SUPREME COURT
OF THE UNITED STATES

WILFRIED VAN CAUWENBERGHE, :

Petitioner, :

v. : No. 87-336

ROGER BIARD :

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ROGER BIARD

Washington, D.C.

Monday, March 21, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:43 p.m.

APPEARANCES:

JOHN G. KESTER, Washington, D.C.; on behalf of the Petitioner.

THOMAS C. WALSH, St.Louis, Missouri; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(1:43 p.m.)

CHIEF JUSTICE REHNQUIST: Mr. Kester, you may proceed whenever you are ready.

ORAL ARGUMENT BY JOHN G. KESTER, ESQ.

ON BEHALF OF PETITIONER

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

This case presents two questions of appealability of collateral final decisions to the Courts of Appeals under 28 USC 1291 which is the basic statute that provides for appeal from the district courts by right.

The suit is a civil action between two Belgians. It was filed by the Respondent, a Brussels stockbroker for 20 years against the Petitioner, who was a Brussels real estate broker for 30 years. It was brought in the United States District Court for the Central District of California and Los Angeles.

The Petitioner was arrested in Switzerland at the request of the United States government while he was on a business trip to Geneva. He was then extradited to the United States pursuant to the extradition treaty of 1900 between this country and Switzerland. The charges against him were mail fraud and causing interstate transportation of a victim of fraud. And he was tried and convicted in the Central District

of California on those charges, one count of each.

The issue in the criminal case centered around what he knew, what his state of mind was during conversations that he had with Respondent, most of which took place in Belgium or Switzerland and that extended over a period of about three years. And that also included, as a jurisdictional basis for the criminal case, a three-day visit to Los Angeles during which the Respondent gave him a check for a loan to a real estate partnership.

After the conviction, Petitioner was placed on probation. As a part of a sentence of the criminal court, the court ordered him to stay in the United States for the next five years or until he made satisfactory provision for payment of $34,000 as restitution of what the court held he owed to the Respondent, plus some additional money to another Belgian.

QUESTION: Mr. Kester, is the Petitioner still in the United States and still under the probation order?

MR. KESTER: The probation order was modified subsequently. What happened was the judge said at first that he had to stay in California. It was then modified and said he could stay anyplace in the United States. The Petitioner asked the judge later to modify the conditions of probation and the judge said that if an adequate arrangement could be made to provide security for the payment of all the amounts in the criminal case, not the civil case, the judge would -- and if

the government agreed that it was satisfactory, that he could return to Belgium. And, earlier this year, this is spelled out in the papers filed in this Court in the criminal case, he entered such a contract, and the government agreed he could return to Belgium.

QUESTION: And that is where he is?

MR. KESTER: Yes.

QUESTION: On the first day that the Petitioner went, at that time, he was required to be in California, as ordered by the court to report to his probation officer in Los Angeles, as soon as he arrived at the probation office, he was handed the summons and complaint in this case. It demanded millions of dollars in travel and punitive damages for alleged violation of the U.S. civil RICOH statute and for various California laws.

The Respondent later explained that he waited until after the trial to serve Petitioner and to quote Respondent: "Because of case authority questioning the validity of serving a defendant during a compelled appearance in a judicial proceeding."

The Respondent claimed that handing the summons in California in the probation office was what created jurisdiction for the civil case based on personal service of process within that state.

The Petitioner was allowed to appear specially in the

district court. He moved to dismiss on several jurisdictional grounds, two of which were the subject of the appeal. The first ground was that he could not be called to answer in a civil suit that was based on personal service made on him while he was compelled to be in this country because of extradition. And he relied on U.S. extradition statutes, the extradition treaty with Switzerland and this Court's decision in 1886 in the United States v. Rauscher. Rauscher held that an extradited person while here in the United States is immune from being required to defend in a criminal court except against the criminal charges for which he was extradited.

QUESTION: Rauscher didn't involve appealability; did it?

MR. KESTER: Rauscher did not involve appealability. It actually came up prior to final judgment on a certificate of division between the two judges who were sitting in the Circuit Court. In fact, I don't believe at that time the criminal cases were appealable to the federal courts, if I'm not mistaken.

QUESTION: It didn't involve a civil case.

MR. KESTER: I beg your pardon?

QUESTION: It also did not involve a civil case.

MR. KESTER: That is right. It was a criminal case. And then after Rauscher, within three or four years, the question came up in the lower courts of: What do you do with

the Rauscher principle when there is a civil case and it was immediately held in the Southern District of New York in what became the leading case on the subject, In Re Reinitz, that the principle of Rauscher necessarily applied equally to a criminal prosecution or a civil case. And that has been the law up to this point. There is nothing ever until this case that held otherwise.

QUESTION: That held otherwise than there was absolute immunity?

MR. KESTER: That's right. Immunity from service of process. Immunity from having to defend a civil case.

