ORIGINAL

In the

Supreme Court of the United States

UNITED STATES, PETITIONER,	)	
V.	)	
HERMAN RADDATZ, RESPONDENT,	)	No. 79-8

Washington, D. C.
February 25, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	:	
v.	:	No. 79-8
HERMAN RADDATZ, Respondent.	:	

Washington, D. C.,

Monday, February 25, 1980.

The above-entitled matter came on for oral argument at 11:44 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ANDREW J. LEVANDER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioner

JOAN B. GOTTSCHALL, ESQ., Jenner & Block, One IBM Plaza, Chicago, Illinois 60611; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 79-8, United States v. Raddatz.

Mr. Levander, you may proceed whenever you are ready.

ORAL ARGUMENT OF ANDREW J. LEVANDER, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on the government's petition to review a decision of the United States Court of Appeals for the Seventh Circuit. At issue is the construction and the constitutionality of the Federal Magistrates Act.

The respondent, who has previously been convicted of numerous crimes, was indicted in the United States District Court for the Northern District of Illinois on one count of unlawful receiving a firearm. Prior to trial, the respondent moves to suppress various statements he had made to the Chicago police at the time of his arrest and also to federal agents on two subsequent occasions. The respondent claimed that these statements were inadmissible as a matter of both Fourth and Fifth Amendment law.

In accordance with section 636(b)(1)(B) of the Federal Magistrates Act, the District Court designated a magistrate to conduct and evidentiary hearing regarding

respondent's pretrial suppression motion. Following an extensive hearing, the magistrate made proposed findings of fact, rejecting respondent's claim. In particular, the magistrate found that the testimony of the federal agents was more credible than that of respondent and he recommended that the motion be denied.

The District Court thereafter, pursuant to section 636(b)(1)(C) of the Federal Magistrates Act, made a "de novo determination" of respondent's motion. That is, the District Court made a thorough review of the transcript of the hearing held before the magistrate, the magistrate's report and the submissions of the parties, and he thereafter denied the motion to suppress evidence. Subsequently, the respondent was convicted based on the evidence at the suppression hearing and some stipulated facts.

On appeal, however, the Court of Appeals reversed. The court first acknowledged that the proceedings in the District Court had complied with the Federal Magistrates Act. The court further found that the Federal Magistrates Act did not violate Article 3 of the Constitution. Nonetheless, the court concluded that the due process clause of the Constitution requires the District Court either to defer to the magistrate's proposed findings of fact or to rehear the testimony itself. And since the statute prohibits the deference that the court felt that the due process

clause requires, the Court of Appeals sent the case back to the District Court for a second duplicative suppression hearing to be conducted personally by the District Court.

QUESTION: Mr. Levander, what if after the denial of the suppression motion but at the point at the trial of the case, where the government sought to introduce the confession, the defendant had objected and said under Jackson v. Denno, an opinionof this Court, I am entitled to the judge's determination as to whether it is voluntary or nog before it goes to the jury?

MR. LEVANDER: Well, it wasn't a formal trial, as I understand it. The trial was based on the stipulations andtthe transcript.

QUESTION: Well, that is how lots of trials are conducted nowadays, because the defendants don't have any defense if they lose their suppression motion.

MR. LEVANDER: Right.

QUESTION: But let's suppose we are talking about a defendant who really did have a defense and had an argument to make, not only his confession was involuntary but he had witnesses to put on and an alibi and that sort of thing, do you think that the District Judge would have been required under those circumstances, when the confession was offered at trial, to conduct a hearing and listen in person to the suppression motion?

MR. LEVANDER: Let me understand your question, Mr. Justice Rehnquist. In your hypothetical, the defendant moved prior to trial and had a hearing before a magistrate?

QUESTION: Had exactly what he got in this case.

MR. LEVANDER: No. Again, that would be the same thing as this case. Once the magistrate has conducted the hearing and a District Court has made its de novo determination of the motion, that is the end of the ball game. Now --

QUESTION: You would say he has already gotten everything that Jackson got?

MR. LEVANDER: That's right, he has had an impartial arbiter evaluate his testimony and thereafter the District Court makes its de novo determination of the motion. He has gotten more in fact than what Jackson v. Denno requires.

QUESTION: Then I suppose -- what happens under the federal procedure now in the federal court? The evidence as to the -- if it is jury trial, the evidence as to voluntariness goes to the jury, too, doesn't it?

MR. LEVANDER: That's right, under 18 U.S.C. 3501 (a) or (b).

QUESTION: So the only function of the hearing in the federal system is to make sure that the jury is entitled to hear the evidence?

MR. LEVANDER: That's right, and in Jackson v. Denno, of course --

QUESTION: And they can reject it?

MR. LEVANDER: That's right. In Jackson v. Denno, of course, the Court held that the jury that determines guilt or innocence is not permitted to make that initial determination.

QUESTION: But you say that somehow a magistrate is more impartial and more neutral than a jury in making that sort of determination.

MR. LEVANDER: Well, I don't know how you would compare one to the other, Mr. Justice Rehnquist, but I would say that he is an impartial arbiter, he is not some person off the street. He is a federal employee who -- you know, there is no claim in this proceeding that the magistrate misconducted the hearing in any way.

QUESTION: Well, there is no claim in most proceedings that juries have misbehaved either, and yet Jackson v. Denno says you can't submit a confession to them without --

MR. LEVANDER: I think you can. In a footnote in Jackson v. Denno and also in Lego v. Twomey, the Court reiterated that you could give it to a jury, it just can't be the same jury that decides guilt or innocence. In other words, you could have a suppression hearing at which a jury

was empaneled and listen to the evidence and made a determination of voluntariness. Thereafter at trial you would have to have another jury decide the question of guilt or innocence. The Court made quite clear in both Jackson v. Denno and in Footnote 9, I believe it is, of Lego v. Twomey that it has just got to be a neutral fact-finder, that is the trial judge, another judge or another jury. It just can't be the jury that tries guilt or innocence.

QUESTION: Which presumably is not a neutral fact-finder?

MR. LEVANDER: Well, the theory I think in Jackson v. Denno is that the jury will be misled as to the question of voluntariness because it will look to reliability. And since the question of voluntariness does not involve the question of reliability but rather involves solely the question of the policeman's behavior or the constable's conduct, the Court said that due process requires that a neutral fact-finder that is not concerned with guilt or innocence make the determination.

In this Court, the respondent makes essentially three claims --

QUESTION: Before you go on, is there anything final about the magistrate's recommendation?

MR. LEVANDER: It is not final. It is not determinative and he has no power to make a determination.

The statute divides pretrial matters into two kinds of categories. As to most pretrial matters, which I will call procedural for want of a matter nomenclature, or subsection (a) matters, the magistrate is authorized to "hear and determine the matter," and as to that the District Court makes a review as if it were a court of appeals. Thatis, it can reverse for errors of law and for findings of fact which are clearly erroneous.

