CHAPTER 8, Exhibit 6

SCIENTOLOGY CASES

LIST OF CASES

1. Church of Scientology of Minnesota v. Dept. of Health Education and Welfare et al
   No. 4-69 CIV 86
   U.S. District Court Fourth Division

2. Church of California v. Siegelman Conway Lippincott Co. and Deutzh 79 civ. 1166(GLG)
   U.S. District Court N.Y.

3. Church of Scientology v. U.S. No. 226-61 U.S. Court of Claims cite 412 F. 2d 1197 (1969)

4. U.S. of America v. Article or Device "Hubbard Electrometer"
   No. DC 1-63 U.S. District Court
   District of Columbia Cite/333F. Supp. 357

5. Allard v. Churvh of Scientology of California civ. 45562 cite app. 129 Cal. RPTR 797

6. U.S. of America v. Mary Sue Hubbard et. al., Crim. No. 78-0401 District Court of Columbia

7. Church of Scientology v. U.S. of America
   No. 71-2761
   U.S. Court of Appeals
   Cite 485 F2d 313 (1973)

8. Church of Scientology v. Gabriel Cazares + 5th Circuit Opinion
   No. 76-86 Civ T-K
   U.S. District Court Tampa, FLA

9. Church of Scientology of Washington D.C. v. Heinrich Bauer Verlag et al.
   No. 74-1789

10. U.S. District Court of Appeals District of Columbia cite 536 F, 2d 249 (1976)
    U.S. Court of Appeals Ninth Circuit

11. Church of Scientology v. Elliot Richardson
    No. 24276
    U.S. Court of Appeals Ninth Circuit

12. Church of Scientology v. Bernard Green
    No. 69 Civ 5745
    U.S. Disctrict Court S.D. N.Y.

CHURCH OF SCIENTOLOGY OF HAWAII, Plaintiff-Appellee,

v.

The UNITED STATES of America, Defendant-Appellant.

No. 71-2761.

United States Court of Appeals, Ninth Circuit.

Sept. 6, 1973.

Appeal by Government from an order of the United States District Court for the District of Hawaii, Martin Pence, Chief Judge, denying Government's motion to dismiss tax refund suit by nonprofit religious corporation. The Court of Appeals, Trask, Circuit Judge, held that corporation waived contentions that it refused the tender by Government of 1965 and 1966 tax payments made by corporation because amount of tender was insufficient but that Government's tender did not moot action.

Affirmed.

Koelsch, J., filed a dissenting opinion.

1. Constitutional Law ⇐69

There must be a viable justiciable controversy before the federal court in order for it to act, since the court does not render advisory opinions or decide abstract propositions. U.S.C.A.Const. art. 3, § 1 et seq.

2. Action ⇐6

Mere voluntary cessation of allegedly illegal conduct does not moot a case.

3. Declaratory Judgment ⇐217

Proscriptions of Declaratory Judgments Act as to tax matters had no application to action which did not ask for declaratory relief but which sought a refund of taxes, allegedly unlawfully assessed and paid, on the basis that the taxpayer was a church formed exclusively for religious and educational purposes with no part of its net earnings inuring to the benefit of any individual and exempt from taxation. 26 U.S.C.A. (I.R.C.1954) §§ 501(c)(3), 7422; 28 U.S.C.A. § 2201.

4. Internal Revenue ⇐2011

Taxpayer's refusal for specified reasons to accept a tender by the Government of the taxes taxpayer has paid waives all other reasons, for purpose of determining whether tender moots refund suit.

5. Internal Revenue ⇐2011

Church which refused to accept Government's tender of income taxes paid by church for two years only on the basis that refund would not lay to rest charges of collateral harassment and settle all questions but which made no objection to the amount of the tender waived contention that it refused tender because amount of tender was insufficient in that the interest included was inadequate and no costs of the action were included.

6. Criminal Law ⇐1026

In criminal cases, payment of penalty does not moot the case for final appeal and determination if judgment of conviction may entail collateral consequences.

7. Internal Revenue ⇐2011

Where underlying issue of status of nonprofit religious corporation as an organization exempt from federal income taxation was a continuing one and recurring each year, determination of corporation's status involved collateral consequences such as the corporation's right to be exempt from contributing under Federal Insurance Contributions Act and its right to certain postal rates, and Government's tender of a refund of corporation's 1965 and 1966 income tax payments was not intended to be a final resolution of tax-exempt status issue and tender was not accepted, tender of tax payments did not moot corporation's action for refund of taxes. 26 U.S.C.A. (I.R.C.1954) §§ 501(c)(3), 3121(b)(8)(B), 3401(a)(9), 7422.

13. Church of Scientology of California v. Dell Publishing Co. Inc. v. Dell Publishing
No. C-70-2089

14. U.S. of America v. Church of Scientology of California
No. 74-1487 Court of Appeals Ninth Circuit

15. Church of Scientology v. United States
No. 226-61 cite 412 f. 2d 1197 (1969)

16. Church of Scientology of Washington, D.C. v. Director FBI et al
Civ. A. No. 78-0107
U.S. District Court of D.C.

17. Church of Scientology v. Ronald Schultz
No. 78-1310
District Court of Florida Second District

18. Church of Scientology v. Paul M. Wade
No. 77-578

19. Missouri Church of Scientology v. State Tax Commission
No. 59551
Supreme Court of Missouri en. banc.
Cite 560 s.w. 2d 837

20. Church of Scientology v. James Adams
No. 75-1954
U.S. Court of Appeals Ninth Circuit

21. Church of Scientology of Washington D.C. et.a. appellants, v. U.S. of America
No. 21483
U.S. Court of Appeals

22. Founding Church of Scientology of Washington D.C. v. American Medical Association
No. 77-561

23. Church of Scientology of California v. U.S. of America
No. 78-2434
U.S. Court of Appeals Ninth Circuit

24. Appeal of Arthur Maren

25.

26. U.S. v. Miscellaneous Appellants
No.

27. Church of Scientology of California v. I.R.S.

28. Church of Scientology of California v. Lorna Levett and Brendon Moore
No.

29. Misc. Cases

CHURCH OF SCIENTOLOGY OF MINNESOTA et al., Plaintiffs,

v.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE et al., Defendants.

No. 4-69 Civ. 86.

United States District Court, D. Minnesota, Fourth Division.

July 20, 1971.

Misbranding case. On defendants' motion for reconsideration of order denying motion to dismiss and for summary judgment, the District Court, Nordbye, J., held that in view of literature of organization attributing therapeutic value to use of galvanometers imported from the United Kingdom, the galvanometers were misbranded in that the devices did not bear adequate instructions for their use.

Motion granted.

Judgment affirmed 8 Cir., 459 F.2d 1044.

1. Drugs and Narcotics ⇐4

In view of literature of organization attributing therapeutic value to use of galvanometers imported from the United Kingdom, the galvanometers were misbranded in that the devices did not bear adequate instructions for their use. Federal Food, Drug, and Cosmetic Act, § 502(f) (1), 21 U.S.C.A. § 352(f) (1).

2. Drugs and Narcotics ⇐4

Whether or not other religious institutions violated the Food and Drug Act by making therapeutic claims for the use of certain metals, artifacts, symbols, waters, etc., was immaterial in proceeding to determine whether galvanometers imported from the United Kingdom were misbranded in failing to bear adequate instructions for their use. Federal Food, Drug, and Cosmetic Act, § 502(f) (1), 21 U.S.C.A. § 352(f) (1).

3. Drugs and Narcotics ⇐2

A religious institution is not immune from provisions of the Food and Drug Act. Federal Food, Drug, and Cosmetic Act, § 502(f) (1), 21 U.S.C.A. § 352(f) (1).

4. Drugs and Narcotics ⇐7

Disclaiming labels on galvanometers imported from the United Kingdom could not be considered a labeling in conformity with the banding requirements of misbranding statute in view of the numerous therapeutic uses made of the machines in organization. Federal Food, Drug, and Cosmetic Act, § 502(f) (1), 21 U.S.C.A. § 352(f) (1).

Craig W. Gagnon, of Oppenheimer, Hodgson, Brown, Wolff & Leach, St. Paul, Minn., for plaintiffs.

Robert G. Renner, U. S. Atty., and Peter J. Thompson, Asst. U. S. Atty., Minneapolis, Minn., for defendants.

ORDER

NORDBYE, District Judge.

The defendants have moved for reconsideration of the Court's order of June 11, 1969, denying their motion to dismiss the complaint herein and for summary judgment in their behalf. Subsequent to the order denying defendants' motion, there were filed with this Court excerpts of published material issued by the Church of Scientology, one of the plaintiffs herein, and its founder, L. Ron Hubbard, upon which the Government has renewed its motion for summary judgment. These excerpts from literature put forth by the plaintiffs were obtained by the inspectors of the Food and Drug Administration at the Church of Scientology bookstore located at 3007 Nicollet Avenue, Minneapolis, or received through the mail directly from the said bookstore. The only exception, according to the affidavit of Robert W. Marrs, is exhibit numbered 176, which apparently was mailed directly to an inspector in Minnesota, from Copenhagen, Denmark, where Mr. Hubbard, for a

time at least, carried on some of his activities. It is upon the basis of the literature distributed by these plaintiffs or L. Ron Hubbard and the decision of the Court of Appeals of the Ninth Circuit in Church of Scientology of California v. Richardson, 437 F.2d 214, dated January 11, 1971, which constitute, in part, the basis for the defendants' renewal of their motion for summary judgment. The California case sustained the Government's refusal of admission of certain E-meters allegedly manufactured in the United Kingdom to be used for auditing purposes by the Church of Scientology in California. The Court of Appeals observed as to the District Court's finding, p. 218,

> "In determining the E-meter's *intended* use, the court could validly consider the appellant's publications that discuss the device's applications. * * * Unlike the 'mislabeling' section involved in Founding Church, the court here could determine the E-meter's intended use without evaluating the truth or falsity of any related 'religious' claims. To the contrary, appellant's claims in its literature regarding the applications of the device in the practice of religion were presumed to be true for the purpose of determining its intended use. We find no infringement of First Amendment rights."

In addition, the court made this observation, p. 216,

> "* * * The E-meter is manufactured in the United Kingdom and is, in fact, a simple skin galvanometer that crudely measures changes in electrical resistance in the human body."

It may be noted that the galvanometers in question in this proceeding were manufactured in the United Kingdom and imported into the United States, but E meters are now manufactured in this country and apparently are available to the adherents of the Church of Scientology. An examination of the literature distributed by these plaintiffs in connection with the teachings of Dianetics and the Church of Scientology discloses that it sets forth numerous statements contradictory to the labels affixed to the E-meters, to wit, "Not intended or effective for the diagnosis, treatment or prevention of any disease."

It appears from the showing here that L. Ron Hubbard, at one time at least, maintained his headquarters in England, and according to the recital of facts in Founding Church of Scientology v. United States, 133 U.S.App.D.C. 229, 409 F.2d 1146, he first developed certain teachings in the early 1950's which he called "Dianetics". These teachings are significant in this case since many of the therapeutic techniques in Dianetics are now found in the teachings of the Church of Scientology. In the *Founding Church* case the court stated, p. 1151,

> "The basic theory of Dianetics is that man possesses both a reactive mind and an analytic mind. The analytic mind is a superior computer, incapable of error, to which can be attributed none of the human misjudgments which create social problems and much individual suffering. These are traceable rather to the reactive mind, which is made up of 'engrams,' or patterns imprinted on the nervous system in moments of pain, stress or unconsciousness. These imprinted patterns may be triggered by stimuli associated with the original imprinting, and may then produce unconscious or conditioned behavior which is harmful or irrational.
>
> "Dianetics is not presented as a simple description of the mind, but as a practical science which can cure many of the ills of man. It terms the ordinary person, encumbered by the 'engrams' of his reactive mind, as a 'preclear,' by analogy to a computer from which previously programmed instructions have not been erased. The goal of Dianetics is to make persons 'clear,' thus freeing the rational and infallible analytical mind. The benefits this will bring are set out in considerable and alluring detail. All mental disorders are said to be caused by 'en-

grams,' as are all psychosomatic disorders, and that concept is broadly defined. [Dianetics: The Modern Science of Mental Health, Hubbard].

"A process of working toward 'clear' is described as 'auditing.' This process was explicitly characterized as 'therapy' in Hubbard's best-selling book Dianetics: The Modern Science of Mental Health (1950). The process involves conversation with an 'auditor' who would lead the subject or 'preclear' along his 'time track,'* discovering and exposing 'engrams' along the way. Though auditing is represented primarily as a method of improving the spiritual condition of man, rather explicit benefits to bodily health are promised as well. Hubbard has asserted that arthritis, dermatitis, asthma, some coronary difficulties, eye trouble, bursitis, ulcers and sinusitis are psychosomatic and can be cured, and further that tuberculosis is 'perpetuated by engrams.'

"A few years after the appearance of Dianetics, Hubbard began to set forth the broader theories of Scientology. Dianetics was explicitly endorsed as part of Scientology, 'that branch * * * that covers Mental Anatomy.'"

The relationship of Dianetics to Scientology and the use of the E-meter in each is repeatedly emphasized in the literature and advertising sent out by Hubbard through the local Church of Scientology. One of plaintiffs' exhibits herein noted as Exhibit 128 reads in part as follows:

"GET E-METER TRAINING

"Every level of training in Scientology from the Dianetic Auditor's Course to the Academy Levels O, I, II, III, IV, and the Saint Hill Special Briefing Course (Class VI) gives definite, expanded steps of E-Meter auditing technology. Excellent understanding and handling of the E-Meter is thus easily acquired on an exact gradient.

"Contact your nearest Hubbard Scientology Organization to begin your first or next step in training in standard Scientology auditor technology.

"A student on all courses from the Dianetic Auditor's Course upward must own a Mark V E-Meter."

On Page 14 of Exhibit 131, in discussing "auditing" generally appears the following:

"Paralysis, anxiety, stomachs, arthritis and many ills and aberrations have been relieved by auditing them. An E-Meter shows them up and makes them confess their misdeeds."

In Exhibit 132, the E-Meter essentials are listed beginning with the sentence:

"There is no known way to clear anyone without using a meter."

In Exhibit 156, the following appears in an advertisement pamphlet obtained from the local Church of Scientology bookstore, which reads:

"ORDER YOUR E-METER TODAY!

"You need an E-Meter on every Dianetic or Scientology Course.

* * * * * *

"* * * the Mark V E-meter accurately measures the mental state and changes in state of homo sapiens."

Exhibit 162, headed "GET PROCESSED," contains the following:

"DIANETIC PROCESSING—Become a happy, well human being. Dianetic processing (pastoral Counseling) is The Mental Technology which handles psychosomatic ills. If you have emotional problems or psychosomatic ills, GET DIANETIC AUDITING. 5 hour Intensive—$175 25 hour Intensive—$725.00"

Exhibit 170, a pamphlet sent through the mails from the local Church of Scientology in 1970, outlines the services

* In Exhibit 126, "time track" is defined as "The span of the individual from conception to present time on which lies the sequence of events of his life."

available in Dianetics training in Minneapolis, and then lists a few of the uses of auditing as follows:

"To increase IQ

"To help cure any body problem that is not purely physical in nature or cause such as helping mothers give easier birth and faster recovery after birth

"To speed recovery and healing after operations and accidents

* * * * * *

"Almost any human situation containing pain and misemotion should be handled by auditing. Auditing is the answer to human disability and travail. It can make life worth living. Auditing is not a limited action. There is no limit to what good auditing can do."

In L. Ron Hubbard's pamphlet issued in 1970 called "The Auditor," Exhibit 176, he discusses the effect of his book called "Standard Dianetics" issued in the middle of 1969, and he commented upon its wide success compared to Scientology as follows:

"You see there have always been, since 1950, these TWO subjects—Dianetics and Scientology.

"DIANETICS addressed the body, the direct effect of thought on the body.

"SCIENTOLOGY addressed the world of thought, of life itself."

* * * * * *

"Anyway, Dianetics is what you use to handle material matters. Scientology is used to handle thought, ability, further awareness.

* * * * * *

"People who are medically ill, we send to the medical doctor. People who are physically ill from pscho-somatic causes are processed on Dianetics.

"Those who are not medically ill or psycho-somatically ill can be entered directly into Scientology grades and *should be.*

"Dianetics has many uses - accidents, injuries heal much more quickly —chronic illness ends when so assisted. Drug addition or drug troubles can be erased.

"The road out, of course, is Scientology.

"But a preclear can be audited on either Dianetics or Scientology at any stage of his auditing.

"Scientology is said to be easier to confront for most preclears at first."

It is to be gathered from other literature distributed by the Church of Scientology that in order to be efficient in auditing in Scientology, one should first become efficient in Dianetics. Reference may be made to Exhibit 121, which is an advertising sheet issued by Hubbard in 1969, which reads, in part,

"SEND FOR YOUR MARK V E-METER TODAY

"You need a Hubbard Mark V E-Meter (Electrometer) on the Hubbard Dianetic Auditor's Course and on every Scientology Course from the Hubbard Recognized Scientologist Course onwards.

"YOU NEED AN E-METER on your Road to Total Freedom.

"Precision built to Ron's exact specifications, the Mark V E-Meter accurately indicates mental states and changes in these states. It is *indispensable* to your progress in Scientology."

As stated in the case of Church of Scientology of California, 437 F.2d p. 216,

"The 'Hubbard E-meter' is an instrument that is allegedly essential in the practice of Scientology. The E-meter is manufactured in the United Kingdom * * *. The Food and Drug Administration refused to allow the importation of the E-meters because they were deemed to be 'devices' (21 U.S.C. § 321(h)) that ap-

peared to be 'misbranded' in that they did not bear adequate instructions for use (21 U.S.C. § 352(f) (1))."

In the California case, p. 217, the District Court held that the E-meter was a "device" within Section 321(h) because it is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man, and further held that Section 381(a) requires only that the device appears to be misbranded and vests such determination in the discretion of the Secretary of Health, Education and Welfare. Moreover, the court held that the "Secretary's determination of misbranding is *not* subject to judicial alteration unless it was arbitrary and capricious." And, as here, the court noted that there were no allegations in the complaint that the Secretary's determination of misbranding was arbitrary or capricious and held that the real issue tendered by the complaint was a claimed violation of civil rights, to wit, religious freedom.

The plaintiffs assert that the only use of the E-meter is in connection with the religious ceremony called "auditing" and that the Church of Scientology in its religious ceremony does not in any way relate to the alleviation of any disease or ailment, mental or physical, but that the E-meter is used in a religious rite similar to the orthodox confession which is formalized in some of the churches which adhere to many religious creeds. Although the E-meter is used in auditing in Dianetics, it seems clear that the literature distributed by the Church teaches primarily that higher skill and longer experience are demanded in successfully auditing a person with the E-meter in the Church of Scientology. Moreover, it seems reasonably clear upon the entire showing herein that the principal purpose of auditing in the Church with the E-meter is to delve more effectively into the mental and physical stresses of the individual audited, resulting in the person audited ultimately becoming a "clear" and thus free from any psychosomatic or similar ailments of the human body.

In commenting upon the purposes of Scientology and the progress being made in its various fields of activity, Mr. Hubbard distributed many circulars. That inconsistencies and seeming contradictions appear in the field of Dianetics and the purposes of Scientology is evident. In Exhibit 114, he refers to the five levels of Scientology. As to Scientology No. 2, that is, the second level, he states:

> "Academy HPA/HCA accomplishment level. Scientology for use in spiritual healing. This is a healing strata, using the wealth of past processes which produced results on various illnesses. I am shortly sending out questionaires to get all Healing process results as a research project. The auditing level is Reach and Withdraw and Repetitive Processes. The target is human illness. We have never entered this field but as we are not thanked for staying out of it, we might as well dominate it. It is a good procurement area."

Granted that the claims for Dianetics in the cure and alleviation of disease and various ailments with the aid of the E-meter are emphasized more frequently in literature distributed by these plaintiffs than that which is circulated in the field of Scientology. It may be argued that the Church with the use of the E-meter in Scientology assumes to enter the field of psychiatry and psychology with the limited claim of the mental improvement of the person audited. However, it is unmistakably clear from the record that with the E-meter the Church of Scientology contends that one of the primary purposes of auditing in the Church is to improve the health of the person audited. For instance, in Exhibit 118, in commenting upon Scientology in the chapter entitled "Science Processing," appears the following:

> "Scientology, used by the trained and untrained person, improves the health, intelligence, ability, behavior, skill and appearance of people.
>
> * * * * * *

"It is employed by an AUDITOR (a Scientology practitioner) upon individuals or small or large groups of people in their presence. The Auditor makes these people, at their choice, do various exercises, and these exercises (processes) bring about changes for the better in intelligence, behaviour and general competence."

[1] This Court in passing upon defendants' motion does not assume to find or determine the actual effects of the use of the E meter in auditing in the ceremony of the Church. That is, the question of the truth or the falsity of the claims made by the Church in the process of auditing in the Church of Scientology is not herein determined and is not before the Court for determination. The Court merely finds that the E-meter as used in the auditing ceremony is an instrument which is used by the Church for certain diagnostic and therapeutic purposes in improving the health of the person audited, usually after Dianetic auditing, and therefore the machine and the use thereof come within the scope of Section 352(1) (1), 21 U.S.C., and finds that the machines transported from the United Kingdom to this country and seized by the defendants do not bear adequate instructions for their use.

[2, 3] It is to no purpose to urge, as plaintiffs do, that other religious sects in their practices make certain therapeutic claims for the use of certain medals, artifacts, symbols, waters, etc., in the alleviation and even cure of certain human ailments, and therefore because these religious sects are in no way molested by the Government in these teachings and the results thereof, the Church of Scientology should be accorded the same religious freedom. Whether or not other religious institutions violate the Food and Drug Act is immaterial in this proceeding. A religious institution is not immune from the provisions of the Food and Drug Act. This fact is recognized in the *Founding Church* case where the court observed that the exercise of religious freedom does not include the freedom to violate the Federal Act now under consideration. The literature adopted by the plaintiffs contains an abundance of claims of diagnostic and therapeutic values, particularly in the neurotic and psychotic field in the use of the E-meter in auditing in the Church of Scientology, and admittedly there are no instructions for the use of this machine by way of any labeling thereof. As stated before, this Court does not assume to find whether or not the auditing claims are true or false.

Moreover, this Court agrees with the statement of the Ninth Court of Appeals in its California decision of January 11, 1971, wherein it held in considering a similar state of facts in connection with the use of the E-meters by the Church of Scientology of California that the E-meter should not be held harmless and thus exempt under Section 352(f), 21 U.S.C., which reads, in part,

"Provided, That where any requirement of clause (1) of this subsection as applied to any drug or device, is not necessary for the protection of the public health, the Secretary shall promulgate regulations exempting such drug or device from such requirement."

In that connection, the California court referred to Drown v. United States, 198 F.2d 999, 1006, where the court stated,

"* * * While the instruments may be harmless in themselves, their danger lies in the possibility that 'ignorant and gullible persons are likely to rely upon them instead of seeking professional advice for conditions they are represented to relieve or prevent.'" (Citing United States v. Kordel, 7 Cir., 1948, 164 F.2d 913, 916, affirmed 335 U.S. 345, 69 S.Ct. 106, 93 L.Ed. 52.

[4] That there is an absence of any instructions for the use of these machines by way of any labeling is not contradicted. True, there are disclaiming labels on the machines, but such an inscription cannot be considered a labeling

of E meters in conformity with the labeling requirements of Section 352(f)(1), 21 U.S.C., in light of the showing made here as to the numerous therapeutic uses made of these machines by these plaintiffs in auditing in the Church of Scientology.

The Court has not assumed to rest this decision solely upon the contention of the defendants that the Court should grant summary judgment in their behalf because plaintiffs are in privity with the Church of Scientology of California v. Richardson. But clearly the holding of the California case is strong authority in support of the analysis and the conclusions therefrom which this Court has made of the various church publications as to the therapeutic uses of the E-meter in the auditing ceremony in the Church of Scientology.

It follows from the foregoing that defendants' motion for summary judgment must be granted, and judgment in their behalf may be entered dismissing the complaint herein. It is so ordered. Exceptions are allowed.



Lawrence Lee CARTER, Petitioner,

v.

A. E. SLAYTON, Superintendent, Virginia State Penitentiary, Respondent.

Civ. A. No. 71-C-61.

United States District Court,
W. D. Virginia,
Danville Division.

April 17, 1972.

Proceeding on petition by state prisoner for federal habeas corpus relief. The District Court, Dalton, J., held that where prisoner, who pled guilty, knew that he could be tried by jury on plea of not guilty, and where, though retained defense counsel never made formal inquiry to determine if petitioner was aware of nature and consequences of plea, it was clear that he understood them, plea was freely and voluntarily entered.

Petition dismissed

1. Courts ⇨100(1)

That trial judge failed, before accepting guilty plea from accused who was represented by retained counsel, to conduct inquiry to determine if accused understood nature of plea was not fatal error where plea was accepted prior to United States Supreme Court decision relating to requirement that trial judge make such inquiry.

2. Criminal Law ⇨273

Where accused, who pled guilty, knew that he could be tried by jury on plea of not guilty, and where, though retained defense counsel never made formal inquiry to determine if accused was aware of nature and consequences of plea, it was clear that he understood them, plea was freely and voluntarily entered.

3. Criminal Law ⇨273

That guilty plea, which was freely and voluntarily entered, was entered on considered advice of retained counsel did not alter its validity.

4. Criminal Law ⇨641.13(2, 6)

Accused charged with malicious wounding was not denied effective assistance of counsel on theory that defense counsel failed to investigate claim of self defense and that counsel failed to cross-examine prosecutrix where counsel, from his interviews with accused and police, and after reading written confession to crime, determined that there was no defense to charge and where counsel did in fact cross-examine prosecutrix, eliciting her testimony that though she had no gun, she did in fact threaten accused with fork before he wounded her. 28 U.S.C.A. § 2254.

COPY

U.S. DISTRICT COURT
FILED
DEC 20 1979
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

CHURCH OF SCIENTOLOGY OF CALIFORNIA and FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C.,

Plaintiffs,

-against-

JAMES SIEGELMAN, FLO CONWAY, J.B. LIPPINCOTT COMPANY and MORRIS DEUTSCH,

Defendants.

- -x

79 Civ. 1166 (GLG)

O P I N I O N

#49455

A P P E A R A N C E S :

COHN, GLICKSTEIN, LURIE,
OSTRIN & LUBELL, ESQS.
Attorneys for Plaintiffs
1370 Avenue of the Americas
New York, N.Y. 10019
By: Jonathan W. Lubell, Esq.
Audrey J. Isaacs, Esq.
Of Counsel

ROSNER & ROSNER, ESQS.
Attorneys for Defendant, Deutsch
6 East 43rd Street
New York, N.Y. 10017
By: Jonathan Rosner, Esq.
Of Counsel

G O E T T E L, D. J.:

In this libel action brought by two branches of the Church of Scientology, defendant Morris Deutsch has moved to reargue many of the issues decided by the Court in its opinion of August 27, 1979. Church of Scientology of California v. Siegelman, 475 F. Supp. 950 (S.D.N.Y. 1979).

The facts of this action are set forth in detail in the August 27th decision. Defendant Deutsch now asserts that the Court erred in failing to dismiss the action as against him. In essence he argues that because the statements allegedly made by him were directed at the Scientology movement in general, and not at either of the instant plaintiffs, neither of these plaintiffs was defamed or, consequently, damaged.

In order to make out a cause of action for libel a plaintiff must establish that the alleged defamatory remark was directed at some specific individual or group and not merely at an "indeterminate class." Gross v. Cantor, 270 N.Y. 93, 96, 200 N.E. 592, 593 (1936); Schutzman & Schutzman v. News Syndicate Co., 60 Misc. 2d 827, 304 N.Y.S.2d 167 (Sup. Ct. 1969). Where the defamatory remark is found to be directed at a "small" group as a whole, however, it has been held that suit may be brought by any member of that group. Neiman-Marcus v. Lait, 13 F.R.D. 311, 315 (S.D.N.Y. 1952). See Arcand v. Evening Call Publishing Co., 567 F.2d 1163, 1164-65 (1st Cir. 1977).

The defendant asserts that the alleged defamatory remarks refer to the overall, worldwide Scientology movement, of which there are more than five million members (over three million members in the United States) and numerous organizational instrumentalities. Accordingly, as the group allegedly defamed is extremely large, the defendant claims that no individual within that group can sue absent proof that that individual was a specific target of the defamatory language. See Neiman-Marcus v. Lait, supra.

Conversely, the plaintiff asserts that the alleged defamatory language relates to the very limited group of Churches of Scientology in the United States. As there are only twenty-two such churches within that group, the plaintiffs claim that all members of the group can sue. See Gross v. Cantor, supra.

Where the truth lies in this matter is somewhat unclear. The Court believes, after having closely examined the alleged defamatory language in the complaint, that the plaintiff will have difficulty proving that the language relates to the limited group of Churches of Scientology. Nevertheless, we cannot say at this time, as a matter of law, that they will not be able to do so, and thus show that the alleged defamation related to these plaintiffs. See Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966). See also Mitchell v. Bindrim, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979), cert. denied, 48 U.S.L.W. 3370 (U.S. Dec. 3, 1979). Accordingly, the defendant's motion to reargue as to this point is denied.

In its August 27th opinion the Court expressed its doubts as to the ability of the plaintiffs to prove the existence of the "actual malice" on the part of the defendant that is necessary in order to establish his liability. Church of Scientology of California v. Siegelman, supra, 475 F. Supp. at 955. The Court has now expressed its doubts as to the ability of the plaintiffs to demonstrate that the alleged defamatory remarks made were directed at them rather than at some far larger group. Nevertheless, as to both issues discovery has not as yet been completed,[1/] and the Court believes it would be premature to reach any final determination on these issues. However, in view of the importance of preventing potentially frivolous suits where first amendment rights are concerned, and in view of the continuing appropriateness of summary judgment (though apparently limited by the Supreme Court's recent decision in Hutchinson v. Proximire, 99 S.Ct. 2675, 2680 n.9 (1979)) as a means through which to resolve many such cases, see Nader v. De Toledano, F.2d (D.C. Cir., July 31, 1979), the Court makes its determination as to the instant motion, as it did as to the defendant's previous motion,

---

1/ Discovery in this action has, it appears, been proceeding at a less than rapid pace, with frequent disputes arising between the parties.

without prejudice to renewal upon completion of discovery.[2/]

Finally, the defendant has asserted that the Court also erred in dismissing his counterclaims that alleged violations of 42 U.S.C. § 1985(3). In this regard, and contrary to the defendant's assertions, the Court has previously considered and rejected as insufficient for section 1985 purposes, the overbroad class, which has been characterized as consisting of members, former members, and persons disseminating information about, the Church of Scientology, but which in essence is made up of persons who are critics of the Church. Church of Scientology of California v. Siegelman, supra, 475 F. Supp. at 957 n.19. Having been presented with no compelling reason why this result should be modified or reversed, the Court reaffirms its conclusion that this "vague and amorphous class was not formed on the basis of any invidious criteria," id., 475 F. Supp. 957 and, accordingly, that the defendant's counterclaims brought under section 1985 must be dismissed.

The defendant Deutsch's motion for reargument is, at this time, denied in all respects.

SO ORDERED:

Dated: New York, N.Y.,
December 19, 1979.

Gerard L. Goettel

U.S.D.J.

2/ In this regard the Court reaffirms its statement in Church of Scientology of California v. Siegelman, supra, 475 F. Supp. at 956 n.16, that "should it be ultimately determined that this suit was brought without cause, or for the purpose of harassment, the Court will not hesitate to order the imposition of counsel fees upon the plaintiff. See Nemeroff v. Abelson, 469 F. Supp. 630 (S.D.N.Y. 1979)."

CHURCH OF SCIENTOLOGY OF CALIFORNIA and Founding Church of Scientology of Washington, D. C., Plaintiffs,

v.

James SIEGELMAN, Flo Conway, J. B. Lippincott Company and Morris Deutsch, Defendants.

No. 79 Civ. 1166 (GLG).

United States District Court, S. D. New York.

Aug. 27, 1979.

Religious organization brought defamation suit against authors, publisher, and a former member of the organization, and defendants counterclaimed for prima facie tort, abuse of process, and conspiracy to deprive defendants of their constitutional rights. The District Court, Goettel, J., held that: (1) statements which were made by defendant authors and which were replete with opinions and conclusions about methods and practices used by religious organization and the effect such methods and practices had, recounts of what authors had been told during the course of their investigation, and some unflattering factual statements did not go beyond what one would expect to find in a frank discussion of a controversial religious organization, which was a public figure, and thus such statements could not be the basis for religious organization's defamation action; (2) fact issue existed as to whether defamatory statements of fact made by former member of religious organization were made with actual malice, precluding summary judgment as to that defendant; and (3) counterclaim sufficiently alleged cause of action against plaintiff religious society for prima facie tort; however, defendants' counterclaim failed to allege cause of action for abuse of process and conspiracy to deprive defendants of their constitutional rights.

Order accordingly.

1. Constitutional Law ⇐84

Testing in court the truth or falsity of religious beliefs is barred by the First Amendment; courts must remain neutral in matters of religious doctrine and practice, avoid involvement in affairs of any religious organization or group, and resist the making of any type of ecclesiastical determination. U.S.C.A.Const. Amend. 1.

2. Constitutional Law ⇐84

Where alleged defamation relates to secular matters and where issues can be resolved by neutral principles of law, the First Amendment does not bar a defamation suit brought by a religious organization. U.S.C.A.Const. Amend. 1.

3. Constitutional Law ⇐84

The First Amendment did not bar defamation suit brought by religious organization, since the allegedly defamatory remarks did not, on their face, relate to the validity of religious beliefs or practices, but dealt with the allegedly debilitating physical and psychological effects certain actions by the religious organization had upon its members. U.S.C.A.Const. Amend. 1.

4. Libel and Slander ⇐78

Religious organization was not precluded from bringing defamation suit merely because it was an association and not an individual.

5. Libel and Slander ⇐48(1)

Plaintiffs that were component parts of a large worldwide religious movement which claimed to have over 5 million adherents, which had taken affirmative steps to attract public attention, and which had actively sought new members and financial contributions from the general public were "public figures," and were thus required to prove that defendants made statements knowing them to be false, or with reckless disregard as to whether they were false or not, in order to recover in their defamation suit.

See publication Words and Phrases for other judicial constructions and definitions.

6. Federal Civil Procedure ⇐2515

In defamation suit brought by religious organization against coauthors of a book, publisher of the book, and a former member of the organization, fact issue existed as to whether the allegedly defamatory remarks were made with actual malice.

7. Libel and Slander ⇐123(1)

In defamation action, whether a particular statement itself could constitute a fact or an opinion is a question of law to be determined by the court.

8. Libel and Slander ⇐6(1)

Statements which were made by defendant authors and which were replete with opinions and conclusions about methods and practices used by religious organization and the effect such methods and practices had, recounts of what authors had been told during the course of their investigation, and some unflattering factual statements did not go beyond what one would expect to find in a frank discussion of a controversial religious organization, which was a public figure, and thus such statements could not be the basis for religious organization's defamation action.

9. Federal Civil Procedure ⇐2515

In defamation action brought by religious organization, fact issue existed as to whether defamatory statements of fact made by former member of religious organization were made with actual malice, precluding summary judgment as to that defendant.

10. Conspiracy ⇐18
Process ⇐171
Torts ⇐26(1)

Counterclaim filed by authors and publisher named defendants in defamation action sufficiently alleged cause of action against plaintiff religious organization for prima facie tort; however, defendants' counterclaim failed to allege cause of action for abuse of process and conspiracy to deprive defendants of their constitutional rights.

Cohn, Glickstein, Lurie, Ostrin & Lubell, New York City, for plaintiffs by Jonathan W. Lubell and Audrey J. Isaacs, New York City, of counsel.

Clark, Wulf, Levine & Peratis, New York City, for defendants Siegelman and Conway by Melvin L. Wulf, New York City, of counsel.

Lester, Schwab, Katz & Dwyer, New York City, for defendant Lippincott by Patrick A. Lyons, New York City, of counsel.

Rosner & Rosner, New York City, for defendant Deutsch by Jonathan Rosner, New York City, of counsel.

OPINION

GOETTEL, District Judge:

In this latest libel action brought by the plaintiffs, two branches of the litigious Church of Scientology,[1] motions have been made by the various defendants to dismiss the complaint for failure to state a claim upon which relief may be granted, Fed.R.Civ.P. 12(b)(6), for judgment on the pleadings, Fed.R.Civ.P. 12(c), and for summary judgment, Fed.R.Civ.P. 56. The plaintiffs have cross-moved to dismiss the counterclaims raised against them.

The defendants Siegelman and Conway are the co-authors of the book *Snapping: America's Epidemic of Sudden Personality Change*, which was published by defendant J. B. Lippincott Company in 1978. In this book the authors attempt to explore what they describe as the "phenomenon . . . [of] sudden and drastic alterations of personality," investigating in the process the effects on personality of the techniques used by many of the current religious "cults" and mass-marketed self help therapies. Included among the many groups studied and commented upon was the

1. A lexis scan provided this Court of reported decisions in the United States courts in which the Church of Scientology was a party revealed the existence of thirty such cases. *See* Exhibit C, Motion of Defendant Deutsch to Dismiss Complaint, for Judgment on the Pleadings, or for Summary Judgment Dismissing the Complaint.

Church of Scientology.[2] The plaintiffs now contend that included among the passages in the book relating to the Church of Scientology were a number of highly defamatory comments.

Following publication of *Snapping*, and as a result of the interest generated by it, and the topic generally, the defendant Siegelman, along with the defendant Deutsch, a former member of the Church of Scientology, appeared as guests on the syndicated television program "The David Susskind Show." The plaintiffs allege that during the course of the program both of these defendants, in response to certain questions posed, made defamatory comments about the Church.[3] The plaintiffs additionally assert that further defamatory remarks were made by Siegelman and Conway in an interview which was published in *People* magazine.

The plaintiffs in the instant action, the Church of Scientology of California, which is registered in California as a non-profit, religious corporation, and the Founding Church of Scientology of Washington, D.C., which is registered in Washington, D.C. as a non-profit, religious corporation, are part of the worldwide Scientology religion of which the plaintiffs assert there are more than five million members, over three million of them in the United States. Numerous local churches of Scientology are located throughout the United States and in various foreign countries.[4] The plaintiffs assert that their individual churches have been seriously injured by the defendants' alleged defamatory statements, and that as a result their ability to function as a non-profit organization has been seriously impaired. The plaintiffs now seek damages against all of the defendants.

2. Although the text of *Snapping* covers two-hundred and fifteen pages, only seven and one-half of these deal specifically with the Church of Scientology.

3. Although Mr. Susskind took part in the discussion, neither he, nor any of the television entities, were named as defendants in this action.

The defendants have alleged a number of grounds upon which the complaint should be dismissed. They first assert, characterizing this action as one concerning statements of religious practice and beliefs, and citing to a long line of Supreme Court cases, that this suit is barred by the free exercise and establishment clauses of the First Amendment.[5]

[1] It is well established that "testing in court the truth or falsity of religious beliefs is barred by the First Amendment." *Founding Church of Scientology v. United States*, 133 U.S.App.D.C. 229, 243, 409 F.2d 1146, 1156 (D.C.Cir.1969). *See United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944). Courts must remain neutral in matters of religious doctrine and practice, *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), avoid involvement in the affairs of any religious organization or group, *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977), *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), and resist the making of any type of ecclesiastical determination, *Presbyterian Church in the United States v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969), *see Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1975). As has been noted, the First Amendment rests "upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum v. Board of Education*, 333 U.S. 203, 212, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948).

[2] The defendants assert that this doctrine of non-entanglement with religion bars the bringing of a libel action by a religious denomination, such as the Church

4. Apparently all of these local churches are separately incorporated in a state in which they conduct their activities.

5. The First Amendment states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ." U.S.Const. Amend. 1.

of Scientology,[6] when the alleged libel relates to the validity of religious beliefs and practices. The Court agrees that where validity of religious beliefs are at issue involvement by the judiciary would be inappropriate. *See Canjotti v. Paulsen*, 280 F.Supp. 89 (N.D.Iowa, 1964). It does not follow from this, however, that simply because a religious organization is a party to an action that that action should be immediately categorized as a theological dispute. Where the alleged defamation relates to secular matters, and where the issues can be resolved by neutral principals of law, no First Amendment bar exists. As was noted by the Supreme Court in a somewhat different context, "[c]ivil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property." *Presbyterian Church in the United States v. Hull Memorial Presbyterian Church*, 393 U.S. at 449, 89 S.Ct. at 606.

[3] In the instant action the alleged defamatory remarks do not, on their face, relate to the validity of religious beliefs or practices. Rather, these statements deal with the alleged debilitating physical and psychological effect certain actions by the Church of Scientology have upon its members. While the Court will be vigilant to avoid any entanglement with theological questions should they arise, at this time no such questions are presented. Accordingly, the Court finds that the free exercise and establishment clauses to the First Amendment are no bar to this action.

[4] Having determined that this action is not precluded by the free exercise and establishment clauses, the Court must next turn to more traditional defamation concerns and determine whether the plaintiff churches constitute public figures within the doctrine of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).[7]

In *New York Times* it was held that a public official could not recover in defamation absent proof that the defendant made the statement knowing it to be false, or with reckless disregard as to whether it was false or not. This standard of proof has been extended so as to apply to public figures as well as public officials. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). Thereafter, the Supreme Court, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789 (1974), attempted to define the ways in which a person could become a public figure:

"For the most part those who attain this status have assumed roles of especial

6. In *Founding Church of Scientology v. United States*, 133 U.S.App.D.C. 299, 409 F.2d 1146 (D.C.Cir.1969), the court held, in view of the plaintiff's having made out a *prima facie* case that Scientology was a religion, and of the defendant's decision not to contest such a characterization, that for the purposes of that action the Church of Scientology was to be treated as a religion entitled to the protection of the free exercise clause. None of the defendants in the instant action have, as of this time, challenged the plaintiffs' description of themselves as religious institutions.

7. The defendants have also asserted that, since the plaintiffs are religious associations and not individuals, their rights to compensation for damages is non-existent, and that therefore the action should be dismissed. The Court, however, finds no merit to this claim for, while it is true that the great majority of defamation cases have been brought by individuals to protect their reputation, *see, e. g., Herbert v. Lando*, — U.S. —, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 1557, 43 L.Ed.2d 773 (1976), corporations have also been allowed to maintain such actions. *See, e. g., Friends of Animals, Inc. v. Associated Fur Manufacturers*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790, 390 N.E.2d 298 (1979); *Cole Fischer Rogow, Inc. v. Carl Ally, Inc.*, 29 A.D.2d 423, 288 N.Y.S.2d 556 (1st Dep't. 1968). In *Cole Fischer Rogow, Inc., supra* at 427, 288 N.Y.S.2d at 562, it was held that for a corporation to recover in defamation it was necessary that:

"the language used must tend directly to injure plaintiff in its business, profession or trade, and must 'impute to the plaintiff some quality which would be detrimental, or the absence of some quality which is essential to the successful carrying on of his office, profession or trade.'"

Thus, if the plaintiffs, after having established the liability of any or all of the defendants, can meet the *Cole Fischer* test and show direct injury, they would then be entitled to compensation for damages.

prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."

[5] Applying this standard to the facts of the instant action the Court finds the plaintiffs, the Church of Scientology of California, and the Founding Church of Scientology of Washington, D.C., to be public figures. The plaintiffs are component parts of a large world-wide religious movement which claims to have over five million adherents. Unlike the plaintiff in *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976),[8] the instant plaintiffs have taken affirmative steps to attract public attention, and actively seek new members and financial contributions from the general public.[9] *See James v. Gannett*, 40 N.Y.2d 415, 386 N.Y.S.2d 871, 353 N.E.2d 834 (1976). As was found in regards to another religious institution (the Gospel Spreading Church) this Court believes the Church of Scientology to be "[a]n established church with substantial congregations . . . [which] seeks to play 'an influential role in ordering society.'" *Gospel Spreading Church v. Johnson Publishing Co.*, 147 U.S.App.D.C. 207, 208, 454 F.2d 1050, 1051 (D.C.Cir.1971). The Church of Scientology has thrust itself onto the public scene, and accordingly should be held to the stringent *New York Times* burden of proof in attempting to make out its case for defamation. *See Church of Scientology of California v. Cazares*, 455 F.Supp. 420 (M.D.Fla. 1978); *Church of Scientology of California v. Dell Publishing Co., Inc.*, 362 F.Supp. 767 (N.D.Cal.1973).[10] *See also Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790, 390 N.E.2d 298 (1979).

[6] Holding the plaintiffs to the *New York Times* burden of proof, however, does not resolve the issue before the Court. The defendants Deutsch and Lippincott[11] (defendants Siegelman and Conway have not joined in this motion) assert that the plaintiffs cannot satisfy the requirement of proving actual malice, and that therefore summary judgment should be granted. They further state that such summary disposition is particularly appropriate, and in fact may be "the 'rule' and not the exception," *Guitar v. Westinghouse Electric Corp.*, 396 F.Supp. 1042, 1053 (S.D.N.Y. 1975), in defamation actions, and is necessary so as to prevent the litigation from having any potentially chilling effect on the exercise of free speech. *See Bon Air Hotel v. Time, Inc.*, 426 F.2d 858, 864 (5th Cir. 1970); *Oliver v. Village Voice, Inc.*, 417 F.Supp. 235 (S.D.N.Y.1976).

The Court is similarly concerned over the damaging effect a frivolous suit could have upon the exercise of First Amendment rights. The propriety of granting summary judgment where actual malice has been alleged, however, has been cast into great doubt by the Supreme Court's recent pronouncement in *Hutchinson v. Proxmire*, ___ U.S. ___, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979). In its decision the Court noted

8. In *Firestone* it was held that a prominent socialite involved in a heavily publicized (with extensive media coverage) divorce action was not a public figure since such publicity had been involuntarily obtained as a result of the plaintiff being "compelled to go to court by the State in order to obtain legal release from the bonds of matrimony." *Id.* at 454, 96 S.Ct. at 965.

9. The plaintiffs, in order to attract both contributors and new adherents to their religion, utilize street-side solicitations, distribute large amounts of printed matter, and send unrequested literature through the mails.

10. In *Dell Publishing Co.* the court, although not directly addressing the public figure issue, applied the *New York Times* actual malice standard in determining the motion before it.

11. The plaintiffs assert that as a result of defects in the defendant Lippincott's moving papers, such papers should not be treated as ones for summary judgment (but simply as additions to the papers moving to dismiss the complaint.) In view of the Court's disposition of this motion, however, there is no need to reach this question.

its doubt as to the validity of the "so-called 'rule' that summary judgment is more appropriately granted in defamation actions than in other types of suits, and stated that "[t]he proof of 'actual malice' calls a defendant's state of mind into question, *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and does not readily lend itself to summary disposition."

The plaintiffs have alleged that the defamatory remarks were made with actual malice and that therefore the *New York Times* standard can be met. While the supporting material submitted as to this point is far from convincing, the plaintiffs have managed to place the defendants' state of mind into question, and, in view of the Supreme Court's statement in *Frankmire*, the Court does not believe it appropriate to grant summary judgment at this time. This determination is made, however, without prejudice to any future motion being made after additional discovery has been conducted.[12]

[7] Finally, the defendants argue that even if the Court does not accept their theoretical arguments as to the free establishment and exercise clauses, or as to the lack of actual malice, it must still dismiss the complaint because the alleged defamatory statements either are not libelous, or constitute expression of opinion. In this regard it has been held that "[u]nder the First Amendment there is no such thing as a false idea," *Gertz v. Robert Welch*, 418 U.S. at 339, 94 S.Ct. at 3007, and thus an opinion, "[h]owever pernicious" cannot be the basis for an action in defamation. *See Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976). Whether a particular statement is held to constitute a fact or an opinion is "a question of law," *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 331, 397 N.Y.S.2d 943, 950, 366 N.E.2d 1299, 1306 (1977), to be determined by the Court. *See Letter Carriers v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).

The plaintiffs have alleged in their complaint the utterance of twenty-three defamatory statements by the various defendants: ten by Siegelman, Conway and Lippincott arising from the publication of *Snapping*, and contained in count ten; one by Siegelman, contained in count eighteen, and eight by Deutsch, contained in count nineteen, arising from the Susskind interview; and four by Siegelman and Conway arising from the People magazine interview, and contained in count twenty-seven. After careful examination of these statements the Court finds that many of them are clearly either non-libelous, or statements of opinion, and thereby may not be the basis for an action in defamation.

[8] Turning first to the allegations against Siegelman, Conway and Lippincott contained in count ten, the Court can find nothing in these statements capable of rising to the level of a malicious false utterance necessary for recovery in defamation. These statements are replete with opinions and conclusions about the methods and practices used by the Church of Scientology and the effect such methods and practices have,[13] recounts of what the authors had been told during the course of their investigation,[14] and some unflattering, though not

12. In light of the Court's ultimate determination as to the action against defendants Siegelman, Conway, and Lippincott, *see infra*, any such subsequent motion would, of course, only apply as to defendant Deutsch.

13. *See, e. g.*, ¶ 10(d) of the complaint:
"In our opinion, however, Scientology does not lead people beyond faith to absolute certainty—it leads them to levels of increasingly realistic hallucination. The crude technology of auditing is a direct assult on human feeling and on the individual's ability to distinguish between what he is actually experiencing and what he is only imagining. The bizarre folklore of Scientology is a tour de force of science fiction. . . ."

14. *See, e. g.*, ¶ 10(B) of the complaint:
"It may also be one of the most powerful religious cults in operation today: The tales that have come out of Scientology are nearly impossible to believe in relation to a religious movement that has accumulated great credibility and respect around the world in less than twenty-five years. It has also gathered an estimated 3.5 million followers. Nevertheless, the reports we have seen and heard in the course of our research, both in the media and in personal interviews with former Scientology high-

defamatory, factual statements.[16] None of these statements go beyond what one would expect to find in a frank discussion of a controversial religious movement, which is a public figure, and thus none of these statements may be the basis for an action in defamation.

Similarly, the alleged utterances in counts eighteen and twenty-seven cannot survive judicial scrutiny. After examining the defamatory language attributed to Siegelman in count eighteen the Court finds it to be a statement of opinion, albeit a rather negative one, by the defendant about the plaintiff, and thus not actionable. As to the alleged defamation contained in count twenty-seven the Court once again finds the statements to be a mix of opinion and unflattering, but non-defamatory, factual statements, none of which is actionable.

[9] Turning finally to the alleged defamatory remarks made by defendant Deutsch on the Susskind show, the Court finds that questions exist which preclude disposition at this time. The statements attributed to Deutsch are, unlike the ones attributed to the other defendants, defamatory statements of fact. Deutsch asserts as a defense both that he believes the statements to be true, and that, in any event, they were all made without actual malice. He also asserts that the statements alleged were not addressed to these plaintiffs but rather to Scientology in general, and thus that these plaintiffs were neither defamed nor damaged. Finally, he claims that the utterances in the complaint were so edited and placed out of context as to be thoroughly misleading. These defenses, however, raise questions of fact which cannot be decided at this time. *See Proximire v. Hutchinson*, — U.S. —, 99 S.Ct. 2675, 61 L.Ed.2d 411.

Accordingly, the motion to dismiss of defendants Siegelman and Conway, and the motion to dismiss of defendant Lippincott, are hereby granted. The motion of defendant Deutsch is, at this time, denied.[17]

[10] Having thus disposed of the defendants' motions, the Court next turns its attention to the plaintiffs' motion to dismiss the counterclaims for *prima facie* tort, abuse of process, and conspiracy to deprive the defendants of their constitutional rights,[18] which have been alleged against them.

er-ups, are replete with allegations of psychological devastation, economic exploitation, and personal and legal harassment of former members and journalists who speak out against the cult."

16. *See, e. g.*, ¶ 10(C) of the complaint:

"But for the casual customer choosing among a vast assortment of currently available techniques for self-betterment, the Scientology procedure is well-known, attractive, and inexpensive to begin. The auditing process takes place in private sessions between subject and auditor, in which the subject's emotional responses are registered on a device called an E-meter, a kind of crude lie detector. The subject holds the terminals of the E-meter in his hands, and the rise or fall of electrical conductivity in response to the perspiration emitted from the palms is explained as a measure of emotional response to the auditor's course of questioning. The average response registers in the normal range on the meter, with abnormal indicating an overreaction, "uptightness," or sign of trauma on the part of the subject.

The goal of auditing is to bring all the individual's responses within the range of normal on the E-meter. Using a technique that bears only superficial resemblance to the popular method of biological regulation known as biofeedback, the individual watches the E-meter and follows precise instructions given by the auditor to learn how to reduce his emotional response to the auditor's questions about past and painful experiences. When the individual has mastered this ability, he becomes eligible for admission to the elite club of Scientology clears."

17. Although the Court feels constrained, in view of the *Proximire* footnote, to deny the motion of defendant Deutsch at this time, should it be ultimately determined that this suit was brought without cause, or for the purpose of harassment, the Court will not hesitate to order the imposition of counsel fees upon the plaintiff. *See Nemeroff v. Abelson*, 469 F.Supp. 630 (S.D.N.Y.1979).

17. The defendant Deutsch had initially also alleged a counterclaim based upon 42 U.S.C. § 1983. Upon the plaintiff's bringing of the instant motion, however, the defendant chose, quite correctly in view of the facts of this case, to consent to the dismissal of this claim.

It has been held that in order to be liable for a *prima facie* tort a party must be found guilty of having inflicted intentional harm, resulting in damages, without legal excuse or justification, by an act or series of acts which would otherwise be lawful. *Sommer v. Kaufman*, 59 A.D.2d 843, 399 N.Y.S.2d 7 (1st Dept., 1977). In the instant action, the defendants allege that the plaintiffs, acting with malice and without excuse or justification, brought this lawsuit solely for the purpose of punishing the defendants for their expression of adverse opinions about Scientology, and that as a result they have suffered monetary damages. Proof of such intentional infliction and resulting damage would establish a *prima facie* tort, *Rager v. McCloskey*, 305 N.Y. 75, 111 N.E.2d 214 (1953), and would thereupon shift the burden to the plaintiffs who would have to prove that such conduct was privileged. While the facts before the Court at this stage of the litigation are sparse, it is certainly not clear, contrary to the plaintiffs' claim, that the defendants will not be able to meet their burden of proof. Accordingly, the motion to dismiss this counterclaim is denied.

The defendants' second counterclaim alleges "abuse of process" by the plaintiffs. Abuse of process has been defined as the "misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process." *Board of Education of Farmingdale v. Farmingdale Classroom Teachers Assoc.*, 38 N.Y.2d 397, 400, 380 N.Y.S.2d 635, 639, 343 N.E.2d 278, 280 (1975).[18] The defendants allege that the plaintiffs so abused process when they served each defendant with a summons and complaint for the sole purpose of harassing, discouraging and intimidating them from further criticizing Scientology. Upon close examination, however, the Court believes that while such allegations may succeed in a suit for malicious prosecution (brought after a successful termination of this litigation), they are insufficient to sustain a cause of action for abuse of process. *Hoppenstein v. Zemek*, 62 A.D.2d 979, 408 N.Y.S.2d 642 (2d Dep't. 1978) (the mere institution of a civil action by summons and complaint is not legally considered such process as is capable of being abused and thereby does not afford a basis for a cause of action for abuse of process). The plaintiffs' motion to dismiss the defendants' counterclaims for abuse of process is granted.

The defendants' final counterclaims allege that the plaintiffs, along with other not-for-profit corporations and organizations affiliated with the Church of Scientology, have engaged in a conspiracy to deprive a class of individuals, of whom the defendants were a part, (described essentially as consisting of critics of the Church of Scientology),[19] of their constitutionally-protected rights in violation of 42 U.S.C. § 1985(3). The plaintiffs have moved to dismiss, asserting that such class was not formed on the basis of any invidious criteria, and thus that the defendants cannot satisfy the prerequisites for maintaining a section 1985 action. *Griffen v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); *Jacobson v. Organized Crime and Racketeering, etc.*, 544 F.2d 637 (2d Cir.), *cert. denied*, 403 U.S. 955, 97 S.Ct. 1599, 51 L.Ed.2d 804 (1977). Although the Court finds this to be a close issue, we conclude that this vague and amorphous alleged class was not formed on the basis of any invidious criteria. *See Rodgers v. Tolson*, 582 F.2d 315 (4th Cir. 1978) (critics of city commissioners not a valid class); *Harrison v. Brooks*, 519 F.2d 1358 (1st Cir. 1975) (residential property owners who own adjacent residential land illegally crossed by industrial access driveways not a valid class); *Kimble v. D. J. McDuffy, Inc.*, 445

18. In this regard it has been noted that even a pure spite motive is insufficient to show abuse of process where process is used only to accomplish the result for which it was created. See Prosser, *Law of Torts*, § 121 (4th ed. 1971).

19. Defendant Deutsch characterized the class as consisting of members and former members, and persons disseminating information about, the Church of Scientology.

F.Supp. 269 (E.D.La.1978) (oil industry workers who had made any prior claim for personal injuries not a valid class).[28] In addition, the defendants have not even made a minimal showing that the two plaintiffs, as opposed to the world-wide Scientology movement in general, have conspired with each other for the purpose of depriving the putative class of their constitutional rights. Accordingly, the plaintiffs' motion to dismiss the defendants' counterclaim based upon 42 U.S.C. § 1985(3) is hereby granted.

Conclusion

The action against defendants Siegelman, Conway and Lippincott is hereby dismissed. The motion of defendant Deutsch is denied, without prejudice, however, to a subsequent motion upon completion of additional discovery. The plaintiffs' motion to dismiss all counterclaims is denied in part and granted in part.

The Clerk will enter judgment dismissing the action against defendants, Siegelman, Conway, and Lippincott.

SO ORDERED.

28. For cases which have found a valid class for § 1985 purposes, see *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975); *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975), *vacated as moot*, 507 F.2d 215 (5th Cir. 1975); *Selzer v. Berkowitz*, 459 F.Supp. 347 (E.D.N.Y.1978); *Bradley v. Clegg*, 403 F.Supp. 830 (E.D.Wis.1975).

Tommie W. TAYLOR and Larry C. Peyton, Plaintiffs,

v.

TELETYPE CORPORATION, Defendant,

James H. Bibbs, Ike Bolden, Virginia Burke, Bowman Burns, Jr., Fred Donley, Ray Jackson, Ray Kennard, Will Simmons, William Walker, James Walters, Jr., Cato Conley, Joseph Harris, Earl Jones, and Godfrey Hill, Intervenors.

No. LR-C-77-65.

United States District Court, E. D. Arkansas, W. D.

Aug. 29, 1979.

Plaintiffs brought employment discrimination suit, alleging discrimination in employment based on race. The District Court, Arnold, J., held that: (1) plaintiffs made prima facie case with respect to black employees demoted between February 22, 1974, and the end of 1976 but failed to make a prima facie case with respect to demotions in 1977, 1978, and 1979; (2) employer rebutted certain employee's prima facie case with respect to first demotion but not second demotion and subsequent layoff; (3) evidence established that certain employee's demotion was based at least in part on his race; (4) employer rebutted prima facie case with respect to other employee's demotion, and (5) employer rebutted prima facie case of discrimination with respect to employee who was terminated for excessive absences.

Ordered accordingly.

1. Civil Rights ⇐44(1)

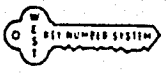
In employment discrimination suit, plaintiffs made prima facie case with re-

tion of the Victoria Channel and appurtenant levee in the summer of 1967. In this aspect of the case, there is lacking the element of inevitably recurring floodings which the Supreme Court stressed in holding that the Government had taken a flowage easement over the land involved in the *Cress* case, *supra*.

With respect to the interference with the runoff of floodwaters from the plaintiff's land which is to be expected from the permanent existence of the Victoria Channel and protective levee in the slot south of the plaintiff's land, it has been mentioned previously that such interference has occurred on one occasion since the completion of the channel and protective levee in the summer of 1967, and that it can reasonably be expected to recur at intervals of about once in every 15 years, on the average. Thus, this case lacks the future prospect of intermittent and frequent floodings which the Supreme Court mentioned in the *Cress* case.

Accordingly, it is my opinion that the evidence in the record fails to show a taking by the defendant of a flowage easement over the 478 acres, or any portion thereof, involved in the present case.

It necessarily follows that the petition should be dismissed.



The FOUNDING CHURCH OF SCIENTOLOGY

v.

The UNITED STATES.

No. 226-61.

United States Court of Claims.

July 16, 1969.

Action by church to recover federal income taxes and assessed interest paid. The Court of Claims, Collins, J., held that where founder of church was not only paid, in addition to his salary, commissions and royalties but he and his family received unexplained payments in nature of loans and reimbursements, church was not entitled to exemption from federal income taxation under statute, which includes among those organizations exempt from taxation a corporation organized and operated exclusively for religious or educational purposes, no part of net earnings of which inures to benefit of any private shareholder or individual.

Petition dismissed.

1. Internal Revenue ⇐837

Congress, when conditioning exemption granted to corporation organized for religious purposes upon "no part" of earnings being of benefit to a private individual, specifically intended that the amount or extent of benefit should not be the determining factor. 26 U.S.C.A. (I.R.C.1954) § 501(c) (3).

2. Internal Revenue ⇐837

Where founder of church was not only paid, in addition to his salary, commissions and royalties but he and his family received unexplained payments in nature of loans and reimbursements, church was not entitled to exemption from federal income taxation under statute, which includes among those organizations exempt from taxation a corporation organized and operated exclusively for religious or educational purposes, no part of net earnings of which inures to benefit of any private shareholder or individual. 26 U.S.C.A. (I.R.C.1954) § 501(c) (3).

Ronald Dreier, New York City, for plaintiff, Bella L. Linden, New York City, attorney of record. David Blasband, Peter C. Clapman, and Linden & Deutsch, New York City, of counsel.

Michael I. Sanders, Washington, D. C., with whom was Asst. Atty. Gen., Johnnie M. Walters, for defendant. Philip R. Miller and Norman J. Hoffman, Jr., Washington, D. C., of counsel.

Before COWEN, Chief Judge, and LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, Judges.

OPINION *

COLLINS, Judge.

This is a suit to recover Federal income taxes and assessed interest paid by plaintiff to defendant for the fiscal year ended June 30, 1956. Defendant has counterclaimed for taxes assessed but unpaid for the fiscal years ended June 30, 1956, June 30, 1958, and June 30, 1959. The central issue presented is whether plaintiff is entitled to an exemption from Federal income taxation. The pertinent statute is section 501(c) (3) of the Internal Revenue Code of 1954, which includes among those organizations exempt from taxation a corporation "organized and operated exclusively for religious * * * or educational purposes, * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual * * *."

The facts set forth in detail in the findings can be briefly summarized to the extent pertinent here:

Plaintiff is a District of Columbia corporation organized in 1955 with its purpose, as stated in the Certificate of Incorporation, "[t]o act as a parent church for the propagation of the religious faith known as 'Scientology,' and to act as a Church for the religious worship of that Faith." The beliefs of Scientology center around the spirit or "thetan," which is said to reside within the physical body of every human being. Scientologists believe that the spirit is immortal and that it receives a new body upon the death of the body in which it then resides. They also believe that in the course of its various lives the spirit is inhibited by "detrimental aberrations," or "engrams," which result from misdeeds or unpleasant experiences. The objective of Scientology is to counteract this burden through "processing," also called "auditing." This objective which is the principal practice of Scientology, attempts to make the person being audited, called a "preclear," aware of these aberrations and engrams and thus reduce the burdens and inhibitions affecting his spirit. Processing is performed by ministers of the plaintiff, or persons studying to become ministers, and is done in individual sessions with an auditor processing a single preclear through the use of a Hubbard Electro-Meter or "E-Meter." The E-Meter is an instrument which indicates changes in electrical resistance in the preclear's body, and changes in such resistance are viewed as an index of the activity of the spirit. (See finding 10, *infra.*)

Scientology is derived from the thoughts and writings of one L. Ron Hubbard. Its origin was an article written by Hubbard in the May 1950 issue of ASTOUNDING SCIENCE FICTION magazine, describing a new "science" called *Dianetics*. Dianetics, the creation of Hubbard, was offered primarily as a psychotherapeutic technique and was not presented as a religious discipline. Like its successor, Scientology, Dianetics employed a Hubbard E-Meter in its practice. In 1952 Hubbard began to focus his attention and his energies upon Scientology. He founded the plaintiff organization and completely dominated every aspect of its affairs during the relevant period. At the same time he continued to direct the growth and affairs of Scientology organizations throughout the world.

Persons coming to plaintiff for processing were usually required to sign a contract for a stated amount of auditing. The normal contract covered 25 hours of processing at a rate of $20 per hour. Other blocks of processing were available, and the per-hour fee was slighty lower for larger amounts. In addition to proc-

* The court is indebted to Trial Commissioner Donald E. Lane (now Judge, U.S. Court of Customs and Patent Appeals) for his opinion, findings of fact, and recommended conclusion of law. Although the court reaches the same result, we decide the case on a different ground.

essing, another department of plaintiff offered various courses or training programs, and such instruction was also performed under contract for comparable fees. Most students enrolled in these courses were studying to become auditors and/or ministers of Scientology. Applicants were often required to contract for processing at the standard fee before being allowed to enroll as students.

During the period in issue, more than 90 percent of plaintiff's income was received from the sales of processing and training services, including sales of E-Meters. Additional income was realized from the sales of examinations and tests, tapes, and books, from minimal donations, and from various other sources. Plaintiff's gross receipts were $102,604 for the fiscal year ending June 30, 1956; $179,491 for the fiscal year ending June 30, 1958; and $247,674 for the fiscal year ending June 30, 1959.

For his services to plaintiff, Hubbard was paid a salary of $125 per week from plaintiff's inception through March 29, 1957; during the period October 26, 1956, through March 29, 1957, he also received an additional $125 per week which was designated as a "fee." On March 29, 1957, plaintiff adopted a compensation scheme (known as the "proportional pay plan") whereby Hubbard was paid, in lieu of salary, 10 percent of the gross income of plaintiff. Other Scientology congregations, franchises, and organizations also paid Hubbard a portion of their gross income, usually 10 percent. In addition, Hubbard received royalties on his numerous Scientology books, as well as lecture fees and other incidental income.

During the taxable years in issue, Mary Sue Hubbard and L. Ron Hubbard, Jr., the wife and son of plaintiff's founder, were compensated employees of the corporation. Also, from June 1957 through February 1959, plaintiff issued weekly checks to Kay Hubbard, the daughter of L. Ron Hubbard.

Defendant's position, briefly stated, is that plaintiff fails to qualify for the statutory exemption because (1) its sales of processing and training services constituted a substantial commercial (and hence nonexempt) purpose, and (2) a portion of its net earnings inured to the benefit of private individuals. Plaintiff denies both contentions.

It is our opinion that plaintiff has failed to prove that no part of the corporation's net earnings inured to the benefit of private individuals, and plaintiff is not entitled to recover. The court finds it unnecessary to decide whether plaintiff is a religious or educational organization as alleged, since, regardless of its character, plaintiff has not met the statutory conditions for exemption from income taxation. In any event, the Government has not raised this issue. Because of the manner in which the second question framed by the parties is resolved, we need not and do not determine whether plaintiff's operations were exclusively for religious or educational purposes.

Implicit in section 501 is the recognition that certain institutions and organizations exist and function for purposes which Congress deems beneficial to society as a whole. In order to foster these aims, funds which would otherwise be acquired and expended for the public good by the Government are left by Congress in the hands of these organizations to be used in furtherance of their beneficial ends. *See* Duffy v. Birmingham, 190 F.2d 738, 740 (8th Cir. 1951). For that reason, it has been held that the exemption provisions should be liberally construed. *E.g.*, American Institute for Economic Research v. United States, 302 F.2d 934, 157 Ct.Cl. 548 (1962), cert. denied, 372 U.S. 976, 83 S.Ct. 1109, 10 L.Ed.2d 141, rehearing denied, 373 U.S. 954, 83 S.Ct. 1677, 10 L.Ed.2d 708 (1963).

The statutory language also makes it eminently clear, however, that Congress intended to extend the exemption only when the sole beneficiary of the institutional operations was the public at large. The substantial import of this express limitation cannot be ignored.

See Better Business Bureau of Washington, D. C., Inc. v. United States, 326 U.S. 279, 283, 66 S.Ct. 112, 90 L.Ed. 67 (1945). The congressional intent behind the conditional language of section 501 (c) (3), coupled with the burden of proof placed upon the taxpayer in these circumstances (*see, e.g.*, Kenner v. Commissioner of Internal Revenue, 318 F.2d 632 (7th Cir. 1963); Cleveland Chiropractic College v. Commissioner of Internal Revenue, 312 F.2d 203, 206 (8th Cir. 1963)), requires plaintiff to clearly demonstrate its right to exemption. *See* New Jersey Auto. Club v. United States, 181 F.Supp. 259, 149 Ct.Cl. 344 (1960), cert. denied, 366 U.S. 964, 81 S.Ct. 1913, 6 L.Ed.2d 1255 (1961).

The term "net earnings" in the inurement-of-benefit clause, as stated in section 501 and its predecessor, section 101 of the Internal Revenue Code of 1939, has been construed to permit an organization to incur ordinary and necessary expenditures in the course of its operations without losing its tax-exempt status. Birmingham Business College, Inc. v. Commissioner of Internal Revenue, 276 F.2d 476 (5th Cir. 1960); Enterprise Ry. Equip. Co. v. United States, 161 F. Supp. 590, 142 Ct.Cl. 192 (1958); Mabee Petroleum Corp. v. United States, 203 F. 2d 872 (5th Cir. 1953); Broadway Theatre League of Lynchburg, Va., Inc. v. United States, 293 F.Supp. 346, 355 (W.D.Va.1968).

By analogy to the recurrent tax question in the business sphere, whether corporate officers' salaries are reasonable and deductible, or are excessive and disguise the distribution of dividends (*see, e. g.*, Jones Bros. Bakery, Inc. v. United States, 188 Ct.Cl. ——, 411 F.2d 1282 (June 1969)), several decisions indicate that the payment of reasonable salaries by an allegedly tax-exempt organization does not result in the inurement of net earnings to the benefit of private individuals. Birmingham Business College, Inc. v. Commissioner of Internal Revenue, *supra* 276 F.2d at 480; Enterprise Ry. Equip. Co. v. United States, *supra*; Mabee Petroleum Corp. v. United States, *supra*, 203 F.2d at 876. Of course, as the *Birmingham Business College* and *Mabee Petroleum* cases hold, excessive salaries do result in inurement of benefit. *Cf. also* Duffy v. Birmingham, *supra*. As always, whether the salaries paid are reasonable is a question of fact. *Compare, e.g.*, Mabee Petroleum Corp. v. United States, *supra* 203 F.2d at 875, *with* Jones Bros. Bakery, Inc. v. United States, *supra*, and cases cited.

It is clear, however, that an organization's net earnings may inure to the benefit of private individuals in ways other than by the actual distribution of dividends or payment of excessive salaries. General Contractors' Ass'n of Milwaukee v. United States, 202 F.2d 632 (7th Cir. 1953) (reports and surveys furnished to members); Chattanooga Auto. Club v. Commissioner of Internal Revenue, 182 F.2d 551 (6th Cir. 1950) (services to members); Underwriters' Laboratories, Inc. v. Commissioner of Internal Revenue, 135 F.2d 371 (7th Cir.), cert. denied, 320 U.S. 756, 64 S.Ct. 63, 88 L.Ed. 450 (1943) (reports and studies furnished); Spokane Motorcycle Club v. United States, 222 F.Supp. 151 (E.D.Wash.1963) (goods, services, and refreshments given), and cases cited. That the benefit conveyed may be relatively small does not change the basic fact of inurement. Spokane Motorcycle Club v. United States, *supra*.

We scrutinize the facts of the instant case in the light of these principles. According to the trial commissioner's findings, L. Ron Hubbard received over $108,000 from plaintiff and related Scientology sources during the 4-year period June 1955 through June 1959. This figure represents $77,460 in fees, commissions, royalties, and compensation for services, plus $13,538 in payment for expenses incurred in connection with his services, as well as a total of $17,586 in reimbursement for expenditures made in plaintiff's behalf, in repayment of loans made to plaintiff and the New York organization, and as a loan from plaintiff to Hubbard. As the commissioner found, and we agree, the precise nature of the

FOUND:

loans and reimburs
not appear in the re
any explanation for
paid. The portion
ly paid by plaintiff
mately $6,000 in
$11,550 in 1956–57,
000 in 1957–58, a
1958–59.

Hubbard also had
mobile at plaintiff's
plaintiff's taxable y
and 1959, the organi
maintained a personal
bard and his family.
tion to all the foreg
ceived a percentage (
of the gross income
tology organizations.

For purposes of dec
do not consider the i
Hubbard from the a
tions and organization
plaintiff. However, u
stances here, the fact
income from such close
indicates that Hubbar
from plaintiff was not
ice. During the year
other percentages, fees,
so far as the record
parently received or re
bard for his personal u
rangement suggests a f
for private profit and,
doubt upon the propriety
by plaintiff to Hubbard
of his family. The fac
was the recipient of inc
tiff in the form of roy
missions likewise occasio
of personal gain.

In this regard, we not
crease in Hubbard's comp
inally salaried at $125 per
received $250 the followin
which is described merel
In March of 1957, Hubbar
ceive 10 percent of plaint
come. Although the organ
receipts in fiscal year 195
than in fiscal year 1956–
income pattern is still o

In fiscal years 1957–58 and 1958–59, Kay Hubbard, the daughter, received payments, generally designated as salary or wages, totaling $3,242. The record is devoid of any evidence showing services performed by Miss Hubbard for plaintiff. This amount includes loans of $550 made in 1958.

What emerges from these facts is the inference that the Hubbard family was entitled to make ready personal use of the corporate earnings. *Cf.* Birmingham Business College, Inc. v. Commissioner of Internal Revenue, *supra* at 276 F.2d 480. We have no evidence that the rental paid by plaintiff for Mrs. Hubbard's property was reasonable, or that such an arrangement was beneficial or desirable to the corporation. Inflated rental prices can amount to inurement of benefit. *See* Texas Trade School v. Commissioner of Internal Revenue, 272 F.2d 168 (5th Cir. 1959).

Similarly, the purpose of the loans made to the Hubbards is unexplained. We do not know whether the terms were financially advantageous to plaintiff or whether in fact the loans were ever repaid. Indeed, the very existence of a private source of loan credit from an organization's earnings may itself amount to inurement of benefit. For comparable reasons, the proof concerning the payments for expenses and expenditures in behalf of plaintiff is also defective.

In substance, then, nothing we have found in the record dispels the substantial doubts the court entertains concerning the receipt of benefit by the Hubbards from plaintiff's net earnings. Since plaintiff has failed to meet its burden of proof, we hold therefore that a part of the corporate net earnings was a source of benefit to private individuals.

In this regard, we think it immaterial whether the benefit is viewed as inuring to Hubbard—by easing his obligation to support his family—or directly to the respective members of the family. All the Hubbards were persons "having a personal and private interest in the activities of the organization." Treas.Reg. § 1.501(a)-1(c).

[1] The extent of the seeming benefit to Hubbard's family might appear relatively small, but plaintiff has not suggested that it was *de minimis*, and we cannot so conclude from the evidence before us. It is our opinion, from an examination of the statute and the decided cases, that Congress, when conditioning the exemption upon "no part" of the earnings being of benefit to a private individual, specifically intended that the amount or extent of benefit should not be the determining factor. *See* Spokane Motorcycle Club v. United States, *supra*.

With respect to Mr. Hubbard, plaintiff seeks to bring itself within the doctrine of the cases cited above which hold that reasonable salaries paid by a corporation do not result in inurement of benefit to private individuals. Even had the compensation paid to Hubbard been demonstrably reasonable, however, this showing would not remedy the defects in proof concerning the additional payments to Hubbard, or, of course, his family. If in fact a loan or other payment in addition to salary is a disguised distribution or benefit from the net earnings, the character of the payment is not changed by the fact that the recipient's salary, if increased by the amount of the distribution or benefit, would still have been reasonable.

[2] For all the above reasons, therefore, the court concludes that plaintiff has failed to prove its entitlement to exemption from income taxation under section 501(c) (3) of the Internal Revenue Code of 1954. Plaintiff's claim is denied, and the petition is dismissed. Defendant is entitled to prevail on its counterclaims. In accordance with the stipulation of the parties, as reflected in unchallenged findings of the commissioner, judgment is entered for defendant in the amounts of $3,262.75 for the fiscal year ending June 30, 1956, $5,399.03 for the fiscal year ending June 30, 1958, and $7,381.97 for the fiscal year ending June 30, 1959. As part of the judgment, defendant is entitled to statutory interest of 6 percent on all three sums from the respective appropriate dates.

law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port." 179 U.S. at 558, 21 S.Ct. at 214.

The law would likewise vary depending on whether, say, a vessel collided with a privately-owned bridge or similar maritime structure or a publicly-owned one.

To allow immunity would lead to another evil—the denial of justice.

"This must be the inevitable consequence of admitting the proposition which assumes that the maritime law disregards the rights of individuals to be protected in their persons and property from wrongful injury, by recognizing that those who are amenable to the jurisdiction of courts of admiralty are nevertheless endowed with a supposed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility therefor." At 559, 21 S.Ct. at 214.

This latter evil is clearly demonstrated by situations such as that in Board of Commissioners v. Gypsum Transp. Ltd., 209 So.2d 296 (La.App.1968), writ ref. 252 La. 260, 210 So.2d 505, cert. den. 393 U.S. 938, 89 S.Ct. 302, 21 L.Ed.2d 275, in which the court held that the Board could sue Gypsum for tort damages arising out of a maritime collision but disallowed Gypsum's counterclaim for its damages for the same collision because of the Board's immunity from suit.

[7] Other than the tottering, treadworn assertion that the sovereign can do no wrong, this Court can find no valid reasons supporting the doctrine of immunity sufficient to offset the strong reasons stated by the Supreme Court in *Workman* for not recognizing the state immunity doctrines in a court of admiralty. Since, for purposes of this motion, we assume that plaintiff's cause of action is meritorious, we refuse to defeat it by holding the Board of Commissioners immune from suit for their alleged torts. Accordingly, it is the order of the court that the motion of the Board of Commissioners to dismiss the complaint because the Board is immune from suit be, and the same is hereby, denied.



UNITED STATES of America,
Libelant,
v.
An ARTICLE OR DEVICE . . . "HUBBARD ELECTROMETER" or "Hubbard E-Meter," etc.,
Founding Church of Scientology et al.,
Claimants.
No. D.C. 1-63.

United States District Court,
District of Columbia.
July 30, 1971.

Action on libel of information by the United States seeking condemnation of gadget and related writings. The District Court, Gesell, J., held that writings which were distributed by religious institution to accompany auditing device, which were intended to promote use of the device by the public, and which contained false unqualified scientific claims without a religious overlay or suggestion were "labeling," within the Federal Food, Drug, and Cosmetic Act; thus, the device was misbranded as a result of misrepresentation in failure of the labeling to bear adequate directions for its use, and its secular use, along with secular use of the writings, had to be condemned. The Court further held that where auditing device, which was harmless in

itself, was used by legitimate church to aid its ministers in communicating with adherents, the church could continue its use of the device, which was condemned for misbranding, provided it was used only in religious setting subject to explicit warning disclaimers on the device itself and on all labeling.

Order accordingly.

1. Druggists ⇐2

Auditing instrument held out as apparatus intended for use in the diagnosis, cure, medication and treatment of mental and physical illnesses was a "device" within meaning of the Federal Food, Drug, and Cosmetic Act. Federal Food, Drug, and Cosmetic Act, § 201(h), 21 U.S.C.A. § 321(h).

See publication Words and Phrases for other judicial constructions and definitions.

2. Druggists ⇐5

Books and other documents containing false scientific and nonreligious claims as to auditing device held out as apparatus intended for use in the diagnosis, cure, medication or treatment of disease, and used in various direct and indirect ways to promote the device, "accompanied" the device in meaning of the Federal Food, Drug, and Cosmetic Act, and had all the necessary elements of labeling specified in the Act. Federal Food, Drug, and Cosmetic Act, §§ 201 (m), 304, 502, 21 U.S.C.A. §§ 321(m), 334, 352.

See publication Words and Phrases for other judicial constructions and definitions.

3. Druggists ⇐11

Single false scientific nonreligious libel claim is sufficient to support condemnation of a device under the Federal Food, Drug, and Cosmetic Act. Federal Food, Drug, and Cosmetic Act, § 1 et seq., 21 U.S.C.A. § 301 et seq.

4. Druggists ⇐5, 11

Writings which were distributed by religious institution to accompany auditing device, which were intended to promote use of the device by the public, and which contained false, unqualified scientific claims without a religious overlay or suggestion were "labeling," within the Federal Food, Drug, and Cosmetic Act; thus, the device was misbranded as a result of misrepresentation in failure of the labeling to bear adequate directions for its use, and its secular use, along with secular use of the writings, had to be condemned. Federal Food, Drug, and Cosmetic Act, § 502(a), (f)(1), 21 U.S.C.A. § 352(a), (f)(1).

See publication Words and Phrases for other judicial constructions and definitions.

5. Religious Societies ⇐13

Law designed to afford protection to the public against genuine evils must be used to regulate the activities of religion only if the regulation involved is the narrowest possible remedy to achieve the legitimate nonreligious end.

6. Druggists ⇐5

Where auditing device, which was harmless in itself, was used by legitimate church to aid its ministers in communicating with adherents, the church could continue its use of the device, which was condemned for misbranding, provided it was used only in religious setting subject to explicit warning disclaimers on the device itself and on all labeling. Federal Food, Drug, and Cosmetic Act, § 304(d), 21 U.S.C.A. § 334(d); U.S.C.A.Const. Amend. 1.

John Joseph Matonis, Washington, D. C., for Founding Church of Scientology.

Nathan Dodell, Asst. U. S. Atty., Washington, D. C., for the United States.

GESELL, District Judge.

MEMORANDUM OPINION

This is an action by the United States seeking nationwide condemnation of a gadget known as an E-meter and related writings, by libel of information under the Food, Drug & Cosmetic Act, 21 U.S.C. § 301 et seq. The E-meter is claimed to be a device within the meaning of the

Act. Misbrandin
directions for use
are the Founding
and various indivi

This suit was o
before another Ju
the conviction
reversed on appea
cause of certai
problems suggest
and evidentiary
Church of Scient
133 U.S.App.D.C.
(1969). The pres
to the Court witho
of pretrials which
The record consist
exhibits taken at
some additions a
testimony of one
testified further
the case. Many o
are set forth in th
of Appeals and si
main not contest
they need not all

The E-meter i
galvanometer usi
electrodes. It is
and designed to
resistance. It is c
ineffective in itsel
meter for treatm
in his hands durin
operator who is k
who purports to r
galvanometer need
to questions. Sci
exact science whi
When practiced b
persons, Scientolo
to improve the
ability, behavior,
the individual tre

L. Ron Hubbar
fiction magazine
advanced the ext
that various physi
es could be cured
ed a major part in
Thereafter, comm
1950's numerous
pamphlets were w

Act. Misbranding and lack of adequate directions for use are alleged. Claimants are the Founding Church of Scientology and various individuals.

This suit was originally tried to a jury before another Judge of this Court and the conviction there obtained was reversed on appeal after a long trial because of certain First Amendment problems suggested by the instructions and evidentiary rulings. Founding Church of Scientology v. United States, 133 U.S.App.D.C. 229, 409 F.2d 1146 (1969). The present trial was conducted to the Court without a jury after a series of pretrials which narrowed the issues. The record consists of the transcript and exhibits taken at the prior trial with some additions and deletions, plus the testimony of one additional witness who testified further on religious aspects of the case. Many of the background facts are set forth in the opinion of the Court of Appeals and since they were in the main not contested at the second trial they need not all be repeated here.

The E-meter is essentially a simple galvanometer using two tin cans as electrodes. It is crude, battery-powered, and designed to measure electrical skin resistance. It is completely harmless and ineffective in itself. A person using the meter for treatment holds the tin cans in his hands during an interview with the operator who is known as an auditor and who purports to read indicators from the galvanometer needle as it notes reactions to questions. Scientology is a so-called exact science which promotes auditing. When practiced by trained or untrained persons, Scientology auditing is claimed to improve the health, intelligence, ability, behavior, skill and appearance of the individual treated.

L. Ron Hubbard, writing in a science fiction magazine in the 1940's, first advanced the extravagant false claims that various physical and mental illnesses could be cured by auditing. He played a major part in developing Scientology. Thereafter, commencing in the early 1950's numerous Scientology books and pamphlets were written explaining how various illnesses can be and had been cured through auditing. These materials were widely distributed. Hubbard, who wrote much of the material, is a facile, prolific author and his quackery flourished throughout the United States and in various parts of the world. He was supported by other pamphleteers and adherents who also promoted the practice of Scientology and touted its alleged benefits.

Hubbard and his fellow Scientologists developed the notion of using an E-meter to aid auditing. Substantial fees were charged for the meter and for auditing sessions using the meter. They repeatedly and explicitly represented that such auditing effectuated cures of many physical and mental illnesses. An individual processed with the aid of the E-meter was said to reach the intended goal of "clear" and was led to believe there was reliable scientific proof that once cleared many, indeed most illnesses would automatically be cured. Auditing was guaranteed to be successful. All this was and is false—in short, a fraud. Contrary to representations made, there is absolutely no scientific or medical basis in fact for the claimed cures attributed to E-meter auditing.

Unfortunately the Government did not move to stop the practice of Scientology and a related "science" known as Dianetics when these activities first appeared and were gaining public acceptance. Had it done so, this tedious litigation would not have been necessary. The Government did not sue to condemn the E-meter until the early 1960's, by which time a religious cult known as the Founding Church of Scientology had appeared. This religion, formally organized in 1955, existed side-by-side with the secular practice of Scientology. Its adherents embrace many of Hubbard's teachings and widely disseminate his writings. The Church purports to believe that many illnesses may be cured through E-meter auditing by its trained ministers through an appeal to the spirit or soul of a man. As a matter of formal doctrine, the Church professes to have

abandoned any contention that there is a scientific basis for claiming cures resulting from E-meter use. The Church, however, continued widely to circulate Scientology literature such as Government's exhibits 16 and 31, which hold out false scientific and medical promises of certain cure for many types of illnesses.[1]

In 1962, when the Government seized the E-meters involved in the present controversy, it took them from the premises of the Church, confiscating some E-meters which were actually then being used primarily by ministers of the Church to audit adherents or to train auditors for subsequent church activity. Thus the Government put itself in the delicate position of moving against not only secular uses of the E-meter but other uses purporting to be religious, and the Court accordingly confronts the necessity of reconciling the requirements of the Food, Drug & Cosmetic Act prohibiting misbranding and the requirements of the First Amendment protecting religious institutions and religious beliefs from governmental interference under the First Amendment.

The Court of Appeals has ruled that the evidence at the prior trial and reintroduced at this trial established prima facie that the Founding Church of Scientology, the principal claimant here, is a bona fide religion and that the auditing practice of Scientology and accounts of it are religious doctrine. No evidence to the contrary was offered by the Government on the second trial. Accordingly, for purposes of this particular case only, claimant must be deemed to have met its burden of establishing First Amendment standing for whatever significance the religious practice of Scientology may have on the outcome of this particular litigation.

The Government considers the First Amendment issue wholly irrelevant and extraneous. Claimant, on the other hand, relies heavily on the religious claim. The positions of the parties are so completely different that neither even deigns to recognize any merit in the other. The briefs and findings proposed by each side pass like two ships at night with not even a port or starboard light showing. Yet the truth is not as absolute as either party contends. Religious aspects of this controversy, once tactically conceded, cannot be ignored. On the other hand, it is a gross exaggeration to insist that the energetic, persistent solicitation of E-meter-audited cures for a fee has all occurred in a spiritual setting without use of secular appeals and false scientific promises made in a wholly non-religious context.

[1] Turning to the precise issues presented, it must first be determined whether the E-meter is a device within the meaning of the Act (21 U.S.C. § 321(h)). It obviously meets the statutory definition of an apparatus or contrivance intended for use in the diagnosis, cure, mitigation or treatment of disease. Moreover, it is held out as such in the constant promotion of E-meter auditing, a process designed to effectuate cures of mental and physical illnesses. Claimants contend that the E-meter is harmless in itself, cures nothing by itself, and therefore cannot be a device since those who use it appreciate its ineffectiveness and cannot therefore have the requisite intent. This begs the question. The device plays a key part in both the secular and religious auditing process which is used and intended to be used in the cure, mitigation or treatment of disease. It need not be the only agent in an allegedly curative process to be a device within the definition. The E-meter is a device within the meaning of the Act.

Over 100 E-meters were seized. At the same time the Government seized some 200 separate pieces of literature containing approximately 20,000 pages, much of which it now contends demonstrates misbranding of the device by mis-

1. The issues have been tried as of January, 1963, the date of the libel. Thus the findings as to Scientology literature and positions of the claimants do not necessarily reflect current conditions.

representation and directions for use un and 352.

The writings seiz bookstore, or "Di separately incorpora Church, with office the Church premi advertised and sold of Scientology, D writings concerned book, pamphlet, nc forms.

A few of these wi religious in natur medical or scientific ly religious conte material, however, Scientology and l matter-of-fact med terms without any reference. While t concluded that lite the theory of aud claims for curativ therein, is religiou as a matter of law nized this was so charged with misre held himself out as opposed to medical wise secular claim material is replete v scientific claims de overlay or referen the Church especi interested partici The Fundamentals ment Ex. 31), an Work" (Governmen examples of boo scientific non-reli amples of such clai a few other repr used in various di to promote E-mete in Appendix A.

[2] Thus the l necessary elements

2. Claimants urge seizure was overly the Fourth Amend

representation and lack of adequate directions for use under 21 U.S.C. §§ 334 and 352.

The writings seized were located in a bookstore, or "Distribution Center," separately incorporated but owned by the Church, with offices in the basement of the Church premises.[2] The Center advertised and sold for profit a long list of Scientology, Dianetics and other writings concerned with auditing in book, pamphlet, newsletter and other forms.

A few of these writings are primarily religious in nature. Others contain medical or scientific claims in a partially religious context. Most of the material, however, explains aspects of Scientology and Dianetics in purely matter-of-fact medical and scientific terms without any apparent religious reference. While the Court of Appeals concluded that literature setting forth the theory of auditing, including the claims for curative efficacy contained therein, is religious doctrine and hence as a matter of law not labeling, it recognized this was so only if the person charged with misrepresentation explicitly held himself out as making religious as opposed to medical, scientific or otherwise secular claims. The bulk of the material is replete with false medical and scientific claims devoid of any religious overlay or reference. Two books which the Church especially recommended to interested participants, "Scientology: The Fundamentals of Thought" (Government Ex. 31), and "The Problems of Work" (Government Ex. 103), are typical examples of books containing false scientific non-religious claims. Examples of such claims found in these and a few other representative documents used in various direct and indirect ways to promote E-meter auditing are listed in Appendix A.

[2] Thus the literature has all the necessary elements of labeling specified in 21 U.S.C. § 321(m) since it "accompanied" the device within the meaning of the Act. See Kordel v. United States, 335 U.S. 345, 351, 69 S.Ct. 106, 93 L.Ed. 52 (1948).

[3] Having in mind a jury trial, the Court of Appeals contemplated an item-by-item analysis of the writings alleged to be labeling in order to remove from jury inspection purely religious appeals, reserving a presentation of the other literature for determination under instructions differentiating the secular from the religious. This exercise is, of course, unnecessary on a trial to the Court. A single false scientific non-religious label claim is sufficient to support condemnation, and in fact there are many. Moreover, differentiation of individual documents as a practical matter is of little value when it comes to an overall resolution of the controversy. Realistically, the writings cannot only be viewed separately. They are available and distributed in infinite combinations. Whole books are involved which often ramble, contradict and are constructed to make diversified appeals that are basically secular and directed to varying temperaments, ages and attitudes of potential readers. Much of the material is skillful propaganda designed to make Scientology and E-meter auditing attractive in many varied, often inconsistent wrappings.

The Food and Drug laws are designed to protect the public. The literature disseminated by various Scientology groups is written for popular lay consumption. The words and thrust of the writings must accordingly be so considered. Claims as to the efficacy of the E-meter must be read to mean what they clearly purport to say to ordinary lay readers. The Court notes that the task of determining whether a claim or representation is religious or non-religious, or whether a religious claim is genuine or merely "tacked on" to basically pseudo-scientific claims, is hardly less trouble-

2. Claimants urge that this search and seizure was overly broad and contravenes the Fourth Amendment but this issue was resolved against this position by the Court of Appeals and need not be again considered.

some than the task of determining whether a religious claim is true or false. The Court has attempted to resolve the difficulty thus presented by the Court of Appeals by refusing to consider the truth or falsity of any claim which, in the understanding of the average reader, could be construed as resting on religious faith. All doubts on this issue have been resolved in favor of the Claimants. But the overall effect of the many separate writings and the writings as a whole cannot be seriously questioned. Whether the documents are viewed singly or as a whole, the proof showed that many false scientific claims permeate the writings and that these are not even inferentially held out as religious, either in their sponsorship or context.

It should be kept in mind at all times that the Church is but one of several groups engaged in the promotion of Scientology; others include the Hubbard Guidance Center, that offers non-religious processing and auditing to the public for a fee; Hubbard Association of Scientologists International (HASI), a world-wide organization promoting Scientology among members of the organization who receive a monthly magazine ("Ability") and other benefits; and the Distribution Center, Inc., already mentioned. The combined effort of all these activities is to persuade the public to come forward for auditing with an E-meter for a fee, and while some may be motivated or attracted by religious considerations, others who audit or are audited are not.[3]

[4] An individual was not required to be either a Church member or a Scientologist to be audited at cost of $500 for 25 hours, with state of "clear" guaranteed for $5,000. The E-meter was available for sale to the public for a fee of $125. The benefits of auditing were extravagantly advertised. At the time this action was commenced, E-meters—perhaps as many as one-third the total supply—were being used by members of the public without any religious control or supervision.[4] The writings were distributed to accompany the E-meter and intended to promote its use by members of the public; they were used by laymen for secular purposes; individually a great many contain false unqualified scientific claims without even a religious overlay or suggestion. Viewed as a whole the thrust of the writings is secular, not religious. The writings are labeling within the meaning of the Act. Thus, the E-meter is misbranded and its secular use must be condemned along with secular use of the offensive literature as labeling. The misbranding results not only from misrepresentation by reason of 21 U.S.C. § 352(a) but because the labeling failed to bear adequate directions for use required by 21 U.S.C. § 352(f) (1).[5]

3. *Ability*, issue 14 (Ex. 9L, p. 14) states: Scientology is going all out as a religion. The religious aspect is highly functional, very true and is very—much—more successful • • • The public expects to have ministers around. That's us folks.
• • • • • •
• • • If you don't like religion for heaven's sakes call yourself a Dianeticist.

4. At the time of this action at least half the E-meters in use in the United States were being used by non-ordained lay personnel. Operators franchised by the Church who may or may not subscribe to its doctrines, provide secular auditing, retaining for themselves ninety percent of the fees collected and purport to send only ten percent to the Church. Claimants were unable to show that these franchised services were in any real sense religious missionary work in the sense that auditing was done by members of this group on a religious basis.

5. Accompanying labeling must specify the conditions for which the device is intended and sufficient information under which the device can be used safely and effectively for the purposes for which it is intended to be used. United States v. Shock, 370 F.2d 20 (8th Cir. 1967). Adequate directions are literally lacking here. It is impossible to write adequate directions for use of the E-meter by laymen. *Cf.* United States v. Ellis Research Laboratories, 300 F.2d 550 (7th Cir. 1962). The Church of Scientology of California v. Richardson, 437 F.2d 214 (9th Cir. 1971).

On the basis of these findings, the Government is entitled to some relief. It is only when the Court confronts the question of appropriate remedy that serious difficulties arise.

[5] An initial issue presented is whether the normal Food and Drug remedies, 21 U.S.C. § 334, may under any circumstances be applied to the device when used by some as an "artifact" of a church. A law designed to afford protection to the public against genuine evils may be used to regulate the activities of religion only if the regulation involved is the narrowest possible remedy to achieve the legitimate non-religious end, which in this case is only to protect the public against misrepresentation since the E-meter is harmless in itself. *See* Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); Barnett v. Rodgers, 133 U.S.App.D.C. 296, 410 F.2d 995 (1969).

The Government argues that once a violation of the Act is established, the devices seized may be treated the same as any other misbranded device. Since the bona fides of the religion remains unquestioned on this record, the Government's position is an oversimplification. Here is a pseudo-science that has been adopted and adapted for religious purposes. The literature held to make false representations, while in itself non-religious, nevertheless comprises for some, part of the writings, teachings, and history of a religion. Those who belong to the Church and accept its beliefs assert that many illnesses may be alleviated by religious counseling designed to free the spirit of encumbrances. They find in the rationale and procedures of Scientology satisfactory early explanations and techniques to implement what is essentially faith healing by use of the E-meter. Thus they purport to read the purely secular writings of Scientology with semantic interpretations fostered by their evolving religious doctrine. Purely scientific statements are given a theological slant by the initiated and the occasional theological indications in the writings are given enthusiastic exaggeration. What the layman reads as straight science fiction becomes to the believer a bit of early imperfect scripture. The result of all this is that what may appear to the layman as a factual scientific representation (clearly false) is not necessarily this at all when read by one who has embraced the doctrine of the Church.

Accordingly, the Government's protestations that it is not interfering with religious practice when it seeks to condemn the E-meter and related literature must be qualified. The Church is a religious institution protected by the First Amendment. The E-meter is used by its ministers as part of the ritual and practice of the Church. Serious interference indeed results if the Church is entirely prohibited from using the E-meter by condemnation or if the Court orders the Food and Drug Administration to oversee a general rewriting of all the writings the Church purveys. Where there is a belief in a scientific fraud there is nonetheless an interference with the religion that entertains that belief if its writings are censored or suppressed. Similarly, if a church uses a machine harmless in itself to aid its ministers in communicating with adherents, the destruction of that machine intrudes on religion. The dilemma cannot be resolved by attempting to isolate purely false scientific claims from claims that have sufficient religious content to be outside the Food and Drug laws. There is a religious substance to everything when seen with the eyes of the believer.

For these reasons, the Church may not be wholly prevented from practicing its faith or from seeking new adherents. A decree of condemnation which ordered destruction of the device, with its necessary *res judicata* effect as to all E-meters in the country, would achieve this effect. On the other hand, a condemnation decree which allowed the FDA to reform the writings as is done in the usual commercial drug misbranding case would give a Government agency excessive

power to interfere with the exercise of religion, fostering that Government "entanglement" with religion which has been recently condemned by the Supreme Court. *See, e. g.*, Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Neither of these possible remedies is acceptable to the Court.

Had the Government proceeded in equity to enjoin specific non-religious practices or representations which it believed to violate the Act, the Court could have curtailed the purely commercial use of the E-meter while leaving the Church free to practice its belief under limited circumstances. An action *in rem*, however, acts only upon the device, and the Court cannot fashion a remedy in libel which distinguishes with particularity between religious and non-religious uses. An equity proceeding is clearly the most satisfactory remedy in this and any similar future cases, and may in some instances be the only remedy which the Government may seek consistent with the First Amendment.

[6] Dismissal of this libel after eight years of legal proceedings is not justified on the grounds that the Government has not used the most appropriate remedy. A decree of condemnation will therefore be entered, but the Church and others who base their use upon religious belief will be allowed to continue auditing practices upon specified conditions which allow the Food and Drug Administration as little discretion as possible to interfere in future activities of the religion. Pursuant to 21 U.S.C. § 334 (d), upon the findings and conclusions contained in this Memorandum Opinion, relief in the following form shall be set out in an implementing order:

All E-meters are condemned together with all writings seized. The Government shall have its costs.

The device and writings condemned shall be returned to the owners, upon execution of an appropriate bond, to be destroyed or brought into compliance with the Food, Drug & Cosmetic Act. An E-meter shall be deemed to comply with the Act if and only if it is used, sold or distributed upon specified conditions.

The device may be used or sold or distributed only for use in bona fide religious counseling. No user, purchaser or distributee (other than the Founding Church of Scientology or an ordained practicing minister of the Church) shall be considered engaged in bona fide religious counseling unless and until such user, purchaser or distributee has filed an affidavit with the Secretary of the Food and Drug Administration stating the basis on which a claim of bona fide religious counseling is made, together with an undertaking to comply with all conditions of the judgment so long as the E-meter is used.

The device should bear a prominent, clearly visible notice warning that any person using it for auditing or counseling of any kind is forbidden by law to represent that there is any medical or scientific basis for believing or asserting that the device is useful in the diagnosis, treatment or prevention of any disease. It should be noted in the warning that the device has been condemned by a United States District Court for misrepresentation and misbranding under the Food and Drug laws, that use is permitted only as part of religious activity, and that the E-meter is not medically or scientifically capable of improving the health or bodily functions of anyone.

Each user, purchaser, and distributee of the E-meter shall sign a written statement that he has read such warning and understands its contents and such statements shall be preserved.

Any and all literature which refers to the E-meter or to auditing, including advertisements, distributed directly or indirectly by the seller or distributor of the E-meter or by anyone utilizing or promoting the use of the E-meter, should bear a prominent notice printed in or permanently affixed to each item or such literature, stating that the device known as a Hubbard Electrometer, or E-meter, used in auditing, has been condemned by

a United States District Court on the grounds that the literature of Dianetics and Scientology contains false and misleading claims of a medical or scientific nature and that the E-meter has no proven usefulness in the diagnosis, treatment or prevention of any disease, nor is it medically or scientifically capable of improving any bodily function. Where the notice is printed in or affixed to literature, it should appear either on the outside front cover or on the title page in letters no smaller than 11-point type.

The E-meter should not be sold to any person or used in any counseling of any person except pursuant to a written contract, signed by the purchaser or counselee, which includes, among other things, a prominent notification as specified immediately above.

The effect of this judgment will be to eliminate the E-meter as far as further secular use by Scientologists or others is concerned. E-meter auditing will be permitted only in a religious setting subject to placing explicit warning disclaimers on the meter itself and on all labeling. The Government has requested an opportunity to show that complete forfeiture and destruction of the E-meter is required, but the Court has concluded that however desirable this may be in the public interest, the Court is without power to so order in view of the protections afforded claimant and others similarly situated under the First Amendment.

The foregoing shall constitute the Court's findings of fact and conclusions of law. The parties are directed to submit an appropriate form of order providing the relief indicated on or before September 1, 1971.

APPENDIX A

Representative Documents Found to be Non-Religious, and Samples of False or Misleading Claims Found Therein

1. Eight-page pamphlet, entitled "What is Scientology?"

(Government Exhibit No. 16)

"Scientology is today the only successfully validated psychotherapy in the world. Tens of thousands of completely documented cases exist in the files of the Hubbard Association of Scientologists International.

"The first science to put the cost of psycho-therapy within the range of any person's pocketbook. A complete Freudian analysis costs $8000 to $15,000. Better results can be achieved in Scientology for $25 and, on a group basis for a few dollars."

"The first science to make whole classes of backward children averagely bright using only drills the teacher can do a few minutes each day.

"The first science to determine the basic cause of disease.

"The first science to contain exact technology to routinely alleviate physical illnesses with complete predictable success.

"The first science of mind to prove conclusively that physical illness can stem from mental disturbance, a fact which Freud held only as a theory, and only seldom demonstrated.

2. Twenty-four page pamphlet, entitled "Ability Issue 71: Being Clear and How to Get There," by L. Ron Hubbard

(Government Exhibit No. 9BA)

"Scientologically, the optimum individual is called the *clear*. One will hear much of that word, both as a noun and a verb, so it is well to spend time here at the outset setting forth exactly what can be called a *clear*, the goal of Scientology processing.

"A *clear* can be tested for any and all psychoses, neuroses, compulsions and repressions (all aberrations) and can be examined for any autogenic (self-generated) diseases referred to as psychosomatic ills. These tests confirm the *clear* to be entirely without such ills or aberrations. Additional tests of his intelligence indicate it to be high above the current norm. Observation of

his activity demonstrates that he pursues existence with vigor and satisfaction.

"Further, these results can be obtained on a comparative basis. A neurotic individual, possessed also of psychosomatic ills, can be tested for those aberrations and illnesses demonstrating that they exist. He can then be given Scientology processing to the end of clearing these neuroses and ills. Finally, he can be examined, with the above results. This, in passing, is an experiment which has been performed many times with invariable results. It is a matter of laboratory test that all individuals who have organically complete nervous systems respond in this fashion to Scientology clearing."

(3) Hard back book, 452 pages, entitled "Dianetics: The Modern Science of Mental Health," by L. Ron Hubbard.

"Simple though it is, dianetics does and is these things:

1. It is an organized science of thought built on definite axioms: statements of natural laws on the order of those of the physical sciences.

2. It contains a therapeutic technique with which can be treated all inorganic mental ills and all organic psycho-somatic ills, with assurance of complete cure in unselected cases.

3. It produces a condition of ability and rationality for Man well in advance of the current norm, enhancing rather than destroying his vigor and personality.

4. Dianetics gives a complete insight into the full potentialities of the mind, discovering them to be well in excess of past supposition.

5. The basic nature of man is discovered in dianetics rather than hazarded or postulated, since that basic nature can be brought into action in any individual completely. And that basic nature is discovered to be *good*.

6. The single source of mental derangement is discovered and demonstrated, on a clinical or laboratory basis, by dianetics.

7. The extent, storage capacity and recallability of the human memory is finally established by dianetics.

8. The full recording abilities of the mind are discovered by dianetics with the conclusion that they are quite dissimilar to former suppositions.

9. Dianetics brings forth the nongerm theory of disease, complementing bio-chemistry and Pasteur's work on the germ theory to embrace the field.

10. With dianetics ends the "necessity" of destroying the brain by shock or surgery to effect "tractability" in mental patients and "adjust" them.

11. A workable explanation of the physiological effects of drugs and endocrine substances exists in dianetics and many problems posed by endocrinology are answered."

"Chapter V

PSYCHO-SOMATIC ILLNESS"

"Psycho-somatic illnesses are those which have a mental origin but which are nevertheless organic. Despite the fact that there existed no precise scientific proof of this before dianetics, an opinion as to their existence has been strong since the days of Greece, and in recent times various drug preparations have been concocted and sold which were supposed to overcome these sicknesses. Some success was experienced, sufficient to warrant a great deal of work on the part of researchers. Peptic ulcers, for instance, have yielded to persuasion and environmental change. A recent drug called ACTH has had astonishing but wildly unpredictable results. Allergies have been found to yield more or less to things which depressed histamine in the body.

"The problem of psycho-somatic illness is entirely embraced by dianetics, and by dianetic technique such illness has been eradicated entirely in every case."

"On the physical therapy level any thing as violent as surgery or exodontistry in the psycho-somatic plane i utter barbarism in the light of dianetic "Toothache" is normally psycho-somatic

Organic illnesses c
catalogues are psy
course to surgery
had until it is cer
is not psycho-soma



Sad!

We
who

HU



Glac

(A4474)

Organic illnesses enough to fill several catalogues are psycho-somatic. No recourse to surgery of any kind should be had until it is certain that the ailment is not psycho-somatic or that the illness will not diminish by itself if the potency of the reactive mind is reduced. * * "

(4) Twelve page pamphlet, entitled "Ability Issue 72" (Government Exhibit No. 114)



Sad! Mad! Gad!

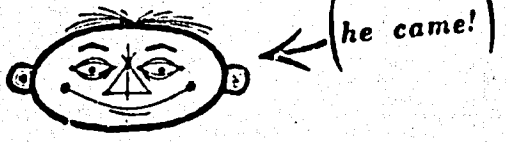
We don't care

what your problem is,

we can clear you

at the

HUBBARD GUIDANCE CENTER



Glad!

For regular processing rates:
For further information:

Write the Registrar
1812 19th Street, N.W.
Washington 9, D.C.

If you're no gambler,
you can have a

CLEAR GUARANTEE: $5,000

(regardless of how many hours it takes)

(A4474)

(5) Sixty-four page booklet, entitled "Scientology: The Fundamentals of Thought," by L. Ron Hubbard. Subtitle: "The Basic Book of the Theory & Practice of Scientology for Beginners"

(Government Exhibit No. 31)

Scientology is that branch of psychology which treats of (embraces) human ability. It is an extension of DIANETICS * * * Scientology is actually a new but very basic psychology in the most exact meaning of the word. It can and does change behaviour and intelligence and it can and does assist people to study life.

Scientology, used by the trained and untrained person improves the health, intelligence, ability, behaviour, skill and appearance of people.

It is a precise and exact science, designed for an age of exact sciences.

Scientology is employed by an Auditor (one who listens and commands) as a set of drills (exercises, processes) upon the individual, and small or large groups. It is also employed as an educational (teaching) subject. It has been found that persons can be processed (drilled) in Scientology with Scientology exercises and can be made well of many, many illnesses and can become brighter, more alert and more competent. BUT if they are only processed they have a tendency to be overwhelmed or startled and although they may be brighter and more competent they are still held down by an ignorance of life. Therefore it is far better to teach AND process (audit, drill) a person than only to process him. In other words the best use of Scientology is through processing and education in Scientology. In this way there is no imbalance. It is interesting that people only need to study Scientology to have some small rise in their own intelligence, behaviour and competence. The study itself is therapeutic (good medicine) by actual testing.

Tens of thousands of case histories (reports on patients, individual records) all sworn to (attested before public officials) are in the possession of the organizations of Scientology. No other subject on earth except physics and chemistry has had such grueling testing (proofs, exact findings). Scientology in the hands of an expert (Auditor) can cure some 70% of Man's illnesses (sicknesses). Scientology is used by some of the largest companies (business organizations) on Earth. It is valid. It has been tested. It is the only thoroughly tested system of improving human relations, intelligence and character and is the only one which does.

(6) Seventy-one page booklet, entitled "The Problems of Work," by L. Ron Hubbard.

(Government Exhibit No. 103)

"Scientology is the first American science of Man. It is the technical know-how of the American applied to himself. In contrast to the metaphysical thinking of Europe that has formed the basis of our concepts of ourselves, Scientology is a technology as factual and as exact as the technologies that base the development of the atom bomb . . . and it has a like source—the first class in nuclear physics, taught at George Washington University.

"Scientology can and does change human behavior for the better. It puts the individual under the control of himself—where he belongs. Scientology can and does increase human intelligence. By the most exact tests known it has been proven that Scientology can greatly increase intelligence in an individual. And Scientology can do other things. It can reduce reaction time and it can pull the years off one's appearance. But there is no intention he it can do. It is it works. It adequ rules of life and chaos.

"The mysteries with Scientology, stery is not a nee the very aberrated vast secrets held a tology has slashe the complexities wi for men and has these problems. first time in man's ably raise intellige bring about a reti play a game, and p from the dwindlin disabilities. There become a game, a thing.:

(7) Hard cover titled "All A Nuclear Phy Doctor"

(Government

We care very l there is radiation i cause a person who sical condition does fer mentally and thu effects of radiation. at a level where health is good, the capable of depressin. Radiation is more physical problem and that."

"The reaction to who have been give essing is by actual te those who have not r conducted many exp rection. But even w difficult and even everybody together amount of group pr safeguard against ra

is no intention here to give a list of all it can do. It is a science of life and it works. It adequately handles the basic rules of life and it brings order into chaos.

"The mysteries of life are not today, with Scientology, very mysterious. Mystery is not a needful ingredient. Only the very aberrated man desires to have vast secrets held away from him. Scientology has slashed through many of the complexities which have been erected for men and has bared the core of these problems. Scientology for the first time in man's history can predictably raise intelligence, increase ability, bring about a return of the ability to play a game, and permits man to escape from the dwindling spiral of his own disabilities. Therefore work itself can become a game, a pleasant and happy thing.:

(7) Hard cover book, 112 pages, entitled "All About Radiation, by a Nuclear Physicist and a Medical Doctor"

(Government Exhibit No. 116)

We care very little about whether there is radiation in the atmosphere because a person who is in excellent physical condition does not particularly suffer mentally and thus physically from the effects of radiation. When a person is at a level where his general physical health is good, then this worry is not capable of depressing him into ill-health. Radiation is more of a mental than a physical problem and Scientology handles that."

"The reaction to radiation in persons who have been given Scientology processing is by actual tests much lower than those who have not received it. We have conducted many experiments in that direction. But even we would find it very difficult and even antipathetic to get everybody together and give them the amount of group processing needed as safeguard against radiation."

UNITED STATES of America
v.
Ralph BORELLI.
Crim. No. 12605.

United States District Court,
D. Connecticut.
Nov. 9, 1971.

Proceeding on motion to vacate sentence, treated as motion seeking correction or reduction of sentence. The District Court, Zampano, J., held that where convictions are returned, under federal bank robbery statute, for both bank robbery and bank larceny, appropriate course is to impose sentence only under one of the counts and suspend imposition of sentence, with the required period of probation, under the other count; such procedure does not violate prohibition against pyramiding sentences under bank robbery statute since suspension of sentence with probation is not a sentence.

Motion denied.

1. Criminal Law ⇐996(1)

Where petitioner was not serving sentence he sought to attack, his motion to vacate sentence would be treated as a proceeding for correction or reduction of sentence. 28 U.S.C.A. § 2255; Fed. Rules Crim.Proc. rule 35, 18 U.S.C.A.

2. Robbery ⇐30

Where convictions are returned, under federal bank robbery statute, for both bank robbery and bank larceny, appropriate course is to impose sentence only under one of the counts and suspend imposition of sentence, with the required period of probation, under the other count; such procedure does not violate prohibition against pyramiding sentences under bank robbery statute since suspension of sentence with probation is not a sentence. 18 U.S.C.A. §§ 2113(a, d), 3651.

the statement, she would not have considered it as a statement against either her pecuniary or proprietary interest.

[15] Appellants intimate also that Marian's hearsay statement was of a type that ought to be admissible against her adopted children as her successors in interest. If a hearsay statement qualifies as a declaration against interest under Evidence Code section 1230, it becomes admissible against any party to the litigation to the extent that it is relevant to an issue presented. Perhaps appellants have in mind another section of the Evidence Code, to wit, Evidence Code section 1225. Section 1225 makes admissible against a party a statement of a party's predecessor in interest which tended to impugn the interest of the predecessor at the time the predecessor held title and made the statement. The basis for reliability of this hearsay exception is that statements of a declarant, made while he has title to property and which are in disparagement of that title, are statements against the interest of the declarant.

[16] But Evidence Code section 1225 is not applicable in the case at bench, since Marian's adopted children, John and Elizabeth, as parties to the litigation, are not asserting an interest or right to the trust property which is dependent upon the prior right to this property of Marian, the declarant. The adopted children are not successors in interest to the interest which Marian had in the trust property. The interest of Marian's children is derived from the will of Huntington, just as Marian's own interest was derived from the will of Huntington. The children take their interest through Huntington and not through their mother, Marian, whose interest was solely that of a life beneficiary.

The judgment appealed from is affirmed.

FILES, P. J., and JEFFERSON, J.* concur.

Hearing denied; WRIGHT, C. J., did not participate.

58 Cal.App.3d 439

L. Gene ALLARD, Plaintiff, Cross-Defendant and Respondent,

v.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, Defendant, Cross-Complainant and Appellant.

Civ. 45562.

Court of Appeal, Second District, Division 2.

May 18, 1976.

Hearing Denied July 15, 1976.

Plaintiff brought action against defendant church for malicious prosecution, and defendant brought cross complaint for conversion. The Superior Court, Los Angeles County, Parks Stillwell, J., entered judgment on verdict awarding plaintiff compensatory and punitive damages and, from a judgment for plaintiff and against defendant on cross complaint, defendant appealed. The Court of Appeal, Beach, J., held that defendant was not deprived of a fair trial on ground of prejudicial misconduct by plaintiff's trial counsel, that procedure and verdict below did not constitute a violation of defendant's First Amendment free exercise of religion, that question as to whether inferences could be drawn that defendant, through its agents, was carrying out its own policy of fair game in its criminal actions against plaintiff was for jury, that trial court's voir dire of prospective jurors was not improper by reason of alleged failure to question jurors as to their religious prejudices or attitudes, that it was not prejudicial error to direct jury, in its assessment of malicious prosecution claim, to disregard evidence that plaintiff stole travelers' checks from defendant, that award of $50,000 compensatory damages was proper, and that plaintiff was entitled to punitive damages, but that award of punitive damages would be reduced to $50,000 under circumstances.

Affirmed as modified.

* Retired Justice of the Court of Appeal, assigned by the Chairman of the Judicial Council.

be presumed from a charge that is libelous per se, i. e., that a person committed the crime of theft.

12. Appeal and Error ⇐205

Refusal to allow, in connection with issue of damages in action for malicious prosecution, introduction of evidence on defendant's prior reputation was not error, much less prejudicial error, in absence of an offer of proof from defendant regarding such reputation.

13. Malicious Prosecution ⇐69

Presumed damage to plaintiff's reputation from an unfounded charge of theft leveled by defendant, along with imprisonment for 21 days, and mental and emotional anguish that must have followed were such as to justify a jury finding of $50,000 in compensatory damages in action for malicious prosecution.

14. Malicious Prosecution ⇐68

The jury in an action for malicious prosecution must have found knowledge of falsity or reckless disregard for the truth in order to award punitive damages.

15. Malicious Prosecution ⇐42

"Fair game" policy which was initiated by founder and chief official of defendant church and which operated to authorize members of chuch to treat "enemies" in such a manner as led to filing of criminal theft charge against plaintiff was sufficient to establish ratification necessary for an award of punitive damages.

16. Malicious Prosecution ⇐69

Disparity between compensatory damages of $50,000 and punitive damages of $250,000 suggested that jury may have been so enraged by defendant's conduct toward plaintiff that award of punitive damages in action for malicious prosecution may have been more the result of feelings of animosity, rather than a dispassionate determination of an amount necessary to assess defendant in order to deter it from similar conduct in the future; accordingly, award for punitive damages would be reduced to $50,000.

17. Appeal and Error ⇐215(1)

Claim that trial court instruction on probable cause in action for malicious prosecution was prejudicially erroneous could not be raised for first time on appeal.

18. Malicious Prosecution ⇐64(2)

While jurors in an action for malicious prosecution may consider that magistrate at preliminary hearing in previous criminal matter found probable cause for defendant's bringing charge against plaintiff, that should be in no way conclusive of jurors' own determination of probable cause.

Morgan, Wenzel & McNicholas by Gerald E. Agnew, Jr., Charles B. O'Reilly, Los Angeles, for plaintiff, cross-defendant and respondent.

Murchison, Cumming, Baker & Velpmen by Michael B. Lawler, Los Angeles, Tobias C. Tolzmann, Honolulu, Hawaii, Joel Kreiner, Los Angeles, for defendant, cross-complainant and appellant.

BEACH, Associate Justice. 443

L. Gene Allard sued the Church of Scientology for malicous prosecution. Defendant cross-complained for conversion. A jury verdict and judgment were entered for Allard on the complaint for $50,000 in compensatory damages and $250,000 in punitive damages. Judgment was entered for Allard and against the Church of Scientology on the cross-complaint. Defendant-cross complainant appeals from the judgment.

FACTS:

[1] The evidence in the instant case is very conflicting. We relate those facts supporting the successful party and disregard the contrary showing. (*Nestle v. City of Santa Monica*, 6 Cal.3d 920, 925-926, 101 Cal.Rptr. 568, 496 P.2d 480.)

In March 1969, L. Gene Allard became involved with the Church of Scientology in Texas. He joined Sea Org in Los Angeles

1. Appeal and Error ⇐930(1), 989

When the evidence on appeal is very conflicting, the Court of Appeal must relate those facts supporting the successful party and disregard the facts to the contrary.

2. Trial ⇐131(1), 133.6(1)

Though several of individual statements and questions made by plaintiff's trial counsel were inappropriate, where there often were no objections by counsel for defendant when an objection and subsequent admonition would have cured any defect, or there was an objection and trial court judiciously admonished jury to disregard comment, there was no prejudicial conduct by plaintiff's trial counsel, and defendant was not deprived of a fair trial.

3. Estoppel ⇐63

A party whose reprehensible acts are the cause of harm to another and the reason for the lawsuit by the other cannot be heard to complain that its conduct is so bad that it should not be disclosed.

4. Religious Societies ⇐31(5)

Evidence of policy statements and other peripheral mention of practices of defendant church was admissible in action for malicious prosecution where members of church were allowed to trick, sue, lie to, or destroy "enemies" and if plaintiff was considered to be an enemy as claimed, policy was relevant to credibility issues.

5. Constitutional Law ⇐84

Introduction of evidence of policy statements and other peripheral mention of practices of defendant church did not constitute a violation of defendant's First Amendment free exercise of religion in action for malicious prosecution where members of church were allowed to trick, sue, lie to, or destroy "enemies" and, if plaintiff was considered to be an enemy as claimed, policy was relevant to issues of credibility. U.S.C.A.Const. Amend. 1.

6. Malicious Prosecution ⇐71(1)

Whether officer of defendant church was within scope of his employment when he lied about plaintiff's alleged theft from a safe and whether inferences could be drawn that defendant, through its agents, was carrying out a policy of fair game in its actions against plaintiff were questions of fact for jury in action for malicious prosecution.

7. Jury ⇐131(6)

Trial court's thorough questioning of prospective jurors as to whether they had any belief or feeling toward any of the parties that might be regarded as a bias or prejudice for or against any of the parties was not improper in action against church for malicious prosecution, notwithstanding claimed failure to question prospective jurors as to their religious prejudice or attitudes, where questioning served purpose of voir dire, which was to select a fair and impartial jury, not to educate jurors or to determine exercise of peremptory challenges.

8. Appeal and Error ⇐1064.2

It was not prejudicial error to direct jury in its assessment of malicious prosecution claim against defendant church, to disregard evidence that plaintiff purportedly stole travelers' checks from defendant.

9. Appeal and Error ⇐1043(6)

Regardless of whether trial court in action for malicious prosecution was justified in denying defendant's request for discovery of factual basis for obtaining of a dismissal by district attorney of criminal case against plaintiff, prejudicial error did not occur where, during trial, counsel for all parties stipulated that criminal proceedings against defendant were terminated in his favor by a dismissal by a judge of that court upon recommendation of district attorney.

10. Libel and Slander ⇐33

In matters of slander that are libelous per se, such as the charging of a crime, general damages are presumed as a matter of law.

11. Malicious Prosecution ⇐56

Damages in actions for malicious prosecution are similar to those in defamation and, thus, damage to one's reputation can

3. Respondent failed to prove that appellant maliciously prosecuted him and therefore the judgment notwithstanding the verdict should have been granted.

4. The refusal of the trial court to ask or permit voir dire questions of prospective jurors pertaining to their religious prejudices or attitudes deprived appellant of a fair trial.

5. It was prejudicial error to direct the jury, in its assessment of the malicious prosecution claim, to disregard evidence that respondent stole appellant's Australian and American Express travelers' checks.

6. The order of the trial court in denying to appellant discovery of the factual basis for the obtaining of a dismissal by the district attorney of the criminal case *People v. Allard* was an abuse of discretion and a new trial should be granted and proper discovery permitted.

7. Respondent presented insufficient evidence to support the award of $50,000 in compensatory damages which must have been awarded because of prejudice against appellant.

8. Respondent failed to establish corporate direction or ratification and also failed to establish knowing falsity and is therefore not entitled to any punitive damages.

9. Even if the award of punitive damages was proper in this case, the size of the instant reward, which would deprive appellant Church of more than 40% of its net worth, is grossly excessive on the facts of this case.

10. There was lack of proper instruction regarding probable cause.[3]

DISCUSSION:

1. *There was no prejudicial misconduct by respondent's trial counsel, and appellant was not deprived of a fair trial.*

Appellant claims that it was denied a fair trial through the statements, questioning, and introduction of certain evidence by respondent's trial counsel. *Love v. Wolf*, 226 Cal.App.2d 378, 38 Cal.Rptr. 183, is cited as authority.

[2] We have reviewed the entire record and find appellant's contentions to be without merit. Several of counsel's individual statements and questions were inappropriate. However, there often were no objections by counsel for appellant where an objection and subsequent admonition would have cured any defect; or there was an objection, and the trial court judiciously admonished the jury to disregard the comment. Except for these minor and infrequent aberrations, the record reveals an exceptionally well-conducted and dispassionate trial based on the evidence presented.

As in *Stevens v. Parke, Davis & Co.*, 9 Cal.3d 51, 72, 107 Cal.Rptr. 45, 507 P.2d 653, a motion for a new trial was made, based in part upon the alleged misconduct of opposing counsel at trial. What was said in *Stevens* applies to the instant case. "'A trial judge is in a better position than an appellate court to determine whether a verdict resulted wholly, or in part, from the asserted misconduct of counsel and his conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong.' [Citation.] From our review of the instant record, we agree with the trial judge's assessment of the conduct of plaintiff's counsel and for the reasons stated above, we are of the opinion that defendant has failed to demonstrate prejudicial misconduct on the part of such counsel. (*Stevens v. Parke, Davis & Co., supra*, 9 Cal.3d at p. 72, 107 Cal.Rptr. at p. 58, 507 P.2d at p. 666.)

2. *The procedure and verdict below does not constitute a violation of appellant's First Amendment free exercise of religion.*

Appellant contends that various references to practices of the Church of Scientology were not supported by the evidence, were not legally relevant, and were unduly prejudicial. The claim is made that the

3. This issue is raised for the first time in appellant's reply brief.

trial became one of determining the validity of a religion rather than the commission of a tort.

The references to which appellant now objects were to such practices as "E-meters," tin cans used as E-meters, the creation of religious doctrine purportedly to "get" dissidents, and insinuations that the Church of Scientology was a great money making business rather than a religion.

[3-5] The principal issue in this trial was one of credibility. If one believed defendant's witnesses, then there was indeed conversion by respondent. However, the opposite result, that reached by the jury, would naturally follow if one believed the evidence introduced by respondent. Appellant repeatedly argues that the introduction of the policy statements of the Church was prejudicial error. However, these policy statements went directly to the issue of credibility. Scientologists were allowed to trick, sue, lie to, or destroy "enemies." (Exhibit 1.) If, as he claims, respondent was considered to be an enemy, that policy was indeed relevant to the issues of this case. That evidence well supports the jury's implied conclusion that respondent had not taken the property of the Church, that he had merely attempted to leave the Church with the documents for the Internal Revenue Service, and that those witnesses who were Scientologists or had been Scientologists were following the policy of the Church and lying to, suing and at[illegible] respondent. Evidence [illegible] were damaging [illegible] entirely rele[illegible]. A party [illegible] the cause of [illegible] for the [illegible] to [illegible] that it [illegible]

We find the introduction of evidence of the policy statements and other peripheral mention of practices of the Church of Scientology not to be error. In the few instances where mention of religious practices may have been slightly less germane than the policy statements regarding fair game, they were nonetheless relevant and there was no prejudice to appellant by the introduction of such evidence.

3. *The trial court properly denied the motion for judgment notwithstanding the verdict.*

Appellant claimed that it had probable cause to file suit against respondent. The claim is made that even if Alan Boughton did take the checks from the safe, knowledge of that act should not be imputed to appellant Church.

[6] Based on the policy statements of appellant that were introduced in evidence, a jury could infer that Boughton was within the scope of his employment when he stole the francs from the safe or lied about respondent's alleged theft. Inferences can be drawn that the Church, through its agents, was carrying out its own policy of fair game in its actions against respondent. Given that view of the evidence, which as a reviewing court we must accept, there is substantial evidence proving that appellant maliciously prosecuted respondent. Therefore, the trial court did not err in denying the motion for the judgment notwithstanding the verdict.

4. *The trial court performed proper voir dire of prospective jurors.*

Appellant claims that the trial court refused to ask or permit voir dire questions of prospective jurors pertaining to their religious prejudices or attitudes. The record does not so indicate. Each juror was asked if he or she had any belief or feeling toward any of the parties that might be regarded as a bias or prejudice for or

[illegible] failed to do so, and the trial court [illegible] permitted the admission of Exhibit [illegible]

and was sent to San Diego for training. While there, he signed a billion-year contract agreeing to do anything to help Scientology and to help clear the planet of the "reactive people." During this period he learned about written policy directives that were the "policy" of the Church, emanating from L. Ron Hubbard, the founder of the Church of Scientology.[1] After training on the ship, respondent was assigned to the Advanced Organization in Los Angeles, where he became the director of disbursements. He later became the Flag Banking Officer.

[1444] Alan Boughton, Flag Banking Officer International, was respondent's superior. Only respondent and Boughton knew the combination to the safe kept in respondent's office. Respondent handled foreign currency, American cash, and various travelers' checks as part of his job.

In May or June, 1969, respondent told Boughton that he wanted to leave the Church. Boughton asked him to reconsider. Respondent wrote a memo and later a note; he spoke to the various executive officers. They told him that the only way he could get out of Sea Org was to go through "auditing" and to get direct permission from L. Ron Hubbard. Respondent wrote to Hubbard. A chaplain of the Church came to see him. Lawrence Krieger, the highest ranking justice official of the Church in California, told respondent that if he left without permission, he would be fair game and "You know we'll come and find you and we'll bring you back, and we'll deal with you in whatever way is necessary."

On the night of June 7 or early morning of June 8, 1969, respondent went to his office at the Church of Scientology and took several documents from the safe. These documents were taken by him to the Internal Revenue Service in Kansas City; he used them to allege improper changes in the records of the Church. He denies that any Swiss francs were in the safe that night or that he took such Swiss francs. Furthermore, respondent denies the allegation that he stole various travelers' checks from the safe. He admitted that some travelers' checks had his signature as an endorsement, but maintains that he deposited those checks into an open account of the Church of Scientology. There is independent evidence that tends to corroborate that statement. Respondent, having borrowed his roommate's car, drove to the airport and flew to Kansas City, where he turned over the documents to the Internal Revenue Service.

Respondent was arrested in Florida upon a charge of grand theft. Boughton had called the Los Angeles Police Department to report that $23,000 in Swiss francs was missing. Respondent was arrested in Florida; he waived extradition and was in jail for 21 days. Eventually, the charge was dismissed. The deputy district attorney in Los Angeles recommended a dismissal in the interests of justice.[2]

[1445] CONTENTIONS ON APPEAL:

1. Respondent's trial counsel engaged in flagrant misconduct throughout the proceedings below and thereby deprived appellant of a fair trial.

2. The verdict below was reached as a result of (a) counsel's ascription to appellant of a religious belief and practices it did not have and (b) the distortion and disparagement of its religious character, and was not based upon the merits of this case. To allow a judgment thereby achieved to stand would constitute a violation of appellant's free exercise of religion.

1. One such policy, to be enforced against "enemies" or "suppressive persons" was that formerly titled "fair game." That person "[m]ay be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. May be tricked, sued or lied to or destroyed." (Exhibit 1.)

2. Leonard J. Shaffer, the deputy district attorney, testified outside the presence of the jury that members of the Church were evasive in answering his questions. He testified that the reasons for the dismissal were set forth in his recommendation; the dismissal was not part of a plea bargain or procedural or jurisdictional issue.

against any of them. Each juror was also asked if he or she had ever heard of the Church of Scientology. If the juror answered affirmatively, he or she was further questioned as to the extent of knowledge regarding Scientology and whether such knowledge would hinder the rendering of an impartial decision. One juror was excused when she explained that her husband is a clergyman and that she knows a couple that was split over the Church of Scientology.

[7] The trial court's thorough questioning served the purpose of voir dire, which is to select a fair and impartial jury, not to educate the jurors or to determine the exercise of peremptory challenges. (*Rousseau v. West Coast House Movers*, 256 Cal.App.2d 878, 882, 64 Cal.Rptr. 655.)

5. *It was not prejudicial error to direct the jury, in its assessment of the malicious prosecution claim, to disregard evidence that respondent stole appellant's Australian and American Express travelers' checks.*

[8] Appellant submits that evidence of respondent's purported theft of the Australian and American Express travelers' checks should have been admitted as to the issue of malicious prosecution as well as the cross-complaint as to conversion. If there were any error in this regard, it could not possibly be prejudicial since the jury found for respondent on the cross-complaint. It is evident that the jury did not believe that respondent stole the travelers' checks; therefore, there could be no prejudice to appellant by the court's ruling.

6. *Appellant suffered no prejudice by the trial court's denial of discovery of the factual basis for obtaining of the dismissal by the district attorney.*

Prior to trial, appellant apparently sought to discover the reasons underlying the dismissal of the criminal charges against respondent. This was relevant to the instant case since one of the elements of a cause of action for malicious prosecution is that the criminal prosecution against the plaintiff shall have been favorably terminated. (*Jaffe v. Stone*, 18 Cal.2d 146, 114 P.2d 335.)

[9] Whether or not the lower court was justified in making such an order, the denial of discovery along these lines could not be prejudicial. During the trial, counsel for all parties stipulated that the criminal proceedings against Allard were terminated *in his favor* by a dismissal by a judge of that court upon the recommendation of the district attorney.

In addition, there was a hearing outside the presence of the jury in which the trial court inquired of the deputy district attorney as to the reasons for the dismissal. It was apparent at that time that the prospective witnesses for the Church of Scientology were considered to be evasive. There was no prejudice to appellant since the deputy district attorney was available at trial. Earlier knowledge of the information produced would not have helped defendant. We find no prejudicial error in the denial of this discovery motion.

7. *The award of $50,000 compensatory damages was proper.*

Appellant contends that based upon the evidence presented at trial, the compensatory damage award is excessive. In addition, appellant contends that the trial court erred in not allowing appellant to introduce evidence of respondent's prior bad reputation.

There was some discussion at trial as to whether respondent was going to claim damaged reputation as part of general damages. The trial court's initial reaction was to allow evidence only of distress or emotional disturbance; in return for no evidence of damaged reputation, appellant would not be able to introduce evidence of prior bad reputation. The court, however, relying on the case of *Clay v. Lagiss*, 143 Cal.App.2d 441, 299 P.2d 1025, held that lack of damage to reputation is not admissible. Therefore, respondent was allowed to claim damage to reputation without allowing appellant to introduce evidence of his prior bad reputation.

[10-12] In matters of slander that are libelous per se, for example the charging of a crime, general damages have been presumed as a matter of law. (*Douglas v. Janis*, 43 Cal.App.3d 931, 940, 118 Cal.Rptr. 280[4], citing *Clay v. Lagiss, supra*, 143 Cal.App.2d at p. 448, 299 P.2d 1025. Compare *Gertz v. Welch*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789.)[5] Damages in malicious prosecution actions are similar to those in defamation. Therefore, damage to one's reputation can be presumed from a charge, such as that in the instant case that a person committed the crime of theft. In any event, as the trial court in the instant case noted, there was no offer of proof regarding respondent's prior bad reputation; any refusal to allow possible evidence on that subject has not been shown to be error, much less prejudicial error.

Appellant further contends that the amount of compensatory damages awarded was excessive and that the jury was improperly instructed regarding compensatory damages. The following modified version of BAJI 14.00 and 14.13 was given:

"If, under the court's instructions, you find that plaintiff is entitled to a verdict against defendant, you must then award plaintiff damages in an amount that will reasonably compensate him for each of the following elements of loss or harm, which [451] in this case are presumed to flow from the defendant's conduct without any proof of such harm or loss: damage to reputation, humiliation and emotional distress.

"No definite standard or method of calculation is prescribed by law to fix reasonable compensation for these presumed elements of damage. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for damage to reputation, humiliation and emotional distress, you shall exercise your authority with calm and reasonable judgment, and the damages you find shall be just and reasonable."

The following instruction was requested by defendant and was rejected by the trial court:

"The amount of compensatory damages should compensate plaintiff for actual injury suffered. The law will not put the plaintiff in a better position than he would be in had the wrong not been done." Accompanying the request for that motion is a citation to *Staub v. Muller*, 7 Cal.2d 221, 60 P.2d 283, and *Basin Oil Co. of Cal. v. Baash-Ross Tool Co.*, 125 Cal.App.2d 578, 271 P.2d 122.

The Supreme Court has recognized that "Damages potentially recoverable in a malicious prosecution action are substantial. They include out-of-pocket expenditures, such as attorney's and other legal fees . . .; business losses . . .; general harm to reputation, social standing and credit . . .; mental and bodily harm . . .; and exemplary damages where malice is shown . . ." (*Babb v. Superior Court*, 3 Cal.3d 841, 848, fn. 4, 92 Cal.Rptr. 179, 183, 479 P.2d 379, 383.) While these damages are compensable, it is the determination of the damages by the jury with which we are concerned. Appellant seems to contend that the jury must have actual evidence of the damages suffered and the monetary amount thereof.

5. The Supreme Court held in *Gertz v. Welch, supra*, 418 U.S. 323, 340, 810, 94 S.Ct. 2997, 3011, 41 L.Ed.2d 789, an action for defamation, that "the States may not permit recovery of presumed or punitive damages, *at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.*" (Emphasis added.) The instant case is distinguishable from *Gertz*. Initially, the interests protected by a suit for malicious prosecution include misuse of the judicial system itself; a party should not be able to claim First Amendment protection maliciously to prosecute another person. Secondly, the jury in the instant case must have found "knowledge of falsity or reckless disregard for the truth" in order to award punitive damages herein. Therefore, even under *Gertz*, a finding of presumed damages is not unconstitutional.

[13] "[T]he determination of the jury on the issue of damages is conclusive on appeal unless the amount thereof is so grossly excessive that it can be reasonably imputed solely to passion or prejudice in the jury. [Citations.]" (*Douglas v. Janis, supra*, 43 Cal.App.3d at p. 940, 118 Cal. Rptr. at p. 286.) The presumed damage to respondent's reputation from an unfounded charge of theft, along with imprisonment for twenty-one days, and the mental and emotional anguish that must have followed are such that we cannot say that the jury's finding of $50,000 in compensatory dam-
1452 ages is unjustified. That amount does not alone demonstrate that it was the result of passion and prejudice.

8. *Respondent is entitled to punitive damages.*

[14] Appellant cites the general rule that although an employer may be held liable for an employee's tort under the doctrine of respondeat superior, ordinarily he cannot be made to pay punitive damages where he neither authorized nor ratified the act. (4 Witkin, Summary of Calif. Law, 8th Ed., § 855, p. 3147.)[6] Appellant claims that the Church of Scientology, which is the corporate defendant herein, never either authorized or ratified the malicious prosecution.

[15] The finding of authorization may be based on many grounds in the instant case. For example, the fair game policy itself was initiated by L. Ron Hubbard, the founder and chief official in the Church. (Exhibit 1.) It was an official authorization to treat "enemies" in the manner in which respondent herein was treated by the Church of Scientology.

Furthermore, all the officials of the Church to whom respondent relayed his desire to leave were important managerial employees of the corporation. (See 4 Witkin, Summary of Calif.Law, 8th Ed., *supra*, § 857, p. 3148.)

The trier of fact certainly could have found authorization by the corporation of the act involved herein.

9. *The award of punitive damages.*

[16] Any party whose tenets include lying and cheating in order to attack its "enemies" deserves the results of the risk which such conduct entails. On the other hand, this conduct may have so enraged the jury that the award of punitive damages may have been more the result of
1453 feelings of animosity, rather than a dispassionate determination of an amount necessary to assess defendant in order to deter it from similar conduct in the future. In our view the disparity between the compensatory damages ($50,000) and the punitive damages ($250,000) suggests that animosity was the deciding factor. Our reading of the decisional authority compels us to conclude that we should reduce the punitive damages. We find $50,000 to be a reasonable amount to which the punitive damages should be reduced. We perceive this duty, and have so modified the punitive damages award not with any belief that a reviewing court more ably may perform it.[7] Simply stated the decisional authority seems to indicate that the reviewing court should examine punitive damages and where necessary modify the amount in or-

6. We again note that *Gertz v. Welch, supra*, precludes the award of punitive damages in defamation actions "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." The facts of the instant case fall within that categorization, so a finding of punitive damages was proper. Moreover, as we noted above, an egregious case of malicious prosecution subjects the judicial system itself to abuse, thereby interfering with the constitutional rights of all litigants. Punitive damages may therefore be more easily justified in cases of malicious prosecution than in cases of defamation. The societal interests competing with First Amendment considerations are more compelling in the former case.

7. See dissent in *Cunningham v. Simpson*, 1 Cal.3d 301, 81 Cal.Rptr. 855, 461 P.2d 39.

der to do justice. (*Cunningham v. Simpson*, 1 Cal.3d 301, 81 Cal.Rptr. 855, 461 P. 2d 39; *Forte v. Nolfi*, 25 Cal.App.3d 656, 102 Cal.Rptr. 455; *Shroeder v. Auto Driveaway Company*, 11 Cal.3d 908, 114 Cal. Rptr. 622, 523 P.2d 662; *Livesey v. Stock*, 208 Cal. 315, 322, 281 P. 70.)

10. *Instruction on probable cause.*

Appellant requested an instruction stating: "Where it is proven that a judge has had a preliminary hearing and determined that the facts and evidence show probable cause to believe the plaintiff guilty of the offense charged therefore, ordering the plaintiff to answer a criminal complaint, this is *prima facie* evidence of the existence of probable cause." The trial court gave the following instruction: "The fact that plaintiff was held to answer the charge of grand theft after a preliminary hearing is evidence tending to show that the initiator of the charge had probable cause. This fact is to be considered by you along with all the other evidence tending to show probable cause or the lack thereof." [8]

[17, 18] Appellant claimed for the first time in his reply brief that the trial court's lack of proper instruction regarding probable cause was prejudicial error. Since this issue was raised for the first time in appellant's reply brief, we decline to review the issue. [9]

1154 The judgment is modified by reducing the award of punitive damages only, from $250,000 to the sum of $50,000. As modified the judgment is in all other respects affirmed.

Costs on appeal are awarded to respondent Allard.

ROTH, P. J. and FLEMING, J., concur.

8. This instruction was given on the court's own motion.

9. We note that given the circumstances of the instant case, the juror could have easily been misled by the requested instruction. If the evidence showed that the agents and employees of appellant were lying, then the preliminary hearing at which they also testified would not be valid. While the jurors may of course consider that the magistrate at the preliminary hearing found probable cause, that should be in no way conclusive in the jury's determination of probable cause.

Margaret BAXTER and Theodore Baxter, Petitioners,

v.

The SUPERIOR COURT of California, COUNTY OF LOS ANGELES, Respondent;

C. Hunter SHELDON, M.D., et al., Real Parties in Interest.

Civ. 48182.

Court of Appeal, Second District, Division 2.

May 19, 1970.

Hearing Granted July 21, 1970.

Medical malpractice action was brought on behalf of minor child and his parents sought damages for expenses incurred as a result of alleged malpractice and for loss of consortium. Parents sought writ of mandate after the trial court sustained demurrers to their causes of action for loss of consortium. The Court of Appeal, Roth, P. J., held that cause of action could not be asserted by parents for loss of support, comfort, protection, society and pleasure of their minor child.

Alternative writ discharged; petition denied.

1. Parent and Child ⇐7(1)

Cause of action could not be asserted by parents for loss of support, comfort, protection, society and pleasure of their minor child.

2. Parent and Child ⇐1, 7(1)

Neither parent nor child has cause of action for loss of consortium because of wrongful injury of the other.

Ronald L. M. Goldman and Michael K. McKibbin, Newport Beach, for petitioners.

UNITED STATES of America
v.
Mary Sue HUBBARD et al.
Crim. No. 78-0401.
United States District Court,
District of Columbia.
April 25, 1979.

Proceeding was instituted on pretrial motions of defendants in prosecution on multicount indictment. The District Court, Charles R. Richey, J., held that: (1) count one of the indictment was sufficient to allege a single conspiracy; (2) statute proscribing interception of oral communications was to be read as requiring a federal nexus in order to pass constitutional muster; (3) indictment properly included obstruction of a criminal investigation as an objective of conspiracy; (4) indictment properly charged obstruction of justice by concocting false testimony for an investigation carried out in conjunction with a grand jury proceeding; (5) defendants failed to show that indictment was a result of a bad-faith prosecution; (6) indictment was not subject to being dismissed on ground of prejudicial preindictment publicity and alleged prosecutorial misconduct; (7) photocopying government documents through use of government equipment and supplies was prohibited by federal larceny statute; (8) Government was required to particularize some charges in indictment; (9) insinuations of unalleged facts, irrelevant descriptive recitals, inflammatory language, and narrative declarations of past fact were subject to being stricken from indictment as surplusage; (10) alleged thefts of documents from Interpol were in furtherance of conspiracy; (11) defendants had no right to personally confront witnesses in protective custody to determine their willingness to be interviewed by defense counsel; (12) defendants would be given limited access to grand jury qualification questionnaires; (13) defendants were entitled to some discovery, and (14) defendants and counts were properly joined.

Motions granted in part and denied in part.

See also, D.C., 474 F.Supp. 90.

1. Conspiracy ⇐23
Crucial indicator in ascertaining whether more than a single conspiracy is involved is nature of conspiratorial agreement itself.