And just to complete the status of the proceedings in the District Court, the other motion that was denied and that Petitioner appealed from was a motion to dismiss for forum non conveniens. And in support of that, he submitted affidavits showing that the courts in Brussels were open as indeed the Respondent conceded that most of the witnesses were Europeans, most of the documents were in foreign language, that Belgian business customs were involved and it didn't belong in a U.S. court and that he was -- that the Petitioner was able at all times to have been sued in Belgium if the Respondent had wanted to sue him there.

Basically, the argument was that Los Angeles was not a convenient forum for a civil case for anybody except for the Respondent to try to come under the U.S. treble damage and

punitive damage provisions of the peculiar U.S. civil RICOH law.

The District Court denied the motion without any argument and without any opinion. The Petitioner then appealed to the Court of Appeals for the Ninth Circuit. The Court of Appeals did not consider his claim of immunity or his claim of forum non conveniens, and instead it dismissed the case for lack of jurisdiction.

The issue before this Court is whether a district court order that denies an extradited person's claim of immunity from civil process and denies a documented and uncontroverted showing of forum non conveniens is an appealable collateral final decision under the doctrine of Cohen v. Beneficial Loan, Coopers & Lybrand v. Livesay, and Mitchell v. Forsyth.

With your permission, I will address the first part of my argument to the immunity claim and the second part to forum non conveniens. The forum non conveniens case, we will submit, comes within the familiar three tests of Coopers & Lybrand, Cohen and reiterated in many others.

QUESTION: When you talk about immunity, are you talking about freedom from service?

MR. KESTER: That's correct.

QUESTION: Freedom of service because of the particular circumstances surrounding his visit to this country.

You know, if he came to this country at some other time, he could have been served and there would have been no question.

MR. KESTER: Absolutely. What we are talking about, Mr. Chief Justice, is a very limited narrowly statutorily and treaty based kind of immunity that applies to a person who is brought into this country through the engines of the extradition process. And that holds that when a person comes into the jurisdiction for that purpose, his presence here cannot be used to serve him and cause him to come into court.

QUESTION: How long does that run?

MR. KESTER: It runs, according to the treaty with Switzerland, it runs basically for a month. There are cases that have had less explicit treaties. He just can't hang around forever.

QUESTION: It isn't quite the same type of thing as Mitchell v. Forsyth where the immunity was permanent.

MR. KESTER: That is correct. This immunity is not something that would last all his life, although, as a practical matter, perhaps it could.

QUESTION: He wasn't going to come back, I suppose.

MR. KESTER: I would not have advised him to come back.

QUESTION: Is this like immunity from personal jurisdiction -- is this like lack of personal jurisdiction?

MR. KESTER: No, Justice Kennedy, this is not --

QUESTION: You have to say that because lack of personal jurisdiction is not appealable.

MR. KESTER: Well, I don't think my answer surprised you, but this is not the same thing as the ordinary 14th Amendment due process immunity from lack of personal jurisdiction.

QUESTION: Why shouldn't the rule of non-appealability be the same, though? It is very close; isn't it?

MR. KESTER: No, I don't think it is because I think really what you have in this case when we are talking about the immunity is a Cohen v. Beneficial Loan but it is really a Cohen-plus situation. You meet not only the three tests of the Cohen case and Coopers & Lybrand v. Livesay, but there is something more.

I want to make it very clear what I am not arguing. I am not arguing this afternoon to try to persuade you that there ought to be an immediate appeal for every defendant who would like to win his case on a pre-trial motion. Because, obviously, if that became the law, there would be nothing left of 1291 and you would have piecemeal appeals all over. And that is true in the case of a 12(b)(2) ordinary personal jurisdiction situation.

But ordinary personal jurisdiction as this Court said in the Burger King case is not an exemption from having to

stand trial. It is a right not to have an enforceable binding judgment brought against you in a forum with which one did not have adequate contacts.

And it also, as a practice matter, it extends so broadly on across the board that it would be a tremendous inroad on the limitations on appeal --

QUESTION: Excuse me. How do we know that this is any different? Why is this something more than simply a right not to have a judgment entered against you by reason of the fact that you were here in this country by reason of compulsory operation of the treaty?

MR. KESTER: This is different, Justice Scalia, I think first of all because it has always been recognized as different. It is described in the Rauscher case where the immunity was first recognized. It is described in terms of not -- the court not having jurisdiction to bring him to trial. So, the court in Rauscher says that in this question that was certified to it and afterwards, but more importantly --

QUESTION: Well, you could say the same thing about lack of personal jurisdiction. The court has no jurisdiction to bring you to trial. Does it?

MR. KESTER: No, because in Rauscher, the court was not talking about the 14th Amendment or due process or anything like that. The court was talking about the extradition statutes of the United States and the treaty under which the

person was extradited.

What I would submit to the Court, what you can see in the cases is that the principle that allows an appeal in a situation where there is a challenge to bringing person to trial, is that you look at the source of the right. You have to analyze what the right is that is being protected.

Here you have a right protected by a specific federal statute. There is a federal policy that says you cannot do this. It is enacted into law. That was what this Court decided in Rauscher and in the civil context in Reinitz, and I submit correctly in Reinitz.

