ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
UNITED STATES,	)	
	)	No. 87-65
Petitioner	)	
v.	)	
	)	
PROVIDENCE JOURNAL COMPANY	)	
	)	
AND CHARLES M. HAUSER	)	

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DATE: January 20, 1988

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UNITED STATES,

Petitioner,

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PROVIDENCE JOURNAL COMPANY :

AND CHARLES M. HAUSER :

Washington, D.C.

Wednesday, January 20, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the Unites States at 1:46 p.m.

APPEARANCES:

ROBERT D. PARRILLO, ESQ., Associate Special Prosecutor, Providence, Rhode Island; on behalf of the Petitioner.

FLOYD ABRAMS, ESQ., New York, New York; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(1:46 p.m.)

CHIEF JUSTICE REHNQUIST: Mr. Parrillo, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT D. PARRILLO, ESQ.

ON BEHALF OF THE PETITIONER

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

The issue presented by this matter is whether the Respondents should be held in criminal contempt for publishing materials in violation of a temporary restraining order where no attempt was made for judicial relief of that order.

On November 8th, 1985, Mr. Raymond J. Patriarca brought suit against the Providence Journal Company, a Rhode Island newspaper, as well as a Rhode Island television station, WJAR-TV, the Justice Department and the FBI.

Mr. Patriarca at the same time filed an injunction motion seeking to enjoin dissemination of information which was about him, which had been obtained as a result of illegal electronic surveillance by the FBI.

That dated back to 1962 to 1965, when the FBI quite illegally entered into Mr. Patriarca's father's business, and they planted electronic bugging devices. There were tape recordings made of those conversations over those several years. Those tape recordings have since been destroyed, but

logs and memoranda regarding them have been retained.

Some years ago, back in the seventies, the Providence Journal sought to obtain those FBI materials and litigation regarding that was unsuccessful. They did not ultimately prevail in that after the matter was decided at the 1st Circuit level.

After Raymond L.S. Patriarca, that's Raymond J. Patriarca's father, when the senior Patriarca died, thereafter, the Journal renewed its attempts to obtain the FBI materials, and those renewed attempts were successful and they obtained at least some materials from the FBI regarding these illegally-obtained conversations.

Shortly after the complaint was filed, there was a temporary restraining order conference where the Chief Judge of the Rhode Island District Court, Judge Boyle, Chief Judge Boyle, had counsel gather. Counsel for the Providence Journal as well as the WJAR-TV were present in arguing that any kind of restraint would be a prior restraint and would be illegal.

The Government defendants likewise represented by the U.S. Attorney's Office.

The Judge was apparently very concerned that there were paramount 1st Amendment rights which may be or which would be impinged if you were to enter any kind of order. Therefore, he set the matter down for hearing or intended to set the matter down for hearing the next day and issue a temporary

restraining order.

QUESTION: What day of the week was this? Was this a Friday?

MR. PARRILLO: No, Your Honor. The temporary restraining order conference was on a Wednesday at about 12:30. The Judge took a recess from the case he was trying at about 12:30 on a Wednesday, they had this conference.

QUESTION: Mr. Parrillo, I guess you concede, do you not, that there was, indeed, no basis on which the Judge could properly enter a restraining order here?

MR. PARRILLO: No, Your Honor, I'm afraid I cannot concede that.

QUESTION: You don't.

MR. PARRILLO: I suggest --

QUESTION: You think it was perfectly lawful?

MR. PARRILLO: I can't say that either, Your Honor. I suggest that it's an interesting question.

QUESTION: I see. I wonder if you could offer anything to indicate to us that perhaps it was proper for the Judge to have entered it. I confess I couldn't find anything, and I wondered if you had.

MR. PARRILLO: Well, Your Honor, it's true that the 1st Amendment -- any order impinging is going to be presumptively invalid. No question about that.

But, here, Mr. Patriarca had filed a motion and an

affidavit along the lines that he would be essentially suffering a direct irreparable immediate harm to his privacy rights. He asserted a 4th Amendment interest. Perhaps that ultimately will not prevail.

QUESTION: Well, how could the Journal have been responsible for any 4th Amendment violations?

MR. PARRILLO: The Journal, in and of itself, could not. The Judge, however, was not certain about that instantaneously at that point. In fact, Your Honor, within six days, he vacated his order.

But at the time that it was issued, he was concerned with what, to him at least, seemed to be a novel issue concerning an asserted constitutional right by Mr. Patriarca, and irreparable harm would befall Mr. Patriarca, and he had just come recently, I guess, within the last few weeks from a 1st Circuit conference where this entire area had been discussed.

There was, as I say, the litigation having to do with the prior attempts by the Journal to obtain this material, and the 1st Circuit at least suggested that Congress had made it clear, as clear as possible, that invasion of privacy by illegal electronic surveillance was an insidious invasion of privacy, and that --

QUESTION: I somehow thought we took the case just assuming that the issuance of the restraining order was error,

and took it for the purpose of deciding whether the Court, nonetheless, whether it can be raised in the contempt proceedings.

MR. PARRILLO: That gets to the heart of it, Your Honor.