2. Conspiracy ⇐24
Nature of conspiratorial agreement must be inferred from conduct of alleged conspirators.

3. Conspiracy ⇐23
That overt acts which constitute means and objectives of conspiracy can logically be grouped into separate categories does not demonstrate that more than a single conspiracy is involved.

4. Conspiracy ⇐24
Persons privy to a conspiracy and objectives encompassed therein are factors which control contours of conspiratorial agreement.

5. Conspiracy ⇐23
A single conspiracy is alleged as long as there is some linkage between what can logically be treated as separate agreements.

6. Conspiracy ⇐43(1)
Count charging defendants with agreeing to illegally locate and obtain information which was in possession of United States and which related to a church and individuals, organizations, and agencies perceived to be enemies of church was sufficient to allege a single conspiracy as long as there was a linkage between what could logically be treated as separate agreements.

7. States ⇐4.4
The Constitution allocates power among the federal Government and the states by specifying those powers that Congress might exercise and by emphasizing in the Tenth Amendment that undelegated powers are reserved to the state or respectively to the people. U.S.C.A.Const. Amend. 10.

8. Constitutional Law ⇐48(1)
A court can construe a statut
a constitutional difficulty if su
struction is thoroughly possible.

9. Telecommunications ⇐492
Statute providing criminal p
anyone who willfully intercep
to intercept, or procures any
intercept or endeavor to inter
or oral communication must
quire a federal nexus in order t
stitutional muster. 18
§ 2511(1)(a).

10. Telecommunications ⇐
Count charging defenda
ing federal statute by interc
communications made during a
agents and employees of Inter
Service was sufficient to alle
nexus in order to pass constit
ter. 18 U.S.C.A. § 2511(1)(a).

11. Obstructing Justice ⇐4
Statute proscribing act of
criminal investigation was en
tect a witness against intimid
cion by a third party who is a
prevent witness from supplyi
nicating information to a fede
tor. 18 U.S.C.A. § 1510.

12. Obstructing Justice ⇐7
Coercion of accomplices
from coverage of statute pro
obstructing a criminal inve
U.S.C.A. § 1510.

13. Obstructing Justice ⇐4
When an organized grou
prevent one of its members f
ing from a conspiracy, surre
eral investigators, and detaili
fenses committed by othe
group, a violation of statute
of obstructing a criminal i
made out. 18 U.S.C.A. § 15

14. Obstructing Justice ⇐
Count charging defen
timizing unindicted coconsp
included obstruction of a cri
tion as an objective of cons
C.A. § 1510.

8. Constitutional Law ⇐48(1)

A court can construe a statute to avoid a constitutional difficulty if such a construction is thoroughly possible.

9. Telecommunications ⇐492

Statute providing criminal penalties for anyone who willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire or oral communication must be read to require a federal nexus in order to pass constitutional muster. 18 U.S.C.A. § 2511(1)(a).

10. Telecommunications ⇐497

Count charging defendants with violating federal statute by intercepting oral communications made during a meeting of agents and employees of Internal Revenue Service was sufficient to allege a federal nexus in order to pass constitutional muster. 18 U.S.C.A. § 2511(1)(a).

11. Obstructing Justice ⇐4

Statute proscribing act of obstructing a criminal investigation was enacted to protect a witness against intimidation or coercion by a third party who is attempting to prevent witness from supplying or communicating information to a federal investigator. 18 U.S.C.A. § 1510.

12. Obstructing Justice ⇐7

Coercion of accomplices is excluded from coverage of statute proscribing act of obstructing a criminal investigation. 18 U.S.C.A. § 1510.

13. Obstructing Justice ⇐4

When an organized group attempts to prevent one of its members from withdrawing from a conspiracy, surrendering to federal investigators, and detailing criminal offenses committed by other members of group, a violation of statute proscribing act of obstructing a criminal investigation is made out. 18 U.S.C.A. § 1510.

14. Obstructing Justice ⇐11

Count charging defendants with victimizing unindicted coconspirator properly included obstruction of a criminal investigation as an objective of conspiracy. 18 U.S.C.A. § 1510.

15. Conspiracy ⇐44½

Inferences must be made according to stake of conspirators in venture and relations of parties to separate activities.

16. Conspiracy ⇐44½

Where there is a substantial overlap between parties involved in each separate action, and separate objectives each are consistent with and support overall objective, appropriate inference is that one agreement is made and that each objective is merely a means to achieve purpose of overall agreement.

17. Indictment and Information ⇐95

An indictment need not specify the specific means but need only notify the defendants of the nature of the charge so that they may adequately prepare their defense.

18. Obstructing Justice ⇐11

Count charging defendants with preparing and assisting in giving false and misleading testimony in order to impede investigatory function of grand jury was sufficient to charge defendants with violating statute proscribing offense of endeavoring to influence, obstruct, or impede due administration of justice. 18 U.S.C.A. § 1503.

19. Obstructing Justice ⇐6

Statute proscribing offense of endeavoring to influence, obstruct, or impede due administration of justice requires that there be an obstruction of a judicial proceeding such as a grand jury investigation. 18 U.S.C.A. § 1503.

20. Obstructing Justice ⇐11

Allegation that defendant interfered with investigation being conducted in conjunction with a grand jury proceeding was sufficient to provide necessary nexus to satisfy statutory requirement that there be an obstruction of a judicial proceeding. 18 U.S.C.A. § 1503.

21. Criminal Law ⇐31

Defendants failed to meet burden of establishing a prima facie case of selective or discriminatory prosecution in absence of

a showing that any official involved in prosecution had administered the law in any way but with an equal hand.

22. Criminal Law ⇐394.3

Evidence was not subject to being suppressed as having been obtained by illegal electronic surveillance where none of the evidence to be used at trial or presented to the grand jury was derived in any way from electronic surveillance.

23. Indictment and Information ⇐144.-1(1)

Standard remedies for prejudicial publicity are the granting of a continuance or a change of venue and do not include the dismissal of an indictment.

24. Jury ⇐131(1)

Voir dire is the appropriate means for determining whether a fair and impartial jury can be selected.

25. Indictment and Information ⇐144.-1(1)

There was no basis for defendants' contention that indictment was subject to being dismissed by reason of prejudicial pretrial publicity.

26. Indictment and Information ⇐144.-1(1)

Defendants offered absolutely no evidence linking the Government to any press leaks, but even if government employees violated rules and regulations prohibiting feeding information to press, defendants failed to support their claim that this gave them a right to have indictment dismissed.

27. Indictment and Information ⇐144.-1(1)

Allegations of prosecutorial misconduct were unpersuasive where defendants did not at any time during pendency of grand jury investigation petition court for relief from what they perceived to be improper prosecutorial behavior.

28. Criminal Law ⇐627.9(1)

In interest of justice and in view of number of affidavits filed by defendants to support their claim of prosecutorial misconduct, court would order Government to produce transcript of grand jury proceedings for in camera inspection by court and, if any improprieties were discovered, court would consult with counsel to determine appropriate action to take under circumstances.

29. Larceny ⇐3(1)

Statute making it a crime to willfully and knowingly steal, purloin and convert to one's own use records and things of value of United States requires an intent to permanently deprive the owner of his right to possession. 18 U.S.C.A. § 641.

30. Larceny ⇐29

Count charging defendants with copying government documents through use of government equipment was sufficient to meet requirement of federal larceny statute that government owned property be taken with intent to permanently deprive owner of possession. 18 U.S.C.A. § 641.

31. Indictment and Information ⇐121.-1(4)

Simply because defendants seek definition of a term in an indictment is not a ground for objection unless the defendants seek a definition of a term that is sufficiently clear to enable the defendants to prepare their defense.

32. Indictment and Information ⇐121.-2(1)

Terms appearing in indictment, namely, "covertly," "agent of Scientology," "various illegal and unlawful means," and "in conjunction with," were unnecessarily vague and could benefit from some elaboration on the Government's part.

33. Indictment and Information ⇐121.-2(3)

Specification of places where alleged conspiracy was entered into was not necessary for defendants to adequately prepare their defense and, hence, was not required of Government.

34. Indictment and Information ⇐121.-1(7)

Evidence as to places where alleged conspiracy was entered into was not available in a bill of particulars.

35. Indictment and Inf
1(6)

Overt acts which v
any alleged conspirator
defendant related to mat
ment was required to p
particulars.

36. Indictment and Inf
1(6)

Due to complexity o
ing conspiracy, Governme
disclose its theory of cas
ulars.

37. Indictment and Inf
1(7)

Information as to ex
meetings conducted with
conspiracy was purely e
unavailable in a bill of p

38. Indictment and Inf
1(6)

Government was req
a bill of particulars the
with which the conspirat
the indictment were carr

39. Indictment and Inf
1(7)

Minute details of o
acts in course of consp
evidentiary material not
larization.

40. Indictment and Inf
1(2)

Defendants were no
answers to a request f
because they did not w
the particulars they sou
mation already provided

41. Indictment and Inf
2(3)

Information respecti
indicted coconspirators a
ticipated in crime charge
ed defendants in a bill
extent that Government

42. Indictment and Inf

It was not court's i
limit Government's proo

35. Indictment and Information ⇐121.-1(6)

Overt acts which were committed by any alleged conspirator not named as a defendant related to matters which Government was required to provide in a bill of particulars.

36. Indictment and Information ⇐121.-1(6)

Due to complexity of indictment charging conspiracy, Government was required to disclose its theory of case in a bill of particulars.

37. Indictment and Information ⇐121.-1(7)

Information as to exact time or date of meetings conducted with respect to alleged conspiracy was purely evidentiary material unavailable in a bill of particulars.

38. Indictment and Information ⇐121.-1(6)

Government was required to provide in a bill of particulars the manner or means with which the conspiratorial acts alleged in the indictment were carried out.

39. Indictment and Information ⇐121.-1(7)

Minute details of occurrence of overt acts in course of conspiracy were purely evidentiary material not subject to particularization.

40. Indictment and Information ⇐121.-1(2)

Defendants were not entitled to obtain answers to a request for particularization because they did not wish "to ferret out" the particulars they sought from the information already provided.

41. Indictment and Information ⇐121.-2(5)

Information respecting identities of unindicted coconspirators alleged to have participated in crime charged should be provided defendants in a bill of particulars to extent that Government was able.

42. Indictment and Information ⇐121.4

It was not court's intention to strictly limit Government's proof at trial by ordering Government to particularize and, if Government was unable to respond in precise terms because it was uncertain as to facts, Government was to respond precisely as it was able.

43. Indictment and Information ⇐137(1)

Words in indictment such as "various," "including but not limited to the following," "among other things," "and related matters," "on a number of occasions," "at least," "other illegal and improper activities," "and elsewhere," and "besides the defendants" were subject to being stricken from indictment as irrelevant and prejudicial where they could encourage jury to draw inferences that the defendants were believed to be involved in activities not charged in indictment.

44. Indictment and Information ⇐137(1)

Inclusion of legal acts under a heading of "illegal means" was prejudicial and misleading and required that words "illegal" and "unlawful" be stricken from indictment.

45. Indictment and Information ⇐137(1)

Confrontation which was alleged in indictment to have taken place between FBI agents and alleged members of church was subject to being stricken from indictment as prejudicial inasmuch as confrontation was not charged in indictment as a substantive offense.

46. Indictment and Information ⇐137(1)

References in indictment to guilty plea and sentencing of one defendant for wrongful use of a government seal were subject to being stricken as prejudicial and irrelevant.

47. Conspiracy ⇐43(11)

Since defendants were charged with conspiracy to obstruct justice, one defendant's prior conviction of a substantive offense was not an essential element of charge in indictment.

48. Indictment and Information ⇐137(1)

References to offenses the grand jury was investigating were subject to being stricken from indictment as prejudicial and irrelevant.

49. Indictment and Information ⇐137(1)

Words employed in indictment, namely, "infiltrate," "burglary," "cover up," "covertly," "bogus," "illegally," and "operatives," were subject to being stricken from indictment as prejudicial and unnecessarily loaded.

50. Indictment and Information ⇐137(1)

Court would order that narrative declarations of past facts, which were lawful acts of communicating oral written reports of one of defendants concerning past events, be stricken from indictment in order to assure that jury would not be prejudiced should such evidence later be held to be inadmissible.

51. Conspiracy ⇐43(1)

Description which was contained in indictment charging conspiracy to illegally obtain information and documents in possession of United States and which described allegedly stolen Interpol documents as "in the possession of the United States" was not without foundation. 5 U.S.C.A. § 101.

52. Conspiracy ⇐43(5)

Indictment alleging that stolen Interpol documents were in custody, control, or possession of the United States National Central Bureau to Interpol offices located at, or from actual employees of, the United States Department of Justice and the United States Department of Treasury was sufficient to allege overt acts in furtherance of conspiracy to illegally obtain information and documents in possession of United States. 5 U.S.C.A. § 101.

53. Criminal Law ⇐666½

Just as the law is clear that the Government may not interfere with defense counsel's attempts to interview a potential witness, it is just as clear that the witness cannot be compelled to be interviewed.

54. Criminal Law ⇐666½

A written indication from witness in protective custody respecting his willingness to be interviewed would be proper, and witness could not be required to indicate his willingness at a hearing in which he was confronted by defense counsel.

55. Criminal Law ⇐666½

Court and not prosecutor would act as conduit for defendants' request of witness in protective custody as to his willingness to be interviewed.

56. Criminal Law ⇐627.9(1)

Information which defendants sought with regard to qualifications of grand jurors who heard testimony with regard to case, but who did not indict defendants, was irrelevant to case and, hence, was not subject to being revealed.

57. Criminal Law ⇐627.9(2)

With respect to grand jury which did indict defendants, court would permit defendants to have access to all materials they had requested which were relevant to any challenge they might desire to make to selection process of grand jury.

58. Grand Jury ⇐8

Process by which grand jury itself was chosen from panel was subject to legal challenge.

59. Criminal Law ⇐627.9(1)

Defendants were not entitled to names and addresses of members of grand jury which indicted them.

60. Indictment and Information ⇐10.2(6)

There is a strong presumption of regularity in grand jury proceedings.

61. Criminal Law ⇐627.9(1)

Defendants were not entitled to transcripts of opening and closing remarks of prosecutors before grand jury in absence of evidence to rebut presumption of regularity in grand jury proceedings.

62. Criminal Law ⇐627.9(1)

Absent an objection from Government, defendants would be given access to date upon which grand jury completed its term.

63. Criminal Law ⇐627.6(1), 627.9(1)

Data concerning grand jury which indicted defendants and history of Government's relations with church which was subject of indictment was plainly outside scope of discovery rule. Fed.Rules Crim. Proc. rule 16, 18 U.S.C.A.

64. Criminal Law ⇐627.8(1)

Government would be re over all Jencks Act material v of trial of case 18 U.S.C.A.

65. Criminal Law ⇐627.5(5)

Government could not r some material because it ha vided it to some defendants required to make material a tire defense team.

66. Indictment and Informa

General purpose behind j joinder are to promote efficie my and to avoid a multip when those objectives can be out substantial prejudice to to a fair trial. Fed.Rules C 8(b), 14, 18 U.S.C.A.

67. Criminal Law ⇐622(1)

District court posse es with respect to grant or den ance. Fed.Rules Crim.Proc. 18 U.S.C.A.

68. Indictment and Informa

There is a strong feder ing joinder. Fed.Rules Cr 8(b), 14, 18 U.S.C.A.

69. Indictment and Informa

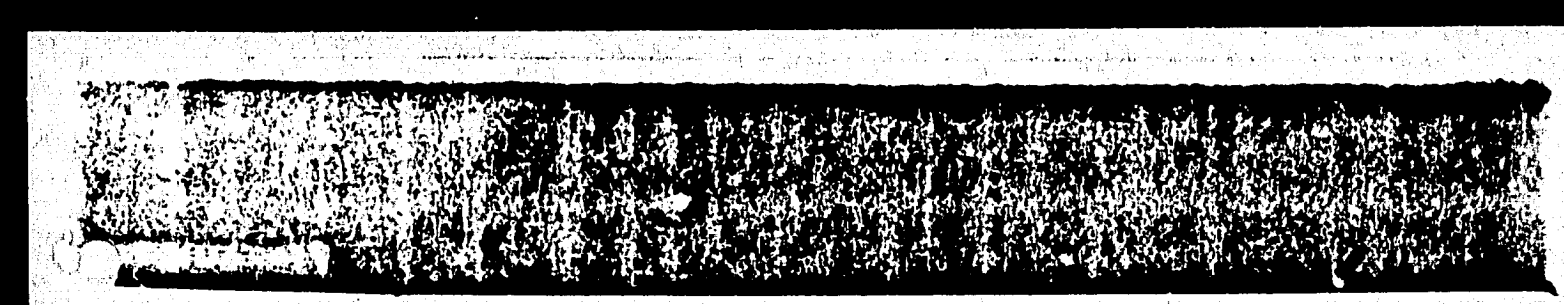
Predominant factor in joinder problem is common Fed.Rules Crim.Proc. rules 8 C.A.

70. Indictment and Informa

When there is a substa overlap in evidence that wil prove separate charges, var may be joined. Fed.Rules C 8(b), 14, 18 U.S.C.A.

71. Criminal Law ⇐618

Conspiracy charged in dictment and its substanti not subject to being severe acy charged in count 23 of its substantive offenses wh acy allegedly had as its obj tion of data by illegal mean conspiracy a cover-up of Fed.Rules Crim.Proc. rules C.A.



64. Criminal Law ⇐627.8(1)

Government would be required to turn over all Jencks Act material within ten days of trial of case. 18 U.S.C.A. § 3500

65. Criminal Law ⇐627.5(5)

Government could not resist producing some material because it had already provided it to some defendants and would be required to make material available to entire defense team.

66. Indictment and Information ⇐124(1)

General purpose behind rules governing joinder are to promote efficiency and economy and to avoid a multiplicity of trials when those objectives can be fulfilled without substantial prejudice to accused's right to a fair trial. Fed.Rules Crim.Proc. rules 8(b), 14, 18 U.S.C.A.

67. Criminal Law ⇐622(1)

District court possesses great discretion with respect to grant or denial of a severance. Fed.Rules Crim.Proc. rules 8(b), 14, 18 U.S.C.A.

68. Indictment and Information ⇐124(1)

There is a strong federal policy favoring joinder. Fed.Rules Crim.Proc. rules 8(b), 14, 18 U.S.C.A.

69. Indictment and Information ⇐127

Predominant factor in analysis of a joinder problem is commonality of proof. Fed.Rules Crim.Proc. rules 8(b), 14, 18 U.S.C.A.

70. Indictment and Information ⇐127

When there is a substantial degree of overlap in evidence that will be adduced to prove separate charges, various allegations may be joined. Fed.Rules Crim.Proc. rules 8(b), 14, 18 U.S.C.A.

71. Criminal Law ⇐618

Conspiracy charged in count one of indictment and its substantive offenses was not subject to being severed from conspiracy charged in count 23 of indictment and its substantive offenses where first conspiracy allegedly had as its objective the collection of data by illegal means and the second conspiracy a cover-up of the activities. Fed.Rules Crim.Proc. rules 8(b), 14, 18 U.S.C.A.

72. Criminal Law ⇐618

Perjury counts were so intimately connected with second conspiracy charge in indictment that severance of perjury counts from indictment was uncalled for. Fed. Rules Crim.Proc. rules 8(b), 14, 18 U.S.C.A.

73. Conspiracy ⇐45

Perjury charges, even if severed from indictment, were admissible since alleged perjury was material and relevant to charge of conspiracy to avoid detection.

74. Indictment and Information ⇐127

Indictment properly joined a series of acts or transactions within meaning of rule on joinder where it charged defendant with a multifaceted scheme with a consistent, logically interlocked set of goals, in furtherance of which overlapping groups of defendants allegedly formed two conspiracies and committed substantive offenses. Fed. Rules Crim.Proc. rules 8(b), 14, 18 U.S.C.A.

75. Criminal Law ⇐613, 622(1)

District court is not required to sever defendants and counts joinable unless joinder is prejudicial. Fed.Rules Crim.Proc. rules 8(b), 14, 18 U.S.C.A.

76. Criminal Law ⇐622(6)

Since evidence as to each count and defendant would be admissible at separate trials, there would be no prejudice to defendants' right to a fair trial by trying case as presently joined. Fed.Rules Crim.Proc. rules 8(b), 14, 18 U.S.C.A.

77. Criminal Law ⇐622(2)

Motion of two defendants to sever was not subject to being granted on ground that there would be prejudicial spillover if defendants were tried with other alleged conspirators because there was a disparity of evidence as to their respective involvement in two conspiracies. Fed.Rules Crim.Proc. rules 8(b), 14, 18 U.S.C.A.

78. Criminal Law ⇐622(1)

Constitutional right of defendants to confront witnesses against them would not be violated by introduction of reliable out-

of court declarations in accordance with requirements of rule. Fed Rules Crim Proc rule 11, 18 U.S.C.A., Fed Rules Evid rule 801(d)(2)(E), 28 U.S.C.A., U.S.C.A. Const Amend 6.

Earl J. Silbert, U. S. Atty., Raymond Banoun, Judith Hetherton, Timothy J. Reardon, III, Steven C. Tabackman, Asst. U. S. Attys., Washington, D. C., for the U. S.

Leonard B. Boudin, Rabinowitz, Boudin & Standard, Michael Lee Hertzberg, New York City, for defendant Hubbard.

Philip J. Hirschkop, John D. Grad, Leonard S. Rubenstein, Hirschkop & Grad, P. C., Alexandria, Va., for defendants Heldt and Snider.

Roger E. Zuckerman, Roger C. Spaeder, Lawrence A. Katz, Richard A. Stanley, Wendy K. Manz, Zuckerman, Spaeder & Taylor, Washington, D. C., for defendants Willardson and Weigand.

Michael Nussbaum, James P. Davenport, Ronald G. Precup, Nussbaum & Owen, Washington, D. C., for defendants Hermann and Raymond.

John Kenneth Zwerling, Jonathan Shapiro, Zwerling & Shapiro, Alexandria, Va., for defendant Wolfe.

Leonard J. Koenick, Washington, D. C., for defendant Thomas.

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

I. BACKGROUND

On August 15, 1978, a United States Grand Jury empanelled by the United States District Court for the District of Columbia returned a twenty-eight count indictment against eleven individuals. Indicted are: Mary Sue Hubbard, Jane Kember, Morris Budlong, Henning Heldt, Duke Snider, Gregory Willardson, Richard Weigand, Mitchell Hermann, Cindy Raymond, Gerald Bennett Wolfe, and Sharon Thomas. Nine of the defendants are currently under the jurisdiction of the Court and two, Kember and Budlong, are in Great Britain, where extradition proceedings are pending. Of the nine individuals before the Court, the Grand Jury indicated its belief that seven of the defendants, Hubbard, Heldt, Snider, Weigand, Willardson, Raymond, and Hermann, held official positions within the United States Branch of the Guardian's Office of the Church of Scientology. The other two, Wolfe and Thomas, are charged with being agents of the Guardian's Office.

Counts One and Twenty-three charge the defendants with conspiracy. The Count One conspiracy charges each of the defendants except Wolfe[1] with conspiring to collect, by covert means, data relating to the Church of Scientology, its founder L. Ron Hubbard, and other Church members, which was in the possession of the United States Department of Justice, the Department of the Treasury's Internal Revenue Service, and the Office of the United States Attorney for the District of Columbia. Count Twenty-three alleges that the defendants, except for Thomas, conspired to cover up the scope of these activities after two agents of the Church, Michael J. Meisner and Wolfe, were caught inside the United States Courthouse with fake IRS credentials.

Counts Two through Twenty-two charge the defendants with various offenses in furtherance of the conspiracy in Count One. Count Two charges all of the defendants except Wolfe, Thomas, and Weigand with the interception or aiding and abetting the interception of wire or oral communications in violation of 18 U.S.C. § 2511(1)(a).

1. Wolfe is named in Count One as an unindicted co-conspirator along with Michael J. Meisner. On May 13, 1977, Wolfe entered a guilty plea to a charge of [illegible] of a government seal [illegible] for his plea the government agreed not to charge him with any other possible violations arising out of three separate entries into the courthouse using a false IRS identification card. Michael J. Meisner is in the protective custody of the United States Marshal's Service and is expected to testify for the government at the trial of this case.

Counts Three through Eight, [illegible] teen, Nineteen and Twenty [illegible] fendants with second degre[illegible] aiding and abetting such a c[illegible] D.C. Code 1801(b). Counts [illegible] Thirteen, Sixteen through Ei[illegible] ty-one and Twenty-two char[illegible] ants with the theft of govern[illegible] or aiding or abetting such th[illegible] of 18 U.S.C. § 641.

Counts Twenty-four thr[illegible] eight charge the defendants [illegible] offense in furtherance of [illegible] charged in Count Twenty-[illegible] Twenty-four charges each [illegible] ants except Thomas with obs[illegible] tice in violation of 18 U.S.C. [illegible] Twenty-five through Twent[illegible] the defendant Wolfe with fal[illegible] before a Grand Jury in v[illegible] U.S.C. § 1623.

The defendants' counsel [illegible] that oral argument on thei[illegible] tions be held in three phas[illegible] has determined that oral arg[illegible] be necessary. Under Rule [illegible] United States District Court [illegible] of Columbia Rules, this dec[illegible] the sole discretion of the co[illegible]

II. COUNT ONE OF THE [illegible] IS NOT DUPLICITOUS [illegible] LY ALLEGES A SING[illegible] ACY.

The defendants move to [illegible] One of the indictment on th[illegible] improperly charges more th[illegible] acy in a single count. Cou[illegible] the defendants with agree[illegible] locate and obtain informati[illegible] sion of the United States [illegible] the Church of Scientology [illegible] als, organizations, and agen[illegible] be enemies of the Church. In support of the charge in [illegible] indictment alleges fifty-[illegible] committed to effect the ob[illegible] of this conspiracy.

The defendants contend [illegible] tions of this count actually [illegible] distinct conspiracies: (1) t[illegible]



Counts Three through Eight, Fourteen, Fifteen, Nineteen and Twenty charge the defendants with second degree burglary or aiding and abetting such a crime under 22 D.C.Code 1801(b). Counts Nine through Thirteen, Sixteen through Eighteen, Twenty-one and Twenty-two charge the defendants with the theft of government property or aiding or abetting such theft in violation of 18 U.S.C. § 641.

Counts Twenty-four through Twenty-eight charge the defendants with various offense in furtherance of the conspiracy charged in Count Twenty-three. Count Twenty-four charges each of the defendants except Thomas with obstruction of justice in violation of 18 U.S.C. § 1503. Count Twenty-five through Twenty-eight charge the defendant Wolfe with false declarations before a Grand Jury in violation of 18 U.S.C. § 1623.

The defendants' counsel have requested that oral argument on their pretrial motions be held in three phases. The Court has determined that oral argument will not be necessary. Under Rule 1.9(f) of the United States District Court for the District of Columbia Rules, this decision is "within the sole discretion of the court."

II. COUNT ONE OF THE INDICTMENT IS NOT DUPLICITOUS, IT PROPERLY ALLEGES A SINGLE CONSPIRACY

The defendants move to dismiss Count One of the indictment on the ground that it improperly charges more than one conspiracy in a single count. Count One charges the defendants with agreeing to illegally locate and obtain information in the possession of the United States which relates to the Church of Scientology and to individuals, organizations, and agencies perceived to be enemies of the Church of Scientology. In support of the charge in Count One, the indictment alleges fifty-nine overt acts committed to effect the objects and means of this conspiracy.

The defendants contend that the allegations of this count actually encompass three distinct conspiracies. (1) the effort to obtain information from the Internal Revenue Service and the Tax Division of the Department of Justice concerning the government's effort to remove the tax exempt status of the Church of Scientology; (2) to protect the founder and leader of the Church of Scientology, L. Ron Hubbard, from harassment from governmental officials in general, and, particularly to keep him from being subjected to an abuse of the legal process through the subpoena power of the government; and (3) the scheme to obtain documents from all government agencies which had been withheld under the Freedom of Information Act, 5 U.S.C. § 552.

The defendants contend that this joinder of three conspiracies in one count of the indictment violates *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). In *Kotteakos*, the Supreme Court reversed the convictions of defendants who were charged in a one-count indictment with a conspiracy to obtain fraudulent loans through the National Housing Act. *Id.* at 752-53, 66 S.Ct. 1239. At the center of the conspiracy was one man who arranged the fraudulent loans for a number of people. *Id.* at 754-55, 66 S.Ct. 1239. On the appeal before the Supreme Court, the government conceded that the indictment actually alleged several conspiracies in one count, *id.* at 752, 66 S.Ct. 1239, and the Court ruled that such a duplicitous indictment did not constitute harmless error. *Id.* at 767, 66 S.Ct. 1239. Thus, *Kotteakos* disallows the joinder of more than one conspiracy in a single count of an indictment.

[1-3] This motion raises the question of what constitutes a single conspiracy. In ascertaining whether there is a single conspiracy or separate conspiracies, the crucial indicator is the nature of the conspiratorial agreement itself. *United States v. Varelli*, 407 F.2d 735, 742 (7th Cir. 1969), *cert. denied*, 395 U.S. 1040, 92 S.Ct. 1311, 31 L.Ed.2d 581 (1971). However, since the agreement is rarely explicit and in writing, its nature must be inferred from the conduct of the alleged conspirators. Simply because the overt acts which constitute the

means and objectives of the conspiracy can logically be grouped into separate categories does not demonstrate that more than a single conspiracy is involved. *See Braverman v. United States*, 317 U.S. 49, 53, 63 S.Ct. 99, 87 L.Ed. 23 (1942). *United States v. Johnson*, 337 F.2d 180, 185 (4th Cir. 1964), *aff'd*, 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966), *citing Frohwerk v. United States*, 249 U.S. 204, 210, 39 S.Ct. 249, 63 L.Ed. 561 (1919). Even if the defendants are correct in pointing out that there must be some linkage between what can logically be treated as separate agreements, the defendants are not correct in asserting that the acts alleged in Count One of the indictment in this case lack such linkage.

[4] Two key factors control the contours of a conspiratorial agreement: "the persons privy thereto, and the objectives encompassed therein." *Note*, Federal Treatment of Multiple Conspiracies, 57 Col.L.Rev. 387, 387 (1957) (citations omitted), *cited in United States v. Varelli*, 407 F.2d at 743. In this case, there is a large overlap between the people involved in the "three conspiracies" as claimed by the defendants. Of the ten defendants named in Count One, only one has no involvement in the first conspiracy as defined by the defendants, only one has no involvement in the second conspiracy as defined by the defendants, and only three have no involvement in the third conspiracy as defined by the defendants. Since so many of the same people are engaged in each of these three supposedly separate conspiracies, it is logical to conclude that distinct agreements were not made but, rather, a single agreement encompassing each of the distinct objectives was made by each conspirator.

[5] The second factor, which as previously indicated, often demonstrates a linkage between individuals so that an agreement can be inferred is the objectives encompassed by the behavior of the conspirators. In *Kotteakos*, there was more than a single conspiracy because each person who attempted to get a loan through the central figure had no interest in whether the other people trying to get similar fraudulent loans succeeded or not. *See Blumenthal v. United States*, 332 U.S. 539, 558, 68 S.Ct. 248, 92 L.Ed. 154 (1947). The absence of any stake in the ventures of others made a single conspiracy unlikely. In this case, the government alleges a single objective: to illegally locate and obtain information in the possession of the United States which relates to the Church of Scientology and to individuals, organizations, and agencies perceived to be enemies of the Church of Scientology. The alleged conspirators are all allegedly members of the Church. Their interest in advancing the Church's interest would be assisted in each of the three conspiracies as described by the defendants. Accordingly, there is a sufficient stake by each defendant in the entire venture or conspiracy.

[6] Therefore, the Court finds that there is a linkage between the separate objectives of Count One, and it properly alleges a single conspiracy. Thus, the motion of the defendants to dismiss the first count of the indictment is denied.

III. THE FEDERAL STATUTE PROSCRIBING THE INTERCEPTION OF ORAL COMMUNICATIONS MUST BE READ TO REQUIRE A FEDERAL NEXUS IN ORDER TO PASS CONSTITUTIONAL MUSTER, AND SUCH A NEXUS IS PRESENTED IN THIS CASE

The defendants have moved to dismiss Count Two of the indictment which charges a violation of section 2511(1)(a) of Title 18 U.S.C., the federal provision prohibiting eavesdropping. The defendants move to dismiss on the ground that the statute exceeds the bounds of Congressional authority to legislate.

Section 2511(1)(a) provides criminal penalties for anyone who "wilfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication." Section 2511(1)(a) is supplemented by section 2511(2)(b)(i) which prohibits the interception of "oral communications through

the use of equipment which involve or affe
merce." The defendan
with violating the latter

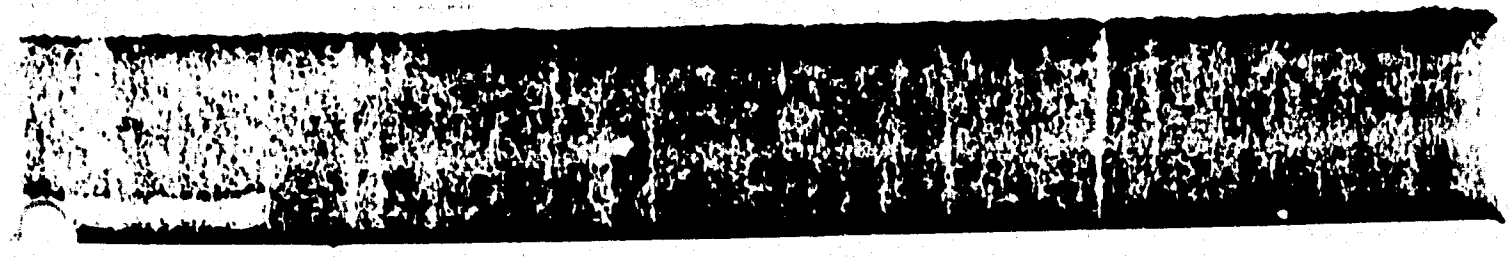
[7] The Constitution
tions against excessive
power in the federal gov
allocated among the f
and the states by speci
the Congress might exer
sizing in the tenth amer
gated powers were reser
respectively to the pe
Congress has authority
respect to the powers s
stitution. *See* G. Gun
Law 81 (1975).

Section 2511(1)(b)(i-i
the Congress in accord
over interstate commerc
tion 2511(1)(a) the Con
clear where they derive
Libit "any person
an
tion" In fact, Congre
over its authority to
broad fashion. The Se
panying Title III of
Control and Safe Stre
which this section was

The broad prohibitio
[2511(1)] (a) is also ap
ception of oral comm
terception of such co
ever, does not necess
the interstate or fore
network, and the ext
tional power of Cong
interception is less cl
of interception of wi

S.Rep.No.90-1097, 90
reprinted in 1968 U.S.C
News at 2180-81.

The defendants co
2511(1)(a) exceeds the a
to legislate, and that C
attempt to tie this secti
power of Congress. I
has given this section
order to save its consti
ed States v. Burroughs,



UNITED STATES v. HUBBARD 73
Cite as 474 F.Supp. 64 (1979)

the use of equipment under circumstances which involve or affect interstate commerce." The defendants are not charged with violating the latter section.

[7] The Constitution has explicit protections against excessive concentration of power in the federal government. Power is allocated among the federal government and the states by specifying those powers the Congress might exercise and by emphasizing in the tenth amendment that undelegated powers were reserved to the states or respectively to the people. Accordingly, Congress has authority to act only with respect to the powers specified in the Constitution. See G. Gunther, Constitutional Law 81 (1975).

Section 2511(1)(b)(i-iv) was enacted by the Congress in accordance with its power over interstate commerce. In enacting section 2511(1)(a) the Congress was not at all clear where they derived the power to prohibit "any person to intercept any oral communication." In fact, Congress expressed doubt over its authority to legislate in such a broad fashion. The Senate Report accompanying Title III of the Omnibus Crime Control and Safe Street Act of 1968, in which this section was enacted, states:

> The broad prohibition of subparagraph [2511(1)](a) is also applicable to the interception of oral communications. The interception of such communications, however, does not necessarily interfere with the interstate or foreign communications network, and the extent of the constitutional power of Congress to prohibit such interception is less clear than in the case of interception of wire communications.

Sen.Rep.No.90-1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.Code Cong. & Admin. News at 2180-81.

The defendants contend that section 2511(1)(a) exceeds the authority of Congress to legislate, and that Congress has made no attempt to tie this section to an enumerated power of Congress. However, one court has given this section a judicial gloss in order to save its constitutionality. In *United States v. Burroughs*, 564 F.2d 1111 (4th Cir. 1977), two management employees of J. P. Stevens Company were indicted for intercepting oral communications of union organizers. *Id.* at 1113. The jury returned a verdict of guilty, but the court granted the defendants' motion for a judgment of acquittal because the government had failed to provide the necessary evidence of a federal nexus. *Id.* The U.S. Court of Appeals for the Fourth Circuit upheld the district court's result, and held that "because subsection (1)(a) does not specify any particular basis for jurisdiction, we are of the opinion that proof of any rational basis would be adequate." *Id.* at 1115. Thus, the *Burroughs* decision, relied upon by the government in this case, merely requires that "*some* basis for federal jurisdiction be established at trial." *Id.* (emphasis in original).

The defendants strongly urge this Court not to follow the *Burroughs* case. According to the defendants, where statutory language and legislative intent is clear, courts will not construe a criminal statute so as to limit its natural scope only to those cases which would be within Congress' power. *Citing Aptheker v. Secretary of State*, 378 U.S. 500, 515-16, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964); *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059 (1925); *James v. Bowman*, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979 (1902); *United States v. Steffens*, 100 U.S. 82, 98-99, 25 L.Ed. 550 (1879); *United States v. Reese*, 92 U.S. 214, 23 L.Ed. 563 (1875).

[8] The defendants and the government agree that a court can construe a statute to avoid a constitutional difficulty if such a construction is "fairly possible." See *Swain v. Pressley*, 430 U.S. 372, 378 n. 11, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977) *quoting Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1966). However, the parties disagree whether this statute is susceptible to a limiting construction.

[9] The Court finds that it will accept the narrowing gloss on the statute in order to save its constitutionality. See *Scales v. United States*, 367 U.S. 203, 221-22, 81 S.Ct.

1469, 6 L.Ed.2d 782 (1961). Accordingly, as did the court in *Burroughs*, the Court finds that the statute requires some federal nexus as an essential element thereof.

In making this determination, the Court is aware that the defendants have raised a very serious challenge to the facial validity of this statute. However, two other courts have upheld its validity, see *United States v. Burroughs*, 564 F.2d 1111 (4th Cir. 1977); *United States v. Perkins*, 383 F.Supp. 922 (N.D.Ohio 1974) (holding that there is a constitutional basis for the action of Congress in enacting section 2511(1)(a) to protect the right of privacy from incursions by private individuals). Moreover, the defendants concede that the actions alleged in the indictment constitute crimes at the common law; thus, a judicial modification of the statute will not create any notice problems to the defendants.

[10] The Grand Jury has anticipated the *Burroughs* problem and has alleged a federal nexus in the indictment. The indictment charges that the defendants intercepted oral communications made during a meeting of agents and employees of the Internal Revenue Service of the United States Department of the Treasury, held at the IRS headquarters in the District of Columbia. Accordingly, the Motion of the defendants to dismiss Count Two is denied.

IV. COUNT TWENTY-THREE OF THE INDICTMENT PROPERLY INCLUDES THE OBSTRUCTION OF A CRIMINAL INVESTIGATION AS AN OBJECTIVE OF THE CONSPIRACY.

The defendants move to dismiss a portion of Count Twenty-three of the indictment, which charges a conspiracy in violation of 18 U.S.C. § 371. The indictment specifies four objects of the Count 23 conspiracy: (1) to obstruct justice in violation of 18 U.S.C. § 1503; (2) to obstruct a criminal investigation in violation of 18 U.S.C. § 1510; (3) to harbor and conceal a fugitive from arrest in violation of 18 U.S.C. § 1071; and (4) to make false declarations in violation of 18 U.S.C. § 1623. The defendants wish to have stricken the portion of Count Twenty-three which alleges as an objective of the conspiracy violations of section 1510—to obstruct a criminal investigation.

[11, 12] Section 1510 was enacted to deter coercion of potential witnesses and has been interpreted to exclude coercion of accomplices from its coverage. *See United States v. Cameron*, 460 F.2d 1391, 1401-1402 (5th Cir. 1972). The rationale is that this section was enacted to protect a witness against intimidation or coercion by a third party who is attempting to prevent the witness from supplying or communicating information to a federal investigator. House Report No. 90-658, 1967 U.S.Code Cong. & Admin.News at 1762. According to the defendants, an accomplice or co-conspirator, may be punished under other sections such as obstruction of justice, but not under section 1510, if he has merely imposed silence on an accomplice.

The government contends that the allegations of Count Twenty-three plainly make out a violation of section 1510 as an object of the conspiracy. According to the government, the "accomplice" rule is not applicable to this case because the unindicted co-conspirator, Michael Meisner, at one point withdrew from the conspiracy, and it was not until his withdrawal that the conspirators agreed to obstruct a criminal investigation in violation of section 1510. Thus, the unindicted co-conspirator became a victim of the section 1510 objective when he was no longer an accomplice.

The defendants reject the plausibility of this analysis in their reply to the government's opposition, and further contend that the indictment fails to allege that the unindicted co-conspirator ever withdrew from the conspiracy. Thus, according to the defendants, the government is improperly attempting to amend the indictment, or has improperly joined more than a single conspiracy in one count.

The Court finds that the indictment makes out, as an objective of the conspiracy in Count Twenty-three, a violation of section 1510. Many of the overt acts alleged in the indictment under Count Twenty-three support the gover
an objective of the con
gage in conduct in violat
See Indictment Count 7
41, 44-45.

[13] In addition, in
co-conspirator who has
conspiracy, there can b
plice" rule. The ration
1510 completely support
situation. When an or
tempts to prevent one of
withdrawing from a con
ing to federal investiga
the criminal offenses con
er members of the group
of section 1510 is made o
98-658, 1967 U.S.Code
News at 1762; *United*
460 F.2d at 1402 ("Ther
proof of force, threats
perhaps none of misrepr

[14] Furthermore, th
ly is precise enough to
section 1510 as an obje
Twenty-three conspira
States v. Lippman, 492
Cir. 1974), *cert. denied*,
S.Ct. 779, 42 L.Ed.2d 805
rejects the defendants'
indictment must specifi
unindicted co-conspirat
the conspiracy prior t
objectives." If the indic
claim that violations of
an objective of the cons
unable to fathom any
dictment must specifi
which remove the poss
called "accomplice" rule
the defendants. The i
anticipate every possib
fendants might raise in
motion to dismiss. Mor
the indictment in this ca
the unindicted co-cons
point attempt to withd
spiracy. The fact that
alleged in the overt ac
charging paragraph is
cause the absence of t

...s an objective of the ...of section 1510—to ob... ...tigation.

...0 was enacted to de... ...al witnesses and has ...clude coercion of ac... ...verage. *See United* ...60 F.2d 1391, 1401 ... The rationale is that ...ed to protect a wit... ...ion or coercion by a ...tempting to prevent ...ying or communicat... ...federal investigator. ...658, 1967 U.S.Code ...at 1762. According ...accomplice or co-con... ...hed under other sec... ...on of justice, but not ... has merely im... ...ence.

...tends that the allega... ...y-three plainly make ...ion 1510 as an object ... According to the ...omplice" rule is not ...because the unindict... ...hael Meisner, at one ...he conspiracy, and it ...drawal that the con... ...struct a criminal in... ...on of section 1510. ...o-conspirator became ... 1510 objective when ...ccomplice.

...et the plausibility of ...reply to the govern... ...further contend that ...allege that the unin... ...ever withdrew from ...according to the de... ...ent is improperly at... ...indictment, or has ...than a single con...

...ur ...he indictment ... the conspiracy ...a violation of sec... ...overt acts alleged ...der Count Twenty-

three support the government's claim that an objective of the conspiracy was to engage in conduct in violation of section 1510. *See* Indictment Count Twenty-three, ¶ 35-41, 44-45.

[13] In addition, in the context of a co-conspirator who has resigned from the conspiracy, there can be no such "accomplice" rule. The rationale behind section 1510 completely supports its use in such a situation. When an organized group attempts to prevent one of its members from withdrawing from a conspiracy, surrendering to federal investigators, and detailing the criminal offenses committed by the other members of the group, plainly a violation of section 1510 is made out. *See* H.Rep.No. 90-658, 1967 U.S.Code Cong. & Admin. News at 1762; *United States v. Cameron*, 469 F.2d at 1102 ("There is no hint in the proof of force, threats, intimidation and perhaps none of misrepresentation.")

[14] Furthermore, the indictment clearly is precise enough to allege violations of section 1510 as an objective of the Count Twenty-three conspiracy. *See United States v. Lippman*, 492 F.2d 314, 317 (6th Cir. 1974), *cert. denied*, 419 U.S. 1107, 95 S.Ct. 779, 42 L.Ed.2d 803 (1975). The Court rejects the defendants' contention that the indictment must specifically allege that the unindicted co-conspirator withdrew from the conspiracy prior to the section 1510 objectives. If the indictment makes out a claim that violations of section 1510 were an objective of the conspiracy, the Court is unable to fathom any reason why the indictment must specifically allege facts which remove the possibility that the so-called "accomplice" rule can be invoked by the defendants. The indictment need not anticipate every possible defense the defendants might raise in order to survive a motion to dismiss. Moreover, a reading of the indictment in this case makes clear that the unindicted co-conspirator did at one point attempt to withdraw from the conspiracy. The fact that this information is alleged in the overt acts rather than the charging paragraph is not significant because the absence of the "accomplice" defense is not an essential element of the crime charged—conspiracy under section 371.

[15, 16] Finally, the defendants contend that the agreement to victimize the unindicted co-conspirator in violation of section 1510 is only alleged against certain defendants, thus it is wholly separate and cannot be prosecuted along with the other agreement under *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The Court finds no merit in this contention. The scope of the conspiracy is determined by the scope of the agreement between the conspirators. Since the agreement is seldom visible, inferences must be made according to the stake of the conspirators in the venture and the relations of the parties to the separate activities. In this count, there is a substantial overlap between the parties involved in each separate action, and the separate objectives each are consistent with and support the overall objective; thus, the conspirators each had a similar stake in the success of the several objectives. Therefore, the appropriate inference is that one agreement was made, and each objective was merely a means to achieve the purposes of the overall agreement. *See* pages 71 and 72 *supra*.

Accordingly, the motion of the defendants to dismiss portions of Count Twenty-three relating to offenses under 18 U.S.C. § 1510 is denied.

V. COUNT TWENTY-FOUR OF THE INDICTMENT PROPERLY CHARGES OBSTRUCTION OF JUSTICE BY CONCOCTING FALSE TESTIMONY FOR AN INVESTIGATION CARRIED OUT IN CONJUNCTION WITH A GRAND JURY PROCEEDING

Count Twenty-four of the indictment charges eight of the defendants with obstructing justice in violation of 18 U.S.C. § 1503. In pertinent part, section 1503 provides criminal penalties for:

> Whosoever corruptly, or by threat or force, or by any threatening letter or

communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or any grand jury or officer in or of any court of the United States or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice.

The defendants contend that there are two defects in Count Twenty-four: (1) Count Twenty-four charges no more than the preparation of false testimony, and this alone is insufficient to constitute a violation of section 1503; and (2) there is no charge of interfering with a judicial proceeding as required by section 1503.

According to the defendants, the preparation of false testimony cannot in isolation be construed to be an obstruction of justice. The defendants candidly point out that some courts have held that false statements alone can support a conviction under section 1503. *See United States v. Partin*, 552 F.2d 621, 630 (5th Cir.) *cert. denied*, 431 U.S. 903, 98 S.Ct. 208, 54 L.Ed.2d 189 (1977), *United States v. Cohn*, 452 F.2d 881, 883-84 (2d Cir. 1971), *cert. denied*, 405 U.S. 975, 92 S.Ct. 1196, 31 L.Ed.2d 249 (1972). However, the defendants contend that the better-reasoned opinions and those approved by the United States Court of Appeals for the District of Columbia hold that prosecutions for the *giving of* misleading testimony is not permissible under 18 U.S.C. § 1503. *Citing United States v. Jackson*, 168 U.S. App.D.C. 198, 201 n. 11, 513 F.2d 456, 459 n. 11 (1975); *United States v. Essex*, 407 F.2d 214 (6th Cir. 1969).

According to the court in *Essex*, section 1503 was enacted to reach contemptuous conduct occurring away from the court. *Id.* at 216. Furthermore, the court in *Essex* found that perjury alone lacks the essential element of obstruction. *Id.* at 218. And, in the facts presented in *Essex*, the court found that the defendant may have perjured herself but she did not endeavor to influence or interfere with officers, jurors, or witnesses within the meaning of 18 U.S.C. § 1503. *Id.* The defendants contend that as in *Essex*, Count Twenty-four must be dismissed because it alleges no more than the preparation of false testimony.

[17, 18] The Court finds that Count Twenty-four in the indictment in this case is distinguishable from the charge in *Essex*. In *Essex*, the defendant was charged with no more than submitting a false affidavit in support of Jimmy Hoffa's motion for a new trial. The court stressed that the defendant was not charged with endeavoring to influence or interfere with officers, jurors, or witnesses. *Id.* at 218. In this case, the defendants are not charged in Count Twenty-four with merely giving false testimony before the Grand Jury. Count Twenty-four charges that the defendants

> willfully and knowingly, would and did corruptly influence, obstruct and impede and would and did corruptly endeavor to influence, obstruct and impede the due administration of justice in connection with the investigation referred to in paragraph three (3) of this Count, by preparing and assisting in the giving of false and misleading statements and information, for the purpose of concealing and causing to be concealed the identities of the persons who were responsible for, participated in, and had knowledge of (a) the activities which were the subject of the said investigation and judicial proceedings, and (b) other illegal and improper activities.

By charging the defendants with preparing and assisting in the giving of false and misleading testimony in order to impede the investigatory function of the Grand Jury, the indictment in Count Twenty-four steps beyond mere perjury and properly alleges an obstruction of justice under section 1503. The Court is not prepared to hold that nothing short of bribery, intimidation or threats suffices to state an offense under section 1503. Section 1503 does include the word "impede." Moreover, in the present posture of this case, the Court cannot say that the government's evidence will not show intimidation. The indictment need

UN

not specify the specific mea
only notify the defendants of
the charge so that they ma
prepare their defense. *Unit
Haldeman*, 181 U.S.App.D.C.
F.2d 31, 123 (1976) (per curia
cert. denied, 431 U.S. 933, 97 S
L.Ed.2d 250 (1977).

[19, 20] The defendants' se
that Count Twenty-four fails
the defendants obstructed a
ceeding as required by sectio
Court rejects this contention
paragraph alleges that:

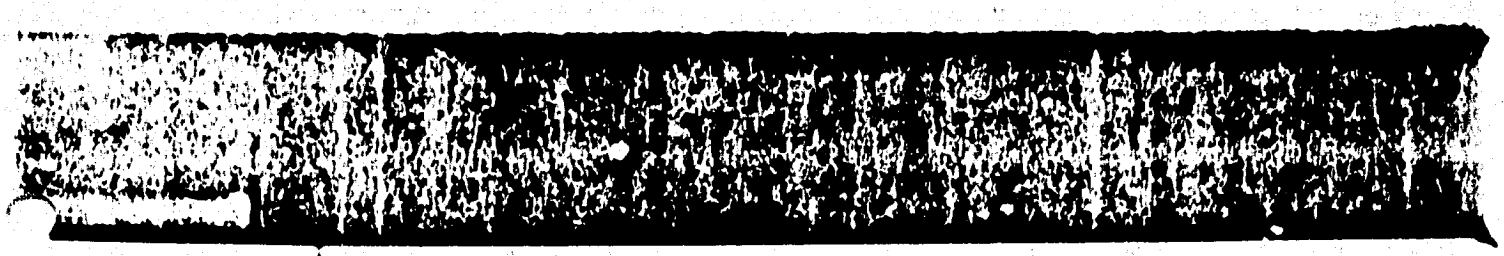
> The FBI and the Office o
> States Attorney for the D
> lumbia were conducting an
> which was continued in con
> a Grand Jury of the Unite
> trict Court for the District
> which was duly empaneled
> or about October 13, 1976,
> whether violations of the
> United States and of the D
> lumbia had been committe
> trict of Columbia and else
> identify the individuals wh
> ted such violations.

The Court finds that this a
vides the necessary nexus to
1503's requirement that the
struction of a judicial proceed
Grand Jury investigation.
States v. Haldeman, 181 U.
338 n. 229, 559 F.2d at 115 n

Accordingly, the defendan
dismiss Count Twenty-four
ment is denied.

VI. THE DEFENDAN
FAILED TO SHOW TH
DICTMENT IS THE R
BAD FAITH PROSECU

[21] The defendants con
indictment must be dismisse
ment of a selective, discrimi
faith prosecution and by
government's gross misconc
port this contention, the defe
Yick Wo v. Hopkins, 118 U
1064, 30 L.Ed. 220 (1886).



not specify the specific means but must only notify the defendants of the nature of the charge so that they may adequately prepare their defense. *United States v. Haldeman*, 181 U.S.App.D.C. 254, 346, 559 F.2d 31, 123 (1976) (per curiam) (en banc), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977).

[19, 20] The defendants' second point is that Count Twenty-four fails to allege that the defendants obstructed a judicial proceeding as required by section 1503. The Court rejects this contention. The third paragraph alleges that:

> The FBI and the Office of the United States Attorney for the District of Columbia were conducting an investigation which was continued in conjunction with a Grand Jury of the United States District Court for the District of Columbia, which was duly empaneled and sworn on or about October 13, 1976, to determine whether violations of the statutes of United States and of the District of Columbia had been committed in the District of Columbia and elsewhere, and to identify the individuals who had committed such violations.

The Court finds that this allegation provides the necessary terms to satisfy section 1503's requirement that there be an obstruction of a judicial proceeding such as a Grand Jury investigation. *See United States v. Haldeman*, 181 U.S.App.D.C. at 338 n. 229, 559 F.2d at 115 n. 229.

Accordingly, the defendants' motion to dismiss Count Twenty-four of the indictment is denied.

VI. THE DEFENDANTS HAVE FAILED TO SHOW THAT THE INDICTMENT IS THE RESULT OF A BAD FAITH PROSECUTION

[21] The defendants contend that the indictment must be dismissed as the instrument of a selective, discriminatory and bad faith prosecution and by reason of the government's gross misconduct. To support this contention, the defendants rely on *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) and *Fowler v. Rhode Island*, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953). In *Yick Wo*, the board of supervisors allowed all who were not Chinese but one, to operate laundries in wooden buildings, but withheld consent from *all* Chinese. 118 U.S. at 359, 6 S.Ct. 1064. In *Fowler*, a Jehovah's Witness minister was convicted of violating an ordinance for preaching in a public park. 345 U.S. at 67-68, 73 S.Ct. 526. In this case, the defendants are charged with being burglars, thieves, perjurers, and conspirators. There is no allegation that others committing similar acts have not been prosecuted, or that the alleged behavior came within first amendment protections. The Court finds that the defendants have failed to meet the burden of establishing a *prima facie* case of selective or discriminatory prosecution. *See United States v. Berrios*, 501 F.2d 1207, 1212 (2d Cir. 1974). There has been absolutely no showing that any official involved in this prosecution has administered the law in any way but with an equal hand.

[22] Included with the defendants' motion to dismiss the indictment as an instrument of bad faith prosecution is the request to suppress evidence obtained by illegal surveillance. The Court finds that there is no merit to this request. The government has filed seven affidavits from Assistant United States Attorneys and FBI agents who have been involved in this case since its inception, stating that none of the evidence to be used at trial or presented to the Grand Jury was derived in any way from electronic surveillance. Therefore, such surveillance has no bearing on this case. Accordingly, the defendants' motion is denied.

VII. THE INDICTMENT WILL NOT BE DISMISSED ON THE GROUND OF PREJUDICIAL PRE-INDICTMENT PUBLICITY AND ALLEGED PROSECUTORIAL MISCONDUCT.

The defendants move to dismiss the indictment because: (1) prejudicial pre-indictment and pretrial publicity was generated by the government calculated to create a climate of public opinion hostile to the de-

fendants and to influence and prejudice the grand jury; (2) government misconduct before the grand jury which was calculated to prejudice the grand jury against the defendants; (3) government misconduct in presenting evidence to the grand jury in such a way as to deprive it of its capacity to arrive at an informed independent judgment with regard to each defendant; (4) for actual bias and prejudice of the grand jury; (5) for violation of grand jury secrecy contrary to Rule 6(e) of the Federal Rules of Criminal Procedure; (6) the indictment was not founded on an informed, independent judgment of the grand jury with regard to each defendant; and (7) the prosecution violated the Justice Department and court rules with respect to pre-indictment publicity. In the alternative, the defendants request a hearing on the government's responsibility for the press leaks which they claim have marked this case, the prosecution's conduct before the grand jury tending to prejudice that body, the manner in which the prosecution presented evidence to the grand jury, and the actual bias and prejudice of the grand jury.

[23–25] The first step in the defendants' argument is that there was an intolerable degree of prejudicial pre-indictment publicity. However, the Court is aware of no case in which an indictment was dismissed for prejudicial pretrial publicity. The standard remedies for prejudicial publicity are the granting of a continuance or a change of venue. *United States v. Haldeman*, 181 U.S.App.D.C. 254, 282–287, 559 F.2d 31, 59–64 (1976) (per curiam) (en banc), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). The defendants have sought neither remedy. Moreover, *voir dire* is the appropriate means for determining whether a fair and impartial jury can be selected. *Jones v. Gasch*, 131 U.S.App.D.C. 254, 262, 404 F.2d 1231, 1239 (1967), *cert. denied*, 390 U.S. 1029, 88 S.Ct. 1414, 20 L.Ed.2d 286 (1968). Thus, there is no basis for the defendants' contention that the indictment must be dismissed on account of prejudicial pretrial publicity.

[26] The next step in examining defendants' numerous claims with regard to pre-indictment publicity is adding into the picture defendants' allegations of prosecutorial violations of rules and regulations which prohibit feeding information to the press. First, the defendants have offered absolutely no evidence linking the government to any press leaks. Second, even if government employees violated such regulations, the defendants have failed to support their claim that this would give them a right to have the indictment dismissed. Certainly the government employees could be punished, but the Court is not convinced that the identity of the people who create the publicity should somehow change its significance when determining whether the trial can proceed. The Court is unable to find any basis for what would amount to an exclusionary rule. Applying the rule of *Stone v. Powell*, 428 U.S. 465, 489, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), on balance, the social costs in dismissing an indictment because of a leak by the government greatly outweigh the benefits in deterrence, since there are remedies already available for such government misconduct.

[27, 28] The defendants' allegations of prosecutorial misconduct are also unpersuasive. The government has pointed out that the defendants did not at any time during the pendency of the grand jury's investigation petition the Court for relief from what it now perceives to be improper prosecutorial behavior. The defendants have been given ample time to reply and have offered no explanation for their delay in bringing these serious allegations to the Court's attention. Nevertheless, in the interest of justice, and in view of the number of affidavits filed by the defendants to support their claim, the Court will order the government to produce the transcripts of the Grand Jury's proceedings for an *in camera* inspection by the Court. *See People v. Sears*, 49 Ill.2d 14, 273 N.E.2d 380 (1971). If any improprieties are discovered, they will be brought to the attention of all counsel, and in that event the Court will consult with counsel to determine the appropriate action to take under the circumstances.

VIII. PHOTOCOPYING [illegible] DOCUMENTS THROU[illegible] OF GOVERNMENT [illegible] AND SUPPLIES IS PR[illegible] THE FEDERAL LA[illegible] UTE.

Ten of the substantive [illegible] dictment in this case charg[illegible] U.S.C. § 641. Each coun[illegible] tions of section 641 track [illegible] the statute alleging that [illegible] "did wilfully and knowing[illegible] and convert to their own [illegible] things of value of the Uni[illegible] a department and agenc[illegible] and give the date and tim[illegible] theft as well as the pro[illegible] "documents and photocopi[illegible] though the indictment alle[illegible] ments as well as photoco[illegible] ment has indicated that [illegible] stolen. Instead, the gov[illegible] that the defendants rem[illegible] government documents [illegible] copies of them through [illegible] ment equipment and gov[illegible] and then returned the ori[illegible] ey. United States' Opp[illegible] ants' Motion to Dism[illegible] Through Thirteen, Sixte[illegible] teen, Twenty-one Throu[illegible] in the Alternative, to [illegible] From Said Counts at 1 (1[illegible]

The defendants conten[illegible] under section 641 must [illegible] cause theft requires an[illegible] nently deprive the own[illegible] possession, and the indi[illegible] lege that something wa[illegible] en. The government i[illegible] tempted to predicate a [illegible] 641 on two theories. Th[illegible] defendants stole the info[illegible] uments, and the second [illegible] allegedly made from [illegible] ments, by means of gov[illegible] are records of the gover[illegible] copies were stolen. Th[illegible] the latter rationale will [illegible] of section 641, and will [illegible] raised by the former ra[illegible] it is unnecessary to rem[illegible] defendants in this regar[illegible]

VIII. PHOTOCOPYING GOVERNMENT DOCUMENTS THROUGH THE USE OF GOVERNMENT EQUIPMENT AND SUPPLIES IS PROHIBITED BY THE FEDERAL LARCENY STATUTE

Ten of the substantive counts of the indictment in this case charge violations of 18 U.S.C. § 641. Each count alleging violations of section 641 track the language of the statute alleging that the defendants "did wilfully and knowingly steal, purloin and convert to their own use records and things of value of the United States and of a department and agency thereof ," and give the date and time of the alleged theft as well as the property involved "documents and photocopies thereof." Although the indictment alleges theft of documents as well as photocopies, the government has indicated that no originals were stolen. Instead, the government contends that the defendants removed originals of government documents and made photocopies of them through the use of government equipment and government supplies, and then returned the original to the agency. United States' Opposition to Defendants' Motion to Dismiss Counts Nine Through Thirteen, Sixteen Through Eighteen, Twenty-one Through Twenty-two, or in the Alternative, to Strike Surplusage From Said Counts at 1 (February 23, 1979).

The defendants contend that the charges under section 641 must be dismissed because theft requires an intent to permanently deprive the owner of his right to possession, and the indictment fails to allege that something was permanently taken. The government in response has attempted to predicate a violation of section 641 on two theories. The first is that the defendants stole the information in the documents, and the second is that the copies, allegedly made from government documents, by means of government resources, are records of the government, and thus the copies were stolen. The Court finds that the latter rationale will support a violation of section 641, and will not reach the issue raised by the former rationale. Therefore, it is unnecessary to reach the claims of the defendants in this regard.

[29,30] In *United States v. DiGilio*, 538 F.2d 972 (3d Cir.), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 733, 50 L.Ed.2d 749 (1976), the court ruled that availing oneself of government resources in copying government documents makes the duplicate copies government property and "things of value" within the requirements of section 641. *Id.* at 977-78. Therefore, the indictment's claim that the defendants violated section 641 by copying government documents through the use of government equipment withstands the defendants' motion to dismiss because government-owned copies were taken with the intent to permanently deprive the owner of possession.

The Court will not reach the question of the validity of the government's alternative rationale. If section 641 reaches the theft of government information, as the government contends, serious first amendment questions would be raised, and there is ample legal authority to avoid those constitutional questions by interpreting the statute to not include information as a thing of value.

In *Pearson v. Dodd*, 135 U.S.App.D.C. 279, 410 F.2d 701, *cert. denied*, 395 U.S. 947, 89 S.Ct. 2021, 23 L.Ed.2d 465 (1969), the court of appeals for this circuit ruled that the temporary removal of documents for copying purposes does not result in a tortious conversion. *Id.* at 708. If the actions do not constitute the tort of conversion, the same actions should not constitute the federal crime of conversion in the absence of some clearer indication of Congressional intent to change the law. *See Morissette v. United States*, 342 U.S. 246, 262, 72 S.Ct. 240, 96 L.Ed. 288 (1952). In addition, in a case completely devoid of first amendment implications, the U.S. Court of Appeals for the Ninth Circuit ruled that section 641 must be construed to include only tangible property. *Chappell v. United States*, 270 F.2d 274, 277-78 (9th Cir. 1959). In *Chappell*, the court set aside the conviction under section 641 of an officer in the military who had ordered a subordinate to paint three

dwellings owned by the defendant. The court found that the conversion of a government employee's labor was not prohibited by section 641, because the statute incorporated common law definitions of offenses, and conversion requires the theft of tangible property. *Id.* at 78.

Moreover, treating information as a thing of value under section 641 would raise the strong possibility of harm to important first amendment values. *See* Nimmer, National Security Secrets v. Free Speech: The Issues Left Undecided in the *Ellsberg* Case, 26 Stan.L.Rev. 311, 322-24 (1973). First, there is clear precedent that the copying of any document does not constitute conversion. *See Local Trademarks, Inc. v. Price*, 170 F.2d 715, 718-19 (5th Cir. 1948); *Pickford Corp. v. DeLuxe Laboratories, Inc.*, 109 F.Supp. 118, 120 (S.D.Cal.1953). Second, whereas there are penalties for copyright violations, the Congress has explicitly provided that there is no copyright on government documents. 17 U.S.C. § 105. Moreover, if there were a crime for converting unspecified government information, it would not be limited to photocopying. If a person came across certain completely unclassified information during his employment within the federal government, and discussed it outside the scope of his employment, an argument could be made that he had converted government information in violation of section 641. Of course, such an interpretation would be impermissible. *See New York Times v. Sullivan*, 376 U.S. 254, 269, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The free exchange of ideas, especially ideas in possession of the government, is at the very heart of our first-amendment guarantees. *See Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). Accordingly, the government will not be permitted to rely on any alleged conversion of government information for a violation of section 641 in this case. However, the government may proceed on the theory that copies made from government records are owned by the government. Accordingly, the defendants' motion to dismiss all charges of section 641 violations is denied.

IX. THE GOVERNMENT MUST PARTICULARIZE SOME OF THE CHARGES IN THE INDICTMENT

The defendants have made thirty-three specific requests, with numerous subparts, for particularization of the indictment. Three purposes are usually ascribed to a bill of particulars: (1) to enable a defendant to prepare his defense; (2) to avoid prejudicial surprise at trial; and (3) to protect a defendant against double jeopardy. 1 C. Wright, Federal Practice & Procedure sec. 129 & 129. The issue of particularization is addressed to the sound discretion of the district court. *Wong Tai v. United States*, 273 U.S. 77, 82, 47 S.Ct. 300, 71 L.Ed. 545 (1927).

The defendants have broken down the government's objections to their thirty-three requests into thirteen categories.

[31, 32] In response to the defendants' requests numbers 1, 3, 4d, and 30b, the government objects on the ground that the defendants seek definitions, citing *United States v. Smallwood*, 443 F.2d 535, 540-41 (8th Cir.), *cert. denied*, 404 U.S. 853, 92 S.Ct. 95, 30 L.Ed.2d 93 (1971). However, simply because the defendants seek definitions is not a ground for objection unless the defendants seek a definition of a term that is sufficiently clear to enable the defendants to prepare their defense. *Id.* at 540. In this case the defendants seek explication of the terms "covertly," "agent of Scientology," "various illegal and unlawful means," "in conjunction with." The Court finds that each of these terms or phrases is unnecessarily vague and could benefit from some elaboration on the government's part.

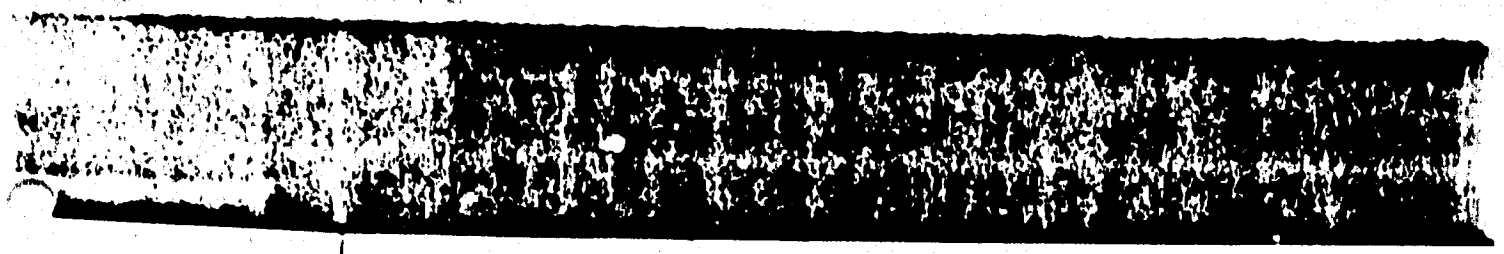
[33, 34] The government has opposed the defendants' requests numbers 4a, 4f, 4g, 19a, 19d, and 19e, on the ground that the proof of a conspiracy does not require specification of the places where the alleged conspiracy was entered into. The Court finds that this information is not necessary for the defendants to adequately prepare their defense. Moreover, it is evidence which is not available in a bill of particulars. *United States v. Sma*
at 540-41.

[35] The government o
fendants' requests number
19f, and 19h, on the ground
furtherance of the conspira
merated in the indictment o
mitted by unindicted cocon
not be particularized. Wit
acts of unindicted co-conspir
finds that the government
"the overt acts by
conspirator not named as
which the government will
which it is alleged defend
commit the crimes charg
States v. Corrado, 307 F.
(S.D.N.Y.1969). The defe
quest any overt acts not s
indictment. The Court gra
to the extent of approximat
See United States v. Fine, 4
746 (W.D.Wis.1976).

[36] The government obj
fendants' requests numbered
c5h, 16b(i), 16b(iv), 24, 31j, a
ground that it need not dis
of the case in a bill of parti
the complexity of the pres
the Court finds that suc
should be made available t
See United States v. Bake
657, 674 (D.D.C.1966).

[37] The government o
fendants' requests numbers
and 18, on the ground that t
need not provide the exact t
meetings. The Court finds t
mation is purely evidentiary
available in a bill of partic
States v. Smallwood, 443 F.2

[38] The government obj
fendants' requests numbered
and 16d, on the ground that
means with which the acts
indictment were carried out a
in a bill of particulars. Th
that the government should
formation available. *See U*
Baker, 262 F.Supp. 657, 673



UNITED STATES v. HUBBARD
Cite as 474 F.Supp. 64 (1979)
81

lars. *United States v. Smallwood*, 443 F.2d at 540-41.

[35] The government opposes the defendants' requests numbered 4c, 4h, 19c, 19f, and 19h, on the ground that any acts in furtherance of the conspiracy but not enumerated in the indictment or allegedly committed by unindicted co-conspirators need not be particularized. With regard to the acts of unindicted co-conspirators, the Court finds that the government should provide "the overt acts by any alleged conspirator not named as a defendant, which the government will prove at trial by which it is alleged defendants sought [to commit the crimes charged]." *United States v. Corrado*, 307 F.Supp. 513, 517 (S.D.N.Y.1969). The defendants also request any overt acts not specified in the indictment. The Court grants this request to the extent of approximate specifications. *See United States v. Fine*, 413 F.Supp. 740, 746 (W.D.Wis.1976).

[36] The government objects to the defendants' requests numbered 6, 7f, 10b, 15g, 15h, 16b(i), 16b(iv), 24, 31j, and 33b, on the ground that it need not disclose its theory of the case in a bill of particulars. Due to the complexity of the present indictment, the Court finds that such information should be made available to the defense. *See United States v. Baker*, 262 F.Supp. 657, 674 (D.D.C.1966).

[37] The government opposes the defendants' requests numbers 11a, 15c, 16a, and 18, on the ground that the government need not provide the exact time or date of meetings. The Court finds that such information is purely evidentiary material unavailable in a bill of particulars. *United States v. Smallwood*, 443 F.2d at 540.

[38] The government objects to the defendants' requests numbered 7f, 15b, 15d, and 16d, on the ground that the manner or means with which the acts alleged in the indictment were carried out are unavailable in a bill of particulars. The Court finds that the government should make such information available. *See United States v. Baker*, 262 F.Supp. 657, 673 (D.D.C.1966).

[39] The government resists the defendants' requests numbered 7a-d, 11d, 11e, 12b, 13, 19f, 19h, 21c, and 30a, on the ground that the defendants seek discovery which is unavailable in a bill of particulars. These requests seek information such as the minute details of the occurrence of the overt acts. The Court finds this to be purely evidentiary material not subject to particularization. *United States v. Smallwood*, 443 F.2d at 540.

[40] The government opposes the defendants' requests numbered 5, 9a, 9b, 25, 26, and 27, on the ground that the government has already provided the information to the defendants. The defendants still seek answers to their request for particularization because they do not wish "to ferret out" the particulars they seek from the information already provided. If the government has disclosed this information, the Court does not see why the government rather than the defendants should ferret it out.

[41] The government has opposed defendants' requests numbered 15e, 15f, and 31k, on the ground that they are beyond the scope of a bill of particulars. The Court finds that requests 15e and 15f seek the minute details of meetings and times, and therefore are denied. However, request number 31k asks for the identities of unindicted co-conspirators alleged to have participated in the crime charged in Count Twenty-four. To the extent that the government is able, the Court finds that it should respond to this request. *See United States v. Orsini*, 406 F.Supp. 1264 (S.D.N.Y.1976).

The government objects to the defendants' requests numbered 19g, 31c, 31d, 31f, 31h, 33c, and 33d on the ground that the indictment is clear on these points. The Court agrees with the government with respect to requests numbered 19g, and 33d(iii). The Court finds that the government should provide approximate specifications to requests numbered 31c, 31d, 31f, 33c, 33d(i), and 33d(iv), and should answer request number 31h.

The government has answered the defendants' requests numbers 11a, 15a, 21a, 21b, 21c, 21d, 22c and 31i in ways which the defendants contend is so vague to be essentially meaningless. For example, the defendants request that the government specify which criminal statute the indictment charges the defendants conspired to obstruct. The governments' response is that it ought not be required to do legal research for the defendants. The Court finds that the government's answers to requests numbered 21b and 22c should be further explicated; however, the other responses are sufficiently complete to permit the defendants to prepare their defense.

The government has failed to object to the defendants' requests numbered 15i and 33e. The Court finds that the government should make this information concerning the identity of unindicted coconspirators available.

[42] In ordering the government to particularize, it should be noted that it is not the Court's intention to strictly limit the government's proof at trial, and if the government is unable to respond in precise terms at this time because it is uncertain as to the facts, the government should respond as precisely as it is able. *See United States v. Fine*, 413 F.Supp. 740, 746 (W.D.Wis. 1976); *United States v. Ahmad*, 53 F.R.D. 194, 200 (M.D.Pa.1971).

X. INSINUATIONS OF UNALLEGED FACTS, IRRELEVANT DESCRIPTIVE RECITALS, INFLAMMATORY LANGUAGE, AND NARRATIVE DECLARATIONS OF PAST FACT ARE STRICKEN FROM THE INDICTMENT AS SURPLUSAGE

The defendants have moved the Court to strike from the indictment sixty-nine (69) items of prejudicial surplusage, in four categories: (1) insinuations of unalleged facts, (2) irrelevant descriptive recitals, (3) inflammatory language, and (4) narrative declarations of past facts not evidentially admissible. This motion is made pursuant to Rule 7(d) of the Federal Rules of Criminal Procedure which empowers the Court to "strike surplusage from the indictment."

Under the defendants' category of insinuations of unalleged facts are phrases which occur throughout the indictment such as "among other things," "including but not limited to," and "at least." The defendants object to their inclusion in the indictment because they insinuate unalleged facts unnecessary to the elements of the crimes charged, and they may open the door to attempts by the prosecution to enlarge the charges, and they may lead the jury to infer accusations of crimes beyond those actually charged. The defendants rely on the cases of *United States v. Brighton Building & Maintenance Co.*, 435 F.Supp. 222, 230-31 (N.D.Ill.1977), and *United States v. Pope*, 189 F.Supp. 12, 25-26 (S.D.N.Y.1960). The court in *Pope* struck the words "among other things" from an indictment, while the court in *Brighton Building* struck the words "at least."

[43] The government contends that in *Pope* and *Brighton Building*, the offending words appeared in the charging paragraphs of individual counts of the indictment. The government's contention is incorrect. The court in *Brighton Building* struck such words throughout the indictment, and neither court drew any distinction based on the location of the offending words. Moreover, the Court is not convinced that such words are not prejudicial outside of the charging paragraphs. Regardless of their location in the indictment, they may encourage the jury to draw inferences that the defendants are believed to be involved in activities not charged in the indictment. Furthermore, they serve no useful purpose. Accordingly, the words "various," "including but not limited to the following," "among other things," "and related matters," "on a number of occasions," "at least," "other illegal and improper activities," "and elsewhere," and "besides the defendants" shall be stricken from the indictment as irrelevant and prejudicial.

The defendants also move the Court to strike descriptive language that is irrelevant and prejudicial from the indictment. Within this category, th
clude: (1) the inclusion o
list described as "illegal
ences to a confrontation b
al Bureau of Investiga
members of the Church
the United States Cou
ington, D.C., (3) the gu
tencing of the defenda
wrongful use of a gover
(4) the cataloging of the
jury was investigating.

[44] First, the Court
clusion of legal means
"illegal means" is prejudi
and should be stricken.
correct in asserting that
not be illegal; however
that inclusion of legal ne
of "illegal means" would
misleading. The defend
the legal means be stru
Court finds that the pro
died by striking the w
"unlawful" from the in
list; thus, the prejudice

[45] Second, the de
strike references to a
tween Federal Bureau
agents and alleged mem
of Scientology in the U
house. Since this occurre
on the indictment as a s
the Court finds that it m
the defendants. Accor
stricken from the indict

[46, 47] Third, the d
strike references to the
cening of Gerald Wolf
of a government seal. T
ech references are pre
ant, and orders them
ndictment. *See Unite*
203 F.Supp. 87, 89 (S.D
Verra, the defendants
conspiracy to obstruct j
fendant's prior convictio
offense is not an essen
charge in this indictmen

Within this category, the defendants include: (1) the inclusion of legal means in a list described as "illegal means;" (2) references to a confrontation between the Federal Bureau of Investigation and alleged members of the Church of Scientology in the United States Courthouse in Washington, D.C.; (3) the guilty plea and sentencing of the defendant Wolfe for his wrongful use of a governmental seal; and (4) the cataloging of the offenses the grand jury was investigating.

[11] First, the Court finds that the inclusion of legal means in a list entitled "illegal means" is prejudicial and irrelevant and should be stricken. The government is correct in asserting that an overt act need not be illegal; however, the Court finds that inclusion of legal acts under a heading of "illegal means" would be prejudicial and misleading. The defendants request that the legal means be struck. However, the Court finds that the problem can be remedied by striking the words "illegal" and "unlawful" from the introduction to the list, thus, the prejudice will be removed.

[15] Second, the defendants move to strike references to a confrontation between Federal Bureau of Investigation agents and alleged members of the Church of Scientology in the United States Courthouse. Since this occurrence is not charged in the indictment as a substantive offense, the Court finds that it may be prejudicial to the defendants. Accordingly, it shall be stricken from the indictment.

[16, 17] Third, the defendants move to strike references to the guilty plea and sentencing of Gerald Wolfe for wrongful use of a government seal. The Court finds that such references are prejudicial and irrelevant, and orders them stricken from the indictment. *See United States v. Verra*, 203 F.Supp. 87, 89 (S.D.N.Y.1962). As in *Verra*, the defendants are charged with conspiracy to obstruct justice and one defendant's prior conviction of the substantive offense is not an essential element of the charge in this indictment.

[18] Fourth, the defendants move to strike the litany of offenses the grand jury was investigating. The Court finds these references to be prejudicial and irrelevant. *See United States v. Bonanno*, 177 F.Supp. 106, 116 (S.D.N.Y.1959), *rev'd on other grounds sub nom. United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960). These are as the above irrelevant descriptive recitals.

[19] Under the defendants' category of inflammatory language are such words as "infiltrate," "burglary," "cover up," "covertly," "bogus," "illegally," and "operatives." The Court finds that the use of such colorful words to describe the allegations in the indictment is improper where less colorful and more accurate words would suffice. The government contends that this is mere semantic quibbling, however, the Court finds such words to be prejudicial and unnecessarily loaded.

[20] Finally, the defendants move the Court to strike narrative declarations of past facts which are lawful acts of communicating written and oral reports among the defendants concerning past events. The defendants rely on *United States v. Burnham*, 337 F.2d 430, 435 (2d Cir. 1964), in which the court held such narrative declarations to be inadmissible into evidence. The government has tried to distinguish *Burnham* by arguing that these narratives would be admissible because they were made in furtherance of the conspiracy to obstruct justice. Without resolving the evidentiary question at this time, the Court will order these references struck in order to assure that the jury will not be prejudiced should this evidence later be held to be inadmissible.

Nothing in this Memorandum Opinion should be interpreted as a ruling on the admissibility of evidence at trial.

XI. ALLEGED THEFTS OF DOCUMENTS FROM INTERPOL WERE IN FURTHERANCE OF THE CONSPIRACY

The defendants have moved to strike four overt acts from the first count of the indict-

ment. The four overt acts the defendants seek to have stricken allege thefts of documents from the United States National Central Bureau to Interpol. The defendants contend that these alleged thefts could not be in furtherance of the conspiracy to illegally obtain information and documents in the possession of the United States because Interpol is not an agency or department of the United States.

[51] Defendants point out that Title 5 of the U.S.C. section 101 lists all the departments in the executive branch and Interpol does not appear on the list. However, control of the United States National Central Bureau of Interpol is vested in the Deputy Attorney General of the United States. 28 C.F.R. 0.15(b)(3). Furthermore, it is undisputed that the office is staffed by United States law enforcement personnel. Its policies are enunciated by the Department of Justice, and its offices are located in the United States Department of Justice main building and previously were in the United States Department of the Treasury headquarters. Accordingly, the Court finds that the indictment's description of the Interpol documents as "in the possession of the United States" is not without foundation.

[52] Alternatively, the defendants contend that the indictment alleges that the documents were in the possession of the Department of Justice and the Department of the Treasury, and that Interpol documents would not be included in such a description. However, the indictment alleges that the Interpol documents stolen were in the custody, control or possession of the United States National Central Bureau to Interpol offices located at, or from actual employees of, the United States Department of Justice and the United States Department of the Treasury. The Court finds that the allegations of thefts from Interpol are not surplusage, but are properly alleged as overt acts in furtherance of the conspiracy alleged in Count One. Accordingly, the motion is denied.

XII. THE DEFENDANTS HAVE NO RIGHT TO PERSONALLY CONFRONT WITNESSES IN PROTECTIVE CUSTODY TO DETERMINE THEIR WILLINGNESS TO BE INTERVIEWED BY DEFENSE COUNSEL.

The defendants have moved the Court to order the government to produce Michael Meisner at a hearing before this Court to determine his willingness to be interviewed before trial by defense counsel. Mr. Meisner was allegedly involved in the conspiracy as a member of the Church of Scientology. According to the government, Meisner requested that he be placed in protective custody because he feared that the defendants and other members of the Church would cause him grievous bodily harm. It is the defendants' understanding that Meisner will testify for the government in the trial of this case.

The government has indicated its willingness to forward a letter from the defendants' counsel to the United States Marshal's Service, who would in turn forward it to Meisner. The defendants contend that they have a right to personally confront Meisner to determine if he is willing to be interviewed by defense counsel, and that it is "not proper for the prosecution to serve as conduit for defense counsel's request." Defendants' Reply to Government's Response to Defendants' Motion to Interview Witnesses Held in Protective Custody, at 6 (March 27, 1979).

[53] The law is clear that the government may not interfere with defense counsel's attempts to interview a potential witness. *Gregory v. United States*, 125 U.S. App.D.C. 140, 143-44, 369 F.2d 185, 188-89 (1966) *cert. denied* 396 U.S. 865, 90 S.Ct. 143, 24 L.Ed.2d 119 (1969); *Coppolino v. Helpern*, 266 F.Supp. 930, 935 (S.D.N.Y. 1967). However, the law is just as clear that the witness cannot be compelled to be interviewed. *See United States v. Matlock*, 491 F.2d 504, 506 (6th Cir.) (per curiam), *cert. denied*, 419 U.S. 864, 95 S.Ct. 119, 42 L.Ed.2d 100 (1974).

[54] The defendants co
have a right to personally
witness to determine his w
interviewed. In support o
they rely on *People v. Pask*
171, 270 N.Y.S. 799 (1934) w
witness' willingness to be i
matter upon which the wi
permitted to speak for him
neither *Paskowitz* nor any c
Court requires that the wit
cate his willingness at a he
he is confronted by defens
Court sees no reason why a
tion would be inadequate.

[55] The defendants also
is improper for the prosecu
conduit for defense counsel'
Court is persuaded by defe
this point. Accordingly, the
as conduit for the defendan

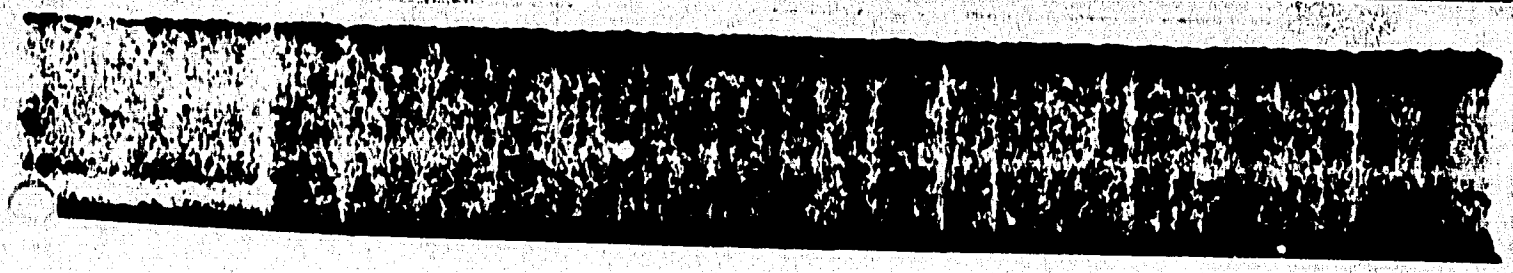
Therefore, defense counse
the Court any request they v
forwarded to witnesses in
custody of the United States
vice with regard to their wi
interviewed prior to trial by
sel. The Court will then d
shal's Service to forward th
the potential witnesses. Th
of the defendants to produce
hearing to determine their wi
interviewed is denied.

XIII. THE DEFENDANTS
LIMITED ACCESS TO
JURY QUALIFICATIO
NAIRES.

The defendants seek access
ing information:

1. the names and address
tions of the members
13, 1974, and April 3,
ries;
2. juror qualification
filled out by members o
3. the opening remarks
States Attorney or his
of a judge before those

471 F.Supp.—



NDANTS HAVE NO
PERSONALLY CON-
NESSES IN PROTEC-
DY TO DETERMINE
NGNESS TO BE IN-
BY DEFENSE COUN-

ave moved the Court to
nt to produce Michael
g before this Court to
ness to be interviewed
se counsel. Mr. Meis-
olved in the conspiracy
Church of Scientology.
ernment, Meisner re-
aced in protective cus-
d that the defendants
of the Church would
odily harm. It is the
anding that Meisner
ment in the trial

s indicated its willing-
tter from the defend-
nited States Marshal's
n turn forward it to
ants contend that they
ally confront Meisner
willing to be inter-
ounsel, and that it is
rosecution to serve as
unsel's request." De-
overnment's Response
n to Interview Wit-
ective Custody, at 6

ear that the govern-
e with defense coun-
view a potential wit-
ited States, 125 U.S.
369 F.2d 185, 188-89
6 U.S. 865, 90 S.Ct.
1969); *Coppolino v.*
930, 935 (S.D.N.Y.
aw is just as clear
be compelled to be
tes v. Matlock,
) (per curiam),
64, 95 S.Ct. 119, 42

[54] The defendants contend that they have a right to personally interview the witness to determine his willingness to be interviewed. In support of their position, they rely on *People v. Paskowitz*, 151 Misc. 171, 270 N.Y.S. 799 (1934) which held that a witness' willingness to be interviewed is a matter upon which the witness should be permitted to speak for himself. However, neither *Paskowitz* nor any case cited to this Court requires that the witness must indicate his willingness at a hearing at which he is confronted by defense counsel. The Court sees no reason why a written indication would be inadequate.

[55] The defendants also contend that it is improper for the prosecution to act as conduit for defense counsel's request. The Court is persuaded by defense counsel on this point. Accordingly, the Court will act as conduit for the defendants' request.

Therefore, defense counsel may file with the Court any request they would like to be forwarded to witnesses in the protective custody of the United States Marshal's Service with regard to their willingness to be interviewed prior to trial by defense counsel. The Court will then direct the Marshal's Service to forward these requests to the potential witnesses. Thus, the motion of the defendants to produce witnesses at a hearing to determine their willingness to be interviewed is denied.

XIII. THE DEFENDANTS MAY HAVE LIMITED ACCESS TO THE GRAND JURY QUALIFICATION QUESTIONNAIRES

The defendants seek access to the following information:

1. the names and addresses and occupations of the members of the October 13, 1974, and April 3, 1978 grand juries;
2. juror qualification questionnaires filled out by members of those juries;
3. the opening remarks of the United States Attorney or his assistants, or of a judge before those grand juries;
4. the closing remarks of the United States Attorney or of a judge before those grand juries;
5. documentation of the dates the grand juries heard testimony; and
6. documentation of the dates the grand juries were discharged.

[56] Although the October 13, 1974 grand jury heard testimony with regard to this case, it did not indict the defendants. Therefore, the Court finds that the information the defendants seek with regard to that grand jury is irrelevant to this case, and their request to that extent will be denied.

[57] With respect to the grand jury which did indict the defendants, the Court will permit the defendants to have access to all materials they have requested which are relevant to any challenge they may desire to make to the selection process of the grand jurors.

The defendants seek the names, addresses, and occupations of the members of the grand jury. The government contends that the defendants should be permitted access only to the master list from which the grand jurors were drawn.

[58, 59] The Court finds that the process by which the grand jury itself was chosen from the panel could be subject to a legal challenge. *See Collins v. Walker*, 329 F.2d 100, 105 (5th Cir.) *cert. denied*, 379 U.S. 901, 85 S.Ct. 189, 13 L.Ed.2d 175 (1964). However, the Court sees no reason why the defendants need the names and addresses of the members of the grand jury which indicted them. All that would be necessary would be the demographic data upon which a challenge could be made. Accordingly, the Court will have the Clerk's office turn over relevant information about the make-up of the grand jury which indicted the defendants. Although the government has indicated its willingness to turn over the information on the panel from which the jurors were chosen, the defendants have not requested that information. Accordingly, the Court will not order the Clerk's office to turn over that information. The Court is

somewhat perplexed by this omission by the defendants because the defendants will have some difficulty in raising a challenge to the composition of the grand jury without knowing the composition of the panel from which the grand jury was chosen.

[60, 61] The defendants also seek transcripts of the opening and closing remarks of the prosecutors before the grand juries. There is a strong presumption of regularity in grand jury proceedings. *See United States v. Winchester*, 407 F.Supp. 261, 277 (D.Del.1975). The defendants have not raised any challenge which rebuts that presumption. Accordingly, the defendants' request for transcripts of the grand jury proceedings will be denied. However, the Court will examine the transcripts of those proceedings and disclose any wrongdoing to the parties as previously indicated. See page 78 *supra*.

The defendants also seek documents setting forth the dates on which the grand jury heard testimony in order to "discover whether in fact that grand jury actually heard *any* testimony prior to returning an indictment." Defendants' Reply Brief on Motion for Inspection, Reproduction and Copying of Records and Papers in the Custody of the Clerk of the Court, at 4 (April 3, 1979) (emphasis in original). The Court will keep the defendants' concern in mind as it examines the transcript of the grand jury proceedings.

[62] The defendants also seek access to the date upon which the grand jury completed its term. Neither the Court nor the government has any objection to the release of this information.

XIV. THE DEFENDANTS ARE ENTITLED TO SOME DISCOVERY

The defendants have made a motion for discovery. The government has resisted the defendants' request on detailed grounds that the defendants separate into five categories.

[63] The government has refused to disclose any items which are undiscoverable, irrelevant, or immaterial. The defendants seek such information as data concerning the grand jury which indicted the defendants and the history of the government's relations with the Church of Scientology. The Court finds that these requests are plainly outside the scope of Federal Rule of Criminal Procedure 16.

[64] The government has refused to disclose Jencks Act material, 18 U.S.C. § 3500, until the time it is required by statute to do so. During the informal phase of discovery, the government agreed to provide Jencks Act material a reasonable time in advance of trial. It is this Court's standard practice to add the precatory wish that the government turn over all Jencks Act material within ten days of the date of the trial. However, in view of the government's earlier representations, the Court shall require the government to fulfill its promises. Accordingly, the government shall be required to turn over all Jencks Act material within ten days of the trial of this case.

[65] The government has resisted producing some material because it has already provided it to some defendants. The Court finds that the material should be made available to the entire defense team, except as otherwise indicated at the hearing on February 21, 1979.

The government has agreed to make some material available but has not yet done so. The Court will in its order establish a timetable for requiring the government to hand over discoverable material.

XV. THE DEFENDANTS AND COUNTS ARE PROPERLY JOINED.

[66–68] The defendants have filed numerous motions to sever counts and defendants. The general purpose behind the rules governing joinder are to promote efficiency and economy and to avoid a multiplicity of trials when these objectives can be fulfilled without substantial prejudice to the accused's right to a fair trial. *Bruton v. United States*, 391 U.S. 123, 131 n. 6, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The district court possesses great discretion with respect to the grant or [illegible] ance. *United States v.* [illegible] App.D.C. 36, 46, 494 F.2 There is a strong feder joinder and the balance h ly struck in favor of join

The joinder of defend for a single trial is gover and 14 of the Federal Procedure. *Cupo v. Unit* App.D.C. 324, 326, 359 F Cir.1966), *cert. denied*, S.Ct. 723, 17 L.Ed.2d 549 *v. United States*, 391 U. S.Ct. 1620. Rule 8(b) pr is proper if the defendar have participated in the action or in the same seri actions constituting an of Rule 14 provides for reli joinder of offenses or def

[69, 70] The Court fi fenses charged in the i case allege the same seri actions within the requ 8(b). The predominant f se of a joinder problem i of proof. *Baker v. Unite* App.D.C. 7, 20 21, 401 (1978) (per curiam), *cert.* 965, 91 S.Ct. 367, 27 L. Thus, when there is a sub overlap in the evidence th to prove the separate ch allegations may be joined

[71] The defendants conspiracy charged in C indictment and its sub must be severed from charged in Count Twenty- stantive offenses. The f legedly had as its objectiv data by illegal means, a cover-up of these activitie two such offenses has be neat example" of a proper *United States*, 355 F.2d (9th) *citing United State* F.2d 276 (3d Cir.), *rev'd* [illegible] *second convictions aff'd*, 1 *denied*, 316 U.S. 678, 62 S.

respect to the grant or denial of a severance. *United States v. Leonard*, 161 U.S.App.D.C. 36, 46, 494 F.2d 955, 965 (1974). There is a strong federal policy favoring joinder and the balance has been approvingly struck in favor of joint trials. *Id.*

The joinder of defendants and offenses for a single trial is governed by Rules 8(b) and 14 of the Federal Rules of Criminal Procedure. *Capo v. United States*, 123 U.S.App.D.C. 324, 326, 359 F.2d 990, 992 (D.C.Cir.1966), *cert. denied*, 385 U.S. 1013, 87 S.Ct. 723, 17 L.Ed.2d 549 (1967); *see Bruton v. United States*, 391 U.S. at 131 n. 6, 88 S.Ct. 1620. Rule 8(b) provides that joinder is proper if the defendants "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Rule 14 provides for relief from prejudicial joinder of offenses or defendants.

[69, 70] The Court finds that the offenses charged in the indictment in this case allege the same series of acts or transactions within the requirements of Rule 8(b). The predominant factor in the analysis of a joinder problem is the commonality of proof. *Baker v. United States*, 131 U.S.App.D.C. 7, 20-21, 401 F.2d 958, 971-72 (1968) (per curiam), *cert. denied*, 400 U.S. 965, 91 S.Ct. 367, 27 L.Ed.2d 384 (1970). Thus, when there is a substantial degree of overlap in the evidence that will be adduced to prove the separate charges, the various allegations may be joined. *Id.*

[71] The defendants contend that the conspiracy charged in Count One of the indictment and its substantive offenses must be severed from the conspiracy charged in Count Twenty-three and its substantive offenses. The first conspiracy allegedly had as its objective the collection of data by illegal means, and the second a cover-up of these activities. The joinder of two such offenses has been termed a "classical example" of a proper joinder. *King v. United States*, 355 F.2d 700, 701 (1st Cir. 1966) *citing United States v. Perlstein*, 129 F.2d 276 (3d Cir.), *rev'd on other grounds, second convictions aff'd*, 126 F.2d 789, *cert. denied*, 316 U.S. 678, 62 S.Ct. 1106, 86 L.Ed. 1752 (1942). The Court finds that these allegations constitute a common series of transactions joinable under Rule 8(b).

[72, 73] The defendants also move to sever the perjury Counts Twenty-five through Twenty-eight, from the remainder of the indictment. The Court finds that these charges are so intimately connected with the second conspiracy charge that severance is uncalled for. Even if there were a separate trial on the Count Twenty-three conspiracy, the perjury charges would be admissible since the alleged perjury would be material and relevant to the charge of conspiracy to avoid detection. *See United States v. Sweig*, 316 F.Supp. 1148, 1158 (S.D.N.Y.1970), *aff'd* 441 F.2d 114, 118-19 (2d Cir.), *cert. denied*, 403 U.S. 932, 91 S.Ct. 2256, 29 L.Ed.2d 711 (1971). And it would be admissible in a trial on the Count One conspiracy because it would be a false exculpatory statement. *Id.* Thus, there is the technical nexus required by Rule 8(b). *Id. See also United States v. Mitchell*, 372 F.Supp. 1239, 1256 (S.D.N.Y.1973); *United States v. Hilliard*, 436 F.Supp. 66, 75 (S.D.N.Y.1977).

[74] In this case, the indictment charges the defendants with a multifaceted scheme with a consistent, logically interlocked set of goals, in furtherance of which overlapping groups of the defendants allegedly formed two conspiracies and committed substantive offenses. Accordingly, the indictment properly joins a series of acts or transactions within the meaning of Rule 8(b).

[75, 76] Under Rule 14 the Court must sever defendants and counts joinable under Rule 8(b) is prejudicial. At this time the Court finds that the defendants' right to a fair trial will not be substantially interfered with by trying this case as presently joined. Since the evidence as to each count and defendant would be admissible at separate trials, there would be no prejudice. *See United States v. Kim*, 193 U.S.App.D.C. 370, at 385-386, 595 F.2d 755, at 770-771 (D.C.Cir. 1979).

[17] Two of the defendants move to sever on the ground that there would be prejudicial spillover if they were tried with the other alleged conspirators because there is a disparity of evidence as to their respective involvement in the two conspiracies. The defendants rely on *United States v. Mardian*, 178 U.S.App.D.C. 207, 546 F.2d 973 (1976) and *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947, 86 S.Ct. 1467, 16 L.Ed.2d 541 (1966). The Court finds these cases to be distinguishable. In *Mardian*, the government consented to the severance the defendant made a strong showing of prejudice at the pretrial stage, he was named in only one count, only five of forty-five overt acts named him, a substantial part of the evidence at trial would concern events after Mardian ceased active participation, and his attorney became ill in the midst of trial. 546 F.2d at 979-80. In *Kelly*, the proof supporting the defendant's participation in the over-all conspiracy was tenuous and insubstantial. 349 F.2d at 756. In this case, the defendant Hubbard is alleged to be a prime participant in the second conspiracy and has a significant role in the first conspiracy. And the Court has no evidence before it to indicate that the evidence against Hubbard or Thomas will be tenuous or insubstantial. Although the defendant Thomas is charged with a smaller role, safeguards are available to prevent substantial spillover. *See Kelly v. United States*, *supra* at 756-57.

The defendants also move to sever under *United States v. Yates*, 173 U.S.App.D.C. 308, 524 F.2d 1282 (1975) (per curiam). In *Yates*, the defendant took the stand and raised an alibi defense which consisted of a claim that he was with his companion Jones when the robbery he was charged with occurred. *Id.* 173 U.S.App.D.C. at 310, 524 F.2d at 1284. In rebuttal, a police officer took the stand and testified that after he placed the defendant and Jones into custody, and while they were being taken to the scene of the crime, Jones remarked that he had been with the defendant for only five minutes. *Id.* At trial, Jones invoked the fifth amendment and declined to testify. *Id.* The trial court allowed the officer's testimony under the rationale that the defendant's silence in the face of that accusation indicated his assent to its accuracy. *Id.*, 173 U.S.App.D.C. at 311, 524 F.2d at 1285. The court of appeals rejected this basis because the defendant was at the time a prime suspect, in custody, in a police car, and in the presence of two policemen. Thus, it was not natural to assume that he would contradict the statement if it were inaccurate. *Id.* Moreover, the Court found that implying assent to an accusatory statement by silence in a custodial situation was at odds with the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *United States v. Yates*, 173 U.S.App.D.C. at 311, 524 F.2d at 1285. After deciding that the statement was not admissible under the rationale of the lower court, the court faced the sixth amendment issue. *Id.*

The Court in *Yates* held that the admission of the statement violated the defendant's rights under the sixth amendment to confront the witnesses against him. In reaching this determination, the court listed three criteria which, if satisfied, would make the admission of an out-of-court statement by an unavailable declarant permissible under the sixth amendment. *Id.*, 173 U.S.App.D.C. at 312, 524 F.2d at 1286. The Court did not rule that each of the three criteria listed was necessary in order to admit such a statement. According to the court, such statements are admissible "*at least* when three conditions are satisfied . . ." *Id.*, 173 U.S.App.D.C. at 313, 524 F.2d at 1286 (emphasis added). And the court stated, "[a]dmittedly, the precise contours of these three requirements are not free from doubt, nor is it certain whether all three must be satisfied in every case." *Id.* (citation omitted).

The three factors the court in *Yates* focused on to decide that case were: (1) the reliability of the statement; (2) whether the evidence was peripheral or devastating; and (3) whether the witness is equally available to the prosecution and the defense. *Id.* On the facts before it, the court found that the evidence was unreliable. "Clearly, grave doubts exist as to th
self-serving statement," *id.* was far from peripheral government could have g
munity to make him ava
fense. *Id.*

The defendants contend ment is going to admit implicate the defendants co-conspirators in further spiracy under Rule 801(e). ble that the declarant-co-d take the stand at trial, th be faced with incrimina declarations without the amination. According to these statements will not the witness would be government through the nity. Therefore, the de that the government mus not offering these incrimi into evidence or severin fendants so that they may ity of calling the declari

The Court finds that *Y* able from this case. First case had before it a state ble reliability. In this ca the government plans to are grounded on the pres admissions against penal "the mission of the Co
to advance a pr
the accuracy of the truth ess in criminal trials
Evans, 400 U.S. 74, 89, 9 L.Ed.2d 213 (1970). Thu the out-of-court declarat importance.

Second, the Court in address the question of ment could be admitted evolving, amorphous ex say rule" but did first co whether it was admissil deny an accusation. 1 312, 524 F.2d at 1285. It would be admissible u nized rule of evidence. Rules of Evidence, adm

grave doubts exist as to the sincerity of the self-serving statement," *id.*, it found that it was far from peripheral, and that the government could have granted Jones immunity to make him available to the defense. *Id.*

The defendants contend that the government is going to admit documents which implicate the defendants as admissions of co-conspirators in furtherance of the conspiracy under Rule 801(e). Since it is possible that the declarant-co-defendant will not take the stand at trial, the defendants will be faced with incriminating out-of-court declarations without the right of cross-examination. According to the defendants, these statements will not be peripheral and the witness would be available to the government through the granting of immunity. Therefore, the defendants contend that the government must choose between not offering these incriminating documents into evidence or severing the trial of defendants so that they may have the possibility of calling the declarants as witnesses.

The Court finds that *Yates* is distinguishable from this case. First, the court in that case had before it a statement of questionable reliability. In this case, the documents the government plans to introduce at trial are grounded on the presumed reliability of admissions against penal interest. And it is "the mission of the Confrontation Clause

> to advance a practical concern for the accuracy of the truth-determining process in criminal trials . . ." *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970).

Thus, the reliability of the out-of-court declarations are of prime importance.

Second, the Court in *Yates* declined to address the question of whether the statement could be admitted under "any of the evolving, amorphous exceptions to the hearsay rule" but did first confront the question whether it was admissible as a failure to deny an accusation. 173 U.S.App.D.C. at 312, 524 F.2d at 1285. In this case, evidence would be admissible under a long-recognized rule of evidence. Under the Federal Rules of Evidence, admissions of a co-conspirator are not exceptions to the hearsay rule, but are simply not hearsay at all. Rule 801(d)(2)(E). Although the fact that evidence is admissible does not mean it does not violate the confrontation clause, *California v. Green*, 399 U.S. 149, 155-56, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), the admissibility of evidence under a rule of evidence is a factor that is material to the court's determination. *See Bruton v. United States*, 391 U.S. 123, 128 n. 3, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Dutton v. Evans*, 400 U.S. 74, 85-89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).

Third, in *Yates* the court observed that the declarant was equally available to the government and the defendant because the government could have given him immunity from prosecution. In *Yates*, the declarant was not being prosecuted. 173 U.S.App.D.C. at 311, 524 F.2d at 1284. In this case, granting immunity would foreclose prosecution of those defendants. Furthermore, there is no indication on the part of the defendants or any proffer of exculpatory evidence which would be available if the co-conspirators were called. If such a showing were made, it would decrease the reliability of the proposed evidence and favor severance. Moreover, there is no indication that severance would be an acceptable remedy. Even if the defendants were tried separately, they would still have their fifth amendment privileges.

Fourth, *Yates* included in its consideration the fact that the evidence was peripheral. *United States v. Yates*, 173 U.S.App.D.C. at 311, 524 F.2d at 1286. Other courts have not tended to treat that requirement with very much weight. *See United States v. King*, 552 F.2d 833, 846 n. 16 (9th Cir. 1976), *cert. denied*, 430 U.S. 966, 97 S.Ct. 1646, 52 L.Ed.2d 357 (1977). When there is substantial independent evidence to support the government's case this requirement is held to be satisfied. *See United States v. Scholle*, 553 F.2d 1109, 1120 (8th Cir. 1977), *cert. denied*, 431 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (1978). At this time the Court, of course, is completely unable to determine how devastating the evidence will be; thus,

this factor can have little bearing on a pretrial determination in a case of this kind.

Fifth, other courts have focused on factors not discussed in *Yates*, which support the admission of the documents in this case. In *United States v. Leonard*, 161 U.S.App.D.C. 36, 494 F.2d 955 (1974) the court of appeals for this circuit suggested many factors which would be relevant to determine whether statements violated the confrontation clause. These factors included considerations which are present in this case: the co-conspirator allegedly had personal knowledge of the identity and role of the other participants, the jury will be able to weigh the credibility of the extra-judicial statements, the possibility that the statement was founded on faulty recollection was remote, and the statement was against the declarant's penal interest. *Id.*, 161 U.S. App.D.C. at 50-51, 494 F.2d at 969-70.

[78] Accordingly, under the facts of this case, the Court finds that under the case-by-case approach required by the Supreme Court's plurality in *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), the defendant's constitutional right to confront the witnesses against them would not be violated by the introduction of reliable out-of-court declarations which satisfy the requirements of Rule 801(d)(2)(E). The Court recognizes that its duty under Rule 14 is a continuing one and that at present the contours of the evidence and prejudice has not yet been solidified. *See United States v. Hilliard*, 436 F.Supp. at 75-76.

An order in accordance with the foregoing shall be issued of even date herewith.

UNITED STATES of America
v.
Mary Sue HUBBARD et al.
Crim. No. 78-0101.

United States District Court,
District of Columbia.

June 1, 1979.

Motion to Require Government to Elect Aug. 23, 1979.

Motions to dismiss and to quash indictment were filed by defendant, charged with burglarizing offices of various federal officials, stealing government documents from such offices, conspiring to obstruct justice, obstructing the due administration of justice and knowingly making false material declarations to the grand jury. The District Court, Charles R. Richey, J., held that: (1) charges of burglarizing federal offices and stealing documents therefrom did not violate plea agreement settling charges arising out of charge of using a falsely made identification card to enter United States courthouse; (2) even if defendant's grand jury testimony was compelled, in violation of the Fifth Amendment, suppression of the allegedly false testimony could not be had; (3) without misrepresentation, defendant's claim that he was equitably immunized from further prosecution failed; (4) defendant was not entrapped into lying before the grand jury; (5) present indictment did not violate double jeopardy; and (6) Government was not required to elect between the obstruction of justice count and the allegedly lesser included false declaration counts.

Defendants' motions denied.

1. Criminal Law ⇨273.1(2)

Counts charging violations of burglary statute as regards entry of office of Internal Revenue Service in January 1976, theft of federal property from such office, burglary of and theft from the same office in March of 1976, burglary and theft of anoth-

er office later in M
identification room th
ry of and theft fro
deputy general in A
theft of another IRS
ing into a conspiracy
tion of burglaries an
ing justice did not
exchange for felony
a falsely made identi
United States courth
that the Government
fendant with any oti
arising out of such
§§ 499, 641, 1017,
1801(b).

2. Indictment and In

Indictment was
missed on ground of
ant's Fifth Amendm
grand jury, based on
that defendant no
Amendment privileg
was simply tell
longer had suc
three incidents
throughout his grand
fendant had ready ac
at no time did he inv
ment or refuse to an
C.A.Const. Amend. 5.

3. Criminal Law ⇨3

Even if defendan
mony was compelled
Fifth Amendment, s
ant's allegedly false
quired. U.S.C.A.Cons

4. Criminal Law ⇨3

Without misrep
Government of facts
defendant was not
from further prosecut

5. Criminal Law ⇨7

To meet the evi
merely obtain an entr
the District of Colum
foundation in the e
viewed most favorabl
finding of inducemen
agent, that is persuas

TES of America
v.
BBARD et al.
78-0401.
District Court,
Columbia.
1979.
Government to
23, 1979.

and to quash indict-
endant, charged with
various federal offi-
ment documents from
to obstruct justice,
dministration of jus-
false material
jury. The Dis-
Richey, J., held that
rizing federal offices
ts therefrom did not
nt settling charges
of using a falsely
rd to enter United
even if defendant's
was compelled, in vio-
endment, suppression
testimony could not
misrepresentation, de-
he was equitably im-
r prosecution failed;
entrapped into lying
; (5) present indict-
louble jeopardy; and
not required to elect
ion of justice count
er included false dec-

ns denied.

3.1(2)
olations of burglary
ffice of Inter-
ary 1976, theft
m such office, bur-
the same office in
and theft of anoth-
er office later in March, burglary of IRS identification room the same month, burglary of and theft from office of associate deputy general in April, burglary of and theft of another IRS office in April, entering into a conspiracy to obstruct investigation of burglaries and thefts and obstructing justice did not violate agreement, in exchange for felony plea to charge of using a falsely made identification card to enter United States courthouse in May and June that the Government would not charge defendant with any other possible violations arising out of such entries. 18 U.S.C.A. §§ 499, 641, 1017, 1503; D.C.C.E. § 22-1801(b).

2. Indictment and Information ⇨144.1(1)

Indictment was not required to be dismissed on ground of violation of defendant's Fifth Amendment rights before a grand jury, based on prosecutor's statement that defendant no longer had a Fifth Amendment privilege, where prosecutor was simply telling defendant that he no longer had such a right with respect to the three incidents involved in plea agreement, throughout his grand jury appearance defendant had ready access to his counsel and at no time did he invoke the Fifth Amendment or refuse to answer a question. U.S.C.A.Const. Amend. 5.

3. Criminal Law ⇨394.1(3)

Even if defendant's grand jury testimony was compelled in violation of the Fifth Amendment, suppression of defendant's allegedly false testimony was not required. U.S.C.A.Const. Amend. 5.

4. Criminal Law ⇨31

Without misrepresentation by the Government of facts before the grand jury, defendant was not equitably immunized from further prosecution.

5. Criminal Law ⇨772(6)

To meet the evidentiary threshold to merely obtain an entrapment instruction in the District of Columbia, there must be a foundation in the evidence in the light viewed most favorably to the accused, for a finding of inducement by the government agent, that is persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, pleas based on need, sympathy, or friendship, and any other government conduct which would create the risk of causing an otherwise unpredisposed person to commit the crime charged.

6. Criminal Law ⇨37(6)

Defendant could not be found to have been entrapped into lying before grand jury where he was continuously reminded that he should tell the truth and that any false statements he made would make him the subject of criminal penalties.

7. Indictment and Information ⇨144.1(1)

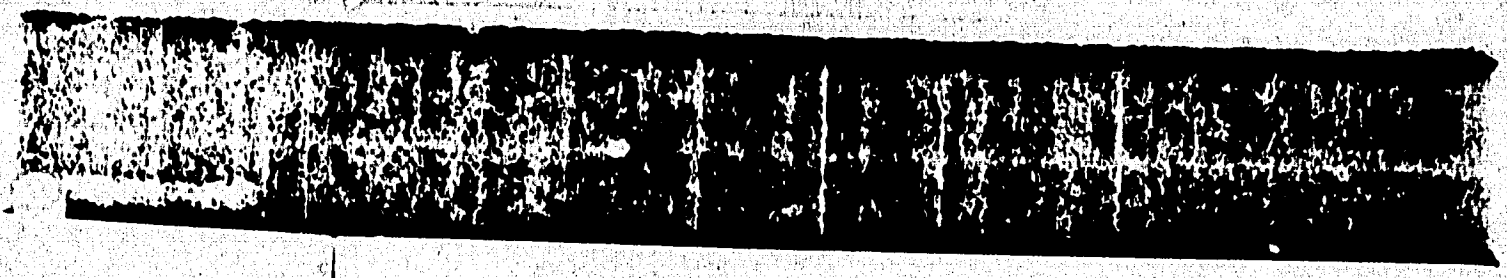
Indictment was not required to be dismissed on ground that only reason for calling defendant before grand jury was to lay a foundation for perjury prosecution where grand jury was investigating crimes within its jurisdiction, defendant had not previously given his testimony under oath, questions directed to defendant were material to matters being investigated and defendant was repeatedly warned that he could be prosecuted for perjury if he made false statements.

8. Criminal Law ⇨1210

Test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment is whether each crime requires proof of a fact which the other does not. U.S.C.A.Const. Amend. 5.

9. Criminal Law ⇨195(1)

Offenses involved in plea agreement, i. e., using a falsely made identification card to enter United States courthouse, with defendant pleading guilty to misuse of a government seal, were separate from offenses involved in subsequent indictment for burglarizing offices of various federal officials, stealing government documents from such office, conspiring to obstruct justice, obstructing due administration of justice and knowingly making false declarations to grand jury investigating subject charges, such that the subsequent indictment did not violate double jeopardy. 18 U.S.C.A. §§ 499, 641, 1017, 1503; U.S.C.A. Const. Amend. 5; D.C.C.E. § 22-1801(b).



James Davenport,
Nussbaum & Owen,
defendants Hermann

ling, Jonathan Shapi-
Alexandria, Va., for

Washington, D. C., for

M OPINION

EY, District Judge.

his Court issued an
rous pretrial motions
kground to this case
ints are named in an
wo conspiracies, ob-
al electronic eaves-
and thefts of
al false declara-
y. *United States v.*
61 (D.D.C. 1979),
will rule on a series
defendant Gerald

ROUND.

ictment, Wolfe is
ounts. In Counts
olfe and others are
ing the offices of
In Counts Nine
fe and others are
government docu-
In Count Twen-
s are charged with
justice. In Count
others are charged
administration of
venty-five through
ne is charged with
material declara-
investigating the
dictment.

resolve four
tion to dis-
to dismiss pursu-
States, 406 U.S.
21 212 (1972), for
wrongful use of his immunized Grand Jury testimony; (3) motion to dismiss Count Twenty-four of the indictment, or, in the alternative, to compel an election between Count Twenty-four and the perjury allegation; and (4) motion to quash because of abusive questioning before the grand jury and because of taint arising from the improper use of his grand jury testimony.

II. WOLFE'S MOTION TO DISMISS ALL COUNTS IS WITHOUT MERIT.

Wolfe has moved to dismiss all counts of the indictment in which he is named on the grounds that (1) the charges violate his plea agreement with the government; (2) the government has violated his fifth amendment rights; (3) the government has equitably immunized him from prosecution; (4) the government has entrapped him into giving false testimony before the Grand Jury; and (5) the government has improperly subjected him to multiple prosecution and punishment.

A. *The Indictment Does Not Violate the Plea Agreement.*

On June 30, 1976, the defendant Wolfe was arrested and charged with violating section 499 of Title 18 of the U.S.C. for using a falsely made identification card to enter the United States Courthouse in Washington, D. C. The government offered to settle the matter if Wolfe would plead to a misdemeanor and cooperate with the government's continuing investigation. Rather than cooperate, Wolfe rejected the offer and pleaded guilty to a felony—the misuse of a government seal in violation of section 1017 of Title 18 U.S.C. In exchange for his plea to the felony, the government "agreed not to charge Mr. Wolf [*sic*] with any other possible violations arising out of three separate entries into this courthouse with another man in May and June of last year using a false and fraudulently obtained Internal Revenue I.D. card." Plea Transcript at 2; *see id.* at 12.

[1] The defendant contends that Counts Three through Thirteen and Twenty-three and Twenty-four of the current indictment violate his plea agreement. Count Three charges Wolfe and others with violations of the District of Columbia burglary statute, 22 D.C.Code § 1801(b), in the office of the Internal Revenue Service (hereinafter, "IRS") Exempt Organization Division in January of 1976. Count Nine charges Wolfe and others with the theft of federal property in violation of 18 U.S.C. § 641 in the same office as Count Three in June of 1975. Counts Four and Ten charge Wolfe and others with burglary of and theft from the office of the IRS Exempt Organization Division in March of 1976. Counts Five and Eleven charge Wolfe and others with burglary of and theft from another office of the IRS Exempt Organization Division later in March of 1976. Count Six charges Wolfe and others with the burglary of the IRS Identification Room in March of 1976. Counts Seven and Twelve charge Wolfe and others with burglary of and theft from the Office of the Associate Deputy Attorney General of the United States Department of Justice in April of 1976. Counts Eight and Thirteen charge Wolfe and others with the burglary of and theft from the IRS Office of International Operations in April of 1976. Count Twenty-three charges Wolfe and others with entering into a conspiracy to obstruct the investigation of the burglaries and thefts. County Twenty-four charges Wolfe and others with obstructing justice in violation of section 1503 of Title 18.

Each of these charges concerns offenses which did not occur in the courthouse, did not occur in the months of May or June of 1976, and are completely distinct from the offenses encompassed in the agreement entered into between the government and the defendant. The defendant's contention that there was a mutual understanding that he would be immune from further prosecution for all such offenses is not supported by the record. Before Judge Flannery the defendant indicated that the only promises made to induce his plea were immunity for the three courthouse incidents in May or June of 1976. Plea Transcript at 12. Av-

cordingly, the present indictment does not violate the agreement between the government and Wolfe.

B. The Indictment Should Not Be Dismissed For Fifth Amendment Violations.

[2] Wolfe's second contention in support of his motion to dismiss all counts of the indictment is that the government violated his fifth amendment rights before the Grand Jury. In support of this contention, the defendant relies heavily on a remark of the Assistant United States Attorney which is significant only when quoted out of context. However, in the context in which the statement was made, it is clear that the assistant was simply telling the defendant that he no longer had a fifth amendment right with respect to the three incidents involved in the plea agreement. Before the Grand Jury Wolfe was told that: "You are here to give your truthful responses to our questions involving a matter that this grand jury is investigating. And as a citizen of the United States and having entered your plea of guilty to one of these instances and having the government bargain away in the plea agreement, it's [*sic*] right to charge you with everything it could charge you with as far [*sic*] those instances are concerned. You no longer have a Fifth Amendment privilege; do you understand that?" Grand Jury Transcript at 17.[1]

Throughout his appearance before the Grand Jury,[2] Wolfe had ready access to his attorney who was immediately outside the room in which his testimony was being taken. He was warned that he could be charged with perjury if he answered falsely. Grand Jury Transcript at 10-11. He was instructed that if he had any questions concerning his rights he could consult with his attorney. Grand Jury Transcript at 13. In fact, at one point, Wolfe halted the proceedings to confer with his counsel and returned and proceeded to answer a question. Grand Jury Transcript at 20-21. At no time did Wolfe invoke the fifth amendment and refuse to answer a question during his appearance before the first Grand Jury.[2] Accordingly, the Court finds that, based on the totality of the circumstances, the will of the defendant was not overborne and his testimony was voluntary and was not obtained in violation of his fifth amendment rights. *See United States v. Mandujano*, 425 U.S. 564, 574-75, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976).

[3] Furthermore, the defendant's attempt to suppress his allegedly false testimony before the Grand Jury is misguided. Even if his testimony was compelled in violation of the fifth amendment, which it was not, suppression would not *lie* available. According to the Supreme Court, *"Under no circumstances, however, could he commit perjury and successfully claim that the Constitution afforded him protection from prosecution from that crime."* *United States v. Mandujano*, *supra* at 570, 96 S.Ct. at 1772 *quoting United States v. Orta*, 253 F.2d 312, 314 (5th Cir.) *cert. denied*, 357 U.S. 905, 78 S.Ct. 1140, 2 L.Ed.2d 1156 (1958) (emphasis added by the Supreme Court). As the Court has pointed out, "Our Legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson v. United States*, 396 U.S. 64, 72, 90 S.Ct. 355, 360, 24 L.Ed.2d 264 (1969). Accordingly, the Court finds that the fifth amendment rights of the defendant were not violated before the Grand Jury, and no testimony will be suppressed.

1. The government contends that the punctuation of the final two sentences is incorrect. According to the government, there should not be a period between "concerned" and "You." However, the government's interpretation of the remark stands up without any alteration in the punctuation.

2. The Grand Jury which indicted Wolfe was not the Grand Jury he testified before. The first Grand Jury's term ran out prior to returning an indictment. The second Grand Jury was read the testimony of Wolfe before the first Grand Jury. Wolfe was called before the second Grand Jury and declined to answer any questions. His refusal to testify before the second Grand Jury was acquiesced to by the government.

C. The Defendant Wa munized From Fur

[4] Wolfe contends should be compelled to resentations before the according to Wolfe, he immunized from furth Court finds that the misrepresent the facts Jury. *See* page 94, s representation, the defe munity fails. Accordin that Wolfe was not e from further prosecutio

D. The Defendant W trapped Into Lyin Jury.

[5, 6] Wolfe contem counts of the indictmen because he was entrap grand jury. In order to ry threshold to merely ment instruction in the him, there must be a fo dence in the light viewe the accused, for a findi a government agent, fraudulent representat sive tactics, harassme ward, pleas based on friendship, and any oth duct which would creat an otherwise unpredisp mit the crime charged *Burkley*, 192 U.S.App. F.2d 903, 914 (1978). N nor the government ha dence which would sho ment agent in any way the slightest that Wolf before the Grand Jury, was continuously remin tell the truth and that a he made would make hi nal penalties. Grand Therefore, Wolfe fails t of entrapment under t stands.

[7] According to Wo for calling him before t

10. Indictment and Information ⇨144.-1(1)

Indictment would not be dismissed pursuant to the *Kastigar* rule absent compelled immunized testimony.

11. Indictment and Information ⇨132(2)

Government was not required to elect between prosecuting defendant for obstruction of justice or for allegedly lesser included offense of false declarations before a grand jury. 18 U.S.C.A. § 1503.

Motion to Require Government to Elect

12. Criminal Law ⇨29

Charges that defendant lied when he stated to grand jury that his purpose in going to bar association library was to learn to do legal research, when he stated that he went nowhere else on his first visit than to library and men's room, when he stated that he and another carried case histories to Xerox machine and copied them while at courthouse and when he stated that he knew his companion at library only by specified name were subject to separate perjury prosecutions since proof of falsity of each statement would require proof of distinct facts and each involved a separate untruth which could have hindered grand jury investigating burglaries of various federal offices. 18 U.S.C.A. § 1623.

Earl J. Silbert, U. S. Atty., Raymond Banoun, Judith Hetherton, Timothy J. Reardon, III, Steven C. Tabackman, Asst. U. S. Attys., Washington, D. C., for the United States.

Leonard B. Boudin, Rabinowitz, Boudin & Standard, Michael Lee Hertzberg, New York City, for defendant Hubbard.

Philip J. Hirschkop, John D. Grad, Leonard S. Rubenstein, Hirschkop & Grad, P. C., Alexandria, Va., for defendants Heldt and Snider.

Roger Zuckerman, Roger Spaeder, Lawrence A. Katz, Richard A. Stanley, Wendy Manz, Zuckerman, Spaeder & Taylor, Washington, D. C., for defendants Willardson and Weigand.

Michael Nussbaum, James Davenport, Ronald G. Precup, Nussbaum & Owen, Washington, D. C., for defendants Hermann and Raymond.

John Kenneth Zwerling, Jonathan Shapiro, Zwerling & Shapiro, Alexandria, Va., for defendant Wolfe.

Leonard Koenick, Washington, D. C., for defendant Thomas.

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

On April 25, 1979, this Court issued an opinion resolving numerous pretrial motions and providing some background to this case in which eleven defendants are named in an indictment charging two conspiracies, obstruction of justice, illegal electronic eavesdropping, several burglaries, and thefts of government documents, and false declarations before a grand jury. *United States v. Hubbard*, 474 F.Supp. 64 (D.D.C. 1979). At this time, the Court will rule on a series of motions filed by the defendant Gerald Bennett-Wolfe.

I. BACKGROUND

In the current indictment, Wolfe is named in seventeen counts. In Counts Three through Eight, Wolfe and others are charged with burglarizing the offices of various federal officials. In Counts Nine through Thirteen, Wolfe and others are charged with stealing government documents from these offices. In Count Twenty-three, Wolfe and others are charged with conspiring to obstruct justice. In Count Twenty-four, Wolfe and others are charged with obstructing the due administration of justice. In Counts Twenty-five through Twenty-eight, Wolfe alone is charged with knowingly making false material declarations to the Grand Jury investigating the charges brought in this indictment.

At this time, the Court will resolve four motions filed by Wolfe. (1) motion to dismiss all counts; (2) motion to dismiss pursuant to *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), for wrongful use of his immu testimony; (3) motion to Twenty-four of the indict alternative, to compel an Count Twenty-four and th tion; and (4) motion to s abusive questioning before and because of taint arisi proper use of his grand

II. WOLFE'S MOTION ALL COUNTS IS V MERIT.

Wolfe has moved to dism the indictment in which he grounds that (1) the charge agreement with the gover government has violated ment rights; (3) the gover tably immunized him from the government has entrap ing false testimony before and (5) the government ha jected him to multiple pros ishment.

A. *The Indictment Does Plea Agreement.*

On June 30, 1976, the was arrested and charge section 499 of Title 18 o using a falsely made ident enter the United States Washington, D. C. The fered to settle the matter plead to a misdemeanor an the government's continui Rather than cooperate, W offer and pleaded guilty misuse of a government s section 1017 of Title 18 U.S for his plea to the felony, "agreed not to charge Mr. any other possible violatio three separate entries int with another man in May year using a false and fra ed Internal Revenue I.D. c script at 2; *see id.* at 12.

[1] The defendant cont Three through Thirteen a

ury Transcript at 13, Wolfe halted the pro- ith his counsel and d to answer a ques- script at 220-21. At ke the fifth amend- swer a question dur- ore the first Grand e Court finds that, f the circumstances, t was not overborne voluntary and was of his fifth amend- *d States v. Mandu-* 75, 96 S.Ct. 1768, 48

e defendant's at- llegedly false testi- Jury is misguided. compelled in endment, which it ld not be available. e Court, "*Under no could be commit claim that the Con- otection from pros-*" *United States v.* 0, 96 S.Ct. at 1772 *Orta*, 253 F.2d 312, d, 357 U.S. 905, 78 58 (1958) (emphasis Court). As the "Our Legal system challenging the k questions--lying *Bryson v. United* 0 S.Ct. 355, 360, 24 ordingly, the Court endment rights of violated before the imony will be sup-

prior to returning an rand Jury was read fore the first Grand e the second ver any ques- re the second to by the govern-

C. The Defendant Was Not Equitably Immunized From Further Prosecution

[4] Wolfe contends that the government should be compelled to abide by its misrepresentations before the Grand Jury. Thus, according to Wolfe, he should be equitably immunized from further prosecution. The Court finds that the government did not misrepresent the facts before the Grand Jury. See page 94, *supra*. Without misrepresentation, the defendant's claim of immunity fails. Accordingly, the Court finds that Wolfe was not equitably immunized from further prosecution.

D. The Defendant Wolfe Was Not Entrapped Into Lying Before the Grand Jury.

[5,6] Wolfe contends that the perjury counts of the indictment must be dismissed because he was entrapped into lying to the grand jury. In order to meet the evidentiary threshold to merely obtain an entrapment instruction in the District of Columbia, there must be a foundation in the evidence in the light viewed most favorably to the accused, for a finding of inducement by a government agent, that is persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, pleas based on need, sympathy, or friendship, and any other government conduct which would create the risk of causing an otherwise unpredisposed person to commit the crime charged. *United States v. Burkley*, 192 U.S.App.D.C. 294, 305, 591 F.2d 903, 914 (1978). Neither the defendant nor the government has proffered any evidence which would show that any government agent in any way even suggested in the slightest that Wolfe not tell the truth before the Grand Jury. On the contrary, he was continuously reminded that he should tell the truth and that any false statements he made would make him subject to criminal penalties. Grand Jury Tr. at 10-11. Therefore, Wolfe fails to make out a claim of entrapment under the law as it now stands.

[7] According to Wolfe, the only reason for calling him before the Grand Jury was to lay the foundation for a perjury prosecution. He contends, therefore, that his testimony was outside the scope of the Grand Jury's authority. In support of this contention, the defendant relies on a series of cases, the most recent of which was decided over fifteen years ago. *United States v. Cross*, 170 F.Supp. 303 (D.D.C.1959); *United States v. Thayer*, 214 F.Supp. 929 (D.Colo. 1963); *United States v. Icardi*, 140 F.Supp. 383 (D.D.C.1956); *Brown v. United States*, 245 F.2d 549 (8th Cir. 1957).

In *United States v. Icardi*, *supra*, the defendant was charged with perjury before a special subcommittee of the Congressional Committee on Armed Services. *Id.* at 385. The subcommittee was investigating the disappearance and death of an American major in Italy during the Second World War. Icardi had been implicated, but there was no jurisdiction to punish him since he had severed his relationship with the service. *Id.* at 387. The Chairman of the subcommittee admitted that Icardi was called only to tell his side of the story or to enable a perjury prosecution because the subcommittee already had in its possession sufficient information on which to base its report to Congress. *Id.* at 388. The Court with Judge Keech sitting held that providing a forum in which to allow an accused to protest his innocence or to lay the foundation of a perjury prosecution are not valid legislative purposes. *Id.* Furthermore, the Court held that even if there were a valid legislative purpose, the questions were not material to the subcommittee's investigation. *Id.* at 389. According to the Court in *Icardi*, at the time the defendant was questioned, which was after the committee admittedly had all the information that was necessary to fulfill its function, the alleged perjurious answers were not material to the subcommittee's authorized investigation. *Id.*

In *United States v. Cross*, 170 F.Supp. 303 (D.D.C.1959), the defendant was being prosecuted for perjury before the Senate Select Committee on Improper Activities in the Labor or Management Field. *Id.* at 304. In this case, the defendant had been re-

called to testify before the committee a second time for the sole purpose of strengthening the case against him for perjury. *Id.* at 309. Judge Keech again held that the committee was not a competent tribunal and the statements were immaterial because the questions were not asked for the purpose of eliciting facts material to the committee's investigation. *Id.* at 310.

In both *Icardi* and *Cross*, it is important to note that the tribunals were legislative, raising the spectre of what Judge Keech referred to in *Icardi* as "legislative trial and conviction." *Id.* at 388, which "should not be condoned, as it denies to the accused the constitutional safeguards of judicial trial." *Id.* at 389.

In *Brown v. United States*, 245 F.2d 549 (8th Cir. 1957), the defendant was charged with perjury before a grand jury in Nebraska. The court ruled that the grand jury, by asking the defendant questions concerning events in Missouri, exceeded its authority. *Id.* at 555. Therefore, the only possible purpose for the grand jury to inquire into those matters was to enable the defendant to be prosecuted for perjury. *Id.* The Court followed *Icardi* and overturned the conviction and held that the allegedly false answers were not material to the grand jury's investigation.

In *United States v. Thayer*, 214 F.Supp. 929 (D.Colo 1963), the court ordered a new trial for the defendant who was convicted of perjury before the United States Securities and Exchange Commission. The Court ruled that it was unfair to the defendant to recall him with a perjury prosecution in mind without informing him of their intentions. *Id.* at 932-33.

The Court finds these cases to be distinguishable from the case *sub judice*, even if they still constitute good law.[3] First, the Grand Jury was plainly investigating crimes within its jurisdiction, therefore this case is unlike *Brown*. Second, this case involves a grand jury and does not involve the problem of legislative or administrative trials as do *Icardi*, *Cross*, and *Thayer*. Third, the defendant in this case had not previously given his testimony under oath when he was called before the Grand Jury as had the defendants in *Thayer* and *Cross*; therefore, in this case, even if the prosecutor believed he was previously lying, he could hope that the defendant would tell a more truthful story once under oath. Unlike *Brown*, *Icardi* and *Cross*, the questions directed to Wolfe were material to the matters being investigated; there was no hint that the investigation had already been completed as in *Icardi* and *Cross*, or that the questions concerned matters outside the grand jury's authority as in *Brown*. Finally, unlike *Thayer*, the defendant in this case was repeatedly warned that he could be prosecuted for perjury if he made false statements; thus, he was not misled in this regard. Grand Jury Transcript at 10-11. Accordingly, the Court finds that the defendant Wolfe was not entrapped into lying to the grand jury.

E. The Government Has Not Subjected Wolfe to Improper Multiple Prosecution and Punishment.

[8, 9] Wolfe contends that he has been the victim of multiple prosecution and punishment in violation of the double jeopardy clause of the fifth amendment. According to the defendant, the charges in the present indictment arise from the same series of acts or transactions as those charged in the earlier case against Wolfe, and therefore the current indictment is improper. In *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), the Supreme Court pointed out that the established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment is whether each crime requires proof of a fact which the other does not. *Id.* at 166, 97 S.Ct. 2221. Plainly, under this test the offenses involved in the plea agreement would be

3. Compare the treatment of the Fifth Circuit's [illegible] in *United States v. Ohio*, 2[illegible] F.2d 312 [illegible] 357 U.S. [illegible] S.Ct. [illegible] 2 L.Ed.2d [illegible] (1958) in *United States v. Mandujano*, 425 U.S. 564, 570, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976) with its treatment in *United States v. Thayer*, 214 F.Supp. 929, 932-33 (D.Colo 1963).

separate from those
ment. See pages 9
ingly, the Court fi
indictment does not v
ardy clause.

III. THE USE OF
WOLFE'S TEST
VIOLATE *KAS*
STATES, 406 U.S
L.Ed.2d 212 (1972

[10] Wolfe has n
case against him on
compelled testimony l
will lead to the inflic
ties in violation of
States, 406 U.S. 44
L.Ed.2d 212 (1972).
found that his testim
Jury was not compell
the basis for this m
mined. Accordingly,
fendant to dismiss p
denied because there
munized testimony in

IV. THE FALSE DI
OBSTRUCTION
CHARGES AGA
ANT WOLFE A
WITHSTAND TI
MISS.

Wolfe has moved t
ty-four of the indic
him with obstruction
of 18 U.S.C. § 1503
Wolfe contends that
be compelled to elect
ty-four and the fals
tions which make u
through Twenty-eight

According to Wolf
is defective because
defendant with false
to charge the defenda
element of "obstructi
performance of its du
Hudgings, 249 U.S.
309, 63 L.Ed. 656 (1
already ruled with re

FURTHER ORDERED, that the motion of the defendant Wolfe to dismiss pursuant to *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), for wrongful use of his immunized Grand Jury testimony be, and the same hereby is, denied; and it is

FURTHER ORDERED, that the motion of the defendant Wolfe to dismiss Count Twenty-four of the indictment or, in the alternative, to compel an election between Count Twenty-four and the perjury allegation be, and the same hereby is, denied; and it is

FURTHER ORDERED, that the motion of the defendant Wolfe to quash because of alleged abusive questioning before the grand jury, and because of alleged taint arising from the improper use of his grand jury testimony, be, and the same hereby is, denied; and it is

FURTHER ORDERED, that the motion of the government to dismiss Count Six as to the defendant Wolfe be, and the same hereby is, granted.

MOTION TO REQUIRE GOVERNMENT TO ELECT

[12] The defendant Wolfe has moved the Court for an order requiring the government to proceed on only one of the perjury counts charged in Counts twenty-five (25), twenty-six (26), twenty-seven (27) and twenty-eight (28). According to the defendant, it is the government's theory that each alleged untruth to the Grand Jury was part of a single plan by the defendant, and his alleged co-conspirators, to cover up certain prior activities by the defendants. Count twenty-five (25) charges that Wolfe lied when he stated that his purpose in going to the D.C. Bar Association Library was to learn to do legal research. Count twenty-six (26) charges that he lied when he stated that he went nowhere else on his first visit to the library than to the library and the men's room. Count twenty-seven (27) charges that he lied when he stated that he and Foster carried case histories to the xerox machine and copied them while at the courthouse. Count 28 charges that he lied when he stated that he knew his companion at the D.C. Bar Association Library only as John Foster. The defendants charge that the government has taken the single story testified to by Wolfe, extracted at random four statements, and seeks to impose criminal liability for each.

The test approved by several circuits to determine the number of perjury charges permissible in a single story is: "If [the defendant] in fact told separate lies, each of which could have hindered the Grand Jury in its investigation, then he could properly be separately charged for each lie." *Gebhard v. United States*, 422 F.2d 281, 289 (9th Cir. 1970); *see United States v. Williams*, 552 F.2d 226, 228 (8th Cir. 1977); *United States v. Doulin*, 538 F.2d 466, 471 (2d Cir.) *cert. denied*, 429 U.S. 895, 97 S.Ct. 256, 50 L.Ed.2d 178 (1976); *United States v. Lazaros*, 480 F.2d 174, 179 (6th Cir. 1973); *United States v. Tyrone*, 451 F.2d 16, 18 (9th Cir. 1971). *United States v. Andrews*, 370 F.Supp. 365, 369 (D.Conn.1974).

The defendant Wolfe's purpose in going to the D.C. Bar Association Library, his movements within the building that night, what was photocopied, and how that photocopying was carried out on the three occasions he was allegedly in the U.S. Courthouse, and the identity of his accomplice were each non-redundant relevant areas of inquiry. Proof of the falsity of each statement will require the government to prove distinct facts. Plainly, this is not a case of consistent responses to repeated or rephrased questions. *Compare Masinia v. United States*, 296 F.2d 871 (8th Cir. 1961) *with United States v. Doulin*, 538 F.2d at 471. The Court finds that each perjury count alleges a separate lie which could have hindered the Grand Jury in its investigation.

The defendants contend that such a result is simply unjust. However, the Court disagrees. There is a material difference between fabricating a scenario to cover one's tracks at every point, and lying on one fact to mislead a Grand Jury on a single aspect. For example, the possible penalty for protecting the identity of an accomplice

versas manufacturing an endless story to protect a web of actions, motivations, and conspirators, should not necessarily be the case. The phrase "declaration" in the perjury statute, 18 U.S.C. § 1623, plainly must be read to require such a result.

Accordingly, the motion of the defendant Wolfe to require the government to elect between the four perjury counts is hereby denied.



Harold H. EMCH, Plaintiff,

v.

The UNITED STATES of America et al., Defendants.

Civ. A. No. 77-C-677.

United States District Court,
E. D. Wisconsin.

May 7, 1979.

On Motion to Amend Order of Dismissal Aug. 15, 1979.

Suit was brought against the United States and various federal defendants to obtain damages for the decline in value of certain stock held by plaintiff. Plaintiff alleged that negligence on the part of United States and its agents was a proximate cause of the insolvency of a certain bank and of the loss in value of plaintiff's stock in the bank's parent corporation. On defendants' motion to dismiss, the District Court, Reynolds, Chief Judge, held that: (1) the Federal Deposit Insurance Corporation was not a proper party defendant in a suit under the Federal Tort Claims Act, and (2) the claim as set forth was barred by the sections of the FTCA which provide that the United States is not liable on any claim based on the exercise or performance of a discretionary function or duty or on any claim arising out of misrepresentation.

Thereafter, on plaintiff's motion to amend the order of dismissal and for leave to file an amended complaint, the District Court held that in view of plaintiff's failure to exhaust administrative remedies with respect to the proposed claim, plaintiff was not entitled to file an amended complaint asserting a claim for operational level negligence in the performance of extrastatutory duties.

Complaint dismissed.

1. United States ⇨135

The Federal Deposit Insurance Corporation was not a proper party defendant in a suit under the Federal Tort Claims Act. 28 U.S.C.A. §§ 1346(b), 2671-2680; Federal Deposit Insurance Act, § 2[9], 12 U.S.C.A. § 1819.

2. United States ⇨78(12)

Where, despite plaintiff's inclusion of the word "operational" in his complaint, the complaint did not allege operational level negligence on the part of the United States or its employees in performing extrastatutory functions in connection with day-to-day operations of bank, claim based on allegation that negligence of the United States and its agents was a proximate cause of the bank's insolvency and of loss in value of plaintiff's stock in bank's parent corporation was barred by the section of the Federal Tort Claims Act which provides that the United States is not liable on any claim based on the exercise or performance or the failure to exercise or perform a discretionary function or on any claim arising out of misrepresentation. 28 U.S.C.A. § 2680(a, h).

3. Federal Civil Procedure ⇨671

In determining whether a complaint states a cause of action, court should look at the substance of the claim alleged and not merely at the language used.

On Motion to Amend Order of Dismissal

4. United States ⇨127

Filing of a claim with the appropriate administrative agency or agencies is a juris-

Meyer T. Rothwacks (argued), Scott P. Crampton, Asst. Atty. Gen., Fred B. Ugast, Acting Asst. Atty. Gen., Dept. of Justice, Washington, D. C., Robert K. Fukuda, U. S. Atty., Honolulu, Hawaii, Harold S. Larsen, Grant W. Wiprud, Donald H. Olson, Tax Div., Dept. of Justice, Washington, D.C., for defendant-appellant.

Tobias C. Tolzmann (argued), Joe Thrasher, Honolulu, Hawaii, for plaintiff-appellee.

Before KOELSCH, WRIGHT and TRASK, Circuit Judges.

TRASK, Circuit Judge:

The district court denied the government's motion to dismiss in this tax refund case. Being of the opinion that the denial involved a controlling question of law and that an immediate appeal might materially advance the ultimate disposition of the case, the trial court so stated and we allowed the interlocutory appeal under 28 U.S.C. § 1292(b).[1]

The Church of Scientology of Hawaii (Church) was granted a charter as a nonprofit religious corporation on December 8, 1954. It filed information income tax returns for the years 1965 and 1966 claiming exemption under section 501(c)(3) of the Internal Revenue Code as a church formed exclusively for religious and educational purposes, no part of the net earnings of which inured to the benefit of any private shareholder or individual. The Internal Revenue Service denied the claim of exemption and assessed tax deficiencies for the two years. The Church paid the deficiencies, filed claims for refunds which were disallowed and then filed suit for a refund of the sums paid. The issue in all of the proceedings was the claimed exempt status under section 501(c)(3). Following discovery proceedings and a motion for summary judgment filed by the Church, the government proposed a settlement whereby a refund would be made of the amount "plaintiff would have received (other than costs) had it prevailed in this litigation." The action would then be dismissed with prejudice. This offer was rejected but the Church suggested that an offer of judgment pursuant to Rule 68 Fed.R.Civ.P. would receive favorable consideration. No such offer was made but the government caused checks aggregating $806.08 to be tendered. The tender was not accepted and the motion to dismiss was filed asserting that the action had become moot and that a justiciable controversy no longer existed by virtue of the continuing tender. The motion to dismiss was denied and this interlocutory appeal allowed.

[1] At the outset we recognize that there must be a viable justiciable controversy before the court in order for it to act, since the court does not render advisory opinions, or decide abstract propositions. California v. San Pablo & Tulare R.R. Co., 149 U.S. 308, 314, 13 S.Ct. 876, 37 L.Ed. 747 (1893).[2] It is also entirely clear that jurisdiction to decide questions concerning federal taxes has been expressly withheld under the Declaratory Judgments Act, 28 U.S.C. § 2201. Apart from these settled rules there is left for consideration whether under the general rules of mootness there remains anything for the court to decide after an unconditional and continuing offer by the government to refund the amount the taxpayer has paid, plus interest. Appellee calls our attention to several matters about the offer that it urges as significant. (1) The offer does not include any costs in the ac-

1. The question certified was as follows:
"Should the defendant's motion to dismiss, on the ground that this civil Tax refund action be rendered moot by reason of an absolute and unconditional tender to plaintiff of the amounts sued for plus interest as provided by law, be granted." Appellant's Brief at 3.

