
22 assuming she's even the one who made the notes, I don't know if  
23 she did, on this calendar that's identified as her calendars?

24           MS. SWEENEY: Yes, Your Honor. Addressing the  
25 personal, the personal records versus the governmental records

1 issue first, if I might, it seems to me that Mr. Wehner is trying  
2 to relitigate what has already been decided both by the Court of  
3 Appeals as well as by Judge Robinson. In Dean 1, the Court of  
4 Appeals gave Judge Robinson a great deal of guidance as to how he  
5 should review precisely the calendars, recognizing that they  
6 contained mixed entries and setting forth the case law that deals  
7 with those circumstances.

8           Judge Robinson examined the calendars in camera and  
9 ruled that they were governmental records in their entirety. He  
10 did not permit Ms. Dean at that point to make redactions,  
11 Ms. Dean and her counsel to make redactions because of the way  
12 the case had been litigated by them. He said that had they  
13 chosen to argue that portions were personal at an earlier time  
14 during that proceeding, he would have entertained some sort of  
15 redaction procedure. Your Honor, that decision was not appealed.

16           Before Judge Gesell, repeatedly Mr. Wehner indicated  
17 that these records were governmental records and he could not  
18 relitigate that, that he admitted that. He did it repeatedly,  
19 and I can give you one citation to a particular day, June 15,  
20 1992, transcript 2, 5, and 8 through 9.

21           So, Your Honor, I just think that it's a settled issue  
22 whether or not these are governmental records. They have been  
23 found to be governmental records.

24           THE COURT: All right.

25           MS. SWEENEY: In Dean 2, the Court of Appeals

1 indicated that it would be the trial judge's determination to  
2 decide whether certain entries were more prejudicial than  
3 probative, but Dean 1 makes it quite clear that the burden is  
4 on the defense to establish that particular entries are purely  
5 personal and are more prejudicial than probative under rule 403.

6  
7           So, Your Honor, that's the way the Independent Counsel  
8 sees the personal issue coming before Your Honor, but not a  
9 relitigation of whether or not these are governmental records or  
10 personal records. The subpoena has been enforced.

11           THE COURT: I think that's fair. I think really  
12 Mr. Wehner was saying that in essence he realizes it's been  
13 litigated and he's going to have to keep challenging it to  
14 preserve his position, but at this point, we're looking more  
15 at -- and I just appreciate your bringing me up to date on what  
16 happened in the past, because obviously I wasn't there -- but I  
17 think more we have two issues now, and one is are there certain  
18 areas that he can point out or has pointed out through some of  
19 the mentions he's made that are really personal and have a more  
20 prejudicial effect than a probative value to them under 403  
21 balancing, and then secondly -- and what is the relevance as  
22 well, and then secondly, as to the methodology of proof of these  
23 items.

24           MS. SWEENEY: Yes, Your Honor. The particular items  
25 that he mentioned, I do not anticipate that the government would

1 have a problem with redacting those. Now we're not willing to  
2 let him go through the calendars and denominate what he believes  
3 is personal. That would have to be litigated.

4 THE COURT: Well, I think we should make arrangements  
5 to do that. It appears to the Court just from the brief -- and I  
6 don't have the calendar in front of me. I don't think those were  
7 part of the exhibits given to me. They were blank.

8 MS. SWEENEY: No, Your Honor, but we certainly can  
9 provide, provide a set. They're quite voluminous. And we do  
10 have a set here, Your Honor, but we can --

11 THE COURT: Before the Court does that and spends the  
12 time on that, I think counsel are going to have to -- and I do  
13 think the defendant is going to be faced with the procedure to  
14 identify parts of the calendar, phrases or whatever it is in the  
15 calendars, and there may be considerable numbers of pages that  
16 should be redacted because they are either not relevant or the  
17 prejudicial effect is not substantially outweighed by the  
18 probative value, that is, the prejudicial effect overcomes the  
19 probative value, and that I do think reading the Court of Appeals  
20 opinion and Judge Gesell's opinion, that that was left open to be  
21 done.