QUESTION: But you don't want to concede that it was unlawful?

MR. PARRILLO: I just don't know, Your Honor. I think that there's an interesting issue, and I don't think that I can concede it. But assuming for argument that it were to be conceded, then, Your Honor, I think that the Judge then made a mistake, clearly makes a mistake, issues an order which is going to be invalid on a constitutional proportion.

QUESTION: Mr. Parrillo, before you get too deep into the merits, would you say a couple of words about the motion that we have to dismiss the writ because -- well, essentially, the caption of this case is United States of America v. Providence Journal Company. It's a criminal suit for enforcement of a criminal statute, and Section 518(a) of Title 28 says that except the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits in this Court.

Now, you are not the Attorney General or the Solicitor General. You haven't been delegated any authority by them, as I understand it. You're appointed by the District

Court.

MR. PARRILLO: Correct, Your Honor.

QUESTION: Now, how can we entertain this suit in light of Section 518(a)? This is a suit by the United States, isn't it?

MR. PARRILLO: This is a suit that was originally brought entitled In the Matter of Application to Adjudge the Journal and its Editor in Contempt. The caption was changed when the matter got to this Court on our belief or understand that it's the custom at the Court anyway to have two clearly-delineated parties.

Perhaps it was a mistake to have changed the caption, but, in any event, Your Honor, you're absolutely right. It's a criminal contempt proceeding.

QUESTION: Under a criminal statute.

MR. PARRILLO: Under a criminal statute, 401, yes, Your Honor. And to answer your question, if I can try to directly, it goes back to the inherent power of the Courts to vindicate their authority by instituting contempt proceedings.

QUESTION: That can be vindicated up to the Court of Appeals level without having you come here, without the permission of the Attorney General or the Solicitor General. That vindication would exist anyway. The Courts aren't out of the play. It's just that unless the Solicitor General or the Attorney General thinks this matter is important enough to

warrant this Court's attention, as I read the statute, it does not come here.

MR. PARRILLO: Well, Your Honor, I can understand your -- that reading of the statute.

QUESTION: Well, give me another reading. What -- are you representing the United States or not?

MR. PARRILLO: Yes, Your Honor.

QUESTION: Well, the statute says that the United States will be represented here by the Solicitor General or the Attorney General.

MR. PARRILLO: I understand that, Your Honor, and I think that criminal prosecutions --

QUESTION: And they don't want this case here, apparently, or they would have brought it here themselves.

QUESTION: Perhaps we violated the law when we granted your petition for certiorari.

MR. PARRILLO: Perhaps, Your Honor. Perhaps it should be dismissed as improvidently granted.

QUESTION: And perhaps the United States shouldn't be filing a brief here as amicus?

MR. PARRILLO: That may be correct as well.

QUESTION: On your side.

QUESTION: On your side.

MR. PARRILLO: That's correct. I suggest one point is that I think perhaps have ratified our arguments and what we

have done, we -- to get back to try to answer your question, Justice Scalia, the United States, as it were, has an interest through the judiciary in this case.

I think we represent the interests of the people to vindicate the rule of law in Rhode Island, and that's -- I beg your pardon, Your Honor?

QUESTION: All of the people?

MR. PARRILLO: Yes, Your Honor. All of the people.

QUESTION: Including the Judge?

MR. PARRILLO: Well, the Judge as a citizen, but not as a party. He is not the party --

QUESTION: Once we start doing that, we are going to get into some trouble.

QUESTION: Here's my problem, Mr. Parrillo. If you say that you're not covered by the statute somehow because you're not really the United States or you're the United States in a different sense, in this class of suit, then what happens when, instead of appointing a special prosecutor as the District Court did here, the Court follows our instructions in our opinion last term and first offers the prosecution to the United States Attorney and the United States Attorney accepts the prosecution?

It would still be the same type of case, wouldn't it?

MR. PARRILLO: At that point, Your Honor, yes, it would.

QUESTION: Can the United States Attorney petition for certiorari even though the Solicitor General and the Attorney General don't want it?

MR. PARRILLO: No, he couldn't, because that would become an executive function once the Justice Department accepted it.

QUESTION: But it's the same suit; it's the very same prosecution.

MR. PARRILLO: Well, --

QUESTION: I take it that the Solicitor General doesn't believe his authorization was necessary for you to come here.

MR. PARRILLO: He does not, Your Honor. He's confirmed that.

QUESTION: Footnote 2 of his brief indicates that.

MR. PARRILLO: He does, Your Honor, and later in his memorandum regarding the motion to dismiss, he says the same thing again. It's certainly a difficult question. I appreciate that.

QUESTION: Does that answer mean that you think if anybody walks in off the street and tries to bring an appeal to this Court in a federal case, so long as the Attorney General says it's okay, it's proper for us to entertain it?

MR. PARRILLO: Well, that statute says that if the Attorney General authorizes it first and then it's all right

for that person, but for anybody off the street --

QUESTION: But he hasn't authorized you. He's just said he has no objection to your going off and doing your own thing.

MR. PARRILLO: That's correct, Your Honor.