However, as to subsection (b) or case dispositive motions as are sometimes referred to, which include prisoner petitioners, motions to suppress evidence in a criminal case, prisoner petitions regarding the conditions of confinement, as to those kinds of more important motions, Congress established a different standard of review, that is the magistrate only makes a proposed finding of fact and recommendations of law and it is the District Court which actually must make the decision, and he does not have to give a clearly erroneous deference to the fact-finding or --

QUESTION: The judge in those -- in those kinds of cases, the district judge has more than two choices.

MR. LEVANDER: That's correct.

QUESTION: He can hold a hearing himself.

MR. LEVANDER: He could. He is empowered to do that. He is also empowered to send it back to the magistrate

for further hearings, to recommit the matter.

QUESTION: Or he can accept it.

MR. LEVANDER: Accept, reject or modify in whole or in part.

QUESTION: Well, he can hold a hearing himself if he thinks -- if someone convinces him that he really ought to hear the witnesses himself --

MR. LEVANDER: That's correct.

QUESTION: -- he can hear them.

MR. LEVANDER: That's right. But the Court of Appeals in this case for good reason concluded that there was no abuse of discretion in not holding such a hearing.

QUESTION: We realize that in some cases a motion to suppress is a determination of guilt or innocence.

MR. LEVANDER: Well, it may, as Mr. Justice Rehnquist pointed out a few moments ago, be determinative of the trial. But in Lego v. Twomey, this Court made quite clear that the question at the suppression hearing, clearly a voluntariness hearing has nothing whatsoever to do with guilt or innocence. And as has been repeated by this Court on many occasions, and a question -- we don't denegrate the importance of suppression hearings in terms of effectuating constitutional rights --

QUESTION: Do you know how many narcotics cases go to trial after the denial of a motion to suppress?

MR. LEVANDER: Well, I suspect that there are a fair number of guilty pleas if the defendant loses --

QUESTION: A fair number, about 80 or 90.

MR. LEVANDER: I don't know specifically at this point.

Our position and a critical question on the statutory matter is what is a "de novo determination." Our position is quite clear. A de novo determination is a thorough review of the evidence induced before the magistrate, the magistrate's report and submissions of the parties.

The respondent's position is not quite so clear. They say that de novo determination means what we say it means some of the time, but other times it means a de novo hearing, and they distinguish and they say that it means that a de novo hearing any time that the credibility of the witness is called into question, in other words any time there is a conflict in testimony. But of course in a suppression hearing, and certainly habeas proceedings and all of those kinds of proceedings, virtually every pretrial hearing is going to involve conflicting testimony, so therefore respondent's real position I take it is that in most cases two hearings will be required.

QUESTION: Well, even if there isn't conflicting testimony, in a sense questions of credibility are almost

always at issue, aren't they, to the extent that a judge or a magistrate has the right to ignore uncontradicted testimony?

MR. LEVANDER: That's true. Although respondent hasn't addressed that claim as to whether or not they would think, you might ask them whether or not a second hearing would be required.

At the outset, it is quite apparent in our view that the act, that respondent's construction of the act would utterly defeat Congress' purpose. Congress enacted the Magistrates Act to relieve the District Courts from the tremendous burden in litigation. The statistics are fairly overwhelming. And in particular, Congress said in 1976, when it amended the act, we want magistrates to conduct these kinds of evidentiary hearings. To require two hearings in every case would just obviously defeat what Congress sought to do, to relieve the District Courts of pretrial matters so that they could conduct trials and make decisions.

QUESTION: I suppose it wouldn't really be in every case, although it would be most cases because I suppose the parties could stipulate that they would accept the determination of the magistrate.

MR. LEVANDER: They could consent to it, that's right. I don't think the respondent could contest it,

but the respondent here of course did not consent.

QUESTION: Right.

MR. LEVANDER: The language in the legislative history of the act squarely refute respondent's claim. The act does not say the District Court is required to make a de novo hearing of the evidence. It says it must make a de novo determination of the magistrate's report. This distinction in language makes it clear, it seeme to us, that there is not a de novo hearing requirement. It is simply, on contrast to subsection (a) motions, a kind of review pattern. It is not the clearly erroneous pattern. It is a de novo determination pattern.

Moreover, the act itself empowers the District judge to conduct a second hearing. Now, if that grant of power be wholly unnecessary, if de novo determination meant de novo hearing, the power would already be there. Obviously Congress thought it meant something else.

Finally, where Congress thought it important in the body of the act to require the District Court to make a second hearing or to reheat the testimony, it expressly provided. 636(d) talks about contempt proceedings. When contempt occurs before a magistrate, Congress specifically stated that the District Court must hear the testimony. Here, however, he only must make a de novo determination, something quite different.

QUESTION: Isn't there a special reason for that, for perhaps he would include among the witnesses on the contempt matter the testimony of the magistrate himself or herself?

MR. LEVANDER: That is exactly right, Mr. Chief Justice. The legislative history I think answers any questions on this point.

The original version of the 1976 amendment provided that the District Court would have to rehear the testimony. Congress rejected this language and said instead of hear de novo, they put in de novo determination, and the legislative history makes clear that that language comes from a Ninth Circuit decision called Campbell v. United States District Court, which is quoted at length and with approval in the House report accompanying the 1976 amendment.

In Campbell, the Court of Appeals concluded that a District Court could designate a magistrate to conduct a suppression hearing and that thereafter the District Court make a de novo determination of the motion, which did not mean that it had to rehear the testimony. And the report itself, the House report itself states that, and I roughly quote, "use of the words de novo determination is not intended to require the district judge to conduct a new hearing on contested issues," squarely and flatly refuting

the respondent's construction of the act.

QUESTION: Well, what if this case had gone to trial not on the testimony of the suppression motion but just after the motions made a regular trial on guilt or innocence and a question was raised as to the admissibility of a point of evidence which required a determination by the judge as to whether the evidence was admissible, do you think it would have been permissible for him to say, well, you present this testimony to a magistrate?

MR. LEVANDER: Well, that would not be a pretrial motion --

QUESTION: No.

MR. LEVANDER: -- and the act speaks about pretrial motions, so therefore I don't think it would be statutory power to do that. I think that --

QUESTION: Do you think it would be constitutional?

MR. LEVANDER: Yes, although it would be a very unusual circumstance for a district judge to do that, because it would certainly delay the process and it would be hard for me to imagine a hypothetical where a district judge would really want to do that. Normally questions of admissability can be determined quite readily during the course of trial, and a district judge would have no reason to. But where he knows that he can set up his schedule and designate magistrates to conduct certain pretrial motions,

then he would be inclined to do so.

QUESTION: You are not suggesting that in a jury trial a judge could stop the trial and refer something to a magistrate after the trial has commenced?

MR. LEVANDER: No, under the statute he would have no power to do that.

