

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1120

TITLE UNITED STATES, ET AL., Petitioners v.
RICHARD W. RYLANDER, SR., AS PRESIDENT OF RYLANDER &
CO., REALTORS, INC., ET AL.

PLACE Washington, D. C.

DATE January 18, 1983

PAGES 1 thru 54



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, ET AL., :

4 Petitioners :

5 v. : Case No. 81-1120

6 RICHARD W. RYLANDER, SR., AS :

7 PRESIDENT OF RYLANDER & CO., :

8 REALTORS, INC., ET AL. :

8 - - - - -x

9 Washington, D.C.

10 Tuesday, January 18, 1983

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 2:05 p.m.

14 APPEARANCES:

15 LAWRENCE G. WALLACE, ESQ., Office of the Solicitor

16 General, Department of Justice, Washington, D.C.;

16 on behalf of the Petitioners.

17 JOSEPH H. HARRISON, III, ESQ., Sacramento, California;

18 on behalf of the Respondent.

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

2 CHIEF JUSTICE BURGER: Mr. Wallace, I think
3 you may proceed whenever you're ready.

4 ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
5 ON BEHALF OF THE PETITIONERS

6 MR. WALLACE: Thank you, Mr. Chief Justice,
7 and may it please the Court:

8 This case is here on the Government's petition
9 from the Court of Appeals' reversal of a judgment
10 holding the respondent in civil contempt for
11 noncompliance with an order enforcing Internal Revenue
12 summonses. A motion to expand the issues beyond those
13 raised in the Government's petition was denied by this
14 Court.

15 Briefly, what occurred here was a summons was
16 issued as part of an investigation of respondent's tax
17 liabilities for the years 1973 through '77. The summons
18 called upon him as president of two real estate
19 corporations to produce the books and records of those
20 corporations, as well as to testify. When he failed to
21 comply, the usual petition for enforcement of the
22 summons was filed within a -- a supporting affidavit by
23 the Internal Revenue agent, and a show cause order was
24 issued for the summons enforcement proceeding.

25 There were some evasions of efforts to serve

1 the order. Those are for the most part more relative to
2 the criminal contempt proceeding rather than the civil
3 contempt proceeding now before the Court, although they
4 could have a bearing on the respondent's credibility
5 when he did appear.

6 Eventually he was served and directed to
7 appear at an enforcement hearing held about one year
8 after the summons had been issued, and he was also asked
9 to respond, to put into issue any issues that might be
10 controverted. He neither appeared nor filed a response,
11 nor did anyone else appear on behalf of the corporation,
12 although he did prior to the hearing send a letter to
13 the Deputy United States Marshall and to the Court in
14 which he claimed he was not the president of the
15 corporations and had been improperly served.

16 Because the Government therefore anticipated
17 that he might put that issue into contest into the
18 summons enforcement proceeding, it did come prepared to
19 make proof that the corporations had been duly chartered
20 with him as a director and had not been dissolved and
21 that he had acted in banking and business transactions
22 on behalf of the corporations.

23 This offer of proof was made in his absence,
24 and an enforcement order was issued, and he was ordered
25 to comply. And when he failed to produce the records

1 upon meeting with the agent in pursuit of that, and
2 after other difficulties in serving him again,
3 eventually a show cause order for the contempt
4 proceeding was served upon him after his arrest pursuant
5 to a bench warrant; and the hearing was held some months
6 later with the respondent in attendance.

7 And at that time he again did not testify or
8 present any evidence, was -- the Government attempted to
9 further bolster its case with some additional evidence,
10 but that proved to be unsuccessful because the witnesses
11 in one case pleaded the Fifth Amendment, in the other
12 case had nothing of value to state. And the District
13 Court held the respondent in contempt and then gave him
14 an opportunity to purge himself, whereupon he offered a
15 written statement entitled "Oath in Purgation of
16 Contempt," but refused to testify or to be cross
17 examined on the statement and did not produce any other
18 evidence in response to the order. And the District
19 Court found that he as president of the corporations had
20 possession or control of the records and had not
21 satisfied his burden to show that he could not comply
22 with the summonses and failed to produce any evidence of
23 the contempt proceeding.

24 Now, while our position gained some strength
25 from the belated nature of the respondent's submission

1 of this oath in purgation, as I will explain for
2 purposes of the civil contempt, our basic position would
3 be the same if he had made precisely the same submission
4 at the outset of the summons enforcement hearing.

5 This Court has considered the showing that the
6 Government is required to make in an Internal Revenue
7 summons enforcement proceeding on a number of
8 occasions. The basic case, United States v. Powell, is
9 of course cited in the briefs. And if those cases mean
10 anything they mean that when the Government made that
11 showing, it is entitled to have its summons enforced
12 unless -- and the question in this case is what does
13 that "unless" mean in the context of a summons seeking
14 production of corporate records from an officer who
15 would ordinarily be their custodian, have either
16 possession or control over them.

17 And in answering the question of what the
18 "unless" means, we look to, and we think it's proper for
19 the Court to look to, cases involving not only Internal
20 Revenue summons but other forms of legal process such as
21 grand jury subpoenas, congressional subpoenas,
22 proceedings to direct a bankrupt to turn over his
23 records to a trustee, et cetera.

24 Because the issue is basically the same, and
25 the principle that we draw from the case law is that

1 when the Government has made its requisite showing, it
2 has established a prima facie case that it's entitled to
3 enforcement, that the order should be complied with, and
4 that a burden of production then shifts to the
5 respondent to introduce some evidence of why he should
6 not comply. The burden of persuasion does not shift,
7 but a burden of production shifts at that point because
8 the Government is not required to anticipate and negate
9 every possible defense.

10 This is -- this principle is explained perhaps
11 most explicitly in an excerpt that we reproduce on page
12 24 of our brief from this Court's opinion in United
13 States v. Fleischman, which happened to be a criminal
14 contempt proceeding involving a congressional subpoena.
15 But it explains that the rule being adopted is a rule
16 affecting merely the time and manner of proof rather
17 than a shift of the burden of persuasion, but it
18 explains that the prosecution would be under a serious
19 practical handicap if it must negate all possible
20 defenses, and that the -- the relevant facts are
21 peculiarly within the respondent's knowledge of why,
22 contrary to what one would normally think of the
23 president of a corporation, he is not in a position to
24 comply with the subpoena.

25 There is sort of a presumption of business

1 regularity, that the person normally thought to be in
2 possession or control of a business' records would be
3 the person to seek them from. This is the way grand
4 jury subpoenas are issued, and there's never any further
5 showing than that. Then it's up to that officer to say
6 why it is that he can't comply.

7 QUESTION: Mr. Wallace, could I interrupt you
8 for a moment?

9 You say you don't think it makes any
10 difference that he was late making this. He didn't make
11 the same showing at the original judicial enforcement
12 proceeding. Do you rely at all on the fact that instead
13 of getting on the witness stand, he submitted this
14 so-called written oath?

15 Supposing he had gotten on the witness stand
16 and said exactly the same thing he said in the oath?

17 MR. WALLACE: That would be a very different
18 case. Our position is that he submitted no evidence at
19 all.

20 QUESTION: Oh, I see.

21 MR. WALLACE: That's what we're leading up
22 to. It wouldn't have mattered whether he did it at one
23 hearing or the other.