2. "[I]t is well settled that federal courts may act only in the context of a justiciable case or controversy." Benton v. Maryland, 395 U.S. 784, 788, 89 S.Ct. 2056, 2059, 23 L.Ed.2d 707 (1969); Liner v. Jafco, Inc., 375 U.S. 301, 306 n. 3, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964).

tion; (2) there
computation of i
states that "the
should *not* be i
tion", (emphasis
there remain a
questions and c
whose determinat
by a dismissal.
gether, it is argue
tion against an u
refund.

Appellant relies
sion in Mitchell v
(9th Cir.1968),
456, 89 S.Ct. 1
(1969), as being
In *Mitchell* the se
trust established
ble purposes had
fully to have the
vice (IRS) declare
ization. The serv
so and persisted i
trust report its i
ganization, althou
sessment had been
er legal action tak
a determination
filed a trust retur
ten dollars to IRS
and "included the
was due, . . .
fund with reasons
841. He thereupo
trict court to recov
a second cause of
the trust operatio
exempt under the
ment later repaid
tlor and settlor
The trial court d
firmed. We held
mooted the first c
proscription in 28
Declaratory Judgm
court of jurisdicti
second.

Some readily
make Mitchell v. I
tionable precedent.
refund was not o
cepted. Again, the

tion; (2) there is a dispute as to the computation of interest; (3) the offer states that "the terms of settlement should *not* be included in the stipulation" (emphasis in original); and (4) there remain a number of unresolved questions and continuing consequences whose determination will be foreclosed by a dismissal. All of these work together, it is argued, to preserve jurisdiction against an unaccepted tender of the refund.

Appellant relies heavily upon our decision in Mitchell v. Riddell, 402 F.2d 842 (9th Cir.1968), cert. denied, 394 U.S. 456, 89 S.Ct. 1223, 22 L.Ed.2d 415 (1969), as being dispositive of this case. In *Mitchell* the settlor of an inter vivos trust established exclusively for charitable purposes had attempted unsuccessfully to have the Internal Revenue Service (IRS) declare it a tax exempt organization. The service had declined to do so and persisted in its demand that the trust report its income as a taxable organization, although apparently no assessment had been made by IRS nor other legal action taken. In order to obtain a "determination Mitchell, the settlor, filed a trust return, remitted the sum of ten dollars to IRS in behalf of the trust and "'included the statement that no tax was due, . . . and calling for a refund with reasons stated.'" 402 F.2d at 844. He thereupon filed suit in the district court to recover the ten dollars. In a second cause of action he asked that the trust operations be found to be tax exempt under the Code. The government later repaid the ten dollars to settlor and settlor accepted the money. The trial court dismissed and we affirmed. We held that the repayment mooted the first cause of action and the proscription in 28 U.S.C. § 2201 of the Declaratory Judgments Act stripped the court of jurisdiction to pass upon the second.

Some readily apparent distinctions make Mitchell v. Riddell, *supra*, a questionable precedent. The payment of the refund was not only tendered, but accepted. Again, the entire litigation was contrived by settlor. No assessment for unpaid federal income taxes against the trust or its alter ego had been made. Significantly, we said:

> "Appellants are not without a remedy. The Congress has provided ample machinery for the settlement of income tax controversies. In the event a tax is assessed against the Foundation, judicial review of such assessment may be sought under the provisions of 26 U.S.C. § 7422 by paying the tax and seeking a refund in the district court, or by petitioning the Tax Court of the United States, prior to paying the tax, and in the event of an adverse decision by the Tax Court by petitioning this Court to review the decision of the Tax Court." 402 F.2d at 847.

Here there had been an assessment for claimed tax deficiencies, payment with claim for refund and detailed statement of reasons and after denial of claim, a suit to recover payments. This is the "ample machinery for the settlement of income tax controversies" to which we pointed in *Mitchell, supra*.

The government also cites four cases as authority for the proposition that in no other case has a taxpayer been able "to withstand a motion to dismiss following a tender of the amount in dispute." We consider them. In Dis. Hill & Thomas Co. v. United States, 392 F.2d 201 (6th Cir.1968), the taxpayer, a professional corporation, challenged a Treasury Regulation which would eliminate taxation of income to the corporation and cause it to flow through to the individuals on a partnership basis. The Commission tendered a refund of the entire amount in dispute and the case was dismissed, the court pointing out that the identical problem was being litigated in two other circuits where no mootness defense was available. The taxpayer was thus assured of a judicial determination. In Lamb v. Commissioner of Internal Revenue, 390 F.2d 157 (2nd Cir. 1968), the taxpayer sought a determination of the deductibility of his law school expenses. During the pendency of

the litigation a similar problem was ruled against the Commissioner, prompting him to tender the refund sought by this suit. The court dismissed the action as moot pointing out the foregoing and that further proceedings against the taxpayer for the next year were barred. Thus, there appears to have been a final determination. A. A. Allen Revivals, Inc. v. Campbell, 353 F.2d 89 (5th Cir. 1965), was a case where taxpayer sought exemption as a religious and educational organization. Its suit was to recover funds paid as Federal Insurance Contributions Act taxes. It tendered the money to the taxpayer but during the litigation the Tax Court held that the taxpayer was in fact organized and operated exclusively for charitable and educational purposes and no income taxes were due. IRS also ruled that the taxpayer was exempt from employment taxes. Thus, again there had been a judicial determination of status. Regina v. United States, 208 F.Supp. 137 (W.D. Pa.1962), involved an income tax based upon a valuation of corporate stock used in an exchange. A tender of the refund sought was made and the litigation held moot and dismissed. Although the merits were not judically determined it was a non-recurring transaction and tax with no indicated collateral involvements upon which other difficulties to the taxpayer could hinge.

[2] In none of them, therefore, was there an even arguable reason to continue with litigation after the tender or payment was made. Thus we do not find any of the cases cited by the government as dispositive of the issues here. Looking first at the direct controversy between the parties, we note that there is nothing in the proposed refund payment to the taxpayer of sums involuntarily paid for 1965-1966 which would have assured it that the same demands would not be made for 1967 and 1968. Indeed, the contrary is strongly suggested.[3] It has long been the rule that "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case." United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968). Prior to the *Phosphate Export* case, the Court had warned against the danger of dismissal for mootness when actions of governmental agencies are likely to be repeated, pointing out that broader considerations should not be defeated by short-term orders "capable of repetition, yet evading review. . . ." *See also* Moore v. Ogilvie, 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911).

[3] The proscription of the Declaratory Judgments Act as to tax matters, 28 U.S.C. § 2201, has no application here. Appellee had sought relief under the statute which provided a cause of action for refunds of taxes unlawfully assessed and paid. 26 U.S.C. § 7422. It did not pretend to ask for declaratory relief. The assessment had been made by the IRS, the taxes paid and claims for refunds made and disallowed and the suit for refund then properly filed. The underlying issue at all stages was taxpayer's claim of exemption under section 501(c) (3).

[4, 5] Turning, then, to the appellee's arguments in opposition to mootness, we conclude that the contention that the amount of the tender is insufficient and therefore the action may not be mooted by that tender is not well taken. Insufficient interest was claimed of $1.30; costs were not included in the tender. But no objection to the tender was made for these reasons. The rejection was based upon a letter to Mr. Wilkenfield of the Department of Justice dated May 11, 1971. It relied upon charges of collateral harassment which a

3 Attached to appellee's brief was a reproduction of a letter from the IRS dated September 24, 1971, sending back to appellee information returns it had filed based upon its claimed exempt status and notifying it that it was not eligible to file such a return, but must file federal income tax returns.

CHURCH

cash refund would n
counter offer of set
tions. A refusal to
one reason waives i
Investment Propert
711, 717-718 (9th Ci
U.S. 611, 55 S.Ct.
(1934). The same r
lee's argument based
government to tende

The principal reas
pellee in support of
tention of jurisdicti
derlying issue of th
as an exempt corpor
one. It recurs each
the failure to resolv
sults in adverse coll
which would be resol
tion of the underlyin

The ongoing natu
sy is evidenced not
of information retu
which were filed on t
lee is tax exempt an
for regular tax ret
denced even more
"Manual Supplement
dated September 21
the record. The st
manual is to identif
tology type religious
to provide guideline
turns and for proces
exemption. The d
which purport to des
ligious philosophy of
to make such orga
group. It is couche
tions for future guid

That the tender by
a refund of 1965 a
payments was not in
resolution of the tax
is also evidenced by

4 See footnote 3 supra.

5 The number "941" ap
941 which is the form
income withholding tax
Reg. § 39.1-1(2) (F.
4 (income tax).

ng been the rule
y cessation of al-
does not moot a
v. Concentrated
'n, 393 U.S. 199,
, 21 L.Ed.2d 344
Phosphate Export
rned against the
r mootness when
'al agencies are
pointing out that
should not be de-
ders "capable of
review, . . ."
ie, 394 U.S. 814,
Ed.2d 1 (1969);
nal Co. v. Inter-
ssion, 219 U.S.
Ed. 310 (1911).

of the Declara-
to tax matters,
application
relief under
d a cause of ac-
s unlawfully as-
S.C. § 7422. It
for declaratory
had been made
paid and claims
sallowed and the
erly filed. The
stages was tax-
on under section

to the appel-
sition to moot-
the contention
tender is insuf-
action may not
is not well tak-
was claimed of
included in the
n to the tender
ns. The rejec-
letter to Mr.
tment of Jus-
It relied upon
ament which a

t was not
o, ... must file

cash refund would not lay to rest and a counter offer of settlement of all questions. A refusal to accept a tender for one reason waives all others. Moore v. Investment Properties Corp., 71 F.2d 711, 717-718 (9th Cir.), cert. denied, 293 U.S. 611, 55 S.Ct. 142, 79 L.Ed. 701 (1934). The same reason defeats appellee's argument based upon failure of the government to tender costs.

The principal reasons advanced by appellee in support of the trial court's retention of jurisdiction are that the underlying issue of the status of appellee as an exempt corporation is a continuing one. It recurs each year. In addition, the failure to resolve the legal issue results in adverse collateral consequences which would be resolved by a determination of the underlying issue.

The ongoing nature of the controversy is evidenced not only by a rejection of information returns for a later year which were filed on the basis that appellee is tax exempt and a demand by IRS for regular tax returns,[4] but is evidenced even more clearly by an IRS "Manual Supplement," a copy of which dated September 21, 1970, appears in the record. The stated purpose of the manual is to identify "Church of Scientology type religious organizations" and to provide guidelines for examining returns and for processing applications for exemption. The detailed instructions which purport to describe in part the religious philosophy of the Church appear to make such organizations a suspect group. It is couched in terms of directions for future guidance.

That the tender by IRS in this case of a refund of 1965 and 1966 income tax payments was not intended to be a final resolution of the tax exempt status issue is also evidenced by the fact that on March 24, 1971, officials of the Church were subpoenaed to appear at the IRS office and bring with them:

(1) Payroll records from January 1, 1967, through December 31, 1970, inclusive.

(2) W-2's for 1967 through 1970 inclusive.

The ongoing nature of the problem was also disclosed by a levy by IRS on the bank account of the Church in the First Hawaii Bank for unpaid "941 tax" on or about March 2, 1971.[5]

Collateral consequences are also involved. An organization exempt from income taxation pursuant § 501(c)(3) is additionally exempt from contributing under the Federal Insurance Contributions Act, 26 U.S.C. § 3121(b)(8)(B), under certain circumstances. There are also advantages to a church found to be exempt under other provisions of the 1954 Internal Revenue Code.[6]

Other collateral consequences of its indeterminate status include the right to certain postal rates and the right to solicit financial support on the basis that gifts will be tax deductible as religious or charitable contributions.

In United States v. W. T. Grant Co., 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953), the resignation of a common director did not render moot an attack upon an interlocking directorate.

> "[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. . . . The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' The burden is a heavy one." 345 U.S. at 632-633, 73

4. *See* footnote 3 *supra*.

5. The number "941" apparently refers to Form 941 which is the form on which F.I.C.A. and income withholding taxes are reported. Treas. Reg. § 39.1-1(2) (F.I.C.A.); § 31.6011(a)-1 (income tax).

6. *See* 26 U.S.C. § 3401(a)(9); Treas. Reg. § 31.3401(a)(9)-1(b)(2).

An exemption is provided for certain withholding tax payments by religious organizations with such organizations being defined as having "the same meaning and application as is given to the term for income tax purposes."

S.Ct. at 897, quoting United States v. Aluminum Co. of America, 148 F.2d 416, 418 (2nd Cir. 1945).

See also United States v. Concentrated Phosphate Export Ass'n, *supra*.

[6] In criminal cases it appears clear that the payment of the penalty will not moot the case for final appeal and determination if the judgment of conviction may entail collateral consequences. Sibron v. New York, 392 U.S. 40, 53-55, 88 S.Ct. 1912, 20 L.Ed.2d 917 (1968); Ginsberg v. New York, 390 U.S. 629, 633 n. 2, 88 S.Ct. 1274, 20 L.Ed. 2d 195 (1968). The rule has developed to the point where the Court stated in *Sibron*, *supra*, that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." 392 U.S. at 57, 88 S.Ct. at 1900.

Granted that a criminal case is different from a civil case in many respects, it is difficult to find a reason for distinction when considering whether a case or controversy exists under Article III of the Constitution. Certainly we find no distinction under the circumstances of this case.

Our conclusion in this respect if fortified by the judgment of the United States District Court for the Western District of Missouri in First Federal Savings & Loan Ass'n v. United States, 288 F.Supp. 477 (W.D.Mo.1968). In a fact situation quite similar to the case here, that court held that a tender (as distinguished from payment) was not effectual to moot the case and that the possibility of a continuing recurrence of the problem was sufficient to entitle the taxpayer to have the underlying legal issue determined.

[7] We must conclude with the admonition that what we say and hold here on the issue of mootness is not intended to indicate any view upon the merits. Whether the Church is eligible and can qualify for an exemption from payment of income taxes under section 501(c)(3) of the Internal Revenue Code for its taxable years 1965 and 1966 must be determined upon the evidence presented at the trial upon that issue. We only answer the question certified by the interlocutory appeal which is that the defendant's motion to dismiss on the ground stated should be denied.

KOELSCH, Circuit Judge (dissenting).

If a judgment on the merits would be worth the judicial time, the outlay of money, and the attorney's efforts, I would hasten to join in the court's opinion. No good purpose would be served, now that the judicial process has been initiated, to dismiss this suit only to have a similar one commenced and prosecuted at some future time. However, I am convinced that the trial, which the Commissioner seeks to avoid, will settle nothing more than the church's income tax status for the particular years under consideration—1965 and 1966. Why, then, should we permit litigation which bids fair to be involved and time consuming to continue?

The collateral estoppel effect of a judgment in an income tax matter is generally limited, because each year's taxes are based upon facts peculiar to that particular year, and give rise to separate claims by the Collector. Although the doctrine does operate in the field of tax law, the factual peculiarities of the subject have limited its application.

Thus in Tait v. Western Md. Ry. Co., 289 U.S. 620, 53 S.Ct. 706, 77 L.Ed. 1405 (1933) the Court, concluding that the concept of res judicata was applicable in the field of tax law despite the scheme of annual tax periods, held that a prior adverse determination regarding the deductibility of an amortized proportion of the discount on sales of bonds by the taxpayer's predecessors estopped the Collector from relitigating that issue in a suit involving a later period. However, it should be noted that the allowable discount constituted a "static fact"—one which did not derive its legal impact from events of the later period.

CHURC

On the other h
Internal Revenue
591, 68 S.Ct. 715,
established two are
estoppel does not
where the legal cl
interim between t
though the materia
prior determinatio
The second, whe
sense of new—fact
a series of contract
tions, although suc
lar or identical to
liar to a prior year.
tion on the "old" i
the decision regard
of the "new."

This "separable i
cases has been cri
mechanical in its o
form over substan
Russell Mfg. Co., :
1965)] and has be
courts; but it is
Branscomb, Collate
Cases: Static and
Texas L.Rev. 584,
doctrine has been
cation of the gener
must in fact be lit
have an estoppel ef
litigation [Heckman
as the Answer to
Problems in Federa
View of Sunnen and
Case W.Res.L.Rev.
on the basis that
genuinely identical
same legal implicat
trine necessitates
require less judicia
peals and remand
erroneous determin
that collateral esto
scomb, supra, 37 T
85 Harv.L.Rev. 1478

The record in the
clear that a trial w

1. A forfeiture with resp
for amounts may be p
reasonableness will v

On the other hand, Commissioner of Internal Revenue v. Sannen, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948) established two areas in which collateral estoppel does not operate: The first, where the legal climate changes in the interim between the suits; there, although the material fact is "static," the prior determination is not controlling. The second, where different—in the sense of new—facts have arisen, such as a series of contracts or directors' resolutions, although such facts may be similar or identical to facts that were peculiar to a prior year, the prior determination on the "old" facts does not control the decision regarding the legal impact of the "new."

This "separable facts" doctrine in tax cases has been criticized as being too mechanical in its operation and exalting form over substance [United States v. Russell Mfg. Co., 349 F.2d 13 (2d Cir. 1965)] and has been confused by lower courts; but it is still good law. See Branscomb, Collateral Estoppel in Tax Cases: Static and Separable Facts, 37 Texas L.Rev. 584, 588-97 (1959). The doctrine has been defended as an application of the general rule that an issue must in fact be litigated before it can have an estoppel effect on a subsequent litigation [Heckman, Collateral Estoppel as the Answer to Multiple Litigation Problems in Federal Tax Law: Another View of Sunnen and The Evergreens, 19 Case W.Res.L.Rev. 230, 240 (1968)] and on the basis that the relitigation of genuinely identical sets of facts with the same legal implications which the doctrine necessitates in tax cases may well require less judicial time than the appeals and remands involved in an erroneous determination by a trial court that collateral estoppel applies. *Branscomb, supra*, 37 Tex.L.Rev. at p. 591; 85 Harv.L.Rev. 1478 (1972).

The record in the instant case makes clear that a trial would simply establish the "separable facts" of *Sannen*, not the "static facts" of *Tait*.

Under § 501(c)(3) a church is eligible for exemption if it is a corporation "organized and operated exclusively for religious—purposes—[and] no part of the net earning of which inures to the benefit of any private shareholder or individual—". The Tax Regulations relating to this section of the statute [Treas. Reg. § 1.501(c)(3)-1 (1959)] set up two essential requirements for an exemption; one organizational and the other operational. Both must be met. A determination of the first requires an analysis of the corporation's charter to determine whether it was organized exclusively for religious purposes; of the second, a consideration of the actual day to day operation of the corporation. Here the Commissioner has forthrightly admitted that the church meets the organizational requirement of § 501(c)(3) and, accordingly, has made clear that his objection to church's claim of exemption is predicated solely upon operational grounds.

There are, of course, a variety of bases upon which the Commissioner can challenge a claim of exempt status, all of which involve a consideration and determination of the financial operation of the church during a given tax year. For instance, as in Founding Church of Scientology v. United States, 412 F.2d 1197, 188 Ct.Cl. 490 (1969), he may take the position that exemption should be denied because church income inured to the private benefit of its founder. Or he may assert that exemption is lost because church paid unreasonable salaries. However, under the "separable facts" doctrine, a determination that church has or has not violated the "inurement of benefits" clause during 1965 and 1966 would have no estoppel effect in litigation concerning the same issues with respect to subsequent years.[1] This result follows both under *Sannen* and under

[1] A further with respect to salaries, the dollar amounts may be precisely the same but the reasonableness will vary with changes in living standards and community mores from year to year.

the general principle of collateral estoppel that an issue must be actually litigated in order to have an impact in subsequent litigation of a different claim. Developments in the Law—Res Judicata, 65 Harv.L.Rev. 818, 840 (1952).

The judgment should be reversed.

UNITED STATES of America, Appellee,
v.
Artis Lee VAUGHT, Appellant.

UNITED STATES of America, Appellee,
v.
Isaac LEE, Appellant.
Nos. 72-2207, 72-2208.

United States Court of Appeals, Fourth Circuit.

Argued March 6, 1973.

Decided Oct. 8, 1973.

Defendants were convicted before the United States District Court for the District of South Carolina, at Florence, J. Robert Martin, Jr., Chief Judge, of conspiring to unlawfully distribute heroin and of unlawful distribution of heroin. The defendants appealed. The appeals were consolidated. The Court of Appeals, Boreman, Senior Circuit Judge, held that failure to strike from the record evidence of acts and statements of coconspirator prior to the existence of any proven conspiracy was reversible error and was also plain error.

Reversed and remanded.

1. Criminal Law ⇐622(2)

Where codefendants and coconspirator were indicted on one count of conspiracy to distribute heroin and one count of distribution of heroin, coconspirator was charged with two additional counts of distribution of heroin and coconspirator, prior to trial, entered into plea-bargaining arrangement and agreed to plead guilty to one count of distribution of heroin, the two counts against coconspirator alone for distribution of heroin should have been treated as severed for trial purposes. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

2. Criminal Law ⇐122(1)

Where defendants were not involved in alleged sale of heroin by coconspirator in December, 1971, evidence of the December sale was admissible in conspiracy trial only if it might tend to prove single conspiracy existing among coconspirator and defendants at the time of the December sales and ending subsequent to the January, 1972, sale for which defendants were charged. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

3. Criminal Law ⇐123(1)

When two or more persons have conspired to commit criminal offense anything said or done by one of them, during the existence of the conspiracy, and in furtherance of the common design, may be admitted as evidence against the others.

4. Criminal Law ⇐127(2)

In order for rule that anything said or done by one of conspirators, during existence of the conspiracy, and in furtherance of the common design, may be admitted in evidence against the other, to apply there must be prima facie proof of the conspiracy as alleged.

5. Criminal Law ⇐127(3)

Trial judge, in his discretion, may permit introduction of evidence as to things said and done by alleged coconspirator subject being connected up and followed by evidence of the existence of the conspiracy.

6. Criminal Law ⇐

Where no evi
to connect defend
tor's December, 19
the coconspirator's
nected up and fol
the existence of t
prejudicial error
strike evidence of
tions in trial of de
cy to distribute he
tion of heroin on J
prehensive Drug
Control Act of 19
21 U.S.C.A. §§ 841

7. Criminal Law ⇐

In prosecutio
acts and words of
tor prior to the act
ercise of the consp
evant and should
record.

8. Criminal Law ⇐

Where one of
to strike evidence
spirator's acts an
the actual format
the conspiracy a
such evidence was
to strike that evid
error and require
viction of the no
Fed.Rules Crim.Pr
C.A.

Charles Porter, (
Porter & Sullivan
brief) for appellant

Isadore E. Lo
(Bert H. Nisonoff,
brief), for appellan

John K. Grisso,
L. Marshall, Asst.
for appellee.

Before BOREM
Judge, and BUTZN
cuit Judges.

* For conv

CHURCH OF SCIENTOLOGY OF CALIFORNIA, Plaintiff,

v.

Gabriel CAZARES, Defendant.

No. 76-86 Civ. T-K.

United States District Court, M. D. Florida, Tampa Division.

Aug. 15, 1978.*

Religious corporation brought action against mayor of city asserting that mayor had prohibited it from practicing its religion and had made numerous false and defamatory statements against it. Defendant made motion for summary judgment. The District Court, Krentzman, J., held that: (1) since there were no rights that could not be asserted by an individual or member of religious corporation and there was no need for corporation to protect rights of any of its members, corporation had no standing to assert First Amendment rights of freedom of religion in civil rights action, and (2) alleged defamatory statements, constituting merely conclusions or opinions which expressed ideas which mayor had concerning religious corporation, a "public figure," could not be basis for defamation action.

Motion granted.

1. Constitutional Law ⇐42.3(1)

Where there were no rights that could not be asserted by an individual or member of religious corporation and there was no need for corporation to protect rights of any of its members, religious corporation had no standing to assert First Amendment rights of freedom of religion in civil rights action. 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 1.

2. Civil Rights ⇐13.1

Defamation action brought by religious corporation against mayor of city was not appropriate under Civil Rights Act. 42 U.S.C.A. § 1983.

3. Libel and Slander ⇐48(1)

For purposes of defamation action, religious corporation was a "public figure" concerning public events which surrounded corporation's purchase, occupation and use of hotel.

See publication Words and Phrases for other judicial constructions and definitions.

4. Libel and Slander ⇐6(1)

Alleged defamatory statements, constituting merely conclusions or opinions which expressed ideas which defendant had concerning public figure, could not form basis for defamation action.

Tobias C. Tolzmann, Honolulu, Hawaii, John R. Parkhill, Tampa, Fla., for plaintiff.

Thomas A. Bertin, City Atty., Clearwater, Fla., John T. Allen, Jr., St. Petersburg, Fla., Charles W. Pattman, Tampa, Fla., for defendant.

OPINION GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

KRENTZMAN, District Judge.

STATEMENT OF THE CASE

This cause is before the Court on defendant's motion for summary judgment and partial summary judgment upon the issues framed in Plaintiff's Third Amended Complaint. The complaint is framed in two counts. Count I is an action under 42 U.S.C.A. § 1983 alleging that defendant, under color of state law deprived the plaintiff of its civil rights by prohibiting the Church of Scientology of California from practicing its First Amendment privilege of freedom of religion. The second count is a common law defamation action[1] which precipitated

* Affirmed by unpublished opinion of Court of Appeals, ... Cir., ... 1979.

1. Pendent jurisdiction exists to hear state law claims which form part of same case or controversy as federal claim.

being based upon diversity of citizenship under 28 U.S.C.A. § 1332.

The event out of which this controversy arose occurred during the months of October 1975 through March of 1976 when the plaintiff, Church of Scientology of California, acquired ownership of the Fort Harrison Hotel in downtown Clearwater, Florida. In October of 1975, the hotel was purchased by a corporation known as Southern Land and Development and Leasing Corporation. Because the hotel was a city landmark and was centrally located in the downtown area, speculation arose in the press as to what Southern Land and Development and Leasing Corporation was and to what use the company would make of the Fort Harrison Hotel. Documents were filed in Clearwater City Hall indicating the hotel would be used as a training facility for a large religious organization. Initially, personnel of Southern Land and Development and Leasing Corporation indicated that this organization was known as United Churches of Florida, Inc.

As church organizational employees moved into the hotel, a substantial public controversy arose as to the type of church which would use the facility. Substantial coverage was given to this public event by all news media with extensive coverage by the press. On January 28, 1976, the plaintiff, Church of Scientology of California, announced that it was directly connected with Southern Land and Development and Leasing Corporation and United Churches of Florida and in fact would be utilizing the hotel for functions of the Church of Scientology of California.

During the progress of the news developments, the defendant, Gabriel Cazares, as Mayor of the City of Clearwater, spoke out on numerous occasions on the controversy of who had actually purchased the hotel and what was it to be used for. When it was revealed that the true owner of the hotel was the Church of Scientology of California, the defendant became the subject of intense public and political attack.

On February 6, 1976, the Church of Scientology of California filed complaint in this Court alleging that defendant had prohibited it from practicing its religion and had made numerous false and defamatory statements against the Church of Scientology of California. After various motions and rulings by the Court, the pleadings were settled and issues in the case framed by Plaintiff's Third Amended Complaint. Extensive discovery has been taken on these issues.

THE CIVIL RIGHTS ACTION

The Third Amended Complaint alleges that plaintiff is a non-profit religious organization exclusively engaged in the practice of a religious faith within the meaning of the First Amendment to the United States Constitution. It asserts that the defendant, under the power of his office as Mayor of the City of Clearwater, Florida, prohibited plaintiff from exercising the right of freedom of religion by making false and defamatory remarks, thereby turning the community against plaintiff, inducing clergymen of other faiths to shun association with plaintiff, inducing officials of the City of Clearwater and officials of state government to undertake discriminatory and harassing actions and investigations of plaintiff, inducing civic organizations and other entities to shun association with plaintiff and join public condemnation and ridicule of plaintiff, inducing the news media to refrain from publishing accurate information and/or favorable comments concerning plaintiff and publish only adverse comments and false and derogatory information concerning plaintiff.

The instant inquiry upon motion for summary judgment is whether the plaintiff has standing under the First Amendment to the United States Constitution to claim that as a corporation it has the right to bring a

Count I and Incorporated as part of a civil rights action. Plaintiff's counsel has argued to this effect in prior hearings before the Court. Because the Court finds that defamation actions are not actionable under 42 U.S.C.A. § 1983, Count II is otherwise treated by the Court as sounding in common law defamation with jurisdiction based upon diversity of citizenship.

direct action under the Civil Rights Act, 42 U.S.C.A. § 1983, for actions allegedly depriving it of its right of freedom of religion.

Traditionally, it has been held that First Amendment rights are personal rights accruing to individuals. *Hague v. Committee of Industrial Organization*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). 42 U.S.C.A. § 1983 refers to "persons." Decisions under this act have held that corporations in some circumstances come within the classification of a "person" under the Civil Rights Act. *Allee v. Medrano*, 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974). The question here is whether the plaintiff as a religious corporation is *directly* entitled to protection of the right of freedom of religion under the Civil Rights Act.

There have been cases where, because of the particular facts of the case, a corporation has been held to have sufficient standing to seek protection of the civil rights of its members. In *National Association for the Advancement of Colored People v. State of Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) the "NAACP" brought suit to enjoin the State of Alabama from obtaining the names of "NAACP" members in Alabama State Court. The Alabama court held that the "NAACP" did not have standing to bring the suit and held the corporation in contempt for noncompliance with an order requiring it to produce records revealing the names of its members. After the Supreme Court of Alabama denied certiorari, the "NAACP" sought certiorari in the Supreme Court of the United States. The Court granted the writ holding that the Association had standing to bring the action and protect its members' right to freedom of association, since to hold otherwise would mean that if the individual members were required to bring suit themselves, the whole reason for the suit would be lost since they would have to make their identity known in bringing the litigation.

The Court has examined the record in this case carefully and has found no genuine issue of material fact to exist as to Count I. The Court finds only matters of law to be determined. There are two possible theories under which a civil rights action can be brought. One is a direct action by the corporation itself while the other is a suit to protect the rights of the corporation's members. Under the circumstances of this case as disclosed by all of the facts, it is the judgment of the Court that plaintiff as a corporation does not have standing to assert First Amendment rights of freedom of religion in a civil rights action. The issue raised by the pleadings only involves the first of the two possible theories under which civil rights actions may be brought, i. e., a direct suit for the protection of the corporation's own rights. No class action has been raised by the pleadings, and therefore, no class action is before the Court.

[1] The record reveals that neither of the two theories are applicable here. There are no rights that cannot be asserted by an individual or member of the Church of Scientology of California and there is no need for a corporation in this instance to protect the rights of any of its members. The unusual circumstances under which a corporation may sue to protect the rights of its members simply does not exist in this case. Based upon the entire record, there is no deprivation of the First Amendment right of either the Church or its members.

Accordingly, the Court grants defendant's motion for summary judgment as to Count I. The question of awarding to defendant a reasonable attorney's fee under Title 42, U.S.C.A. § 1988 is reserved for further determination by the Court.

THE DEFAMATION ACTION

Count II of Plaintiff's Third Amended Complaint claims that the defendant maliciously published false and defamatory statements about plaintiff on two occasions during the public controversy surrounding the purchase of the Fort Harrison Hotel by the plaintiff. First, plaintiff claims that during February of 1976, defendant in an interview by the press stated that plaintiff practiced "mythology under the cover of religion" and "extortionate tactics" and "espoused [a] nefarious scheme of religion, business and government" and "[a] diabo-

ject Clearwater citizens to untoward actions too bizarre to contemplate" which "would result in a chilling attack to the democratic process with possible national ramifications." These statements were allegedly reported in the local press.

Second, that in March of 1976, defendant stated to a reporter which was later reported in the press that "Scientologists are bringing to the City a helter-skelter world ind philosophy," fully well appreciating that in so doing the term "helter-skelter" had by reason of a best-selling book and television movie by the same title come into public understanding as descriptive of the policy of a generation of racial strife and indiscriminate mass murder allegedly espoused by the infamous and widely publicized Charles Manson, and intending thereby to convey to the public that plaintiff was dedicated to promotion of a generation of racial strife and indiscriminate mass murder.

[2] Initially, the Court finds that this defamation action is not appropriate under Title 42, U.S.C.A. § 1983. *Azar v. Conley*, 456 F.2d 1388 (6th Cir. 1972). *Hopkins v. Wasson*, 320 F.2d 67 (6th Cir. 1964). *People Pub Co. v. Bloom*, 472 F.2d 163 (10th Cir. 1972). Therefore, this defamation action is brought under state law with the Court having jurisdiction by reason of diversity of citizenship under 28 U.S.C.A. § 1332.

The case of *Olan Mills, Inc. of Tenn. v. Enterprise Publishing Co.*, 210 F.2d 895 (5th Cir. 1954) held that defamatory language must be plead with sufficient particularity to allow the Court to perform its function of screening defamatory allegations before they proceed to jury trial. The Court in performing this function has determined that there is no genuine issue of material fact that the statements allegedly made by defendant are not actionable under state or federal law.

[3] The Church of Scientology is a public figure within the doctrine of *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) concerning the public events which surrounded the Church's purchase, occupation and use of the Fort Harrison Hotel. This publicity went on to spread the news papers in the community for several weeks.

Under the doctrine of *New York Times v. Sullivan*, supra, persons are granted the right to speak out about public figures and public events. It is in effect a qualified privilege in which recovery must be based upon a defamatory statement of fact shown to be untrue and made with actual malice. Indeed, there must be a showing of some predetermined reason for malice.

The applicable law of Florida in regard to defamation is codified in *Palm Beach Newspaper, Inc. v. Early*, 334 So.2d 50 (Fla. 4th D.C.A.1976), cert. den. *Early v. Palm Beach Newspaper, Inc.*, 354 So.2d 351 (1977), in which the Fourth District Court of Appeals held that the principle of *New York Times v. Sullivan*, supra, applies to defamatory actions in Florida:

"This case is governed squarely by *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and its progeny. In the *New York Times* case, the court defined a constitutional privilege intended to free criticism of public officials from the restraints imposed by the common law of defamation:

> 'The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'

"376 U.S. at 279-80, 84 S.Ct. at 726."

• • • • • •

"The *Gertz* case, supra, also made clear that the defamatory falsehood referred to in the *New York Times* standard refers to a statement of fact as opposed to pure comment or opinion:

> 'We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the

conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.' (418 U.S. 339-40, 94 S.Ct. at 3007)."

* * * * * *

"Suffice it to say that while most of the articles and cartoons can fairly be described as slanted, mean, vicious, and substantially below the level of objectivity that one would expect of responsible journalism, there is no evidence called to our attention which clearly and convincingly demonstrates that a single one of the articles was a false statement of fact made with actual malice as defined in the *New York Times* case. * * *"

[4] The Court has examined the newspaper articles which contain the alleged defamatory statements of the defendant. When read in their proper context, the statements made constitute merely conclusions or opinions which express ideas which defendant had concerning a public figure. The defendant is entitled under the public figure doctrine to express his ideas or opinions as long as he does not maliciously make a false statement of fact. The entire record and in particular the articles themselves show that the defendant made no malicious, false statement concerning the plaintiff. Therefore, the Court grants plaintiff's motion for summary judgment as to Count II in its entirety.

The Court having found that defendant's motion for summary judgment should be granted as to both counts of Plaintiff's Third Amended Complaint therefore finds that this cause should be dismissed in its entirety. A final judgment will be entered accordingly.

NORFOLK & WESTERN RAILWAY COMPANY, a corporation, Plaintiff,

v.

NORTH AMERICAN CAR CORPORATION, a corporation, Defendant.

No. 76 C 715.

United States District Court, N. D. Illinois, E. D.

Aug. 16, 1978.

Suit was instituted to recover tariff charges arising from transportation of several empty railroad cars. The District Court, Bua, J., held that free movement provision of mileage tariff did not apply to transportation of empty railroad cars over plaintiff's railroad lines to defendant's shop where identification markings on cars were not properly contained in then effective issue of Official Railway Equipment Register as required.

Judgment for plaintiff.

1. Carriers ⇨30

Provision of tariff precluding rules and mileage allowances from being applied to cars that were not properly registered in Official Railway Equipment Register required proper car identification data to be printed in published issue of register in effect at time of car movement and, if data was not printed in publication, precluded application of any no charge provision contained elsewhere in tariff.

2. Carriers ⇨30

Rules and mileage allowances of tariff do not apply to cars that are not properly registered in Official Railway Equipment Register if car identification data is not contained in issue of Register in effect at time of car movement.

3. Carriers ⇨30

Free movement provision of mileage tariff did not apply to transportation of empty railroad cars over plaintiff's railroad lines to defendant's shop where identifica-

counsel. It is difficult to understand these allegations because we are not cited to any supporting references in the transcript. Moreover, what evidence we can find in the record is sparse, almost to the point of non-existence and the claims are ambiguously stated. As to the hearsay claim, if that is what it is, the Government contends that the appellant's deposition in a civil case in Maryland showed that appellant recalled so little about his alleged course of study in Mexico as to strongly indicate that he never attended all the courses at the university that his allegedly forged credentials set forth (Tr. 689 696). It appears that this is prior testimony by way of deposition, and if so it would be admissible as a recognized exception to the hearsay rule.

> Upon compliance with requirements which are designated to guarantee an adequate opportunity of cross-examination, evidence may be received in the pending case, in the form of a written transcript or an oral report, of a witness's previous testimony. This testimony may have been given by deposition or at a trial, either in a separate case or proceeding, or in a former hearing of the present pending case.

McCormick on Evidence § 254, at 614 (2d ed. 1972).

The context of this deposition, insofar as it was read into the record in this case, appears in the transcript at 689 696. Among other apparently startling deficiencies in memory, it indicates that Maturo could not translate the Spanish on his diploma while he admitted that the examinations in medical school were all in Spanish (Tr. 689 697. *See also* Tr. 710 711).

[3] Insofar as appellant may be claiming inadequate representation by his counsel it is our opinion that the allegation with respect thereto is insufficient to raise the issue for this court. However, inasmuch as the case is being remanded, the trial court should include all three claims in the hearing. So far as we can determine from the briefs and record, points (2) and (3) have not been raised or argued heretofore and what is involved in point (1), except for the possible claim of inadmissible hearsay, is not apparent to us. At the hearing appellant will have an opportunity to clarify the arguments he relies upon.

Appellant also contends that the prosecutor misrepresented to the court in the bond hearing that Officer Vance had recanted his affidavit in connection with the alleged wiretapping (Tr. June 16, 1970, at 9 10). The status of this issue as a new or old one is not readily apparent, but the court may consider it with the wiretapping and the intimidation issues, to which it also relates. *See* Appellant's Brief at M 8.

Finally, as to Maturo's claim that he was discriminated against by the court not hearing his claim while it did hear Vecchiarello's, this remand for a joint hearing with Vecchiarello is a complete answer to this claim.

The case is remanded to the district court for disposition consistent with this opinion.

Order accordingly.

The **FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D. C.**, Appellant,

v.

Heinrich Bauer VERLAG et al.

No. 74-1789.

United States Court of Appeals, District of Columbia Circuit.

Argued Oct. 22, 1975

Decided June 1, 1976

Religious organization brought libel action against, inter alia, distributor of West German magazine which contained allegedly libelous article. The District Court for the District of Columbia dismissed for want

of jurisdiction and religious organization appealed. The Court of Appeals, MacKinnon, Circuit Judge, held that distributor which had sales of $26,000 in ten-month period within the District of Columbia, representing one percent of the gross revenues of the distributor for that ten-month period, had sufficient contact with the District to permit assertion of long-arm jurisdiction over it; and that court erred in dismissing on grounds of forum non conveniens where both plaintiff and defendant were residents of the United States and where plaintiff sought damages for libelous publication in the District of Columbia, even though the article was written and published in West Germany and even though certain West German residents had initially been defendants in the action.

Reversed.

1. Courts ⇨12(2)

In order for court to properly assert personal jurisdiction over a nonresident defendant, service of process over the nonresident must be authorized by statute and be within the limits set by the due process clause of the constitution. U.S.C.A.Const. Amend. 14.

2. Courts ⇨444.3(2)

Connection with the District of Columbia sufficient to authorize assertion of personal jurisdiction over a nonresident defendant can be demonstrated under the District's long-arm statute only by proving that the defendant has one of three types of contact with the district and that the connection at least evinces the minimum contacts with the District sufficient to satisfy traditional notions of fair play and substantial justice. D.C.C.E. § 13-423(a)(4).

3. Statutes ⇨226

Because their similarly worded statutes also derive from the Uniform Interstate and International Procedure Act, decisions construing Maryland and Virginia long-arm statutes are entitled to substantial weight in considering long-arm statute of the District of Columbia. D.C.C.E. § 13-423(a)(4); Code Md.1957, art. 75, § 96(a)(4); Code Va. 1950, § 8-81.2(a)(4).

4. Courts ⇨444.3(2)

In order to show the reasonable connection necessary for assertion of long-arm jurisdiction over a defendant on the basis of its having derived substantial income for goods used or consumed in the jurisdiction, court must look both at the absolute amount of revenues and the percentage of total revenues represented by activities in the jurisdiction. D.C.C.E. § 13-423(a)(4).

5. Courts ⇨444.3(2)

Distributor which had its principal offices in city of New York, which received German-language magazines from West Germany and forwarded them by common carrier to another distributor in the District of Columbia, which had sales of $26,000 in the District in the first ten months of the year, with such sales representing approximately one percent of its gross revenues for the ten-month period, had, on the basis of income derived from the District, reasonable connection with the District so that District could assert long-arm jurisdiction over the distributor with respect to allegedly libelous magazine article. D.C.C.E. § 13-423(a)(4).

6. Courts ⇨444.3(2)

Distributor which engaged in the distribution of magazines outside the area of their immediate circulation and which did not engage in news-gathering activities in the District of Columbia could not assert protection of news-gathering exception to assertion of long-arm jurisdiction over it. D.C.C.E. § 13-423(a)(4).

7. Courts ⇨260.4

Statutory reference to "any District of Columbia court" in forum non conveniens statute does not include federal courts in the District of Columbia. D.C.C.E. § 13-425.

See publication Words and Phrases for other judicial constructions and definitions.

8. Courts ⇨260.4

Federal courts have the power to refuse jurisdiction over cases which should

FOUNDI

have been brought in
rather than in the U
foreign jurisdiction c
considered more suitab
rum in which to requ
parties to be determi

9. Courts ⇨260.4

Where both allege
and distributor of maj
of the United States, v
damages for libelous p
trict of Columbia, an
action in the District
prompted by an inten
was error for trial cou
tion on basis of forum
ly because the maga
been written and pul
many.

10. Courts ⇨260.4

Trial judge has g
eral, discretion to appl
non conveniens; whei
weighing of relative
forum but only a consi
backs of one, that
abused.

Appeal from the U
Court, for the Distric

* Sitting by designation
§ 292(d).

1. The Founding Chu
Washington, D. C., is
organized under the
Columbia, which engag
practice, and proselyt
in the District of Col
hereinafter be referre
the "Church of Scien
apparently affiliated
churches of Scientolo
both domestic and for
of this relationship
record.

2. The article, which ap
tion at App. 9-12, desc
two women by West
reports on the recruit
tims" of Scientology,

have been brought in a foreign jurisdiction rather than in the United States but a foreign jurisdiction cannot necessarily be considered more suitable and convenient forum in which to require the rights of the parties to be determined.

9. Courts ⇐260.4

Where both allegedly defamed plaintiff and distributor of magazine were residents of the United States, where plaintiff sought damages for libelous publication in the District of Columbia, and where bringing of action in the District of Columbia was not prompted by an intent to vex or harass, it was error for trial court to decline jurisdiction on basis of forum non conveniens merely because the magazine in question had been written and published in West Germany.

10. Courts ⇐260.4

Trial judge has great, but not unlimited, discretion to apply doctrine of forum non conveniens; where there has been no weighing of relative advantages of each forum but only a consideration of the drawbacks of one, that discretion has been abused.

Appeal from the United States District Court, for the District of Columbia.

Samuel H. Seymour, Washington, D. C., for appellant. Earl C. Dudley, Jr., Arlington, Va., was on the brief for appellant.

Irvin B. Nathan, Washington, D. C., with whom Edgar H. Brenner and Werner Kronstein, Washington, D. C., were on the brief for appellee German Language Publications, Inc.

Before McGOWAN and MacKINNON, Circuit Judges, and McMILLAN,* United States District Judge for the Western District of North Carolina.

Opinion for the court filed by Circuit Judge MacKINNON.

MacKINNON, Circuit Judge.

In this diversity action the Founding Church of Scientology of Washington, D. C.[1] sued (1) the author, editor, publisher, and distributor of an allegedly defamatory article which appeared in the July 1973 edition of the German-language magazine *Neue Revue*, and (2) an official of the West German federal criminal investigating authority who allegedly aided in the preparation of that publication.[2] The district court dismissed the suit on the grounds (1) that it lacked personal jurisdiction over any of the defendants under the District of Columbia "long arm" statute[3] and (2) that suit in the District of Columbia was barred under the doctrine of *forum non conveniens*.[4] Appeal

*Sitting by designation pursuant to 28 U.S.C. § 292(d).

1. The Founding Church of Scientology of Washington, D. C., is a nonprofit corporation, organized under the laws of the District of Columbia, which engages in the active exercise, practice, and propagation of "Scientology" in the District of Columbia. App. 1. It will hereinafter be referred to as the "Church" or the "Church of Scientology." The Church is apparently affiliated in some way with other churches of Scientology in other jurisdictions, both domestic and foreign, but the exact nature of this relationship does not appear in the record.

2. The article, which appears in English translation at App. 9-12, describes the terrorization of two women by West German Scientologists, reports on the recruitment there of new "victims" of Scientology, and notes an investigation into the activities of Scientologists by the West German Federal Criminal Affairs Bureau.

Of a total of approximately 1,400,000 copies of the issue in question, 56 reached the District of Columbia where they were distributed to four news dealers who are not parties to this action; of the 56 copies, 30 were sold and the rest returned.

3. D.C. Code § 13-423 (1973).

4. Virtually identical suits in New York and California have been dismissed on these two grounds. *See Church of Scientology of California v. Herold*, No. C 60230 (Superior Court for the County of Los Angeles, March 12, 1974), 172 N.Y.L.J. No. 1 at 13 (July 1, 1974) (Appellee's Supp. Appendix at 8). Other suits have been filed in West Germany (both Munich and Wiesbaden), Holland, and Canada. On October 21, 1975, the appellee filed with this court a copy of a November 1974 decision by the Wiesbaden court holding that the article was not

was then filed as to all defendants, but appellant later consented to dismissal as to all appellees except the distributor, a New York corporation, German Language Publications, Inc. [GLP][5] As regards this one remaining appellee we disagree that the action should have been dismissed, and reverse.

Personal Jurisdiction

[1] In order for a court to properly assert personal jurisdiction over a nonresident defendant, service of process over the nonresident must be authorized by statute and be within the limits set by the due process clause of the United States Constitution. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In the District of Columbia, the relevant "long arm" statute provides:

> (a) a District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's—
>
> * * * * * *
>
> (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or *derives substantial revenue* from goods used or consumed, or services rendered, in the District of Columbia.

D.C.Code § 13-423(a)(4) (1973) (emphasis added).

[2] The District of Columbia "long arm" statute is a slightly modified version of the Uniform Interstate and International Procedure Act, 13 U.L.A. 285, § 1.03 (1975), which was drafted by the National Conference of Commissioners on Uniform State Laws several years after the famous decision in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961), interpreted the Illinois long-arm statute to cover a nonresident defendant who had no connection with the state except that it had acted negligently out of state, causing injury within the state. The Uniform Act (and derivatively the D.C. Code) draws back from the limits set by expansive opinions such as *Gray*, and "was presumably devised to obviate any possible due process objections." *Margoles v. Johns*, 157 U.S.App.D.C. 209, 213, 483 F.2d 1212, 1216 (1973). Consistent with this intent, section 423(a)(4) requires, in addition to conduct outside the District which causes injury within the District, some other reasonable connection between the District and the defendant. Viewed in light of the statute's history, such a connection sufficient to authorize the assertion of personal jurisdiction over a nonresident defendant can be demonstrated *only* by proving that the defendant has one of three types of contact with the District *and* that the connection at least evinces the minimum contact with the District sufficient to satisfy traditional notions of fair play and substantial justice. See *International Shoe Co. v. Washington, supra*, 326 U.S. at 316, 66 S.Ct. 154, 90 L.Ed. 95.

[3-5] One way in which this "reasonable connection" can be shown under the Uniform Act and D.C.Code § 13-423(a)(4), is by demonstrating that the defendant has derived "substantial income" from goods used or consumed in the jurisdiction. In the case now before us, GLP has obtained gross revenues in excess of $26,000 over a period of ten months from sales made in the Dis-

defamatory under German law, the Wiesbaden action was therefore dismissed.

5. Appellee German Language Publications is a New York Corporation with its principal offices in the city of New York. It has no office, employees or agents in the District of Columbia. App. 13. It is not licensed to do business in the District, and does not engage in solicitation or bill collecting activities therein. App. 15. Its sole connection with the District is to receive German-language magazines from West Germany and to forward them by common carrier to Prudential News in the District, which in turn delivers them to four independent news dealers for ultimate resale. App. 14. GLP received approximately one percent of its gross revenues, or $26,202.63, from magazines sold in the District during the first ten months of 1973. App. 15.

trict—approximately on
tal gross revenues.[6] In
District of Columbia ca
phrase, the court stated
qualitative one, that is,
revenue relating to the
and total revenue is
Mutual Insurance Co.
Corp., 334 F.Supp. 522
agree, but feel that th
more than this. Beca
worded statutes also d
form Interstate and I
dure Act, we think the
the Maryland[7] and V
statutes are entitled t
in our consideration.[9] I
000 worth of window fr
ia amounted to "subst
spite the fact that it v
one percent of the nonr
er's sales, the Fourth C
Corp. v. J. F. Zook, In
Cir. 1972), stated the
* * * Although
sales may be a facto
cannot be dispositive
age of the sales of a
indeed prove substa
sense.[5] On the othe
5 onversely, a rela
amount might be deem
it constitutes a sign
small corporation's t
to identify an absolu
facto must be deem
Accord, Egeria, Socie
Azioni v. Orinoco Mi
997-1002 (D.Md.1973).
both at the absolute
percentage of total
what is "substantial"

6. *See* note 5 *supra*.

7. Code Md 1957, art.

8. 2 Code of Virginia A
Supp.)

9. If anything can be a
islative] history it
overall intent [in e
423] was to provid
the greatest extent

trict—approximately one percent of its total gross revenues.[6] In apparently the only District of Columbia case to interpret this phrase, the court stated that "the test is a qualitative one, that is, a comparison of the revenue relating to the locally used article and total revenue is required." *Liberty Mutual Insurance Co. v. American Peeco Corp.*, 334 F.Supp. 522 (D.D.C.1971). We agree, but feel that the test must embrace more than this. Because their similarly-worded statutes also derive from the Uniform Interstate and International Procedure Act, we think the decisions construing the Maryland[7] and Virginia[8] "long-arm" statutes are entitled to substantial weight in our consideration.[9] In holding that $37,000 worth of window frames sold in Virginia amounted to "substantial revenue" despite the fact that it was only one-half of one percent of the nonresident manufacturer's sales, the Fourth Circuit in *Ajax Realty Corp. v. J. F. Zook, Inc.*, 493 F.2d 818 (4th Cir. 1972), stated the following test:

> • • • Although percentage of total sales may be a factor to be considered, it cannot be dispositive, for a small percentage of the sales of a corporate giant may indeed prove substantial in an absolute sense.[5] On the other hand, it is difficult

[5] Conversely, a relatively small absolute amount might be deemed "substantial" where it constitutes a significant percentage of a small corporation's total sales

> to identify an absolute amount which *ipso facto* must be deemed "substantial."

Accord, Egeria, Societa di Navigazione Per Azioni v. Orinoco Mining Co., 360 F.Supp. 997, 1002 (D.Md.1973).[10] Thus the test looks *both* at the absolute amount and at the percentage of total sales, and determines what is "substantial" on the facts of each case. Here, recognizing the low unit price of each magazine, we think that sales of $26,000 in ten months constitute "substantial revenue" and demonstrate contacts that are sufficiently substantial to establish the "reasonable connection" with the District required by D.C.Code § 13-423 and the Constitution.

In denying personal jurisdiction over the defendants in this case, the district judge cited *Margoles v. Johns, supra*, a 1973 decision of this court, in which we affirmed a denial of personal jurisdiction under D.C. Code § 13-423 in a libel action against a nonresident newspaper publisher who maintained only what are essentially news gathering offices in the District. The ground for our refusal to find jurisdiction under section (a)(4) of the "long arm" statute in that case was what has become known in the District of Columbia as the "newsgathering exception": in minimal contact situations, the First Amendment protects newsgathering activities in the nation's capital and weighs against the assumption of personal jurisdiction over a nonresident publisher. See also *Bulletin Co. v. Origoni*, 128 U.S.App.D.C. 282, 387 F.2d 240, *cert. denied*, 389 U.S. 928, 88 S.Ct. 287, 19 L.Ed.2d 278 (1967); *Layne v. Tribune Co.*, 63 App.D.C. 213, 71 F.2d 224, *cert. denied*, 293 U.S. 572, 55 S.Ct. 83, 79 L.Ed. 670 (1934); *Neely v. Philadelphia Inquirer Co.*, 61 App.D.C. 334, 62 F.2d 873 (1932). Appellee here contends that this exception is broad enough to cover news *dissemination* as well as newsgathering, since the former "is surely more at the core of guaranteed First Amendment rights than news gathering."[11] We disagree.

The purpose of the newsgathering exception was well expressed by the opinion that established it:

> identical long-arm jurisdiction as was then available in Maryland and Virginia

Margoles v. Johns, 157 U.S.App.D.C. 209, 212-13, 483 F.2d 1212, 1215-16 (1973).

10. *See also* Note, *The Virginia "Long Arm" Statute*, 51 Va.L.Rev. 719, 749 (1965), encouraging a "non-restrictive, liberal view of the conditions in subsection (4)"

11. Appellee's Brief at 32

6. See note 5 *supra*

7. Code Md.1957, art. 75, § 96(a)(4)

8. 2 Code of Virginia Ann. § 8-81.2(a)(4) (1975 Supp.)

9. If anything can be ascertained from the [legislative] history it must be that Congress' overall intent [in enacting D.C.Code § 13-423] was to provide the District's courts, to the greatest extent possible, with essentially

Mo. Law—16

As the seat of national government, Washington is the source of much news of national importance, which makes it desirable in the public interest that many newspapers should maintain vigilant correspondents here. If the employment of a Washington correspondent, the announcement of his address, and the payment of his office rent, subjects a nonresident newspaper corporation to legal process in Washington for matter appearing in its paper at home, it would bring in nearly every important newspaper in the nation, and many foreign publishing corporations, which in our opinion the present statute does not do.

Neeley v. Philadelphia Inquirer Co., *supra* at 875. Thus what is being protected by the news gathering exemption is the right of *subscribers* within the area of immediate circulation of a newspaper or magazine [12] to receive news of national interest which must be gathered in the District of Columbia. This is quite different from interpreting the exemption to protect the right of a *publisher* to distribute his product *without responsibility* in foreign jurisdictions. To subject a nonresident publisher to suit in the District merely because he gathers news here *for dissemination elsewhere* would severely constrict the flow of national news to his local subscribers. Viewed this way, however, the newsgathering exception would not prohibit suits against publishers whose area of immediate circulation includes the District, nor against those who distribute publications in the District which have an area of primary circulation elsewhere. In the former case, the publisher is essentially a local publisher and should be subject to suit here; in the latter case, the suit, being against the importing distributor rather than the publisher, will have no effect on the *primary* distribution of the newspaper or magazine.

[6] In the instant case, GLP engages in the distribution of magazines outside the area of their immediate circulation and does not engage in any newsgathering activities in the District. Thus, it has no proper claim to the protection of the newsgathering exception, and we refuse to expand that exception to bar this suit.

Forum Non Conveniens

[7] The common law doctrine of *forum non conveniens* is codified by D.C.Code § 13-425 (1973), which provides:

> When any District of Columbia court finds that in the interest of substantial justice the action should be heard in another form, the court may stay or dismiss such civil action in whole or in part on any conditions that may be just.[13]

[8] It has long be
eral courts have the
diction over cases w
brought in a forei
than in the United
singer, 276 F.2d 44
Vanity Fair Mills v.
633, 645 (2d Cir. 19
City Southern Ry., 1
Mo.1951); *Latimer v*
das F. Matarazzo, 9
N.Y.1950); *De Si*
F.Supp. 270, 273 (S.
a foreign jurisdictio
considered "a more
forum in which to r
parties to be deter
Products, Inc. v. Fi
182, 281 F.2d 611 (
U.S. 827, 81 S.Ct. 71
"The doctrine that
does not have an ab
ed States courts us
context of a citizen
expecting still to us
Thompson v. Palmi
Cir. 1966). Moreo
dismiss on this gr
defendant be vexed
tiff's choice of fo
defendant was not
or resident, and wa
minimal contacts w
66.

[9] We think it
cance that both pla

Pursuant to this st
law, the district co
conveniens to be an
dismissal in the pre
appellee GLP makes
other *domestic* juris
ter forum for this su
the case should be d
trial in West Gern
pledged to submit to
German court.[14]

---

12. The existence of a newspaper, no matter how popular, depends primarily upon circulation in the vicinity of its publication. Circulation in other areas may well be welcomed, but it is not critical to the newspaper's continued existence. Circulation beyond the vicinity of publication can be characterized as "passive" in that it is a product of the publication's excellence rather than of a business effort of active solicitation in all areas of the nation.

Curtis Publishing Co. v. Golino, 384 F.2d 586, 590 (5th Cir. 1967).

13. This District of Columbia statute was relied on by the district court in ruling on the *forum non conveniens* issue. App. 18-19. The statutory reference to "any District of Columbia court," however, does not include *federal* courts in the District of Columbia. *Aiken v. Lustine Chevrolet, Inc.*, 392 F.Supp. 884, 887 n. 5 (D.D.C.1975). Moreover, there is a split of authority on the question of whether federal courts in diversity cases are required to apply the local rule of *forum non conveniens* under the doctrine of *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). *Compare Weiss v. Routh*, 149 F.2d 193 (2d Cir. 1945), *with Gilbert v. Gulf Oil Corp.*, 153 F.2d 883 (2d Cir. 1946), *rev'd on other grounds*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). *See also* 1A 2 J. Moore, Federal Practice ¶ 0.317[2] (1974). The Supreme Court has twice refused to rule on this point. *Gilbert v. Gulf Oil Corp.*, 330 U.S. 501, 509, 67 S.Ct. 839, 91 L.Ed. 1055 (1947); *Williams v. Green Bay & Western R. R. Co.*, 326 U.S. 549, 558-59, 66 S.Ct. 284, 90 L.Ed. 31 (1946). Although the issue has never been squarely addressed by this court, federal courts in the District have in practice used the federal law of *forum non conveniens*. *See Altman v. Central of Georgia Ry.*, 124 U.S.App.D.C. 155, 361 F.2d 281, *cert. denied*, 385 U.S. 920, 87 S.Ct. 231, 17 L.Ed.2d 144 (1966); *Aiken v. Lustine Chevrolet*, *supra*. In any case, the law of *forum non conveniens* in the District of Columbia appears to be identical to federal law on the point at issue in this

FOUND

Pursuant to this st
law, the district co
conveniens to be an
dismissal in the pre
appellee GLP makes
other *domestic* juris
ter forum for this su
the case should be d
trial in West Gern
pledged to submit to
German court.[14]

[8] It has long be
eral courts have the
diction over cases w
brought in a forei
than in the United
singer, 276 F.2d 44
Vanity Fair Mills v.
633, 645 (2d Cir. 19
City Southern Ry., 1
Mo.1951); *Latimer v*
das F. Matarazzo, 9
N.Y.1950); *De Si*
F.Supp. 270, 273 (S.
a foreign jurisdictio
considered "a more
forum in which to r
parties to be deter
Products, Inc. v. Fi
182, 281 F.2d 611 (
U.S. 827, 81 S.Ct. 71
"The doctrine that
does not have an ab
ed States courts us
context of a citizen
expecting still to us
Thompson v. Palmi
Cir. 1966). Moreo
dismiss on this gr
defendant be vexed
tiff's choice of fo
defendant was not
or resident, and wa
minimal contacts w
66.

[9] We think it
cance that both pla

Cir. See Doratt v.
App.1975). There
whether the district
ing that the Distric
tools on this point.

Pursuant to this statute and the common law, the district court found *forum non conveniens* to be an alternative ground for dismissal in the present case. On appeal, appellee GLP makes no argument that any other *domestic* jurisdiction would be a better forum for this suit, but only argues that the case should be dismissed in favor of a trial in West Germany, where GLP has pledged to submit to the jurisdiction of the German court.[11]

[8] It has long been recognized that federal courts have the power to refuse jurisdiction over cases which should have been brought in a foreign jurisdiction, rather than in the United States. *Pruck v. Weissinger*, 276 F.2d 446, 448 (4th Cir. 1960); *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 645 (2d Cir. 1956); *Wilson v. Kansas City Southern Ry.*, 101 F.Supp. 56, 60 (W.D.Mo.1951); *Latimer v. S/A Industries Reunidas F. Matarazzo*, 91 F.Supp. 469, 470 (S.D.N.Y.1950); *De Sairigne v. Gould*, 83 F.Supp. 270, 273 (S.D.N.Y.1949). However, a foreign jurisdiction cannot necessarily be considered "a more suitable and convenient forum in which to require the rights of the parties to be determined." *North Branch Products, Inc. v. Fisher*, 109 U.S.App.D.C. 182, 284 F.2d 611 (1960), *cert. denied*, 365 U.S. 827, 81 S.Ct. 713, 5 L.Ed.2d 705 (1961). "The doctrine that a United States citizen does not have an absolute right to use United States courts usually is expressed in the context of a citizen doing business abroad expecting still to use United States courts." *Thompson v. Palmieri*, 355 F.2d 61, 65 (2d Cir. 1966). Moreover, "[m]ost [cases that dismiss on this ground] require that the defendant be vexed and harassed by plaintiff's choice of forum. And usually the defendant was not a United States citizen or resident, and was validly served because of minimal contacts with the forum." *Id.* at 66.

[9] We think it to be of great significance that both plaintiff and the remaining defendant here are residents of the United States and that plaintiff seeks damages for a libelous publication *in the District of Columbia*. Complaint at ¶ 11. In incorporating in this country and locating here, they have in effect signified their willingness to be sued in American courts. *Cf. Dorati v. Dorati*, 342 A.2d 18, 22 (D.C.App.1975). Only two cases have been located where, although the incident forming the basis of the suit had occurred in a foreign jurisdiction, both of the parties were residents of the United States. *See Burt v. Isthmus Development Co.*, 218 F.2d 353 (5th Cir. 1955); *Horovitz v. Renault, Inc.*, 162 F.Supp. 344 (S.D.N.Y.1958). Dismissal was denied in both. In *Burt*, *supra* at 357, the Fifth Circuit stated:

> It strikes us as being inconsistent with the very purpose and function of the federal courts to hold that one may decline to hear a case and thereby in effect decree that a citizen must go to a foreign country to seek redress of an alleged wrong. Nevertheless, because we are of the belief that it is unnecessary to do so here, we are not prepared flatly to hold that no discretion exists in *any* such case to decline jurisdiction. Experience has taught that such a holding may prove unsound in extreme cases, and the Supreme Court in the *Swift* case [*Swift & Co. Packers v. Compania Colombiana Del Caribe, S. A.*, 339 U.S. 684, 70 S.Ct. 861, 94 L.Ed. 1206 (1950)] declined to pass upon a similar point. We leave that question open.

We do, however, express the view that courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country.

Finding no extreme circumstances or manifest injustice, the court reversed the order

case. *See Dorati v. Dorati*, 342 A.2d 18 (D.C.App.1975). Therefore, we do not decide whether the district court was correct in holding that the District of Columbia statute controls on this point.

11. Appellee's Brief at 9-10. *Compare Dorati v. Dorati*, 342 A.2d 18, 20 n.3 (D.C.App.1975).

of the district court dismissing a suit by a Texas citizen against a New York citizen over transactions governed by Mexican law. The court specifically rejected the arguments of appellee that all its operations were carried on primarily in Mexico, that all the witnesses were in Mexico, and that an American court would encounter difficulties in applying foreign law. None of these circumstances was considered sufficient to overcome the policy in favor of hearing suits between American residents in a United States court. *See also Vanity Fair Mills, supra* at 646; *Horovitz, supra* at 346; *Garrity v. United States*, 67 F.Supp. 821, 107 Ct. of Cl. 92 (Ct.Cl.1946).

Similar arguments have been made in the case now before us. Although there may be circumstances in which dismissal to avoid the complexities of foreign law can be justified,[15] that is not the case here. Even if the district court should decide on remand that the defamatory character of the article in question is to be determined under German law, a question about which we express no opinion, we note that this issue has already been decided by at least one West German court.[16] Moreover, the case presents important questions—such as the knowledge of the distributor of the article's libelous content—which will turn on evidence collected in the United States, and questions which may be controlled by local law.[17] Similarly, though the defense may intend to call almost exclusively German witnesses, the plaintiff will as a practical matter be required to call many witnesses from this country; and the Federal Rules of Civil Procedure make some provision for obtaining the foreign testimony and evidence that may be required.[18] The risk that foreign evidence cannot be obtained is no greater in federal court in the District of Columbia than it would be in a West German court. Finally, to the extent that language differences present problems, interpreters are available under Fed.R.Civ.P. 43(f).

[10] In *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947), the Supreme Court held:

> It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Our weighing of the relative advantages and obstacles to a fair trial[19] in the District convinces us that, while it is a somewhat inconvenient forum for the defendant, it is by no means apparent that the choice has been prompted by an intent to vex or harass. *See Wheeler v. Societe Nationale Des Chemins De Fer Francais*, 108 F.Supp. 652, 653 (S.D.N.Y.1952), *Latimer v. SZA Industrias Reunidas F. Matarazzo*, 91 F.Supp. 469, 471 (S.D.N.Y.1950). A trial judge has great but not unlimited discretion to apply the doctrine of *forum non conveniens*. Where, as here, there has been no *weighing* of the relative advantages of each forum but only a consideration of the drawbacks of one, that discretion has been abused.

Reversed.

---

15. *But see* Fed.R.Civ.P. 44.1.

16. *See* note 4 *supra*.

17. For example, the district judge indicated in his memorandum opinion that, even if he were to reach the merits, the action would in all probability be barred by the District of Columbia "single publication" rule, which the court apparently interpreted to mean that only one plaintiff may institute a defamation action based upon a single alleged libel in one edition of a magazine. App. 19. We think this may misconstrue the purpose of that rule. *Cf. Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967); W. Prosser, Torts 769-70 (4th ed. 1971).

18. *See* Fed.R.Civ.P. 28(b), 37(e), 43(a)(2). *See also Thomson v. Palmieri*, 355 F.2d 61, 66 (2d Cir. 1966) ("Presumably the witnesses employed by the defendant corporation can be examined in the United Kingdom by letters rogatory enforced by courts accorded the United States court by United Kingdom courts.").

19. *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

the many thousands of cosmetic formulations to pre-marketing clearance—both listing and certification—at enormous and apparently unnecessary cost both to the industry and to the Government." 419 F.2d at 27, 28.

Second, the district court in *Toilet Goods* did not determine whether silver nitrate, silver sulfate, and pyrogallol are "additives" or "diluents". The court only granted the Toilet Goods Association's request for an injunction against the enforcement of 21 C.F.R. § 8.1(f) because it improperly included *diluents and finished cosmetic products* within the definition of additives.

We conclude that the district court erred in granting the appellee's motion for summary judgment. The application of the doctrines of estoppel by judgment and res judicata was not justified. The *Toilet Goods* decision did *not* enjoin the F.D.A. from seizing cosmetics that *contain* "additives" that are unsafe because they have not been listed or exempted under the regulations. Furthermore, the district court in *Toilet Goods* did not determine whether the ingredients silver nitrate, silver sulfate, and pyrogallol are "additives" or "diluents". Therefore, the district court's reliance on *Toilet Goods* begged the controlling factual issue in this case. Are silver nitrate, silver sulfate, and pyrogallol "additives" or "diluents"?

2. *Estoppel Contention.*

[3] Appellee urges that, even if the district court erred in granting summary judgment, this court should nevertheless affirm the result because appellee is entitled to judgment as a matter of law on the ground of estoppel. More specifically, appellee asserts that the F.D.A. must be estopped from obtaining forfeiture of these cosmetics because it has rendered compliance with the Act impossible. Compliance was allegedly impossible because the F.D.A. has refused to grant permanent listing of additives during the pendency of the *Toilet Goods* appeal.

Appellee has failed in its proof. We cannot conclude that the F.D.A., at any time, announced a blanket refusal to consider listing applications for additives pending the appeal in *Toilet Goods*. Appellee has shown no prejudice or no improper practices by the F.D.A. The estoppel argument is without merit.

The judgment of the district court is reversed and remanded for trial on the merits.

The CHURCH OF SCIENTOLOGY OF CALIFORNIA, Plaintiff-Appellant,

v.

Elliot RICHARDSON,* et al., Defendants-Appellees.

No. 24276.

United States Court of Appeals, Ninth Circuit.

Jan. 11, 1971.

Suit by nonprofit corporation organized for ostensible purpose of disseminating religious doctrine to enjoin the Food and Drug Administration from refusing admission of skin galvanometers, known as E-meters, into the United States, to enjoin return of the devices to the country of origin and for damages. The United States District Court for the Central District of California, Manuel L. Real, J., granted the government's motion for summary judgment and denied a motion for relief from the judgment. The nonprofit corporation appealed. The Court of Appeals, James M. Carter, Circuit Judge, held that in determining the intended use of the E-meters, for determining applicability of the Federal

* Elliot Richardson has been substituted for his predecessor in office, Robert H. Finch, pursuant to Fed.R.Civ.P. 25(d) (1).

Food, Drug, and Cosmetic Ac
could validly consider claimar
tions which discussed applica
device, and claims in such l
regarding applications of th
practice of religion were pre
true, and there was no infri
First Amendment rights in
of allegedly religious literatu

Affirmed.

1. Constitutional Law ⇐84

Exercise of religious f
not include freedom to vio
Food, Drug, and Cosmetic A
Food, Drug, and Cosmet
201(h), 502, 801(a), 21
321(h), 352, 381(a).

2. Customs Duties ⇐22

Determination by S
Health, Education and Welf
vice" within Federal Foo
Cosmetic Act has been mi
may therefore not be imp
subject to judicial alteratio
trary and capricious. F
Drug, and Cosmetic Act
502(f), 801(a), 21 U.S.C.
352(f), 381(a).

3. Customs Duties ⇐2

In determining w
e., skin galvanometers, w
of Health, Education an
garded as "devices" w
Food, Drug and Cosmetic
to be misbranded and t
prohibition of importat
could consider: (a) plain
which contained diagnos
peutic claims, (b) plaint
that devices were ineff
medical therapeutic purp
of instructions for use on
vices, and (d) prior ad
E-meters were in fact
vices. Federal Food, Dru
ic Act, §§ 502(f) (1), 80
A. §§ 352(f) (1), 381(a).

4. Customs Duties ⇐22

E-meters, i. e., skin
even if harmless in them

...cy of the *Toilet Goods*

...ailed in its proof. We ...that the F.D.A., at any ...a blanket refusal to ...applications for addi... appeal in *Toilet Goods*, ...n no prejudice or no ...s by the F.D.A. The ...is without merit.

...of the district court is ...nded for trial on the

...SCIENTOLOGY OF ...Plaintiff-Appellant,

v.

...N 2 et al., Defendants-...pellees.

...21276.

...Court of Appeals, ...Circuit.

...1, 1971.

...rofit corporation or... ...ible purpose of dis... ...is doctrine to enjoin ...Administration from ...of skin galvanome... ...eters, into the United ...turn of the devices to ...in and for damages. ...District Court for the ...California, Manuel L. ...he government's mo... ...udgment and denied ...from the judgment. ...rporation appealed. ...ls, James M. Carter, ...that in determining ...he ...meters, for de... ...the Federal

...ert H. Finch, pursu...

Food, Drug, and Cosmetic Act, the court could validly consider claimant's publications which discussed applications of the device, and claims in such publications regarding applications of the device in practice of religion were presumed to be true, and there was no infringement of First Amendment rights in examination of allegedly religious literature.

Affirmed.

1. Constitutional Law ⇨81

Exercise of religious freedom does not include freedom to violate Federal Food, Drug, and Cosmetic Act. Federal Food, Drug, and Cosmetic Act, §§ 201(h), 502, 801(a), 21 U.S.C.A. §§ 321(h), 352, 381(a).

2. Customs Duties ⇨22

Determination by Secretary of Health, Education and Welfare that "device" within Federal Food, Drug, and Cosmetic Act has been misbranded and may therefore not be imported is not subject to judicial alteration unless arbitrary and capricious. Federal Food, Drug, and Cosmetic Act, §§ 201(h), 502(f), 801(a), 21 U.S.C.A. §§ 321(h), 352(f), 381(a).

3. Customs Duties ⇨22

In determining whether E-meters, i. e., skin galvanometers, which Secretary of Health, Education and Welfare regarded as "devices" within Federal Food, Drug and Cosmetic Act appeared to be misbranded and thus subject to prohibition of importation, Secretary could consider: (a) plaintiff's literature which contained diagnostic and therapeutic claims, (b) plaintiff's admission that devices were ineffective for any medical therapeutic purpose, (c) absence of instructions for use on labeling of devices, and (d) prior adjudication that E-meters were in fact misbranded devices. Federal Food, Drug, and Cosmetic Act, §§ 502(f)(1), 801(a), 21 U.S.C.A. §§ 352(f)(1), 381(a).

4. Customs Duties ⇨22

E-meters, i. e., skin galvanometers, even if harmless in themselves, could not be considered harmless, where ignorant and gullible persons might rely upon them instead of seeking professional advice for conditions which E-meters were represented to relieve or prevent, and branding provisions of Federal Food, Drug, and Cosmetic Act, including provision authorizing prohibition of importation, were therefore applicable. Federal Food, Drug, and Cosmetic Act, §§ 502, 801(a), 21 U.S.C.A. §§ 352, 381(a).

5. Constitutional Law ⇨81
Customs Duties ⇨22

In determining intended use of E-meters, i. e., skin galvanometers, for determining applicability of Federal Food, Drug, and Cosmetic Act provision authorizing refusal of importation, court could validly consider claimant's publications which discussed applications of device, and claims in such publications regarding applications of device in practice of religion were presumed to be true, and there was no infringement of First Amendment rights in examination of allegedly religious literature. Federal Food, Drug, and Cosmetic Act, § 502(f), 21 U.S.C.A. § 352(f); U.S.C.A. Const. Amend. 1; 42 U.S.C.A. §§ 1981, 1983.

6. Courts ⇨100.9(3)

Where prior case was mentioned by district court as one upon which government could have reasonably relied in taking the action complained of in instant case, but res judicata was not mentioned by district court, subsequent reversal of prior case did not require reversal in instant case on ground of misapplication of res judicata.

7. Customs Duties ⇨22

Labels of disclaimer, to-wit: "Not intended or effective for the diagnosis, treatment or prevention of any disease," found on about half of devices, were not controlling in determining whether devices were mislabeled within Federal Food, Drug, and Cosmetic Act, and thus subject to prohibition of importation, but were to be considered together with any extrinsic evidence of intended use of device. Federal Food, Drug, and Cos-

metic Act, § 502(f), 21 U.S.C.A. § 352(f).

Marvin Zinman (appeared), Los Angeles, Cal., for appellant.

Larry Dier (appeared), Asst. U. S. Atty., William Matthew Byrne, Jr., U. S. Atty., Frederick M. Brosio, Jr., Chief, Civ. Div., Los Angeles, Cal., for appellees.

Before ELY, CARTER and TRASK, Circuit Judges.

JAMES M. CARTER, Circuit Judge:

This appeal involves an alleged deprivation of rights protected by the United States Constitution and the Civil Rights Act of 1964 (42 U.S.C. §§ 1981, 1983).

Appellant is a California non-profit corporation, organized for the ostensible purpose of disseminating religious doctrine known as "Scientology."[1] The "Hubbard E-meter" is an instrument that is allegedly essential to the practice of Scientology. The E-meter is manufactured in the United Kingdom and is, in fact, a simple skin galvanometer that crudely measures changes in electrical resistance in the human body. The Food and Drug Administration refused to allow the importation of E-meters because they were deemed to be "devices" (21 U.S.C. § 321(h)) that appeared to be "misbranded" in that they did not bear adequate instructions for use (21 U.S.C. § 352(f) (1)). The refusal was based, *inter alia*, on a successful condemnation action against certain E-meters in the District Court for the District of Columbia [United States v. An Article of Device . . . E-meter (D.C.Civ.No. DC1-1963 (1967))]. The E-meters here in question were seized and detained by Post Office and Customs officials on the ground that they were in violation of the Federal Food, Drug, and Cosmetic Act.

After the instruments were seized, appellant received a hearing before the Food and Drug Administration in Los Angeles on August 6, 1968. The hearing examiner concluded that the E-meters did not bear adequate instructions for use and, therefore, that they could not be imported into this country. Upon considering the record of the hearing and other available information, the Food and Drug Administration concluded that the E-meter devices appeared to be misbranded within the meaning of 21 U.S.C. § 352(f)(1), as alleged in the notice of seizure, and made the determination of misbranding.

Appellant then filed this suit: (a) to enjoin the F.D.A. from refusing admission of the E-meters into the United States; (b) to enjoin the F.D.A. from compelling the return of the devices to their country of origin; and (c) for $20,000.00 in damages to persons in the class affected. The district court granted the Government's motion for summary judgment. Thereafter, appellant filed a motion for relief from judgment on the basis that, in the interim, the D. C. District Court's earlier condemnation of certain E-meters had been reversed by the D.C. Circuit Court of Appeals in Founding Church of Scientology v. United States, 133 U.S.App.D.C. 229, 409 F. 2d 1146, cert. denied 396 U.S. 963, 90 S. Ct. 434, 24 L.Ed.2d 427 (1969). The motion was denied. We affirm.

Discussion

The Government may refuse admission to any "device" offered for importation if it *appears* to be "misbranded" [21 U.S.C. § 381(a)]. The term "device" is defined as "instruments, apparatus, and contrivances * * * intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man * * *. [21 U.S.C. § 321(h)]." A device is considered to be "misbranded" if, *inter alia*, its labeling does not bear adequ use [21 U.S.C. § 352(

1. *Issues*

Appellant contends court erred in granti ment because there w of fact remaining. A these issues of fact v the E-meter was use practices of Scient whether the E-mete ed?

[1] The issue of leged religious use The district court hel of religious freedom freedom to violate Drug, and Cosmetic A

The "misbranding" accurately described scope of judicial rev court held that the vice" within § 321(h tended for use in t mitigation, treatmen disease in man.[2] All ject to the Act's bra [21 U.S.C. § 352].

[2] Section 381(a the device *appear* to vests such determina tion of the Secretary tion, and Welfare, termination of misb ject to judicial alter arbitrary and capric Forbrand (9 Cir., 19

First, there were complaint that the nation of misbrandi capricious. The real the complaint was a of civil rights, to wi

[3] Second, the the action was not cious. In determinin appeared to be misl

1. For a thorough presentation of the facts and practices of "Scientology" see Founding Church of Scientology v. United States (1969) 133 U.S.App.D.C. 229, 409 F.2d 1146.

2. The Seventh Circui finding with regard galvanometer in Uni

ments were seized, ap- hearing before the dministration in Los 6, 1968. The hear- luded that the E-me- adequate instructions fore, that they could this country. Upon ord of the hearing le information, the ministration conclud- devices appeared to in the meaning of 21 as alleged in the d made the determi- ng.

ed this suit: (a) to om refusing admis- rs into the United in the F.D.A. from n of the devices to and (c) for s to persons in the district court grant- motion for summa- ereafter, appellant lief from judgment the interim, the D. arlier condemnation had been reversed ourt of Appeals in Scientology v. Unit- pp.D.C. 229, 409 F. 396 U.S. 963, 90 S. 427 (1969). The We affirm.

sion

ay refuse admis- offered for impor- be "misbranded"]. The term "de- struments, appara- * * * intend- diagnosis, cure, or prevention of *. [21 U.S.C. § considered to be its labeling

pp.D.C. 229, 409

does not bear adequate directions for use [21 U.S.C. § 352(f)].

1. *Issues of Fact*

Appellant contends that the district court erred in granting summary judgment because there were material issues of fact remaining. Appellant urges that these issues of fact were: (a) whether the E-meter was used in the religious practices of Scientology; and (b) whether the E-meters were misbranded?

[1] The issue of the E-meters' alleged religious use is irrelevant here. The district court held that the exercise of religious freedom does *not* include the freedom to violate the Federal Food, Drug, and Cosmetic Act. We agree.

The "misbranding" issue can be most accurately described as a question of scope of judicial review. The district court held that the E-meter was a "device" within § 321(h) because it is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man.[2] All "devices" are subject to the Act's branding requirements [21 U.S.C. § 352].

[2] Section 381(a) requires only that the device *appear* to be misbranded, and vests such determinations in the discretion of the Secretary of Health, Education, and Welfare. The Secretary's determination of misbranding is *not* subject to judicial alteration unless it was arbitrary and capricious. Sugarman v. Forbragd (9 Cir. 1968) 405 F.2d 1189.

First, there were no allegations in the complaint that the Secretary's determination of misbranding was arbitrary or capricious. The real issue tendered by the complaint was an asserted violation of civil rights, to wit religious freedom.

[3] Second, the district court found the action was not arbitrary or capricious. In determining that the E-meters appeared to be misbranded, the Secretary could consider: (a) appellant's literature that contains diagnostic and therapeutic claims for the E-meter; (b) appellant's admission that the devices are ineffective for any medical therapeutic purpose; (c) the absence of instructions for use on the labeling of the devices; and (d) the prior adjudication by the D.C. District Court that the E-meters were in fact misbranded devices. In view of this evidence, the district court concluded that appellant had failed to establish any arbitrary or capricious action by the Secretary. We agree.

[4] Appellant argues that *Sugarman's* limitation on judicial review is inapplicable here because the Secretary has ignored the Congressional mandate to exempt from the Act's branding requirements any device as to which labeling would not be necessary for the protection of the public health [21 U.S.C. § 352(f)]. Appellant contends that E-meters are non-injurious and, therefore, should have been exempted. We think that the Hubbard E-meter is akin to the device in issue in Drown v. United States (9 Cir. 1952) 198 F.2d 999. In *Drown*, this court held:

> "While the instruments may be harmless in themselves, their danger lies in the possibility that 'ignorant and gullible persons are likely to rely upon them instead of seeking professional advice for conditions they are represented to relieve or prevent'." [198 F. 2d at 1006].

In this sense, appellant's E-meters cannot be considered harmless and, therefore, the Act's branding provisions are applicable. *See also* United States v. Ellis Research Labs. (7 Cir. 1962) 300 F. 2d 550.

2. *First Amendment Violations*

[5] Appellant contends that, in making the determination of "misbranding," the court must have considered and evaluated Scientology's religious literature

2 The Seventh Circuit upheld the same finding with regard to a similar skin galvanometer in United States v. Ellis Research Labs (7 Cir. 1962) 300 F.2d 550.

in violation of its First Amendment rights. The district court found that the appellant had conceded that the E-meter devices were ineffective for any medical or therapeutic purposes. Appellant asserts that the devices are used solely as a confessional aid in Scientology, and that the detention of the devices by the Government unlawfully interferes with appellant's religious freedom.

In *Founding Church, supra*, the D.C. Circuit held that the court could not constitutionally evaluate the truth or falsity of the medical claims made in Scientology's "religious" literature, citing United States v. Ballard (1944) 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148. The statute in issue there was 21 U.S.C. § 334(a), which provides that a device is misbranded if its "labeling" bears false or misleading claims. The court reversed the decree of condemnation on the ground that "*some* of that literature was at least *prima facie* religious doctrine, and that the jury, as it was instructed, could have found against the E-meter by finding false statements in 'labeling' which was at the same time religious doctrine." 409 F.2d at 1164. The court specifically reserved, however, the issue of whether "a drug or device used in a religion is subject to condemnation as 'misbranded' if its labeling is found to lack * * * adequate directions for use [21 U.S.C. § 352(f)]." 409 F.2d at 1162.

In determining the E-meter's *intended* use, the court could validly consider the appellant's publications that discuss the device's applications. Nature Food Centres, Inc. v. United States (1 Cir. 1963) 310 F.2d 67; United States v. Article of Drug . . . Capsules (3 Cir. 1966) 362 F.2d 923; Alberty Food Prod's v. United States (9 Cir. 1952) 194 F.2d 463. Unlike the "mislabeling" section involved in *Founding Church*, the court here could determine the E-meter's intended use without evaluating the truth or falsity of any related "religious" claims. To the contrary, appellant's claims in its literature regarding the applications of the device in the practice of religion were presumed to be true for the purpose of determining its intended use. We find no infringement of First Amendment rights.

3. *Potpourri*

[6] Appellant contends that the district court misapplied the doctrine of res judicata by allegedly relying completely on the district court result in *Founding Church*. Appellant is mistaken. The district court's opinion does not contain any mention of the doctrine of res judicata. The court only referred to the district court decision in *Founding Church* as a fact, among others, that the Government could have reasonably relied upon in deciding to refuse admission to the E-meters pursuant to 21 U.S.C. § 381(a). During the pendency of the appeal in the District of Columbia, such reliance would seem to be quite proper. The subsequent reversal by the D.C. Circuit does not require reversal here, because the doctrine of res judicata was never applied.

[7] Finally, appellant asserts that the E-meters are not misbranded because they bear disclamatory labels, to wit: "Not intended or effective for the diagnosis, treatment, or prevention of any disease." Such labels, however, were found to appear on less than half of the devices seized. Furthermore, labels of disclaimer are not controlling, but are to be considered together with any extrinsic evidence of the device's intended use (e. g. publications, advertisements, etc.) Alberty Food Prod's v. United States (9 Cir. 1952) 194 F.2d 463. There is ample evidence to support the court's finding of the E-meter's intended use.

We find appellant's allegations of error to be without merit. The judgment of the district court is affirmed.

E

Gerasimos BEKRIS
v.
GREEK M/V ARISTOT
engines, tackle, appare
Shipping Ltd., Vinke
Freighters, S.A., J. A
Ltd., Aristides Stea
Amerind Shipping Co
ent Gulf Line, all for
or associations, as ow
ators of the Greek M/V
Elias Lymardatos, a
vidually and as Mast
M/V Aristoteles, Appe
No. 1456

United States Court
Fourth Cir

Argued Dec. 1

Decided Jan. 2

Suit in admiralty
resident of Greece a
Greek registry flying
The United States Dist
Eastern District of Vir
Kellam, J., 318 F.Supp.
suit without prejudice,
pealed. The Court of
Senior Circuit Judge, h
supported findings that
tiff for earned wages
States port, without d
vances on future earnin
tion of federal statutes,
ed damages due under
statute because of wi
wages due at such po
faith claims. The Co
that declining jurisdict
other than such statut
bore no relationship t
other than that case v
personal jurisdiction v
United States was not
tion.

Affirmed.

1. Admiralty ⇐25

Timely objection, i
ty, to federal district

* Judge Sobeloff att

that became vacant within two years of the effective dates of such lists.[16] The stay entered on March 6, 1972, is terminated.

Jurisdiction will be retained for the implementation of the decree.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, INC., Plaintiff,

v.

Bernard GREEN and Barbara Green, Defendants.

No. 69 Civ. 5745.

United States District Court, S. D. New York.

Feb. 9, 1973.

Proceeding on counterclaim for libel brought by members of church against church. The District Court, Levet, J., held that where third party saw a copy of alleged libelous writ of expulsion issued by the church in normal course of his duties as executive secretary worldwide for the church and as a member of executive council, and the writ was properly brought to such third party by executive officers of the church, such communication to third party was subject to a qualified privilege and did not constitute a "publication."

Counterclaim dismissed.

1. Courts ⇐359.1(5)

In cases founded upon diversity of citizenship, a federal district court applies substantive law of state wherein it sits, including rules of conflict of law prevailing in that state.

2. Courts ⇐359.1(13)

New York's rule of conflict of law furnished guide for resolution of choice of law issue arising in diversity action for libel brought in federal district court for Southern District of New York.

3. Torts ⇐2

Under New York's rule of conflict of law, substantive law applicable to an alleged tort is the place which has the most significant relationship with the subject matter of the tort charged.

4. Libel and Slander ⇐1

Substantive law of New York governed diversity action for libel brought in United States District Court for Southern District of New York, where receipt of alleged libelous statement took place in New York, and alleged publication, in all but one instance, took place in New York.

5. Libel and Slander ⇐25

There can be no libel, regardless of nature of statement, unless there is publication.

6. Libel and Slander ⇐25

Mere receipt of an alleged libelous statement by one claiming to be defamed does not establish libel.

7. Libel and Slander ⇐23

There is no publication if defamatory statement is exposed to a third party by person claiming to be defamed.

8. Libel and Slander ⇐15(3)

A communication made between officers within organizational structure of a church, or a corporation, made in good faith, on any subject in which the one communicating has an interest or in which there is a duty, is privileged if made to a person having a corresponding

16 The pendency of this lawsuit did not prevent any person standing high on the eligibility lists for patrolman and detective from being appointed or promoted to vacancies occurring after two years from the effective dates of such lists. Only those who would have been promoted to patrolman or promoted to detective but for this lawsuit and the consent order of March 6, 1972, staying appointments and promotions, are entitled to the benefit of a ruling tolling the validity period of the lists that otherwise would have expired in October, 1972. But they are not entitled to any more protection than that provided by provision 4.

CHURC

interest or duty, o
matter which, wi
would be actionabl
though duty is not
a moral or social d

9. Libel and Slande
Where third
alleged libelous wr
by church in norm
as executive secret
church and as a
council, and the
brought to such th
officers of the chu
tion to third party
fied privilege and
"publication," hen

See publication
for other judici
definitions.

10. Libel and Slan
Evidence fail
on part of church
of expulsion.

Silk, Slonim & W
for plaintiff; How
City, Joel Kreine
of counsel.

John J. Seffern
defendants.

LEVET, Dis

The present
terclaim, is for li
ants Bernard Gre
against plaintiff
ogy of California
ferred to as "the
original claims of
enjoin the Greens
selves out as "bo

1. For a thorough
tion, history and
Church of Scient
nartly able opin
Wright in Found
tology v. United St
229, 60 T.C.M. 11
Founding Church
States, 188 Ct.Cl.

351 F.Supp.—51

interest or duty, even though it contains matter which, without this privilege, would be actionable; such is case even though duty is not a legal one but only a moral or social duty or obligation.

9. Libel and Slander ⇐25, 45(3)

Where third party saw a copy of alleged libelous writ of expulsion issued by church in normal course of his duties as executive secretary worldwide for the church and as a member of executive council, and the writ was properly brought to such third party by executive officers of the church, such communication to third party was subject to a qualified privilege and did not constitute a "publication," hence there was no libel.

See publication Words and Phrases for other judicial constructions and definitions.

10. Libel and Slander ⇐112(1)

Evidence failed to show publication on part of church of alleged libelous writ of expulsion.

Silk, Slonim & Young, New York City, for plaintiff; Howard Slonim, New York City, Joel Kreiner, Los Angeles, Cal., of counsel.

John J. Seffern, New York City, for defendants.

LEVET, District Judge.

The present action, by way of a counterclaim, is for libel brought by defendants Bernard Green and Barbara Green against plaintiff The Church of Scientology of California, Inc. (sometimes referred to as "the Church"). One of the original claims of the Church sought to enjoin the Greens from holding themselves out as "bona fide" ministers of the Church. All claims of the Church have been withdrawn.

Although the case has been completely tried, the sole issue for determination presently before this court is whether there was publication of the alleged libelous statement. Obviously, if there is no publication then there is no libel. Other issues, although tried, have been deferred pending a decision on this limited issue.

After hearing the testimony of the parties, examining the exhibits, the pleadings, the Proposed Findings of Fact and Conclusions of Law with respect to the issue of publication, this court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This court has jurisdiction over the subject matter of the litigation and the parties hereto.

2. The Church of Scientology of California, Inc. is a non-profit corporation, incorporated under the laws of the State of California, with its principal place of business in Los Angeles, California.[1] (288[2]; Ex. 6.)

3. Bernard Green and Barbara Green reside at 685 West End Avenue, New York, New York, and are presently operating from that address an unincorporated association known as the "International Awareness Center."

Bernard Green became a member of Scientology in 1953 and received training for several years thereafter. He held a "franchise" of the Church of Scientology and was operating said franchise in 1969. In such a capacity he conducted spiritual counseling. (17-34, 38-43, 69.)

1. For a thorough discussion of the structure, history and goals of the "unusual" Church of Scientology see the extraordinarily able opinion of Judge Skelly Wright in Founding Church of Scientology v. United States, 133 U.S.App.D.C. 228, 409 F.2d 1146 (1969). See also, Founding Church of Scientology v. United States, 188 Ct.Cl. 880, 412 F.2d 1197 (decided July 16, 1969); Church of Scientology v. United States, United States Court of Claims No. 229-67 (decided August 7, 1968).

2. Numbers in parentheses, unless otherwise specified, refer to the stenographic minutes of the trial before this court on October 4, 5, and 6, 1972.

Barbara Ferraro married Bernard Green in 1968 and together they operated the Scientology franchise. (170-171.)

On or about November 20, 1969 the Scientology franchise held by the Greens was cancelled by a notice from the Church of Scientology of New York. (123-124; Ex. 3.)

4. On December 10, 1969 a document from the Church bearing the heading, "Writ of Expulsion," was received by Bernard Green in the mail. The document, dated December 3, 1969, contained the alleged libelous statement:

> "1. Further evidence found indicts Bernard Green of attempted blackmail of parishioners he has counseled." (50-52; Ex. B.)[3]

Clarice Jackson, an Ethics Officer and member of the Church of Scientology of California, authored the writ which was sent to Bernard Green. After the formulation of the writ Jackson personally carried it to Fred Hare and Hanna Eltringham, officers of the Church, for their approval. The names of Jackson, Hare and Eltringham appear on the writ (Ex. B) as co-originators. Jackson then typed the original handwritten draft onto a stencil. Two copies of the stencil were then mimeographed, in Jackson's presence, by one James Isaacson. Isaacson was a L. Ron Hubbard (LRH)[4] Communicator, whose duties were "to watch the organization, that it was running correctly, that it was following the prescribed policy . . . and that the ethics decisions that came down were done correctly . . . ." (374.) In such a capacity Isaacson was responsible for mimeographing ethic orders such as the writ sent to Bernard Green. (325-326, 374-375; Ex. B.)

Clarice Jackson mailed one copy of the writ to Bernard Green and placed the other copy in the locked files of the Church. (339-342.)

The original writ prepared by Clarice Jackson differed from the letters or copies of the writ claimed by the Greens to have been received by other members of the Church (Ex. B) in three respects:

(A) It did not have a border of approximately two inches from the top and bottom edges of the paper;

(B) There were no initials on the original prepared by Jackson as found in the lower left corner of Exhibit B;

(C) The writ, when mailed by Jackson, was placed in a white envelope and folded in thirds. There is no indication on Exhibit B, the writ received by Bernard Green, that it had been folded.

6. Bernard Green's allegation of publication by the Church is not supported by the credible evidence.

Green contends that there was publication of the writ when it was mailed in California and received in New York by Barbara Green, Michael Gerson, Michael Kates, Frank Catricola and Allan Ferguson.

(A) Barbara Green testified that she first saw a copy of the writ when her husband showed it to her. (159-160.) This, obviously, is not a publication on which a libel action can be based since Bernard Green himself "published" it.

(B) Michael Gerson, who had received counseling from Bernard Green in 1969, testified that he received a copy of the writ on October 4, 1969. Gerson said the letter came in a business envelope and that it was folded in thirds. (148-149.) Furthermore, he had no definite recollection from whom or from which branch of the Church of Scientology, if any (California or New York), the letter came. (241-243.)

(C) Michael Kates, who received counseling from Bernard Green, testified that he received a copy of the writ in the mail in December of 1969. He also conceded that he did not know where the writ came from. (233-242.)

(D) Frank Catricola, who received counseling from Bernard Green, testified

3. Exhibit B is Appendix I hereto. In this opinion I am proceeding on the presumption that this statement is libelous.

4. L. Ron Hubbard is the founder of Scientology and resides somewhere at sea. (230.)

CHU

that he receive
or about Decen
did not testify
came from. (2

(E) Allan F
Secretary Wor
and a member
working in En
that he saw a
course of his of
1969, Ferguso
brought to him
ther Roger Wri
tor, or by Jam
Deputy Guardi
Wide of the
Ferguson passe
to Hubbard "w
been." (259-26
to see the writ,
no publication.

I find that p
libelous writ ha
any of the afo

In summa
publication
ment.

DI

Bernard and
this action for
of Scientology o

[1-4] The
tion requires
What law appli
nia? In such c
on diversity of
trict court appl
of the state w
the rules of co
in that state.
Electric Mfg. C
1020, 85 L.Ed.
Corp. v. Randol
508 (2d Cir. 1
of conflict of l
the guide. It p
substantive law
tort is "the pla

5. In disposing of
sidered the que
Green is a prop

that he received a copy of the writ on or about December 15 or 16, 1969. He did not testify as to where the writ came from. (273-276.)

(E) Allan Ferguson, the Executive Secretary World Wide for Scientology and a member of the Executive Council, working in England in 1969, testified that he saw a copy of the writ in the course of his official duties in December 1969. Ferguson said that the writ was brought to him by executive officers either Roger Wright, a LRH Communicator, or by Jane Kember, who was the Deputy Guardian or Guardian World Wide of the Church of Scientology. Ferguson passed the copy of the writ on to Hubbard "wherever he might have been." (259-261.) Ferguson had a duty to see the writ. Accordingly, there was no publication.

I find that publication of the alleged libelous writ has not been shown through any of the aforementioned witnesses.

In summary, I find that there was no publication of the alleged libelous statement.

DISCUSSION

Bernard and Barbara[5] Green bring this action for libel against the Church of Scientology of California, Inc.

[1-4] The basic choice-of-law question requires no extended discussion. What law applies, New York or California? In such cases as this, founded upon diversity of citizenship, a federal district court applies the substantive law of the state wherein it sits, including the rules of conflict of law prevailing in that state. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); Jaffee Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960). New York's rule of conflict of law, therefore, furnishes the guide. It plainly provides that the substantive law applicable to an alleged tort is "the place which has the most significant relationship with the subject matter of the tort charged." Nader v. General Motors Corp., 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (1970). See also Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963). Accordingly, the substantive law of New York governs. Bernard Green is a citizen of the State of New York. Receipt of the alleged libelous statement by Bernard Green took place in New York. Alleged publication, in all but one instance (i. e., Ferguson) took place in New York. New York thus has the greatest interest in the outcome of the litigation.

The only substantive issue presently before this court for determination is whether or not there was publication of the alleged libelous statement.

On December 10, 1969 a "Writ of Expulsion" (Ex. B) was received in the mail by Bernard Green from the Church. The writ or letter contained the alleged libelous statement:

"Further evidence found Indicts Bernard Green of attempted blackmail of parishioners he has counseled." (Ex. B.)

[5, 6] It is elementary that there can be no libel, regardless of the nature of the statement, unless there is publication. Mere receipt of an alleged libelous statement by the one claiming to be defamed does not establish libel.

Law in the field of defamation has changed considerably in a short span of time. However, an enunciation of Judge Cardozo in Ostrowe v. Lee, 256 N.Y. 36, 175 N.E. 505 (1931) is "as good as new":

"In the law of defamation, 'publication' is a term of art. . . . A defamatory writing is not published if it is read by no one but the one defamed. Published, it is, however, as soon as read by any one else. [Citations omitted.]" (At p. 38, 175 N.E. at p. 505.)

5. In disposing of this case I have not considered the question of whether Barbara Green is a proper party, although it would seem that she has no right of action since her husband was the one allegedly defamed.

in this District have
le time. The Consti-
not require any pay-
advance of the tak-
omary for the Unit-
ndemnor, to make a
of what it estimates
for.

rence of opinion be-
r and the land owner
at the property is
nt to a taking with-
ithout just compen-

lequate award after
n would not be a vi-
nal rights. As Jus-
Chicago Life Ins.
.S. 25, 30, 37 S.Ct.
66 (1917): "When-
ment is entered
roperty is tak-
ot have been, but
may be, if the mis-
as to be impossible
ration of justice, it
e imperfection of
of constitutional
revered judge said
York, 229 U.S. 363,
76, 57 L.Ed. 1228
very judgment by
than he ought, and
ed of his property"
n of due process of

to deposit in ad-
as plaintiffs want-

a rule, returnable
vice upon the con-
se why a writ of
issue, upon which
iminary objections
ending, may issue
conditioned upon
nce or into court
st compensation
ms as the court

S..., 357 U.S.
2 L.Ed.2d 1332

ed for their property is not a violation of the Civil Rights provision.[6]

[10] The same is true of plaintiffs' other allegation, that the authority was condemning for an improper purpose. Plaintiffs waived this issue by failing to file preliminary objections as authorized by the Eminent Domain Code, 26 P.S. § 1-406.[7]

Moreover, whatever a social philosopher may feel in the exercise of hindsight with regard to the hardship and folly manifested in certain "redevelopment" programs, there has never been a case where the legislative determination of what constitutes a proper public use has been judicially overruled.[8] Berman v. Parker, 348 U.S. 26, 34, 75 S.Ct. 98, 99 L.Ed. 27 (1954), is a striking case. So is Crawford v. Redevelopment Authority, 418 Pa. 549, 554-556, 211 A.2d 866 (1965).

[11] Thus in the absence of any constitutional rights of which defendant Authority deprived plaintiffs, there is no cause of action stated under the Civil Rights provision, and the motion to dismiss must be granted.[9]

The action against the individual board members of the Authority must also be dismissed because of the lack of any specific allegations of any actions by themselves other than collectively as the Authority's board.

The CHURCH OF SCIENTOLOGY OF CALIFORNIA a religious corporation, and Reverend Robert H. Thomas, Plaintiffs,

v.

DELL PUBLISHING CO., INC., a New York corporation, and George Malko, Defendants.

No. C-70-2089.

United States District Court, N. D. California.

Aug. 3, 1973.

As Corrected Sept. 17, 1973.

Defamation action was brought against publisher and author of book on scientology by a corporation and an individual engaged in proselytizing the religion of scientology. On a defense motion for summary judgment, the District Court, Schnacke, J., held that a material issue of fact on the question of actual malice existed in view of the admitted republication of the book in paperback after defendants' receipt of a letter from an attorney for plaintiffs demanding a retraction, accompanied by a signed statement of one of the persons referred to in the book denying the truth of certain statements about him therein, precluding entry of summary judgment.

Motion denied.

6. Similarly, it is settled law that mere tort claims and suits to recover property are not civil rights cases. Fletcher v. Hook, 446 F.2d 14, 15 (C.A.3, 1971); Carter v. Chief of Police of Red Bank, 437 F.2d 413, 415 (C.A.3, 1971); Cisneros v. Cavell, 437 F.2d 1202, 1203 (C.A.3, 1971); Isenberg v. Prasse, 433 F.2d 449 (C.A.3, 1970); United States ex rel. Gittelmacker v. County of Philadelphia, 413 F.2d 84, 87 (C.A.3, 1969); Screws v. United States, 325 U.S. 91, 101, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945).

7. "Preliminary objections shall be ... the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated, (2) the sufficiency of the security; ... Failure to raise these matters by preliminary objections shall constitute a waiver thereof."

8. See Dumbauld, The Bill of Rights and What It Means Today (1957) 99-100.

9. Hence we do not reach the ticklish issue of "abstention" [see Clark v. Ellenbogen, 319 F.Supp. 623, 624-625 (W.D.Pa. 1970)], noting only that an award of just compensation to plaintiffs will doubtless in due course issue as a consequence of the pending proceeding in State court, where plaintiffs have sought delay rather than a speedy trial. We note also that litigation regarding rights in land is one that was recognized as a peculiarly proper subject for State adjudication even in pre-*Erie* days.

1. Libel and Slander ⇐49

Privilege laid down in the "New York Times" line of defamation cases is applicable to permanent publications such as books, as well as to newspapers, magazines, radio and television.

2. Federal Civil Procedure ⇐2515

In defamation action brought against publisher and author of a book on scientology by a corporation and an individual engaged in proselytizing the religion of scientology, a material issue of fact on the question of actual malice existed in view of the admitted republication of the book in paperback after defendants' receipt of a letter from an attorney for plaintiffs demanding a retraction, accompanied by a signed statement of one of the persons referred to in the book denying the truth of certain statements about him therein, precluding entry of summary judgment. Fed. Rules Civ.Proc. rule 56, 28 U.S.C.A.; West's Ann.Cal.Civ.Code, §§ 48a, 3425.3.

3. Libel and Slander ⇐112(2)

If a republication of an allegedly defamatory article is found to be malicious, that can be evidence of maliciousness in the original publication. West's Ann.Cal.Civ.Code, §§ 48a, 3425.3.

4. Libel and Slander ⇐123(6)

On the question of actual malice, prepublication denials and demands for retraction are not decisive either way, but are for the trier of fact to determine under the circumstances as part of the overall questions of knowledge and recklessness.

Robert B. Ingram, Belli, Ashe, Ellison & Choulos, San Francisco, Cal., for plaintiffs.

John A. Sutro, Jr., Pillsbury, Madison & Sutro, San Francisco, Cal., for defendants.

OPINION AND ORDER

SCHNACKE, District Judge.

In this defamation action, defendants have moved for summary judgment. The Court has concluded that the motion must be denied but deems it advisable to discuss some of the legal issues for guidance in future phases of the case.

Defendants are the publisher and author, respectively, of a book entitled *Scientology: The New Religion*, originally published in a hardcover edition, upon which the present complaint is founded, and later reissued in paperback following the commencement of this action, a point which will be discussed below. Plaintiffs are a corporation and an individual engaged in "proselytizing the religion of Scientology."

In connection with its consideration of the present motion, the Court has read the book in question. In general terms, it is a work of the expose type, its thesis being that "Scientology" is a pseudoreligion concocted by one Lafayette Ronald Hubbard, originally a science-fiction writer, but now claiming credentials as a religious founder and teacher; that Hubbard concocted Scientology primarily for commercial purposes (which have been most successfully achieved despite running battles with governmental officials in this country and abroad); and that it is no more than a hodgepodge of (1) scientific gobbledygook with borrowings from Freudian psychology, (2) other scientific and pseudoscientific sources, and (3) fantasies of the type familiar to devotees of science-fiction—all decked out in religious guise solely to attract the gullible and achieve certain hoped-for legal advantages.

Whether or not the book is false or defamatory of plaintiffs or others is not the issue before the Court; for present purposes it may be assumed to be.

The basic issue raised by defendants' motion is whether, under undisputed facts before the Court, defendants are entitled to judgment as a matter of law. F.R.Civ.P., Rule 56.

This turns in large measure upon whether the undisputed facts disclose that the publication is privileged under the rules laid down in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct.

710, 11 L.Ed.2d 686
quent controlling dec
of which need be discu

[1] Plaintiffs at
that the privilege is i
cause the subject ma
"public interest", Tim
U.S. 374, 388, 87 S.C
456 (1967); Rosenblo
403 U.S. 29, 41-42, 91
Ed.2d 296 (1971), but
lege applies only to n
papers, magazines, ra
and not to more p
tions such as a book.
that the privilege w
book in Gordon v. Ra
349 F.Supp. 919 (E.
ently the only case fo
Times involving a bo
the Court there "did
However, in grantin
ment for defendant,
sarily assumed, althou
cifically so state, that
volved was privileged
ards of the *New Yo*

Moreover, the dist
plaintiffs is not an a
Times line of cases re
tial freedom of pub
shrined in the First A
upon the form such d
or the mere expedienc
reports to the public
ally, books have pla
tal a role in the disc
sues as the other medi

We therefore hold
laid down in the *Ne*
of cases is applicable h

The nature of, and
the privilege are state
Times case as follows:

"The constitutio
quire, we think, a
prohibits a public
covering damages

1. The need for speed i
bear upon the issue
ciency. Cf. Curtis Pu

uded that the motion
deems it advisable to
legal issues for guid-
s of the case.

he publisher and au-
of a book entitled
Now Religion, origi-
a hardcover edition,
resent complaint is
eissued in paperback
encement of this ac-
will be discussed be-
a corporation and an
n "proselytizing the
ry."

its consideration of
the Court has read
In general terms,
xpose type, its thesis
ogy" is a pseudoreli-
ne Lafayette Ronald
a science-fiction
credentials a
and teacher; that
Scientology primari-
rposes (which have
lly achieved despite
governmental offi-
and abroad); and
an a hodgepodge of
edygook with bor-
ian psychology, (2)
d pseudoscientific
ntasies of the type
of science-fiction
gious guise solely to
and achieve certain
tages.

he book is false or
ffs or others is not
Court; for present
umed to be.

ised by defendants'
under undisputed
rt, defendants are
s a matter of law.

ge measure upon
facts disclose
ileged under
New York Times
U.S. 254, 84 S.Ct.

710, 11 L.Ed.2d 686 (1964) and subsequent controlling decisions, only a few of which need be discussed here.

[1] Plaintiffs at the outset argue that the privilege is inapplicable, not because the subject matter is not one of "public interest", Time, Inc. v. Hill, 385 U.S. 374, 388, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967); Rosenbloom v. Metromedia, 403 U.S. 29, 41-42, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), but because the privilege applies only to news media—newspapers, magazines, radio and television—and not to more permanent publications such as a book. Plaintiffs concede that the privilege was afforded to a book in Gordon v. Random House, Inc., 349 F.Supp. 919 (E.D.Pa.1972), apparently the only case following *New York Times* involving a book, but argue that the Court there "did not face the issue." However, in granting summary judgment for defendant, that Court necessarily assumed, although it did not specifically so state, that the book there involved was privileged under the standards of the *New York Times* doctrine.

Moreover, the distinction urged by plaintiffs is not an appealing one. The *Times* line of cases rests upon the essential freedom of public discussion enshrined in the First Amendment and not upon the form such discussion may take or the mere expediency of getting news reports to the public promptly.[1] Historically, books have played at least as vital a role in the discussion of public issues as the other media.

We therefore hold that the privilege laid down in the *New York Times* line of cases is applicable here.

The nature of, and limitations upon, the privilege are stated in the *New York Times* case as follows:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (Pp. 279-280 of 376 U.S., p. 726 of 84 S.Ct.).

The type of persons and subject matter against which the privilege applies have been broadened in later cases, so that it now applies generally to matters of "public interest." See cases cited above. But the limitations or qualifications have remained the same, and have been repeated a number of times by the Court. E. g., St. Amant v. Thompson, 390 U.S. 727, 728, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

It is clear that the concept of "actual malice" includes what follows the quoted term. Thus, the issue is not whether there was ill will or animosity, but only whether the defendant acted with "knowledge" of the falsity of the published matter or with "reckless disregard of whether it was false or not." Accordingly, the cases have generally boiled down to a consideration of the circumstances leading up to the publication, the investigation that preceded it and the like. In most of the cases, in fact, the principal issue is the nature, extent and reasonableness of the prepublication investigation.

The requirements of such investigation are extensively discussed in *Curtis Publishing Co., supra*, and other cases.

[2] The background of the writing and publication of *Scientology: The Now Religion* is the subject of numerous affidavits, interrogatories, depositions and other matters we have considered. After such consideration, the Court is not convinced that no triable issues are presented.

It would not be profitable to review the material in detail. We shall focus

1. The need for speed in news reporting may bear upon the issue of investigative sufficiency. Cf. Curtis Publishing Co. v. Butts, 388 U.S. 130, 157, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), rehearing denied, 389 U.S. 889, 88 S.Ct. 11, 19 L.Ed.2d 197 (1967).

on only one matter that is of both legal and factual importance, that of the effect the trier of the fact might give to the admitted republication of the book in paperback after defendant's receipt of a letter from one of the attorneys for plaintiffs demanding a retraction, accompanied by a signed statement of one of the persons referred to in the book (not a party hereto) denying the truth of certain statements about him in the book.

[3] Defendants argue that these matters should be disregarded, since the present complaint is founded on the hardcover edition and not the paperback. But it is not claimed that the latter differed any way other than format or that receipt of the above items led defendants to make any additional investigation as to the truth of the statements made in the book. If the republication is found to be malicious, that can be evidence of maliciousness in the original publication.

The effect of republication after a demand for retraction or claim of falsity by the person allegedly defamed has not been authoritatively determined under the *New York Times* standards.[2]

In *New York Times*, *supra*, at p. 286 of 376 U.S., at p. 729 of 84 S.Ct., the Court said:

> "The Times' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Paterson, is likewise not adequate evidence of malice for constitutional purposes."

The Court reserved, however, the question "Whether or not a failure to retract must ever constitute such evidence [illegible]" (*Id.*)

In his concurring opinion in *Curtis Publishing*, *supra*, Warren, C. J., referred to the failure to make additional inquiries, after receipt of republication denials, as a factor among others supporting a jury finding of malice.[3]

[4] Lower court decisions fail entirely to answer the question of retraction or republication left open in *New York Times*. Morgan v. Dun & Bradstreet, Inc., 421 F.2d 1241 (5th Cir. 1970) and Diplomat Electric, Inc. v. Westinghouse Electric Sup. Co., 430 F.2d 38 (5th Cir. 1970), relied upon by plaintiffs, were not constitutional cases, but cases involving the privilege of confidential communications to interested parties. The Supreme Court of Minnesota seems to have conflicting views. Compare Rose v. Koch, 278 Minn. 235, 154 N.W.2d 409, 428 (1967), with Mahnke v. Northwest Publications, Inc., 280 Minn. 328, 160 N.W.2d 1, 10 (1968). The better view seems to us to be that of the latter case, that republication denials and demands for retraction are not decisive either way, but are for the trier of fact to determine under the circumstances as a part of the overall questions of knowledge and recklessness.

The existence of this element, alone, therefore, raises a disputed issue of fact which precludes the granting of summary judgment.

The motion for summary judgment is denied.

2. California has adopted the Uniform Single Publication Act, Civil Code § 3425.3, and a statute pertaining to damages recoverable in retraction cases, Civil Code § 48a. But these do not bear directly, as we see it, on the present motion, which raises different issues.

3. The main opinion, by Harlan, J., ruled that the jury instructions regarding "malice", while given under a state statute dealing with punitive damages, essentially complied with the *New York Times* standards. Pp. 156-157 of 388 U.S., 87 S.Ct. 1975.

GOULD v.

Maryan GOULD, Exe
of J. Donald Roga
Pincus, on behalf of
others similarly sit
Mary S. McCord and
Jr., Intervenin
v.
AMERICAN HAWAI
COMPANY et al
Civ. A. No. 37

United States D
D. Dela
Wilmington
Aug. 17,

Action was brou
rities Exchange Act
holders of acquired
certain other shareho
The District Court,
Chief Judge, held t
director was, for pu
agent of shareholder
vored treatment and
sentative for approvi
in the inclusion in
materially defective
such shareholders'
ments, and role in n
such shareholders w
proxy violations; tha
lation of federal fid
director in negotiati
ment for such share
where said proxy vi
deprived plaintiff sha
tunity to share in pr
defendant shareholde
entitled to participat
tained by the fa
though it was stipula
of the acquiring corp
plaintiffs had an int
than the intrinsic val
given up

Judgment accord

1. Securities Regulatio
Where director o
tion was agent on the

[7] Furthermore, there is no publication if the defamatory statement is exposed to a third party by the person claiming to be defamed. Horovitz v. Weidenmiller, 53 N.Y.S.2d 379 (S.Ct. N.Y.1945); Shepard v. Lamphier, 81 Misc. 498, 146 N.Y.S. 745 (1914); Galligan v. Kelly, 31 N.Y.S. 561 (Sup. 1894).

The evidence unequivocally establishes that the Church issued only two "original" Writs of Expulsion. One writ was mailed to Bernard Green in New York, while the other was maintained in the locked files of the Church.

Clarice Jackson, an Ethics Officer of the Church, charged with the responsibility of issuing such writs, drew up the writ in question. She had the writ cosigned, as required by the rules and regulations of the Church, and then personally drew up the stencil for the two "original" mimeographed documents. Furthermore, the physical dimensions of the writ prepared by Jackson differ from that document allegedly received by Green and others—that is, it did not have a border of approximately two inches, there were no initials in the lower left hand corner and the writ, when mailed, was folded into thirds.

Bernard Green attempts to establish publication by alleging that the writ was received by others. However, his proof falls far short of the requisite and fails to rebut the well-documented steps taken by Clarice Jackson.

Bernard and Barbara Green put on the stand several persons who claimed that they received a letter or a copy of the writ in the mail. However, not one witness was certain that the writ came from the California church. Even approaching the situation in the light most favorable to claimants and assuming that every witness testified that the writ came from the Church of Scientology of California, this does not counteract the testimony given by Clarice Jackson. Indeed, a speculative argument could be made that it was not the Church of California from whom these persons received the writ but from the defendants, the Greens. There is testimony that the copies received by other persons were Xeroxed copies. (328.)

In one instance the Greens' contention of publication is plausible but falters upon close examination.

The proof clearly establishes that Allan Ferguson, the Executive Secretary Word Wide for Scientology, received, in England, a copy of the alleged libelous writ. On its face this constitutes publication; exhibition of a libelous document to a third party.

[8] However, the publication in this instance is subject to a qualified privilege and is, therefore, permissible. A communication made between officers within the organizational structure of a church, or a corporation for that matter, made in good faith, on any subject in which the one communicating has an interest or in which there is a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable. Such is the case even though the duty is not a legal one but only a moral or social duty or obligation. John W. Lovell Co. v. Houghton, 116 N.Y. 520, 22 N.E. 1066 (1839); Garripa v. Townsend, 285 App.Div. 199, 136 N.Y.S.2d 295 (1954); Doyle v. Clauss, 190 App.Div. 838, 180 N.Y.S. 671 (1922); 26 Brooklyn L. Rev. 147.

[9] Allan Ferguson saw a copy of the writ in the normal course of his duties as Executive Secretary World Wide for Scientology and as a member of the Executive Council. The writ was properly brought to Ferguson by a LRH Communicator or by the Deputy Guardian of the Church, both executive officers. Assessed within the light of the peculiar structure of the Church of Scientology, such communication to Ferguson was subject to a qualified privilege and does not constitute a publication.

[10] On the totality of the evidence the Greens have failed to show publication on the part of the Church and,

Indeed, "until
is not complet
it is dispersed
no present or a
public or to t
then there is
the part of the
posing and writ
153 N.Y. 214,
(1897).

CONCLU

1. The cour
subject matter
parties hereto.

2. Defendar
Barbara Green
plaintiff, Chur
fornia, Inc., pu
tion of the alle

3. Plaintiff
of California,
ment dismissin
without costs.

Settle Judgm
hereto.

A

(GOLD

WRIT

To: Those Co

From: MAA A

Subject: Ad
ven

1. Further ev
nard Gree
of parishio

2. He is, furth
to the dest
Church me
damaging
Church an
standing.

3. He has con
tions to th
and is conti
seling mat

indeed, "until the publication, the act is not complete in its mischief. Before it is dispersed abroad, it can produce no present or actual injury, either to the public or to the individual, and until then there is a *locus penitentiæ* on the the part of those concerned in the composing and writing." Youmans v. Smith, 153 N.Y. 214, 218, 47 N.E. 265, 266 (1897).

CONCLUSIONS OF LAW

1. The court has jurisdiction over the subject matter of the litigation and the parties hereto.

2. Defendants Bernard Green and Barbara Green have failed to prove that plaintiff, Church of Scientology of California, Inc., published or caused publication of the alleged libelous statement.

3. Plaintiff, Church of Scientology of California, Inc., is entitled to judgment dismissing the counterclaim but without costs.

Settle judgment on notice pursuant hereto.

APPENDIX I

(GOLDENROD PAPER)

WRIT OF EXPULSION

December 3, 1969

To: Those Concerned

From: MAA AOLA

Subject: Additions to Writ, 19 November—Bernard Green.

1. Further evidence found indicts Bernard Green of attempted blackmail of parishioners he has counselled.
2. He is, further, guilty of contributing to the destruction of a high ranking Church member by his vicious and damaging rumours concerning the Church and Scientologists of good standing.
3. He has continued to pretend connections to the Church of Scientology, and is continuing his misuse of counseling materials.
4. Prosecution for the illegal use of copyrighted Church counselling materials will follow.
5. BEWARE of the person. He is not to be trusted in any way.

Ens. Clarice Jackson
MAA AOLA
for
Ens. Fred Hare
Captain AOLA
for
Cmdr. H. Eltringham
Deputy Commodore Flotilla

HE:FH:CJ:dr

Myron M. AMATO, Petitioner,
v.
Archie H. DIVINE, Jr., Sheriff of Rock County, Wisconsin, Respondent.

Jack L. ROCKEY, Petitioner,
v.
Archie H. DIVINE, Jr., Sheriff of Rock County, Wisconsin, Respondent.

Nos. 72-C-281, 72-C-282.

United States District Court, W. D. Wisconsin.

Feb. 22, 1973.

Petitions for federal habeas corpus relief by petitioners convicted in state court of sale of obscene materials. The District Court, James E. Doyle, J., held that magazine containing collection of photographs of young women, most of whom had their knees spread with emphasis on fully exposed pubic area, and magazines, which contained similar photographs and photographs of women in physical contact with other women and partially dressed and nude men with

UNITED STATES of America, and Robert H. Cluberton, Internal Revenue Agent, Internal Revenue Service, Petitioners-Appellees,

v.

CHURCH OF SCIENTOLOGY OF CALIFORNIA and Henning Heldt, Vice President, Respondents-Appellants.

No. 74-1487.

United States Court of Appeals, Ninth Circuit.

June 26, 1975.

Internal Revenue Service filed petition seeking enforcement of summons requiring church officer to testify and to produce for examination certain church records bearing on church's federal income tax liability. The United States District Court for the Central District of California, Harry Pregerson, J., entered order enforcing summons and denied church's request for preenforcement discovery, and church appealed. The Court of Appeals, Dunway, Circuit Judge, held that Service's litigative strategy in prior proceedings involving the church did not sufficiently evince bad faith so as to require denial of enforcement, that mere conclusory allegations of bad faith harassment and bad purpose were not sufficient to warrant preenforcement discovery but that church's allegations of bad faith harassment, though thin, raised sufficient doubt about Service's purposes to require the district court to hold a limited evidentiary hearing to determine whether further inquiry into the Service's purposes by way of discovery was warranted.

Reversed and remanded.

1. Courts ⇐405(3.8)

Court of Appeals had jurisdiction of appeal from district court order enforcing summons issued by internal revenue service agent and denying taxpayer's request for pre-enforcement discovery. 26 U.S.C.A. (I.R.C.1954) § 7602, 28 U.S.C.A. § 1291.

2. Internal Revenue ⇐1456, 1460

An internal revenue summons is administratively issued but its enforcement is only by federal court authority in an adversary proceeding affording the opportunity for challenge and complete protection of the witness. 26 U.S.C.A. (I.R.C.1954) § 7602.

3. Internal Revenue ⇐1456, 1460

Federal Rules of Civil Procedure apply to a proceeding to enforce an internal revenue service summons. 26 U.S.C.A. (I.R.C.1954) § 7602, Fed.Rules Civ.Proc. rule 81(a)(3), 28 U.S.C.A.

4. Federal Civil Procedure ⇐1267

Federal Rules of Civil Procedure, as applied in a summons proceeding, are not inflexible; the district court may limit their application in a proceedings to enforce a summons, which is intended to be a summary proceeding, so long as the rights of the parties summoned are protected and adversary hearing, if requested, is made available. Fed.Rules Civ.Proc. rule 81(a)(3), 28 U.S.C.A.

5. Internal Revenue ⇐1456, 1460

Internal Revenue Service need not meet any standard of probable cause to obtain enforcement of a summons; it must show only (1) that the investigation will be conducted pursuant to a legitimate purpose, (2) that the inquiry may be relevant to the purpose, (3) that the information sought is not already within the Service's possession and (4) that the administrative steps required by the internal revenue code have been followed. 26 U.S.C.A. (I.R.C.1954) § 7602.

6. Internal Revenue ⇐1456

Fact that proposed assessments for earlier years were pending at time of internal revenue service summons for church records bearing on subsequent tax years did not in itself indicate bad faith sufficient to deny enforcement of summons, under code, determination of tax exempt status for a given year depends upon the financial operations of the church for that year, in any event,

UNITED STAT

since gross receipts
years were marked
for prior years it w
for the service to in
ent periods separate
ly. 26 U.S.C.A. (I.R
7602.

7. Internal Revenue

Fact that in one
nal Revenue Service
taxes paid by church
the government adm
sufficiently establish
and moot" strategy
ice so as to warran
ment of summons
of certain church re
federal income tax
fact that Service m
in certain cases bec
were in issue or be
ient evidence to su
reason to bar it from
it deemed necessary
U.S.C.A. (I.R.C.1954

8. Internal Revenue

Mere unsuppor
harassment and
not alone suffici
to deny enforcem
service summons
1954) § 7602.

9. Federal Civil Pro
Internal Revenue

In proceedings
of administrative su
internal revenue se
district court has co
to restrict or d
C.A. (I.R.C.1954)
Proc. rule 81(a)(

10. Federal Civil Pr

In contrast to
mary civil cases, disc
summons enforceme
exception rather t
Rules Civ.Proc. rule

11. Federal Civil Pr

Party resisting
administrative sumr
thus allege an impr

were gross receipts for subsequent tax years were markedly higher than those for prior years it was not unreasonable for the service to investigate the different periods separately but simultaneously. 26 U.S.C.A. (I.R.C.1954) §§ 501(c)(3), 7602.

7. Internal Revenue ⟸1456

Fact that in one instance the Internal Revenue Service tendered return of taxes paid by church and in another case the government admitted error did not sufficiently establish a bad faith "harass and mood" strategy on part of the Service so as to warrant denial of enforcement of summons requiring production of certain church records bearing on its federal income tax liability, likewise, fact that Service may have capitulated in certain cases because small amounts were in issue or because it had insufficient evidence to sustain its case was no reason to bar it from gathering evidence it deemed necessary in instant case. 26 U.S.C.A. (I.R.C.1954) §§ 501(c)(3), 7602.

8. Internal Revenue ⟸1456, 1460

Mere unsupported allegations of harassment and improper purpose are not alone sufficient to require the court to deny enforcement of internal revenue service summons. 26 U.S.C.A. (I.R.C. 1954) § 7602.

9. Federal Civil Procedure ⟸1267
Internal Revenue ⟸1456, 1460

In proceedings seeking enforcement of administrative summons, such as an internal revenue service summons, the district court has considerable discretion to restrict or deny discovery. 26 U.S.C.A. (I.R.C.1954) § 7602; Fed.Rules Civ.Proc. rule 81a(3), 28 U.S.C.A.

10. Federal Civil Procedure ⟸1261

In contrast to the procedure in ordinary civil cases, discovery in a summary summons enforcement proceeding is the exception rather than the rule. Fed. Rules Civ.Proc. rule 81a(3), 28 U.S.C.A.

11. Federal Civil Procedure ⟸1269

Party resisting enforcement of an administrative summons must do more than allege an improper purpose to entitle him to pre-enforcement discovery. Fed.Rules Civ.Proc. rule 81a(3), 28 U.S.C.A.

12. Internal Revenue ⟸1456

Allegations that Internal Revenue Service issued administrative summons for improper purpose or to harass taxpayers were not alone sufficient to warrant pre-enforcement discovery, to allow taxpayer to depose examining agent and his superiors and to inspect internal revenue service record and memoranda on basis of such conclusory allegations would place undue burdens on the service and impede what is supposed to be a summary enforcement procedure. 26 U.S.C.A. (I.R.C.1954) § 7602; Fed.Rules Civ.Proc. rule 81a(3), 28 U.S.C.A.

13. Internal Revenue ⟸1456

A taxpayer resisting enforcement of internal revenue service summons bears burden of proving bad faith harassment or other abuse. 26 U.S.C.A. (I.R.C.1954) § 7602.

14. Internal Revenue ⟸1456

A taxpayer resisting enforcement of internal revenue service summons on ground of bad faith harassment or other abuse is entitled to some opportunity to substantiate his allegations, holding of an evidentiary hearing would accommodate the needs of efficient tax administration and at the same time provide a reasonable opportunity for the summonee to carry the burden of showing an abuse of process. 26 U.S.C.A. (I.R.C. 1954) § 7602; Fed.Rules Civ.Proc. rule 81a(3), 28 U.S.C.A.

15. Internal Revenue ⟸1456, 1460

Purpose of an evidentiary hearing to determine whether to grant discovery in proceeding seeking enforcement of internal revenue service summons is to sift out those rare cases where bald allegations of harassment or improper purpose can be substantiated and thereby avoid dilatory and burdensome discovery procedures. 26 U.S.C.A.(I.R.C.1954) § 7602; Fed.Rules Civ.Proc. rule 81a(3), 28 U.S.C.A.

16. Internal Revenue ⇐1456

Since church's allegation of bad faith harassment by Internal Revenue Service, though thin, raised doubt as to Service's purposes, district court should have held a limited evidentiary hearing to determine whether further inquiry into the Service's purposes by way of discovery was warranted, although such a hearing would entail cross-examination of the summoning agent, permissible scope of the hearing was for the district court's discretion. 26 U.S.C.A. (I.R.C. 1954) § 7602, Fed.Rules Civ.Proc. rule 81(a)(3), 28 U.S.C.A.

17. Internal Revenue ⇐1456

Although summonee attempted discovery only by way of taking deposition and request for internal revenue service documents, summonee did not waive its right to evidentiary hearing to determine whether further inquiry into Service's purposes by way of discovery was warranted where summonee twice called district court's attention to case law providing for such a hearing in an enforcement proceeding. 26 U.S.C.A. (I.R.C.1954) § 7602.

James Q. Fisher (argued), Encino, Cal., for respondents-appellants.

Alfred S. Lombardi, Atty. (argued), Tax Div., U. S. Dept. of Justice, Washington, D. C., for petitioner-appellee.

OPINION

Before DUNIWAY and ELY, Circuit Judges, and JAMESON,* District Judge.

DUNIWAY, Circuit Judge:

The Church of Scientology of California appeals from the district court's order enforcing a summons issued by an Internal Revenue Service agent under § 7602 of the Internal Revenue Code of 1954, 26 U.S.C. § 7602, and denying the Church's request for pre-enforcement discovery. We reverse and remand for further proceedings.

I *Facts*

On February 8, 1973, agent Culberton of the Service's Audit Division issued a summons to Henning Heldt, then vice president of the Church of Scientology of California, requiring Heldt to appear on February 20, 1973, to testify and to produce for examination certain records of the Church bearing on its federal income tax liability for 1968 and 1969. Heldt appeared at the appointed time, apparently willing to testify, but without the required records. Heldt said that he was no longer an officer of the Church and that he had neither control nor possession of the records because he had resigned as director and vice president of the Church four days earlier, on February 16, 1973. The agent noted Heldt's appearance but did not examine him. In the course of two years of negotiations preceding the issuance of the summons, Heldt had consistently held himself out to the agent as the representative of the Church in charge of its books and records, and never stated that he was contemplating resigning.

On September 5, 1973, the Service petitioned the district court to enforce the summons against Heldt and the Church under 26 U.S.C. §§ 7402(b) and 7604(a), both of which somewhat redundantly gave the district courts jurisdiction "by appropriate process" to compel compliance with such summonses. The district court issued an order requiring Heldt and the Church to show cause why they should not be required to comply with the summons.

Heldt and the Church then filed a notice of taking depositions of agent Culberton and two other Service officials and a demand for the production of Service files relating to the Church. The Service moved to quash this discovery. Then Heldt and the Church responded to the order to show cause by alleging, *inter alia*, that the Service had issued the summons for the bad faith purpose of harassing the Church. More specifically, the Church asserted that the instant summons was part of wide Service strategy churches of Scientolog Church's words "doct separate entities. A Church, the Service h tern of initiating inve ministrative and judici nonetheless resisting nation of the tax exer churches - all, the Chu purpose of applying churches to settle th claimed tax exemption ing Scientology or Church sought to take Service officials to at evidence to support th

The district judge the order to show caus ice's motion to quash to oral argument by co the presentation of t evidence other than af file. Concluding that harassment is 'not record,' the judge c quashing the notice of tions and (2) enforc against the Church. the Church, the judg ment of the summons the condition that th with the court all records sought by th Church did so, filing records, and brought

[1] We have juri U.S.C. § 1291. *Reism* 375 U.S. 440, 449, L.Ed.2d 459; *D. I. Op ol States*, 9 Cir., 196

II *Summons Enf ings in General*

We begin with a re se, settled principles.

[2-4] An internal is "administratively i forcement is only by theory in 'an adversa fording the opportun and 'complete pre

* The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

commons was part of a concerted nationwide Service strategy to harass various churches of Scientology, which are in the Church's words "doctrinal cousins" but separate entities. According to the Church the Service has followed a pattern of initiating investigations and administrative and judicial proceedings, but nonetheless resisting definitive determination of the tax exempt status of those churches—all, the Church alleges, for the purpose of applying pressure to the churches to settle the issue of their claimed tax exemptions and of eliminating Scientology organizations. The Church sought to take the depositions of Service officials to attempt to uncover evidence to support these allegations.

The district judge held a hearing on the order to show cause and on the Service's motion to quash discovery, listening to oral argument by counsel, but without the presentation of testimony or other evidence other than affidavits already on file. Concluding that the "allegations of harassment is not supported by the record," the judge entered orders (1) quashing the notice of taking of depositions and (2) enforcing the summons against the Church. At the request of the Church, the judge stayed enforcement of the summons pending appeal, on the condition that the Church deposit with the court all of the books and records sought by the summons. The Church did so, filing 24 trunks with records, and brought this appeal.

[1] We have jurisdiction under 28 U.S.C. § 1291. *Reisman v. Caplin*, 1964, 375 U.S. 440, 449, 84 S.Ct. 508, 11 L.Ed.2d 459; *D. L. Operating Co. v. United States*, 9 Cir., 1963, 321 F.2d 586.

II. *Summons—Enforcement Proceedings in General*

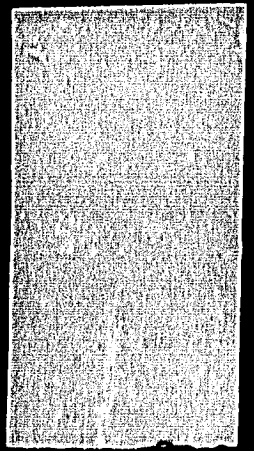
We begin with a review of a few basic, settled principles.

[2–4] An internal revenue summons is "administratively issued but its enforcement is only by federal court authority in 'an adversary proceeding' affording the opportunity for challenge and 'complete' protection to the witness." *Donaldson v. United States*, 1971, 400 U.S. 517, 525, 91 S.Ct. 534, 27 L.Ed.2d 580, *Reisman v. Caplin*, 1964, 375 U.S. 440, 446, 84 S.Ct. 508, 11 L.Ed.2d 459. The Federal Rules of Civil Procedure apply to a summons proceeding. Fed.R.Civ.P. 81(a)(3), *United States v. Powell*, 1964, 379 U.S. 48, 58, n. 18, 85 S.Ct. 248, 13 L.Ed.2d 112, *Marten v. Chandis Securities Co.*, 9 Cir., 1942, 128 F.2d 731, 734. But the Civil Rules are not inflexible; a district court may limit their application in a proceeding to enforce a summons which is intended to be a summary proceeding, so long as the rights of the party summoned are protected and an adversary hearing, if requested, is made available. *Donaldson*, *supra*, 400 U.S. at 528–29, 91 S.Ct. 534.

[5] The Internal Revenue Service need not meet any standard of probable cause to obtain enforcement of its summonses. It must show only (1) that the investigation will be conducted pursuant to a legitimate purpose, (2) that the inquiry may be relevant to the purpose, (3) that the information sought is not already within the Service's possession, and (4) that the administrative steps required by the Internal Revenue Code have been followed. *United States v. Powell*, *supra*, 379 U.S. at 57–58, 85 S.Ct. 248.

However, as the Court explained in *Powell*, 379 U.S. at 58, 85 S.Ct. at 255 (footnotes omitted):

> This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered. At the hearing he "may challenge the summons on any appropriate ground," *Reisman v. Caplin*, 375 U.S. 440, at 449, 84 S.Ct. [508], at 513 [11 L.Ed.2d 459]. Nor does our reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper



proper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the court's process is on the taxpayer, and it is not met by a mere showing, as was made in this case, that the statute of limitations for ordinary deficiencies has run or that the records in question have already been once examined.

These principles were reaffirmed by the Court in *Donaldson v. United States*, 1971, 400 U.S. 517, 526-27, 91 S.Ct. 534, 27 L.Ed.2d 580, and more recently in *United States v. Bisceglia*, 1975, 420 U.S. 141, 146, 95 S.Ct. 915, 43 L.Ed.2d 88.

III. *The Alleged Abuse of Process*

The four criteria for enforcement set out in *Powell* were satisfied in this case. The principal question on appeal is whether the district court erred in enforcing the summons without allowing discovery and without taking evidence on the alleged abuse of the court's process. We conclude that the court should have held a limited pre-enforcement evidentiary hearing.

A. *The Allegation of Bad Faith IRS Harassment.*

We first consider the Church's allegations and the support for them that appears in the record.

Attached to the Church's memorandum in opposition to enforcement of the summons is a "Summary of Administrative and Judicial Proceedings involving the Church of Scientology and its Parishioners," which the Church says reveals a pattern of bad faith IRS harassment. This summary lists eleven proceedings involving various churches of Scientology. With respect to the California Church, the summary states that the Service retroactively revoked the tax exempt status of the California Church in 1968 and that questions of the Church's tax liability for 1964 through 1967 were pending at the appellate conference level when the summons was issued. Also appended to the memorandum are the affidavit of Heldt and certain correspondence between the Church and Service officials in which the Church asked the Service, and the Service refused, to defer the examination for 1968 and 1969 while examinations for earlier years were pending.

[6,7] The pendency of proposed assessments for the earlier years, however, does not in itself indicate bad faith on the part of the Service. Under § 501(c)(3) of the Code, determination of tax exempt status for a given year depends upon the financial operation of the Church for that year. *See Church of Scientology of Hawaii v. United States*, 9 Cir., 1979, 485 F.2d 313, 319 (Goodwin, J., dissenting). Moreover, the gross receipts of the California Church for 1968 and 1969 were markedly higher than those for 1964 through 1967. It was not unreasonable for the Service to investigate the different periods separately but simultaneously.

The Church also cites our *Church of Scientology of Hawaii* case, *supra*, and another case now pending on appeal to this court, *Handeland v. Commissioner*, 519 F.2d 327, as evidence of an alleged bad faith "harass and moot" strategy in which the Service repeatedly imposes assessments on churches of Scientology but stops short of litigating the merits of the churches' tax exempt status by refunding the taxes paid or conceding non-liability. In the Church of Hawaii case, we held that the taxpayer's suit for a refund was not mooted by the Service's tender of the taxes paid. *Handeland* involves an action in the Tax Court by ministers of the Church of Scientology of Minnesota in which the government admitted error and the Tax Court entered a judgment without opinion for the ministers. The propriety of this mooting tactic is not now before us. If this mooting tactic is improper the Church will have its remedy, as it did in the *Church of Hawaii* case.

For present purposes we conclude only that the Service's litigative strategy o

UNITED STATI

those cases does not
bad faith to require
court to deny enforc
mons. It may be th
capitulated in certain
amounts were in issu
insufficient evidence
We see no reason to
ing the evidence it
this case. We note
Service has litigated
a case involving the
of a Scientology ch
Church of Scientolog
1969, 412 F.2d 1197,
denied, 397 U.S. 100
L.Ed.2d 422, where
the Church failed to
of the corporation's
to the benefit of
See 26 U.S.C. § 501(

As evidence of pu
Service motives, the
on a Service "Manual
September 2, 1970,
as we observed in *Ch*
of Hawaii, *supra*, 48
identify "Church of S
higious organizations'
publicity for exam
proceeding appropriate
see no reflection of
on the face of this d

The manual suppl
the opinion of the
Founding Church of
ed States, *supra*. T
both the tenets and
Scientology organiza
out that the Foun
10 percent of its gros
L. Ron Hubbard, the
F.2d at 1199.

Other Scientology
churches, and organ
Hubbard a portion
come, usually 10 p

The Court of Claims
at 1201.

For purposes of
we do not consider
ing to Hubbard
congregations and

those cases does not sufficiently evince bad faith to require us or the district court to deny enforcement of the summons. It may be that the Service has capitulated in certain cases because small amounts were in issue or because it has insufficient evidence to sustain its case. We see no reason to bar it from gathering the evidence it deems necessary in this case. We note in passing that the Service has litigated to finality and won a case involving the tax exempt status of a Scientology church in *Founding Church of Scientology v. United States*, 1969, 412 F.2d 1197, 188 Ct.Cl. 490, *cert. denied*, 397 U.S. 1009, 90 S.Ct. 1237, 25 L.Ed.2d 422, where the court held that the Church failed to prove that no part of the corporation's net earnings inured to the benefit of private individual. See 26 U.S.C. § 501(c)(3).

As evidence of purportedly improper Service motives, the Church also relies on a Service "Manual Supplement" dated September 2, 1970. Its stated purpose, as we observed in *Church of Scientology of Hawaii, supra*, 485 F.2d at 317, is to identify "Church of Scientology type religious organizations" and to provide guidelines for examining returns and processing applications. However, we see no reflection of a nefarious purpose on the face of this document.

The manual supplement is based on the opinion of the Court of Claims in *Founding Church of Scientology v. United States, supra*. The court discussed both the tenets and the structure of Scientology organizations. After pointing out that the Founding Church tithed 10 percent of its gross income to founder L. Ron Hubbard, the court observed, 412 F.2d at 1199:

> Other Scientology congregations, franchises, and organizations also paid Hubbard a portion of their gross income, usually 10 percent.

The Court of Claims explained, 412 F.2d at 1201:

> For purposes of deciding this case, we do not consider the income accruing to Hubbard from the affiliated congregations and organizations as coming from plaintiff. However, under the circumstances here, the fact that Hubbard had income from such closely related sources indicates that Hubbard's compensation from plaintiff was not for full-time service. During the years in issue these other percentages, fees, and commissions, so far as the record shows, were apparently received or receivable by Hubbard for his personal use. Such an arrangement suggests a franchise network for private profit and, in turn, casts doubt upon the propriety of the payments by plaintiff to Hubbard and the members of his family. The fact that Hubbard was the recipient of income from plaintiff in the form of royalties and commissions likewise occasions an inference of personal gain.

Given the evidence in that case and the conclusion of the Court of Claims, it was entirely reasonable for the Service, using the characteristics sketched by that court, to identify Scientology organizations and to establish a uniform policy and procedure for examining them. In fact, we might suspect an improper external influence if, under the circumstances, the Service did not give such organizations careful scrutiny.

[8] In short, we agree with the district court that the allegations of harassment and improper purposes were not supported by the record and standing alone did not require the court to deny enforcement. However, our inquiry does not end here, for it may be that the Church's allegations have more substance than meets the eye. See, e.g., *Center on Corporate Responsibility, Inc. v. Schultz*, D.D.C., 1973, 368 F.Supp. 863 (evidence of White House use of IRS administrative actions against certain "activist" organizations whose views were offensive to the White House).

B. *Denial of Discovery and Evidentiary Hearing*

The Church contends that it was entitled to discovery under Fed.R.Civ.P. 30 and 34 or, failing that, an evidentiary hearing to inquire into the motives of the Service in issuing the summons.

[9-12] Under Fed.R.Civ.P. 81(a)(3) the district court has considerable discretion to restrict or deny discovery. *See United States v. Bell*, 9 Cir., 1971, 448 F.2d 40, 42; *United States v. Ruggero*, 9 Cir., 1970, 425 F.2d 1069, 1071; *United States v. Ahmanson*, 9 Cir., 1969, 415 F.2d 785, 787. In contrast to the procedure in ordinary civil cases, discovery in a summary summons enforcement proceeding is the exception rather than the rule. The party resisting enforcement should be required to do more than *allege* an improper purpose before discovery is granted. *United States v. National State Bank*, 7 Cir., 1972, 454 F.2d 1249, 1252; *United States v. Salter*, 1 Cir., 1970, 432 F.2d 697, 700. Conclusory allegations carefully tailored to the language of *Powell, supra*, that the Service has issued a summons for an improper purpose such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, are easily made. *See Garrett v. United States*, 9 Cir., 1975, 511 F.2d 1037.

