

UNITED STATES of America v. Mary Sue HUBBARD et al., Appellants. UNITED STATES of America v. Mary Sue HUBBARD et al. Church of Scientology of California, Appellant. CHURCH OF SCIENTOLOGY OF CALIFORNIA, Appellant, v. UNITED STATES of America et al.

Nos. 79-2312, 79-2313, 79-2324

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

208 U.S. App. D.C. 399; 650 F.2d 293; 1981 U.S. App. LEXIS 20G60; 6 Media L. Rep. 1909

February 21, 1980, Argued

February 9, 1981

PRIOR HISTORY: [**1]

Appeals from the United States District Court for the District of Columbia (D.C. Criminal No.78-401 and D.C. Civil Action No.79-2975) .

COUNSEL: Earl C. Dudley, Jr., Washington, D. C., with whom Michael Nussbaum, Washington, D. C., was on brief, for appellants Hermann and Raymond.

Leonard B. Boudin, New Yo'rk City, was on brief, for appellant Hubbard.

Philip J. Hirschkop, Alexandria, Va., was on brief, for appellants Heldt and Snider.

Roger Zuckerman, Washington, D. C., was on brief, for appellants Weigand and Willardson.

John Kenneth Zwerling, Alexandria, Va., was on brief, for appellant Wolfe.

Leonard J. Koenick, Washington, D. C., was on brief, for appellant Thomas.

Leonard B. Boudin, New York City, for appellant Church of Scientology of California.

Steven C. Tabackman, Asst. U. S. Atty., Washington, D. C., with whom Charles F. C. Ruff, U. S. Atty., Carl S. Rauh, Principal Asst. U. S. Atty., John A. Terry, John R. Fisher, Keith A. O'Donnell, Michael W. Farrell, Raymond Banoun, Judith Hetheron and Timothy J. Reardon, III, Asst. U. S. Attys., Washington, D C., were on brief, for appellee.

George K. Rahdert, St. Petersburg, Fla., and James L. Yacavone, III, Clearwater, [**2] Fla., were on brief, for amici curiae Clearwater Newspapers, Inc. and Times Publishing Co.

Also, Ronald G. Precup, Washington, D. C., entered an appearance, for appellants Hermann and Raymond.

Leonard S. Rubenstein and Geraldine R. Gennet, Alexandria, Va., entered appearances, for appellants Heldt and Snider.

Roger Spaeder and Lawrence A. Katz, Washington, D. C., entered appearances, for

appellants Weigand and Willardson. I

Richard McMillin, Washington, D. C., entered an appearance, for appellant Thomas.

JUDGES: Before ROBINSON, MacKINNON and WALD, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD

Dissenting opinion filed by Circuit Judge MacKINNON.

OPINION BY: WALD

OPINION: [*332] MEMORANDUM

Opinion After Remand

In *United States v. Hubbard*, 208 U.S. App. D.C. 399, 650 F.2d 293 (D.C.Cir. 1980), this court ordered this case remanded to the district court for "review (of) its decision to unseal the documents" at issue in light of "this court's determination, on the basis of the record now before us, that the seal on the documents at issue should be retained, absent substantial factors weighing in favor of public access." *Id.*, at 324. We left open to the district court [**3] the option of abiding by its original order in whole or in part.

However, we mandated that this result be accompanied by an expanded record. Any decision ordering the unsealing of documents as to include an explanation in a "supplemental rationale" of "how the trial judge's analysis of the generalized interests at stake differed from our own, (and) whether he may have justified disclosure on the basis of the "particularize" factors we suggest or on some other basis as well as with specific reference to the particular documents or groups of documents to which each reason is applicable." *Id.*, at 324. This rationale was to be supplied to the parties, including the Church, to enable them to file a motion for reconsideration in which they might contest its findings or offer evidence of particularized privacy interests in the involved documents. We postponed our final ruling on the original appeal from the unsealing order until such time as the district court ruled on these motions and transmitted the record of the supplemental proceedings to this court. *Id.*, at 324-325.

