



***THE UNITED
STATES COURT
OF APPEALS FOR
THE DISTRICT
OF COLUMBIA
CIRCUIT***

***U.S.
V. HUBBARD***



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The United States Court of Appeals for the District of Columbia Circuit

U.S. v. Hubbard

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Church and individual defendants appealed from orders entered by the United States District Court for the District of Columbia, Charles R. Richey, J., making publicly available all documents seized during searches of churches, denying motion by the church to intervene, and denying motion seeking immediate return of the seized documents and also seeking injunctive relief. The Court of Appeals, Wald, Circuit Judge, held that: (1) church had sufficient interest in papers seized during two searches of church buildings to be entitled to seek, by motion, return of such property and to apply for injunctive relief restraining public access to such documents; however, it was not appropriate for the church to seek from Court of Appeals writ of mandamus directing district court to refrain from unsealing such documents for public inspection; (2) district court had ancillary jurisdiction over claims of the church, as well as most claims made by individual defendants concerning the documents; and (3) seal of documents, which were introduced under seal only in pretrial suppression hearing and only for purpose of showing that search and seizure were unlawful and which were not used in ruling on the suppression motion, should not have been lifted. After remand, the Court of Appeals entered a final judgment reversing the original unsealing order in which the appeals were taken, and remanded the case for reentry of an order.

Reversed and remanded.

MacKinnon, Circuit Judge, dissented and filed opinion.

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).

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 York 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. *295 **401 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 Hetherton 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, 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.

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

Before ROBINSON, MacKINNON and WALD, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

Dissenting opinion filed by Circuit Judge MacKINNON.

WALD, Circuit Judge

We confront the issue here of whether and on what grounds a district court judge may make available to the public papers seized from a third party nondefendant, subsequently introduced under seal only in a pretrial suppression hearing and only for the purpose of showing that the search and seizure were unlawful. As far as we have been able to determine, there is no precedent on the issue. The seized documents were made available to the public on the eve of the defendants' convictions under a disposition agreement and at a time when the trial judge's ruling denying suppression of the seized materials was certain to be appealed. Three reasons were given for making these documents publicly available: "there is a right in the public to know what occurs before the courts;" "there is a public interest in access to court records;" and "sunshine is the best disinfectant." [FN1] When the unsealing decision was announced, the third party nondefendant sought but was denied leave to intervene to assert its interest in retaining the documents under seal. It then moved the court for immediate return of the documents and for an order temporarily enjoining public access pending their return.

These motions were also denied.

FN1. *United States v. Hubbard*, Cr. No. 78-401 (D.D.C. Oct. 25, 1979). The consolidated appeals argued to this panel are from four orders of the district judge. The first was entered in response to a motion filed by the individual criminal defendants to seal the stipulated record on which the trial was to occur. The motion was denied and the judge took the occasion to order the unsealing of the documents at issue here. That order is cited above and offers the rationale quoted in the text. The defendants' motion for reconsideration was denied in a second order entered October 30, 1979, also appealed here. Although the motion for reconsideration was denied, the court in a memorandum order responded to several arguments for nondisclosure raised by the defendants and expressed an intention to screen the documents prior to release to ensure against "an unwarranted invasion of privacy" of "innocent third-parties." These two orders are appealed by the individual defendants, Docket No. 79-2312, and are reprinted in the joint appendix filed in that case at 171 and 223, respectively. (The joint appendix in No. 79-2312 is hereinafter referred to as *Hubbard App.*)

The third and fourth orders are the subject of appeals by the Church of Scientology of California (the "Church"). The third order, entered October 31, 1979, denied the Church's motion to intervene in the criminal case to assert its interest in retaining the documents under seal; the order is appealed in No. 79-2313. The fourth order, rendered orally November 2, 1979, in a proceeding assigned to the same judge but docketed in the district court as a separate civil action, dismissed the Church's motion for return of property and application for an order temporarily restraining public access to the documents unsealed pending their return; the order is appealed in No. 79-2324. Transcript of Proceedings, *Church of Scientology of Cal. v. United States*, Civ. No. 79-2975 at 51-56. The order denying intervention and the transcript of the proceedings in open court at which the Church's motion for return of property and application for a temporary restraining order were denied are reprinted in the appendix filed by the Church in Nos. 79-2313 & 79-2324 as documents (Docs.) 9 and 11, respectively.

(The Church's appendix in Nos. 79-2313 & 79-2324 is hereinafter referred to as Church App.)

After studying the matter in depth, we have determined to stay the unsealing orders appealed in No. 79-2312, to vacate the orders denying intervention and temporary injunctive relief appealed in Nos. 79-2313 and 79-2324,[FN2] and to remand to the trial court for supplemental proceedings and transmission to this court of a more particularized rationale, under guidelines discussed below. We retain jurisdiction over the matter and order all documents at issue here sealed pending our decision following remand.[FN3]

FN2. We vacate the orders denying intervention and temporary injunctive relief because we treat the various means by which the Church sought to assert its interests in the district court as having commenced a proceeding within the trial court's ancillary jurisdiction. See text at notes 63-65, *infra*. As noted in the text, *infra*, at note 67, we do not reach the question whether a nonparty may ever intervene in a criminal case. For the reasons given *infra*, note 63, we affirm that portion of the order appealed in No. 79-2324 which may be read to deny on the merits immediate return of the seized documents.

FN3. We choose to retain jurisdiction with the virtual certainty that a simple remand would result in a second appeal regardless of the trial judge's ultimate decision. Our purpose is twofold. First, we hope to obviate the proliferation of motions and collateral proceedings which has characterized the litigation of this and other issues related to these criminal proceedings, a profusion of paper which has sorely tried the patience of this court and the district court. Second, we seek to ensure that the documents remain under seal until the matter is again before this court. If upon reconsideration the district court determines not to release any documents or if the parties determine not to contest the district court's ultimate decision, the parties should so inform this court.

I. BACKGROUND