QUESTION: The statute doesn't permit him to do it.

MR. LEVANDER: That's right. I think Mr. Justice Rehnquist was asking me whether hypothetically the statute provided that, would it be constitutional, and I didn't see any problem.

The respondent defends the --

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon, at 12:00 o'clock meridian, the Court was in recess, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION -- 1:00 O'CLOCK P.M.

MR. CHIEF JUSTICE BURGER: Mr. Levander, you may continue.

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

The Court of Appeals concluded and the respondent agrees that the due process clause requires either that the district judge defer to the magistrate's proposed findings of fact or to rehear the testimony, but this analysis doesn't make any sense in the facts of this case.

Here the District Court adopted the magistrate's findings. If the District Court had merely deferred to the magistrate's findings. If the District Court had merely deferred to the magistrate's findings, it would have again denied the motion. That it made a more thorough review and did not defer could not possibly have deprived the respondent of any kind of procedural protections. In fact, he received more protection because he got a more thorough review.

We also believe that the Court of Appeals analysis is flawed in failing to consider the three facts that this Court has set forth which should be considered in determining what process is due in a particular circumstance. That is the personal interest involved, the risk of erroneous deprivation of that interest, and the

government's administrative and financial interests in adhering to the procedure set forth.

QUESTION: Counsel, supposing the magistrate had decided the other way and on review, that is had held that the statement should be suppressed, and on review at the instance of the government, without taking any additional evidence, the court had overruled that determination, would you say it still would be just a -- there would be no purpose to having -- then would you say the standard didn't make any difference?

MR. LEVANDER: No, the standard would certainly be different because he would be able to review and overturn him, that is the District Court would be able to overturn the magistrate even though the findings of fact were not "clearly erroneous." He would be able to overturn --

QUESTION: He could do it without taking any additional evidence?

MR. LEVANDER: That's right. Now --

QUESTION: But you said the defendant really doesn't get hurt by the Court of Appeals position but he might be hurt if it had gone the other way for the magistrate, is what I am saying.

MR. LEVANDER: But I think in this criminal case the respondent can't raise the deprivation that might occur

to others. Here in this case, he had a full and fair hearing before the magistrate. The magistrate made proposed findings of fact against him. Those findings have ample support in the record and the District Court, upon making a thorough review of that record, the magistrate's report and the submissions of the parties concluded that the motion should be denied. The case would be a more difficult one perhaps where it was purely a swearing contest between a defendant and a --

QUESTION: But your view of the procedure -- now you are saying he doesn't have standing to make this argument, and I have to think that through -- but your view of the procedure is that even if it is a swearing contest between the officer and the defendant, the district judge may nevertheless in its so-called de novo review reverse the finding of the magistrate without hearing any additional evidence.

MR. LEVANDER: That is a much more difficult question. When it is purely a swearing contest -- and the evidence is equally balanced --

QUESTION: Well, as a matter of statutory construction, you say that that is what Congress intended.

MR. LEVANDER: That's right.

QUESTION: Haven't we hinted if we have not held that credibility findings are rarely if ever to be reviewed

on a cold record?

MR. LEVANDER: You have to --

QUESTION: Or to reverse them, on the hypothetical that Justice Stevens has just posed. Is it not one thing to affirm credibility findings on a cold record and quite another to reverse them on a cold record?

MR. LEVANDER: Yes, it is, Mr. Chief Justice, and that is why we say in our brief that the District Court could reverse the magistrate's proposed findings in a case like this one, for example, where there are objective factors in the record to support the magistrate, what the magistrate actually concluded. But let's assume that the magistrate concluded that he believed respondent, well, there are various objective factors in this record which make respondent's testimony fairly incredible at points, from which upon reading from the cold record you can tell that the respondent -- he admitted that he lied on November 19th, his August 8th -- he claims he made no statement on August 8th, yet that statement that is attributed to him by the Chicago police and appears in the arrest report is the same statement that he admits having made on January 12th. And it is just inherently incredible that the Chicago police made up a statement which respondent admits that he subsequently made in January following his arrest.

So in this kind of a case, where there are

objective factors aside from the just a pure swearing contest, the District Court in making its de novo determination could reverse the magistrate. Obviously, the District Court is on shaky ground in those circumstances where it is purely a swearing contest and he simply reverses the magistrate, and that is a much more --

QUESTION: He believes that the trier of facts disbelieve, is that the kind of a case you are posing?

MR. LEVANDER: Well, that would be difficult to do, but here we don't have that problem, of course, because he adopted the magistrate's findings.

QUESTION: Was it not difficult under the statute?

MR. LEVANDER: That's correct.

QUESTION: The statute makes no distinction.

MR. LEVANDER: That's correct, but due process may come into play at some point where it is purely a swearing contest and the District Court reverses the magistrate. Of course, as I said before, that did not happen here. The magistrate evaluated the respondent's testimony and he found it not to be credible and the District Court adopted those findings.

QUESTION: Let me test that out with this hypothetical. Suppose the magistrate made careful and detailed findings that he believed the defendant and disbelieved the officers and therefore recommended the suppression of

the testimony. Now, the District Judge reading the record and nothing more reverses the district judge on the credibility finding, do you mean that would give rise to due process questions?

MR. LEVANDER: Yes, although that would be similar to what happens in agency proceedings. The same kind of relationship that exists between the magistrate and the District Court exists in agency proceedings, in the British special master situation, in special masters in original cases in this Court, and normally the reviewing court or the court that has the power to enter the judgment does not simply toss aside the magistrate's findings, and it normally would give them credit for what they are worth based on his independent review of the record. And when the reviewing court reviews, let's say, the SEC's determination of something, it may be that the ALJ concluded adversely to the agency's findings of fact, and that is something again under Universal Camera Corp., this Court's decision in Universal Camera Corp., that the reviewing court can take into account as to whether there is substantial evidence in the record or whether the District Court's determination is erroneous.

QUESTION: But don't you take into account the difference between findings of fact generally and findings of fact based entirely on credibility of the speaker?

MR. LEVANDER: That is absolutely correct. And where, of course, the only issue is credibility, the District Court, if you wanted to reverse the magistrate and the only issue was credibility and the evidence was equipoised between the defendant and the police officer, then the District Court cannot simply ignore the magistrate's determination of credibility. If you wish to reverse the magistrate in that circumstance, he would probably have to rehear the testimony or recommit it back to the magistrate for further findings.

QUESTION: You say he would probably have to do that. What would require him to do it?

MR. LEVANDER: Due process.

QUESTION: Do you think the Constitution would require him to do that?

MR. LEVANDER: Because in the case in which there was solely credibility at issue --

QUESTION: Isn't that about what Judge Sprecher said this case was, that you have a credibility determination and therefore due process requires the judge hear the evidence himself?

MR. LEVANDER: Well --

QUESTION: It just that they are affirming instead of reversing.