22 Independent Counsel attempted to appeal that, and that  
23 was not successful. In the ruling, the Court reserved, the lower  
24 Court, to the extent to which if any purely private material  
25 found in the documents would have to be redacted, the

1 admissibility of the documents and any claim by the defendant  
2 that the portions of the papers selected by Independent Counsel  
3 are incomplete, the Court reserved on those, and the Court of  
4 Appeals said the Court obviously reserved that some portions of  
5 the document might be more prejudicial than probative or might  
6 not be relevant, and I believe that that is an issue that has to  
7 be raised by the defendant and then after raising that as to  
8 particular items contained within the calendar overall,  
9 presumably that the calendar can be admitted under Braswell,  
10 that the government can then respond to the claims, and I suspect  
11 about a majority of the, I don't know, but I would suspect a  
12 majority, if they're purely personal matters not directly  
13 relevant to the case, can be stricken from the calendars, can be  
14 whited out before their production. I don't know how many there  
15 are or what's contained therein, and there may be a segregable  
16 group that can be argued to the Court about prior to trial and I  
17 can resolve those prior to trial. I think that's another step  
18 that still has to be done.

19 MS. SWEENEY: All right, Your Honor.

20 As to the second point, Mr. Wehner's complaint that  
21 there was not a government agent present, there was a government  
22 agent present, and perhaps his problem can be solved by styling  
23 the agent's testimony such that the documents were turned over by  
24 HUD -- by a custodian to a government agent. If he wants it to  
25 be pursuant to court order or in a courtroom or something like



1 that, that, I mean, that's fine, also.

2 THE COURT: How do they get identified -- I may be  
3 missing something here, because I haven't seen the actual  
4 documents. How do they get identified as Ms. Dean's calendar she  
5 kept in the ordinary course of business at her office other than  
6 you're saying that Judge Robinson has ruled that these are  
7 government documents? I mean, what is a jury told about this  
8 document when it's introduced by the witness precisely? What is  
9 said?

10 He said, "I have these documents produced pursuant to  
11 an order -- or to a subpoena, whatever we resolve that as -- and  
12 they were produced by a custodian of the records for HUD, these  
13 are HUD documents produced by subpoena." Well, HUD documents  
14 could mean anything. I mean, how do they know that they're  
15 getting Ms. Dean's business calendar at this point for 1985?

16 MS. SWEENEY: Well, Your Honor, we believe that the  
17 testimony should be that the subpoena was directed at documents  
18 obtained or generated in the course of Ms. Dean's employment --

19 THE COURT: Right, I understand that.

20 MS. SWEENEY: -- and that they were then provided by a  
21 custodian of HUD documents.

22 Now Mr. Wehner seems to think that the only person who  
23 could serve as a custodian of HUD documents is some sort of  
24 record keeper at HUD. In this case, Ms. Dean has been found to  
25 be a custodian.

1 THE COURT: I understand that. I'm not concerned with  
2 that issue.

3 MS. SWEENEY: And so that part of his argument, I  
4 think, has already been pretermitted by both Court of Appeals'  
5 decisions.

6 THE COURT: All right.

7 MS. SWEENEY: And, Your Honor, we're not claiming that  
8 she's the high custodian, just a custodian.

9 THE COURT: Again, then you have marked for evidence  
10 the 1985 calendar, and then how is that used? I mean, I'm not  
11 still sure I'm clear of how once he says, "These were produced by  
12 a custodian of the documents for HUD," and then you said, "All  
13 right, we move to introduce the 1985 calendar," is it your theory  
14 then that these, these are sort of self-authenticating statements  
15 contained in here? I'm not sure how you're going to use them and  
16 who's going to discuss lunch with Andrew Sankin on such-a-such a  
17 day or brunch with him at Rehobeth Beach. I mean, I'm still not  
18 clear how that's going to be used at all.