24 QUESTION: Let's assume for a moment, Mr. --
25 are you finished?

1 QUESTION: Well, it's -- yes, I am. Because I
2 gather you would say it would be different if he,
3 instead of submitting a written affidavit he'd given
4 oral testimony saying in haec verba the same thing.

5 MR. WALLACE: If he had submitted himself to
6 cross examination --

7 QUESTION: No, no. No. Without cross
8 examination.

9 MR. WALLACE: Oh, no. Cross --

10 QUESTION: In other words, if he'd done what
11 he did in the Curcio case, which was get on the stand,
12 say I don't have the records, and I refuse to say why
13 because of the privilege, which is exactly --

14 MR. WALLACE: The -- the -- but in the Curcio
15 case, the only thing contested at the appellate level
16 was his refusal to testify rather than his refusal to
17 produce the records. And what was upheld was his right
18 not to testify if he claimed the privilege against
19 self-incrimination.

20 But the Court was very careful -- and this is
21 one of the cases that we draw our principle from -- to
22 distinguish the question of producing the records that
23 he, because he held them in a representative capacity
24 had no privilege not to produce. And if the requisite
25 showing is made to support the production order, that is

1 our prima facie case that it requires a burden of
2 production to shift to him to show why he can't produce
3 them.

4 QUESTION: But the Curcio case holds that the
5 claim of privilege is proper. You agree with that?

6 MR. WALLACE: With respect to the testimony
7 that the subpoena asked him for.

8 QUESTION: Right. And but, therefore, the
9 testimony on -- his direct testimony "I don't have the
10 record" is acceptable without subjecting himself to
11 cross examination. That's what the case holds.

12 MR. WALLACE: With -- with respect to --

13 QUESTION: Nonpossession of the records.

14 MR. WALLACE: With respect to the -- the order
15 in the subpoena requiring him to testify with respect to
16 the records. But the case --

17 QUESTION: Under the Curcio opinion would
18 Curcio have been subject to cross examination on his
19 answer "I don't have the records?" You know, not on the
20 issue of where they are if you don't have them, but on
21 the issue of does he have them?

22 MR. WALLACE: He would be subject to cross
23 examination in the context of enforcing the order to
24 produce the records, if that was the way he chose to
25 respond to that order through his own testimony.

1 QUESTION: Well, that doesn't really -- that
2 doesn't really answer my question, I don't think.

3 MR. WALLACE: I -- I -- I -- I -- yes.

4 QUESTION: He gets on the stand and says "I
5 haven't brought the records. I don't have the
6 records." And concededly, under Curcio he cannot be
7 cross examined as to where the records are if you don't
8 have them.

9 Could he have been cross examined consistently
10 with the Curcio opinion on his answer "I don't have the
11 records?

12 MR. WALLACE: Well, in -- in our view he could
13 be cross examined on both of those issues in the context
14 of the need to get compliance with the order to produce
15 the records. He -- he -- he was responding -- I mean
16 what was at issue on appeal in Curcio was the question
17 whether he had to testify concerning the records in
18 response to the subpoena.

19 But in order to meet his burden with respect
20 to production of the records, he doesn't have to take
21 the stand at all. He can introduce other evidence to
22 show that he cannot produce the records. Once the
23 Government has made the requisite showing that he is an
24 officer who ordinarily would be holding the records or
25 have them available in his representative capacity, that

1 is all the Government needs to show in order to get its
2 production order enforced. And then it's up to him
3 through either his own testimony or the testimony of
4 third parties or of other witnesses that he wants to
5 bring in, and compulsory process is available to him to
6 bring them in.

7 QUESTION: Mr. Wallace, kill the hypothetical
8 case. Suppose his answer truthfully was "I burned them
9 up." He couldn't testify to that, could he, because
10 he'd violate his Fifth Amendment, couldn't he?

11 MR. WALLACE: Well, he -- he has that
12 problem. That is -- that -- he --

13 QUESTION: You don't know any way out of that
14 problem, do you?

15 MR. WALLACE: Well, what I think should not be
16 the way out is to have the law reward him for destroying
17 the records when process issues by allowing him through
18 refusing to testify and pleading his privilege against
19 self-incrimination to defeat a -- a production order
20 that would otherwise result from the showing that the
21 Government made.

22 QUESTION: Is there any holding in this Court
23 that prohibits a judicial inquiry into the good faith of
24 the assertion of the Fifth Amendment?

25 MR. WALLACE: Not at all. Precisely the

1 contrary. The Court --

2 QUESTION: It's done constantly in trial
3 courts, isn't it, when -- when there is an apparently
4 dubious assertion of the Fifth Amendment and cross
5 examination develops that there is no basis for a
6 genuine Fifth Amendment claim?

7 MR. WALLACE: That is -- is -- is precisely
8 the case. And even when there is a proper basis for a
9 Fifth Amendment claim -- and this is our basic point
10 here -- what the Court has held time and again is that
11 once a witness chooses to offer testimony upon a fact
12 that's been put into issue, and in this context upon
13 whether he can produce the records, if he chooses to
14 contest that through his own testimony, that operates as
15 a waiver of the Fifth Amendment privilege as to matters
16 reasonably related to that question, to the question on
17 direct examination.

18 QUESTION: Curcio held squarely to the
19 contrary.

20 MR. WALLACE: Well, that is not our view of
21 Curcio, because the production question was not what was
22 at issue. And --

23 QUESTION: Well, would you tell me what you
24 think Curcio holds?

25 MR. WALLACE: It -- it -- it holds that he can

1 refuse to testify in response to the subpoena requiring
2 him to produce and testify. We are not in this
3 proceeding --

4 QUESTION: Well, it holds he -- he testified
5 that he didn't have the records, and then he said I
6 won't tell you where they are because I assert the Fifth
7 as to the cross examination. Exactly what this man was
8 doing.

9 MR. WALLACE: That -- that -- that is correct
10 and -- but all I can do is repeat that what was
11 contested was that whether he -- he responded adequately
12 and waived his Fifth Amendment privilege with respect to
13 the order that he testified concerning the records.

14 Here we're not -- we're not trying to enforce
15 the subpoena requiring him to testify in face of his
16 Fifth Amendment claim at all. We're just saying that if
17 he doesn't want to testify, he has to make some other
18 showing of why he can't produce the records. And if he
19 chooses to make that showing through his testimony, then
20 the normal principle of waiver of cross examination with
21 respect to related matter has to apply.

22 QUESTION: Mr. Wallace, I'm not quite sure yet
23 that I understand your position. Did I understand you
24 to say that if the individual here, the defendant, the
25 suspect had simply taken the Fifth rather than making

1 any effort to explain why he didn't have the records or
2 even to deny that he had them, could he have just said
3 as soon as you've made your prima facie case I claim the
4 privilege against self-incrimination?

5 MR. WALLACE: He -- then I think he would be
6 subject to civil contempt, because he has done nothing
7 to satisfy his burden of production.

8 QUESTION: So he would at least have had to
9 bring in the -- a witness, a third party, for example,
10 to explain his situation.

11 MR. WALLACE: We have made the requisite
12 showing. Then there is a burden of production on him.
13 That is the way we read the law and the cases.

14 QUESTION: Well, if he gets on the stand and
15 says I don't have them, even if he may not be cross
16 examined beyond that, you say that he hasn't made the
17 requisite showing.