What you have is something very much like the Mercantile Bank case which was decided under 1257 which we cite in our briefs. That was an appeal from a state court and a tougher row to hoe in that respect. But, analytically, this case is like Mercantile Bank v. Langdeau.

QUESTION: Analytically, it is like lack of personal jurisdiction. I mean anybody can defined the rights so as to win this particular case: the right not to be brought to trial as opposed to the right not to have a judgment entered against you. Those are just little nuances of expression. I don't think they carry the day one way or the other.

MR. KESTER: No. I don't think they are nuances, Mr. Chief Justice, with all respect. I think what you have is a federal statute. The basis for Rauscher was a federal

statute that --

QUESTION: A federal statute that says: You shall not bring this guy to trial in a criminal case when he is here under these circumstances.

MR. KESTER: That is right. That is right. You shall not bring this guy to trial.

QUESTION: And you have personal jurisdiction statutes and constitutional provisions that say it takes a certain amount of contact in order to hail a guy into court. Well, what is the difference?

MR. KESTER: The difference, Mr. Chief Justice, is that the principle here is the same principle you had in Mitchell v. Forsyth.

QUESTION: How does it differ from the personal jurisdiction principle?

MR. KESTER: Because in the personal jurisdiction principle, you are talking about very broad general provisions under the 14th Amendment having to do with personal contact. And the right is the right that was talked about in the Burger King case.

QUESTION: No. But how do you distinguish? You say it is a different right. It is a right not to have a judgment entered against you as opposed to not being brought to trial?

MR. KESTER: That's right.

QUESTION: I just don't think those are of really

controlling significance.

MR. KESTER: I think that you have to look at the basis, as you are suggesting, the basis on which it is claimed and say: Would bringing the person to trial seriously subvert the policy of the very protection which he is invoking. And if you conclude that the only way to vindicate the policy of the legal provision, the statute or treaty on which he is relying is to provide an appeal at that point --

QUESTION: But how about the policy that protects someone from being hailed into court where there are insufficient contacts?

MR. KESTER: It is not that strong a policy, I would have to say.

QUESTION: How do you know?

MR. KESTER: I don't know. All I can say on that is to cite the Rauscher case, the Reinitz case and the specific provisions. The difference, Mr. Chief Justice, is that you are not dealing here with just general provisions that apply to everybody. This is a statute that is set up for particular --

QUESTION: But why should that make it lean in your favor, the fact that it is not a general provision that applies to everybody? If it is such a good idea, why don't we -- why shouldn't we extend it across the board?

MR. KESTER: We are only talking about people who are present in this country as a result of extradition. It is a

narrowly defined class of people. As Justice Brennan's dissent in Mitchell says, "a self-limiting class." Limited by the statute. And if there is not a right to protect from being called into a foreign court when you are brought here by the purposes of extradition, the whole extradition process is subverted. That is basically what this Court said in Rauscher.

QUESTION: Mr. Kester, how broad is this rule of specialty do you think? Suppose that your client was here under extradition and convicted as he was here and placed on probation as he was here, and while on probation had an auto accident and his negligence caused damage to somebody else, do you think he is immune so to speak from suit for that auto accident?

MR. KESTER: No. No, I don't. And that is clear. If he committed a crime while he was here --

QUESTION: Crime, a tort.

MR. KESTER: A tort or a crime, either one, clearly he would not be immune because there it is a subsequent situation. It is not a subversion of the extradition process, itself. People cannot be extradited, come to this country, and say, "Well, now, I have a free pass to go and commit torts." No, we are not talking about that kind of thing at all.

QUESTION: Assuming he is convicted and sentenced to prison, does that end his immunity?

MR. KESTER: The immunity would end after he was

released and had a reasonable time, let's say a month, to return home.

QUESTION: From prison?

MR. KESTER: After he was released.

QUESTION: I say he is in prison.

MR. KESTER: Yes.

QUESTION: For 80 years. Does his immunity end?

MR. KESTER: It would not end as long as he was subject to the criminal process for which the extradition had brought him to this country. No, it would not end until he had been released and had a reasonable time to return home. That is what the statute says. That is how the statute has been interpreted and the treaty.

QUESTION: May I ask you another question that is somewhat like Justice O'Connor's. Supposing during the period that your claimed immunity applies while he is still on probation, he is here, but he also owns a home here, has a business here and would have been subject to civil process even if he had been physically out of the country, would the service be good?

MR. KESTER: I think that if he would be otherwise subject to civil process, it would be good. The right protected here is the right not to have your presence in this country taken advantage of for purposes of civil process. And if there is some other way, his house is here or something, I

think that that would not come within it. You have to look at the nature of the protection.

QUESTION: But then suppose he makes the motion in the district court on the grounds he did here and the Plaintiff says, "Well, he is subject to process. He has got a house here." And they deny it and there is a factual dispute on that and they get into an argument on the facts, would the resolution of that factual dispute be appealable just like your claim would be?

MR. KESTER: I would say it could be. I mean it is hard to imagine that this sort of thing --

QUESTION: It seems to me that this issue need not always arise in the pristine clear posture in which you describe this.