19 MS. SWEENEY: Well, Your Honor, our position would be  
20 that under the Court of Appeals' reasoning, these are  
21 authenticated HUD records. Your Honor is now raising the  
22 question as to whether or not there will be witnesses who will  
23 testify making reference to the exhibits once they were admitted,  
24 and we do intend --

25 THE COURT: Yes, because I don't know what the jury is

1 going to do with this if you just hand them all these things  
2 showing that she had some lunches and meetings with various  
3 people mentioned as, perhaps as co-conspirators in the charges  
4 against her.

5 MS. SWEENEY: Yes, Your Honor. We anticipate that  
6 there will be testimonial evidence that will link up with the  
7 calendar entries.

8 I know that Your Honor has not had an opportunity to  
9 look at the calendars, and perhaps that is what is, is causing  
10 some of the confusion. The calendars themselves are offered in  
11 their entirety, and then the individual exhibits that come from  
12 the calendars identify the particular dates and particular  
13 meetings and lunches and dinners that are of relevance to the  
14 case and that have been, are relevant to events identified in the  
15 indictment.

16 THE COURT: And you're saying there will be testimony  
17 tying these particular subsections of these Exhibits 5 and on  
18 through 8 as to these subsections where you've put up particular  
19 meetings and dates, et cetera?

20 MS. SWEENEY: Yes, Your Honor. Many of the individuals  
21 identified in the calendar will be testifying.

22 THE COURT: All right.

23 MS. SWEENEY: Thank you, Your Honor.

24 THE COURT: The Court is still not sanguine as to this  
25 method of introducing this calendar in the subsets thereof, and I

1 think that may be more from just the standpoint of how it's going  
2 to be accomplished and what it will mean to the jury than it is  
3 an evidentiary sense at this point.

4 I'm going to do two things: One, I want the defendant,  
5 if he has on behalf of his client, if Ms. Dean has objections as  
6 to the overall portions to the calendar being introduced overall,  
7 that is, like No. 5 is the 1985 calendar, and there's another  
8 exhibit, No. 7, the 1986 calendar, and I guess No. 8 must be the  
9 1987 calendar, that the calendar overall, not referring to the  
10 subparts, has personal materials in there that are not relevant  
11 or that the prejudicial value outweighs any probative value, it  
12 would have to be identified by the defendant, raised with the  
13 government, and the government has to see whether they agree or  
14 disagree, and those items they disagree on I will decide prior to  
15 trial in another pretrial hearing.

16 Secondly, that would also, I think, would have to apply  
17 to any subsections as well if they think any of these identified  
18 in these subsections are in the same category. They all seem to  
19 refer to meetings of people at least, except for one thing, I  
20 see, there's names that the Court recognizes from other materials  
21 in the case, so they may have some claim of relevancy. There's a  
22 skull-and-cross-bone reference, I don't know what that means,  
23 that I see specifically noted.

24 Secondly, as to the introduction and authentication of  
25 these materials, I think Braswell does set forth a procedure.

1 The defendant says he cannot stipulate to a legal fiction.  
2 Actually, legal fiction is used many times to accomplish items in  
3 evidence for a protection of parties in various ways.

4           It does seem to me Braswell lays out a scenario that  
5 can be modified to fit the needs in this case. My concern was  
6 more of the significance to the jury and the understanding of the  
7 jury in the introduction of this calendar besides just an agent  
8 or an officer of the Independent Counsel getting up and saying  
9 these were produced by subpoena as HUD documents and produced  
10 during the tenure of Ms. Dean while she worked at HUD, without  
11 any discussion of what it really is from someone with knowledge,  
12 and I don't know if there is such a person beyond Ms. Dean that  
13 has knowledge of this calendar, if she has a secretary that  
14 recognizes these documents or not or other coworkers.

15           I'm going to rule at this time I do believe under the  
16 Braswell scenario and Dean 2, that is, the Court of Appeals'  
17 decision of April 6, 1993, in this case upholding Judge Gesell's  
18 rulings as to this, that the Court of Appeals has clearly  
19 indicated the procedure that may be employed, it may be that  
20 Braswell employed as well as others, and they suggested in  
21 footnote 7 other methods of authentication through the testimony  
22 of a witness with knowledge as well as from the Braswell method  
23 of protecting danger arising against self-incrimination. I do  
24 believe that can be accomplished still protecting her rights  
25 against self-incrimination.