18 MR. WALLACE: Well --

19 QUESTION: Don't you? Don't you say that?

20 MR. WALLACE: That is correct. I mean at --
21 at -- at the least that may not be entitled to credence.

22 QUESTION: His uncross-examined -- his
23 uncross-examined assertion is not -- he cannot use an
24 uncross-examined assertion to satisfy his burden of
25 showing why he can't produce.

1 MR. WALLACE: That is our position.

2 QUESTION: Yes.

3 MR. WALLACE: And that is precisely the error
4 that we think the Court of Appeals made in this case.
5 The oath in purgation really was in the nature of a
6 pleaing of what it is that he could prove if he -- if he
7 put in his proof.

8 QUESTION: In your view could he be then asked
9 and required to answer "Did you ever have possession of
10 them?"

11 MR. WALLACE: I think that would be a proper
12 question on cross examination, and that if he chose to
13 testify on the subject he would have waived that. He
14 would have waived any effort to find out from him what
15 became of the records.

16 QUESTION: I'm not talking about a waiver.
17 I'm talking about a compelled answer. Let's assume a
18 hypothetical now. The man is put on the stand. It's
19 established by objective evidence other than his
20 testimony that at one time he was the secretary of the
21 corporation, and then he's asked where are these
22 records. He takes the Fifth Amendment.

23 Then the next question is "Did you ever have
24 these records in your possession?" Can that answer be
25 compelled?

1 MR. WALLACE: I rather doubt it, not in the
2 face of this Fifth Amendment claim, because it could be
3 a step in the chain of proof against him. But --

4 QUESTION: Without any explanation of how the
5 Fifth Amendment protection is required to explain
6 whether he ever had possession of them?

7 MR. WALLACE: That -- that -- that might be a
8 proper inquiry into whether he has a basis for the claim.

9 QUESTION: But if he -- if he invokes the
10 Fifth Amendment in response to a question like that, the
11 District Court is entitled to weigh that invocation of
12 privilege against him in making a factual determination
13 as to whether he testified truthfully on the original
14 question, isn't it? I mean this is a civil proceeding.

15 MR. WALLACE: Yes, yes, that is correct also.

16 QUESTION: You can also say if you're going to
17 take the Fifth Amendment and not make a showing, you're
18 going to have to produce the records because you just
19 haven't made -- unless you permit cross examination, you
20 just haven't satisfied your burden.

21 MR. WALLACE: That is precisely our position.

22 QUESTION: Well, I suppose -- doesn't the
23 court have to, on your motion to strike, simply strike
24 the preceding testimony and the answer? There's nothing
25 then in the record in the way of evidence that he's

1 produced. Isn't that the reality the court must enforce?

2 MR. WALLACE: That is our position. That is
3 our position, that he has produced nothing except
4 something that's in the nature of a pleading that the
5 Court of Appeals erred in giving any evidentiary weight
6 to. And --

7 QUESTION: But if he takes the stand and says
8 "The reason I didn't produce them is because I don't
9 have them and I never had them," I don't know why that
10 is not an adequate answer.

11 MR. WALLACE: It -- it -- it may well be, but
12 it would be subject to the test of cross examination.

13 QUESTION: And you ask him "Did you ever have
14 them," and --

15 MR. WALLACE: Well, we might ask --

16 QUESTION: -- And then he says, "I refuse to
17 answer on the grounds it would incriminate me." I think
18 he has a perfect right to do that, doesn't he? Doesn't
19 he?

20 MR. WALLACE: Well, then we -- we might -- he
21 might still not satisfy his burden with -- with that
22 kind of testimony. That's a pretty thin showing for a
23 president of a corporation to make with respect to
24 corporate records. And he's not --

25 QUESTION: When I take the Fifth Amendment --

1 MR. WALLACE: -- The fact that he's taken the
2 Fifth Amendment does not require the District Court to
3 give credence to his testimony prior to his taking the
4 Fifth Amendment. If anything, it detracts from the
5 credibility of his prior testimony.

6 QUESTION: Well, I don't understand what else
7 he can do after he asks and says that my answer would
8 incriminate me.

9 MR. WALLACE: Well, that -- that is up to
10 him. It depends on the circumstances what else he can
11 do.

12 QUESTION: But isn't that what he did here?
13 He said "I would incriminate myself."

14 MR. WALLACE: Here he didn't submit himself to
15 any cross examination whatsoever. He refused to take
16 the stand.

17 QUESTION: All you're saying is that the
18 Government can't have -- all you're saying is that he
19 can't have his cake and eat it, too.

20 MR. WALLACE: That is correct. I mean under
21 the District -- under the Court of Appeals holding, he
22 has been put in a stronger position than a forthright
23 witness who got on the stand and who submitted himself
24 to examination by the Government, and whose credibility
25 was undercut by the Government's cross examination, and

1 who was disbelieved by the District Court.

2 The -- the -- here someone who refuses to take
3 the stand at all and couples this written statement,
4 which he tries to get weighed as evidence, with a plea
5 of the Fifth Amendment has been put into an impregnable
6 position in comparison with a forthright witness who
7 does take the stand. Now, that can't be right.

8 QUESTION: Well, of course, you're really
9 disagreeing again with Curcio, because of course that
10 same thing happened there.

11 But what is your understanding, Mr. Wallace,
12 on what will happen on remand if the Ninth Circuit order
13 were carried out? Didn't they send it back for an
14 investigation of the bona fides of the Fifth Amendment
15 claim?

16 MR. WALLACE: That is correct.

17 QUESTION: And what do you understand that
18 means? What will they be doing? Asking him the factual
19 basis for his -- for his claim, is that it?

20 MR. WALLACE: As far as I can tell. They
21 didn't really specify. And, you know, my surmise is
22 really no better than anyone else's on that. I don't
23 see what else would be at issue. There might be a
24 further effort made by the Government to bolster its
25 proof, but our position is that we've already introduced

1 more than is necessary under the Powell case and others
2 that spell out what our requisite showing is in the
3 absence of some production of evidence on the other side.

4 I'd like to reserve my remaining time, please.

5 MR. HARBISON: Mr. Chief Justice Burger --

6 CHIEF JUSTICE BURGER: Mr. Harrison.

7 ORAL ARGUMENT OF JOSEPH F. HARBISON, III, ESQ.,

8 ON BEHALF OF THE RESPONDENT

9 MR. HARBISON: Mr. Chief Justice Burger, and
10 may it please the Court:

11 What this case is really all about is whether
12 or not my client, Mr. Rylander, met his burden of
13 production on his defense of inability to comply by
14 several things, not just his oath and affirmation that
15 he didn't have the documents, but when he showed up in
16 front of the IRS on February 4th and said I don't have
17 them and I take the Fifth, when the agents testified on
18 the trial on October 8th that he had said that, when he
19 filed the oath, and finally, in answer to Justice
20 Stevens' question, when he took the stand on October
21 23rd and Federal Judge Carlton said to him, "Mr. Carl --
22 Mr. Rylander, you have filed an oath in purgation
23 stating that you do not have the records." He said,
24 "That is correct, Your Honor." Judge Carlton said to
25 him, "Where are the records?" And he said, "I take the

1 Fifth on the advice of my counsel."

2 As the Court is aware from the record, I was
3 appointed to represent him on October 9th, the day after
4 the trial, a combined trial, civil and criminal
5 contempt. The first thing I did immediately was have
6 the civil contempt vacated. We then proceeded to adduce
7 more evidence. So it's not just his oath that's in
8 evidence to support his burden. But the issue here is
9 is the oath -- and I say along with his other testimony,
10 including that on the stand and that in front of the IRS
11 agent -- sufficient to meet his burden of production at
12 a contempt hearing to prove his inability sufficient to
13 put the burden of production again back to the
14 Government along with their burden of persuasion, which
15 they had all along, by clear and convincing evidence to
16 prove that the records that they sought ever existed,
17 which they never showed.