QUESTION: So, can he say that to anybody, anybody at all can bring a matter before us simply because the Attorney General says that's okay by me, Section 518(a) isn't that important as far as I'm concerned?

MR. PARRILLO: Well, that's the position of the Solicitor General. It's his position and our position that this is a judicial function and that's why I'm here, in that we represent the people, the interests of the people to do so.

QUESTION: Would it be a judicial function if it had been given to the United States Attorney?

MR. PARRILLO: I think then, Your Honor, it would be an executive prosecution, and in this case, if the executive, after the 1st Circuit, reversed the contempt, made a prosecutorial decision not to go forward, then the executive need not go any further.

I think, however, where the executive takes no part in this case at all, the executive is not involved at all, it's representatives of the judicial branch for the public interest, then we're in a different situation.

And, Your Honor, I think that if there were a

violation of this Court's order anywhere and you submitted it to the Attorney General and the Attorney General, for whatever reason, turned you down, that under your supervisory powers, the Court could appoint a special prosecutor to appear here.

QUESTION: Assuming we rule against you, who did we send the bill to? I think that's a very realistic point.

MR. PARRILLO: Well, Your Honor, the Chief Judge authorized us to go forward and pay the expenses to bring the action.

QUESTION: But I don't think that the Chief Judge has very much jurisdiction over us.

MR. PARRILLO: No, Your Honor. Only insofar as you allow him to.

QUESTION: We might have to explain that to him. But I still say it's important for us to know who we bill.

MR. PARRILLO: Well, Your Honor, I'm here under Young, essentially. Either Young v. United States authorizes us to be here or it does not.

QUESTION: You were in the lower courts under Young. Young didn't speak to what happens in this Court. This statute only applies to the Supreme Court and a couple of other courts. It doesn't apply to the Court of Appeals and to the District Courts. So, Young didn't speak to this.

QUESTION: Mr. Parrillo, you've now had fifteen minutes of your time consumed. You have fifteen minutes

remaining. I hope when you're given an opportunity to do so, you'll address some of your remarks to the question on which this Court voted to grant certiorari.

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

What happened at this conference was critical, at the temporary restraining order conference, because the Judge indicated that he would hear the matter tomorrow, the next morning, presumably because it was of such constitutional proportions.

In response to that invitation, the Journal lawyers and the media lawyers said, no, we cannot go forward tomorrow, we need more time to prepare. In response to that, the case was put over another day. The request for postponement was granted, and then the violation occurred in the interim.

Before the violation occurred, there are several things of extreme importance that did not occur, and that is that the Journal did not go back to the trial judge to seek to vacate or to stay the order. They didn't indicate that they had so much problem with it that they had to violate it, that it was such a sense of urgency that they couldn't live with it.

They did not go to the Court of Appeals to seek to vacate it or stay it. They did not seek an emergency appeal at the Court of Appeals level, although that right is available to them in these sorts of situations. They did not seek mandamus. They did not apply, as Mr. Justice Brennan asserted, to the

judge. They did nothing, except violate.

The publication was the next day of the matters that they ought not to have published, and the basis of our argument on the merits is that courts are the only body that are empowered by the power of this country to determine cases. Private litigants are simply not authorized to do so.

The Respondents in this case seized Article III power. They made themselves the court and not just made themselves the court, but it was sort of a star chamber proceeding where they didn't even invite Mr. Patriarca. They claimed a unique status in the superiority to the judiciary and went ahead.

The basis of our being here on the merits is that we suggest that lawful review is required and that Walker v. The City of Birmingham requires that where there are facially available procedures for judicial review, you must try to take them, and if, at that point, you're denied meaningful opportunity, then that's a different story and perhaps then you can later contest the merits on a collateral attack at the contempt proceedings.

But in this case, there is no excuse or no attempt at all to proceed. The explanation perhaps may be that the Journal considered any question or any answer by any court to be beyond their belief in that they would not be beholden to any court that might restrain them.

Had they applied to the District Court and indicated to the District Court Judge that they were having this problem with the order and it was so serious to them, he might well have averted this clash and the ensuing contempt of the Court's authority.

I think the timing is important. It happened mid-day in the middle of the week. The courts were open. The 1st Circuit has said that where rights are lost due to delay, that they will entertain expedited review. As the Court commented in Walker, we cannot assume that courts would ignore constitutional rights or pleas for constitutional rights, exercise of those.

I suggest further that if the question was obvious, and Justice O'Connor perhaps think it was obvious, that -- and perhaps it is obvious, then that is exactly where the case should have begun legally, because if it's obvious and an application is made to a judge obeying the law, either the District Judge being cited some authority, which he had not been before, although he asked for it, or the Circuit, any Circuit Duty Judge being presented the question, that they would have obtained this immediate relief.

QUESTION: Mr. Parrillo, does Section 18 U.S. Code Section 401 have any bearing on the case? That section authorizes federal courts to punish disobedience of their lawful orders.

MR. PARRILLO: That's right, Your Honor. It does. That's the basis of bringing a contempt action.