On remand, the trial judge who had issued the original order unsealing the documents reaffirmed the original reasons [* 4] given for his order in a supplemental memorandum opinion issued on October 15, 1980. *United States v. Hubbard*, Crim. No.78-401 (D.D.C. Oct. 15, 1980). Although the trial judge wrote that he "perceives no particularized reason for the release of the documents, other than those stated in the unsealing order," see *id.*, slip op. at 3, he both restated several general reasons for his decision to release the entire group of documents at issue, and presented apparently particularized justifications for the release of individual documents or groups of documents. See *id.*, slip op. at 4. However, he failed to identify the documents or groups of documents to which these particularized justifications applied. See *id.* The record was then transmitted to this court.

On October 30, 1980, the trial judge recused himself from participation in any further proceedings in this case.

On November 5, the district judge assigned to the case after the first judge's recusal filed an order stating that because he had no "knowledge regarding the trial judge's determination tha disclosure of the documents under seal was warranted, (he) is in no position to 'supplement' his rationale (.)" Church of Scientology [**5] v. United States, Civ. No.79-2975, slip op. at 2 (D.D.C. Nov. 5, 1980). Stating further that "this court perceives no 'substantial factors' favoring disclosure," he concluded:

Upon consideration of the generalized and particularized privacy interests in the instant case, this Court can only conclude that the documents in question must remain under seal "until the evidentiary [*333] utility of the seized documents is exhausted."

Id.

No motions for reconsideration nor appeals have been filed subsequent to the November 5th order of the district court. Bot appellants and appellees have filed memoranda with this court responsive to the earlier supplemental opinion of the original trial judge, appellants urging that the documents continue to be kept under seal, and appellees urging that the supplemental record provides a sufficient rationale for their unsealing. We consequently decide the original appeal from the unsealing order on the basis of the original record as supplemented by the memoranda and order issue by the two district judges.

Our original remand, designed to clarify the reasons for release, did not require the district court to state particularized justifications [**6] for the release of individual documents or categories of documents; our remand required instead that if such justifications in fact contributed to the decision to unseal, then the reasons be stated and the documents to which they are applicable be identified. In his supplemental opinion, the original trial judge, though disclaiming any additional reasons for release other than those set out in his original order, set out several particularized justifications without reference to identifiable documents or groups of documents. In the absence of any such identification, neither this court nor the parties concerned can meaningfully address the stated reasons for release. Thus, the purpose of the remand was not fulfilled. If he had not recused himself, we would therefore have been forced to remand this case again, stressing that while the district court is not required to conduct the review which may be necessary to identify the documents to which the trial judge's apparently particularized justification pertain, he should have the opportunity to do so.

The subsequent memorandum and order of the second judge, however, indicates that he has decided not to conduct any such review, as he [**7] perceives no substantial factors, generalized or particularized, favoring disclosure. Instead, he has ordered that the documents remain under seal until their evidentiary value is exhausted.

In light of this new determination, this court now enters a final judgment in accordance with the rationale stated in our earlier opinion, reversing the original unsealing order from which the appeals were taken, and remanding the case to the district court for reentry of an order similar to the order of November 5 maintaining the documents under seal. Upon entry of such order our stay of the original unsealing order will be automatically vacated.

MacKINNON, Circuit Judge (dissenting): I dissent from the order sealing the record in this

case. My reasons are stated extensively in my dissent, supra at 325. In short, in my view, the decision was within the discretion allotted to the trial judge and conforms to that "presumption of openness (which) inheres in the very nature of a criminal trial under our system of justice." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 10 S. Ct. 2814, 65 L. Ed. 2d 973 (1980). The availability of the documents in question to public scrutiny is fully supported [**8] by the principle that the public should have access to the testimony and written evidence in the record upon which the court relied in making its decision. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98, 98 S. Ct. 1306, 1311-12, 55 L. Ed. 2d 570 (1977).