Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

Docket No. 758

THE UNITED STATES OF AMERICA,

Petitioner

vs

RAYMOND J. RYAN

Respendent

Place Washington D.C.

Date April 26, 1971

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

THE UNITED STATES OF AMERICA, Petitioner	)	
vs	)	No. 758
RAYMOND J. RYAN, Respondent	)	

The above-entitled matter came on for argument at 10:20 o'clock a.m. on Monday, April 26, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

JEROME FEIT, ESQ.
Office of the Solicitor General
Department of Justice
Washington, D. C. 20530
On behalf of Petitioner

HERBERT J. MILLER, JR., ESQ.
Miller, Cassidy, Larroca & Lewin
1320 19th Street, N.W.
Washington, D. C. 20036
On behalf of Respondent

TABLE OF CONTENTS

ORAL ARGUMENT OF	PAGE
JEROME FEIT, ESQ On Behalf of Petitioner	2
HERBER J. MILLER, JR. ESQ, On Behalf of Respondent	

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments now in Number 758: United States against Raymond J. Ryan.

Mr. Feit, you may proceed.

ORAL ARGUMENT BY JEROME FEIT, ESQ.

ON BEHALF OF PETITIONER

MR. FEIT: Mr. Chief Justice and may it please the Court:

This case is here on certiori to the Court of Appeals for the Ninth Circuit and raises as its basic issue the applicability of the finality rule of Cobbledick against the United States to an order of the District Court which denied a motion to quash a grand jury subpoena duces tecum and at the same time modified the terms of the subpoena.

It is our submission that the Court below, in holding the order appealable prior to any contempt conviction, disregarded the central considerations of finality upon which Cobbledick rests.

The relevant facts are these: on March 5, 1968 Respondent was served with a grand jury subpoena directing that he produce before a grand jury sitting in the Central District of California, those records in his possession, control or custody, either personally or as a corporate director of five enumerated Kenya corporations.

These were the Ryan Investments, Limited, the

Mawingo, Ltd, the Mount Kenya Safari Club, Ltd, Zimmerman, Ltd, and Seven-Up Bottling Company. Later that month Respondent moved to quash the subpoena, asserting among other things that its terms were overly broad, that he did not have control or possession of the records and that removal from Kenya as to certain of the records, would violate Kenya law.

On five dates thereafter, the first on April 9, 1968 and the last July 25, 1968, proceedings were held before the District Court concerning this motion to quash. Arguments of counsel during these proceedings centeredprimarily on the issue of control, the relationship between Internal Revenue summonses and the grand jury's investigation and the restrictions of Kenya law regarding the removability from Kenya certain of the records without the authorization of Kenya authorities.

In dealing with this latter restriction, the latter consideration, namely the limitations of Kenya law as to certain of the records, the Court, at July 12, the July 12 '68 hearing indicated that it was making a finding of control and suggested that the parties enter a stipulation under which none of the records would have to be removed from Kenya, but that instead, agents of the Government representing the grand jury would be permitted to inspect and copy all the sought-after records in Kenya.

The Court made clear that if defense counsel agreed

to the

/arrangement he would be waiving only the authenticity of the records and all other objections would be preserved. The Government agreed to this procedure and elected that the parties try to work out some arrangements which were satisfactory ones.

The Court further pointed out at this hearing that if an agreement could be worked out presumably Mr. Ryan would not have to appear before the grand jury at all in connection with these documents.

Q Were these domestic corporations or --

A These were Kenya corporations.

Q And what was Mr. Ryan's connection with them?

A The Government's position was that Mr. Ryan was a director who owned 80 percent of the Mawingo, which was doing business as Mount Kenya Safari Club, that he owned 98 percent of Ryan Investments, and that in fact, he was in control generally of all these corporations.

Q One of them was the Pepsi-Cola Company?

A Well, that was in the original subpoena, but the Court's order which modified the subpoena, excluded the Pepsi-Cola and one of the other companies, the Zimmerman Company, from the reach of the subpoena on the grounds that the Pepsi-Cola Company apparently had gone out of business several years before.

Q That is the Pepsi-Cola Company of --

A Of Kenya, not the Pepsi-Cola Company in general.

On July 25 counsel reappeared before the Court and respondent's attorney said he could not agree to the proposed stipulations since he did not believe his clients could authenticate the records sought. The Court thereupon entered the order which is here at issue and it's set forth, for the Court's convenience, at 63 and 64 of the Appendix.

In this order the Court first made clear that it found that respondent had control of the records of two or perhaps three, as to the way one reads it, of the five companies originally specified in the subpoena. There is Ryan Investments, Limited and Mawingo, Ltd, doing business as the Mount Keny Safari Club.

The order then contained three operative parts: Paragraph I denied the motion to quash the subpoena; Paragraph II required production before the grand jury of all the sought after records of the two companies excepting the part restricted by Kenya law, which were: books of accounts, minutes of meetings, and lists of members.

And Paragraph III dealt with these restricted records in the following way, and this is at page 64 of ethe record: it directed that Respondent forthwith make application to the Registrar of Companies in Kenya to release restricted

records and provided for that if he were unable to secure official consent for their release he would be required and was required to make these records available to government agents for copying in Kenya.

Before his September 11 return date Respondent filed a notice of appeal --

Q Well, isn't there anything in Kenya law that would prevent them from copying them?

A There is nothing in Kenya law -- pages 38 and 39 of the record -- Kenya law provides that the records of corporations be open to all directors and there is nothing in Kenya law as far as we were able to ascertain, nor do I think Respondent contended the contrary, which prohibits such copying.

