OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-751

TITLE SECURITIES AND EXCHANGE COMMISSION, ET AL., Petitioner v. JERRY T. O'BRIEN, INC., ET AL.

PLACE Washington, D. C.

DATE April 17, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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SECURITIES AND EXCHANGE :

COMMISSION, ET AL., :

Petitioner : No. 83-751

v. :

JERRY T. O'BRIEN, INC., ET AL. :

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Washington, D.C.

Tuesday, April 17, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:12 a.m.

APPEARANCES:

KENNETH S. GELLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

WILLIAM D. SYMMES, ESQ., Spokane, Washington; on behalf of the Respondents.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Geller, you may proceed whenever you're ready.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.

ON BEHALF OF THE PETITIONERS

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

The Court of Appeals for the Ninth Circuit has held in this case that the Securities and Exchange Commission, and in effect every other government agency, must provide to the so-called targets of its nonpublic investigations notice whenever it issues a subpoena to a so-called third party.

We've sought certiorari because the Ninth Circuit's ruling is without any basis in the law, conflicts with the decisions of this Court, and threatens to impede law enforcement investigations by the SEC and other administrative agencies.

The facts that give rise to this case can be briefly stated. In September 1980, the Commission issued a formal order, authorizing its staff to begin a private investigation into possible violations of the securities laws in connection with certain mining stocks. Several of the respondents were named in this formal order.

During the course of the investigation, the Commission staff issued subpoenas to the respondents and several other people. Shortly thereafter, respondents brought this suit to enjoin the investigation on the grounds that the Commission's formal order was defective, and that the staff was proceeding with the investigation improperly.

Respondents also claimed that as the so-called targets of this investigation, they were entitled to be notified of all subpoenas issued to people other than themselves during the course of the investigation. The District Court denied all of this relief. The Court held that respondents had available to them an adequate remedy of law for challenging the propriety of the Commission's investigation as it was directed to them, simply by defending against any proceedings that might be brought against them.

And the District Court also declined to fashion what it called the novel remedy of requiring that the Commission give notice to targets whenever it issues a subpoena to a third party. The District Court held in this regard that respondent had no legally cognizable interest in preventing compliance with subpoenas issued to anyone other than themselves.

And the Court of Appeals affirmed the denial

of injunctive relief, challenging the SEC's actions directed at respondents. But, as I mentioned a moment ago, the Court of Appeals reversed as to the so-called third party notice issue. The essence of the Court of Appeal's reasoning seems to be the following two sentences from its opinion, which are reprinted at page 7a of the Appendix to the Government's petition, the last two sentences in the first paragraph on page 7a, the Ninth Circuit said, and I quote: "While respondents lack any right to maintain confidentiality of information held by third parties, they do have the right to be investigated consistently with the Powell standards." Here, the Court of Appeals is referring to this Court's decision in United States v. Powell, which simply concerned what an administrative agency must show in order to get judicial enforcement of its subpoenas.

The Court then goes on to say: "To assure that the target has the opportunity to assert this right," this so-called right to be investigated consistently with the Powell standards, "notice of third party subpoenas is necessary."

The Ninth Circuit therefore ordered the Commission to notify the targets of its investigation, a term it did not define, whenever the Commission issues a subpoena to a third party. And this is all apparently

so that the target can bring some sort of legal prcceedings, to assure that the subpoena to the third party complies with the Powell standards.

Now, one of the problems one has in analzying the Court of Appeals' decision in this case is that it is not at all clear from the Ccurt's short and somewhat cryptic opinion, exactly what source of legal authcrity the Court of Appeals thought it was relying on in imposing this unprecedented notice requirement. It seems tolerably clear that the Court of Appeals was not relying on any provision of the Constitution, and respondents seem tc concede as much. I think this Court's decision in cases such as Hannah v. Larche and Fisher v. United States, United States v. Miller, leave little doubt that the Fourth and Fifth Amendments don't give anyone a protectable interest in records held by third parties, don't give anyone the right cr the opportunity to challenge the validity of subpoenas fcr reccrds held by third parties.

It also seems fairly clear from the Court cf Appeals' opinion that it wasn't relying on any expressed provisions of the securities laws, because the statutes that govern the SEC's issuance of subpoenas don't contain any requirement that the Commission notify so-called targets of its investigations each time it

issues a subpoena to a third party. The fact is, I hope to discuss in a few moments, when Congress has wanted tc require the Commission to give notice of its subpoenas to somecne cther than a subpcena recipient, it has said so expressly in carefully crafted legislation. But there is no legislation that requires that the Commisison notify so-called targets when it issues subpoenas to third parties.