QUESTION: So, do we need to look and see if this was a lawful order then?

MR. PARRILLO: It has to be a lawful order before there could be any punishment for contempt of it, yes.

QUESTION: And do you think that any temporary restraining order issued for the purpose of letting the Court determine its own jurisdiction is a lawful order?

MR. PARRILLO: Absolutely, Your Honor. In the Mine Workers case, in a variety of other cases, I guess Mine Workers is probably the best example, where the Court said that the Court has or courts have jurisdiction to determine their jurisdiction, and in that interim period of time when they're mulling it over, brief time, granted, but in that span of time, they have the authority to hold matters in status quo in order to make these determinations.

QUESTION: But, Mr. Parrillo, was this matter held in status quo for the purpose of enabling the District Judge to determine his jurisdiction?

MR. PARRILLO: Well, Your Honor, I think at the time it was presented to him, according anyway to his rescript, I think it's at page 812 in the appendix to the brief, he stated that the Journal hadn't presented any question about jurisdiction at the time.

QUESTION: I know, which would suggest to me that he didn't have any doubt about his jurisdiction.

MR. PARRILLO: He may not have.

QUESTION: So, he didn't need time to make the jurisdictional inquiry. But, nevertheless, your opponent argues in the last part of its brief that there really is no basis for federal jurisdiction anyway, and in that event, the order would fall for that independent reason.

Do you think there is federal jurisdiction?

MR. PARRILLO: Well, Your Honor, I think that there is, and perhaps Judge Boyle openly made a mistake in judgment in thinking that there was jurisdiction, if, indeed, my brother is right and there isn't, because there is enough federal question raised and presented to him which was not easy to answer, I think, at the time, to allow him at least a short period to reflect on it. Not a long period, a short period to reflect on it.

QUESTION: Yes, but I understood from my reading of it, maybe I have it wrong, is that he was reflecting on the merits rather than whether there was any jurisdiction at all.

MR. PARRILLO: He may well have been simply focusing on the merits, Your Honor, although the federal defendants did raise the jurisdictional question.

QUESTION: Did they raise it at that very first conference?

MR. PARRILLO: Yes, Your Honor.

QUESTION: They did?

MR. PARRILLO: They did. I think what I somewhat expected you to ask me about when I mentioned this holding of the status quo had to do with perhaps the status quo was not maintained any time there is a restriction of 1st Amendment rights because to stop someone from speaking even for a moment is irreparable harm.

QUESTION: Counsel, where is the judgment in this case? Is it in the record?

MR. PARRILLO: Yes, Your Honor. Unfortunately, it's not entitled Judgment, it's entitled Order of Conviction.

QUESTION: Do you have an order? Who were the parties in the order?

MR. PARRILLO: As I say, the caption was In the Matter of.

QUESTION: In the Matter of. Is there any caption in the lower court that says the United States?

MR. PARRILLO: No, Your Honor.

QUESTION: Well, who put it in there? You did?

MR. PARRILLO: I did, Your Honor. I did, Your Honor, again trying to conform -- no, Your Honor. No. I did try to proceed in accordance with the Court's customs and laws and rules.

But, Justice Stevens, in considering the idea of harm

moment to moment, so that even the two-day restraining order might be considered to be irreparable harm to 1st Amendment rights, I would suggest that those rights had perhaps been waived or that a principle of estoppel ought to apply, given the fact that the Journal's lawyers had requested a continuance.

QUESTION: I understand that insofar as you're addressing the merits, but I think that we do take a little different approach if the Court was entirely without jurisdiction of the litigation at all.

MR. PARRILLO: Well, if the Court was entirely without jurisdiction and that's so clear, then it wouldn't be a lawful order.

QUESTION: What do you think is the strongest argument supporting federal jurisdiction in the case?

MR. PARRILLO: Well, Your Honor, as has been said not only by our trial judge in this case but other judges, there is at least the ability to look over the law and think about it. I think in this case, where Title III was raised, where the Freedom of Information Act was raised and where the 4th Amendment right was raised, there was enough federal law presented to the Judge to put him on notice that he had a difficult question in front of him or potentially difficult question.

As Justice Frankfurter commented in his concurrence

in the Mine Workers case, questions of jurisdiction are peculiarly fit to determination by court as opposed to determination by private parties.

As it turns out, I gather the Freedom of Information Act does not provide for injunctions. At that time, Title III did not provide for injunctions. Perhaps the 4th Amendment does not provide any kind of remedy, but those matters, I think, have to do with the merits of the case as opposed to the jurisdiction of the case.

QUESTION: Mr. Parrillo, I'm not clear. Do you concede that if there is no colorable basis for jurisdiction, the case is at an end, that you don't have jurisdiction to determine jurisdiction when there's no colorable basis for jurisdiction?

MR. PARRILLO: Has to be a colorable basis for jurisdiction, Your Honor. There has to be at least something to latch hold of, even if the judge makes the wrong decision, as perhaps he did make in this case.

QUESTION: So, a judge is not given any time to determine whether there's a colorable basis; he has to figure that out right away?