Allowing the Church to take depositions of the examining IRS agent and his superiors and to inspect internal IRS records and memoranda on the basis of such conclusory allegations would place undue burdens on the Service and impede what is supposed to be a summary enforcement procedure. Accordingly, we reject the Church's argument that it was entitled to pre-enforcement discovery.

[13-16] Nonetheless, because, as we have seen, the Church or any other summonee bears the burden of proving bad faith harassment or other abuse, we think that the summonee must be afforded at least *some* opportunity to substantiate its allegations.

The Church argues that, failing to grant its request for discovery, the district court should at least have held an evidentiary hearing to inquire further into the motives of the Service in issuing the summons. As the Church points out, that was the approach adopted by the First Circuit in *United States v. Salter*, 1 Cir., 1970, 432 F.2d 697, where the summonee also alleged an improper Service purpose in issuing a summons. There the court said (at 700):

> We agree with the government, however, that respondent should be required to do more than *allege* an improper purpose before discovery is ordered in a proceeding of this type. Some *evidence* supporting respondent's allegations should be introduced. We approve of the following suggestion, offered by the government:
>
> "The general solution would probably be for the district court to proceed directly to a hearing at which, if desired, the summonee could examine the agent who issued the summons, concerning his purpose. The court could then, by observation and, where necessary, its own questioning of the agent, makes its own determination of whether exploration, as by discovery, seemed to be in order."
>
> If, at the end of the hearing, there remains a substantial question in the court's mind regarding the validity of the government's purpose, it may then grant discovery.

The Third Circuit has recently adopted a similar procedure in *United States v. McCarthy*, 3 Cir., 1975, 514 F.2d 368. We agree with the First and Third Circuits that this solution would accommodate the needs of efficient tax administration and at the same time provide a reasonable opportunity for the summonee to carry the burden imposed by *Powell, supra*, of showing an abuse of the court's process.

In approving the procedure suggested by the First Circuit, we also endorse that court's limiting rationale that the purpose of the evidentiary hearing is to sift out those rare cases where bald allegations of harassment or improper purpose can be substantiated and thereby to avoid dilatory and burdensome discovery procedures. As the First Circuit said in *Salter, supra*, 432 F.2d at 700-01 (footnote omitted):

> We believe that there are strong reasons of public policy for placing a

burden of proof on re
allowing discovery in
proceeding of this typ
covery order puts the
nue Service under a se
conducting a civil
Broad discovery can
cause extensive delays
dize the integrity and
the entire investigation
these considerations i
taxpayers have been a
unsuccessful in provin
purpose" defense. Re
dentiary hearing will
respondent from raisin
[sic] "improper" purpo
course have no intenti
him from doing so. I
the hearing requireme
salutary effect of
covery in cases in whi
respondent will not h
his allegations.

Applying these princi
at hand, we conclude th
allegations of bad faith
the Service, though th
cient doubt about the S
to require the district
limited evidentiary hear
whether further inquiry
ice's purposes by way
warranted. Although w
such a hearing would e
ple, cross-examination of
agent (*Cf. Wild v. Unite*
1966, 362 F.2d 206, 208
attempt to define precis
ble scope of the evid
We leave that to the
district court.

[17] In the proceed
Church attempted discov
of taking depositions a
IRS documents. Appare
the Church mistakenly
had a right to discovery
sentation of any evide
mons enforcement proce
is arguable that the Ch
argument that it was e
discovery evidentiary he

burden of proof on respondent before allowing discovery in an enforcement proceeding of this type. A broad discovery order puts the Internal Revenue Service under a severe handicap in conducting a civil investigation. Broad discovery can be expected to cause extensive delays and to jeopardize the integrity and effectiveness of the entire investigation. Coupled with these considerations is the fact that taxpayers have been almost uniformly unsuccessful in proving an "improper purpose" defense. Requiring an evidentiary hearing will not preclude a respondent from raising and proving a [sic] "improper purpose," and we of course have no intention of precluding him from doing so. But we feel that the hearing requirement will have the salutary effect of eliminating discovery in cases in which it is clear that respondent will not be able to prove his allegations.

Applying these principles to the case at hand, we conclude that the Church's allegations of bad faith harassment by the Service, though thin, raised sufficient doubt as to the Service's purposes to require the district court to hold a *limited* evidentiary hearing to determine whether further inquiry into the Service's purposes by way of discovery is warranted. Although we anticipate that such a hearing would entail, for example, cross-examination of the summoning agent (*Cf. Wild v. United States*, 9 Cir., 1966, 362 F.2d 206, 208-09), we do not attempt to define precisely the permissible scope of the evidentiary hearing. We leave that to the discretion of the district court.

[17] In the proceedings below, the Church attempted discovery only by way of taking depositions and requests for IRS documents. Apparently counsel for the Church mistakenly believed that it had a right to discovery before the presentation of any evidence in the summons enforcement proceeding. Thus it is arguable that the Church waived any argument that it was entitled to a pre-discovery evidentiary hearing. However, we agree with the Third Circuit, *McCarthy*, *supra*, 514 F.2d at 368 n. 11, that to hold under these circumstances that the Church failed to ask the court for the proper sequence of procedures would be unduly harsh. Moreover, in reviewing the record, we note that the Church twice called the district court's attention to the *Salter* case and the procedure there recommended. Accordingly, we conclude that the Church did not waive its right to an evidentiary hearing.

IV *Conclusion*

In view of our conclusion that the district court should have granted the Church a limited evidentiary hearing to inquire into the Service's purposes, we do not reach the Church's other arguments for reversal.

Reversed and remanded for further proceedings.

William E. SHEEHAN, by his father, Henry Sheehan, as next friend, Individually on behalf of himself and on behalf of a class of persons similarly situated but too numerous and too transitory to mention, Plaintiffs-Appellants,

v.

William J. SCOTT, Attorney General of Illinois, et al., Defendants-Appellees.

No. 74-1281.

United States Court of Appeals, Seventh Circuit.

Argued Jan. 17, 1975.

Decided July 22, 1975.

Plaintiff, who had been absent from school 11 days during two months, and who had been required to meet with probation officer who inquired into his family life and personal makeup, sued chal-

tion of the Victoria Channel and appurtenant levee in the summer of 1967. In this aspect of the case, there is lacking the element of inevitably recurring floodings which the Supreme Court stressed in holding that the Government had taken a flowage easement over the land involved in the *Cress* case, *supra*.

With respect to the interference with the runoff of floodwaters from the plaintiff's land which is to be expected from the permanent existence of the Victoria Channel and protective levee in the slot south of the plaintiff's land, it has been mentioned previously that such interference has occurred on one occasion since the completion of the channel and protective levee in the summer of 1967, and that it can reasonably be expected to recur at intervals of about once in every 15 years, on the average. Thus, this case lacks the future prospect of intermittent and frequent floodings which the Supreme Court mentioned in the *Cress* case.

Accordingly, it is my opinion that the evidence in the record fails to show a taking by the defendant of a flowage easement over the 478 acres, or any portion thereof, involved in the present case.

It necessarily follows that the petition should be dismissed.

The FOUNDING CHURCH OF SCIENTOLOGY

v.

The UNITED STATES.

No. 226-61.

United States Court of Claims.

July 16, 1969.

Action by church to recover federal income taxes and assessed interest paid. The Court of Claims, Collins, J., held that where founder of church was not only paid, in addition to his salary, commissions and royalties but he and his family received unexplained payments in nature of loans and reimbursements, church was not entitled to exemption from federal income taxation under statute, which includes among those organizations exempt from taxation a corporation organized and operated exclusively for religious or educational purposes, no part of net earnings of which inures to benefit of any private shareholder or individual.

Petition dismissed.

1. Internal Revenue ⇐837

Congress, when conditioning exemption granted to corporation organized for religious purposes upon "no part" of earnings being of benefit to a private individual, specifically intended that the amount or extent of benefit should not be the determining factor. 26 U.S.C.A. (I.R.C.1954) § 501(c) (3).

2. Internal Revenue ⇐837

Where founder of church was not only paid, in addition to his salary, commissions and royalties but he and his family received unexplained payments in nature of loans and reimbursements, church was not entitled to exemption from federal income taxation under statute, which includes among those organizations exempt from taxation a corporation organized and operated exclusively for religious or educational purposes, no part of net earnings of which inures to benefit of any private shareholder or individual. 26 U.S.C.A. (I.R.C.1954) § 501(c) (3).

Ronald Dreier, New York City, for plaintiff, Bella L. Linden, New York City, attorney of record. David Blasband, Peter C. Clapman, and Linden & Deutsch, New York City, of counsel.

Michael I. Sanders, Washington, D. C., with whom was Asst. Atty. Gen., Johnnie M. Walters, for defendant. Philip R. Miller and Norman J. Hoffman, Jr., Washington, D. C., of counsel.

Before COWEN, Chief Judge, and LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, Judges.

OPINION *

COLLINS, Judge.

This is a suit to recover Federal income taxes and assessed interest paid by plaintiff to defendant for the fiscal year ended June 30, 1956. Defendant has counterclaimed for taxes assessed but unpaid for the fiscal years ended June 30, 1956, June 30, 1958, and June 30, 1959. The central issue presented is whether plaintiff is entitled to an exemption from Federal income taxation. The pertinent statute is section 501(c) (3) of the Internal Revenue Code of 1954, which includes among those organizations exempt from taxation a corporation "organized and operated exclusively for religious * * * or educational purposes, * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual * * *."

The facts set forth in detail in the findings can be briefly summarized to the extent pertinent here:

Plaintiff is a District of Columbia corporation organized in 1955 with its purpose, as stated in the Certificate of Incorporation, "[t]o act as a parent church for the propagation of the religious faith known as 'Scientology,' and to act as a Church for the religious worship of that Faith." The beliefs of Scientology center around the spirit or "thetan," which is said to reside within the physical body of every human being. Scientologists believe that the spirit is immortal and that it receives a new body upon the death of the body in which it then resides. They also believe that in the course of its various lives the spirit is inhibited by "detrimental aberrations," or "engrams," which result from misdeeds or unpleasant experiences. The objective of Scientology is to counteract this burden through "processing," also called "auditing." This objective which is the principal practice of Scientology, attempts to make the person being audited, called a "preclear," aware of these aberrations and engrams and thus reduce the burdens and inhibitions affecting his spirit. Processing is performed by ministers of the plaintiff, or persons studying to become ministers, and is done in individual sessions with an auditor processing a single preclear through the use of a Hubbard Electro-Meter or "E-Meter." The E-Meter is an instrument which indicates changes in electrical resistance in the preclear's body, and changes in such resistance are viewed as an index of the activity of the spirit. (See finding 10, *infra*.)

Scientology is derived from the thoughts and writings of one L. Ron Hubbard. Its origin was an article written by Hubbard in the May 1950 issue of ASTOUNDING SCIENCE FICTION magazine, describing a new "science" called *Dianetics*. Dianetics, the creation of Hubbard, was offered primarily as a psychotherapeutic technique and was not presented as a religious discipline. Like its successor, Scientology, Dianetics employed a Hubbard E-Meter in its practice. In 1952 Hubbard began to focus his attention and his energies upon Scientology. He founded the plaintiff organization and completely dominated every aspect of its affairs during the relevant period. At the same time he continued to direct the growth and affairs of Scientology organizations throughout the world.

Persons coming to plaintiff for processing were usually required to sign a contract for a stated amount of auditing. The normal contract covered 25 hours of processing at a rate of $20 per hour. Other blocks of processing were available, and the per-hour fee was slighty lower for larger amounts. In addition to proc-

* The court is indebted to Trial Commissioner Donald E. Lane (now Judge, U.S. Court of Customs and Patent Appeals) for his opinion, findings of fact, and recommended conclusion of law. Although the court reaches the same result, we decide the case on a different ground.

FOUNDI

essing, another dep
offered various cou
grams, and such inst
formed under conti
fees. Most student
courses were studyin
and/or ministers of
cants were often req
processing at the s
being allowed to enr

During the period
90 percent of plainti
ceived from the sale
training services, in
Meters. Additional i
from the sales of exa
tapes, and books, f
tions, and from var
Plaintiff's gross rec
for the fiscal year en
$179,491 for the fisc
30, 1958; and $247,
year ending June 30,

For his services to
was paid a salary of
plaintiff's inception
1957; during the
1956, through March
ceived an additional $
was designated as a
29, 1957, plaintiff ad
tion scheme (known a
pay plan") whereby
in lieu of salary, 10 p
income of plaintiff,
congregations, franch
tions also paid Hubb
their gross income, u
In addition, Hubbard
on his numerous Sci
well as lecture fees a
income.

During the taxabl
Mary Sue Hubbard an
Jr., the wife and son
der, were compensated
corporation. Also,
through February 195
weekly checks to K
daughter of L. Ron Hu

Defendant's position
that plaintiff fails to q

essing, another department of plaintiff offered various courses or training programs, and such instruction was also performed under contract for comparable fees. Most students enrolled in these courses were studying to become auditors and/or ministers of Scientology. Applicants were often required to contract for processing at the standard fee before being allowed to enroll as students.

During the period in issue, more than 90 percent of plaintiff's income was received from the sales of processing and training services, including sales of E-Meters. Additional income was realized from the sales of examinations and tests, tapes, and books, from minimal donations, and from various other sources. Plaintiff's gross receipts were $102,604 for the fiscal year ending June 30, 1956; $179,491 for the fiscal year ending June 30, 1958; and $247,674 for the fiscal year ending June 30, 1959.

For his services to plaintiff, Hubbard was paid a salary of $125 per week from plaintiff's inception through March 29, 1957; during the period October 26, 1956, through March 29, 1957, he also received an additional $125 per week which was designated as a "fee." On March 29, 1957, plaintiff adopted a compensation scheme (known as the "proportional pay plan") whereby Hubbard was paid, in lieu of salary, 10 percent of the gross income of plaintiff. Other Scientology congregations, franchises, and organizations also paid Hubbard a portion of their gross income, usually 10 percent. In addition, Hubbard received royalties on his numerous Scientology books, as well as lecture fees and other incidental income.

During the taxable years in issue, Mary Sue Hubbard and L. Ron Hubbard, Jr., the wife and son of plaintiff's founder, were compensated employees of the corporation. Also, from June 1957 through February 1959, plaintiff issued weekly checks to Kay Hubbard, the daughter of L. Ron Hubbard.

Defendant's position, briefly stated, is that plaintiff fails to qualify for the statutory exemption because (1) its sales of processing and training services constituted a substantial commercial (and hence nonexempt) purpose, and (2) a portion of its net earnings inured to the benefit of private individuals. Plaintiff denies both contentions.

It is our opinion that plaintiff has failed to prove that no part of the corporation's net earnings inured to the benefit of private individuals, and plaintiff is not entitled to recover. The court finds it unnecessary to decide whether plaintiff is a religious or educational organization as alleged, since, regardless of its character, plaintiff has not met the statutory conditions for exemption from income taxation. In any event, the Government has not raised this issue. Because of the manner in which the second question framed by the parties is resolved, we need not and do not determine whether plaintiff's operations were exclusively for religious or educational purposes.

Implicit in section 501 is the recognition that certain institutions and organizations exist and function for purposes which Congress deems beneficial to society as a whole. In order to foster these aims, funds which would otherwise be acquired and expended for the public good by the Government are left by Congress in the hands of these organizations to be used in furtherance of their beneficial ends. *See* Duffy v. Birmingham, 190 F.2d 738, 740 (8th Cir. 1951). For that reason, it has been held that the exemption provisions should be liberally construed. *E.g.*, American Institute for Economic Research v. United States, 302 F.2d 934, 157 Ct.Cl. 548 (1962), cert. denied, 372 U.S. 976, 83 S.Ct. 1109, 10 L.Ed.2d 141, rehearing denied, 373 U.S. 954, 83 S.Ct. 1677, 10 L.Ed.2d 708 (1963).

The statutory language also makes it eminently clear, however, that Congress intended to extend the exemption only when the sole beneficiary of the institutional operations was the public at large. The substantial import of this express limitation cannot be ignored.

See Better Business Bureau of Washington, D. C., Inc. v. United States, 326 U.S. 279, 283, 66 S.Ct. 112, 90 L.Ed. 67 (1945). The congressional intent behind the conditional language of section 501 (c) (3), coupled with the burden of proof placed upon the taxpayer in these circumstances (*see, e.g.*, Kenner v. Commissioner of Internal Revenue, 318 F.2d 632 (7th Cir. 1963); Cleveland Chiropractic College v. Commissioner of Internal Revenue, 312 F.2d 203, 206 (8th Cir. 1963)), requires plaintiff to clearly demonstrate its right to exemption. *See* New Jersey Auto. Club v. United States, 181 F.Supp. 259, 149 Ct.Cl. 344 (1960), cert. denied, 366 U.S. 964, 81 S.Ct. 1913, 6 L.Ed.2d 1255 (1961).

The term "net earnings" in the inurement-of-benefit clause, as stated in section 501 and its predecessor, section 101 of the Internal Revenue Code of 1939, has been construed to permit an organization to incur ordinary and necessary expenditures in the course of its operations without losing its tax-exempt status. Birmingham Business College, Inc. v. Commissioner of Internal Revenue, 276 F.2d 476 (5th Cir. 1960); Enterprise Ry. Equip. Co. v. United States, 161 F. Supp. 590, 142 Ct.Cl. 192 (1958); Mabee Petroleum Corp. v. United States, 203 F. 2d 872 (5th Cir. 1953); Broadway Theatre League of Lynchburg, Va., Inc. v. United States, 293 F.Supp. 346, 355 (W.D.Va.1968).

By analogy to the recurrent tax question in the business sphere, whether corporate officers' salaries are reasonable and deductible, or are excessive and disguise the distribution of dividends (*see, e.g.*, Jones Bros. Bakery, Inc. v. United States, 188 Ct.Cl. ——, 411 F.2d 1282 (June 1969)), several decisions indicate that the payment of reasonable salaries by an allegedly tax-exempt organization does not result in the inurement of net earnings to the benefit of private individuals. Birmingham Business College, Inc. v. Commissioner of Internal Revenue, *supra* 276 F.2d at 480; Enterprise Ry. Equip. Co. v. United States, *supra*; Mabee Petroleum Corp. v. United States, *supra* 203 F.2d at 876. Of course, as the *Birmingham Business College* and *Mabee Petroleum* cases hold, excessive salaries do result in inurement of benefit. *Cf. also* Duffy v. Birmingham, *supra*. As always, whether the salaries paid are reasonable is a question of fact. *Compare, e.g.*, Mabee Petroleum Corp. v. United States, *supra* 203 F.2d at 875, *with* Jones Bros. Bakery, Inc. v. United States, *supra*, and cases cited.

It is clear, however, that an organization's net earnings may inure to the benefit of private individuals in ways other than by the actual distribution of dividends or payment of excessive salaries. General Contractors' Ass'n of Milwaukee v. United States, 202 F.2d 633 (7th Cir. 1953) (reports and surveys furnished to members); Chattanooga Auto. Club v. Commissioner of Internal Revenue, 182 F.2d 551 (6th Cir. 1950) (services to members); Underwriters' Laboratories, Inc. v. Commissioner of Internal Revenue, 135 F.2d 371 (7th Cir.), cert. denied, 320 U.S. 756, 64 S.Ct. 63, 88 L.Ed. 450 (1943) (reports and studies furnished); Spokane Motorcycle Club v. United States, 222 F.Supp. 151 (E.D.Wash.1963) (goods, services, and refreshments given), and cases cited. That the benefit conveyed may be relatively small does not change the basic fact of inurement. Spokane Motorcycle Club v. United States, *supra*.

We scrutinize the facts of the instant case in the light of these principles. According to the trial commissioner's findings, L. Ron Hubbard received over $108,000 from plaintiff and related Scientology sources during the 4-year period June 1955 through June 1959. This figure represents $77,460 in fees, commissions, royalties, and compensation for services, plus $13,538 in payment for expenses incurred in connection with his services, as well as a total of $17,586 in reimbursement for expenditures made in plaintiff's behalf, in repayment of loans made to plaintiff and the New York organization, and as a loan from plaintiff to Hubbard. As the commissioner found, and we agree, the precise nature of the

FOUND.

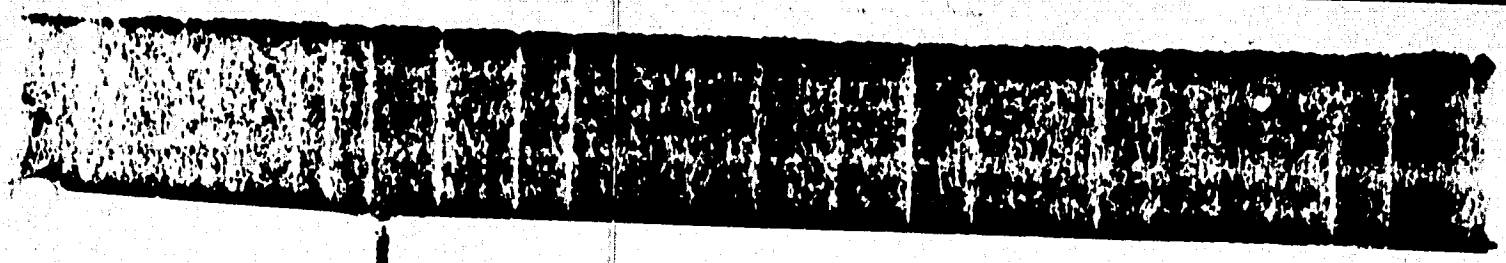
loans and reimbur
not appear in the r
any explanation fo
paid. The portion
ly paid by plaintiff
mately $6,000 in
$11,550 in 1956–57
000 in 1957–58, a
1958–59.

Hubbard also had
mobile at plaintiff
plaintiff's taxable y
and 1959, the organ
maintained a person
bard and his family.
tion to all the fore
ceived a percentage
of the gross income
tology organizations

For purposes of d
do not consider the
Hubbard from the
tions and organizatio
plaintiff. However,
stances here, the fact
income from such clo
indicates that Hubb
from plaintiff was no
ice. During the ye
other percentages, fee
so far as the record
parently received or
bard for his personal
rangement suggests a
for private profit a
doubt upon the proprie
by plaintiff to Hubbar
of his family. The f
was the recipient of i
tiff in the form of r
missions likewise occa
of personal gain.

In this regard, we n
crease in Hubbard's con
inally salaried at $125 p
received $250 the follow
which is described me
In March of 1957, Hubb
ceive 10 percent of pla
come. Although the ori
receipts in fiscal year 1
than in fiscal year 195
income pattern is still

412 F.2d—76



loans and reimbursed expenditures does not appear in the record. Nor do we find any explanation for most of the expenses paid. The portion of the $77,460 actually paid by plaintiff amounted to approximately $6,000 in 1955-56, more than $11,550 in 1956-57, approximately $18,000 in 1957-58, and over $22,000 in 1958-59.

Hubbard also had the use of an automobile at plaintiff's expense. During plaintiff's taxable years ending in 1958 and 1959, the organization provided and maintained a personal residence for Hubbard and his family. Moreover, in addition to all the foregoing, Hubbard received a percentage (usually 10 percent) of the gross income of affiliated Scientology organizations.

For purposes of deciding this case, we do not consider the income accruing to Hubbard from the affiliated congregations and organizations as coming from plaintiff. However, under the circumstances here, the fact that Hubbard had income from such closely related sources indicates that Hubbard's compensation from plaintiff was not for full-time service. During the years in issue these other percentages, fees, and commissions, so far as the record shows, were apparently received or receivable by Hubbard for his personal use. Such an arrangement suggests a franchise network for private profit and, in turn, casts doubt upon the propriety of the payments by plaintiff to Hubbard and the members of his family. The fact that Hubbard was the recipient of income from plaintiff in the form of royalties and commissions likewise occasions an inference of personal gain.

In this regard, we note the steady increase in Hubbard's compensation. Originally salaried at $125 per week, Hubbard received $250 the following year, $125 of which is described merely as a "fee." In March of 1957, Hubbard began to receive 10 percent of plaintiff's gross income. Although the organization's gross receipts in fiscal year 1957-58 were less than in fiscal year 1956-57, Hubbard's income pattern is still on of growth.

Moreover, the record supports the conclusion that plaintiff and Scientology generally have consistently grown since the years in issue, while Hubbard, or his communication center in England, has continued to receive a percentage of the income of plaintiff and affiliated organizations.

When, with this general background, we consider that Hubbard, the dominant figure in Scientology, and his wife were two members of plaintiff's 3-man board of trustees during the relevant period, it is not inappropriate to require plaintiff to justify the payments made to Hubbard and his family in the nature of loans, reimbursements for expenditures in plaintiff's behalf, for expenses, and other purposes. Not only can these payments, in the absence of explanation, be properly attributable to the individuals as income (*cf.* Parker v. Commissioner of Internal Revenue, 365 F.2d 792 (8th Cir. 1966), cert. denied, 385 U.S. 1026, 87 S.Ct. 752, 17 L.Ed.2d 674 (1967); *see also* Kenner v. Commissioner of Internal Revenue, 318 F.2d 632 (7th Cir. 1963)), but the logical inference can be drawn that these payments were disguised and unjustified distributions of plaintiff's earnings.

In addition to the unexplained amounts received by Hubbard described above, his family received the following additional payments entirely, or almost entirely, from plaintiff:

Mary Sue Hubbard, the wife of plaintiff's founder, had income from September 1955 through December 1958 by virtue of renting property owned by her to plaintiff. Her total receipts from this venture were $10,685. Payments amounting to $1,450, attributable to the debts of her son, were made in 1956 and 1957. A completely unexplained grant of $250 and loans of $800 were received in 1958-59.

L. Ron Hubbard, Jr., was the recipient of loans in 1955-56 and 1958-59 totaling $1,226. He was reimbursed for expenditures of approximately $200 in behalf of plaintiff in 1957-58 and 1958-59.

412 F.2d—76

In fiscal years 1957-58 and 1958-59, Kay Hubbard, the daughter, received payments, generally designated as salary or wages, totaling $3,242. The record is devoid of any evidence showing services performed by Miss Hubbard for plaintiff. This amount includes loans of $550 made in 1958.

What emerges from these facts is the inference that the Hubbard family was entitled to make ready personal use of the corporate earnings. *Cf.* Birmingham Business College, Inc. v. Commissioner of Internal Revenue, *supra* at 276 F.2d 480. We have no evidence that the rental paid by plaintiff for Mrs. Hubbard's property was reasonable, or that such an arrangement was beneficial or desirable to the corporation. Inflated rental prices can amount to inurement of benefit. *See* Texas Trade School v. Commissioner of Internal Revenue, 272 F.2d 168 (5th Cir. 1959).

Similarly, the purpose of the loans made to the Hubbards is unexplained. We do not know whether the terms were financially advantageous to plaintiff or whether in fact the loans were ever repaid. Indeed, the very existence of a private source of loan credit from an organization's earnings may itself amount to inurement of benefit. For comparable reasons, the proof concerning the payments for expenses and expenditures in behalf of plaintiff is also defective.

In substance, then, nothing we have found in the record dispels the substantial doubts the court entertains concerning the receipt of benefit by the Hubbards from plaintiff's net earnings. Since plaintiff has failed to meet its burden of proof, we hold therefore that a part of the corporate net earnings was a source of benefit to private individuals.

In this regard, we think it immaterial whether the benefit is viewed as inuring to Hubbard—by easing his obligation to support his family—or directly to the respective members of the family. All the Hubbards were persons "having a personal and private interest in the activities of the organization." Treas.Reg. § 1.501(a)-1(c).

[1] The extent of the seeming benefit to Hubbard's family might appear relatively small, but plaintiff has not suggested that it was *de minimis*, and we cannot so conclude from the evidence before us. It is our opinion, from an examination of the statute and the decided cases, that Congress, when conditioning the exemption upon "no part" of the earnings being of benefit to a private individual, specifically intended that the amount or extent of benefit should not be the determining factor. *See* Spokane Motorcycle Club v. United States, *supra*.

With respect to Mr. Hubbard, plaintiff seeks to bring itself within the doctrine of the cases cited above which hold that reasonable salaries paid by a corporation do not result in inurement of benefit to private individuals. Even had the compensation paid to Hubbard been demonstrably reasonable, however, this showing would not remedy the defects in proof concerning the additional payments to Hubbard, or, of course, his family. If in fact a loan or other payment in addition to salary is a disguised distribution or benefit from the net earnings, the character of the payment is not changed by the fact that the recipient's salary, if increased by the amount of the distribution or benefit, would still have been reasonable.

[2] For all the above reasons, therefore, the court concludes that plaintiff has failed to prove its entitlement to exemption from income taxation under section 501(c) (3) of the Internal Revenue Code of 1954. Plaintiff's claim is denied, and the petition is dismissed. Defendant is entitled to prevail on its counterclaims. In accordance with the stipulation of the parties, as reflected in unchallenged findings of the commissioner, judgment is entered for defendant in the amounts of $3,262.75 for the fiscal year ending June 30, 1956, $5,399.03 for the fiscal year ending June 30, 1958, and $7,381.97 for the fiscal year ending June 30, 1959. As part of the judgment, defendant is entitled to statutory interest of 6 percent on all three sums from the respective appropriate dates.

"It is well settled, however, that to resist a motion for summary judgment, the party against whom it is sought must present some evidence to indicate that the facts are in dispute, where the moving party's evidence has shown otherwise, and . . . the record reveals no such evidence. His bare contention that the issue is disputable will not suffice."

Inasmuch as there is no genuine issue as to any material fact and defendant is entitled to a judgment as a matter of law, accordingly, an Order will be entered granting defendants' Motion for Summary Judgment.

FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D. C., INC., Plaintiff,

v.

DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.

Civ. A. No. 78-0107.

United States District Court, District of Columbia.

Oct. 19, 1978.

Plaintiff, nonprofit religious organization, brought action against United States and various public officers of United States, alleging that defendants had violated its constitutional and statutory rights by harassing, surveilling, infiltrating plaintiff, blacklisting its members, and subjecting it to discriminatory tax audits. The District Court, Charles R. Richey, J., held that: (1) where each alleged class member had not exhausted his or her administrative remedies, plaintiff was precluded from maintaining action as class action for damages under Federal Tort Claims Act; (2) class would be conditionally certified for purposes of injunctive relief only; (3) complaint sufficiently complied with rule requiring claim to contain short and plain statement of claim showing that pleader is entitled to relief; (4) plaintiff failed to properly exhaust its administrative remedies, and thus court lacked jurisdiction over action for damages under Federal Tort Claims Act; (5) Title VII of Civil Rights Act of 1964 was exclusive remedy for injunctive relief based on claims of religious discrimination in federal employment, and (6) plaintiff stated claim upon which relief could be granted in its allegations regarding surveillance, informants, and involvement of foreign officials.

Ordered accordingly.

1. Injunction ⇐75

In action brought by religious organization which alleged that it had been subject of government-wide conspiracy to destroy a religion, organization properly asserted claim against public officers of United States in their official capacities for injunctive relief under First and Fourth Amendments. U.S.C.A.Const. Amends. 1, 4.

2. United States ⇐78(5)

Where religious organization brought action against United States and various public officers in their official capacities, alleging that it had been subject of government-wide conspiracy to destroy a religion, and where religious organization alleged violations of First, Fourth, Fifth, and Ninth Amendment rights, organization could proceed under Federal Tort Claims Act while relying upon constitutional tort theory. 28 U.S.C.A. §§ 2671-2680, U.S.C.A.Const. Amends. 1, 4, 5, 9.

3. Conspiracy ⇐7.5

Under civil rights conspiracy statute, recovery may be had against persons if plaintiff establishes (1) a conspiracy, (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws or of equal privileges and immunities under the laws, (3) pursuant to which one or more of the conspirators did or caused to be done an act

FOUNDI

in furtherance of
whereby (4) plaintif
person or property
and exercising any
citizen of the Unite
§ 1985(3).

4. Conspiracy ⇐13

Under civil rig
allowing recovery ag
al officials should be
42 U.S.C.A. § 1985(3

See publication
for other judicia
definitions.

5. Conspiracy ⇐7.

Civil rights co
limited to racial disc
any class-based, inv
animus. 42 U.S.C.A

6. United States ⇐

Where religiou
that it had been s
destroy a religion
conspiracy statute
ble to suit by religi
public officers of th
zation could maint
United States sinc
Act made United S
extent as a privat
circumstances. 42
C.A.Const. Amend
§ 2674.

7. United States ⇐

Federal Tort C
of exhaustion of a
jurisdictional and i
to an action unde
§ 2675(a).

8. United States ⇐

Under Federa
alleged class mem
ber administrative
§ 2675(a); Fed.Ru
U.S.C.A.

9. Federal Civil P

Every membe
comply with jurisd
damage suit. Fe
28 U.S.C.A.

in furtherance of object of conspiracy, whereby (4) plaintiff was injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States. 42 U.S.C.A. § 1985(3).

4. Conspiracy ⇨13

Under civil rights conspiracy statute allowing recovery against "persons," federal officials should be considered "persons." 42 U.S.C.A. § 1985(3).

See publication Words and Phrases for other judicial constructions and definitions.

5. Conspiracy ⇨7.5

Civil rights conspiracy statute is not limited to racial discrimination but includes any class-based, invidiously discriminatory animus. 42 U.S.C.A. § 1985(3).

6. United States ⇨78(3)

Where religious organization alleged that it had been subject of conspiracy to destroy a religion and where civil rights conspiracy statute was potentially applicable to suit by religious organization against public officers of the United States, organization could maintain action against the United States since Federal Tort Claims Act made United States liable to the same extent as a private individual under like circumstances. 42 U.S.C.A. § 1985(3), U.S.C.A.Const. Amends. 1, 4, 9, 28 U.S.C.A. § 2671.

7. United States ⇨127

Federal Tort Claims Act's requirement of exhaustion of administrative remedies is jurisdictional and is an absolute prerequisite to an action under the Act. 28 U.S.C.A. § 2675(a).

8. United States ⇨127

Under Federal Tort Claims Act, each alleged class member must exhaust his or her administrative remedies. 28 U.S.C.A. § 2675(a), Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

9. Federal Civil Procedure ⇨161

Every member of class must actually comply with jurisdictional prerequisites in a damage suit. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

10. United States ⇨127

Integral requirement of a proper claim to an administrative agency under Federal Tort Claims Act is that claim state a sum certain; reason for sum certain requirement is that if agency knows exactly what claimant seeks, prelitigation settlement will more likely result. 28 U.S.C.A. §§ 2671, 2680.

11. United States ⇨127

To allow exhaustion of one claimant under Federal Tort Claims Act to satisfy exhaustion requirement for all members of proposed class would eliminate requirement that each claimant state sum certain and accompanying advantage to prelitigation process consisting of increased likelihood of prelitigation settlement, and thus every member of proposed class must state sum certain in his or her administrative claim. 28 U.S.C.A. §§ 2671, 2680.

12. United States ⇨127

In view of statutory provision that exhaustion requirement under Federal Tort Claims Act does not apply to claims as may be asserted under Federal Rules of Civil Procedure by third-party complaint, cross-claim, or counterclaim and in view of notion of *expressio unius est exclusio alterius*, Congress did not intend to waive exhaustion requirement of Federal Tort Claims Act for class action rule. 28 U.S.C.A. § 2675(a); Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

13. Federal Civil Procedure ⇨186.15

In action brought against United States and public officers of United States by religious organization which alleged that it was subject of government-wide conspiracy to destroy a religion, proposed class would be conditionally certified for purposes of injunctive relief sought, despite argument that court could fashion injunctive relief that would protect members of class without certifying class, in view of fact that treating action as class action would prevent any party from withholding discovery material on basis that it related to entity not included in class and in view

of fact that class action would probably make it easier for members of class to enforce injunction in the future should one be issued. Fed.Rules Civ.Proc. rule 23(b)(2), 28 U.S.C.A.

14. Federal Civil Procedure ⇨630, 633

Complaint filed by religious organization alleging that it was subject of government-wide conspiracy to destroy a religion sufficiently complied with rule requiring pleading to contain short and plain statement of claim showing that pleader is entitled to relief, but, even though complaint was sufficient, in view of fact that complaint permitted neither defendants nor court to judge exactly what prior actions might have barred claim, religious organization would be directed to make specific factual allegations once discovery progressed further. Fed.Rules Civ.Proc. rule 8(a), 28 U.S.C.A.

15. United States ⇨113

Signature of vice-president of religious organization on letters accompanying claim forms submitted to government agencies was sufficient to fix responsibility for claims and representations made therein for purposes of action against United States and certain public officers under Federal Tort Claims Act. 28 U.S.C.A. §§ 2671-2680.

16. United States ⇨113

Where religious organization filed claims with government agencies alleging existence of government-wide conspiracy to destroy a religion, alleging that agency personnel secretly planned and executed series of harassing programs and that agency personnel negligently disseminated erroneous information from intelligence and criminal files, but where no specific time, place nor incident was given for any alleged negligent maintenance or dissemination of erroneous information, and where organization failed to comply with agency requests for supplemental information, description of claims was insufficient under Federal Tort Claims Act, and thus court lacked jurisdiction over damages claim under Act. 28 U.S.C.A. § 2675.

17. Estoppel ⇨62.1

For estoppel to apply, party asserting estoppel must reasonably rely upon government's action or inaction.

18. Estoppel ⇨62.2(4)

Where religious organization filed claims against government agencies, where description of wrong alleged was insufficient, and where agencies indicated insufficiency of claim, silence of agencies did not indicate sufficiency of claim and organization could not invoke any estoppel against government agencies that did not request further information with respect to organization's claims.

19. Civil Rights ⇨38

Title VII of Civil Rights Act of 1964 is exclusive remedy for injunctive relief based on claims of religious discrimination in federal employment. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

20. Civil Rights ⇨32

Where religious organization sought injunctive relief with respect to its claims of religious discrimination in federal employment but where organization failed to exhaust administrative remedies prescribed under Title VII, exclusivity of Title VII barred organization's request for injunctive relief, despite absence of any claim for hiring or reinstating individuals or for back pay or for an affirmative plan to eliminate vestiges of past discrimination. Civil Rights Act of 1964, §§ 701 et seq., 706(g), 717 as amended 42 U.S.C.A. §§ 2000e et seq., 2000e-5(g), 2000e-16.

21. Records ⇨11

District court is empowered to order expungement of government records where necessary to vindicate rights secured by the Constitution or by statute.

22. Civil Rights ⇨13.12(3)

Where religious organization alleged that actions of United States and its officers had effect of interfering with lawful association and religious activities of organization, disrupting organization's growth,

FOUND

harassing and intim
organization and
benefits, preventin
gious beliefs and o
ties, and deterring
organization, crime
"subjective chill,"
cient to withstand
C.A.Const. Amend.

23. Criminal Law

While law enfo
right to use info
there are limits to
Const. Amend. 1.

24. Civil Rights ⇨

Where religio
that government
trators to harass a
where complaint
law enforcement to
lawful associationa
of organization,
was sufficient to
miss complaint.

25. Injunction ⇨

Where religiou
junction to preve
officers from rele
derogatory inform
to foreign governm
zation did not se
foreign officials o
tion stated claim u
granted.

—

Earl C. Dudley,
Washington, D. C.

Barbara Allen
Gen., Barbara B.
Whitaker, David
dy, Mauricio A. F
Justice, Washingt

1. Because of the
this case and to
resolution of this
address many of
ing motions which
certain issues, wo

harassing and intimidating practitioners of organization and denying of government benefits, preventing free practicing of religious beliefs and other associational activities, and deterring supporters from joining organization, crime alleged was more than a "subjective chill," and complaint was sufficient to withstand motion to dismiss. U.S.C.A.Const. Amend. 1.

23. Criminal Law ⇐1224(1)

While law enforcement officials have a right to use informers and infiltrators, there are limits to use thereof. U.S.C.A. Const. Amend. 1.

24. Civil Rights ⇐13.12(3)

Where religious organization alleged that government used informants or infiltrators to harass and harm organization and where complaint also charged that these law enforcement techniques interfered with lawful associational and religious activities of organization, organization's allegation was sufficient to overcome motion to dismiss complaint. U.S.C.A.Const. Amend. 1.

25. Injunction ⇐75

Where religious organization sought injunction to prevent United States and its officers from releasing allegedly false and derogatory information about organization to foreign governments and where organization did not seek to enjoin actions of foreign officials on foreign soil, organization stated claim upon which relief could be granted.

Earl C. Dudley, Jr., Robert A. Seefried, Washington, D. C., for plaintiff.

Barbara Allen Babcock, Asst. U. S. Atty. Gen., Barbara B. O'Malley, Elizabeth Gere Whitaker, David H. White, Brian G. Kennedy, Mauricio A. Flores, Civil Div., Dept. of Justice, Washington, D. C., for defendants.

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

This case is before the Court on the plaintiff's motion for class certification and the defendants' motion to dismiss. For the reasons hereinafter stated, the Court will grant plaintiff's motion for class certification in part and will grant defendants' motion to dismiss in part.[1]

I. BACKGROUND

Plaintiff, the Founding Church of Scientology of Washington, D. C., is a non-profit corporation chartered and operating under the laws of the District of Columbia as a religious organization practicing the religion of Scientology.[2] Plaintiff brought this case as a class action, purporting to represent "all Churches of Scientology and Scientology missions located throughout the United States."

The defendants include public officers of the United States and are sued in their official capacities only: the Director of the Federal Bureau of Investigation, the Attorney General of the United States, the Director of the Central Intelligence Agency, the Secretary of the Treasury, the Chief of the National Central Bureau of the International Criminal Police Organization, the Director of the National Security Agency, the Secretary of the Army, and the Postmaster General of the Postal Service. The United States is also named as a defendant.

Plaintiff commenced the instant action on January 24, 1978, three weeks after dismissing on its own motion a virtually identical action which had been filed on January 31, 1977. *See The Founding Church of Scientology v. Clarence Kelley, et al.*, C.A. No. 77-0175 (D.D.C. January 31, 1977).

1. Because of the complexity of the issues in this case and to help expedite the ultimate resolution of this entire matter, the Court will address many of the issues raised in the pending motions which, because of the resolution of certain issues, would otherwise not be reached.

2. Because this case is before the Court on a motion to dismiss, the Court will accept the allegations made in the complaint as true. *See Jenkins v. McKeithen*, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). Nothing in the "Background" section should in any way be construed as a finding of fact.

Plaintiff alleges that it, as well as the class it seeks to represent, has been the subject of a government-wide conspiracy to destroy a religion. Plaintiff claims that its constitutional and statutory rights have been violated in that the defendants have improperly maintained and disseminated information regarding the plaintiff; harassed, observed, and infiltrated the plaintiff organization; "blacklisted" members of the plaintiff; and subjected the plaintiff to discriminatory tax audits. This conspiracy, plaintiff claims, began about the year 1955 and allegedly continues to date. Plaintiff charges that these alleged actions of the defendants were in violation of the first, fourth, fifth, ninth and fourteenth amendments to the Constitution; 28 U.S.C. § 534, 42 U.S.C. § 1985(3), 18 U.S.C. § 2520, 50 U.S.C. § 403(d), 47 U.S.C. § 605, 18 U.S.C. §§ 1702 and 1703, and 28 U.S.C. § 2674.

In terms of relief, plaintiff seeks a declaratory judgment that the alleged actions of the defendants violate the Constitution. Plaintiff also requests an injunction restraining all the defendants from interrogating, observing, infiltrating, reviewing or opening mail, disrupting travel or collecting or utilizing any information regarding the plaintiff. Plaintiff further requests the expungement of all information and files regarding the plaintiff that is in the possession of the defendants. In addition, plaintiff demands from the United States compensatory damages totalling $20 million, and punitive damages of ten times the amount of compensatory damages awarded by the Court, not to exceed $750 million.

II. JURISDICTIONAL ISSUES AND CLAIMS UPON WHICH RELIEF MAY BE GRANTED

The Court, upon initially reviewing the extensive allegations in the complaint, directed the parties to submit memoranda concerning the statutes and constitutional provisions relied upon by the plaintiff herein. Although plaintiff enumerated several sources of liability in its complaint, plaintiff now admits that "several of the statutes cited are not necessarily relied upon as independent sources of damage liability, but rather to establish standards of legality governing the conduct of government officials . . ." (Memorandum of Law Concerning Statutes and Constitutional Provisions Relied Upon at 2, February 13, 1978) Therefore, the Court need not now concern itself with whether every statute cited in the complaint properly states a claim upon which relief may be granted. Moreover, because no motion specifically based on the jurisdictional issues has been made and because of the Court's opinion in part IV B, *infra*, the Court need rule on neither of these jurisdictional issues nor whether these statutes state a cognizable claim. However, in order to expedite this litigation, the Court *sua sponte* has decided some of the basic jurisdictional issues set forth in the complaint even though the Court's final resolution of the motion to dismiss obviates the need to decide all jurisdictional questions at this time.

[1] As to plaintiff's claim for declaratory and injunctive relief, the Court notes, and the defendants appear to concede, that plaintiff has properly based jurisdiction on 28 U.S.C. § 1331. In addition, plaintiff has properly asserted a claim against the defendant officials for injunctive relief under the first and fourth amendments, and perhaps other amendments as well. *See Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975); *Berlin Democratic Club v. Rumsfeld*, 410 F.Supp. 144 (D.D.C.1976).

As to plaintiff's claim for damages against the United States, the Court notes that plaintiff has asserted a claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680. According to this Act, unless expressly excepted, the United States is liable in tort "in the same manner and to the same extent as a private individual under like circumstances . . ." 28 U.S.C. § 2674. In *Black v. Sheraton Corp. of America*, 184 U.S.App.D.C. 46, 54, 564 F.2d 531, 539 (1977), the court recognized the sweeping effect of this language:

> As a result of this language, "the Government's liability is no longer restricted to circumstances in which government bod-

FOUNDI

ies have traditiona
misconduct of the
extends to nove
forms of liability
v. Muniz, 374 U.S
[1850] at 1856 [10
(emphasis added).
that liability predica
a constitutional rig
claim under the FT

The district cou
damages to plaint
lapping theories o
vasion of privacy
privacy by public
constitutional rig
389 F.Supp. 529, 5
theories, which th
see among the ex
bility specified in
181 U.S.App.D.C. a
(emphasis added).

[2] The plaintiff
least two "torts" w
the United States li
would create a liab
individual under li
U.S.C. § 2674. The
tion of plaintiff's
ninth amendment ri
Unknown Named A
S.Ct. 1999, 29 L.Ed
amendment); *Dellu*
App.D.C. 275, 566 F
nied, — U.S. —
L.Ed.2d 1161 (1978)
ton v. La Prade, 52
(first amendment);
Inc. v. Schultz, 498 F
(fifth amendment).
Norton v. United
F.2d 390 (4th Cir. 1
edged the use of the
type of torts:

> While *Bivens* cre
> certain violations
> ment, it did not
> impose liability o
> the federal gov
> this,] Senator Pe
> H.R. 8245 "to pr

ies have traditionally been responsible for misconduct of their employees. The Act extends to novel and unprecedented forms of liability as well." *United States v. Muniz*, 374 U.S. [150] at 159, 83 S.Ct. [1850] at 1856 [10 L.Ed.2d 805]

(emphasis added). The court then found that liability predicated upon a violation of a constitutional right could give rise to a claim under the FTCA.

The district court in this case awarded damages to plaintiff invoking four overlapping theories of liability: trespass, invasion of privacy by intrusion, invasion of privacy by publication and *violation of constitutional rights*. [*Black v. U. S.*,] 389 F.Supp. 529, 531 (1975). None of the theories, which the district court invoked are among the exemptions from tort liability specified in the Tort Claims Act.

184 U.S.App.D.C. at 54, 564 F.2d at 539 (emphasis added).

[2] The plaintiff herein relies upon at least two "torts" which, it claims, render the United States liable because these torts would create a liability against a "private individual under like circumstances." 28 U.S.C. § 2674. The first "tort" is a violation of plaintiff's first, fourth, fifth and ninth amendment rights. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1974) (fourth amendment); *Dellums v. Powell*, 184 U.S. App.D.C. 275, 566 F.2d 167 (1977), *cert. denied*, — U.S. —, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978) (first amendment); *Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975) (first amendment); *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974) (fifth amendment). In a recent decision, *Norton v. United States of America*, 581 F.2d 390 (4th Cir. 1978), the court acknowledged the use of the FTCA for these *Bivens*-type of torts:

> While *Bivens* created a federal tort for certain violations of the fourth amendment, it did not (and indeed could not) impose liability on the officer's employer, the federal government. [To correct this,] Senator Percy proposed a rider to H.R. 8245 "to provide a remedy against the United States for the intentional torts of its investigative and law enforcement officers." S.Rep. No. 93-588, *supra*, [1974] U.S.Code Cong. & Admin.News at 2789. Enacted in March 1974, as Pub.L. No. 93-253, § 2, this legislation amended FTCA to create an exception to the intentional-tort exception of 28 U.S.C. § 2860(h).
>
> * * * * * *
>
> The legislative history, however, makes clear that the 1974 amendment [to the FTCA] was viewed by Congress as a "counterpart to the *Bivens* case. . . ." S.Rep. No. 93-588, *supra*,

581 F.2d at 393. *See Birnbaum v. United States*, 436 F.Supp. 967, 974-75 (E.D.N.Y. 1977). Thus, plaintiff herein could proceed under the FTCA, while relying upon a constitutional tort theory.

[3] The second "tort" relied upon by the plaintiff is that created by 42 U.S.C. § 1985(3). Under this statute, recovery may be had against "persons" if a plaintiff establishes (1) a conspiracy, (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, (3) pursuant to which one or more of the conspirators did or caused to be done an act in furtherance of the object of the conspiracy, whereby (4) the plaintiff was injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03, 91 S.Ct. 1790, 29 L.Ed.2d 358 (1971).

[4-6] In applying the elements of 42 U.S.C. § 1985(3) to the facts of this case, the Court notes that there are two initial obstacles, which may well be surmountable. First, federal officials should be considered "persons" within the meaning of § 1985(3). *See Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 931 (10th Cir. 1975); *Stith v. Barnwell*, 447 F.Supp. 970 (M.D.N.C.1978); *Alvarez v. Wilson*, 431 F.Supp. 136 (N.D.Ill. 1977); *Butler v. United States*, 365 F.Supp. 1045 (D.Hawaii 1973). Second, the statute

is not limited to racial discrimination but includes any "class-based, invidiously discriminatory animus," such as that alleged here. 403 U.S. at 102, 91 S.Ct. 1790. Having thus established the potential applicability of § 1985(3) to a suit by these plaintiffs against the *officers*, the plaintiff can, therefore, maintain an action against the *United States*, because the FTCA makes the United States liable "to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

III. MOTION FOR CLASS CERTIFICATION

Plaintiff seeks in this litigation to represent the class of "all Churches and Missions of the Church of Scientology located in the United States." Asserting that the prerequisites of Fed.R.Civ.P. 23(a) are met, plaintiff asks that the class be certified under either Rule 23(b)(1), (2), or (3).

Defendants do not challenge the application of the language of Rule 23 to this case. However, defendants do challenge the proposed certification on two grounds apart from Rule 23: (1) that the Court lacks jurisdiction to adjudicate the damage claims of the proposed class members because they have failed to exhaust their administrative remedies, required by 28 U.S.C. § 2675(a);[3] and (2) that the injunctive relief sought would have the same effect as a class-wide injunction. The Court agrees with defendants' first objection, but not their second.

A. *Under the FTCA, Each Alleged Class Member Must Exhaust His or Her Administrative Remedies, Which Has Not Been Done Here and, Therefore, Plaintiff May Not Maintain This Case as a Class Action for Damages.*

[7, 8] Section 2675(a) of Title 28 of the United States Code states:

> An action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency . . .

This requirement of exhaustion of administrative remedies is jurisdictional and is an absolute prerequisite to an action under the FTCA. *Melo v. United States*, 505 F.2d 1026, 1028 (8th Cir. 1974); *Best Bearings Co. v. United States*, 463 F.2d 1177, 1179 (7th Cir. 1972); *Bialowas v. United States*, 443 F.2d 1047 (3d Cir. 1971). The issue here is whether proper exhaustion by one class member obviates the need for other class members to exhaust, in order for the Court to have jurisdiction over the entire class. All the courts that have considered this issue have concluded that *every* member of a class must exhaust his administrative remedies. *See Lunsford v. United States*, 570 F.2d 221 (8th Cir. 1977); *Caidin v. United States*, 564 F.2d 284 (9th Cir. 1977); *Commonwealth of Pennsylvania v. National Association of Flood Insurance*, 520 F.2d 11 (3d Cir. 1975); *Harrigan v. United States*, 63 F.R.D. 402 (E.D.Pa.1974). These decisions accord with the purpose of the exhaustion requirement as well as other case law.[4]

The purpose of the exhaustion requirement, as stated in the Senate and House Reports, is

> to improve and expedite disposition of monetary claims against the Government by establishing a system of prelitigation settlement, to enable consideration of claims by the agency having the best information concerning the incident, and to ease court congestion and avoid unnecessary litigation.

S.Rep. No. 1327, 89th Cong., 2d Sess. 3 (1966); H.R. Rep. No. 1532, 89th Cong., 2d Sess. 4 (1966); U.S.Code Cong & Admin. News 1966, p. 2515. The Court finds these

3. Plaintiff has admitted that "the only member of the proposed class which has presented administrative claims under the Federal Tort Claims Act is the [named] plaintiff." (Memorandum of Points and Authorities in Support of Motion for Class Action Certification at 9, February 13, 1978)

4. The discussion of the exhaustion requirement involved here is applicable only to the FTCA and does not apply to the procedure in a class action under 42 U.S.C. § 2000e *et seq.* *See* p. 755 *infra*.

reasons fully supportive of requiring each member of a class to exhaust his administrative remedies. If the Court were to allow the exhaustion of one to be sufficient, this might well delay the litigation and burden the court congestion because, had some of the class members exhausted and had the agency settled their claims, the ultimate litigation would be quicker and less complex.

[9] Every member of the class must usually comply with the jurisdictional prerequisites in a damage suit. In *Harrigan v. United States*, 63 F.R.D. 402 (E.D.Pa.1974), the court discussed the significance of a jurisdictional requirement.

> The Supreme Court held [in *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973)] that a class action was not maintainable since the separate claims of all the members of the class failed to satisfy independently the $10,000 jurisdictional requirement of 28 U.S.C. § 1332. It is concluded from the *Zahn* case that the jurisdictional requirement in the present case must also be met independently by the members of the purported class. To allow the named plaintiff here [in a suit under the FTCA], by the filing an administrative claim on his own behalf, to satisfy the administrative claim requirements for unnamed plaintiffs would constitute a prohibited expansion of the jurisdiction of the federal courts. *See Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969).

63 F.R.D. at 409.

[10, 11] Another basic requirement—which is integral to a proper claim to the agency under the FTCA—is that the claim state a sum certain. *Lunsford, supra* at 226. In fact, cases have been dismissed for failure of the claimant to state a sum certain in his or her administrative claim. *See Allen v. United States*, 517 F.2d 1328 (6th Cir. 1975); *Caton v. United States*, 495 F.2d 635 (9th Cir. 1974). The reason for the sum certain requirement is that if the agency knows exactly what the claimant seeks, prelitigation settlement will more likely result. To allow the exhaustion of one claimant to satisfy the exhaustion requirement for all members of the class would eliminate the requirement that *each* claimant state a sum certain and the accompanying advantage to the prelitigation process. This Court will not allow this advantage to the prelitigation process to be bypassed.

[12] Moreover, it is interesting to note that when Congress amended § 2675(a) to its present form in 1966, it considered the possible relationship between the exhaustion requirement and the Federal Rules of Civil Procedure. The last sentence of the provision states:

> The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, crossclaim, or counterclaim.

Congress thus considered the impact of the exhaustion requirement on the Federal Rules of Civil Procedure and, by virtue of the notion of *expressio unius est exclusio alterius*, decided not to waive the exhaustion requirement for Rule 23.

While acknowledging the existence of contrary authority, plaintiff relies upon an analogy to Title VII law, 42 U.S.C. § 2000e *et seq.*, for its contention that not all members of a class need exhaust. Plaintiff argues that because the instant case is actually one seeking recourse for violation of civil rights, the rule under Title VII—that only the named plaintiffs need exhaust—should be applicable.[5] The requirement of exhaustion is a *statutory* one; therefore, it must be the statute which is inherently appropriate for class action treatment to allow the exhaustion of one to satisfy the requirement for the entire class. While Title VII actions are inherently class-based, *see Bowe v. Colgate Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969), actions under the FTCA are not. When the Title VII rule developed, it was based upon Congress's intent to provide

5. This analogy was explicitly rejected in *Lunsford v. United States*, 570 F.2d 221 (8th Cir. 1977).

a basis for jurisdiction consistent with the policy of the Title VII statute. In light of the FTCA and its policy, the Court cannot conclude that Congress intended the "named plaintiff exhaustion" rule to apply to the FTCA. Thus, even if a single FTCA case raises Title VII-like claims and seems appropriate for the "named plaintiff exhaustion" rule, the analogy to Title VII law fails. Accordingly, each member of the plaintiff class must exhaust his or her administrative remedies. This not being the case at bar, the Court will not certify the class for purposes of damage relief.

B. *The Court Will Conditionally Certify the Class Under Fed.R.Civ.P. 23(b)(2) for Purposes of Injunctive Relief Only.*

[13] Defendants argue that this Court can fashion injunctive relief that would protect the members of the class, even without certifying the class. The Court thanks the defendants for the confidence they have in it but the Court has, nevertheless, decided to conditionally certify the class for purposes of the injunctive relief sought, pursuant to Fed.R.Civ.P. 23(b)(2).

Treating this as a class action will prevent any party from withholding discovery material on the basis that it relates to an entity not included in a class. Furthermore, as a class action under Fed.R.Civ.P. 23(b)(2), in all probability it may be easier for members of the class to enforce an injunction in the future, should one be issued in this case.

IV. MOTION TO DISMISS

The defendants move to dismiss this action pursuant to Fed.R.Civ.P. 8(a) and 12(b). The Court will discuss each of the defendants' arguments seriatim.

A. *The Complaint Complies Sufficiently with Fed.R.Civ.P. 8(a) Because it Presents a Plain Statement of the Claim Showing that the Pleader is Entitled to Relief*

[14] Defendants move to dismiss the complaint because, they allege, it is a general, amorphous pleading not in accord with the requirements of Fed.R.Civ.P. 8(a). This provision provides that

> a pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) *a short and plain statement of the claim showing that the pleader is entitled to relief*, and (3) a demand for judgment for the relief to which he deems himself entitled.

(emphasis added). Defendants argue that the lengthy complaint contains "prolix and irrelevant matter," "fails to provide any specificity as to date or location of the activity, who was involved, or any other information which adequately sets out the elements of a claim or gives defendants fair notice of what is complained of." (Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss at 4-5, February 13, 1978). Furthermore, defendants note, because of the generality of the allegations in the complaint, it is difficult to discern what claims may be barred by prior litigation on grounds of collateral estoppel or *res judicata*.

Although the Court is sensitive to defendants' problems in dealing with the complaint, the Court will not dismiss the complaint. "[T]he Federal Rules of Civil Procedure do not require a claimant to act out in detail the facts upon which he bases his claim." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957); *Bogosian v. Gulf Oil Co.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978). All that is required is a "short and plain statement of the claim." Fed.R.Civ.P. 8(a)(2). However, the complaint is puzzling; it does not permit the defendants—nor the Court—to judge exactly what prior actions may bar the present one. Plaintiff's response has been, essentially, that only through discovery can the plaintiff know the specific

FOUNDI

acts allegedly concea
spirators. Although
complaint is sufficie
the plaintiff to make
tions once discovery
Therefore, the Court
ants' motion to dism
refiling after more
and plaintiff has h
state more precisely
gations.

B. *The Court L*
Plaintiff's Ac
der the Feder
cause Plaintif
Administrativ

The defendants ne
uisite to a suit und
been met because pl
ly exhaust its admin
its complaint, plaintif
administrative claim
CIA, Department of
NSA, the Departmen
United States Postal
¶ 65) Defendants cla
to sign the claims sul
the Treasury; that p
the wrong committe
was insufficient; an
ineffective because, l
after a similar civil
this Court, the pow
transferred from the
ney General.[6]

On the claim form
plaintiff indicated t
curred throughout th
[the] present time."
"impairment and sup
Amendment freedom
ligion valued at $10,0
tiff described the ci
the injury:

6. The Court has no
issue because of the
issue regarding signi
sufficiency of wrong a

7. The Court in *Molin*
United States, 505 F
Caton v. United State
1974), *Avril v. Unite*

acts allegedly concealed by the claimed conspirators. Although as a matter of law the complaint is sufficient, the Court will direct the plaintiff to make specific factual allegations once discovery has progressed further. Therefore, the Court will deny the defendants' motion to dismiss without prejudice to refiling after more discovery is conducted and plaintiff has had an opportunity to state more precisely and concisely its allegations.

B. *The Court Lacks Jurisdiction Over Plaintiff's Action for Damages Under the Federal Tort Claims Act Because Plaintiff Failed to Exhaust Its Administrative Remedies*

The defendants next argue that a prerequisite to a suit under the FTCA has not been met because plaintiff failed to properly exhaust its administrative remedies. In its complaint, plaintiff contends that it filed administrative claims with "the FBI, the CIA, Department of Treasury, Interpol, the NSA, the Department of the Army, and the United States Postal Service." (Complaint, ¶ 65) Defendants claim that plaintiff failed to sign the claims submitted to the CIA and the Treasury; that plaintiff's description of the wrong committed on the claim form was insufficient; and that the claims were ineffective because, having been submitted after a similar civil suit had been filed in this Court, the power to settle them was transferred from the agency to the Attorney General.[6]

On the claim forms (Standard Form 95), plaintiff indicated that the "incidents occurred throughout the U.S." "from 1955 to [the] present time." The injury alleged was "impairment and suppression of basic First Amendment freedoms of association and religion valued at $10,000,000.00." The plaintiff described the circumstances attending the injury:

> [Agency' personnel secretly planned and execu[ted] a series of programs whose purpo[se] and effect was to inhibit the growth of claimant organization and to impair its ability to formulate and exercise its religious beliefs and rights of association. [Agency] personnel negligently maintained intelligence and criminal files with respect to claimant organization, and negligently disseminated erroneous information from these files to state, local, federal and foreign agencies thereby damaging claimant organization.

[15] As to defendants' argument that two of the claims were unsigned, plaintiff points out that the letters forwarding the claims, to which the Form 95's were attached, were signed by plaintiff's then-Vice President. "The necessity for a signature to the claim is to fix responsibility for the claim and the representations made therein." *Bialowas v. United States*, 443 F.2d 1047, 1050 (3d Cir. 1971). The Court finds that the signature of the Vice President of plaintiff *on the accompanying letters* was sufficient to "fix responsibility for the claims and the representations made therein."

[16] Defendants next argue that the description of the claims was insufficient. Most of the cases in which the claim form was held to be sufficient are distinguishable on the basis that there the claim lacked a request for a sum certain. *See Molinar v. United States*, 515 F.2d 246 (5th Cir. 1975).[7] Here, plaintiff clearly stated a sum certain. The question then becomes whether the general description of the wrong alleged was sufficient to properly present a claim to the government. The Court finds that the claims were too general to allow the agen-

6. The Court has no occasion to address this issue because of the Court's resolution of the issue regarding signing of the forms and the sufficiency of wrong asserted in the forms.

7. The Court in *Molinar* distinguished *Melo v. United States*, 505 F.2d 1026 (8th Cir. 1974), *Caton v. United States*, 495 F.2d 635 (9th Cir. 1974), *Avril v. United States*, 461 F.2d 1089 (9th Cir. 1972), *Lunn v. United States*, 457 F.2d 804 (6th Cir. 1972) (per curiam), *Bialowas v. United States*, 443 F.2d 1047 (3d Cir. 1971), *Johnson v. United States*, 401 F.2d 22 (5th Cir. 1968) (per curiam), *Jordan v. United States*, 333 F.Supp. 987 (E.D.Pa.1971), *aff'd without opinion*, 474 F.2d 1340 (3d Cir. 1973) on this basis.

cies to fully investigate the situation.[8] No specific time nor specific place nor specific incident was given for any alleged negligent maintenance or dissemination of erroneous information. Without this, the agencies could not effectively evaluate the claims presented.

> The purpose of requiring preliminary administrative presentation of a claim is to permit a government agency to evaluate and settle the claim at an early stage, both for the possibility of financial economy and for the sake of relieving the judicial burden of FTCA suits. These purposes would be defeated if a claimant could refuse to submit the information necessary for the agency to evaluate the claim and then present the matter for the first time to a district court.

Kornblath v. Savannah, 398 F.Supp. 1266, 1268 (E.D.N.Y.1975). No administrative agency could be expected to settle a claim based on the scarce information provided by the plaintiff in this case. In finding the claims inadequate, the Court is aware that Form 95 was not designed for claims based on constitutional or statutory violations. *See Locke v. United States*, 351 F.Supp. 185, 188 (D.Hawaii 1972). However, this Court *cannot* excuse the plaintiff's failure to expand its broad-scale and unparticularized allegations in light of the failure of the plaintiff to respond to the requests of two agencies for supplemental information.[9] *See Rothman v. United States*, 434 F.Supp. 13, 16 (C.D.Cal.1977) ("Having alleged that the government's treatment of the decedent was negligent, it was plaintiffs' duty to respond to the government's request for substantiation with whatever information they possessed."); *Mudlo v. United States*, 423 F.Supp. 1373 (W.D.Pa.1976). In fact, 28 C.F.R. § 14.6(b)(6) *required* the plaintiff to respond to these requests.

> In support of a claim for personal injury, including pain and suffering, the claimant may be *required* to submit the following evidence or information:
>
> . . . . . .
>
> Any other evidence or information which may have a bearing on either *the responsibility of the United States for the personal injury* or the damages claimed.

(emphasis added). Therefore, having failed to submit additional information after being requested to do so, the claims submitted were inadequate.

[17, 18] While it is true that not all the agencies involved requested additional information from plaintiff, no estoppel against the government can be established here. For estoppel to apply, plaintiff must reasonably rely upon the government's action or inaction. *See Beverly Enterprises v. Califano*, 446 F.Supp. 599, 601 (D.D.C.1978); *Brown v. Richardson*, 395 F.Supp. 185, 191 (W.D.Pa.1975). No one could reasonably expect the silence of certain agencies to indicate the sufficiency of the claim when the description of the wrong was so general and where two agencies *did* indicate the insufficiency of the claim. Therefore, the plaintiff will not be permitted to invoke any estoppel against the government agencies that did not request further information.

While this result may appear harsh, the Court has gone out of its way to accommodate the plaintiff in submitting its administrative claims. The Court allowed plaintiff to dismiss its first case without prejudice so that plaintiff could properly file its administrative claims with the various agencies. Instead of seizing this opportunity to com-

8. The Court wishes to note that while the complaint herein has been held sufficient, the sufficiency of the claim in form serves a different purpose and must be evaluated on different grounds. The complaint need only show a "short and plain statement of the claim," Fed.R.Civ.P. 8(a)(2), and will be followed by extensive discovery.

9. Plaintiff claims it did not receive the October 31, 1977 letter from the Army and the National Security Agency, and that even if it had, the letter was sent after the six months period following submission of the claims. However, the October 31, 1977 letter was sent by certified mail and the certification reflects receipt. Furthermore, and more importantly, the October 31, 1977 letter was a follow-up to a letter requesting further information sent on March 22, 1977. Plaintiff does not deny receipt of that letter, and it was well within the six month period.

FOUNDING

ply fully with the techn
a claim form, plaintiff
thwart the entire claim
to sign the Form 95 th
CIA, although it had th
(Memorandum of Point
Support of Defendants
at 10-11, February 13,
sign the Form 95 sent
failed to supply addi
when asked to do so by
CIA (*Id.* at 11-12); it
specify any specific ever
could investigate, so a
These suggest the absen
the submission of the
helpful to the plaintiff
persuade the Court th
filed the claim forms
settlement at the agen
plated by the FTCA.
Court is forced to dismi
for damages on the gro
lacks jurisdiction over th
plaintiff's failure to exh
tive remedies, as is req
and unmistakable man
§ 2675, on its face.

C. *Title VII Is the*
for Injunctive
Claims of Religio
Federal Employ
the Court will Dis
ligious Discrimin
cause Plaintiff ha
nor Complied with

[19] The defendants
request for injunctive r
discrimination in the f
must be based upon a cl
of the Civil Rights Act o
42 U.S.C. § 2000e-16. P
alleged Title VII nor exh
istrative remedies prese
In *Brown v. General S*
tion, 425 U.S. 820, 96 S.C
402 (1976), the Supreme
Title VII is the exclusiv
for religious discriminat
ployment. *See League*
American Citizens v. I
App.D.C. 283, 501 F.2d 8

ply fully with the technical requirements of a claim form, plaintiff has made efforts to thwart the entire claims process: it failed to sign the Form 95 that was sent to the CIA, although it had three chances to do so (Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss at 10-11, February 13, 1978); it failed to sign the Form 95 sent to the Treasury; it failed to supply additional information when asked to do so by the Army and the CIA (*Id.* at 11-12); it failed to adequately specify any specific events that the agencies could investigate, so as to settle a claim. These suggest the absence of good faith in the submission of the claims and are not helpful to the plaintiff in its attempt to persuade the Court that it has diligently filed the claim forms for the purpose of settlement at the agency level, as contemplated by the FTCA. Accordingly, the Court is forced to dismiss plaintiff's action for damages on the ground that the Court lacks jurisdiction over this claim because of plaintiff's failure to exhaust its administrative remedies, as is required by the plain and unmistakable mandate of 28 U.S.C. § 2675, on its face.

C. *Title VII Is the Exclusive Remedy for Injunctive Relief Based on Claims of Religious Discrimination in Federal Employment. Therefore, the Court will Dismiss Plaintiff's Religious Discrimination Claims Because Plaintiff has Neither Asserted nor Complied with Title VII*

[19] The defendants contend that any request for injunctive relief from religious discrimination in the federal government must be based upon a claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16. Plaintiff has neither alleged Title VII nor exhausted the administrative remedies prescribed thereunder. In *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), the Supreme Court held that Title VII is the exclusive judicial remedy for religious discrimination in federal employment. *See League of United Latin American Citizens v. Hampton*, 163 U.S. App.D.C. 283, 501 F.2d 843 (1974).

Nothing in the recent decision of *Neely v. Blumenthal*, (D.D.C.1978), 458 F.Supp. 945 is to the contrary. There, the court held that Title VII does not preclude a suit for *damages against the government officials* who allegedly discriminated. However, the court explicitly acknowledged the exclusivity of Title VII when the action is one for *injunctive relief against officials*, as is the case here:

> Unlike in this case, the remedies sought in *Richardson* [*v. Wiley*, 186 U.S.App.D.C. 309, 569 F.2d 140 (1977)] were all official injunctive remedies. So, in holding that plaintiff was barred from obtaining injunctive relief on any of his non-Title VII theories, the Court of Appeals did not decide the question of *Brown's* preemptive effect on constitutional damage causes of action. *The only application Richardson can have in the case at bar is with regard to plaintiff's first amendment claim for injunctive relief also available under Title VII.* Accordingly, based on the *Richardson* decision, the Court will dismiss plaintiff's constitutional claim for injunctive remedies.

At 458 F.Supp. at 955 n.17. Thus, this Court must similarly dismiss plaintiff's request for injunctive relief as to religious discrimination in employment by federal officials.

[20] Plaintiff has argued that the exclusivity of Title VII should not bar its claims here because plaintiff has not sought the remedies that Title VII was designed to invoke. Plaintiff, seeking a mere injunction, points out that, here, "there is no claim for hiring or reinstating individuals or for back pay, or for an affirmative plan to eliminate the vestiges of past discrimination." (Plaintiff's Opposition to Defendants' Motion to Dismiss at 1-, August 30, 1977, in C.A. No. 77-0175, incorporated by reference into this case by Plaintiff's Opposition to Defendants' Motion to Dismiss at 23, February 2, 1978). Therefore, according to plaintiff's argument, it need not rely upon Title VII. This argument, however, overlooks the terms of Title VII, which authorizes all "appropriate remedies," 42 U.S.C. § 2000e-16. Not only is an injunction an "appropriate remedy," but Title VII

was designed for the simple purpose of *enjoining* unlawful employment practices. *See* 42 U.S.C. § 2000e-5(g). Thus, the relief plaintiff seeks here, an injunction, is available under Title VII. Consequently, because plaintiff has not alleged nor complied with Title VII, and because Title VII is the exclusive independent remedy for claims of religious discrimination in the federal sector, plaintiff's claims for relief from such discrimination are barred herein.

D. *It Is Premature to Now Decide Whether the Remedy of Expungement Will Be Available in This Case; Further Discovery and Proof Are Necessary.*

[21] The defendants move to dismiss plaintiff's suit for expungement of all records referring to plaintiff because plaintiff has failed to "specify the nature of the items it seeks to have expunged and the harm caused by their continued retention." (Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss at 27, February 13, 1978) However, the Court is empowered to order the expungement of government records where necessary to vindicate rights secured by the Constitution or by statute. *See Chastain v. Kelley*, 167 U.S.App.D.C. 11, 14, 510 F.2d 1232, 1235 (1975); *Menard v. Saxbe*, 162 U.S.App.D.C. 284, 290, 498 F.2d 1017, 1023 (1974); *Sullivan v. Murphy*, 156 U.S.App. D.C. 28, 56, 478 F.2d 938, 966, *cert. denied*, 414 U.S. 880, 94 S.Ct. 162, 38 L.Ed.2d 125 (1973); *Washington Mobilization Committee v. Cullinane*, 400 F.Supp. 186, 219 (D.D.C.1975), *aff'd*, 184 U.S.App.D.C. 215, 229, 566 F.2d 107, 121 (1977). Therefore, it is too premature to rule upon defendants' instant argument. Only after discovery and proof can the Court decide which specific records, if any, should be expunged.

E. *Plaintiff Has Stated a Claim Upon Which Relief Can be Granted in its Allegations Regarding Surveillance, Informants, and the Involvement of Foreign Officials*

The defendants have moved to dismiss three other independent claims made by the plaintiff. Each will be dealt with seriatim

[22] First, the defendants claim that plaintiff's contention that it "was the subject of surveillance and the object of informant interest by the government" fails to state a claim without more harm being alleged than a "subjective chill." (Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss at 28, February 13, 1978) *See Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). The Court finds the allegations herein more specific than those in *Laird*, and more akin to those in *Socialist Workers Party v. Attorney General of United States*, 419 U.S. 1314, 95 S.Ct. 425, 42 L.Ed.2d 627 (1974). In *Socialist Workers Party*, the Court remarked:

> In this case, the allegations are much more specific [than in *Laird*]: the applicants have complained that the challenged investigative activity will have the concrete effects of dissuading some YSA delegates from participating actively in the convention and leading to possible loss of employment for those who are identified as being in attendance. Whether the claimed "chill" is substantial or not is still subject to question, but that is a matter to be reached on the merits, not as a threshold jurisdictional question

419 U.S. at 1318, 95 S.Ct. at 428. Similarly, plaintiff in this case has asserted that the actions of the defendants have had the effect, *inter alia*, of interfering with the lawful associational and religious activities of the plaintiff (Complaint, ¶ 31), disrupting the plaintiff's organization and its growth (Complaint, ¶ 33, ¶ 35); harassing and intimidating practitioners of plaintiff and denying of government benefits (Complaint, ¶ 41), and preventing the free practicing of religious beliefs and other associational activities, as well as deterring supporters from joining the plaintiff (Complaint, ¶ 50). These are more than a "subjective chill" and, whether they are substantial can only be decided at a later time. 419 U.S. at 1318, 95 S.Ct. 425. Therefore, the Court will deny defendants' motion to dismiss on this ground.

FOUND

[23, 24] Second, plaintiff's charge th informants or 'infilt claim upon which The complaint, how these law enforcem fere with the lawfu gious activities" of ¶ 31) While law e have a right to us limits to its use.

> The use of inform itself does not gi violation of const ever, those so eng constitutional bou protects individua abuses in such Plaintiffs' challeng of informers and such, but to condu that allegedly ex and goes far bey lance activities wi pose to invade th of free associatio

Handschu v. Specia F.Supp. 766, 769-7 notes omitted). *Handschu*, plaintiff's to overcome defend

[25] Third, defen tiff failed to state a violations based on wholly by foreign p thereof on foreign tion, defendants rely *ed States*, 405 F.2d 7 *denied*, 395 U.S. 9 L.Ed.2d 747 (1969), *Club v. Rumsfeld*, 4 1976) Both are in the court held that *r* did not give rise to t the United States su in the raids. 405 F *Democratic Club*, th *carried out by forei*

10. Plaintiff cannot the United States' ac foreign officials bec

defendants claim that
n that it "was the sub-
nd the object of infor-
government" fails to
more harm being al-
ive chill." (Memoran-
Authorities in Support
on to Dismiss at 28.
See Laird v. Tatum,
2318, 33 L.Ed.2d 154
finds the allegations
than those in *Laird*,
in *Socialist Workers*
eral of United States,
425, 42 L.Ed.2d 627
Workers Party, the

llegations are much
n *Laird*]; the appli-
that the chal-
rrity will have the
ssuading some YSA
cipating actively in
leading to possible
for those who are
in attendance.
"chill" is substantial
o question, but that
ched on the merits.
isdictional question

at 428. Similarly,
asserted that the
s have had the ef-
erfering with the
religious activities
int, ¶ 31); disrupt-
nization and its
¶ 35); harassing
oners of plaintiff
nt benefits (Com-
ing the free prac-
nd other associa-
s deterring sup-
plaintiff (Com-
ore than a "sub-
are sub-
later time
125. Therefore,
ants' motion to

[23, 24] Second, defendants claim that plaintiff's charge that the government used informants or infiltrators does not state a claim upon which relief can be granted. The complaint, however, also charges that these law enforcement techniques "interfere with the lawful associational and religious activities" of plaintiff. (Complaint, ¶ 31) While law enforcement officials do have a right to use informers, there are limits to its use.

> The use of informers and infiltrators by itself does not give rise to any claim of violation of constitutional rights. However, those so engaged may not overstep constitutional bounds; the Bill of Rights protects individuals against excesses and abuses in such activities.
> Plaintiffs' challenge here is not to the use of informers and undercover agents as such, but to conduct of SIS and its agents that allegedly exceeds permissible limits and goes far beyond legitimate surveillance activities with the intent and purpose to invade their constitutional right of free association and communication.

Handschu v. Special Services Division, 349 F.Supp. 766, 769-70 (S.D.N.Y.1972) (footnotes omitted). Under the teaching of *Handschu*, plaintiff's allegation is sufficient to overcome defendants' motion to dismiss.

[25] Third, defendants argue that plaintiff failed to state a claim when it asserted violations based on alleged actions taken wholly by foreign governments, or organs thereof on foreign soil. For this proposition, defendants rely upon *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960, 89 S.Ct. 2102, 23 L.Ed.2d 747 (1969), and *Berlin Democratic Club v. Rumsfeld*, 410 F.Supp. 144 (D.D.C. 1976). Both are inapposite. In *Stonehill*, the court held that *raids by foreign officials* did not give rise to a cause of action unless the United States substantially participated in the raids. 405 F.2d at 713. In *Berlin Democratic Club*, the court held *wiretaps carried out by foreign officials* are not actionable unless the United States was a joint venturer in the endeavor. 410 F.Supp. at 151. Here, however, plaintiff seeks an injunction[10] to prevent *the defendants from releasing* allegedly false and derogatory information about plaintiff to other governments. The action sought to be restrained is action that this Court has power to affect and, therefore, the reason for the holdings of *Stonehill* and *Berlin Democratic Club*—that courts cannot require foreign officials to abide by our Constitution on foreign soil—is inapplicable here. Accordingly, the Court will not dismiss these claims of the plaintiff at this time.

V. SUMMARY

There are two motions before the Court. In plaintiff's motion for class certification, plaintiff sought to represent the class of "all Churches and Missions of the Church of Scientology located in the United States." The Court will conditionally certify this case as a class action for the purpose of injunctive relief pursuant to Fed.R.Civ.P. 23(b)(2). However, because each member of the class must exhaust its administrative remedies under the FTCA, and because this was not done here, the Court will *not* certify the class for purposes of damage relief.

In defendants' motion to dismiss, several arguments were advanced. The defendants argued that the complaint failed to satisfy Fed.R.Civ.P. 8(a) because, defendants contend, the complaint does not present a plain statement of the claims asserted by the plaintiff. The Court finds the complaint sufficient but will allow the defendants to renew their motion to dismiss on this basis at a later date after the plaintiff has had a chance to conduct some discovery and can precisely and concisely specify its allegations. The defendants next argued that the Court lacks jurisdiction over the FTCA claims because plaintiff failed to properly exhaust its administrative remedies. The Court finds that the plaintiff has not properly exhausted because it has not filed a

10. Plaintiff cannot obtain damages for either the United States' actions nor the actions of the foreign officials because plaintiff failed to exhaust its administrative remedies. *See* part IV B, *supra*

Form 95 that is sufficiently specific and because the plaintiff did not respond to the requests of two agencies for more information. Thus, all of plaintiff's claims for damages, whether premised upon a *Bivens* action or 42 U.S.C. § 1985(3) as a basis under the FTCA, will be dismissed. The defendants next argued that the plaintiff's claim for discrimination in federal employment on the basis of religion is barred by the exclusivity of Title VII. The Court agrees, and will therefore dismiss the plaintiff's claim for relief from religious discrimination in federal employment. Moreover, the defendants argued that plaintiff has failed to state a claim for expungement. The Court finds defendants' argument premature because the expungement issue can only be decided after the merits are determined. The defendants argued also that plaintiff has failed to state a claim regarding surveillance and informants. The Court finds that plaintiff's claim alleges more than a "subjective chill," and, therefore, plaintiff's claim surpasses a motion to dismiss. Finally, defendants argued that the plaintiff has failed to state a claim for the actions of foreign governments. The Court finds that because plaintiff seeks only to enjoin the actions of United States officials, not the actions of foreign officials on foreign soil, plaintiff has stated a claim upon which relief may be granted.

Accordingly, the Court will grant plaintiff's motion for class certification and conditionally certify, for purposes of injunctive relief only, the class of "all Churches and Missions of the Church of Scientology located in the United States," pursuant to Fed.R.Civ.P. 23(b)(2). Furthermore, the Court will grant defendants' motion to dismiss to the extent that this Court lacks jurisdiction over plaintiff's claim under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, and to the extent that plaintiff's claims seek injunctive relief from religious discrimination in federal employment.

An Order in accordance with the foregoing will be issued of even date herewith.

CHEN CHAUN-FA et al., Plaintiff,

v.

Maurice F. KILEY, District Director Immigration and Naturalization Service and Leonel J. Castillo, Commissioner Immigration and Naturalization Service, Defendants.

No. 78 Civ. 3663.

United States District Court, S. D. New York.

Oct. 19, 1978.

Action was brought to enjoin the Immigration and Naturalization Service from taking any administrative action while district court reviewed denial of aliens' application for political asylum. On motion to dismiss, the District Court, Sand, J., held that court was without jurisdiction to review denial of political asylum.

Motion granted.

1. Aliens ⇨54.3(1)

District court had no subject matter jurisdiction to review denial of political asylum by the Immigration and Naturalization Service. Immigration and Nationality Act, § 279, 8 U.S.C.A. § 1329.

2. Aliens ⇨54.3(1)

Decision denying review of request for political asylum did not foreclose judicial scrutiny, albeit at a later date, since aliens could make application for stays of deportation on ground that they would be subject to persecution on account of race, religion or political opinion and could seek review of denial of such relief in the Court of Appeals. Immigration and Nationality Act, §§ 106(a)(3), 243(h), 279, 8 U.S.C.A. §§ 1105a(a)(3), 1253(h), 1329.

3. Constitutional Law ⇨274.3

Procedures in connection with request for political asylum and hearing afforded under statute allowi
do not violate due
ford substitute for
lum denial. Immig
Act, §§ 106(a)(3), 2
§§ 1105a(a)(3), 1253(

4. Aliens ⇨54.3(1)

Since Congress
cial review to claims
ter II of the Immig
Act, judicial review
litical asylum under
ed pursuant to first
fell within exceptio
fers jurisdiction on
agency decisions. I
ality Act, § 279, 8
U.S.C.A. § 1331.

David C. Buxbau
plaintiff.

Robert B. Fiske,
Y., New York City,
as H. Belote, Asst.
City, of counsel.

OP

SAND, District J

Plaintiffs bring
themselves and all
Tu Chen Islands,
States. In their ap
injunction, brought
Cause, plaintiffs s
gration and Natur
from taking any ad
this Court reviews

1. While we dismis
jurisdiction to revi
lum, we note that
as alleging other
immigration status
ever, that insofar
plaintiffs have fail
trative remedies,
reach the merits o

2. Because the Ord
panied by affidavi
named plaintiffs.
each of the seven
clear from the con
tiffs are natives

(1967) that so long as the existence of an ascertainable class has been shown, there is no need to be able to identify the individual members of the class to determine the issues affecting the class. The trial court can determine the total amount of fines paid on the illegal parking citations and enter judgment. After judgment each individual member of the class must prove his or her identity and the amount paid on the illegal parking citation in order to recover.

[2] Mr. Holley has also moved this court to award attorney fees, apparently relying on the rule that a court may, in its discretion, allow attorney fees from a common fund where an action has created, preserved, or increased a common fund in which others may share. See 8 Fla.Jur., *Costs* § 37; *G. M. Dykes Iron Works, Inc. v. Dehenffle*, 131 So.2d 760 (Fla.3d DCA 1961). We recognize the applicability of this rule to the facts of the instant case but we deny the motion without prejudice. Mr. Holley may file a motion for attorney fees in the trial court. If the trial court grants the motion, the reasonable value of Mr. Holley's services should then be determined after the amount of the fund has been established. Each individual member of the class should bear his or her proportionate share of attorney fees.

The portion of the trial judge's order denying relief on Count II is reversed and the cause is remanded for further proceedings consistent with this opinion.

BOARDMAN and OTT, JJ., concur.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, Appellant,

v.

Ronald SCHULTZ, as Pinellas County Property Appraiser, and O. Sanford Jasper, as Pinellas County Tax Collector, Appellees.

No. 78-1310.

District Court of Appeal of Florida, Second District.

May 9, 1979.

Church of Scientology of California appealed from order of Circuit Court, Pinellas County, Harry Fogle, J., which denied it tax-exempt status. The District Court of Appeal held that: (1) tax-exempt status was properly denied, and (2) church's property taxes for year 1976 did not become overdue until April 1, 1977.

Affirmed in part; reversed in part.

1. Taxation ⇨244

Church of Scientology of California was not entitled to tax-exempt status.

2. Taxation ⇨528

Property taxes applying to 1976 did not become overdue until April 1, 1977; thus, trial court erred in assessing interest on 1976 property taxes from March 31, 1976. West's F.S.A. § 197.056.

Clyde H. Wilson, Jr. and John S. Jaffer, of Wilson, Wilson & Namack, Sarasota, for appellant.

W. Gray Dunlap, County Atty., and Patrick T. Maguire, Asst. County Atty., Clearwater, for appellees.

PER CURIAM.

[1] The Church of Scientology of California appeals from a final order denying it tax exempt status. Appellant raises several points in its brief; however, only one argument has merit.

[2] The trial court, a
appellant was not entitl
status, assessed interest
property taxes from Mar
court was in error inasm
applied to the year 1976 a
overdue until April 1, 19
056, Florida Statutes (19
should be charged until A

In all other respects, t
of the trial court is affirn

Affirmed in part, rever

HOBSON, Acting C.
MAN and DANAHY, JJ.,

**TRAVELERS IND
COMPANY, Ap**

v.

William A. MORALE

No. 78-166

District Court of App
Third Distri

May 15, 19

Rehearing Denied Ju

Appeal from Circuit
George Orr, Judge.

Adams & Ward
Miami, for appellant.

Weissenborn & Burr
Burr, Miami, for appellee.

Before HAVERFIELD,
SON and SCHWARTZ, JJ.

PER CURIAM.

Affirmed. See *Moore General Life Insurance* 342 (Fla.3d DCA 1973); *Insurance Company v.* (Fla.1st DCA 1976); *Tru*

[2] The trial court, after holding that appellant was not entitled to tax exempt status, assessed interest on the overdue property taxes from March 31, 1976. The court was in error inasmuch as the taxes applied to the year 1976 and did not become overdue until April 1, 1977. Section 197.056, Florida Statutes (1977). No interest should be charged until April 1, 1977.

In all other respects, the final judgment of the trial court is affirmed.

Affirmed in part, reversed in part.

HOBSON, Acting C. J., and BOARDMAN and DANAHY, JJ., concur.



TRAVELERS INDEMNITY COMPANY, Appellant,

v.

William A. MORALES, Appellee.

No. 78-1666.

District Court of Appeal of Florida, Third District.

May 15, 1979.

Rehearing Denied June 22, 1979.

Appeal from Circuit Court, Dade County; George Orr, Judge.

Adams & Ward and Amy Shield Levine, Miami, for appellant.

Weissenborn & Burr and Leonard F. Burr, Miami, for appellee.

Before HAVERFIELD, C. J., and PEARSON and SCHWARTZ, JJ.

PER CURIAM.

Affirmed. See *Moore v. Connecticut General Life Insurance Co.*, 277 So.2d 839, 842 (Fla.3d DCA 1973); *Standard Marine Insurance Company v. Allyn*, 333 So.2d 497 (Fla.1st DCA 1976); *Travelers Insurance Co. v. Robertson*, 369 So.2d 454 (Fla.3d DCA 1979).



The FLORIDA CANNERS ASSOCIATION, a Florida Corporation, et al., Petitioners,

v.

STATE of Florida, DEPARTMENT OF CITRUS, Respondent.

No. 77-1921.

District Court of Appeal of Florida, Second District.

May 16, 1979.

Association of grapefruit product processors and members of such association petitioned for review of Department of Citrus's action in adopting rule requiring a declaration of state origin on state grapefruit products packed in retail containers in state. The District Court of Appeal, Second District, Danahy, J., held that: (1) such rule was "proper and necessary" for purpose of performance of Department's duty to advertise state citrus fruit, and, thus, Department had the implied statutory authority to adopt the rule; (2) legislature had not unconstitutionally delegated legislative power to Department by empowering it to adopt the rule; (3) rule constituted a valid exercise of state police power; (4) rule did not violate commerce clause; (5) rule did not unconstitutionally infringe on grapefruit processors' freedom of commercial speech on basis of contention that rule would require processors' products to become an expression of points of view believed to be harmful to processors' efforts to distinguish and promote their own brands of grapefruit products; (6) evidence as to anticipated increase in competition

and reliable performance of all lease covenants—rental payments being only one—and that this is directly related to the evidence as to the dependability, solvency and stability of the actual occupant. This is particularly true in a total performance lease of the type employed in this instance.

In *Whitman*, the court described the role of the appellate court in such a case:

> Generally, an appellate court will not set aside the findings of fact by the trial court in a non-jury case unless there is no substantial evidence to sustain them, or they are contrary to the manifest weight of the evidence or the legal effect of the evidence, or are induced by an erroneous view of the law. 335 So.2d at 579; *See Holland v. Gross*, 89 So.2d 255 (Fla.1956); *Jaquith, supra.*

Both the *Whitman* and *Jaquith* cases held that the burden of proof was upon the lessee to prove that the lessor had unreasonably withheld its consent to assignment of the lease.

Generally speaking, courts of other jurisdictions have rejected refusals to consent where arbitrary, unreasonable or unfair on their face. For example, in *Chanslor-Western Oil & Development Co. v. Metropolitan Sanitary Dist.*, 131 Ill.App.2d 527, 266 N.E.2d 405 (1970) the court held that racial grounds for refusal were unreasonable. *Cf., Krieger v. Helmsley-Spear, Inc.*, 62 N.J. 423, 302 A.2d 129 (1973) wherein refusal because the proposed subtenant was then a tenant occupying office space in another building owned by landlord was held unreasonable.

Similarly, refusal of consent based upon a religious or moral objection of the landlord has been viewed as unreasonable or arbitrary. *See American Book Co. v. Yeshiva University Development Foundation, Inc.*, 59 Misc.2d 31, 297 N.Y.S.2d 156 (Sup.Ct. 1969).

Clearly the landlord, in this instance, did not withhold consent on a patently arbitrary ground. In the absence of such there must be competent substantial evidence of circumstances that establish the refusal as unreasonable. *See, e. g., Moore v. Bannister*, 269 So.2d 291 (La.App.1972) where the lessor had been aware of the sublease for several months prior to raising any objection, knew the sublessee was a "reputable, substantial businessman" who was paying more than double the original rent for the same business use of the premises.

We hold that the uncontroverted essential facts of this case fail to establish either an arbitrary or an unreasonable refusal.

Reversed and remanded for further proceedings consistent with this opinion.

SCHEB, Acting C. J., and DANAHY, J., concur.

WEST KEY NUMBER SYSTEM

CHURCH OF SCIENTOLOGY OF CALIFORNIA, a California Corporation, and Southern Land Development & Leasing Corporation, a Delaware Corporation, Appellants Cross-Appellees,

v.

Paul M. WADE and Sophie G. Wade, his wife, et al., Appellees Cross-Appellants.

No. 77-578.

District Court of Appeal of Florida, Second District.

May 17, 1978.

Tenants brought suit against landlords for constructive eviction from leased premises in hotel in which they operated gift shop. The Circuit Court, Pinellas County, David F. Patterson, J., awarded tenants relocation cost of $18,400, and landlords appealed. The District Court of Appeal held that even if issue of relocation costs had been tried and amount of those costs had been established, the most tenants would have been entitled to recover was 11 months' interest on what it would cost to

relocate to comparable premises, inasmuch as lease would have expired of its own accord 11 months later at which time tenants would have been faced with having to pay relocation costs without prospect of reimbursement.

Reversed.

Grimes, J., filed opinion in which he concurred in part and dissented in part.

1. Landlord and Tenant ⇐180(3)

In suit brought by tenants against landlords for constructive eviction, breach of implied covenant of quiet enjoyment, and breach of a written lease, there was competent, sufficient evidence to support conclusion that tenants were constructively evicted in March of 1976 from leased premises in hotel in which they operated gift shop.

2. Landlord and Tenant ⇐180(4)

Even if, in suit brought by tenants against landlords for constructive eviction from leased premises in hotel in which they operated gift shop, issue of relocation costs had been tried and amount of those costs had been established, the most tenants would have been entitled to recover was 11 months' interest on what it would cost to relocate to comparable premises, inasmuch as lease would have expired of its own accord 11 months later at which time tenants would have been faced with having to pay relocation costs without prospect of reimbursement.

Clyde H. Wilson, Jr. and H. Wayne Floyd of Wilson, Wilson & O'Connell, Sarasota, for appellants/cross-appellees.

John W. Hamilton of Ware & Hamilton, St. Petersburg, for appellees/cross-appellants Paul and Sophie Wade.

PER CURIAM.

Appellants/cross-appellees/defendants, Church of Scientology of California and Southern Land Development & Leasing Corp., appeal the final judgment entered in favor of appellees/cross-appellants/plaintiffs, Paul M. and Sophie G. Wade.

[1] Appellees brought suit against appellants for constructive eviction, breach of the implied covenant of quiet enjoyment, and breach of a written lease. There is competent, sufficient evidence to support the conclusion that appellees were constructively evicted in March of 1976, from the leased premises in the old Fort Harrison Hotel in which they operated a gift shop. The issue of damages presents more difficulty.

Appellees pled for damages resulting from lost profits and the lost value of the leasehold. The court expressly found that appellees had failed to establish these damages by the greater weight of the evidence. The court did award relocation costs of $18,400, but the only evidentiary predicate for these damages is found in the following testimony of one of appellees concerning the opening of a new shop at 426 Cleveland Street.

Q What is the general overall picture of the Daisy Shop, 426 Cleveland Street?

A I can give you a figure for the net gross for the entire period of operations through December 1st, December 31st of 1976 from the day of opening which is May something. Is this regarding the investment, that is to say the cost of building the shop, putting in the fixtures and increased inventory,

Q How much was that, sir?

A Net loss, approximately $6,500.

THE COURT: I think the question was, what was the start of the cost, the cost to move to re-equip the new shop—things of that nature?

A I misunderstood the question. Disregarding the fixtures and their value that were removed from the Fort Harrison and ultimately used in the new shop, material and labor totaled approximately $18,400.

The matter was not further pursued even though the $18,400 figure obviously included the costs incident to opening the new gift shop which had a floor space almost ten times as large as the old one.

[2] Aside fro
costs were never
the proof thereof
colloquy, we ca
could constitute
nge in the case o
der a short ter
would have expir
months later at w
have been faced
tion costs witho
ment. In the w
fore he became
States Supreme
Whether the d
in September,
the cost of mo
fore he cannot
the plaintiff's
was one, in fa
thus obliging
the end of his
that the defen
this item was
Eddy v. Coffin,
(1889); *accord, I*
Wis. 56, 42 N.W
Guerin, 144 La.
Pierce v. Heddle
(1901). Even if
had been tried
costs had been e
lees would have
was eleven mo
would cost to re
ises.

Accordingly, t
versed and set a
the other points
appeal by appell
they are without

REVERSED.

BOARDMAN,
concur.

GRIMES, J., c
part.

GRIMES, Judg
senting in part.

I concur in th
were constructi

[2] Aside from the fact that relocation costs were never claimed by appellees and the proof thereof lay solely in the foregoing colloquy, we cannot see how such costs could constitute a proper element of damage in the case of constructive eviction under a short term lease. Here the lease would have expired of its own accord eleven months later at which time appellees would have been faced with having to pay relocation costs without prospect of reimbursement. In the words of Justice Holmes before he became a member of the United States Supreme Court.

> Whether the defendant moved in July or in September, he would have had to pay the cost of moving his machinery; therefore he cannot attribute the payment to the plaintiff's breach of contract, if there was one, in failing to furnish steam, and thus obliging him to go elsewhere before the end of his tenancy. The instruction that the defendant could not recoup for this item was correct.

Eddy v. Coffin, 149 Mass. 463, 21 N.E. 870 (1889); *accord, Besinger v. McLoughlin*, 257 Wis. 56, 42 N.W.2d 358 (1950), *Knapp v. Guerin*, 144 La. 754, 81 So. 302 (1919); *Pierce v. Hedden*, 105 La. 294, 29 So. 734 (1901). Even if the issue of relocation costs had been tried and the amount of those costs had been established, the most appellees would have been entitled to recover was eleven months' interest on what it would cost to relocate to comparable premises.

Accordingly, the final judgment is reversed and set aside. We have considered the other points raised on appeal and cross-appeal by appellants and appellees and hold they are without merit.

REVERSED.

BOARDMAN, C. J., and HOBSON, J., concur.

GRIMES, J., concurs in part, dissents in part.

GRIMES, Judge, concurring in part, dissenting in part.

I concur in the conclusion that appellees were constructively evicted but were not entitled to recover relocation costs. On the other hand, I believe their claim for loss of profits merits further consideration. In support of this claim the appellees testified that they tried to keep the store open under adverse circumstances for about four months and finally closed it in order to avoid further losses. They reopened in a new location two months later but incurred a loss for the period of time in which the lease would have remained in effect. They presented the testimony of a certified public accountant who gave his opinion as to profits they would have earned had they been able to stay in the old location for the balance of the term of the lease. The appellants presented no rebuttal testimony on the subject but did subject the accountant to a thorough cross-examination. Clearly, the court was not bound to accept the figures claimed by the appellees. However, from a study of the testimony as a whole, I am convinced that the appellees suffered at least *some* loss of profits as a result of their constructive eviction.

Accordingly, I would recognize appellees' cross-appeal to the extent of remanding the case for further proceedings directed toward a new award of damages at which the court could, in its discretion, consider the prior record and any additional testimony which might be presented.

STATE of Florida, Appellant,

v.

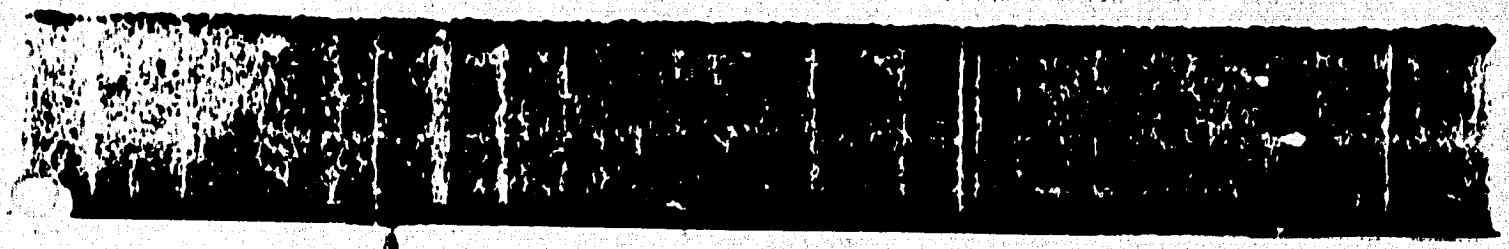
Richard Michael DAVIS, Appellee.

No. 77-1075.

District Court of Appeal of Florida, Second District.

May 17, 1978.

State appealed from order of the Circuit Court, Pinellas County, Harry W. Fo-



70(2) precludes appellant from
imself against appellee.

050(1) provides that the se-
the vehicles occupied by the
s primary, and further that:
is no security covering the
contract of basic reparation
der which the injured person
paration insured shall apply.

nt case, the appellant cannot
a basic reparation insured of

f KRS 304.39-160(4), appel-
d from participating in the
plan.

feel that the public policy of
wealth of Kentucky allows us
ninsured motorist a cause of
injuries as against the
an insured motorist. We
of Justice Palmore's com-
777, of *Fann v. McGuffey*,

he compulsory insurance as-
which there seems to be no
on, is likely to rip off more
he limitation of tort rights.
ent of the trial court is af-

MISSOURI CHURCH OF SCIENTOLOGY, Plaintiff-Appellant,

v.

STATE TAX COMMISSION of Missouri, J. E. Riney, Don G. Williams, Robert F. Love, Commissioners of State Tax Commission of Missouri, John K. Travers, Collector of Revenue, City of St. Louis, and Glenn J. McBrady, Assessor, City of St. Louis, Defendants-Respondents.

No. 59551.

Supreme Court of Missouri,
En Banc.

Dec. 19, 1977.

Rehearing Denied Feb. 8, 1978.

Church whose tangible personal property had been added to tax rolls by city assessor appealed to Board of Equalization and State Tax Commission and, obtaining no relief, sought judicial review, claiming exemption from ad valorem taxation on ground that its property was used exclusively for religious worship. The Circuit Court of the City of St. Louis, Lackland H. Bloom, J., denied relief and appeal was taken. The Supreme Court, Rendlen, J., held that: (1) twenty-two proposed exhibits which had been marked and identified during testimony of taxpayer's sole witness, but which were neither offered nor accepted as evidence by State Tax Commission would not be considered a part of record for judicial review, where Commission had before it no offer of evidence or objections thereto on which to rule and it had not been apprised of attitude of Tax Commission's counsel who stated to trial court and to Supreme Court in oral argument that he would not have objected to introduction of exhibits had they been offered; (2) constitutional and statutory exemption from ad valorem taxation of property used "exclusively for religious worship," the term "religious worship" embodies as a minimum requirement a belief in the Supreme Being, and (3) evidence supported Tax Commission's findings that church claiming exemption from ad valorem taxation on ground that its property was used exclusively for religious worship appeared to be more in applied philosophy which had religious connotations but which fell short of being devoted to worship of Supreme Being.

Affirmed.

Seiler, J., concurred in result in separate opinion file.

1. Administrative Law and Procedure ⇐788, 791

Generally, scope of judicial review of administrative agency decisions is limited to determination of whether order is supported by competent and substantial evidence upon the whole record. V.A.M.S. § 536.140, subd. 2(3).

2. Administrative Law and Procedure ⇐793

Where case involves only application by agency of law to facts, court may weigh evidence for itself, giving due weight to opportunity of agency to observe witnesses and to expertise and experience of agency.

3. Administrative Law and Procedure ⇐313

Although technical rules of evidence are not controlling in administrative hearings, fundamental rules of evidence apply.

4. Taxation ⇐489

Twenty-two proposed exhibits which had been marked and identified during testimony of taxpayer's sole witness but which were neither offered nor accepted as evidence by State Tax Commission would not be considered a part of record for judicial review, where Commission had before it no offer of evidence or objections thereto on which to rule and it had not been apprised of attitude of Tax Commission's counsel who stated to trial court and to Supreme Court in oral argument that he would not have objected to introduction of exhibits had they been offered.

5. Taxation ⇐37.1, 211

Within constitutional and statutory exemption from ad valorem taxation of prop-

erty used "exclusively for religious worship," the term "religious worship" embodies as a minimum requirement a belief in the Supreme Being. V.A.M.S.Const. art. 10, § 6; V.A.M.S. § 137.100; U.S.C.A.Const. Amend. 1.

6. Constitutional Law ⇐84
Taxation ⇐244

Requiring devotion to worship of Supreme Being as sine qua non to classification as religion and entitlement to exemption from ad valorem taxation does not contravene First Amendment. V.A.M.S. Const. art. 10, § 6; V.A.M.S. § 137.100; U.S.C.A.Const. Amend. 1.

7. Administrative Law and Procedure ⇐462

Administrative agency may base its decision solely on finding of lack of credible testimony, though such testimony is uncontradicted or unimpeached, but agency may not arbitrarily disregard or ignore undisputed testimony of witness not shown to have been impeached or disbelieved by Commission.

8. Taxation ⇐493.8

While State Tax Commission's findings are not insulated from review, court must give weight to opportunity of agency to observe the witnesses.

9. Taxation ⇐251

Law places substantial burden on those claiming exemptions from ad valorem taxation on ground that property is used exclusively for religious worship to establish that their property falls within exempt class. V.A.M.S.Const. art. 10, § 6; V.A.M.S. §§ 137.100, 137.100(5).

10. Taxation ⇐201(2)

Taxation is the rule and exemption therefrom the exception and exemption claims are not favored in the law.

11. Taxation ⇐251

Evidence supported Tax Commission's finding that church claiming exemption from ad valorem taxation on ground that its property was used exclusively for religious worship was not devoted to worship of Supreme Being. V.A.M.S.Const. art. 10, § 6; V.A.M.S. §§ 137.100, 137.100(5).

Alan C. Kohn, Thomas J. Frawley, St. Louis, for plaintiff-appellant.

James J. Wilson, Associate City Counselor, St. Louis, for defendants-respondents.

RENDLEN, Judge.

This proceeding arose with the addition of appellant's tangible personal property to the tax rolls for the year 1974 by the St Louis City Assessor. Obtaining no relief by successive appeals to the Board of Equalization and the State Tax Commission, appellant sought judicial review claiming exemption from ad valorem taxation under Mo. Const. Art. X, § 6, and § 137.100,[1] on the ground its property was "used exclusively for religious worship".[2] No challenge is made to the assessed valuation of appellant's property but only to the denial of the claimed exemption.

[1, 2] Generally the scope of judicial review for administrative agency decisions is limited to a determination of whether the order is supported by "competent and substantial evidence upon the whole record" as provided in § 536.140 2(3). However, this case does not involve the exercise by the agency of administrative discretion in the light of the facts under § 536.140 2, but only the application by the agency of the law to the facts, accordingly the court may weigh the evidence for itself giving due weight to the opportun observe the witnesses and experience of the 140-3. It is by this st appellant's contentions

[3, 4] In the hearing sion twenty-two propos marked and identified the appellant's sole wi were neither offered n dence by the Commissi consideration by this co *Hilke v. Firemen's Reti St. Louis*, 441 S.W.2d 1969) as authority for however, we perceive distinguishing *Hilke* fro There, in a claim for certain medical reports h erly offered before the ment System Board. O stated: "Although the re the reports were offered alistic language, we hold putting them before the sideration fully met the dural requirements of hearing." [l.c. 733] T sidered, despite lack of f medical reports prepared provisions of § 87.160.2, purpose of informing the and the conclusions and of the medical examiners statute requiring the exa

1. All statutory references are to RSMo 1969

2. Mo.Const. Art. X, § 6 provides in pertinent part: "[A]ll property, real and personal ... not held for private or corporate profit and *used exclusively for religious worship*, ... may be exempted from taxation by general law." (Emphasis ours.) Pursuant to this authority, the legislature by § 137.100(5), RSMo 1969 exempted from state, county and local taxation: "All property, real and personal, actually and regularly *used exclusively for religious worship*, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit ..." (Emphasis ours.)

3. These exhibits consist, a appellant's Articles of amendments thereto, bylaw mendation for charitable w volume entitled "The Backg nes of the Church of Scient Worldwide" which appella Rock, identified as "the cer we use at Sunday services a standard format for our weddings, christenings, funer background information wh sophical roots of the church Buddhism, Hinduism and e Another book entitled "Scie Religion Emerges in the Sp scribed as a recently publishe background information con ophy and ceremonies of the tology"

IES

ted Tax Commission's
claiming exemption
xation on ground that
d exclusively for reli-
ot devoted to worship
V.A.M.S.Const. art. 10,
7.100, 137.100(5).

omas J. Frawley, St.
ppellant.

Associate City Counsel-
fendants-respondents.

rose with the addition
e personal property to
r 1974 by the St.
aining no relief by
the Board of Equaliza-
Tax Commission, appel-
review claiming exemp-
n taxation under Mo.
and § 137.100,[1] on the
was "used exclusively
p".[2] No challenge is
d valuation of appel-
nly to the denial of the

he scope of judicial re-
ive agency decisions is
ination of whether the
y "competent and sub-
on the whole record" as
10-2(3). However, this
ve the exercise by the
rative discretion in the
nder § 536.140-2, but
by the agency of the
rdingly the court may
for itself giving due

state, county and local
y, real and personal, actu-
ively for religious
leges, or for pur-
e and not held for private
" (Emphasis

weight to the opportunity of the agency to observe the witnesses and to the expertise and experience of the Commission, § 536.140.3. It is by this standard we examine appellant's contentions of error.

[3, 4] In the hearing before the Commission twenty-two proposed exhibits had been marked and identified during testimony of the appellant's sole witness though they were neither offered nor accepted as evidence by the Commission.[3] Urging their consideration by this court, appellant cites *Hilke v. Firemen's Retirement System of St. Louis*, 441 S.W.2d 730, 733 (Mo.App. 1969) as authority for such consideration, however, we perceive factual differences distinguishing *Hilke* from the case at bar. There, in a claim for disability benefits, certain medical reports had not been properly offered before the Firemen's Retirement System Board. On appeal the court stated: "Although the record does not show the reports were offered in evidence in ritualistic language, we hold that the method of putting them before the Board for its consideration fully met the less formal procedural requirements of an administrative hearing." [l.c. 733] The items so considered, despite lack of formal offer, were medical reports prepared pursuant to the provisions of § 87.160.2, for the express purpose of informing the Board of the facts and the conclusions and recommendations of the medical examiners. It is clear the statute requiring the examining physicians to "report in writing to the board," contemplated that the reports be available to assist the Board in its deliberation and equally important the Board and the parties intended the use of those reports as evidence.[4] Those facts, not present here, were determinative of the issue. Though counsel for the Tax Commission stated to the trial court and to this court in oral argument he would not have objected to the introduction of the exhibits had they been offered, the fact remains they were not and no stipulation waiving objection to their consideration has been presented. The Commission had before it no offer of evidence nor objections thereto on which to rule, neither was the Commission apprised of counsel's later announced attitude on the matter. Although technical rules of evidence are not controlling in administrative hearings, fundamental rules of evidence are applicable. *State ex rel. Bond v. Simmons*, 299 S.W.2d 546 (Mo.App.1957). Consistent with these holdings, § 536.070 provides in subsection 2 that "each party" in an administrative hearing "shall have the right . . . to *introduce exhibits*." (Emphasis ours.) No mention is made of other procedures for admission of exhibits as a part of the record in such proceedings except *subsection 5* which provides that "Records and documents of the agency [which also must be offered in evidence] . . . may be considered as a part of the record *by reference thereto* when so offered," (Emphasis ours).

3. These exhibits consist, among others, of the appellant's Articles of Incorporation and amendments thereto, bylaws, letters of commendation for charitable work done, a bound volume entitled "The Background and Ceremonies of the Church of Scientology of California, Worldwide" which appellant's witness, Rev. Rock, identified as "the ceremonies book that we use at Sunday services and we use this as a standard format for our other ceremonies weddings, christenings, funerals. And it is also background information which relate to philosophical roots of the church to other religions, Buddhism, Hinduism and early Christianity." Another book entitled "Scientology A World Religion Emerges in the Space Age" was described as a recently published work containing background information concerning the philosophy and ceremonies of the "Church of Scientology"

4. The court in *Hilke* at 733 states: "Early in the hearing plaintiff's counsel referred to plaintiff's injury report lodged in one of the Board's two files and said, '*I imagine it is part of this official document that we have introduced in evidence here.*' *Defendant's counsel agreed* and thereupon the Board's files were marked as Exhibits 1 and 2. Later, plaintiff's counsel formally offered other documents in evidence, but in speaking of documents already in Exhibits 1 and 2 he referred to them as '*part of the file*.' Near the end of the Board hearing, defendant's counsel wished to introduce City Ordinance 50707 as Exhibit 3, he stated he wanted the record to show that the ordinance was introduced as an exhibit 'with the others' . . ." (Emphasis ours.)

No provision is made that records of any other type may be received in this manner. While we do not suggest that parties may not stipulate for the admission of such proposed evidence and waive objection thereto, no authority appears for the course contended by appellant. The exhibits will not be considered a part of the record for review.

The Commission (whose extensive findings and conclusions are set out in the attached appendix) properly found the office equipment and furniture in question were "used in the promotion of the organization including such purposes as record keeping and providing mailings to the membership." As to the religious nature of appellant, the Commission concluded that "while the appellant has some of the trappings and accouterments of an organized religion, it appears to be more an applied philosophy which has a certain religious connotation, but which falls short of *being devoted to the worship of the Supreme Being*, which this Commission concludes is necessary for the property owner to have its property considered exclusively for religious worship." (Emphasis ours.) Further that "an applied religious philosophy" is not identical for purposes of exemption "with an organized religion devoted to religious worship." The Commission then held, "The personal property of the appellant has not, therefore been shown to be used exclusively for religious or charitable purposes and therefore cannot be exempted from ad valorem taxation." Considering the findings and conclusions in their entirety and particularly those immediately above cited, it appears the order rests not on the lack of *exclusivity* or *extent* of use, but on the failure to show the character of the use as "for religious worship." The Commission determined the statutory and constitutional phrases "used exclusively for religious worship" postulate more than an "applied philosophy which has a certain religious connotation". It found the statute and constitution instead require a belief in and devotion to a Supreme Being. For reasons hereinafter discussed we affirm.

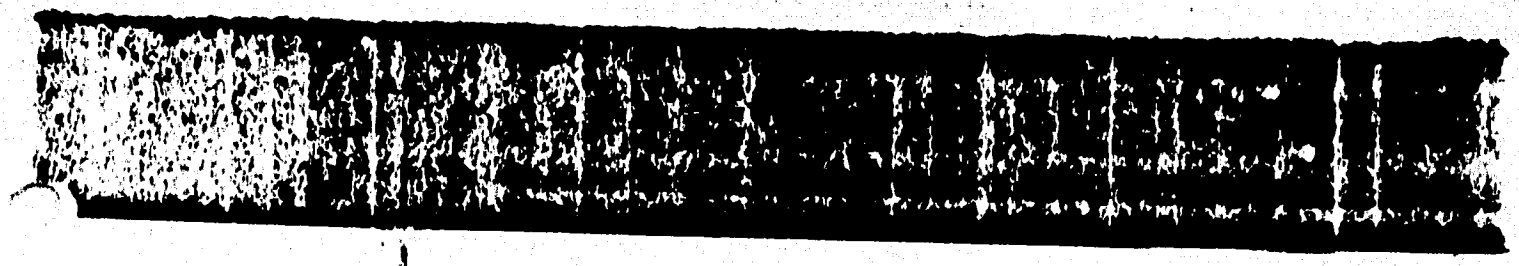
The term religious worship in the commonly accepted sense includes as a necessary minimum a belief in the Supreme Being of the universe. Generally religious worship is expressed by prayers, reverence, homage and adoration paid to a deity and include the seeking out by prayer and otherwise the will of the deity for divine guidance. Webster's New World Dictionary of the American Language, Second College Edition, copyrighted in 1974, defines religion as "belief in a divine or superhuman power or powers to be obeyed and worshiped as the creator[s] and ruler[s] of the universe; b) expression of such a belief in conduct and ritual." "Worship" is defined as "reverence or devotion for a deity; religious homage or veneration; b) a church service or other right showing this." In Webster's Third New International Dictionary, copyrighted 1976, religion is defined as "the personal commitment to and serving of God or a God with worshipful devotion, conduct in accord with divine commands esp. as found in accepted sacred writings or declared by authoritative teachers, a way of life recognized as incumbent upon true believers, and typically the relating of oneself to an organized body of believers." Another definition suggested is "a personal awareness or conviction of the existence of a supreme being or supernatural powers or influences controlling one's own, humanity's, or all nature's destiny." In this authority *worship* is defined as "the reverence or veneration tendered a divine being or supernatural power; also: an act, process, or instance of expressing such veneration by performing or taking part in religious exercises or ritual." Other dictionaries consulted provide similar definitions.

In 1890 the United States Supreme Court stated "The term 'religion' has references to one's view of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." *Davis v. Beason*, 133 U.S. 333, 342, 10 S.Ct. 299, 300, 33 L.Ed. 637 (1890). Similarly the Oklahoma Court of Criminal Appeals in *McMasters v. State*, 21 Okl.Cr. 318, 207 P. 566 (1922) defined religion as "all forms of belief in the existence

of superior beings, exc
human beings by volitio
conduct with future re
ments." Justice Harlan
Archbishop and Consist
thodox Greek Catholic
Misc. 894, 255 N.Y.S. 6
the term as "a bond u
and a virtue whose purpo
the worship due him as
being and the principle of
things." Mr. Justice Hu
in *United States v. Mach*
633, 51 S.Ct. 570, 578, 75
(the dissent involved ano
"The essence of religion
tion to God involving d
those arising from any
Joining in this dissent we
and Brandeis. Hughes' is
fication of the indispensa
religion remains a basic
of the law. When consid
tion provisions of the S
and Service Act of 1940 f
tiously opposed to particip
reason of religious trainin
9th Circuit in *Berman v. U*
F.2d 377 (9th Cir. 1946)
above quoted phrase on th
gion from *Macintosh* state

"It is our opinion tha
'by reason of religious tr
is plain language, and
the statute for the spe
distinguishing between
social belief, or a sincer
high moralistic philosophy
upon an individual's belie
bility to an authority hig
any worldly one. . .
saying that man's compre
gion is static and remains
as a short hundred and
ago in the area of our c
ing. Nature m
close to Oneness that some
them inseparately."

Commenting on the nature
court stated, it "involves a
and reciprocal interplay 'be
man and the supernatural.'"



religious worship in the com-
ed sense includes as a neces-
a belief in the Supreme Be-
iverse. Generally religious
ressed by prayers, reverence,
oloration paid to a deity and
king out by prayer and oth-
of the deity for divine guid-
r's New World Dictionary of
Language, Second College
ghted in 1974, defines reli-
in a divine or superhuman
ers to be obeyed and wor-
creator[s] and ruler[s] of the
xpression of such a belief in
tual." "Worship" is defined
or devotion for a deity; reli-
or veneration; b) a church
er right showing this." In
l New International Diction-
76, religion is defined as
ommitment to and serving of
with worshipful devotion,
cord with divine commands
n accepted sacred writings or
thoritative teachers, a way of
as incumbent upon true be-
pically the relating of oneself
l body of believers." Anoth-
suggested is "a personal
onviction of the existence of
g or supernatural powers or
trolling one's own, humani-
ture's destiny." In this au-
is defined as "the reverence
tendered a divine being or
ower; also: an act, process,
expressing such veneration
or taking part in religious
ual." Other dictionaries con-
similar definitions.

United States Supreme Court
m 'religion' has references to
is relations to his Creator,
ations they impose of rever-
ing and character, and of
w[illegible]." *Davis v. Beason*, 133
299, 300, 33 L.Ed. 637
ly the Oklahoma Court of
s in *McMasters v. State*, 21
P. 566 (1922) defined reli-
ns of belief in the existence

of superior beings, exercising power over human beings by volition, imposing rules of conduct with future rewards and punishments." Justice Hammer in *Nikulnikoff v. Archbishop and Consistory of Russian Orthodox Greek Catholic Church, et al.*, 142 Misc. 894, 255 N.Y.S. 653 (1962) described the term as "a bond uniting man to God and a virtue whose purpose is to render God the worship due him as the source of all being and the principle of all government of things." Mr. Justice Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605, 633, 51 S.Ct. 570, 578, 75 L.Ed. 1302 (1931) (the dissent involved another issue) stated: "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." Joining in this dissent were Holmes, Stone and Brandeis. Hughes' isolation and identification of the indispensable ingredient of religion remains a basic guide in this area of the law. When considering the exemption provisions of the Selective Training and Service Act of 1940 for those conscientiously opposed to participation in war "by reason of religious training and belief" the 9th Circuit in *Berman v. United States*, 156 F.2d 377 (9th Cir. 1946) after citing the above quoted phrase on the essence of religion from *Macintosh* stated: [l.c. 380]

> "It is our opinion that the expression, 'by reason of religious training and belief' is plain language, and was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one. We are not saying that man's comprehension of religion is static and remains today the same as a short hundred and fifty odd years ago in the area of our constitution-making Nature and God seem so close to Oneness that some thinkers blend them inseparately."

Commenting on the nature of religion the court stated, it "involves a process of vital and reciprocal interplay between the human and the supernatural." More recently the Supreme Court of Kansas in *Board of Trustees of the Kansas East Conference of the United Methodist Church v. Cogswell*, 205 Kan. at page 847, 473 P.2d at page 1 (1970), adopted and applied the definition of religion enunciated in *Davis v. Beason, supra*, as that intended by the Kansas constitutional and statutory provisions permitting tax exemption for "all property used exclusively for religious purposes."

The Supreme Court in *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965), (urged as authority for reversal by appellant) interpreting the Universal Military Training and Service Act and claimed exemptions by conscientious objectors under § 6 J, when reversing the convictions, addressed the meaning of the expression "religious training and belief" as used in the Act. The Act exempted those who opposed participation in war by reason of their "religious training and belief" and the court pointed out that the Act defined that phrase as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." [l.c. 165, 85 S.Ct. 853] The court observed that Congress had adopted by this definition the language of Chief Justice Hughes in *United States v. Macintosh, supra*, but substituted the phrase "Supreme Being" for the "Appellation God". The *Seeger* court, however, construed this substitution of terms as license to extend the Congressional intent to include a definition of "belief in a Supreme Being" as follows: "It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption."

Though announcing this diluted version as the intended legislative meaning of "religious belief", the court nevertheless acknowledged that Congress had referred in the Act to "this higher authority" [l.c. 175, 85 S.Ct. 850] The *Seeger* definition is not one of constitutional construction

but of statutory interpretation neither controlling nor persuasive here for a number of reasons. Contrary to this appellant's argument that the Court in effect excised the concept of a Supreme Being from "religion" it can reasonably be said that when the court spoke of "claimed belief" as occupying "the same *place in the life of the objector* as an *orthodox belief in God holds in the life of one clearly qualified for exemption*," (Emphasis ours), the term necessarily includes God or Supreme Being. This because the "claimed belief" must equate qualitatively and quantitatively with the *place God holds* in the life of one clearly qualified for exemption (e. g., a devout member of the Society of Friends) and such would require a devotion to *God* (or an equivalent) accompanied by a divinely inspired rejection of violence in the form of war. It is against this or a similar orthodox standard of another "clearly qualified for exemption" that an objector's "claimed belief" must measure. In the alternative, *Seeger* may be said to mean that the "claimed belief" occupies the same place in the life of the objector as that which an orthodox belief in God holds in the lives of others clearly exempted, but the objector may choose not to use the word "God" or "Supreme Being". In that sense *Seeger's* interpretation of the Act seems more a matter of semantics than substance, but in no sense can that case be considered as declaring a constitutional standard circumscribing state action in the field of tax exemption.

[5, 6] Appellant directs our attention to other authority, the most notable, a decision of the California court of appeals in *Fellowship of Humanity* v. *County of Alameda*, 153 Cal.App.2d 673, 315 P.2d 394 (1957), which considered a claimed exemption from city and county property tax on the ground that the property was used "solely and exclusively for religious worship" within the meaning of the California Constitution. When defining the term religion the court held it is improper to include in the concept a belief in God or a Supreme Being. The court stated "the belief or nonbelief in a Supreme Being is a false factor," and went on to say "This simply means that 'religion' fills a void that exists in the lives of most men. Regardless of why a particular belief suffices, as long as it serves this purpose, it must be accorded the same status of an orthodox religious belief. . . . [T]he proper interpretation of the terms 'religion' or 'religious' in tax exemption laws should not include any reference to whether the beliefs involved are theistic or nontheistic. Religion simply includes: [1] a belief, not necessarily referring to supernatural powers; [2] a cult, involving a gregarious association openly expressing the belief; [3] a system of moral practice directly resulting from an adherence to the belief; and [4] an organization within the cult designed to observe the tenets of belief. The content of the belief is of no moment." Under this loose concept it is readily apparent any organization espousing moral principles, without theistic foundation, to which the membership openly express belief might opt for the exempt status. We are unwilling to ascribe such meaning to the expression "religious worship" in Missouri's tax law. Instead we conclude that the constitutional and statutory term religious worship of Art X, § 6 and § 137.100 embody as a minimum requirement a belief in the Supreme Being[5]

5. Appellant contends that requiring devotion to worship of the Supreme Being as a sine qua non to classification as religion and entitlement to exemption from ad valorem taxation would be in direct contravention of the First Amendment citing *United States* v. *Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965); *Torcaso* v. *Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), and *Everson* v. *Board of Education of the Township of Ewing*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). Appellant gives little explanation how these cases support its position and the cases do not justify the contention made. *Seeger*, discussed at length above, involves an interpretation of the Selective Service Act, with its main thrust defining the statutory terms religious belief and Supreme Being. *Torcaso* does not define religion holding only that a state may not require an oath declaring a belief in God as a prerequisite for holding public office but indicated nothing that would limit a legislative grant of tax exempt status to religious organizations. *Everson* dealt with the constitutionality of the

Though appellant cont
of a Supreme Being is n
a definition of "religious w
nevertheless that Scien
edges the existence of G
and espouses devotion to
establishing its entitleme
tion. It further argues
ports the Commission's
Scientology "appears to b
philosophy which has a
connotation, but which ful
devoted to the worship of
ing." This brings us to
credibility and burden of

[7, 8] An administrati
base its decision solely on
of credible testimony, thou
ny is uncontradicted or uni
lar v. State Tax Commis
686 (Mo.1959). *Veal v.*
S.W.2d 491 (Mo.App.1952)
Kahler v. State Tax
S.W.2d 460 (Mo.1965); and
ock Bros., 357 Mo. 480,
(1948). However, the Com
arbitrarily disregard or ig
testimony of a witness not
been impeached or disbelie
mission. Such was the ca
assessor in *Koplar, supra*.
the Commission here mad
findings as to credibility
"We find the testimony o
Frederick M. Rock generally
ible and worthy of belief

States (Maryland) providing
rochial school students. It
principles pertinent to the iss

6. The Church of Scientology
ness, Frederick M. Rock, a
twenty-six year old minister
detailed the beliefs, activitie
history of the church. He te
teaches the existence of God,
spirit analogous to a soul; th
ices are conducted each Sund
a sermon and prayers; minist
can perform marriage servic
christenings, the church has
ship services similar to those
a code or doctrine and religi
preach. (1) man is good but
survive, (2) man has a spiritu

Though appellant contends that worship of a Supreme Being is not indispensable to a definition of "religious worship", it argues nevertheless that Scientology "acknowledges the existence of God and recognizes and espouses devotion to a Supreme Being" establishing its entitlement to the exemption. It further argues no evidence supports the Commission's conclusion that Scientology "appears to be more an applied philosophy which has a certain religious connotation, but which falls short of being devoted to the worship of the Supreme Being." This brings us to the questions of credibility and burden of proof.

[7, 8] An administrative agency may base its decision solely on a finding of lack of credible testimony, though such testimony is uncontradicted or unimpeached. *Koplar v. State Tax Commission*, 321 S.W.2d 686 (Mo.1959). *Veal v. Leimkuehler*, 249 S.W.2d 491 (Mo.App.1952); *State ex rel. Kahler v. State Tax Commission*, 393 S.W.2d 460 (Mo.1965); and *Scott v. Wheelock Bros.*, 357 Mo. 480, 209 S.W.2d 149 (1948). However, the Commission may not arbitrarily disregard or ignore undisputed testimony of a witness not shown to have been impeached or disbelieved by the Commission. Such was the case of the county assessor in *Koplar, supra*. Unlike *Koplar*, the Commission here made the following findings as to credibility of the witness: "We find the testimony of the Reverend Frederick M. Rock generally not to be credible and worthy of belief in particular in respect to his description and categorization of the activities of the organization, its alleged religious services, its financial structure and the nature of the so-called donations which are made to the organization. The Commission finds that there is no sufficient credible evidence presented by the appellant to satisfy the burden placed upon one claiming exemption from taxation." The Commission then concluded "that with the lack of credibility found by this Commission in the testimony of the witness Rock and the lack of corroboration by any independent authority on contemporary religions that the property owner *has not satisfied the burden* placed on him." While the Commission findings are not insulated from review, the court must "give due weight to the opportunity of the agency to observe the witnesses." The Commission had ample opportunity to observe the demeanor as well as the words of the witness and make a determination of credibility from its point of vantage. It recognized testimonial inconsistencies and those things petitioner failed to establish, finding that "appellant has some of the trappings and accouterments of an organized religion, it appears to be more an applied philosophy which has a certain religious connotation, but which falls short of being devoted to the worship of a Supreme Being." The Commission could properly consider the financial interest of the witness in the outcome of the proceeding and the absence of corroborating testimony.[6] Giving due

states (Maryland) providing bus service to parochial school students. It did not suggest principles pertinent to the issues here.

6. The Church of Scientology presented one witness, Frederick M. Rock, a recently ordained twenty six year old minister of the church who detailed the beliefs, activities, functions and history of the church. He testified the church teaches the existence of God, that man has a spirit analogous to a soul, that religious services are conducted each Sunday which include a sermon and prayers, ministers of the church can perform marriage services, funerals, and christenings, the church has a creed and worship services similar to those of other religions, a code or doctrine and religious tenets which preach: (1) man is good but must struggle to survive, (2) man has a spiritual nature which gives him inalienable rights, and (3) each person is responsible for and to the world; that the church is active in charitable works; a training program for ministers which was not characterized as a seminary, the church is an applied religious philosophy because it teaches a way of life relating to the spirit and to God, and finally that all the property in question is used to further the functions of the church. However, this picture was clouded by admitted atypical features. For example, Rev. Rock testified members of the Church of Scientology can actively practice and belong to other religious faiths (i. e., Catholic priests and Jewish rabbis belong and actively pursue the worship of the Church of Scientology), the church raises its funds by accepting "donations" for counseling services to members and non-members alike for which a fixed schedule sets the

weight to the opportunity of the Commission to observe the witness and the factors noted we find nothing sufficient to disturb its finding that the witness was not credible.

[9-11] The law places a substantial burden on those claiming exemptions under the referenced constitutional and statutory provisions to establish that their property falls within an exempted class. *City of St. Louis v. State Tax Commission*, 524 S.W.2d 839 (Mo.banc 1975). It is firmly engrained that taxation is the rule and exemption therefrom the exception, *Midwest Bible and Missionary Institute v. Sestric*, 364 Mo. 167, 260 S.W.2d 25, 29-30 (1953), and such claims are not favored in the law. *Community Memorial Hospital v. City of Moberly*, 422 S.W.2d 290 (Mo.1967). The extent of this burden has been characterized as requiring proof beyond a reasonable doubt. *Fitzrer v. Crawford*, 157 Mo. 51, 57 S.W. 532 (1900).

Weighing the evidence in light of the appellant's sole witness' want of credibility and against the substantial burden of proof required, we find the record supports the Commission findings.

The judgment is affirmed.

MORGAN, C. J., and BARDGETT, BENLEY, FINCH and DONNELLY, JJ., concur.

SEILER, J., concurs in result in separate opinion filed.

APPENDIX

MISSOURI STATE TAX COMMISSION

Findings of Fact

1. The Missouri Church of Scientology was organized in 1969 and is a not-for-profit corporation. The earliest incorporation of the Church of Scientology elsewhere in the United States was in 1954.

2. The property in question was used in its headquarters at 4221 Lindell on January 1, 1974.

3. There are ceremonies or services conducted on Sunday afternoons at the headquarters. These are the only regular services (Tr. 14).

4. These services are presided over by ministers.

5. The founder of the Church is L. Ron Hubbard who is still living.

6. There is literature which is disseminated which encourages other persons to join and there are other efforts made to achieve the same purpose.

7. The Missouri Church of Scientology also engages in public affairs such as conducting a drug counseling program.

8. The property in question consists of office equipment and furniture is used in the promotion of the organization including keeping its records, providing mailings to the membership.

9. The Church of Scientology does not have formal seminaries but requires that prospective ministers go through counseling courses which are conducted in their headquarter buildings.

10. There is no formal membership roll for the Church of Scientology.

11. The Church of Scientology is an applied religious philosophy having as its members persons who belong to other formal religions such as members of the Catholic and Lutheran churches and including Catholic priests and Jewish rabbis (Tr. 20). Membership in other religious faiths does not preclude membership in the Church of Scientology.

charges, in either service or cash, however about ten percent of the counseling sessions are gratuitous; the church has no structured seminary but offers courses in which the student sets his learning pace and at the end of which he may be ordained as a minister; there is an applied religious philosophy teaching methodology and the church keeps no formal membership rolls. As to the interest of the

witness he was in the employ of the church receiving about $3,000.00 annually from monies raised in the St. Louis area. No attempt was made to corroborate Rock's testimony with that of church officials, parishioners or others familiar with appellant and its system of beliefs. No income or expense statements were introduced and the sources of income and use of funds were ambiguous at best.

APPENDIX—

12. There was no co
from any independent v
the effect that the M
Scientology is recognize
gious faiths as being a

13. We find the testi
end Frederick M. Rock
credible and worthy of
in respect to his descrip
tion of the activities of t
alleged religious services,
ture and the nature of t
tions which are made to

14. The Commission
no sufficient credible evi
the appellant to satisfy
upon one claiming exen
tion.

Conclusions o

1. Under Article X,
Missouri Constitution an
R.S.Mo. all property us
religious worship is exen

2. This Commission h
this proceeding and the p
is the sole judge of the
witnesses appearing befor

3. It is the function o
to determine the credibi
and to judge what probati
ue to give to their testim

4. As to claims for exe
ation the burden is on th
his property to be exempt
his property falls within
class. *National Cemetery*
ri v. Benson, 344 Mo. 784,
(1939).

5. Exhibits which we
identified but which wer
into evidence cannot be co
by this Commission in its
trier of fact.

6. Claims for exemptio
are not favored in the law
for exemption are strictly c
one who claims to be exem

7. It is concluded that
credibility found by this Co

SERIES

of Scientology elsewhere in
tes was in 1954.

rty in question was used in
at 4221 Lindell on January

ceremonies or services con-
ay afternoons at the head-
e are the only regular serv-

vices are presided over by

ier of the Church is L. R.
still living.

literature which is dissem-
courages other persons to
are other efforts made to
e purpose.

uri Church of Scientology
ic affairs such as co
ounseling program.

rty in question consisting of
t and furniture is used in
f the organization includin
ords, providing mailings to

ch of Scientology does not
minaries but requires that
sters go through counseling
re conducted in their head
s

no formal membership roll
f Scientology.

rch of Scientology is an ap
philosophy having as its
s who belong to other for
h as members of the Cath
an churches and including
and Jewish rabbis (Tr. 2
other religious faiths do
mbership in the Church of

in the employ of the church
$3,000.00 annually from m
Louis area. No attempt
ate Rock's testimony
ficials, parishioners or
th appellant and its system of
ome or expense statements
and the sources of income and
ambiguous at best

APPENDIX—Continued

12. There was no corroborative evidence from any independent witness presented to the effect that the Missouri Church of Scientology is recognized by any other religious faiths as being a bona fide religion.

13. We find the testimony of the Reverend Frederick M. Rock generally not to be credible and worthy of belief in particular in respect to his description and categorization of the activities of the organization, its alleged religious services, its financial structure and the nature of the so-called donations which are made to the organization.

14. The Commission finds that there is no sufficient credible evidence presented by the appellant to satisfy the burden placed upon one claiming exemption from taxation.

Conclusions of Law

1. Under Article X, Section 6 of the Missouri Constitution and Section 137.100 R.S.Mo. all property used exclusively for religious worship is exempt from taxation.

2. This Commission has jurisdiction of this proceeding and the parties hereto, and is the sole judge of the credibility of the witnesses appearing before it.

3. It is the function of the Commission to determine the credibility of witnesses and to judge what probative weight or value to give to their testimony.

4. As to claims for exemption from taxation the burden is on the owner claiming his property to be exempt to establish that his property falls within the exempted class. *National Cemetery Ass'n. of Missouri v. Benson*, 344 Mo. 784, 129 S.W.2d 842 (1939).

5. Exhibits which were marked and identified but which were never offered into evidence cannot be considered as such by this Commission in its capacity as the trier of fact.

6. Claims for exemption from taxation are not favored in the law and provisions for exemption are strictly construed against one who claims to be exempt.

7. It is concluded that with the lack of credibility found by this Commission in the testimony of the witness Rock and the lack of corroboration by any independent authority on contemporary religions that the property owner has not satisfied the burden placed upon him.

8. While the appellant has some of the trappings and accoutrements of an organized religion, it appears to be more an applied philosophy which has a certain religious connotation, but which falls short of being devoted to the worship of the Supreme Being, which this Commission concludes is necessary for the property owner to have its property considered exclusively for religious worship. The Commission does not believe that an applied religious philosophy is identical for purposes of exemption with an organized religion devoted to religious worship.

9. The personal property of the appellant has not, therefore, been shown to be used exclusively for religious worship or charitable purposes and therefore cannot be exempted from ad valorem taxation.

10. The decision of the Board of Equalization placing an assessment of $5,000.00 upon the personal property of the Missouri Church of Scientology for the year 1974 is herewith affirmed.

SEILER, Judge, concurring in result.

As I understand the situation, the only evidence offered by appellant before the commission was a witness whom the commission found not credible with respect to his testimony bearing on the issues. We are not going to disturb that finding. Beyond question, then, appellant has not carried the burden of establishing an exemption from taxation. In my opinion, this disposes of the appeal.

We should be careful not to do anything to restrict religious freedom and I am sure the principal opinion has no intention to do otherwise, but if it is necessary to define religious worship or religion, I do not believe we should restrict the definition to conventional orthodox religions, which it seems to me is what the principal opinion does. History shows that what is ortho

doxy today was once heresy. I therefore concur in result only.

CITY OF RAYTOWN, Missouri, Respondent,

v.

John C. DANFORTH Attorney General, Missouri Department of Social Services, Kansas City Ambulance Association, Inc., Ralph L. Martin, Prosecuting Attorney, Mid-America Regional Council, Emergency Rescue, Inc., Appellants.

No. 59734.

Supreme Court of Missouri, En Banc.

Dec. 19, 1977.

Rehearing Denied Feb. 8, 1978.

City brought declaratory judgment action seeking judgment that provisions of ambulance licensing law did not require city to secure license from Division of Health prior to operation of ambulance service. The Circuit Court, Jackson County, William J. Peters, J., entered judgment in favor of city and enjoined threatened enforcement of licensing law as to city, and appeal was taken and cause was transferred from Court of Appeal. The Supreme Court, Rendlen, J., held that despite statute authorizing cities to operate ambulance services and despite statute authorizing municipal prohibition of ambulance operation, ambulance licensing law required city to secure license from Division of Health prior to operation of ambulance service.

Reversed and remanded.

Bardgett, J., concurred in part and dissented in part and filed opinion.

1. Automobiles ⇨77

Ambulance licensing law required city to secure license from Division of Health prior to operation of ambulance service, despite statute authorizing cities to operate ambulance services and despite statute authorizing city to require ambulance franchise for those ambulance services operating within bounds of city. V.A.M.S. §§ 67.300, 67.300, subd. 2, 190.100-190.195, 190.100(10), 190.105, subds. 1, 4, 5.

2. Statutes ⇨223.2, 223.4

Statutes relating to same subject must be read together and, if possible, in harmony, and provisions of one having special application to particular subject will be deemed a qualification to another statute general in its terms.

3. Automobiles ⇨77

Statute providing that city may require franchise for ambulance licensees operating ambulance services within bounds of city does not authorize municipality to franchise its own operation and thereby circumvent licensing requirement. V.A.M.S. §§ 190.100(10), 190.105, subds. 1, 5.

Harvey M. Tettlebaum, John D. Ashcroft, Atty. Gen., Jefferson City, Billy S. Sparks, Kansas City, for appellants.

Joseph E. Stevens, Jr., Kansas City, for respondent.

RENDLEN, Judge.

Appeal from the trial court's judgment declaring that provisions of Missouri's ambulance licensing law, §§ 190.100 to 190.195, RSMo Supp.1975,[1] do not require that plaintiff City secure a license from the Missouri Division of Health prior to operation of an ambulance service. The judgment also enjoined the threatened enforcement of the licensing law as to pla
was transferred from the
Appeals, Kansas City dis
lon, pursuant to civil rul

During 1975 Raytow
fourth class, negotiated
defendant Kansas City A
tion, Inc., to obtain amb
its residents. Resolving
community ambulance, R
of 1976 applied to the M
Health for an ambulance
recently enacted Licensi
the City had not previous
service and did not q
"grandfather" provision
Act,[3] its application was
same manner as others
following the effective d
hearing required by § 19
ducted in which it was de
lic convenience and nece
quire the proposed ambul
accordingly Raytown's li
was denied. Apparently

1. The statutory sections, 190.100 to 190.195, regulating "ambulances, ambulance personnel and emergency treatment," shall be referred to as the "Licensing Law" or the "Act".

2. Defendants so enjoined a
eral of Missouri; the Jacks
ing Attorney; the Missour
cial Services and its Dire
ants are the Mid-Americ
Emergency Rescue, Inc. a
Ambulance Association, h
for-profit corporation org
pose of providing ambulan
tract basis in the Kansas
order the court directed t
hereby preliminarily restr
from taking any action wh
which would be designed t
effect of requiring plaintiff
from the State of Missouri
lance service and from br
either civil or criminal, ag
officers, agents or employe
or any of its officers with a
190.100 *et seq.*, R.S.Mo., un
of this Court

This is a final and appeal

3. See our recent decision,
Ambulance Service, Inc. v.
242 (Mo.banc 1977), for a
implied "grandfather" prov
those ambulance services i
July 1, 1974 (the effective
from the requirements of a
mination of the public conv
sity

[2] On September 9, at the outset of the campaign and contemporaneously with sending the letter in question, the union held a meeting with ten to twelve employees present. There is evidence the union president explained then that the fee reduction offer would apply during contract negotiations after the election, thus indicating compliance with the *Savair* rule. A union official gave a similar explanation to about the same number of employees who attended the single meeting held thereafter, on September 25. Relying on this further communication from the union, the Board argues that any misapprehension on the part of the employees was cured, since the employees in attendance at the meetings would have conveyed the correct information about dues to their co-workers. The problem with this argument is that the only specific communication to other workers discussed in the record is an interpretation of the offer as the employer construes it, not as the union does. One Ruth Kurlytis, who was a supporter of the union, told three different employees that the reduced fee offer would remain open until the election but not afterwards. There is no substantial evidence, therefore, to support the Board's contention that the misleading terms of the letter were clarified by adequate explanations from the union or its supporters.

[3] Where a fee waiver offer is communicated to employees in a confusing fashion and a responsible interpretation of the offer is contrary to the requirements of *Savair*, then the election should be set aside. *NLRB v. Johnson & Hardin Co.*, 554 F.2d 275 (6th Cir. 1977) (per curiam). The Board itself has interpreted a union statement that "there will be no initiation fees for anyone joining now during this campaign" as violating the *Savair* rule, a finding which requires invalidation of the election. *Deming Division, Crane Co.*, 225 NLRB 657 (1976). We think the offer in this case was equally violative of the *Savair* rule. It reasonably can be interpreted as an offer to reduce dues only until the election is held; therefore it significantly impaired the free choice of those voting in the election.

The employer also asserts that the union violated the Act by announcing an intention to forfeit initiation dues if the election went against it. In view of our disposition of the case, it is unnecessary for us to reach the merits of this further contention.

Enforcement of the order is DENIED.