And the Ninth Circuit's sole reason for impcsing this novel third party notice requirement is apparently based on its construction of this Court's decisicn in United States against Powell. As I noted a moment ago, in reading from a portion of the Ninth Circuit's decision, the Ninth Circuit seems to have understood Powell as creating a right in so-called targets of an agency's investigation to be investigated consistently with the Powell standards. And to the extent that we can understand the Ninth Circuit's reasoning, it seems to have concluded that notices tc third parties is essential to protect this so-called right to be investigated consistently with the Powell standards, and this is so because in the Court of Appeals' view, apparently, third party recipients of subpoenas who are not targets of an agency's investigation would not have standing to suggest that

the subpoena somehow failed to satisfy the Powell standards.

Now, there are a number of obvious flaws in the Court of Appeals analysis. The principal problem, of course, is that Powell has absolutely nothing at all to do with how administrative agencies go about conducting their investigations. Powell simply holds that if an agency can't get voluntary compliance with a request for information, it has to make certain showings in order to get judicial enforcement of its subpoenas. The purpose of this rule, as the Court noted in Powell, is to protect the enforcement court's own processes, not to superintend investigations conducted by agencies.

And, contrary to the Court of Appeals' somewhat puzzling assumption, which I think to some extent underlies its whole notice requirement, it's quite clear that the recipient of an administrative subpoena would have standing to insist on compliance with the Powell standards, whether or not the recipient of the subpoena was a target. In fact, this Court's decision in LaSalle National Bank, a few years ago, was a case in which a recipient of a subpoena raised so-called Powell claims. The target wasn't even a party to that judicial enforcement proceeding.

But Powell only concerns the rights of

subpoena recipients. The decision says nothing at all about the rights of third parties, much less anything about requiring that third parties be given notice -- rather, targets be given notice when subpoenas are issued to third parties. And in this respect, the Court of Appeals' reading of Powell seems quite inconsistent with this Court's subsequent decisions in Mueller and Donaldson, because Mueller and Donaldson, in fact, unlike Powell, did involve third party subpoenas and the rights of third parties, and this Court held in both cases that the target of an investigation has not legally cognizable interest in questioning whether a subpoena issued to someone else should be judicially enforced.

QUESTION: Mr. Geller, are there any circumstances, in your view, in which the target of an investigation, assuming he had knowledge of it, could intervene in a subpoena enforcement action brought against a third party recipient?

MR. GELLER: Assuming the target had notice of it, he could --

QUESTION: Yes, yes.

MR. GELLER: Assuming the target had notice, under this Court's decision in Donaldson, he would have the opportunity to seek permissive intervention, and I

think that Donaldson makes it quite clear that the standards of Rule 24b are to apply, the normal equitable standards of determining whether permissive intervention should be granted. But Donaldson makes quite clear that a target, under no circumstances, would have a right of intervention under Rule 24a of the Federal Rules of Civil Procedure.

That was precisely, in fact, the argument that this Court rejected in Donaldson. In fact, the decision of the Ninth Circuit in this case seems flatly inconsistent with Donaldson, because in Donaldson -- Donaldson, as the Court will recall, was the target of an IRS investigation, and he sought to intervene in a then-pending judicial enforcement proceeding. But the Court noted that Donaldson had no interest in the materials that were subpoenaed, other than to try to prevent the agency from getting ahold of them so that they might not be used against him.

This Court held that that interest was not even strong enough to allow Donaldson to have a right of intervention in pending enforcement proceedings. So it seems quite bizarre that that same interest, which is the only interest that respondents have in this case, is strong enough to entitle them to notice simply the issuance of subpoenas. We don't know of any

circumstance in which potential permissive intervenors, which is all these respondents are, have a right to be given notice of the occurrence of an event -- here, the issuance of a subpoena -- that might or might not ultimately lead to judicial enforcement proceedings, in which they would, at most, have the opportunity to seek permissive intervention.

In fact, Rule 24 of the Federal Rules of Civil Procedure doesn't even require that notice be given to someone who has an absolute right to intervene in a judicial proceeding, so it seems quite peculiar that only a potential permissive intervenor would have to be given -- would have to be given notice.

QUESTION: Mr. Geller, the Powell case dealt with the Internal Revenue Code, and I know the Ninth Circuit assumed -- I guess there are some lower court cases saying it applies to SEC investigations as well.

Do you agree with that view?

