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NOTES

In re United States Catholic Conference: Considering Non-Party Rights

I. INTRODUCTION

American procedural jurisprudence has traditionally distinguished parties from non-parties in determining a particular litigant's rights in a lawsuit.¹ Most often, this distinction deprives non-parties of rights commonly given to parties because they are not sufficiently "interested" in the litigation.² However, non-party status is not always indicative of the real degree of interest involved.

For example, non-party witnesses held in civil contempt are generally given extraordinary rights of appeal.³ Paradoxically, however, the Supreme Court has held that a non-party witness cannot challenge the subject matter jurisdiction of a federal court on appeal.⁴ This strict adherence to the party/non-party distinction leads to narrow decisions which fail to consider other

1. The distinction has been made because our judicial system assumes that non-parties must become parties (adversaries) in order to participate in the system. See Weinstein, *Litigation Seeking Changes in Public Behavior and Institutions - Some Views on Participation*, 13 U.C. DAVIS L. REV. 231, 232 (1980). Some procedural rules reflect the value that "parties" should be treated differently than "non-parties." See, e.g., FED. R. CIV. P. 17 (suit must be pursued in the name of the "real party in interest"); FED. R. CIV. P. 20 (permissive joinder—the rule allows "all persons" to join the action as plaintiffs or defendants, i.e. as parties).

2. See *Blair v. United States*, 250 U.S. 273, 279 (1919). at 279. "Interested" in the traditional context appears to suggest that litigants whose names are on the pleadings are somehow more entitled to have the court hear their claims than are non-parties, even if the non-party is subpoenaed to appear before the court.

3. *International Business Machines Corp. v. United States*, 493 F.2d 112, 115 n.1 (2d Cir. 1973), cert. denied, 416 U.S. 995 (1974); *In re Manufacturers Trading Corp.*, 194 F.2d 948, 955 (6th Cir. 1952).

4. *Blair*, 250 U.S. at 279 (decided in the context of a federal grand jury investigation).

factors which are critical in determining a non-party's true interests.⁵

Within this context, the United States Court of Appeals for the Second Circuit decided *In re United States Catholic Conference*.⁶ The court considered the "interesting and apparently novel"⁷ question of whether a non-party witness, upon being found in civil contempt, can appeal the contempt order on the ground that the district court lacked subject matter jurisdiction over the underlying action. The Second Circuit, implicitly relying on the party/non-party distinction described above, held that a non-party witness cannot mount a full scale challenge to federal jurisdiction in order to attack an order holding it in civil contempt.⁸

This note analyzes *Catholic Conference* by first describing the case in section II. Section III outlines the constitutional and procedural issues involved in *Catholic Conference*, then considers a non-party witness' "interests" and the court's use of bootstrap jurisdiction.⁹ The note concludes that the Second Circuit erroneously adopted a narrow view of non-party witnesses' rights in the litigation process.

II. THE *Catholic Conference* CASE

A. Facts

Abortion Rights Mobilization, Inc., several other pro-abortion groups and various individuals (plaintiffs), filed suit against

5. See, e.g., *In re United States Catholic Conference*, 824 F.2d 156, 172-73 (2d Cir.) (Cardamone, J., dissenting) (majority decision effectively denied non-party witnesses a right to appeal a contempt order), *cert. granted*, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 484 (1987) (No. 87-416).

Some critics suggest that courts should adopt a lenient approach in their treatment of non-parties to facilitate acquisition of as much information as possible. As Judge Weinstein notes,

those persons who may be affected by a court's decision should have the right to be heard before their fate is sealed. This thesis is vital to the effective functioning of the court, since it minimizes the chance of error due to the lack either of knowledge or appreciation of the variety of interests that may be affected.

Weinstein, *supra* note 1, at 232.

6. 824 F.2d 156 (2d Cir.), *cert. granted*, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 484 (1987) (No. 87-416).

7. *Id.* at 158.

8. *Id.* at 160.

9. For a definition of bootstrap jurisdiction, see *infra* note 29 and accompanying text.

the Secretary of the Treasury the Commissioner of the Internal Revenue Service (collectively referred to as the federal defendants), the United States Catholic Conference (USCC) and the National Conference of Catholic Bishops (NCCB) (collectively referred to as USCC/NCCB).¹⁰ The plaintiffs alleged that USCC/NCCB's political activity violated section 501(c)(3) of the Internal Revenue Code,¹¹ making them ineligible for tax-exempt status.¹² The plaintiffs argued that the federal defendants made a government expenditure establishing religion in violation of the first amendment by allowing USCC/NCCB to retain their tax exempt status.¹³

USCC/NCCB moved to dismiss for failure to state a claim.¹⁴

10. Brief for Appellant at 3, *In re United States Catholic Conference*, 824 F.2d 156 (2d Cir. 1987) (No. 86-6092). Because "[t]here is no single entity called the 'Catholic Church,'" plaintiffs named the USCC and NCCB because they are the national organizations through which catholic bishops and other leaders coordinate and conduct religious and secular activities. *Id.* at 3 nn.1-3.

11. 26 U.S.C. § 501(c)(3) (1982). That section allows a tax exemption for groups organized and operated exclusively for religious . . . purposes, . . . no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in (including publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

12. *In re United States Catholic Conference*, 824 F.2d 156, 158-59 (2d Cir.), cert. granted, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 484 (1987) (No. 87-416). One count was brought against USCC/NCCB and the remaining four were brought against the federal defendants on the ground that they violated their statutory duties by failing to revoke the tax exempt status of USCC/NCCB. *Id.*

13. *Id.* at 159. The plaintiffs sought a declaratory judgement and an injunction ordering the federal defendants to revoke the tax exempt status of the Catholic Church entities. In addition, they requested an order requiring the federal defendants to collect the resulting taxes and to compel the church entities to notify their contributors that they would no longer be able to deduct their church contributions. Brief for Appellant at 5, *In re United States Catholic Conference*, 824 F.2d 156 (2d Cir. 1987) (No. 86-6092).

For convenience, the IRS provides an annual group ruling which gives the section 501(c)(3) exemption to thousands of entities affiliated with the Catholic Church. *Id.* at 24 n.22.

Undoubtedly, if plaintiffs were successful in their request, there would be an enormous financial impact on the Catholic Church entities and their contributors. Effectively, the Church would lose its exempt status and the contributors would lose their deduction under 26 U.S.C. § 170(a) (1982). Therefore, the economic incentive to donate would be lost. See *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471, 475 (S.D.N.Y. 1982).

14. *Catholic Conference*, 824 F.2d at 159; *Regan*, 544 F. Supp. at 473. USCC/NCCB's motion was based on FED. R. Civ. P. 12(b)(6). They argued specifically with regard to count one that as a private religious organization, they were incapable of violating the first amendment and that they breached no duty imposed upon them by section 501(c)(3). *Regan*, 544 F. Supp. at 487.