Q Well, is there anything that prohibits him from taking them out of the country?

A Yes. The -- without the consent of the Registrar of Companies, and this is set forth in the affidavit of Mr. William Shirley Devereaux, who was Respondent's attorney in Kenya, and the appropriate applicable Kenya provisions provide that the books of account may not be removed from Kenya without consent of the Registrar of Company's consent.

However, as I say, the directors, as the law specifically provides has free access to these records, and

they must have free access to these records under Kenya law.

Q Why?

A Well, because the law so provides.

Q And what authority do we have over the Kenya officials?

A We have no authority over Kenya officials.

Q I know.

A Our authority is over Mr. Ryan against whom the subpoena was issued and upon whom the subpoena was served.

Q The most you can do is try to get them and if Kenya says no, that's it.

A If Kenya said no -- well, as I say, the order had two provisions: one that he should make an application to Kenya authorities. If Kenya said "no," we will not permit you to remove the records," that's it. We cannot certainly, as we point out in our brief, and it's perfectly settled, we have no authority to direct Kenya to do anything. And this is certainly not the purport of the order. The order is directed at Respondent.

Q Is there anything that could interfere with Ryan's rights to get these copies any time you would want them?

A As far as our position is, no; there is no limitation upon Mr. Ryan's rights to provide copies of these

records which are restricted.

Now, I must add, not all the records which we sought and which are covered by the order were restricted by Kenya law. For example: correspondence is also sought as to the Mawingo Company doing business as Mount Kenya Safari Club. There are no restrictions under Kenya law for the removal of those records.

The specific answer to your question, Mr. Chief Justice, again, there is no limitation upon copying of the records which were restricted by Kenya law.

Q Then the process involved here is directed only at Mr. Ryan --

A Only at Mr. Ryan. There is no question --

Q To tell him give us what he could get any day in the week for himself.

A Precisely.

Q Where is he now, Mr. Feit?

A In Evansville, Indiana, as far as in this country, as far as we know. He maintains an office and a residence, I also believe, in California. And in addition is a world traveler.

Our position is that -- well, let me just continue -- that's precisely what the order provided in Part III of these two alternatives. One, to seek permission if not authorized then to permit copying.

Before the September 11 return date Respondent filed a notice of appeal and also sought extraordinary relief in the Court of Appeals to restrain the District Court from enforcing this July 25 order. After oral argument the Court of Appeals denied the application for extraordinary relief and extended the return date two weeks, until September 23.

Respondent then applied to the Circuit Justice for a stay and that was denied. On the September 23rd return date he did not produce any records as the Court had directed, nor had he permitted any copying in Kenya. And there was some suggestion at the September 23rd hearing that he had made an application to Kenya authorities for removal of certain of the restricted records and that had been denied. However, he had not made the records available for copying, nor had he produced the correspondence essentially, which is not governed by restrictions of Kenya law.

As I say, he appeared before a grand jury and claimed privilege. Thereafter civil contempt proceedings were instituted by an order to show cause and hearings were held on several occasions in the fall of '68.

On December 10, 1968 on the Government's motion, the order to show cause was transformed into an order to show cause why Respondent should not be held in criminal contempt. This transformation occurred because the Grand Jury Selection Act of 1968 was to go into effect on the 21st of December and

this grand jury was to expire on that date.

Also on December 10, 1968 an indictment was returned by this grand jury charging that Respondent had falsified records which he had been ordered to produce before a 1967 grand jury in the summer of 1967. That case was ultimately tried this past summer; Respondent was convicted and sentenced to three years in jail.

Q On what charge?

A On the charge that in a 1967 grand jury subpoena which required production of Mount Kenya correspondence within this country that he had produced or falsified the documents. He was convicted, as Isay, in the summer and is presently pending on appeal.

Q For filing a false statement under --

A Obstruction of justice.

Q Is there any indication of the underlying subject of what the grand jury's investigation was in this case?

A Well, the authorization dealt primarily -- well, primarily interstate operations, transformation of gambling information, income tax violations, perhaps. Beyond that, primarily, I think counsel so stated to the Court, primarily the interstate transportation and gambling information under 1952, which was basically the nature of the grand jury's investigation, as I understand it. Of course the grand

jury's investigation may well uncover matters not specifically gone after.

Q Was he convicted of criminal contempt?

A He has not been convicted -- that's precisely why we're here. He was not convicted of anything; as a matter of fact, what happened was: when the grand jury, just before the grand jury expired, as I said, on December 10th, the proceeding was transformed into a criminal contempt proceeding and it dragged on with an interrogatory being sought by Respondent, cross-interrogatories being sought by Government counsel until finally in October of '69 trial had been set for December of '69 on the contempt, the criminal contempt charge now that the grand jury was expired. The Court of Appeals stayed that proceeding and a year later, more than a year later, in May of 1970 it issued the opinion and order which is presently before the Court, finding that the order was subpoenable despite the fact that there had been no contempt conviction and broad and vague on the merits. And it is that question which is here before the Court. Namely: the interlocutory appeal problem before there has been any contempt conviction, whichleads me precisely into my basic argument.

I think there is no dispute that the July 25, 1968 order was fully appealable if andwhen Respondent was held in contempt. The sole dispute is whether it's now appealable, and it's common ground that that depends upon the application

of the Cobbledick case, which this Court decided three years ago unanimously.

Q The District Court here made findings that this man had control of the records?

A That's right.