MR. KESTER: I think the issue, Justice Stevens, is almost always going to arise in a very pristine posture. I mean it has taken 100 years for it to arise here.

QUESTION: But there have been so few appeals of this question. How do you explain that?

MR. KESTER: I beg your pardon?

QUESTION: There have been so few appeals on this.

MR. KESTER: I can explain it this way. First of all, people who have asserted this privilege have always won in the district court.

QUESTION: Well, then aren't you sure to win at the

end of the ball game in that case?

MR. KESTER: It has always been the other person who is appealing, if any.

QUESTION: Yes, right.

MR. KESTER: The other is that many of the earlier cases came up on habeas corpus because in those days the creditor's rights were much fiercer than they are today and they commonly commenced civil law suits with what the called the capias and they would put a capias ad respondendum in. That put the man in jail and he had to give to security before he could get out of jail. That is how a lot of these civil suits started.

He had a remedy there in habeas corpus. And, in fact, if you look towards the end of the Rauscher opinion and also at the end of the Reinitz opinion, the courts there say, "We invite people to bring habeas corpus actions in these situations to the federal courts, even though the state proceedings are not yet completed, because this ought to be resolved right away." At the end of Reinitz, the district judge says that.

And Rauscher, even this Court said that. It was a clear understanding that this ought to be resolved without a lot of proceedings in the lower courts.

QUESTION: In this case, was there also an attempt to obtain jurisdiction by attachment of his property?

MR. KESTER: There was a purported attachment of his property. There was never a claim made that that created any jurisdiction. It was never used for a jurisdictional purpose. And what happened was at the time that order was obtained, his property had already been -- which had been extradited from Switzerland with him, had already gone back out of the jurisdiction pursuant to the order of the criminal court. So, there was nothing there to attach. In fact, the order, by its very terms says, "This is an attachment of property which will be in the jurisdiction." I know that cannot create quasi-jurisdiction, if anything can anymore.

QUESTION: Mr. Kesler, do you want to say something about forum non conveniens?

MR. KESTER: Yes.

QUESTION: I thought you might.

MR. KESTER: Thank you, Justice Scalia. What I would say about forum non conveniens is this: Obviously, I recognize that the forum non conveniens issue is a closer issue, in my view, it is a closer issue than the immunity issue. You don't have the statutory provisions in support. You don't have the background of 100 years supporting it.

And there has been disagreement among respected judges on both sides on the forum non conveniens point. We would submit on that that the three provisions required in Coopers & Lybrand and Cohen are met in the forum non conveniens

situation for the reasons ably stated by Judge Wilke in his D.C. Circuit opinion on that.

QUESTION: Do you think it is an important issue?

MR. KESTER: Is this an important issue?

QUESTION: Is it an important issue in the sense that you are going to get a fair trial either way. That is the assumption of the venue statute that so long as these minimals are met, you have the basic conditions for a fair trail. So, is it really important enough whether you can be tried here or somewhere else? There is some inconvenience to the parties, but is it going to do any injustice?

MR. KESTER: I think in the real world, it does do injustice. This man couldn't afford to defend a civil case in Los Angeles, California. There was no way that he could do that even if he had wanted to. And this happens all too frequently in forum non conveniens situations.

It is an important right. This Court in Piper v. Reyno talked about the importance of the forum non conveniens situation, the right there. It is not a statutorily embodied right of the kind that you have in the immunity situation or embodied in a treaty, but it is a very important right. It is certainly important enough to litigants to the point that as the word "important" has been used in Cohen cases, it is dispositive of whether the trial is going to take place in this country. And I think that is important for purposes of federal

jurisdiction.

QUESTION: Well, that may be a problem with the venue statute. I mean there are a lot of times when it is very expensive for a civil litigant to litigate before one of the courts where venue is established, but once you have made the judgment that venue properly lies there, forum non conveniens -- it is a nice thing to make it more convenient if possible, but does it rise to the level of injustice that qualifies for that condition of importance?

MR. KESTER: The forum non conveniens, I would submit, is something more than simply venue. And I am not urging that venue motions should be appealable if they are denied. Forum non conveniens cases really don't come up all that often. There probably are -- I checked. Last year they were on about a dozen forum non conveniens cases where it had been granted and gone up to the Court of Appeals. And we can assume that there would be more. But there certainly wouldn't be any great opening of flood gates in this situation, but the rights in a forum non conveniens case are different than mere venue rights.

It boils down really as a practical matter as to whether there is going to be any effective appellate review when district courts allow cases to remain on their documents that simply shouldn't be in this country. The venue statutes don't really necessarily provide that kind of adequate

protection. Venue is very easy to come by in this country.

Forum non conveniens looks at something deeper and more involving issues of justice than venue does. And venue really is not what is at stake here.

As a technical matter, I think that the forum non conveniens issue really focuses around the second of the Coopers & Lybrand and Cohen tests. The question whether it is enmeshed in the merits and therefore should not be viewed as a final collateral decision.