In addition, all defendants moved to dismiss, claiming that the federal court lacked subject matter jurisdiction because of the plaintiffs' lack of standing.¹⁵ The court granted USCC/NCCB's rule 12(b)(6) motion, but denied the federal defendants' motion on the standing issue.¹⁶ USCC/NCCB, therefore, became a non-party to the litigation.

The plaintiffs and the federal defendants subsequently served subpoenas duces tecum on USCC/NCCB requesting records relating to "financial support of political candidates and organizations."¹⁷ After three years of posturing by the plaintiffs and the witnesses,¹⁸ the trial judge held USCC/NCCB in civil contempt because they refused to comply with the subpoenas.¹⁹

15. Whether the plaintiffs actually had standing is beyond the scope of this note. The issue considered here is whether non-party witnesses are entitled to have their claim that the plaintiffs lack standing heard on appeal.

16. *Catholic Conference*, 824 F.2d at 159. The district court held that all of the named plaintiffs except five health clinics had standing to pursue the action against the government. *Id.*

17. *Id.* As originally drafted, the subpoenas also sought "access to the records of internal church discussions regarding the formulation and implementation of the bishops' position on abortion as represented in the Pastoral Plan." Brief for Appellant at 9, *In re United States Catholic Conference*, 824 F.2d 156 (2d Cir. 1987) (No. 86-6092). In addition, plaintiffs requested documents which reflected any contact with political candidates throughout the United States and information relating to a financial relationship between Catholic institutions and pro-life organizations. *Id.* Eventually, the district judge narrowed the scope of the subpoenas because the paragraphs seeking production of the minutes of internal church meetings raised first amendment concerns. *Catholic Conference*, 824 F.2d at 159.

18. Initially, the witnesses did not produce the documents because they anticipated the Supreme Court's decision in *Allen v. Wright*, 468 U.S. 737 (1984) (involved the standing of plaintiffs who sued to challenge the tax-exempt status of racially segregated schools). The federal defendants renewed their motion to dismiss after the Court held the plaintiffs in *Allen* did not have standing to bring the suit. However, the district court upheld its previous decision by distinguishing *Allen*. *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985).

Plaintiffs sought enforcement of their subpoenas by moving for an order holding USCC/NCCB in contempt on June 18, 1985. *Catholic Conference*, 824 F.2d at 159. Judge Carter narrowed the scope of the subpoenas, *see supra* note 17, and ordered the witnesses to comply. The witnesses again refused to produce because they awaited the results of a pending petition for a writ of mandamus filed by the federal defendants to the Second Circuit. When the petition was denied, *In re Baker*, No. 85-3056 (2d Cir. Jan. 14, 1986) (unpublished order), plaintiffs renewed their motion to hold the witnesses in contempt. *Catholic Conference*, 824 F.2d at 160.

Though they originally served subpoenas on USCC and NCCB, the federal defendants never tried to enforce them and only the subpoenas served by the plaintiffs became the subject of the appeal. Brief for Appellee at 7 n.5, *In re United States Catholic Conference*, 824 F.2d 156 (2d Cir. 1987) (No. 86-6092).

19. The court imposed a \$50,000 per day fine on each group, *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337, 340 (S.D.N.Y. 1986), and noted that USCC/NCCB

USCC/NCCB responded by appealing the contempt order to the Second Circuit.²⁰

B. *The Second Circuit's Analysis*

USCC/NCCB argued on appeal that the subpoena and contempt order were invalid because the district court lacked subject matter jurisdiction over the underlying action due to the plaintiffs' lack of standing.²¹ However, because the Second Circuit determined that USCC/NCCB could not challenge a contempt order on the ground that subject matter jurisdiction is lacking,²² the court did not reach the substance of USCC/NCCB's appeal.²³ The court's analysis discussed (1) the "interests" of a non-party witness, and (2) the applicability of the "bootstrap" principle of jurisdiction to the case.

1. *The Interests Argument*

In determining the sufficiency of USCC/NCCB's interests, the Second Circuit relied on the Supreme Court's decision in *Blair v. United States*,²⁴ which involved witnesses who received subpoenas to testify before a federal grand jury. In *Blair*, the witnesses refused to testify, arguing that the grand jury and the district court lacked subject matter jurisdiction because the statute authorizing the investigation was unconstitutional, thereby rendering the subpoenas invalid.²⁵ The Second Circuit, following the reasoning of *Blair*, held that a non-party witness is not sufficiently interested to challenge the federal court's subject matter jurisdiction, even though the non-party could challenge the court's "colorable jurisdiction" (hereinafter referred to as bootstrap jurisdiction).²⁶ The court apparently adopted *Blair* on the theory that subject matter jurisdiction is not sufficiently "per-

"wilfully misled the court and the plaintiffs and [had] made a travesty of the court process." *Id.* at 337.

20. The imposition of the \$50,000 per day fine was stayed pending USCC/NCCB's appeal. *Catholic Conference*, 824 F.2d at 160.

21. *Id.*

22. See *supra* notes 15-16 and accompanying text.

23. *In re United States Catholic Conference*, 824 F.2d 156, 160 (2d Cir.), cert. granted, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 484 (1987) (No. 87-416).

24. 250 U.S. 273 (1919).

25. *Id.* at 282-83.

26. *Catholic Conference*, 824 F.2d at 161; see *Blair*, 250 U.S. at 279.

sonal" to the witness to make it an appropriate issue for appeal.²⁷

In addition, the Second Circuit rejected USCC/NCCB's arguments that *Blair* should be limited to grand jury investigations because a grand jury has broad discovery power not granted to a district court. The Second Circuit said that *Blair* is broad enough to include civil cases and noted that "the [Supreme] Court upheld the contempt adjudication [in *Blair*], not because [of] . . . the grand jury's far ranging authority, but because the witness had no standing to complain that subject matter jurisdiction had been exceeded."²⁸

2. *The Bootstrap Argument*

The Second Circuit implicitly created an exception to its holding by recognizing that USCC/NCCB could challenge the court's bootstrap jurisdiction.²⁹ The court noted that even if the district court lacked subject matter jurisdiction, the contempt order was valid because the district court was conducting "appropriate proceedings to determine whether it [had] jurisdiction."³⁰

This position was based on *United States v. United Mine Workers*³¹ where the Supreme Court recognized that a court can exercise jurisdiction to determine jurisdiction.³² According to the court, *Mine Workers* illustrates the principle that "orderly processes of the courts must be observed even if it is subsequently determined by an appellate court that the trial court lacked subject matter jurisdiction."³³ In other words, even

27. *Catholic Conference*, 824 F.2d at 161.

28. *Id.* at 162.

29. The court referred to this concept as "colorable jurisdiction." See *id.* at 161. This exception is apparently based on language in *Blair* indicating that "the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction." *Blair v. United States*, 250 U.S. 273, 283 (1919).