MR. PARRILLO: Well, maybe going backwards in time, that's what you say. I tend to think in this case that there was enough federal law presented to him to make it a colorable claim.

So, I suggest to you that jurisdiction ought not to be a problem for you, that the fact that the Journal's lawyers had requested a continuance ought to essentially have given the court system, not just the District Judge, but the Court of Appeals and perhaps this Court, a couple of days within the publisher's schedule and within their own requests to figure this case out.

I would request that you seriously consider reinstating the contempt.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Parrillo.

We will hear now from you, Mr. Abrams.

ORAL ARGUMENT OF FLOYD ABRAMS, ESQ.

ON BEHALF OF THE RESPONDENT

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

I'd like to turn first briefly to the motion we have made to dismiss the writ and then to the merits of the case.

On the face of Section 518(a), I don't think that there's any question but that this is a case in which the United States is "interested". It is the party Petitioner in the case. It is the party which can take one of my clients that's been sentenced to eighteen months in jail, sentence suspended, but hardly forgotten, to jail by a United States Marshal who put him there and presumably keep him there.

The United States is interested in this case in any ordinary use of that word, at least. There's no question but that Mr. Parrillo is not the Attorney General or the Solicitor General, and not only does not have their authority but was explicitly denied that authority in a letter from Solicitor General Fried annexed to his brief filed in this Court.

Solicitor General Fried wrote in a letter of July 2, 1987, "To the extent that such authorization is necessary, however, I decline to authorize such a filing or appearance in this particular case."

And Solicitor General Fried's amicus brief points out as well that a conscious decision was made by the Solicitor General's office not to take this case over and file a petition for certiorari on behalf of the United States.

So, the only out, it seems to me, --

QUESTION: Mr. Abrams, where in the brief is the letter of the Solicitor General?

MR. ABRAMS: There is a brief. It's the very last page, Your Honor, to his amicus brief. Not on the merits, but on the motion.

QUESTION: Thank you.

MR. ABRAMS: In that letter, he urges the proposition that the Young case of this Court did not resolve the question of whether authorization of the Solicitor General was necessary and then concludes that if it is necessary, he declines to

authorize it.

So, the only out, it seems to me, Your Honor, on Section 518(a), if there is any, for the Petitioner here is if the United States doesn't mean the United States in the ordinary sense of the word. In short, if it means just the executive branch of the United States.

QUESTION: Mr. Abrams, is there anything in the legislative history of this Section 518(a) to suggest that Congress intended that language to apply to a case like this or to a case where a special prosecutor possibly prosecuting the Attorney General or the Solicitor General, that in such a case it's still up to the Solicitor General and Attorney General to decide whether review would be proper?

MR. ABRAMS: Justice Stevens, the legislative history of this statute is very -- of great long standing, but of little revelation in the sense of a direct response to your question.

Almost identical language is contained in the Judiciary Act of 1789. It has been continued through the years in one statute after another. After saying that, though, I can't answer you directly. I know of nothing in the legislative history which directly deals with that topic.

It would seem to me, Justice Stevens, that the plain reading --

QUESTION: I understand the plain language argument,

but do you think if Congress had asked itself the question, do we want the Attorney General to decide in the case in which he is interested as an individual, as opposed to the United States, is he able to control review, do you think Congress would have said yes, we still want him to do it?

MR. ABRAMS: Yes, I think Congress would have said we want one place to go out of which the position of the United States of America comes to the Supreme Court of the United States, and that to the extent that there is self-interest, there will always be self-interest by some branch of government about some course of conduct, and that the Congress, having decided to put the power in the executive branch, said that is where it should repose.

Now, an argument has been made, Justice Stevens, which is at least quasi-constitutional in nature. It's made in the Solicitor General's brief, and it is a separation of powers argument. It's based on this Court's Young decision, and it goes along the lines that, I don't think I'm being unfair to it, that Congress cannot put the power there because this is instinct in the judicial power.

I think one of the places the Court might look or think about looking there is a case not cited in our brief called In Re Grossman, a decision of the United States Supreme Court at 267 U.S., in which this Court was faced with the question of whether the President could pardon someone

convicted of contempt of court for violating a judge's order, and Chief Justice Taft, writing for this entire Court, unanimous court, held that while it was possible that a President could everyone convicted of contempt of court, and thus effectively destroy the judicial power to protect itself against total disregard, that, nonetheless, the pardon power governed and that you couldn't cut into the pardon power in the service of protecting the institution of the judiciary.

It seems to me --

QUESTION: Of course, that's a constitutional decision interpreting the power of the President rather than the statutory interpretation question of what Congress might have intended in a situation like this.

MR. ABRAMS: Absolutely, Your Honor, except insofar as the argument made against us is the separation of powers argument that Congress could not provide the executive branch with this power and it is to that that I am responding.

QUESTION: Would there be any problem here if the special prosecutor had headed the case up differently?

MR. ABRAMS: It would be just the same, Justice, but I'm not basing this on the special prosecutor using the words "United States". It is the United States.

QUESTION: Well, how was it headed up in the lower courts?