Q But if you prevail in this case would those findings be open to review on appeal --

A Yes, on appeal -- after a contempt conviction, yes. Our position would be that those findings are clearly not foreclosed, that they are clearly open to review on appeal from a contempt conviction and this is precisely one of the reasons why we say Cobbledick controls, because one of the exceptions -- the law recognizes traditional exceptions to Cobbledick, is the case where, unless you permit an immediate appeal Stack versus Ball(?) comes immediately to mind, where the bail was set pending trial. Unless you get the appeal that issue is ruled out. There is nothing to decide.

Our position is quite plain that the July 25 order is fully reviewable on appeal should Respondent be held incontempt.

As the Court will recall, Cobbledick involves a question of a District Court order denying a motion to quash grand jury subpoenas duces tecum. The Ninth Circuit in that case -- that case was also a Ninth Circuit case -- held it had

no jurisdiction to entertain the appeals and dismissed the appeals.

This Court affirmed unanimously and announced what has become the classic expression of ethe finality doctrine in criminal cases. The Court first stressed the historic roots noting that the first Judiciary Act had contained a finality provision, but did not solely rely on historical considerations. On the contrary it delineated the crucial policy considerations which give continuing vitality to the concepts of finality under Cobbledick. That is, the elimination of delay and and costs of individual appeal of each order and --

Q Is it appealable under its 1292 certificate?

A We don't think so. WE find nothing that is --

Q Well, is that the section on --

A Well, filing claims that the order in the Court of Appeals held here, that the order was appealable under the interlocutory provisions of 1292(a)(1)--

Q That's what I'm talking about.

A Yes. It seems to us quite clearly now we find no case which supports the notion that 1292(a)(1) applies to an order of a court modifying its grand jury subpoena.

Q Was an application made for a certificate?

A No, there was no application made for a certificate.

In Cobbledick the Court stated the basic rationale which we think governs here and in Younger and Harris in a somewhat different context the Court suggested the same type of consideration. That is, bearing - and I'm quoting from Cobbledick --"bearing the discomfiture and cost of a prosecution for crime, even by an innocent person is one of the painful obligations of citizenship. The correctness of the trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an Appellate Tribunal."

This doctrine was particularly applicable, the Court was of the view, and the grand jury situation, because of its essential and primary function in the enforcement of criminal law, as this Court has recognized repeatedly; it's life is short (18 months generally), governed by statute and interruptions of its work had to be avoided.

Cobbledick concluded: "Interruption of its proceedings by an appeal by a balking witness was permissible only after the witness had been held in contempt. At that point, even though the grand jury's process would be interrupted, such interruption was justified, otherwise the witness would have no alternative but to abandon this claim or languish in jail."

Obviously weighing the considerations of finality against immediate interlocutory review -- this Court in Cobbledick took account of the deterrent nature of the contempt power; that the exercise of that power would have real potential in compelling an otherwise recalcitrant witness to produce or testify as ordered.

This coercive potential, I submit, was deemed proper and was the balance struck in Cobbledick because of the overwhelming importance ofthe grand jury function and the need to prevent this interruption by the frivolous claim. It could only be interrupted, the Court found, by those witnesses whose refusal to comply was of such paramount significance to them that they would refuse even though faced with a contempt citation, contempt conviction.

Only at that point did the scales tip in favor of appealability and permit interruption of the grand jury's investigation.

Subsequent decisions of this Court have strengthened Cobbledick. I refer to Di Bella against the United States, where this Court held appeals aren't available to challenge orders denying motions to suppress evidence where criminal proceedings were in train(ph) at the time of the ruling.

In the course of Di Bella the Court significantly pointed out that every statutory exception to finality is addressed either in terms or by necessary operation to civil

actions, or by necessary operation to civil action. There has bee thus no retreat from the Cobbledick rule that the cost and discomfiture of a trial, even as to a constitutional claim, must be gone through before a witness challenging a grand jury subpoena may bring that matter to an appellate court.

There is no sound reason, we submit, why these principles should not govern this case. We point out again that the question regarding control and other issues involved in the July 25 order would be fully reviewable on appeal if Respondent is held in contempt.

Q What do you say about the Court of Appeals' reasoning as to why Cobbledick didn't apply?

A I find it somewhat mystifying.

Q Could you state it and your answer to it?

A Well, the Court of Appeals stated, and this is set out -- the precise language is set out at 72 of the record, and he said: "None of the cases cited had the District Court ordered anything other than compliance with the subpoena. In contrast, the District Court here modified the subpoena with respect to certain documents and directed the appellant to undertake steps in a foreign country to have those documents released by other persons for transportation to this country or for inspection in Kenya by United States Agents.

IN directing that affirmative action be taken in another country the District Court did more than deny a motion

to quash; it in effect, granted a mandatory injunction which, given full effect, would require action by officials of the Kenya Government.

My answer is that I don't know what that has to do with the question of appealability. The Court simply, it seems to me, by calling an order of a court which has complete control over the grand jury process -- the grand jury has no authority to subpoena documents without the authority of the court and the court has full authority to modify and change. If a court is limited by the notion that any modification which might have some affirmative effect would result in appealability, we think that the courts would be hesitant to do what they should do: modify change subpoenas to grand juries.

I see nothing in the fact that it, in the reasoning of the Court of Appeals, nor in the cases which it cites, which takes this out of the Cobbledick rule. If this takes it out of the Cobbledick rule then I don't know why a subpoena directing production of documents, for example, which are located in New York City, which is sought by a grand jury sitting in the Central District of California are similarly not outside the Cobbledick rule.