18 If we return to the summons enforcement
19 hearing, which this Court has said in Donaldson must be
20 summary in nature, and this Court said in Powell you
21 must meet only these minimum conditions, and in Freedom
22 Church said that the issue of his possession, the person
23 summoned, is never in issue was met.

24 Their -- their offer of proof there was -- and
25 you have to remember this is 1979 now -- excuse me --

1 1980 -- that he was president of a corporation in 1975,
2 that he signed two checks in 1975, that he was president
3 of the other corporation in 1975, and that he signed two
4 checks in 1975.

5 As the Court should be aware from the trial on
6 October 8th, the Government introduced two affidavits
7 from the Secretary of State of California that both of
8 those corporations weren't active. One died in 1975,
9 and the other one had been active in '74, '76 and '78.

10 So the Government at the summons enforcement
11 hearing never had the burden to show that those records
12 existed, never tendered the issue that those records
13 existed, and never proved that those records existed.

14 At the contempt trial for the first time Mr.
15 Rylander said, "The reason I can't produce them is I
16 don't have them." And when asked why don't you have
17 them, he properly, under McPhaul, Curcio, O'Henry,
18 Meeks, Traub, Hansen Niederhauser and every other case
19 we've cited in our brief, said, "I can't tell you that.
20 I take" --

21 QUESTION: You say -- you say at the contempt
22 trial he said he didn't have them. Did he actually
23 testify at the contempt trial?

24 MR. HARBISON: Yes. That's why I made the
25 point that the day I was appointed, the day after the

1 so-called trial, I had the civil contempt vacated.
2 There was no longer a conviction of civil contempt.
3 Judge Carlton gave me time to prepare for a continued
4 hearing. That hearing was had on October 23rd.

5 At that hearing Judge Carlton forced Mr.
6 Rylander to the stand. He asked him the question,
7 "Where are the records?" And Mr. Rylander said, "I
8 can't answer that. I invoke my Fifth Amendment on the
9 advice of counsel." He then reinstated civil contempt.

10 QUESTION: He said, "Where are the records?"
11 Did your client at that hearing himself get on the stand
12 and say "I don't have the records?"

13 MR. HARBISON: No. He filed the oath, the
14 affidavit saying I don't have them. The first question
15 from the Federal judge is "You have filed an oath
16 stating you do not have them." He said, "That is
17 true." The second question was "Where are the
18 records?" He said, "I take the Fifth."

19 That was the end of the questioning. Judge
20 Carlton said I've made my record. Take it to the Ninth.

21 QUESTION: Well, what was he held in contempt
22 for -- failure to produce the records or failure to
23 testify?

24 MR. HARBISON: That's a very interesting
25 question, Judge White. The initial --

1 QUESTION: Well, let's assume for the moment
2 that the judge had said, "Look, I know you're taking --
3 you're validly taking the Fifth Amendment, but you have
4 not made a showing. I think the Government has made its
5 case. I know you disagree with that, but the Government
6 has made its case, and you are either going to have to
7 explain why you can't produce, or you're going to be
8 held in contempt for failing to produce, not for failing
9 to testify."

10 MR. HARBISON: Okay. I --

11 QUESTION: That's Curcio.

12 MR. HARBISON: Okay. Well, I -- I have a
13 couple of points to make to answer your hypothetical.

14 First, there is no difference between
15 producing and testifying. The original summons said,
16 "Mr. Rylander, come testify and produce." The summons
17 enforcement order that the judge signed said "Produce."

18 QUESTION: Well, he certainly never made any
19 claim that producing the records would -- would violate
20 his Fifth Amendment rights.

21 MR. HARBISON: No. And nor do I state that
22 here.

23 QUESTION: No. Well --

24 MR. HARBISON: I think this Court --

25 QUESTION: -- So there is quite a difference

1 between those --

2 MR. HARBISON: Certainly.

3 QUESTION: -- Two things. Don't tell me there
4 isn't.

5 MR. HARBISON: Well, that -- I haven't
6 finished yet.

7 In this case there isn't because there are two
8 purging conditions. The conditions are produce or
9 testify. Now, that's my precise point here. To carry
10 his burden of production, to force him to go further
11 than to say I don't have them and I can't tell you their
12 whereabouts, puts him in the cruel trilemma that the
13 Fifth Amendment, the policies behind it, are designed to
14 protect.

15 He's forced to produce something that may not
16 exist. If it doesn't exist, he goes to jail. He's
17 forced to incriminate himself if he can't produce for
18 some crime.

19 QUESTION: Well, has he made any showing that
20 they don't exist?

21 MR. HARBISON: My point is, Your Honor, that
22 he doesn't have to make that showing. That's the
23 Government's burden to show that the records exist once
24 he states inability. Once he tenders an issue of fact
25 "I don't have them," then the burden goes back to the

1 Government to prove that they exist, and if the
2 Government proves that, he's in contempt.

3 QUESTION: Well, suppose they -- let's make
4 this concrete -- suppose the treasurer of -- or the
5 secretary of General Motors Corporation is called as a
6 witness and he's asked to produce the minutes of the
7 last five meetings of the board. Do you think he could
8 get by with this procedure you're talking about?

9 MR. HARBISON: He would have to show up --

10 QUESTION: He's presumptively in charge of
11 those records unless he can demonstrate that he is not.

12 MR. HARBISON: No, Your Honor, I disagree with
13 the so-called presumption that he is in possession of
14 those records without at least some showing. The case
15 of Straub, Hansen Niederhauser, Rizzo -- they all say no
16 contempt unless the Government --

17 QUESTION: Are those cases from this Court?

18 MR. HARBISON: No, but Fleischman is, Your
19 Honor. Fleischman impliedly said since the Government
20 has shown that the record exist, now the burden is on
21 you to give us some reason for inability, and you've
22 given us nothing. You never made a statement to the
23 Committee on Un-American Activities, you never made a
24 statement to the District Court. If you had of said --
25 they used the word "any" -- if you hadn't made any

1 reference to the fact of inability, then the burden of
2 persuasion is back to the Government to show they exist,
3 and if they show --

4 QUESTION: I suppose the point is, though,
5 that if all he says is "I don't have them and won't
6 submit to cross examination," then the trial court has
7 to strike his statement that he doesn't have them. So
8 there is no evidence. That's why there is no evidence.

9 MR. HARBISON: I disagree, Justice O'Connor.
10 He has met his burden of production. I agree that at a
11 contempt hearing the alleged contemtor has to tender
12 the issue, the issue being inability. He does that by
13 saying "I don't have the records."