MR. GELLER: To the extent that Powell standard overlap Fourth Amendment standards set out in cases like Oklahoma Press, and to a large extent I think they do, then, of course, the SEC would have to make the same showing at a subpoena enforcement proceeding.

There are, however, certain elements of the Powell test, such as the third element, that the IRS not

already have the information in its possession, which I think were simply construction of the Internal Revenue Code, and those --

QUESTION: It really purports to be mainly a construction of the statute, rather than --

MR. GELLER: That's correct. And to that extent, to the extent it is simply a construction of the statute, it would not apply to other agencies. However, as I say, some of the elements of the Powell test, such as that the subpoena be issued for a legitimate purpose and that it be relevant, seek relevant information, are, I think, simply Fourth Amendment standards. And to that extent, of course, the SEC and other agencies would have to meet it as well.

So, to sum up, there is no constitutional basis for the Court of Appeals' decision, and it didn't purport to identify one. There is no statutory basis for the Court of Appeals' decision, and it didn't purport to identify one. The Court of Appeals' decision seems to be based on a plain misreading of the Powell case in two respects: (1) that Powell grants rights to so-called targets of an investigation, and (2) that recipients of a subpoena who are not targets would somehow not have standing to challenge the subpoena on Powell grounds. Both of those assumptions are plainly

inccrrect.

And, finally, the relief awarded here, which is providing notice, seems plainly inconsistent with the decision in Donaldson, which held that targets of investigations don't even have a right of intervention in a pending judicial enforcement prcceeding. That being so, it seems inconceivable that they could have a right to greater relief, which is notice, such as the Ninth Circuit ordered here.

Now, I think it's important to emphasize that the issue presented in this case is of tremendcus concern to the SEC and other administrative agencies, not simply because the Ninth Circuit's decision is wrong -- which it is -- and not simply because it would be tremendously quite burdensome administratively to try to apply this test. It's not clear what a target is; the SEC often investigates transactions rather than individuals, and it would be quite burdensome to try to figure out who has to get notice. But what really concerns the government is that the Court of Appeals' decision, the notice requirement, will severely impair the ability of the SEC and other agencies to conduct effective law enforcement investigations.

And the reason for this are the reasons that this Ccurt has consistently explained in upholding the

need for secrecy in the Grand Jury. If targets of a Commission's investigation had to be told at the very outset the names of the people who are being served with subpoenas by the SEC, then, of course, the target would have essentially a road map of the Commission's investigation. It would increase the target's opportunity to fabricate defenses or destroy evidence, intimidate witnesses, tailor testimony, perhaps secrete assets beyond the reach of the SEC or injured investors. And, in addition, many people, especially cooperative, confidential informants, might decline to cooperate with the SEC if they knew that their names would immediately have to be given over to the targets, the so-called targets of the investigation.

And I should add that this is not a speculative or fanciful concern on the SEC's part. In the Wedbush case, which was a follow-up to this case in the Ninth Circuit, the District Court ordered the SEC to provide the targets of that investigation with the names of subpoena recipients. The SEC sought a stay from the Ninth Circuit and specifically argued -- and this is on page 28a of the Appendix to the Government's Petition -- specifically argued that some of the third party witnesses had requested confidentiality, and the disclosure of these witnesses to the target would impair

the effectiveness of the investigation.

Despite this, the Ninth Circuit summarily denied a stay in Wedbush and ordered the SEC to provide the so-called targets of that investigation, with the names of third party subpoena recipients.

Finally, providing notice would tremendously increase the opportunities for delay in conducting an investigation, and would prejudice the privacy rights of people called to testify or produce evidence in the investigation.

These consequences are important, we believe, because Congress could not possibly have intended them, at least without expressly saying so. And, as I pointed out earlier, there's no provision of the securities laws that requires this sort of notice, and in this regard, it's extremely significant that Congress has enacted legislation that does, in very limited circumstances, require the SEC and other agencies to give notice to certain types of people when subpoenas have been served on third parties.

Section 21h of the Securities Exchange Act incorporates the Right to Financial Privacy Act, which was passed by Congress in 1978. And the Right to Financial Privacy Act creates a limited exception to this rule by providing that the SEC and other agencies

have to give customers of banks notice when administrative agencies serve subpoenas on banks for the private records of these customers.