The problem here, it seems to me, is that there is no sound basis for continued adherence to Cobbledick if one can simply, by talking about affirmative directions of an order, transform that into a 1292(a)(1) injunction. The history of

1292(a)(1) -- neither the history of 1292(a)(1) nor its application by this Court in the Bowden(?) case, Switzerland Cheese Association case, has indicated that even a civil actions the court has been not prone to apply that provision except where there is truly an injunction. And here, I think to talk about this being an injunction in terms of a grand jury proceeding, would hamper and make it quite easy to avoid a grand jury investigation.

Q Did the July 25th order have any independent source except the subpoena?

A As far as I know the July 25th order was based upon the subpoena because in Part I it denied the motion to quash the subpoena.

Q What I'm getting at: supposing the contempt proceeding was brought against this man for failure to obey the subpoena, which the July 25th order sustain a separate contempt proceeding?

A No. The order of July 25th, what that did was it took the subpoena and in our view eased the burdens of compliance. It transformed the subpoena into a different kind of a document retaining the grand jury function that it was to perform, but there are no two independent documents now outstanding. In answer to your question: there will be no basis for contempt with regard to the subpoena and then a contempt with regard to the order. There would be one of contempt --

Q Well, it did order him to take certain affirmative action in Kenya.

A The order did; yes. It told him to apply to the Registrar of Companies to produce, to permit removal from Kenya of certain documents. If that request were denied he was to permit agents, and we believe agents of the grand jury, and argument wasmade here that these records would have been available to the civil tax --

Q I suppose what you say is that, although the -- that was a form of mandatory injunction it was really in essence, an interpretation of what this man had to do in order to comply with the subpoena.

A Precisely. As I say, my point was that the subpoena issues through the authority of the court and the order of the court modifying the subpoena requiring the affirmative action was merely a clarification which made precise and particularized the duties that the Respondent was required to perform.

And it is our view that if that is a mandatory injunction that any kind of modification by a judge of a subpoena can be classified the same way and the policy decisions of Cobbledick and Di Bella can be very easily avoided.

Q What was the form of the proceeding that triggered the July 25th order?

A It was a motion to quash the subpoena duces

tecum.

Q Not a motion of the Government for supplemental relief?

A Oh, no. The situation was this: the subpoena was served, as I said, on March 5, '68; a motion to quash alleging a variety of grounds was made toward the end of March, and thereafter the five proceedings which led up to the July 25 order were wholly in connection with the motion to quash the subpoena.

Q I suppose a subpoena itself could be considered an injunction under the reasoning of the Court of Appeals.

A Well, we --

Q Let alone a modification.

A I assume so, because any subpoena requires some affirmative action implicit in it. To produce records one must, if he has them in his warehouse he must go to the warehouse and get them. So that I think that the Court of Appeals, it seems to me, has opened the door for an easy way to avoid the very significant requirements of Cobbledick which this Court has reaffirmed and developed and it is our view that 1292(a)(1) does not provide the remedy nor the cost of delay argument that Respondent makes. It is our view that this is nothing more than the Court exercising the authority, historic authority to promote the functioning of the grand jury.

And we submit that the Court should vacate the judgment of the Court of Appeals and remand it with directions to dismiss the appeal. I would lik

I would like to save the remainder of my time for rebuttal.

Thank you.

MR. CHIEFJUSTICE BURGER: Very well, Mr. Feit.

Mr. Miller.

ORAL ARGUMENT BY HERBER J. MILLER, JR., ESQ.

ON BEHALF OF RESPONDENT

MR. MILLER: Mr. Chief Justice and may it please the Court:

The subpoena that was served on Raymond Ryan on March 5, 1968 required the production of records, corporate records covering a period of 30 years; required the production of these records, even though they were Kenya corporations, and all of the records subpoenaed, were in fact, located in Kenya.

Upon receiving the subpoena, Ryan, as this Court has suggested in McPhaul and Bryan, out of respect for the tribunal seeking the records, filed a motion to quash, based on several grounds, including oppressiveness, a violation of the law of Kenya.

I submit that Petitioners in later proceedings, if this is not considered an appealable order, would be well-advised when being served with a grand jury subpoena not to

file a motion to quash and not to obtain an interlocutory ruling as to whether or not there should be compliance. The reason is very simple: that had this subpoena merely been ignored there was no question in anyone's mind who has looked at it that this subpoena would in fact, have been void and invalid; if not for being oppressive and requiring the transportation of records 10,000 miles into the United States because the subpoena itself did, in fact, violate the laws of Kenya.

Q Well, it was peculiar where, as you stated,that the Court of Appeals did not rule on the breadth or oppressiveness or pther possible illegality of the subpoena; it simply researched the appeal.

A If the Court please, the Ninth Circuit Court of Appeals held that the order of July 25, 1968 issued by Judge Manuel Rio of the District Court of California requiring Respondent Ryan to travel to Kenya and produce 2,000 pounds of records at his own expense, covering a 30-year period, was an appealable order. And they further said that it was appealable because it was a mandatory injunction requiring Mr. Ryan, in effect, to sue and labor, to act as an agent of the grand jury to travel 20,000 miles to make application to officials of a foreign country; to attend and superintend the packing, the crating and the shipping of some 2,000 pounds of records to the United States.

And if he does not -- if he were unable to obtain the permission of the Kenya officials, then he would be required to make those records available for copying, and I quote: "for agents of the Department of Justice and/or the Treasury Department." There is no limitation in that order of July 25, 1968 that these records are to be treated as though they were subpoenaed by a grand jury; that they are under the secrecy provisions of 6(e) of the Criminal Rules as required by the grand jury and in fact there was no limitation on what rights the government had with respect to those records. They could publish them in a newspaper; they could use them for a civil proceeding; they could use them for any purpose, even though ostensibly thisproceeding began as a grand jury proceeding.