CHURCH OF SCIENTOLOGY OF CALIFORNIA, a Nonprofit California Corporation, Plaintiff-Appellant,

v.

James E. ADAMS, Elaine Viets, Pulitzer Publishing Co., Inc., et al., Defendants-Appellees.

No. 75-1954.

United States Court of Appeals, Ninth Circuit.

Oct. 23, 1978.

California church brought libel action against Missouri publisher of newspaper and authors of allegedly libelous newspaper articles appearing in Missouri newspaper. The United States District Court for the Central District of California, Francis C. Whelan, J., dismissed the action, and appeal was taken. The Court of Appeals, Kennedy, Circuit Judge, held that: (1) Missouri publisher's revenues from California advertisers did not constitute sufficient basis for establishing personal jurisdiction over publisher, and (2) where California events were not topic of allegedly libelous newspaper articles, California readers were not principal or secondary target of articles, articles were not written or researched in California, articles mentioned California resident only by reference and California church was not mentioned in articles, Missouri publisher could not be held to have reasonably

foreseen that any substantial risk of defamation would arise from circulation of articles in California so that its distribution in California of approximately 150 copies of allegedly libelous articles was insufficient contact with California to support personal jurisdiction over publisher.

Affirmed.

1. Federal Courts ⇐417

In ruling on motion to dismiss for lack of personal jurisdiction libel action brought by California church against Missouri newspaper and Missouri residents, district court properly applied California law.

2. Courts ⇐12(2)

California law permits state courts to exercise personal jurisdiction over nonresident defendants to the full extent permitted by the Constitution. West's Ann.Cal. Code Civ.Proc. § 410.10.

3. Courts ⇐12(2)

If defendant is not present for all purposes in the forum, due process requires that jurisdiction be based on contacts which have some nexus to cause of action alleged.

4. Federal Courts ⇐81

Missouri publisher's revenues from California advertisers did not constitute sufficient basis for maintaining personal jurisdiction in California over publisher sued by California church for libel where advertising revenues were unrelated to libel action based on articles appearing in Missouri newspaper and publisher earned that revenue by giving California advertisers opportunity to reach persons outside California.

5. Federal Courts ⇐82

Where Missouri publisher of allegedly libelous newspaper articles in Missouri newspaper owned only 17 percent of California advertising corporation and no parent-subsidiary relationship existed between Missouri publisher and California corporation, Missouri publisher's relationship to California corporation was insufficient to give California district court personal jurisdiction over Missouri publisher in libel action.

6. Courts ⇐12(2)

It is the quality and nature of defendant's activity in relation to cause of action alleged which determines whether exercise of personal jurisdiction comports with fair play and substantial justice.

7. Courts ⇐12(2)

Where there have been commercial dealings between the parties, personal jurisdiction in large part depends upon whether consensual activity potentially touched forum state in that such indicates whether or not there is some act by which defendant purposefully availed itself of privilege of conducting activities within forum.

8. Courts ⇐12(2)

In determining whether exercise of personal jurisdiction in a tort action comports with fair play and substantial justice, inquiry extends beyond whether there has been submission to sovereignty of forum by some consensual act but requires examination of expected consequences of defendant's conduct.

9. Courts ⇐12(2)

Determination whether exercise of personal jurisdiction in products liability case comports with fair play and substantial justice resolves into inquiry as to whether defendant could reasonably foresee that his product, when injected into stream of commerce, would come to rest in the forum.

10. Courts ⇐12(2)

Physical presence of product within forum state is critical factor in conferring personal jurisdiction in products liability case.

11. Federal Courts ⇐84

In a libel case, likelihood that offending publication will enter forum is not fair measure of reasonableness on exercising personal jurisdiction over nonresident publisher.

12. Federal Courts ⇐84

In a defamation case, appropriate jurisdictional analysis is to determine whether it was foreseeable that risk of injury by defamation would arise in the forum state.

13. Federal Court

Where Califor
of allegedly libelo
Missouri newspa
were not principa
articles, articles
searched in Calif
California residen
California church
was not mentioned
lisher could not be
foreseen that any
mation would aris
cles in California
California of app
allegedly libelous
contact with Calif
jurisdiction over p

14. Constitutional

First Amendm
ter developed in t
defenses on the m
jurisdiction stage
U.S.C.A.Const. An

Richard M. Cole
les, Cal., for plain

Theodore B.
Dunn & Cruther,
defendants.

Appeal from th
Court for the Cen

Before CHOY
Judges, and PAL

KENNEDY, Cir

The Church of
(California Churc
tion, appeals fron
its action for libel
Pulitzer Publishin
Louis Post-Dispat
E. Adams and El
thors of the newsp

* Honorable Edmun
States District Ju
of New York, sitti

13. Federal Courts ⇐84

Where California events were not topic of allegedly libelous articles appearing in Missouri newspaper, California readers were not principal or secondary target of articles, articles were not written or researched in California, articles mentioned California resident only by reference and California church which brought libel action was not mentioned in articles, Missouri publisher could not be held to have reasonably foreseen that any substantial risk of defamation would arise from circulation of articles in California so that its distribution in California of approximately 150 copies of allegedly libelous articles was insufficient contact with California to support personal jurisdiction over publisher.

14. Constitutional Law ⇐90.1(5)

First Amendment protections are better developed in the context of substantive defenses on the merits rather than at initial jurisdiction stage of defamation proceeding. U.S.C.A.Const. Amend. 1.

Richard M. Coleman (argued), Los Angeles, Cal., for plaintiff.

Theodore B. Olson (argued), Gibson, Dunn & Cruther, Los Angeles, Cal., for defendants.

Appeal from the United States District Court for the Central District of California.

Before CHOY and KENNEDY, Circuit Judges, and PALMIERI,* District Judge.

KENNEDY, Circuit Judge:

The Church of Scientology of California (California Church), a California corporation, appeals from a judgment dismissing its action for libel. The suit is against the Pulitzer Publishing Co., publisher of the *St. Louis Post-Dispatch* newspaper, and James E. Adams and Elaine Viets, principal authors of the newspaper articles in question.[1] The district court dismissed the action against appellees for lack of personal jurisdiction and ruled, alternatively, that the complaint fails to state a claim upon which relief may be granted. We hold that the trial court was correct in concluding that it did not have jurisdiction over the appellees, and it is not necessary for us to address the district court's alternative ruling.

The Post-Dispatch published a series of five articles about Scientology on March 3 through 7, 1974. The articles discussed Scientology generally and made particular reference to the Church of Scientology of Missouri. In preparing the articles, Adams and Viets interviewed local leaders of the Missouri Church of Scientology and former members of that Scientology branch as well as former staff members of the Toronto Scientology office. The articles were written in St. Louis and at no time did the reporters enter California for research or any other purpose. At the suggestion of a staff member of the Missouri Church, the reporters did interview Emily Watson, who was connected with a national Scientology office located in California, while she was visiting in St. Louis. No reference to the California Church or any of its individual members was made in the articles.

Two months after the articles were published, the California Church filed this action in a California superior court. Notwithstanding the lack of any reference to the California Church in the articles, the complaint attempted to establish that they pertained to the appellant. We summarize the complaint's allegations of libel, which were specific and lengthy, as follows:

(1) that Scientology is not a religion but rather a commercial enterprise and that appellant is a commercial business;

(2) that appellant exploits individuals for money and confers no benefits of a spiritual, religious, or other nature on its members;

* Honorable Edmund L. Palmieri, Senior United States District Judge for the Southern District of New York, sitting by designation.

1. Eric, Nancy, and John McLean were also named as defendants, but the action against them was dismissed for lack of prosecution by order of the district court on March 25, 1975, and appellant does not contest that ruling.

(3) that appellant is operated solely for the personal and financial aggrandizement of L. Ron Hubbard, the founder of Scientology, at the financial and emotional expense of its members;

(4) that appellant is operated by "a group of paramilitaristic fanatics who motivate and control members by instilling a fear of reprisal, and who drive members insane and harass members" who leave the organization (quoting from complaint).

Further, it was alleged that appellant was defamed by reason of untruthful and highly derogatory remarks about Scientology's founder, L. Ron Hubbard.

The appellees filed a motion to dismiss for lack of personal jurisdiction, and the motion was heard in the federal district court to which the action had been removed. In contesting the motion, the California Church did not dispute the facts adduced by appellees as to their respective contacts with the State of California. It is thus agreed that Pulitzer makes no attempt to market the *Post-Dispatch* in California. Circulation in California to mail subscribers and to a few independent news dealers amounts to 0.01% of the newspaper's total circulation. Approximately 156 copies of one of the allegedly libelous publications and 121 copies of each of the other articles reached California in this manner. The *Post-Dispatch* does not direct any advertising whatsoever to California readers, but California companies do advertise in the paper to reach markets in Missouri and elsewhere. It is agreed that 2.91% of the newspaper's general advertising revenue is from this source. In addition, Pulitzer owns approximately 17% of Million Market Newspapers, Inc., an advertising firm licensed to do business in California, which solicits advertising for Pulitzer and other newspaper publishers by providing potential advertisers with information about the newspapers and their market areas. Finally, the reporters are residents of St. Louis County, Missouri, and neither has been in the State of California during the last fifteen years.

[1, 2] In ruling on appellees' motion to dismiss for lack of personal jurisdiction, it was correct for the district court to apply California law. California law permits state courts to exercise personal jurisdiction over nonresident defendants to the full extent permitted by the Constitution.

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

Cal.Civ.Proc.Code § 410.10 (West 1973). The California courts have ruled that this statute permits state courts to exercise the broadest possible jurisdiction, limited only by constitutional considerations. *Sibley v. Superior Court of Los Angeles County*, 16 Cal.3d 442, 128 Cal.Rptr. 34, 546 P.2d 322 (1976), *cert. denied*, 429 U.S. 826, 97 S.Ct. 82, 50 L.Ed.2d 89 (1978). "Thus, the usual two-step analysis [in inquiries respecting personal jurisdiction] collapses into a single search for the outer limits of what due process permits." *Forsythe v. Overmyer*, 576 F.2d 779, 782 (9th Cir. 1978).

[3] The California Church concedes that Pulitzer and the individual appellees do not have such substantial contacts with the forum that they are present there for purposes of defending against all types of actions. *See Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952). If a defendant is not present for all purposes in the forum, due process requires that jurisdiction be based on contacts which have some nexus to the cause of action alleged. *Forsythe*, 576 F.2d at 782. The Supreme Court has described "the relationship among the defendant, the forum, and the litigation" as "the central concern of the inquiry into personal jurisdiction." *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1977).

[4] We dispose at the outset of the claim that Pulitzer's revenues from California advertisers are a sufficient basis for jurisdiction in this case. The advertising revenues are unrelated to appellant's action for libel. Pulitzer earned that revenue by giving Cali-

fornia advertiser
persons outside
tacts with Califo
dence of an inte
or of an effort t

[5] Pulitzer's
Market Newspa
stantial basis f
owns only sevent
the California co
sidiary relationsl
where the contac
corporation are
personal jurisdict
activities of one
relevant to the is
other, so long as
corporations has
Grand Resorts,
(9th Cir. 1977).
cates that the C
ration is not ope
of Pulitzer.

The sole conc
the forum which
tional inquiry is
forum of approx
allegedly libelou

[6–8] It is t
the defendant's
la, 357 U.S. 235,
L.Ed.2d 1283 (19
of action alleged
or not the exer
comports with
justice," *Interna*
ington, 326 U.S.
L.Ed. 95 (1945).
commercial dea
jurisdiction in
whether conse
touched the for
whether or not
the defendant
the privilege of
the forum," *H.*
S.Ct. at 1240.
myer, 576 F.2d
action based on
necessarily exc
has been submi

fornia advertisers an opportunity to reach persons outside of California. Those contacts with California companies are not evidence of an intent to publish in California or of an effort to reach readers there.

[5] Pulitzer's relationship to Million Market Newspapers, Inc. is also an insubstantial basis for jurisdiction. Pulitzer owns only seventeen percent of the stock in the California company and no parent-subsidiary relationship exists. Even in cases where the contacts of a parent or subsidiary corporation are sufficient to subject it to personal jurisdiction, we recognize that the activities of one related corporation are irrelevant to the issue of jurisdiction over the other, so long as a separation between the corporations has been maintained. *Uston v. Grand Resorts, Inc.*, 564 F.2d 1217, 1218 (9th Cir. 1977). Nothing in the record indicates that the California advertising corporation is not operated wholly independently of Pulitzer.

The sole contact between appellees and the forum which is relevant to our jurisdictional inquiry is thus the distribution in the forum of approximately 150 copies of each allegedly libelous article.

[6–8] It is the "quality and nature of the defendant's activity," *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958), in relation to the cause of action alleged which determines whether or not the exercise of personal jurisdiction comports with "fair play and substantial justice," *International Shoe Co. v. Washington*, 326 U.S. 310, 320, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Where there have been commercial dealings between the parties, jurisdiction in large part depends upon whether consensual activity potentially touched the forum state, as this indicates whether or not there is "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum," *Hanson*, 357 U.S. at 253, 78 S.Ct. at 1240. *See, e. g., Forsythe v. Overmyer*, 576 F.2d 779 (9th Cir. 1978). In an action based on tort, however, the inquiry necessarily extends beyond whether there has been submission to the sovereignty of the forum by some consensual act, and it requires an examination of the expected consequences of the defendant's conduct. In such cases we have held that the demands of due process are satisfied when jurisdiction is asserted over a defendant who "purposefully sets his product or his designs into the stream of commerce, knowing or having reason to know that they will reach the forum state and that they create a potential risk of injury." *Jones Enterprises, Inc. v. Atlas Service Corp.*, 442 F.2d 1136, 1140 (9th Cir. 1971); *accord, Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231, 235 (9th Cir. 1969).

[9–12] In products liability cases, this determination resolves into an inquiry as to whether the defendant could reasonably foresee that his product, when injected into the stream of commerce, would come to rest in the forum. *See, e. g., Duple Motor Bodies, supra; Buckeye Boiler Co. v. Superior Court of Los Angeles County*, 71 Cal.2d 893, 80 Cal.Rptr. 113, 458 P.2d 57 (1969) (en banc); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961). It is assumed in such cases, indeed it is so almost by definition, that the locus of the risk of injury is the situs of the product. Physical presence of the product within the forum state is thus the critical factor in conferring jurisdiction, and the due process inquiry turns in large part on whether it was foreseeable that the defective product would be introduced into the state. In a libel case, however, we do not think the likelihood that an offending publication will enter a forum is a fair measure of the reasonableness of the exercise of jurisdiction over a publisher. The nature of the press is such that copies of most major newspapers will be located throughout the world, and we do not think it consistent with fairness to subject publishers to personal jurisdiction solely because an insignificant number of copies of their newspapers were circulated in the forum state. In a defamation case, therefore, the appropriate jurisdictional analysis should be to determine whether or not it was foreseeable that a risk of injury by

defamation would arise in the forum state. Certain of our other tort cases which do not involve product liability or conduct causing personal injury are consistent with this approach. *Taylor v. Portland Paramount Corp.*, 383 F.2d 634, 640-44 (9th Cir. 1966); *Amba Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784 (9th Cir. 1977).

[13] While it was reasonably foreseeable that the allegedly libelous articles would find their way to California, we think it was not reasonably foreseeable that any substantial risk of defamation would arise from their circulation in that state, even assuming the articles to be untrue and maliciously published. Although Pulitzer did mail the *Post-Dispatch* to regular subscribers and delivered it to some independent distributors, based on its knowledge that no more than 150 copies of the articles would find their way to California it had little reason to expect a risk of injury from defamation in that state. Under some circumstances a publisher could be held to a duty to anticipate injury to reputation from distribution of a small number of copies. For example, in *Anselmi v. Denver Post, Inc.*, 552 F.2d 316 (10th Cir. 1977), *cert. denied*, 432 U.S. 911, 97 S.Ct. 2960, 53 L.Ed.2d 1084 (1977), jurisdiction was predicated on distribution of an even smaller number of newspapers in the State of Wyoming, but jurisdiction was conferred in part by the fact that "when the story was written and published it was foreseeable that it would be given substantial attention within the State of Wyoming since there was more reader interest there than in any of the other states." *Id.* at 325. The action was brought by Wyoming residents who were specifically named in the allegedly libelous article, entitled "U. S. Tries to Close Up 'Wide Open' Wyoming," which carried a Wyoming dateline. Also of substantial significance in the court's analysis was that the article had been written by three reporters dispatched to Wyoming.

In the present appeal, California events were not the topic of the allegedly actionable writings, nor were California readers a principal or secondary target of the articles. No research was done in California and the articles were not written in that state. The only mention of a California resident was by way of reference to a person who spoke as a representative of the national Scientology organization. The California Church is a separate corporation, and it was not mentioned in any of the articles. The appellant is included in the discussion only to the extent that one article makes reference to "about 300 branches" of the Scientology movement in the context of discussing the St. Louis Scientology office, and to the extent that the articles concern Scientology in general.

We think it is relevant to the jurisdictional ruling, and to the issue of foreseeable risk of defamation injury, that were we to reach the merits of this case a difficult question would arise as to whether the articles were published "of and concerning" the California Church, as they must be before this action for libel will lie.[2] While it is unnecessary to make a final ruling on this

2. In California, as in most other states, an allegedly libelous statement is not actionable unless "published or spoken *concerning the plaintiff.*" Cal.Civ.Proc.Code § 460 (West 1973) (emphasis supplied). *Harris v. Curtis Publishing Co.*, 49 Cal.App.2d 340, 121 P.2d 761 (1942). *see generally New York Times Co. v. Sullivan*, 376 U.S. 254, 288, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). As a corollary of this requirement California courts have held that

> general language against a class or group of people cannot constitute libel. Where a group is very large and nothing that is said applies in particular to the plaintiff he cannot recover.

Noral v. Hearst Publications, Inc., 40 Cal.App.2d 348, 351, 104 P.2d 860, 862 (1940). Although recovery may be allowed when suit is brought by a member of a small group where the defamation applied to all members of a group, *see, e. g., Neiman-Marcus v. Lait*, 107 F.Supp. 96 (S.D.N.Y.1952), this court has stated that "libels against groups consisting of large numbers of persons cannot satisfy the fundamental requirements of the law of libel . . ." *Golden North Airways, Inc. v. Tanana Publishing Co.*, 218 F.2d 612, 620 (9th Cir. 1954). *Cf. Kentucky Fried Chicken of Bowling Green, Inc. v. Sanders*, 563 S.W.2d 8 (Ky.1978) (individual franchisee may not bring action for defamation where Colonel Sanders stated, *inter*

CHI

substantive issue.
doubt that the a
lant. That doub
risk of injury
have been fores
few copies of the
fornia, when co
diffuse, nonspecif
as to this Califor
the publisher's re
forum with respe
too attenuated
jurisdiction over

Under the cir
California of p
could have fores
them on notice o
ing personal jur
basis would be in
of fairness embo
process.[3]

[14] Counsel
siderable attenti
reason of the fir
is entitled to inc
position of pers
York Times Co.
Cir. 1966), the
order to accon
concerns, more
minimum for otl
to sustain perso
tion actions aga
See also Rebozo
F.2d 1208 (5th C
ciated Press, 51
Curtis Publishin
(5th Cir. 1967);

alia, that fran
paste.").

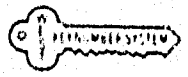
3. We are mindf
may be exercis
articles at issue
called upon t
charges in eve
branch is locat
that lawsuits
demands or g
legitimate on
must be desi
of what is fa
dispute Int
which consid
not consona
sues of due p

sub antive issue, we think there is serious doubt that the articles refer to the appellant. That doubt bears strongly upon the risk of injury by defamation that could have been foreseen by the publisher. The few copies of the articles circulated in California, when considered in relation to the diffuse, nonspecific direction of the writings as to this California plaintiff, suggest that the publisher's relationship to the California forum with respect to this cause of action is too attenuated to support an assertion of jurisdiction over the person.

Under the circumstances, the impact in California of publication which appellees could have foreseen was not such as to put them on notice of a risk of injury. Sustaining personal jurisdiction on so tenuous a basis would be inconsistent with the notions of fairness embodied in the concept of due process.[3]

[14] Counsel for both parties gave considerable attention to the argument that by reason of the first amendment a newspaper is entitled to increased protection from imposition of personal jurisdiction. In *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966), the Fifth Circuit held that in order to accommodate first amendment concerns, more contacts than the requisite minimum for other tort actions are required to sustain personal jurisdiction in defamation actions against out-of-state publishers. *See also Rebozo v. Washington Post Co.*, 515 F.2d 1208 (5th Cir. 1975); *Edwards v. Associated Press*, 512 F.2d 258 (5th Cir. 1975); *Curtis Publishing Co. v. Golino*, 383 F.2d 586 (5th Cir. 1967); *Buckley v. New York Times Co.*, 338 F.2d 470 (5th Cir. 1964). We do not find it necessary to reach this point in view of our holding above, but we note that the proposition advanced by the appellees is not a factor in our decision and that its soundness is open to question. The Tenth Circuit has rejected the applicability of first amendment concerns to the jurisdictional inquiry, *Anselmi v. Denver Post, Inc.*, 552 F.2d 316, 324 (10th Cir.), *cert. denied*, 432 U.S. 911, 97 S.Ct. 2960, 53 L.Ed.2d 1084 (1977), and the Fifth Circuit itself recently has referred to first amendment considerations as "not so much a rule as . . . a cautionary note," in the context of a jurisdictional analysis. *Edwards v. Associated Press*, 512 F.2d at 266. *See also Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041, 97 S.Ct. 740, 50 L.Ed.2d 753 (1977) (upholding the exercise of personal jurisdiction over an out-of-state magazine publisher without mention of the first amendment). We observe that first amendment protections are better developed in the context of substantive defenses on the merits rather than at the initial jurisdictional stage of a defamation proceeding. *See Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967).

The order of the district court dismissing this action for lack of personal jurisdiction is AFFIRMED.



...in any of the other ... The action was ... residents who were ...he allegedly libelous ... Tries to Close Up ...," which carried a ...o of substantial sig... analysis was that ...written by three re... Wyoming.

...l, California events ...e allegedly actiona... California readers a ...rget of the articles. ... California and the ... in that state. The ...ornia resident was ... person who spoke ...e national Scientol... California Church is ...d it was not men... ... The appellant ...ssion only to the ...makes reference to ...f the Scientology ...t of discussing the ...fice, and to the ex... ...ern Scientology in ...

...to the jurisdiction... ...ue of foreseeable ..., that were we to ...s case a difficult ... whether the arti... ...d concerning" the ...y must be before ...lie.[2] While it is ...nal ruling on this ...

...*ions, Inc.*, 40 Cal ...d 860, 862 (1940), ...allowed when suit is ...small group where ...all members of a *Marcus v. Lait*, 107 ...this court has stat... ...ups consisting of ...annot satisfy the ...f the law of libel ...*rs, Inc. v. Ta...* ... (9th Cir. ...*Bldg. of Bowling* ...W.2d 8 (Ky.1978) ...d bring action for ...nders stated, *inter*

2. We are mindful that if jurisdiction properly may be exercised in California based on the articles at issue here, appellees equally may be called upon to defend against defamation charges in every state where a Scientology branch is located. This court has recognized that lawsuits can be brought on frivolous demands or groundless claims as well as on legitimate ones, and that procedural rules must be designed and appraised in the light of what is fair and just to both sides in the dispute. Interpretations of basic rights which consider only those of a claimant are not consonant with the fundamental requisites of due process. *Taylor v. Portland Paramount Corp.*, 383 F.2d 634, 642 (9th Cir. 1967), *quoting with approval, Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761, 766 (1961). Although "[t]he differences between individuals and corporations may lead to the conclusion that a given set of circumstances establishes state jurisdiction over one type of defendant but not over the other," *Shaffer v. Heitner*, 433 U.S. 186, 201 n. 19, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1977), this does not mean that inconvenience and potential for harassment should not be important considerations even where a corporate defendant is concerned.

The FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D. C., et al., Appellants,

v.

UNITED STATES of America, Appellee.

No. 21483.

United States Court of Appeals
District of Columbia Circuit.

Argued Nov. 5, 1968.

Decided Feb. 5, 1969.

Petition for Rehearing Denied April 18, 1969.

Proceeding on libel of information filed by United States Attorney for condemnation of device and accompanying false or misleading labeling. The United States District Court for the District of Columbia, John J. Sirica, J., entered a judgment in favor of the government and the claimant appealed. The Court of Appeals, J. Skelly Wright, Circuit Judge, held that where incorporated church, whose ministers were qualified to perform marriages and burials, made out an unrebutted prima facie case that it was a bona fide religion, its literature setting forth religious doctrines and referring to instrument used in auditing procedures which played a central part in religious doctrine did not constitute "labeling" within Federal Food, Drug, and Cosmetic Act rendering device with accompanying false and misleading labeling subject to condemnation.

Reversed.

McGowan, Circuit Judge, dissented.

1. Searches and Seizures ⇐2

Purpose of warrant clause of Fourth Amendment is to interpose relatively detached and independent decision maker between privacy of individual and the otherwise unchecked zeal of enforcement officials. U.S.C.A.Const. Amend. 4.

2. Admiralty ⇐47
Federal Civil Procedure ⇐584

In case of ordinary civil attachments, details of such proceedings are, even in federal courts, left to state law and in cases in admiralty the process is governed by Admiralty Rules. Fed.Rules Civ.Proc. rule 64, 28 U.S.C.A.; Supplemental Rules for Certain Admiralty and Maritime Claims, rules B, C, 28 U.S.C.A.

3. Searches and Seizures ⇐4

Where libel of information filed by United States Attorney particularly described items to be seized and gave a reasonably particular account of respects in which items were thought to contravene Food, Drug, and Cosmetic Act, libel was subject to scrutiny by federal district judge and it was only after his review and by court order that warrant was issued for seizure, all requirements interposed by Fourth Amendment had been complied with and the seizure was reasonable. Federal Food, Drug, and Cosmetic Act, § 304(a, b), 21 U.S.C.A. § 334(a, b); U.S.C.A.Const. Amend. 4.

4. Searches and Seizures ⇐7(10)

Inspections of premises open to general public are not illegal searches. U.S.C.A.Const. Amend. 4.

5. Constitutional Law ⇐84

First Amendment does not protect from regulation or prohibition all bona fide religious practices, but rather embraces two concepts: freedom to believe and freedom to act; and while the first is absolute, in the nature of things the second cannot be and conduct remains subject to regulation for protection of society. U.S.C.A.Const. Amend. 1.

6. Constitutional Law ⇐84

Legal restrictions cannot be applied to religious practices merely on showing of rational relationship between regulation imposed and legitimate end sought. U.S.C.A.Const. Amend. 1.

7. Constitutional Law ⇐84, 90, 91

Freedoms of speech and of press, of assembly and of worship are susceptible of restriction only to prevent grave and immediate danger to interests which state may lawfully protect. U.S.C.A. Const. Amend. 1.

to state law and in ... process is gov- ...les. Fed.Rules ... U.S.C.A.; Supple- ...rtain Admiralty and ...les B, C, 28 U.S.C.A.

...ures ⇐4
... information filed by ...rney particularly de- ...e seized and gave a ...lar account of respects ...re thought to contra- ..., and Cosmetic Act, ...o scrutiny by federal ... it was only after his ...rt order that warrant ...izure, all requirements ...urth Amendment had ...h and the seizure was ...ral Food, Drug, and ...04(a, b), 21 U.S.C.A. § ...A.Const. Amend. 4.

...izures ⇐7(10)
...f premises open to gen- ...t illegal searches. U.S. ...d, 4.

...w ⇐81
... does not protect ... or prohibition all bona ...actices, but rather em- ...pts: freedom to believe ...act; and while the first ...he nature of things the ...e and conduct remains ...tion for protection of so- ...Const. Amend. 1.

... Law ⇐84
...ictions cannot be applied ...ctices merely on showing ...tionship between regula- ...d legitimate end sought. ... Amend. 1.

...l Law ⇐84, 90, 91
... of speech and of press, of ...f worship are susceptible ...nly to prevent grave and ...ger to interests which ...vfully protect. U.S.C.A. ... 1.

8. Druggists ⇐11

In determining whether literature "accompanies" a device within meaning of Federal Food, Drug, and Cosmetic Act authorizing seizure of misbranded device, literature need not be shipped together with device but must be designed for use in distribution and sale of device; and the two must be parts of an integrated distribution system. Federal Food, Drug, and Cosmetic Act, §§ 1 et seq., 201(b, m), 304(a), 502, 21 U.S.C.A. §§ 301 et seq., 321(b, m), 334(a), 352; U.S.C.A.Const. Amends. 1, 4.

See publication Words and Phrases for other judicial constructions and definitions.

9. Druggists ⇐5

Where incorporated church, whose ministers were qualified to perform marriages and burials, had made out an unrebutted prima facie case that it was a bona fide religion, its literature setting forth religious doctrines and referring to instrument used in auditing procedures which played central part in religious doctrine did not constitute "labeling" within Federal Food, Drug, and Cosmetic Act rendering device with accompanying false and misleading labeling subject to condemnation. Federal Food, Drug, and Cosmetic Act, §§ 1 et seq., 201(b, m), 304(a), 502, 21 U.S.C.A. §§ 301 et seq., 321(b, m), 334(a), 352; U.S.C.A.Const. Amends. 1, 4.

See publication Words and Phrases for other judicial constructions and definitions.

10. Constitutional Law ⇐84

Failure of incorporated church whose ministers were licensed as such with legal authority to marry and to bury, and which had fundamental writings containing general account of man and his nature comparable in scope, if not in content, to those of some recognized religions, to postulate a deity in conventional sense did not preclude its status as a religion within protection of First Amendment. U.S.C.A.Const. Amend. 1.

11. Constitutional Law ⇐84

Theories of church, which had made a prima facie showing of being a bona fide religion, as expounded in its literature were protected by First Amendment from court room evaluation as to truth or falsity in suit by government to condemn instrument under Federal Food, Drug, and Cosmetic Act on theory that literature expounding the theories constituted false and misleading labeling of the devices. Federal Food, Drug, and Cosmetic Act, §§ 1 et seq., 201(b, m), 304(a), 502, 21 U.S.C.A. §§ 301 et seq., 321(b, m), 334(a), 352; U.S.C.A.Const. Amends. 1, 4.

On Appellee's Petition for Rehearing

12. Druggists ⇐11

A showing that auditing services had been peddled by incorporated church to general public on basis of wholly nonreligious pseudo-scientific representations would support a verdict of false and misleading labeling of instruments seized by Food and Drug Administration as devices with accompanying false and misleading labeling. Federal Food, Drug, and Cosmetic Act, §§ 1 et seq., 201(b, m), 304(a), 502, 21 U.S.C.A. §§ 301 et seq., 321(b, m), 334(a), 352; U.S.C.A.Const. Amends. 1, 4.

13. Druggists ⇐11

In order to raise a religious defense to charge of misbranding of device, person charged with alleged misrepresentation must have explicitly held himself out as making religious, as opposed to medical, scientific or otherwise secular claims. Federal Food, Drug, and Cosmetic Act, §§ 1 et seq., 201(b, m), 304(a), 502, 21 U.S.C.A. §§ 301 et seq., 321(b, m), 334(a), 352; U.S.C.A.Const. Amends. 1, 4.

14. Courts ⇐406.1(8)

Where jury's general verdict may have rested upon grounds improper for First Amendment reasons, a reviewing court will not pause to speculate whether jury's verdict was actually reached on other, and permissible, grounds. U.S.C.A.Const. Amend. 1.

15. Appeal and Error ⇐170(2)

Denial of First Amendment rights is one of those exceptional instances where appellate court will notice error in charge even when no objection is made at trial. U.S.C.A.Const. Amend. 1.

16. Druggists ⇐11

If on new trial relating to condemnation of device and accompanying false or misleading labeling defense of religious claim is made with regard to labeling it is incumbent on trial judge to rule in first instance as to whether each item of alleged false and misleading labeling makes religious claims and hence cannot be submitted to jury for factual determinations of whether it is a label for device in question and whether it is false. Federal Food, Drug, and Cosmetic Act, §§ 1 et seq., 201(b, m), 304(a), 502, 21 U.S.C.A. §§ 301 et seq., 321(b, m), 334 (a), 352; U.S.C.A.Const. Amends. 1, 4.

17. Constitutional Law ⇐84

If government in event of a new trial in proceeding relating to condemnation of device and accompanying false labeling successfully challenges bona fides of church's claim of religion with respect to literature describing device and asserted to be false and misleading labeling, First Amendment question as a defense would disappear from case. Federal Food, Drug, and Cosmetic Act, §§ 1 et seq., 201(b, m), 304(a), 502, 21 U.S.C.A. §§ 301 et seq., 321(b, m), 334(a), 352; U.S.C.A.Const. Amends. 1, 4.

Mr. Oscar H. Brinkman, Washington, D. C., for appellants.

Mr. Nathan Dodell, Asst. U. S. Atty., with whom Messrs. David G. Bress, U. S. Atty., Frank Q. Nebeker, Asst. U. S. Atty., William W. Goodrich, Assistant General Counsel, Department of Health, Education and Welfare, and Joanne S. Sisk, Attorney, Department of Health, Education and Welfare, were on the brief, for appellee.

Before WRIGHT, McGOWAN and ROBINSON, Circuit Judges.

J. SKELLY WRIGHT, Circuit Judge:

This is an appeal from a judgment and decree of condemnation and destruction against several electrical instruments and a large quantity of literature owned by claimants-appellants, The Founding Church of Scientology of Washington, D. C. and various individual adherents of that organization. The instruments and literature were seized by the Food and Drug Administration as "devices" with accompanying "false and misleading labeling" subject to condemnation under the Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.* (1964). The Government further charged that the instruments were "devices" lacking "adequate directions for use," in further violation of the Act.[1] After a jury trial, a general verdict "for the Government" was returned, and a judgment and decree of condemnation was entered.

Appellants contend that the seizure of the articles violated their Fourth Amendments rights, that the proceedings interfered with the free exercise of their religion, and that the evidence was insufficient to sustain the verdict. Because we find that much of the literature re-

1. "Any • • • device • • • that is • • • misbranded • • • while in interstate commerce • • • shall be liable to be proceeded against • • • and condemned in any district court of the United States within the jurisdiction of which the article is found • • •."

21 U.S.C. § 334(a).

"A drug or device shall be deemed to be misbranded—

"(a) False or misleading label.

"If its labeling is false or misleading in any particular.

• • • • • •

"(f) Directions for use and warnings on label.

"Unless its labeling bears (1) adequate directions for use • • •."

21 U.S.C. § 352.

"The term 'interstate commerce' means • • • (2) commerce within the District of Columbia • • •."

21 U.S.C. § 321(b).

FOUNI

lied on by the Go
misbranding was
the meaning of the
in the light of t
we reverse.

At the outset, w
claim that the dis
literature, the *res*
seized in violation
ment. The Act pr
ed devices "shall be
against • • •
tion,"[3] and that s
liable to seizure by
the libel, and the p
der this section sha
as may be, to the p
• • •."[4] The ap
admiralty at the tin
provided in former
the text of which i
gin.[5]

The Government
procedures required
in this case. Pursu
provisions of the A
ed the Founding Ch
obtained a demonst
ment later seized, a
the literature later
ing" of the instru
States Attorney the

2. As defined in 21
text of which is
infra.

3. 21 U.S.C. § 334(a).

4. 21 U.S.C. § 334(b).

5. "All informations
tion upon seizures
revenue, or navigati
the United States,
of seizure, whether
the high seas, or
within the admiralty
diction of the Uni
district within whi
brought and where
formation or libel
propound in distinc
ters relied on as
of forfeiture, and n
contrary to the for
statutes of the Uni

lied on by the Government to establish misbranding was not "labeling" [2] within the meaning of the statute as interpreted in the light of the First Amendment, we reverse.

I

At the outset, we confront appellants' claim that the disputed instruments and literature, the *res* of this lawsuit, were seized in violation of the Fourth Amendment. The Act provides that misbranded devices "shall be liable to be proceeded against * * * on libel of information," [3] and that such devices "shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty * * *." [4] The applicable procedure in admiralty at the time of the seizure was provided in former Admiralty Rule 21, the text of which is set out in the margin.[5]

The Government complied with the procedures required by statute and rule in this case. Pursuant to the inspection provisions of the Act, FDA agents visited the Founding Church of Scientology, obtained a demonstration of the instrument later seized, and bought copies of the literature later alleged to be "labeling" of the instrument. The United States Attorney then filed a libel of information with the District Court, describing the instrument and literature and averring that together they constituted a "device" and accompanying "false or misleading labeling" subject to condemnation under the Act. The court ordered issuance of a warrant authorizing seizure of the instruments and literature, and public advertisement of the seizure. FDA agents and United States Marshals carried out the seizure on January 4, 1963, at various premises owned by appellant Founding Church and its affiliates, after service of the warrant of attachment.

Appellants [6] contend that seizures such as this are governed by the warrant clause of the Fourth Amendment, which provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Since in appellants' view the warrant of seizure was not issued "upon probable cause, supported by Oath or affirmation," they contend that the exclusionary rule bars the use in evidence in a condemnation proceeding of the matter seized.

In arguing the Fourth Amendment issue, the parties have concentrated chiefly upon the question whether the exclusionary rule applies to condemnation proceedings under the Act.[7] Because we find

2. As defined in 21 U.S.C. § 321(m), the text of which is set out in Note 15, *infra*.

3. 21 U.S.C. § 334(a).

4. 21 U.S.C. § 334(b).

5. "All informations and libels of information upon seizures for any breach of the revenue, or navigation or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed."

7A J. MOORE, FEDERAL PRACTICE ¶ .30, p. 236 (2d ed.1968).

6. Appellants appeared as claimants to the seized goods in the District Court, and demanded a jury trial, under 21 U.S.C. § 334(b).

7. *See* One 1958 Plymouth Sedan v. Com. of Pennsylvania, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965); Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886); *but see* United States v. 2989 Plastic Tubular Cases, etc., 3 Cir., 352 F.2d 311 (1965), *cert. denied*, 383 U.S. 913, 86 S.Ct. 891, 15 L.Ed.2d 667 (1966).

that the seizure in this case was "reasonable" under the applicable Fourth Amendment standards, we do not reach that question.

[1] The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." It gives procedural form to this sweeping protection through the warrant clause, which requires that a magistrate review the decision to arrest or search except in exigent cases. The often stated purpose of this requirement is to interpose a relatively detached and independent decision maker between the privacy of the individual and the otherwise unchecked zeal of enforcement officials.[8]

[2] Though warrants are generally necessary for arrests of persons and for searches, the warrant requirement has not traditionally been imposed upon seizures of the type involved in this case—attachment of property in the course of civil proceedings. This does not mean that the Fourth Amendment does not apply to such seizures, in both its substantive prohibition against unreasonable seizures and its procedural requirement of judicial or quasi-judicial review of the decision to seize. It means merely that judicial restraint is imposed through a different form of proceeding than the showing of probable cause before a magistrate. In the case of ordinary civil attachments, the details of such proceedings are, even in the federal courts, left to state law.[9] In cases in admiralty, the process is governed by the Admiralty Rules, lately recodified as a supplement to the Civil Rules.[10]

Tradition has sanctified these forms and processes of civil attachments, and they have not been subjected to much Fourth Amendment scrutiny in either litigation or scholarly literature. We need not review them generally now, however, for we find that this particular seizure was reasonable in both the grounds supporting it and the judicial supervision over the decision to make it.

[3, 4] The libel of information filed by the United States Attorney particularly described the items to be seized, and gave a reasonably particular account of the respects in which they were thought to contravene the Act.[11] Though the libel was not a verified complaint, it has been been held that in admiralty complaints signed by Government officers are attested to by the officer's oath of office.[12] The libel was subject to scrutiny by a United States District Judge, and it was only after his review and by court order that the warrant issued. In these circumstances, all requirements imposed by the Fourth Amendment were complied with.[13]

8. Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 532-533, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

9. Rule 64, Fed.R.Civ.P.

10. Supplemental Rules B and C, Fed.R. Civ.P.

11. The libel alleged that the "Hubbard Electrometers" were accompanied as labeling by a list of named books and pamphlets, which were alleged to claim that the E-meter could be used in the cure or treatment of a list of named diseases, claims alleged to be false and misleading.

12. United States v. 935 Cases, etc., of Tomato Puree, 6 Cir., 136 F.2d 523, 525, *cert. denied*, 320 U.S. 778, 64 S.Ct. 92, 88 L.Ed. 467 (1943).

13. Appellants also contend that the seizure was the fruit of an illegal search in the form of a visit to the Scientology headquarters four years previously by an FDA agent passing as a member of the general public. There was no showing that the previous visit bore any relationship to the seizure in this case, and in any event inspections of premises open to the general public are not illegal searches. Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966). Appellants also contend that the seizure was carried out in an unreasonable manner, but on examination of the record we find this contention to be without merit.

We turn then
ernment's case
and literature s
condemnation.
charged that
Hubbard Electr
are "devices" a
that the literatu
beling" of the d
ten, printed, or
accompanying"
this "labeling" is
cause our readin
cation to this c
pellants' claims
their religion, so
ing their movem

A. Appellant
to the seized mat
corporate adher
known as Scien
apparently rests
writings of one
American who
ters of the move
time this action
early 1950's, Hu
dating what he c
anetics is a theor
out many of the
now used by
techniques attac
in this case as f

The basic the
mar, possesses b

14. "The term 'dev
struments, appa
including their
necessories, inte
diagnosis, cure,
prevention of d
animals; or (2
or any function
other animals."
21 U.S.C. § 321(h).

15. "The term 'la
and other writt
matter (1) upo
its containers o
panying such ar
21 U.S.C. § 321(m)

16. DIANETICS: T
SCIENCE (1958)

II

We turn then to the merits of the Government's case against the instruments and literature subject to the decree of condemnation. The Government has charged that the instruments seized, Hubbard Electrometers or "E-meters," are "devices" as defined in the Act [14]; that the literature seized constitutes "labeling" of the device, in that it is "written, printed, or graphic matter * * * accompanying" the device [15]; and that this "labeling" is false or misleading. Because our reading of the Act in its application to this case is influenced by appellants' claims to the free exercise of their religion, some background concerning their movement becomes necessary.

A. Appellants in this case, claimants to the seized materials, are individual and corporate adherents to the movement known as Scientology. The movement apparently rests almost entirely upon the writings of one man, L. Ron Hubbard, an American who maintained the headquarters of the movement in England at the time this action was brought. In the early 1950's, Hubbard wrote tracts elucidating what he called "Dianetics." [16] Dianetics is a theory of the mind which sets out many of the therapeutic techniques now used by Scientologists, including techniques attacked by the Government in this case as false healing.

The basic theory of Dianetics is that man possesses both a reactive mind and an analytic mind. The analytic mind is a superior computer, incapable of error, to which can be attributed none of the human misjedyments which create social problems and much individual suffering. These are traceable rather to the reactive mind, which is made up of "engrams," or patterns imprinted on the nervous system in moments of pain, stress or unconsciousness. These imprinted patterns may be triggered by stimuli associated with the original imprinting, and may then produce unconscious or conditioned behavior which is harmful or irrational.[17]

Dianetics is not presented as a simple description of the mind, but as a practical science which can cure many of the ills of man. It terms the ordinary person, encumbered by the "engrams" of his reactive mind, as a "preclear," by analogy to a computer from which previously programmed instructions have not been erased. The goal of Dianetics is to make persons "clear," thus freeing the rational and infallible analytical mind. The benefits this will bring are set out in considerable and alluring detail. All mental disorders are said to be caused by "engrams," as are all psychosomatic disorders, and that concept is broadly defined.[18]

A process of working toward "clear" is described as "auditing." This process was explicitly characterized as "therapy" in Hubbard's best-selling book DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH (1950); SCIENCE OF SURVIVAL: PREDICTION OF HUMAN BEHAVIOUR (1951). In this and succeeding footnotes, where author is not given, the author is L. Ron Hubbard.

14. "The term 'device' * * * means instruments, apparatus, and contrivances, including their components, parts, and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals."
21 U.S.C. § 321(h).

15. "The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."
21 U.S.C. § 321(m).

16. DIANETICS: THE EVOLUTION OF A SCIENCE (1958) (a work which apparently appeared in ASTOUNDING SCIENCE FICTION magazine in 1950—see A BRIEF BIOGRAPHY OF L. RON HUBBARD 8 (author not given, 1959), DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH (1950); SCIENCE OF SURVIVAL: PREDICTION OF HUMAN BEHAVIOUR (1951).

17. An exposition of the "fundamentals of Dianetics" of relative clarity and brevity is to be found in the publisher's introduction to SCIENCE OF SURVIVAL, *supra* Note 16, at i-viii.

18. DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH, *supra* Note 16, at 91-105.

ICS: THE MODERN SCIENCE OF MENTAL HEALTH (1950). The process involves conversation with an "auditor" who would lead the subject or "preclear" along his "time track," discovering and exposing "engrams" along the way. Though auditing is represented primarily as a method of improving the spiritual condition of man, rather explicit benefits to bodily health are promised as well. Hubbard has asserted that arthritis, dermatitis, asthma, some coronary difficulties, eye trouble, bursitis, ulcers and sinusitis are psychosomatic and can be cured, and further that tuberculosis is "perpetuated by engrams." [19]

A few years after the appearance of Dianetics, Hubbard began to set forth the broader theories of Scientology. Dianetics was explicitly endorsed as part of Scientology, "that branch * * * that covers Mental Anatomy." [20] Testimony by Scientology adherents at the trial made clear that they continue to uphold the theories of Dianetics, though they feel that there may have been some errors in early formulations.

With Scientology came much of the overlay which lends color to the characterization of the movement as a religious one. Hubbard has claimed kinship between his theories and those espoused by Eastern religions, especially Hinduism and Buddhism.[21] He argues that man is essentially a free and immortal spirit (a "thetan" in Scientological terminology) [22] which merely inhabits the "mest body" ("mest" is an acronym of the words matter, energy, space, time).[23] Man is said to be characterized by the qualities of "beingness," "havingness," and "doingness." [24] The philosophical theory was developed that the world is constructed on the relationships of "Affinity," "Reality" and "Communication," which taken together are denominated "the ARC Triangle." [25]

On the more mundane level, early in the career of Scientology Hubbard's followers—at least those in the United States—began to constitute themselves into formal religious bodies. The Founding Church of Scientology of Washington, D. C., one of the appellants, was incorporated in the District of Columbia in 1955. A formal creed was promulgated and was made part of the Articles of Incorporation. From the literature of the movement in evidence at trial, it appears that the move toward formal religious organization disturbed some adherents of Scientology, who seem to have regarded it as an attempt to provide a legal cloak for the movement's activities. But Hubbard defended the church movement, disavowing mysticism or supernaturalism, but pointing out the kinship of his ideas with those of the Vedas and other Eastern religious doctrines.[26]

From the evidence developed at trial, it appears that a major activity of the Founding Church and its affiliated organizations in the District of Columbia is providing "auditing," at substantial fees (at the time of trial $500 for a 25-hour course), to persons interested in Scientology. The affiliated Academy of Scientology is engaged in training auditors. Auditors are paid directly by the Church. There is no membership in the Church as such; persons are accepted for auditing on the basis of their interest in Scientol-

19. *Id.* at 92-93. In a later work, Hubbard brought cancer within the scope of treatment by "auditing." *See* SCIENTOLOGY: A HISTORY OF MAN 21 (4th ed. 1961).

20. *See* SCIENCE OF SURVIVAL, *supra* Note 16, at 1 n. 1 (apparently a footnote inserted into a later printing of this pre-Scientology book).

21. *See, e.g.*, L. RON HUBBARD'S PAB'S, BOOK III 14-20 (1956).

22. *See* SCIENTOLOGY: THE FUNDAMENTALS OF THOUGHT 32 (1956).

23. *See* SCIENTOLOGY 8-8008 at 13-19 (3d ed. 1956).

24. *See* SCIENTOLOGY: THE FUNDAMENTALS of THOUGHT, *supra* Note 22, at 10.

25. *See* SCIENTOLOGY 8-8008, *supra* Note 23, at 20-41.

26. For Hubbard's account of this dispute, *see* L. RON HUBBARD'S PAB'S, BOOK III, *supra* Note 21, at 14-20.

FOUNDIN

ogy (and presumably for its benefits).

The Hubbard Elec ter, plays an essentia tant, part in the p The E-meter is a skin ilar to those used in tests. The subject or his hands two tin so linked to the electri needle on the apparat es in the electrical re ject's skin. The aud of the subject, and th needle is apparently the emotional reactio According to comple dures set out in Scien the auditor can inter of the needle after questions are asked, agnosing the mental tion of the subject. sold for about $125, in Scientology publi the Distribution Ce Church.

The Scientology m trict of Columbia al range of Scientolog sale. Over the years grown into a formi bard's two early boo sold, along with later Scientology. A lar phlets and tracts su cover books. The monthly magazine, A time of trial had publ bers. In addition, Professional Auditor bering at least 80 a are collected and pul Much of this litera court as exhibits in proportion of it st the District Court's misleading labeling"

27. In an appendix to trict Court listed make false claims r powers of auditing condemned along Since we conclude

ogy (and presumably their ability to pay for its benefits).

The Hubbard Electrometer, or E-meter, plays an essential, or at least important, part in the process of auditing. The E-meter is a skin galvanometer, similar to those used in giving lie detector tests. The subject or "preclear" holds in his hands two tin soup cans, which are linked to the electrical apparatus. A needle on the apparatus registers changes in the electrical resistance of the subject's skin. The auditor asks questions of the subject, and the movement of the needle is apparently used as a check of the emotional reaction to the questions. According to complex rules and procedures set out in Scientology publications, the auditor can interpret the movements of the needle after certain prescribed questions are asked, and use them in diagnosing the mental and spiritual condition of the subject. The E-meters are sold for about $125, and are advertised in Scientology publications available at the Distribution Center adjoining the Church.

The Scientology movement in the District of Columbia also offers the entire range of Scientology publications for sale. Over the years this literature has grown into a formidable *corpus*. Hubbard's two early books on Dianetics are sold, along with later treatises developing Scientology. A large number of pamphlets and tracts supplements the hard-cover books. The movement has a monthly magazine, ABILITY, which at the time of trial had published over 100 numbers. In addition, "L. Ron Hubbard's Professional Auditors' Bulletins," numbering at least 80 at the time of trial, are collected and published in pamphlets. Much of this literature is before the court as exhibits in evidence, and a large proportion of it stands condemned by the District Court's decree as "false or misleading labeling" of the E-meter.[27]

B. With this factual background in mind, we turn to the litigation of this case in the District Court. The Government has framed this as a typical Food, Drug and Cosmetic Act case, involving a device whose accompanying promotional literature makes claims to curative powers unsupported in fact. The Government has culled from the vast literature of Scientology a large number of statements which assert or imply that "engrams" or the "reactive mind" cause various conditions, mostly those normally considered mental or psychosomatic disorders, but also including diseases or conditions which standard medical opinion would regard as organic. Further statements have been found asserting that auditing or processing, in clearing away the "engrams," can cure or alleviate these conditions. And finally statements have been introduced indicating that the E-meter is essential to, or at least useful in, auditing or processing. On this basis, the Government claims to have shown that the E-meter is a "device" within the meaning of the Act, in that it is "intended * * * for use in the diagnosis, cure, mitigation, treatment, or prevention of disease * * *." 21 U.S.C. § 321(h).

The Government put on a series of expert witnesses. First, physicists and engineers testified concerning the E-meter itself. They found it to be a crude skin galvanometer, of reasonably craftsmanlike design and construction, though with certain serious defects if meant to be used as a research tool for meaningfully measuring electrical skin resistance.

Next, a series of doctors and medical researchers and a psychiatrist testified that, within their expert knowledge, there was no use for such an instrument in the diagnosis or treatment of any disease or mental disorder. They were asked about the specific diseases or conditions claimed in the Scientology litera-

27. In an appendix to its decree the District Court listed the works found to make false claims respecting the curative powers of auditing and ordered them condemned along with the E-meter. Since we conclude that the judgment of the court must be reversed *in toto*, we do not reach appellants' claim that the Act does not authorize condemnation of labeling, especially "labeling" which takes the form of general literature.

ture to be susceptible of alleviation through auditing, and unanimously agreed that none of these could be treated or helped in any way through any known use of the E-meter.[28]

In its legal arguments the Government has contended from the outset that whether or not Scientology is a religion, and whether or not auditing or processing is a practice of that religion, are entirely irrelevant to the case. Religious beliefs, it is argued, are entirely protected by the First Amendment, but action in the name of religion is susceptible to legal regulation under the same standards and to the same degree as it would be if entirely secular in purpose.

Appellants have argued from the first that the entire case must fall as an unconstitutional religious persecution. In their view, auditing or processing is a central practice of their religion, akin to confession in the Catholic Church, and hence entirely exempt from regulation or prohibition. They have made no attempt to contradict the expert testimony introduced by the Government. They have conceded that the E-meter is of no use in the diagnosis or treatment of disease as such, and have argued that it was never put forward as having such use. Auditing or processing, in their view, treats the spirit of man, not his body, though through the healing of the spirit the body can be affected. They have culled from their literature numerous statements disclaiming any intent to treat disease and recommending that Scientology practitioners send those under their care to doctors when organic defects may be found. They have introduced through testimony a document which they assert all those who undergo auditing or processing must sign which states that Scientology is "a spiritual and religious guide intended to make persons more aware of themselves as spiritual beings, and not treating or diagnosing human ailments of body or mind, and not engaged in the teaching of medical arts or sciences * * *."

Finally, with respect to their claim to be a religion and hence within the protection of the First Amendment, they have shown that the Founding Church of Scientology is incorporated as a church in the District of Columbia, and that its ministers are qualified to perform marriages and burials. They have introduced their Creed into evidence. The Government has made no claim that the Founding Church is not a *bona fide* religion, that auditing is not part of the exercise of that religion, or that the theory of auditing is not a doctrine of that religion.

C. Thus both parties have viewed the religious issue as a simple one. In the Government's view, religion is simply irrelevant—appellants have engaged in "action" and hence stripped themselves of any First Amendment protection. In appellants' view, religion is dispositive—auditing is part of the practice of their faith and hence the free exercise clause protects it from all secular regulation. In our view, the religious issue is more complex than either of the parties has maintained.

[5] First, it is clear that the First Amendment does not protect from regulation or prohibition all *bona fide* religious practices. As the Supreme Court has stated:

"* * * [The First Amendment] embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct re-

28. One Government witness, a psychophysiologist and neurophysiologist, did testify that there is a connection between stimuli, including mental or emotional stimuli, and skin resistance. He stated: "The good skin resistance devices have been used as a research tool and only very occasionally as a clinical tool to try to discover areas of emotional conflict within an individual who is characterized by a neurotic ailment, if that is the correct word to use here." However, the witness did not consider the E-meter a "good skin resistance device" because its needle reacted to such irrelevant factors as the tightness with which the subject held the soup cans.

FOUND

mains subject t
protection of soc
Cantwell v. Conne
303-304, 60 S.Ct. 9
(1940). (Footnote
prohibition of plur
upheld, even though
ligious duty to some
ing without a licens
children of religio
been prohibited, ev
as tenets of religious

[6, 7] On the ot
strictions cannot be
practices, as they ca
ular realm, merely o
tional relationship
tion imposed and
sought. In *Cantwell*
304, 60 S.Ct. at 903,
"the power to regula
cised as not, in atta
end, *unduly* to infr
freedom." (Emphas
West Virginia State
v. Barnette, 319 U.S.
1178, 1186, 87 L.Ed.
Court spoke more el
forcefully to the same

"* * * The
regulate, for exam
may well include,
process test is conc
pose all of the restri
islature may have
for adopting. But
and of press, of ass
ship may not be infr
der grounds. They
restriction only to
immediate danger
the State may lawfu

Similarly in Sherbe
U.S. 398, 406, 83 S.C
L.Ed.2d 965 (1963), th
"'[o]nly the gravest

29. Davis v. Benson, 1
S.Ct. 299, 33 L.Ed. 6
olds v. United States,
145, 25 L.Ed. 244 (187

30. Cox v. New Hampshi
61 S.Ct. 762, 85 L.Ed

mains subject to regulation for the protection of society. * * *"

Cantwell v. Connecticut, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). (Footnote omitted.) Thus the prohibition of plural marriage has been upheld, even though the practice is a religious duty to some.[29] Similarly, parading without a license[30] and the sale by children of religious literature[31] have been prohibited, even though practiced as tenets of religious faith.

[6, 7] On the other hand, legal restrictions cannot be applied to religious practices, as they can in much of the secular realm, merely on a showing of a rational relationship between the regulation imposed and the legitimate end sought. In *Cantwell, supra*, 310 U.S. at 304, 60 S.Ct. at 903, the Court stated that "the power to regulate must be so exercised as not, in attaining a permissible end, *unduly* to infringe the protected freedom." (Emphasis added.) And in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628 (1943), the Court spoke more elaborately and more forcefully to the same issue:

"* * * The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. * * *"

Similarly in Sherbert v. Verner, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963), the Court held that "'[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'" of religious practices. In that case, the Court held that denial of unemployment benefits to those who would not work on Saturday, though permissible as a general rule, could not be applied to one whose refusal to work was based on religious objections.

The principles enunciated in *Cantwell, Barnette* and *Sherbert* at least raise a constitutional doubt concerning the condemnation of instruments and literature apparently central to the practice of religion. That doubt becomes more serious when we turn to the decision of the Supreme Court in United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944).

Ballard involved an eccentric religion known as the "I Am" movement. The promoters of this religion, members of the Ballard family, claimed to have been appointed by one "Saint Germain" as "divine messengers," and to have been given the power to cure all diseases. By virtue of these claims, they obtained money from members of the public. They were tried for mail fraud. The trial judge excluded from consideration by the jury the issue of the truth or falsity of their claims to divine designation and miraculous powers, and the case was submitted on the sole issue of whether they made those claims in good faith. They were convicted, and on review the Court of Appeals ruled that exclusion of the issue of truth or falsity was improper. Ballard v. United States, 9 Cir., 138 F.2d 540 (1943).

The Supreme Court reversed the Court of Appeals, holding that the First Amendment prohibited trial of the truth or falsity of religious beliefs:

"* * * Freedom of thought, which includes freedom of religious be-

29. Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1890); Reynolds v. United States, 98 U.S. (8 Otto) 145, 25 L.Ed. 244 (1878).

30. Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).

31. Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

lief, is basic in a society of free men. * * * It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. * * * Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. * * * The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. * * *"

322 U.S. at 86-87, 64 S.Ct. at 886.

The *Ballard* case does not hold merely that religious belief is protected. The Ballards engaged in action; they solicited money from their faithful. Rather the holding of the case seems to be that regulation of religious action which involves testing in court the truth or falsity of religious belief is barred by the First Amendment.

The relevance of *Ballard* to the case before us is obvious.[32] Here the E-meter has been condemned, not because it is itself harmful, but because the representations made concerning it are "false or misleading." And the largest part of those representations is contained in the literature of Scientology describing the process of auditing which appellants have claimed, without contest from the Government, is part of the doctrine of their religion and central to its exercise. Thus if their claims to religious status are accepted, a finding that the seized literature misrepresents the benefits from auditing is a finding that their religious doctrines are false. To construe the Food, Drug and Cosmetic Act to permit

32. We do not perceive any meaningful distinction in the fact that this is a civil *in rem* action whereas *Ballard* was a criminal prosecution. In the first place the Supreme Court has long recognized that *in rem* forfeiture actions are penal in nature and subject to many of the same restrictions placed upon prosecutions. One 1958 Plymouth Sedan v. Pennsylvania, *supra* Note 7; Boyd v. United States, *supra* Note 7. The action taken against appellants here is more than merely remedial; it is punitive. The devices condemned here cannot properly be considered contraband *per se*. *See One 1958 Plymouth Sedan, supra*, 380 U.S. at 699, 85 S.Ct. 1246, 14 L.Ed.2d 170. They are not in themselves harmful, as are adulterated foods and drugs or miswired electrical devices. Their only alleged illegal attribute is the supposedly false claims made concerning their powers.

Second, we do not perceive the constitutional defect found in *Ballard* to have been the prosecution of individuals for promulgating false religion. That defect was rather the *litigation* of the truth or falsity of religious doctrines. *See* 322 U.S. at 87, 64 S.Ct. at 887:

"* * * But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. *When the triers of fact undertake that task, they enter a forbidden domain.* * * *" (Emphasis added.)

Thus under *Ballard* it seems unlikely that a disgruntled former adherent could sue a church for fraud and deceit because it had collected money from him on the basis of allegedly "false" doctrines concerning salvation, heaven and hell—or for that matter on the basis of doctrines, such as those of the Christian Scientists, concerning the cause and cure of disease.

Indeed, the Supreme Court has recently unanimously held that courts cannot settle a civil property dispute between church bodies where the dispute turns on the orthodoxy of the religious doctrines espoused by the parties. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969).

such a finding would, in the light of *Ballard*, present the gravest constitutional difficulties.

D. It is with these constitutional considerations in mind that we turn to our examination of the application of the statute to the facts of this case. Appellants have argued that much of the Scientology literature from which claims concerning the curative powers of auditing was culled by a Government witness is not "labeling" of the E-meter within the meaning of the Act, since it is part of the religious doctrine of their church.

For purposes of the Act, "the term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."[33] Most of the litigation over this definition has turned upon the question of when written matter may be said to "accompany" an article. In this case the Government has contended that Scientology literature on sale in the Distribution Center, which adjoins the Hubbard Guidance Center where E-meters were used in auditing, "accompanied" the E-meters.

The courts have construed the word "accompanying" to give broad remedial effect to the purposes of the Act. In Kordel v. United States, 335 U.S. 345, 69 S.Ct. 106, 93 L.Ed. 52 (1948), the Supreme Court ruled that, in order to be considered "labeling" of a drug, promotional pamphlets need not be shipped together with the drug. It held that:

> "One article or thing is accompanied by another when it supplements or explains it, in the manner that a committee report of the Congress accompanies a bill. No physical attachment one to the other is necessary. * * *
>
> "The false and misleading literature in the present case was designed for use in the distribution and sale of the drug, and it was so used. * * *"

335 U.S. at 350, 69 S.Ct. at 109. Nor did the fact that the pamphlets were sold save them from being "labeling" in the context of that case:

> "* * * [T]he booklets and drugs were nonetheless interdependent; they were parts of an integrated distribution program. The Act cannot be circumvented by the easy device of a 'sale' of the advertising matter where the advertising performs the function of labeling."

Ibid.

[8] *Kordel* thus laid down the broad lines for determining whether literature "accompanies" a drug or device; to do so it need not be shipped together with the device, but it must be "designed for use in the distribution and sale of" the device, and the two must be "parts of an integrated distribution program."

Subsequent cases in the lower courts have helped sketch in the rough outlines drawn by *Kordel*. In the *Molasses*[34] case, a best-selling book extolling the curative powers of blackstrap molasses, though mentioning no brand names, was used by health food retailers in a promotional scheme. A copy of the book was placed in the window of the store next to a display of their brand of molasses. Prospective purchasers of molasses inside the store were handed copies of the book and referred to passages in it which made the misleading claims about the product. The particular copies of the book used in this scheme were found by the District Court to "accompany" the molasses.[35]

On the other hand, in the *Balanced Foods*[36] case, general literature which falsely claimed healthful properties for a food was found by the Second Circuit not

33. 21 U.S.C. § 321(m).

34. United States v. 8 Cartons, etc., Molasses, W.D.N.Y., 103 F.Supp. 626 (1951).

35. For a similar case involving the book About Honey, see United States v. 250 Jars, etc., of U. S. Fancy Pure Honey, E.D.Mich., 218 F.Supp. 208 (1963), *affirmed*, 6 Cir., 344 F.2d 288 (1965).

36. United States v. 24 Bottles "Sterling Vinegar & Honey, etc.", 2 Cir., 338 F.2d 157 (1964).

to "accompany" it. The facts of that case are interesting. The best sellers FOLK MEDICINE and ARTHRITIS AND FOLK MEDICINE prescribed a mixture of vinegar and honey for a wide variety of maladies. After FOLK MEDICINE achieved success, a health food manufacturer bottled a preparation of this mixture for sale. The manufacturer also purchased copies of the book and distributed them after special promotional efforts to the same health food outlets which sold the mixture. There was evidence that the retail stores displayed the mixture and copies of the book a few feet apart. On these facts, the court reversed a judgment that the book constituted "false labeling" of the food. The court distinguished *Kordel* on the ground that the drug and pamphlet in that case had been mailed in "integrated transactions," and that the vendors had given away copies of the pamphlets with sales of the drugs in some instances.[37]

[9] The facts of the case before us differ materially from those in the cases just reviewed. The alleged "labeling" here is not a single readily digestible book, or a collection of pamphlets obviously promotional in nature, but rather a vast array of the often obscure literature of Scientology. This literature was, according to the evidence at trial, all offered for sale at the Distribution Center, Inc., a corporation affiliated with the Founding Church, which had its book store next to the Guidance Center at which Scientology auditing services were provided.

A small proportion of this literature deals directly with the E-meter itself. Two books, apparently intended for Scientology auditors rather than the general public, describe the nature and workings of the E-meter, and at the same time give some guidance as to its use in the auditing process.[38] Within these books can be found statements to the effect that the E-meter is an essential aid to proper auditing. However, these works contain very little of what the Government contends is false and misleading in the labeling of the E-meter. Though there are claims concerning the scientific properties of the E-meter which are open to question,[39] the Government placed little reliance upon these in presenting its case to the jury.

Among the literature of Scientology before the court there are found a few advertisements, apparently directed at the general public, which make direct appeals for customers (or converts, if the appellants' version is to be accepted). These advertisements are found in copies of the monthly Scientology magazine ABILITY. Their representations concerning the auditing process appear to be general comments, designed to bring in the curious or the gullible.[40]

By far the greatest bulk of the material alleged to be "false labeling" of the E-meter consists of the general literature of Scientology, which presents in an integrated manner the

37. In another case the Second Circuit has found general literature (even this case articles in medical journals) to be "labeling" because it was used in a promotional scheme with a device. United States v. Diapulse Manufacturing Corp. of America, 2 Cir., 389 F.2d 612, *cert. denied*, 392 U.S. 907, 88 S.Ct. 2059, 20 L.Ed.2d 1365 (1968).

38. J. SANBORN, THE HUBBARD ELECTROMETER (1959); L. R. HUBBARD, E METER ESSENTIALS 1961.

39. For instance, in E METER ESSENTIALS 1961, *supra* Note 38, at 18, Hubbard claims that "[t]he meter will also read Basal Metabolism". The Government included this claim among its allegations of false labeling in the libel. However, the great bulk of the allegations charged that false or misleading statements were made, not about the E-meter itself, but about the process of auditing in which it is used.

40. *See, e.g.*, ABILITY, No. 58 at 5:

"Plagued by illness? We'll make you able to have good health. Get processed by the finest capable auditors in the world today. Every auditor a D.D. One week intensives. Three-week intensive. Weekend group intensives. Personally coached and monitored by L. Ron Hubbard, Founder. Come to Reception, 1812 19th Street, N. W., Washington 9, D. C."

grated manner the
ler concerning th
sources of various
personality disorde
complaints, and th
process of auditing
ills. Within this lit
only the most occa
ence to the E-mete
not, the meter is n
these general works
the introductory wo
tology, and it is pres
if any, which are p
members of the pu
which might be mad
of Scientology serv

It is within this ge
the Government has
which, in isolation,
matically as fraudul
For instance, in pe
scure and impenetr
Hubbard's SCIENTOL
MAN (4th ed. 1961),
sentence: "Cancer
by auditing out co
sis." [41] In short, it
literature that the
depended in showing,
of the jury, that the
ment had made fals
the curative powers o
niques.

These, however, a
set forth the doctri
If that movement is

41. At page 21.

42. 2 D.C.Code § 1316
from the operation
cerning laws "person
ailments by prayer
as an exercise or enj
freedom . . . ."
ley, *Criminal Liability*
39 MISS.L.REV. 48, 6
If not all, . . .
except from the ben
those persons who end
man advocates by pr
means exclusively." I
that the Constitution
ceptions to medical lic
ple v. Cole, 219 N.Y.
700, 705, L.R.A.1917C,

grated manner the theory sketched earlier concerning the human mind, the sources of various sorts of unhappiness, personality disorder and psychosomatic complaints, and the way in which the process of auditing can alleviate these ills. Within this literature is to be found only the most occasional passing reference to the E-meter; more often than not, the meter is not even mentioned in these general works. Among these are the introductory works describing Scientology, and it is presumably these works, if any, which are pressed upon curious members of the public in any effort which might be made to promote the sale of Scientology services.

It is within this general literature that the Government has found the passages which, in isolation, stand out most dramatically as fraudulent healing claims. For instance, in perhaps the most obscure and impenetrable of the books, Hubbard's SCIENTOLOGY: A HISTORY OF MAN (4th ed. 1961), occurs the damaging sentence: "Cancer has been eradicated by auditing out conception and mitosis."[41] In short, it is upon this mass of literature that the Government largely depended in showing, to the satisfaction of the jury, that the Scientology movement had made false claims concerning the curative powers of its auditing techniques.

These, however, are the books which set forth the doctrines of Scientology. If that movement is a religion, as appellants here have claimed, and as the Government has not denied, these books are its scriptures. The statements concerning the powers of auditing over the ills of mind and body are not readily separable from general statements of Scientological doctrines concerning the nature of man and the relationship of his mind to his body. Many will find these doctrines, those which relate to health as well as those which do not, absurd or incoherent. But the *Ballard* case makes suspect the legal inquisition of such doctrines where they are held as religious tenets.

Were the literature here introduced clearly secular, we might well conclude that under existing law it constituted "labeling" for purposes of the Act. Such a conclusion might be justified by a broad reading of the statute, consistent with its high purpose of protecting the public health and pocketbook against health frauds. However, such broad readings are not favored when they impinge upon constitutionally sensitive areas, especially in the absence of a showing of legislative intent to regulate these areas. Nothing in the history or interpretation of the Act indicates that it was meant to deal with the special problem of religious healing, a problem often given legislative treatment separate from that imposed upon the general area of public health and medical practice.[42] In light of these considerations, highlighted by the explicit holding of *Ballard*,[43] we

41. At page 21.

42. 2 D.C.Code § 134(d) (1967) exempts from the operation of the medical licensing laws "persons treating human ailments by prayer or spiritual means, as an exercise or expression of religious freedom • • •." According to Cawley, *Criminal Liability in Faith Healing*, 30 MINN.L.REV. 48, 61 (1954), "[M]ost, if not all, • • • states • • • except from the licensing requirements those persons who endeavor to treat human ailments by prayer or spiritual means exclusively." It has been argued that the Constitution requires such exceptions to medical licensing laws. People v. Cole, 219 N.Y. 98, 111, 113 N.E. 785, 785, L.R.A.1917C, 816 (1916) (concurring opinion of Chief Judge Bartlett). Official and unofficial exemptions from various health regulations have protected Christian Scientists in the exercise of their religion. *See* Schneider, *Christian Science and the Law: Room for Compromise?*, 1 COLUM.J.LAW & SOC.PROB. 81 (1965).

43. The Ballards made claims to miraculous healing powers and collected money on the basis of these claims. The truth or falsity of their claims was held not subject to evaluation in a prosecution for mail fraud. They contracted no "disease" in connection with their claims, but it is difficult confidently to conclude that had they, and had their practices been attacked under food and drug laws

interpret the Act as not including within its concept of "labeling" the literature developing the doctrines of a religion.

[10] E. Finally, we come to the vexing question: is Scientology a religion? On the record as a whole, we find that appellants have made out a *prima facie* case that the Founding Church of Scientology is a religion. It is incorporated as such in the District of Columbia. It has ministers, who are licensed as such, with legal authority to marry and to bury. Its fundamental writings contain a general account of man and his nature comparable in scope, if not in content, to those of some recognized religions.[44] The fact that it postulates no deity in the conventional sense does not preclude its status as a religion.[45]

The Government might have chosen to contest the claim that the Founding Church was in fact a religion. Not every enterprise cloaking itself in the name of religion can claim the constitutional protection conferred by that status. It might be possible to show that a self-proclaimed religion was merely a commercial enterprise, without the underlying theories of man's nature or his place in the Universe which characterize recognized religions. Though litigation of the question whether a given group or set of beliefs is or is not religious is a delicate business,[46] our legal system sometimes requires it so that secular enterprises may not unjustly enjoy the immunities granted to the sacred. When tax exemptions are granted to churches, litigation concerning what is or is not a church will follow.[47] When exemption from military service is granted to those who object on religious grounds, there is similar litigation.[48] When otherwise proscribed substances are permitted to be used for purposes of worship, worship must be defined.[49] The law has provided doctrines and definitions, unsatisfactory as they may be, to deal with such disputes.[50] Since the Government chose not to contest appellants' claim to religious status, and since in our view appellants have made a *prima facie* case for such status, we conclude that for purposes of review of the judgment before us they are entitled to the protection of the free exercise clause.[51]

rather than the mail fraud statute, the truth of their claims would have been any more a fit subject for litigation.

44. *See* text accompanying Notes 21-26, *supra*.

45. *See* United States v. Seeger, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965); Washington Ethical Society v. District of Columbia, 101 U.S.App.D.C. 371, 249 F.2d 127 (1957).

46. *Cf.* United States v. Ballard, 322 U.S. 78, 92, 64 S.Ct. 882, 88 L.Ed. 1148 (1944) (dissenting opinion of Mr. Justice Jackson).

47. Washington Ethical Society v. District of Columbia, *supra* Note 45; *and see particularly*, for perhaps the fullest discussion of the meaning of religion for tax exemption purposes, Fellowship of Humanity v. County of Alameda, 153 Cal.App.2d 673, 315 P.2d 391 (1957).

48. United States v. Seeger, *supra* Note 45; United States v. Kauten, 2 Cir., 133 F.2d 703 (1943).

49. People v. Woody, 61 Cal.2d 716, 40 Cal.Rptr. 69, 394 P.2d 813 (1964); In re Grady, 61 Cal.2d 887, 39 Cal.Rptr. 912, 394 P.2d 728 (1964).

50. For thoughtful efforts at "defining" religion in the context of litigation, see United States v. Seeger, *supra* Note 45 (with concurring opinion of Mr. Justice Douglas, 380 U.S. at 188, 85 S.Ct. 850), and Fellowship of Humanity v. County of Alameda, *supra* Note 47. Further on the question see Comment, *Defining Religion: Of God, the Constitution and the D.A.R.*, 32 U.Chi.L.Rev. 533 (1965); Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U.Pa.L.Rev. 479 (1968). For recognition that the *bona fides* of religious professions may properly be litigated, see United States v. Seeger, *supra* Note 45, 380 U.S. at 185, 85 S.Ct. 850; In re Grady, *supra* Note 49; People v. Cole, *supra* Note 42, 113 N.E. at 794.

51. The Founding Church of Scientology has sued the United States in the Court of Claims for recovery of income taxes paid upon denial of an exemption to the Church under 26 U.S.C. § 501(c). In-

FOUND

Appellants have
theories concerning
their religious doct
cated in detail the
claim is based. A
has not contested t
tried to argue or
that even if Sciento
is a religion, auditi
peddled to the gener
of wholly non-relig
representations,[52]
a matter of law tha
ing curative techni
medical and therefo
tablished religions
tices the power to
ease, or include wit
accounts of miracul
circumstances of th
clude that the litera
theory of auditing,
for curative efficac
is religious doctrin
hence as a matter
ing" for the purpos

ternal Revenue Cod
empts a corporation
erated exclusively f
or educational purp
part of the net earn
to the benefit of an
or individual • •
er of the Court of
opinion including f
recommended conclu
mending that the co
of the exemption (N
gust 7, 1968). The
that a large part of
Founding Church w
nature, and that som
inured to the benef
hard.

52. As one thoughtfu
noted: "[W]e can
claim is based on r
told that it is. The
ing that a claim is in
can be that it is lo
ligious in nature."

And further:

"• • • If a
drugs and defends
we can find his
For we say: fits

Appellants have contended that their theories concerning auditing are part of their religious doctrine. We have delineated in detail the evidence on which this claim is based. Again the Government has not contested this claim; it has not tried to argue or prove, for instance, that even if Scientology as practiced here is a religion, auditing services have been peddled to the general public on the basis of wholly non-religious pseudo-scientific representations.[52] We cannot assume as a matter of law that all theories describing curative techniques or powers are medical and therefore not religious. Established religions claim for their practices the power to treat or prevent disease, or include within their hagiologies accounts of miraculous cures.[53] In the circumstances of this case we must conclude that the literature setting forth the theory of auditing, including the claims for curative efficacy contained therein, is religious doctrine of Scientology and hence as a matter of law is not "labeling" for the purposes of the Act.

[11] This case was tried before a jury on two charges: that the E-meter was misbranded in that its "labeling" made false or misleading claims concerning the process of auditing in which it was used, and that the E-meter was not accompanied by adequate instructions for its use. The jury returned a general verdict for the Government. During the course of the trial, in an effort to prove the first of these two charges, the Government put into evidence some thousands of pages of Scientology literature, all of which the jury was invited to consider on the issue of misbranding. Through a Government witness, the jury's attention was directed to passages in this literature describing the theories of Scientology as they relate to auditing and claiming curative powers for that process. We have found that, under *Ballard*, these theories are not properly subject to courtroom evaluation as to truth or falsity. Since the jury's general verdict may have rested in whole or in part on a finding that this literature was false

terial Revenue Code of 1954, which exempts a corporation "organized and operated exclusively for religious * * * or educational purposes * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual * * *." A Commissioner of the Court of Claims has filed an opinion, including findings of fact and recommended conclusion of law, recommending that the court uphold the denial of the exemption. (No. 225-65, filed August 7, 1968). The Commissioner found that a large part of the activities of the Founding Church was profit-making in nature, and that none of its net earnings inured to the benefit of L. Ron Hubbard.

52. As one thoughtful commentator has noted: "[W]e can only know that a claim is based on religion when we are told that it is. The legal basis for statutes that a claim is in the religious domain can be that it is held out as being religious in nature." Schneider, *Problems in Defining "Religion"*, 1 Journal of Church and State 139, 140 (1959).

And further:

"* * * If a man simply sells land drugs and defends on religious grounds, we can find his defense insufficient. For us to say: 'First, you failed to define your claims as religious and they were claims of a nature that would not ordinarily be understood as religious; second, holding yourself out as a drug salesman implied that you spoke with medical authority * * *.'"

Weiss, *Practice, Pastoral and Political: Notes on "Religion"*, 72 Yale L.J. 593, 604, 605 (1963).

The distinction between a healer who represents his cure from the first as religious, and one who represents it as 'medical' or scientific but then defends on the basis of religion, is well marked by two New York cases. People v. Cole, supra Note 12 (Christian Science practitioner who cured only by prayer exempt from medical licensing statute), and People v. Vogelsang, 224 N.Y. 266, 270 N.E. 257 (1917) (Cardozo, J.) ("faith healer" who advertised self as specialist in all forms of chronic diseases" and who prescribed drugs not exempt).

In this opinion, of course, we express no view as to whether the District of Columbia medical licensing statute, 2 D.C.Code §§ 120, 121 (1967), is applicable to appellants' activities.

53. *See, e. g.*, Schneider, *op. cit. supra* Note 52.

or misleading labeling of the E-meter, that verdict must be set aside.

III

Since our road to this conclusion has been long and complex, we think it appropriate to summarize what we have and what we have not held. We have held the following:

(1) On the basis of the record before us, the Founding Church of Scientology has made out a *prima facie* case that it is a *bona fide* religion and, since no rebuttal has been offered, it must be regarded as a religion for purposes of this case.

(2) On the record before us, a *prima facie* case exists that auditing is a practice of Scientology, and that accounts of auditing integrated into the general theory of Scientology are religious doctrines. Since no rebuttal has been offered, we must take the point as proven.

(3) In view of the constitutional doctrine of United States v. Ballard, *supra*, literature setting forth religious doctrines, and related to an instrument in the manner in which the "auditing" literature here is related to the E-meter, cannot be subjected to courtroom evaluation and, therefore cannot be considered "labeling" of such an instrument for purposes of the "false or misleading labeling" provisions of the Act.

On the other hand, the following should be noted:

(1) We do not hold that the Founding Church is for all legal purposes a religion. Any *prima facie* case made out for religious status is subject to contradiction by a showing that the beliefs asserted to be religious are not held in good faith by those asserting them, and that forms of religious organization were erected for the sole purpose of cloaking a secular enterprise with the legal protections of religion.

(2) We do not hold that, even if Scientology is a religion, all literature published by it is religious doctrine immune from the Act.

(3) We do not hold that public health laws in general, or the Food, Drug and Cosmetic Act in particular, have no application to the activities of religion. For instance, it may well be that adulterated foods, drugs or devices used in religious practices can be condemned under the Act.[54] It may be that a drug or device used in religion is subject to condemnation as "misbranded" if its labeling is found to lack, for instance, adequate directions for use, as was charged in this case.[55] Our holding prevents only a finding of false labeling on the basis of doctrinal religious literature.

(4) Finally, we make no holding concerning the power of Congress to deal generally with the making of false claims by religious deemed injurious to the public health or welfare. The *Ballard* case of course casts doubt on some aspects of such a power; but this opinion makes only a narrowing construction, in a constitutionally sensitive area, of a statute which has otherwise quite properly been construed broadly by the courts.

Reversed.

McGOWAN, Circuit Judge (dissenting):

At the trial in the District Court, the Government put in evidence from which, in my view, a jury would be warranted in finding that (1) the practice of the asserted religion of Scientology involved the use of a mechanical device in association with certain publications which represented the device to have utility in the prevention, relief, or cure of physical illnesses such as cancer, and (2) the device in fact had no such capacity. The majority, as I understand it, holds that, because the Government did not go further and prove that Scientology was not a *bona fide* religion, the First Amendments, as interpreted in United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944), bars any judicial inquiry whatsoever in[to] whether the device had the healing powers claimed for it. Absent such a determination, the

54. *See* 21 U.S.C. §§ 331(a), 331(c), 341, 351.

55. *See* 21 U.S.C. § 352(f)(1).

FOUNI

majority logically
ment that the dev
not be upheld.

This proceeding
quisition into the v
religious beliefs,
punishment upon a
or disseminating s
proceeding against
gressional statute a
unsophisticated age
their money but, r
dangering their li
misbranded machin
majority points o
distinction between
ing of a religious b
and unlimited freed
belief by conduct.
the Government wa
a statutory in re
kind here involved, t
above the misbrand
religious pretens
were fraudulent.

I respect the diffi
have with the *Balla*
think it compels th
That was a criminal
fraud of an indivi
as a religion the fa
vine messenger" end
ment of "St. Germ
to cure all diseases.
in its then posture,
practice of giving h
hire, much less the s
(s like the meters wi
cerned here. To the
expressions in *Balla*
ably point in the di
goes. I would limit t
facts of that case, w
not involve the use of
and did result in c
against the persons

I am not, however
Government official
broadly in this seizu
vulnerable to seizu
misbranded, and th
must be found in sep
ed, pieces of literatu

majority logically concludes that a judgment that the device is misbranded cannot be upheld.

This proceeding did not involve an inquisition into the validity of any personal religious beliefs, or the infliction of a punishment upon any person for holding or disseminating such beliefs. It was a proceeding against property under a Congressional statute aimed at protecting the unsophisticated against not only wasting their money but, more importantly, endangering their lives by relying upon misbranded machines. There is, as the majority points out, a well-recognized distinction between the good faith holding of a religious belief, however bizarre, and unlimited freedom to implement that belief by conduct. I do not believe that the Government was required, at least in a statutory *in rem* proceeding of the kind here involved, to show that, over and above the misbranding of the device, the religious pretensions of its sponsors were fraudulent.

I respect the difficulties my colleagues have with the *Ballard* case, but I do not think it compels the result they reach. That was a criminal prosecution for mail fraud of an individual who proclaimed as a religion the fact that he was a "divine messenger" endowed by the appointment of "St. Germain" with the power to cure all diseases. The case, at least in its then posture, did not involve a practice of giving healing treatments for hire, much less the sale and use of devices like the meters with which we are concerned here. To the extent that there are expressions in *Ballard* that may conceivably point in the direction the majority goes, I would limit them to the peculiar facts of that case, which, to repeat, did not involve the use of misbranded devices and did result in criminal proceedings against the persons there involved.

I am not, however, satisfied that the Government officials did not swep too broadly in this seizure. The meters are vulnerable to seizure only if they are misbranded, and the misbranding here must be found in separate, but associated, pieces of literature. The record before us is such as to support a finding that certain items of the Scientology literature did contain healing claims (i. e. "Cancer has been eradicated by auditing out conception and mitosis"), and that the association of these claims with the meter is sufficiently close as to justify the latter's seizure. But this relationship in the case of one or more books or pamphlets would not necessarily mean that all the Scientology literature is subject to confiscation. Every aspect of the practice or preaching of a religion cannot be interfered with simply because one phase of it is exposed to legal action.

The District Court was at some pains to identify those items of literature which effected misbranding of the meters, and those which did not. It is not clear to me that this separation was uniformly successful in differentiating affirmations of faith, on the one hand, from representations as to the curative capacities of the meters, on the other. Indeed, it may be that, absent a special showing of need beyond that for evidentiary use, the Congressional purposes are exhausted by a seizure and permanent retention of the devices alone. Certainly, as a practical matter, the objectives of the statute would normally be realized thereby, and difficult problems of religion and speech, inherent in the wholesale seizure of printed matter, avoided.

On Appellee's Petition for Rehearing

PER CURIAM:

From the Government's petition for rehearing in this case, it appears that the following clarifying observations are in order.

I

[12, 13] The Government has correctly inferred from our opinion that a showing that "auditing services have been peddled to the general public on the basis of wholly non-religious pseudo-scientific representations" would support a verdict of false labeling. 133 U.S.App.D.C. at ——, 409 F.2d at 1161. We gave as further explication of this view a

passage from Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 604, 605 (1964), and citations to two instructive New York cases, People v. Cole, 219 N.Y. 98, 113 N.E. 790, L.R.A.1917C, 816 (1916), and People v. Vogelgesang, 221 N.Y. 290, 116 N.E. 977 (1917). Our basic point is that, in order to raise a religious defense to a charge of false statement (here misbranding), the person charged with the alleged misrepresentation must have explicitly held himself out as making religious, as opposed to medical, scientific or otherwise secular, claims.

The Government now argues that there was sufficient evidence in the record to permit the jury to find false labeling on the basis of "wholly non-religious pseudo-scientific representations." In the thousands of pages of Scientology literature introduced at trial, it finds passages which appear to be based on secular rather than religious claims, such as the claim that Scientology is "a precise and exact science, designed for an age of exact sciences," and that "[n]o other subject on earth except physics and chemistry has had such grueling testing (proofs, exact findings)."[1]

[14,15] This argument misconceives the ground upon which we reversed. We did not find insufficient competent evidence to support a verdict, nor did we find that all literature submitted to the jury as "false labeling" was religious doctrine. Rather we found that *some* of that literature was at least *prima facie* religious doctrine, and that the jury, as it was instructed,[2] could have found against the E-meter by finding false statements in "labeling" which was at the same time religious doctrine. *See* main opinion, 133 U.S.App.D.C. at —, 409 F.2d at 1161. And, of course, where a jury's general verdict *may* have rested upon grounds improper for First Amendment reasons, a reviewing court will not pause to speculate whether the jury's verdict was actually reached on other, and permissible, grounds. Stromberg v. California, 283 U.S. 359, 367-368, 51 S.Ct. 532, 75 L.Ed. 1117 (1931); Gregory v. City of Chicago, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969).

II

In its petition, the Government finds unclarity in our failure to state whether or not a second trial may follow in this case. Of course, it is not within our power authoritatively to declare the *res judicata* effect of our own decision. However, since the basis of our reversal was that the case was improperly framed, rather than that the Scientologists' devices and literature were absolutely pro-

1. In our main opinion, we have already noted that some claims made on behalf of the E-meter and the auditing process, and introduced into evidence at trial, had no discernible relation to whatever religious content Scientology might have. *See* 133 U.S.App.D.C. at —, 409 F.2d at 1158, n. 39 and n. 40.

2. A tremendous volume of Scientology literature was submitted to the jury, and the jury was charged that if the literature "accompanied" the E-meter in the sense described in the main opinion, 133 U.S.App.D.C. at —, 409 F.2d at 1157 it was labeling. Thus there was neither a winnowing out by the judge of the religious material, nor an instruction to the jury that it could not find such material to be false labeling.

It is true that no such sifting process and no such instruction was requested by appellants. Appellants framed their First Amendment point in more broadside fashion, as described in the main opinion, 133 U.S.App.D.C. at —, 409 F.2d at 1151. However, even though the narrower *Ballard* point was never raised in the form of objections to evidence or suggested jury instructions, we regard it as subsumed in the broader free exercise objections actually made. In any case, a denial of First Amendment rights is one of those exceptional instances where an appellate court will notice error in the charge even where no objection is made at trial. 5 J. Moore, FEDERAL PRACTICE ¶ 51.01 (2d ed. 1965); Shokoweh Shisonbukuno v. Hagyosio, Nakayama, 78 U.S.App.D.C. 271, 273, 140 F.2d 13, 15, *cert. denied* 322 U.S. 736, 64 S.Ct. 1270, 88 L.Ed. 1581 (1944).

FOUNDI

tested, or that the
ficient, it would app
would be in order.

[16] If a new tri
ther observation m
have held that as a
construction compell
tional doctrine of U
lard, 322 U.S. 78, 64
1148 (1944) religio
found "false labelin
ing of the Food, Dru
Thus it is incumben
lo rule in the first in
item of alleged false
ligious claims and he
mitted to the jury fo
minations of whether
device in question

3. With respect to this
mination, the inquiry
that item puts for
false claims respecti
auditing or a "wholly
Of course, this does

fected, or that the evidence was insufficient, it would appear that a new trial would be in order.

[16] If a new trial does follow, a further observation may be helpful. We have held that as a matter of statutory construction compelled by the constitutional doctrine of United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944), religious claims cannot be found "false labeling" within the meaning of the Food, Drug and Cosmetic Act. Thus it is incumbent on the trial judge to rule in the first instance whether each item of alleged false labeling makes religious claims and hence cannot be submitted to the jury for the factual determinations of whether it is a label for the device in question and whether it is false.[3] *See* Jacobellis v. Ohio, 378 U.S. 184, 187-188, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964).

[17] Finally, it should be noted that the Government up to this time, including its motion for rehearing, has not challenged the *bona fides* of appellants' claim of religion. In the event of any new trial, as indicated in the panel opinion, it would be open to the Government to make this challenge. If the challenge is made successfully, the First Amendment question would, of course, disappear from this case. *See* United States v. Kuch, D.D.C., 288 F.Supp. 439 (1968).

Circuit Judge McGOWAN does not join in this clarification of the majority opinion, and continues to adhere to his dissenting opinion.

3. With respect to this item-by-item determination, the inquiry should be whether that item puts forward its allegedly false claims respecting the character or auditing on a "wholly non-religious" basis. Of course, this does not preclude a finding that an item (book, pamphlet, advertising flier) makes out a self-sufficient non-religious claim for Scientology services, to which a religious appeal has been merely tacked on.

[4, 5] The Municipal Code of Chicago provides that it is unlawful to "engage or employ or permit any minor to work or to entertain * * * in or upon the licensed premises where the principal business is the sale of alcoholic liquor, while such premises are open for the sale at retail of alcoholic liquor." (MCC ch. 147, par. 147.14.) From the evidence adduced by the city before the commissioner, the minor was allowed, encouraged, and even directed to ascend the stage and to entertain plaintiff's customers in a costume furnished by plaintiff's agent. Plaintiff's managing agent had informed the minor as to the hours of employment and that the salary would be $30 a night. It is thus clear that the commissioner as trier of fact could conclude that the minor was employed by plaintiff, if only for one evening, to dance at the licensed premises. The fact that a party performs work for another is prima facie evidence of employment and supports a presumption that the party is an employee of the other, in the absence of evidence to the contrary. (*Winston v. Sears, Roebuck & Co.* (1967), 88 Ill.App.2d 358, 233 N.E.2d 95.) We agree with the city that the fact the minor received no pay for dancing is immaterial. The important fact for the resolution of the issue is that the minor performed work on plaintiff's premises. Indeed, the police officer testified that Genoff told him she employed the minor. There was substantial and competent evidence to support the finding that the minor was an employee. As to whether plaintiff knowingly employed a minor, the commissioner had the minor before him as a witness and could make a judgment as to her appearance. Additionally, the city adduced evidence that, when the minor stated she was of age but had no identification plaintiff's agent replied that she could bring the identification later in the week. Licensees may not deal with such an important matter as the employment of a minor in such a casual manner. The commissioner's finding that plaintiff knowingly hired a minor as a dancer was not contrary to the manifest weight of the evidence.

For the reasons stated, the judgment of the circuit court of Cook County is reversed.

Judgment reversed.

JIGANTI, P. J., and McGILLICUDDY, J., concur.

FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D. C., a not-for-profit corporation, Plaintiff-Appellant,

v.

AMERICAN MEDICAL ASSOCIATION, an Illinois not-for-profit Corporation, et al., Defendants-Appellees.

No. 77-661.

Appellate Court of Illinois, First District, Third Division

May 17, 1978

Appeal was taken from an order of the Circuit Court, Cook County, Daniel P. Coman, J., dismissing with prejudice a complaint sounding in libel and interference with contractual relationships. The Appellate Court, Simon, J., held that: (1) where the allegedly defamatory article was published generally and released in 1968, neither the plaintiff's original charge nor its amended complaint that a "reprint" of the article was distributed "within the last year" were sufficient to give rise to a new cause of action in 1975, (2) the one-year statute of limitations on the alleged libel began to run in December of 1968 and thus the suit was barred, and (3) the complaint failed to state a cause of action for tortious interference with contractual relationships.

Affirmed.

1. Action ⇐38(4)
Limitation of Actions ⇐55(6)

Rationale for Uniform Single Publication Act is that cause of action for libel is complete at time of first publication, and any subsequent appearances or distributions of copies of original publication are of no consequence to creation or existence of cause of action, but are only relevant in computing damages; thus, subsequent distribution of existing copies of original publication neither creates fresh cause of action nor tolls applicable statute of limitations. S.H.A. ch. 126, § 11.

2. Limitation of Actions ⇐55(6)

Where allegedly defamatory article was published generally and released in 1968, charge that publisher caused reprints and copies of article to be delivered, distributed and published to three named persons "within the last year" was not sufficient to give rise to new cause of action in 1975 under theory that reprints could be considered to constitute "second edition" or "new publication." S.H.A. ch. 126, § 11.

3. Limitation of Actions ⇐55(6)

Where original publication of allegedly defamatory article occurred in 1968, and where copies mailed seven years later were not sufficient to be termed "republication" giving rise to new cause of action for libel, statute of limitations began to run in 1968 and time for bringing suit expired one year later; complaint alleging libel, which was not filed until 1975, was barred by statute of limitations. S.H.A. ch. 83, § 14; ch. 126, § 11.

4. Pleading ⇐48

Complaint which fails to allege sufficient facts to show plaintiff is entitled to recovery does not state cause of action, and such deficiency may not be remedied by liberal construction or by argument. S.H.A. ch. 110, § 31.

5. Pleading ⇐48

Although complaint need not contain evidentiary matter or allege facts precisely, it must have enough nonconclusory factual allegations to demonstrate how plaintiff has been harmed, and that harm resulted from some violation of legal duty by defendant. S.H.A. ch. 110, § 31.

6. Torts ⇐26(1)

Complaint alleging that defendant's publication of allegedly defamatory article interfered with, and caused termination of plaintiff organization's contractual relationship with its actual and prospective members, but which set forth no statements indicating what contract deserving of legal protection was involved, failed to state cause of action for malicious, intentional and willful interference with contractual relationships.

Brizius & Nixon, Chicago (Charles W. Nixon, Chicago, of counsel), for plaintiff-appellant.

Richard J. Phelan, Michael A. Pope, Roseann Oliver, Chicago (Phelan & Pope and Sidley & Austin, Chicago, of counsel), for defendants-appellees.

SIMON, Justice:

The core of this case is the applicability of the statute of limitations (Ill.Rev.Stat. 1975, ch. 83, par. 14) and the Uniform Single Publication Act (Ill.Rev.Stat.1975, ch. 126, par. 11 et seq.) to a complaint alleging libel.

On December 29, 1975, the plaintiff, the Founding Church of Scientology of Washington, D. C. (FCS) filed a three-count complaint for libel against the defendants, American Medical Association of Illipois (AMA), Frank Campion, the AMA's director of communications, and Ralph Smith, the author of the article, "Scientology—Menace to Mental Health," which appeared in the December 1968 issue of the AMA's monthly magazine, "Today's Health."

Counts I and II of the complaint alleged that the article was defamatory and libelous, and that after the article appeared in print in December 1968, Campion and the AMA caused reprints and copies of the article to be delivered, distributed and published to three named persons with various newspapers on the east coast, as well as

throughout the United States "within the past year." In their first count, the FCS claimed actual and punitive damages for injuries to its reputation and ability to function, while the second count sought actual and punitive damages on account of malicious, intentional and willful interference with "plaintiff's contractual relationships with its members and prospective members."

The trial judge granted the defendants' motion to strike and dismissed Count I with prejudice. He also granted a similar motion with respect to Count II, but allowed FCS leave to file an amended count. On January 24, 1977, after again hearing argument and receiving the proposed amended Count II as well as a proposed amended Count I, the trial judge denied the FCS's petition to vacate and for leave to file an amended complaint on both counts, and dismissed the entire cause with prejudice.

On appeal, the FCS contends that (i) the libel count, Count I, was not barred by the statute of limitations, (ii) the article was not absolutely privileged under the first amendment, (iii) the article was in fact defamatory, and (iv) Count II properly alleged a cause of action for the tort of interfering with contractual relationships. Because the FCS is incorrect in asserting that the first count of its complaint was not barred by the statute of limitations, it is unnecessary to discuss the merits of its substantive second and third contentions on that count. In addition, we must reject the FCS's argument that its Count II stated a proper cause of action.

The relevant statute of limitations provides:

"Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued." (Ill.Rev.Stat.1975, ch. 83, par. 14.)

Also in point here is the so-called single publication rule, which has been codified in this state in the Uniform Single Publication Act:

"No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions." (Ill.Rev.Stat.1975, ch. 126, par. 11.)

Considered together, these two statutes preclude the FCS's first count claim for libel.

[1, 2] Under the Uniform Single Publication Act, no person is given more than one cause of action for damages for libel founded on any single publication, such as one edition of a newspaper or magazine, or one printing of a book. The rationale for the statute is that the cause of action for libel is complete at the time of the first publication, and any subsequent appearances or distributions of copies of the original publication are of no consequence to the creation or existence of a cause of action, but are only relevant in computing damages. (*Insull v. New York World-Telegram Corp.* (7th Cir. 1959), 273 F.2d 166.) Thus, the subsequent distribution of existing copies of an original publication neither creates a fresh cause of action nor tolls the applicable statute of limitations. As the court stated in *Winrod v. Time, Inc.* (1948), 334 Ill.App. 59, 72, 78 N.E.2d 708, 714:

"[T]he release of miscellaneous copies incidental to the general publication either through the mail or on news stands does not constitute a new publication or create a new cause of action * * *. The interval of time or a separate sale should not be the sole determining factor whether the article is a republication or a repetition of the defamatory material * * [I]n the case of a newspaper or magazine 'no conscious intent arises until the defendant consciously as a second edition republishes the article.'"

Here, the alleged
published general
Neither the FCS's
amended complai
article was distrib
and other unname
cient to give rise t
1975, or, under *In*
considered to cons
new publication i
released by Campi
an isolated basis
than miscellaneou
general publicatio
earlier. To conclu
them a "republica
with the law of li
or author to a law
had first been pu
or someone else
two and mail the
for example, to
letter to an editor
publisher to a lib
would be particul
realistic because
might well be o
open to the publi

[3] According
mailed 7 years af
did not constitut
rise to a new ca
statute of limita
time of the origi
ber 1968. The t
expired 1 year
count alleging li
statute of limitat
1975, ch. 83, par.

[4-6] We also
missing the seco
While the compl
fendants' articl
caused terminat
relationship with
members, the co
ments indicating
of legal protecti
plaint which fail
to show the plai
does not state a

Here, the allegedly defamatory article was published generally and released in 1968. Neither the FCS's original charge, nor its amended complaint that a "reprint" of the article was distributed to three journalists, and other unnamed individuals, were sufficient to give rise to a new cause of action in 1975, or, under *Insull* and *Winrod*, could be considered to constitute a second edition or new publication in 1975. The three copies released by Campion in 1975 were mailed on an isolated basis and were nothing more than miscellaneous copies incidental to the general publication of the article 7 years earlier. To conclude otherwise and consider them a "republication," would cause havoc with the law of libel and expose a publisher or author to a lawsuit years after his article had first been published simply because he or someone else chose to xerox a copy or two and mail the photocopy to a friend or, for example, to a magazine as part of a letter to an editor. Exposing the author or publisher to a libel suit in such an instance would be particularly unjust as well as unrealistic because the article in question might well be on file in libraries, and so open to the public anyway.

[3] Accordingly, because the copies mailed 7 years after the original publication did not constitute a "republication" giving rise to a new cause of action for libel, the statute of limitations began to run at the time of the original publication in December 1968. The time for bringing this suit expired 1 year later, and the FCS's first count alleging libel was barred by Illinois' statute of limitations on libel. Ill.Rev.Stat. 1975, ch. 83, par. 14.

[4-6] We also uphold the judgment dismissing the second count of the complaint. While the complaint alleged that the defendants' article interfered with, and caused termination of, FCS's contractual relationship with its actual and prospective members, the complaint set forth no statements indicating what contract deserving of legal protection was involved. A complaint which fails to allege sufficient facts to show the plaintiff is entitled to recovery does not state a cause of action, and such a deficiency may not be remedied by liberal construction or by argument. (Ill.Rev.Stat. 1975, ch. 110, par. 31; *Fanning v. LeMay* (1967), 38 Ill.2d 209, 230 N.E.2d 182.) And, although a complaint need not contain evidentiary matter or allege facts precisely, it must have enough non-conclusory factual allegations to demonstrate how the plaintiff has been harmed, and that the harm resulted from some violation of a legal duty by the defendant. (*B. L. Cartage Co. v. City of Chicago* (1976), 35 Ill.App.3d 1055, 342 N.E.2d 733.) In this case, the FCS's complaint, in failing to set forth what contracts and contractual rights may have been violated, fell short of meeting the standards which a pleader must comply with to properly apprise a defendant of the basis for the complaint against him. The trial judge did not err in dismissing Count II of the FCS's complaint on the ground it failed to state a cause of action.

Judgment affirmed.

JIGANTI, P. J., and McNAMARA, J., concur.

KEYNUMBER SYSTEM

Raymond L. SABATH and Century Provision Co., an Illinois Corporation, Plaintiffs-Appellants and Cross-Appellees,

v.

Leonard MANSFIELD, Kenneth Schwartz and Arthur S. Yergin, Defendants-Appellees,

and

Morris Handler Co., an Illinois Corporation, Defendant-Appellee and Cross-Appellant.

No. 61177.

Appellate Court of Illinois,
First District, Fourth Division.

May 18, 1978.

Suit was instituted for fraudulent concealment of breach of contract. The

CHURCH OF SCIENTOLOGY OF CALIFORNIA, Petitioner-Appellant,

v.

UNITED STATES of America, Respondent-Appellee.

No. 78-2434.

United States Court of Appeals, Ninth Circuit.

Feb. 22, 1979.

A religious organization appealed from a judgment of the United States District Court for the Central District of California, Malcolm M. Lucas, J., denying its application for return of property seized under certain search warrants and for suppression of the evidence seized. The Court of Appeals, Duniway, Circuit Judge, held that the judgment appealed from was interlocutory and not appealable.

Appeal dismissed.

Federal Courts ⇐583

Where religious organization, in its petition for return of property seized under search warrants and motion for suppression of evidence thus seized, did not seek only return of such property but also sought suppression of evidence in grand jury, extradition and other criminal proceedings, and where association's actions were also taken on behalf of employees who might not have standing to seek suppression, judgment denying relief was interlocutory and not appealable. Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.; 18 U.S.C.A. §§ 371, 641, 1503; U.S.C.A.Const. Amend. 4.

Donald M. Re (argued), Los Angeles, Cal., Leonard B. Boudin (argued), Rabinowitz, Boudin & Standard, New York City, for petitioner-appellant.

Raymond Banoun, Asst. U. S. Atty. (argued), Washington, D. C., for respondent-appellee.

Appeal from the United States District Court for the Central District of California.

Before DUNIWAY and CHOY, Circuit Judges, and SOLOMON,* District Judge.

DUNIWAY, Circuit Judge:

The Church of Scientology of California appeals from a judgment denying its application under Rule 41(e), F.R.Crim.P., for the return of property seized under certain search warrants and for the suppression of the evidence seized. We conclude that we do not have jurisdiction, and dismiss the appeal.

On July 7, 1977, two search warrants were obtained authorizing search of certain offices of the Church, located in two buildings that it owns in Los Angeles. A similar warrant was obtained for a search of part of a building owned by the Founding Church of Scientology in Washington, D.C. The affidavits in support of the warrants were substantially identical, and so were the warrants, except for descriptions of the premises to be searched. There was a separate warrant for each place to be searched. The warrants were executed simultaneously at 9:00 a. m. Washington time, and at 6:00 a. m. Los Angeles time. Many files were examined at each place, in an effort to find the papers listed in 161 separate paragraphs of the warrants, and in paragraph 162 of each, which reads:

> Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government property in violation of 18 U.S.Code §§ 371, 1503 and 641 of which facts recited in the accompanying affidavit make out.

The Church asserts that more than 20,000 documents were seized. Motions to recover the seized documents were filed on July 12,

* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

1977, in the District Court for the Central District of California, and on July 15, 1977, in the District Court for the District of Columbia. In the District of Columbia, the District Court granted the Church's motion. The Court of Appeals reversed. *See In re Search Warrant dated July 4, 1977*, D.D.C., 1977, 436 F.Supp. 689; *Id.*, 1977, 187 U.S. App.D.C. 297, 572 F.2d 321, *cert. denied*, sub nom. *Founding Church of Scientology v. United States*, 435 U.S. 925, 98 S.Ct. 1491, 55 L.Ed.2d 519 (1978).

Throughout the proceedings in the District Court in the case at bar, the Church has made it clear that the principal reason for its motion has been and is to prevent the use of any of the seized papers for the purpose of obtaining indictments against either the Church or its officials or employees. A grand jury in the District of Columbia had been considering the offenses mentioned in the affidavits supporting the search warrants—conspiracy to steal government property, conspiracy to obstruct justice, theft of government property, and obstruction of justice. Many of the seized documents have been presented to that grand jury, both before and during the proceedings in this case. Since this case began, and on August 15, 1978, the District of Columbia grand jury has indicted 11 persons, at least some of them officials or employees of the Church. So far as we are advised, however, the Church has not been indicted.

Under orders of the District Court, the government has supplied the Church with two sets of copies of all documents seized, except for certain ones that, according to the government, are its property and are of a sensitive or confidential character.

Although the matter is not free from doubt, we conclude that the principles applied in *DiBella v. United States*, 1963, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614, require that the appeal be dismissed. There, two persons were involved. One, DiBella, had been arrested under a warrant, and he was arraigned and released on bail. Some evidence was seized when he was arrested. He moved to suppress the seized evidence. While the motion was pending, he was indicted. The motion to suppress was denied, and he appealed. The other person, Koenig, had been arrested in Florida on the basis of a complaint charging bank robbery in Ohio. He filed a proceeding in the federal court in Florida, to suppress seized property, while removal proceedings were pending. Meanwhile, Koenig had been indicted in Ohio. Thereafter, the Florida District Court granted suppression but denied return of the property. Koenig appealed from the denial of his motion for return of his property. The Supreme Court held that neither order was appealable.

The Court's holding is stated as follows:

> We hold, accordingly, that the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability. Presentations before a United States Commissioner [citation omitted] as well as before a grand jury [citation omitted] are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train. When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment—in each such case the order on a suppression motion must be treated as "but a step in the criminal case preliminary to the trial thereof." [Citation omitted.] *Only if the motion is solely for return of property and is in no way tied to a criminal prosecution in esse against the movant can the proceedings be regarded as independent.* *Id.* at 131-32, 82 S.Ct. at 660 (emphasis added).

The Court also disposed of another argument that could be made for appealability in this case, that this case was decided by a District Court in California, where the seizure occurred, while the criminal proceeding is in the District of Columbia.

An alternative gro
in the *Koenig* case
dicta in some of ou
sign independence
der because render
trict from that of
S.Ct. at 661.

• • •

Rule 41(e), of cours
for making of the
of seizure. On a su
ever, the ruling th
be tentative. We
satisfactorily with
of the Rules to tre
terlocutory. *Id.* a
661.

We recognize that *
in point. While the
investigating the Chu
complaint, arraignme
dictment against it,
DiBella there was ar
indictment; in *Koen*
plaint, an arrest, and

Later cases, howe
principle a little farth
United States, 5 Cir.
this was the court's h
tions to suppress fil
ments were returned:

2. The appellants'
below included a d
of property, but the
that "[o]nly if th
return of property
to a criminal prose
the movant can th
garded as independ
plied.) 369 U.S. at
660. As regards t
the three Sklaroffs,
who are now under
tions of Title 18, U
suppress is an inte
proceedings *in esse*
nonappealable at
manner, the motio
lants Rogers, Witte
pealable for the m
the return of prop

An alternative ground for appealability in the *Koenig* case, likewise culled from dicta in some of our decisions, would assign independence to the suppression order because rendered in a different district from that of trial. *Id.* at 132, 82 S.Ct. at 661.

* * * * * *

Rule 41(e), of course, specifically provides for making of the motion in the district of seizure. On a summary hearing, however, the ruling there is likely always to be tentative. We think it accords most satisfactorily with sound administration of the Rules to treat such rulings as interlocutory. *Id.* at 132-33, 82 S.Ct. at 661.

We recognize that *DiBella* is not precisely in point. While the grand jury had been investigating the Church, there has been no complaint, arraignment, information or indictment against it, nor any arrest. In *DiBella* there was arrest, arraignment, and indictment, in *Koenig* there was a complaint, an arrest, and an indictment.

Later cases, however, carry the *DiBella* principle a little farther. In *Application of United States*, 5 Cir. 1970, 427 F.2d 1140, this was the court's holding, concerning motions to suppress filed before any indictments were returned:

> 2. The appellants' motions in the court below included a demand for the return of property, but the Court in *DiBella* held that "[o]nly if the motion is solely for return of property *and* is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent." (Emphasis supplied.) 369 U.S. at 131, 132, 82 S.Ct. at 660. As regards the appellants Dudley, the three Sklaroffs, Blott and Richmond, who are now under indictment for violations of Title 18, U.S.C., their motion to suppress is an integral part of criminal proceedings *in esse* the denial of which is nonappealable at this time. In a like manner, the motion to suppress of appellants Rogers, Wittell and Green is nonappealable for the motion is not solely for the return of property, in conformity to the *DiBella* rule, but primarily seeks suppression of evidence from grand juries in criminal proceedings. *DiBella v. United States*, supra at 131, 132, 82 S.Ct. at 660, 661.

Subsequent language in the opinion can be read to indicate that the last three persons mentioned were also indicted. However, in *United States v. Glassman*, 5 Cir., 1976, 533 F.2d 262, the court tells us that this was not so:

> The order [of the district court] denying this motion was dated September 12, 1975; appellant was not indicted until November 13, 1975, and apparently was never detained. So according to the literal language of *DiBella* there was no criminal prosecution *in esse* at the time this appeal was brought. But in *Application of United States* . . . three of the appellants were not indicted by the grand jury, and yet the court found that their Rule 41(e) motion was made primarily to suppress evidence from the anticipated grand jury hearings and therefore was not made "solely for return of property" as *DiBella* requires. *Id.* at 263.

Both *Glassman* and *Application of United States*, and especially the latter, support dismissal of the appeal that is before us.

Our decision in *Meier v. Keller*, 9 Cir., 1975, 521 F.2d 548, 556, *cert. denied*, 424 U.S. 943, 96 S.Ct. 1410, 47 L.Ed.2d 348 (1976), is also persuasive:

> The denial of a preindictment motion or comparable relief is an interlocutory nonappealable order unless "the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." *DiBella*. Meier's appeal meets neither criterion for appealability. His complaint sought suppression as well as return. [T]here was already a criminal prosecution *in esse* because presentment had already been made to the Nevada grand jury at the time the complaint [for Rule 41(e) relief] was filed [in the Central District of California]. Thus, the appeal should be dismissed for want of jurisdiction in this court.

In *Parrish v. United States*, 4 Cir., 1967, 376 F.2d 601, the plaintiffs sought, under Rule 41(e) return of records obtained from them by Internal Revenue agents, allegedly by fraud, and their suppression as evidence. Relief was denied, and they appealed. At that time, so far as appears, there was no indictment and no other criminal proceeding pending (p. 602). Later, they were indicted. On the authority of *DiBella, supra*, the appeal was dismissed. Judge Boreman would have gone further and held the order not appealable even if there had been no indictment (pp. 603–04).

In *Smith v. United States*, 3 Cir., 1967, 377 F.2d 739, Smith and his wife petitioned for an injunction prohibiting the presentation of certain evidence to a grand jury, prohibiting its use in prosecuting the petitioners, and requiring return of the evidence. The petitioning husband and wife had produced the records relating to their income at the request of the Internal Revenue Service. When their action was filed, they had not been indicted. While their petition was under submission, they were indicted for income tax evasion. Nine days later, their petition was denied. The court held that the denial was not appealable, citing *DiBella, supra*, despite the fact that the petitioners had not been indicted when they filed their petition. The rationale was that the petition was not solely for the return of property; it sought to enjoin use of the evidence looking toward prosecution; it was tied to an incipient criminal proceeding (p. 742).

Austin v. United States, 4 Cir., 1962, 353 F.2d 512, is similar to *Smith v. United States, supra*, and held, on the authority of *DiBella, supra*, that an order denying a petition to have suppressed, in advance of indictment, documents that petitioner claimed the I.R.S. had obtained from her by fraud (see *Austin v. United States*, 4 Cir., 1961, 297 F.2d 356), was not appealable.

Our decision in *Goodman v. United States*, 9 Cir., 1966, 369 F.2d 166, is different. There, as we said, "there is, and has been, no criminal case pending in any stage." (p. 168.) Not so in the case at bar.

In *Cobbledick v. United States*, 1940, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783, the Court held that an order denying a motion to quash a subpoena duces tecum to appear and produce documents before a grand jury is not appealable. Part of the rationale was that it would be undesirable to permit a witness, by appealing, to halt an ongoing criminal proceeding. Thus, he cannot appeal, even though he could not appeal from the final decision in the criminal case because he is not a party to it (p. 326, 60 S.Ct. 540). *See also Alexander v. United States*, 1906, 201 U.S. 117, 26 S.Ct. 356, 50 L.Ed. 686.

United States v. Ryan, 1971, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85, is similar. As Mr. Justice Brennan said:

> Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims have we allowed exceptions to this principle. We have thus indicated that review is available immediately of a denial of a motion for the return of seized property, where there is no criminal prosecution pending against the movant. See *DiBella v. United States, supra*, [369 U.S.] at 131–132, 82 S.Ct. 654. Denial of review in such circumstances would mean that the Government might indefinitely retain the property without any opportunity for the movant to assert on appeal his right to possession.

The principle that runs through all of these authorities is that an ongoing criminal proceeding is not to be interrupted by an appeal from an order denying suppression of evidence that may be used in that proceeding. This is such a case. There was, and so far as the record shows there is, an ongoing proceeding before at least one grand jury, in the District of Columbia. The parties tell us that there is, or was, another proceeding before a Federal grand jury in New York. There is also a proceeding pending in Great Britain to extradite two of the persons indicted by the District of Columbia grand jury, and some of the seized papers are being used in that proceeding.

The petition or mot
does not seek only the
ty. It expressly seek
dence, and is avowedly
ing evidence in grand
other criminal proceedi

Moreover, suppressi
sought by the Church
ployees as well as on it
or all of those emplo
standing to seek suppr
at the behest of the
abuse of Rule 41(e),
reason to deny appe
suppression of evide
presented to the gra
though the governm
right, under the decisio
Calandra, 1974, 414 U
38 L.Ed.2d 561, to use
the grand jury as the
witness, even though
have been obtained
Fourth Amendment.
Daily, 1978, 436 U.S.
L.Ed.2d 525, holds
showing of probable
issue authorizing a se
of an innocent third
crime. Usually, the
standing to suppress
a denial of a motion
return of the eviden
were appealable, pro
against the criminal
be delayed for long pe
if the evidence can be
be retained during the
inal proceeding. Yet
Church seeks to termi

Our decision that th
is not appealable is no
the reasons stated by
in *United States v.*
must, at some time,
to the Church for the
if it has been unlaw
present appeal is no
decide nothing more.

Appeal dismissed.

The petition or motion here did not and does not seek only the return of the property. It expressly seeks suppression of evidence, and is avowedly aimed at suppressing evidence in grand jury, extradition, and other criminal proceedings.

Moreover, suppression in this case is sought by the Church on behalf of its employees as well as on its own behalf. Some or all of those employees may not have standing to seek suppression. Suppression at the behest of the Church would be an abuse of Rule 41(e), and is an additional reason to deny appealability. Similarly, suppression of evidence that is to be presented to the grand jury is sought, although the government would have the right, under the decision in *United States v. Calandra*, 1974, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561, to use the evidence before the grand jury as the basis of questions to a witness, even though the evidence may have been obtained in violation of the Fourth Amendment. *Zurcher v. Stanford Daily*, 1978, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525, holds that, upon a proper showing of probable cause, a warrant may issue authorizing a search of the premises of an innocent third party for evidence of crime. Usually, the criminal would have no standing to suppress such evidence. Yet, if a denial of a motion by the third party for return of the evidence and to suppress it were appealable, presentation of the case against the criminal to a grand jury could be delayed for long periods of time. Surely, if the evidence can be obtained, it can also be retained during the progress of the criminal proceeding. Yet it is retention that the Church seeks to terminate here.

Our decision that the order appealed from is not appealable is not free from doubt, for the reasons stated by Mr. Justice Brennan in *United States v. Ryan, supra*. There must, at some time, be a remedy available to the Church for the return of its property, if it has been unlawfully taken. But the present appeal is not that remedy. We decide nothing more.

Appeal dismissed.

STATE OF ALASKA & Mauneluk Association, Appellants,

v.

Cecil D. ANDRUS, Secretary of the Interior, Appellee,

v.

DEFENDERS OF WILDLIFE et al., Intervenors.

STATE OF ALASKA & Mauneluk Association, Appellees,

v.

Cecil D. ANDRUS, Secretary of the Interior, Defendant,

v.

DEFENDERS OF WILDLIFE et al., Appellants.

Nos. 77-3169, 77-3408.

United States Court of Appeals, Ninth Circuit.

Feb. 22, 1979.

State of Alaska brought suit seeking, inter alia, a judgment declaring that the Secretary of the Interior has no power to stop the wolf-kill program undertaken by the state to protect the Western Arctic caribou herd. The United States District Court for the District of Alaska, James A. von der Heydt, J., 429 F.Supp. 958, held that the Secretary had the power to halt the wolf-kill program but that, nonetheless, no environmental impact statement was necessary if he refrained from exercising that power, and an appeal was taken by the state and by an animal-welfare group. The Court of Appeals, Goodwin, Circuit Judge, held that even if the Secretary had some power under a delegation by Congress to stop the wolf-kill program, his failure to exercise that power, in effect, his inaction, was not the type of conduct requiring an environmental impact statement.

Affirmed.

mation concerns not the defendant's sanity but his propensity to be violent in the future. The first is that a psychiatrist's conclusions about a defendant's sanity rest on the non-testimonial aspects of the defendant's conduct during the examination, while Grigson's conclusions were based almost entirely on the defendant's statements. Second, and more importantly, if a defendant raises insanity as a defense and introduces psychiatric testimony, the government will seldom have a satisfactory method of meeting the defendant's proof except through the testimony of its own psychiatrist who has had the opportunity to examine the accused. But Smith never used psychiatric evidence and never suggested that he might.

[Text] Preventing the prosecution from relying on compelled psychiatric examinations will scarcely disable it from proving the defendant's dangerousness in appropriate cases. • • • [W]e leave open the possibility that a defendant who wishes to use psychiatric evidence in his own behalf can be precluded from using it unless he is willing to be examined by a psychiatrist nominated by the state. *[End Text]*

Moreover, the inquiry demanded by Texas' question regarding future violence is not obviously a matter for psychiatrists. Indeed, many in the psychiatric community believe that nothing about a psychiatrist's training or skill qualifies him to predict how dangerous a person will be in the distant future. More important is what the Supreme Court has said about the question.

While the Court did not disapprove of the use of psychiatric testimony, it said that the question was constitutionally acceptable precisely because it could be resolved by non-experts. Jurek v. Texas.

Finally, any attempt to compel defendants to submit to a psychiatric inquiry into their dangerousness is likely to be erratic and capricious. Such an examination, which depends on other factors than mere observation, cannot succeed without the defendant's cooperation. A defendant cannot be physically forced to cooperate with an examining psychiatrist, as he can for example, with a doctor extracting a blood sample or a policeman who is fingerprinting him. Civil contempt is unlikely to move a defendant who is contemplating the sentencing phase of a capital trial. The sanction of barring the defense from submitting psychiatric evidence cannot be used against a capital defendant who, like Smith, proposes to use no such evidence. The state might be permitted to comment on the defendant's refusal to be examined by a psychiatrist, but it is not clear what the jury is to infer, and permitting such an inference might clash with the Supreme Court's insistence that capital sentencing procedures be unusually reliable.

[Text] The principal significance of allowing compelled examination on the question of dangerousness, then, will be in cases like Smith's. If the state is entitled to compel a defendant to submit to an examination, it can, in an effort to gain the defendant's cooperation, mislead him or indeed lie to him about the significance of the examination, it can take advantage of his ignorance or lack of understanding. It can coerce him in any way that does not make his statements less useful to the interrogating psychiatrist. Psychological pressure, sharp practices, and deceit are likely to be, in effect, the means of compelling examinations. These tactics are inherently discriminatory. A knowledgeable defendant, or one with vigilant attorneys, will either simply refuse to submit to an examination or will bargain with the state to have the examination conducted by a psychiatrist who is more likely to favor the defense. Only defendants who do not know better will allow themselves to be examined by psychiatrists antecedently favorable to the state.

We have every reason, therefore, to give effect to the apparent command of the fifth amendment and to hold that a defendant may not be compelled to speak to a psychiatrist who can use his statements against him at the sentencing phase of a capital trial. If a state wishes to prove a defendant's propensity to commit future crimes of violence by using evidence gathered at a psychiatric examination, the defendant must voluntarily consent to the examination. It follows that Judge Porter was correct when he held that if a defendant indicates that he wishes to remain silent, "he may not be questioned by the psychiatrist for the purpose of determining dangerousness." Judge Porter also held that the defendant must be warned that he had a right to remain silent, since Smith was in custody when he was interviewed, this holding, too, was correct. • • • We also agree with Judge Porter's holding that a defendant has no constitutional right to have an attorney present during a psychiatric evaluation of his dangerousness. Here Judge Porter followed Cohen, which held that there was no right to have an attorney present when the examination was to decide if the defendant was sane. See id. at 48. Judge Porter reasoned, as we had in Cohen, that an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination. In this he was correct. But Judge Porter overlooked the role that an attorney might have played in helping a client like Smith decide whether he wished to submit to an examination. This is a vitally important decision, literally a life or death matter. It is a difficult decision even for an attorney; it requires a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, of possible alternative strategies at the sentencing hearing. For a lay defendant, who is likely to have no idea of the vagaries of expert testimony and its possible role in a capital trial, and who may well find it difficult to understand, even if he is told, whether a psychiatrist is examining his competence, his sanity, his long-term dangerousness for purposes of sentencing, his short-term dangerousness for purposes of civil commitment, his mental health for purposes of treatment, or some other thing, it is a hopelessly difficult decision. There is no reason to force the defendant to make it without "the guiding hand of counsel." Powell v. Alabama, 287 U.S. 45, 57 (1933). The Supreme Court has spoken of the "vital need" for counsel "at the pretrial stage," and has said that "whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him — 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" Brewer v. Williams, 430 U.S. 387, 398, 20 CrL 3095 (1977), quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972). Smith, of course, had been indicted when Dr. Grigson examined him, indeed, an attorney had been appointed to represent him. And the Supreme Court has repeatedly held that a defendant is entitled to the assistance of counsel when he faces decisions that may have a crucial effect on his trial. • • • We therefore hold that at the sentencing phase of a capital trial, Texas may not use evidence based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent, was allowed to terminate the examination when he wished, and was assisted by counsel in deciding whether to submit to the examination. Smith was denied these rights, for this reason, too, his death sentence must be set aside. *[End Text]*
—Goldberg, J.

(Smith v. Estelle; CA 5, 9/13/79)

SCOPE OF SEARCHES OF SCIENTOLOGISTS' CALIF. OFFICES WASN'T OVERLY BROAD

Defendants have standing only to contest searches of their own offices

Two years ago, the FBI searched three premises operated by the Church of Scientology — one in the District of Columbia and two in California — and seized hundreds of documents which allegedly show that Church members stole government documents and then covered up their crime. All three searches occurred on the same day and were pursuant to very similar warrants. Although the District of Columbia search was recently held unconstitutionally "general," In re Search Warrant (Church of Scientology), 25 CrL 2525 (USDC DC 1979), the California searches didn't suffer from the same infirmity, the U.S. District Court for the District of Columbia now concludes.

The indicted Church members admit that 95 percent of the documents that the government plans to use against them were named in the warrants, and, the court says, Andresen v. Maryland, 427 U.S. 463, 19 CrL 3183 (1976), stands for the proposition that properly seized items are admissible even though other items seized at the same time were illegally seized. Although an entire search may be so unreasonable that it infects all the property seized, that is not the case here, the court says. The government, through briefings and supervision of the FBI agents, made "good-faith and reasonable efforts" to limit the searches to the scope of the warrants. Moreover, the defendants have not sustained their burden of showing that an adverse number of the seized documents were outside the scope of the warrants or of the plain view doctrine.

Citing Rakas v. Illinois, 439 U.S. 128, 24 CrL 3009 (1978), the court also holds that only those Church members whose personal offices were searched have standing to contest the searches. (U.S. v. Hubbard, 9/13/79)

Digest of Opinion: On July 8, 1977, three search warrants were simultaneously executed on premises owned and operated by the Church of Scientology (which the court assumes, for purposes of this action, to be a bona fide religious organization): one in the District of Columbia and the Edfield Manor and the Cedars-Sinai Complex, both in Hollywood, California. Immediately thereafter, the Church filed separate actions in L.A. and D.C. seeking the suppression and return of the seized property pursuant to F.R.Crim.P. 41(e). Chief Judge Bryant of this court ruled that the warrant executed in D.C. was invalid on its face, but that decision was reversed on appeal. In re Search Warrant (Church of Scientology), 437 FSupp 689, reversed 572 F2d 321, 22 CrL 2251 (CA DC 1977).

In separate memorandum opinions, Judge Lucas upheld the execution of the warrants in California. Church of Scientology v. U.S., No. CV-77-2865-MML (USDC CCal 4/4/78 and 7/5/78). The Ninth Circuit dismissed the Church's appeal on the ground that the judgement was interlocutory and unappealable, 591 F2d 833 (1979).

Meanwhile, on August 15, 1978, 11 individuals were indicted by a federal grand jury. Nine of these individuals, who are about to go to trial, are now before this court seeking to suppress the evidence seized on July 8, 1977.

Recently, Chief Judge Bryant held that the search conducted in D.C. violated the Fourth Amendment, this time on the ground that the search itself was general. In re Search Warrant (Church of Scientology), 25 CrL 2525 (USDC DC 1979). It has been the government's position, throughout the litigation before this court, that none of the documents seized in D.C. were shown to the grand jury and that none would be used at the trial in this case. Thus, the propriety of the D.C. search is not an issue before this court.

In the prior proceeding at which the searches were challenged, the Church, as owner and operator of the searched premises, was the party challenging the searches. The searches plainly involved that plaintiff's Fourth Amendment rights. But in the instant proceedings, the parties challenging the searches are individuals, and each individual defendant in a criminal case must demonstrate that his Fourth Amendment rights are involved in order to suppress evidence. Such rights are involved if the individual has "a legitimate expectation of privacy in the invaded place." Rakas v. Illinois.

The four defendants whose offices were searched have standing to suppress evidence seized from their own offices. See Mancusi v. DeForte, 392 U.S. 364 (1968). The claim of defendant Hubbard, that she too has standing because of her status as the supervisor of one of the employees who has standing, is rejected. The evidence shows that Hubbard did not even have a key to that defendant's office, and there is no evidence that Hubbard ever set foot in it.

The defendants also claim a legitimate expectation of privacy with respect to the contents of seized letters that they purportedly authored or were to receive. But they cannot rely on the government's "purported" allegations of the indictment. They have the burden of asserting a property or possessory interest in the seized property and this they have not done. Moreover, the legitimate expectations of privacy of a party who has received letters is obviously affected by what happens to the letters after their arrival. If the letters are kept in the office of the addressee, then the Mancusi rule applies. However, if the letters are forwarded to a central filing system, accessible to numerous third parties, the expectations of privacy would be seriously undermined. Finally, the court is unable to understand how sending letters to a third party, and thus relinquishing control, would form a basis for a legitimate expectation of privacy after delivery of the letters.

With the defendant's final contention — the vague and general argument that they had an expectation of privacy in the exercise of their First Amendment right to association and free exercise of religion — they seek to raise the rights of third parties simply because they share membership in a religious organization. In Rakas, the Supreme Court explicitly and emphatically declared that Fourth Amendment rights are personal and cannot be raised vicariously.

[Relying primarily on the D.C. Circuit's opinion respecting the D.C. search, the court holds that the L.A. search warrants were facially valid. It also rejects the defendants' claims that the searches were illegal because they were executed through excessive force and because the supporting affidavit wasn't attached to the warrants. These portions of the court's opinion are not digested here. In the final portion of its opinion the court examines the scope of the searches — ed.]

[*Text*] To a significant extent, the defendants' posture in this case is twisted. The government has indicated it will seek to introduce into evidence at the trial of this case 201 documents seized at the searches in California. The defendants have made no attempt to directly challenge the legality of the seizure of these case-in-chief documents. In fact, they have introduced exhibits which illustrate their opinion that 95% of the case-in-chief documents were described in the warrant, and thus properly seized. * * * Moreover, they contend that it is the Court's duty to examine each and every document seized during the searches to determine the validity of its seizure, while indicating their belief that it would be error for the Court to look at the case-in-chief documents prior to trial. . . . Thus, it is the defendants' somewhat bizarre "theory of the case," that the Court is to decide whether the government can introduce the 201 case-in-chief documents at trial by examining everything seized during the search except the 201 case-in-chief documents. [*End Text*]

Merely because some evidence is seized beyond the scope of the warrant does not taint that evidence which has been properly seized. The key case in this regard is Andresen v. Maryland.

[*Text*] In Andresen, the Supreme Court affirmed the conviction of the defendant on one count of false pretenses and three counts of misappropriation by a fiduciary. The defendant challenged the reasonableness of the searches and seizures from his corporation and his law office. A single document from the corporation, and seventeen items from his law office were introduced into evidence at his trial. There was evidence that between 2% and 3% of the files in the law office were seized and less than 5% of the corporation's files were seized. Of the 52 items seized from the offices of the corporation, 45 were returned and the trial court suppressed six. Of the 28 items seized from the law office, seven were returned and four were suppressed. In the course of its opinion, the Court observed, "The record discloses that the officials executing the warrants seized numerous papers that were not introduced into evidence. Although we are not informed of their contents, we observe that to the extent such papers were not within the scope of the warrants or were otherwise improperly seized, the State was correct in returning them voluntarily and the trial judge was correct in suppressing others." Thus, the Court explicitly approved a document-by-document approach. Those properly seized could be used in evidence even though at the offices of the

0011-1341-79-$00.50

corporation only one of the 52 items seized was ultimately determined to be properly seized. Therefore, Andresen can be read to hold that even if most of the documents seized by a valid warrant have not been properly seized, those properly seized can be introduced into evidence." *[End Text]*

The five cases cited by the defendants in an attempt to counteract the Andresen holding are easily distinguished. See Kremen v. U.S., 353 U.S. 346 (1957); U.S. v. Rettig, 589 F.2d 418, 24 Cr.L. 2150 (CA 9, 1978); Application of Lafayette Academy, Inc., 462 F.Supp. 767 (USDC RI, 1978); Vander Ahe v. Howland, 508 F.2d 364 (CA 9, 1975); and Lo-Ji Sales, Inc. v. New York, 25 Cr.L. 3135 (1979). In none of those cases did the court refuse to permit the introduction of properly seized evidence.

[Text] Nevertheless, some cases not cited by the defendants' team of attorneys do provide that at some point an entire search may become so unreasonable that its unreasonableness infects the seizure of each and every item seized. U.S. v. Fernandez, 430 F. Supp. 794, 801 (N.D.Cal. 1976); U.S. v. Leta, 332 F. Supp. 1357 (M.D.Pa. 1971). Accordingly, the Court shall examine the reasonableness of the entire search to be completely certain that justice is done in this case. *[End Text]*

The standard to be applied to the searches is reasonableness, not "scrupulous exactitude." The Supreme Court applied the latter standard in Stanford v. Texas, 379 U.S. 476 (1965), where the documents seized were wanted for the ideas they contained. Here, on the other hand, the warrant sought hundreds of documents allegedly stolen from the government, and written material which allegedly detailed the planning, operation, and handling of such stolen material, as well as material prepared in order to cover up these actions.

[Text] These documents were not sought as obscene or communist material; they were merely sought as contraband and ledgers of an unlawful enterprise. Therefore, the scrupulous exactitude test cannot be invoked. Merely because the defendants kept their offices in a building belonging to the Church of Scientology does not insulate their actions from the process of law. *[End Text]*

This point is made ever clearer by comparing the defendants' contentions with the Supreme Court's decision in Zurcher v. The Stanford Daily, 436 U.S. 547, 23 Cr.L. 3061 (1978).

[Text] Although the Court rejects the defendants' attempt to invoke a higher standard, the Court recognizes that the true standard, reasonableness, is not a mechanical one. The nature of the material sought, and its location, are important elements in the application of the test. Although the scrupulous exactitude test does not apply, the Court has examined the facts and circumstances of this case with the utmost care in order to determine the reasonableness of the government's actions in conducting these searches. Of course, the government is required to act with more care than if they were looking for heroin in a toolshed. What would be reasonable there would be inadequate in a search for documents in a Church. • • •

First, the defendants contend that there was no attempt on the part of the government to restrict the searches and seizures to what was in the warrant. Second, the defendants contend that the vast majority of documents seized were outside the warrant. The Court finds that the government made good-faith and reasonable efforts to limit the searches and seizures to items within the warrants or otherwise legally seizable. Finally, the Court finds that the defendants have failed to sustain their burden with respect to the degree of documents seized outside the scope of the warrant. • • •

There was probable cause to believe that the leaders of a large religious organization were involved in complex, sophisticated conspiracies to illegally obtain government documents and to cover up their activities. The government had probable cause to believe that evidence of these and related crimes was located in the offices of the Church in two locations. The government had probable cause to believe that at one location there would be 250 filing cabinets with evidence of criminal activity. Due to the nature of the allegations, the reasonable thing to do would be to obtain the services of numerous agents of the Federal Bureau of Investigation [FBI] to conduct the searches and to prepare these agents for their task by conducting an extensive briefing session. That is what the government did in this case. *[End Text]*

The day before the search, from 8 a.m. to 5 p.m., 100 FBI agents were briefed on the search. Among other things, they were given copies of the affidavit, and a question-and-answer session concerning the documents was held.

On the day of the search, the warrant and affidavit were available to the agents. In addition, supervisory personnel, team leaders, and lawyers for the U.S. Attorney's Office and the FBI were available and often consulted. As the search progressed, additional agents were ordered to the scene, where they were given copies of the warrant and affidavit, as well as more limited briefings, and were told to seek the assistance of other agents or superiors.

Testimony shows that the agents understood the warrant and the affidavit, and made good faith and reasonable efforts to comply with them. They understood the warrant's item 162. For example, Agent Valencia: "162 dealt with obtaining instrumentalities and fruits of a conspiracy dealing with obstruction of justice and theft of government property as supported by the affidavit." Agent Breen: "If there were other documents not listed in the description of property here that appeared to indicate a theft of Government property had occurred • • •." Agent Stovall: the objectives of the conspiracies were "to steal government documents." In addition, the agents seized a very small percentage of documents they went through.

[Text] Accordingly, the Court finds that the government, through its agents, made adequate good-faith and reasonable efforts to limit their seizures to evidence which could be properly seized. • • •

Although none of the documents designated by the government to be used in its case-in-case were seized under the plain view doctrine, the application of this concept to the searches is necessary in order to evaluate the defendants' claim with respect to the scope and breadth of the documents seized.

The defendants contend that the plain view doctrine is inapplicable to this case, because the search involved documents; the evidence was not incriminating; and their discovery was not inadvertent. The Court disagrees.

In this case, the initial intrusion which brought the documents within the plain view of the agents was proper. In order to execute the warrants, "the agents were required to glance through the documents in the areas designated by the warrant. • • •

The second requirement is that the discovery must be inadvertent. • • • There has been no credible evidence in this case to indicate that the agents knew in advance the nature or location of other incriminating evidence or that the warrant was obtained as a subterfuge.

Third, the article seized must be of an incriminating character. Immediately upon observing the article, the agent must have probable cause for its seizure. *[End Text]*

During the search, one agent came across a document (which began with these words: "Red Box Data Information Sheet. 1. What is Red Box data" a) Proof that a Scnist is involved in criminal activities, b) Anything illegal that implicates MSH, IRH. c) Large amounts of non FOI docs. d) Operations against any government group or persons. • • •" After this seizure, an order went out for agents to watch for documents marked "red box." A second large class of documents seized under the plain view doctrine discussed infiltration and covert operations to obtain documents from private and state organizations. The agents' seizure of both these classes of documents was reasonable. The agents, with knowledge of the warrant and affidavit, had probable cause to believe that this material was evidence of criminal activities.

The court must reject the defendants' contention that the plain view doctrine does not apply to searches for documents. See Marron v. U.S., 275 U.S. 192 (1927). Here, the agents were required to glance through documents to execute the warrant. Thus, incriminating documents can be seized if the three other general requirements are met as they are in this case.

The defendants rely on In re Search Warrant (Church of Scientology), 25 Cr.L. 2525 (USDC DC, 1979), and contend that the mere fact that the government returned 40 percent of the

[illegible] to the Church indicates the amount that was improperly seized.

[illegible] In this case, the United States has represented to the [illegible] documents were deemed unnecessary. The [illegible] doubt the word of the government [illegible] in this case. In addition, this procedure [illegible] by the Supreme Court in Anderson v. Maryland, [illegible] Moreover, if the courts take the return of documents as an admission of error, such activity, which should be encouraged, would be chilled: the government will not return [illegible] out of fear that it will be interpreted as an admission of impropriety.

Accordingly, the Court finds that the defendants have failed to meet this burden of proof as to the scope of the seizures. Perhaps some documents were seized outside the warrants; however, some error must be expected and is entirely reasonable. There has been no showing that the degree of error was so egregious that the entire search was exploratory or unreasonable.

The defendants' arguments that the searches violated their procedural rights and that the government proceeded in bad faith are also rejected.

No one in our civilized society is pleased by searches of Churches lasting twenty hours and involving over 150 FBI agents. However, the fourth amendment does not provide a mechanical rule that prevents searches of certain places, at certain times, by more-than-so-many people. The bottom line is reasonableness. Overall, the FBI agents who executed the warrants at issue in this case performed a very difficult job in a most reasonable manner. When the government has probable cause to believe that evidence of criminal activity is present in a particular place, government agents have a responsibility to pursue their investigation. It is most unfortunate that the information which came to the government in this case required that searches be conducted by numerous agents, for long hours, in buildings owned by a Church. However, the fourth amendment cannot become so inflexible that criminal activity can be completely insulated from our criminal justice system by the talismanic invocation of religion. We can only hope that never again in our history will the government be required to perform such an unseemly task.

The Court has examined the documents that the government intends to submit during its case in chief. The Court finds that there is no evidence to indicate that these documents were improperly seized; they are within the warrants and were seized from areas described in the warrants. The government is not barred by the fourth amendment from introducing these documents into evidence at the trial of this case. [*End Text*] —Richey, J.

(U.S. v. Hubbard; USDC DC, 9/13/79)

EXIGENCIES JUSTIFIED NARC DETECTIVE'S ENTRY INTO HOUSE 3 HOURS AFTER FIRE

Warrantless intrusion was proper so that detective could supervise disposal of volatile chemicals used in drug production

Relying on Michigan v. Tyler, 436 U.S. 499, 23 CrL 3055 (1978), a majority of the U.S. Court of Appeals for the Second Circuit concludes that a narcotics detective who had knowledge of drug chemistry did not need a warrant to enter a house that had been damaged by a suspicious fire hours earlier and to supervise the disposal of volatile chemicals found on the scene. The first officers on the scene suspected that the house had been a drug factory. Of course, the majority says, the initial warrantless entry soon after firefighters brought the blaze under control was proper under Tyler.

Although the detective didn't have a warrant when he entered the house three hours after the fire, exigent circumstances justified that entry. "At the time when [the detective] arrived, the house was unsecured and filled with poisonous and explosive chemicals which could escape if allowed to freeze," in the mid-winter cold. In any case, Tyler sanctioned a warrantless entry six hours after a fire to investigate a blaze of suspicious origin, the majority says.

The majority rejects the defendant's contention that the detective needed a warrant since he had come to the house to investigate a "possible drug factory." The detective's subjective intentions have nothing to do with whether exigent circumstances existed, the majority explains. While the detective may have been chosen to supervise the investigation because of his experience with drug-related paraphernalia and chemicals, that same experience made him well-suited to handle disposal of the highly flammable chemicals in the house. The officer's actions make clear that his first priority was getting rid of the chemicals.

Since the detective was properly on the premises, the majority finds nothing wrong with his plain view seizure of chemicals and drug-producing paraphernalia.

Dissenting Judge Oakes would not reach the Tyler point, but would dispose of this case on standing grounds. Emphasizing that some evidence indicates that the defendant may have abandoned the house, he would remand to the trial judge for an evidentiary hearing on this point. If the defendant abandoned the house, he may not have standing to contest the search, Judge Oakes says. (U.S. v. Callabrass, 9/26/79)

Digest of Opinion. A jury convicted Callabrass of charges related to the manufacture and possession of phencyclidine (PCP). Callabrass raises a Fourth Amendment challenge to the seizure of certain drug-making equipment from the scene of a fire.

The evidence indicates that Callabrass, using the name Eugene Jones, arranged in mid-February 1978 to rent a Queens' house from one Frank Mecurio. At about 4 p.m. on February 19, 1978, a fire began in the back bedroom of the house. While one group of firefighters sought to put out the fire, another vented the building by knocking out the windows and also conducted a "primary" search for possible victims. Pursuant to routine fire department procedures, the firefighters also opened up the ceilings, walls and window mouldings to make sure that the fire was not smoldering. The firefighters also later made an extensive secondary search of the entire house, again looking for victims or anybody who might have tried to hide from the fire. This search involved opening closets, and cabinets and looking under the sink and in a clothes hamper. During this search, the firefighters found chemicals, scales and vials in the kitchen and the bedroom where the fire started. Besides that, they found books and papers in the kitchen area. They labeled the fire suspicious and called the police.

Patrolman Shyne arrived on the scene a half hour after the fire department's call. Before the firefighters left, a veteran fireman told Shyne that a dangerous condition existed in the house because of the chemicals. Shyne notified the local police station of the condition of the premises and then attempted to learn from neighbors the identity of the owner.

Shortly thereafter, a number of detectives from the local precinct arrived at the scene. Shyne escorted them through the house. A little while later, someone from the local police station summoned Detective Cassidy of the Queens Narcotics Squad. Cassidy arrived at the house at about 8 p.m., and joined the other officers there. Going through the house, Cassidy noticed pieces of narcotics paraphernalia, including glassine bags, strainers, scales, large plastic bottles labeled "Lactose," assorted vials, beakers and burners. On the floor of the living

0311-1241/79 $00.50

cluding the press from a pretrial suppression hearing. At a newspaper's request, the trial court rescinded the closure order, but it ordered counsel for the paper to attend the hearing and advise the editors on what should and should not be published. This amounted to a "gag order," the higher court says, with the newspaper's counsel acting in effect as a court-appointed censor.

Nebraska Press Association v. Stuart, 427 U.S. 539, 19 Crl. 3193 (1976), indicates that an order such as this cannot stand in the absence of very strong justification. There is nothing in the record of this case to support the order, the court concludes.