Now, I think the enactment of Section 21h and the Right to Financial Privacy Act is very instructive, for two reasons. First, it shows that Congress clearly knows how to provide for a notice requirement when it wants to do so. And the debates on Section 21h in the Right to Financial Privacy Act leave no doubt that Congress thought, when it was enacting those statutes, that there was no sort of requirement in the law previous to that point, such as the Ninth Circuit seems to have discovered in this case.

And secondly, I think the enactment of Section 21h is quite instructive, because when Congress did impose a notice requirement, it quickly surrounded that requirement with a number of protections designed to prevent the sort of harms that I was discussing a few moments ago. And, needless to say, the Ninth Circuit's ruling does not contain any of these protections, nor could it.

We think what all of this shows is that the Ninth Circuit's ruling represents nothing more than that court's notion of what constitutes sound public policy, and even if the Court of Appeals were right in that

judgment, and we doubt that it was, it was not a judgment that the Court of Appeals was entitled to make. There is no constitutional or statutory requirement that the SEC or other agencies give notice to the so-called targets of its investigations, and therefore the Court of Appeals had no power to order it.

We think what this Court said only a few weeks ago, in the Arthur Young case, is extremely relevant here. There, the Court said, this kind of policy choice, restricting agency investigative power, is best left to the legislative Branch.

If there are no further questions, I'd like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Mr. Symmes.

ORAL ARGUMENT OF WILLIAM D. SYMMES, ESQ.

ON BEHALF OF THE RESPONDENT

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

I'd like to divide my argument, with the Court's permission, into two parts. First, I would like to address the Ninth Circuit's opinion, why it's correct, why we believe it should be upheld, and secondly, respond to counsel's argument, in that order.

This Court, back in 1964, handed down the Reisman decision. The Reisman decision essentially said

four things. Firstly, it said that a target of any agency investigation has a remedy for unlawful subpoenas or for agency subpoenas which have been issued in excess of or in abuse of statutory authority. That case specifically was not limited just to the recipient of agency process. The language of that case stated that not only may the recipient intervene, but also any party who is affected by the agency process.

The Reisman decision went on to say that the remedy for this situation is the opportunity to intervene, the opportunity to intervene in the subpoena enforcement action that would occur in order to enforce the third party subpoenas. The Court went on -- I think this is very important -- to say in the Reisman case, that to preserve that remedy of intervention, the affected person may seek a restraining order to restrain the compliance of the third party witness with the outstanding subpoenas, pending hearing at the subpoena enforcement hearing. And the fourth thing -- this is very important -- the Reisman case said was that, at this subpoena enforcement hearing, the recipient or the target, the person affected by the outstanding subpoena, whether it be the target or the recipient, may challenge the subpoena or summons, the administrative summons or subpoena, on any appropriate ground, including for

improper purpose or -- I think the example they gave was violation of the attorney/client privilege.

Eleven months later -- and this is important to understand from the standpoint of how the Ninth Circuit reached its conclusion -- eleven months later, 1964, this same Court handed down the decision in Powell. And in Powell, this Court elaborated on what it meant by the appropriate grounds for challenging an abusive or excessive outstanding subpoena or administrative summons. At that time, Powell listed at least four grounds.

Now, the counsel arguing today for the SEC has conceded at least three of those grounds would be applicable to the Securities and Exchange Commission in the issuance of process. The first is, the subpoena must be issued for legitimate purpose. The second is that the information or document sought must be relevant to that purpose. And, lastly, that the agency, in the course of conducting its investigation and issuing its process, must be in compliance with its own rules.

Now, this Court reasserted or reaffirmed its position taken in both Reisman and in Powell in the LaSalle case, which counsel mentioned in his opening statement.

Now, at that point, the Ninth Circuit had

before it both the Reisman and the Powell case. And what it concluded was this -- I think the conclusion is well contained within both Reisman and Powell -- that in order for a person affected by an outstanding abusive or excessive subpoena -- that is to say, in order for a target to intervene, as Reisman said he could -- granted, it's permissive; we don't say it's absolute -- in order for such a target or affected person to not only intervene, to obtain a restraining order, and challenge the subpoena on appropriate grounds, that affected person or target must be aware of the outstanding process in which he has a protectable interest, if the subpoena seeks information that's not legitimate to the purpose of the investigation, or if it seeks information of documents which are not relevant to that purpose, or if in the conduct of investigation the agency is violating its own rules.

Therefore, the Ninth Circuit concluded that in order for the target or affected person under Reisman and Powell to intervene, to challenge, to get a restraining order, in order to do this he must have notice. Therefore --

QUESTION: Mr. Symmes, didn't Donaldson cut back on both Reisman and Powell?