If I may address myself to the order which we are talking about and the subpoena. The District Court himself made it abundantly clear on several occasions; he said: "It is not the subpoena that is the subject of the contempt charge; it is not the subpoena that we are talking about. We are talking about the Court's order of July 25, 1968. It is the Court's order that Mr. Ryan has to comply with. It is the Court's order that Mr. Ryan is in contempt of. It is the Court's order thatthe order to show cause was directed against as to whether or not Mr. Ryan had, in fact, violated anything issued by the Court.

And the Court also stated in a colloquy that the order itself of July 25 was like a civil injunction; therefore, once a civil injunction was entered compliance must be had. Failure to comply would result in a finding of contempt and the findings and the legal issues could not be relitigated at the contempt hearing.

Thus, the -- incidentally I note that the Government argues that the finding and the various legal issues would be reviewable upon appeal if Mr. Ryan had, in fact, been found guilty of contempt. And yet there is respectable law that looks to the contrary and has been decided by this Court. It says: "When a civil injunction has been entered as here, and there is a failure to comply that then becomes a contempt and you may not relitigate the factual or the legal basis of that order even though it may, the order may be reversed on appeal or by the Supreme Court.

Q Mr. Miller, is that order any more than an implement to carry out the subpoena duces tecum?

A Yes, sir.

Q In what respect?

A It goes far beyond the capability of any subpoena that I have ever seen in my experience at the bar. In the first place it is an order requiring a man to make an application to a high official of a foreign government. That's the first one.

Q Does the subpoena not do that by clear implication?

A No, sir; it does not, because the -- what the subpoena says is that you produce the records. Ryan, if he had custody and control could produce the records were it not in violation of the law.

Q Doesn't that command of the subpoena mean when it directs that he produce the records to do everything necessary to accomplish that -- whatever it is?

A Yes, Your Honor. I see your point.

Q To apply to a foreign government, to apply to our State Department to make the request of the foreign government; whatever is necessary.

A Yes, sir. He would have to take those steps that were within his power.

Now, let us look at the order itself. I submit, if the Court please, that the order went far beyond any legitimate requirements that can be imposed by a subpoena.

Now, if I may: one, I do not believe that any District Court or grand jury or agent of the Department of Justice acting as an agent of the grand jury has the authority toissue a subpoena without prepayment of costs which requires an individual totravel 10,000miles over to a foreign country and return 10,000miles back, carrying with him 2,000 pounds of records, forgetting the application to the foreign government

for the time being.

I don't believe that there is that authority. I know of no case, and we challenge the Government to supply us with any case in which that was, in fact, the requirement of a subpoena, and they have come forth with none. And thus, if the Court please, equating the order and the subpoena together, I think the subpoena goes far beyond any rights that a grand jury has to force an individual to sue and labor as would be required under the facts of this case; to forthwith, as the order requires, really drop everything the citizen is doing. Drop everything the citizen is doing; go to a foreign country 10,000 miles, 25 hours of air travel to get to Kenya; 25 hours, obtain the record, crate them up, bear the responsibility of bringing them back to the cCentral District of California and to do this without any prepayment of expenses, any offer of round trip payment of the aircraft fare.

In other words, if Ryan were a person in abject poverty there isn't a court in this land that would permit such a thing to happen, but because he is supposedly aman of some means then it's all right that he has to spend his money, the thousands of dollars required for air fare, the thousands of dollars to haul 2,000 pounds of records back to the United States.

That is what the grand jury subpoena required and that is what the July 25 order required.

Q Where do we find in this record that it's necessary that he go to Kenya? Can't these things be done by correspondence and surface travel?

A If the Court please, it could not be done by surface travel, I don't believe --

Q Has that issue been litigated; are there findings about that?

A There are no findings. The only finding in this record, if the Court please, is that Ryan at times before and after the commencement of the Government investigation had custody and control of these records and I submit, if the Court please, the record is clear that the IRS investigation began in 1964. So what the finding is that sometime before and after 1964 he had custody and control of the records. And, of course I challenged that in the Court of Appeals and they did not get to it.

But, if I could address myself to the appealability factor because I think it bears very much on the type of conduct required here. I would be concerned if this Court or if the Court of Appeals had no supervisory power over the utilization of subpoenas to require an individual, for example, to go into an FBI office and give a voice exemplar, a grand jury subpoena requiring that so that his voice exemplar might be compared with an intercepted telephone conversation to see whether he was, in fact, the individual.

I think we are entering into a period when the grand jury is moving from its original purpose and moving out now into the position where it is being used more and more as an investigative body rather than merely a body to consider whether or not there has been a violation or crime.

I submit, if the Court please, that this order and this subpoena here is broader than anything that I have ever seen in my experience in terms of requiring an individual citizen to sue, to labor, to act as an agent of the grand jury and, in effect, to investigate for the grand jury.

And I submit that the subpoena power does not permit that and I submit that the order itself that the Court could not, in fact, enter an order of this nature.

A Well, Mr. Miller, it doesn't mean that those records go to the grand jury at all; it means they go to the U. S. Attorney to look at. It might never get to the grand jury; isn't that right?

A That is correct. There is no requirement that the records available in Kenya, to be made available in Kenya be returned to the grand jury or that copies be returned to the grand jury. All it was was that the records be turned over to agents of the Department of Justice or the Treasury Department for copying.

And this, I submit, went far beyond any subpoena requirement that could come out of a grand jury subpoena.

Grand jury subpoenas require that those records be submitted to the grand jury and produced there. This order did not require that; it went far beyond what was required.