The court also notes that, whatever the correct interpretation of Gannett Co., Inc. v. DePasquale, 25 Crl. 3239 (1979), closure orders in New Hampshire are governed by standards set forth in a state case, Keene Publishing Corp. v. Keene District Court, 380 A2d 261, 22 Crl. 2313 (NH 1977) (Keene Publishing Corp. v. Chesire County Superior Court, 9/13/79)

Digest of Opinion. At a pretrial suppression hearing involving robbery and murder cases, the state requested that the public and news media be excluded from the hearing because of the alleged adverse pretrial publicity that might result. The defendants joined the motion, and the trial court issued a closure order. A newspaper publisher then moved to intervene and have the courtroom closure order set aside. The court granted the publisher's motion, but required that counsel for the publisher attend the pretrial hearing, "in order to advise his client • • • so that the publication of the proceedings in these hearings shall not require change of venue • • • or alternative actions by the court." The publisher challenges this order.

In this state the press has been held to have a state constitutional right, though not unlimited, to gather news. Keene Publishing Corp. v. Keene District Court, Opinion of the Justices, 373 A2d 644 (NH 1977). In Keene Publishing Corp. we adopted standards and established a presumption in favor of open judicial proceedings and unsealed court records. Although the trial judge may have relied on one of a number of possible interpretations of Gannett Co., Inc. v. DePasquale, we adhere to the standards earlier set forth, which are unaffected by Gannett.

[Text] The case in its present posture does not, however, present a closure question because the trial judge, upon motion, has now opened the hearing. The real question now is whether the trial court's order constitutes a prior restraint on the press. We are of the opinion that it does and that Nebraska Press Ass'n v. Stuart governs.

The trial court, after properly reopening the hearings, required that plaintiff's counsel advise his client so that any "publication" would not require the court to change venue or consider "alternative actions." Counsel for the newspaper thus became a court appointed "censor" or monitor to control what the paper was to publish. In Nebraska Press Ass'n v. Stuart, the Supreme Court balanced the First and Sixth Amendment rights and concluded that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Id at 559. See also Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 23 Crl. 3089 (1978) and Smith v. Daily Mail Publishing Co., 25 Crl. 3218 (June 26, 1979). Thus the "barriers to prior restraint remain high and the presumption against its use continues intact." Nebraska, at 570. See also ABA Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press, 8-3.1 (Approved Draft, 1978).

Although the order is not a direct "gag" order as in Nebraska, supra, it nonetheless constitutes an implied "gag" order. We find nothing in the record which would support such an order. We find nothing in the record which would support such an order, we therefore hold that the court's order after the re-opening of the hearing was invalid. Nebraska Press Ass'n v. Stuart.

One effective method of avoiding any prejudicial effect of media coverage, while at the same time resolving the conflict between fair trial-free press rights, is to seek the voluntary cooperation of the news media in delaying dissemination of potentially prejudicial information. See ABA Standards, at 8-3.2. • • •

The New Hampshire Fair Trial-Free Press Committee has formulated a procedure that conforms to our policy favoring open judicial proceedings. It provides that when a closure order is contemplated and the news media are present, or indicate an interest in the matter, the court should consider holding an informal conference in which interested parties, including the news media, may be heard. If, after such a hearing or conference, no voluntary agreement is reached, and an order closing a hearing is issued, the court must state for the record its supporting findings of fact. • • • This procedure and the procedures set forth in Keene Pub. Corp., not only protect the defendant's Sixth Amendment right to an impartial trial, N.H. Const., pt. I, art. 15, but preserve the news media's State constitutional right to gather news under New Hampshire Const. pt. I, art. 22. *[End Text]* —Per curiam.

(Keene Publishing Corp. v. Chesire County Superior Court; NH SupCt, 9/13/79)

REPORTER NEED NOT DISCLOSE MATERIAL GATHERED FOR BOOK

Privilege of nondisclosure not limited to newspaper reporters.

Using the balancing test that many courts have employed in the wake of Branzburg v. Hayes, 408 U.S. 665 (1972), the U.S. District Court for the District of Columbia decides that a newsman's privilege protects the materials gathered by a Washington Post reporter for use in a proposed book about the Church of Scientology. Officials of the Church, defendants in a criminal case, sought to subpoena the material for the light it would allegedly throw on FBI searches of two church premises.

Branzburg held that reporters have no First Amendment privilege not to testify before grand juries. But the concurring opinion of Mr. Justice Powell, who cast the crucial fifth vote, has "inspired" other courts to use a balancing test that focuses on the need for the information and its availability from other sources. The information at issue here relates to a briefing for FBI agents prior to the searches. Although the defendants say they have been unable to learn much about the briefing from the agents, the court says that there is no need to subpoena the reporter and that his testimony is "far less than necessary • • •."

En route to its decision, the court rejects the argument that the privilege is unavailable to a writer who gathers information for a book from which he will profit, rather than for a newspaper. It also does not agree with the defendants that the law in this area was somehow changed by the proceedings before single Justices in last year's Myron Farber controversy. See New York Times v. Jascalevich, 23 Crl. 4128, 4130 (opinions of Justices White and Marshall). (U.S. v. Hubbard, 8/27/79)

Digest of Opinion. This court is currently conducting a hearing on a motion to suppress evidence the FBI seized from two Church of Scientology premises in Los Angeles. Allegedly, the reporter has written a proposal for a book concerning the Church, which contains a detailed discussion of the FBI searches and the briefings that preceded them. The defendants contend that it is crucial to obtain knowledge of the pre-search

0011-1341/79/$00.50

briefings and that the reporter is an indispensable witness on the subject. They have been unable to obtain information about the briefings from any other source, they contend. The subpoena at issue commands the reporter to appear to testify at the suppression hearings and to bring with him all writings and materials regarding the search and the FBI's searches.

The Supreme Court has confronted the issue of reporter's privilege on only one occasion. In Branzburg v. Hayes, the Court rules that requiring newsmen to appear and testify before state or federal grand juries did not abridge the freedom of speech and press guaranteed by the First Amendment. But the concurring opinion of Mr. Justice Powell, who cast the deciding vote, has inspired the courts to engage in a case-by-case balancing of interests to determine whether the reporter will be required to testify. The reporter's privilege will be upheld unless the information sought is necessary to a just resolution of the case and cannot be obtained by alternative means. See Carey v. Hume, 492 F.2d 631 (1974).

[Text] The defendants contend that the reporter's privilege does not apply to this case because Mr. Robinson has been subpoenaed regarding a book he is writing for his own personal gain and not for The Washington Post. The Court must reject any distinction on such grounds. First, the fact that the newsgathering is conducted for financial gain is irrelevant. Reporters normally receive salaries for their newsgathering efforts. Such financial gain does not taint the importance of the services to our cherished first amendment goals. Second, the reporter's privilege must encompass all news gathering efforts not simply those for newspapers. "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." Lovell v. City of Griffin, 303 U.S. 444, 450 (1938).

Finally, the defendants contend that the proceedings in New York Times v. Jascalevich, 98 S.Ct. 3055, 3060, 23 CrL 4128, 4130 (1978) have somehow modified the Supreme Court's decision in Branzburg. The refusal of Justices White and Marshall to stay the order of the Supreme Court of New Jersey was plainly not a ruling on the merits. Furthermore, Justice White indicated his belief that the Court had never ruled on the issue whether "the obligation to obey an otherwise valid subpoena served on a reporter is unconditioned upon the showing of special circumstances." 98 S.Ct. at 3060. In the absence of a definitive resolution of this issue, the Court is not bound to follow the precedent of the Supreme Court of New Jersey in In re Farber, 78 N.J. 259, 394 A.2d 330, 24 CrL 2081 (1978).

Accordingly, the reporter is protected from the subpoena power of a criminal defendant unless the information is necessary to a fair hearing and there are no alternative means for access to the information in the reporter's possession.

The information the defendants seek from the reporter concerns a briefing which was attended by nearly 100 FBI agents. Any information in the reporter's possession would be merely hearsay provided from one of the participants to the reporter. The Court has already heard testimony from numerous eyewitnesses to the briefing. The Court has also heard testimony from an FBI agent who testified with the assistance of notes made during the briefing and another agent who testified from notes made within a short period of the briefing. Any testimony the reporter could offer would be merely cumulative and less than the best evidence available. Here plainly are alternative means to obtain information about the briefing, and the testimony of the reporter would be far less than necessary to a fair resolution of this case. Accordingly, the motion of the reporter to quash is granted. *[End Text]* — Rodney, J.

U.S. v. Hubbard; USDC DC, 8-27-79.

GOVERNMENT MUST PRODUCE IMPEACHABLE PRIORS OF ITS WITNESSES ON REQUEST

D.C. Court of Appeals reaffirms earlier opinion

Reaffirming its earlier opinion in this case, 393 A.2d 109 (1978), the D.C. Court of Appeals, on rehearing, concludes that upon defense request the government must produce impeachable convictions of prosecution witnesses. Brady v. Maryland, 373 U.S. 83 (1963), and U.S. v. Agurs, 427 U.S. 97, 49 CrL 2189 (1976), require this result, the court says. Although those cases involved post-trial challenges to prosecutorial failure to disclose exculpatory evidence, they establish a basic premise that the government has an obligation to produce evidence that may be material to guilt or innocence.

By allowing impeachment with prior convictions, see D.C. Code 14-305, Congress has recognized such impeachment as "likely to be material" to the trial determination of guilt or innocence, the court says. "It follows, in the words of Agurs that a defendant is entitled to disclosure [of the impeachable convictions] because 'a substantial basis for claiming materiality exists' . . . ."

The court also concludes that a government witness' juvenile delinquency adjudications must be produced if a trial judge determines that those offenses show bias against the defendant. And the court reaffirms that part of its holding which deemed the local U.S. Attorney office "to know all prior convictions of government witnesses which happen to be listed in FBI rap sheets."

Judge Nebeker concurs, but write separately to make clear his view that the court's ruling on production of impeachable priors of juveniles applies to defense as well as government witnesses. (Lewis v. U.S., 9/20/79.)

Discovery Opinion [Text] The government argues that our [original] order requiring disclosure of all impeachable convictions at trial upon request, is conceptually unsound. The government points out, first, that our principal authority, Brady v. Maryland, and the Supreme Court cases interpreting Brady, e.g., U.S. v. Agurs, and Moore v. Illinois, 408 U.S. 786 (1972), concern retrospective looks at particular evidence withheld by the government; they do not create categories of automatically producible government evidence. . . .

It is here that we part company with the government. Contrary to its second contention, we cannot accept the argument that impeachable convictions are rarely material to guilt or punishment. . . .

We begin from the premise that "impeaching evidence is exculpatory and thus can be material to guilt or punishment" within the meaning of Brady. See Williams v. Dutton, 400 F.2d 797, 800 (5th Cir. 1968). Indeed Congress, by providing for impeachment of witnesses by reference to their prior convictions, has made a legislative finding that such impeachment is likely to be material to the outcome. Consequently, heretofore, federal district court judges, presented with defense motions to produce impeachable convictions of government witnesses, have ordered their disclosure at trial as a matter of due process, citing Brady. . . .

In none of these cases has the court required the defendant as the moving party, to satisfy the test of materiality normally associated with a retrospective Brady-Agurs inquiry, namely materiality to outcome. Instead these courts, in effect, have deemed impeachable convictions to be automatically producible. On the premise that there can be a pretrial ruling under Brady, this abandonment of the material-to-outcome test is necessary because there can be no objective, ad hoc way to evaluate before trial whether an impeachable conviction of a particular government witness will be material to the outcome. No one has that gift of prophecy. To argue that the court can apply a material-to-outcome test before trial is to argue a contradiction. See generally Agurs, at 105-08. It also raises the serious possibility that a defendant may be forced, unfairly, to disclose his or her case before trial in an effort to carry a virtually impossible burden. *[End Text]*

since he secretly held an outside job, the union could properly allocate the work to those who needed it most. In no way could that action be interpreted as a warning to those who opposed the union. On the other hand, in the present case the union was at least partially motivated by the employee's anti-union activities, and the order of the Executive Board denying Melillo seniority could easily influence other employees in the exercise of their § 7 rights.[3]

Therefore, the Board's order is enforced.



Petition of Aaron BARR for a Writ of Habeas Corpus, Petitioner-Appellee,

v.

Robert W. WEISE, Adjutant General, Department of the Army; Stanley R. Resor, Secretary of the Army; Macon A. Hipp, Commanding Officer, Fort McClellen, Respondents-Appellants.

No. 415, Docket 33032.

United States Court of Appeals
Second Circuit.

Argued March 25, 1969.

Decided June 16, 1969.

Proceeding on application by petitioner for a writ of habeas corpus on ground petitioner was entitled to a discharge from the United States Army Reserve as a student for the ministry in Church of Scientology. The United States District Court for the Southern District of New York, Charles H. Tenney, J., 293 F.Supp. 7 granted petitioner's application, and an appeal was taken. The Court of Appeals, Moore, Circuit Judge, held that case would be remanded for appropriate action by Army officials where during pendency of appeal petitioner became a duly ordained minister of the religious sect, rather than merely a divinity student, and thus appeared, under Army regulations, to be entitled to a discharge.

Judgment modified in accordance with opinion and remanded.

1. Armed Services ⇐25

A minister in the Church of Scientology would be considered a minister of a recognized religion for purposes of determining right to discharge from the Army reserve where in absence of rebuttal it appeared that the church was incorporated in New York as a religious corporation, and that it had a substantial membership and a functioning divinity school which ordained its ministers.

2. Habeas Corpus ⇐113(13)

Habeas corpus proceeding would be remanded for appropriate action by Army officials where during pendency of appeal from denial of relief petitioner became a duly ordained minister of a religious sect, rather than merely a divinity student, and thus appeared, under Army regulations, to be entitled to a discharge.

Patricia M. Hynes, Asst. U. S. Atty., New York City (Robert M. Morgenthau, U. S. Atty., for the Southern District of New York, Alan B. Morrison and Michael D. Hess, Asst. U. S. Attys., New York City, on the brief), for respondents-appellants.

David Blasband, New York City (Linden & Deutsch, Peter C. Clapman, New York City, on the brief), for petitioner-appellee.

Before WATERMAN, MOORE and FRIENDLY, Circuit Judges.

3. The union also urges Texas Co. v. NLRB, 198 F.2d 540 (9 Cir. 1952), discussed *supra*, to support its argument here that § 8(b) (2) is not violated. We have already stated our reasons for not following that case, however, and need not restate them here.

MOORE, Circu

The petitioner 1966 enlisted for a member of th Reserve. He ser ly some eighteen and upon separat Reserves. In Ma mulgated new cr for discharge if ship"; (b) "Reli Supported by a employer in Colu in July 1967 sou he was the sales House, Inc." Th Thereafter in S tioner reapplied theory that it sh the viewpoint of ty, or Interest." decided that pet "for the benefit o than NIHSI" and was "not critical main of NIHSI."

Petitioner then and in Novembe for a discharge o had commenced Church of Scientol ister." His enrol by a letter from t Thomas, President also stated that " tology of New Yo nized religious co Articles of the Law of New Yo 1955.

The Army, acti of the Chief of C January 1968 tha quirements for ap men to the Army ble to discharge fr Furthermore, said Chief of Chaplai Center is not liste Directory publishe of Health, Educat currently recogniz ment" and that a

MOORE, Circuit Judge:

The petitioner, Aaron Barr, in May 1965 enlisted for a period of six years as a member of the United States Army Reserve. He served his period (actually some eighteen weeks) of active duty and upon separation was assigned to the Reserves. In March 1967 the Army promulgated new criteria and procedures for discharge if (a) "Dependency/hardship"; (b) "Religious reasons" existed. Supported by a letter from his then employer in Columbus, Ohio, petitioner in July 1967 sought discharge because he was the sales manager for "Varsity House, Inc." This request was denied. Thereafter in September 1967 petitioner reapplied for discharge on the theory that it should be granted "from the viewpoint of National Health, Safety, or Interest." In October the Army decided that petitioner's request was "for the benefit of the Company rather than NHSI" and that his employment was "not critical nor essential to the main of NHSI."

Petitioner then moved to New York and in November 1967 again applied for a discharge on the ground that he had commenced his "studies in The Church of Scientology to become a Minister." His enrollment was confirmed by a letter from the Reverend Robert H. Thomas, President of the Church, who also stated that "The Church of Scientology of New York was a duly recognized religious corporation pursuant to Articles of the Religious Corporation Law of New York," incorporated in 1955.

The Army, acting through the office of the Chief of Chaplains, concluded in Janugry 1968 that the educational requirements for appointment of clergymen to the Army should also be applicable to discharge from the Army Reserve. Furthermore, said the office of the Chief of Chaplains, "The Scientology Center is not listed in the Educational Directory published by the Department of Health, Education and Welfare or currently recognized by that Department" and that additional information was desired to enable it to ascertain whether the educational requirements for an Army Chaplain had been met. But all this is quite irrelevant since petitioner has indicated quite convincingly that he wishes no part of the Army, even as a Chaplain in the Reserve.

The Army reviewed petitioner's previous applications ("request denied 5 Oct 67. Em encl May 65—ETS 17 May 71—comp! ACDUTRA 28 Dec 65—Asgn Anl Tng Con Gp 28 Dec 65 due to ocupation [sic].") and advised petitioner in February 1968 that as a theological student "your case does not meet the requirements for discharge from the United States Army Reserve."

In July 1968 petitioner decided to obtain a more sympathetic understanding of his situation from the federal courts which so frequently are forced to become the final arbiters in many divers fields. This he did via the popular habeas corpus approach to prevent his unlawful detention by the Army and to obtain a judicial review of the Army's denial of a discharge despite the fact that he possessed a "status as a full-time student of the ministry in the Church of Scientology."

The trial court analyzed the appropriate Army regulations and the H. E. W. criteria in its "Educational Directory" and concluded that, because the exclusion of the Academy of Scientology (the Church's alleged Divinity School) from the "approved list" was the sole basis for the denial, "the Army capriciously neglected to consider either the standards set by the Academy of Scientology or the established character of the Church of Scientology of New York." In support of this conclusion the court found that:

> "* * * the Church of Scientology of New York is a duly recognized religious corporation under the laws of the State of New York. It has been in existence since November 15, 1955. The membership of the Church of Scientology throughout the United States has grown to between 75,000 and 100,000 parishioners. It is estl-

mated that there are approximately 500,000 members in the various Churches of Scientology throughout the world. The duties and functions of its ministers are similar to those of the clergy of other religious denominations. Their ministers hold services every Sunday, officiate at funerals, christenings and weddings, counsel their parishioners, and conduct confessionals. The Church has three ministers duly licensed by the State of New York as well as other ministers licensed by other states. There are some 50 full-time students in the Academy of Scientology who devote approximately 35 to 40 hours per week to their training. Their course of study includes instruction in the basic tenets of their Church and its system of ethics, and on the methods of counseling parishioners as to their personal, spiritual and ethical affairs. In order to qualify as a minister, students must pass oral and written examinations."

Apparently all previous proceedings and decisions have become academic because this court has just been advised that the petitioner no longer is Private Barr but the Reverend Barr; that thanks to the decision below he was able to complete his ministerial training in one year; and that, since his appointment effective February 14, 1969 as a Chaplain of the Church in New York, the "Reverend Barr is now performing the functions of a minister in the Church."

This somewhat rapid change of status therefore requires a slightly different judicial approach. No longer are we dealing with a mere divinity student but with a full-fledged minister. The only question which remains is: Is petitioner a minister of a recognized religion?

There is no need to repeat the interesting comments and the results of the exhaustive research made by Judge Skelly Wright to be found in his very able opinion in Founding Church of Scientology of Washington, D. C. et al. v. United States of America, 409 F.2d 1146, D.C. Cir., 1969 (February 5, 1969). He, writing for the majority, concluded, as we plagiaristically conclude, "On the basis of the record before us, the Founding Church of Scientology has made out a *prima facie* case that it is a *bona fide* religion and, since no rebuttal has been offered, it must be regarded as a religion for purposes of this case." Judge Wright accepted the same factual background relied upon by Judge Tenney here.

However, we also adopt Judge Wright's caveat and "We do not hold that the Founding Church is for all legal purposes a religion." In this reservation we are reinforced by the decision of the United States Court of Claims in Founding Church of Scientology v. United States, 7 CCH 1968 Stand. Fed. Tax Rep., ¶ 7927, August 7, 1968, holding that the Church was not exempt from income taxes because of its substantial nonreligious and commercial activities.

[1] Nor is it necessary to encumber the law reports with repetitions or elaborations of the discussions as to what constitutes a religion to be found in United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1943) and United States v. Seeger, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965). Suffice it to say that it is not for the Army, the H. E. W., the American jury, or even the courts themselves to bestow recognition or non-recognition *qua* religion upon any particular religious sect. For our purposes and with respect to the Reverend Barr, it is enough, absent rebuttal, that the Church is incorporated in New York as a religious corporation, that it has a substantial membership and a functioning divinity school which ordains its ministers.

It may well be that courts and administrative agencies will have to continue to cope with mail fraud and tax exemption situations created by false prophets under the guise of pseudo-religions. The necessity of protecting a public, particularly gullible when a religious element is injected, against quack preach-

WILLIAM J

ings, literature and will require such a and Drug Adminis watchful. It is not the benefits, or lack come to the memb from being audited their hands two tin an electrical apparatu which the Reverend these E-meters, now of Judge Wright's d future. For the pres Barr's status vis-a-vis Tenney decreed that charged from the U Reserve forthwith." based upon petitioner divinity student. Bec sentation now made t ter, the following para 125-10 would appear to

"b. *Religious reaso*

(1) *Regular or duly of religion.*

Applications for di on religious reasons ular or duly ordaine ligion will be susta appropriate documen follows:

(a) Statement fr ate authority of gious sect, or o the enlisted mem requirements for regular or duly o of religion."

[2] Despite his perio studies and his now bec ter, petitioner still is Army Reserve. His sta the Army and the Distr their rulings was that of ist "preparing for the mi ognized [assumed for pu decision] theological or d 32 C.F.R. § 125.5(b). U cumstances such a Reser transferred to the Stan However, if he wishes to tion from service," 32 C.

ings, literature and mechanical devices will require such agencies as the Food and Drug Administration to be ever watchful. It is not for us to prejudge the benefits, or lack thereof, which may come to the members of the Church from being audited while holding in their hands two tin soup cans linked by an electrical apparatus. The use, if any, which the Reverend Barr may make of these E-meters, now released by virtue of Judge Wright's decision, is for the future. For the present is the Reverend Barr's status vis-a-vis the Army. Judge Tenney decreed that "petitioner be discharged from the United States Army Reserve forthwith." This decision was based upon petitioner's then status as a divinity student. Because of the representation now made that he is a minister, the following paragraphs of Circular 135-10 would appear to apply:

"b. *Religious reasons.*

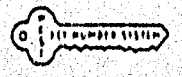
(1) *Regular or duly ordained minister of religion.*

Applications for discharge based upon religious reasons to become a regular or duly ordained minister of religion will be sustantiated [sic] by appropriate documentary evidence as follows:

> (a) Statement from the appropriate authority of the church, religious sect, or organization that the enlisted member has met the requirements for recognition as a regular or duly ordained minister of religion."

[2] Despite his period of ministerial studies and his now becoming a minister, petitioner still is enrolled in the Army Reserve. His status at the time the Army and the District Court made their rulings was that of a Ready Reservist "preparing for the ministry in a recognized [assumed for purposes of this decision] theological or divinity school," 32 C.F.R. § 125.5(b). Under these circumstances such a Reservist "shall be transferred to the Standby Reserve." However, if he wishes to seek "Separation from service," 32 C.F.R. § 561.37, and "Discharge from Reserve duty status," § 561.37(b), he must do so pursuant to this section. "Authority to discharge," § 561.37(c), is delegated to certain officers, and the procedure to obtain such discharge is set forth in § 561.37 in minute detail. Thus at the time of the decision below, § 561.37(c)(16) would have been applicable but because petitioner has now become "a regular or duly ordained minister of religion," § 561.37(c)(15) would appear to be the paragraph controlling petitioner's destiny. Therefore, because the Army did not have the facts now presented or the District Court's (and our) views as to "Scientology" as a religion before it when passing upon petitioner's case, we remand for appropriate action by respondents in accordance with this opinion and, to this extent, modify the judgment by the court below, discharging petitioner forthwith.

Judgment modified.



WILLIAM H. SILL MORTGAGES, INC., a Michigan corporation, Plaintiff-Appellee,

v.

The OHIO CASUALTY INSURANCE COMPANY, an Ohio corporation, Defendant-Appellant.

No. 18202.

United States Court of Appeals
Sixth Circuit.
June 11, 1969.

Action to recover on fidelity bond. The United States District Court for the Eastern District of Michigan, Southern Division, Stephen J. Roth, J., entered judgment on jury verdict in favor of plaintiff for full amount of bond and defendant appealed. The Court of Appeals, Cecil, Senior Circuit Judge, held that where president and

Judge Holtzoff's cogent observation respecting the non-crucial nature of the listed inventive entity is of particular interest here:

> [T]he patent law does not regard as crucial the question whether an invention is the product of several joint inventors, or of a sole inventor. A misjoinder or nonjoinder of joint inventors, does not invalidate a patent. An error in that respect may be corrected, either by the Commissioner of Patents or by the Court, by an amendment striking out or adding the name of an inventor, 35 U.S.C. §§ 116, 256. [*Monsanto Co. v. Kamp*, 269 F.Supp. 818, 824, 154 USPQ 259, 262 (D.D.C. 1967).]

CONCLUSION

The constitutional objectives sought by the patent laws would be best served by a reading of 35 U.S.C. § 116 sufficiently expansive to justify the correction sought in the instant continuation application. The same correction for the same reason, can with respect to U.S. Patent No. 3,691,069 be effected by means of the instant reissue application filed under the remedial reissue provision, 35 U.S.C. § 251 (*supra*, note 7).[16]

Accordingly, we reverse the District Court's order and remand the case to the District Court, with directions to enter an order authorizing the Commissioner of Patents and Trademarks to issue patents on the involved applications upon compliance with all applicable requirements of law.

It is so ordered.

16. Stoddard could have effected the correction under 35 U.S.C. § 256 (*supra*, note 5), but chose to follow 35 U.S.C. § 251.

564 F.2d 567

In re POSSIBLE VIOLATIONS OF 18 USC 371, 641, 1503.

Appeal of Arthur MAREN.

No. 77-1704.

United States Court of Appeals, District of Columbia Circuit.

Argued Aug. 22, 1977.

Decided Sept. 2, 1977.

The United States District Court for the District of Columbia, William B. Bryant, Chief Judge, held religious worker in contempt for refusing to answer questions put to him in the course of a grand jury investigation, and religious worker appealed. The Court of Appeals held that religious worker was not entitled, by virtue of his alleged status as minister of church, to refuse to answer questions before grand jury until government established that it was investigating serious crime, that witness was likely to have relevant information, that there was substantial connection between such information and governmental interest involved, and that means of obtaining information were no more drastic that necessary to forward governmental interest.

Affirmed.

Spottswood W. Robinson, III, Circuit Judge, concurred specially and filed opinion

1. Grand Jury ⇐36

A newsman can claim no general immunity, qualified or otherwise, from grand jury questioning; on the contrary, like all other witnesses, he must appear and must normally answer. U.S.C.A.Const. Amend 1.

2. Grand Jury ⇐36

Religious worker was not entitled, by virtue of his alleged status as minister of church, to refuse to answer questions before grand jury until government established that it was investigating serious crime, that witness was likely to have relevant information, that there was substantial connection between such information and governmental interest involved, and that means of obtaining information were no more drastic than necessary to forward governmental interest. U.S.C.A.Const. Amend. 1.

Appeal from the United States District Court for the District of Columbia (Misc. No. 77-0171).

Leon Friedman, New York City, Bar of the Court of Appeals of pro hac vice by special leave of Leonard J. Koenick, Washington, on the brief, for appellant.

Kenneth M. Robinson, Washington also entered an appearance for

Judith Hetherton, Asst. U. S. Washington, D. C., with which bert, U. S. Atty., Carl S. Rist W. Ogren, Asst. U. S. Attys., D. C., were on the brief, for

John D. Grad and Philip Alexandria, Va., filed a brief the Church of Scientology as

Eugene R. Scheiman, New filed a brief on behalf of Council of Churches of Christ States of America as amicus

Before ROBINSON, ROBINKEY, Circuit Judges.

Opinion per curiam.

Concurring opinion filed by WOOD W. ROBINSON, III, C

PER CURIAM:

Appellant is Arthur Maren Public Relations for the Church tology in the United States.

1. The parties disagree as to why was subpoenaed solely because contest the search warrant or be sistant United States Attorney a he was the Director of Public R Guardian's Office and as such p sess information relevant to the

grand jury until government established that it was investigating serious crime, that witness was likely to have relevant information, that there was substantial connection between such information and governmental interest involved, and that means of obtaining information were no more drastic than necessary to forward governmental interest. U.S.C.A.Const. Amend. 1.

Appeal from the United States District Court for the District of Columbia (D.C. Misc. No. 77 0171).

Leon Friedman, New York City, of the Bar of the Court of Appeals of New York, pro hac vice by special leave of court, with Leonard J. Koeniek, Washington, D. C., was on the brief, for appellant.

Kenneth M. Robinson, Washington, D. C., also entered an appearance for appellant.

Judith Hetherton, Asst. U. S. Atty., Washington, D. C., with whom Earl J. Silbert, U. S. Atty., Carl S. Rauh and Robert W. Ogren, Asst. U. S. Attys., Washington, D. C., were on the brief, for appellee.

John D. Grad and Philip J. Hirschkop, Alexandria, Va., filed a brief on behalf of the Church of Scientology as amicus curiae.

Eugene R. Scheiman, New York City, filed a brief on behalf of The National Council of Churches of Christ in the United States of America as amicus curiae.

Before ROBINSON, ROBB and WILKEY, Circuit Judges.

Opinion per curiam.

Concurring opinion filed by SPOTTSWOOD W. ROBINSON, III, Circuit Judge.

PER CURIAM:

Appellant is Arthur Maren, Director of Public Relations for the Churches of Scientology in the United States. He appeals from an order of the District Court holding him in contempt for refusing to answer three questions put to him in the course of a grand jury investigation of criminal conduct charged to members of the Church. For the reasons discussed below, we affirm.

I

The background of this dispute can be stated briefly. The Government alleges that two members of the Church, Gerald Wolfe and Michael Meisner, using false Government identification, entered the United States Courthouse in the District of Columbia on three occasions in order to surreptitiously copy Church-related documents in the United States Attorney's offices. Wolfe pleaded guilty to false use of a Government seal; Meisner entered into discussions with the United States Attorney's Office concerning criminal violations assertedly committed by himself and others on behalf of the Church.

In the course of his conversation with the prosecutors, Meisner stated that high ranking church officials were involved in copying of Government documents, electronic eavesdropping on Internal Revenue Service officials and concoction of false testimony for Gerald Wolfe to give to the grand jury. Based largely on the information furnished by Meisner, the Government obtained warrants to search premises of the Guardian Church in Los Angeles and the Founding Church in the District of Columbia. During the execution of the warrant in Los Angeles, an Assistant United States Attorney served appellant with a Jane Doe subpoena to appear as a witness before the grand jury in the District of Columbia.[1]

Appellant subsequently appeared before the grand jury on four separate occasions—twice on July 26, 1977 and twice on July 29, 1977. On all four occasions he refused to

1. The parties disagree as to whether appellant was subpoenaed solely because he appeared to contest the search warrant or because the Assistant United States Attorney ascertained that he was the Director of Public Relations of the Guardian's Office and as such might well possess information relevant to the investigation. There is nothing in the record that compels either conclusion, though on balance the latter version appears more likely. We need not resolve this dispute, since in our view appellant was obliged in either event to appear as a witness and answer the three questions at issue here.

answer any questions other than those soliciting his name, address, and employment. At no time did he claim the privilege against self-incrimination; indeed, he disdains that privilege as a defense.

Following appellant's third grand jury appearance and after concluding that he had failed to assert any legally cognizable privilege, the District Court ordered him to testify. Upon his return to the grand jury, appellant was asked the following three questions:

1) Do you know Gerald Wolfe?[2]

2) [D]id you . . . discuss with anyone plans for Gerald Wolfe to develop an untrue cover story with regard to his entry into the United States Courthouse on June 11th, 1976 for him to tell . . . [to the] Grand Jury . . . ?[3]

3) [D]id you participate in discussions with anyone in the nature of plans to enter [an Internal Revenue Service] conference room . . . for the purpose of planting a listening device with which to monitor conversations of [Internal Revenue Service] officials . . . [and] did you ever read or discuss a transcript of discussions of officials of the Internal Revenue Service come at by means of the bugging of a conference room . . . ?[4]

Appellant's refusals to answer the first two questions were based on an asserted First Amendment privilege to resist inquiry "into the internal structure of [his] church, its religious tenets or . . . information relating to [his] confidential relationships with persons in the course of the performance of [his] duties . . . "[5] until the Government established that there was probable cause to believe he possessed relevant information, that the information could not be obtained from other sources, and that the crimes being investigated were of a serious nature.[6] In response to the two-part third question, appellant stated that the inquiry was an attempt to extract information in order to construct a criminal case against him, and as such amounted to an abuse of legal process and a violation of the doctrine of separation of powers; consequently, he refused to answer until assurances were given that the information would not be disclosed to the Executive Department.[7] The District Court concluded that appellant's continued refusal to answer these questions constituted contempt of court, and pursuant to 28 U.S.C. § 1826(a)[8] ordered him confined until he was willing to testify, the period of confinement not to exceed the lesser of the term of the grand jury or eighteen months.[9]

II

The parties agree that the only issue before us is whether appellant was privileged to refuse to answer the three questions put to him during his fourth and final grand jury appearance. As we have stated, on that occasion appellant asserted two privileges—a First Amendment privilege and a separation-of-powers privilege. Since we were informed at oral argument that appel-

2. Joint Appendix (J.App.) 130.

3. J.App. 133.

4. J.App. 135-136.

5. J.App. 132.

6. J.App. 131-133, 134-135.

7. J.App. 137.

8. 28 U.S.C. § 1826(a) provides in relevant part:
(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify . . . the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony . . . No period of such confinement shall exceed the life of—
1) the court proceedings, or
2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred but in no event shall such confinement exceed eighteen months.

9. J.App. 187.

lant has abandoned h
ers argument, we will

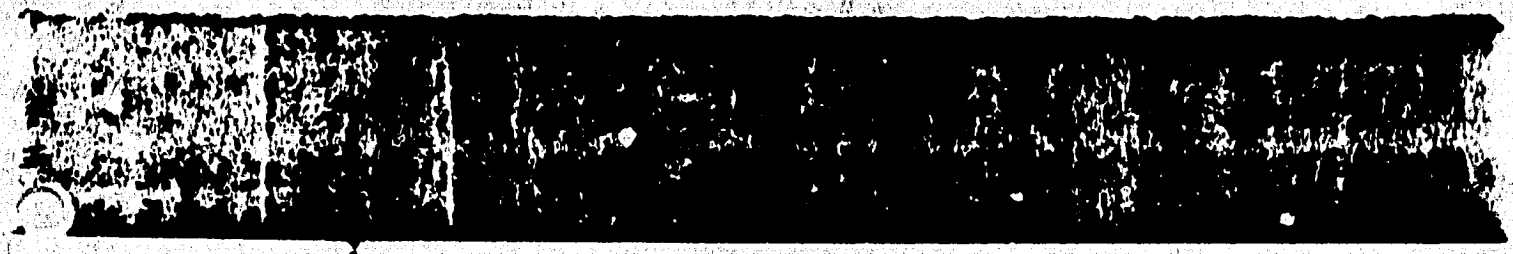
There remains, the
whether appellant jus
First Amendment in s
to testify. Here, too,
ed from his previous po
contends, as he did be
for First Amendment
premise that the Gover
religious beliefs and c
he now makes the broa
a minister he is privile
Amendment to refuse
tion until the Governm
is investigating serious
witness called, is likel
information; 3) there i
nection between the
and the governmental
and 4) the means of ob
tion are no more drasti
forward the governme
pellant argues that ther
ing that he was likely
information or that th
not be obtained from ot

Appellant relies aln
Branzburg v. Hayes,[12]
broad First Amendment
that in *Branzburg* the S
that newsmen are prot
jury questioning unless
meets the preconditions
and that the First A
similar protection for rel
workers.

10. On appeal appellant se
claim. He argues that b
circumstances of this c
was required to establish
grand jury's questions w
vestigation. Brief for Ap
know of no such require
appellant has been fully i
jury's mission and the re
tions to the grand jury's i
puted and indisputable.

11. Brief of Appellant at 2

12. 408 U.S. 665, 92 S.Ct.
(1972)



ns in the course of the
is] duties . . . ."[5] an-
nt established that there
se to believe he possessed
ion, that the information
ined from other sources,
s being investigated were
re.[6] In response to the
uestion, appellant stated
as an attempt to extract
r to construct a criminal
and as such amounted to
rocess and a violation of
ration of powers; conse-
l to answer until assur-
that the information
closed to the Executive
District Court concluded
ntinued refusal to answer
onstituted contempt of
28 U.S.C. § 1826(a)[7]
ed until he was willing
od of confinement not to
f the term of the grand
onths.[8]

II

e that the only issue be-
appellant was privileged
the three questions put
fourth and final grand
As we have stated, on
llant asserted two privi-
endment privilege and a
rs privilege. Since we
ral argument that appel-

. . . the court, upon
when such refusal is duly
vention, may summarily or
nt at a suitable place until
witness is willing to give
. . . No period of such
exceed the life of—
roceedings, or
the grand jury, including
re which such refusal to
order occurred but
ste—confinement exceed

lant has abandoned his separation-of-powers argument, we will not address it.[10]

There remains, then, only the question whether appellant justifiably invoked the First Amendment in support of his refusal to testify. Here, too, appellant has departed from his previous position. He no longer contends, as he did before the grand jury, for First Amendment protection on the premise that the Government inquired into religious beliefs and confidences. Instead, he now makes the broad contention that as a minister he is privileged under the First Amendment to refuse to answer *any* question until the Government establishes: 1) it is investigating serious crime; 2) he, as the witness called, is likely to have relevant information; 3) there is a substantial connection between the information sought and the governmental interest involved; and 4) the means of obtaining the information are no more drastic than necessary to forward the governmental interest.[11] Appellant argues that there has been no showing that he was likely to possess relevant information or that the information could not be obtained from other sources.

Appellant relies almost entirely upon *Branzburg v. Hayes*,[12] as the basis for his broad First Amendment claim. He asserts that in *Branzburg* the Supreme Court held that newsmen are protected from grand jury questioning unless the Government meets the preconditions referred to above, and that the First Amendment requires similar protection for religious officials and workers.

Appellant's view of the constitutional protection appropriate for newsmen, though wholly unsupported by the holding in *Branzburg* is not without adherents. Dissenting in *Branzburg*, Mr. Justice Stewart, joined by two other members of the Court, argued that "when a reporter is asked to appear before a grand jury and reveal confidences, . . . the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information."[13]

The *Branzburg* majority, however, rejected that formulation in clear and unmistakable terms.[14] In their view, its adoption would frustrate the historic role of the grand jury in determining probable violations of law.[15] Further, its recognition would needlessly "embroil[] [courts] in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance . . . ."[16] These considerations "dispose[d] of the reporters' claims that preliminary to requiring their grand jury appearance, the State must show that . . . [reporters] possess relevant information not available from other sources . . . ."[17]

The *Branzburg* decision did not leave newsmen completely without protection from indiscriminate probing for news sources. In particular, the Court observed

10. On appeal appellant seeks to interject a new claim. He argues that because of the unusual circumstances of this case, the Government was required to establish by affidavit that the grand jury's questions were relevant to its investigation. Brief for Appellant at 33-37. We know of no such requirement. In any event, appellant has been fully informed of the grand jury's mission and the relevance of the questions to the grand jury's investigation is undisputed and indisputable.

11. Brief of Appellant at 23.

12. 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).

13. *Branzburg v. Hayes*, *supra* note 12, 408 U.S. at 743, 92 S.Ct. at 2681, 33 L.Ed.2d at 676 (footnotes omitted).

14. *Id.* at 690, 92 S.Ct. at 2651, 33 L.Ed.2d at 644-645.

15. *Id.* at 701-702, 92 S.Ct. at 2666-2667, 33 L.Ed.2d at 651-653.

16. *Id.* at 705, 92 S.Ct. at 2669, 33 L.Ed.2d at 653.

17. *Id.* at 701, 92 S.Ct. at 2666, 33 L.Ed.2d at 651.

that official harassment of the press undertaken solely to disrupt a reporter's relationship with news sources would clearly be subject to judicial control.[18] In a separate opinion, Mr. Justice Powell, who also concurred in the opinion of the Court, emphasized and elaborated upon this aspect of the majority opinion:

> If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.[19]

[1] We conclude that *Branzburg* squarely rejected the very privilege appellant asserts that it established. A newsman can claim no general immunity, qualified or otherwise, from grand jury questioning. On the contrary, like all other witnesses, he must appear and normally must answer. If the grand jury's questions are put in bad faith for the purpose of harassment, he can call on the courts for protection.

[2] It follows that appellant's parallel claim of a blanket religious-worker's privilege must fail. A minister, like a newsman, has no general right to resist all questioning; "like all other witnesses," appellant is "not . . . in a position to litigate at the threshold the [Government's] very authority to subpoena him."[20] Thus, assuming arguendo that Scientology is a religion within the meaning of the First Amendment and that appellant is a minister, we must deny appellant's sweeping assertion that solely by virtue of his status as a minister of the Church he may refuse all questioning until the Government satisfies the conditions upon which he insists. In light of *Branzburg*, a contrary holding would sacrifice the essential societal interest in the detection and prosecution of crime without advancing any important First Amendment interest.

Of course, a minister, like a newsman, is free to seek court protection from official harassment. Appellant, however, no longer contends that the three questions inquire into religious beliefs or information obtained in the course of his religious duties. Moreover, there can be no claim whatsoever that the questions are asked solely for purposes of harassment. We hold that under these circumstances appellant was not entitled to invoke the protection of the First Amendment, and the judgment of the District Court is therefore

Affirmed.

SPOTTSWOOD W. ROBINSON, III, Circuit Judge, concurring:

I join in the court's disposition of this appeal, and generally in the court's opinion as far as it goes. I believe it helpful, however, to point out the limits of what we today decide.

Appellant asserts a privilege both broad in application and substantial in its impositions upon the Government. The court, correctly in my view, declines to create a privilege generally available to religious officials and workers to refuse grand jury questions of any type unless and until the Govern-

18. *Id* at 707-708, 92 S.Ct. at 2669-2670, 33 L.Ed.2d at 653

19. *Id* at 710, 92 S.Ct. at 2671, 33 L.Ed.2d at 656 (footnote omitted)

20. *Id* at 710 n.*, 92 S.Ct. at 2671 n.*, 33 L.Ed.2d at 656 n.* (Powell, J., concurring)

ment has met certain p
tions.[1] With the concess
pellant, he would not be
thus no one has now to ad
of—a privilege narrower
less stringent in its burde
Government must show t

In subscribing to the hol
I do not imply that one a
grand jury might not h
qualified privilege to d
some types of questions,
quiring into religious belie
es.[2] I would not rule o
that some grand jury que
interfere with the free ex
as to warrant some measu
tection, even absent an
faith.[3] *Branzburg*,[4] after
stantial part upon a judg
disclosure of news source
relevant grand jury que
significantly constrict th
news.[5] More serious i
First Amendment interest
correspondingly greater pr

1. The four conditions for w
tends are discussed in the
text accompanying note 11.
requirements were urged b
dissenting opinion in *Branz*
U.S. 665, 743, 92 S.Ct. 2646
626, 676-677 (1972), but w
majority of the Supreme Co

2. The concurring opinion
who was also the fifth men
burg majority, rejects an a
applicable First Amendmen
porters, but does suggest c
tion of newsmen in some s
es. 408 U.S. at 710 & n.*,
n.*, 33 L.Ed.2d at 656 & n.
Stewart in dissent, Justice P
ly presume against a privile
put the burden on the news
the specific First Amendme
to vindicate outweigh the g
est in effective functioning
grand jury investigation.
States v. Liddy, 155 U.S.App
F.2d 586, 587 (1972) (separa
enthal, J.).

3. The First Amendment impl
mental intrusion into religio
example, might be stronger

ment has met certain preordained conditions.[1] With the concessions made by appellant, he would not be benefited by—and thus no one has now to adjudge the efficacy of—a privilege narrower in its scope and less stringent in its burden as to what the Government must show to overcome it.

In subscribing to the holding of the court, I do not imply that one appearing before a grand jury might not have some sort of qualified privilege to decline to answer some types of questions, such as those inquiring into religious beliefs and confidences.[2] I would not rule out the possibility that some grand jury questioning might so interfere with the free exercise of religion as to warrant some measure of judicial protection, even absent an allegation of bad faith.[3] *Branzburg*,[4] after all, rested in substantial part upon a judgment that forced disclosure of news sources in response to relevant grand jury questions would not significantly constrict the free flow of news.[5] More serious interference with First Amendment interests might call for correspondingly greater protection.

We need not, of course, pass on the validity of a privilege of greater qualification than that suggested by appellant. Indeed, our duty as judges is to refrain from constitutional pronouncements that are not a matter "of strict adjudicative necessity."[6] What we decide, and all we decide, is that appellant's status as a minister in the Church of Scientology does not by itself privilege him to refuse—until the Government satisfies at the threshold a stringent four-part test—to answer the three questions put to him, which from aught that appears do not implicate free exercise values.

1. The four conditions for which appellant contends are discussed in the court's opinion in text accompanying note 11. Nearly the same requirements were urged by Justice Stewart's dissenting opinion in *Branzburg v. Hayes*, 408 U.S. 665, 743, 92 S.Ct. 2646, 2681, 33 L.Ed.2d 626, 676-677 (1972), but were rejected by a majority of the Supreme Court.

2. The concurring opinion of Justice Powell, who was also the fifth member of the *Branzburg* majority, rejects an automatic, broadly-applicable First Amendment privilege for reporters, but does suggest case-by-case protection of newsmen in some special circumstances. 408 U.S. at 710 & n.*, 92 S.Ct. at 2671 & n.*, 33 L.Ed.2d at 656 & n.*. Unlike Justice Stewart in dissent, Justice Powell would initially presume against a privilege, and thus would put the burden on the newsman to show that the specific First Amendment values he seeks to vindicate outweigh the governmental interest in effective functioning of the particular grand jury investigation. *Id.*; see *United States v. Liddy*, 155 U.S.App.D.C. 382, 383, 478 F.2d 586, 587 (1972) (separate opinion of Leventhal, J.).

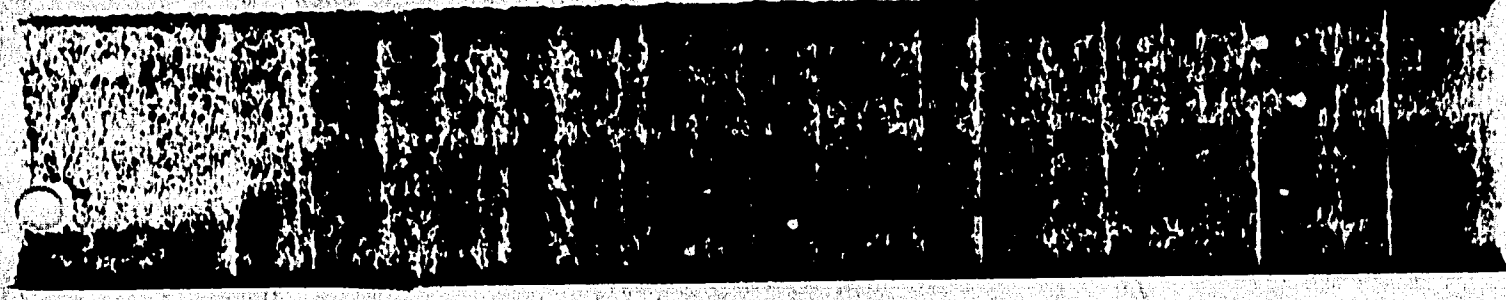
3. The First Amendment implications of governmental intrusion into religious confidences, for example, might be stronger than the "consequential, but uncertain" effects of intrusion into newsman-informant confidences. *Branzburg v. Hayes*, *supra* note 1, 408 U.S. at 690, 92 S.Ct. at 2661, 33 L.Ed.2d at 644-645. The forced breach of informant confidences might be at least one step attenuated from the First Amendment interest in the free flow of news, while religious confidences arguably are directly protected by the Free Exercise Clause.

Because appellant has not attempted to make out a prima facie showing of bad faith or abuse of the grand jury, although he occasionally hints at such concerns, we need not determine how a district court should respond to such a showing. Accordingly, I do not subscribe to the dicta in notes 1 and 10 of the court's opinion.

4. *Branzburg v. Hayes*, *supra* note 1.

5. 408 U.S. at 690, 693-694, 92 S.Ct. at 2661, 2662-2663, 33 L.Ed.2d at 644-645, 646-647.

6. *Langston v. Johnson*, 156 U.S.App.D.C. 5, 7, 478 F.2d 915, 917 (1973); see *Ashwander v. TVA*, 297 U.S. 288, 346-347, 56 S.Ct. 466, 484, 80 L.Ed. 688, 711 (1936) (Brandeis, J., concurring).



rentals against the "premium"
This would permit Midler
is cost of receiving "premium"
the terms of the leases under
remium" rentals are due.

d believe "premium" rentals
cond definition were shown in
consequently need not decide
cost might be amortized over
the initial leases. In *Dick*
ommissioner [53-1 USTC ¶ 9123],
ted the rule governing the
roof on the availability of

ayer claiming a deduction has
of bringing himself within the
statute authorizing such relief.

67 (3d Cir. 1953). To support
Midler was obliged under
prove that a portion of the
ial terms was "premium."
Midler relied principally
Hawley E. Van Swall who
erning the fair rental value
buildings as of 1961, the date
He apparently calculated the
lue of the buildings during
the initial lease terms. We
however, that Van Swall's
be fairly read as indicating
value of the buildings during
periods. Thus, Van Swall's
uld not support a conclusion
ally specified in the leases for
periods were at a level which,
sor in the open market would
similar options independent of
ntals fixed in the initial terms.
the record has not revealed
e which would support such

sence of evidence concerning
lue during the renewal periods,
tention that "premium" rent
g the initial terms must be
use the rentals could have been
pensatorily low rentals during
periods. Even if the rentals
lease terms were above fair
nd the renewal rents were at
possible that the higher initial
the substantial value to the
three consecutive options.
t its burden of estab-
the possibility of re-
market nor the value of the
ted for any amount by which
the initial periods may have
et value and therefore failed

to prove that the initial lease terms did in fact call for "premium" rents.

[*Conclusion*]

Furthermore, there was evidence that even if the lessee may have been obligated to pay "premium" rents during the initial periods, Midler itself may not have paid any additional costs to acquire the property in 1961. Carl Brookman, a real estate broker, engineer, and also an adjacent developer, testified that, due to the outstanding renewal options, the property was not salable between 1959 and 1961. He stated that the options were an unfavorable encumbrance on the buildings which "are in a desirable location and appreciating in value all the time." Because of the options, the leases, therefore, were not in his opinion "premium." Brookman regarded "the low rental [during the renewal periods] as greatly affecting and diminishing the value" of building number five, which he used as an example for the General Electric complex. The initial term, he testified, would command a higher rental because of the appended options outstanding in favor of General Electric.

We believe that Midler did not meet its burden of establishing that it incurred additional cost in purchasing the property because of the right to receive rent in excess of fair rental value during the initial lease terms.[1] Therefore, we need not decide whether the costs of acquiring "premium" rentals may be amortized over the period of the initial leases. Midler is restricted to depreciation deductions over the useful lives of the buildings calculated on the basis of the entire purchase price.

The decision of the Tax Court will be affirmed.

[¶ 9651] Church of Scientology of Hawaii, Plaintiff v. United States of America, Defendant.

U. S. District Court, Dist. Hawaii, Civil No. 70-3138, 8/4/75.

[*Code Sec. 501*]

Exempt organizations: Religious tenets: Church of Scientology.—The taxpayer was found to be an exempt organization for the taxable years in question. Back reference: ¶ 3033.4811.

Tobias C. Tolzmann, Bank of Hawaii, Waikiki Bldg., 2222 Kalakaua Ave., Honolulu, Hawaii, for plaintiff. Harold M. Fong, United States Attorney, Honolulu, Hawaii, Harold S. Larsen, Department of Justice, Washington, D. C. 20530, for defendant.

Judgment

PENCE, District Judge: Pursuant to the Stipulation of the parties filed in this action, it is hereby ORDERED AND DECREED:

(1) The Church of Scientology of Hawaii was a tax exempt organization within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1954 during the years 1965 and 1966.

(2) The United States of America is indebted to the Church of Scientology of Hawaii in the amount of $685.61 for income taxes and interest paid for the year 1965 and $63.40 for income taxes and interest paid for the year 1966 plus interest as provided by law together with allowable costs.

---

[1] We find additional support for this view in the undisputed testimony of Robert J. Barrett, one of the original developers and one of the principals in the negotiations for the sale of the building complex to Midler. He testified that the selling price was reached after negotiations pegged to the existing mortgages. The parties established the price without "any discussions on the relativity of the price versus anything." He further testified:

Q. So, I'm taking it, there were never any separate negotiations or statements made by you to a buyer or any negotiations with a buyer concerning an additional price paid because of the General Electric leases.

A. Absolutely not.

Accordingly, the Tax Court found as a fact that "there were no negotiations or discussions concerning a separate price attributable to, and paid for the General Electric leases, as part of the total purchase." We believe that had the purchaser intended to pay the significant sum of $5 million for "premium" rentals, it would have played an important part in the negotiations.

observation in *Beagle* that, as a general rule, felony convictions bearing on veracity are admissible, does not detract from the caution the trial court has been mandated to exercise. This is particularly true in dealing with a similar prior in view of the "inevitable pressure" on jurors to believe "if he did it before he probably did so this time." (*Ibid.*) Admissibility which is allowed "sparingly," as thus cautioned by the state Supreme Court, can only embrace admissibility which is granted in the exceptional case.

At the time when the trial court was called upon to rule on the *Beagle* exclusionary motion, nothing in the evidence indicated that this case was an exceptional one favoring admissibility of the similar prior. Before the court ruled on the motion, defendant had been identified at trial by two eyewitnesses as the alleged offender. Eyewitness identification as part of the prosecution's case-in-chief is routine; it does not make for an exceptional case.

Admission of a similar prior is so prejudicial that, in obedience to *Rist*, the trial court should proceed with great caution. Only when it appears that the need for impeachment is greater than the certain prejudice should the similar prior be admitted. Manifestly, such will be a rare case. That is, prior convictions for the same crime will be admitted sparingly.

Upon an examination of the entire cause, I am of the opinion that the court's abuse of discretion in admitting evidence of the 1969 prior did not result in a miscarriage of justice. The defendant did testify. The jury had all the facts before it. The case for the prosecution was very strong. (*People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243.) Another court, upon a fact situation much weaker for the prosecution, has held the introduction of a similar prior to be reversible error. (*People v. Roberts* (1976) 57 Cal.App.2d 782, 129 Cal.Rptr. 529.)

65 Cal.App.3d 661

LOS ANGELES POLICE DEPARTMENT et al., Petitioners, v. SUPERIOR COURT of the State of California, FOR the COUNTY OF LOS ANGELES, Respondent; CHURCH OF SCIENTOLOGY OF CALIFORNIA, Real Party in Interest.

Civ. 49339.

Court of Appeal, Second District, Division 2.

Jan. 5, 1977.

As Modified on Denial of Rehearing Feb. 2, 1977.

Los Angeles police department requested writ of mandate to set aside order of the Superior Court, County of Los Angeles, requiring the police department to furnish answers to certain written interrogatories. The Court of Appeal, Roth, P. J., held that since police department records concerning any investigations of church were in all likelihood exempt from disclosure under the Public Records Act the church, seeking to have such records declared public records, was not entitled to compel answers to interrogatories about those records.

Petition granted and peremptory writ of mandate issued.

1. Records ⇐14

If record is a public record all persons have access thereto as permitted by the Public Records Act, and a person who may be the subject of particular record sought does not, because he is personally affected, have any greater right than any person to examine record and, conversely, subject person has no right to prevent disclosure of record to any other person. West's Ann.Gov.Code, §§ 6250-6261.

2. Records ⇐14

Public Records Act was enacted with objective of increasing freedom of information and it is designed to give public access to information in possession of public agencies. West's Ann.Gov.Code, §§ 6250-6261

3. Discovery ⇐42

When principal action itself seeks records which are in all likelihood not discoverable under the Public Records Act because of specific exemption or public interest, interrogatories which seek information about these records should not be permitted. West's Ann.Gov.Code, §§ 6250 6261.

4. Discovery ⇐42

Where church sought disclosure of any records with Los Angeles police department concerning the church's activities and activities of its founder to be declared public records open to public inspection and in all likelihood such records were exempt from disclosure under the specific statutory exemptions provided for records of complaints to or investigations conducted by or records of intelligence information or security procedures of any local police agency, church was not entitled to compel answers to interrogatories seeking information about the records. West's Ann.Gov.Code, § 6254(f).

Burt Pines, City Atty., Hilary F. Goldstone, Deputy City Atty., for petitioners.

Law Offices of Mark V. Kaplan, Sherman Oaks, for real party in interest.

Fred Okrand, Jill Jakes, Los Angeles, Mark D. Rosenbaum, Beverly Hills, Gary D. Sowards, Santa Monica, for amicus curiae.

No appearance for respondent.

ROTH, Presiding Justice.

Government Code,[1] sections 6250 through 6261, comprise the California Public Records Act (Act). Section 6250 recites in part:

"• • • the Legislature, mindful of the right of individuals to privacy, finds and declares that access to *information* concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Emphasis added.)

Act is a group of integrated sections which generally define public records and the rights of any person to inspect, copy and receive copies of such records. (§§ 6250, 6252, 6253, 6253.5, 6254.7, 6254.8.)

Section 6254, however, lists 24 separate types of records which are by legislative fiat exempt from disclosure. Section 6254, as is relevant here, recites:

"• • • nothing in this chapter [Act] shall be construed to require disclosure of records that are: • • •

(f) Records of complaints to or investigations conducted by, or records of intelligence information or security procedures of, • • • any • • • local police agency, • • •" (referred to herein as Exemption (f)).[2]

Real Party in Interest, Church of Scientology (Church) instituted this action against petitioner, Los Angeles Police Department (Department) under the authority of Act and seeks to have any records which Department maintains of its activities and the activities of its founder declared to be public records free from any exemption and open for public inspection.

The summary exemption provided for in Exemption (f)[3] in section 6254 is reiterated

1. All Code references herein made are to the Government Code unless otherwise noted.

2. It is clear from one of the cases strongly relied on by Church, *Black Panther Party v. Kehoe*, 42 Cal.App.3d 645, 117 Cal.Rptr. 106, that the legislature meant to make certain types of records exempt from disclosure. Thus, Justice Friedman says at page 655, 117 Cal.Rptr. at page 112:

"If citizenship in a functioning democracy requires general access to government files, limited but genuine interests also demand restricted areas of *non-access*." (Emphasis added.)

3. A helpful explanation of section 6254(f) is set out in *Younger v. Berkeley City Council* (1975) 45 Cal.App.3d 825, 832, 119 Cal.Rptr. 830, 834:

"Ordinarily all criminal offender record information, including that compiled by the Berkeley Police Department, is confidential and not 'public' or subject to disclosure. (Gov.Code, § 6254, subd. (f). *People v. Wilkins* (1955) 135 Cal.App.2d 371, 377, 287 P.2d 555.) While the Attorney General conceded in this case that the City of Berkeley could permit whatever access the city council deemed appropriate in the case of arrest records compiled by the Berkeley Police Department, the same does not apply to records compiled by the State Department of Justice, particularly where Penal Code sections

LOS ANGI

65 Cal.App.3d 666

in section 6255. In : tion 6255 provides f any record embraced specifically exempte public interest in weighs" disclosure.

Section 6255 provi

"The agency sh any record by de record in question press provisions of the facts of the pa interest served by public clearly outw est served by disc (Emphasis added.)

The procedure whi to obtain judicial re denial of access to p In section 6258:

"Any person ma for injunctive or d court of competent his right to inspect any public recor records under thi for responsive plea in such proceeding judge of the cou securing a decision the earliest possib Section 6259 provi

"Whenever it i verified petition to the county where part thereof are public records are held from a mem court shall order charged with with disclose the public why he should not decide the case record in camera, i 11077 and 11079 c state interest in thos

The special nature alleged records at be *Younger* in a comme *Howie* (1971) 19 Cal 493 a case relied up

"*Uribe* dealt with a file. It could gain ex

Legislature, mindful of
iduals to privacy, finds
access to *information*
onduct of the people's
amental and necessary
on in this state." (Em-

grated sections which
blic records and the
to inspect, copy and
h records. (§§ 6250,
54.7, 6254.8.)

ver, lists 14 separate
h are by legislative
osure. Section 6254,
cites:

in this chapter [Act]
require disclosure of
• •

ts to or investi-
or records of intel-
or security proce-
any • • • local
• •" (referred to
(f)).[2]

t, Church of Scien-
tuted this action
Angeles Police De-
under the authority
any records which
f its activities and
der declared to be
any exemption and
n.

on provided for in
6254 is reiterated

section 6254(f) is set
City Council (1975)
9 Cal Rptr. 830, 834
Render record infor
plied by the Berke-
onfidential and not
osure. (Gov Code,
Wilkins (1955) 135
2d 555.) While the
ase that the
ever access
ropriate in the case
y the Berkeley Po-
does not apply to
te Department of
nal Code sections

in section 6255. In addition, however, section 6255 provides for the withholding of any record embraced in Act which is not specifically exempted by section 6254 if public interest in non-disclosure "outweighs" disclosure.

Section 6255 provides:

"The agency shall justify withholding any record by demonstrating that the record in question *is exempt* under express provisions of this chapter *or* that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." (Emphasis added.)

The procedure which enables any person to obtain judicial relief from a wrongful denial of access to public records is set out in section 6258:

"Any person may institute proceedings for injunctive or declarative relief in any court of competent jurisdiction to enforce his right to inspect or to receive a copy of any public record or class of public records under this chapter. The times for responsive pleadings and for hearings in such proceedings shall be set by the judge of the court with the object of securing a decision as to such matters at the earliest possible time."

Section 6259 provides in pertinent part:

"Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he should not do so. The court shall decide the case after examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and such oral argument and additional evidence as the court may allow.

"If the court finds that the public official's decision to refuse disclosure is not justified under the provisions of Section 6254 or 6255, he shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure. Any person who fails to obey the order of the court shall be cited to show cause why he is not in contempt of court. • • •."

After Church had filed its action, an application for a temporary injunction requiring disclosure was denied on the ground there was no showing that the records sought were not expressly exempt from disclosure by reason of Exemption (f). Prior to the conclusion of the argument for a temporary injunction and its denial, the following exchange took place between the court and counsel for Church:

"THE COURT: What about this problem: these cases which involved administrative agencies did not deal with situations where you have a police department maintaining, quote, 'intelligence information,' so, of course, the court wasn't dealing with that type of situation. And yet the statute specifically recognizes that there can be such a thing as intelligence information.

"MR. IVENER: Yes.

"THE COURT: What must be the statutory intent regarding that?

"MR. IVENER: Well, the statutory intent relating to intelligence files and re-

11077 and 11079 contemplate a continuing state interest in those records."

The special nature of records such as the alleged records at bench is further explained in *Younger* in a comment distinguishing *Uribe v. Howie* (1971) 19 Cal.App.3d 194, 96 Cal.Rptr. 493 a case relied upon by Church.

"*Uribe* dealt with a routine report in a public file. It could gain exemption not because of its content but only when and if it became a part of an investigatory file. Here, by their very content, the criminal records compiled by the State Department of Justice are independently entitled to exemption." (See *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 651, 117 Cal.Rptr. 106.)"

(15 Cal.Rptr. 2)

lating to investigatory files is that they are exempt . . . ."

Church did not appeal the order denying a temporary injunction. Church did, however, initiate the discovery proceedings before us by filing and serving on Department certain interrogatories. Department refused to answer the interrogatories;[4] Church moved for an order requiring responses. The court treated the issue as if it were a conditional privilege under Evidence Code section 1040; deferred ruling on the question of privilege as embraced in section 1040 of the Evidence Code until time of trial and then ordered the cited interrogatories answered and directed discovery to proceed. Petitioner's request for a writ of mandate to set aside that order is before us.

[1] Church's verified complaint to require disclosure and its declarations and documents filed in support of its motion for the temporary injunction, which was denied, clearly establish that the records which it seeks, if they in fact exist as claimed, are the type which are embraced in Exemption (f). The complaint refers repeatedly to "*information*, documents, reports and *records*" (emphasis added) which are being allegedly maintained by Department and which relate to Church; and, in oral argument upon the motion for preliminary injunction, Church's attorney admitted that "the statutory intent relating to intelligence files and relating to investigatory files is that they are exempt." It is plain that "records of intelligence information" fall within the ambit of Exemption (f). Thus, the soundness of the action itself is drawn into question by the binding allegations of the complaint,[5] as well as by the admission of Church at the proceedings for a temporary injunction excerpted above. We are thus presented with the question, what, if any, discovery should take place, especially when *any* proceedings under the Act is from first to last a form of discovery, i. e., the disclosure of certain records and/or information.

In proceeding under Act, section 6255 provides the public entity which has denied a person the right of inspection two alternative justifications, independent of section 1040 of the Evidence Code although similar thereto, for its decision not to open its files: (1) the information sought may be exempt under one or more of the fourteen exemptions listed in section 6254; or (2) disclosure of the information sought, although *not* exempt, would not be in the public interest.

Church argues in support of its position that the records are inappropriately kept and contain inaccurate information and asserts that upon disclosure the records may be corrected. In fact, the interrogatories previously set forth, as well as other interrogatories, posed by Church are intended to discover whether Department has complied with internal administrative criteria on intelligence files.

4. These interrogatories are:

"*INTERROGATORY # 9*: Has the Defendant [Department] determined, at any time within the period commencing January 1, 1969 to the present, that the CHURCH OF SCIENTOLOGY OF CALIFORNIA, or any Scientology organization, has engaged, or is engaging, in acts disruptive of the public order as that term is defined in the Guidelines of the Public Disorder Intelligence Division of the Los Angeles Police Department.

"*INTERROGATORY # 10*: If the answer to Interrogatory # 9 is affirmative, please state the following:

(a) Is a file presently maintained by the Public Disorder Intelligence Division relating to the determination hereinabove referred in Interrogatory # 9?

(b) The date of the last entry of any such file hereinabove referred in Interrogatory # 10(a).

"*INTERROGATORY # 11*: If the answer to Interrogatory # 10(a) is affirmative, please state:

(a) The person(s), if any, and title thereof, who conducted a review of any such file since April 10, 1975

(b) The date upon which such review(s) was conducted."

5. Exemption (f) refers to "investigatory or security files compiled by any [ ] state or local agency for correctional, law enforcement or licensing purposes." The complaint alleges that defendant L.A.P.D. " received compiled, and otherwise maintained information, documents, reports and records pertaining to the Plaintiff herein" and, at another point, refers to "records of intelligence information or

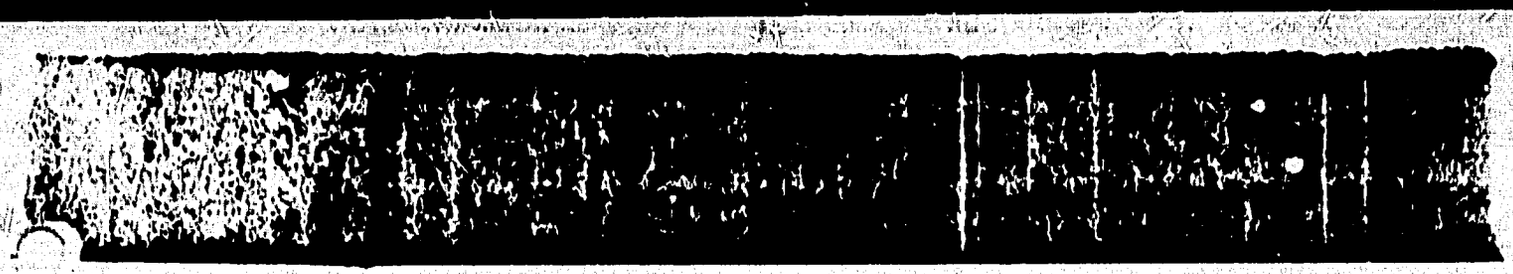
TR
65 Cal.App.3d 751

[1] In this conn
that if the record
persons have access
Act and *a* person w
the particular reco
cause he is person
greater right than
the record. Conve
has no right under
of the record to an
Panther Party v. K
117 Cal.Rptr. 106.)

[2] Act was ena
of increasing freedo
designed to give the
mation in possessi
Act itself does not
what type of infor
may gather, nor to
records such an ag
provide a method
records. Its sole fu
disclosure.

[3, 4] Common s
the principal action
which are in all lik
able" under Act bec
or the public interes
seek information also
not be permitted.
discovery process of
to proceed would en
plish indirectly the o
action without any sh
(f) does not apply or,
Exemption (f), that
disclosure. When vi
the action at bench
Superior Court (197
Cal.Rptr. 257, 550 P.
Superior Court (197
Cal.Rptr. 897, 522 P.
Church and the trial
Neither *Shepherd* nor
brought under Act
special proceeding th
is the discovery and

security procedures o
tory or security files
tained by Defendant
Law enforcement or in
ords which are exem
pect of future enforce



atory files is that they
plain that "records of
tion" fall within the
(f). Thus, the sound-
self is drawn into ques-
allegations of the com-
by the admission of
edings for a temporary
above. We are thus
question, what, if any,
place, especially when
er the Act is from first
covery, i. e., the disclo-
ds and/or information
der Act, section 6255
ntity which has denied
f inspection two alter-
independent of section
Code although similar
ot to open its files.
it may be exempt
the fourteen exemp-
6254; or (2) disclosure
ought, although *not* ex-
in the public interest
support of its position
e inappropriately kept
te information and as-
osure the records may
et, the interrogatories
as well as other inter-
Church are intended to
partment has complied
strative criteria on in-

last entry of any such file
ferred in Interrogatory

11: If the answer to
) is affirmative, please

if any, and title thereof,
a review of any such file
1975.
hich such review(s) was

(c) investigatory or se
y [illegible] state or local
enforcement as
The complaint alleges
" received,
e maintained informa-
s and records pertaining
and, at another point,
elligence information or

[1] In this connection, it should be noted that if the record is a public record *all* persons have access thereto as permitted by Act and a person who may be the subject of the particular record sought does not, because he is personally affected, have any greater right than *any* person to examine the record. Conversely, a subject person has no right under Act to prevent disclosure of the record to any other person. (*Black Panther Party v. Kehoe*, 42 Cal.App.3d 645, 117 Cal.Rptr. 106.)

[2] Act was enacted with the objective of increasing freedom of information. It is designed to give the public access to information in possession of public agencies. Act itself does not undertake to prescribe what type of information a public agency may gather, nor to designate the type of records such an agency may keep, nor to provide a method of correcting such records. Its sole function is to provide for disclosure.

[3,4] Common sense dictates that when the principal action itself seeks records which are in all likelihood not "discoverable" under Act because of Exemption (f) or the public interest, interrogatories which seek information about these records should not be permitted. To allow the ancillary discovery process of written interrogatories to proceed would enable Church to accomplish indirectly the objective of its discovery action without any showing that Exemption (f) does not apply or, if it is not embraced in Exemption (f), that public interest requires disclosure. When viewed in the context of the action at bench, neither *Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 130 Cal.Rptr. 257, 550 P.2d 161 nor *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 113 Cal.Rptr. 897, 522 P.2d 305 relied upon by Church and the trial court are applicable. Neither *Shepherd* nor *Pitchess* were actions brought under Act which, as noted, is a special proceeding the sole object of which is the discovery and production of records

security procedures of, or any such investigatory or security files compiled and/or maintained by Defendant L.A.P.D. [illegible] correctional, law enforcement or licensing purposes" as records which are exempt only when "the prospect of future enforcement proceedings is concrete." What these allegations demonstrate is that Church well knows that records embraced in Exemption 6254(f) exist and that, in the very terms of the allegations themselves, they are exempt from disclosure.

The exemption for the records of law enforcement agencies as contained in the quoted language of section 6254(f) "Records of complaints to or investigations conducted by, or records of intelligence information * * *" is broad and all-encompassing. It does not further describe the type of complaints or investigations or the nature of intelligence information that is exempt. (See *Uribe v. Howie*, 19 Cal.App.3d 194, 96 Cal.Rptr. 493.)

We conclude that the order of respondent court is erroneous and the court is therefore directed to vacate its order. Accordingly, we grant the petition and issue the peremptory writ of mandate requiring the court to vacate its order requiring defendants to answer interrogatories 9, 10 and 11 and to enter a new and different order sustaining defendant's objections thereto.

COMPTON and BEACH, JJ., concur.

65 Cal.App.3d 751

The TRAVELERS INSURANCE COMPANY, a corporation, Petitioner,

v.

SUPERIOR COURT of the State of California FOR the COUNTY OF KERN, Respondent;

Maurice HERBOLDSHEIMER, etc., Real Party in Interest.

Civ. 3123.

Court of Appeal, Fifth District.

Jan. 6, 1977.

Petitioner, who was defendant in an alleged class action, sought writs of mandate and prohibition to review propriety of order of the Superior Court, Kern County, John M. Nairn, J., refusing to dismiss class

In re SEARCH WARRANT DATED JULY 4, 1977, FOR PREMISES AT 2125 S STREET, NORTHWEST WASHINGTON, D.C.

No. 77-1793.

United States Court of Appeals, District of Columbia Circuit.

Argued Nov. 13, 1977

Decided Dec. 1, 1977.

As Amended Dec. 8 and 13, 1977.

Rehearing En Banc Denied Jan. 4, 1978.

As Amended Jan. 9, 1978.

Certiorari denied March 20, 1978. See 98 S.Ct. 1491.

Proceeding was instituted on motion of church to return property seized from its files. The United States District Court for the District of Columbia, William B. Bryant, Chief Judge, 436 F.Supp. 689, granted the church's motion, and government appealed. The Court of Appeals held, inter alia, that while the district court held that search warrant granted authority to agents to search for and seize any evidence of conspiracies to steal government property and obstruct justice, and that such grant of authority amounted to a "general warrant," the court, in reaching such conclusion, gave an overbroad construction to the warrant, improperly interpreted the relevant offenses, ignored a significant part of Item 162, viz., language restricting the search and seizure of evidence of particular conspiracies that are described in the "accompanying affidavit," and gave an unduly restrictive interpretation to the Supreme Court's *Andresen* decision, which held that a warrant did not become fatally general because it followed an exhaustive list of particularly described documents with the phrase "together with other fruits, instrumentalities and evidence of crimes at this [time] unknown."

Order vacated.

J. Skelly Wright, Circuit Judge, joined by Bazelon, Chief Judge, and Leventhal, Circuit Judge, filed a statement as to why he did not request a vote on the suggestion for rehearing en banc.

Spottswood W. Robinson, III, Circuit Judge, with whom McGowan, Circuit Judge, concurred, filed a statement as to why he did not request a vote on the suggestion for rehearing en banc.

1. Searches and Seizures ⇐3.4

While district court held that search warrant granted authority to agents to search for and seize any evidence of conspiracies to steal government property and obstruct justice, and that such grant of authority amounted to a "general warrant," the court, in reaching such conclusion, gave an overbroad construction to the warrant, improperly interpreted the relevant offenses, ignored a significant part of Item 162, viz., language restricting the search and seizure of evidence of particular conspiracies that are described in the "accompanying affidavit," and gave an unduly restrictive interpretation to the Supreme Court's *Andresen* decision. 18 U.S.C.A. §§ 371, 641, 1503; U.S.C.A.Const. Amend. 4.

2. Searches and Seizures ⇐7(8)

While the reference in search warrant to "conspiracies" referred to "conspiracies to steal government property and to obstruct justice," this did not make the warrant and supporting affidavit general and insufficiently particularized to pass constitutional muster, where the supporting documents went into great particularity not only as to the relevant documents and their location but also as to the particular offenses that the property sought was designed to prove. 18 U.S.C.A. §§ 371, 641, 1503; U.S.C.A.Const. Amend. 4.

3. Searches and Seizures ⇐3.6(2), 3.7

Searches and seizures can only be conducted after a showing of probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized. U.S.C.A.Const. Amend. 4.

4. Searches and Seizures ⇐3.8(2)

In the context of the search warrant in question and the conspiracies referred to therein the district court erroneously concluded that 'there is nothing "particular" about conspiracy; rather, the two specified conspiracies were described in great particularity, and the district court therefore erred in finding that the warrant "[permitted] seizure of anything at all" and "invited the agents to seize any document in the Church's files that struck their fancy." U.S.C.A.Const. Amend. 4; 18 U.S.C.A. § 371.

5. Searches and Seizures ⇐3.8(2)

While the trial court found that search warrant was overbroad on the ground that, as a practical matter, it constituted a directive to seize "evidence at this time unknown" of conspiracy which amounted to a "wild card" permitting seizure of anything at all, such interpretation of the warrant was itself overbroad, since the warrant, in Item 162, only authorized seizure of the fruits, instrumentalities and evidence, at that time unknown, of the crimes of conspiracy, obstruction and theft of government property "which facts recited in the accompanying affidavit make out." U.S.C.A.Const. Amend. 4.

6. Searches and Seizures ⇐3.7

Under the Supreme Court's *Andresen* decision, which held that a search warrant did not become fatally general because it followed an exhaustive list of particularly described documents with the phrase "together with other fruits, instrumentalities and evidence of crimes at this [time] unknown," the search warrant in the instant case, authorizing seizure of "Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction and theft of government property * * * which facts recited in the accompanying affidavit make out," was not a general warrant and was valid. 18 U.S.C.A. §§ 2, 371, 641, 1503; U.S.C.A.Const. Amend. 4.

Appeal from the United States District Court for the District of Columbia (D.C. Misc. 77-0151).

Hamilton P. Fox, III, Atty., Dept. of Justice, Washington, D. C., with whom Earl J. Silbert, U. S. Atty., Carl S. Rauh, Principal Asst. U. S. Atty., Henry F. Schuelke, III, Executive Asst. U. S. Atty., John A. Terry, Brian Shaughnessy, Raymond Banoun, and Judith Hetherton, Asst. U. S. Attys., Washington, D. C., were on the brief, for appellant.

Philip J. Hirschkop, Alexandria, Va., with whom John D. Grad and Earl Dudley, Alexandria, Va., were on the brief, for appellee.

Before MacKINNON and ROBB, Circuit Judges, and MARKEY,* Chief Judge, United States Court of Customs and Patent Appeals.

Opinion for the Court Per Curiam.

PER CURIAM:

Following a search and seizure by the Government of numerous documents pursuant to a search warrant, on motions of the Church of Scientology, the trial court granted (1) a protective order against the use by the Government of certain of the documents in certain civil litigation between the parties, and (2) ordered the return of the property seized. The latter order which directed the return of the seized property was construed by the court to involve "[i]n effect . . . a motion to suppress" (Appellant's Appendix, 5) and on that basis the Government has appealed therefrom under 18 U.S.C. § 3731.[1] The

* Sitting by designation pursuant to 28 U.S.C. § 293(a).

1. 18 U.S.C. § 3731 (1970) provides:

* * * * * *

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

IN RE S

statute directs such app
prosecuted, and pendi
ceedings are being held
ing the decision on this
ly, we have expedited t
appeal and our decision

In our view of the co
ty of the order of the D
ing the return of the se
on a single issue, *i. e.*,
court was correct whe
search warrant to be a
prohibited by the Consti

The principal issue in t
on whether the warran
constitutes a general w
the reference to the cri
as set forth in item 162
the search warrant (App
search warrant (App. 2:
warrant in designating t
tain property" that the "
Investigation" was "com
. . . and seize" stat
Description of property)."
entitled "*Description of*
ed of 7½ typewritten p
which very specifically d
nated a great many iten
found on the designated
were 162 separately enu
described. In most insta
ferred to a document or
specified by type, date,
relevant data such as the
ee. A few items were sta
but generally none of th
except item 155, is attack
lack of specificity or p
"Description" incorporat
affidavit attached to the
Search Warrant. It is ite
principal subject of attac
and which furnished the
the ruling by the trial co
in the Search Warrant, it
the following context:

The appeal in all such c
within thirty days after
ment or order has been re
diligently prosecuted.

construction to the search warrant, improperly interpreted the relevant offenses, ignored a significant part of item 162, and gave an unduly restrictive interpretation to the Supreme Court decision in *Andresen v. Maryland, supra.*

First, as to the overbroad construction of the search warrant: as stated in its holding, set forth above, the district court held that the search warrant granted "authority to the agents to search for and seize *any* evidence of conspiracies to steal government property and to obstruct justice . . . ." Such construction is patently incorrect. It ignores completely the following language which limits the breadth of item 162: ". . . *which facts recited in the accompanying affidavit make out.*" (App. 31, emphasis added). The recited facts and designations of property and offenses impose particular limits upon the search warrant and that was the purpose of the italicized statement. This, the trial court did not consider. Properly construed, the warrant only authorizes a search and seizure of evidence of the particular conspiracies to steal government property and to obstruct justice that are described in the "accompanying affidavit."

Without exhaustively describing these conspiracies and offenses, and the relevant "fruits, instrumentalities and evidence" (App. 31, 40) thereof that are described and particularized in the "Description of Property" and the "accompanying affidavit," the conspiratorial and obstruction offenses that may be the subject of the authorized search and seizure, because they are designated and particularized in the affidavit and search warrant, are the following: (1) Conspiracy to steal government property from: (a) the office of the United States Attorney in the U.S. Court House, Washington, D.C., and more particularly from the office of "Assistant United States Attorney Nathan Dodell" (App. 41, 52); (b) the office of Staff Attorney Paul Figley, Department of Justice, Washington, D.C. (App. 41, 48, 50); (c) the Internal Revenue Service (identification cards) (App. 42) and possibly other documents; and (d) by unlawfully breaking and entering such offices and the offices of Interpol maintained in the U.S. Treasury Department in Washington, D.C. (App. 49). (2) Conspiracy to obstruct justice: (a) by illegally obtaining from opposing parties in litigation "documents relating to Scientology-instituted Freedom of Information Act suits against, *inter alia*, the Central Intelligence Agency, the Drug Enforcement Administration, [the U.S.] Customs [Service], Interpol and the Defense Communications Agency" (App. 50); (b) by engaging in illegal eavesdropping (App. 46); (c) by perjury and subornation of perjury committed, *inter alia*, by Henning Heldt, Greg Willardson, Duke Snider, Michael James Meisner, Richard Weigand, Gerald Bennett Wolfe (App. 57–61) and others;[2] most of whom occupy managerial positions with the Church of Scientology in Washington, D.C. and Los Angeles, California (App. 75, 76).

The allegations referred to above, in connection with the *conspiracy* offenses, also include allegations of facts which particularize the specific *substantive* offenses of theft of government property (18 U.S.C. § 641) and obstruction of justice (18 U.S.C. § 1503).

In addition to all the foregoing, a separate part of the affidavit for the search warrant, extending over 11 typewritten pages, is devoted to setting forth in particular detail the "*Nature and Location of Document Files Maintained by the Church of Scientology*" (App. 63–73). This part of the supporting affidavit names names, describes documents, gives dates, describes their contents, and indicates where in the organization's offices they might be found. It also describes their size, the titles under which they might be found in the files, the extent of the relevant files, the meaning of certain titles, such as "program files" (App. 64), "operations (files)" (App. 64), "government special bank" (App. 64) file systems [are maintained covertly and overtly obtain (App. 64). Of particular in particular reference to the ". of the Deputy Guardian (U.S.) [of the Church of Sci allegedly contains "reports [U.S.] Central Intelligence America (in particular Ecu concerning Interpol agent involved in drug dealings" of the documents which w "included some programs government agencies" (Ap and filing system at the of the search warrant "212 Washington, D.C." were particularized (App. 72).

A significant part of particularizes the stolen d ifying their source and t to which they relate:

SOURCE OF D

Items 1–99 lists docu copied) from the offic ed States Attorney N ed States Attorney's trict of Columbia.

Items 100–148 lists do copied) from the offic Paul Figley, Depa Washington, D.C.

Items 100–122 are d the case of *Church o fornia v. United St Justice*, CV 74–3550

Items 123–127 are d the case of *Church fornia v. Kelly*, Civi

Items 128–130 are the case of *Churc fornia v. Postal Se* 2004–R.

Items 131–132 are the case of *Church fornia v. State De* 75–2632 AAH.

Items 133–134 are the case of *Church fornia v. Alcohol,* Civil Action 75–1

2. Anyone who aids, abets, counsels, commands, induces, procures or willfully causes another to commit an offense in violation of any U.S. statute is guilty as a principal of the crime so committed. 18 U.S.C. § 2 (1970).

statute directs such appeals to be diligently prosecuted, and pending grand jury proceedings are being held in abeyance awaiting the decision on this appeal. Accordingly, we have expedited the argument on the appeal and our decision as well.

In our view of the controversy, the validity of the order of the District Court directing the return of the seized property turns on a single issue, *i. e.*, whether the trial court was correct when it construed the search warrant to be a "general warrant" prohibited by the Constitution.

The principal issue in this case thus turns on whether the warrant is overbroad and constitutes a general warrant because of the reference to the crime of "conspiracy" as set forth in item 162 of the affidavit for the search warrant (App. 32–76), and in the search warrant (App. 22–31). The search warrant in designating the "concealed certain property" that the "Federal Bureau of Investigation" was "commanded to search . . . and seize" stated "(See attached Description of property)." The attachment entitled "*Description of Property*" consisted of 7½ typewritten pages (App. 33–40) which very specifically described and designated a great many items to be seized if found on the designated premises. There were 162 separately enumerated items so described. In most instances each item referred to a document on a single subject specified by type, date, subject and other relevant data such as the author or addressee. A few items were stated more broadly, but generally none of the first 161 items, except item 155, is attacked for any alleged lack of specificity or particularity. The "Description" incorporated the extensive affidavit attached to the affidavit for the Search Warrant. It is item 162 that is the principal subject of attack by the appellee and which furnished the principal basis for the ruling by the trial court. As set forth in the Search Warrant, item 162 appears in the following context:

> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted . . . . The provisions of this section shall be liberally construed to effectuate its purposes.

> there is now being concealed certain property, namely
>
> (See attached Description of Property)

(App. 22).

> DESCRIPTION OF PROPERTY
>
> . . . . . .
>
> 162. Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government porperty [*sic*] in violation of 18 U.S. Code §§ 371, 1503 and 641 *which facts recited in the accompanying affidavit make out.*

(App. 31, emphasis added).

The reference in the search warrant to the "accompanying affidavit" incorporated the 33-page "Affidavit in Support of Search Warrant" (App. 42–74) that was attached to the "Description of Property" (App. 33–41), all of which was appended to the regular "Affidavit for Search Warrant," Form A.O. 106 (Rev. Apr. 1973) (App. 12). The affidavit was executed by Robert Tittle, Special Agent, Federal Bureau of Investigation.

The trial court in its Memorandum construed item 162 and stated:

> I hold that the grant of authority [by item 162] to the agents to search for and seize any evidence of conspiracies to steal government property and to obstruct justice amounted to a "general warrant" and therefore contravened the Fourth Amendment's guarantee against unreasonable searches and seizures. I am not persuaded that the Supreme Court's recent decision in *Andresen v. Maryland*, 427 U.S. 463 [96 S.Ct. 2737, 49 L.Ed.2d 627] (1976), is to the contrary.

(App. 6).

[1] In reaching such conclusion we find that the district court gave an overbroad

ment special bank" (App. 61), and that "two file systems [are maintained] consisting of covertly and overtly obtained documents" (App. 64). Of particular importance is the particular reference to the "confidential file of the Deputy Guardian for Information (U.S.) [of the Church of Scientology]" which allegedly contains "reports written by the [U.S.] Central Intelligence Agency in South America (in particular Ecuador and Bolivia) concerning Interpol agents believed to be involved in drug dealings" (App. 65). Some of the documents which were particularized "included some programs directed against government agencies" (App. 65). The files and filing system at the office designated in the search warrant "2125 S Street N.W., Washington, D.C." were also described and particularized (App. 72).

A significant part of the affidavit also particularizes the stolen documents by specifying their source and the subject matter to which they relate:

SOURCE OF DOCUMENTS

Items 1-99 lists documents stolen (and copied) from the office of Assistant United States Attorney Nathan Dodell, United States Attorney's Office for the District of Columbia.

Items 100-148 lists documents stolen (and copied) from the office of Staff Attorney Paul Figley, Department of Justice, Washington, D.C.

Items 100-122 are documents relating to the case of *Church of Scientology of California v. United States Department of Justice*, CV 74-3550-F.

Items 123-127 are documents relating to the case of *Church of Scientology of California v. Kelly*, Civil Action 74-906.

Items 128-130 are documents relating to the case of *Church of Scientology of California v. Postal Service*, Civil Action 75-2004-R.

Items 131-132 are documents relating to the case of *Church of Scientology of California v. State Department*, Civil Action 75-2832 AAH.

Items 133-134 are documents relating to the case of *Church of Scientology of California v. Alcohol, Tobacco and Firearms*, Civil Action 75-1699 RFP.

Items 135-136 are documents relating to the case of *Church of Scientology of California v. Department of State*, Civil Action 75-2562F.

Item 137 is a document relating to the case of *Church of Scientology of California v. Department of Transportation*, Civil Action No. 75-3482.

Items 138-147 are documents relating to the case of *Church of Scientology of California v. Energy Research and Development Administration*, Civil Action No. 76-11R.

(App. 41).

The last paragraph of the affidavit makes further specific reference to "the crimes . . . which facts recited in the accompanying affidavit make out . . ." (App. 31, 40).

Based on the foregoing, affiant submits that there is probable cause to believe that, from 1974 through 1976, officials of the Church of Scientology in Los Angeles, California and in Washington, D.C., conspired to steal documents from the Government of the United States by means of the burglary of U.S. Government offices and theft by operatives of the Church in the employ of the U.S. Government; that documents belonging to the United States Government were stolen pursuant to that conspiracy; that copies of such stolen documents are secreted in the files of the Church of Scientology in Los Angeles, California, and Washington, D.C.; that subsequent to the confrontation between Messrs. Meisner and Wolfe and agents of the F.B.I. on June 11, 1976, officials of the Church of Scientology conspired to obstruct justice by preparing a false response to expected inquiries of Meisner and Wolfe by law enforcement authorities and federal grand juries; that plans, scenarios and directives were committed to writing in furtherance of this conspiracy; that such writings are secreted in the files of the Church of Scientology in Los Angles, California, and Washington, D.C.; that the objects of this latter conspiracy were met

in part before a Grand Jury of the United States District Court for the District of Columbia on June 10, 1977; that, thereafter a summary of Wolfe's Grand Jury testimony was prepared by him in furtherance of the objectives of this latter conspiracy; and that copies of that summary are secreted in the offices of the Church of Scientology in Los Angeles, California, and Washington, D.C. (Appellant's App. 73.)

[2] It is apparent from the "Memorandum and Order" of the trial court that it interpreted the reference in the search warrant to "conspiracies" to refer to "conspiracies to steal government property and to obstruct justice" (Appellant's App. 6). We agree. However, we strongly disagree with the statement that the affidavit and search warrant were therefore general and not sufficiently particularized to pass constitutional muster. As outlined briefly above, the supporting documents went into great particularity not only as to the relevant documents and their location but also as to the particular offenses that the property sought was designed to prove. These offenses are not "amorphous"—they are specific, particularized and according to the affidavit supported by reams of hard documentary evidence as well as by sworn statements of some of the alleged conspirators and principals in the conspiracy and substantive offenses.

[3, 4] We agree with the District Court that the searches and seizures can only be conducted after a showing of

> . . . probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched and the person or things to be seized.

U.S. Const. amend. IV. However, we agree with the finding of the United States Magistrate that the affidavit did show probable cause and described the "place to be searched and the . . . things to be seized" with the required particularity. The trial court Memorandum admits: "To be sure, the affidavit provided the agents with substantial guidance as to what to look for" (App. 17), but it gets off the track when it concludes: "For there is nothing 'particular' about conspiracy" (App. 15). In the context of *this* search warrant and the conspiracies it refers to, this is an erroneous conclusion—the two conspiracies here specified were described in great particularity. *See* text, *supra*. We thus do not agree with the further findings of the trial court that the warrant "[permitted] seizure of anything at all" (App. 17), and "invited the agents to seize any document in the Church's files that struck their fancy" (App. 9).

[5] The trial court also finds the warrant to be overbroad because:

> As a practical matter [it constitutes] . . . a directive to seize "evidence at this time unknown" of conspiracy [which amounts to] . . . a "wild card" permitting seizure of anything at all.

(App. 17). This, however, is an overbroad interpretation of the warrant. The warrant, in item 162, only authorizes

> Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction and theft of government property . . . *which facts recited in the accompanying affidavit make out.*

(App. 31). Thus, as pointed out in the forepart of this opinion, the italicized language imposes a very great degree of particularity and specificity to all the offenses described and to the evidence, fruits, and instrumentalities that may be seized. But the important feature about the questioned language in item 162 is that it follows identically the language which the Supreme Court in *Andresen v. Maryland, supra* found was not overbroad in the context of the offenses there designated. Precisely, *Andresen* holds that the warrant did not become "fatally general because it followed an exhaustive list of particularly described documents with the phrase 'together with other fruits, instrumentalities and evidence of crimes at this [time] unknown.'" 427 U.S. at 479, 96 S.Ct. at 2748.

A cursory comparison indicates that the questioned language here is more precise than that in *Andresen*, in that it is limited

by the facts concerning the
are made out by the recitati
companying affidavit. Also
here described do not suffer
with the offense concerning
false pretenses surrounding
was involved in *Andresen*.
the search was upheld for e
tent to defraud and know
falsity" of the allegedly fa
tions. 427 U.S. at 483, 96
The limitation of the presen
designated crimes "which
the accompanying affidavit
every bit if not more speci
larized than the warrant in

A further question is ra
155. Item 156 should also
cluded. These items provid

> 155. A Guardian Order
> fied as "Snow Whi
> 156. Any and all Guard.
> pursuant to the
> generally identif
> White" which wo
> by the mention o

(App. 39). These may be
"Snow White" files. In
with, on this appeal, the
at oral argument:

> This warrant, if it's up
> [on its Snow White ite
> FBI to seize all of the
> Church of Scientology,
> files, all of its corresp
> all of its pleadings, a
> pleadings, all of its rec

3. We do not find any of
counsel in his letter of No
contrary to the above hold
Katz, 238 F.Supp. 689, 6
dered the return of an
government sought to for
dence. The court found
reason had been shown f
tion of the auto and that
its forfeiture claim. The
motion to suppress evi
evidence seized in the
the conclusion we reach
rial may be retained wh
not be retained. *Unite*
F.Supp. 670 (D.D.C.1954
feiture and was decided

by the facts concerning the offenses which are made out by the recitations in the accompanying affidavit. Also, the offenses here described do not suffer in comparison with the offense concerning the crime of false pretenses surrounding "Lot 13T" that was involved in *Andresen*. In that decision the search was upheld for evidence of "intent to defraud and knowledge of [the] falsity" of the allegedly false representations. 427 U.S. at 483, 96 S.Ct. at 2749. The limitation of the present warrant to the designated crimes "which facts recited in the accompanying affidavit make out" is every bit if not more specific and particularized than the warrant in *Andresen*.

A further question is raised as to item 155. Item 156 should also probably be included. These items provide:

> 155. A Guardian Order generally identified as "Snow White"
>
> 156. Any and all Guardian Orders issued pursuant to the Guardian Order generally identified as "Snow White" which would be identified by the mention of "Snow White".

(App. 39). These may be referred to as the "Snow White" files. In connection therewith, on this appeal, the Church contended at oral argument:

> This warrant, if it's upheld by the court [on its Snow White items] authorized the FBI to seize all of the legal files of the Church of Scientology, all of its litigation files, all of its correspondence to counsel, all of its pleadings, all of its proposed pleadings, all of its records

In this connection, the warrant should not be construed that broadly. While the warrant may have supported a claim to examine the "Snow White" file but not necessarily to seize its entire contents, just as a warrant to search a house for a murderer would not authorize seizing the contents of the house, the Government cannot retain "all the legal files of the Church of Scientology" but only those in the "Snow White" category that constitute the particularized "Guardian Orders," possibly including general orders in the "Snow White" phase of the Church's operations, and material in such files that constitute "fruits, instrumentalities and evidence of the [stated] crimes which facts recited in the accompanying affidavit make out." (App. 39-40).[3] If any of the documents seized in the search by the agents exceed the bounds of the search warrant they should be returned, but the "fruits, instrumentalities and evidence" that were seized, and that are relevant to the particularized offenses and which are specifically referred to in the affidavit and search warrant, should be delivered to the government forthwith for use in connection with the grand jury proceedings. Our order herein does not restrict the right of the court to consider and determine whether any specific document may have been seized outside the authority of the search warrant as construed in this opinion.

[6] On the authority of *Andresen v. Maryland*, 427 U.S. 463, 478-484, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976), we hold that

3. We do not find any of the cases cited by counsel in his letter of November 16, 1977 to be contrary to the above holding. *United States v. Katz*, 238 F.Supp. 689, 695 (S.D.N.Y.1965) ordered the return of an automobile that the government sought to forfeit and retain as evidence. The court found that no "evidentiary" reason had been shown for requiring the retention of the auto and that it had not supported its forfeiture claim. The court also denied the motion to suppress evidentiary use of other evidence seized in the search. This supports the conclusion we reach that some seized material may be retained while other material may not be retained. *United States v. Bell*, 125 F.Supp. 670 (D.D.C.1954), also involved a forfeiture and was decided on procedural grounds. As for *Green v. United States*, 386 F.2d 953, 956 (headnote 5) (10th Cir. 1967), and *Goodman v. United States*, 369 F.2d 166, 168 (9th Cir. 1966), neither are relevant to our disposition of the case. As for the citation to Wright, Federal Practice and Procedure, Criminal at 676, the citation is generally irrelevant, but it does point out that when a motion to suppress is granted, normally the "property must be returned" but not where the property is "otherwise subject to lawful detention." This would negate that part of the court's order that directed the return to the Church of stolen government property or material that had been improperly copied from government documents. Certainly such material is "subject to detention" by the Government.

the search warrant in this case is not a general warrant and is valid. The order requiring the return of the property is thus vacated.[4]

Order accordingly.

JUDGMENT

This cause came to be heard on the record on appeal from the order of the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing, for reasons which appear in the attached *per curiam* opinion, it appears to the Court that the warrant for the search of the premises at 2125 S Street, Northwest, Washington, D.C. dated July 4, 1977 is indistinguishable in practical effect from the warrant upheld by the Supreme Court in *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976); that the warrant states with sufficient particularity the things to be seized; that Item 162 of this warrant does not render the warrant a general warrant within the meaning of the Fourth Amendment; and that the warrant does not leave to the executing officers impermissible discretion; it is therefore

ORDERED by this Court that the July 27, 1977 decision of the United States District Court for the District of Columbia that the warrant in this case is a general warrant in contravention of the Fourth Amendment and therefore invalid is reversed; and, it is

FURTHER ORDERED by the Court that the July 27, 1977 order of the District Court is vacated in its entirety; and, it is

FURTHER ORDERED by the Court that the case is remanded to the District Court for consideration of the other grounds alleged for invalidating the warrant not considered by the District Court, specifically, that the search was conducted in a manner that constituted a violation of the Fourth Amendment, that the agents employed unnecessary force in violation of 18 U.S.C. § 3109, and that the warrant was stale.

Supplemental Opinions on Suggestion for Rehearing En Banc

(D.C.Misc. 77-0151)

Before BAZELON, Chief Judge; WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MacKINNON, ROBB and WILKEY, Circuit Judges.

ORDER

The suggestion for rehearing *en banc* filed by appellee Founding Church of Scientology, having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court *en banc* that appellee's aforesaid suggestion for rehearing *en banc* is denied.

Statement of Circuit Judge WRIGHT, in which Chief Judge BAZELON and Circuit Judge LEVENTHAL Join, as to Why He Does not Request a Vote on the Suggestion for Rehearing *En Banc*, is attached.

4. The search warrant is clearly limited to a search for evidence relating to the crimes of theft of government property, obstruction of justice, and a conspiracy to commit such crimes. There is nothing in the nature of the crime of conspiracy as proscribed by 18 U.S.C. § 371 that prevents a magistrate from issuing a search warrant to seize evidence that such crime has been committed. In fact, conspiratorial crimes are conducted with more secrecy than many other crimes, and search warrants that seek evidence of conspiracy, and otherwise meet the required standards, may extend to all relevant evidence of that crime. Otherwise, alleged conspirators would occupy a special protection from prosecution that is not available to other accused persons. The same may be said of search warrants seeking relevant evidence of obstruction of justice. Neither of these offenses possess any special immunity that would protect them from being ferreted out by proper search warrants seeking relevant evidence. While these offenses may have certain subjective elements, like the criminal intent in *Andresen v. Maryland, supra*, the evidence that proves such subjective elements may be objective, tangible and constitute clear proof. This appears to be a case where, if the documents described and particularized in the affidavit and search warrant, live up to their description, the crimes of conspiracy to steal government property and to obstruct justice and such substantive offenses, would be practically proved, amorphous intent and all, merely by introducing the documents themselves with testimony as to where they were found.

Statement of Circuit Judge with whom Circuit Judge Mc curs, as to Why He Does n Vote on the Suggestion for *Banc*, is attached.

Statement of Circuit Judge Which Chief Judge BAZE cuit Judge LEVENTHA Why He Does not Requ the Suggestion for Rehe

J. SKELLY WRIGHT, C

In its most recent case c constitutionality of a search Supreme Court stated:

> General warrants, of co hibited by the Fourth "[T]he problem [posed by warrant] is not that of int but of a general, explorato in a person's belongings. Fourth Amendment addre lem] by requiring a 'part tion' of the things to be *idge v. New Hampshire*, 467, [91 S.Ct. 2022, 2038, 2 (1971). This requirement " al searches . . . impo vents the seizure of one warrant describing another *is to be taken, nothing discretion of the officer warrant.'" Stanford v. T* 476, 485, [85 S.Ct. 506, 51 431] (1965), quoting *Mar States*, 275 U.S., at 196.

Andresen v. Maryland, 427 U S.Ct. 2737, 2748, 49 L.Ed.2d phasis added). The search the panel of this court upho directed the seizure of

> [a]ny and all fruits, instru evidence (at this time un crimes of conspiracy, obst

1. Appellant's Appendix 40, *Search Warrant Dated July 4*, 187 U.S.App.D.C., at 323 of 57

2. *In re Search Warrant Dated* F.Supp. 689, 698 (D.D.C.1977)

3. *Id.* at 694, 697. See also *Burch*, 432 F.Supp. 961, 963 (I District Court explained:

Statement of Circuit Judge ROBINSON, with whom Circuit Judge McGOWAN Concurs, as to Why He Does not Request a Vote on the Suggestion for Rehearing *En Banc*, is attached.

Statement of Circuit Judge WRIGHT, in Which Chief Judge BAZELON and Circuit Judge LEVENTHAL Join, as to Why He Does not Request a Vote on the Suggestion for Rehearing *En Banc*

J. SKELLY WRIGHT, Circuit Judge:

In its most recent case considering the constitutionality of a search warrant the Supreme Court stated:

> General warrants, of course, are prohibited by the Fourth Amendment. "[T]he problem [posed by the general warrant] is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, [91 S.Ct. 2022, 2038, 29 L.Ed.2d 564] (1971). This requirement "'makes general searches impossible and prevents the seizure of one thing under a warrant describing another. *As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*'" *Stanford v. Texas*, 379 U.S. 476, 485, [85 S.Ct. 506, 512, 13 L.Ed.2d 431] (1965), quoting *Marron v. United States*, 275 U.S., at 196.

Andresen v. Maryland, 427 U.S. 463, 480, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976) (emphasis added). The search warrant which the panel of this court upheld in this case directed the seizure of

> [a]ny and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of governmental [property] in violation of 18 U.S.C. §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out.

Appellant's Appendix at 40.

The panel here predicated its decision upholding the warrant squarely on the Supreme Court's opinion in *Andresen*. Thus the question presented in this case is whether "nothing [was] left to the discretion of the officer executing the warrant." Since it is clear that the parties will ask the Supreme Court to review whatever is decided at this level in this case, in the interest of reducing unnecessary delay in this litigation, I think the case should now be passed on to the Supreme Court.

STATEMENT OF CIRCUIT JUDGE ROBINSON, WITH WHOM CIRCUIT JUDGE McGOWAN CONCURS, AS TO WHY HE DOES NOT REQUEST A VOTE ON THE SUGGESTION FOR REHEARING EN BANC

SPOTTSWOOD W. ROBINSON, III, Circuit Judge:

The warrant under scrutiny directed seizure of 161 designated items and of

> [a]ny and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of governmental [property] in violation of 18 U.S.C. §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out.[1]

The District Court, denominating the latter call "a 'wild card' permitting seizure of anything at all,"[2] reasoned that it communicated to executing officers permission to search for and seize anything arguably related to any and all violations of the three enumerated statutes[3] and thus was tanta-

1. Appellant's Appendix 40, quoted in *In re Search Warrant Dated July 4, 1977*, at —— of 187 U.S.App.D.C., at 323 of 572 F.2d

2. *In re Search Warrant Dated July 4, 1977*, 436 F.Supp. 689, 696 (D.D.C.1977).

3. *Id.* at 694, 697. See also *United States v. Burch*, 432 F.Supp. 961, 963 (D.Del.1977). The District Court explained

> The warrant in this case authorized—if indeed it did not direct—agents of the FBI to examine carefully and completely the contents of every document in the fourth floor files of the Church and to make ad hoc, on-the-spot decisions as to which of those documents constitute evidence of conspiracy—an amorphous and open-ended crime that, as discussed below, has since its con-

mount to an unconstitutional general warrant.[6] The panel, on the other hand, read the warrant as reasonably instructing officers to search only for evidence of seven specific criminal incidents alleged in the affidavit.[7] Thus construed, the warrant in the panel's view was adequately particularized, as judged by the standards of the Supreme Court's recent decision in *Andresen v. Maryland*.[8]

Whether the panel correctly appraised a prudent officer's understanding of the language of this warrant is surely not an issue rising to *en banc* caliber.[9] And though the panel's opinion is not entirely clear, I do not view it as a negation of the time-honored principle that the pivotal question is not whether a court in hindsight *can* find in the warrant a curb on the power to search but rather whether at the time of execution an officer reasonably and likely would take the warrant as authority for unbridled rummaging.[8] Nor is it argued that the magistrate reasonably could have defined the items subject to seizure with greater particularity and thus have "minimize[d] unwarranted intrusions upon privacy."[9] Therefore, because the panel opinion rests squarely upon its quasi-factual interpretation of the total context of this warrant, I think rehearing *en banc* would be unjustified. The mere inclusion in future warrants of language that in isolation is similar or identical to that under review in this case would not necessarily immunize those warrants from challenges that they authorized overbroad searches.



ceptual inception perplexed commentators and courts alike. In my view this warrant—addressed as it is to the crime of conspiracy—invited the agents to seize any documents in the Church's files that struck their fancy.

436 F.Supp. at 694.

4. The Fourth Amendment provides in part that "no warrant shall issue" unless "particularly describing the place to be searched, and the person or things to be seized."

5. *In re Search Warrant Dated July 4, 1977*, *supra* note 1, at —— of 187 U.S.App.D.C., at 323-324 of 572 F.2d. The panel concluded that the authorization in this warrant is nearly identical to that approved by the Supreme Court in *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). *In re Search Warrant* dated July 4, 1977, *supra* note 1, at —— of 187 U.S.App.D.C., at 326 of 572 F.2d. The District Court, however, felt that in context the challenged language, though similar, likely conveyed a different message. See note 3 *supra*.

6. See note 5 *supra*.

7. See Fed.R.App.P. 35(a).

8. *Andresen v. Maryland*, *supra* note 5, 427 U.S. at 493, 96 S.Ct. at 2754, 49 L.Ed.2d at 650 (Brennan J., dissenting); *see id.* at 480-481, 96 S.Ct. at 2748, 49 L.Ed.2d at 642 (majority opinion), quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564, 583 (1971) (one of two main objectives of the Fourth Amendment warrant requirement is to assure that "searches deemed necessary should be as limited as possible," and the warrant achieves that goal only by directing executing officers to the particular things to be seized), and quoting also *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 512, 13 L.Ed.2d 431, 437 (1965), in turn quoting *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231, 237 (1927) ("[t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another"; "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant"). See also *United States v. United States District Court* (*Keith*), 407 U.S. 297, 316, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752, 765 (1972), quoting *Leach v. Three of King's Messengers*, 19 How.St.Tr. 1001, 1027 (1765) ("'[i]t is not fit,' said Mansfield, 'that the receiving or judging of information should be left to the discretion of the officer. The magistrate ought to judge and should give certain directions to the officer'").

Thus, it is not enough that the parameters the magistrate intends to place on the scope of the search would bring it within constitutional bounds. Nor is it enough that a reviewing court is able to read the warrant as not necessarily chartering an impermissible search. The executing officers themselves must know at the outset how far they are licensed to go in their pursuit of evidence.

9. *Andresen v. Maryland*, *supra* note 5, 427 U.S. at 482 n. 11, 96 S.Ct. at 2749 n. 11, 49 L.Ed.2d at 643 n. 11.

S

Angel R. SANTANA,
Appellant,

v.

The UNITED STATES
Defendant, Appe

No. 76-1278.

United States Court o
First Circuit

Heard Feb. 15,
Decided June 14,

Appeal was taken from
United States District Cour
of Puerto Rico, Robert A.
by designation, denying Jo
in a suit brought by a seam
injuries sustained when he
on a United States navy tu
of Appeals, Ingraham, Seni
sitting by designation, held
Spanish-speaking seaman
ness to the accident, and w
ny, that the hoses and cabl
he slipped upon were gre
weather was foggy, was
and was not directly imp
court erred by summarily
timony regarding grease
of liability on the grou
grease was present, the
was not the proximate
dent.

Reversed and remand

Van Oosterhout, Se
sitting by designation, d
an opinion.

1. Seamen ⇐29(5.16)

Admiralty suits for
conducted with extraord
for seaman and direct
fendants in such cases u
46 U.S.C.A. § 688.

2. Seamen ⇐29(5.14)

Burden of plaintiff
cause in actions based

discrimination to the attention of the employer with some measure of protection. The resolution of such charges without governmental prodding should be encouraged.

The statutory language does not compel a contrary result. The elimination of discrimination in employment is the purpose behind Title VII and the statute is entitled to a liberal interpretation. When an employee reasonably believes that discrimination exists, opposition thereto is opposition to an employment practice made unlawful by Title VII even if the employee turns out to be mistaken as to the facts.[3]

Applying this conclusion to the instant case, the claim of retaliatory suspensions is viable even though the Court has determined that plaintiffs were mistaken in charging sex discrimination.[4]

Nevertheless, defendants are correct in pointing out that plaintiffs have not adequately pleaded subject matter jurisdiction. This deficiency must be cured by a second amended complaint. Leave for that purpose will be granted. Plaintiffs should also plead their retaliation claim with more particularity in order to provide sufficient notice to defendants as to the nature of the opposition and the basis for the reasonable belief that discrimination existed.

IT IS ORDERED:

1. That defendants' motion for summary judgment be, and is hereby, granted as to the claims under 42 U.S.C. § 2000e-2 and otherwise denied.

2. That plaintiffs amend their complaint within 20 days.

3. In *C & D Sportswear*, the court analogized to the situation under the National Labor Relations Act where employees subject to a no-strike agreement may strike to protest an unfair labor practice only at their peril. If the NLRB later determines that no unfair labor practice existed, the employee may be discharged. *C & D Sportswear, supra*, at 306. In labor-management relations the courts and Congress attempt to regulate and equalize the weapons which may be used in economic warfare. In the Title VII context, however, the intention of Congress to eliminate discrimination in employment requires a broad construction of the statute to further this policy. Title VII is aimed at the employer to circumscribe the discretion exercised in employment decisions.

4. The result here is particularly appropriate because at the time the plaintiffs were protesting the grooming code and its enforcement, the law looked more favorably on their complaints. *See Willingham v. Macon Telegraph Publishing Co.*, 482 F.2d 535 (5th Cir. 1973), *vacated* 507 F.2d 1084 (5th Cir. 1973) (en banc), and authority cited therein

In re SEARCH WARRANT DATED JULY 4, 1977, FOR PREMISES AT 2125 S STREET, NORTHWEST, WASHINGTON, D.C.

Misc. No. 77-0151.

United States District Court, District of Columbia.

July 27, 1977.

Proceeding was instituted on motion of church to return property seized from its files. The District Court, Bryant, Chief Judge, held that: (1) sweep of discretion given by warrant authorizing agents to examine carefully and completely every document in fourth-floor files of church and to make ad hoc, on-the-spot decisions as to which of those documents constituted evidence of a conspiracy to steal government property and to obstruct justice was constitutionally intolerable, and (2) warrant authorizing search for "unknown evidence of" particular conspiracies failed to meet particularity requirement of Fourth Amendment.

Motion granted.

1. Searches and Seizures ⇐7(8)

Grant of authority to agents to search for and seize any evidence of conspiracy to steal government property and to obstruct justice amounted to a "general warrant" and, therefore, contravened Fourth Amend-

ment's guarantee against unreasonable searches and seizures. 18 U.S.C.A. §§ 371, 641, 1233; U.S.C.A.Const. Amend. 4.

2. Searches and Seizures ⇨7(1)

Provisions of Fourth Amendment serve to prevent both unjustified and arbitrary interferences with personal security and property. U.S.C.A.Const. Amend. 4.

3. Searches and Seizures ⇨7(1)

Fourth Amendment is designed in first instance to ensure that Government cannot interfere with a person's security unless it has a good reason for doing so. U.S.C.A. Const. Amend. 4.

4. Searches and Seizures ⇨7(8)

Particularity requirement of Fourth Amendment ensures that Government cannot conduct a search indiscriminately as by rummaging through a person's belongings in search of any evidence of any crime whatsoever. U.S.C.A.Const. Amend. 4.

5. Searches and Seizures ⇨7(8)

Provisions of Fourth Amendment accomplish end of ensuring against indiscriminate searches by leaving initial decision as to what can be seized to a neutral judicial officer and by circumscribing permissible bounds of search itself. U.S.C.A.Const. Amend. 4.

6. Searches and Seizures ⇨3.7

As particularity is required for issuance of a search warrant, so necessarily is generality forbidden. U.S.C.A.Const. Amend. 4.

7. Searches and Seizures ⇨3.7

Sweep of discretion given by warrant authorizing agents to examine carefully and completely every document in fourth-floor files of church and to make ad hoc, on-the-spot decisions as to which of those documents constitute evidence of a conspiracy to steal government property and to obstruct justice was constitutionally intolerable. 18 U.S.C.A. §§ 371, 641, 1503; U.S.C.A.Const. Amend. 4.

8. Searches and Seizures ⇨7(8)

A warrant authorizing search for unknown evidence of particular conspiracies does not comport with particularity requirement of Fourth Amendment. U.S.C.A. Const. Amend. 4.

9. Searches and Seizures ⇨7(7, 8)

A search warrant must satisfy both the probable cause and particularity commands of the Fourth Amendment, not simply the former. U.S.C.A.Const. Amend. 4.

10. Searches and Seizures ⇨3.7

The inclusion of phrase "evidence of" a particular crime in a warrant does not automatically and necessarily render warrant particular rather than general. U.S.C.A. Const. Amend. 4.

11. Searches and Seizures ⇨7(8)

That searches for "evidence of" crimes are no longer prohibited does not mean that particularity requirement of Fourth Amendment has been discarded along with "mere evidence" rule; rather, Government can safely assume only that searches for particular evidence will be condoned. U.S.C.A.Const. Amend. 4.

12. Searches and Seizures ⇨3.4

A neutral and detached judicial officer must in first instance ensure that strict standards exist to guide officer in his exercise of discretion with respect to execution of a search warrant. U.S.C.A.Const. Amend. 4.

13. Searches and Seizures ⇨7(8)

Subjective judgments of agents as to what might or might not be evidence were not narrowly confined by objects of search and, hence, were exercised in contravention of Fourth Amendment where, despite details with which alleged conspiracy to burglarize government offices, steal government property, and obstruct criminal investigations were described in affidavit in support of warrant, potential fruits of search were limited only by number of documents in files of church and no practical limitations were placed upon determinations of agents as to what they could seize. 18 U.S.C.A. §§ 371, 641, 1503; U.S.C.A.Const. Amend. 4.

14. Searches and Seizures ⇐3.7

Even if warrant was valid insofar as it authorized the search for "evidence of" particular conspiracies, it nevertheless failed to meet particularity requirement by authorizing search or seizure of evidence of conspiracies "at this time unknown." 18 U.S.C.A. §§ 371, 641, 1503; U.S.C.A.Const. Amend. 4.

15. Searches and Seizures ⇐7(8)

Unless search warrant directed executing officers to seize only evidence objectively pertaining to specific acts of conspiracy identified in supporting affidavit, as distinguished from evidence of any potential act in furtherance of conspiracies described, officers could maintain their license to rummage through files and take whatever they pleased in contravention of Fourth Amendment. 18 U.S.C.A. §§ 371, 641, 1503; U.S.C.A.Const. Amend. 4.

16. Searches and Seizures ⇐3.7

Even a warrant authorizing search only for unknown documents pertaining to specific acts of conspiracy would seem to suffer for want of particularity. 18 U.S.C.A. §§ 371, 641, 1503, U.S.C.A.Const. Amend. 4.

17. Searches and Seizures ⇐7(1)

Fourth Amendment commands more than a justification for an intrusion into a person's privacy; it also commands that no such intrusion be executed in an arbitrary, or indiscriminate manner. U.S.C.A.Const. Amend. 4.

18. Searches and Seizures ⇐3.7

Rule that responsible officials must take care to ensure that searches of a person's papers are conducted in a manner that minimizes unwanted intrusions upon privacy applies with still more force in a case involving a search through religious organization's files. U.S.C.A.Const. Amend. 4.

19. Searches and Seizures ⇐3.7

Once government agents have a search warrant in hand, only the requirement that the warrant particularly describes the place to be searched and the persons or things to be seized serves to protect citizens from unjustified interferences with personal security or property. U.S.C.A.Const. Amend. 4.

20. Searches and Seizures ⇐7(8)

Particularity requirement of Fourth Amendment, and nothing else, confines the intrusion to its justifiable limits. U.S.C.A. Const. Amend. 4.

Philip Hirschkop, Alexandria, Va., Daniel Sheehan, Washington, D.C., Earl Dudley, Alexandria, Va., for petitioner.

Brian W. Shaughnessy, Raymond Banoun, Asst. U.S. Attys., Washington, D.C., for respondent.

MEMORANDUM AND ORDER

BRYANT, Chief Judge.

On July 8, 1977, agents of the Federal Bureau of Investigation (FBI) executed a search warrant on the premises of the Founding Church of Scientology, Washington, D.C.[1] issued on the strength of a lengthy affidavit alleging that certain Church officials had conspired "to steal documents from the Government of the United States by means of the burglary of U.S. Government offices and theft by operatives of the Church in the employ of the U.S. Government" and to obstruct justice by "preparing a false response to expected inquiries by law enforcement authorities and federal grand juries,"[2] the warrant directed the agents to file cabinets located in the rear of the fourth floor of the building that houses the Church's Washington offices. There, the affiant stated he had probable cause to believe, the agents would find copies of the stolen documents as well as written plans, scenarios, directives and a summary of grand jury testimony prepared in furtherance of the alleged conspiracies.

1. Another search was conducted the same day at the Church's offices in Los Angeles, California. I am concerned here only with the propriety of the search conducted in the District of Columbia.

2. Affidavit in Support of Search Warrant at 32. The affidavit discusses these allegations in considerable detail.

The warrant directed the agents to leave no stone unturned. It identifies 148 documents and files allegedly stolen from government offices. It also lists as appropriate for seizure the summary of grand jury testimony and 12 other documents and categories of documents that the government apparently believes constitute evidence of the alleged conspiracies. Finally, item number 162 of the warrant authorizes the agents to seize:

> Any and all fruits, instrumentalities and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government porperty [sic] in violation of 18 U.S. Code §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out.

While the FBI agents were conducting the search the Church filed a motion in this Court seeking to restrain them from doing so and to impose a protective order sealing all documents seized, primarily on the ground that the warrant was overbroad on its face in violation of the Fourth Amendment to the United States Constitution. The Church argued in addition that should the contents of some of the seized documents be disclosed to representatives of the numerous federal agencies with which it is presently involved in civil litigation, its attorney-client privilege would be violated and its litigation prospects irreparably damaged. This Court denied the motion without reaching the merits of the Church's contentions. On July 31 the Church renewed its request for a protective order; with the consent of the United States Attorney's responsible for the criminal investigation, an order was entered prohibiting disclosure of the seized materials to attorneys for or employees of agencies involved in civil litigation with the Church. The order was to remain in effect for ten days.

The Church has now moved for return of the property seized from its Washington files on July 8. Rule 41(e), Fed.R.Crim.P. In effect this is a motion to suppress. *Id.* The Church asserts four grounds for invalidating the seizure: The warrant was overbroad—or "general"—on its face; the agents conducted the search in a manner violative of the Fourth Amendment; the agents employed unnecessary force in violation of 18 U.S.C. § 3109; and any probable cause that might have been established by the affidavit had grown stale by the time it was executed.

[1] Having considered the memoranda filed by representatives of the Church and of the government and heard their oral arguments with respect to the warrant's facial validity, I find I need go no further. I hold that the grant of authority to the agents to search for and seize any evidence of conspiracies to steal government property and to obstruct justice[3] amounted to a "general warrant" and therefore contravened the Fourth Amendment's guarantee against unreasonable searches and seizures. I am not persuaded that the Supreme Court's recent decision in *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976), is to the contrary.

I

[2-5] The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, *and particularly describing the place to be searched and the persons or things to be seized.* (emphasis added).

The Fourth Amendment serves to prevent both unjustified and arbitrary interferences with personal security and property.[4] In the first instance the amendment is de-

3. It should be noted that item 162 of the warrant purports to permit seizure of evidence of any conspiracy. I reject such a construction, however, in light of the recitals in the affidavit on the two other alleged conspiracies I have mentioned.

4. *See generally* Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn.L.Rev. 349, 410 ff. (1974).

signed to ensure that the government cannot interfere with a person's security unless it has a good reason for doing so. The *particularity* requirement ensures as well that the government cannot conduct a search indiscriminately, as by rummaging through a person's belongings in search of any evidence of any crime whatsoever. It accomplishes this end in two ways. First, it leaves to a neutral judicial officer the initial decision as to what can be seized.[5] Second, it circumscribes the permissible bounds of the search itself; as a commonly-used example illustrates, an officer executing a warrant could not reasonably expect to find a stolen elephant in a kitchen closet or in the drawer of a desk.

[6] As particularity is required, so necessarily is generality forbidden. Opposition to the so-called "general warrant" has firm roots in the history of Anglo-American law. As Justice Stewart has observed, writing for a majority of the Supreme Court in *Stanford v. Texas*, 379 U.S. 476, 481-82, 85 S.Ct. 506, 509, 13 L.Ed.2d 431 (1965):

> These words [commanding a particularized description of the place to be searched and the persons or things to be seized] are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant. Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child of Independence was born.'" *Boyd v. United States*, 116 U.S. 616, 625, 6 S.Ct. 524, 29 L.Ed. 746 (1886).

Also it is significant, in considering the propriety of seizure of a Church's documents, that the First and Fourth Amendments share at least in part a common heritage.

> Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.

Marcus v. Search Warrants, 367 U.S. 717, 724, 81 S.Ct. 1708, 1712, 6 L.Ed.2d 1127 (1961). In fact, unlimited power to search was first directed at nonconforming religious groups.

> In Tudor England officers of the Crown were given roving commissions to search where they pleased in order to suppress and destroy the literature of dissent, both Catholic and Puritan.

Stanford v. Texas, supra, 379 U.S. at 482, 85 S.Ct. at 510.

I make reference to the First Amendment not to suggest that overtones of religious persecution attend the criminal investigation of the Church of Scientology, but to make clear the need for increased sensitivity in cases in which religious organizations are involved, irrespective of the nature or gravity of the charges against them.

5. The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is to be left to the discretion of the officer executing the warrant. *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927).

Cf. Stanford v. Texas, supra; Marcus v. Search Warrants, supra.

[7] The flaw I find in the warrant involved here is precisely the evil that inheres in general warrants. The warrant in this case authorized—if indeed it did not direct—agents of the FBI to examine carefully and completely the contents of every document in the fourth-floor files of the Church and to make ad hoc, on-the-spot decisions as to which of those documents constitute evidence of conspiracy—an amorphous and open-ended crime that, as discussed below, has since its conceptual inception perplexed commentators and courts alike. In my view this warrant—addressed as it is to the crime of conspiracy—invited the agents to seize any documents in the Church's files that struck their fancy. As the Supreme Court put it in another context in *Marcus v. Search Warrants, supra*: "The warrants gave the broadest discretion to the executing officers; they . . . left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted 'obscene publications.'" 367 U.S. at 732, 81 S.Ct. at 1716. In the present context as well, the sweep of that discretion is constitutionally intolerable.

II

[8] The government rests its case, and quarrels with the analysis presented above, primarily on the authority of *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). In fact, as counsel for the government has indicated, the warrant involved in this case was patterned after the one at issue in *Andresen*. As I have suggested, I do not believe that *Andresen* stands for the proposition that a warrant authorizing search for evidence of particular conspiracies comports with the particularity requirement of the Fourth Amendment. Nevertheless, *Andresen* closely resembles the present case in numerous respects and obviously must be examined here.

Andresen can best be understood in the light of the Supreme Court's earlier opinion in *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). In *Warden* a majority of the Court joined in abandoning the so-called "mere evidence" rule, which had prohibited seizure of items having only evidential value as distinguished from contraband, fruits and instrumentalities of crime. *Warden* involved a "hot pursuit," *warrantless* search that culminated in retrieval not only of a robbery suspect, weapons, and ammunition he allegedly used, but also of clothing he allegedly wore during the robbery, found in a washing machine in the basement of his house. The Court was hard put, on the facts of that case, to draw distinctions in terms of interests the Fourth Amendment is designed to protect between the clothing, on the one hand, and the weapons and ammunition, on the other. Chief Justice Warren and Justice Fortas concurred in the result only, expressing apprehension that abandonment of the "mere evidence" rule was not only unnecessary but also likely to destroy the Fourth Amendment's prohibition against general searches. 387 U.S. at 310-12, 87 S.Ct. 1642. Justice Douglas dissented vigorously on essentially the same ground. *Id.* at 312-25, 87 S.Ct. 1642.

At the time of the Court's decision in *Warden*, despite some ambiguity it was generally assumed that the *Fifth* Amendment stood as a bar to *seizure* of an individual's personal papers, as well as to compelled *production* of such papers. *E. g., Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886). *Warden*, however, expressly left open the question whether that was so. 387 U.S. at 303, 87 S.Ct. 1642.

The Supreme Court apparently determined to resolve much of this ambiguity in *Andresen*. It upheld a conviction for the crime of "false pretenses" as defined by Maryland law, *see* Md.Ann.Code, Art. 27, § 140 (1976), over petitioner's contentions that the Fifth Amendment barred seizure of his personal business records and that warrants authorizing searches for documents in his offices were unconstitutionally general. The warrants at issue directed seizure of certain specified "items pertain-

ing to sale, purchase, veyance of lot 13, bloc subdivision, Montgon land," 427 U.S. at 480 "together with other ties and evidence of unknown." *Id.* As Andresen based his " on the catch-all phras each warrant. He c the Court, that the permitted the execut for and seize eviden

After rejecting pet ment claim, for reas the Court began it analysis by reaffirm

General warran hibited by the "[T]he problem warrant] is not t but of a general, in a person's belo Fourth Amendm lem] by requirin tion' of the thing *v. New Hampshi* S.Ct. 2022, 2038, This requirem searches impossi zure of one thi scribing another *taken, nothing i the officer ex Stanford v. Tex* S.Ct. 506, 512, quoting *Marro* U.S., at 196, 4

Andresen v. Mar 480, 96 S.Ct. at 27 Court then state the

challenged phr rizing only the evidence relati pretenses with

Id. (citation omi therefore "did n officers to condu *other* crimes," a

ing to sale, purchase, settlement and conveyance of lot 13, block T, Potomac Woods subdivision, Montgomery County, Maryland," 427 U.S. at 480 n. 10, 96 S.Ct. at 2488, "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." *Id.* As does the Church here, Andresen based his "generality" argument on the catch-all phrase at the conclusion of each warrant. He contended, according to the Court, that the "other-fruits" clause permitted the executing officers to search for and seize evidence of any crime.

After rejecting petitioner's Fifth Amendment claim, for reasons not germane here, the Court began its Fourth Amendment analysis by reaffirming the rule that:

> General warrants, of course, are prohibited by the Fourth Amendment. "[T]he problem [posed by the general warrant] is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. . . . [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized. *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971). This requirement "'makes general searches impossible and prevents the seizure of one thing under a warrant describing another. *As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*'" *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 512, 13 L.Ed.2d 431 (1965), quoting *Marron v. United States*, 275 U.S., at 196, 48 S.Ct., at 76.

Andresen v. Maryland, *supra*, 427 U.S. at 480, 96 S.Ct. at 2748 (emphasis added). The Court then stated that, taken in context, the

> challenged phrase must be read as authorizing only the search for and seizure of evidence relating to 'the crime of false pretenses with respect to Lot 13T.'

Id. (citation omitted). Since the warrants therefore "did not authorize the executing officers to conduct a search for evidence of other crimes," said the Court, they did not run afoul of the particularity requirement. *Id.* at 481-82, 96 S.Ct. at 2749 (emphasis added).

Petitioner in *Andresen* had a second Fourth Amendment claim, which pertained to documents referring to a lot other than 13T that were seized pursuant to a clause in the warrant authorizing search for "books, records, documents, papers, memoranda and correspondence, showing or tending to show a fraudulent intent, and/or knowledge as elements of the crime of false pretenses . . ." Id. at 481 n. 10, 96 S.Ct. at 2748. Apparently he contended that these items were irrelevant to the charge concerning Lot 13T and therefore should have been suppressed according to *Warden v. Hayden*, *supra*. The Court disagreed, observing that intent to defraud is an element of the crime of false pretenses in Maryland and that it is well settled that "proof of similar acts is admissible to show intent or the absence of mistake." *Andresen*, *supra*, at 483, 96 S.Ct. at 2750. Moreover, said the Court,

> Lot 13T and the other lot [about which evidence was seized] had numerous features in common. Both were in the same section of the . . . subdivision; both had been owned by the same person; and transactions concerning both had been handled by petitioner. Most important was the fact that there were two deeds of trust in which both lots were listed as collateral.

Id. at 484, 96 S.Ct. at 2750.

III

The government apparently would have me read *Andresen*, in conjunction with *Warden v. Hayden*, as sanctioning any warrant that directs the executing officers to search for "evidence of" a particular crime. The logic of the government's position is clear and, I admit, parallels statements made by the Court in *Andresen*: If the affidavit and warrant together identify in precise terms the crime believed to have been committed, and the warrant directs the agents to search for "evidence of" that crime, then the agents have no discretion to search for evidence of other crimes, and the particularity requirement is satisfied.

[9, 10] Were the government correct, the particularity requirement would be rendered a nullity. Hence I cannot believe that the Court intended *Andresen* to be interpreted so broadly, or so literally. For a warrant must satisfy *both* the probable cause and particularity commands, not simply the former: "[N]o Warrants shall issue, but upon probable cause [to believe a *particular* crime has been committed], *and* particularly describing the place to be searched and the persons or things to be seized." U.S.Const. amend. IV (emphasis added). To say that mechanical inclusion of the phrase "evidence of [a particular crime]" in a warrant automatically and necessarily renders it particular rather than general is to say, simply, that we no longer prohibit general searches.

[11] To be sure, searches for "evidence of" crimes are no longer prohibited, and in *Andresen* the Court did validate a warrant authorizing just that. This in no way means, however, that the particularity requirement has been discarded along with the "mere evidence" rule; rather, the government can safely assume only that searches for *particular evidence* will be condoned. As the Court put it in *Warden*,

> if rejection [of the "mere evidence" rule] does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause *and particularity* requirements of the Fourth Amendment

. . .

387 U.S. 309, 87 S.Ct. 1651 (emphasis added).

[12] *Andresen* must, I believe, be read in the light of the Court's reiteration of our historical proscription of general warrants and the Court's statement, derived from numerous prior cases, that "*[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*" 427 U.S. at 480, 96 S.Ct. at 2748 (emphasis added). I do not take this statement literally to mean that the executing officer can make no determinations at all with respect to what is to be seized. Such an application of the Court's language would require me to ignore the rule permitting the executing officer to seize manifestly criminal objects such as contraband that he encounters inadvertently in plain view.[6] What I do take the Court to mean, however, is that a neutral and detached judicial officer must in the first instance ensure that strict standards exist to guide the officer in his exercise of discretion. Evidently the majority[7] of the Court was satisfied that the judicial officer who issued the warrant in *Andresen* could reasonably have concluded that a search for evidence pertaining to the sale of a specific parcel of real estate—precisely and unmistakably identified as "Lot 13T"—is sufficiently circumscribed to comport with the rule against discretionary searches and seizures. Presumably the agents could readily determine whether a particular document pertained to that lot simply by inspecting its contents in a cursory fashion—that is, by keying on the magic words, "Lot 13T." Thus they could instantly seize—or eliminate from their scrutiny—any document that on its face did not relate to that property.[8]

Try as the government might, the same cannot be said about a search for evidence of a conspiracy—irrespective of the preci-

6. *E. g., Alderman v. United States*, 394 U.S. 165, 177 n. 10, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969) (dictum); *see also* Amsterdam, *supra* note 4, at 358

> Whether documentary evidence in a person's files can be encountered "inadvertently" is a question that is sure to arise. I would have grave apprehensions about such an application of the "plain view" doctrine

7. Justices Brennan and Marshall each wrote a dissenting opinion. 427 U.S. at 484, 96 S.Ct. 2737; *Id.* at 493, 96 S.Ct. 2737

8. I must admit that the Court's sanction of the seizure of evidence of "intent" or "absence of mistake" casts some doubt upon the issue involved here. However, the Court limited its sanction to evidence of similar transactions that related closely and objectively to Lot 13T, i. e. evidence pertaining to a second lot that was listed as collateral together with Lot 13T in two deeds of trust. 427 U.S. at 484, 96 S.Ct. 2737. In so doing, the Court appeared to be embracing the rationale I have espoused in the text.

sion with which the un
offense is described,[9]
the permissive rules of
prosecutors seeking to
this context especially
government urges bet
searches for evidence of
missible searches for ev
lar crime is patently h
nothing "particular" al
counsel for the Church
the best known statem
dence concerning the la
that of Justice Jackso
United States, 336 U.S.
L.Ed. 790 (1949):

> The modern crime
> vague that it almos
> Despite certain eleme
> elements, it also, chan
> a special coloration
> many independent of
> may be overlaid. It i
> nantly mental in com
> consists of a meeting
> intent.
>
> The crime comes de
> in vague but unpleasa
> sounds historical under
> secret plotting and v
> that menaces social st
> curity of the state its

. . .

> [E]ven when appropri
> looseness and pliabilit
> present inherent dange
> in the background o
> wherever it is sought
> trine to meet the exig
> lar case.

Id. at 446-47, 449, 69

Inasmuch as conspiracy "
nition," it is no surprise
evidence that pertain to
pliable as well. This is
cause the underlying su
do not limit the scope of
that might be introduced

9. In the present case, on
substantive offenses is ob
That in itself is a rather a

sion with which the underlying substantive offense is described.[9] Indeed, because of the permissive rules of evidence available to prosecutors seeking to prove conspiracy, in this context especially the distinction the government urges between impermissible searches for evidence of *any crime* and permissible searches for evidence of a *particular crime* is patently hollow. For there is nothing "particular" about conspiracy. As counsel for the Church points out, perhaps the best known statement in our jurisprudence concerning the law of conspiracy was that of Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949):

> The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always 'predominantly mental in composition' because it consists of a meeting of minds and an intent.
>
> The crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself.
>
> . . . . . .
>
> [E]ven when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case.

Id. at 446-47, 449, 69 S.Ct. at 720, 721. Inasmuch as conspiracy "almost defies definition," it is no surprise that the rules of evidence that pertain to it are loose and pliable as well. This is so principally because the underlying substantive offenses do not limit the scope of relevant evidence that might be introduced at trial. Rather, evidence of conspiracy could also include evidence of *any* action taken by one of the accused confederates—no matter how trivial or manifestly innocuous on its face—that might somehow be connected to an agreement to commit the substantive offenses, or be said to constitute an act in furtherance of such an agreement. *See, e. g.*, Wharton, Criminal *Evidence*, § 642 (13th ed. 1973). Thus "evidence of conspiracy" is a virtually open-ended proposition.

[13] It seems self-evident, then, in considering both the warrant and the affidavit supporting it, *see Moore v. United States*, 149 U.S.App.D.C. 150, 461 F.2d 1236, 1238 (1972), that the agents in this case had no clear standard to guide their exercise of discretion. Item 162 of the warrant authorized them to search for and seize "evidence at this time unknown" of the two conspiracies outlined in the affidavit. Such evidence, quite clearly, is of a character substantially different from the evidence involved in *Andresen*. In that case, subjective judgments by the officers as to what may or may not be evidence were narrowly confined by the *objects* of the search—documents pertaining to the sale of a specific parcel of real estate, precisely identified as "Lot 13T." Thus a search for "unknown evidence" pertaining to a single real estate transaction may be said to be particular in the sense that the agents know essentially what they are looking for, and definite limitations exist with respect to their exercise of discretion as to what to seize. In the present case, by contrast, despite the detail with which the alleged conspiracies to burglarize government offices, steal government property, and obstruct the criminal investigation are described in the affidavit, the potential fruits of the search were limited only by the number of documents in the Church's files. To be sure, the affidavit provided the agents with substantial guidance as to what to look for. But neither the warrant nor the affidavit—nor both construed together—placed practical limita-

9. In the present case, one of the underlying substantive offenses is obstruction of justice. That in itself is a rather amorphous crime, and remains so despite the detail with which the alleged plot is described in the affidavit.

tions upon their determinations respecting what to seize. For unless the contents of any particular document rendered it manifestly criminal, the decision whether to seize it was complicated by the subjective considerations attending the law of conspiracy. In effect, each agent had been delegated authority to consider the relevance of the documents according to his own subjective standards as to what evidences the conspiracies suggested by the affidavit. As a practical matter, therefore, a directive to seize "evidence at this time unknown" of conspiracy is a "wild card" permitting seizure of anything at all. In terms of the damage done to the Church's interest in freedom from unjustified, indiscriminate seizures, item 162 is indistinguishable from a warrant to seize evidence of "any crime."

Under the circumstances of this case, the government's argument that the affidavit was sufficient to establish the necessary particularity is on especially tenuous ground. For the government concedes that "certain documents . . . should not have been seized," that indeed "approximately half of the documents will be returned . . . " Memorandum in Opposition To Motion For Return of Property at 4. Though, as the government suggests, the fact of improper *seizure* may not *ipso facto* demonstrate an improper *warrant*, that fact certainly provides strong indication that the agents themselves did not construe the affidavit as limiting their discretion.

[14–16] Moreover, even assuming *arguendo* that the government's broad interpretation of *Andresen* is the correct one, I would still find it difficult to condone a warrant authorizing search for and seizure of evidence of conspiracy "at this time unknown." For unless the warrant directed the executing officers to seize *only evidence objectively pertaining to specific acts of conspiracy identified in the affidavit*—as distinguished from evidence of any potential act in furtherance of the conspiracies described—the officers would maintain their license to rummage through the files and take whatever they pleased. Indeed, even a warrant authorizing search only for unknown documents pertaining to specific acts of conspiracy would seem to suffer for want of particularity. Execution of such a warrant, again, would vest in the agents discretion to make difficult, subjective determinations with respect to relevancy. Thus I must admit that I have serious doubts whether any warrant authorizing search for and seizure of "documentary evidence of conspiracy at this time unknown" could withstand constitutional scrutiny.

IV

[17, 18] I recognize and share the Supreme Court's concern that the "complexity of an illegal scheme . . . not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession." *Andresen, supra*, 427 U.S. at 481 n. 10, 96 S.Ct. at 2749. At the same time, of course, a complex legal scheme cannot be used as a shield from the commands of the Fourth Amendment. Thus it may be said that a far-flung criminal scheme—such as conspiracy—*justifies* an equally far-flung search for evidence of that scheme. The Fourth Amendment, however, as the Court has repeatedly recognized, commands more than a justification for an intrusion into a person's privacy. It also commands that no such intrusion be executed in an *arbitrary*, or indiscriminate manner. Thus steps must be taken to ensure that the intrusion is confined to its justifiable limits. This is so especially where searches for documents are involved.

We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. . . . In both kinds of searches, responsible officials, including judicial officials, must take care to ensure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

Andresen, 427 U.S
2749. This ration
with still more fo
search through a
files.

[19, 20] Once g
search warrant in
ment that the w
scrib[e] the place
persons or things
protect citizens fr
ences with person
The particularity
ing else—confines
fiable limits.[10] In
Court evidently be
of the term "Lot
accomplish that p
there is no such pr
warrant cannot sta

Fay WA

Joseph ROTHE
No. 7
United State
E. D.
Richmo
July

Defendants file
tion brought under

10. Had the warrant
items one through 1
ing interference wi
would have been
First, the agents cou
Church's files only t
in the warrant. Se
things to be seized
search-process itself
items has certain obj
earmarkings—name
date, title and the lik
another each item
pertaining to "Lot
Church has imposed
its files, most likely

Andresen, 427 U.S. at 482 n. 11, 96 S.Ct. at 2749. This rationale, it seems to me, applies with still more force in a case involving a search through a religious organization's files.

[19, 20] Once government agents have a search warrant in hand, only the requirement that the warrant "particularly describ[e] the place to be searched, and the persons or things to be seized" serves to protect citizens from unjustified interferences with personal security or property. The particularity requirement—and nothing else—confines the intrusion to its justifiable limits.[10] In *Andresen* the Supreme Court evidently believed that the precision of the term "Lot 13T" was sufficient to accomplish that purpose. Here, however, there is no such precision. This is why the warrant cannot stand.

Fay WASHINGTON

v.

Joseph ROTHENBERG, etc., et al.

No. 77-0330-R.

United States District Court,
E. D. Virginia,
Richmond Division.

July 27, 1977.

Defendants filed motion to dismiss action brought under Truth in Lending Act. The District Court, Warriner, J., held that (1) district court would decline to exercise pendent jurisdiction over state court claim where issue concerning invalidity of contract terms could be raised as defense to state court action, and (2) district court would order stay of further proceedings in federal case until final disposition was made in state court case.

Ordered accordingly

Federal Courts ⇐14

Pendent jurisdiction is a doctrine of discretion which is justified by considerations of judicial economy, convenience, and fairness to litigants.

2. Federal Courts ⇐15

Where action involving credit transaction had been brought in state court and issue concerning invalidity of contract terms could be raised as defense to state court action on the contract, district court would decline to exercise pendent jurisdiction over state court claim in federal action brought under Truth in Lending Act. Code Va.1950, § 6.1-330.26; Truth in Lending Act, § 130(e), 15 U.S.C.A. § 1640(e).

3. Action ⇐69(5)

Where state court action was brought involving credit transaction and where claims concerning credit transaction could be disposed of in their entirety in state court, district court would order stay of further proceedings in federal case brought

10. Had the warrant authorized only seizure of items one through 161, for example, the resulting interference with the Church's privacy would have been narrowed considerably. First, the agents could have removed from the Church's files only the items listed specifically in the warrant. Second, specification of the things to be seized would have altered the search process itself. Each of the specified items has certain objective, readily identifiable earmarkings—name of author or addressee, date, title and the like. Thus in one respect or another each item is similar to a document pertaining to "Lot 13T." Presumably the Church has imposed some system of order on its files, most likely by alphabetizing them. The agents, then, could first have looked in the specific sections of the files in which the documents would most likely be found. If perchance the agents succeeded immediately in locating the documents sought, no justification would have existed to search further, and no other documents could have been disturbed. Assuming the files had no order whatever or the specified items were randomly interspersed throughout them, the agents could have inspected each document in the files in cursory fashion, keying on the objective earmarkings specified in the warrant. Thus the agents would not have had authority to consider and take with them those secrets of the Church which should have been left alone.