"Colorable" jurisdiction is another way to refer to the principle that even if the subject matter jurisdiction of the court does not exist, a federal court has "jurisdiction to decide its own jurisdiction." See, e.g., Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject Matter Jurisdiction Before Final Judgement*, 51 MINN. L. REV. 491, 494 (1967). This idea has been characterized as the "bootstrap doctrine." *Id.*

30. *Catholic Conference*, 824 F.2d at 162.

31. 330 U.S. 258 (1947).

32. *Id.* at 293.

33. *In re United States Catholic Conference*, 824 F.2d 156, 163 (2d Cir.), cert. granted, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S.

though compelling a reluctant witness to comply with a discovery order may not be as vital to orderly court processes as something as basic as maintaining courtroom order, the court held it is sufficiently vital to justify the use of bootstrap jurisdiction.³⁴ Thus, under the bootstrap doctrine, the district court's issuance of the subpoenas and the subsequent contempt order were valid even if the court lacked jurisdiction.

III. ANALYSIS: THE SCOPE OF NON-PARTY RIGHTS

The Second Circuit's analysis of the rights of non-party witnesses held in contempt is inadequate³⁵ for three major reasons. First, it does not consider the constitutional or procedural questions concerning the lower court's ability to exercise power over USCC/NCCB. Second, the court failed to adequately consider the true "interests" of USCC/NCCB. Third, the court inappropriately relied on the principle of bootstrap jurisdiction.

A. *Constitutional and Procedural Foundations*

Because of USCC/NCCB's non-party status, the Second Circuit failed to address unique constitutional and procedural issues which must be considered in order to accurately determine USCC/NCCB's rights. First, because there is a possibility that the district court does not have jurisdiction over the case, article III requires that the jurisdictional issue be decided before USCC/NCCB can be compelled to comply with the subpoenas. Second, non-party witnesses held in civil contempt have a recognized right to appeal a contempt order. Because the Second Circuit refused to consider the substance of USCC/NCCB's appeal, their recognized right was effectively denied.

Ct. 484 (1987) (No. 87-416).

34. *Id.*

35. The court did not provide a convincing analysis of the rights of non-party witnesses held in contempt. Indeed, the three judge panel produced three opinions. In his concurrence, Judge Kearsce stated that the determination of jurisdiction in this case was based on whether the plaintiffs had standing. Because standing is an inherently fact sensitive issue, Judge Kearsce would allow discovery into all facts relevant to the standing question. *Id.* at 166 (Kearsce, J., concurring). In contrast, Judge Cardamone dissented, reasoning that USCC/NCCB, though they are non-party witnesses, have enough interest in the suit to justify allowing the jurisdictional question on appeal. *Id.* at 167-76 (Cardamone, J., dissenting).

1. Constitutional limitations and fairness

a. *Limitations.* The first issue is whether the court can force USCC/NCCB to comply with the subpoenas before it is certain that it has proper jurisdiction over the case. One commentator has noted that “[t]he federal courts cannot be given authority beyond that conferred by the Constitution.”³⁶ Consequently, a federal court’s jurisdiction is limited by the express language of article III and the court is not at liberty to exercise judicial authority over parties or non-parties unless it has proper jurisdiction.³⁷

Thus, if the trial court in fact lacked jurisdiction, any order issued to the USCC/NCCB violated article III and was therefore void.³⁸ This principle is illustrated in *United States v. United*

36. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3502 (1984).

37. See U.S. CONST. art. III, § 2, cl. 2. The Supreme Court recently reiterated its adherence to the idea that “[f]ederal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.” *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986); see also *Delta Coal Program v. Libman*, 743 F.2d 852 (11th Cir. 1984). In addition, strict adherence to the notion that federal jurisdiction is limited to cases or controversies was articulated in *Hodel v. Irving*, 107 S. Ct. 2076 (1987); see also *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976); *In re United States Catholic Conference*, 824 F.2d 156, 167 (2d Cir.) (Cardamone, J., dissenting), cert. granted, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 484 (1987) (No. 87-416).

The Court also recognizes that issues of justiciability are jurisdictional precepts which preclude federal court authority in the absence of the required elements. “Mootness is a jurisdictional question because the Court ‘is not empowered to decide moot questions or abstract propositions. . . .’” *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quoting *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920)). Therefore, because the issue in this case is a question of standing, before the federal court can properly exercise authority it must be satisfied that the jurisdictional prerequisites have been met.

38. The Supreme Court has noted that “if the command was . . . beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements.” *Ex Parte Rowland*, 104 U.S. 604, 612 (1882); see also *Ex Parte Fisk*, 113 U.S. 713, 718 (1885). Where a court issues an order without proper jurisdiction, the order has been called void and may be disregarded with impunity. *Cox, The Void Order and the Duty to Obey*, 16 U. CHI. L. REV. 86, 86 (1948); see *Maresse v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1158 (7th Cir. 1984) (no discovery unless there is a pending lawsuit and if the suit should not have been pending, the discovery order may exceed the judge’s authority), *rev’d on other grounds*, 470 U.S. 373 (1985). The notion of the void order is grounded in the derivative nature of federal jurisdiction. Because a court’s authority to act derives from a grant of constitutional and congressional power, any action in excess of that grant is necessarily void. *Catholic Conference*, 824 F.2d at 167 (Cardamone, J., dissenting); see also *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950).

Mine Workers where the United States possessed and operated domestic coal mines pursuant to an executive order. Because of a contract dispute, the union went on strike. The government sued to enjoin the strike and the union defended on the ground that the district court lacked jurisdiction to enjoin a strike arising out of a labor dispute³⁹ under the Norris LaGuardia Act.⁴⁰ The Court said "we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."⁴¹ Thus, a broad reading of *Mine Workers* requires obedience to discovery orders if the issuing court has jurisdiction, and by negative inference, obedience to discovery orders is not required if the court lacks jurisdiction.⁴²

It is arguable, however, that a narrow reading of *Mine Workers* requires litigants to comply with all court orders until the question of the court's jurisdiction is resolved. If read in this light, *Mine Workers* can be distinguished from *Catholic Conference*. The *Mine Workers* Court said that "the elements of federal jurisdiction were clearly shown," and that the only question was whether the Norris LaGuardia Act applied to deprive the court of jurisdiction.⁴³ The Court held that the act did not apply and that there was consequently no question whether the court had jurisdiction over the action. By contrast, *Catholic Conference* did not involve a situation where the existence of jurisdiction was clear. There was a legitimate question of whether the plaintiffs had standing. Therefore, USCC/NCCB had at least a good faith basis for refusing to comply with the subpoena until the fundamental question of the court's jurisdiction over the case was resolved.

Justice Rutledge, dissenting in *Mine Workers*, addressed USCC/NCCB's situation. He said, "when an order is void for want of jurisdiction it may be disobeyed with impunity pending but depending upon determination of its invalidity by appeal."⁴⁴ USCC/NCCB operated on the assumption that the contempt order against them was void for want of jurisdiction and chose to

39. *United States v. United Mine Workers*, 330 U.S. 258, 262-69 (1947).

40. 29 U.S.C. § 101 (1982).