MR. ABRAMS: In the Matter of The -- I don't have it

in front of me, Your Honor, but is In the Matter of the Contempt Proceeding brought against the Providence Journal. So, it didn't say who it was that was commencing it.

QUESTION: You would be making the same argument?

MR. ABRAMS: Exactly, Your Honor, exactly, and if it had been captioned differently, obviously I'd be saying all the same things to you. It happens to come within a special clarity because counsel has chosen so well.

So, I'll say no more on that argument, Your Honor, and I will turn to the merits now.

QUESTION: Do you not -- both of you can't give us jurisdiction.

MR. ABRAMS: I'm sorry? No, sir.

QUESTION: Do you agree?

MR. ABRAMS: There is no jurisdiction and that's our argument to you, and we don't think that you can be vested with it in the face of this explicit statute. Congress, after all, has the power to cut down on the contempt jurisdiction. It did so when it passed Section 401. It did so in 1831. There's an enormous amount of congressional authority here, and while there will be areas where that will be debatable, I would urge upon you that it is not debatable where the question is who represents the United States of America.

Turning to the merits of the case, I would start first with the proposition that although my brother here does

not concede error of the trial court, he necessarily comes awfully close, and I would urge upon that beyond error, we have a case here which, in the words of Chief Justice Vinson in the United Mine Workers case, any claim to jurisdiction was frivolous and not substantial.

In that case, and in other cases, this Court has made clear that judges do not have carte blanche to enter any orders, even when counsel first come into judicial chambers and seek temporary relief.

QUESTION: Mr. Abrams, if we were to adopt that point of view, we would not be following the judgment or the reasoning of the Court of Appeals in the case, would we?

MR. ABRAMS: That's right, Your Honor. I was addressing that first. The Court of Appeals says nothing about jurisdiction. I'm simply addressing it first because there were questions and answers given as to that issue.

It seems to me that if there were ever a case before this Court in which it were clear that there was no jurisdiction, it is one in which jurisdiction was premised on two counts, one of which the Freedom of Information Act, this Court had previously held in the Chrysler Corp. v. Brown case, there was no jurisdiction, even for a private company to have a reverse Freedom of Information Act case; the other of which Title III is clear, we would urge upon you in the face of the statute that there's no private cause of action for injunctive

relief, and the third of which was really brought up by the trial judge himself at the pre-trial conference, the 4th Amendment, which is not mentioned as a claim against the Providence Journal, as a basis for jurisdiction against the Providence Journal, but which was mentioned in a memorandum of law submitted by Mr. Patriarca, not as a basis for jurisdiction.

QUESTION: Mr. Abrams, does a court always have jurisdiction at least to determine its own jurisdiction?

MR. ABRAMS: Justice O'Connor, a court has jurisdiction to decide jurisdiction, but where the claim to jurisdiction is itself frivolous and someone disobeys the order, he cannot be held liable and in contempt for having done so. We don't --

QUESTION: Well, that's a different concept. Do we get as far here as saying the trial court had jurisdiction to enter the TRO?

MR. ABRAMS: No, Your Honor. I mean, that is the first question and my answer to that question is he did not have jurisdiction to enter the TRO because the claim to jurisdiction itself was so frivolous.

QUESTION: What if the judge had recited on the face of the order that he wasn't sure if he had jurisdiction and he entered the order only to preserve the status quo until he could make that determination?

MR. ABRAMS: I would distinguish, Your Honor, between situations in which one might criticize the judge, one might well not criticize him in a situation like that, and in which what he entered was a valid order. If the claim to jurisdiction was as frivolous as I'm urging upon you, then no matter how he said it or how little he knew or because of briefing perhaps, because this, after all, a rather quickly scheduled conference, a complaint was filed Friday, the judge scheduled a conference Wednesday at lunch time. The service was made on Tuesday.

The counsel came in, the judge raised these issues, somewhat improper issues to raise at all. They're interesting and they may be important. If they're clear enough, we would urge upon you they are clearly enough, then there was no jurisdiction.

QUESTION: What if in one of the states that has capital punishment, someone is scheduled to be executed in a few hours, goes into the federal District Court and says, look, I got these claims, and the federal judge looks at him and says, geez, it certainly doesn't look like much, but I just am not absolutely sure, I'm going to enter a stay anyway, and, so, he -- the state says, well, this guy just didn't have jurisdiction, we're going to go ahead and execute the fellow anyway, it's contested later, do you think a court would be very receptive to the idea that that judge simply had no power

to enter the stay?

MR. ABRAMS: No. I certainly understand, Mr. Chief Justice, that the Court would not be, and in United States v. Shipp, I think, is an example in which this Court was not, and rightly not, sympathetic to any such claim.

Nonetheless, this Court has made clear through the years, at least as I read the UMW case, that there is at least some category of case as to which the claim to jurisdiction is so weak, so previously decided, so lacking in any viability at all, that there is no jurisdiction, so to speak, to decide jurisdiction in a binding fashion.