MR. SYMMES: Not my reading. I think

Donaldson, Your Honor, clarified Reisman and Powell, clarified that intervention exists, not as a matter of right; it's a permissive intervention. But the fact that it's permissive intervention doesn't rule out, doesn't logically or, in my mind, persistently preclude the issuance of notice, particularly --

QUESTION: How do you respond to the Solicitor General's point that if Donaldson said that limited permissive intervention was permissible, nothing more, after Kaplan and Powell, it's a fortiori that no notice is required.

MR. SYMMES: First of all, Donaldson did not say that no notice was required. Neither Donaldson nor Reisman nor Powell ruled out notice. And the mere fact that a target or affected person under Donaldson is permissibly entitled to intervene by itself doesn't preclude notice.

QUESTION: No. But if -- I think the Solicitor General's argument is that if Donaldson only went as far as it did in allowing permissive intervention, a requirement of notice on top of permitting intervention goes even further, and that Donaldson would have had to go further as to intervention before you'd even think about notice.

MR. SYMMES: Our answer would be simply this;

that under Donaldson or Powell or Reisman, a target doesn't even have the opportunity to intervene, can't even exercise, if you'll forgive the phrase, permissive intervention unless he knows about the outstanding subpoenas, which is --

QUESTION: What follows from that?

MR. SYMMES: What follows from that is, particularly in this case, particularly how this case arose, you can see why notice is important, and what I would refer to is this.

QUESTION: Well, the fact that it's important doesn't mean it's required. That's a kind of house-that-Jack-built reasoning; that if one thing is good, surely another thing must be even better. But we don't generally decide cases that way.

MR. SYMMES: I understand that. What I'm saying is, Donaldson at least held there was permissive intervention. Permissive intervention as applied to targets in this case is a complete nullity. It's totally illusory, and I'll tell you what happened and why, and what the Ninth Circuit had in mind.

When we were at the District Court level, the Court held that the targets, O'Brien and Magnuson, had an adequate remedy at law to challenge the subpoenas issued to them, Magnuson and O'Brien. The adequate

remedy at law was found in Reisman. The adequate remedy consists of intervention and the opportunity to challenge on any recognized grounds, specifically the Powell grounds, those subpoenas.

After the Court handed down its ruling, the SEC brought no subpoena enforcement action. Instead what happened is, many, many third party subpoenas were issued; that is to say, subpoenas issued to third parties seeking, in some cases, the very same information, in other cases, to the extent that it came to our light, other or additional information which we believe were not legitimate to the purpose of the investigation or relevant; and in the process of doing so, avoided the opportunity, prevented us, precluded us, preempted us from the opportunity that Reisman said that a target or affected person would have. And that is, the opportunity to intervene and obtain judicial scrutiny of the outstanding subpoenas.

QUESTION: Mr. Symmes, can I interrupt for just a second?

MR. SYMMES: Sure.

QUESTION: How could that really preclude you? Isn't it entirely possible -- say that they served subpoenas on a broker -- that you would have an understanding with the broker, if they subpoenaed your

records, please let me know, and that the broker could tell you voluntarily, I suppose.

MR. SYMMES: First of all, in this case, there were -- at least to our knowledge -- over 60 third party subpoenas served.

QUESTION: Well, they might all call you up. I mean you might well do business only with people who are willing to give you notice if there's a subpoena like this served. Why isn't that an adequate protection for most third party relationships?

MR. SYMMES: The reason why it's not adequate protection -- and I may be begging the question, if I understand your question -- the reason why it's not adequate protection is because the third party doesn't have any incentive whatever to disclose to the target the fact that there's an outstanding subpoena --

QUESTION: If he wants to retain your business, I don't suppose he's going to be too happy with his -- too popular with his customers if he doesn't tell them about things like this.

MR. SYMMES: But not all third parties are brokers or dealers. Not all third parties are persons who are friendly to the target, and therefore would not have the incentive.

QUESTION: Well, those who are unfriendly

might well respond to an inquiry without a subpoena. And you get no notice of that.

MR. SYMMES: I agree. If the SEC, in the course of conducting an informal investigation, chooses not to issue subpoenas, it can talk to whomever it wants and, presumably, about whatever it wants, even if that information they seek is beyond the scope of the formal order of investigation which is issued by the Commission to the staff and authorizes them to proceed.