MR. LEVANDER: But that is a big difference

because here an impartial neutral Article 3 adjunct has evaluated the credibility and made specific findings about that credibility and the District Court has credited those findings based on his independent review of the record, so therefore, just like an --

QUESTION: What if he says on the review, well, I really can't tell because you've got a swearing contest here, but even though the statute directs me to give a de novo hearing, there is really no way to do it but I will just assume they are probably right. Could he have done that?

MR. LEVANDER: Yes, and then he would be giving the magistrate's report that credibility which it is due. He would say I trust the magistrate, the magistrate has made a finding, having viewed credibility, the magistrate is equally competent as the district judge to evaluate a simple matter of credibility. Juries are entrusted in our system to evaluate credibility, and it doesn't take a --

QUESTION: What do the words de novo determination mean then?

MR. LEVANDER: A much more thorough review than a simple clearly erroneous standard.

QUESTION: Well, de novo doesn't -- doesn't de novo ordinarily mean you are privileged to submit additional evidence to the reviewer?

MR. LEVANDER: When it says de novo hearing or de novo review. This is a de novo determination of the magistrate's report. That is what the statute says, and the legislative history makes quite clear that Congress did not intend the District Courts to rehear testimony on contested issues. That statement appears over and over again in the legislative history.

QUESTION: Then why do they use the words de novo?

MR. LEVANDER: To contrast it to subsection (a) in which the magistrate hears and determines motions and the District Court must give deference on a clearly erroneous standard to the magistrate's findings.

The Court of Appeals in our view simply misevaluated the three factors underlying the due process analysis. In Lego v. Twomey, this Court made clear that a suppression hearing does not implicate the important issue of guilt or innocence, it is simply a matter of the conduct of the police that is in question and the question is whether or not evidence which is wholly probative and relevant shall be kept out because of the conduct of the police.

Second, the Court of Appeals viewed this to be a very -- have a high risk of erroneous deprivation, yet this same kind of proceeding has been used in England for many years, it is used in all of the administrative agencies, and it is used by this Court in its original jurisdiction

cases.

And finally, the Court of Appeals did not at all address the government's substantial interests in using magistrates. There is a terrible problem of congested litigation and magistrates in a recent article appearing in 16 Harvard Journal of Legislation, it has been shown that a study shows that the use of magistrates has increased by a third the ability of District Courts to dispose of cases. In 1979, over 3,000 evidentiary hearings were conducted by magistrates under section 636(b)(1)(B), a considerable saving of time. And these things were not addressed by the Court of Appeals at all.

I would like to reserve the rest of my time, if I might.

MR. CHIEF JUSTICE BURGER: Very well.

Ms. Gottschall.

ORAL ARGUMENT OF JOAN B. GOTTSCHALL, ESQ.,

ON BEHALF OF THE RESPONDENT

MS. GOTTSCHALL: Mr. Chief Justice, and may it please the Court:

As the government stated this morning, the Magistrates Act not only withholds from the magistrate decision-making power with respect to case dispositive motions, but it expressly provides that if any party objects to any finding or any recommendation of the magistrate "a

judge of the court shall make a de novo determination of those portions of the report or specified proposed findings to which objection is made."

QUESTION: Laying aside for a moment what differences if any there may be between de novo determination and a de novo hearing, would you -- do you think there is a difference between a district judge affirming a magistrate's finding on credibility and reversing a finding on credibility?

MS. GOTTSCHALL: I do not. I think that the question is whether the district judge is in a position to make an independent determination. If all the district judge does is looks at what the magistrate has done and says, well, this is a credibility finding, I obviously don't have the evidence before me to reevaluate that, I don't see how that can possibly be explained as any kind of a de novo determination of anything, and I think that is the difference between what the Court of Appeals felt and the position that the government is urging now.

QUESTION: What do you think is the difference between a de novo determination and a de novo hearing?

MS. GOTTSCHALL: I don't believe there is any difference, and I think that the prior decisions of this Court established that very clearly.

First of all, let me just point out that this act does not use the word hearing the way the government

suggests, that is an evidentiary hearing. This act speaks of hearing motions for summary judgment and motions to dismiss complaints and all kinds of things that are not evidentiary. And this Court, in the case of United States v. First City National Bank, had virtually an identical argument before it, where a party claimed that because a statute spoke of de novo review rather than trial de novo that there was to be more limited judicial review, and the Court rejected that. It said that the critical concept is de novo and what de novo means is that there has to be an independent determination of the issues. And I would just suggest that in many decisions of this Court, virtually all the decisions of this Court talk about de novo, all of these terms are used interchangeably. I think this is quite clearly a distinction without a difference.

QUESTION: Do you have to have a whole new hearing?

MS. GOTTSCHALL: I don't believe so, Mr. Justice Marshall. I think that what it appears that the act contemplated was that the district judge would be able to evaluate on what issues it would be necessary for him to rehear evidence in order to make a de novo determination. Now, the case is established that one of those issues is credibility.

QUESTION: Well, wouldn't it end up in a new

hearing?

MS. GOTTSCHALL: As to credibility questions, yes.

QUESTION: Well, what good is sending out the magistrate if he is going to have two hearings?

MS. GOTTSCHALL: Well, there are a lot of ways the statute --

QUESTION: Do you think Congress meant to establish another hearing, an extra hearing?

MS. GOTTSCHALL: What I believe the Congress was trying to do was to take some of these motions away from district judges to the extent possible, while preserving the district judge's ability to make a decision of those issues. And I think that the suggestion that the statute is rendered useless because in cases where credibility was critical or some other source of evidence that wasn't included in the record required rehearing, I don't think that is true. I would expect that there area great many matters where if there is an initial hearing before a judicial magistrate, there can be a stipulated record developed, a question of law can surface, and many different things can happen that will avoid the necessity of having to rehear the evidence.

I would suggest that a real swearing contest such as occurred in this case is really rather unusual. Perhaps not in confession cases -- the Court has noted the

confession cases typically involve this kind of thing, but in all the great variety of matters that are covered by section 636(b)(1)(B), I would expect that credibility would not be the critical issue in that many cases.

QUESTION: In suppression of tangible evidence cases, do you say it would not be?

MS. GOTTSCHALL: I don't think it would be uniformally.

QUESTION: Not uniformally but overwhelmingly.

MS. GOTTSCHALL: That would --

QUESTION: There are contests of credibility. I say that on the basis of having reviewed almost literally thousands of records in the courts of appeals, when the court of appeals had general jurisdiction over the District of Columbia.

MS. GOTTSCHALL: Well, I think it may be a different question --

QUESTION: I'm not sure it makes a difference, but I think your statement of the fact is not based on -- not consistent with my observations.