14 Now, that -- if that's the only evidence --

15 QUESTION: He wouldn't let himself be cross
16 examined on that.

17 QUESTION: So that evidence goes out --

18 QUESTION: So that evidence goes out --

19 QUESTION: -- Front, and there's nothing.

20 MR. HARBISON: No. I think you missed the
21 point of Curcio and McPhaul. Once he says "I don't have
22 them," just like Curcio -- Curcio admitted they existed
23 and said "I don't have them." And the Court -- this
24 Court held he couldn't cross examine him as to
25 whereabouts.

1 QUESTION: Well, I know, but they -- they --
2 they held him -- want to hold him in criminal contempt
3 for failing to testify any farther. They did -- they
4 carefully set aside the question about production.

5 QUESTION: Right.

6 MR. HARBISON: Well, that -- that was answered
7 in O'Henry. O'Henry is a well-reasoned opinion of
8 Curcio and McPhaul.

9 QUESTION: Is O'Henry a case from this Court?

10 MR. HARBISON: No, it is not. It is, I
11 believe, a Fifth Circuit. But it's a well-reasoned
12 opinion that takes into account Curcio and McPhaul just
13 as Meeks, which is pending before this Court, and as
14 does Rylander.

15 It was established long ago in Austin Bagley
16 Corporation by Judge Learned Hand that a corporate
17 custodian has no personal Fifth Amendment right not to
18 produce corporate records, but having produced those, he
19 can give unprivileged testimony to identify them. He
20 makes explicit that which is implicit in their
21 production.

22 Curcio and then O'Henry after it takes that
23 rationale and says when a corporate custodian produces
24 the record and says -- when he doesn't produce the
25 records, his burden requires him to take the stand,

1 testify under oath, as Mr. Rylander did here, "I do not
2 have them." Then under the rationale of Curcio, you
3 can't cross examine him any more because you're going to
4 violate his Fifth Amendment right. That's --

5 QUESTION: Even the question "Did you ever
6 have them?" Can't ask him that?

7 MR. HARBISON: That's one of the questions in
8 Curcio, one of the 15 written questions: "Did you ever
9 have them?" and "When did they become unavailable to
10 you?"

11 QUESTION: The setting is different in
12 Curcio. Take my hypothetical, the secretary of General
13 Motors, and let's enlarge a little bit. The evidence
14 shows that the records have been kept by him up to the
15 last five meetings, the most recent five meetings, his
16 name on them, no question about it. Then he's asked
17 about the last five, and he just simply says Fifth
18 Amendment.

19 Is that the end of it? Can no inquiry be made
20 thereafter?

21 MR. HARBISON: No. Because in your
22 hypothetical, Your Honor, somebody has shown that those
23 records existed at one time, and in all the cases the
24 Government cites, either at the summons enforcement or
25 the contempt hearing, one of those two the Government

1 carried its burden. They showed that the records
2 exist. They showed either that they existed, or like in
3 Oriole the only year that was missing was 1925, in
4 Maggio the trustee made a specific finding in the
5 turnover order that they existed, in NLRB v. Transocean
6 a Special Master was appointed and specific detailed
7 findings were made that they existed.

8 That has never happened in this case. If the
9 Government had tendered the issue of his ability either
10 at the summons enforcement or at the trial and given
11 some evidence, any kind, one scintilla of evidence that
12 those records existed, my argument wouldn't hold up.

13 QUESTION: Does the law in -- does the law in
14 California say who is to have custody of corporate
15 records?

16 MR. HARBISON: No, it does not, and that's why
17 the Ninth Circuit held that on the --

18 QUESTION: Isn't that about the only one of
19 the 50 states, isn't it, that says that a corporation
20 doesn't have to keep records?

21 MR. HARBISON: No. A corporation does have to
22 keep records.

23 QUESTION: And whose possession are they in?

24 MR. HARBISON: There is no presumption as to
25 whose possession they are in, but it is reasonable to

1 assume that a corporate officer might possess them. But
2 that presumption is not sufficient to get a conviction
3 of contempt.

4 QUESTION: Including -- including the
5 president.

6 MR. HARBISON: Including the president.

7 QUESTION: And is it presumed under California
8 law that this president we are now talking about did at
9 one time have possession of those records?

10 MR. HARBISON: Well, apparently someone made
11 that presumption that since he might have had them in
12 1975, he still ought to have them in 1980, but there's
13 no proof.

14 QUESTION: Well, do you agree that they -- he
15 presumed to have had them in '75?

16 MR. HARBISON: No, I do not.

17 QUESTION: You presume that he violated the
18 California laws? I'm talking about your client now.

19 MR. HARBISON: No, I do not, because one of
20 the documents that the Government introduced at trial
21 was an affidavit from the Secretary of State saying that
22 the corporation they wanted the records from was defunct
23 in 1975. Therefore, they wiped out any presumption they
24 might have had with their own evidence.

25 QUESTION: Why?

1 MR. HARBISON: Because they proved that the
2 corporation was defunct; therefore, there's no
3 presumption that it was keeping any records.

4 QUESTION: If the biggest rum running, dope
5 peddling corporation in a state is caught by IRS or
6 somebody and the ring leader is subpoenaed to bring in
7 the records, if we follow this case, will his best
8 defense be to burn them up?

9 MR. HARBISON: Well, that's apparently what
10 the Solicitor General is arguing, that it will be very
11 difficult to enforce the law. But I don't think that
12 this Court should make an exception and carve out a
13 piece of the Fifth Amendment because it's going to be
14 difficult --

15 QUESTION: I said in my hypothetical case.

16 MR. HARBISON: Is it going to be difficult?

17 QUESTION: Yes?.

18 MR. HARBISON: I would need more facts. Do
19 they have the liquor? Did they confiscate it? Is the
20 only way to convict them the records? Then it would be
21 difficult. If there's some other means, then no, it
22 wouldn't be any more difficult than any other case.

23 QUESTION: But wouldn't that be the normal
24 thing for a corrupt law -- not law-abiding but
25 law-destroying organization to do would be the best way

1 would be to burn them up?

2 MR. HARBISON: If they had records --

3 QUESTION: And the lawyer would say if you
4 burn them up, I've got a good case that'll support you.

5 MR. HARBISON: Well, you'd have a better case,
6 because the Government could not --

7 QUESTION: Wouldn't this be a good one, if we
8 come out your way?

9 MR. HARBISON: I don't think it would be
10 good. It would be harder for the prosecution to prove
11 their case certainly because they -- one avenue of proof
12 is now gone. They won't have the company's records.

13 QUESTION: My point is -- I thought I made it
14 clear -- this is the only evidence they had.

15 MR. HARBISON: Well, if that's the only
16 evidence they have, then it's impossible.

17 QUESTION: That's right. So he goes free.

18 MR. HARBISON: That's true.

19 QUESTION: Mr. Harbison, I just glanced over
20 Curcio again, and it didn't involve -- the issue on
21 appeal didn't involve production at all. It involved
22 criminal contempt for failure to answer questions for
23 which the privilege against self-incrimination was
24 claimed.

25 MR. HARBISON: I agree --

1 QUESTION: The -- the Court said that the fact
2 that they were union records and not his personal
3 records didn't mean that he couldn't invoke this
4 privilege against self-incrimination if questions about
5 the union records would in fact incriminate him.