We may want to challenge that. That's not an issue before this Court, and there's no practical way to monitor that. What the Congress has done, however -- and I think this is a point that may be lost on this argument, at least so far -- Congress has specifically placed the courts between the Securities and Exchange Commission in the course of issuing subpoenas and the enforcement of the same, by not allowing those subpoenas to be self-enforcing or self-executing, and as a result, has put the courts squarely in the middle.

And what we're asking that this Court do is to affirm the Court of Appeals to the extent that they held that a logical extension of Reisman is to provide the notice necessary to allow us to intervene.

QUESTION: The notice is to give them the names of the people that they're doing business with.

MR. SYMMES: Notice is to give them the names and identities and information sought as to all --

QUESTION: The names of the people they're doing business with.

MR. SYMMES: That would be true only in part, Justice Marshall. That would be true only in part.

QUESTION: My question was, don't they have that information? Don't they know who they're doing business with? Sir?

MR. SYMMES: A target knows -- a target knows who he is doing business with, yes.

QUESTION: And he knows that the SEC is investigating him.

MR. SYMMES: He knows the SEC is investigating him. However, what he doesn't know is the subpoenas and summonses that are issued to third parties who are not business associates of the target.

QUESTION: And how much time would that take away from the investigation, to try out each one with the targets? You say you've got 60, this one. How much time would that take?

MR. SYMMES: First of all, if all the subpoenas were lawfully issued, it would take no time. Secondly, mechanically --

QUESTION: Well, if you start with that

conclusion, you don't have any problem.

MR. SYMMES: That's correct.

But secondly, the presumption is that if notice could be issued to the target at the same time as the outstanding subpoena is issued as to notice form, or in this case, a copy of the subpoena -- that's all that would be required, is a copy of the subpoena to be furnished to the target at the time that the original subpoena is issued.

QUESTION: Is that done in any other agency of government?

MR. SYMMES: Is that done in any other agency?

QUESTION: Yes.

MR. SYMMES: The argument is that it ought to be done by any agency and every agency who is similarly positioned.

QUESTION: My question was a very simple one. The answer is no, isn't it?

MR. SYMMES: The answer is, the Securities and Exchange Commission, you are correct, has not given notice for the last 30, 40, 50 years of its existence. That is correct. But that doesn't indicate that notice should not be given. The mere fact that an agency historically has not given notice as a matter of its own practice or custom would not preclude this Court from

requiring notice. In order to --

QUESTION: What other federal agency in government gives the type of notice that you want?

MR. SYMMES: Pardon me?

QUESTION: What other agency in the United States Government gives the type of infcrmation that you want?

MR. SYMMES: I'm not aware of any other governmental agency that would give the type of information that the Ninth Circuit said must be given.

QUESTION: May I ask one other question? Mr. Geller's opening argument was that -- what's the scurce of this rule of law that the Ninth Circuit has announced? What is your view cf this argument?

MR. SYMMES: We agree that there is no constitutional basis for the argument, certainly none that's been made here. I can see where there might arguably be a Fifth Amendment due process argument. It wasn't made to the trial court, it wasn't made tc the Court of Appeals, and we haven't made it here. There is no specific statutory basis for the notice requirement.

The Ninth Circuit Court of Appeals found that notice should be given as part of its reading of the decision in Reisman and as part of its --

QUESTION: Of course, that was a construction

of one of the tax provisions of the Internal Revenue Code. So in the sense that it relies on statute, that case really doesn't give it any help at all. I mean maybe the same rule should apply -- I'm not suggesting that.

MR. SYMMES: Except to the extent that lower courts have historically applied, as the Solicitor General has just mentioned, the courts have historically applied the decisions like Reisman and Powell and Donaldson, applying to the IRS -- they have traditionally applied those to the Securities and Exchange Commission. As a matter of fact, I think the Commission has agreed on several occasions in lower courts, specifically in that Pittsburgh Steel case.

QUESTION: Well, wouldn't we be accused of legislating?

MR. SYMMES: Pardon me?

QUESTION: When we don't have any constitutional backing or any legislative backing, wouldn't we be accused of legislating?

MR. SYMMES: It is the opinion of the Respondents here, and it was the opinion of the Ninth Circuit when that same argument was made to the Ninth Circuit by the Securities and Exchange Commission, that no, this Court would not be accused or guilty, if I can

use those terms, of legislating or going beyond its province as a court.

The reason for that, simply, is that there already exist statutes in both the '33 Act, in the Exchange Act of '34, requiring the courts to get involved with outstanding subpoenas issued by the Securities and Exchange Commission, or by their staff more properly, in the event that a target or a recipient, being a non-target, voluntarily refrains from complying. And under those circumstances, this would be simply a logical extension of that statute.