Judge Wilke talked about that. The cases, even from some of the circuits which have feeling under the compulsion of Coopers held that these orders are not appealable, the cases have made clear in the Second Circuit and in the Fifth Circuit that a forum non conveniens determination does not require or involve getting deeply into the issues of the case at all. You simply have a few affidavits. The affidavits will plainly or not plainly show whether this is a convenient forum in which to hold the proceedings.

The issue is collateral. It doesn't bog the reviewing court down. And, indeed, the Fifth Circuit, which has held that under the compulsion of its reading of this Court's cases, it cannot hear forum non conveniens cases. The Fifth Circuit has practically begged the district judges in that circuit to certify such issues to the Court of Appeals so that they can be decided without having the waste of going

through an unnecessary trial.

There is only one reported case in which a forum non conveniens denial has ever lead to a reversal after trial. So, the only time that you can, as a practical matter, enforce this protection, and keep cases out of the U.S. courts that do not belong there, is to do so -- is to do so before trial or never. It is a pre-trial motion. It is always decided pre-trial. And that is when it should be decided.

With the Court's permission, I will reserve the balance of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kester.

We will hear now from you, Mr. Walsh.

ORAL ARGUMENT OF THOMAS C. WALSH, ESQ.

ON BEHALF OF RESPONDENT

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

The Petitioner in this case was indicted, tried, convicted and sentenced in the United States District Court for the Central District of California for, among other things, transporting the Respondent to Los Angeles for the purpose of defrauding him out of a million dollars. He was also convicted of the substantive offense of wire fraud. That conviction was affirmed by the Ninth Circuit and certiorari has been denied by this Court. This case that is presently before you is the civil aftermath of that criminal matter.

The legal questions presented, although as has been mentioned, they have a few nuances to them. Basically, what they asked this Court to hold is that motions based on lack of jurisdiction, motions challenging venue, when they are denied, they are immediately appealed under the collateral order doctrine. Now, he says he does not want a ruling that broad, but that is the practical effect of what he is asking you to do here. And I suggest that that type of a ruling, if it comes from this Court, has substantial implications for our justice system.

It will further open the doors to interlocutory appeals and will overburden the already overtaxed appellate courts. Now, this is really a frontal assault on the final judgment rule, in my view, Section 1291 of Title 28, which is in reality the cornerstone of appellate jurisdiction.

The final judgment rule goes back to the first Judiciary Act and has a number of salutary purposes. One of which is that it of course prevents repetitive piecemeal appeals of what is in essence a single lawsuit. It allows review after the case so that claims of error can be put in their proper perspective to determine not only if they were in fact erroneous, but if they were prejudicially so. It recognizes the critical role of the trial judge in our system, as Justice Marshall mentioned in the Firestone case. It prevents the appellate court from looking over his shoulder at

every turn. It makes the appellate court appropriately a reviewing court and not an intervening court. And, finally and practically, it avoids appeals in a large number of cases which are either settled or eventually won by the party who was originally aggrieved. And since 80 to 90 percent of our cases are eventually settled, it is obvious how the final judgment rule helps to relieve the burden on the appellate courts.

Of course, there are exceptions to the final judgment rule some of which come from Congress, such as Section 1292(b), the Interlocutory Appeals Act, Section 1651 which is the Extraordinary Writs Act providing for mandamus, Section 1292(a)(1), injunction cases, and this Court's Rule 54(b). But, generally, the price we pay for the administration of justice in our federal system in this country is that we await the final judgment before we take our complaints about the way the proceedings were conducted to the appellate court.

Now, in 1949, in the Cohen case, of course, this Court carved out what it called a narrow exception to the finality requirement to be applied in a small class of cases. And that is the Cohen v. Industrial Beneficial case. And there were three requirements set out by the Court in Cohen and reiterated by Justice Stevens in his opinion in Coopers & Lybrand just 10 years ago.

The first, in order for an interlocutory order to be appealable as a collateral order, it must first conclusively

determine the issue. Secondly, it must involve an important issue that is completely separate from the merits; and, thirdly, the order must be effectively unreviewable after final judgment.

Now, in the last decade or so since Coopers & Lybrand this Court has grappled with the collateral order doctrine on a number of occasions and has consistently said that it should be applied with the utmost strictness and the exception should be narrowly construed. And, thus, cases such as Coopers & Lybrand and Firestone, United States v. MacDonald, and Flanagan, and Richardson-Merrell, in addition to Justice Powell's opinion in Stringfellow and the opinion in Hollywood Motor Car Company of all refuse to expand the collateral order doctrine. And when read against the context of Abney, which involved double jeopardy, and Mitchell and Nixon, which involved immunity, the rule that comes out of this whole series of cases is that as far as item 3 of the Cohen formulation is concerned, namely, effective unreviewability, what that really means is that what is at stake in order to justify a collateral order appeal must be indeed the right not to be tried. Any other right, the Court has held, can be vindicated after final judgment.

Now, let me turn to the forum non conveniens motion here against that background. Forum non conveniens as has been mentioned is a venue-based objection. We believe that it fails the collateral order doctrine because it does not pass either

the second or the third test of the Cohen or Coopers & Lybrand criteria.