41. *Mine Workers*, 330 U.S. at 293.

42. See *infra* note 44 and accompanying text.

43. *Mine Workers*, 330 U.S. at 294.

44. *Id.* at 360 (Rutledge, J., dissenting).

disobey the district court's discovery order. Whether their choice was correct can only be decided on an appeal which reaches the question of the plaintiffs' standing.

Moreover, the Second Circuit recognized that USCC/NCCB's right to assert the jurisdictional question depends on the effect that a lack of jurisdiction would have on the court's power to issue valid orders. The court noted that "[i]f the absence of subject matter jurisdiction over the underlying suit would preclude the District Court from ordering a witness to produce evidence . . . then we would agree that the witness would have standing to assert such a claim on appeal from an adjudication of contempt."⁴⁵

This admission seems to agree with the doctrines outlined above, but the court's holding ignores them. The lower court had no power over USCC/NCCB until they were served with the subpoenas. The contempt order was issued when there was an arguable basis to challenge the court's jurisdiction, and to this extent, the district court's actions were potentially void. Nevertheless, the Second Circuit refused to reach the jurisdictional question. Because there is some potential that the district court lacked jurisdiction, forcing the USCC/NCCB to comply with the subpoenas without examining whether proper jurisdiction exists may result in the court violating article III. Adherence to the principles of article III should preclude such a result.⁴⁶

b. Fairness. The constitutional concern under article III dovetails into the fundamental fairness of the *Catholic Conference* decision. Courts have always been concerned about avoiding, if possible, irreparable damage to parties.⁴⁷ In fairness, such a concern should extend to non-parties as well. The Supreme Court has stated that "[w]hen a court . . . orders a [non-party] witness to reveal information, . . . a different situation [from

45. *In re United States Catholic Conference*, 824 F.2d 156, 162 (2d Cir.), cert. granted, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 484 (1987) (No. 87-416).

46. The court would respond to this argument by indicating that at the very least, bootstrap jurisdiction was properly exercised in issuing the contempt order against the witnesses. See *supra* notes 29-34 and accompanying text. However, this note takes the position that the court's actions in *Catholic Conference* exceed the proper scope of bootstrap jurisdiction. See *infra* notes 92-104 and accompanying text. Consequently, whether the court has exceeded the limits placed upon it by article III is a valid consideration in considering normal subject matter and bootstrap jurisdiction.

47. See *e.g.*, FED. R. CIV. P. 65 (the standard for granting injunctive relief to an "adverse party" is whether the facts show that "immediate and irreparable injury, loss, or damage will result to the applicant").

when the court orders a party to reveal information] may be presented. Compliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released."⁴⁸

Consider the scenario faced by USCC/NCCB. The ultimate goal of the plaintiff's case is to have USCC/NCCB's tax-exempt status revoked. To achieve that goal, the plaintiffs sought extensive records from USCC/NCCB, many of which contained sensitive church information. The Second Circuit's decision, if upheld, will require USCC/NCCB to deliver the documents for the plaintiffs' inspection. Even if the plaintiffs lose on the merits of the tax claim, the effect on USCC/NCCB of releasing the documents would be irreparable. Moreover, the damage would be exacerbated if the court's exercise of authority over USCC/NCCB is without jurisdiction and in violation of article III.⁴⁹ In fairness, and in deference to article III, this result should not be allowed. Rather, the court should allow USCC/NCCB to pursue their appeal.

2. USCC/NCCB's right to appeal

Even though USCC/NCCB have a generally recognized right to appeal the contempt order,⁵⁰ the Second Circuit foreclosed that right by ignoring the article III limitations on its power to act.

Generally, a matter cannot be appealed unless one has received a "final judgment."⁵¹ This rule "will be enforced not only

48. *Maness v. Meyers*, 419 U.S. 449, 460 (1975); see *Pennsylvania v. Ritchie*, 107 S. Ct. 989, 997-98 (1987).

49. In addition, the majority's holding would allow the discovery process to proceed on the risk that the court lacked proper jurisdiction. Though the district court held that the plaintiffs had standing, see *supra* note 16 and accompanying text, the court denies any opportunity to verify that decision until the case is decided on the merits. If jurisdiction is ultimately found to be deficient, the court's holding directly contravenes the principle that procedural rules (the subpoenas and the contempt order in this case) should not be used to "extend or limit the jurisdiction of the United States district courts . . ." FED. R. CIV. P. 82; see also *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) ("[t]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded.").

50. See *infra* notes 51-56 and accompanying text.

51. "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all." *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940) (citations omitted).

The policy for this rule is to avoid piecemeal litigation for a single controversy and to avoid the cost of multiple appeals in the same case. *Id.* at 325.

against a party to the litigation but against a witness who is a stranger to the main proceeding."⁵² However, because he has no rights to appeal once a case has proceeded to final judgment, a non-party witness faces a paradoxical situation if he objects to the imposition of judicial authority. In describing the fate of a non-party witness held in contempt, the Supreme Court observed,

in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, *leaving to him no alternative but obey or be punished*. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court . . . punish the witness for contempt . . . then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case.⁵³

In other words, the very act of disobeying the court's order and being held in contempt is sufficiently separate from the main action to give the witness a right to an immediate appeal.

In addition, a non-party's right to appeal from a contempt order is treated with greater deference than the right of a party in the same situation.⁵⁴ Effectively, upon being held in con-

A final decision has been defined as "one which ends the litigation on the merits and leaves nothing for the court to do but execute judgement." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

52. *Cobbledick*, 309 U.S. at 326.

53. *Alexander v. United States*, 201 U.S. 117, 121 (1906) (emphasis added); see also *Pennsylvania v. Ritchie*, 107 S. Ct. 989, 997 (1987) (right to appeal should not be foreclosed when another opportunity to appeal does not exist); *United States v. Ryan*, 402 U.S. 530 (1971) (one cannot appeal a denial of a motion to quash, but can appeal if held in contempt); *Cobbledick*, 309 U.S. at 328 (when a witness is held in contempt, his situation is severed from the main action thus permitting an appeal); *In re United States Catholic Conference*, 824 F.2d 156, 170 (2d Cir.) (Cardamone, J. dissenting) (non-party witness' right to appeal facilitates standing to challenge jurisdiction), *cert. granted*, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 484 (1987) (No. 87-416); *Union Carbide Corp. v. Getzendanner*, 782 F.2d 710, 712 (7th Cir. 1986) (contempt order has character of final judgement); *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1157 (7th Cir. 1984) (if party is willing to pay the price of being punished for contempt he can get an appeal), *rev'd on other grounds*, 470 U.S. 373 (1985).

54. Parties held in criminal contempt have an immediate right of appeal. However, if they are held in civil contempt, they must delay the appeal until a final judgement has been rendered. By contrast, a non-party held in civil contempt has a right to appeal because effectively, the appeal must be heard or be forever foreclosed since the non-party cannot appeal the final judgement. See *International Business Machines Corp. v. United States*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *In re Manufacturers Trading Corp.*, 194 F.2d 948 (6th Cir. 1952).

tempt, the non-party is treated as though he has a greater interest in the case than a party, at least for purposes of appeal. Consequently, it makes little sense to say a non-party is not sufficiently interested to bring an appeal.