Now, counsel has indicated in the course of his argument a number of things which I would like to respond to. First of all is -- and perhaps this is an extension of the question which Justice Marshall has posed to me earlier -- first of all, the question is why are we entitled to notice in this case, and specifically, why isn't it that the target isn't already aware and won't be made aware from his business associates of the fact that there is an outstanding subpoena?

I can think of one reason that I wrote down in response to counsel's argument that perhaps I should have mentioned in response to Justice Marshall's argument, and that is this. Many times, the target

isn't even aware, as was true in this case, that a formal crder of investigaticn had been issued and that the Securities and Exchange Commission was investigating the target.

The second thing, I think, that I would like to mention is that -- respond to -- and that is, notice would result in impediment cr in delay in the normal investigative process which the Securities and Exchange Commission are following. I would respond by saying several things. First of all, delay to the extent ycu may call that -- and I would put it in quotes -- a certain lapse of time is already built in the statutes to the extent that if someone doesn't comply voluntarily with an cutstanding subpoena, the Commission must then in turn bring a subpoena enforcement action to the extent that there is delay.

Secondly, the decision in Reisman involved or envisioned some delay. I think the proper term would be "lapse of time" in the proper case where an affected person would move to intervene.

Next, with respect to the abuse issue, I think that the courts are well-situated -- we argued this in our brief, and I won't be redundant here -- the courts are well-situated, I think, to handle abuse through protective orders that would also handle the privacy

issue, through contempt citations, through certain types of restraints imposed by the court in any specific case.

I think the next issue that I'd like to respond to is something that was mentioned in the brief, not mentioned in oral argument by the Solicitor General. And that is that Donaldson somehow created a civil right to suppress evidence, information, or documents wrongly obtained through abusive or excessive subpoenas at the time that the Commission choose or seek to choose to enforce the case against the target. And I would just simply suggest that I don't see that. Donaldson doesn't say that. Donaldson concerned itself with a criminal case.

The Commission argues that as an alternative to the granting of notice.

Now, the next thing I'd like to point out is this. In the brief of O'Brien -- and I think it was also alluded to, to some extent, in the Wedbush brief which was filed as an amicus brief with the permission of this Court -- it is argued, and we would suggest it eminently to the Court, that although the Ninth Circuit case basically held that notice should be given in all cases, there is a lesser position that this Court could take and still grant the relief which the Respondents now seek and continue to seek, and that is, that notice

is not something you are entitled to in all cases, but notice is something that a target would be entitled to after having made a shcwing cf some evidence that there are subpoenas being issued to third parties, that there are outstanding subpoenas that we're not aware of, and that in turn some showing can be made that these subpoenas do not meet or exceed Powell standards to the extent, as in this case, our argument basically is, and we believe we've made that showing below -- certainly we've alleged it and those pleadings are deemed true before this Court, and that is this: that in the case of the legitimate purpcse requirement cf Powell, we believe we have and can make a showing that the legitimate purposes behind these subpoenas are not present. At least there's nc --

QUESTION: Mr. Symmes, that would just add another tier of judicial prcceeding, wculdn't it?

MR. SYMMES: But it's already present. That tier of judicial proceeding is already present right now, built into the statutes by Congress, both in the '33 Act and in the '34 Act. We are entitled as a target, presuming we know of the formal order investigatien, which is one big assumption that I shculd have mentioned to Justice Marshall, that you cannot make. See, the Commission is not required by its rules

to give a copy of the formal order of investigation authorizing subpoenas to the target. There are subpoenas outstanding many times before the target is not only aware of the subpoenas -- not aware of the subpoenas, but is not aware of the order.

QUESTION: I thought you were talking about a separate proceeding whereby your client could go into court and make a showing and get the court to order that it be given notice.

Now, I take it that wouldn't be the substitute for the proceeding at which, after receiving notice, you might seek to intervene in the action. So don't you agree that would be a separate judicial proceeding?

MR. SYMMES: It would be a separate judicial proceeding before the same court on the issue of notice alone, which as the Ninth Circuit mentioned, could be handled summarily by affidavits, not any necessary presence there by counsel, no live testimony.

QUESTION: But would it be ex parte?

MR. SYMMES: It would not be ex parte.

QUESTION: Well, what if the affidavits disagreed? Then you'd have testimony.

MR. SYMMES: Well, I'm not sure that we would have testimony.