6 But I don't see how that bears on the
7 production issue here at all. Your client wasn't
8 sentenced for failure to answer a question to which he'd
9 raised the privilege. He was sentenced for failure to
10 obey the summons order.

11 MR. HARBISON: Yes, but he was sentenced for
12 that because he is unable because of the Fifth Amendment
13 to meet his burden.

14 QUESTION: He's not unable. He's unwilling.

15 MR. HARBISON: Well, see, no one knows that.
16 It's never been proved by the Government the records
17 exist. If they don't exist, it's impossible.

18 QUESTION: But at this stage the Government
19 has come forward with enough, the Government says, so
20 that your client should take the laboring oar for a
21 while, and if he refuses, he's entitled to refuse under
22 the Fifth Amendment, but he's not entitled to go
23 scott-free of the summons order.

24 MR. HARBISON: Well, therein lies the issue.
25 He has rowed the oar, I am arguing, by submitting his

1 affidavit, by appearing in front of the IRS agent
2 pursuant to the enforcement order and stating he does
3 not have them, and by taking the stand and saying he
4 cannot testify where they are. He has done enough. To
5 force him to go further forces him to give up his Fifth
6 Amendment right and incriminate himself for burning
7 those records, not keeping those records, and subjecting
8 himself to further criminal penalties.

9 QUESTION: It doesn't force him to give up
10 anything because --

11 MR. HARBISON: He's going to go to jail if he
12 doesn't. That's compulsion.

13 QUESTION: Well, he's going to go to jail
14 under one of two theories. It's really his choice.

15 MR. HARBISON: That's compulsion. That's
16 compulsion.

17 QUESTION: But a defendant -- but a defendant
18 -- counsel, in a criminal case where a defendant, for
19 instance, is charged with murder and the only people
20 present at the scene of the alleged murder were the
21 deceased and the defendant, now, if the defendant wants
22 to plead the Fifth Amendment so he can't take the stand
23 and say well, it was self-defense, then he risks going
24 to jail because he's convicted possibly of the offense
25 charged. It puts him in a tough position to choose, but

1 we've said he has to make that choice. He either gives
2 up the Fifth Amendment and testifies fully and tries to
3 get off the hook, or he pleads the Fifth and perhaps is
4 convicted.

5 Now, how is Mr. Rylander in this case in any
6 worse position than that?

7 MR. HARBISON: He's in a much worse position,
8 Your Honor, because in your hypothetical that gentlemen
9 is not compelled. He has a tactical choice to make,
10 albeit difficult. In this case he either produces the
11 records or goes to jail. There is no uncertainty. In
12 your hypothetical the man has a tactical advantage about
13 whether or not to take the stand, and he listens to the
14 prosecution's case, and if he feels it's pretty strong,
15 then tactically he's going to have to take the stand and
16 rebut it. If he doesn't, he stays off. That's like
17 McGautha or Brooks v. Tennessee or U.S. v. Jackson.

18 They're cases that compelled the violation of
19 the Fifth like this one does. It said you either
20 testify first in your defense, or you don't testify at
21 all. And the other one said if you plead guilty before
22 a judge under a specific statute, you cannot get the
23 death penalty. You must --

24 QUESTION: Mr. Harbison, suppose -- suppose
25 that -- that -- that you would agree that -- at the --

1 at the enforcement hearing the Government made a prima
2 facie showing that the records existed and that -- and
3 that you would agree to it, that that showing had been
4 made. Then what is your client's --

5 MR. HARBISON: Then I would -- I would say to
6 you, Your Honor, if you were the District Court judge
7 and we had legitimate presumption of possession because
8 somebody had shown it at the summons enforcement, which
9 wasn't done here, I would cite to you the case of Maggio.

10 Maggio specifically sets forth that inability
11 is a defense to Powell for conditions under Powell to
12 stop the order. And it's also -

13 QUESTION: So you're -- what you're really
14 saying is that the Government -- that there's no way the
15 Government can come back and meet its burden here when
16 he takes the Fifth Amendment.

17 MR. HARBISON: No.

18 QUESTION: All he has to do is say I'm sorry,
19 I just can't -- I don't have them. I can't produce
20 them. And that's the end of the case.

21 MR. HARBISON: No. There's a very good
22 factual distinction in Maggio. If they had of shown
23 possession at the summons enforcement, then you have a
24 legitimate continuing presumption at the contempt
25 hearing. Then they have made their prima facie case of

1 contempt, and it's up to him to show present inability
2 to comply. The burden would be on him.

3 QUESTION: All right. If he took the Fifth
4 Amendment then and refused to say another word and
5 produced no other evidence, he would be in trouble.

6 MR. HARBISON: Yes.

7 QUESTION: All right. So when do you -- what
8 do you say the Government has to have proved, that they
9 were in existence once?

10 MR. HARBISON: Yes. At least to get -- the
11 Government makes a very novel argument on page 21 and 25
12 of their brief. They claim that the findings of fact
13 entered by the court on October 24th, the day after
14 contempt, created a presumption, retroactive, that he
15 had the records at the summons enforcement hearing eight
16 months before on January 14th. That presumption carried
17 forward to the trial on October 8th. That's how they
18 met their burden. So what they're saying to this Court
19 is we never showed he had possession.

20 QUESTION: Well, it sounds to me like what you
21 really should argue is that -- is that the turnover
22 order was infirm in that there never was a requisite
23 showing to substantiate or to support a turnover order.

24 MR. HARBISON: If we were in a bankruptcy
25 proceeding, that would be precisely what I'm doing. But

1 in a summons enforcement, the issue of possession does
2 not arise. That's what this Court said in Powell. The
3 only possession in Powell is that the IRS doesn't have
4 them, and Mr. Rylander already beat Agent Vandenburg in
5 a prior summons enforcement by going to the Ninth
6 Circuit and showing that she did have possession. She
7 lied in her affidavit. She said I don't have
8 possession, but the IRS did.

9 QUESTION: Is it -- do you think the
10 Government -- I'll ask the other side -- but do you
11 think the Government agrees that at some point it has
12 the burden of showing existence?

13 MR. HARBISON: I think they have, Your Honor,
14 because every case they've cited for the proposition
15 that they have this continuing presumption or that there
16 was a final appeal of our order -- that is, res judicata
17 -- those cases that they cite found possession. They
18 didn't find possession.

19 QUESTION: Well, the only difference between
20 -- it sounds to me like the only difference between you
21 two then is whether the Government has made an ample
22 showing of possession.

23 MR. HARBISON: Ever.

24 QUESTION: If they have, if they have, you
25 just a while ago, I thought, indicated --

1 MR. HARBISON: I did.

2 QUESTION: -- That your client would have --
3 could not just take the Fifth and be quiet.

4 MR. HARBISON: No. That's why the Government
5 doesn't have the -- the Government wants to shift the
6 burden back to us.

7 QUESTION: So this isn't a question of the
8 Fifth Amendment or anything else. It's just a question
9 of -- it's a question of whether the Government made an
10 ample showing and satisfied its burden.

11 MR. HARBISON: Well, you're right to a certain
12 extent, but here --

13 QUESTION: Thank you.

14 (Laughter.)