None of the cases which indicate that a witness held in contempt has a right to appeal place a limitation on what the *content* of that appeal may be.⁵⁵ Though it may be unwise to give a non-party an unlimited appeal,⁵⁶ when a non-party seeks to raise issues which affect the validity of the order issued against him, the court should consider the merits of that issue. Thus, even though the typical appeal probably attacks the substantive validity of the contempt order, an attack on the jurisdiction of the court over the underlying action still reaches the question of whether the contempt order is valid. Consequently, the Second Circuit should have allowed USCC/NCCB to raise the jurisdictional question on appeal.⁵⁷

One can argue that the standing question raised by USCC/NCCB may still be raised by the federal defendants on appeal after the case reaches final judgment. However, this reasoning misses the point. The finality rule has been adopted in order to avoid piecemeal litigation, multiple appeals and undue delay in the progression of the lawsuit.⁵⁸ To an extent, one can argue that USCC/NCCB's appeal has unduly delayed the suit. Nevertheless, countervailing considerations arise because of the witnesses' non-party status. First, the question for the witnesses is not whether the appeal can be brought *now or later*, (as would be the case for the federal defendants) but whether the appeal can be brought *now or never*. Second, though they are non-parties, USCC/NCCB are in fact the real object of the suit. They are subject to the contempt fine and they are the ones who will lose their tax exempt status if the plaintiffs prevail on the merits. Therefore, the article III limitation on the exercise of judicial authority should be given greater weight to insure that unjusti-

55. See *supra* note 53 and accompanying text. The cases cited each discuss whether the right to appeal exists and conclude that it does. The cases place no limitation on the substantive nature of the appeal.

56. For a discussion of the problem of defining a workable standard for determining the extent of a non-party's rights on appeal see *infra* notes 69-83 and accompanying text.

57. *Catholic Conference*, 824 F.2d at 172-73 (Cardamone, J., dissenting) (the court's holding causes USCC/NCCB's claim to be lost at the risk of causing irreparable harm); see *Maness v. Meyers*, 419 U.S. 449, 460 (1975) (cannot unring the bell).

58. See *supra* note 51.

fied action⁵⁹ by the court is avoided. By foreclosing the witnesses' appeal, the court misconstrues the article III limitations on its own power to act.

B. *The Interests of Non-Parties*

1. *USCC/NCCB's interests under Blair*

As previously indicated, the foundation for the Second Circuit's holding is that a non-party witness lacks sufficient interest in the suit to challenge federal jurisdiction under *Blair*.⁶⁰ However, the court's reliance on *Blair* is misplaced because *Blair* is factually distinguishable from *Catholic Conference*, and *Blair* potentially required the Court to rule on the constitutionality of a statute, making *Catholic Conference* legally distinguishable as well.

a. *Factual distinctions.* First, the witnesses in *Blair* were subpoenaed to testify before a federal grand jury. Because of this factual distinction, *Blair* should not be read so broadly as to preclude a jurisdictional challenge by a witness in a civil proceeding.

A grand jury has a power of inquiry "which does not depend on a case or controversy [under article III] for power to get evidence but can investigate merely on suspicion that the law is being violated."⁶¹ For this reason, the validity of the contempt order issued against the witnesses in *Blair* was not necessarily dependent on the existence of valid federal jurisdiction. Therefore, even if the witnesses in *Blair* were allowed to challenge the court's jurisdiction, it may not have resulted in an invalidation of the contempt order. In contrast, the validity of the contempt order issued against the USCC/NCCB necessarily depended on whether the court had proper jurisdiction because "[a] federal

59. The term "unjustified action" relates to an exercise of jurisdiction which is beyond the scope of article III parameters. See *supra* notes 36-38 and accompanying text.

60. *In re United States Catholic Conference*, 824 F.2d 156, 161 (2d Cir.), cert. granted, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 484 (1987) (No. 87-416); see *supra* notes 24-28 and accompanying text.

61. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950); see *Blair v. United States*, 250 U.S. 273, 282 (1919); *Catholic Conference*, 824 F.2d at 173 (Cardamone, J., dissenting). The policy enumerated for grand jury power is that its "investigative power must be broad if its public responsibility is adequately to be discharged." *United States v. Calandra*, 414 U.S. 338, 344 (1974).

court's . . . power to issue a subpoena is determined by its jurisdiction."⁶²

The Second Circuit suggested that *Blair* is applicable in the civil context because of language stating that a witness "is not entitled to challenge the authority of the court or of the grand jury, provided they have a *de facto* existence and organization."⁶³ However, a federal court's "*de facto*" existence does not eliminate the article III case or controversy limitations imposed on the court.⁶⁴ Moreover, every case which has relied on *Blair* as precedent arose in the context of grand jury proceedings.⁶⁵ In short, *Blair* simply did not deal with the question of whether a non-party witness in a civil proceeding can challenge the court's jurisdiction. As a result, the Second Circuit should not have read *Blair* so broadly.

b. Legal distinctions. The second reason the court should not have relied on *Blair* is that the witnesses argued that the grand jury did not have jurisdiction to hold them in contempt because the grand jury was investigating violations of an unconstitutional statute. The premise was that because the statute was constitutionally deficient, jurisdiction of the grand jury was deficient as well.⁶⁶ In this context, the Court noted that "[c]onsiderations of propriety . . . demand that we refrain from passing upon the constitutionality of an act . . . unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it."⁶⁷ USCC/NCCB do not raise their jurisdictional challenge on grounds that a statute is unconstitutional. Rather, their claim is based on the fundamental premise that all parties who seek to invoke the power of the court must have standing to sue.⁶⁸ Federal courts generally rule on the constitutionality of

62. *In re Marc Rich & Co., A.G.*, 707 F.2d 663, 669 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983).

63. *Blair*, 250 U.S. at 282.

64. The limits upon the exercise of federal jurisdiction cannot be "disregarded or evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978).

65. *See, e.g., In re Archuleta*, 432 F. Supp. 583, 590-91 (S.D.N.Y. 1977), *In re Maury Santiago*, 533 F.2d 727, 730 (1st Cir. 1976); *Carter v. United States*, 417 F.2d 384, 386-87 (9th Cir. 1969), *cert. denied*, 399 U.S. 935 (1970); *United States ex rel. Rosado v. Flood*, 394 F.2d 139, 141 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968).

66. *Blair v. United States*, 250 U.S. 273, 277 (1919).

67. *Id.* at 279.

68. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475-76 (1982) ("[t]hose who do not possess [a]rticle III standing may not litigate as suitors in the courts of the United States.").

statutes only upon a showing of significant need. Therefore, the simple question of the plaintiffs' standing should not be subjected to the higher standard which the Court applied in *Blair*.