QUESTION: Well, how would the District Court

resolve a disagreement if affidavit --

MR. SYMMES: The Ninth Circuit envisioned when it made this requirement of notice, the Ninth Circuit envisioned that it would be handled by affidavits, that if there were a controversy amongst the affidavits, that there could be argument. But at no time was it envisioned that there would be an evidentiary hearing. As a matter of fact, the lower courts now are following the practice of not awarding or allowing evidentiary hearings unless some substantial showing is made that there is violation of Powell standards.

QUESTION: How does a District Court resolve a situation where both party opponents submit affidavits that directly contradict one another? You say they are doing it without any testimony. How do they resolve those questions?

MR. SYMMES: They do it based on the affidavits.

QUESTION: Well, which affidavit.

MR. SYMMES: The affidavit submitted by the targe on the one hand, and the affidavit submitted by the Commission on the other hand.

QUESTION: But what if those affidavits disagree?

MR. SYMMES: What if they disagree? Then

there's argument held. In order for --

QUESTION: Do you argue before the District Court -- the lawyers argue as to which affiance should be believed? That's a rather unusual proceeding.

MR. SYMMES: The court can order an evidentiary hearing to be held if, based on the affidavits filed by the target who is moving for notice, if there is a substantial showing or at least some substantial evidence showing those affidavits that there is a violation by the SEC of the Powell standards which govern the protectable interests of the target in having investigation concerning him being conducted lawfully.

If there is some showing made, at that point the District Court could order -- and they have in the past ordered evidentiary hearings -- limited, short, evidentiary hearings.

QUESTION: Mr. Symmes?

MR. SYMMES: Yes.

QUESTION: The Powell standards are not particularly onerous, the need to prove relevance to the investigation and the other requirements. And I assume that the recipients of the subpoenas can assert meeting the Powell standards, can they not?

What tremendous advantage is to be gained by making this rather remarkable extension of the statute

to protect the target?

MR. SYMMES: First of all, the recipients don't have the incentive to challenge an excessive subpoena. For example, if the subpoena is served on the recipient, and the recipient happens to be a broker-dealer who is regulated by the Securities and Exchange Commission and whose livelihood depends on the Commission and their compliance with Commission requests, the broker-dealer has really no incentive or interest in raising the Powell standards.

Secondly, the broker-dealer or the person who receives the subpoena doesn't usually have a copy of the formal order of investigation which defines the scope of the investigation, or if they do, they're not in a position and don't usually have the time or would take the time, and have no incentive to take the time to review the subpoenas and compare them to the formal order investigation to determine whether or not the staff is conducting the investigation through issuance of process within or without the authority granted it by the Commission itself, which is done through the medium of the formal order.

And for at least those two reasons, the Powell standards cannot be and will not, as a practical matter, ever be met if we leave it to the recipient.

QUESTION: Well, they certainly can be met. Your argument is basically that they're not likely to be urged upon the court by the recipient.

MR. SYMMES: They're not likely to be urged on the court, and as a practical matter, most people who are the recipients of such subpoenas are not in a position to do so. The subpoena itself, the form itself, is so strong -- fail not at your peril, you must do this -- subject to fines -- I realize the courts haven't imposed that -- but the subpoena is so strong and so demanding and so official that even if a recipient might be inclined to do so, he has no incentive whatever based on the subpoena alone.

So for those reasons, we believe that the Powell standards could only be met by a target having the opportunity to intervene, and only by intervention can he assert those rights, and he needs notice in order to intervene. And that's our position.

And I think that what we must not forget is that this Supreme Court in Reisman said that a target, one affected by a subpoena, has a protectable interest in not having information or documents disclosed or revealed by a third party in response to a subpoena that's not lawful or issued in excess or abuse of statutory authority, or thus in violation of the Powell

standards. And if Resiman is correct, and if we do have protectable interest, then as a target we ought to be able to intervene, and we need notice to intervene -- because, as I pointed cut in this case, there were subpoenas outstanding and being responded to by third parties befcre Magnuson and C'Brien were ever even aware, were ever even aware that there was a formal order investigation or any investigation of any kind pending against them.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further?

MR. GELLER: No, Mr. Chief Justice, unless the Court has some questions.

CHIEF JUSTICE BURGER: Thank you, gentlemen. the case is submitted.

We'll hear argument next in Spaziano against Florida.

(Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.)

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:

#83-751 - SECURITIES AND EXCHANGE COMMISSION, ET AL., Petitioner v. JERRY T. O'BRIEN, INC., ET AL.

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BY Karen K. Ilseman