MS. GOTTSCHALL: There is a different kind of credibility question I would think in Fourth Amendment cases, in the generality of cases. In general, there would be one probably police officers testifying as to perhaps articulable facts that they observed that they contend amounted to

probable cause --

QUESTION: The evidence was in plain sight and the defendant says no, it was not in plain sight, it was in his back pocket, and that sort of thing. Isn't that typical of the type of evidence you have?

MS. GOTTSCHALL: Well, I don't know exactly how many or what percentage of Fourth Amendment suppression motions would raise this kind of credibility question. It may be that suppression motions do raise credibility questions in the majority of cases.

QUESTION: You might well argue that if in fact they are overwhelmingly credibility contests, that is the reason for an Article 3 judge to hear them.

MS. GOTTSCHALL: I would think that is right because in that situation the independence of a decision-maker is critically important. I would point out that I think the legislative history is very clear that credibility findings and findings of fact in which credibility figured were very clearly covered by the de novo review provision. There is really no question on the basis of this legislative history that Congress contemplated that credibility issues would be redetermined just like any other issues, that any finding of fact of the magistrate would be subject to this de novo review provision.

QUESTION: Well, I would have reached almost the

opposite conclusion from hearing the government's argument that the statutory language probably is in your favor, but that the legislative history is against you.

MS. GOTTSCHALL: I think there are two questions, Mr. Justice Rehnquist. The first question is the standard of review when a finding is objected to, and I don't believe that there is any conflict between the parties in this case that the judge is supposed to make an independent determination of the issue. The government states in its brief that the judge would be violating the statute if he deferred to the magistrate on fact-findings. So I think on that point there is agreement.

The problem arises on the question of what procedures the judge has to follow in evaluating the magistrate's recommendations. And what the legislative history says, it is true that the statement that the government has quoted consistently in its brief, the use of the words de novo determination is not intended to require the judge to actually conduct a new hearing on contested issues, that is true. But the government consistently omits the two explanatory sentences which follow, which state that normally the judge upon application would consider the record which has been developed before the magistrate and make his own determination on the basis of that record. But in some specific instances, however, it may be

necessary for the judge to modify or reject the findings of the magistrate, take additional evidence, to recall witnesses or to recommit the matter to the magistrate for further proceedings.

There is no question that Congress contemplated that rehearing would be necessary in some cases. And from the cases that Congress cited --

QUESTION: The government doesn't contend otherwise, does it?

MS. GOTTSCHALL: Well, the government seems to --

QUESTION: I asked specifically if that was one of the options that was open to the judge, and the government said yes, that occasionally he would have a hearing himself.

MS. GOTTSCHALL: The government suggests though a completely unreviewable standard of discretion, that whether the judge decides to hear evidence or decides not to hear evidence is completely unreviewable. It depends on how the judge feels that particular day. That can't possibly be the law.

QUESTION: He also conceded that if a judge, a district judge reversed a credibility finding, it might -- I don't think he conceded it would, but it might well give rise to serious due process questions.

MS. GOTTSCHALL: I think the question is whether

the judge has to put himself in a position where he can fulfill the statutory requirement that he make a de novo determination. The government's argument is basically saying that all the process that an objecting party is entitled to is to have the magistrate affirm. If you objected to the magistrate's findings and if the judge affirmed the magistrate, there would be no problem. But if you objected to the magistrate's findings and the district judge reversed the magistrate, well then there would be due process constraints on that.

QUESTION: What is your position with respect to say the magistrate granting a motion for summary judgment? You don't have those in criminal cases, but suppose in a civil case, and it comes before the District Court, do you say that the judge -- there are affidavits on both sides so you call it a swearing contest, do you say the district judge must as a matter of law under this act hear the witnesses or at least read the affidavits himself?

MS. GOTTSCHALL: Absolutely not. I think that that case is covered by this Court's decision in Matthews v. Weber, where the parties can focus the judge's attention on the problems that they have with the magistrate's recommendation and the judge can go to the record and he has the evidence before him, it was before the magistrate, and with the guidance of the parties he can make an independent

determination of whether or not the magistrate was correct. I don't think there is any problem.

QUESTION: Suppose the District Court has denied a motion for summary judgment, saying there is a credibility issue here, I can't tell which of the parties is telling the truth, do you think the District Court could reverse that and say I have determined that one of the parties is telling the truth and the other isn't?

MS. GOTTSCHALL: On a motion for summary judgment?

QUESTION: Yes.

MS. GOTTSCHALL: On affidavits?

QUESTION: Yes.

MS. GOTTSCHALL: No, I don't think the law would permit that at all, I think that --

QUESTION: That isn't permitted the magistrate or anybody.

MS. GOTTSCHALL: That's correct. No, that is contrary to the whole notion of motions for summary judgment which our response is to the same concerns that the Court of Appeals was worried about here, making credibility determinations on the basis of cold records.

QUESTION: Well, the government doesn't argue that whatever judgment the district judge makes of the magistrate's findings isn't subject to review, does it?

MS. GOTTSCHALL: The government seems -- it appears

to me that what the government is suggesting is something like a substantial evidence standard, which this Court has always said is equivalent to record review. If regardless of the nature of the issues, all the judge does is look at the record, and really what the judge is doing is simply making sure that there is evidence in the record to support the magistrate's conclusion.

QUESTION: Well, what if the judge says I've read the record, I've read the written record, the record of the evidence, and I make my own determination as follows, and it just so happens that every determination agrees with the magistrate. That wouldn't satisfy you.

MS. GOTTSCHALL: It would depend on whether the district judge --

QUESTION: I know, but let's assume there that there are square conflicts in the evidence or in the testimony before the master.

MS. GOTTSCHALL: Yes.

QUESTION: That process wouldn't satisfy you.

MS. GOTTSCHALL: That's right.

QUESTION: You would think that the judge must call witnesses.

MS. GOTTSCHALL: If there is a testimonial conflict and credibility is -- if there were some --

QUESTION: Well, I thought the government was

saying that -- the government doesn't urge that the court is free not to make its own determination, does it?

MS. GOTTSCHALL: The government's position seems to be that the court has to make its own determination, although --

QUESTION: Yes, it reads the record and makes its determinations and if there is a conflict it resolves them itself, and if it disagrees with the magistrate it disagrees, and if it agrees it agrees with the magistrate. And if it wanted to it could have a hearing.

MS. GOTTSCHALL: I think that whether what the judge does, whether it is permissible under established principles of due process and fair procedure depends on whether the judge has an adequate basis beforehand for making that decision, and that depends on the importance of issues such as credibility and basically on the state of the record and what kinds of issues it i that he is evaluating.

QUESTION: Then he can send it to a magistrate.

MS. GOTTSCHALL: If the judge believes that it will assist him in the disposition of the cases, can send anything under section 636 to a magistrate.

QUESTION: But if there is any conflict he has to try it all over again?

MS. GOTTSCHALL: With respect to any findings to which objections are made and to the extent credibility or

some issue --

QUESTION: So the only thing to prevent a defendant from getting two hearings is not to object?