In Gulf Oil v. Gilbert and Piper v. Reyno, this Court set up the elements of a forum non conveniens termination, particularly as regards the private factors to be considered. The Court in weighing the forum non conveniens motion must look at the access to sources of proof and the availability of witnesses and must also make some practical determinations about the problems associated with the case that might make the trial easy, convenient, and expeditious.

Now, in a forum non conveniens setting, we suggest that this kind of analysis, necessarily, requires the Court to delve into the merits of the case. And, therefore, we believe that the issue of forum non conveniens is not completely separate from the merits within the meaning of the Cohen doctrine. It is in effect a discretionary ruling by the trial court based on speculation at the outset of a case as to whether the forum will indeed be inconvenient and if inconvenient, whether it will be prejudicially so.

And I guess it is not surprising that six of the seven circuits that have ruled on the precise issue that is before you today have held that forum non conveniens does not meet the collateral order requirements because it is, among other things, not completely separate from the merits.

Now, counsel has referred to the fact that there is

split in the circuits. The only circuit that has gone the other way is the Fourth Circuit and it did so without any elaboration of its reasoning, whatsoever, in a footnote to an opinion after it had decided the merits. And all the court said was, "We find that the Cohen criteria have been met."

The other circuits have engaged in a fairly elaborate analysis of the issue and have determined not only, for the most part, that forum non conveniens does not meet the second criterion of Coopers and Cohen, but that it does not meet the third, either.

Now, as regards the third Cohen element and forum non conveniens, there really isn't any reason why this issue is not reviewable at the end of the case like any other venue motion. From his brief and from his argument here today, I gather that counsel's strongest point on that issue is that it doesn't very often result in reversal after final judgment.

Well, this Court has been approached with that argument before in Stringfellow and Firestone and Richardson-Merrell, and has said, "That may well be, but that is true of a lot of pre-trial orders and that goes more to the difficulty of showing prejudicial error after final judgment than to the question of whether the order ought to be appealable before trial."

It also raises the question in my mind that if that is true, is forum non conveniens objection that important?

Because if it never results in reversal, how important can it be? And, indeed, in spite of his empirical study which he has in his brief, it is recognized that the Fifth Circuit very recently in the Gonzales did, in fact, reverse a final judgment based on forum non conveniens. So, obviously, forum non conveniens does not involve the right not to be tried. And, therefore, it fails the third Cohen element as well.

With regard to what has been labeled "immunity" by the Petitioner, which really results from his extradition status in this country, obviously, the label "immunity" is appended to that status in order to avail himself of the holding of Nixon and Mitchell which dealt with true immunity. That is the right not to undergo trial. But this is not of that kind, obviously. This is in effect a claim of defective service or a claim of lack of personal jurisdiction.

Whether it is really immunity or not immunity isn't the issue, I don't think. The issue is whether it passes the Cohen land Coopers & Lybrand tests. And, again, we suggest that it does not for several reasons. First of all, I question again whether this is the kind of important right that Cohen was designed to make collaterally appealable.

That doesn't just mean important to Mr. Van Cauwenberghe. That means according to the commentators that the issue must be settled by this appeal not just for the Petitioner, but for many others similarly situated.

QUESTION: Well, Mr. Walsh, do you think it has in this sense perhaps some international implications? I would think that another country concerned about extradition matters might be quite concerned if that issue could not be resolved on a timely basis in a case. I wonder if there aren't broader implications.

MR. WALSH: Well, first of all, there isn't any indication that any country in the world has any interest in whether this particular petitioner is served with a civil summons while he is in this country. Now, he has stated the source of this right to be statutes, treaties, et cetera.

Well, I suggest that you can search that statute, you can search those treaties, and it is not there. He also says that it derives from some old cases: Rauscher from this Court over 100 years ago and a case from the Southern District of New York. But it is not there, either.

QUESTION: Well, I guess you have two points. One, you say the rule of specialty just doesn't cover it.

MR. WALSH: Correct.

QUESTION: And then, secondly, is the appealability question. I guess my question assumed that the rule might cover it.

MR. WALSH: Well, if you want to assume that, there is nothing anywhere that would indicate that Switzerland in this case or Belgium or any other country --

QUESTION: I am talking about the generality of this situation.

MR. WALSH: Yes. Whether they would have any concern about whether this right was vindicatable pre-trial or whether you had to wait until the end of the trial, I can't envision that there would be that kind of concern.

QUESTION: What about a diplomatic immunity question? A suit against a diplomat?

MR. WALSH: As to whether that would be immediately appealable?

QUESTION: Yes.

MR. WALSH: Well, if it was truly the right not to stand trial in the Nixon and Mitchell sense, then I think it would fall within the three Cohen criteria and could be immediately appealable. If it was something less than that, then I would suggest that it would have to await final judgment like other --

QUESTION: How do we know which is which? That is just not a very comforting -- you can describe both of them that way.