The -- on the issue --

Q The issue here is appealability; not whether the order was valid?

A That is correct.

Q Would you say that any ordinary civil case, any order for inspection and copying of the records or an order for a physical examination, for example, would be appealable?

A On the contrary; it would not be.

Q But it would be an order, an affirmative order.

A It would be --

Q Why isn't that an injunction?

A It is because it is in the nature of an order entered in the course of civil litigation and the requirements there are that -- the way the order is enforced is that the pleadings of the party be stricken or that some other action be taken with respect to the litigant as distinguished from here where you have an order directed to a particular individual.

I would submit, if the Court please --

Q Well, there is nothing that is more a

specific order to a specific individual than to submit to a physical examination.

A Yes, sir, and I would submit that if that order were directed to a plaintiff in a case and he refused under the practice, certainly of the Federal Rules, that that individual would just have his complaint stricken; that it would not be treated, in effect, as a mandatory injunction that he be required to comply with the physical examination.

Q I take it you think that there wouldn't be any possibility of contempt; is that it?

A The order could be so phrased whereby it could be contempt.

Q If it were appealable?

A If it were and if it were mandatory -- if the Court specifically said, as in this case, that: "You shall forthwith take yourself to a doctor's office," and the like, then under those circumstances comparable to the order issued here I think you would have a question of an appealability. And the reason is, if the Court please: Congress itself, which has established the appellate jurisdiction, has said that certain interlocutory decisions are appealable. That's 1292.

Now, the interlocutory decisions granting an injunction or mandatory injunction are held, according to the Congress requirement, they are made appealable.

Now, in this case there occurred much of the

Cobbledick case. In there he did not have any aspect of an injunction or a mandatory requirement that an individual take action. There all you had was a denial of a motion to quash a grand jury subpoena. And the decision of this Court was limited to the question of whether that was a final order; whether it was a final order under 28 USC, Section 1291.

Q Well, doesn't a subpoena pretty well command somebody to do something?

A Yes, sir; it does.

Q And you are subject to a contempt order if you disobey it?

A Correct.

Q Well, what's the difference between the subpoena and an order -- an ordinary subpoena and what happened in this case in terms of whether it commands certain affirmative acts or not?

A Because, if the Court please, the man was under no requirement to turn records over for copying, for example, in Kenya. There was no requirement in that subpoena to turn records over for copying by any agent of the Department of Justice or the Treasury Department.

Q Well, in the case of civil litigation if the Government had applied to inspect and copy records in Kenya and the Court had ordered Mr. Ryan to turn them over for inspection and copying it would not have been an appealable

A If the Court please, depending on the type of order and depending on the framework -- for example: if it were in fact, an independent action -- suppose the Government in this case, instead of going to the grand jury, decided to apply for a letters rogatory.Then I concede that there would, in fact, when the letters rogatory(?) had been entered and the requirements made then I can see that you would, in fact, have a final order thatwould perhaps fall under the provisions of 1291 and would be -- because then you get into the question of: is this, in fact, such an independent proceeding as will support an appeal.

Now, here on the contrary, you have the different situation where you have a court order compelling conduct that is not, in fact, required by the original subpoena. And in effect, could not be required by the original subpoena. And I submit, if the Court please, once that happens you go far beyond any requirement of merely complying with a subpoena or not. You have moved out into a separate independent proceeding where an individual, at his own expense, has to fly 20,000 miles to get 2,000 pounds of records and bring them back, or to make them available to the people in a foreign land.

Q Yes, Mr. Miller, but wasn't his going business in Kenya his own doing?

A If the Court please, the fact that he was in Kenya was, in fact, his own doing; to be sure: yes.

Q Well, I fail to follow you on why then it would be such an imposition on him to produce records which may have some consequence in this investigation.

A The imposition, sir, is that he is required "forthwith," to make application and to do the things required in the order. The mere fact that he was in Kenya or had been to Kenya, I do not think makes any more less onerous the fact that he was required to produce these corporate documents from Kenya and plant them in the Central District of California.

Q Well, then I come back, of course, to the Chief Justice's inquiry: isn't this order of which you complain nothing more than an implementation to the original subpoena.

A I believe it goes far beyond the original subpoena, because it does what the subpoena could not do: it requires these records be made available to any agent of the Department of Justice or of the Internal Revenue Service, without restriction and the Court of Appeals years ago in an in re grand jury, 229 Fd. 2d, said you cannot utilize a grand jury subpoena in that manner. It's impossible. That's been the law for years.

And that is where this order has gone far beyond what a subpoena could, in fact, do.

And I would like to suggest to the Court further

that the -- on the question of custody and control. There is no finding that Ryan, in fact, was a director of these companies, nor could in fact, there be such a finding and absent the fact that there was such a finding it is a violation of Kenya law for him to attempt to make certain of these records, namely: the books of account available even in Kenya for copying. And this argument is set forth in extenso in the brief which we filed in the Ninth Circuit Court of Appeals at page 22, 23 and 24, which I think clearly demonstrate that even this order as currently drafted, violates the laws of Kenya.

Q Now, Mr. Miller, let's assume that in a criminal case the Government subpoenas a witness, not a party; subpoenas a witness or applies for an order to, for the witness to produce certain records. Isn't there a procedure for producing records at a specific location and permitting inspection and copying?

A There is, under Rule 17 --

Q 16?

A Well, Rule 16 applies to certain statements and documents, but Rule 17 permits the Court when a subpoena has been issued to require the records be produced in advance of trial at a specific date and time, but that is not a grand jury subpoena, if the Court please.

Q I understand that.

A Yes, sir.