Moreover, both the *Blair* Court and the *Catholic Conference* court asserted that a non-party witness is not sufficiently interested, but the courts fail to address what *would* make him sufficiently interested to allow his appeal. Rather, both courts seem to adhere implicitly to the traditional notion that because a person's name is not on the pleadings, he is not interested in the outcome. This conclusion, which is based on assumptions rather than through establishment of some reasonable standard of what a sufficient interest is, leads to ambiguous decision-making and does a disservice to future courts faced with the same issue as well as to potential litigants who need to clearly discern their legal rights.

2. *Considering a non-party's interests*

The *Catholic Conference* court couched the issue presented to it in terms of whether a non-party "has standing on appeal" to challenge the district court's jurisdiction.⁶⁹ As applied to *Blair*, the question was couched in terms of whether the witnesses had sufficient "interests" to challenge jurisdiction. Both characterizations relate to what a non-party can argue on appeal. Moreover, implicit in either characterization of the non-party's situation is the idea that there are threshold requirements, which if met, would allow the non-party to challenge federal jurisdiction. Neither *Catholic Conference* nor *Blair* provide an analytical framework for establishing and applying these threshold requirements. Consequently, this note suggests that a personal standard, or a standard based on standing may be useful in considering a non-party's interests.

a. A personal standard. The Second Circuit implies that a minimal standard might be to determine whether the issue which a non-party seeks to assert on appeal is "personal" in nature.⁷⁰ *United States v. Thompson*⁷¹ was construed as a case

69. *In re United States Catholic Conference*, 824 F.2d 156, 158 (2d Cir.), *cert. granted*, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 484 (1987) (No. 87-416).

70. The court distinguished *United States v. Thompson*, 319 F.2d 665 (2d Cir. 1963) from *Blair* because "Thompson was allowed to raise on appeal an issue personal to him. . . . *Blair* was not allowed to challenge an issue in which he was 'not interested.'" *Catholic Conference*, 824 F.2d at 165.

which was personal to the witness. The case involved Thompson, who was held in contempt for failure to comply with a grand jury subpoena issued to him outside of the United States. He appealed the contempt order on the ground that the district court lacked statutory jurisdiction to serve the subpoena. The court held that "the power and jurisdiction of the court to issue a subpoena may be raised for the first time in a proceeding to punish for contempt."⁷²

Given the Second Circuit's holding in *Thompson*, its decision in *Catholic Conference* is inconsistent for two reasons. First, the court suggested that the validity of the service of the subpoena on Thompson made the issue "personal" to him. However, the ruling of contempt was no more personal to Thompson than the contempt ruling against USCC/NCCB was to them. In each case, the court exercised its authority over the witness through governmental power. As a result, to argue that service of process is somehow more personal than subject matter jurisdiction when the ultimate result is the same is inconsistent and does not provide a rational basis for ruling contrary to *Thompson* in *Catholic Conference*. In fact, USCC/NCCB have a stronger case than Thompson did because he received the subpoena from a grand jury, which is not limited by article III.⁷³

Second, the court held that USCC/NCCB have "standing to question only whether the District Court has a colorable basis for exercising subject matter jurisdiction."⁷⁴ Essentially, the court suggests that a non-party witness may challenge whether the court has some subject matter jurisdiction, but not whether it has sufficient jurisdiction to allow the case to proceed to judgment on the merits. However, this position is inconsistent because both full scale jurisdiction and bootstrap jurisdiction provide the basis for a court to exercise its power. Moreover, the line between full scale jurisdiction and bootstrap jurisdiction is unclear at best. Nevertheless, the conclusion one must draw from the court's position is that bootstrap jurisdiction is somehow personal to the witness while full scale jurisdiction is not.⁷⁵

71. 319 F.2d 665 (2d Cir. 1963).

72. *Id.* at 668. The court went further and noted that because there was no jurisdiction, Thompson was not required to obey the subpoena and could not be held in contempt for his recalcitrance. *Id.* at 670.

73. See *supra* notes 37, 61 and accompanying text.

74. *Catholic Conference*, 824 F.2d at 158.

75. See *id.* at 175 (Cardamone, J., dissenting).

Despite the court's inconsistent analysis, the use of a standard based on whether a particular issue is personal to the witness is instructive. Courts using this analysis might consider the impact which the judicial action would possibly have on the non-party. If the action has the potential of causing irreparable harm to the non-party,⁷⁶ then the issue is sufficiently personal to allow the non-party to challenge the validity of the court's actions by raising the question of jurisdiction.

Under the personal standard, USCC/NCCB should have been allowed to pursue their appeal for three reasons. First, the court's contempt order imposed a coercive fine of \$50,000 per day until USCC/NCCB complied. As a result, both the USCC and NCCB had the very personal decision to either comply or pay substantial fines. Second, if they complied, they would have had to release documents relating to church activity. Even if these documents were not privileged, their release had the potential for causing irreparable harm to the witnesses. Finally, beyond the direct results of the contempt order, the witnesses had a substantial financial interest in the outcome of the action.⁷⁷

b. A standard based on standing. Another alternative which may be useful in considering the interests of the witnesses is to apply the traditional requirements of standing under article III.⁷⁸ One might argue that the standing principles are applicable only to persons who either are or wish to become parties to a lawsuit. This, if true, would render the standing rules inapplicable as to USCC/NCCB. The Supreme Court, however, has characterized standing as a question of "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."⁷⁹ Therefore, to the extent that the witnesses sought to have the Second Circuit decide the merits of the jurisdictional question as it related to the validity of the contempt order, standing analysis is applicable to determine the witness' interest.

76. See *supra* note 48 and accompanying text.

77. See *supra* note 13.

78. The majority uses the term "standing" which implicitly provides room for the application of the standing rules to consider the witnesses' interests. See *In re United States Catholic Conference*, 824 F.2d 156, 158 (2d Cir.), *cert. granted*, 108 S. Ct. 484 (1987) (No. 87-416). In addition, Judge Cardamone uses standing rules to establish his position that the USCC/NCCB have sufficient interests to challenge the court's jurisdiction. *Id.* at 170-71 (Cardamone, J. dissenting).

79. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); see *Allen v. Wright*, 468 U.S. 737, 752 (1984).