MR. WALSH: Well, if -- I do not know that much about diplomatic immunity, but if it means that this person is immune from arrest, cannot be arrested, cannot be tried, cannot be convicted, for this crime here, then --

QUESTION: I think that is the same thing this one

means.

MR. WALSH: This doesn't mean that at all. First of all, this is a civil matter, Your Honor. This man is not being detained at all.

QUESTION: I understand that. But I don't understand it to mean you can be tried, but the judgment is just no good. That is never how I have heard it described. To the extent it exists in both the criminal and the civil context, it is usually expressed as the fact that he is immune, he is exempt from the judicial process.

MR. WALSH: The most that he is, in this particular situation, Your Honor, and I submit is if his theory of specialty is correct, which I submit it is not; but, assuming arguendo that it is correct, all that means is that the service that we have on him at present is no good. It does not mean that we cannot sue him under the California Long Arm Statute for committing a tort in California. It does not mean that we cannot get service on him under Rule 4(e) or Rule 4(i) or under the Hague Convention.

QUESTION: You could say the same thing about diplomats, of course. There are other ways in which you can get jurisdiction over them.

MR. WALSH: But the question is: Does he have the right not to be tried. Now, this man, no way has he the right not to be tried.

QUESTION: I understand. You are right that that is the question. And I don't know where one goes about seeking an answer to it.

MR. WALSH: Well, you look at double jeopardy from Abney and you look at absolute immunity from Nixon. That involves the right not to be tried. This involves a claim that the service on me --

QUESTION: We said so.

MR. WALSH: That's correct, yes.

In any event, I would like to talk a minute about this alleged right and its origins that have been referred to by opposing counsel. First of all, the treaty with Switzerland under which this man was extradited is set forth in Appendix B to Petitioner's brief on the merits. And at page 6A, what he is protected against, assuming that this right is viable, is that he shall not be prosecuted or punished for any offense committed before the demand for extradition other than that for which the extradition is granted. Now, clearly, that speaks only in terms of criminal prosecutions.

Now, the statute that he relies on, which is also set forth in his brief, there are two of them. The first, 18 USC 3186 has nothing to do with this case. That is the Secretary of State's duties when the United States is extraditing someone to a foreign country.

The other one, 3192, requires the President, it says,

"He shall have the power to take all necessary measures for the transportation and safe keeping of such accused person."

I suggest it takes a tremendous strain to argue that that means that the President must protect this man against the service of a civil summons.

QUESTION: Well, the Rauscher case, I guess, decided it should protect him against the service of a criminal --

MR. WALSH: Of criminal, only.

QUESTION: Yes.

MR. WALSH: It was a criminal prosecution for a different crime in a situation where the Queen of England was obviously miffed about the possibility of her national being prosecuted for a different crime.

QUESTION: Now, does the individual myth in each case contribute to the appealability or not? Whether a particular foreign nation is outraged that we are not speeding this thing up?

MR. WALSH: Well, what it does is it affects whether there is a right nor not. For instance, Judge Friendly in the Second Circuit held that in the absence of a complaint by the rendering country, there is no restriction on prosecution for a separate crime.

In the Najohn case in the Ninth Circuit that we cite in our brief, this very treaty from Switzerland was used to prosecute for another crime. And the government of Switzerland

had no objection to that. So, if they had no objection to that, how could they have any objection to the service of a civil summons on this particular Belgian national?

Now, no case -- no case has ever held --

QUESTION: Your argument: There is no individual right under this treaty and that the only time a court should stay its hand is when the country, itself, objects. It confers rights only on the government, not on the individual?

MR. WALSH: Well, clearly, the right is that of the country. But the individual, if the right exists, is sort of a third party beneficiary of that right and has standing, certainly.

QUESTION: I was about to say: You can say that about every treaty. And we certainly have allowed people to sue on the basis of rights that they assertedly have by treaty.

MR. WALSH: Yes, but part of the problem in determining whether the right exists requires an examination of the elements, the merits of the case, if you will, and gets you into the kind of analysis that I think prevents the second Cohen factor from being met in that it is not completely separate from the merits.

Most of the time when you are talking about a collateral appeal, you are dealing with a recognized right. And the question is: Does it apply here?

Well, I suggest that there is a big threshold

question in this case as to whether there is a right at all. You see, the basis of specialty and the basis for the --

QUESTION: Just let me interrupt you. But if there is a right to not to be served that is clearly separate from the merits of the underlying controversy.

MR. WALSH: Well, I think it requires you to look at the allegations of the complaint, look at the criminal case that preceded it.

QUESTION: Why?

MR. WALSH: And have a determination made of whether the foreign country really cares about whether there is a right.

QUESTION: Well, in the plain language of the treaty, and the man is a third party beneficiary --

MR. WALSH: But it doesn't.

QUESTION: I know because that doesn't in terms apply to civil.

MR. WALSH: Right.

QUESTION: But if it did apply to civil, if he is a third party beneficiary of the treaty, I do not know why you have to worry about whether Switzerland cares or not.

MR. WALSH: Well, I think you do have to engage in an analysis. Maybe it is not the same kind as you do with forum non conveniens. It is a closer question as to whether this second element is met here.