15 MR. HARBISON: -- Here, after my client makes
16 his showing and the burden goes back to them, they want
17 to cross examine him to make their showing instead of
18 them going out and getting the third party or
19 introducing the extrinsic evidence. They want to
20 convict him out of his own --

21 QUESTION: Well, how can your client make a
22 showing -- that is, at a hearing where there's
23 presumably the facts are adduced by oral testimony -- if
24 he simply gets up and makes an assertion, albeit orally,
25 and refuses to be cross examined on it. I think Justice

1 O'Connor is quite right. The Government is entitled to
2 have that testimony stricken.

3 MR. HARBISON: Your -- that hypothetical is
4 akin to a Fleischman-type situation where the Government
5 did show some possession, and the person failed to say
6 anything. They didn't even say I don't -- I don't have
7 the ability.

8 QUESTION: Well, the discussion -- the
9 discussion in Fleischman was not in the context of
10 anyone having taken a witness stand and offered a
11 partial explanation. It was in the context of having
12 offered no explanation, as I read Fleischman.

13 MR. HARBISON: That's true. My client has
14 offered some explanation.

15 QUESTION: But utterly worthless so far as
16 cross examination is concerned.

17 QUESTION: Well, it may be -- and it may be
18 worthless, but what if you said well, yes, it's
19 worthless, but nevertheless before my client can be held
20 in contempt for failing to produce, there must be -- the
21 Government must have shown somewhere in this proceeding
22 that the -- that the records existed.

23 MR. HARBISON: That's precisely my argument.
24 And until they do, he's got the Fifth Amendment.

25 QUESTION: Which is a -- it's, a) a question

1 of law, and it's also a question of fact: is there some
2 kind of a showing in the record?

3 MR. HARBISON: Correct.

4 QUESTION: I'm not sure your responses now are
5 consistent with your responses to me on my
6 hypothetical. When I hypothesized the secretary of
7 General Motors and the Government showing that he had
8 traditionally kept these records and -- up to a point,
9 put his signature on them, all this established so that
10 their existence and his testimony was established, but
11 then they asked him a question and he says he takes the
12 Fifth Amendment, and you say that's the end of it. They
13 can't ask him when he last saw them, if he knows where
14 they are, or if he knows who has them in custody.

15 MR. HARBISON: No. I think we jibe, Mr. Chief
16 Justice, because in your hypothetical you take it as a
17 given that somebody has proved possession.

18 QUESTION: Well, that is given.

19 MR. HARBISON: No, it's not given in this case.

20 QUESTION: In my -- I'm talking about my
21 hypothetical. But you said even the secretary of
22 General Motors may just assert the Fifth Amendment, and
23 that's the end of it. There can't be any pursuit or
24 cross examination beyond that; that that's an absolute.

25 MR. HARBISON: Then I would retract that

1 answer and say to your hypothetical once there has been
2 proven possession, the Fifth Amendment is no longer bona
3 fide. The burden is back on him, and he will -- he has
4 forfeited it because the Government has shown they
5 exist. And he has no --

6 QUESTION: They still can't make him answer.
7 It's just that he might be in --

8 MR. HARBISON: He's in contempt. He can
9 legitimately be held in contempt.

10 QUESTION: He might be in jail for not
11 producing.

12 MR. HARBISON: And he wasn't sent there
13 because he wouldn't violate his Fifth Amendment right
14 like he is in this case, because they never carried a
15 burden, either at the summons enforcement or at the
16 trial.

17 Their argument, their threefold argument
18 here: we didn't have the burden. If we did have the
19 burden, it was res judicata at the summons enforcement,
20 although the issue was never raised. And if you don't
21 like that, then when he filed the affidavit, that's not
22 competent evidence to carry his burden. And if you
23 think it is competent evidence, then he waived his
24 Fifth, and we can cross examine it and carry our burden.

25 All of their arguments are thrusting at

1 carrying their burden that the records existed, which it
2 didn't, and their arguments fail because there is no
3 proof.

4 QUESTION: Let me ask you a question, if I
5 may. I -- I detect some change in your position, too, I
6 think. Assume that he proved that the records were in
7 existence and in the custody of your client at the date
8 he was supposed to respond to the subpoena.

9 MR. HARBISON: The summons enforcement hearing.

10 QUESTION: The summons -- no, the General
11 Motors example. And then at the contempt hearing, in
12 civil contempt, not criminal contempt -- I understand
13 he's been held in criminal contempt, but that's not
14 before us. At the civil contempt hearing he gets on the
15 witness stand and says yes, it's true I had the
16 documents then. I am now, however, unable to comply.
17 They are no longer in existence, something of that --
18 and he does not explain why, and he pleads the Fifth as
19 to the explanation of why.

20 Can he be held in civil contempt, in your
21 opinion?

22 MR. HARBISON: Absolutely.

23 QUESTION: You think he can be held in civil
24 contempt?

25 MR. HARBISON: Absolutely, because they proved

1 -- they have a legitimate presumption that the records
2 exist, and he has not rebutted it. He can still take
3 the Fifth. In my case my client has taken the Fifth,
4 and there never was a continuing presumption.

5 QUESTION: Well, I understand that, but you
6 think that your --

7 MR. HARBISON: And there's no proof at the
8 contempt hearing that they ever existed.

9 QUESTION: You think under Maggio that he
10 could be held in civil contempt even though he has
11 testified under oath that the documents no longer exist.

12 MR. HARBISON: Sure. His Fifth Amendment then
13 was no longer bona fide. That's why the Ninth Circuit
14 said send it back, and let's see if it's bona fide, and
15 let's see if the Government can carry some burden of
16 proof here to show that the records exist.

17 QUESTION: Is it your position that once he
18 says they're not, you can't any questions about those
19 records, is that right?

20 MR. HARBISON: My position is that if the
21 Government at the summons enforcement shows that they
22 exist, they're entitled to a continuing presumption. If
23 they don't at the contempt hearing, they must put on a
24 prima facie case that the records exist. In the light
25 of either of those, the Fifth Amendment would fall and

1 he would be held in contempt.

2 QUESTION: What do you mean when you say --
3 oh, excuse me.

4 QUESTION: But you argue -- you say they don't
5 put on prima facie evidence, right?

6 MR. HARBISON: Prima facie is --

7 QUESTION: Well, why isn't it prima facie when
8 he says "I don't have the records?" He said that.

9 MR. HARBISON: That carries his burden, yes.

10 QUESTION: Well, he said he didn't have the
11 records.

12 MR. HARBISON: Yes.

13 QUESTION: So he admitted that the records
14 existed.

15 MR. HARBISON: No. He said he didn't have the
16 records that were the subject of the subpoena. I don't
17 think that's an admission that they ever existed.

18 QUESTION: He said he didn't have them at this
19 time. Didn't he infer that he had them?

20 MR. HARBISON: No, absolutely not.

21 This case would be akin, I think, on the issue
22 of Fifth Amendment to someone who committed a murder,
23 and the district attorney does not go after that
24 individual. Either the city attorney or maybe the heir
25 of the person murdered files a civil action, and they

1 hit this guy with a summons, a subpoena, or a motion to
2 produce the gun. And he shows up and he says "I don't
3 have the gun."

4 QUESTION: Why not get a man for treason if
5 you're going to give a hypothetical. They're not
6 talking about a murder.