Article III imposes three requirements on one who invokes the court's authority to establish standing. First, he must show that he has or will suffer an injury. Second, the cause of the injury must be fairly traced to the challenged action. Finally, the court must be able to provide a remedy if the proponent prevails in the action.⁸⁰ In addition, the case law suggests that beyond the affirmative requirements, there are "prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated."⁸¹

Application of these standing requirements to USCC/NCCB reveals that they have interests which are sufficient to invoke the court's authority to reach the merits of their claim. First, the witnesses have the potential of suffering injury if they are compelled to comply with the discovery order pursuant to the contempt sanction.⁸² Second, the cause of the witnesses' injury can be fairly traced to the action of the court. If the court does not have jurisdiction, the result of the majority opinion is to compel the witnesses' compliance to a subpoena which had no legal effect. Thus, the direct source of the injury can be traced to the court's action. Finally, USCC/NCCB's injury could be relieved if the court were to reach the merits of their claim. If the results of the appeal were to reverse the district court's determination with regard to plaintiff's standing, the court would then be without jurisdiction to enforce its contempt order thus relieving the witnesses of the potential injury. In addition, this characterization of the witness' claim does not violate any of the prudential limitations which would preclude federal adjudication.⁸³

80. See *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541-43 (1986) (reviews standing requirements); *Allen*, 468 U.S. at 770 (Brennen, J., dissenting) (standing requires stake in the outcome and a causal connection); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 120 (1979) (Rehnquist, J., dissenting); *Duke Power Co. v. Carolina Evtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Warth*, 422 U.S. at 498-99.

81. *Gladstone Realtors*, 441 U.S. at 99-100. To satisfy the prudential limitations, a proponent's claim cannot be a generalized grievance shared by a large class of citizens. He must assert his own legal rights and not those of a third party and the question cannot be an "abstract question of wide public significance." *Warth*, 422 U.S. at 499-500; see *Allen*, 468 U.S. at 751.

82. See *supra* note 48 and accompanying text; *Catholic Conference*, 824 F.2d at 171 (Judge Cardamone explains that "[s]ubsequent appellate vindication does not have its ordinary consequence of totally repairing error.") (quoting *Maness v. Meyers*, 419 U.S. 449, 460 (1975)).

83. The witnesses are clearly asserting their own legal right since it is the validity of the contempt order which is the underlying focus of their claim. In addition, the claim does not involve an abstract issue of broad public interest. See *supra* note 81.

Application of the standing requirements clearly show that USCC/NCCB have sufficient interest to challenge the court's jurisdiction. While this use of the standing rules may not be conventional, it does not violate the policies or requirements of the rules, and it ensures that article III limitations are satisfied by allowing the court to reach the merits of USCC/NCCB's claim.

c. *A judicial example.* Though it did not expressly consider a non-party's interests, the Second Circuit has implicitly accepted the premise that a non-party can challenge the court's jurisdiction. In *Manway Construction Co. v. Housing Authority of Hartford*,⁸⁴ the court resolved a dispute between Manway and the Housing Authority regarding a construction project. As part of an agreement to solve the dispute, Manway purchased a certificate of deposit from a bank. When the dispute erupted again, Manway sued the Housing Authority and garnished the certificate of deposit. The bank, as a non-party, paid the principal to the Authority pursuant to a court order, but refused to pay the interest because the court order did not award interest to the Authority. As a result the bank was held in contempt.

On appeal, the bank challenged the contempt order on the ground that the court lacked subject matter jurisdiction. The court acknowledged that the non-party bank had "substantial" rights and reversed the contempt order holding that the district court lacked jurisdiction.⁸⁵ Ironically, the Second Circuit did not consider whether the non-party bank could raise the jurisdictional issue. But simply reaching the merits of the bank's claim indicates that the court assumed that the jurisdictional issue was appropriately raised. The court observed that the bank's presence in the underlying action was "peripheral at most."⁸⁶ Nevertheless, the court recognized the bank's substantial rights. Similarly, USCC/NCCB had a peripheral role in the underlying action between the plaintiffs and the federal defendants. Therefore, the court's failure to recognize its *Manway* holding is plainly inconsistent. Moreover, the court's implicit recognition that a non-party can challenge federal jurisdiction supports the

The application of the standing requirements to the witnesses is consistent with the policy underlying them. The standing requirements tend to ensure that a legal question will be presented to the court in a concrete factual context. Moreover, allowing the witnesses to assert their claims tends to ensure that all of the facts relevant to its jurisdiction are before the court. See *Bender*, 475 U.S. at 541-43.

84. 711 F.2d 501 (2d Cir. 1983).

85. *Id.* at 504.

86. *Id.*

idea that one can properly determine non-party interests through the standing principles or the personal standard, thereby allowing the assertion of the jurisdictional claim.

In summary, had the court focused on USCC/NCCB's real interests in the action, it may have reached the merits of the jurisdictional claim.

3. *The court's sua sponte duty to consider jurisdiction*

Regardless of whether USCC/NCCB had sufficient interests to mount a jurisdictional challenge, the court has an inherent duty to insure that it exercises its authority only when jurisdiction exists.⁸⁷ The Supreme Court commented on the nature of the *sua sponte* duty and said,

[t]he true question is not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgement of the Circuit Court on the merits, when it appears on the record, by a plea to the jurisdiction, that it is a case to which the judicial power of the United States does not extend.⁸⁸

This language implies that because the ultimate question the court is obligated to address is whether it has jurisdiction, it is not important *who* raises the issue of jurisdiction. Moreover, the presumption in federal litigation is that the court lacks jurisdiction unless there is some affirmative showing that jurisdiction exists.⁸⁹

The majority recognized that if they "were reviewing a final judgment in the underlying suit, [they] . . . would of course be obliged to consider the District Court's jurisdiction."⁹⁰ This position, however, ignores the inherent duty of the court to check *its own* jurisdiction. In essence, the court simply avoided USCC/

87. The *Bender* Court suggested that "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)); see *United States v. Corrick*, 298 U.S. 435, 440 (1936); *Mansfield Coldwater & Lake Mich. Ry. v. Swan*, 111 U.S. 379, 382 (1884); *Catholic Conference*, 824 F.2d at 171-72 (Cardamone, J., dissenting); *Koerpel v. Heckler*, 797 F.2d 858, 861 (10th Cir. 1986); *Williams v. Secretary of the Navy*, 787 F.2d 552, 557 (Fed. Cir. 1986); *Dobbs*, *supra* note 29, at 491.

88. *Mansfield Coldwater & Lake Mich. Ry. Co.*, 111 U.S. at 384.

89. *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 336-37 (1895); *Fifty Assoc. v. Prudential Ins. Co. of Am.*, 446 F.2d 1187, 1190 (9th Cir. 1970).

90. *Catholic Conference*, 824 F.2d at 164.

NCCB's claim that the plaintiffs' lacked standing by putting up a shield saying they would check jurisdiction if there were a final judgment and a party raised the issue. Because USCC/NCCB are non-parties, however, the court chose to avoid their substantive claim.⁹¹ In short, the court questioned the "standing" of USCC/NCCB when it should have questioned the standing of the plaintiffs.