MS. GOTTSCHALL: On a matter of credibility, I would agree with that, but I would point out that --

QUESTION: Do you have many hearings that credibility isn't involved?

MS. GOTTSCHALL: I frankly don't know how this comes out in the generality of cases.

QUESTION: I think it would help you if you don't need a hearing. If there is not going to be disagreement, you don't need a hearing.

MS. GOTTSCHALL: Mr. Justice Marshall, I don't think that is correct, for this reason: In a criminal case, largely because of the discovery rules and a lot of other factors, the fact is that the parties do not know what the testimony is going to be at the suppression hearing before they hear it. And in many suppression hearings that I have been involved in --

QUESTION: Well, you did object.

MS. GOTTSCHALL: Yes.

QUESTION: Why did you object? You didn't know but you objected? You must hae known something because you objected.

MS. GOTTSCHALL: To the admission of the evidence.

QUESTION: No, you objected to it being referred to the magistrate.

MS. GOTTSCHALL: Well, I expected that credibility would be an issue in this case and I told that to the district judge.

QUESTION: Then you knew about credibility, so why wouldn't ie be better to just have the magistrate?

MS. GOTTSCHALL: In this case I think it clearly would have been better.

QUESTION: So that is really what you are against, the magistrates, aren't you?

MS. GOTTSCHALL: Well --

QUESTION: But Congress has overruled you, isn't that correct?

MS. GOTTSCHALL: I don't think that is right. I think that Congress has made a policy decision in the area of case dispositive motions that --

QUESTION: Well, who else can make that decision other than Congress? Who else can make the decision as to the judicial process in this country other than Congress?

MS. GOTTSCHALL: Well, I think the Constitution may put some restraints on that. When you are talking about case dispositive motions and an Article 3 court and an issue arising directly under the Fifth Amendment of the Constitution, I don't think the issue has to be reached

in this case because of the de novo determination requirement, but the fact of the matter is that there may be constraints on the poiwer of Congress.

QUESTION: If Congress had expressly said that magistrates will make findings of fact and resolve issues turning on credibility and that the district judge shall accept them if they are supported by substantial evidence, would you say that there is a constitutional issue?

MS. GOTTSCHALL: I would.

QUESTION: I guess you would.

QUESTION: But nobody is being sent to jail as a result of the magistrate's denial of the suppression here, this suppression motion. It required the stipulation of the parties to forego a trial in order to have the magistrate's hearing become what was in effect the trial record, did it not? Had you been dissatisfied with the magistrate's ruling on the suppression motion and the District Court's affirmance of it, you could have gone ahead and had a full-scale trial.

MS. GOTTSCHALL: I'm not entirely certain that the issues, all of the issues in this case at the suppression motion could have been tried before the jury, and certainly the decision of the jury would not be the decision that the law on the Firth Amendment itself in fact requires the judge to make in this case. It would have been a

different decision with different factors being important.

QUESTION: Well, what would have happened if you had not stipulated and the time came during the trial that the confession is offered in evidence? You certainly would have objected, would you not?

MS. GOTTSCHALL: Well, under the rules my understanding is that once the pretrial motion has been decided adversely, there is no need to make an objection and that is the end of it, it is the law of the case.

QUESTION: You can't object --

MS. GOTTSCHALL: One might be able to. You might be permitted to do it, but you certainly don't have to do it. And if you were permitted to do it, you would be doing something somewhat different from what you are doing in a pretrial hearing.

QUESTION: But the issue of -- was it a voluntariness question, is that it?

MS. GOTTSCHALL: Yes, it was, Your Honor.

QUESTION: Well, you certainly are entitled to have that submitted to the jury.

MS. GOTTSCHALL: On the issue of reliability.

QUESTION: Well, how about voluntariness?

MS. GOTTSCHALL: I've seen cases going both ways on that question in terms of the legal standard.

QUESTION: Have you seen one where it is denied

if you ask or request to put on evidence about the voluntariness issue before the jury and have the judge instruct on it in the federal system?

MS. GOTTSCHALL: I'm not sure, I can't really think of any case. It wasn't my understanding that I would be allowed to relitigate the constitutional question apart from questions of reliability, the precise issue that the law required me to make as a pretrial again.

QUESTION: What authority do you have on that?

MS. GOTTSCHALL: I may not be correct on that. That has been my understanding.

QUESTION: I thought Jackson v. Denno said the judge had to make an initial determination and that many jurisdictions, including the federal, permitted the question of voluntariness to be submitted to the jury also.

MS. GOTTSCHALL: Well, as I say, I'm not sure what the law is. At least in some form I suspect I could have submitted that question to the jury, but that certainly would not serve the interests of the government that it is putting forth in its case. If in order to have an Article 3 judge hear the evidence relevant to the Fifth Amendment issue I have to take a jury trial, it seems to me that that is probably as counter-productive of --

QUESTION: Well, that isn't congressional, that is Jackson v. Denno.

QUESTION: At any rate, it may not serve the interests of the government, it would uphold the constitutionality of the statute.

MS. GOTTSCHALL: I don't think that submitting the issue of voluntariness to the trial jury would be a satisfactory determination of the question of voluntariness under this Court's decisions.

QUESTION: Jackson v. Denno says maybe you have to submit it to the trial judge, too.

MS. GOTTSCHALL: My understanding of Jackson v. Denno is that it entitles the defendant to a hearing outside the presence of the trial jury on the issue of voluntariness, so I don't think that submitting that issue to the trial jury would be of consequence in terms of whether this is an adequate determination of the voluntariness question itself.

QUESTION: The judge may then submit it, allow it to go to the jury if he makes the appropriate findings under Jackson v. Denno, may he not?

MS. GOTTSCHALL: Yes, Your Honor, he may. Once he has decided that it is admissible, then he is permitted to let it go to the jury.

QUESTION: In some jurisdictions, and I think the federal, if the defendant wants he can have the issue of voluntariness resubmitted to the jury.

MS. GOTTSCHALL: Yes, I believe that is right. I am still not entirely convinced that all of the evidence that might be relevant to the voluntariness employed on the pretrial hearing would be properly submitted to the jury, but certainly in some jurisdictions I understand that to be true.

QUESTION: Counsel, you have been asked questions about civil cases, and it is not clear to me whether you draw a distinction at all between civil and criminal cases.

MS. GOTTSCHALL: I think that whether there is a distinction between civil and motions related to criminal cases, like suppression motions, would depend on whether one were to analyze this problem as a matter of a construction of the statute and the de novo determinations problem.

QUESTION: Let's think in terms of due process.

MS. GOTTSCHALL: Perhaps not under the Seventh Circuit's opinion --

QUESTION: Right.