Suppose, for example, counsel in this case had simply come in on the Freedom of Information Act, no reference to the 4th Amendment, no reference at all to Title III, and this case, this Court had previously decided in Chrysler v. Brown, that there is no jurisdiction, the word the Court used, no jurisdiction for a reverse Freedom of Information Act, the case, it seems to me, Your Honor, that that is not only binding authority but, for purposes of the later contempt action, just the sort of authority which should lead the Court to say the alleged contemptor should not be liable for violating that order. At least that's the way I read the UMW.

Beyond jurisdiction, to the broader merits issue, which the Court of Appeals did reach, we have urged upon the Court and do urge upon the Court really two lines of argument.

In the Walker v. Birmingham case, this Court was very careful to distinguish cases involving "pure speech" from cases involving speech plus conduct.

It also indicated, I would say more than indicated, it strongly suggested that if Walker v. Birmingham had been a case in which the order was transparently invalid or had only a "frivolous pretense to validity", that the result at least might well have been different. The Court did not hold that, of course, but it certainly indicated that.

The Court of Appeals in this case said that when you put together a variety of factors, the presumptive unconstitutionality under the 1st Amendment of this prior restraint, the absence of any claim, whether one calls it jurisdiction now, the absence of any viable claim at all in support of the proposition under Title III or under the Freedom of Information Act or under the 4th Amendment, that that is the sort of order that the Court of Appeals said that could not give rise to the sort of order which -- as to which someone can be held in contempt for violating.

Now, the Court of Appeals made clear that in the future, even as to such orders, they must be tested by judicial review, and the Court of Appeals, although it said it in dictum in its own ruling, made it very clear that it expected that to be adhered to as it will be, I assume.

So, we have a situation then where based upon the

language of Walker but more the whole theme of Walker, --

QUESTION: Mr. Abrams, what do you think of the upshot of the Court of Appeals observation that you ought to at least seek appellate review? What if you seek appellate review and you're turned down? Are you then free to go ahead and publish?

MR. ABRAMS: I read the Court of Appeals opinion to mean that you can publish at your peril.

QUESTION: Then, you would be subject to the UMW ruling.

MR. ABRAMS: I would think so. I mean, I think -- let me take it in two different steps. The Court of Appeals analyzed this basically on a transparent invalidity theory rather than the pure speech theory. It took into account it was pure speech, but it treated -- it concluded it was transparently invalid.

If there were, say, an order of this Court, to take the easiest case, it would be hard to see any circumstance under which an order of this Court could, even in the most optimistic moments of counsel, be deemed transparently invalid, and, so, that would fail. I mean, there are some arguments one simply cannot make, and I think that would be such an argument.

So, to the extent one focuses on transparent invalidity or some such notion, frivolous pretense to validity, when the Court of Appeals has spoken or the Supreme Court has

spoken, I take it that that would govern.

It is only if you come to the other branch of our argument to you, which the Court of Appeals did not reach, but which six or seven state courts, highest courts, have reached, --

QUESTION: Well, but, I mean, supposing on this branch, on the Court of Appeals statement that you have to at least seek appellate relief, supposing Judge Boyle has ruled against you, you go to Judge Selia on the Court of Appeals and you present your case to him and he says, I think Judge Boyle was right, I refuse to set aside the injunction, then are you bound by the traditional rule that a valid court order is binding?

MR. ABRAMS: I have two separate answers. I think the answer to the Court of Appeals is yes, that you are bound. I think what the Court of Appeals meant to leave open is a situation where you had no decision from the Court of Appeals. After all, it was the Court of Appeals which, in its ruling, speaking about itself, said that it was left with no clear conviction that an answer could have been had.

QUESTION: You could have found a judge within that, couldn't you?

MR. ABRAMS: That's right. That's right. But I think that that's what they were speaking to, really.

So, it is our view, Your Honor, that, and this is an

extraordinary case, we have so few prior restraints in our country and fewer still situations where something like this occurs, that what the Court of Appeals is saying is that there is a small exception to the collateral bar rule. It is an exception in the area of an order which is so wholly insupportable based on already-decided case law and the like, and even in that case, they have said in the future that you must make a good faith attempt to seek to appeal.

The fact that there are and have been exceptions to the collateral bar rule is really indisputable. This has never been a rigid rule requiring immediate and total adherence to every court order.

If Mr. Hauser, the editor of the paper, had during the contempt proceeding, claimed the 5th Amendment and the Court overruled it and ordered him to testify, it's settled law in this Court that the way to test that is to claim the 5th Amendment. If he had asserted a claim that he shouldn't produce documents, if he had asserted a claim that under the 1st Amendment, confidential sources were protected, all that is settled law in this Court already, that the way to test those orders is not to abide by them.

So, it is not as if we have a principle so sweeping that any disobedience to any court order is itself a contempt or itself would prevent you from defending in a contempt case. There are exceptions. They are few. They are deliberately few

because it's so important that court orders be abided by.

I have only a final word to add on the last of our arguments.

QUESTION: Before you get to that, may I just ask you one question?

MR. ABRAMS: Yes.

QUESTION: One of the elements that your opponent stresses is the fact that at that conference, counsel for the newspaper seemed more or less acquiescent to a two-day delay, partly because the questions were novel and he might have needed time and so forth, so there was a little bit of an element of almost a consent order. It isn't. I understand that.