1           So the general procedure I'm going to approve over the  
2 defendant's objection is preserved. However, the specifics I  
3 still want to look at, and the individual items contained in the  
4 calendar, whether they'll be stricken or not as personal or too  
5 prejudicial, remain to be decided.

6           I would like to set up another time when we can come in  
7 and consider that. It will have to be after two weeks.  
8 Hopefully, if my jury decides this other case, I can get away  
9 for a little bit this summer, so it will have to be after August  
10 28, probably the 29th, 30th, and 31st, somewhere in that time  
11 frame.

12           We can take a look at whatever you've got to with the  
13 personal matters contained in the calendar and if there's any  
14 other witness that can identify this calendar beyond substituting  
15 an agent who was present and saw it delivered by the order of the  
16 Court.

17           I would like to -- I've got to take a note from the  
18 jury for a second. I'd like counsel and Ms. Dean to stay for one  
19 more minute to meet in chambers about something for a minute, not  
20 dealing with the substantive issues at all in the case, strictly  
21 procedural issues. It's just easier to sit around a desk than it  
22 is to sit here on the bench and talk about them, that's all.

23           I'll set a date up. Do you all have any dates you  
24 cannot appear that week of the 28th of August? Are you all being  
25 away at that time or something?

1 MR. O'NEILL: Not from the government, Your Honor.

2 MR. WEHNER: Judge, may I ask one question about what  
3 you said about the calendars?

4 THE COURT: Certainly, yes.

5 MR. WEHNER: Have you ruled today that they will be  
6 admitted as --

7 THE COURT: Government records? HUD records?

8 MR. WEHNER: As authentic?

9 THE COURT: As authentic HUD records? I think the  
10 Court of Appeals' ruling in that and the ruling from the, Judge  
11 Robinson establishing that they are government records at this  
12 point is binding upon the Court.

13 I indicated I would perceive that the Braswell  
14 methodology can be used and their rights would not be violated by  
15 that but that the Court thinks that perhaps another identifying  
16 witness would be more appropriate, but overall, I have ruled that  
17 they can be admitted under the Braswell procedure as authentic,  
18 that is, as government records produced by Ms. Dean's, during  
19 Ms. Dean's term of her employment at HUD, unless there's some  
20 other challenge I haven't heard where she denies that those are  
21 hers and is willing to say she never made those records, entries.

22 I mean, unless there's something else I haven't heard,  
23 it seems to me that's exactly what Braswell provides and what  
24 the fight has always been about. It was decided she was a  
25 custodian by earlier litigation, and it was decided these are

1 government records by earlier litigation. If the government has  
2 anyone else to say what they are, propose they appear to be,  
3 that's fine. I'd suggest that may be appropriate.

4 But the upshot of it is yes.

5 MR. WEHNER: Thank you.

6 THE COURT: If you want a short answer, a short, not a  
7 legal answer.

8 MR. WEHNER: Thank you.

9 THE COURT: I have some time September 1 or August 31,  
10 depending on the parties' needs. You're going to be here that  
11 week, I suppose, preparing for trial in any event.

12 All right, why don't we make it August 31 then at 10:00  
13 a.m. I'll put another status call in the case and take up the  
14 remaining issues in this calendar, production problem as to these  
15 personal or probative versus prejudicial issues and seeing what  
16 witnesses we have to prove this and the exact proffer the  
17 government will have at that time exactly what the witness will  
18 say is going to be offered to prove these.

19 (Discussion off the record.)

20 THE COURT: Counsel could be excused. I appreciate it.  
21 I'm going to have the other matter out for a minute, and then  
22 I'll see you in chambers in about five minutes, all right?

23 MR. O'NEILL: Yes, Your Honor. Thank you.


24 (Which were all the proceedings had  
25 at this time.)



CERTIFICATE OF THE REPORTER

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

  
Anneliese J. Thomson

1133

PENGAD LU, BATUNNE, NJ 07062 · LASEH BUNDA