Supreme Court Proceedings Cases Filed On Appellate Docket

Silver, and Miriam R. Eisenstein, all Justice Dept. Attys.

v. 79-501, U.S. v. Mississippi

-28

Reapportionment of state legislature—Racially discriminatory purpose and effect—§ 5 of Voting Rights Act.

Ruling below (USDC DC, 6/1/79):

Legislative reapportionment plan enacted by Mississippi legislature in March, 1978, and approved by Governor on April 12, 1978, and changes resulting from such plan are within scope of § 5 of Voting Rights Act, which precludes enforcement or implementation of any change in voting qualification or voting standard, practice, or procedure without approval by U.S. Attorney General or favorable declaratory judgment by U.S. District Court for District of Columbia; proof in this case demonstrates that Mississippi legislative reapportionment plan enacted by Mississippi legislature would not lead to retrogression in current position of racial minorities with respect to their effective exercise of electoral franchise and therefore does not have "effect of denying or abridging the right to vote on account of race or color"; implementation of such legislative reapportionment plan for 1979 quadrennial legislative elections in Mississippi will not have either purpose or effect of denying or abridging full and free exercise of right to vote of black citizens in that state.

Questions presented: (1) Did district court err in holding that state had met its burden of proving that statutory plan was enacted without racially discriminatory purpose? (2) Did district court apply proper legal standard on purpose issue when it noted that burden was on state but then held that proof of discriminatory racial purpose is necessary for finding of purpose proscribed by § 5 of Voting Rights Act? (3) Did district court err in holding that statutory plan would not have racially discriminatory effect and that differences between settlement plan in Connor v. Finch and statutory plan were insignificant in face of uncontradicted testimony of black voters affected by redistricting that differences were significant and on basis of 1970 census statistics of population and voting age population that were hopelessly out of date and that did not reflect current voting realities? (4) Did district court correctly apply principles of Beer v. U.S., 425 U.S. 130, 44 LW 4435 (1976), in holding that statutory plan that has fewer majority black districts than existing plan and that contains districts in which black percentages are significantly lower than in corresponding districts in existing plan was not retrogressive of black voting strength?

Appeal filed 9/28/79, by Frank R. Parker, of Jackson, Miss., and Richard S. Kohn, of Washington, D.C.

No. 79-528, Henry v. Mississippi

Employment Discrimination

79-507

Refusal to renew pregnant teacher's employment contract—Rebuttal of prima facie case.

Ruling below (CA 4, 19 FEP Cases 1711):

Pregnant teacher whose contract with school board was not renewed pursuant to board's policy requiring pregnant teachers to report their pregnancy and precluding renewal of contract of any teacher who could not commit herself to full year's service established prima facie violation of § 703(a)(2) of 1964 Civil Rights Act because board's policies imposed upon female school teachers substantial burden that men did not have to suffer, and application of policies is indistinguishable from those held violative of Title VII in Nashville Gas Co. v. Satty, 434 U.S. 136, 46 LW 4026 (1977); school board cannot rebut pregnant teacher's showing of prima facie violation unless it shows "business necessity" as justification for its challenged policies; because school board and federal district court improperly viewed appropriate defense to teacher's action as "legitimate state interest," case is remanded to district court, inasmuch as course of adjudication did not previously reveal business necessity defense to be appropriate.

Questions presented: (1) Must employer sued for alleged sex discrimination under Title VII of 1964 Civil Rights Act do more than "articulate some legitimate nondiscriminatory reason" for refusing to renew employment contract in order to rebut pregnant employee's prima facie case, when trial court found as fact that challenged employment practice impacts equally on men and women? (2) Can prima facie case of sex discrimination be established by "judicial notice" of "potential" effect of employment policy when there is no showing of actual or statistical disparity in impact of policy on men and women and trial court found policy to be facially neutral, neutral in intent, and neutrally applied to both men and women?

Petition for certiorari filed 9/26/79, by Bruce E. Davis, of Camden, S.C., and Randall T. Bell, of Columbia, S.C.

No. 79-507, Board of Trustees of Pickens County School District v. Mitchell.

Federal Courts and Procedure

79-480

Federal court refusal to decide pendent claim.

Ruling below (CA 6, 6/13/79):

Federal district court has no jurisdiction to decide union's pendent state-law claim against party with whom it had no contract and against whom it could assert no independent basis of federal jurisdiction; Fed.R.Civ.P. 64 cannot provide such jurisdictional basis.

Questions presented: (1) Where pendent claim (although involving defendants not subject to federal claim) was integral part of federal claim, did district court abuse its discretion in refusing to decide pendent claim? (2) Where remedy established by state law was used for purpose of securing satisfaction (in whole or in part) of federal labor claim, was district court required by Fed.R.Civ.P. 64 to decide pendent claim?

Petition for certiorari filed 9/20/79, by Sheldon M. Meizlish, Kolland R. O'Hare, and Marston, Sachs, Nunn, Kates, Kadashin, & O'Hare, P.C., all of Detroit, Mich.

No. 79-480, Carpenters District Council of Detroit v. Morse

✳ 79-529

Appeals—Denial of motion for return of property—Concurrent grand jury investigation and indictment.

Ruling below (CA 9, 591 F.2d 533):

Denial of Church of Scientology's motion, made on behalf of itself and its employees, for return of seized property and for suppression of evidence is not appealable in light of ongoing grand jury proceedings in District of Columbia and New York and pending extradition proceeding in Great Britain.

Question presented: Is Church of Scientology of California precluded from appealing from final order of district court, which denied its application under Fed.R.Crim.P. 41(e) for return of property, by fact that during pendency of its appeal, grand jury in different jurisdiction indicted 11 individuals, but not Church, on matters relating to materials seized?

Petition for certiorari filed 9/28/79, by Leonard B. Boudin, Eric M. Leiberman, and Rabinowitz, Boudin, Standard, Krinsky & Leiberman, all of New York, N.Y.

No. 79-529, Church of Scientology of California v. U.S.

Freedom of Information

79-518

Demand for information from FBI—District court's failure to conduct in camera examination of withheld material.

Ruling below (CA 7, 5/25/79):

FBI's provision of detailed description of all documents released and withheld pursuant to Freedom of Information Act request, and its explanation of claimed exemptions with regard to withheld documents, is sufficient to establish that withheld documents fall with FBI's asserted exemptions from disclosure and thus district court did not err in refusing to conduct in camera inspection.

Questions presented: (1) Does decision below conflict with decisions of U.S. Court of Appeals for District of Columbia Circuit, notably Ray v. Turner, 587 F.2d 1195 (1978), as to proper interpretation of 5 U.S.C. § 552? (2) Does decision below raise significant and recurring problems concerning overall administration of Freedom of Information Act? (3) Should district court have made determination de novo of applicability of Act's exemptions through use of in camera inspection of documents?

Petition for certiorari filed 9/27/79, by Lance Haddix, of Chicago, Ill.

No. 79-518, Terkel v. Webster.

Motor Vehicles

79-472

Violation of 55 mph speed limit—Due process.

Ruling below (Ore.SupCt, 6/13/79):

Lower court rejection of constitutional attack on 55 mph speed limit is affirmed without opinion.

Questions presented: (1) Was appellant wrongly denied jury trial? (2) Was maximum Oregon speed limit of 55 mph unconstitutionally adopted?

Appeal filed 9/20/79, by Darrell Darwin Smith, pro se, of Pilot Rock, Ore.

No. 79-472, Smith v. Oregon

Municipal Corporations

79-500

Rezoning—Reduction in value of land—Just compensation—Due process.

Ruling below (NJ SupCt, AppDiv, 2/5/79):

Court affirms judgments of Superior Court, Law Division, Morris County, that amendment to Township of Montville zoning ordinance raising minimum lot size to three acres was invalid but that amendment could be sustained if more reasonable cluster alternative was enacted within

Review Denied

sulfur dioxide on basis of alleged state procedural deficiencies precludes challenge to EPA's approval of Indiana designation; state trial court ruling that Indiana designation is void for procedural defects is not binding on U.S. court of appeals unless affirmed on appeal; EPA Clean Air Act designation of sulfur dioxide nonattainment area that is supported by monitoring and modeling data is not arbitrary and capricious.

FEDERAL COURTS AND PROCEDURE

No. 79-529. Church of Scientology of California v. U.S.

Ruling below (CA 9, 591 F2d 533):

Denial of Church of Scientology's motion, made on behalf of itself and its employees, for return of seized property and for suppression of evidence is not appealable in light of ongoing grand jury proceedings in District of Columbia and New York and pending extradition proceeding in Great Britain.

GOVERNMENT PERSONNEL

No. 79-686. Power v. U.S.

Ruling below (US CtCls, 4/18/79):

Unlawfully removed civil servant's right to receive pay did not terminate on date of court decision finding removal unlawful, but on date of denial of motion of rehearing in which court held that civil servant, by his position and conduct with respect to rehearing motion, waived all claim to further back pay and reinstatement; Government is entitled to offset against back pay award amount that civil servant could have earned by seeking and obtaining employment at applicable minimum wage during period that began after his removal from Government service became final and extended through date of court's denial of rehearing.

LABOR

No. 79-568. Occidental Life Insurance Co. of California v. Saffo.

Ruling below (CA 8, 6/1/79):

Reductions of vested benefits of retired beneficiaries of union pension plan by insurance company that received custody of plan previously administered by plan trustees on self-insured basis upon "guarantee" that vested benefits at time of retirement would be paid constituted breach of contract; trial court's finding that certain employee did not have break in service that destroyed eligibility for benefits was clearly erroneous.

No. 79-573. Kayner v. Occidental Life Insurance Co. of California

Ruling below (CA 8, 6/1/79):

Reductions of vested benefits of retired beneficiaries of union pension plan by insurance company that received custody of plan previously administered by plan trustees on self-insured basis upon "guarantee" that vested benefits at time of retirement would be paid constituted breach of contract; trial court's finding that certain employee did not have break in service that destroyed eligibility for benefits was clearly erroneous.

No. 79-708. Philadelphia Food Store Employers' Labor Council v. Retail Clerks Intnat'l Ass'n Locals 1349 etc.

Ruling below (CA 3, 7/3/79):

Arbitrator's decision that food stores' closings were not for "economic" reasons but were undertaken for strategic purposes in stores' labor dispute with meat cutters and were therefore "lockouts" prohibited by stores' contract with clerks union had rational basis and should have been upheld.

LIBEL AND SLANDER

No. 79-891. Saxon v. Johnston.

Ruling below (Miss SupCt, 5/30/79):

Court affirms circuit court decision that sustained demurrer to libel action brought by "quasi-public figure" who failed to show that defendant newspaper published statement about plaintiff with malice.

PRODUCT SAFETY

No. 79-821. Morgan and Co., Inc. v. Olin Corp., Inc.

Ruling below (CA 4, 6/21/79):

Insufficient proof that chemical product caused loss of growing cotton crops warranted directed verdict against cotton grower in his suit against product manufacturer for damages.

PUBLIC HEALTH

No. 79-794. DeVito v. Lang.

Ruling below (Ill SupCt, 76 Ill2d 311, 391 NE2d 350, 25 CrL 2283):

Under state statutes, murder defendant who is unfit to stand trial because he is deaf-mute and unable to communicate with others is thereby rendered subject to involuntary commitment; evidence and testimony taken in earlier stages of defendant's case sufficiently establish that he is dangerous to himself or others; accordingly, defendant may be civilly committed, with entitlement to treatment and periodic review of his status.

SCHOOLS AND COLLEGES

No. 79-531. Newell v. Orleans Parish School Board.

Rulings below (La CtApp, 4th Cir, 370 So2d 655 and 370 So2d 658):

School board's refusal to grant sabbatical leave to teachers who are otherwise eligible under Louisiana law, but who were granted maternity leave for period immediately preceding requested sabbatical leave, does not violate Equal Protection Clause.

SECURITIES AND EXCHANGES

No. 79-685. Dresser Industries, Inc. v. U.S.

Ruling below (CA 5, 596 F2d 123):

Company's claim that it had contract with Securities and Exchange Commission under which it agreed to undertake investigation of itself and SEC agreed to preserve confidentiality of company's investigatory documentation reflecting identities and locations of certain of company's overseas employees, claim that SEC has exceeded its statutory authority in ordering investigation of company, and claim that SEC and Justice Department demands for production of certain evidence indicate that agencies seek to deprive company and its employees of rights secured by Fourth and Fifth Amendments are not ripe for judicial review; even if company's claims could be construed to allege existence of contract between company and SEC, which would purport to bind Justice Department not to investigate company, not to issue grand jury subpoenas, and not to assess civil or criminal penalties, such contract would not be enforceable because neither SEC nor any of its agents possesses authority to make such agreements.

No. 79-828. Edwards and Hanly v. Wells Fargo Securities Clearance Corp.

Ruling below (CA 2, 602 F2d 478):

Court, in considering broker's negligence, which is mixed question of fact and law, is not necessarily bound by limitations of Fed.R.Civ.P. 52(a); broker that failed to exercise due diligence by not discovering that massive selling by its client broker was for its own account, that late deliveries of stock indicated client broker's short selling, and that violated Regulation T, 12 C.F.R. § 220.4, by failing to inquire whether client broker's sales it marked "long" were actually long sales cannot hold its clearing agent liable for losses it sustained when required to buy in securities due to client broker's default.

SOCIAL SECURITY

No. 79-687. Kyzar v. Harris.

Ruling below (CA 5, 597 F2d 68):

Social Security regulation that provides, for purposes of child's insurance benefits, that "child shall be deemed dependent upon his stepfather or stepmother *** if *** child was living with *** such stepfather or stepmother," allows conclusive establishment of dependence upon proof of specified objective criteria; thus, stepchildren who were living with their stepfather at his death were entitled to share in child's insurance benefits with his natural minor children.

TAXATION

No. 79-695. Bosch v. U.S.

Ruling below (CA 5, 590 F2d 165):

Florida divorcee's basis in land, formerly titled to ex-husband, which divorce court had awarded to her in recognition of her "special equity" due to contribution of her own funds to property's improvement, is value of land when originally purchased by husband.

TORTS

No. 79-707. Uptegrove v. U.S.

Ruling below (CA 9, 600 F2d 1248):

Naval officer's death while space available passenger on military aircraft that crashed due to alleged negligent conduct of FAA air traffic controllers was incident to military service within meaning of doctrine announced in Feres v. U.S., 340 U.S. 135 (1950), precluding recovery under Federal Tort Claims Act by military person for injuries sustained during activity incident to his military service; in determining applicability of Feres doctrine, only status of plaintiff, and not that of tortfeasor (such as civilian employees of FAA in this case), need be considered.

0148-8139/80/$00.50

time law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port." 179 U.S. at 558, 21 S.Ct. at 214.

The law would likewise vary depending on whether, say, a vessel collided with a privately-owned bridge or similar maritime structure or a publicly-owned one.

To allow immunity would lead to another evil—the denial of justice.

"This must be the inevitable consequence of admitting the proposition which assumes that the maritime law disregards the rights of individuals to be protected in their persons and property from wrongful injury, by recognizing that those who are amenable to the jurisdiction of courts of admiralty are nevertheless endowed with a supposed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility therefor." At 559, 21 S.Ct. at 214.

This latter evil is clearly demonstrated by situations such as that in Board of Commissioners v. Gypsum Transp. Ltd., 209 So.2d 296 (La.App.1968), writ ref. 252 La. 260, 210 So.2d 505, cert. den. 393 U.S. 938, 89 S.Ct. 302, 21 L.Ed.2d 276, in which the court held that the Board could sue Gypsum for tort damages arising out of a maritime collision but disallowed Gypsum's counterclaim for its damages for the same collision because of the Board's immunity from suit.

[7] Other than the tottering, tread-worn assertion that the sovereign can do no wrong, this Court can find no valid reasons supporting the doctrine of immunity sufficient to offset the strong reasons stated by the Supreme Court in *Workman* for not recognizing the state immunity doctrines in a court of admiralty. Since, for purposes of this motion, we assume that plaintiff's cause of action is meritorious, we refuse to defeat it by holding the Board of Commissioners immune from suit for their alleged torts. Accordingly, it is the order of the court that the motion of the Board of Commissioners to dismiss the complaint because the Board is immune from suit be, and the same is hereby, denied.

UNITED STATES of America,
Libelant,
v.
An ARTICLE OR DEVICE . . . "HUBBARD ELECTROMETER" or "Hubbard E-Meter," etc.,
Founding Church of Scientology et al.,
Claimants.
No. D.C. 1-63.

United States District Court,
District of Columbia.
July 30, 1971.

Action on libel of information by the United States seeking condemnation of gadget and related writings. The District Court, Gesell, J., held that writings which were distributed by religious institution to accompany auditing device, which were intended to promote use of the device by the public, and which contained false unqualified scientific claims without a religious overlay or suggestion were "labeling," within the Federal Food, Drug, and Cosmetic Act; thus, the device was misbranded as a result of misrepresentation in failure of the labeling to bear adequate directions for its use, and its secular use, along with secular use of the writings, had to be condemned. The Court further held that where auditing device, which was harmless in

itself, was used by legitimate church to aid its ministers in communicating with adherents, the church could continue its use of the device, which was condemned for misbranding, provided it was used only in religious setting subject to explicit warning disclaimers on the device itself and on all labeling.

Order accordingly.

1. Druggists ⇐2

Auditing instrument held out as apparatus intended for use in the diagnosis, cure, medication and treatment of mental and physical illnesses was a "device" within meaning of the Federal Food, Drug, and Cosmetic Act. Federal Food, Drug, and Cosmetic Act, § 201(h), 21 U.S.C.A. § 321(h).

See publication Words and Phrases for other judicial constructions and definitions.

2. Druggists ⇐5

Books and other documents containing false scientific and nonreligious claims as to auditing device held out as apparatus intended for use in the diagnosis, cure, medication or treatment of disease, and used in various direct and indirect ways to promote the device, "accompanied" the device in meaning of the Federal Food, Drug, and Cosmetic Act, and had all the necessary elements of labeling specified in the Act. Federal Food, Drug, and Cosmetic Act, §§ 201 (m), 304, 502, 21 U.S.C.A. §§ 321(m), 334, 352.

See publication Words and Phrases for other judicial constructions and definitions.

3. Druggists ⇐11

Single false scientific nonreligious libel claim is sufficient to support condemnation of a device under the Federal Food, Drug, and Cosmetic Act. Federal Food, Drug, and Cosmetic Act, § 1 et seq., 21 U.S.C.A. § 301 et seq.

4. Druggists ⇐5, 11

Writings which were distributed by religious institution to accompany auditing device, which were intended to promote use of the device by the public, and which contained false, unqualified scientific claims without a religious overlay or suggestion were "labeling," within the Federal Food, Drug, and Cosmetic Act; thus, the device was misbranded as a result of misrepresentation in failure of the labeling to bear adequate directions for its use, and its secular use, along with secular use of the writings, had to be condemned. Federal Food, Drug, and Cosmetic Act, § 502(a), (f) (1), 21 U.S.C.A. § 352(a), (f) (1).

See publication Words and Phrases for other judicial constructions and definitions.

5. Religious Societies ⇐13

Law designed to afford protection to the public against genuine evils must be used to regulate the activities of religion only if the regulation involved is the narrowest possible remedy to achieve the legitimate nonreligious end.

6. Druggists ⇐5

Where auditing device, which was harmless in itself, was used by legitimate church to aid its ministers in communicating with adherents, the church could continue its use of the device, which was condemned for misbranding, provided it was used only in religious setting subject to explicit warning disclaimers on the device itself and on all labeling. Federal Food, Drug, and Cosmetic Act, § 304(d), 21 U.S.C.A. § 334(d); U.S.C.A.Const. Amend. 1.

John Joseph Matonis, Washington, D. C., for Founding Church of Scientology.

Nathan Dodell, Asst. U. S. Atty., Washington, D. C., for the United States.

GESELL, District Judge.

MEMORANDUM OPINION

This is an action by the United States seeking nationwide condemnation of a gadget known as an E-meter and related writings, by libel of information under the Food, Drug & Cosmetic Act, 21 U.S.C. § 301 et seq. The E-meter is claimed to be a device within the meaning of the

Act. Misbrandin
directions for use
are the Founding
and various indiv

This suit was o
before another Ju
the conviction
reversed on appea
cause of certai
problems suggeste
and evidentiary
Church of Scient
133 U.S.App.D.C.
(1969). The pres
to the Court witho
of pretrials which
The record consist
exhibits taken at
some additions a
testimony of one
testified further
the case. Many o
are set forth in th
of Appeals and a
main not contest
they need not all

The E-meter i
galvanometer usi
electrodes. It is
and designed to
resistance. It is c
ineffective in itsel
meter for treatm
in his hands durin
operator who is k
who purports to r
galvanometer need
to questions. Sci
exact science whi
When practiced b
persons, Scientolo
to improve the
ability, behavior,
the individual tre

L. Ron Hubbar
fiction magazine
advanced the ext
that various physi
es could be cured
ed a major part in
Thereafter, comm
1950's numerous
pamphlets were w

Act. Misbranding and lack of adequate directions for use are alleged. Claimants are the Founding Church of Scientology and various individuals.

This suit was originally tried to a jury before another Judge of this Court and the conviction there obtained was reversed on appeal after a long trial because of certain First Amendment problems suggested by the instructions and evidentiary rulings. Founding Church of Scientology v. United States, 133 U.S.App.D.C. 229, 409 F.2d 1146 (1969). The present trial was conducted to the Court without a jury after a series of pretrials which narrowed the issues. The record consists of the transcript and exhibits taken at the prior trial with some additions and deletions, plus the testimony of one additional witness who testified further on religious aspects of the case. Many of the background facts are set forth in the opinion of the Court of Appeals and since they were in the main not contested at the second trial they need not all be repeated here.

The E-meter is essentially a simple galvanometer using two tin cans as electrodes. It is crude, battery-powered, and designed to measure electrical skin resistance. It is completely harmless and ineffective in itself. A person using the meter for treatment holds the tin cans in his hands during an interview with the operator who is known as an auditor and who purports to read indicators from the galvanometer needle as it notes reactions to questions. Scientology is a so-called exact science which promotes auditing. When practiced by trained or untrained persons, Scientology auditing is claimed to improve the health, intelligence, ability, behavior, skill and appearance of the individual treated.

L. Ron Hubbard, writing in a science fiction magazine in the 1940's, first advanced the extravagant false claims that various physical and mental illnesses could be cured by auditing. He played a major part in developing Scientology. Thereafter, commencing in the early 1950's numerous Scientology books and pamphlets were written explaining how various illnesses can be and had been cured through auditing. These materials were widely distributed. Hubbard, who wrote much of the material, is a facile, prolific author and his quackery flourished throughout the United States and in various parts of the world. He was supported by other pamphleteers and adherents who also promoted the practice of Scientology and touted its alleged benefits.

Hubbard and his fellow Scientologists developed the notion of using an E-meter to aid auditing. Substantial fees were charged for the meter and for auditing sessions using the meter. They repeatedly and explicitly represented that such auditing effected cures of many physical and mental illnesses. An individual processed with the aid of the E-meter was said to reach the intended goal of "clear" and was led to believe there was reliable scientific proof that once cleared many, indeed most illnesses would automatically be cured. Auditing was guaranteed to be successful. All this was and is false—in short, a fraud. Contrary to representations made, there is absolutely no scientific or medical basis in fact for the claimed cures attributed to E-meter auditing.

Unfortunately the Government did not move to stop the practice of Scientology and a related "science" known as Dianetics when these activities first appeared and were gaining public acceptance. Had it done so, this tedious litigation would not have been necessary. The Government did not sue to condemn the E-meter until the early 1960's, by which time a religious cult known as the Founding Church of Scientology had appeared. This religion, formally organized in 1955, existed side-by-side with the secular practice of Scientology. Its adherents embrace many of Hubbard's teachings and widely disseminate his writings. The Church purports to believe that many illnesses may be cured through E-meter auditing by its trained ministers through an appeal to the spirit or soul of a man. As a matter of formal doctrine, the Church professes to have

abandoned any contention that there is a scientific basis for claiming cures resulting from E-meter use. The Church, however, continued widely to circulate Scientology literature such as Government's exhibits 16 and 31, which hold out false scientific and medical promises of certain cure for many types of illnesses.[1]

In 1962, when the Government seized the E-meters involved in the present controversy, it took them from the premises of the Church, confiscating some E-meters which were actually then being used primarily by ministers of the Church to audit adherents or to train auditors for subsequent church activity. Thus the Government put itself in the delicate position of moving against not only secular uses of the E-meter but other uses purporting to be religious, and the Court accordingly confronts the necessity of reconciling the requirements of the Food, Drug & Cosmetic Act prohibiting misbranding and the requirements of the First Amendment protecting religious institutions and religious beliefs from governmental interference under the First Amendment.

The Court of Appeals has ruled that the evidence at the prior trial and reintroduced at this trial established prima facie that the Founding Church of Scientology, the principal claimant here, is a bona fide religion and that the auditing practice of Scientology and accounts of it are religious doctrine. No evidence to the contrary was offered by the Government on the second trial. Accordingly, for purposes of this particular case only, claimant must be deemed to have met its burden of establishing First Amendment standing for whatever significance the religious practice of Scientology may have on the outcome of this particular litigation.

The Government considers the First Amendment issue wholly irrelevant and extraneous. Claimant, on the other hand, relies heavily on the religious claim. The positions of the parties are so completely different that neither even deigns to recognize any merit in the other. The briefs and findings proposed by each side pass like two ships at night with not even a port or starboard light showing. Yet the truth is not as absolute as either party contends. Religious aspects of this controversy, once tactically conceded, cannot be ignored. On the other hand, it is a gross exaggeration to insist that the energetic, persistent solicitation of E-meter-audited cures for a fee has all occurred in a spiritual setting without use of secular appeals and false scientific promises made in a wholly non-religious context.

[1] Turning to the precise issues presented, it must first be determined whether the E-meter is a device within the meaning of the Act (21 U.S.C. § 321 (h)). It obviously meets the statutory definition of an apparatus or contrivance intended for use in the diagnosis, cure, mitigation or treatment of disease. Moreover, it is held out as such in the constant promotion of E-meter auditing, a process designed to effectuate cures of mental and physical illnesses. Claimants contend that the E-meter is harmless in itself, cures nothing by itself, and therefore cannot be a device since those who use it appreciate its ineffectiveness and cannot therefore have the requisite intent. This begs the question. The device plays a key part in both the secular and religious auditing process which is used and intended to be used in the cure, mitigation or treatment of disease. It need not be the only agent in an allegedly curative process to be a device within the definition. The E-meter is a device within the meaning of the Act.

Over 100 E-meters were seized. At the same time the Government seized some 200 separate pieces of literature containing approximately 20,000 pages, much of which it now contends demonstrates misbranding of the device by mis-

1. The issues have been tried as of January, 1963, the date of the libel. Thus the findings as to Scientology literature and positions of the claimants do not necessarily reflect current conditions.

representation and directions for use u and 352.

The writings seiz bookstore, or "Di separately incorpora Church, with office the Church premi advertised and sold of Scientology, D writings concerned book, pamphlet, n forms.

A few of these w religious in natu medical or scientifi ly religious conte material, however, Scientology and matter-of-fact mec terms without an reference. While t concluded that lite the theory of aud claims for curativ therein, is religiou as a matter of law nized this was so charged with misre held himself out a opposed to medica wise secular claim material is replete scientific claims de overlay or referen the Church especi interested partici The Fundamentals ment Ex. 31), an Work" (Governmen examples of boo scientific non-reli amples of such clai a few other repr used in various di to promote E-met in Appendix A.

[2] Thus the necessary elements

2. Claimants urge seizure was overly the Fourth Amend

333 F.Supp.—23½

representation and lack of adequate directions for use under 21 U.S.C. §§ 334 and 352.

The writings seized were located in a bookstore, or "Distribution Center," separately incorporated but owned by the Church, with offices in the basement of the Church premises.[2] The Center advertised and sold for profit a long list of Scientology, Dianetics and other writings concerned with auditing in book, pamphlet, newsletter and other forms.

A few of these writings are primarily religious in nature. Others contain medical or scientific claims in a partially religious context. Most of the material, however, explains aspects of Scientology and Dianetics in purely matter-of-fact medical and scientific terms without any apparent religious reference. While the Court of Appeals concluded that literature setting forth the theory of auditing, including the claims for curative efficacy contained therein, is religious doctrine and hence as a matter of law not labeling, it recognized this was so only if the person charged with misrepresentation explicitly held himself out as making religious as opposed to medical, scientific or otherwise secular claims. The bulk of the material is replete with false medical and scientific claims devoid of any religious overlay or reference. Two books which the Church especially recommended to interested participants, "Scientology: The Fundamentals of Thought" (Government Ex. 31), and "The Problems of Work" (Government Ex. 103), are typical examples of books containing false scientific non-religious claims. Examples of such claims found in these and a few other representative documents used in various direct and indirect ways to promote E-meter auditing are listed in Appendix A.

[2] Thus the literature has all the necessary elements of labeling specified in 21 U.S.C. § 321(m) since it "accompanied" the device within the meaning of the Act. See Kordel v. United States, 335 U.S. 345, 351, 69 S.Ct. 106, 93 L.Ed. 52 (1948).

[3] Having in mind a jury trial, the Court of Appeals contemplated an item-by-item analysis of the writings alleged to be labeling in order to remove from jury inspection purely religious appeals, reserving a presentation of the other literature for determination under instructions differentiating the secular from the religious. This exercise is, of course, unnecessary on a trial to the Court. A single false scientific non-religious label claim is sufficient to support condemnation, and in fact there are many. Moreover, differentiation of individual documents as a practical matter is of little value when it comes to an overall resolution of the controversy. Realistically, the writings cannot only be viewed separately. They are available and distributed in infinite combinations. Whole books are involved which often ramble, contradict and are constructed to make diversified appeals that are basically secular and directed to varying temperaments, ages and attitudes of potential readers. Much of the material is skillful propaganda designed to make Scientology and E-meter auditing attractive in many varied, often inconsistent wrappings.

The Food and Drug laws are designed to protect the public. The literature disseminated by various Scientology groups is written for popular lay consumption. The words and thrust of the writings must accordingly be so considered. Claims as to the efficacy of the E-meter must be read to mean what they clearly purport to say to ordinary lay readers. The Court notes that the task of determining whether a claim or representation is religious or non-religious, or whether a religious claim is genuine or merely "tacked on" to basically pseudo-scientific claims, is hardly less trouble-

2. Claimants urge that this search and seizure was overly broad and contravenes the Fourth Amendment but this issue was resolved against this position by the Court of Appeals and need not be again considered

some than the task of determining whether a religious claim is true or false. The Court has attempted to resolve the difficulty thus presented by the Court of Appeals by refusing to consider the truth or falsity of any claim which, in the understanding of the average reader, could be construed as resting on religious faith. All doubts on this issue have been resolved in favor of the Claimants. But the overall effect of the many separate writings and the writings as a whole cannot be seriously questioned. Whether the documents are viewed singly or as a whole, the proof showed that many false scientific claims permeate the writings and that these are not even inferentially held out as religious, either in their sponsorship or context.

It should be kept in mind at all times that the Church is but one of several groups engaged in the promotion of Scientology; others include the Hubbard Guidance Center, that offers non-religious processing and auditing to the public for a fee; Hubbard Association of Scientologists International (HASI), a world-wide organization promoting Scientology among members of the organization who receive a monthly magazine ("Ability") and other benefits; and the Distribution Center, Inc., already mentioned. The combined effort of all these activities is to persuade the public to come forward for auditing with an E-meter for a fee, and while some may be motivated or attracted by religious considerations, others who audit or are audited are not.[3]

[4] An individual was not required to be either a Church member or a Scientologist to be audited at cost of $500 for 25 hours, with state of "clear" guaranteed for $5,000. The E-meter was available for sale to the public for a fee of $125. The benefits of auditing were extravagantly advertised. At the time this action was commenced, E-meters—perhaps as many as one-third the total supply—were being used by members of the public without any religious control or supervision.[4] The writings were distributed to accompany the E-meter and intended to promote its use by members of the public; they were used by laymen for secular purposes; individually a great many contain false unqualified scientific claims without even a religious overlay or suggestion. Viewed as a whole the thrust of the writings is secular, not religious. The writings are labeling within the meaning of the Act. Thus, the E-meter is misbranded and its secular use must be condemned along with secular use of the offensive literature as labeling. The misbranding results not only from misrepresentation by reason of 21 U.S.C. § 352(a) but because the labeling failed to bear adequate directions for use required by 21 U.S.C. § 352(f) (1).[5]

3. *Ability*, issue 14 (Ex. 91, p. 14) states: Scientology is going all out as a religion. The religious aspect is highly functional, very true and is very—much—more successful • • • The public expects to have ministers around. That's us folks.
• • • • • •
• • • If you don't like religion for heaven's sakes call yourself a Dianetician.

4. At the time of this action at least half the E-meters in use in the United States were being used by non-ordained lay personnel. Operators franchised by the Church who may or may not subscribe to its doctrines, provide secular auditing, retaining for themselves ninety percent of the fees collected and purport to send only ten percent to the Church. Claimants were unable to show that these franchised services were in any real sense religious missionary work in the sense that auditing was done by members of this group on a religious basis.

5. Accompanying labeling must specify the conditions for which the device is intended and sufficient information under which the device can be used safely and effectively for the purposes for which it is intended to be used. United States v. Shock, 370 F.2d 29 (8th Cir. 1967). Adequate directions are literally lacking here. It is impossible to write adequate directions for use of the E-meter by laymen. *Cf.* United States v. Ellis Research Laboratories, 309 F.2d 550 (7th Cir. 1962). The Church of Scientology of California v. Richardson, 437 F.2d 214 (9th Cir. 1971).

On the basis
Government is e
It is only when t
question of app
serious difficultie

[5] An initi
whether the no
remedies, 21 U.S
any circumstanc
device when used
fact" of a churc
afford protection
genuine evils ma
the activities of
regulation involve
sible remedy to
non-religious end
only to protect t
representation a
harmless in its
Verner, 374 U.S.
L.Ed.2d 965 (196
133 U.S.App.D.C
(1969).

The Governme
violation of the
devices seized ma
as any other mis
the bona fides o
unquestioned on t
ment's position is
Here is a pseudo
adopted and ado
poses. The litera
representations,
religious, nevert
some, part of th
and history of a
belong to the C
beliefs assert that
alleviated by rel
signed to free the
They find in the r
of Scientology sat
tions and techniq
is essentially fall
E-meter. Thus th
purely secular w
with semantic i
by their evolvi
Purely scientific
theological slant
occasional theolo

On the basis of these findings, the Government is entitled to some relief. It is only when the Court confronts the question of appropriate remedy that serious difficulties arise.

[5] An initial issue presented is whether the normal Food and Drug remedies, 21 U.S.C. § 334, may under any circumstances be applied to the device when used by some as an "artifact" of a church. A law designed to afford protection to the public against genuine evils may be used to regulate the activities of religion only if the regulation involved is the narrowest possible remedy to achieve the legitimate non-religious end, which in this case is only to protect the public against misrepresentation since the E-meter is harmless in itself. *See* Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); Barnett v. Rodgers, 133 U.S.App.D.C. 296, 410 F.2d 995 (1969).

The Government argues that once a violation of the Act is established, the devices seized may be treated the same as any other misbranded device. Since the bona fides of the religion remains unquestioned on this record, the Government's position is an oversimplification. Here is a pseudo-science that has been adopted and adapted for religious purposes. The literature held to make false representations, while in itself non-religious, nevertheless comprises for some, part of the writings, teachings, and history of a religion. Those who belong to the Church and accept its beliefs assert that many illnesses may be alleviated by religious counseling designed to free the spirit of encumbrances. They find in the rationale and procedures of Scientology satisfactory early explanations and techniques to implement what is essentially faith healing by use of the E-meter. Thus they purport to read the purely secular writings of Scientology with semantic interpretations fostered by their evolving religious doctrine. Purely scientific statements are given a theological slant by the initiated and the occasional theological indications in the writings are given enthusiastic exaggeration. What the layman reads as straight science fiction becomes to the believer a bit of early imperfect scripture. The result of all this is that what may appear to the layman as a factual scientific representation (clearly false) is not necessarily this at all when read by one who has embraced the doctrine of the Church.

Accordingly, the Government's protestations that it is not interfering with religious practice when it seeks to condemn the E-meter and related literature must be qualified. The Church is a religious institution protected by the First Amendment. The E-meter is used by its ministers as part of the ritual and practice of the Church. Serious interference indeed results if the Church is entirely prohibited from using the E-meter by condemnation or if the Court orders the Food and Drug Administration to oversee a general rewriting of all the writings the Church purveys. Where there is a belief in a scientific fraud there is nonetheless an interference with the religion that entertains that belief if its writings are censored or suppressed. Similarly, if a church uses a machine harmless in itself to aid its ministers in communicating with adherents, the destruction of that machine intrudes on religion. The dilemma cannot be resolved by attempting to isolate purely false scientific claims from claims that have sufficient religious content to be outside the Food and Drug laws. There is a religious substance to everything when seen with the eyes of the believer.

For these reasons, the Church may not be wholly prevented from practicing its faith or from seeking new adherents. A decree of condemnation which ordered destruction of the device, with its necessary *res judicata* effect as to all E-meters in the country, would achieve this effect. On the other hand, a condemnation decree which allowed the FDA to reform the writings as is done in the usual commercial drug misbranding case would give a Government agency excessive

power to interfere with the exercise of religion, fostering that Government "entanglement" with religion which has been recently condemned by the Supreme Court. *See, e. g.*, Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Neither of these possible remedies is acceptable to the Court.

Had the Government proceeded in equity to enjoin specific non-religious practices or representations which it believed to violate the Act, the Court could have curtailed the purely commercial use of the E-meter while leaving the Church free to practice its belief under limited circumstances. An action *in rem*, however, acts only upon the device, and the Court cannot fashion a remedy in libel which distinguishes with particularity between religious and non-religious uses. An equity proceeding is clearly the most satisfactory remedy in this and any similar future cases, and may in some instances be the only remedy which the Government may seek consistent with the First Amendment.

[6] Dismissal of this libel after eight years of legal proceedings is not justified on the grounds that the Government has not used the most appropriate remedy. A decree of condemnation will therefore be entered, but the Church and others who base their use upon religious belief will be allowed to continue auditing practices upon specified conditions which allow the Food and Drug Administration as little discretion as possible to interfere in future activities of the religion. Pursuant to 21 U.S.C. § 334 (d), upon the findings and conclusions contained in this Memorandum Opinion, relief in the following form shall be set out in an implementing order:

All E-meters are condemned together with all writings seized. The Government shall have its costs.

The device and writings condemned shall be returned to the owners, upon execution of an appropriate bond, to be destroyed or brought into compliance with the Food, Drug & Cosmetic Act. An E-meter shall be deemed to comply with the Act if and only if it is used, sold or distributed upon specified conditions.

The device may be used or sold or distributed only for use in bona fide religious counseling. No user, purchaser or distributee (other than the Founding Church of Scientology or an ordained practicing minister of the Church) shall be considered engaged in bona fide religious counseling unless and until such user, purchaser or distributee has filed an affidavit with the Secretary of the Food and Drug Administration stating the basis on which a claim of bona fide religious counseling is made, together with an undertaking to comply with all conditions of the judgment so long as the E-meter is used.

The device should bear a prominent, clearly visible notice warning that any person using it for auditing or counseling of any kind is forbidden by law to represent that there is any medical or scientific basis for believing or asserting that the device is useful in the diagnosis, treatment or prevention of any disease. It should be noted in the warning that the device has been condemned by a United States District Court for misrepresentation and misbranding under the Food and Drug laws, that use is permitted only as part of religious activity, and that the E-meter is not medically or scientifically capable of improving the health or bodily functions of anyone.

Each user, purchaser, and distributee of the E-meter shall sign a written statement that he has read such warning and understands its contents and such statements shall be preserved.

Any and all literature which refers to the E-meter or to auditing, including advertisements, distributed directly or indirectly by the seller or distributor of the E-meter or by anyone utilizing or promoting the use of the E-meter, should bear a prominent notice printed in or permanently affixed to each item or such literature, stating that the device known as a Hubbard Electrometer, or E-meter, used in auditing, has been condemned by

a United States District Court on the grounds that the literature of Dianetics and Scientology contains false and misleading claims of a medical or scientific nature and that the E-meter has no proven usefulness in the diagnosis, treatment or prevention of any disease, nor is it medically or scientifically capable of improving any bodily function. Where the notice is printed in or affixed to literature, it should appear either on the outside front cover or on the title page in letters no smaller than 11-point type.

The E-meter should not be sold to any person or used in any counseling of any person except pursuant to a written contract, signed by the purchaser or counselee, which includes, among other things, a prominent notification as specified immediately above.

The effect of this judgment will be to eliminate the E-meter as far as further secular use by Scientologists or others is concerned. E-meter auditing will be permitted only in a religious setting subject to placing explicit warning disclaimers on the meter itself and on all labeling. The Government has requested an opportunity to show that complete forfeiture and destruction of the E-meter is required, but the Court has concluded that however desirable this may be in the public interest, the Court is without power to so order in view of the protections afforded claimant and others similarly situated under the First Amendment.

The foregoing shall constitute the Court's findings of fact and conclusions of law. The parties are directed to submit an appropriate form of order providing the relief indicated on or before September 1, 1971.

APPENDIX A

Representative Documents Found to be Non-Religious, and Samples of False or Misleading Claims Found Therein

1. Eight-page pamphlet, entitled "What is Scientology?"

(Government Exhibit No. 16)

"Scientology is today the only successfully validated psychotherapy in the world. Tens of thousands of completely documented cases exist in the files of the Hubbard Association of Scientologists International.

"The first science to put the cost of psycho-therapy within the range of any person's pocketbook. A complete Freudian analysis costs $8000 to $15,000. Better results can be achieved in Scientology for $25 and, on a group basis for a few dollars."

"The first science to make whole classes of backward children averagely bright using only drills the teacher can do a few minutes each day.

"The first science to determine the basic cause of disease.

"The first science to contain exact technology to routinely alleviate physical illnesses with complete predictable success.

"The first science of mind to prove conclusively that physical illness can stem from mental disturbance, a fact which Freud held only as a theory, and only seldom demonstrated.

2. Twenty-four page pamphlet, entitled "Ability Issue 71: Being Clear and How to Get There," by L. Ron Hubbard

(Government Exhibit No. 9BA)

"Scientologically, the optimum individual is called the *clear*. One will hear much of that word, both as a noun and a verb, so it is well to spend time here at the outset setting forth exactly what can be called a *clear*, the goal of Scientology processing.

"A *clear* can be tested for any and all psychoses, neuroses, compulsions and repressions (all aberrations) and can be examined for any autogenic (self-generated) diseases referred to as psychosomatic ills. These tests confirm the *clear* to be entirely without such ills or aberrations. Additional tests of his intelligence indicate it to be high above the current norm. Observation of

his activity demonstrates that he pursues existence with vigor and satisfaction.

"Further, these results can be obtained on a comparative basis. A neurotic individual, possessed also of psychosomatic ills can be tested for those aberrations and illnesses demonstrating that they exist. He can then be given Scientology processing to the end of clearing these neuroses and ills. Finally, he can be examined, with the above results. This, in passing, is an experiment which has been performed many times with invariable results. It is a matter of laboratory test that all individuals who have organically complete nervous systems respond in this fashion to Scientology clearing."

(3) Hard back book, 462 pages, entitled "Dianetics: The Modern Science of Mental Health," by L. Ron Hubbard.

"Simple though it is, dianetics does and is these things:

1. It is an organized science of thought built on definite axioms; statements of natural laws on the order of those of the physical sciences.

2. It contains a therapeutic technique with which can be treated all inorganic mental ills and all organic psycho-somatic ills, with assurance of complete cure in unselected cases.

3. It produces a condition of ability and rationality for Man well in advance of the current norm, enhancing rather than destroying his vigor and personality.

4. Dianetics gives a complete insight into the full potentialities of the mind, discovering them to be well in excess of past supposition.

5. The basic nature of man is discovered in dianetics rather than hazarded or postulated, since that basic nature can be brought into action in any individual completely. And that basic nature is discovered to be *good*.

6. The single source of mental derangement is discovered and demonstrated, on a clinical or laboratory basis, by dianetics.

7. The extent, storage capacity and recallability of the human memory is finally established by dianetics.

8. The full recording abilities of the mind are discovered by dianetics with the conclusion that they are quite dissimilar to former suppositions.

9. Dianetics brings forth the non-germ theory of disease, complementing bio-chemistry and Pasteur's work on the germ theory to embrace the field.

10. With dianetics ends the "necessity" of destroying the brain by shock or surgery to effect "tractability" in mental patients and "adjust" them.

11. A workable explanation of the physiological effects of drugs and endocrine substances exists in dianetics and many problems posed by endocrinology are answered."

"Chapter V

PSYCHO-SOMATIC ILLNESS"

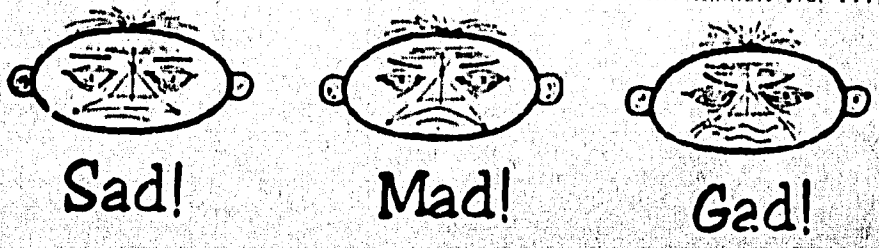
"Psycho-somatic illnesses are those which have a mental origin but which are nevertheless organic. Despite the fact that there existed no precise scientific proof of this before dianetics, an opinion as to their existence has been strong since the days of Greece, and in recent times various drug preparations have been concocted and sold which were supposed to overcome these sicknesses. Some success was experienced, sufficient to warrant a great deal of work on the part of researchers. Peptic ulcers, for instance, have yielded to persuasion and environmental change. A recent drug called ACTH has had astonishing but wildly unpredictable results. Allergies have been found to yield more or less to things which depressed histamine in the body.

"The problem of psycho-somatic illness is entirely embraced by dianetics, and by dianetic technique such illness has been eradicated entirely in every case."

"On the physical therapy level anything as violent as surgery or exodontistry in the psycho-somatic plane is utter barbarism in the light of dianetics. "Toothache" is normally psycho-somatic

Organic illnesses enough to fill several catalogues are psycho-somatic. No recourse to surgery of any kind should be had until it is certain that the ailment is not psycho-somatic or that the illness will not diminish by itself if the potency of the reactive mind is reduced. * * *"

(4) Twelve-page pamphlet, entitled "Ability Issue 72"
(Government Exhibit No. 114)



We don't care

what your problem is,

we can clear you

at the

HUBBARD GUIDANCE CENTER



For regular processing rates:
For further information:

Write the Registrar
1812 19th Street, N. W.
Washington 9, D. C.

If you're no gambler,
you can have a

CLEAR GUARANTEE: $5,000

(regardless of how many hours it takes)

(A4474)

(5) Sixty-four page booklet, entitled "Scientology: The Fundamentals of Thought," by L. Ron Hubbard. Subtitle: "The Basic Book of the Theory & Practice of Scientology for Beginners"

(Government Exhibit No. 31)

Scientology is that branch of psychology which treats of (embraces) human ability. It is an extension of DIANETICS • • • Scientology is actually a new but very basic psychology in the most exact meaning of the word. It can and does change behaviour and intelligence and it can and does assist people to study life.

Scientology, used by the trained and untrained person improves the health, intelligence, ability, behaviour, skill and appearance of people.

It is a precise and exact science, designed for an age of exact sciences.

Scientology is employed by an Auditor (one who listens and commands) as a set of drills (exercises, processes) upon the individual, and small or large groups. It is also employed as an educational (teaching) subject. It has been found that persons can be processed (drilled) in Scientology with Scientology exercises and can be made well of many, many illnesses and can become brighter, more alert and more competent. BUT if they are only processed they have a tendency to be overwhelmed or startled and although they may be brighter and more competent they are still held down by an ignorance of life. Therefore it is far better to teach AND process (audit, drill) a person than only to process him. In other words the best use of Scientology is through processing and education in Scientology. In this way there is no imbalance. It is interesting that people only need to study Scientology to have some small rise in their own intelligence, behaviour and competence. The study itself is therapeutic (good medicine) by actual testing.

Tens of thousands of case histories (reports on patients, individual records) all sworn to (attested before public officials) are in the possession of the organizations of Scientology. No other subject on earth except physics and chemistry has had such grueling testing (proofs, exact findings). Scientology in the hands of an expert (Auditor) can cure some 70% of Man's illnesses (sicknesses). Scientology is used by some of the largest companies (business organizations) on Earth. It is valid. It has been tested. It is the only thoroughly tested system of improving human relations, intelligence and character and is the only one which does.

(6) Seventy-one page booklet, entitled "The Problems of Work," by L. Ron Hubbard.

(Government Exhibit No. 103)

"Scientology is the first American science of Man. It is the technical know-how of the American applied to himself. In contrast to the metaphysical thinking of Europe that has formed the basis of our concepts of ourselves, Scientology is a technology as factual and as exact as the technologies that base the development of the atom bomb . . . and it has a like source—the first class in nuclear physics, taught at George Washington University.

"Scientology can and does change human behavior for the better. It puts the individual under the control of himself—where he belongs. Scientology can and does increase human intelligence. By the most exact tests known it has been proven that Scientology can greatly increase intelligence in an individual. And Scientology can do other things. It can reduce reaction time and it can pull the years off one's appearance. But there

is no intention he
it can do. It is
it works. It adequ
rules of life and
chaos.

"The mysteries
with Scientology,
stery is not a nee
the very aberrated
vast secrets held a
tology has slashe
the complexities wi
for men and ha
these problems.
first time in man'
ably raise intelligc
bring about a ret
play a game, and p
from the dwindlin
disabilities. There
become a game, a
thing.:

(7) Hard cover
titled "All A
Nuclear Phy
Doctor"

(Government

We care very
there is radiation i
cause a person who
sical condition does
fer mentally and thu
effects of radiation,
at a level where
health is good, the
capable of depressin
Radiation is more
physical problem and
that."

"The reaction to
who have been give
essing is by actual t
those who have not r
conducted many exp
rection. But even w
difficult and even
everybody together
amount of group pr
safegunrd against ra

333 F.Supp.—24

is no intention here to give a list of all it can do. It is a science of life and it works. It adequately handles the basic rules of life and it brings order into chaos.

"The mysteries of life are not today, with Scientology, very mysterious. Mystery is not a needful ingredient. Only the very aberrated man desires to have vast secrets held away from him. Scientology has slashed through many of the complexities which have been erected for men and has bared the core of these problems. Scientology for the first time in man's history can predictably raise intelligence, increase ability, bring about a return of the ability to play a game, and permits man to escape from the dwindling spiral of his own disabilities. Therefore work itself can become a game, a pleasant and happy thing.:

(7) Hard cover book, 112 pages, entitled "All About Radiation, by a Nuclear Physicist and a Medical Doctor"

(Government Exhibit No. 116)

We care very little about whether there is radiation in the atmosphere because a person who is in excellent physical condition does not particularly suffer mentally and thus physically from the effects of radiation. When a person is at a level where his general physical health is good, then this worry is not capable of depressing him into ill-health. Radiation is more of a mental than a physical problem and Scientology handles that."

"The reaction to radiation in persons who have been given Scientology processing is by actual tests much lower than those who have not received it. We have conducted many experiments in that direction. But even we would find it very difficult and even antipathetic to get everybody together and give them the amount of group processing needed as safeguard against radiation."

UNITED STATES of America
v.
Ralph BORELLI.
Crim. No. 12605.

United States District Court,
D. Connecticut.
Nov. 9, 1971.

Proceeding on motion to vacate sentence, treated as motion seeking correction or reduction of sentence. The District Court, Zampano, J., held that where convictions are returned, under federal bank robbery statute, for both bank robbery and bank larceny, appropriate course is to impose sentence only under one of the counts and suspend imposition of sentence, with the required period of probation, under the other count; such procedure does not violate prohibition against pyramiding sentences under bank robbery statute since suspension of sentence with probation is not a sentence.

Motion denied.

1. Criminal Law ⇐990(1)

Where petitioner was not serving sentence he sought to attack, his motion to vacate sentence would be treated as a proceeding for correction or reduction of sentence. 28 U.S.C.A. § 2255; Fed. Rules Crim.Proc. rule 35, 18 U.S.C.A.

2. Robbery ⇐30

Where convictions are returned, under federal bank robbery statute, for both bank robbery and bank larceny, appropriate course is to impose sentence only under one of the counts and suspend imposition of sentence, with the required period of probation, under the other count; such procedure does not violate prohibition against pyramiding sentences under bank robbery statute since suspension of sentence with probation is not a sentence. 18 U.S.C.A. §§ 2113(a, d), 3651.

on, even if it otherwise
eclaration against inter-
ster than if Marian had
ch an opinion as a wit-
e expression of such an
tness would be madmis-
provisions of Evidence
his section limits opinion
witness to that which is
on the perception of the
§ 800, subd. (a)) and
to a clear understand-
y." (Evid.Code § 80),

no logical support for
ted statement by Mar-
lopted children are not
her father's will constr-
gainst Marian's proprie-
such statement can
ing contrary to the
of her children. To
Declaration-Against-In-
the hearsay rule, a
contrary to the declar-
Nor does the fact that
of the declarant, or a
contrary to the declar-
admissible, under this
earsay rule, other por-
clarant's statement that
mply contrary to an-
st—pecuniary, proprie-
See *People v. Leach*
19, 124 Cal.Rptr. 752,

hearsay statement
the requirement of Ev-
1230, designed to ex-
ss, that, in order for a
nt to be considered a
interest, the trial court
a reasonable person
n would have realized
as so far contrary to
her it would not have
ant believed the
Applying the reason-
Marian's statement im-
that, when she made

the statement, she would not have considered it as a statement against either her pecuniary or proprietary interest.

[15] Appellants intimate also that Marian's hearsay statement was of a type that ought to be admissible against her adopted children as her successors in interest. If a hearsay statement qualifies as a declaration against interest under Evidence Code section 1230, it becomes admissible against any party to the litigation to the extent that it is relevant to an issue presented. Perhaps appellants have in mind another section of the Evidence Code, to wit, Evidence Code section 1225. Section 1225 makes admissible against a party a statement of a party's predecessor in interest which tended to impugn the interest of the predecessor at the time the predecessor held title and made the statement. The basis for reliability of this hearsay exception is that statements of a declarant, made while he has title to property and which are in disparagement of that title, are statements against the interest of the declarant.

[16] But Evidence Code section 1225 is not applicable in the case at bench, since Marian's adopted children, John and Elizabeth, as parties to the litigation, are not asserting an interest or right to the trust property which is dependent upon the prior right to this property of Marian, the declarant. The adopted children are not successors in interest to the interest which Marian had in the trust property. The interest of Marian's children is derived from the will of Huntington, just as Marian's own interest was derived from the will of Huntington. The children take their interest through Huntington and not through their mother, Marian, whose interest was solely that of a life beneficiary.

The judgment appealed from is affirmed.

FILES, P. J., and JEFFERSON, J.,* concur.

Hearing denied; WRIGHT, C. J., did not participate.

58 Cal.App.3d 430

L. Gene ALLARD, Plaintiff, Cross-Defendant and Respondent,

v.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, Defendant, Cross-Complainant and Appellant.

Civ. 45562.

Court of Appeal, Second District, Division 2.

May 18, 1976.

Hearing Denied July 15, 1976.

Plaintiff brought action against defendant church for malicious prosecution, and defendant brought cross complaint for conversion. The Superior Court, Los Angeles County, Parks Stillwell, J., entered judgment on verdict awarding plaintiff compensatory and punitive damages and, from a judgment for plaintiff and against defendant on cross complaint, defendant appealed. The Court of Appeal, Beach, J., held that defendant was not deprived of a fair trial on ground of prejudicial misconduct by plaintiff's trial counsel, that procedure and verdict below did not constitute a violation of defendant's First Amendment free exercise of religion, that question as to whether inferences could be drawn that defendant, through its agents, was carrying out its own policy of fair game in its criminal actions against plaintiff was for jury, that trial court's voir dire of prospective jurors was not improper by reason of alleged failure to question jurors as to their religious prejudices or attitudes, that it was not prejudicial error to direct jury, in its assessment of malicious prosecution claim, to disregard evidence that plaintiff stole travelers' checks from defendant, that award of $50,000 compensatory damages was proper, and that plaintiff was entitled to punitive damages, but that award of punitive damages would be reduced to $50,000 under circumstances.

Affirmed as modified.

* Retired Justice of the Court of Appeal assigned by the Chairman of the Judicial Council.

1. Appeal and Error ⇐930(1), 989

When the evidence on appeal is very conflicting, the Court of Appeal must relate those facts supporting the successful party and disregard the facts to the contrary.

2. Trial ⇐131(1), 133.6(1)

Though several of individual statements and questions made by plaintiff's trial counsel were inappropriate, where there often were no objections by counsel for defendant when an objection and subsequent admonition would have cured any defect, or there was an objection and trial court vehemently admonished jury to disregard comment, there was no prejudicial conduct by plaintiff's trial counsel, and defendant was not deprived of a fair trial.

3. Estoppel ⇐63

A party whose reprehensible acts are the cause of harm to another and the reason for the lawsuit by the other cannot be heard to complain that its conduct is so bad that it should not be disclosed.

4. Religious Societies ⇐31(5)

Evidence of policy statements and other peripheral mention of practices of defendant church was admissible in action for malicious prosecution where members of church were allowed to trick, sue, lie to, or destroy "enemies" and, if plaintiff was considered to be an enemy as claimed, policy was relevant to credibility issues.

5. Constitutional Law ⇐84

Introduction of evidence of policy statements and other peripheral mention of practices of defendant church did not constitute a violation of defendant's First Amendment free exercise of religion in action for malicious prosecution where members of church were allowed to trick, sue, lie to, or destroy "enemies" and, if plaintiff was considered to be an enemy as claimed, policy was relevant to issues of credibility. U.S.C.A.Const. Amend. 1.

6. Malicious Prosecution ⇐71(1)

Whether officer of defendant church was within scope of his employment when he lied about plaintiff's alleged theft from a safe and whether inferences could be drawn that defendant, through its agents, was carrying out a policy of fair game in its actions against plaintiff were questions of fact for jury in action for malicious prosecution.

7. Jury ⇐131(6)

Trial court's thorough questioning of prospective jurors as to whether they had any belief or feeling toward any of the parties that might be regarded as a bias or prejudice for or against any of the parties was not improper in action against church for malicious prosecution notwithstanding claimed failure to question prospective jurors as to their religious prejudices or attitudes, where questioning served purpose of voir dire, which was to select a fair and impartial jury, not to educate jurors or to determine exercise of peremptory challenges.

8. Appeal and Error ⇐1064.2

It was not prejudicial error to direct jury, in its assessment of malicious prosecution claim against defendant church, to disregard evidence that plaintiff purportedly stole travelers' checks from defendant.

9. Appeal and Error ⇐1043(6)

Regardless of whether trial court in action for malicious prosecution was justified in denying defendant's request for discovery of factual basis for obtaining of a dismissal by district attorney of criminal case against plaintiff, prejudicial error did not occur where, during trial, counsel for all parties stipulated that criminal proceedings against defendant were terminated in his favor by a dismissal by a judge of that court upon recommendation of district attorney.

10. Libel and Slander ⇐33

In matters of slander that are "slanders per se, such as the charging of a crime, general damages are presumed as a matter of law.

11. Malicious Prosecution ⇐56

Damages in actions for malicious prosecution are similar to those in defamation and, thus, damage to one's reputation can

be presumed from
per se, i. e., that
crime of theft.

12. Appeal and Erro

Refusal to all
issue of damages
prosecution, introd
defendant's prior r
much less prejudic
an offer of proof
ing such reputation.

13. Malicious Prosec

Presumed dama
tion from an unfo
leveled by defendar
ment for 21 days, a
al anguish that mu
such as to justify a
in compensatory da
licious prosecution.

14. Malicious Prosec

The jury in a
prosecution must ha
falsity or reckless
in order to award pu

15. Malicious Prosec

"Fair game" p
ed by founder and c
ant church and wh
rize members of ch
in such a manner a
nal theft charge ag
ficient to establish
for an award of pun

16. Malicious Prosec

Disparity betw
ages of $50,000 an
$250,000 suggested
been so enraged by
ward plaintiff that
ages in action for
may have been mor
of animosity, rathe
determination of a
assess defendant in
similar conduct in t
award for punitive
duced to $50,000.

her inferences could be
dant, through is agents,
policy of fair game in
plaintiff were questions
action for malicious

thorough questioning of
as to whether they had
ng toward any of the
regarded as a bias or
nst any of the parties
action against church
ution, notwithstanding
uestion prospective ju-
ions prejudice or affi-
ning served purpose of
to select a fair and
o educate jurors or to
of peremptory chal-

⊃1064.2
udicial error to direct
nt of malicious prose-
defendant church, to
hat plaintiff purported-
hecks from defendant.

⊃1043(6)
hether trial court in
prosecution was justi-
dant's request for dis-
is for obtaining of a
attorney of criminal
prejudicial error did
ing trial, counsel for
that criminal proceed-
were terminated in
d by a judge of that
dation of district at-

⊃33
er that are libelous
arging of a crime,
resumed as a matter

for malicious pros-
hose in defamation
le's reputation can

be presumed from a charge that is libelous per se, i. e., that a person committed the crime of theft.

12. Appeal and Error ⊂=205

Refusal to allow, in connection with issue of damages in action for malicious prosecution, introduction of evidence on defendant's prior reputation was not error, much less prejudicial error, in absence of an offer of proof from defendant regarding such reputation.

13. Malicious Prosecution ⊂=69

Presumed damage to plaintiff's reputation from an unfounded charge of theft leveled by defendant, along with imprisonment for 21 days, and mental and emotional anguish that must have followed, were such as to justify a jury finding of $50,000 in compensatory damages in action for malicious prosecution.

14. Malicious Prosecution ⊂=68

The jury in an action for malicious prosecution must have found knowledge of falsity or reckless disregard for the truth in order to award punitive damages.

15. Malicious Prosecution ⊂=42

"Fair game" policy which was initiated by founder and chief official of defendant church and which operated to authorize members of chuch to treat "enemies" in such a manner as led to filing of criminal theft charge against plaintiff was sufficient to establish ratification necessary for an award of punitive damages.

16. Malicious Prosecution ⊂=69

Disparity between compensatory damages of $50,000 and punitive damages of $250,000 suggested that jury may have been so enraged by defendant's conduct toward plaintiff that award of punitive damages in action for malicious prosecution may have been more the result of feelings of animosity, rather than a dispassionate determination of an amount necessary to assess defendant in order to deter it from similar conduct in the future, accordingly, award for punitive damages would be reduced to $50,000.

17. Appeal and Error ⊂=215(1)

Claim that trial court instructed on probable cause in action for malicious prosecution was prejudicially erroneous could not be raised for first time on appeal.

18. Malicious Prosecution ⊂=64(2)

While jurors in an action for malicious prosecution may consider that magistrate at preliminary hearing in previous criminal matter found probable cause for defendant's bringing charge against plaintiff, that should be in no way conclusive of jurors' own determination of probable cause.

Morgan, Wenzel & McNicholas by Gerald E. Agnew, Jr., Charles B. O'Reilly, Los Angeles, for plaintiff, cross-defendant and respondent.

Murchison, Cumming, Baker & Velpmen by Michael B. Lawler, Los Angeles, Tobias C. Tolzmann, Honolulu, Hawaii, Joel Kreiner, Los Angeles, for defendant, cross-complainant and appellant.

BEACH, Associate Justice. 1003

L. Gene Allard sued the Church of Scientology for malicious prosecution. Defendant cross-complained for conversion. A jury verdict and judgment were entered for Allard on the complaint for $50,000 in compensatory damages and $250,000 in punitive damages. Judgment was entered for Allard and against the Church of Scientology on the cross-complaint. Defendant-cross complainant appeals from the judgment.

FACTS:

[1] The evidence in the instant case is very conflicting. We relate those facts supporting the successful party and disregard the contrary showing. (*Nestle v. City of Santa Monica*, 6 Cal.3d 920, 925-926, 101 Cal.Rptr. 568, 496 P.2d 480.)

In March 1969, L. Gene Allard became involved with the Church of Scientology in Texas. He joined Sea Org in Los Angeles

and was sent to San Diego for training. While there, he signed a billion-year contract agreeing to do anything to help Scientology and to help clear the planet of the "treactive people." During this period he learned about written policy directives that were the "policy" of the Church, emanating from L. Ron Hubbard, the founder of the Church of Scientology.[1] After training on the ship, respondent was assigned to the Advanced Organization in Los Angeles, where he became the director of disbursements. He later became the Flag Banking Officer.

Glow Boughton, Flag Banking Officer International, was respondent's superior. Only respondent and Boughton knew the combination to the safe kept in respondent's office. Respondent handled foreign currency, American cash, and various travelers' checks as part of his job.

In May or June, 1969, respondent told Boughton that he wanted to leave the Church. Boughton asked him to reconsider. Respondent wrote a memo and later a note; he spoke to the various executive officers. They told him that the only way he could get out of Sea Org was to go through 'auditing" and to get direct permission from L. Ron Hubbard. Respondent wrote to Hubbard. A chaplain of the Church came to see him. Lawrence Krieger, the highest ranking justice official of the Church in California, told respondent that if he left without permission, he would be fair game and "You know we'll come and find you and we'll bring you back, and we'll deal with you in whatever way is necessary."

On the night of June 7 or early morning of June 8, 1969, respondent went to his office at the Church of Scientology and took several documents from the safe. These documents were taken by him to the Internal Revenue Service in Kansas City; he used them to allege improper changes in the records of the Church. He denies that any Swiss francs were in the safe that night or that he took such Swiss francs. Furthermore, respondent denies the allegation that he stole various travelers' checks from the safe. He admitted that some travelers' checks had his signature as an endorsement, but maintains that he deposited those checks into an open account of the Church of Scientology. There is independent evidence that tends to corroborate that statement. Respondent, having borrowed his roommate's car, drove to the airport and flew to Kansas City, where he turned over the documents to the Internal Revenue Service.

Respondent was arrested in Florida upon a charge of grand theft. Boughton had called the Los Angeles Police Department to report that $23,000 in Swiss francs was missing. Respondent was arrested in Florida; he waived extradition and was in jail for 21 days. Eventually, the charge was dismissed. The deputy district attorney in Los Angeles recommended a dismissal in the interests of justice.[2]

CONTENTIONS ON APPEAL:

1. Respondent's trial counsel engaged in flagrant misconduct throughout the proceedings below and thereby deprived appellant of a fair trial.

2. The verdict below was reached as a result of (a) counsel's ascription to appellant of a religious belief and practices it did not have and (b) the distortion and disparagement of its religious character, and was not based upon the merits of this case. To allow a judgment thereby achieved to stand would constitute a violation of appellant's free exercise of religion.

1. One such policy, to be enforced against "enemies" or "suppressive persons" was that formerly titled "fair game." That person "may be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. May be tricked, sued or lied to or destroyed." (Ex. 1 at 1.)

2. Leonard J. Shaffer, the deputy district attorney, testified outside the presence of the jury that members of the Church were evasive in answering his questions. He testified that the reasons for the dismissal were set forth in his recommendation; the dismissal was not part of a plea bargain or procedural or jurisdictional issue.

3. Respondent [illegible] pellant maliciously therefore the ju the verdict should

4. The refusal [illegible] or permit voir dire [illegible] jurors pertaining [illegible] dices or attitudes [illegible] fair trial.

5. It was preju jury, in its asses prosecution claim, that respondent sto and American Ex

6. The order of ing to appellant d basis for the obta the district attorn *People v. Allard* v tion and a new tria proper discovery pe

7. Respondent p idence to support compensatory dam been awarded beca appellant.

8. Respondent f rate direction or failed to establish therefore not entitl ages.

9. Even if the ages was proper i the instant reward appellant Church o net worth, is grossl of this case.

10. There was tion regarding prob

DISCUSSION:

1. *There was no by respondent's tria was not deprived of*

Appellant claims fair trial through t ing, and introducti by respondent's tr

3. This

ken by him to the Inter-
ce in Kansas City; he
improper changes in
Church. He denies
es were in the safe that
ok such Swiss francs.
ident denies the allega-
rious travelers' checks
admitted that some
d his signature as an
aintains that he de-
into an open account
entology. There is in-
that tends to corrob-
Respondent, having
ate's car, drove to the
Kansas City, where he
uments to the Internal

rested in Florida upon
Boughton had
es Police Department
in Swiss francs was
was arrested in Fori-
dition and was in jail
ually, the charge was
ty district attorney in
ended a dismissal in
e.[2]

APPEAL: 1441

al counsel engaged in
throughout the pro-
ereby deprived appel-

ow was reached as a
s ascription to appel-
lief and practices it
the distortion and
religious character,
on the merits of this
judgment thereby
d constitute a viola-
exercise of religion.

he deputy district at-
presence of the
h were evasive
le testified that
issal were set forth
the dismissal was
ain or procedural or

3. Respondent failed to prove that appellant maliciously prosecuted him and therefore the judgment notwithstanding the verdict should have been granted.

4. The refusal of the trial court to ask or permit voir dire questions of prospective jurors pertaining to their religious prejudices or attitudes deprived appellant of a fair trial.

5. It was prejudicial error to direct the jury, in its assessment of the malicious prosecution claim, to disregard evidence that respondent stole appellant's Australian and American Express travelers' checks.

6. The order of the trial court in denying to appellant discovery of the factual basis for the obtaining of a dismissal by the district attorney of the criminal case *People v. Allard* was an abuse of discretion and a new trial should be granted and proper discovery permitted.

7. Respondent presented insufficient evidence to support the award of $50,000 in compensatory damages which must have been awarded because of prejudice against appellant.

8. Respondent failed to establish corporate direction or ratification and also failed to establish knowing falsity and is therefore not entitled to any punitive damages.

9. Even if the award of punitive damages was proper in this case, the size of the instant reward, which would deprive appellant Church of more than 40% of its net worth, is grossly excessive on the facts of this case. 1446

10. There was lack of proper instruction regarding probable cause.[3]

DISCUSSION:

1. *There was no prejudicial misconduct by respondent's trial counsel, and appellant was not deprived of a fair trial.*

Appellant claims that it was denied a fair trial through the statements, questioning, and introduction of certain evidence by respondent's trial counsel. *Love v. Wolf*, 226 Cal.App.2d 378, 38 Cal.Rptr. 183, is cited as authority.

[2] We have reviewed the entire record and find appellant's contentions to be without merit. Several of counsel's individual statements and questions were inappropriate. However, there often were no objections by counsel for appellant where an objection and subsequent admonition would have cured any defect; or there was an objection, and the trial court judiciously admonished the jury to disregard the comment. Except for these minor and infrequent aberrations, the record reveals an exceptionally well-conducted and dispassionate trial based on the evidence presented.

As in *Stevens v. Parke, Davis & Co.*, 9 Cal.3d 51, 72, 107 Cal.Rptr. 45, 507 P.2d 653, a motion for a new trial was made, based in part upon the alleged misconduct of opposing counsel at trial. What was said in *Stevens* applies to the instant case. "'A trial judge is in a better position than an appellate court to determine whether a verdict resulted wholly, or in part, from the asserted misconduct of counsel and his conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong.' [Citation.] From our review of the instant record, we agree with the trial judge's assessment of the conduct of plaintiff's counsel and for the reasons stated above, we are of the opinion that defendant has failed to demonstrate prejudicial misconduct on the part of such counsel. (*Stevens v. Parke, Davis & Co., supra*, 9 Cal.3d at p. 72, 107 Cal.Rptr. at p. 58, 507 P.2d at p. 666.)

2. *The procedure and verdict below does not constitute a violation of appellant's First Amendment free exercise of religion.*

Appellant contends that various references to practices of the Church of Scientology were not supported by the evidence, were not legally relevant, and were unduly prejudicial. The claim is made that the 1447

3 This issue is raised for the first time in appellant's reply brief.

trial became one of determining the validity of a religion rather than the commission of a tort.

The references to which appellant now objects were to such practices as "E-meters," tin cans used as E-meters, the creation of religious doctrine purportedly to "get" dissidents, and insinuations that the Church of Scientology was a great money making business rather than a religion.

[3-5] The principal issue in this trial was one of credibility. If one believed defendant's witnesses, then there was indeed conversion by respondent. However, the opposite result, that reached by the jury, would naturally follow if one believed the evidence introduced by respondent. Appellant repeatedly argues that the introduction of the policy statements of the Church was prejudicial error. However, those policy statements went directly to the issue of credibility. Scientologists were allowed to track, sue, lie to, or destroy "enemies." (Exhibit 1.) If, as he claims, respondent was considered to be an enemy, that policy was indeed relevant to the issues of this case. That evidence well supports the jury's implied conclusion that respondent had not taken the property of the Church, that he had merely attempted to leave the Church with the documents for the Internal Revenue Service, and that those witnesses who were Scientologists or had been Scientologists were following the policy of the Church and lying to, suing and attempting to destroy respondent. Evidence of such policy statements were damaging to appellant, but they were entirely relevant. They were not prejudicial. A party whose reprehensible acts are the cause of harm to another and the reason for the lawsuit by the other cannot be heard to complain that its conduct is so bad that it should not be disclosed. The relevance of appellant's conduct far outweighs any claimed prejudice.[4]

We find the introduction of evidence of the policy statements and other peripheral mention of practices of the Church of Scientology not to be error. In the few instances where mention of religious practices may have been slightly less germane than the policy statements regarding fair game, they were nonetheless relevant and there was no prejudice to appellant by the introduction of such evidence.

[3] *The trial court properly denied the motion for judgment notwithstanding the verdict.*

Appellant claimed that it had probable cause to file suit against respondent. The claim is made that even if Alan Boughton did take the checks from the safe, knowledge of that act should not be imputed to appellant Church.

[6] Based on the policy statements of appellant that were introduced in evidence, a jury could infer that Boughton was within the scope of his employment when he stole the checks from the safe or lied about respondent's alleged theft. Inferences can be drawn that the Church, through its agents, was carrying out its own policy of fair game in its actions against respondent. Given that view of the evidence, which as a reviewing court we must accept, there is substantial evidence proving that appellant maliciously prosecuted respondent. Therefore, the trial court did not err in denying the motion for the judgment notwithstanding the verdict.

4. *The trial court performed proper voir dire of prospective jurors.*

Appellant claims that the trial court refused to ask or permit voir dire questions of prospective jurors pertaining to their religious prejudices or attitudes. The record does not so indicate. Each juror was asked if he or she had any belief or feeling toward any of the parties that might be regarded as a bias or prejudice for or

[4] The trial court gave appellant almost the entire trial within which to produce evidence that the fair game policy had been repealed. Appellant failed to do so, and the trial court thereafter permitted the admission of Exhibit 1 into evidence.

ntroduction of evidence of
ments and other peripheral
ctices of the Church of
to be error. In the few
mention of religious prac-
een slightly less germane
tatements regarding fair
nonetheless relevant and
udice to appellant by the
h evidence.

urt properly denied the
ent notwithstanding the

ed that it had probable
gainst respondent. The
even if Alan Boughton
from the safe, knowl
hould not be imputed to

olicy statements of
introduced in evidence,
hat Boughton was with-
s employment when he
n the safe or lied about
theft. Inferences can
Church, through its
out its own policy of
ons against respondent.
the evidence, which as
e must accept, there is
proving that appellant
ed respondent. There-
did not err in denying
udgment notwithstand-

urt performed proper
e jurors.

that the trial court
mit voir dire questions
s pertaining to their
or attitudes. The rec-
ate. Each juror was
any belief or feeling
ties that might be re-
rejudice for or

so, and the trial court
admission of Exhibit

against any of them. Each juror was also asked if he or she had ever heard of the Church of Scientology. If the juror answered affirmatively, he or she was further questioned as to the extent of knowledge regarding Scientology and whether such knowledge would hinder the rendering of an impartial decision. One juror was excused when she explained that her husband is a clergyman and that she knows a couple that was split over the Church of Scientology.

[7] The trial court's thorough questioning served the purpose of voir dire, which is to select a fair and impartial jury, not to educate the jurors or to determine the exercise of peremptory challenges. (*Rousseau v. West Coast House Movers*, 256 Cal.App.2d 878, 882, 64 Cal.Rptr. 655.)

5. *It was not prejudicial error to direct the jury, in its assessment of the malicious prosecution claim, to disregard evidence that respondent stole appellant's Australian and American Express travelers' checks.*

[8] Appellant submits that evidence of respondent's purported theft of the Australian and American Express travelers' checks should have been admitted as to the issue of malicious prosecution as well as the cross-complaint as to conversion. If there were any error in this regard, it could not possibly be prejudicial since the jury found for respondent on the cross-complaint. It is evident that the jury did not believe that respondent stole the travelers' checks; therefore, there could be no prejudice to appellant by the court's ruling.

6. *Appellant suffered no prejudice by the trial court's denial of discovery of the factual basis for obtaining of the dismissal by the district attorney.*

Prior to trial, appellant apparently sought to discover the reasons underlying the dismissal of the criminal charges against respondent. This was relevant to the instant case since one of the elements of a cause of action for malicious prosecution is that the criminal prosecution against the plaintiff shall have been favorably terminated. (*Jaffe v. Stone*, 18 Cal.2d 146, 114 P.2d 335.)

[9] Whether or not the lower court was justified in making such an order, the denial of discovery along these lines could not be prejudicial. During the trial, counsel for all parties stipulated that the criminal proceedings against Allard were terminated *in his favor* by a dismissal by a judge of that court upon the recommendation of the district attorney.

In addition, there was a hearing outside the presence of the jury in which the trial court inquired of the deputy district attorney as to the reasons for the dismissal. It was apparent at that time that the prospective witnesses for the Church of Scientology were considered to be evasive. There was no prejudice to appellant since the deputy district attorney was available at trial. Earlier knowledge of the information produced would not have helped defendant. We find no prejudicial error in the denial of this discovery motion.

7. *The award of $50,000 compensatory damages was proper.*

Appellant contends that based upon the evidence presented at trial, the compensatory damage award is excessive. In addition, appellant contends that the trial court erred in not allowing appellant to introduce evidence of respondent's prior bad reputation.

There was some discussion at trial as to whether respondent was going to claim damaged reputation as part of general damages. The trial court's initial reaction was to allow evidence only of distress or emotional disturbance; in return for no evidence of damaged reputation, appellant would not be able to introduce evidence of prior bad reputation. The court, however, relying on the case of *Clay v. Lagiss*, 143 Cal.App.2d 441, 299 P.2d 1025, held that lack of damage to reputation is not admissible. Therefore, respondent was allowed to claim damage to reputation without allowing appellant to introduce evidence of his prior bad reputation

[1-12] In matters of slander that are indefensible per se, for example the charge of a crime, general damages have been presumed as a matter of law. (*Dauphin v. Janis*, 43 Cal.App.3d 931, 945, 118 Cal.Rptr. 280[4], citing *City v. Lapsley, supra*, 147 Cal.App.2d at p. 448, 209 P.2d 1025. Compare *Gertz v. Welch*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789.)[5] Damages in malicious prosecution actions are similar to those in defamation. Therefore, damage to one's reputation can be presumed from a charge, such as that in the instant case that a person committed the crime of theft. In any event, as the trial court in the instant case noted, there was no offer of proof regarding respondent's prior bad reputation, any refusal to allow possible evidence on that subject has not been shown to be error, much less prejudicial error.

Appellant further contends that the amount of compensatory damages awarded was excessive and that the jury was improperly instructed regarding compensatory damages. The following modified version of BAJI 14.00 and 14.13 was given:

"If, under the court's instructions, you find that plaintiff is entitled to a verdict against defendant, you must then award plaintiff damages in an amount that will reasonably compensate him for each of the following elements of loss or harm, which in this case are presumed to flow from the defendant's conduct without any proof of such harm or loss: damage to reputation, humiliation and emotional distress.

"No definite standard or method of calculation is prescribed by law to fix reasonable compensation for these presumed elements of damage. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for damage to reputation, humiliation and emotional distress, you shall exercise your authority with calm and reasonable judgment, and the damages you find shall be just and reasonable."

The following instruction was requested by defendant and was rejected by the trial court:

"The amount of compensatory damages should compensate plaintiff for actual injury suffered. The law will not put the plaintiff in a better position than he would be in had the wrong not been done." Accompanying the request for that motion is a citation to *Staab v. Muller*, 7 Cal.2d 221, 60 P.2d 283, and *Basin Oil Co. of Cal. v. Baash-Ross Tool Co.*, 125 Cal.App.2d 578, 271 P.2d 122.

The Supreme Court has recognized that "Damages potentially recoverable in a malicious prosecution action are substantial. They include out-of-pocket expenditures, such as attorney's and other legal fees . . . , business losses . . . ; general harm to reputation, social standing and credit . . . , mental and bodily harm . . . ; and exemplary damages where malice is shown . . . ." (*Babb v. Superior Court*, 3 Cal.3d 841, 848, fn. 4, 92 Cal.Rptr. 179, 183, 479 P.2d 379, 383.) While these damages are compensable, it is the determination of the damages by the jury with which we are concerned. Appellant seems to contend that the jury must have actual evidence of the damages suffered and the monetary amount thereof.

5 The Supreme Court held in *Gertz v. Welch*, *supra*, 418 U.S. 323, 349, 350, 94 S.Ct. 2997, 3011, 41 L.Ed.2d 789, an action for defamation, that "the States may not permit recovery of presumed or punitive damages, *at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.*" (Emphasis added.) The instant case is distinguishable from *Gertz*. Initially, the interests protected by a suit for malicious prosecution include misuse of the judicial system itself; a party should not be able to claim First Amendment protection maliciously to prosecute another person. Secondly, the jury in the instant case must have found "knowledge of falsity or reckless disregard for the truth" in order to award punitive damages herein. Therefore, even under *Gertz*, a finding of presumed damages is not unconstitutional.

[13] "[T]he on the issue of appeal unless grossly excessive imputed solely the jury. [Citation *supra*, 43 Cal.App. Rptr. at p. 286.] respondent's re charge of theft for twenty-one emotional angu are such that w finding of $50, ages is unjustif alone demonstr passion and prej

8 *Respondeat damages.*

[14] Appella that although a ble for an emp trine of respon cannot be made where he neith the act. (4 W Law, 8th Ed., § claims that the which is the e never either aut licious prosecuti

[15] The fin be based on ma case. For exam itself was initiat founder and chi (Exhibit 1.) It tion to treat "e

6 We again note precludes the aw defamation metho not based on falsity or reckle The facts of the categorization, a ages was prope alone, an egregi cution subjects t abuse, thereby

...s to the amount of
...ensation. Further-
... counsel as to the
...ot evidence of rea-
... In making an
...reputation, humilia-
...ess, you shall exer-
...n calm and reason-
... damages you find
...le."
...ion was requested
...ejected by the trial

...pensatory damages
...tiff for actual in-
... will not put the
...tion than he would
...t been done." Ac-
... for that motion is
... 7 Cal.2d 221.
... Oil Co. of Cal. v.
... 25 Cal.App.2d 578.

...as recognized that
...coverable in a ma-
...on are substantial.
...cket expenditures,
... other legal fees
... gen-
...n, social standing
...mental and bodily
...xemplary damages
... ." (Babb
...3d 841, 848, fn. 4.
...79 P.2d 379, 383.)
...e compensable, it is
...e damages by the
... concerned. Appel-
...that the jury must
... the damages suf-
...y amount thereof.

... include misuse of
... a party should
... Amendment pro-
... another per-
... instant case
...dge of falsity or
...truth" in order to
...herein. Therefore,
...g of presumed dam-

[13] "[T]he determination of the jury on the issue of damages is conclusive on appeal unless the amount thereof is so grossly excessive that it can be reasonably imputed solely to passion or prejudice in the jury. [Citations.]" (*Douglas v. Janis, supra*, 43 Cal.App.3d at p. 940, 118 Cal.Rptr. at p. 286.) The presumed damage to respondent's reputation from an unfounded charge of theft, along with imprisonment for twenty-one days, and the mental and emotional anguish that must have followed are such that we cannot say that the jury's finding of $50,000 in compensatory damages is unjustified. That amount does not alone demonstrate that it was the result of passion and prejudice.

8. *Respondent is entitled to punitive damages.*

[14] Appellant cites the general rule that although an employer may be held liable for an employee's tort under the doctrine of respondeat superior, ordinarily he cannot be made to pay punitive damages where he neither authorized nor ratified the act. (4 Witkin, Summary of Calif. Law, 8th Ed., § 855, p. 3147.)[6] Appellant claims that the Church of Scientology, which is the corporate defendant herein, never either authorized or ratified the malicious prosecution.

[15] The finding of authorization may be based on many grounds in the instant case. For example, the fair game policy itself was initiated by L. Ron Hubbard, the founder and chief official in the Church. (Exhibit 1.) It was an official authorization to treat "enemies" in the manner in which respondent herein was treated by the Church of Scientology.

Furthermore, all the officials of the Church to whom respondent relayed his desire to leave were important managerial employees of the corporation. (See 4 Witkin, Summary of Calif.Law, 8th Ed., *supra*, § 857, p. 3148.)

The trier of fact certainly could have found authorization by the corporation of the act involved herein.

9. *The award of punitive damages.*

[16] Any party whose tenets include lying and cheating in order to attack its "enemies" deserves the results of the risk which such conduct entails. On the other hand, this conduct may have so enraged the jury that the award of punitive damages may have been more the result of feelings of animosity, rather than a dispassionate determination of an amount necessary to assess defendant in order to deter it from similar conduct in the future. In our view the disparity between the compensatory damages ($50,000) and the punitive damages ($250,000) suggests that animosity was the deciding factor. Our reading of the decisional authority compels us to conclude that we should reduce the punitive damages. We find $50,000 to be a reasonable amount to which the punitive damages should be reduced. We perceive this duty, and have so modified the punitive damages award not with any belief that a reviewing court more ably may perform it.[7] Simply stated the decisional authority seems to indicate that the reviewing court should examine punitive damages and where necessary modify the amount in or-

6. We again note that *Goetz v. Welch, supra*, precludes the award of punitive damages in defamation actions "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." The facts of the instant case fall within that categorization, so a finding of punitive damages was proper. Moreover, as we noted above, an egregious case of malicious prosecution subjects the judicial system itself to abuse thereby interfering with the constitutional rights of all litigants. Punitive damages may therefore be more easily justified in cases of malicious prosecution than in cases of defamation. The societal interests competing with First Amendment considerations are more compelling in the former case.

7. See dissent in *Cunningham v. Simpson*, 1 Cal.3d 301, 81 Cal.Rptr. 855, 461 P.2d 39.

der to do justice. (*Cunningham v. Simpson*, 1 Cal.3d 301, 81 Cal.Rptr. 855, 461 P.2d 33; *Forte v. Nolfo*, 25 Cal.App.3d 656, 102 Cal.Rptr. 455; *Shroeder v. Auto Driveaway Company*, 11 Cal.3d 908, 114 Cal.Rptr. 622, 523 P.2d 662; *Lucesco v. Stock*, 208 Cal. 315, 322, 281 P. 70.)

D. *Instruction on probable cause.*

Appellant requested an instruction stating: "Where it is proven that a judge has had a preliminary hearing and determined that the facts and evidence show probable cause to believe the plaintiff guilty of the offense charged therefore, ordering the plaintiff to answer a criminal complaint, this is *prima facie* evidence of the existence of probable cause." The trial court gave the following instruction: "The fact that plaintiff was held to answer the charge of grand theft after a preliminary hearing is evidence tending to show that the initiator of the charge had probable cause. This fact is to be considered by you along with all the other evidence tending to show probable cause or the lack thereof."[8]

[17, 18] Appellant claimed for the first time in his reply brief that the trial court's fact of proper instruction regarding probable cause was prejudicial error. Since this issue was raised for the first time in appellant's reply brief, we decline to review the issue.[9]

The judgment is modified by reducing the award of punitive damages only, from $25,000 to the sum of $5,000. As modified the judgment is in all other respects affirmed.

Costs on appeal are awarded to respondent Allard.

ROTH, P. J. and FLEMING, J., concur.

8 This instruction was given on the court's own motion.

9 We note that given the circumstances of the instant case, the jurors could have easily been misled by the requested instructions. If the evidence showed that the agents and employees of appellant were lying, then the preliminary hearing at which they also testified would not be valid. While the jurors may of course consider that the magistrate at the preliminary hearing found probable cause, that should be in no way conclusive in the jury's determination of probable cause.

Margaret BAXTER and Theodore Baxter, Petitioners,

v.

The SUPERIOR COURT of California, COUNTY OF LOS ANGELES, Respondent;

C. Hunter SHELDON, M.D., et al., Real Parties in Interest.

Civ. 48162.

Court of Appeal, Second District, Division 2.

May 19, 1976

Hearing Granted July 21, 1976

Medical malpractice action was brought on behalf of minor child and his parents sought damages for expenses incurred as a result of alleged malpractice and for loss of consortium. Parents sought writ of mandate after the trial court sustained demurrers to their causes of action for loss of consortium. The Court of Appeal, Roth, P. J., held that cause of action could not be asserted by parents for loss of support, comfort, protection, society and pleasure of their minor child.

Alternative writ discharged; petition denied.

1. Parent and Child ⇨7(1)

Cause of action could not be asserted by parents for loss of support, comfort, protection, society and pleasure of their minor child.

2. Parent and Child ⇨1, 7(1)

Neither parent nor child has cause of action for loss of consortium because of wrongful injury of the other.

Ronald L. M. Goldman and Michael K. McKibbin, Newport Beach, for petitioners

Peter Abrahan
ington Memorial
man and Francis

Bruce A. Broil
el B. Porter, M

Dale D. Billip
Hunter Sheldon,
M.D.

Boune, Jones
for Norman John

ROTH, Presid

We are asked
date proceeding
can be asserted
of the support, c
and pleasure of

Respondent A
by his guardian a
Margaret Baxter
dore Baxter, indi
the superior cour
don, M.D., et al.,
of the first am
injury to and sou
Andre A. Baxter
medical malprac
damages on beh
Margaret and Th
incurred as a re
practice, and the
damages on behal
dore, respectively.
"support, comfort
pleasure."

Initially defend
Hospital, Edwin
Frances M. Paul,
third and fourth
ground that no ca
thereon. The d
This court perem
for a writ of man
fendants in 2d Ci

1 A seventh def
M.D., has appar
original or the n
petitioners.

2 The opinion in /
term "consortium

Note 12

criminal conversation, testified to his own potency before learning of wife's infidelity and to his impotency thereafter, and where former wife corroborated testimony as to prior potency, testimony of psychiatrist, who had never met or examined plaintiff, that, with reasonable medical certainty, husband's finding his wife committing adultery and her abandonment of husband had causal relationship to impotency, if believed, provided medical basis for finding of causal basis of impotency which would not have been speculative, and exclusion of testimony was error. Kaye v. Newhall (1972) 277 N.E.2d 697, 360 Mass. 701.

A doctor may give an opinion on a medical issue without having examined or treated the patient, and there is no requirement that doctor who treated or examined a patient be produced or his absence explained before another doctor can be allowed to testify. Id.

There is no requirement that an expert witness have personal knowledge of the facts on which his opinion is based. Id.

Trial court properly exclud 1 questions to expert defense witness which related to whether defendant, accused of murder, knew right from wrong. Com. v. Martin (1970) 257 N.E.2d 444, 357 Mass. 190.

Permitting Commonwealth to ask owner of printing company which printed certain stationery for construction engineer whether she observed anything unusual about large capital letter in word on letterhead was not erroneous where subject matter did not require special knowledge beyond that possessed by ordinary juryman and therefore did not necessarily call for expert testimony. Com. v. Monahan (1968) 207 N.E.2d 29, 349 Mass. 189.

Generally, it is within discretion of trial judge to determine whether to admit testimony of an expert. Id.

Whether a witness should have been allowed to testify as an expert, is largely a matter of discretion with the trial judge. Dunn v. Sarno (1962) 25 Mass.App.Dec. 39.

18. Opinions

Physician, once qualified as medical expert, could properly testify as to his medical opinion where opinion related to matter at issue. Milley v. Prudential Ins. Co. of America (1977) 359 N.E.2d 60, 1977 Mass. App.Adv.Sh. 57.

In action to assess damages for taking of land which owners claimed would result in curtailment of operation of quarry on the remaining land, it was preferable to have condemnor's witness, who had purchased an allegedly comparable quarry four years prior to the taking and who testified as to the purchase price thereof on issue of valuation, to describe both the quarry he purchased and the owners' quarry rather than to permit witness to express his opinion on the similarity between the two quarries. Carlin Realty Co., Inc. v. Com. (1974) 306 N.E.2d 460, 1 Mass.App. 689.

In action by lessee's invitee for personal injuries sustained on lessor's premises, allowing witness who had spent his life in construction business and was completely familiar with apartment houses with open porches to give his opinion on progress of timber rot in such porches was proper. Varney v. Donovan (1970) 265 N.E.2d 605, 356 Mass. 739.

19. Jury questions

Valuation of witness' testimony is function belonging to jury and witness should not be called upon to comment on his own testimony. Com. v. Barros (1977) 369 N.E. 2d 464, 1977 Mass.App.Adv.Sh. —.

Factors bearing on credibility of witness are to be weighed by jury alone. Com. v. Desmond (1963) 188 N.E.2d 856, 345 Mass 774.

§ 20A. Privileged communications; communications with clergymen

A priest, rabbi or ordained or licensed minister of any church or an accredited Christian Science practitioner shall not, without the consent of the person making the confession, be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs; nor shall a priest, rabbi or ordained or licensed minister of any church or an accredited Christian Science practitioner testify as to any communication made to him by any person in seeking religious or spiritual advice or comfort, or as to his advice given thereon in the course of his professional duties or in his professional character, without the consent of such person. Added St.1962, c. 372.

Approved April 24, 1962.

1962 Enactment. Report of Judicial Council recommending enactment of this section, see 37th Report, p. 31.

Law Review Commentaries

Evidence. Frederick McDermott, 9 Annual Survey of Mass.Law, Boston College, p. 275 (1962).

Copy

IN THE MUNICIPAL COURT, SAN DIEGO JUDICIAL DISTRICT

COUNTY OF SAN DIEGO, STATE OF CALIFORNIA

DEPARTMENT NO. SIX BEFORE HON. ROBERT J. O'NEILL, JUDGE

FEB 1 1980

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. THEODORE PATRICK, JACK L. DAIN, MARY A. DAIN, JAMES ROE, SANDRA SACKS, AND BETTY BRADY, DEFENDANTS.	F 62207 DA A41585 4128 PRELIMINARY EXAMINATION CR 48034 VOLUME II (PAGE 198 TO PAGE 407)

REPORTER'S TRANSCRIPT
MONDAY, JANUARY 21, 1980
WEDNESDAY, JANUARY 23, 1980
THURSDAY, JANUARY 24, 1980

COUNSEL APPEARING:

FOR THE PLAINTIFF: EDWIN L. MILLER, JR., ESQ.,
DISTRICT ATTORNEY,
BY RICHARD D. HUFFMAN, ESQ.,
CHIEF DEPUTY DISTRICT ATTORNEY.

FOR THE DEFENDANTS: PATRICK WALL, ESQ.,
RICHARD FANNAN, ESQ.,
ATTORNEYS AT LAW.

JOHN T. BRYARS, CSR
MUNICIPAL COURT REPORTER

SAN DIEGO, CALIFORNIA - WEDNESDAY, JANUARY 23, 1980 - 9:40 A.M.

IN CHAMBERS

APPEARANCES:

FOR THE PEOPLE: EDWIN L. MILLER, JR., ESQ., DISTRICT ATTORNEY, BY RICHARD D. HUFFMAN, ESQ., CHIEF DEPUTY DISTRICT ATTORNEY.

FOR THE DEFENDANTS: PATRICK WALL, ESQ., RICHARD FANNAN, ESQ., ATTORNEYS AT LAW.

FOR THE WITNESS PAULA DAIN: ALONZO L. STEVENS, ESQ., ATTORNEY AT LAW.

FOR THE CHURCH OF SCIENTOLOGY: MARK VINCENT KAPLAN, ESQ., ATTORNEY AT LAW.

- - -

THE COURT: ALL RIGHT. WE ARE IN CHAMBERS ON THE MATTER OF THE PEOPLE VERSUS THEODORE PATRICK, ET. AL.

I AM INFORMED BY MR. MARK VINCENT KAPLAN, THE ATTORNEY APPEARING REPRESENTING THE CHURCH OF SCIENTOLOGY, THAT -- THAT THAT ORGANIZATION HAS BEEN SERVED WITH A SUBPOENA DUCES TECUM FOR THE CUSTODIAN OF THE RECORDS OF THE CHURCH OF SCIENTOLOGY TO PRODUCE THE FOLLOWING ITEMS:

NUMBER ONE. ALL DOCUMENTS CONCERNING THE AMOUNT OF MONEY PAID TO PAULA DAIN FOR THE PERIOD AUGUST, '78 TO THE PRESENT, INCLUDING BUT NOT LIMITED TO W-2 FORMS AND PAYROLL SHEETS AND LOGS OF HOURS WORKED.

NUMBER TWO. ALL DOCUMENTS RELATING TO THE TIME THAT PAULA DAIN WAS UNDERGOING "AUDITING" AND ALL DOCUMENTS CONTAINING STATEMENTS MADE BY PAULA DAIN DURING THE TIME THAT SHE WAS TAKING COURSES OF THE CHURCH OF SCIENTOLOGY.

NUMBER THREE. ONE E-METER.

THAT SUBPOENA DUCES TECUM I HAVE BEEN PROVIDED WITH A COPY OF, AND ATTACHED TO THAT IS A DECLARATION IN SUPPORT OF THE SUBPOENA SIGNED BY RICHARD FANNAN. APPARENTLY THE SUBPOENA WAS -- IS --

MR. FANNAN: I HAVE THE --

THE COURT: -- SIGNED ON -- LET ME JUST GET THE RECORD STRAIGHT SO THAT WE KNOW WHERE WE ARE.

THE SUBPOENA WAS SIGNED ON JANUARY THE 21ST, 1980, AND PRESUMABLY WAS SERVED YESTERDAY.

AND SO, MR. KAPLAN IS AT SOMEWHAT OF A DISADVANTAGE, AND HAS NOT PRESENTED POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION TO QUASH THE SUBPOENA.

ALL RIGHT. DID ANYBODY ELSE WANT TO SAY ANYTHING?

MR. FANNAN: I HAVE THE ORIGINAL OUT THERE. AND IT INDICATES THAT IT WAS SERVED AT 11:45 A.M. YESTERDAY MORNING ON THE DIRECTOR OF THE WESTWOOD MISSION OF THE CHURCH OF SCIENTOLOGY.

THE COURT: I NOTICE IT IS TO THE CUSTODIAN OF RECORDS. AND I ASSUME HE WOULD QUALIFY AS SUCH.

MR. KAPLAN: ACTUALLY, HE IS NOT THE CUSTODIAN OF RECORDS, BUT -- NOR WOULD HE QUALIFY AS SUCH. BUT --

THE COURT: WELL, WE CAN TALK ABOUT THAT. THAT'S THE FIRST MATTER WE WILL TAKE UP.

IN ANY EVENT, WOULD YOU LIKE TO BE HEARD WITH REGARD TO THE SUBPOENA?

MR. KAPLAN: YES, I WOULD.

IT IS IRRELEVANT AS TO THE OBJECTIONS WHICH I AM

RAISING, AND WHETHER OR NOT HE IS QUALIFIED OR NOT.

THE COURT: ALL RIGHT.

MR. KAPLAN: AT THIS POINT, I WOULD LEAVE THAT TOWARDS THE END, IF I MAY.

AS TO THE RELEVANCY, I AM SOMEWHAT AT A DISADVANTAGE BECAUSE I HAVE NOT BEEN PRESENT, OF COURSE, DURING THE PROCEEDINGS.

I WILL TAKE THESE ONE AT A TIME. I AM HERE TO MAKE THIS MOTION TO QUASH ON THE FOLLOWING GROUNDS:

AS TO ITEM 1, WHICH IS ALL DOCUMENTS CONCERNING THE AMOUNT OF MONEY PAID TO PAULA DAIN FROM AUGUST, '78 TO THE PRESENT, INCLUDING BUT NOT LIMITED TO W-2'S, AND PAY ROLL SHEETS, ET CETERA, I WOULD OBJECT TO THAT, NUMBER ONE, ON THE GROUNDS OF THE FACT THAT IT IS SOMEWHAT OVERBROAD. NUMBER TWO, I BELIEVE IT IS IRRELEVANT TO THIS PROCEEDING FROM WHAT I CAN UNDERSTAND IS THE TESTIMONY.

THE COURT: WELL, LET ME JUST FILL YOU IN BRIEFLY FROM WHAT I UNDERSTAND THE TESTIMONY TO BE, AND THAT WAY YOU WILL -- AT LEAST AS IT RELATES TO THOSE ITEMS.

I THINK THE TESTIMONY IS GENERALLY CONSISTENT WITH THE DECLARATION MR. FANNON HAS FILED. AND THAT IS IN THE COURSE OF HER TESTIMONY MISS DAIN HAS INDICATED THAT SHE WORKED AN AVERAGE, SHALL WE SAY, OF -- AND I THINK A RATHER ROUGH AVERAGE OF SIXTY HOURS A WEEK IN SOME CAPACITY FOR THE CHURCH OF SCIENTOLOGY, AND WAS ON MOST INSTANCES PAID A HUNDRED DOLLARS A WEEK; SOMETIMES MORE, SOMETIMES LESS, WITHOUT BEING ANY MORE DEFINITE THAN THAT.

THERE WERE A SERIES OF QUESTIONS PUT TO HER WITH REGARD

TO WHETHER SHE EVER TOLD HER PARENTS THAT SHE WAS MAKING A HUNDRED DOLLARS A MONTH. MY RECOLLECTION OF HER TESTIMONY IS THAT SHE DENIED EVER HAVING TOLD THEM THAT.

MR. FANNAN: I HAVE A DIFFERENT RECOLLECTION, YOUR HONOR. I THINK SHE SAID SOMETIMES.

THE COURT: WELL, THAT WHOLE AREA WAS SO INDEFINITE, I DON'T KNOW THAT IT MAKES MUCH DIFFERENCE. I WILL ACCEPT EITHER RECOLLECTION MAY BE RIGHT FOR THE MOMENT, AND WE CAN DEAL WITH THAT LATER.

DO YOU RECALL AS HE DOES?

MR. HUFFMAN: YOUR HONOR -- WELL, MY RECOLLECTION IS THAT THE WITNESS WAS NOT DEFINITE AS TO THE AMOUNTS THAT SHE HAD STATED TO HER FATHER.

THE COURT: THAT MUCH I AM CLEAR ON.

MR. HUFFMAN: THE COURT WILL ALSO RECALL THAT VIRTUALLY ALL OF THAT TESTIMONY WAS RECEIVED OVER OUR OBJECTION AS TO ITS RELEVANCE TO THE OFFENSE IN ANY WAY.

THE COURT: RIGHT.

MR. HUFFMAN: IT IS CERTAINLYNOT RELEVANT TO THE CHARGE. THE QUESTION IS, IS IT RELEVANT TO THE DEFENSE AS ARTICULATED OF NECESSITY TO AVOID THE GREATER EVIL.

THE COURT: YES. I RULED ON THOSE OBJECTIONS AND NOT SO MUCH ON THE -- I OVERRULED THOSE OBJECTIONS NOT BECAUSE I FELT IT WAS RELEVANT TO THE DEFENSE OF NECESSITY, BUT RATHER BECAUSE IN LIGHT OF THE -- WHAT I AM NOW ABOUT TO TALK ABOUT, THAT IT WAS RELEVANT ON THE ISSUE OF IMPEACHMENT.

THE WITNESS THEN TESTIFIED THAT THERE WAS AN AGREEMENT WITH THE CHURCH OF SCIENTOLOGY THAT SHOULD SHE LEAVE THE CHURCH

OF SCIENTOLOGY OR LEAVE THE ORGANIZATION IN SOME FASHION, THAT THE AMOUNTS WHICH HAD BEEN PAID TO HER FOR -- WHICH SHE WOULD HAVE PAID FOR HER EDUCATION WOULD BE DUE AND PAYABLE; AND APPARENTLY SHE WAS RECEIVING THE EDUCATION FOR FREE BECAUSE OF, IN PART, THE THE LABOR OR WORK OR WHATEVER SHE WAS PERFORMING FOR THE CHURCH OF SCIENTOLOGY.

ALL OF THAT INFORMATION, IN MY JUDGMENT, FALLS INTO THE -- PRETTY MUCH INTO THE SAME POT IN THE SENSE THAT IF THIS WITNESS'S TESTIMONY IS SUBJECT TO SOME FINANCIAL COERCION FROM SOME THIRD PARTY, THAT IS, IF BY TESTIFYING AT ODDS WITH WHAT THE CHURCH OF SCIENTOLOGY MAY OR MAY NOT WANT, OR WITH THE INTERESTS OF THIS CHURCH OF SCIENTOLOGY, AS THAT ORGANIZATION PERCEIVES THEIR INTEREST, THAT IT MIGHT BE THAT THERE WOULD BE A FINANCIAL DETRIMENT TO THE WITNESS BY VIRTUE OF HER ACCRUED COSTS FOR EDUCATION BEING MADE ALL DUE AND PAYABLE.

QUITE FRANKLY, THAT WAS THE SAME REASONINING THAT LED ME TO BELIEVE THAT THE CONTRACT THAT THE WITNESS HAS WITH THE CHURCH OF SCIENTOLOGY MAY HAVE SOME BEARING ON THE -- ON THE NATURE OF THAT RELATIONSHIP. I COULD CONCEIVE, FOR EXAMPLE, OF A CONTRACT THAT WOULD SAY THAT -- TO BE OUTLANDISH FOR A MOMENT, OR MAYBE NOT -- THAT IF YOU DON'T TESTIFY AGAINST ALL DEPROGRAMMERS, THEN YOU HAVE VIOLATED SOME OF OUR PRECEPTS AND YOU CAN BE EJECTED FROM THE CHURCH, AND THEN WE WILL MAKE OUR $2501 DUE AND PAYABLE FROM YOU; AT WHICH POINT THERE MAY BE SOME PRESSURE ON HER, SOME COERCION OR SOME INTEREST IN HER TESTIMONY IN THIS MATTER BEYOND THE OBVIOUS.

AND SO, THAT'S THE REASON I HAVE ALLOWED IT IN, AND IT IS RELEVANT ONLY ON THE ISSUE OF IMPEACHMENT IN MY JUDGMENT.

MR. HUFFMAN: THE CONTRACT, YOUR HONOR, I BELIEVE IS PRESENT. AND COUNSEL HAS INDICATED THAT HE WILL SUBMIT IT IN CAMERA.

MR. KAPLAN: I WAS GOING TO SUGGEST, IF I MAY, THAT I DO HAVE THE CONTRACT FOR THECOURT'S IN CAMERA INSPECTION.

THE COURT: ALL RIGHT.

MR. KAPLAN: IF PERHAPS, FOR THE SAKE OF CLARITY AND PROBABLY FOR TIME, I COULD SUBMIT THE CONTRACT TO THE COURT, THE COURT COULD AT THAT TIME RESERVE FURTHER ARGUMENT ON ITEM 1 OF -- OF THE S.D.T. UNTIL THE COURT HAS AN OPPORTUNITY TO ANSWER THOSE QUESTIONS WHICH WILL BE RELEVANT TO WHAT IS PRESENTED ON THE FACE OF THE CONTRACT AND, AS THE COURT HAS STATED, LEAVING SOMETHING -- AS FAR AS ANY KIND OF ACCRUED BENEFITS WHICH HAVE TO BE PAID BACK -- LEAVING IS NOT A QUESTION OF EXPULSION, BUT VOLUNTARY DEPARTURE ON THE PART OF MISS DAIN. AND I THINK THE CONTRACT WILL BEAR THAT OUT.

SO, WHAT I FORMALLY PROPOSE, IF THE COURT WILL APPROVE, IS THAT I SUBMIT THE CONTRACT TO THE COURT, WHICH I WILL DO IN ANY CASE.

THE COURT: OKAY.

MR. KAPLAN: AND LET THE COURT HAVE AN OPPORTUNITY TO REVIEW THESE CONTRACTS, AND RESERVE FURTHER PRESENTATION OF ARGUMENT ON MY OBJECTION TO THE S.D.T. COMPLIANCE, NUMBER 1, UNTIL SUCH TIME AS THE COURT HAS HAD AN OPPORTUNITY TO REVIEW THEM. AND IF THERE NEED BE ARGUMENT TOMORRO, I WOULD, OF COURSE, BE WILLING TO FLY BACK AND COME BACK TOMORROW.

I WOULD LIKE TO PROCEED WITH ITEMS 2 AND 3 ON THE S.D.T. IF I MAY.

ITEM 2 IS ALL DOCUMENTS RELATING TO THE TIME THAT PAULA DAIN WAS UNDERGOING AUDITING, AND ALL DOCUMENTS CONCERNING STATEMENTS MADE BY PAULA DAIN DURING THE TIME THAT SHE HAS BEEN TAKING COURSES AT THE CHURCH OF SCIENTOLOGY.

EXCUSE ME FOR ONE MOMENT. GETTING BACK TO NUMBER 1, I AM ASSUMING THAT WE CAN HAVE FURTHER ARGUMENT ON THAT.

THE COURT: OH, YES.

MR. KAPLAN: I ALSO OBJECT TO IT BECAUSE IT IS VERY OVER-BROAD.

AS TO NUMBER 2, FIRST OF ALL, I WILL START WITH THE SMALLER -- WHAT I CONSIDER EXTREMELY WELL-FOUNDED OBJECTION IN THAT IT IS ENTIRELY OVER-BROAD AND VAGUE TO COMPLY WITH.

BUT, THE MOST IMPORTANT OBJECTION I HAVE, AND THE STRONGEST OBJECTION IS THAT I AM NOT SURE WHAT TESTIMONY HAS BEEN PRESENTED REGARDING AUDITING. BUT, AUDITING IS AN EQUIVALENT TO A CONFESSIONAL SITUATION IN THE CATHOLIC CHURCH OR -- OR IN ANY OTHER CHURCH REGARDING CONFIDENTIAL CONFESSIONAL CONVERSATIONS BETWEEN THE CLERGY AND A PENITENT MEMBER.

AS TO THESE, I WOULD LIKE TO DIRECT THE COURT'S ATTENTION, IF I MAY, AND ASK THE COURT TO TAKE JUDICIAL NOTICE OF THE ARGUMENT SET FORTHREGARDING THE CLERGY-PENITENT PRIVILEGE. AND I AM READING FROM THE BENCH BOOK. THERE ARE TWO PRIVILEGES, AS YOU WELL KNOW. THERE IS THE CLERGY PRIVILEGE, WHICH I AM ASSERTING AT THE PRESENT TIME AS TO ALL INFORMATION REQUESTED PURSUANT TO ITEM NUMBER 2. THERE IS ALSO A PENITENT PRIVILEGE WHICH EVEN IF MISS DAIN -- AND I HAVE NOT SPOKEN WITH HER --

THE COURT: WELL, YOU SAY ALL ITEMS INCLUDED IN ITEM 2.

ITEM 2 ALSO INCLUDES A REQUEST FOR STATEMENTS MADE BY PAULA DAIN DURING THE TIME SHE HAS BEEN TAKING COURSES AT THE CHURCH OF SCIENTOLOGY. I CONCLUDE THAT ONLY REFERS TO WRITTEN STATEMENTS?

MR. FANNAN: YES.

THE COURT: AND I DON'T KNOW WHETHER YOU ARE SAYING ANY WRITTEN STATEMENTS MADE DURING HER COURSE OF -- LIKE TESTS OR ESSAYS WOULD BE PENITENT PRIVILEGE.

MR. KAPLAN: WELL, ANY CONTAINED WITHIN THE AUDITING PROCEDURE WOULD BE.

THE COURT: WELL, AS TO -- THE COURSES TAKEN AT THE CHURCH OF SCIENTOLOGY DURING AUDITING?

MR. KAPLAN: WELL, SOME OF THEM MIGHT BE. BUT, THATGETS BACK TO MY ORIGINAL OBJECTION. AS I SHOULDN'T HAVE TO GUESS EXACTLY WHAT THEY ARE GETTING AT OR REVIEW REAMS OF DOCUMENTS TO LOOK FOR THE NAME PAULA DAIN IN THERE. IT IS ENTIRELY IMPRACTICAL TO MAKE ME OR ANY OTHER ATTORNEY OR ANY OTHER CUSTODIAN OF RECORDS OR CHURCH MEMBER SEARCH EVERY SINGLE DOCUMENT THEY MIGHT HAVE TO SEE WHERE A STATEMENT MADE BY PAULA DAIN MIGHT APPEAR.

NOW --

THE COURT: WELL, I AM JUST TRYING TO UNDERSTAND WHAT THE OBJECTION IS. THAT'S ALL I AM LOOKING FOR.

MR. KAPALAN: ALL RIGHT. AS TO ANYTHING REGARDING AUDITING, INCLUDING WHETHER IT IS A STATEMENT OR AUDITING RECORDS THEMSELVES, I AM GOING TO ASSERT THE CLERGY-PENITENT PRIVILEGE. AND I DO HEREBY ASSERT THAT PRIVILEGE AS AN OBJECTION TO COMPLIANCE WITH THE S.D.T.

THE COURT: ALL RIGHT.

MR. KAPLAN: AS TO ANY STATEMENTS WHICH MAY NOT BE CONTAINED WITHIN THE AUDITING PROCEDURE--- AND I ASSUME WE ARE ALL REFERRING HERE TO WRITTEN STATEMENTS -- I OBJECT TO THAT ON THE GROUNDS THAT IT IS OVER-BROAD AND VAGUE, AND WOULD BE AN IMPRACTICAL BURDEN TO IMPOSE UPON ANYONE TO REVIEW ANY OR ALL OF THOUSANDS AND THOUSANDS OF PAGES OF DOCUMENTS JUST TO SEE WHERE PAULA DAIN'S NAME MIGHT HAVE BEEN MENTIONED. TO THE EXTENT THAT THEY ARE ASKING FOR ANY STATEMENT MADE BY PAULA DAIN, THERE HAS GOT TO BE A RELEVANCY OBJECTION AT THE SAME TIME.

THE COURT: OKAY.

MR. KAPLAN: NOW, SOME LEGAL ARGUMENT ON THE CLERGY-PENITENT PRIVILEGE. THERE ARE TWO PRIVILEGES. ONE IS ASSERTABLE AND HELD BY THE CLERGY, WHICH I ASSERT HERE. THE OTHER ONE IS HELD BY THE PENITENT, WHICH I ASSUME MR. STEVENS WILL BE HEARD ON AFTER I FINISH.

EVEN IF MISS DAIN WAS TO WAIVE HER PRIVILEGE OF THE SECOND PRONG OF THE PENITENT SIDE, IT DOES NOT WAIVE MY PRIVILEGE, WHICH I AM ASSERTING ON BEHALF OF THE CLERGY IN THIS MATTER, AND I AM ASSERTING THAT PRIVILEGE.

I AM REFERRING TO SECTION 39.1 ET.SEQ. OF JEFFERSON'S BENCH BOOK, WHICH HAS A VERY -- AND THE SUPPLEMENT, WHICH HAS A VERY SUCCINCT EXPLANATION OF THE EVOCATION OF THE RELEVANCE OF THAT PRIVILEGE.

AND AT THIS TIME I WOULD, RATHER THAN GOING ON TO NUMBER 3, PERHAPS DEFER TO MR. STEVENS OR ANY OTHER COUNSEL THAT WISHES TO BE HEARD ON NUMBER 2.

THE COURT: MR. STEVENS, MAYBE YOU SHOULD BE HEARD FIRST AS TO YOUR CLIENT, MISS DAIN'S INTENTIONS WITH REGARD TO ASSERTING ANY PRIVILEGE UNDER THE EVIDENCE CODE.

MR. STEVENS: MISS DAIN WOULD ASSERT THE PENITENT PRONG OF THE PRIVILEGE.

THE COURT: ALL RIGHT.

MR. STEVENS: IN THE EVENT THE COURT INTENDS TO ALLOW ANY OF THAT INFORMATION IN, IT IS HER POSITION THAT THE AUDITING ACTIVITY IS RELIGIOUS IN NATURE, AND SHE ASSERTS HER PRIVILEGE.

THE COURT: ALL RIGHT. DO THE PEOPLE HAVE A MOTION?

MR.HUFFMAN: OUR POSITION ON ITEM 2, YOUR HONOR, IS THAT IT IS IRRELEVANT TO THESE PROCEEDINGS, EITHER ON THE QUESTION OF THE CLAIMED DEFENSE OR THE QUESTION OF CREDIBILITY.

THE CLAIMED DEFENSE IS ALLEGEDLY BASED UPON A STATE OF MIND OF THE PARENTS, WHICH PRE-EXISTS THE KIDNAPPING AND FALSE IMPRISONMENT WHICH SERVES AS JUSTIFICATION FOR THE ACTIONS OF MR. PATRICK AND HIS AIDES. THIS MATERIAL IN THE POSSESSION OF SCIENTOLOGY OBVIOUSLY IS NOT MATTER THATCOULD HAVE CONCEIVABLY BEEN WITHIN THE STATE OF MIND OF THE DEFENDANTS.

THE QUESTION OF WHETHER OR NOT IT GOES TO CREDIBILITY, THE MATERIALS -- STATE OF MIND, FOR EXAMPLE, DURING A TEST, OR THERE MAY BE PHONE MESSAGES OR PAULA MAY HAVE SAID: I AM GOING TO LUNCH NOW, OR WHATEVER SERIES OF STATEMENTS ARE INCLUDED IN THAT BROAD, ANIMUS REQUEST, ARE CLEARLY NOT BEARING -- DO NOT BEAR UPON CREDIBILITY OR COULDN'T CONCEIVABLY BEAR UPON CREDIBILITY, NOR WOULD THE AUDITING PROCESS ITSELF BEAR UPON CREDIBILITY IF IT WERE NOT OTHERWISE PRIVILEGED.

AND I WOULD ASK THE COURT ON BEHALF OF THE PEOPLE TO

QUASH THAT PORTION OF THE SUBPOENA ON THE GROUNDS OF RELEVANCE, WITHOUT REACHING THE QUESTION OF PRIVILEGE.

MR. FANNAN: IF I COULD BE HEARD --

THE COURT: WELL, TO THE EXTENT -- I AM QUESTIONING FOR THE MOMENT WHETHER THE -- I AM INTERESTED IN YOUR COMMENTS. I AM JUST QUESTIONING FOR A MOMENT THE PEOPLE'S STANDING TO OBJECT TO THE -- TO THE SUBPOENA. CERTAINLY YOU COULD STAND AN OBJECTION TO THE RELEVANCE.

MR. HUFFMAN: I DON'T HAVE STANDING, I DON'T THINK, TO OBJECT TO THE SUBPOENA. HOWEVER --

THE COURT: RIGHT.

MR. HUFFMAN: HOWEVER, BEING ASKED, I AM ALWAYS --

THE COURT: OH, YES. I ASKED DIRECTLY.

MR. HUFFMAN: AND SECONDLY, THE COUNSEL FOR THE CUSTODIAN HAS RAISED THE GROUNDS OF RELEVANCE. HOWEVER, NOT BEING AT THE ADVANTAGE OF HAVING ATTENDED THE PROCEEDINGS, I THINK THE PEOPLE'S COMMENTS HAVE SOME WEIGHT ON THE QUESTION --

THE COURT: SURE.

MR. HUFFMAN: -- OF BEING RELEVANT.

MR. KAPLAN: I APPRECIATE THAT.

MR. WALL: COULD YOUR HONOR GIVE ME THIRTY SECONDS TO GET SOME DOCUMENTS ON MY DESK?

THE COURT: SURE.

MR. WALL: THANK YOU.

(WHEREUPON, MR. WALL AND MR. FANNAN LEFT CHAMBERS MOMENTARILY).

MR. KAPLAN: I WOULD LIKE TO BE HEARD ON A FURTHER POINT --

THE COURT: WELL, LET ME JUST FINISH READING THIS, AND

I WOULD HAVE ONE OR TWO QUESTIONS BEFORE WE GO MUCH FURTHER ON THAT.

MR. KAPLAN: CAN YOU TELL ME WHAT PAGE THAT IS ON, YOUR HONOR?

THE COURT: PAGE 667.

MR. FANNAN: THANK YOU.

ALL RIGHT. I AM AT A DISADVANTAGE, MR. KAPLAN IN THIS RESPECT. I AM NOT FAMILIAR WITH -- BEYOND THE NEWSPAPERS WITH THE CHURCH OF SCIENTOLOGY; A, ITS STATUS AS A CHURCH; B, ITS PRACTICES; C, WHO AMOUNTS TO A CLERGYMAN AND WHO DOESN'T; D, TO WHAT EXTENT THAT CHURCH PROVIDES FOR CONFIDENTIALITY IN THE "PENITENTIAL" SITUATION; AND FINALLY, AND PERHAPS MAYBE THE FIRST QUESTION, THE EXTENT TO WHICH, IF ANY, ANY OF THIS MATERIAL HAS BEEN MADE AVAILABLE TO THE PEOPLE.

MR. KAPLAN: NONE OF IT HAS BEEN MADE AVAILABLE TO THE PEOPLE.

THE COURT: IS THAT CORRECT, MR. HUFFMAN?

MR. HUFFMAN: THAT'S CORRECT. I JUST --

THE COURT: I JUST WANT TO GET THE DISCOVERY ASPECTS OUT OF THIS.

MR. HUFFMAN: I HAVE NOT SEEN THE CONTRACT OR ANY OF THE MATERIALS OF THE CHURCH OF SCIENTOLOGY.

THE COURT: YOU HAVE SOMETHING TO PRESENT ME WITH IN REGARD TO THE STATUS OF THE CHURCH AND THE APPLICABILITY OF THE PRIVILEGE, I TAKE IT?

MR. WALL: YES, YOUR HONOR.

ONE OF THE STATEMENTS THAT HAS REGULARLY BEEN MADE

ABOUT THE CHURCH OF SCIENTOLOGY IS THAT ITS ADHERENTS ARE AWARE OF THE FACT THAT VERY PERSONAL, PRIVATE CONFESSIONS, "ARE MADE DURING THE AUDITING PROCESS," AND THAT THE ORGANIZATION OF SCIENTOLOGY HAS USED THOSE PRIVATELY MADE CONVERSATIONS FOR ITS OWN PURPOSES.

I HAVE A DOCUMENT HERE, YOUR HONOR-- THIS IS BEARING UPON WHETHER OR NOT THE CHURCH USED THIS AS CONFIDENTIAL -- A DOCUMENT OBTAINED WITHIN THE PAST MONTH FROM THE FILES OF THE UNITED STATES GOVERNMENT, WHICH WAS TAKEN DURING THE COURSE OF A SEARCH AND SEIZURE RULED LEGAL FROM SCIENTOLOGY HEADQUARTERS. THIS IS A THREE PAGE DOCUMENT WRITTEN BY SOMEONE NAMED JIM. AND IF NEED BE, I CAN FIND OUT WHO IT IS IN SCIENTOLOGY. AND THAT A LADY NAMED CINDY, WHO WAS ONE OF THE DEFENDANTS IN WASHINGTON -- CINDY LEHMOND, I BELIEVE HER NAME IS; A HIGH OFFICIAL OF THE CHURCH OF SCIENTOLOGY. IT IS ENTITLED, "EXCERTION," E-X-C-E-R-T-I-O-N.

THIS IS SENT FROM --

THE COURT: I CAN'T EVEN OPEN MY OWN WINDOWS ANY MORE. EXCUSE ME. I JUST WANT TO LET SOME OF THE SMOKE OUT.

GO AHEAD.

MR. WALL: THIS DOCUMENT WAS PREPARED WITH RESPECT TO IRA HIRSCH, A SCIENTOLOGIST, WHO LEFT THE CHURCH, AND WHO THE CHURCH BELIEVED WAS GOING TO GIVE IT SOME TROUBLE. SO, WHAT THEY DID -- AND THIS DOCUMENT WILL PROVE IT. WHAT THEY DID, DESPITE THEIR PRESENT CLAIM THAT THESE ARE HELD IN CONFIDENCE, IS TO IMMEDIATELY GO TO THE FILES. APPARENTLY THEY DIDN'T HAVE TO GO THROUGH THOUSANDS OF FILES, BECAUSE THEY HAVE THEM ALPHABETIZED, IF THAT'S THE CORRECT WORD, AND HERE IS AN

EXCERTION OF IRA HIRSCH, P.C. FILES, WHICH INDICATES THAT ON AUGUST THE 9TH, 1972, HE HAD MASTURBATION, HAD A HOMOSEXUAL PARTNER --

MR. KAPLAN: I OBJECT, YOUR HONOR. FIRST OF ALL --

MR. WALL: EXCUSE ME.

THE COURT: YES. I HAVE A PROBLEM, COUNSEL, WITH THIS INASMUCH AS I HAVE TO LISTEN TO THE EVIDENCE. I DON'T KNOW THAT WE HAVE GOT THE KIND OF FOUNDATION NECESSARY TO HAVE THAT COVERED RIGHT NOW, IT IS A PIECE OF PAPER BEING OFFERED.

MR. WALL: I CAN'T GIVE YOU THE FOUNDATION, YOUR HONOR. IT IS AS SIMPLE AS THAT. I CAN, HOWEVER --

MR. KAPLAN: WELL --

MR. WALL: LET ME SAY WHAT I CAN DO. AND --

THE COURT: OKAY.

MR. WALL: IT IS QUITE OBVIOUS THAT IF I WILL HAVE TO DO IT, I THINK AT THIS POINT I WILL -- PROBABLY, RATHER THAN WASTE THE TIME, I WILL WITHDRAW THE POINT.

BUT, I AM TELLING YOU NOW, YOUR HONOR, THAT THIS IS A SCIENTOLOGY DOCUMENT. AND THIS IS WHAT I WILL BE ABLE TO PROVE.

THE COURT: YOUR DECLARATION ALLUDES TO THE FACT THAT THROUGH MR. FANNAN'S STUDY OF SCIENTOLOGY, OR HIS BACKGROUND IN THE INFORMATION THAT HE HAS READ ABOUT IT, THAT HE IS OF THE BELIEF THAT MATTERS THAT ARE RELAYED TO THE CHURCH DURING THE PROCESS OF AUDITING ARE USED AGAINST THOSE PEOPLE IN SOME FASHION OR MIGHT BE USED AGAINST THEM UPON THEIR --

MR. FANNAN: THAT IS CORRECT, YOUR HONOR.

THE COURT: -- DEPARTURE FROM THE ORGANIZATION.

MR. KAPLAN: I READ THE DECLARATION IN SUPPORT OF THE S.D.T.

AND FURTHER, BACK TO MY OBJECTION, NUMBER 1, IT IS A TOTAL HEARSAY DOCUMENT, WHICH YOU CERTAINLY KNEW WAS HEARSAY WHEN YOU OFFERED IT. AND I THINK IT HAS INFLAMMATORY PURPOSES MORE THAN ANYTHING ELSE.

MR. WALL: WELL, --

MR. FANNAN: IF THE QUESTIONS --

THE COURT: ONE AT A TIME.

MR. FANNAN: THE QUESTION IS WHAT ARE MY BELIEFS. AND I AM ENTITLED TO RELY ON HEARSAY, QUITE CLEARLY.

MR. WALL: THIS DOCUMENT IS HEARSAY.

MR. KAPLAN: THEN WE ARE NOW TALKING ABOUT WHETHER OR NOT YOUR S.D.T. WAS IN GOOD FAITH. WE ARE TALKING ABOUT WHETHER OR NOT THIS GENTLEMAN HERE (INDICATING), CAN OFFER THAT DOCUMENT TO UNDERCUT THE CLERGY-PENITENT PRIVILEGE. AND THAT'S A TOTAL HEARSAY DOCUMENT, WHICH HE KNOWS IS TOTAL HEARSAY, WHICH I HAVE NOT EVEN SEEN YET. AND CONSEQUENTLY, IT IS IRRELEVANT AS TO YOUR GOOD FAITH BELIEF. IT IS A QUESTION OF WHETHER OR NOT IT CAN ESTABLISH THE POINT THAT AUDITING IS NOT USED IN A CONFIDENTIAL PURPOSE.

THE COURT: WELL, OKAY. WAIT A SECOND, COUNSEL.

THE FIRST THING THAT OCCURS TO ME -- AND CORRECT ME IF I AM WRONG -- IS THE DECLARATION IN SUPPORT OF THE SUBPOENA DUCES TECUM IS CERTAINLY-- I CAN READ THAT AND CONSIDER IT. WHAT I THINK I AM CORRECT IN SAYING IS THAT IF A CHALLANGE IS MADE TO THAT DECLARATION, THEN PURSUANT TO A MOTION TO QUASH COUNSEL OR HIS CLIENT HAS THE OPPORTUNITY TO CHALLENGE THE HEARSAY ALLEGATIONS OF THE DECLARATION IF THEY CHOOSE. AND OF COURSE, YOU HAVE THE OPPORTUNITY TO SUPPORT THE DECLARATION --

ALLEGATIONS IN THE DECLARATION.

THE ONLY QUESTION I HAVE ABOUT THIS PIECE OF PAPER, MR. WALL, IS WITHOUT SOME AUTHENTICATION, SOME FOUNDATION, I DON'T THINK I COULD RECEIVE IT EVEN IN PURSUIT OF THAT GOAL. THAT IS, SUPPORTING OR DEROGATING FROM THE DECLARATION.

MR. WALL: YOUR HONOR, IF I WERE ABLE TO LAY THE FOUNDATION QUICKLY, I WOULD DO SO. I SIMPLY TELL YOU, AS AN OFFICER OF THE COURT, THAT THIS IS A COPY OF A DOCUMENT SEIZED FROM SCIENTOLOGY FILES, WHICH WAS MADE PUBLIC WITHIN THE PAST TWO MONTHS. IT WAS OBTAINED FROM THE GOVERNMENT'S ROOM WHERE THEY HAVE SOME FIFTY THOUSAND SCIENTOLOGY DOCUMENTS. AND IT WAS GIVEN TO ME BY THE PERSON WHO GOT IT.

NOW, ULTIMATELY --

MR. KAPLAN: WHO IS THE PERSON WHO GOT IT?

MR. WALL: A YOUNG WOMAN NAMED PAULETTE COOPER.

NOW, OBVIOUSLY ULTIMATELY I CAN ESTABLISH IT IF -- IF, HOWEVER, THE CHURCH OF SCIENTOLOGY TAKES THE POSITION THAT THEY WANT ME TO ESTABLISH IT IN THAT FORM. IT IS QUITE PROPERLY AN OBJECTION, AND I THEREFORE WITHDRAW THIS, BECAUSE I DON'T --

THE COURT: OKAY.

MR. WALL: -- I DON'T INTEND TO WASTE THE TIME.

SIMPLY SPEAKING, YOUR HONOR, THAT ON THE BASIS OF WHAT WE KNOW IN GOOD FAITH, AND WHICH I CAN ASSURE YOU WE CAN PROVE IF WE HAVE TO GET THE FBI AGENT WHO SEIZED IT IN HERE, IT REALLY DOESN'T SET WELL IN THE MOUTH OF SCIENTOLOGY TO CLAIM THAT PRIVILEGE WHEN THEY BLACKMAIL. AND THIS IS A BLACKMAIL ATTEMPT PURE AND SIMPLE. AND I WILL SAY IT FOR THE RECORD.

MR. KAPLAN: I OBJECT, YOUR HONOR, TO THE --

MR. WALL: BUT, I WILL WITHDRAW THAT PORTION.

MR. KAPLAN: THAT WAS VERY FINE OF YOU AFTER YOUR PUT YOUR COMMENTS IN THE RECORD. I THINK YOU ARE A SLOB.

THE COURT: WELL, COUNSEL, JUST A SECOND. I AM NOT VERY EASILY INFLAMED TO BEGIN WITH, AND WE ARE NOT IN FRONT OF A JURY.

MR. KAPLAN: YOUR HONOR, I AM NOT WORRIED ABOUT THE COURT'S STATE OF MIND. BUT, IT IS A DEFINITE PRACTICE THAT HAS BEEN ESTABLISHED OF GETTING THESE COMMENTS INTO THE RECORD, WHICH THEN, OF COURSE, BECOME AN OFFICIAL COURT RECORD, AND WHICH GETS DISSEMINATED TO THE PUBLIC, AND WHICH AT THAT TIME --

MR. FANNAN: WELL, THIS IS AN OFFICIAL COURT RECORD FROM WASHINGTON, D.C., THOUGH. WE ARE NOT DEALING WITH --

THE COURT: WELL, I DARE SAY, HOWEVER, COUNSEL, THAT IF MR. HUFFMAN CAME INTO COURT AND ATTEMPTED TO OFFER THAT DOCUMENT OR ONE LIKE IT, WITH NO MORE FOUNDATION OTHER THAN A GOOD FAITH ASSERTION, AS AN OFFICER OF THE COURT THAT YOU KNOW WHAT IT IS, THAT YOUR OBJECTION WOULD BE SUSTAINED.

MR. WALL: IF I I MADE IT, YOU HONOR, AND I TEND TO BE SOMEWHAT INFORMAL, I WOULDN'T MAKE IT. AND IF --

MR. KAPLAN: OKAY. THEN I --

MR. WALL: EXCUSE ME. IF THE LAWYER FOR SCIENTOLOGY WISHES TO SEAL THIS PORTION OF THE RECORD, I HAVE NO OBJECTION. HOWEVER, I COULD NOT LEAVE UNANSWERED A PURELY FACETIOUS CLAIM THAT AN ORGANIZATION THAT DOES THIS BELIEVES THAT THE PRIEST-PENITENT PRIVILEGE IS APPLICABLE AND CONFIDENTIAL. BUT, I HAVE NO OBJECTION TO SEALING THE PORTION OF THE RECORD WHERE

I RESPONDED TO THAT STATEMENT.

MR. KAPLAN: I THINK I HAVE TO MAKE ANOTHER DISTINCTION ON THE RECORD ALSO.

IN THIS PARTICULAR PROCEEDING, THE CUSTODIAN OF THE RECORDS WAS FOR THE MISSION OF WESTWOOD. AND I REPRESENT THE MISSION OF WESTWOOD IN THIS PROCEEDING. AND THAT IS NOT FROM THE MISSION OF WESTWOOD -- THAT DOCUMENT. SO, THAT SORT OF UNDER CUTS THAT ARGUMENT.

SECOND OF ALL, AS LONG AS IT IS WITHDRAWN, I WOULD MAKE A MOTION TO STRIKE OUT AS TO ALL COMMENTS THAT WERE MADE REGARDING THAT PARTICULAR DOCUMENT.

THE COURT: OH, THE ARGUMENT. AND I AM NOT GOING TO STRIKE THEM BECAUSE I DON'T THINK THERE IS ANY REASON TO STRIKE THEM. THEY ARE ASSERTIONS BY WAY OF AN OFFER OF PROOF. AND I DON'T KNOW WHAT AUTHORITY I WOULD HAVE FOR STRIKING AN OFFICER OF PROOF.

MR.KAPLAN: WELL, HE HAS WITHDRAWN THEM.

THE COURT: I UNDERSTAND THAT. BUT, A LOT OF THINGS GET WITHDRAWN. BUT, I HAVE ALWAYS ADMIRED COUNSEL AND -- AND MR. WALL DOES THIS QUITE FREQUENTLY. HE WILL GET IN THEMIDDLE OF A QUESTION, AS I USED TO DO, AND SAY, "WITHDRAWN," AND WE ALL KNOW THAT WHEN YOU SAY THAT, IT STILL STAYS IN THE RECORD AND NEVER GETS WITHDRAWN. AND THAT'S JUST ONE OF THE STRANGE THINGS THAT WE DO IN THIS BUSINESS.

BUT, LET'S GET BACK TO THE ISSUE.

MR. FANNAN: MAY I RESPOND TO THE QUESTION OF --

THE COURT: WELL, LET'S --

MR. FANNAN: -- THE STANDARD TO BE DECIDED. WHEN YOU SERVE

A SUBPOENA DUCES TECUM IN A CRIMINAL CASE --

THE COURT: ALL RIGHT.

MR. FANNAN: -- I THINK CALIFORNIA LAW HAS HELD A NUMBER OF TIMES THAT A SUBPOENA DUCES TECUM SERVED ON A THIRD PARTY IN A CRIMINAL CASE IS TO BE ADJUDGED BY THE STANDARD OF DISCOVERY IN A CRIMINAL CASE.

THE COURT: YES.

MR. FANNAN: THEREFORE, WHAT WE ARE NOT TALKING ABOUT IS STRICT RELEVANCY IN THIS PROCEEDING OR AT TRIAL, BUT WHETHER IT LEADS TO INFORMATION WHICH WOULD BE HELPFUL TO THE DEFENDANT AT A TRIAL. WE ARE TALKING, THEREFORE, NOT ABOUT STRICT RELEVANCY, BUT OF A MUCH, MUCH LOOSER STANDARD. AND I THINK THE DOCUMENTS WHICH WE HAVE REQUESTED HERE FALL WITHIN THAT.

I WOULD OBJECT TO MR. HUFFMAN'S COMMENT THAT WE HAVE REQUESTED DOCUMENTS -- ITEM 2, THE AUDITING RECORDS -- TO ESTABLISH THE AFFIRMATIVE DEFENSE. WE HAVE NOT. I THINK THE -- ALL THE DOCUMENTS REQUESTED IN ITEM NUMBER 2 GO TO THE CREDIBILITY OF THE WITNESS, HER CONNECTION WITH THE CHURCH OF SCIENTOLOGY, AND HER BELIEFS AS TO WHAT WOULD HAPPEN IF SHE ACTED IN A WAY CONTRARY TO THE WISHES OF SCIENTOLOGY. I THINK THAT THIS IS ALL RELEVANT TO HER CREDIBILITY; TO HER CREDIBILITY LATER AT TRIAL. AND IT WOULD BE HELPFUL TO THE DEFENSE TO LEARN THAT INFORMATION SO THAT WE CAN INVESTIGATE HER TIES TO THE CHURCH OF SCIENTOLOGY, AND WHAT TYPES OF EVIDENCE SHE CAN GIVE AND WHAT TYPES OF EVIDENCE SHE CANNOT GIVE.

AND I THINK I HAVE ESTABLISHED IN MY DECLARATION THE REASONS FOR THAT; THE REASON THAT I BELIEVE THAT STATEMENTS SHE MADE WHILE TAKING COURSES AND WHILE GOING THROUGH AUDITING CAN

BE USED BY THE CHURCH LATER. I THINK THAT SHE IS AWARE THAT IT CAN BE USED BY THE CHURCH LATER. I THINK THESE ARE HIGHLY EMBARRASSING, POSSIBLY, STATEMENTS. AND IF SHE KNOWS THAT THEY CAN BE USED LATER IF SHE BREAKS HER CONTRACT WITH THE CHURCH, OR DESERTS FROM THE CHURCH, OR SPEAKS OUT AGAINST THE CHURCH, THEN SHE HAS VALID REASONS TO TAILOR HER TESTIMONY HERE AND LATER AT TRIAL IN A WAY TO SUIT THE PURPOSES OF THE CHURCH.

AND I THINK THAT'S IN MY DECLARATION. AND I THINK IT ESTABLISHES THE GROUND OF LIMITED RELEVANCE, WHICH THE COURT MUST USE IN DECIDING THE VALIDITY OF A SUPOENA DUCES TECUM IN A CRIMINAL CASE.

THE COURT: OKAY. I SEE WHAT YOU ARE SAYING, BASICALLY, IS THAT IT IS A TWO-STEP ARGUMENT, NOT UNLIKE A PITCHESS SITUATION --

MR. FANNAN: THAT'S CORRECT. VERY SIMILAR TO PITCHESS.

THE COURT: -- WHERE QUESTION NUMBER 1 IN A DISCOVERY SITUATION IS WHETHER IT IS DISCOVERABLE IN THE BROAD SENSE; AND IN THE FACE OF A PRIVILEGE WHETHER THE DEFENDANT'S NEED FOR DISCOVERY OUT WEIGHS THE BASIS FOR THE PRIVILEGE EXISTING.

I SEE A POTENTIAL PROBLEM WITH THAT IN THIS PARTICULAR TYPE OF PRIVILEGE BECAUSE OF THE -- BECAUSE WE ARE NOT TALKING ABOUT A 1040 PRIVILEGE WHERE --

MR. KAPLAN: THAT'S CORRECT, YOUR HONOR.

THE COURT: -- ANY NUMBER OF PEOPLE ARE AWARE OF THE INFORMATION CONTAINED IN POLICE FILES; BUT RATHER, WE ARE TALKING ABOUT A PRIVILEGE ASSERTED AS TO CONVERSATIONS BETWEEN TWO PEOPLE, AS I UNDERSTAND IT; STRICTLY BETWEEN TWO PEOPLE, AS THE PRIVILEGE IS APPLIED BY THE STATUTE.

MR. FANNAN: AND WELL --

MR. KAPLAN: IF I COULD BE HEARD JUST IN REBUTTAL TO WHAT MR. FANNAN HAS SAID --

THE COURT: WELL, HOLD IT.

MR. KAPLAN: -- IS THAT IT IS A LITTLE BIT RELEVANT OR VERY RELEVANT. IT IS IRRELEVANT TO THE ASSERTION OF THIS PRIVILEGE. AND SECOND OF ALL --

THE COURT: OH, I UNDERSTAND YOUR POSITION IN THAT REGARD.

MR. KAPLAN: THERE IS NO WEIGHING TEST WHEN YOU ASSERT THE PRIVILEGE -- THE CLERGY-PENITENT PRIVILEGE. IT IS NOT A WEIGHING TEST AS IN A PITCHESS SITUATION.

MR. WALL: YOUR HONOR --

MR. KAPLAN: THERE IS NO COUNTER-WEIGHING FACTOR TO BE TAKEN INTO CONSIDERATION. EITHER IT EXISTS OR IT DOESN'T.

MR. WALL: YOUR HONOR, I HAVE WITHDRAWN ON -- ON ONE GROUND. I CANNOT ESTABLISH NOW IN THE APPROPRIATE FASHION THE FOUNDATION FOR THE DOCUMENT WHICH I CLAIM IS RELEVANT TO REBUT THE CLAIM THAT THERE IS CONFIDENTIALITY. AND THEREFORE, IT SEEMS -- I WILL HAVE TO DO THAT AT ANOTHER TIME, IT SEEMS TO ME, IF THERE IS ANOTHER TIME. SO, I WITHDRAW IT. AND IF THAT ARGUMENT HAS TO BE MADE LATER, WE CAN MAKE IT LATER.

THE COURT: ALL RIGHT.

MR. WALL: WE ARE STILL MAKING AN ARGUMENT WITH REGARD --

THE COURT: I AM NOT TALKING ABOUT THAT PIECE OF PAPER ANY MORE BECAUSE I HAVE MADE UP MY MIND ON THAT PIECE OF PAPER. I AM MORE CONCERNED WITH THE BALANCE OF THOSE ITEMS SOUGHT UNDER ITEM NUMBER 3.

HAVE YOU WITHDRAWN YOUR REQUEST FOR THE DOCUMENTS

REQUESTED UNDER ITEM NUMBER 2?

MR. WALL: YES, BECAUSE I -- I CANNOT AT THIS MOMENT LAY THE FOUNDATION FOR MY DOCUMENT WHICH I THINK WOULD PERSUADE YOU THAT THE SUBSTANTIVE ARGUMENT IS INCORRECT.

MR. KAPLAN: SO, AM I CORRECT IN ASSUMING THAT ITEM NUMBER 2 IS NO LONGER SUBJECT TO THE S.D.T.?

THE COURT: WELL, THAT'S WHAT I UNDERSTOOD COUNSEL TO BE SAYING.

MR. WALL: I AM WITHDRAWING IT ON THE SOLE GROUND THAT AN APPROPRIATE HEARSAY OBJECTION WAS MADE WITH RESPECT TO THE DOCUMENTS THAT I WOULD USE TO REBUTE THE CLAIM OF CONFIDENTIALITY.

MR. KAPLAN: FINE. THANK YOU, COUNSEL.

MR. WALL: AND I --

THE COURT: WELL, WHEN YOU SAY: I AM WITHDRAWING IT, YOU ARE WITHDRAWING NOW YOUR REQUEST UNDER THE SUBPOENA FOR THE DOCUMENTS ENUMERATED UNDER ITEM 2 OF THAT SUBPOENA?

MR. WALL: THAT'S CORRECT. BECAUSE WITHOUT THIS DOCUMENT AND OTHERS SIMILARLY NOW LACKING IN FOUNDATION, I CAN'T LEGALLY PERSUADE YOU THAT THEY ARE WRONG AND I AM CORRECT.

MR. FANNAN: THIS IS BASED UPON THEIR ASSERTION THAT THEY QUALIFY FOR ALL THE FOUR TENETS LISTED HERE FOR THE ASSERTION.