C. The Bootstrap Argument

As previously indicated, the Second Circuit's analysis extends beyond consideration of USCC/NCCB's interests in the action. The court said that "[a] lack of subject matter jurisdiction does not disable a district court from exercising all judicial power."⁹² The principle that a court has jurisdiction to determine jurisdiction is a familiar one. Judge Cardamone noted, "[t]he very existence of a court presupposes its power to entertain a controversy, if only to decide it has no power over the particular action."⁹³ However, the court read this power too broadly. The bootstrap doctrine normally operates to foreclose collateral attack once a decision has been rendered.⁹⁴

Though a court has power to exercise bootstrap jurisdiction, the crucial question is what limits the court in the exercise of that power. One of the earliest cases to address this issue was *United States v. Shipp*.⁹⁵ *Shipp* involved a county sheriff who was held in contempt for allowing a mob to storm his jail and hang a convicted rapist. The sheriff's actions violated the Supreme Court's stay of execution issued to allow an appeal. The Court wrote that "[u]ntil its judgment declining jurisdiction should be announced, . . . [the circuit court] had authority . . .

91. This course of action by the court not only contravenes the case law suggesting the existence of a *sua sponte* duty, it violates FED. R. CIV. P. 12(h) which says "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

92. *In re United States Catholic Conference*, 824 F.2d 156, 162 (2d Cir.), cert. granted, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 484 (1987) (No. 87-416).

93. *Id.* at 174 (Cardamone, J., dissenting); see 13A C. WRIGHT, A. MILLER & E. COOPER, *supra* note 36, at § 3536.

94. Dobbs, *supra* note 29, at 494. Professor Dobbs suggests that the normal operation of the rule involves cases where a final judgement has been rendered. However, he points out that the Supreme Court decision in *Mine Workers* effectively established that the bootstrap principle was operative outside of cases involving preclusion questions. *Id.* at 498.

95. 203 U.S. 563 (1906).

to make orders *to preserve the existing conditions* and the subject of the petition just as the state court was bound to refrain from further proceedings until the same time.”⁹⁶ Thus, *Shipp* established that the court has power to determine its jurisdiction and that it can issue orders to preserve the status quo pending the jurisdictional determination.

Mine Workers expanded *Shipp* by establishing that a court also has the authority to enforce the order issued to preserve the status quo through such judicial mechanisms as contempt.⁹⁷ *Mine Workers* also established that the court order should be obeyed pending the outcome of the jurisdictional determination unless the court’s exercise of authority is “usurping judicial forms and facilities.”⁹⁸

Catholic Conference, however, implicitly establishes the idea that a court can issue orders which if obeyed, will *change the status quo* and alter the positions of the various groups before the court.⁹⁹ Effectively, this rule expands the umbrella of activity in which a federal court may engage under the guise of bootstrap jurisdiction; almost any kind of judicial activity may be performed before the court assures itself that it has subject matter jurisdiction. Such an expansion of a court’s ability to op-

96. *Id.* at 573 (emphasis added).

97. *Catholic Conference*, 824 F.2d at 174 (Cardamone, J., dissenting). Judge Cardamone clearly points out that precedent has established three proper uses of bootstrap jurisdiction. First, the court has the power to determine its jurisdiction. Second, it may issue orders to preserve the status quo. Finally, it may enforce its orders. *Id.*; see also *Waffenschmidt v. Mackay*, 763 F.2d 711, 716 (5th Cir. 1985) (court has power to punish for disobedience), *cert. denied*, *Currey v. Waffenschmidt*, 474 U.S. 1056 (1986); *National Maritime Union v. Aquaslide ‘N’ Dive Corp.*, 737 F.2d 1395, 1399 (5th Cir. 1984) (the court may enforce its injunction by the contempt power).

An additional limit on the court’s power to exercise bootstrap jurisdiction is that the court may not render advisory opinions while exercising bootstrap jurisdiction. *New York v. Pierce*, 609 F. Supp. 798, 799 (S.D.N.Y. 1985).

Mine Workers allows the exercise of bootstrap jurisdiction so long as the question of jurisdiction is not frivolous or insubstantial. *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947).

98. *Mine Workers*, 330 U.S. at 309-10 (Frankfurter, J., concurring). The Second Circuit has suggested that a court does not usurp jurisdiction if plain error is involved. However if there is a “total want of jurisdiction’ and no arguable basis on which [the court] could have rested a finding that it had jurisdiction,” a finding that the court usurped authority is appropriate. *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986).

99. *In re United States Catholic Conference*, 824 F.2d 156, 174 (2d Cir.) (Cardamone, J., dissenting), *cert. granted*, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 484 (1987) (No. 87-416). One circuit court has held that a court can compel discovery and punish for disobedience while exercising bootstrap jurisdiction. *Ilan-Gat Eng’rs, Ltd. v. Antigua Int’l Bank*, 659 F.2d 234 (D.C. Cir. 1981).

erate outside of article III limitations should not be allowed for three reasons. First, if a court can issue discovery orders which will change the status quo, the court runs the risk of causing irreparable harm to the non-party without a justified basis for the exercise of its authority.¹⁰⁰ Moreover, because the line between bootstrap and full scale jurisdiction is not clear, a federal court can potentially abuse its power by rendering orders which normally would only be rendered by a court with unquestioned jurisdiction.

Second, federal procedural rules allow the use of discovery for the "convenience of the parties."¹⁰¹ As a result, whether a party can obtain a document from a non-party is not as substantial a concern from a constitutional viewpoint as assuring that the court operates within the proper bounds of constitutional and statutory grants of authority. Consequently, the expansion of bootstrap jurisdiction to allow the court to issue process against persons or groups who are not even before it exceeds acceptable uses of authority granted by article III.¹⁰²

Finally, the rules established in *Shipp* and *Mine Workers* seek to preserve the court's ability to function vis-a-vis the particular case.¹⁰³ But allowing the court to issue orders of civil contempt is not necessary to preserve the court's functional capacity.¹⁰⁴ Whether the documents were produced would not impair the court's ability to issue a judgment in the case. Rather, the documents merely provided the plaintiffs more ammunition with which to prove their case. Consequently, when one balances the interests of providing for convenient and accessible discovery with the article III limits on the courts, the conclusion follows that the Second Circuit read the power to exercise bootstrap jurisdiction too broadly.

IV. CONCLUSION

The traditional distinctions between parties and non-parties do not always provide clear analytical tools for determining the

100. See *supra* note 48. Under *Maness*, a court should not be able to issue orders for which it may not subsequently be able to "unring the bell." *Maness v. Meyers*, 419 U.S. 449, 460 (1975).

101. *Catholic Conference*, 824 F.2d at 175 (Cardamone, J., dissenting).

102. See *id.*

103. *Id.*

104. Civil contempt is available for the convenience of the opposing party. *United States v. Russotti*, 746 F.2d 945, 949 (2d Cir. 1984).

extent to which a court can exercise its authority over a non-party. Mere assumptions that non-parties are not "interested" and therefore cannot bring issues to the court's attention do not adequately reflect the complex nature of today's judicial process. Consequently, courts should consider what a non-party's actual interests in the litigation are, and if those interests are sufficient, allow that non-party to challenge the court's jurisdiction. When a non-party is brought into an action, as the USCC/NCCB were—through a discovery request or some other procedural avenue—the non-party should be allowed to protect his rights by ensuring that the court's exercise of authority over him is consistent with constitutional limitations.

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