7 MR. HARBISON: Well, I'm trying to make a
8 demonstration of the Fifth Amendment. If he's forced to
9 produce that gun, obviously he violates his Fifth
10 Amendment because he would be convicting himself out of
11 his own mouth.

12 That is what the Government here wants to do.
13 They want to violate my client's Fifth Amendment to
14 carry their burden of proof, and my argument is that his
15 Fifth Amendment holds up as long -- as well as his
16 statement that he does not have those records until the
17 Government at either the summons enforcement or the
18 contempt hearing proves that those records exist.

19 QUESTION: I don't think you're defending
20 everything that you can find in the Court of Appeals
21 opinion then, are you? Do you think the Government, for
22 example, has to show by clear and convincing evidence
23 that the records are in Rylander's possession or under
24 his control --

25 MR. HARBISON: Yes.

1 QUESTION: -- Are in his possession or under
2 his control.

3 MR. HARBISON: Yes. At some time, either in
4 the summons --

5 QUESTION: Well, that is not -- that isn't
6 what -- that isn't what the Court of Appeals is saying.
7 And do you think their burden of proof is by clear and
8 convincing evidence?

9 MR. HARBISON: Absolutely. And that was one
10 of the reasons that this decision was overturned,
11 because the Federal judge at page 353 of the transcript
12 stated, "I find you guilty of civil contempt by the
13 weight of the evidence, and I tell you, Mr. Robinson" --
14 who was the U.S. Attorney -- "that if the burden is
15 clear and convincing, we have a serious problem here."
16 Because he didn't even believe by clear and convincing
17 evidence that Mr. Rylander was in civil contempt.

18 And the Government in all of its briefs in
19 both the criminal and civil contempt at the Ninth
20 Circuit and its brief here admit that the burden is
21 clear and convincing.

22 QUESTION: Do you think --

23 MR. HARBISON: In fact, on page 21 they say
24 it's on us by clear and convincing to prove inability.

25 QUESTION: If you think -- do you think that

1 at an enforcement proceeding in connection with one of
2 these subpoenas the issue of presumption or existence
3 comes up, that the Government then before it gets a
4 turnover order or an enforcement order must show by
5 clear and convincing evidence that they are then in
6 possession and control of the defendant?

7 MR. HARBISON: No. Because they can send the
8 summons to anybody, and under Freedom of Information it doesn't
9 even have to be the person in possession.

10 QUESTION: So they can get a turnover, or they
11 can get an order for him to produce.

12 MR. HARBISON: Right.

13 QUESTION: And then --

14 MR. HARBISON: An order enforcing the summons.

15 QUESTION: An order enforcing the summons.

16 And then if he doesn't produce them and the gentleman
17 comes in and says "I'm sorry; I don't have them," then
18 the Government has to -- has to prove by clear and
19 convincing evidence that they are in his possession and
20 under his control. That's what the Ninth Circuit said.

21 MR. HARBISON: Yes. If he says "I don't have
22 them" and takes a valid Fifth Amendment. If he doesn't
23 have a valid --

24 QUESTION: I'm not sure. I'm really not sure
25 what your position is right now.

1 MR. HARBISON: If he doesn't have --

2 QUESTION: I understand your -- I understand

3 you think the judgment was wrong.

4 MR. HARBISON: Well, if he doesn't have a

5 valid Fifth Amendment, then under Transocean he has to

6 show detail why he doesn't have.

7 CHIEF JUSTICE BURGER: Do you have anything

8 further, Mr. Wallace?

9 ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

10 ON BEHALF OF THE PETITIONERS -- REBUTTAL

11 MR. WALLACE: Yes, Mr. Chief Justice.

12 We agree that we have to show in a contempt

13 hearing by clear and convincing evidence that he failed

14 to comply with a valid order.

15 QUESTION: Exactly.

16 MR. WALLACE: But we don't agree with what the

17 Ninth Circuit said we have to show by clear and

18 convincing evidence.

19 QUESTION: Well, Mr. Wallace, don't you -- do

20 you think that at some place in this whole proceeding

21 the Government must produce at least probable cause to

22 believe that these records are in existence and that he

23 has them? Is that ever a part of your case?

24 MR. WALLACE: I wouldn't use the term

25 "probable cause." We do --

1 QUESTION: Well, all right. Then whatever it
2 is that you have --

3 MR. WALLACE: We -- it can be shown by
4 inference. Ordinarily you would expect a corporation to
5 have records and the officer to have possession or
6 control of them, as it -- there is a finding by the
7 District Court in this case on page 17A, Finding Number
8 7, "The defendant as president or other corporate
9 officer had possession or control or both of the books
10 and records of said corporation." And this is based
11 partly on this inference from the circumstances, but
12 also on page 54 of the Joint Appendix there is testimony
13 by an Internal Revenue agent who interviewed Mr.
14 Rylander in 1975, that he indicated that at that time
15 the records were in existence, and that they were at
16 Apex Bookkeeping, and an address was given by this agent
17 testifying about what Mr. Rylander said in the interview
18 at that time.

19 And I want to point out that in Curcio, unlike
20 this case, the Court pointed out quite specifically at
21 page 21 the conviction related solely to petitioner's
22 failure to answer questions as pursuant to the personal
23 subpoena ad testificandum. He had not been charged with
24 failing to produce the books and records demanded in the
25 subpoena duces tecum. He had been called to the stand

1 in Curcio pursuant to the subpoena ad testificandum, and
2 the questions were propounded to him.

3 In our situation he has been asked to produce
4 the records, and it was up to him either to produce them
5 or to submit third party testimony about why he couldn't
6 produce them or to take the stand. That's his choice of
7 voluntarily taking the stand, although he didn't
8 legitimately do it because he refused to submit to cross
9 examination.

10 But the court on pages 57 and 58 of the Joint
11 Appendix, the District Court made it quite clear that he
12 could purge himself of the contempt by -- merely by
13 indicating his willingness to comply with the court's
14 order relating to the production of the documents,
15 unlike Curcio's situation where he was called to the
16 stand, and the contempt was in failing to answer
17 questions propounded to him. Or he may forthrightly
18 come forward to this Court and in fact demonstrate that
19 he is incapable of doing so, which doesn't necessarily
20 require his own testimony.

21 QUESTION: The court's order didn't make clear
22 that third party witnesses would also suffice, did it?

23 MR. WALLACE: I -- I -- I would prefer that it
24 be more explicit, but this portion --

25 QUESTION: But it's your position that that

1 would have sufficed.

2 MR. WALLACE: That's right. And that is
3 consistent with the court's explanation on page 58 of
4 the Joint Appendix.

5 CHIEF JUSTICE BURGER: Thank you, gentlemen.

6 The case is submitted.

7 (Whereupon, at 3:03 p.m., the case in the
8 above-entitled matter was submitted.)

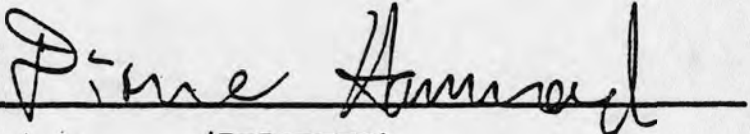
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of: UNITED STATES, ET AL., Petitioners v. RICHARD W. RYLANDER, SR., A PRESIDENT OF RYLANDER & CO., REALTORS, INC., ET AL. #81-1120

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pine Hamner", is written over a horizontal line.

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