Q But, would that kind of a refusal to quash that kind of a subpoena which would demand inspection and copying or permit inspection and copying, would that be refused?

A No, sir; I don't believe it would because it is, unlike the case here where the grand jury subpoena, subject to the strictures of 6(e) has been totally violated by the order of July 25., which requires the records be made available to either the Treasury or Department of Justice agents; no limitation; no requirement that the records be produced for the grand jury at a date certain. No requirements that these records be kept in camera and subject to the rules of 6(e) as required by the Federal Rules of Criminal Procedure.

Thus, this order goes far beyond what is compellable by a grand jury subpoena.

Q Well, I suppose the defendant in an ordinary criminal case could make the Government produce for inspection and copying certain documents?

A Correct.

Q Under 16?

A Yes.

Q And the Court will issue an order directing the Government at a specific time and place to produce, for inspection and copying certain documents?

A Yes, sir.

Q Appealable?

A No. It is not appealable, Mr. Justice White, for the simple reason it is part of the manners precedent to a hearing. This case was not that. This has turned into a completely separate independent action to compel this individual to produce records.

Q Yes.

A I would like to refer also to the fact that when we are talking about the offer of the Federal Government to make these records available in Kenya, as the Government has suggested, that offer was only if Ryan would state, would authenticate the records. The trial court was informed he could not authenticate those records, and consequently the Court said: "Well, all right, we will proceed to have the orders that we had."

The -- getting back to the question of appealability. Under Cobbledick the sole question was one of finality under Section 1291. That is not this case. That was solely a denial of a motion to quash a grand jury subpoena. This was not that. This was an orderwhich directed an individual forthwith to make application to a foreign official, to be in charge of bringing back 2,000 pounds of records located 10,000 miles away and to do so --

Q Did not the subpoena, by implication,

require him to do precisely that?

A The subpoena would by implication require him to do that except,if the Court please, the subpoena would not, as I pointed out before, to the requirements that these records be made available to other people.

Q Well, does that make it any more or less oppressive, Mr. Miller, the fact that other people can look at them?

A Well, why certainly --

Q Other than the officials of the Government.

A Well, let me say this: I'm saying that a the subpoena is oppressive; I want the Court to be clear on that. I was trying to make what I thought was a distinction between what the subpoena should require and what the order did, in fact, require.

Q But the coercive impact of the order is no greater and no broader than the subpoena; is it?

A The -- in effect, the subpoena uwould require that type of action to be taken except that the -- when a subpoena is served you have to use what capabilities you have to produce the records; granted.

I say that this order went far beyond the subpoena because the subpoena did not, even by implication require an application be made to a foreign official of Kenya. Now, if,

in fact, Ryan had to do this to get the records he might have made that application; he might have beenrequired to make that application, but this order made it specific. Furthermore, he was required to turn the records over -- he was required "forthwith" to make that application. There was no time schedule involved.

Furthermore, he was required to bring the records from Kenya and be in charge of those records to the Court in Los Angeles. Now, granted the subpoena would require the latter part, but I submit to the Court that even though the subpoena -- this subpoena goes far beyond any that I have ever seen in my experience, and I wager, as I said before, we tried -- challenged the Government to show us a comparable expression of requirement of any subpoena or court order to produce documents and they came up with exactly no cases, as I knew they would.

Where in other cases is has been indicated that a subpoena cannot compel an individual to sue and labor to act as an agent to obtain records, to get records; to get something that he does not available right at that time. The Monroe case is cited; in fact Justice Frankfurter's comments in his dissent in the Fleishman case, all point to the direction I am saying, that you cannot use the grand jury or its subpoena powers or an order, a separate order which may have been an outgrowth of the grand jury subpoena to require an individual to

do the things which were required here, either by the order or the subpoena and then to say that if he doesn't do it he is guilty of contempt and has no chance to even litigate those factual issues at the time of the contempt hearing.

As the Court, I am sure is aware, under Maggio versus Zeitz in the bankruptcy turnover orders where the courts had for years entered an order saying: "You turn over these records or these assets." That order is forthwith and immediately appealable. And then when the case goes back down the findings involved in that case are not relitigated at the trial court level. They are considered res judicata. And the Government is --

Q Mr. Miller, are there some records in Kenya that he could have had mailed, correspondence and things like that?

A I beg your pardon, sir?

Q Didn't Ryan have some records in Kenya that he could have gotten by his request by mail?

A Absolutely not. We challenged, and --

Q I understood you to say --

A -- the finding that he had custody and control of these records.

Q Well, do you deny that there are any records in Kenya that he had custody and control of?

A Yes, sir.

Q You say there are none over there?

A There are none -- well, there are probably records there, but he doesn't have custody and control of those records.

Q Why isn't that a perfect defense?

A Well, it is, if the Court please --

Q Well, why don't you use it sometime? Why don't you use it sometime?

A I filed a motion to quash and submitted an affidavit from people in Kenya, which established this fact. And the Court ruled to the contrary.

Q Mr. Miller, if, hypothetically, Mr. Ryan needed and wanted these records for his own purposes in the United States, do you say he could not get them?

A I certainly do. I submit to the Court he could not do so. In fact, he filed an affidavit with the Internal Revenue Service two years before this subpoena in question was served. He filed an affidavit in October or November, 1966 --

Q Then why has this been litigated in the first place at the level where, it seems to me fundamental that no man can be held in contempt for not performing an act which he cannot perform.