What if it had been, though? What if the lawyer had not understood the time pressures on his client and had said expressly, I'll stipulate to the entry of this order which enjoins us for forty-eight hours? He got back and he found out that he really pulled a boner. And then they went ahead and violated it and it was transparently true that he could not have entered such an order. Would that be enforceable in your view? It's a prior restraint.

MR. ABRAMS: If counsel quite literally stipulated to the entry of a prior restraint, and if there was jurisdiction in the court, --

QUESTION: Correct.

MR. ABRAMS: -- assuming that for the moment, I think he'd probably be bound by it. But this --

QUESTION: What if, just to take it a little step closer, what if he said, I have no objection to that order, Your Honor? The other asked for it. He said, you know, he went through it and said that certainly seems reasonable, I need time myself anyway, this is pretty close to that.

MR. ABRAMS: I really don't think it is, Justice Stevens, and this is a case in which counsel, and the record, I think, is clear on this, opposed and only opposed the entry of the prior restraint. He never acquiesced in it. The testimony of opposing counsel, which is in the record, the testimony of Mr. Patriarca's counsel is there, and he testified that there was never any agreement or any acquiescence at all in the order.

What counsel said is that it violates the 1st Amendment. Counsel then made a mistake. No question. He made a mistake when the Court -- what happened was that counsel of Patriarca, when the judge said I'll hear you tomorrow, counsel for Patriarca said, well, I have something else, but I think I can get out of it, I'll call Judge so and so and make arrangements, counsel for the newspaper then said, well, I'd like another day to prepare.

It's not a venal sin. It is simply a mistake and it is not a waiver of the 1st Amendment rights of the Journal

simply to have said that. Nor is it a situation in which there was some advantage taken of Judge Boyle. For better or worse, the order was violated that night. The night. Without regarding to the second day.

So, nothing happened as a result of that. It's not like, for example, the Moreland case of this Court where counsel sat for three months not seeking expedition out of this Court on a prior restraint that was then outstanding and then came in and demanded, so to speak, expeditious consideration from this Court and the Court treated it, so to speak, as a waiver.

That is not what happened. It is much more similar to some cases cited in our brief, one involving -- both involving CBS, one involving CBS, one involving NBC, where, in two separate cases around the country, trial courts said in substance to attorneys, turn over material that's about to be broadcast, so I can have a look at it and make a judgment about whether to enter a prior restraint, and in both those cases, counsel initially said, all right, I'll bring it tomorrow, and in both those cases, they then spoke to their clients, which also happened here, they then spoke to their clients and their clients said, what do you mean, to turn over to a judge a script of our broadcast we're going to show tomorrow and they came in the next day and they said, we're not going to turn it over.

In both cases, there was a contempt finding initially and in both cases, the Court of Appeals for the 5th Circuit and the 9th Circuit excused counsel for having said that in the heat of the ordinary desire of counsel to get along with judges.

So, Your Honor, it is really not acquiescence in the order, and I urge upon you that the testimony of counsel and Mr. Patriarca himself really demonstrates that.

The only other thing I was going to add was just a correction to one thing in my opponent's brief, which is of some moment. It's Part III of our brief, in which we deal with a due process claim, and in which we urge upon the Court that a 1st Circuit decision, called United States v. Arthur Andersen, had previously said that the way to test prior restraints on pure speech was to violate it and then argue at the later contempt hearing that the order was improperly entered.

Counsel had urged in his brief, in his reply brief, just received by us a few days ago, that we had not made the same argument at the District Court level. Our District Court brief has been lodged with this Court. At page 22, you will see the citation and brief discussion of this case. It was relied upon there, it was relied upon in the Court of Appeals.

If the Court reaches it, I would urge upon the Court that we have always relied upon it.

Thank you very much, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Abrams.

Mr. Parrillo, you have three minutes remaining.

ORAL ARGUMENT OF ROBERT D. PARRILLO, ESQ.

ON BEHALF OF PETITIONER - REBUTTAL

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

May I make just one point and not stretch your patience any longer, and that would be to draw a distinction between the cases where a party is permitted to violate an order and later challenge its validity in defense of contempt proceedings.

Those cases, the Cobbledick case, the Ryan case, and so forth, all stem from the idea that the prompt administration of justice simply does not permit appeals from such orders and because no appeals lay in those cases, then those parties are permitted to go ahead and violate against the usual rule that is urged by special prosecutor, that all orders must be obeyed.

As was indicated in the United States v. Ryan case, in footnote 4, the distinction was drawn and said that Walker was no different. Walker was totally consistent with that because in Walker, there were procedures available for review.

I simply would like to make that distinction and thank you for your patience.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Parrillo.

The case is submitted.

THE CLERK: The Honorable Court is now adjourned

until Monday next at 10:00.

(Whereupon, at 2:40 o'clock p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 87-65

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HEARING DATE: Wednesday, January 20, 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 Supreme Court of the United States.

Date: 1/20/88

Margaret Daly

Official Reporter

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