MS. GOTTSCHALL: -- but it seems to me that the importance of demeanor evidence in making credibility determinations is so much a part of all judicial process, whether it be criminal or civil, that while the interests at stake might not be as critical in say the preliminary injunction context, that that principle about demeanor evidence would probably make this holding in the extent of

that context. It would be a slightly different analysis.

QUESTION: You rely on Chief Justice Hugh's language in the first Oregon case which of course wasn't a simple case.

MS. GOTTSCHALL: I'm not entirely sure. I don't remember, it must have been but I --

QUESTION: Well, don't count on me for being infallible.

QUESTION: Counsel, is your submission as to criminal cases limited to situations where there is what we have been calling a swearing contest?

MS. GOTTSCHALL: I think that that is the clearest case.

QUESTION: Yes.

MS. GOTTSCHALL: I think that in, for instance, the Fourth Amendment context which Mr. Chief Justice Burger mentioned, the analysis might be different. For instance, in the summary judgment context, in considering for instance summary judgment in a case that was going to be tried to the bench rather than to a jury, so they weren't jury trial issues, the judge would have somewhat more latitude in resolving factual questions on the basis of affidavits than he would in some other context.

So whether, for instance, if at the hearing before the magistrate there was no conflicting testimony

but there was a question of credibility, perhaps then a determination of which party had the burden might be relevant. I think that that gets into a much more complicated situation. But certainly where there is a swearing contest, the trial judge had no reasonable basis for making a de novo decision of the factual matters, and that was the basis for the Seventh Circuit's opinion. The Seventh Circuit read the record and their conclusion was that it was simply impossible to determine the truth from that written record. The evidence was simply too conflicting and too inconsistent.

QUESTION: How are magistrates appointed? What is their tenure and how long is their term?

MS. GOTTSCHALL: Mr. Justice Stewart, they are appointed by the judges of the District Court, by a majority of the judges of the District Court. The offices I believe are established by the Judicial Conference and their terms are eight-year terms.

QUESTION: Are they removable at will during the eight years?

MS. GOTTSCHALL: They are removable for a range of reasons, including incompetence, neglect of duty --

QUESTION: For cause.

MS. GOTTSCHALL: Yes, that's right.

QUESTION: Not at will.

MS. GOTTSCHALL: That's correct, there has to be some kind of a hearing I think before they are removed.

QUESTION: Eight-year terms?

MS. GOTTSCHALL: Yes.

QUESTION: What would you say to a state proceeding which originally went before a JP, tried by him and the state statute provided for a de novo review by the superior court of the circuit or whatever the court of general jurisdiction was?

MS. GOTTSCHALL: My understanding of those statutes is that the defendant is entitled to have the trial again in the higher level court, that it isn't a record review but it is a relitigation of the issues.

QUESTION: You say here you feel that you are not entitled to have the trial --

MS. GOTTSCHALL: There is de novo language in old statutes and old cases that indicate that what de novo means is to begin from scratch and do it all again, as if nothing had ever happened. The more recent federal authorities seem to be working on some standard for de novo which give more play to the possibility of eliminating some issues than those old cases did. We could have argued that the judge was required to redo it. It seemed that in view of the purposes of the legislation and the statements in the congressional history that the proper approach was

the approach taken by some of these recent federal decisions which indicate that de novo requires reconsideration of live evidence only to the extent that issues like credibility, motivation, veracity and those kinds of issues were present. Apart from that, the district judge has a great deal of discretion to try to work out stipulations, to admit the prior record, and engage in a number of duplication-saving devices as long as he puts himself in a position to make a truly independent decision on the credibility questions.

I would like to speak for a minute, because I think that the government's position comes down largely to the question of the costs of rehearing and the costs in terms of economic and administrative considerations of, number one, not sending the motions to suppress to magistrates and, number two, requiring the judge to hear selected evidence rather than reading the transcript.

We have included in our brief some recent statistics that indicate that the whole issue of suppression motions, the hearing of suppression motions are not in any event a very substantial part of the workload of district judges or magistrates. But beyond that, it seems to me that the best answer to that argument is the docket sheet in this case.

The government says that the interests of judicial efficiency has been saved by this procedure. Well,

all there was was a reading of the record. But I would like to suggest that this motion to suppress would in all likelihood have been heard by a district judge in a day and ruled on from the bench. What in fact happened was that it took five months, and the reason it took five months was because first the magistrate had to hold a hearing and then a transcript had to be prepared, which is not that common in most motions to suppress that I have been involved in if there is not going to be an appeal. The parties, the lawyers, both of whom were government lawyers, had to prepare proposed factfindings and recommendations, the magistrate had to review all of this material and write a report to the district judge with proposed fact-findings, the parties had to file objections to the magistrate's report, the district judge had to read all of this record which by this time included a voluminous transcript, presumably in many cases he would hear oral argument and then he had to go about the process of trying to decide from the transcript with all this conflicting testimony what in fact happened.

Now, if any time were to be saved by having the district judge rehear selected testimony rather than reading this transcript, I would submit that it would be a very minimal savings at best. And we have included in our brief some references to some recent congressional

hearings in which district judges have begged Congress not to give them appellate-type duties with respect to magistrate civil trial jurisdiction because they find that it is quicker for them to hear the issues again rather than reading through a transcript.

QUESTION: But the judge didn't have to send this to a magistrate. If he wanted to save time, he could have tried it, couldn't he?

MS. GOTTSCHALL: Well --

QUESTION: Couldn't he?

MS. GOTTSCHALL: -- if he thought it would save time, he could have, yes.

QUESTION: Well, couldn't he?

MS. GOTTSCHALL: Yes.

QUESTION: Well, what is your argument?

MS. GOTTSCHALL: As to why he sent it to the magistrate?

QUESTION: I mean he could have taken it himself and saved, what, five months?

MS. GOTTSCHALL: I don't know.

QUESTION: Well, you said this case -- in this case, if the judge had tried the motion to suppress without the magistrate, he would have saved a whole lot of time, you say.

MS. GOTTSCHALL: I think in reality that is true.

QUESTION: So what? He didn't, and it was up to him.

MS. GOTTSCHALL: That's right, but I think that the government --

QUESTION: That wasn't an error, was it, to send it to the magistrate?

MS. GOTTSCHALL: No, he had the power to send it to the magistrate, there is no question about it.

QUESTION: And he could have decided not to send it.

MS. GOTTSCHALL: I think when it comes down to the question of whether rehearing selected testimony is going to frustrate the purposes of this legislation, it has got to be considered in reference to the alternative and what the alternative is, the government's position is that the alternative is reading a transcript. The Ninth Circuit's alternative is that a tape recording has to be prepared. As I understand it, the Sixth Circuit still holds to its old Wedding v. Wingo rules which still represent the condition they were in at the time of Wingo v. Wedding, that a tape recording has to be prepared.

QUESTION: Do you mean the Ninth Circuit requires the district judge to listen to the tape record or that one be prepared?