A I couldn't agree with the Court more and I did make a motion to quash based on that and of course all of

my evidence I had to get in affidavit form because all of the witnesses were, in fact, in Kenya. And I filed my affidavits and the Government filed other affidavits and the Court read the affidavits and said: "I find that at times before and after the commencement of the investigation of Mr. Ryan by the Federal Government he had control of these documents." And of course I challenged that and I think it's wholly wrong, but now what happens -- now there is an yorder to show cause why he should not be held in contempt and the trial court is saying "Ah, you cannot relitigate the question of custody and control. The only thing at this contempt trial -- the Government is not going to have to prove that he was guilty of contempt beyond a reasonable doubt or had custody and control beyond a reasonable doubt. The Government, all they are going to have to show is that he had the capability to produce the records on July 25, whether he had not done something to turn it over, and that, if the Court please, demonstrates the terrible dilemma in which one is placed by filing a motion to quash.

Q Well, the Government fully concedes, I understood from Mr. Feit that if they prevail in this case the question of custody and control issue can be litigated -- can be reviewed, is what I mean.

A Yes, if the Court please: "Could be reviewed on appeal." I submit they may say that to this Court here, but there is very, a substantial body of case law that

would indicate that it cannot be reviewed on appeal. Now, whether their commitment here would permit us to raise it on appeal. But even on appeal, if the Court please, that's not sufficient for my client because I think he would be entitled to litigate that at the trial level. I mean finding a man in contempt is a very serious procedure. And the fact that he now is faced with the argument that this is res judicata and he will be held in contempt on that issue because he can't even relitigate and I just don't think that this is a fair or proper type of proceeding.

The Government cannot have it both ways: they can't say that this is res judicata at the trial level and then argue to this Court that it's not an appealable order. I mean, bankruptcy orders have established this years ago. If thisis an appealable order then that ruling below is res judicata.

And that's why, I submit, we took the appeal because it is, and I submit that the Court of Appeals held that it was an appealable order.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Miller.

MR. MILLER. Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Feit, you have three minutes left.

REBUTTAL ARGUMENT BY JEROME FEIT, ESQ.

ON BEHALF OF PETITIONER

MR. FEIT: I'd like to make two points. First, inviting the original record, which is here, I will refer the Court to pages 112, in which the Assistant United States Attorney makes it quite plain that these records would only be used for the grand jury purpose; that is those who inspect the records in Kenya.

Again, on pages 90 and 91 where the District Court further makes it plain that these records and that the agents who were to examine them were agents, in fact, of the grand jury and there would be no violation of Rule 16.

It seems to me that the thrust of the argument here, essentially is that Cobbledick rules should not be followed. As we have indicated, there is no question that this issue would be resolved or would be litigated on appeal on the validity of the July 25 order.

The question as to whether or not it can be reviewed at the contempt proceeding it seems to us that it's the -- from April to June 25 1968 the issue of custody and control was litigated. Just like the motion to suppress, it seems to us,if Respondent has additional evidence which would suggest he did not have custody and control as according to the motion to suppress, the Court could change its mind.

However, it's pleaded this is litigable on appeal to a Court of Appeals --

Q On appeal from what?

A On appeal from the findings in contempt. This is precisely Cobbledick and precisely what this court has reaffirmed in cases since Cobbledick.

And I may add one --

Q Is there a further opportunity for a hearing on the issues of whether or not he has control and so on in the District Court before the finding of contempt?

A Well, I would assume that this -- our view would be --

Q Otherwise an appeal is not a very meaningful thing --

A Well, the appeal from the contempt. And Counsel refers to cases which I don't know of in which he refers to cases in which that order of July 25 would not be reviewable on appeal. He refers to cases -- I know of no such cases involving grand jury subpoenas and orders enforcing grand jury subpoenas.

So, what happened, it seems to me, Mr. Justice, is that the initial determination was made that he had custody and control. He had an opportunity to litigate that on five occasions from April to July. I would take it it would be something like law of the case, not res judicata. Quite clearly if he could come in and say at that date: "I have something new. I can show you by an evidentiary basis that I did not have custody and control of the records as of the

date of July 26. It seems to me just like a motion to suppress where the Court can reconsider the Court could say: "We reconsider that and we find that you did not have control; therefore there would be no basis for contempt."

The Court, on the other hand, could well say: "You haven't submitted enough for me to reopen this. I proceed with the contempt proceeding. The Government has the burden of showing proof beyond a reasonable doubt.

And an appeal from the contempt proceeding quite clearly the July 25 1968 order would be subject to full review. And again I say: Counsel referred to some cases to the contrary. I know of none involving the area of the grand jury subpoena and enforcement thereof by the District Court below.

Q Now, going to the point of the contempt proceeding in the District Court, and of course that's where it would be --

A Precisely.

Q It would be triggered by an order to show cause; wouldn't it?

A Yes, as it was here.

Q Now, is there any limit on what cause you can show as an explanation as to why he has not complied?

A No --

Q The whole factual situation?

A There is no limitation except, as I suggest,

that the way the District Court runs the contempt proceeding. The District Court can say -- I don't know what evidence of control that Mr. Miller might or might not bring out -- the proceedings leading up to the July 25 order were essentially arguments of counsel with some testimony, but very little, and affidavits introduced.

Yes, the District Court could entertain, it seems to me, all these matters and say: "Well, if you have something to show that you didn't show me before that suggests that you had no control, I'm going to relitigate that matter. All I'm suggesting is that whether the Court does it or not, that issue would be fully reviewable on appeal.

MR. CHIEF JUSTICE BURGER: All right. Thank you Mr. Feit. Thank you Mr. Miller.

The case is submitted.

(Whereupon, at 11:30 o'clock a.m. the argument in the above-entitled matter was concluded)