But the third element, again, I don't think they can fall within the criterion.

QUESTION: Unless you say it is just a right not to be tried at all in this country.

MR. WALSH: At all? No. I don't agree that in this country it isn't --

QUESTION: Well, what if it were?

MR. WALSH: If it were?

QUESTION: I thought you said then it would be a Nixon, Abney kind of case.

MR. WALSH: If it were -- if he were immune from suit, then depending on the source of the immunity, but I think I would be willing to agree that if he were actually immune from suit in the Nixon sense, then a collateral appeal would perhaps be appropriate.

QUESTION: What is the closest case here in our Court holding that a particular order isn't appealable? What is the closest case that you could rely on?

MR. WALSH: I think that the MacDonald, Jeffrey MacDonald case which involved speedy trial delay. Now, here is a man who claimed he couldn't be tried because the government had waited too long. It was a personal right, he said, "If I am put through all this agony and grief, I have lost that right forever."

QUESTION: What about the defective service cases?

MR. WALSH: No court, to my knowledge, has ever held that defective service of process is immediately appealable.

QUESTION: Well, is there a case here that says they aren't?

MR. WALSH: Well, this Court held twenty or thirty years ago in Catlin that personal jurisdiction denials are not immediately appealable and that certainly is --

QUESTION: Isn't that the closest case here?

MR. WALSH: I think so on the jurisdictional issue. Yes, sir.

I would also like to mention that there is, there are other bases of jurisdiction here and this is why we are not talking about the right not to be tried. Because if the Court were to have sustained this motion based on his extradition status, the proper ruling would not have been to dismiss the case. The proper ruling would have been to quash the service and then we would have been allowed to try to find another basis of jurisdiction and another basis for service of process. And we would have been able to do that assuming that he didn't stay in California. I guess that is the real rub.

So, in our view, neither order that is presently before the Court is immediately appealable under the collateral order doctrine any more than any other jurisdiction or venue motion.

We think the judgment of the United States Court of

Appeals for the Ninth Circuit dismissing the appeal was correct and should be affirmed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Walsh.

Mr. Kester, you have three minutes remaining.

ORAL ARGUMENT BY JOHN G. KESTER, ESQ.

ON BEHALF OF PETITIONER - REBUTTAL

MR. KESTER: The MacDonald case is not the closest case to this. That case involved issues of prejudice and speedy trial. We are talking in the immunity here of a clean clear bright line immunity which depends on nothing outside the question of whether the man was extradited to this country or not.

QUESTION: Well, MacDonald made the same argument, that he had a clean clear case, that the speedy trial thing had been violated and should not have -- the thing should have been dismissed.

MR. KESTER: But as this Court pointed out, speedy trial depends on prejudice. There is no issue of prejudice here. This has nothing to do with the underlying merits of the suit. The suit could be about anything and it wouldn't make any difference. It was said by my friend that in the case of diplomatic immunity he recognizes that under Cohen there would be an appeal.

QUESTION: What if this gentleman had come to this country not -- he wasn't extradited, he just came here. He

certainly was subject to suit here; wasn't he? On those facts?

MR. KESTER: He is certainly subject to service of process if he comes here voluntarily. Any person who wanders into California and has a summons handed to him --

QUESTION: That isn't the same kind of immunity you have been talking about with Abney or Nixon.

MR. KESTER: I think it is very much like the immunity in Abney and Nixon in this respect, Justice White. You have to look at what is the protection that is conferred.

QUESTION: Well, if you won this case and the next day he came back here over, against your advice, he would be subject to suit; wouldn't he?

MR. KESTER: Yes. But I don't think that that really is what this is about because we know that isn't going to happen. There was a suggestion he could be served under a long arm statute. The fact is he couldn't be served under a long arm statute while he was in the United States because --

QUESTION: Well, why isn't this just a case of defective service, of failure to get personal jurisdiction?

MR. KESTER: This is a case of whether this person really can be subjected to suit in the United States because the defective service -- the service was defective because a federal statute and a federal treaty were violated in invoking that service on him.

QUESTION: Well, what if this was a suit in the

federal court and the objection is that this man just wasn't subject to being sued in a federal court in the State of New Mexico.

MR. KESTER: That is just the ordinary 14th Amendment objection. But that has to do simply --

QUESTION: Well, those protections are less important than treaty protection?

MR. KESTER: They are less specific, Mr. Chief Justice. I think that is --

QUESTION: But the claim is he is not subject to suit in New Mexico. He just shouldn't be sued in New Mexico. "You shouldn't make me stand trial here."

MR. KESTER: That is the ordinary personal jurisdiction. That is not what I am talking about.

QUESTION: Then all it means is that ordinarily, they are not appealable.

MR. KESTER: Ordinarily, they are not, but in this case we submit they are because there are considerations of international law and international policy.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kester. Your time is expired. The case is submitted.

(Whereupon, at 2:36 p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

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HEARING DATE: March 21, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the

Date: March 21, 1988

Margaret Daly

Official Reporter

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