MS. GOTTSCHALL: The most recent discussion of

that was in the Orand case which the government has cited in its brief, and the -- I think it was a habeas corpus situation, and the Ninth Circuit reversed the District Court stating that in that case he hadn't even had a transcript. The Ninth Circuit noted that he also hadn't had a tape recording which was still the prevailing law of the circuit, and that it was remanded for him to reconsider whether he ought to have a tape recording. They cited Campbell, they cited this case, so I don't think the requirements are really fixed yet.

But it is obvious under the statute that something has to be written in so that the judge has some basis for making his decision.

QUESTION: Ms. Gottschall, I might add that after looking at the cases I am just not sure what the rule is in the Seventh Circuit on resubmission of voluntariness to the jury, so I may have over-spoken.

MS. GOTTSCHALL: Thank you.

MR. CHIEF JUSTICE BURGER: Do you have something further, Mr. Levander?

ORAL ARGUMENT OF ANDREW J. LEVANDER, ESQ.,
ON BEHALF OF THE PETITIONER--REBUTTAL

MR. LEVANDER: Thank you, Mr. Chief Justice.

First, 18 U.S.C. 3501 requires in a federal case if the defendant wants it that the jury consider voluntariness

separate and apart from the pretrial submission.

QUESTION: Even after the judge --

MR. LEVANDER: That is absolutely correct, Mr. Justice White.

QUESTION: When was that statute passed?

MR. LEVANDER: That was passed in 1968 as part of the Omnibus Crime Control Act.

QUESTION: After Jackson v. Denno?

MR. LEVANDER: Yes.

QUESTION: So it codified the Massachusetts procedure in --

MR. LEVANDER: That's correct.

QUESTION: So I didn't over-speak myself.

MR. LEVANDER: The de novo language in this case, in this statute is much different than the de novo language that Mr. Justice Rehnquist was thinking about and which -- and the cases the respondent relies on. This is not a de novo hearing, it is a de novo determination, and in the act itself Congress uses the words "hear" and "determine" and when it wants the District Court to do, and it enabled the magistrate to do so. So therefore in contrasting that language, it seems quite clear that even in the language of the act, much less the legislative history, does support the government's position.

Second, respondent's position as to the due

process point would render suspect numerous kinds of proceedings in which the original initial trier of fact, the person who evaluates credibility is not the person who makes a determination of fact. That is, in agency proceedings --

QUESTION: Mr. Levander, none of those cases are cases in which the court is directed to make a de novo determination.

MR. LEVANDER: Well, in --

QUESTION: I understand Judge Sprecher's argument to be that when a de novo determination must be made and credibility is an issue, that then due process requires that the witnesses be heard.

MR. LEVANDER: Well, in Mildner v. Gulotta, the case involved bar proceeding, disbarment proceedings in the State of New York, precisely like the sort of situation. It was a referee who conducted the official kind of proceeding, evaluated the witness's credibility, the lawyer's testimony against complaining witnesses, and his decision was not determinative. He had no power to determine. Thereafter the appellate division court in reviewing the record made the de novo determination, and the language is in the case. The three-judge court upheld that statute, this Court summarily affirmed, and it seems to me that case is fairly dispositive of the due process

point that is argued here by respondent. And in that case there was some suggestion that the appellate courts were reversing the referee's findings. Here, of course, the District Court has affirmed and adopted the magistrate's finding, the person who has evaluated the credibility.

QUESTION: Well, on that point of affirming versus reversing, do I correclty understand you to suggest that in making the de novo determination the judge may give some deference to the views of the magistrate?

MR. LEVANDER: He is to credit it for what it is worth.

QUESTION: Well, that means he may give some deference to it, so it is not really a hundred percent de novo, it is like 99.5 percent.

MR. LEVANDER: No, he first makes a de novo determination, a thorough review and he has to make the thorough review --

QUESTION: Well, his thorough review is that the evidence is in conflict, it depends on whether I believe (a) or (b), I really don't know without seeing them, so the only thing I can go on is that the magistrate believed (a). Can he affirm on that basis?

MR. LEVANDER: He can.

QUESTION: So he can give some deference to the determination?

MR. LEVANDER: Correct.

QUESTION: So it is not a hundred percent de novo.

MR. LEVANDER: But preceding his determination to credit the magistrate --

QUESTION: He could be 50-50.

MR. LEVANDER: -- there must be a de novo determination and the -- I see my time is up, but if I could just finish this one answer.

QUESTION: I would like you to.

MR. LEVANDER: Where he is reversing, where there is a pure swearing contest and he is reversing, it may be an abuse of discretion under the statute for him to simply ignore the credibility findings of the magistrate. Again, he gives it some value. He must give it some value, and if it is purely a swearing contest, he has abused his discretion in either not affirming the magistrate's evaluation or in rehearing the testimony.

QUESTION: In either event, the words de novo mean he must give some deference to the magistrate under your view, if I understand you.

MR. LEVANDER: Only he gives it whatever it is worth, and he need not give it any deference, but he can. He can always choose to rehear the --

QUESTION: Well, if he can, the language of the statute is mandatory -- it says he shall make a de novo

determination.

MR. LEVANDER: That's right.

QUESTION: Which would mean to me that he has to do it. And if you are saying that he may give deference to the magistrate, it is not a 100 percent de novo determination.

MR. LEVANDER: He doesn't give deference to the magistrate insofar --

QUESTION: Well, he can affirm but he can't reverse, if the evidence is evenly balanced. That is what you told me.

MR. LEVANDER: That's right, but then he --

QUESTION: Then the only difference between the cases of affirming and reversing is that in one case he gives deference to the magistrate and in the other he doesn't.

MR. LEVANDER: He gives it for what it is worth.

QUESTION: It is worth something, that is what it is worth. But your position is that it is worth something.

MR. LEVANDER: If he wishes to make it so, otherwise he would rehear the testimony if he doesn't think that the magistrate's determination, he doesn't trust it, he thinks the evidence is truly equipoise. That is not the case in this case and again the District Court affirmed the magistrate's findings.

QUESTION: Isn't your position at odds with the dictionary meaning of de novo?

MR. LEVANDER: Well, whatever the dictionary meaning is, it is quite clear here what Congress had in mind, that --

QUESTION: The common understanding of what that phrase means, I don't know what the dictionary says either.

MR. LEVANDER: Well, anew I think it means and --

QUESTION: Anew.

MR. LEVANDER: Well, he gives it a fresh look, and that is what Congress had in mind.

QUESTION: A clean slate.

MR. LEVANDER: He starts by reviewing everything and then he can give credit to what he thinks deserves credit, and the legislative history and the decision in Campbell on which de novo is taken from show quite clearly what Congress had in mind, and it is a thorough review which he doesn't have to give deference as compared to subsection (a) where he has to give clearly erroneous deference to the magistrate's findings.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 1:49 o'clock p.m., the case in the above-entitled matter was submitted.)

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