THE COURT: IF YOU ARE WITHDRAWING IT --

MR. WALL: I AM WITHDRAWING IT.

THE COURT: -- I DON'T CARE WHY YOU ARE WITHDRAWING IT. THEN, YOU ARE WITHDRAWING IT.

MR. KAPLAN: THANK YOU VERY MUCH.

MR. FANNAN: I WOULD JUST LIKE TO GET IT CLEAR FOR THE RECORD THAT THEY HAVE CLAIMED THE CLERGY PENITENT PRIVILEGE.

AND THEY HAVE ASSERTED FOR THE RECORD THAT ONLY QUALIFY FOR ALL OF THE -- THE STATEMENTS CONTAINED HERE UNDER THE RULE.

THE COURT: THAT'S RIGHT.

MR. FANNAN: IS THAT CORRECT?

THE COURT: YES.

MR. KAPLAN: YOU STATED THAT THE PRIVILEGE APPLIES, AND THAT I AM ASSERTING THE PRIVILEGE ON BEHALF OF THE CLERGY AS IT APPLIES TO THE CLERGY.

MR. FANNON: CAN I --

MR. KAPLAN: I AM NOT GOING TO GET INTO AN ARGUMENT ON THE PRONGS OF THE PRIVILEGE.

MR. FANNAN: WELL, IF --

MR. KAPLAN: IF YOU WANT TO PROVE THAT IT DOESN'T APPLY, IF IT BECOMES RELEVANT AT SOME FUTURE DATE, I SUPPOSE YOU COULD TAKE IT UP AT THAT TIME.

THE COURT: WELL, COUNSEL, I WOULD JUST AS SOON AVOID THE --

MR. KAPLAN: I AGREE, YOUR HONOR.

THE COURT: -- DISCUSSION AMONG COUNSEL, BECAUSE I HAVE A FEELING THIS RELATIONSHIP MAY BE ONE OF LONG STANDING.

MR. FANNAN: YES.

THE COURT: THAT'S THE SORT OF THING THAT I WOULD RATHER HAVE DONE OUT IN THE HALL SOMEWHERE.

THE ONLY THING I WANT THE RECORD TO SHOW WITH REGARD TO THAT ITEM OF THE PRIVILEGE IS THAT I AM NOT RULING THAT THE PRIVILEGE DOES OR DOES NOT APPLY. I REALLY DON'T KNOW. THE DECLARATION IS WHAT IT IS. AND I AM SIMPLY SUGGESTING THAT IN ORDER FOR ME TO SUPPORT THE PRIVILEGE, THE LAUNDRY LIST OF THINGS I MENTIONED EARLIER I WOULD HAVE TO RESOLVE. THAT'S

THE NATURE OF THE CHURCH, THE NATURE OF THE PENITENT STATUS, THE CLERGY STATUS, THE NATURE OF THE AUDITING PROCESS, THE NATURE OF THE CONFIDENTIALITY, THE NUMBER OF PEOPLE THERE. I THINK SOME EVIDENCE WOULD HAVE TO BE PRODUCED TO ESTABLISH WHETHER THIS CHURCH AND THIS AUDITING RELATIONSHIP COMES WITHIN THE PRIVILEGE AT ALL, NUMBER 1. AND NUMBER 2, IF IT DOES, WHETHER THE -- THERE IS EVIDENCE SUFFICIENT FOR THE COURT TO JUSTIFY EVEN FURTHER CONSIDERATION AS TO WHETHER THE PRIVILEGE SHOULD FALL. AND I JUST DON'T KNOW THAT AT THIS POINT.

MR. WALL: I WOULD ADD ONLY ONE OTHER THING, YOUR HONOR, THAT I WAS ALSO PREPARED TO SUBMIT TO YOU A DOCUMENT WHICH WOULD HAVE A BEARING UPON WHETHER OR NOT THE CHURCH OF SCIENTOLOGY IS, IN FACT, A RELIGION. BUT, THAT DOCUMENT IS ALSO TAKEN FROM F.B.I. FILES, WHICH ULTIMATELY CAME FROM SCIENTOLOGY FILES. AND I HAVE THE SAME PROBLEM, THAT I DON'T HAVE THE F.B.I. AGENT HERE TO SAY THAT HE FOUND THEM IN THE LOS ANGELES OR WASHINGTON, D.C. OFFICE OF SCIENTOLOGY.

THE COURT: WELL, THAT'S --

MR. WALL: THEREFORE --

MR. KAPLAN: WELL, THAT --

MR. WALL: -- I AM AT A LESS. AND CONSEQUENTLY I WILL NOT OFFER THAT DOCUMENT AT THIS TIME.

THE COURT: LET'S GET ON TO ITEM 3, GENTLEMEN.

MR. WALL: COULD WE DEAL WITH ITEM 1? ITEM 3 IS WE SIMPLY INTEND TO ASK HER A BOUT THE E-METER, AND WE THOUGHT IT APPROPRIATE WHEN WE ASK HER ABOUT THE E-METER TO HAVE ONE PRESENT.

ITEM 1, YOUR HONOR, IS --

THE COURT: WELL, MAYBE YOU COULD TELL ME WHAT AN E-METER IS SO THAT I KNOW WHAT WE ARE TALKING ABOUT.

MR. FANNAN: A GAVENOMETER.

THE COURT: A GAVENOMETER. LIKE A LIE-BOX TYPE OF THING?

MR. FANNAN: IT IS NOT QUITE A POLYGRAPH TESTING DEVICE, AS FAR AS I UNDERSTAND IT, FROM READING ABOUT IT IN NUMEROUS ARTICLES. IT MEASURES SOME SORT OF ELECTRICAL DISCHARGE IN A PERSON, NOT PULSE RATES LIKE IN POLYGRAPH MACHINE. AND THAT THE CHURCH OF SCIENTOLOGY CLAIMS THAT THIS MEASURES SOMETHING CALLED N-GRAMS, WHICH ARE BLOCKS IN A PERSON'S LIFE, AND THAT BY LOOKING AT THE E-METER WHILE ASKING THE SUBJECT QUESTIONS, THEY CAN FIND OUT WHAT TYPES OF BLOCKS THEY HAVE IN THEIR LIFE, WHAT THEY SHOULD DO ABOUT IT. AND THE IDEA BEHIND IT IS TO ASK QUESTIONS THAT PRODUCE A PERFECTLY LEVEL READING SO THAT THERE ARE NO JUMPS AND CHANGES IN THE READING ON THE E-METER.

THE WAY I UNDERSTAND IT, THE E-METER IS A VERY IMPORTANT PART OF THE AUDITING PROCESS, AND A NECESSARY TOOL IN REACHING THE HIGHER LEVELS OF SCIENTOLOGY.

MR. KAPLAN: IT IS A NECESSARY TOOL, IF YOU WANT TO CALL IT A TOOL -- MEANING NO DISCREDIT OR DISGRACE TO MY CLIENT. IT IS NOT A TOOL. IT IS BASIC ELEMENT THAT --

THE COURT: I CAN'T HEAR YOU, COUNSEL.

MR. KAPLAN: IT IS AN INTEGRAL ELEMENT OF THE TEACHING OF THEIR RELIGIOUS TENETS AND DOGMA. IT IS A VERY -- INSTRUMENTAL IN THAT, AND IT IS INVOLVED IN ALL STAGES, NOT JUST AS YOU REACH A HIGH LEVEL, AS MR. FANNAN HAS INDICATED.

THE COURT: IT SOUNDS SOMETHING LIKE BIO-FEED BACK.

MR. FANNAN: IT IS NOT QUITE THAT COMPLEX, YOUR HONOR.

THE COURT: WELL, IN PRINCIPLE, IT SOUNDS LIKE -- WHAT YOU HAVE DESCRIBED SOUNDS VERY MUCH LIKE WHAT I UNDERSTAND THE POLYGRAPH TO BE. POLYGRAPHS DON'T MEASURE SIMPLY PULSE RATES. THEY MEASURE --

MR. FANNAN: WELL, DEPENDING UPON WHICH TYPE YOU USE.

MR. KAPLAN: WELL, QUITE FRANKLY, I WILL -- IF THE COURT SHOULD SO RULE, AT SOME FUTURE DATE BE PREPARED TO GIVE YOU A FULL DISSERTATION, ORAL OR WRITTEN OR WHATEVER, ON THE E-METER. AT THE PRESENT TIME, HOWEVER, WHAT IT IS OR IS NOT IS IRRELEVANT TO MY OBJECTION AS TO THE S.D.T.

THE COURT: WELL, THE S.D.T. SIMPLY REQUESTS THAT SOMEBODY BRING IN AN E-METER. IT DOESN'T REQUEST ANY MORE. IT DOESN'T REQUEST ANY STATEMENTS, AT LEAST IN THIS ITEM, THAT ARE CONCERNED WITH THE USE OF THE E-METER. JUST THAT ONE BE PRESENTED TO BE USED IN EVIDENCE. AND APPARENTLY IT IS SOMETHING THAT THE CHURCH OF SCIENTOLOGY HAS AND OTHER PEOPLE DON'T HAVE, I GATHER.

WHAT OBJECTION IS THERE TO COMPLYING WITH THE S.D.T. IN -- IN REGARD TO THE BRINGING TO COURT OF PHYSICAL ITEM?

MR. KAPLAN: OKAY. FOR ONE THING, E-METERS ARE ONLY -- ARE AN INTEGRAL PART OF THEEXERCISE OF THE RELIGION OF SCIENTOLOGY. A VERY INTEGRAL PART. SECOND OF ALL, ALL LICENSED ORDAINED MINISTERS AND ADMINISTRATORS ARE AUTHORIZED BY THE RELIGION OF SCIENTOLOGY TO BASICALLY USE THE E-METER.

THE COURT: OKAY.

MR. KAPLAN: OKAY. AND THEY ARE THE ONLY ONES -- AND IT IS A VIOLATION OF THEIR FREE EXERCISE OR RELIGION AND THEIR OWN PRINCIPLES TO GIVE IT TO ANYBODY WHO IS NOT QUALIFIED TO USE IT,

SUCH AS DEFENSE COUNSEL REQUESTS AT THIS TIME.

I THINK THERE IS A SUBSTANTIAL RELEVANCE PROBLEM HERE. BUT, THE MOST IMPORTANT OBJECTION IS THAT ACCORDING TO THE DECLARATION IN SUPPORT OF THE S.D.T., THE PURPOSE OF REQUESTING AN E-METER, NOTWITHSTANDING THE SECTION OF THE DECLARATION THAT STATES THAT DEFENSE COUNSEL BELIEVE THEY ARE, YOU KNOW, QUALIFIED TO USE IT AND DEMONSTRATE HOW IT IS HARMFUL -- THE WHOLEQUESTION OF THE HARMFUL EFFECT OF THE E-METER HAS BEEN LITIGATED ALREADY IN A D.C. CASE WHICH I CAN BRING THE COURT IF I AM ALLOWED TO GO TO THE LAW LIBRARY AFTER THIS. THE F.D.A. HAD FOUND THAT -- THAT IT WAS NOT DANGEROUS TO ONE'S HEALTH PER SE, AND CONSEQUENTLY I BELIEVE THAT IT IS BEING SUBPOENAED FOR A PURPOSE WHICH IS IMPROPER.

SECOND OF ALL, TO THE EXTENT THAT SCIENTOLOGY IS FORCED TO TURN THIS THING OVER FOR AN IMPROPER USE, THEN I THINK IT ALSO VIOLATE THEIR FREE EXERCISE --

THE COURT: WELL, WHAT -- WHAT IMPROPER USE WOULD YOU ASSERT IT IS GOING TO BE PUT TO BY HAVING IT PRESENT IN COURT?

MR. KAPLAN: WE HAVE TWO GENTLEMEN HERE THAT ARE NOT QUALIFIED OR, TO THE EXTENT I KNOW, ABLE TO ADMINISTRATE IT TO ANYBODY.

THE COURT: WELL, I -- NOBODY HAS REQUESTED THAT IT BE ADMINISTERED.

MR. KAPLAN: OR TO EXPLAIN HOW IT WORKS.

THE COURT: NOR HAS ANY -- ANY TESTIMONY FROM EITHER OF THESE GENTLEMEN BEEN OFFERED. I THINK MAYBE THAT IS SUBJECT TO A FOUNDATIONAL OR RELEVANCY OBJECTION. BUT, I AM TALKING ABOUT A SUBPOENA THAT REQUESTS THE PRODUCTION OF A PHYSICAL

ITEM. IT DOESN'T REQUEST THAT IT BE USED; IT DOESN'T REQUEST THAT IT DOESN'T. THAT'S MATTER WE HAVE TO TAKE --

MR. KAPLAN: IT STATES IN THE DECLARATION WHAT THE USE OF IT IS GOING TO BE.

MR. FANNAN: I DON'T THINK THAT I STATED --

THE COURT: I AM ATTEMPTING TO -- JUST A MOMENT.

MR. FANNAN: -- THE USE OF AN E-METER IS DANGEROUS TO THE HEALTH --

THE COURT: THEY COULD DO THAT THROUGH EXAMINATION OF MISS DAIN, IF THEY WANTED TO.

MR. KAPLAN: THEN, WHY DO THEY NEED THE E-METER?

THE COURT: I DON'T KNOW. THE ONLY WAY WE CAN FIND OUT IS TO SEE WHAT THEY PLAN TO DO WITH IT, AND TO SUSTAIN OBJECTIONS IF THEY PLAN TO DO SOMETHING WRONG WITH IT, I SUPPOSE.

BUT, I AM SIMPLY AT A LOSS TO SEE, IF IT IS THE TYPE OF DEVICE THAT I THINK IT IS --

MR. KAPLAN: WELL, --

THE COURT: I MEAN, IT MAY BE THAT -- THAT THEY WANT TO ESTABLISH THAT IT IS -- THAT IT HAS ALL THE CHARGE OF A CATTLE PROD THAT WOULD FORCE SOMEBODY TO SAY ALL SORTS OF EVIL THINGS, OR THAT THEY ARE GOING TO ASSERT THAT IT IS A TOOL TO BRAIN WASH OR SOMEHOW EXERT AN EVIL FORCE OVER PEOPLE. I DON'T KNOW IF IT DOES OR DOESN'T, COUNSEL.

MR. KAPLAN: YES.

THE COURT: BUT, YOU KNOW --

MR. KAPLAN: THE FINAL PRONG, WHICH IS SOMETHING I HAVE REFERRED TO EARLIER, YOUR HONOR, IS THAT IT VIOLATES THE PRINCIPLES OF THE ESTABLISHMENT AND FREE EXERCISE OF SCIENTOLOGY

TO GIVE IT TO ONE NOT A SCIENTOLOGIST FOR THIS PURPOSE, AND ONE THAT IS NOT QUALIFIED TO ADMINISTRATE ITS USE.

THE COURT: WELL, HOW ARE YOU GOING TO ESTABLISH THAT, COUNSEL?

MR. KAPLAN: WELL, PERHAPS IF WE CAN GIVE YOU WRITTEN BRIEFS ON HOW IT IS AN INTEGRAL PART THAT THE E-METER PLAYS, AND HOW IT IS USED IN SCIENTOLOGY, I WOULD BE MORE THAN HAPPY TO BRING THAT TO THE COURT.

THE COURT: WELL --

MR. FANNAN: YOUR HONOR, EVEN IF IT WAS AN INTEGRAL PART OF THE RELIGION, THAT STILL COULD NOT MEAN THAT YOU COULD NOT SUBPOENA IT INTO COURT FOR A PROPER PURPOSE. THAT'S LIKE SAYING--

MR. KAPLAN: WHAT IF THEY HAD A TENET THAT IT IS NOT TO BE DELIVERED TO ANYBODY WHO WAS NOT A SCIENTOLOGIST UNLESS FORCED TO DO IT?

MR. FANNAN: WELL --

MR. WALL: THAT'S TOO BAD FOR THE SCIENTOLOGIST. THEN IT DOESN'T COMPORT WITH THE STANDARD OF DUE PROCESS AND FAIR PLAY, AND WHEN A GROUP SUCH AS SCIENTOLOGY CAN DECIDE -- THEN THERE WOULDN'T HAVE BEEN ANY SEARCH WARRANT, AND THERE WOULD HAVE BEEN ANY CONVICTIONS.

MR. KAPLAN: CAN YOU MAKE AN OFFER OF PROOF AS TO HOW YOU INTEND TO USE IT?

MR. WALL: I AM NOT --

MR. KAPLAN: I AM NOT TALKING TO YOU, SIR. I AM TALKING TO MR. FANNAN, WHO SEEMS TO KNOW MORE ABOUT THE E-METER. --

THE COURT: WELL --

MR. FANNAN: AS TO HOW? FIRST OF ALL, I WANT TO EXAMINE IT,

AND I WANT TO ASK PAULA DAIN QUESTIONS ABOUT IT. I DON'T PLAN ON HOOKING PAULA DAIN UP TO IT AND CONDUCTING TESTS WITH IT AND LOOKING AT THE CHARGES. I DON'T EVEN KNOW HOW TO DO THAT. I PLAN TO ASK PAULA DAIN QUESTIONS ABOUT IT, DETERMINE WHAT HER KNOWLEDGE IS. AND OBVIOUSLY FOR THAT PURPOSE, IT WOULD BE VERY HELPFUL TO HAVE THIS METER THERE SO THAT THE COURT, COUNSEL, AND EVERYBODY CAN EXAMINE IT. WE DON'T PLAN ON DOING SOME TESTS TO SEE WHAT EFFECT IT HAS ON HER. I CAN'T DO THAT. NOBODY IN COURT COULD DO THAT.

BUT, CERTAINLY THE FACT IT IS AN INTEGRAL PART OF SCIENTOLOGY, EVEN IF TRUE, MUST FALL TO THE DUE PROCESS --

MR. KAPLAN: THEN IF YOU ARE NOT --

MR. FANNAN: -- CLAUSE OF THE UNITED STATES CONSITUTION.

MR. KAPLAN: -- GOING TO USE IT --

THE COURT: COUNSEL, JUST A MOMENT.

MR. KAPLAN: -- I DON'T UNDERSTAND WHY YOU NEED IT.

THE COURT: MR. KAPLAN, I --

MR. KAPLAN: I BEG YOUR PARDON.

THE COURT: -- I DON'T THINK IT IS APPROPRIATE FOR COUNSEL TO GET INTO PERSONAL COLLOQUIES THAT ARE UPSETTING. IF YOU WANT TO ADDRESS AN ARGUMENT, I SUGGEST YOU ADDRESS IT TO ME. I UNDERSTAND THAT YOU AND MR. FANNAN LIKE TO GO AT IT WITH ONE ANOTHER, BUT I THINK WE COULD BE MORE ORDERLY IF --

MR. KAPLAN: MAY I MAKE AN ARGUMENT TO THECOURT?

THE COURT: YOU MAY.

MR. KAPLAN: AS MR. FANNAN HIMSELF HAS JUST TESTIFIED, HE DOESN'T INTEND TO ADMINISTER THE E-METER TO PAULA, AND HE DOES NOT INTEND TO -- OBVIOUSLY, HE CAN'T CROSS EXAMINE HER AS TO THE

USE OF IT, BECAUSE YOU STATED SHE HERSELF DOESN'T -- SHE DOESN'T KNOW HOW IT WORKS --

MR. FANNAN: LET ME CORRECT SOMETHING THERE.

THE COURT: OH, JUST A SECOND. LET HIM FINISH.

MR. KAPLAN: YOU ALSO STATED THAT YOU HAVE READ QUITE A BIT ABOUT IT. FOR THE OFFER OF PROOF THAT YOU HAVE MADE, IT SEEMS TO ME THAT YOU ARE QUITE CAPABLE OF ESTABLISHING THAT WITHOUT THE PHYSICAL E-METER ITSELF. THERE IS NOTHING THAT YOU HAVE SAID THAT YOU NEED AN E-METER FOR. THERE IS DOCUMENTATION ON IT.

THE COURT: WELL, COUNSEL, JUST -- BECAUSE I KNOW YOU REALLY MEAN TO ADDRESS ALL OF THOSE COMMENTS TO ME, AND NOT TO MR. FANNAN --

MR. KAPLAN: I BEG YOUR PARDON, YOUR HONOR. YOU ARE CORRECT.

THE COURT: LET ME JUST SAY THAT I CAN FORESEE AN EXAMINATION OF THIS WITNESS AS TO THE WAY THE E-METER WAS USED IN HER CONNECTION IS RELEVANT IN THIS PRELIMINARY EXAMINATION -- WHICH ISN'T A QUESTION, I THINK, THAT WE HAVE RESOLVED. ASSUMING THAT IS THE CASE, I CAN FORESEE HOW ON CROSS EXAMINATION OF THIS WITNESS THE PRESENCE, THE PHYSICAL PRESENCE OF THE E-METER COULD BE HELPFUL IN CONDUCTING THAT CROSS EXAMINATION, IN HAVING MISS DAIN, FOR EXAMPLE, DEMONSTRATE WHAT, IF ANYTHING, WAS DONE WITH THE E-METER DURING VARIOUS COMMUNICATIONS.

BUT, THAT'S ALL ASSUMING THAT THERE IS SOME RELEVANCY TO THAT TESTIMONY IN THE FIRST PLACE. AND I THINK THAT COMES TO A DISCUSSION WE OUGHT TO HAVE WITH REGARD TO THE DEFENSE OF NECESSITY, BECAUSE WE SEEM TO BE OBJECTING TO EVERYTHING ON THE

BASIS -- ON THIS SUBPOENA ON THE BASIS OF RELEVANCE.

I HAVE READ THE CASES THAT -- THAT MR. WALL AND MR. FANNAN HAVE PRESENTED TO THE COURT YESTERDAY, AND I HAVE EVEN READ THE L.A. TIMES BRIEF VERSION OF THE U. S. SUPREME COURT'S LATEST RULING ON A CASE INVOLVING THE EXISTENCE OF SUCH A DEFENSE. I DON'T HAVE THE OPINION. APPARENTLY NEITHER DO COUNSEL. BUT, FROM WHAT -- IF THE L.A. TIMES IS ANYWHERE CLOSE TO ACCURATE -- AND THEY MAY BE -- THAT OPINION SEEMS TO RECOGNIZE, AND I WOULDN'T BE SURPRISED IF IT CITES THE LOVERKAMP CASE, WHICH WAS CITED YESTERDAY, AND WHICH I THINK ESTABLISHES THAT UNDER PROPER CIRCUMSTANCES THERE IS SUCH A THING AS DEFENSE OF NECESSITY. IT SEEMS AS THOUGH PERHAPS THE SUPREME COURT SIMPLY FOLLOWED THE EXPANDED REQUIREMENTS THAT THE LOVERKAMP CASE DICTATED FOR THE USE OF THAT DEFENSE IN A PRISON ESCAPE CASE. AND SIMPLY STATED THAT UNLESS THEY COULD MAKE AN OFFER OF PROOF IN THAT CASE THAT THE PERSON ESCAPED FROM PRISON, IMMEDIATELY WENT AND TURNED HIMSELF INTO THE AUTHORITIES, THAT THE WORDS -- THEY DIDN'T FEEL THAT THE -- THE EVIDENCE ON THE DEFENSE WOULD BE APPROPRIATE.

MR. FANNAN: THAT'S MY UNDERSTANDING OF THE CASE.

THE COURT: AT LEAST THAT'S WHAT THE NEWSPAPER SAYS, FOR WHATEVER HELP THAT IS. AND IF ANYBODY WANTS, WE WILL WAIT AND SEE WHAT WE CAN FIND OUT, OR IF THE SUPREME COURT SAYS IF IT IS ANYTHING DIFFERENT. BUT, I DON'T THINK ANYBODY WANTS TO DO THAT.

THE LOVERKAMP CASE SEEMS TO BE GOOD AUTHORITY FOR WHAT IS NOW IN THOSE TYPES OF CIRCUMSTANCES -- ESCAPES, -- THE FIVE POINT REGIMEN THAT HAS TO BE FOLLOWED IN ORDER TO ESTABLISH THE APPLICABILITY OF THE DEFENSE OF THE CIRCUMSTANCES. BUT, WHAT

IT DOES IN THE BROADER SENSE, AS IT MIGHT APPLY TO THIS CASE, IS TO SET WHAT I WOULD SUGGEST IS A RATHER SUBSTANTIAL BURDEN ON ANYONE ASSERTING THAT DEFENSE IN ANY KIND OF CASE, AND ACKNOWLEDGES, NUMBER 1, THE HISTORY OF THE LAW WITH REGARD TO THE APPLICABILITY OF THAT DEFENSE, EVEN IN -- EVEN IN ESCAPE CASES, AND POINTS OUT HISTORICALLY COURTS HAVE BEEN VERY, VERY RELUCTANT TO EVEN ADMIT EVIDENCE OF THAT TYPE OF DEFENSE. LOVERKAMP SIMPLY SAYS BECAUSE OF WHAT PRISONS ARE BASICALLY THAT -- THAT THEY WILL ALLOW IT ONLY IF YOU CAN SHOW A LOT OF VERY DIFFICULT THINGS.

AND IN THIS CASE I DON'T HAVE BEFORE ME YET ANY OFFER OF PROOF OR ANY -- ANY BROAD STATEMENT AS TO WHAT ASPECTS OF THE RELATIONSHIP OF THE PRESENT WITNESS PAULA DAIN WITH THE CHURCH OF SCIENTOLOGY WOULD ASSERTEDLY GIVE RISE TO THE CLAIM OF THIS DEFENSE. IT SEEMS TO ME THAT THE CASES THAT I HAVE READ SEEMS TO -- WOULD MAKE -- WOULD ALLOW THE DEFENSE TO INQUIRE INTO THE -- TO THE DEFENSE ALTHOUGH I AM NOT CONVINCED THAT IT WOULD ALLOW THE DEFENSE TO FORAGE AROUND FOR THE PURPOSE OF DETERMINING DE FACTO WHAT THE RELATIONSHIP OF THIS PERSON WITH THE CHURCH WAS, BUT RATHER WOULD ALLOW THE DEFENSE TO PRESENT EVIDENCE AS TO THE -- AT LEAST AS A THRESHOLD MATTER EVIDENCE AS TO WHAT THE DEFENDANT -- THE PARENTS OR THE DEFENDANTS -- EXCUSE ME -- THE WITNESS'S PARENTS OR THE DEFENDANTS IN THIS CASE, WHAT THEY BELIEVED -- I SUPPOSE THE OTHER WITNESSES -- WHAT THEY BELIEVED AND JUSTIFIABLY BELIEVED GAVE RISE TO THAT DEFENSE.

I THINK ONCE THAT HAS BEEN ESTABLISHED, THEN YOU CONFRONT THE QUESTION OF WHETHER THE DE FACTO RELATIONSHIP OF

THIS PERSON TO THE CHURCH POSED A REAL DIFFICULTY. AND I AM NOT CONVINCED AT THIS POINT YOU WOULD EVER GET TO -- TO THAT.

SO, GIVEN THAT, MY CONCERN WITH REGARD TO THE SUBPOENA AND THESE OBJECTIONS IS THAT -- STARTING, FOR EXAMPLE, WITH THE -- WELL, WE DON'T NEED TO TALK ABOUT ITEM 2. CLEARLY SOME OF THAT INFORMATION IS MADE AVAILABLE TO THESE DEFENDANTS, AND THEY HAD SOME PARTICULAR BELIEFS AS TO THE SPECIFIC INFORMATION RELAYED BY ONE WITNESS -- BY THIS WITNESS TO HER "CONFESSOR," THAT -- THAT IS SOMETHING THAT IS REALLY WELL DOWN THE ROAD AS TO RELEVANCY IN THIS CASE AS TO THAT.

AS IT ITEM NUMBER 1, THE FIRST THING I THINK THAT WOULD BE REQUIRED TO -- WELL, I AM NOT SURE --

MR. WALL: WELL, I DON'T THINK THAT WE HAVE YET SAID ANYTHING ABOUT 1, YOUR HONOR. OUR PURPOSE IN ASKING FOR IT -- OF THE W-2 FORMS AND THE RECORDS WITH RESPECT TO PAULA DAIN'S EMPLOYMENT BY SCIENTOLOGY IS TO FIND OUT WHETHER OR NOT HER TESTIMONY YESTERDAY WAS TRUTHFUL. AND IF WE ARE ABLE TO ESTABLISH THAT IT WAS A HUNDRED DOLLARS A MONTH RATHER THAN A HUNDRED DOLLARS A WEEK, THAT IS A MATTER WHICH YOU HONOR MAY WISH TO CONSIDER IN THE DETERMINING OF HER CREDIBILITY ON OTHER POINTS.

THE COURT: YES. AS TO THE E-METER --

MR. WALL: CAN I ASK JUST ONE QUESTION ABOUT THE E-METER WHICH MAY SAVE SOME TIME?

THE COURT: SURE.

MR. WALL: HAS ONE BEEN PRODUCED?

THE COURT: I DON'T KNOW.

MR. WALL: IS ONE HERE? DO YOU HAVE ---

MR. KAPLAN: I DON'T HAVE ONE, NO.

MR. WALL: WELL, THEN WE ARE WASTING TIME.

THE COURT: DOES THE PERSON WHO WAS SUBPOENAED HAVE ONE? WE ARE NOT WASTING ANY TIME BECAUSE IF THEY DON'T --

MR. WALL: IF THEY DON'T HAVE IT HERE --

THE COURT: -- HAVE IT, THEN I MAY HAVE TO ORDER THEM TO GO GET ONE AND BRING IT BACK HERE IF I UPHOLD YOUR SUBPOENA.

MR. WALL: WELL, MY -- MY ONLY POINT --

MR. KAPLAN: LET ME STATE TO THE COURT THAT IF THE COURT OVERRULES MY OBJECTIONS, I WILL MAKE ARRANGEMENTS TO HAVE ONE PRODUCED.

THE COURT: YES. I ASSUMED THAT YOU WOULD.

MR. KAPLAN: I DON'T HAVE ONE AT MY ACCESS.

THE COURT: OKAY.

MR. KAPLAN: I BELIEVE THE CUSTODIAN THERE AT THE TIME THAT I GOT THIS CASE DIDN'T HAVE ONE IN HIS ACCESS.

THE COURT: IS THERE ONE IN SAN DIEGO?

MR. KAPLAN: I WOULD ASSUME THERE IS. I DON'T KNOW. I ASSUME THERE IS. IF THERE IS A CHURCH AROUND HERE, I ASSUME THERE IS.

MR. HUFFMAN: YOUR HONOR, AGAIN I -- THE PEOPLE MAYNOT HAVE STANDING. TO CHALLENGE THE SUBPOENA, AND I AM NOT CHALLENGING THE SUBPOENA, BUT, WE ARE NOW TALKING ABOUT ALL OF THIS DISCUSSION THAT HAS TO DO WITH GETTING SOMETHING FOR A PARTICULAR USE IN COURT, TO WHICH I DO HAVE STANDING.

THE COURT: TRUE.

MR. WALL: I WITHDRAW NUMBER 3. AND I DO IT FOR A VERY SIMPLE REASON. NOT THAT I DON'T THINK I'M ENTITLED TO IT, BUT

IT SEEMS TO ME THAT AT THIS STAGE OF THE PROCEEDINGS, TO WASTE THE KIND OF TIME THAT WILL BE WASTED BY FURTHER ARGUMENT AND MY GETTING A MACHINE WHICH IS NOT HERE, THAT WASTE OF TIME OR THAT EXPENDITURE OF TIME COMPARED WITH THE RATHER LIMITED USE THAT WE WANTED TO MAKE OF IT -- IT WAS NO BIG DEAL. WE WERE NOT GOING TO PUT HER ON THE METER. I THINK IT WOULD WASTE YOUR HONOR'S TIME. AND IF NEED BE, SOME OTHER DAY.

THE COURT: WELL, I TELL YOU, I HOPE TO BE HERE FOR AT LEAST TWO MORE YEARS, UNTIL I HAVE TO STAND FOR ELECTION. SO, I HAVE LOTS OF TIME. AND I AM HERE ALL DAY EVERY DAY. SO, I AM NOT PUTTING ANY TIME CONSTRAINT ON ANYBODY.

MR. WALL: I UNDERSTAND. I AM PUTTING IT ON MYSELF.

THE COURT: IF YOU WANT TO WITHDR, IT --

MR. WALL: I WITHDRAW IT.

THE COURT: -- IT IS JUST ONE MORE THING I DON'T HAVE TO WORRY ABOUT.

MR. WALL: I DO, HOWEVER, PRESS FOR THE RECORDS AS TO WHETHER OR NOT THE YOUNG LADY WAS TELLING THE TRUTH WITH RESPECT TO HER SALARY AND RECOMPENSE.

MR. KAPLAN: CAN I INQUIRE OF THE COURT, I AM AT SOMEWHAT OF A LOSS HERE, AS YOU KNOW, AND I AM GOING TO HAVE TO REFER TO THE FACT THAT I -- I DID NOT HEAR THE TESTIMONY. I BELIEVE YOUR HONOR DID TESTIFY -- OR EXCUSE ME -- DID STATE IN CHAMBERS EARLIER TODAY THAT SHE TESTIFIED BOTH WAYS; THATSHE SAID SOMETIME SHE MADE A HUNDRED DOLLARS A WEEK AND SOMETIMES A HUNDRED DOLLARS A MONTH.

AS TO THAT FACT, THE MOST THE RECORD COULD DO WAS SHOW WHETHER SHE WAS --

THE COURT: WELL, IT COULD -- THE RECORDS COULD ALSO SHOW THAT SHE WAS PAID A THOUSAND DOLLARS A WEEK OR FIFTEEN HUNDRED DOLLARS EVERY MONTH, IN WHICH CASE THAT WOULD BE AT A SUBSTANTIAL VARIANCE WITH HER TESTIMONY.

COUNSEL INDICATES BY HIS QUESTIONS -- WHICH, OF COURSE, AREN'T EVIDENCE -- THAT SHE MAY HAVE REPRESENTED TO HER PARENTS THAT SHE MADE A HUNDRED DOLLARS A MONTH. NOW, IF THERE ARE RECORDS THAT WILL SUPPORT THE PREMISE THAT SHE MADE A HUNDRED DOLLARS A MONTH, OR EVEN LESS -- FIFTY DOLLARS A MONTH, THEN IT WOULD APPEAR TO THATEXTENT THAT SHE IS IMPEACHED.

AND IT DOESN'T APPEAR TO ME FROM THE CALL OF THE SUBPOENA -- IF WE ARE JUST TALKING ABOUT PAYROLL RECORDS FOR A PERIOD OF APPROXIMATELY FOURTEEN MONTHS, THAT WOULD MEAN FOURTEEN W-2 FORMS -- ACTUALLY -- YES, W-2'S; ONE W-2 FORM FOR ONE YEAR.

MR. WALL: YES. ONE W-2 FORM.

THE COURT: YES. AND THE LOG SHEETS REFLECTING HOURS WORKED, IF THEY EXIST -- THAT THAT ISN'T AN UNDUE BURDEN -- IT IS NOT PARTICULARLY OVER BROAD, AND IT WOULD NOT IMPOSE AN UNDUE BURDEN ON THE CHURCH OF SCIENTOLOGY.

(DISCUSSION BETWEEN MR. KAPLAN AND MR. HUFFMAN).

MR. HUFFMAN: WELL, YOU KNOW, I -- COUNSEL ADDRESSED A REMARK TO ME. I CAN'T -- I DON'T HAVE ANY STANDING TO OBJECT TO THAT. I WILL JUST --

THE COURT: AS A FRIEND OF THE COURT?

MR. HUFFMAN: YES. AS A FRIEND OF THE COURT.

WE HAVE STRAYED WAY BEYOND -- WE START OFF WITH A VERY TANGENTIALISSUE IN THE FIRST PLACE. THE WOMAN HAS TESTIFIED

THAT SHE MADE MORE, SHE MADE LESS; IT VARIED. AND SHE TOLD HER FATHER SOMETHING TO THAT EFFECT. THE STATE OF MIND OF THE DEFENDANT IS AT ISSUE. NOW, WE ARE DEALING WITH THE CREDIBILITY OF SOMETHING SHE SAID TO SOMEBODY. AND I THINK, IF NOTHING ELSE, THE COURT OUT TO GENEROUSLY APPLY EVIDENCE CODE SECTION 352 TO THIS TANGENTIAL AREA.

THE COURT: I DON'T BELIEVE, MR. HUFFMAN, THAT THE PRODUCTION OF THESE DOCUMENTS IS PARTICULARLY ONEROUS FOR ANYBODY. IT IS GOING TO RESOLVE A SIMPLE QUESTION IN THE QUICKEST AND SIMPLEST WAY. WE HAVE SPENT FAR MORE TIME ARGUING ABOUT IT THAN WE WOULD BE LOOKING AT IN RESOLVING IT. I DON'T SEE ANY PRIVILEGE. I DON'T SEE ANY BASIS ON WHICH THE SUBPOENA FOR THOSE DOCUMENTS SHOULD BE QUASHED. I DO THINK, ALTHOUGH THEY ARE NOT OF EARTH-SHAKING RELEVANCE, THAT THEY HAVE SOME RELEVANCE, AND THE DEFENSE IS ENTITLED TO HAVE THE SUBPOENA POWER AVAILABLE TO THEM TO PRESENT EVIDENCE THAT THEY THINK IS APPROPRIATE TO IMPEACH THE WITNESS, AND TO THE EXTENT THAT IT MIGHT SOMEHOW PRODUCE EVIDENCE -- AND I ASSUME COUNSEL IS GOING TO BE IN A POSITION TO PRESENT EVIDENCE OF PRIOR INCONSISTENT STATEMENTS IN THAT RESPECT TO IT. TO THE EXTENT THAT THESE RECORDS WILL RESOLVE THAT, I JUST DON'T SEE WHERE IT IS GOING TO DO ANYBODY ANY DAMAGE. AND CERTAINLY THE DEFENSE SHOULD HAVE A RIGHT TO IT.

SO, I WILL ORDER THE PRODUCTION OF THOSE; OF THE RECORDS REQUESTED IN THE SUBPOENA IN THIS RESPECT. THAT IS RECORDS OF SALARY PAID TO HER FOR WORK PERFORMED BY THE CHURCH OF SCIENTOLOGY FOR THE PERIOD OF AUGUST, 1978, TO SEPTEMBER 8, 1979. I AM NOT SURE THAT WHAT SHE NOW IS MAKING

EVER CAME IN ISSUE IN THIS CASE. AND OF COURSE, THAT POST DATES THE DATE OF THE OFFENSE. AND THATWOULD INCLUDE W-2 FORMS, PAY ROLL SHEETS, AND LOGS OF HOURS WORKED.

I AM CAUTIOUS ABOUT ANY CLAIM ON A SUBPOENA -- BECAUSE I HAVE BEEN BIT ON THIS -- THAT SAY ALL DOCUMENTS RELATING TO MONIES PAID. SHE MAY HAVE LIBRARY FINES REFUNDED. I DON'T KNOW.

MR. FANNAN: WE ARE WILLING TO HAVE THE COURT RESTRICT IT IN A WAY THAT IS -- THATWOULD ACCOMMODATE THE INTERESTS OF EVERYBODY.

MR. KAPLAN: OKAY. COULD I ASK THE COURT TO RESTRICT IT AGAIN SO THAT I KNOW EXACTLY WHAT IT IS THAT I HAVE TO PRODUCE?

I OBJECTED EARLIER TO ONE ON THE GROUNDS OF ALL DOCUMENTS CONCERNING THE AMOUNT OF MONEY PAID.

THE COURT: WELL, FRANKLY, COUNSEL, I THINK I JUST STATED IT. THERE IS AN ASSERTION BY MISS DAIN THAT SHE WORKED FOR THE CHURCH OF SCIENTOLOGY FOR VARIOUS PERIODS OF TIME BEGINNING IN AUGUST, 1978, AND CERTAINLY THROUGH SEPTEMBER -- OR THROUGH AUGUST OF 1979. THAT ONE YEAR PERIOD. I THINK ANY RECORDS OF HER EMPLOYMENT OR WORK THAT SHE DID FOR THE CHURCH OF SCIENTOLOGY FOR WHICH SHE WAS EITHER PAID OR MIGHT HAVE RECEIVED SOME REMUNERATION IN THE NORMAL CASE -- IT MAY BE THATSHE WORKED TWO WEEKS, AND GOT PAID FOR THAT, AND IT MAY BE THAT SHE WORKED A THIRD WEEK AND NEVER GOT PAID FOR IT. I AM INCLUDING THAT IN THE POT, BECAUSE THAT SEEMS TO ME THAT IS CONSISTENT WITH HER TESTIMONY, AND IT MIGHT BALANCE IT OUT. I THINK THAT'S THE INTENTION OF THE CALL --

MR. KAPLAN: WELL, MY MAIN INQUIRY IS THA. YOU DID AT ANY POINT FIX A CUT-OFF DATE OF THE RECORDS OF THE DATE OF THE OFFENSE?

THE COURT: YES. I JUST SAID THAT; THROUGH AUGUST OF 1979.

MR. KAPLAN: OKAY.

THE COURT: THEY HAVE REQUESTED UNTIL TODAY, BUT I DON'T THINK THE -- I DON'T KNOW WHAT THE RELEVANCY WOULD BE OF THE DOCUMENTS --

MR. WALL: I WILL TELL YOU WHAT IT WOULD BE, YOUR HONOR. LET US ASSUME THAT SHE WAS MAKING PRIOR TO HER POTENTIALITY AS A WITNESS AGAINST MR. PATRICK THE SUM OF A HUNDRED DOLLARS A WEEK, OR A MONTH.

THE COURT: AND NOW SHE IS MAKING A THOUSAND DOLLARS?

MR. WALL: YES, AND NOW SHE IS MAKING TWO THOUSAND DOLLARS A WEEK, YOU KNOW. I THINK THAT THAT MIGHT BE RELEVANT.

SO, I WOULD -- I WOULD ASK THAT IT BE TO DATE.

THE COURT: ALL RIGHT. YES, I CAN SEE WHERE THAT WOULD HAVE SOME RELEVANCE ON THE ISSUE OF -- OF WHETHER THIS WITNESS HAS AN INTEREST IN THIS LAW SUIT BEYOND THE INTEREST -- YOU KNOW, CLEARLY, COUNSEL, IT IS -- TO ME THE -- ON THE IMPEACHMENT ISSUE, THE RELEVANCE OF THIS MATERIAL IS SIMPLY: IS THIS WITNESS HERE TESTIFYING AS PAULA DAIN INDEPENDENTLY, OR, AS I AM SURE THE DEFENSE WOULD LIKE THE COURT TO BELIEVE --

MR. KAPLAN: UNDER COERCION.

THE COURT: YES. IS SHE HERE UNDER DURESS, BEING PAID, CARED FOR, NURTURED BY THE CHURCH OF SCIENTOLOGY IN ORDER TO -- TO GET HER TO ASSIST THE CHURCH IN RIDDING THEM OF THEIR ARCH ENEMY TED PATRICK. AND I THINK THEY ARE ENTITLED TO

EXPLORE THAT.

MR. KAPLAN: I UNDERSTAND THAT.

THE COURT: AND SO, I WILL -- AS MODIFIED, I WILL ORDER THE PRODUCTION OF THOSE DOCUMENTS.

NOW, THE QUESTION IS WHEN CAN THAT BE DONE?

MR. KAPLAN: WELL, I WILL GET ON THE PHONE IMMEDIATELY. LAST NIGHT WHEN I GOT ON THIS, OF COURSE, I DIDN'T HAVE ACCESS TO ANY OF THIS, AND I LEFT MY HOUSE THIS MORNING AT 6:30. I WILL GET ON THE PHONE RIGHT NOW AND FIND OUT, NUMBER 1, WHERE THE RECORDS MAY BE LOCATED, AND NUMBER 2, HOW LONG IT WILL TAKE TO COMPILE THEM.

THE COURT: YES. IF YOU COULD DO THAT AND GET BACK TO ME AS SOON AS YOU FIND OUT WHAT YOUR PARAMETERS ARE. OF COURSE, WE ARE IN THE MIDDLE OF IT, AND WE WOULD LIKE TO GET THEM AS SOON AS POSSIBLE.

MR. KAPLAN: YES. I UNDERSTAND.

THE COURT: IT MAY BE THAT YOU WILL BE ABLE TO REACH SOME ACCOMMODATION WITHCOUNSEL NOW THAT THE NECESSITY OF THESE THINGS BE PRODUCED IS CLEAR, AND THEN AS SOON AS WE GET THEM, WE WILL DO WITH THEM WHAT WE WILL. AND WE CAN ALLOW THE DEFENSE TO DEFER CROSS EXAMINATION OF THE WITNESS AS TO THIS MATTER UNTIL SUCH TIME AS THEY HAVE THE MATERIAL.

MR. KAPLAN: CAN I ASK THE COURT AND DEFENSE COUNSEL WHETHER THEY ASSUMED THAT THE DOCUMENTS WOULD HAVE TO BE PRODUCED TODAY, IF I COULD HAVE UNTIL TOMORROW MORNING? I DON'T KNOW WHAT THE SCHEDULE OF PROOF IS.

MR. WALL: WELL, MY INTENDED SCHEDULE, YOUR HONOR, IS TO CONCLUDE TODAY. I DON'T ANTICIPATE REBUTTAL ON THE BASIS OF

WHAT I KNOW ABOUT THE CASE. I WOULD PREFER TO HAVE IT TODAY SO THAT A DECISION CAN BE MADE WHETHER OR NOT TO ASK HER THOSE COUPLE OF QUESTIONS. BUT, AS A MATTER OF FACT, IT SEEMS TO ME THAT THE DOCUMENTS WILL SPEAK FOR THEMSELVES, AND SHE NEED NOT BE QUESTIONED ABOUT THEM. AND I AM SAYING THAT I WOULD LIKE TO BE ABLE TO MAKE MY PLANE TONIGHT.

THE COURT: WELL, THE ONLY POINT IS, WE MAY HAVE A CUSTODIAN OF RECORDS WHO WILL HAVE TO COME IN TO LAY THE FOUNDATION OF THE DOCUMENTS, AND TO EXPLAIN THEM TO SOMEBODY. OF COURSE, WE HAVE GOT TWO LAWYERS HERE. AND I DON'T MEAN TO INFER THAT YOU ARE NOT ABSOLUTELY ESSENTIAL TO THE CASE, MR. WALL, BUT IF WE HAD TO CONTINUE TOMORROW MORNING, WE PROBABLY COULD DO THAT --

MR. WALL: I AM SURE YOU COULD, YOUR HONOR.

THECOURT: -- WITH MR. FANNAN CARRYING THE BURDEN OF THE DEFENSE.

MR. WALL: I THINK THAT'S ALL THAT WOULD BE LEFT FOR TOMORROW MORNING.

MR. KAPLAN: COULD I REQUEST THAT I BE GIVEN UNTIL TOMORROW MORNING FOR THE PRODUCTION OF THESE DOCUMENTS?

THE COURT: WELL, WHY DON'T YOU SEE WHAT YOU CAN DO. AND I AM NOT GOING TO FORCE YOU TO DRIVE TO LOS ANGELES AND DRIVE BACK THIS AFTERNOON WITH THESE DOCUMENTS GIVEN THE LATE HOUR AT WHICH, YOU KNOW, THIS THING WAS SERVED. IF YOU NEED UNTIL TOMORROW MORNING, SO BE IT. IT MAY BE WHEN YOU CALL UP TO THEM AND FIND OUT WHAT THE DOCUMENTS ARE, THAT BY 1:30 THIS AFTERNOON YOU WILL BE ABLE TO TALK TO COUNSEL AND ARRIVE AT SOME ACCOMMODATION. MAYBE NOT.

MR. WALL: IT IS ALSO VERY POSSIBLE --

MR. KAPLAN: LET ME STATE FOR THE RECORD --

MR. WALL: -- THAT IF WE GET THE INFORMATION, WE MAY SAY: FINE. WE DON'T NEED THE DOCUMENTS; WE WILL ACCEPT THE INFORMATION BY PHONE.

MR. KAPLAN: LET ME STATE THAT I WILL MAKE EVERY EFFORT TO GET THE DOCUMENTS HERE AS SOON AS POSSIBLE; BUT, THAT I CAN ALSO REPRESENT TO THE COURT AND TO COUNSEL THAT I BELIEVE THERE WILL BE NO PROBABLE WAY THAT I COULD NOT HAVE THEM HERE BY TOMORROW MORNING. BUT, IF I CAN GET THEM HERE EARLIER THAN THAT, I WILL DO SO.

THE COURT: GOOD. THAT'S FINE.

MR. WALL: THE ONLY OTHER THING, YOUR HONOR, IS THAT I THINK WE OUGHT TO LEAVE YOU ALONE FOR A FEW MINUTES SO THAT YOU CAN LOOK AT THOSE CONTRACTS AND DETERMINE WHETHER OR NOT THEY SHOULD BE TURNED OVER TO US.

MR. HUFFMAN: YOUR HONOR, THERE WAS ONE THING THAT I WOULD LIKE TO DO WHILE THE REPORTER IS HERE. I HAVE ISSUED A SUBPOENA DUCES TECUM FOR ALLEIS ADAMS, WHO IS A CUSTODIAN OF RECORDS FOR THE SEA BLUFFS.

THE COURT: FOR --

MR. HUFFMAN: THE SEA BLUFF APARTMENTS IN LEUCADIA. SHE IS PRESENT IN THE COURTROOM. AND I HAVE SPOKEN WITH COUNSEL. HE HAS INDICATED TO ME HE HAS NO OBJECTION TO THE WITNESS TURNING OVER THOSE DOCUMENTS TO THE CLERK, AND THAT I MAY HAVE ACCESS TO THEM UPON THEIR DELIVERY TO THE CLERK.

THECOURT: DID WE HAVE ALSO A STIPULATION AS TO FOUNDATION FOR THE DOCUMENT? I ASSUME THEY ARE JUST HERE TO SHOW WHO RENTED THE APARTMENT.

MR. WALL: I WILL STIPULATE TO EVERYTHING ON THEM INTO EVIDENCE AND --

MR. HUFFMAN: OKAY. I MAY NOT EVEN INTRODUCE THEM INTO EVIDENCE. I HAVEN'T SEEN THEM BECAUSE OF THE CARLSON-BARTON RULE IN CALIFORNIA. I DON'T KNOW WHAT'S IN THEM YET.

THE COURT RECALLS THAT CASE, I AM SURE.

THE COURT: YES. I DO HAVE A VAGUE RECOLLECTION OF THAT CASE. I TRIED IT.

OKAY. WE ARE OFF THE RECORD.

(PROCEEDINGS IN CHAMBERS CONCLUDED AT 10:46 A.M.)

to read

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2312

UNITED STATES OF AMERICA

v.

MARY SUE HUBBARD, *et al.*, APPELLANTS

No. 79-2313

UNITED STATES OF AMERICA

v.

MARY SUE HUBBARD, *et al.*

CHURCH OF SCIENTOLOGY OF CALIFORNIA, APPELLANT

No. 79-2324

CHURCH OF SCIENTOLOGY OF CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA, *et al.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

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)

Argued February 21, 1980

Decided July 24, 1980

Earl C. Dudley, Jr. with whom *Michael Nussbaum* was on the brief, for appellants Hermann and Raymond. *Leonard B. Boudin* was on the brief, for appellant Hubbard. *Philip J. Hirschkop* was on the brief, for appellants Heldt and Snider. *Roger Zuckerman* was on the brief, for appellants Weigand and Willardson. *John Kenneth Zwerling* was on the brief, for appellant Wolfe. *Leonard J. Koenick* was on the brief, for appellant Thomas.

Leonard B. Boudin, for appellant Church of Scientology of California.

Steven C. Tabackman, Assistant United States Attorney with whom *Charles F. C. Ruff*, United States Attorney, *Carl S. Rauh*, Principal Assistant United States Attorney, *John A. Terry*, *Michael W. Farrell*, *Raymond Banoun*, *Judith Hetherton* and *Timothy J. Reardon, III*, Assistant United States Attorneys were on the brief, for appellee.

George K. Rahdert and *James L. Yacavone* were on the brief for *amici curiae* Clearwater Newspapers, Inc. and Times Publishing Co.

Also, *Ronald G. Precup* entered an appearance, for appellants Hermann and Raymond. *Leonard S. Rubenstein* and *Geraldine S. Gennet* entered appearances, for appellants Heldt and Snider. *Roger Spaeder* and *Lawrence A. Katz* entered appearances, for appellants Weigand and Willardson. *Richard McMillin* 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."[1] When the unsealing decision was announced,

[1] 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

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.

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,[3]

---

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.]

[3] 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

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.[5]

I. Background

Owing to the litigiousness of the parties the full procedural background of these appeals is quite complex, but the essential facts are simply stated. Close to three years ago the government seized approximately 50,000 documents[6] from two Los Angeles sites of the Church of

---

of the order appealed in No. 79-2324 which may be read to deny on the merits immediate return of the seized documents.

[5] 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.

[6] There seems to be general agreement that the number of documents unsealed was approximately half the total seized, but exactly how many documents were seized and how many were unsealed is unclear. Brief for Appellants in No. 79-2312 at 10 (suggesting that 50,000 *pages* are still under seal); *Id.* at 11 (suggesting that 50,000 *pages* were unsealed by order here appealed); Appellants' Emergency Application for *En Banc* Rehearing in Nos. 79-2312 & 79-2313 at 1 (filed Nov. 2, 1979) (judge's order unseals "roughly 50,000 *pages*"); Church's Petition for Writ of Mandamus, *In re* Church of Scientology of Cal., No. 79-2318 (D.C. Cir. filed Nov. 9, 1979) at 3 (total *documents* seized number approximately 48,000); Church of Scientology of Cal. v. United States, 591 F.2d 533

Scientology of California. A motion made by the Church to return the documents was dismissed by a federal district court in California,[5] although various actions of the parties and the courts in California restricted public access to the documents held by or subject to the proceedings of that court.[6]

(9th Cir. 1979), *cert. denied*, 100 S.Ct. 729 (1980) ("Church asserts that more than 20,000 documents were seized") (unclear whether figure represents California searches only or combined total of California and District of Columbia searches). It suffices for our purposes to say that the number of documents seized was very large.

[5] The motion was made in the district court for the Central District of California under Rule 41(e), FED. R. CRIM. P. That rules provides that:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. . . . If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress . . . .

The California district court's memorandum decision finally dismissing the motion was entered July 5, 1978. Church of Scientology of Cal. v. United States, No. CV-77-2565-MML (C.D. Cal. Jul. 5, 1978), Hubbard App. at 37.

[6] For two months after the seizure the seized material remained in the exclusive custody of the government. On August 8, 1977 the California district court to whom the Church's Rule 41(e) motion had been assigned ordered the seized material "impounded" by the clerk of that court while an appeal was taken in the District of Columbia courts from a holding in the Church's favor concerning the lawfulness of a search executed the same day, and as part of the same investigation, on the premises of the Founding Church of Scientology in the District of Columbia. The District of Columbia district court decision, *In re* Search Warrant Dated July 4, 1977, Misc. No. 77-151 (D.D.C. Aug. 24, 1979), Church App. Doc. 12, held

that a warrant "virtually identical" (Brief for Appellee in No. 79-2312 at 1, n.1; Brief for Appellee in Nos. 79-2313 & 79-2324 at 1 n.1) to the warrant underlying the California searches was facially unconstitutional. The California district judge, reasoning that "the principle of collateral estoppel precludes further litigation on the constitutionality of the warrant here at issue," United States v. Various Documents, No. CV-77-2565-MML, slip op. at 1 (C.D. Cal. Aug. 8, 1977), Hubbard App. at 1, entered an order requiring the return to the Church of the materials seized in California, *id.* at 2, Hubbard App. at 2, but stayed this order pending appeal from the District of Columbia district court decision and ordered the materials "impounded" in the interim. *Id.*

When a panel of this court reversed the finding of facial invalidity, *In re* Search Warrant Dated July 4, 1977, 572 F.2d 321 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 925 (1978), the California district court reopened the Rule 41(e) proceedings and, rejecting several arguments made by the Church, ordered the previously impounded materials returned to the government, permitting limited governmental use of the materials but prohibiting their disclosure to the public. Church of Scientology of Cal. v. United States, No. CV-77-2565-MML (C.D. Cal. Apr. 4, 1978), Hubbard App. at 6, 30. Shortly thereafter the government voluntarily returned to the Church approximately half the documents seized in the California searches. (*See* note 17, *infra.*) [The documents selected by the government for return to the Church are sometimes hereinafter referred to as the "returned" documents.]

Apparently because the parties wished to preserve an accurate record of the documents seized, either for appeal of the Rule 41(e) determination or for use in collateral proceedings, the government and the Church entered into a stipulation (the "surrender stipulation," Hubbard App. at 35), on the eve of the documents' partial return, providing for the surrender under seal to the district court clerk in California of one copy of the documents to be returned. There is some dispute about which documents were *actually* surrendered under this arrangement, but it appears that at some point the California district court clerk obtained custody over copies of both the "returned" and the "non-returned" documents. The dispute's importance derives from a subsequent stipulation and order (the "transfer stipulation," Hubbard App. at 83) transferring to the custody of the District of

Columbia district court the documents held by the clerk of the California district court. The documents so transferred were "to remain sealed" except to "be viewed by Mr. Richey . . . in the pre-trial suppression hearings." /... The stipulation described the documents to be transferred and kept under seal as follows: "the documents seized pursuant to the two Los Angeles search warrants, which are the subject of the above-captioned case [the 41(e) motion], and which are currently kept sealed in the custody of the Clerk of this [the California] Court pursuant to the [surrender] stipulation . . . ." *Id.* In fact what was transferred from the district court comprised not only the returned documents but all documents seized. Transcript of Proceedings in United States v. Hubbard, Cr. No. 78-401 (D.D.C.) (Tr.) Aug. 17, 1979 at 15-16 (government making this assertion). Thus the question is posed whether all documents actually transferred were subject to the sealing stipulation and order.

We find as a matter of law that the "surrender" and "transfer" stipulations governed only the terms of custody of the *returned* documents and that the stipulations did not, by themselves, oblige the District of Columbia district court to retain the non-returned documents under seal. Thus any *de jure* seal on these documents must arise out of the independent actions of the parties and of the district court in the District of Columbia, and the propriety of the court's unsealing order will be considered without regard to considerations of comity that may be appropriate where the order of a coordinate jurisdiction is involved. *See generally* Covell v. Heyman, 111 U.S. 176, 182 (1884).

Some two weeks after the surrender stipulation was entered, but months before the transfer stipulation, the California district court disposed of some remaining issues in the Rule 41(e) proceeding and removed the restrictions previously placed on the government's use of seized materials. Church of Scientology of Cal. v. United States, No. CV-77-2565-MML slip op. at 21 (Jul. 5, 1978), Hubbard App. at 37, 57. A stay of this order was sought and denied in the circuit court but in response to a separately filed (July 12, 1978) application, the circuit court entered an order prohibiting the government, "pending appeal," from publicly disclosing the documents. Church of Scientology of Cal. v. United States, No. 78-2434 (9th Cir. Oct. 30, 1978), Church App. Doc. 4. The order, which originally permitted the government only to present the seized materials to federal grand juries, was modified

More than two years after the seizures a District of Columbia grand jury returned indictments against eleven officials or employees of the Church. Seeking to suppress the seized documents as the fruits of an illegally executed "general" search, the nine defendants present before the

---

December 13, 1978 to permit use of the materials "at resulting criminal proceedings." *Id.* (Dec. 13, 1978), Hubbard App. at 66. On February 22, 1979, the Ninth Circuit dismissed the Church's appeal for want of jurisdiction. Church of Scientology of Cal. v. United States, 591 F.2d 533 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 72 (1980).

The Church and the individual defendants here argue that because the Ninth Circuit's orders placed restrictions on the documents' use "pending appeal," the orders survived that court's dismissal for want of jurisdiction and continued at least until certiorari was denied. We disagree. We think that "pending appeal" meant pending appeal from the order already entered in the district court on the basis of which the circuit court's jurisdiction depended and did not include the filing of a petition for certiorari, even though a circuit court may stay the issuance of its mandate until a petition for certiorari is denied. *See* FED. R. APP. P. 41(b). Moreover, we read the orders to address the government's use of the documents and not the court's; the propriety of a court's unsealing order once the materials were properly received in a "resulting criminal proceeding" must thus be determined independently.

Assuming those documents not required to be surrendered were in fact given over to the California district court clerk at about the time the "surrender stipulation" was entered, there would seem to be a period from June 20, 1978 or at least from July 5, 1978 (when the district court indicated its wish not to exercise further control over the documents) until July 20, 1979 when the non-returned documents may not technically have been under seal. But given the confusion surrounding the initial stipulation, their actual accessibility to the public is questionable. *See* Tr. Jul. 20, 1979 at 6015, 6018 (government apparently asserting that all documents were kept by clerk in separate safe under seal). The parties have presented nothing to show that the public was in fact permitted access to the documents held by the California district court.

court[7] urged Judge Richey, to whom the criminal case was assigned, to examine a complete set of the documents seized. Because they were needed for this purpose, copies of all documents held by the district court in California were transferred to the custody of the district court here. From the discussions preceding transfer it is clear that everyone concerned was under the impression that *all* documents to be transferred would be held under seal by the clerk of this court.[8] No separate written sealing order was entered, but before the transfer took place,

---

[7] Extradition proceedings had been initiated in Great Britain against the two other individuals accused who were not in this country. Those proceedings culminated with an unsuccessful appeal by the accused to the House of Lords and we take notice of the fact that they have now been brought before the district court on the indictment returned by the District of Columbia grand jury.

[8] We find determinative the following exchange, occurring during the course of the taking of testimony in connection with the suppression motion:

> MR. BANOUN [Assistant United States Attorney]: . . . It was after the 41(e) proceeding was completed that the government and the petitioner voluntarily entered into a stipulation to keep a copy of all the documents under seal, in the custody of the clerk of this court.
>
> THE COURT: In the transfer to our court in Washington, there are no restrictions on that transfer, are there, except they are—
>
> MR. BANOUN: Sealed.
>
> MR. BOUDIN: They are sealed, and they are for your view.
>
> THE COURT: All right.
>
> . . . .
>
> MR. BANOUN: It is one set, one copy of all the documents seized.
>
> THE COURT: And that is the only place where you have, anybody has—
>
> MR. BANOUN: A complete copy. It is not the only place where anybody has it, because the defense—not the defense, but the surety has [a complete copy].

Tr. Jul. 20, 1979 at 6012-14.

Judge Richey entered repeated oral sealing orders,* al-

* It appears that the returned documents were offered and accepted for review before actual copies of those documents were presented to the court. Tr. Jul. 18, 1979 at 5425-28:

> THE COURT: Can we have an understanding, Mr. Hirschkop—
>
> MR. HIRSCHKOP [counsel for the defendants Heldt and Snider]: Yes.
>
> THE COURT:—between you and your co-counsel that those documents may be made a part of the official record of the evidence in these three suppression motions?
>
> MR. HIRSCHKOP: Under seal, yes, sir.
>
> THE COURT: Subject to the same caveat the Court received all the others.
>
> MR. HIRSCHKOP: Well, I am a little hesitant to give the Court 20,000 documents and then say or have the Court say, "Without consulting you or giving you a chance to be heard, I will open the whole thing up."
>
> I trust the Court's good faith, but the Court may not understand the point we have at the time the Court should or should not reach such an opinion.
>
> These are 20,000 personal documents from the persons seized. Again, it comes back to the problem. Shall we force them to surrender all their rights to privacy by opening everything up in a public record in order to protect their right to privacy? So I will make them available to the prosecution voluntarily.
>
> THE COURT: And part of the record in this case?
>
> MR. HIRSCHKOP: Yes.
>
> THE COURT: All right.
>
> MR. HIRSCHKOP: All right.
>
> THE COURT: Is there any other counsel who will object to that procedure on the defense side? If so, state it now. Otherwise, your right to object is forgiven and forever lost for naught. By your silence I—
>
> MS. HETHERTON [Assistant United States Attorney]: Your Honor—
>
> THE COURT: Let me ask Mr. Banoun as chief counsel for the prosecution.
>
> MR. BANOUN: I'm not chief counsel.

[Continued]

though usually with the caveat that he retained the right to "unseal" the documents at a later time.[9]

---

[9] [Continued]

THE COURT: Well, I treat you as such, like I treat Mr. Hirschkop as chief counsel for the defense.

....

THE COURT: Mr. Banoun, will you accept them as part of the record in this case?

MR. BANOUN: We have no objection to having—

THE COURT: All right.

MR. BANOUN: Also the documents which we have kept as part of the court file as well.

THE COURT: Any objection?

MR. BANOUN: So that every—

THE COURT: Any objection to that addition to the documentary evidence? I am going to be really popular with my clerk. You can see that now, can't you?

....

THE CLERK: We have included all the documents seized at this point?

THE COURT: That is correct.

The general understanding appears to have been that the stipulated transfer would provide the trial court with a complete set of the seized documents.

[10] One rationale offered contemporaneously by the district judge for his repeated caveat that he retained discretion to unseal the documents was as follows:

> [T]he Court is going to seal these documents now, with the caveat that they can be opened at the discretion of the Court. *Why? Because the Court is going to have to make reference to them in making findings*, there is no question about that, as to whether or not this seizure was proper.
>
> And the Court feels that while it has restricted the government at this particular stage they are entitled to know why I have done it. And the public also is entitled to know why I have done it.
>
> Also, since the six attacks on the warrant and the seizure and the search, broadly stated and specifically stated, are complex and raise difficult issues, and the

The legal consequence of the position taken by the defendants in pressing the full set of documents upon the trial judge during the suppression hearing is that the documents became part of the "record" of the case.[11] We think this conclusion is consistent with the contem-

---

Court has endeavored, to the best of its ability, to extend the defense every conceivable opportunity it concedes proper, to let them put on any and all evidence that will be of assistance to the Court as well as argue.

But that does not mean that the government has had no rights, either. I am just suggesting that I think I understand the law about search and seizure pretty well, not that I cannot be educated further. All of us lawyers and judges have a lot to learn, and this judge is no exception.

So with that let's proceed, Mr. Banoun.

Tr. Jul. 19, 1979 at 5868-69 (emphasis supplied).

[11] FED. R. APP. P. 10(a); United States v. Ross, 321 F.2d 61, 65 n.2 (2d Cir.), *cert. denied*, 375 U.S. 891 (1963); Administrative Office of United States Courts, Manual for Clerks of United States District Courts §§ 201.1, 201.2(F)(1) (1978), ch. 13, Ex. 2 at 4-5 (1954) (classifying exhibits as "auxiliary case records"), *cited in* United States v. Mitchell, 551 F.2d 1252, 1259 & n.28 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). Whether the documents were or were not technically "received" in evidence is quite beside the point. For example, documentary materials offered but excluded by a trial judge on evidentiary grounds can be part of the "record" at least for purposes of appeal of the evidentiary ruling. 9 MOORE FEDERAL PRACTICE ¶ 210.04[3] at 10-18 (19[illegible] *citing* Chicago & E. Ill. R.R. v. Southern Ry., 261 F.2d [illegible], 402 (7th Cir. 1958); Texas & Pac. Ry. v. Buckles, 232 F.2d 257, 261 (5th Cir.), *cert. denied*, 351 U.S. 984 (1956). Nevertheless, to state that materials are part of the record of the case does not answer the question whether they are or should be public. This question we address below. Depending on the circumstances, technical receipt in evidence may or may not weigh heavily in determining the answer to this question.

poraneous understanding of the parties and the district court.[12] However, only a small number of the documents were referred to individually by nature or content by either witnesses in the suppression hearing or by the trial judge in his ultimate decision on the motion.[13] It is in fact unclear whether and to what extent the trial judge examined the documents before he denied defendants' suppression motion.[14]

---

[12] *See* exchange quoted *supra*, note 9.

[13] The parties inform us that only 74 of the documents were used in the examination of witnesses at the suppression hearings. Reply Brief for Appellant in Nos. 79-2313 & 79-2324 at 3. The trial judge described only a handful in his memorandum opinion. United States v. Hubbard, Cr. No 78-401, slip op. at 42 (D.D.C. Sept. 13, 1979), Hubbard App. at 104, 145 (Red Box Data Information Sheet); *Id.* at 43, Hubbard App. at 146 (Government exhibit 111); *Id.* at 45, Hubbard App. at 148 ("Re: Herb").

An issue is made by the government of the admission in evidence at the suppression hearing of "an inventory breakdown" and a "computer printout" which were prepared in conjunction with a study conducted on defendants' behalf of the seized materials. The "inventory breakdown" classified 23,000 seized documents as within or without the warrant and grouped them into several categories. The "computer printout," comprising nine volumes, was apparently the basis for the "inventory breakdown." It contained a separate entry for each of the documents studied and an indication of whether it was within or without the warrant. We have examined both the "inventory breakdown" and the "computer printout" and do not find them revealing of the content of the documents surveyed.

[14] Judge Richey decided, *inter alia*, that overbreadth of the search would not by itself taint the entire seizure, United States v. Hubbard, Cr. No. 78-401, slip op. at 23-28 (D.D.C. Sept. 13, 1979), Hubbard App. at 126-31, and that documents seized within the scope of the warrant, *id.*, or in plain view, *id.* at 41, Hubbard App. at 144 during the course of the search need not be suppressed. He also determined, relying on his

Shortly after entry of the decision upholding the search, the government and the defendants negotiated a disposition of charges and a stipulated record consisting of approximately 200 documents. As part of the negotiations the government agreed not to disseminate publicly any documents seized which were not part of the stipulated record. The trial court enforced the negotiated disposition;[15] the case was tried to the bench on the stipulated

---

own view of the premises and the statements of witnesses present at the search, that the physical scope of the search was not unreasonable, *id.* at 31-36, Hubbard App. at 134-39, and that the government made reasonable efforts to limit the search. *Id.* at 36-44, Hubbard App. at 139-44. Finally, he found that none of the documents upon which the government intended to rely for its case-in-chief were outside the scope of the warrant. *Id.* 47-48, Hubbard App. at 150-51. Under this rationale examination of all the documents seized may not have been necessary and there is no indication in the memorandum opinion that such an examination was undertaken. However, when the unsealing order was challenged and counsel for one defendant suggested to the court:

> You are opening up now 12,000 to 15,000 documents that you have never read.
>
> You have read a handful of them; not even one-tenth, not even one-hundredth of one per cent of those documents;

Judge Richey retorted:

> That is a gratuitous statement which you have made and which I am not going to accept, and I don't think it is proper for you to make, because you don't know what I have read.

Tr. Oct. 26, 1979 at 56-57.

[15] The defendants had moved for an order compelling the government specifically to perform a plea agreement. The court found that the government had in fact tendered a plea agreement, that the defendants had accepted the offer, and that the government would be bound by the offer made. United States v. Hubbard, Cr. No. 78-401 (D.D.C. Oct. 8, 1979), Hubbard App. at 157. The offer found by Judge Richey

record and guilty verdicts were returned.[10]

After the disposition agreement was enforced but one day before the guilty verdicts were entered, the trial judge issued an order making publicly available all documents seized except those that the government had earlier "returned" to the Church as unnecessary to the prosecution,[11] if they were not also used by the defendants in

---

to have been made expressly contemplated appellate review of the convictions. *Id.* at 10, Hubbard App. at 166. As one defense counselor stated to Judge Richey on the day the verdicts were rendered, "the whole point of the plea agreement—the whole point of the plea agreement was to preserve for the defendants an appeal on the legality of the search and seizure." Tr. Oct. 26, 1979 at 8, Hubbard App. at 176. The trial judge's own understanding was the same. *Id.* at 21, Hubbard App. at 189. The agreement enforced expressly provided that the government could not make available either to the press or to private individuals copies of documents seized in California (apart from those contained in the stipulated record). United States v. Hubbard, Cr. No. 78-401, slip op. at 11 (D.D.C. Oct. 8, 1979), Hubbard App. at 167.

[10] Each of the nine defendants was found guilty of one count of the indictment. Seven were found guilty under Count XXIII, charging conspiracy to obstruct justice; one was found guilty under Count I, charging conspiracy illegally to obtain government documents; and one was found guilty under Count XVII, charging theft of government property. Although the point is made in text and notes below, text at notes 21-22 and notes 21 & 22, it is worth emphasizing that the documents at issue in this appeal do *not* include those documents made a part of the stipulated record on which these convictions were based.

[11] *See* United States v. Hubbard, Cr. No. 78-401, slip op. at 46 (D.D.C. Sept. 13, 1979), Hubbard App. at 149 (government represented that returned documents "were deemed unnecessary"). Although the reasons for the documents' return are unclear, they may have been returned pursuant to Andresen v. Maryland, 427 U.S. 463, 482 n.11 (1964) (approving the return of papers "not within the scope of the warrants or . . . otherwise improperly seized"). United States

the examination of witnesses at the suppression hearing." When this order was filed, the Church sought to intervene in the criminal case to "protect the constitutional rights of the Church and its members in the privacy of their papers;" [19] it also filed a motion captioned as a separate civil proceeding, seeking immediate return of the seized documents and an order temporarily restraining the court clerk from disseminating or disclosing the documents to anyone pending a decision on the motion for return.[20] The

---

v. Hubbard, *supra*, slip op. at 46, Hubbard App. at 149 (noting "this procedure [return] was approved in *Andresen*").

[18] The approximately 200 documents included in the stipulated record are apparently among those "unsealed." However, we do not understand the unsealing of these documents to be at issue in these appeals. *See* note 21, *infra*.

[19] Church's Motion to Intervene and to Vacate the Court's Order of October 26, 1979, or in the Alternative to Stay Said Order Pending the Determination of the Appeal Therefrom, United States v. Hubbard, Cr. No. 78-401 (D.D.C. filed Oct. 29, 1979) at 1, Church App. Doc. 7 [hereinafter cited as Church's Motion to Intervene]. The transcript of proceedings of October 26, 1979, the day after the unsealing order was entered, reveals that counsel for one of the defendants orally attempted to assert the rights of the Church (which he had represented in some portion of the California 41(e) proceedings) in opposition to the unsealing order, seeking a stay of five to seven days to permit preparation of the appropriate written application. Tr. Oct. 26, 1979 at 53-54, Hubbard App. 211-222. The stay was not granted, the judge apparently reserving decision until a written application was filed. *Id.* at 54, Hubbard App. at 222. The written motion to intervene was not filed until October 29 and the 41(e) application until November 1, several days after the judgments of conviction were entered.

It appears that actual release of the documents was withheld until the order denying defendants' motion for reconsideration was entered (October 30). Reply Brief for Appellants in No. 79-2312 at 19-20.

[20] Church's Motion for Return of Property and Church's Application for Temporary Restraining Order, Church of

individual defendants moved the court for reconsideration. These motions were denied. Applications by the Church and the individual defendants for stay of the unsealing order and a petition by the Church for mandamus relief were denied by motions panels of this court. Rehearing *en banc* of the stay applications was also denied, no judge having called for a vote on the application for rehearing. Finally Chief Justice Burger denied applications for stay submitted to him as Circuit Justice.

Before us now are the consolidated appeals from the orders entered in the district court. We do not understand either the Church or the individual defendants seriously to contest the "unsealing" of documents which are part of the stipulated record or which were used by defendants in the examination of witnesses at the suppression hearing or which were referred to by the trial judge in his opinion on the motion to suppress.[21] At

---

Scientology of Cal. v. United States, Civ. No. 79-2975 (D.D.C. filed Nov. 1, 1979), Church App. Doc. 10. The Church sought return of the originals and all copies held by the government or the court

> with the exception that one copy of any such documents lodged with the Clerk of the Court shall be maintained under seal by the Clerk of the Court for utilization in connection with any appellate proceedings, including petitions for certiorari, by appellants in the criminal case entitled *United States* v. *Hubbard, et al.* 78-401, and thereafter returned to petitioner.

Church's Motion for Return of Property at 2.

[21] The individual defendants do not challenge the unsealing order insofar as it relates to the documents made a part of the stipulated record. Public access to that group of documents does not appear to be contested by the Church, either. Argument by the Church in the district court was restricted to documents other than those made a part of the stipulated record, Church's Motion to Intervene at 3-4, Church App. Doc. 7; and although a "claim" concerning these documents is asserted by the Church in its reply brief in this court, Reply Brief for Appellants in Nos. 79-2313 & 79-2324 at 4,

issue, then, is the substantive and procedural propriety of the judge's orders with respect to the balance of the documents unsealed.[*]

II. The Procedural Rights of the Church and the Individual Defendants

A. *Introduction*

At the outset we are called upon to determine the appealability of the orders entered in the district court. In our judgment a determination of the orders' appealability turns on a proper understanding of the interests asserted in the district court and on the relationship of these interests to the criminal investigation and prosecution to which they are undeniably connected. We thus turn our attention first to an examination of the nature

---

we do not think the unsealing of these documents is actually before us.

Concerning the use of documents at the suppression hearing, the Church and the individual defendants each acknowledged at oral argument in this court that their positions would have been much "weaker" or "different" if all the documents had been introduced at the suppression hearing *in haec verba* or if witnesses had been extensively examined concerning the documents or if the trial judge had engaged in a document-by-document analysis in his consideration of the suppression motion. As a practical matter, we take this acknowledgment to abandon claims to the propriety of unsealing at least that group of documents which were used individually in the examination of witnesses at the suppression hearing or in the trial judge's opinion.

[*] References in this opinion to "the documents at issue" are meant to denote only those documents unsealed which were neither made a part of the stipulated record for purposes of trial nor individually used in the examination of witnesses at the hearing on the suppression motion nor specifically referred to in the district court's opinion on the defendant's motion to suppress.

of the interests asserted in the district court, the procedures attempted to be employed for the assertion of those interests and the procedures which could have been employed, gives our assessment of the nature of the interests asserted and their relationship to the criminal case. We then return to the question of the appealability of the orders entered in the district court.

B. *Procedural Rights of the Church in the District Court*

1. The Nature of the Church's Interests

We think the kinds of interests raised by the Church in its effort to protect the confidentiality of documents seized from its premises are sufficiently strong to mandate the identification of some procedural mechanism by which those interests can be presented contemporaneously to the court that controls public access to the records of which the documents became a part. Our evaluation of the strength of the interests sought to be asserted by the Church derives from an analysis of the Church's asserted property rights in the seized documents and from our recognition of the intrusion by government officials upon the Church's privacy which a compulsory search of Church premises may represent and the compounding of this intrusion that is worked by public access to the contents of the documents seized.

Although we decline the Church's invitation expressly to ground the Church's protectible interests in the Constitution's provisions, we find the kinds of interests asserted to have some constitutional footing, both cognate to and supportive of, constitutional rights.[25] This understanding has framed our consideration of both the procedural and the substantive questions raised in these

[25] *Cf.* Afro-Am. Publishing Co. v. Jaffe, 366 F.2d 649, 654 (D.C. Cir. 1966) (en banc).

appeals and has contributed substantially to the conclusions we have reached.

Prior decisions of this court have made clear that the party from whom materials are seized in the course of a criminal investigation retains a protectible property interest in the seized materials. "[T]he Government's right to seize and retain certain evidence for use at trial," we have said, " 'does not in itself entitle the State to its retention' after trial . . . ."[20] Rather, as we have declared, "it is fundamental to the integrity of the criminal justice process that property involved in the proceeding, against which no Government claim lies, be returned promptly to its rightful owner."[21] Lawful seizure of the property, of itself, may affect the timing of the return,[22] but never the owner's right to eventual return. "[T]he district court, once its need for the property has terminated, has both the jurisdiction and the duty to return the . . . property . . . regardless and independently of the validity or invalidity of the underlying search and seizure."[23]

---

[20] United States v. Farrell, 606 F.2d 1341, 1347 (D.C. Cir. 1979), *quoting* Warden v. Hayden, 387 U.S. 294, 307-308 (1967).

[21] United States v. Wilson, 540 F.2d 1100, 1103 (D.C. Cir. 1976), *quoted in* United States v. Wright, 610 F.2d 930, 934 (D.C. Cir. 1979).

[22] Property lawfully seized may be retained pending exhaustion of its utility in criminal prosecutions. *See* United States v. Farrell, 606 F.2d at 1347. Property unlawfully seized must on motion be promptly returned, *see, e.g.*, Bolt v. United States, 2 F.2d 922, 923-924 (D.C. Cir. 1924), unless it be contraband or statutorily forfeit, in which event it need not be returned at all. United States v. Farrell, 606 F.2d at 1347.

[23] United States v. Wilson, 540 F.2d at 1103-1104. *Accord*, United States v. Wright, 610 F.2d at 935; United States v. Farrell, 606 F.2d at 1343, 1347; United States v. Palmer, 565 F.2d 1063, 1065 (9th Cir. 1977); United States v. LaFatch,

Both in the district court here and in the Central District of California the Church has asserted entitlement to lawful possession of the documents seized and a corresponding right to their return.[28] In the court below this claim was coupled with a request for injunctive relief retaining the documents under seal pending their return. Otherwise, the Church argued, "the ultimate granting of [the] motion [for return of property] will be a meaningless achievement."[29] The Church continued, "The publication of the documents invades the right of privacy of the petitioner and its members, violates the petitioner's Fourth Amendment rights, and chills the rights of and free exercise of religion. This damage cannot be undone by the eventual return to petitioner of its property."[30]

The privacy interests asserted by the Church in its application for injunctive relief pending the documents' return were also asserted in its motion to intervene in the criminal case. In those papers the Church relied not only on the property interests which it retained in the seized documents but on the violation of its right of privacy which release of the seized documents would

---

565 F.2d 81, 83 (6th Cir. 1977), *cert. denied*, 435 U.S. 971 (1978). Jurisdiction to return is not dependent upon whether the matter falls within the compass of FED. R. CRIM. P. 41(e). United States v. Farrell, 606 F.2d at 1347; United States v. Wilson, 540 F.2d at 1104.

[29] *See* Church's Motion for Return of Property, Church of Scientology of Cal. v. United States, Civ. No. 79-2975 (D.D.C. filed Nov. 1, 1979) at 2, Church App. Doc. 10.

[30] Church's Memorandum in Support of Application for Temporary Restraining Order, Church of Scientology of Cal. v. United States, Civ. No. 79-2975 (D.D.C. filed Nov. 1, 1979) at 2, Church App. Doc. 10.

[30] *Id.*

effect.[31] Although adverting to the confidential nature of the information contained in certain of the seized documents, the Church asserted a privacy interest not in particular documents but in the documents as a whole,[32] relying, *inter alia*, on the fact that the materials seized were documents, on the circumstances under which they were seized, on the measures theretofore taken by the parties to preserve the documents' confidentiality, and on the fact that the defendants were certain to appeal their criminal convictions on the grounds of the lawfulness of the search and seizure.[33]

That the fourth amendment—which is now recognized to protect legitimate expectations of privacy[34]—can be invoked by corporations to suppress the fruits of a search of corporate premises[35] demonstrates an understanding

---

[31] Church's Motion to Intervene at 1, 4, 5, Church App. Doc. 7.

[32] As noted above, note 21, the Church did not contest the unsealing of the documents made a part of the stipulated record for purposes of trial.

[33] Church's Motion to Intervene, Church App. Doc. 7.

[34] Rakas v. Ill., 439 U.S. 128, 143 (1978). *See* Katz v. United States, 389 U.S. 347, 353 (1967); *id.* at 361 (Harlan, J., concurring).

[35] *See* G.M. Leasing Corp. v. United States, 429 U.S. 338, 353-54 (1977) (fourth amendment violated by warrantless search of company offices and seizure of books and records for purpose of facilitating satisfaction of tax liability of company's general manager); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (reversing judgment of contempt against company and individual for refusal to comply with subpoena requiring production of company books and documents whose existence was ascertained through unwarranted search of company office) ("[T]he rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way.").

that a compulsory search of even corporate premises may constitute an intrusion upon privacy.[36] Furthermore, the Supreme Court has recognized an obligation on the part of the courts to take some measures to protect even a suspected criminal's privacy. The special difficulties of document searches in this connection have been noted. In *Andresen* v. *Maryland*,[37] the Court stated:

> We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized. Similar dangers, of course, are present in executing a warrant for the "seizure" of telephone conversations. In both kinds of searches, responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

---

[36] G.M. Leasing Corp. v. United States, 429 U.S. at 354. *Cf.* CAB v. United Airlines, Inc., 542 F.2d 394, 397 (7th Cir. 1976) (administrative inspection of regulated carriers) (avoiding fourth amendment question by rejecting plenary inspection powers claimed by agency to have been authorized by statute), *quoting* Statement of Judge Leventhal as to Why He Would Grant Suggestion for Rehearing En Banc in Burlington N., Inc. v. ICC, 462 F.2d 280, 288 (D.C. Cir.), *cert. denied*, 409 U.S. 891 (1972):

> The items involved are internal papers that stand at the heart of management effort, and so long as our carrier operations are rooted in private enterprise there is a strong element of privacy in such items.

[37] 427 U.S. 463, 482 n.11 (1975). The trial judge relied heavily upon *Andresen* in his decision on defendants' motion to suppress. United States v. Hubbard, Cr. No. 78-101 (D.D.C. Sept. 13, 1979), Hubbard App. at 104.

However, the value assigned by our society to protection against governmental invasions of privacy is not measured solely by the fourth amendment's exclusionary rule. The fourteenth amendment's protection against arbitrary or unjustifiable state deprivations of personal liberty also prevents encroachment upon a constitutionally recognized sphere of personal privacy.[58] The fifth amendment's protection of liberty from federal intrusion upon this sphere can be no less comprehensive.[59]

Minimizing the initial intrusiveness of necessary governmental activity is one means of serving fundamental privacy interests, but controlling broadside disclosure of materials or information obtained by intrusive means is another.[60] For example, on at least two recent occasions

---

[58] Whalen v. Roe, 429 U.S. 589, 598 n.23 (1977); Roe v. Wade, 410 U.S. 113, 153 (1973). *Cf.* Griswold v. Conn., 381 U.S. 479 (1965) (multiple constitutional sources of protectible privacy interests).

[59] The liberty interests protected by the fifth amendment have been read broadly. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (holding District of Columbia school segregation to violate fifth amendment's due process clause):

> Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.

But see Mazaleski v. Treusdell, 562 F.2d 701, 709-715 (D.C. Cir. 1977) (Public Health Service commissioned officer's termination for "unsatisfactory performance" not infringement of liberty).

[60] The public is, of course, entitled to be informed concerning the workings of its government. That cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals.

[Continued]

Congress has recognized that the dissemination of information compounds whatever infringement of privacy occurs when materials or information are obtained through compulsory means.[41] The need for both kinds of protection has been perceived by state legislatures as well as by the Congress.[42]

Finally, although the scope of the privacy interests protected by the Constitution differ from the privacy interests protectible under state law,[43] the concept of a

---

[40] [Continued]
Watkins v. United States, 354 U.S. 178, 200 (1957) (footnote omitted), *quoted in* Doe v. McMillan, 412 U.S. 306, 330 (1973) (concurring opinion) (Congress has no general authority, through publication of report concerning school system, to expose private lives); Tarlton v. Saxbe, 507 F.2d 1116, 1124 (D.C. Cir. 1974) (FBI duty to maintain accurate criminal records) (recognizing constitutional and common law expressions of "value of individual privacy," which serves to "insulate individuals from unjustifiable government interference with their private lives").

[41] Privacy Act of 1974, 5 U.S.C. § 552a(b) (1976) (prohibiting disclosure of personal information without consent except in certain circumstances); Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511 (1)(c) (1976) (prohibiting all disclosure of information obtained by unauthorized wiretap). *See* Gelbard v. United States, 408 U.S. 41, 51-52 (1972) (discussing Title III's prohibitions). *See also* 5 U.S.C. § 552(b)(6) (1976) (agency need not disclose under Freedom of Information Act, personnel, medical or similar files, whose disclosure would result in "clearly unwarranted invasion of personal privacy").

[42] *See* UNITED STATES DEPARTMENT OF JUSTICE, COMPENDIUM OF STATE LAWS GOVERNING THE PRIVACY AND SECURITY OF CRIMINAL JUSTICE INFORMATION (1975); Note, *Protecting Privacy From Government Invasion: Legislation at the Federal and State Levels*, 8 MEM. ST. L. REV. 783 (1978).

[43] *See* Katz v. United States, 389 U.S. 347, 350-51 (1967) (comparing fourth amendment and state law protections of

protectible right of privacy has found widespread acceptance in the state law of this country,[44] and has been embraced both in the District of Columbia[45] and in California.[46] Whether and to what extent the privacy inter-

---

privacy); 2 CREIGHTON L. REV. 354 (1969) (analyzing lower court's decision in Nader v. Gen. Motors Corp., *infra* note 45, in which both federal constitutional and common law privacy interests were asserted).

[44] *See* Time, Inc. v. Hill, 385 U.S. 374, 383 n.7 (1967) (widespread recognition of right to privacy). It has been suggested that "the right of privacy should have a broader scope in the government disclosure area than in the private tort situation," Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 334, 353 (1979).

[45] *See, e.g.*, Pearson v. Dodd, 410 F.2d 701, 704 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969); Afro-Am. Publishing Co. v. Jaffe, 366 F.2d at 653 (en banc); Bernstein v. Nat'l Broadcasting Co., 129 F. Supp. 817, 831 (D.D.C. 1955), *aff'd*, 232 F.2d 369 (D.C. Cir.), *cert. denied*, 352 U.S. 945 (1956). *See also* Nader v. Gen. Motors Corp., 25 N.Y.2d 560, 307 N.Y.S.2d 647 (1970) (applying District of Columbia law).

[46] An actionable right of privacy has been recognized by California courts for almost fifty years. *See, e.g.*, Dietemann v. Time, Inc., 449 F.2d 245, 248 (9th Cir. 1971); Gill v. Curtis Publishing Co., 38 Cal.2d 273, 276-78, 239 P.2d 630, 632-33 (1952); Melvin v. Reid, 112 Cal. App. 285, ——, 297 P. 91, 93-94 (1931). Since 1972 privacy rights have been accorded express constitutional protection in California. In that year the state constitution was amended by referendum and now provides that among the "inalienable rights" enjoyed by the people is the right of "pursuing and obtaining . . . privacy." CAL. CONST. art. I, § 1. According to a statement drafted by the amendment's proponents and circulated in a state brochure to prospective referendum voters, three of the principal "mischiefs" at which the amendment was aimed were as follows: "(1) 'government snooping' and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information prop-

ests protected by state law may be asserted by corporate bodies is still unsettled.[45] However, we think one cannot draw a bright line at the corporate structure. The public attributes of corporations may indeed reduce *pro tanto* the reasonability of their expectation of privacy,[46] but the nature and purposes of the corporate entity and the nature of the interest sought to be protected will determine the question whether under given facts the corporation *per se* has a protectible privacy interest.[47]

---

erly obtained for a specific purpose. . . ." White v. Davis, 13 Cal. 3d 757, 775 & n.11, 120 Cal. Rptr. 94, 106 & n.11, 533 P.2d 222, 234 & n.11 (1975). *See* Porten v. Univ. of San Francisco, 64 Cal. App. 3d 825, 829-30, 134 Cal. Rptr. 839, 841-42 (1976); Note, *The California Constitutional Right of Privacy and Exclusion of Evidence in Civil Proceedings*, 6 PEPPERDINE L. REV. 231 (1978) (arguing for the creation of an exclusionary rule in civil proceedings to protect the constitutional right of privacy). We have been unable to find a reported California decision where the privacy rights (constitutional or otherwise) of associations or corporations were determined. In Cobb v. Superior Court, 99 Cal. App. 3d 543, 547 n.3, 160 Cal. Rptr. 561, 564 n.3 (1979), a California appellate court expressly reserved the question as to corporations.

[46] The suggestion can usually be traced to United States v. Morton Salt Co., 338 U.S. 632, 651-52 (1950) whose rationale (*see* note 48, *infra*) has not been as well remembered as its language. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 778 n.14 (1978); Cal. Bankers Ass'n v. Schultz, 416 U.S. 21, 65-67 (1974); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 184 (1951) (concurring opinion). *See also* Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 492 (D.C. Cir. 1967) (concurring opinion).

[47] United States v. Morton Salt Co., 338 U.S. at 651-52 (relying on public attributes of corporations to explain their lesser interest in privacy).

[48] *See, e.g.*, CAB v. United Airlines, 542 F.2d at 397-98; Colegio Puertoriqueño de Niñas, Liceo Ponceño, Inc. v. Pesquera de Busquets, 464 F. Supp. 761, 765 (D.P.R. 1979); Socialist Workers Party v. Attorney Gen., 463 F. Supp. 515, 524-25 (S.D.N.Y. 1978) (holding association itself has protectible privacy interests under New York law).

Moreover at least certain types of organizations—corporate or non-corporate—should be able to assert in good faith the privacy interests of their members.[50] Finally, whether acting for itself or on behalf of its members, surely the privacy interests of a "church" must be assessed somewhat differently from the privacy interests of other sorts of "corporations."[51]

---

[50] *See* Cal. Bankers Ass'n v. Schultz, 416 U.S. at 55 (organization may assert constitutional rights of its members); NAACP v. Button, 371 U.S. 415, 428 (1963) (because association directly engaged in activities claimed to be constitutionally protected, association—though a corporation—may assert on own behalf first amendment associational rights of members and lawyers); NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 458-59 (1958) (association may assert members' right of associational freedom). *See generally* Warth v. Seldin, 422 U.S. 490, 515 (1975) (association may assert rights of others when seeking declaratory or injunctive relief); Comm. for Auto Responsibility v. Solomon, 603 F.2d 992, 998 n.13 (D.C. Cir. 1979), *cert. denied*, 100 S.Ct. 1274 (1980) (listing conditions of "associational standing").

[51] *Cf.* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952) (church property dispute) (Court's prior decision "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation"); *construing* Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872); Cantwell v. Conn., 310 U.S. 296, 303 (1940) ("*Even* the exercise of religion may be at some *slight* inconvenience in order that the state may protect its citizens from injury.") (emphasis supplied).

We agree with Judge Richey that the word "religion" is no talisman, *see* United States v. Hubbard, Cr. No. 78-401, slip op. at 47 (D.D.C. Sept. 13, 1979), Hubbard App. at 150, but in fact Judge Richey, for purposes of the suppression motion, assumed the Church was a bona fide religious organization, *id.* at 3, n.2, Hubbard App. at 106, and made no contrary finding for purposes of his unsealing order. *See generally* Founding Church of Scientology v. United States, 409 F.2d 1146, 1160-61 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969) (*prima facie* case of Church's religious status made out on record of that case, where no government opposition).

Because state law privacy rights are seldom litigated,[52] their contours remain unclear and application of these still-evolving concepts to the claims here stated cannot be determined by reference to already decided cases. However, in our judgment the combination of property and privacy interests asserted were significant enough to warrant an opportunity for the Church to state its interests in the only forum where meaningful relief could expeditiously have been had[53] and within whose supervisory discretion a decision to foreclose public access resides.[54]

2. Procedural Mechanisms for the Church's Assertion of Interest

a. Ancillary Jurisdiction

Our decisions make plain that a federal trial court has ancillary jurisdiction to hear and determine claims

[52] Gavison, *Privacy and the Limits of Law*, 89 YALE L. J. 421, 457 (1980) ("The relative rarity of legal actions might be explained . . . in part because the initiation of legal action itself involves the additional loss of privacy."). *See* Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329, 348 (1979) ("The mere institution of litigation greatly accentuates the original loss of privacy; in fact, it normally multiplies the very effect from which relief is sought.").

[53] By drawing upon decisions considering the right to return of seized property we do not mean to imply that the Church's procedural rights were dependent upon an immediate right to return of the documents at issue. *See* note 63, *infra*. We suggest only that a proprietary interest in a document, in combination with the privacy interests implicated by the facts and circumstances of the seizure, may give rise to a protectible interest in preventing indiscriminate public access to the records of which the document has become a part.

[54] *See* text at notes 78-89, *infra*.

closely related to and arising out of the criminal proceedings brought before it.[56] We think this concept of ancillary jurisdiction is flexible enough to accommodate claims relating to seized property, even when made by strangers to the criminal case.[56] We thus conclude that the trial court had jurisdiction to hear the claims made. However, this conclusion does not imply the proper method by which the claim should be presented, and to that question we turn below.

b. Analysis of the Procedures Employed and Available

The means by which third parties have sought to assert their interests in criminal cases have been manifold.[57]

---

[55] United States v. Wilson, 540 F.2d at 1103 (return of property); Morrow v. Dist. of Columbia, 417 F.2d 728, 740 (D.C. Cir. 1969) (dissemination of information pertaining to accused's arrest).

[56] *See* Go-Bart Importing Co. v. United States, 282 U.S. 344, 356 (1931); Cogen v. United States, 278 U.S. 221, 225 (1929); United States v. LaFatch, 565 F.2d at 82-83. Although this circuit's cases on return of property, *see* notes 24-27, *supra*, have all involved motions by defendants in the criminal proceedings rather than motions by third parties, none has turned on that circumstance, nor have we given it analytical significance. Ancillary jurisdiction enables " 'a common sense solution' of the problems courts . . . face in attempting to 'do complete justice in the premises,' " Morrow v. Dist. of Columbia, 417 F.2d at 738, *quoting* 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23 at 94 (Wright ed. 1960).

[57] Cent. S.C. Chapter v. Martin, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) and Cent. S.C. Chapter v. United States Dist. Court, 551 F.2d 559 (4th Cir. 1977) strikingly illustrate the procedural confusion that erupts when third parties claim some interest in the conduct of criminal proceedings. Those cases concerned a trial judge's restrictive order affecting the activities of the press during a criminal trial. The press' appeal from this order was dis-

missed because filed by a non-party. *Id.* at 563. Even treating the papers on appeal as a petition for writ of mandamus, the court concluded that relief was inappropriate under the accepted standards for issuance of the extraordinary writ, stating that it did not through this treatment reach the merits of the restrictive order. *Id.* at 562. Finally, treating the press' district court motion for stay as having commenced an independent action and the appeal as having been taken from denial of the stay, the appeal was dismissed because in that court's view a summary proceeding commenced by motion was inappropriate to the determination of the press' claims. *Id.* at 565. The court suggested that an independent action commenced by complaint might be an appropriate vehicle for the assertion of the kinds of interests raised by the press. When an independent action for declaratory and injunctive relief was filed and dismissed, however, the appellate court stated its belief that "mandamus is the proper remedy to request the relief prayed for," 556 F.2d at 707, treated the appeal on the merits as a petition for mandamus relief and modified the trial court's restrictive order. *Id.* at 708. Decisions in two other circuits have also identified mandamus as the appropriate vehicle for the assertion of third party interests in criminal proceedings. United States v. Sherman, 581 F.2d 1358, 1360-61 (9th Cir. 1978); CBS, Inc. v. Young, 522 F.2d 234, 237 (6th Cir. 1975). *See also* Martindell v. Int'l Tel. & Tel. Corp., 594 F.2d 291, 294 (2d Cir. 1979).

A different conclusion was reached in the fifth circuit, however. In United States v. Gurney, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978), members of the press sought access to "documents and exhibits, some of which were in evidence [at the criminal trial] and some of which were only identified." *Id.* at 1205. When the clerk "refused access to many of these items pursuant to oral directions of the district judge," *id.*, the press filed with the district judge a "Petition for Hearing and for Vacation of Restrictions on Press and Other News Media." *Id.* The trial judge considered the argument of the press and entered an order permitting inspection of those exhibits received in evidence, *id.*, which was subsequently entertained by the circuit court on appeal, *id.* at 1206-07, a petition for writs of mandamus and prohibition having earlier been denied. *Id.* at 1206 n.4. *Gurney* is consistent with an approach applied in an earlier decision in that circuit, United States v. Briggs, 514 F.2d 794 (5th Cir. 1975). In that case the fifth circuit reviewed on appeal the denial of

Indeed, the Church here chose to employ three of the mechanisms which have been used, with varying success,

---

a pre-trial petition, submitted to the trial judge by unindicted co-conspirators, to expunge references to them from the indictment. The simple motion route has also been approved by the third circuit sitting en banc. United States v. Schiavo, 504 F.2d 1, 5 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 1096 (1974). In that case non-party newspapers had moved the trial judge to vacate a gag order he had entered in a criminal case; the trial judge's decision on that motion was reviewed on appeal. A proceeding by motion to the court of trial has occasionally even been denominated "intervention" without disapproval of the invocation of this concept in a criminal proceeding. *See* United States v. RMI Co., 599 F.2d 1183, 1186 (3d Cir. 1979) and cases discussed *infra* note 67.

A case arising in our own circuit illustrates a third approach to the assertion of non-party interests in criminal proceedings. In United States v. Mitchell, 386 F. Supp. 639, 640 (D.D.C. 1975) and 397 F. Supp. 186 (D.D.C. 1975) members of the media seeking access to the "White House tapes" introduced in evidence and played at trial in the "Watergate case," brought a "motion" under Rule 47, FED. R. CRIM. P. *Id.*, 386 F. Supp. at 640. Upon ruling that the media lacked standing to make a motion in the criminal case, Judge Sirica directed that the motion be treated as a miscellaneous civil proceeding. *See* United States v. Mitchell, 551 F.2d at 1256. Orders entered in that proceeding were appealed this court where the appeal was entertained on the merits. *Id.* The Supreme Court granted certiorari and reviewing the merits of this court's decision, reversed. Nixon v. Warner Communications, Inc., 435 U.S. 589. *See also* cases cited *infra* note 67.

. The means by which third parties have sought to assert their interests in state criminal proceedings have been equally various. *Compare, e.g.*, Richmond Newspapers, Inc. v. Va., 48 U.S.L.W. 5008, 5009-10 (No. 79-243 Jul. 2, 1980) *with* State v. Simants, 194 Neb. 783, 236 N.W.2d 794 (1975), *rev'd*, Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976). *See also* Gannett Co. v. DePasquale, 43 N.Y.2d 370, 401 N.Y.S.2d 756, 372 N.E.2d 544 (1977) *aff'd*, 443 U.S. 368 (1979) and cases cited *infra*, note 67. *See generally* Remlleman, *Free Press-Fair Trial: Review of Silence Orders*, 52 N.C. L. REV. 127 (1973).

by other parties in other cases.[59] It first sought to intervene in the criminal case, it then brought a motion for return of property, accompanied by an application for an order temporarily restraining public access to the documents at issue. Finally, it petitioned this court for a writ of mandamus directing the district court, *inter*

---

[59] *See* note 57, *supra*.

Apart from the various methods employed by the Church itself, individual former and present Church members also brought a separate class action for injunctive relief, *Doe v. Bishop*, Civ. No. 79-3274 (D.D.C. filed Dec. 5, 1979), alleging that members of the class were identifiably discussed in certain of the documents unsealed, that public access to these documents invades their privacy, infringes upon their rights of associational freedom and free exercise of religion, and that the circumstances surrounding the issuance of the unsealing order violated their due process rights. When all District of Columbia district court judges recused themselves, the action was assigned to a judge of this court, sitting as a district judge by designation.

By memorandum opinion and order issued June 12, 1980, the complaint in that case was dismissed for lack of jurisdiction, *id.* (June 12, 1950), the court reasoning that the relief sought was in essence a writ of mandamus, *id.*, slip op. at 2, which could not be employed to countermand an order of a court of coordinate jurisdiction. *Id.* In answer to the plaintiffs' argument that they were left without a remedy, the court suggested that mandamus relief in the court of appeals might be available, slip op. at 3-4, and noted that the propriety of intervention in a criminal case was still under consideration by this court in this case. Slip op. at 5. We think this action and its disposition serve as an additional illustration of the procedural confusion surrounding the assertion of third party interests in criminal proceedings. With respect to the availability of mandamus relief in the court of appeals our discussion *infra*, text at notes 60-62 and notes 60-62 is pertinent. *But see* note 121, *infra*.

alia, "to refrain from unsealing for public inspection" the documents at issue.

Of these methods we think the last employed was neither appropriate nor adequate to the task. It is the trial court and not this court that should engage in the initial consideration of the interests at stake, especially where, as here, the matter is urgent and largely dependent on an extensive record with which the trial judge is intimately familiar.[60] Even assuming mandamus relief is available to non-parties in a criminal proceeding,[61] we think the inevitable delay in seeking a writ

---

[60] Church's Petition for Writ of Mandamus, *In re* Church of Scientology of Cal., No. 79-2318 (D.C. Cir. filed Nov. 9, 1979) at 2.

[60] We have observed that while "[p]roperty which is seized in a criminal proceeding either by search warrant or subpoena may be ultimately disposed of by the court in that proceeding or in a subsequent civil action[,] [i]t makes for an economy of judicial effort to have the matter disposed of in the criminal proceeding by the judge that tried the case." United States v. Wilson, 540 F.2d at 1101. As this court noted in its general discussion of ancillary jurisdiction in criminal cases, "disputes related to a single dispute should be resolved in the original forum." Morrow v. Dist. of Columbia, 417 F.2d at 74

[61] The ninth, fourth and sixth circuits have recently entertained on the merits petitions for mandamus relief brought by members of the press whose access was barred to various aspects of criminal proceedings to which they were not parties. United States v. Sherman, 581 F.2d at 1360-61; Cent. S.C. Chapter v. Martin, 556 F.2d at 707; CBS, Inc. v. Young, 522 F.2d at 237. *See also* Martindell v. Int'l Tel. & Tel. Corp., 594 F.2d at 294. *See generally Ex parte* Uppercu, 239 U.S. 435 (1915) (cited in *Martindell*) (employing mandamus to permit individual not criminally charged to obtain sealed records of a criminal trial for use as evidence in civil proceeding). The special urgency with which the courts address restraints on the press, *see In re* Halkin, 598 F.2d 176, 199 (D.C. Cir. 1979), may explain why in each of these cases the

and the narrow circumstances under which it will be granted[6a] render it inadequate to redress the type of

---

merits of the non-party's mandamus petition were fully considered and no attention was given to devising a means by which the interests at stake might first have been addressed to the district court judge.

[6a] The availability of the extraordinary writ of mandamus is traditionally extremely limited. Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953).

Although the Supreme Court in Schlagenhauf v. Holder, 379 U.S. 104, 109-12 (1964) and LaBuy v. Howes Leather Co., 352 U.S. 249, 257-60 (1957) and this court in Colonial Times, Inc. v. Gasch, 509 F.2d 517, 524 (D.C. Cir. 1975) have expressed a willingness to employ the writ in an advisory capacity to answer important questions of first impression and in a supervisory capacity to remedy certain classes of error not traditionally thought remediable by mandamus, this willingness cannot be read expansively. *See* Will v. United States, 389 U.S. 90, 99-107 (1967); Nat'l Right to Work Legal Defense v. Richey, 510 F.2d 1239, 1242 (D.C. Cir.), *cert. denied*, 422 U.S. 1008 (1975). *But see In re* Halkin, 598 F.2d at 199-200. To come to another conclusion would risk dilution of the extraordinary nature of the writ of mandamus and alteration of the proper functioning of trial and appellate jurisdiction. This is not to suggest that mandamus should not be available or continue to be available in extraordinary circumstances: to cure abuses of discretion; to answer novel and important questions of law; or, of course, to prevent the thwarting of appellate review. *See* Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). *But see* Helstoski v. Meanor, 442 U.S. 500, 505 (1979) (mandamus unavailable when alternative remedies exist); Will v. United States, 389 U.S. 90 (narrow availability of mandamus in criminal proceedings).

Nevertheless, because of the writ's extraordinary nature, this court's earlier denial, without statement of reasons, of the Church's petition for mandamus, *In re* Church of Scientology of Cal., No. 79-2318 (D.C. Cir. Nov. 21, 1979), has no bearing on our decision of these appeals. *See* Hospes v. Burmite Div. of the Whittaker Corp., 420 F. Supp. 806, 809-10

injury here alleged and mandate the identification of some other means by which a non-party's interest may timely be presented to the district court whose actions are alleged to affect that interest.

Of the two other methods by which the Church attempted to assert its interests, we think the motion for return of property and the accompanying application for temporary injunctive relief most closely approximated a proper means by which the trial court's ancillary jurisdiction could have been invoked by the Church to present its claims to retain the documents under seal.[a] In our view the Church could have proceeded by simple motion, served on the parties in the criminal case, under the

---

(S.D. Miss. 1976). *See also* Hoffman v. Blaski, 363 U.S. 335, 340 n.9 (1960).

[a] The motion for return of property was dismissed

> as against the Clerk of the United States District Court for the District of Columbia on the ground that Rules 3 and 8(a) [FED. R. CIV. P.] have not been complied with; and, furthermore, because there is no viable claim set forth in any of the papers, nor can the Court conceive that there could be, against the Clerk of this Court.

Transcript of Proceedings, Church of Scientology v. United States, Civ. No. 79-2975, Nov. 2, 1979 at 56, Church App. Doc. 11. We do not understand the Church to appeal the district court's dismissal of the clerk as a party to its motion, but insofar as the Church contests that portion of the district court's order that may be read to deny on the merits immediate return of the seized documents, we affirm, because the evidentiary utility of the seized documents has not yet been exhausted. United States v. Wilson, 540 F.2d at 1103-04. First, at least copies of the documents may be needed for review of the defendants' criminal conviction. Second, the charges pending against the two other individuals remain to be prosecuted. We do not suggest that the government may, by selective prosecution or otherwise, prolong in bad faith its retention of seized material, but this case does not hint of such purpose.

caption of that case.[64] We think such a motion would have served the Church's interests adequately and we treat the Church's efforts in the district court as having commenced such a proceeding.[65]

It has long been recognized that a summary proceeding initiated simply by motion to the court of trial is ordinarily suitable for the purpose of asserting an interest in the ultimate disposition of property seized in a criminal proceeding.[66] We now hold that it is also ap-

---

[64] *See* Cogen v. United States, 278 U.S. at 225. Despite its criminal caption this motion, and the proceeding commenced by it, are civil in nature.

[65] Given this treatment, a statement now of the precise procedural mechanism the Church could have employed as an original matter is not strictly necessary. However, we offer our views for the guidance of the parties and the district court in future cases presenting similar facts. *But see* note 121, *infra*.

[66] *See* Go-Bart Importing Co. v. United States, 282 U.S. at 355 (approving summary procedure for determination of claim to seized papers); Cogen v. United States, 278 U.S. at 225 (same); Bolt v. United States, 2 F.2d at 923-24 (reversing denial of motion for return of property illegally seized); United States v. Wilson, 540 F.2d at 1103 (same) (summary nature of proceeding not addressed).

"Summary" proceedings by definition are those conducted "in a prompt and simple manner." BLACK'S LAW DICTIONARY 1084 (5th ed. 1979). *See* N.H. Fire Ins. Co. v. Scanlon, 362 U.S. 404, 406-07 (1960). For two reasons a full-scale evidentiary hearing might not in fact be permitted under a proceeding within the criminal trial court's ancillary jurisdiction. First, this court has concluded that a criminal trial court's ancillary jurisdiction is limited to circumstances where the claim is determinable without a substantial new fact-finding. Morrow v. Dist. of Columbia, 514 F.2d at 749. Second, under some circumstances the holding of an evidentiary hearing may threaten the kind of disruption of or delay in the progress of the criminal trial that the courts have consistently viewed with disapprobation. *E.g.*, DiBella v. United States, 369 U.S. 121, 129 (1962) (appeal unavailable from denial of pre-

indictment motion to suppress); Cobbledick v. United States, 309 U.S. 323, 325-26 (1940) (appeal unavailable from denial of motion to quash grand jury subpoena *duces tecum*); Cogen v. United States, 278 U.S. at 228 (appeal unavailable from denial of post-indictment motion to suppress).

Although as a practical matter a proceeding within the trial court's ancillary jurisdiction may be the only truly effective means of protecting the kinds of interests here asserted, we think procedural due process does not require that these interests be explored in a full-scale evidentiary hearing. *See* N.H. Fire Ins. Co. v. Scanlon, 362 U.S. at 409-10 ("It is true that courts have sometimes passed on ownership of property in their custody without a plenary proceeding, where, for illustration, such a proceeding was ancillary to a pending action or where property was held in the custody of court officers, subject to court orders and court discipline."), *citing* Ge-Bart Importing Co. v. United States, 282 U.S. at 355; Gannett Co. v. DePasquale, 43 N.Y.2d at 381, 401 N.Y.S.2d at 762-63, 372 N.E.2d at 550, *aff'd*, 443 U.S. 368 (dictum) ("[C]ourts should of course afford interested members of the news media an opportunity to be heard, not in the context of a full evidentiary hearing, but in a preliminary proceeding adequate to determine the magnitude of any genuine public interest [in access to a suppression hearing]."). *See generally* Parham v. J.L., 442 U.S. 584, 608 n.16 (1979) (emphasizing flexibility of due process: "[T]here is no requirement as to exactly what procedures to employ whenever a traditional judicial type hearing is mandated . . . ."); Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (similar); Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1282-87 (1975). *But see* United States v. Eisner, 533 F.2d 987, 994 (6th Cir.), *cert. denied*, 429 U.S. 919 (1976) (dictum) (better to hold evidentiary hearing before entering exclusionary order in criminal case); United States *ex rel.* Lloyd v. Vincent, 520 F.2d 1272, 1275 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975) (dictum) (same); *Note, All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 TEMP. L. Q. 311, 332 (1979) (arguing for brief evidentiary hearing before exclusionary order is entered in criminal case, recognizing expense and delay to be caused).

propriate for the purpose of the presumptive owner's assertion of interest in maintaining the confidentiality of documents so seized.

The availability of this ancillary, summary proceeding and our treatment of the Church's efforts as having commenced such a proceeding make it unnecessary either to decide the procedural propriety of the methods in fact employed by the Church in its efforts in the district court to retain the documents under seal, or to address the question whether one may ever intervene in a criminal case.[c] Furthermore, because we think the Church was

---

[c] Federal courts have frequently permitted third parties to assert their interests in preventing disclosure of material sought in criminal proceedings or in preventing further access to materials already so disclosed. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 692 (1974) (President, a nondefendant, may appeal denial of motion to quash post-indictment subpoena *duces tecum* directed to him, compelling production of records of certain presidential meetings); Gravel v. United States, 408 U.S. 606, 608 n.1 (1972) (noting that district court had permitted Senator to intervene in proceeding on legislative assistant's motion to quash grand jury subpoena and that circuit court had permitted Senator to appeal from denial of motion to quash); Perlman v. United States, 247 U.S. 7, 12 (1918) (owner may intervene to assert property and constitutional interests in preventing release to government, for purposes of grand jury investigation, of exhibits introduced and impounded in civil case); *In re* Grand Jury Applicants, No. 79-2221 (3d Cir. Apr. 17, 1980) (employer may appeal denial of motion brought as intervenor to quash grand jury subpoenas *ad testificandum* served on employees); United States v. RMI Co., 599 F.2d at 1186-87 (corporation may appeal denial of motion for protective order brought as *de facto* intervenor to prevent pretrial disclosure to defendants of corporate books and records previously disclosed by subpoena to grand jury which indicted defendants). *See also In re* 1975-2 Grand Jury Investigation, 566 F.2d 1293, 1294-95, 1296 & n.6, 1301 (5th Cir.), *cert. denied*, 437 U.S. 905 (1978) (dismissing as nonappealable district court's order permitting party with no apparent ownership interest in docu-

ments to intervene in proceedings begun with purpose to disclose to another district court documents used in terminated grand jury investigation); Ill. v. Sarbaugh, 552 F.2d 768, 772-73 (7th Cir.), *cert. denied*, 434 U.S. 889 (1977) (permitting defendants in terminated criminal proceeding to intervene in motion brought by state for disclosure to it of grand jury transcripts). These assertions of interest have sometimes been denominated "intervention," Perlman v. United States, *supra*; Ill. v. Sarbaugh, *supra*; *see In re* Grand Jury Applicants, *supra*, United States v. RMI Co., *supra*, and the intervention criteria of the Federal Rules of Civil Procedure have occasionally been applied. Ill. v. Sarbaugh, *supra*. *See In re* 1975-2 Grand Jury Investigation, *supra*.

Both the language and rationale of United States v. RMI Co., *supra*, suggests that under the circumstances of this case the Church should be permitted to intervene to assert its interests in denying public access to the documents at issue. In that case the third circuit concluded:

> [I]t is settled law that persons affected by the disclosure of allegedly privileged materials may intervene in pending criminal proceedings and seek protective orders, and if protection is denied, seek immediate appellate review.

Id., 599 F.2d at 1186. That civil intervention rights were historically absolute for those who had an interest in the property held in the custody or subject to the control or disposition of the court, 3B MOORE FEDERAL PRACTICE ¶ 24.09[1] (1980), is also suggestive of this conclusion. However, whether, when and for what purposes intervention *eo nomine* is or should be permitted in criminal proceedings is still a matter of some doubt. Cent. S.C. Chapter v. United States Dist. Court, 551 F.2d at 563-65 (dismissing appeal of order restricting activities of press during conduct of criminal trial) ("nothing in the criminal law or rules permit[s press] to intervene"). *See* Gannett Pac. Corp. v. Richardson, 59 Hawaii 224, 235, 580 P.2d 49, 57-58 (1978) (press may not intervene to protest closure of portion of preliminary hearing in criminal case); State v. Simants, 194 Neb. at 788, 236 N.W.2d at 798, *rev'd on other grounds sub nom.*, Neb. Press Ass'n v. Stuart, 427 U.S. 539 (error to have permitted press to intervene to protest pre-trial gag order); State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978) (no error to have permitted post-trial intervention by non-party asserting inter-

in fact heard on the merits in its efforts to retain the seized documents under seal,[66] and because the district court's rationale for denying relief, insofar as it can be ascertained on this record, turned at least in part on the merits of the interests asserted,[67] we treat the order ap-

---

ost in seized property); State v. Bianchi, 92 Wash.2d 91, 593 P.2d 1330 (1979) (error to have permitted non-party to intervene to protest gag order).

[66] The Church's position on the merits of the unsealing order was argued to the trial judge in open court immediately after the decision was announced, Tr. Oct. 26, 1979 at 43-45, Hubbard App. at 211-13, and again in its motion to intervene, *supra*, note 19 (which was filed while Judge Richey informally stayed his unsealing order), and finally in its motion for return of property, *supra*, note 20, and in oral argument on that motion. Transcript of Proceedings, Church of Scientology of Cal. v. United States, Civ. No. 79-2975, Nov. 2, 1979 at 4-19, 29-42.

[67] The Church's motion to intervene was denied without a statement of reasons. United States v. Hubbard, Cr. No. 78-401 (D.D.C. Nov. 1, 1979), Church App. Doc. 9. Denial of the Church's application for an order temporarily restraining public access pending return of the documents was accompanied by the following rationale:

> [This] issue has been examined repeatedly by this court. It was the subject of an extensive opinion, carefully worded, carefully thought out, by this court in its order and memorandum of October 30, 1979.
>
> The very essence of the order of this court of October 30th held that a party does not have the right to hide material seized during a search on the ground that a search may be declared invalid on appeal.
>
> Since May 19, 1971, this court has kept statistics, and it has had the unfortunate duty to sentence more people convicted of crimes than any other judge of this court.
>
> And this case, namely, the case of the United States versus Hubbard, is the only case where documents in a

pealed by the Church as having reached the merits and will consider the remainder of the issues raised by those appeals accordingly.

C. *Procedural Rights of the Individual Defendants*

The individual defendants, though on different grounds, also protested public access to the seized documents and, with one minor exception, their claims, like the Church's, fell within the trial court's ancillary jurisdiction in crimi-

---

suppression hearing, or otherwise, involving criminal charges have not been spread upon the public record.

The public does have a right to know; and to hold otherwise would be to make a folly of the first amendment with respect to the right of the public to know, which this court has written on at length on several occasions.

. . . .

. . . The court finds that the relief sought here is no more than that relief which was denied by the court of appeals yesterday afternoon.

It is essentially a recasting of an application for another stay of this court's October 30th order.

And the court agrees with the government that what it really seeks here, namely, the petitioner, even though the other relief was sought by other parties, is to have this court reverse itself in its October 30, 1979 order, which it carefully considered, as previously indicated, and did not do.

The court further finds that there is no likelihood of success on the merits, and that the public interest will be served by continuing to make the documents available to interested parties after examination by the court in accordance with the procedures that it has been following, and will continue to follow.

Transcript of Proceedings, Church of Scientology of Cal. v. United States, Civ. No. 79-2975, Nov. 2, 1979 at 54-56, Church App. Doc. 11.

nal cases, as we interpret that concept.[70] This is because the claims, though closely related to the criminal proceedings, were separable from them; their determination did not require the district court and will not require us to decide questions inextricably intertwined with the propriety of the criminal conviction. This conclusion reflects our assessment of the separability from the criminal proceeding of the claims raised on their face; but it also inevitably reflects our judgment on the merits that the interests asserted can and should be evaluated independently of the defendants' motion to suppress the fruits of the search of Church premises.

The one claim made that cannot be divorced from the criminal proceedings themselves was that release of the documents violated the negotiated plea disposition.[71] We do not consider this claim to fall within the trial court's ancillary criminal jurisdiction. Accordingly, we do not address it, but leave it for consideration on appeal from the criminal conviction if the defendants wish to raise it at that time.

A brief summary of the remaining interests asserted by the individual defendants will demonstrate their ancillary nature. The defendants argued: that publication would vitiate the benefits of possible reversal of their convictions on appeal; would interfere with the proceedings commenced and orders entered in the federal courts in California; would prejudice fair trial rights in other criminal proceedings; and would violate the privacy rights of individuals mentioned or discussed in the seized documents.[72] None of these claims is inextricably bound

---

[70] *See* notes 55-56, *supra*, and accompanying text.

[71] *Cf.* Cogen v. United States, 278 U.S. at 227-28 (denial of defendant's pre-trial motion for suppression and return of seized property not "final").

[72] Supplemental Memorandum in Support of Defendants' Motion for Reconsideration Re the Sealing of Documents,

up in an assessment of the validity of the judgment of conviction. Even the "fair trial" rights assertedly jeopardized by public access to the documents at issue presented an ancillary question. This is because the defendants did not seek to protect from unfair publicity the proceedings then in being but rather any subsequent proceedings in which they or other indicted individuals might be defendants.

D. *Appealability*

The "ancillary" nature of the interests asserted by both the Church and the individual defendants and the practical finality of the contested orders determines the question of their appealability.[12] The analogy to the ap-

---

United States v. Hubbard, Cr. No. 78-401 (D.D.C. filed Oct. 29, 1979) (submitted by defendants Heldt and Snider); Motion for Reconsideration of Part of the Court's Order of October 25, 1979, United States v. Hubbard, Cr. No. 78-401 (D.D.C. filed Oct. 26, 1979) (submitted by all defendants). The last of these claims (privacy of individuals) appears to have been made only by defendants Heldt and Snider. Defendants' Supplemental Memorandum, *supra* at 2.

[12] *See* Go-Bart Importing Co. v. United States, 282 U.S. at 356. The government challenges the appealability of the order denying the motion labeled by the Church as one for a temporary restraining order. Refusal of an order truly of that character is a ruling neither final under 28 U.S.C. § 1291 (1976) nor appealable though interlocutory under 28 U.S.C. § 1292(a)(1) (1976). Hoh v. Pepsico, Inc., 491 F.2d 556, 560 (2d Cir. 1974). *See also* Adams v. Vance, 570 F.2d 950, 953 (D.C. Cir. 1977) (grant of temporary restraining order not ordinarily appealable). The denial is, however, appealable when it is equatable to denial of a preliminary injunction. Lemesque v. Me., 587 F.2d 78, 79-80 (1st Cir. 1978). That treatment is proper here because the denial came only after the Church was heard on the merits. Sampson v. Murray, 415 U.S. 61, 86-88 (1974). Moreover, the Supreme Court "has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered

pealable "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*[75] is strong and persuasive. Like the orders which are the subject of that doctrine the orders entered here are "separable from, and collateral to" the rights of the parties to the criminal proceedings. Furthermore, because public access to the documents at issue will to some extent irreparably damage the interests

---

'final,'" Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962) (citing cases), and an order may be deemed final and hence appealable when to do otherwise would effectively destroy the opportunity for meaningful review. N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 162 (1973). *See also* Berrigan v. Sigler, 475 F.2d 918, 919 (D.C. Cir. 1973), *citing* McSurley v. McClellan, 426 F.2d 664, 668 (D.C. Cir. 1970). Here there is serious threat of irreparable harm to the property and the privacy interests advanced.

[75] 337 U.S. 541, 546 (1949). On several occasions the collateral order doctrine has been applied by the Court to determine the reviewability of issues raised in criminal cases. *See* United States v. MacDonald, 435 U.S. 850, 853-61 (1978) (holding unreviewable denial of defendant's motion to dismiss indictment on speedy trial grounds); Abney v. United States, 431 U.S. 651, 657-60 (1977) (holding reviewable denial of defendant's motion to dismiss indictment on double jeopardy grounds). *See also* Helstoski v. Meanor, 442 U.S. at 506-08 (appeal was available for denial of defendant's motion to dismiss indictment on speech or debate clause grounds); Stack v. Boyle, 342 U.S. 1, 6 (1951) (appeal was available for denial of defendant's motion to reduce bail). Significantly, the doctrine was applied by this court in *In re* Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 673-74 (D.C. Cir., *cert. denied*, 100 S.Ct. 229 (1979) (per curiam) to hold reviewable the district court's denial of a motion to return allegedly privileged documents inadvertently disclosed to the Department of Justice in the course of responding to a grand jury subpoena *duces tecum*. *See also* United States v. Cianfrani, 573 F.2d 835, 845 (3d Cir. 1978) (closure of pretrial hearing); United States v. Schiavo, 504 F.2d at 4-5 (gag order).

[76] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 546.

asserted an order which has the effect of permitting such an invasion, as a practical matter, "finally determine[s]" the claim.[16] Our consideration of the issues raised will neither halt nor disturb the orderly progress of the criminal proceeding.[17] We are thus satisfied that these issues are properly before us and turn to consideration of the merits of the district court's decision to unseal the documents at issue.

III. The Merits of the Unsealing Order

We begin by recognizing this country's common law tradition of public access to records of a judicial proceeding.[18] Access to records serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally.[19] But as the Supreme Court noted in *Nixon* v.

---

[16] *Id. See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-69 (1978); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171-72 (1974).

[17] Cobbledick v. United States, 309 U.S. at 327. *See* United States v. MacDonald, 435 U.S. at 853-54.

[18] Nixon v. Warner Communications, Inc., 435 U.S. at 597 [hereinafter cited as *Nixon*]:

> It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. In contrast to the English practice, see, *e.g.*, *Browne* v. *Cumming*, 10 B. & C. 70, 109 Eng. Rep. 377 (K.B. 1829), American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit.

(footnotes omitted); United States v. Mitchell, 551 F.2d at 1257-59 [hereinafter cited as *Mitchell*], *rev'd on other grounds sub nom. Nixon*, 435 U.S. 589. *Cf.* Richmond Newspapers, Inc. v. Va., 48 U.S.L.W. 5008 (No. 79-243, Jul. 2, 1980).

[19] *See Nixon*, 435 U.S. at 597-98:

> The interest necessary to support the issuance of a writ compelling access has been found, for example, in the

Warner Communications, Inc.,[50] the tradition of access is not without its time-honored exceptions:

> Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." Similarly, courts have re-

---

> citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government.

(citations omitted); *Mitchell*, 551 F.2d at 1258:

> This common law right is not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state. As James Madison warned, "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both. . . . A people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Like the First Amendment, then, the right of inspection serves to produce "an informed and enlightened public opinion." Like the public trial guarantee of the Sixth Amendment, the right serves to "safeguard against any attempt to employ our courts as instruments of persecution," to promote the search for truth, and to assure "confidence in . . . judicial remedies."

(footnotes omitted). *Cf.* Richmond Newspapers, Inc. v. Va., 48 U.S.L.W. at 5011-12 (multiple purposes of public access to conduct of criminal trial); *Id.* at 5018-19 (Brennan, J., concurring) (same); *In re* Oliver, 333 U.S. 257, 270 (1948) (public criminal trial is "restraint on possible abuse of judicial power"); United States v. Cianfrani, 573 F.2d at 851-54 (public right of access to criminal trials to see that justice is done); United States v. Lopez, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971) (same).

[50] 435 U.S. at 598.

Warner Communications, Inc.,[7] the tradition of access is not without its time-honored exceptions:

> Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." Similarly, courts have re-

---

citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government.

(citations omitted); *Mitchell*, 551 F.2d at 1258:

> This common law right is not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state. As James Madison warned, "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. . . . A people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Like the First Amendment, then, the right of inspection serves to produce "an informed and enlightened public opinion." Like the public trial guarantee of the Sixth Amendment, the right serves to "safeguard against any attempt to employ our courts as instruments of persecution," to promote the search for truth, and to assure "confidence in . . . judicial remedies."

(footnotes omitted). *Cf.* Richmond Newspapers, Inc. v. Va., 48 U.S.L.W. at 5011-12 (multiple purposes of public access to conduct of criminal trial); *Id.* at 5018-19 (Brennan, J., concurring) (same); *In re* Oliver, 333 U.S. 257, 270 (1948) (public criminal trial is "restraint on possible abuse of judicial power"); United States v. Cianfrani, 573 F.2d at 851-54 (public right of access to criminal trials to see that justice is done); United States v. Lopez, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971) (same).

[7] 435 U.S. at 598.

> fused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's competitive standing.

(citations omitted). The public has in the past been excluded, temporarily or permanently, from court proceedings or the records of court proceedings to protect private as well as public interests: to protect trade secrets,[81] or the privacy and reputation of victims of crimes,[82] as well as to guard against risks to national security interests,[83]

---

[81] *See* Stamicarbon, N.V. v. Am. Cyanamid Co., 506 F.2d 532, 539-40 (2d Cir. 1974) (access to criminal contempt trial may be restricted, over corporate defendant's objections, during portion of trial when another's trade secrets are disclosed); Note, *An Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 TEMP. L.Q. at 335 & n.214, *citing, inter alia*, State *ex rel.* Ampco Metal, Inc. v. O'Neill, 273 Wis. 530, 539-40, 78 N.W.2d 921, 927 (1956) (inherent power to hold proceedings *in camera* when trade secrets might be revealed); Annot. 62 ALR 2d 509, 510-29 (1958). *See also* Richmond Newspapers, Inc. v. Va., No. 79-213, slip op. at 8 n.5 (Stewart, J. concurring).

[82] *E.g.*, United States *ex rel.* Latimore v. Sielaff, 561 F.2d 691, 693 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978) (excluding the merely curious from the testimony of a rape victim); Harris v. Stephens, 361 F.2d 888, 891 (8th Cir. 1966), *cert. denied*, 386 U.S. 964 (1967) ("frequent and accepted practice" to close courtroom to spectators during testimony of rape victim); Sawyer v. Duffy, 60 F. Supp. 852, 853 (N.D. Cal. 1945). *See also* Richmond Newspapers, Inc. v. Va., No. 79-245, slip op. at 3 n.5 (Stewart, J. concurring). *But see* Lexington Herald Leader Co. v. Tackett, Nos. 80-SC-215-MR & 80-SC-287-MR, slip op. at 2, 4 (Ky. June 24, 1980) (although defendant did not object, closure of courtroom during testimony of ten children alleged to have been victims of sodomy was error).

[83] *See, e.g.*, United States v. Wash. Post, 403 U.S. 943 (1971) (court permitting filing under seal of materials claimed to affect national security); N.Y. Times v. United States, 403 U.S. 942 (1971) (same). *See also* Richmond Newspapers, Inc. v. Va., 48 U.S.L.W. at 5019 n.24 (Brennan,

and to minimize the danger of an unfair trial by adverse publicity."[84] In addition, both Congress and the courts have recognized that for certain purposes records of arrests and even of convictions may be expunged by action of the court.[85]

The Supreme Court has recently identified a first amendment right of access in the public to the conduct of a criminal trial, *Richmond Newspapers, Inc. v. Virginia*, 48 U.S.L.W. 5008 (No. 79-243 Jul. 2, 1980), but whether this right extends to the conduct of a pretrial suppression hearing,[86] and, if so, what factors may be found weighty enough to permit complete or partial

---

J. concurring), *citing* United States v. Nixon, 418 U.S. at 714-16; United States v. Lemonakis, 485 F.2d 941, 962-63 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974).

[84] *See* Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972); United States v. Gurney, 558 F.2d at 1206-10. *See also* Gannett Co. v. DePasquale, 443 U.S. at 378-79. In addition, affidavits submitted in support of search warrants are sometimes sealed to protect the secrecy of an ongoing criminal investigation. *See In re* Sealed Affidavits, 600 F.2d 1256 (9th Cir. 1979); Shea v. Gabriel, 520 F.2d 879, 880, 882 (1st Cir. 1975).

[85] *See, e.g.*, Doe v. Webster, 606 F.2d 1226, 1233 (D.C. Cir. 1979) (Federal Youth Corrections Act permits expungement of "conviction records"); Turlton v. Saxbe, 507 F.2d 1116 (apparently addressing only records maintained by law enforcement agencies). Stephens v. Van Arsdale, 221 Kan. 676, 608 P.2d 972 (1980) (statutory denial of access to criminal court records not unconstitutional where convictions are ordered "expunged"). *But see* Johnson v. State, 336 So.2d 93 (Fla. 1976) (expungement statute invalid insofar as it required judiciary to destroy court records).

[86] *Compare* Gannett Co. v. DePasquale, 443 U.S. 368 (1979), distinguished in Chief Justice Burger's opinion in *Richmond Newspapers* as having considered only the question of closure of pretrial hearings, *Richmond Newspapers*, 48 U.S.L.W. at 5010. *See also* the concurring opinion of Mr. Justice Stewart, *id.*, slip op. at 1.

closure of such proceedings," is not clear. In any event, we deal here not with the closure of courtroom proceedings but with the sealing of documents whose contents were not specifically referred to or examined upon during the course of those proceedings and whose only relevance to the proceedings derived from the defendants' contention that many of them were *not* relevant to the proceedings, *i.e.*, that the seizure exceeded the scope of the warrant.

The Court's decision in *Richmond Newspapers* has not cast doubt on its earlier conclusion that "the right to inspect and copy judicial records is not absolute;"[84] nor do we read it to have undermined its conclusion, based on then available law, that "the decision as to access [to judicial records] is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[85] In the analysis that follows we explain

---

[84] *Richmond Newspapers* itself did not forbid all closure of criminal trial proceedings. As the Chief Justice noted, "We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public." *Id.* at 5014 n.18. *See also id.* at 5015-16 (Stevens, J. concurring) (emphasizing "total absence of any record justification for th[is] closure order); *id.* at 5019 n.24 (Brennan, J. concurring) (right to gather information must "be assayed by considering the information sought and the opposing interests invaded" and noting that "national security concerns . . . may sometimes warrant closures"); *id.*, slip op. at 3 n.5 (Stewart, J. concurring) (suggesting justifiability of partial civil trial closure to preserve trade secrets and of partial criminal trial closure—if sixth amendment rights were not impaired—during portions of rape testimony).

[85] *Nixon*, 435 U.S. at 598. *See Richmond Newspapers*, 48 U.S.L.W. at 5018 n.18.

[86] *Nixon*, 435 U.S. at 599. This discretion should, of course, clearly be informed by this country's strong tradition of access to judicial proceedings—a tradition which is

why under the facts and circumstances of this case we think the unsealing order was flawed and why we must remand for supplemental proceedings.

A. *The "Generalized Interests" for and Against Public Access in This Case*

Some aspects of the public's interest in access and of the appellants' interests in denying public access can be weighed without examining the contents of the documents at issue. In the remainder of this opinion these aspects of the competing interests involved in this case are referred to as the "generalized interests" at stake.

We acknowledge an important presumption in favor of public access to all facets of criminal court proceedings but we conclude that on the record now before us an assessment of the generalized interests here at stake does not support a conclusion that the documents at issue should not be retained under seal.

We cannot determine from the trial judge's orders what factors entered into his initial decision to unseal or even if he found a weighing of these generalized interests appropriate. For this reason alone we must remand. However, taken as having weighed *only* the generalized interests, we think the unsealing decision was an abuse of discretion. Compelling this conclusion in this case is an analysis of several relevant factors discussed under separate subheadings below.

1. The Need for Public Access to the Documents at Issue

Under this heading we bring together several considerations which in our judgment bear upon the precise weight to be assigned in this case to the always strong presumption in favor of public access to judicial proceedings. Some of these considerations have already been

---

now grounded, at least with respect to the actual conduct of criminal trials, in the first amendment.

mentioned and others, because they also bear on the reasons why public access might be denied, will be emphasized again later.

We first note that this case does not involve access to the courtroom conduct of a criminal trial, recently found by the Supreme Court to be constitutionally protected.[90] Nor does it involve access to the courtroom conduct of a pre-trial suppression motion, access the Court a year earlier ruled the sixth amendment alone did not protect.[91] It does not involve access to documents which have been introduced as evidence of guilt or innocence in a trial,[92] nor even documents whose contents have been discussed or—insofar as we can determine—relied upon by the trial judge in his decision on the defendants' motion to suppress. As we emphasize below,[93] it concerns only access to documents introduced by the defendants solely to show the overbreadth of a search whose lawfulness, although decided by the trial judge in the government's favor, was certain to be appealed at the time the unsealing order was entered.[94]

The public in this case had access, *inter alia*, to the courtroom proceedings on the motion to suppress, to the memoranda filed by the parties in connection with that motion, to the trial judge's memorandum decision

---

[90] Richmond Newspapers, Inc. v. Va., 48 U.S.L.W. 5008.

[91] Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

[92] *Compare Nixon*, 435 U.S. 589 *rev'g sub nom. Mitchell*, 551 F.2d 1252 (tape recordings).

[93] *See* text at notes 108-111, *infra*.

[94] We note that in the original Rule 41(e) proceedings brought by the Church in California the California federal courts took the precaution of prohibiting all public disclosure while the issue was pending within the ninth circuit. *See* note 6, *supra*.

on the suppression motion, to the trial judge's memorandum decision on the negotiated disposition, to the stipulated record which was the basis for the defendants' convictions and to the actual "trial" of the criminal charges of which the defendants were convicted. None of the documents at issue here was either used in the examination of witnesses during the protracted public hearing on the suppression motion or specifically referred to in the trial judge's public decision on the motion to suppress or included as part of the publicly available stipulated record on which the defendants' criminal convictions were had.[95]

Under all these circumstances we conclude that the purposes of public access are only modestly served by the trial judge's unsealing decision.

2. Public Use of the Documents

Although the materials at issue are part of the "record" of the proceedings, their contents were not publicly revealed until the court entered its unsealing order.[96]

---

[95] *See* note 96, *infra*.

[96] We have described in text and notes above the tortuous proceedings by which the seized documents were made a part of the record in the criminal proceedings and came to reside in the custody of the district court here. Although the defendants urged the court to examine the documents, none of those at issue was read into the record *in haec verba* nor was any used in the examination of witnesses by either the government or the defense. The defense prepared, introduced and examined a witness concerning a study which purported to classify all documents seized as within or without the scope of the warrant. A computerized catalogue of seized materials, which was the basis for the study, was also made a part of the record but neither the study nor the catalogue revealed or even described the contents of the documents. The documents made a part of the stipulated record for trial and the documents used in the examination of witnesses at

Previous access is a factor which may weigh in favor of subsequent access. Determining whether, when and under what conditions the public has already had access to court records in a given case cannot of course guide decision concerning whether, when and under what conditions the public *should* have access as an original matter. However, previous access has been considered relevant to a determination whether more liberal access should be granted to materials formerly properly accessible on a limited basis through legitimate public channels[97] and to a determination whether further dissemination of already accessible materials can be restrained.[98]

---

the suppression hearing are not among those at issue on this appeal. *See* note 21, *supra*. In addition, the content of those at issue was not described either generally or specifically in the trial judge's decision on the motion to suppress, nor so far as we can tell were they described in any papers filed in the district court proceedings. The seized documents were under the seal of this district court from the moment they were made a part of the record until the court acted upon the unsealing orders here at issue and no member of the public, by attending courtroom proceedings or by reading the decisions of the district judge or the motions or other papers filed by the parties, could have determined their contents. As a practical matter these documents had not already entered the public domain through the criminal court proceedings. Furthermore, nothing before us now suggests that their confidentiality had been impaired by use in the federal courts in California. *See* note 6, *supra*.

[97] Those portions of the "White House tapes" to which the media sought access in *Mitchell*, 551 F.2d 1252, *rev'd sub nom. Nixon*, 435 U.S. 589, had already been publicly played to the limited number of spectators who were able to find space in Judge Sirica's "cramped courtroom." *See Nixon*, 435 U.S. at 593 n.3, 594; *Mitchell*, 551 F.2d at 1258.

[98] *See* Okla. Publishing Co. v. Dist. Court, 430 U.S. 308, 310-11 (1977) (press may not be restrained from publishing photograph and information obtained in and around court-

The record in this case reveals no such access to the documents until the district court decided that there was "a right in the public to know."[**] There is thus no previous access to weigh in favor of the access granted through the district court's unsealing order.

---

room proceedings when they were not in fact excluded from courtroom); Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975) (press may not be made liable for publishing name of rape victim whose name was already publicly available).

[**] Acknowledging the relevance of previous access raises the question whether on remand the fact of access while this appeal was pending should enter into a determination whether public access should now be permitted. We think it should not. To employ the language used in the text, we do not think the materials were "formerly *properly* accessible." To permit this mode of access to factor into a subsequent evaluation of the interests at stake would only compound the errors we perceive in the court's original orders.

Because we conceive of the interests asserted as a continuum which can be further invaded with each passing day by a single and unchanging encroachment, we do not think the case has become moot. *Cf.* Walter v. United States, 48 U.S.L.W. 4807, 4810 n.13 (June 20, 1980) (continuing fourth amendment privacy interest in package mistakenly delivered to and opened by third party before delivery to FBI) ("A partial invasion of privacy cannot automatically justify a total invasion."); *Nixon*, 435 U.S. at 602-03 (but for Presidential Recordings Act Court was prepared to balance privacy interests in recordings already publicly played against public interest in access). *See* Cell Assoc., Inc. v. Nat'l Inst. of Health, 579 F.2d 1155, 1157 (9th Cir. 1978) (Privacy Act claim not mooted by public disclosure of materials and widespread comment by press). We do not now address the rights of the press or the public to make use of copies of the documents obtained through the court while access was permitted.

We treat the question whether public access should be granted to particular documents which have already entered the public domain through other channels under our discussion of the "particularized interests" at stake, *infra*, note 112 and accompanying text.

3. Fact of Objection and Identity of Those Objecting to Disclosure

Strong objections were raised to the unsealing order both by the individual defendants and, to the extent it was permitted, by the Church. This is an obvious but important consideration. The kinds of property and privacy interests asserted by the Church to require retention of the documents under seal can be waived by failure to assert them in timely fashion,[100] and the strength with which a party asserts its interests is a significant indication of the importance of those rights to that party.

An important element in this case is the fact that the party from whom the documents were seized was not made a defendant in the proceedings and now objects to public access to the fruits of the seizure. We think that where a third party's property and privacy rights are at issue the need for minimizing intrusion is especially great and the public interest in access to materials which have never been judicially determined to be relevant to

---

[100] The government appears to suggest that the individual defendants' reluctant acquiescence to the trial court's warnings that he reserved the power and discretion to unseal the documents whenever he wished constitutes a waiver of objection to disclosure. Brief for Appellee in No. 79-2312 at 10; Brief for Appellee in Nos. 79-2313 & 79-2324 at 10-11. We disagree. Although we think the defendants' position could have been more forcefully stated and more assiduously pursued, we do not think their acquiescence constitutes a waiver of their underlying substantive objection. See Tr. Jul. 18, 1979 quoted *supra*, note 9. Even if we were to hold that the Church had notice of the trial judge's position through the defendants or through common counsel, the uncertainty of its procedural right to assert an interest in retaining the documents under seal, as well as the uncertainty of eventual unsealing would foreclose a finding of waiver by the Church based on notice of the trial judge's repeated warnings.

the crimes charged is especially small.[101]

We are well aware that all defendants here were officials or employees of the Church and that the defendants' interests and the Church's interests are integrally related; nonetheless it is also true that their interests are not identical. The defendants might not be permitted[102] and are certainly not required to raise the Church's interests

---

[101] *See generally* Andresen v. Maryland, 427 U.S. at 482 n.11, *quoted* in part, *supra* text following note 37. *But see* Zurcher v. Stanford Daily, 436 U.S. 547, 562 n.9 (1978) (rejecting rule requiring government to proceed by subpoena for materials held by third party not suspected of crime): "We reject totally the reasoning of the District Court that additional protections are required to assure that the Fourth Amendment rights of third parties are not violated because of the unavailability of the exclusionary rule as a deterrent to improper searches of premises in the control of nonsuspects." We, of course, have no occasion to pass upon the lawfulness of the underlying search in this case. The minimization of intrusion which we address is that which may be effected by careful exercise of the trial court's supervisory authority over public access to the fruits of a search and seizure held in that court's custody.

[102] *E.g.*, County of Kern v. Superior Court, 82 Cal. App. 3d 396, 401, 147 Cal. Rptr. 248, 251 (1978) (in resisting discovery of records hospital may not assert California constitutional privacy right of doctors); Hendrickson v. Cal. Newspapers, Inc., 78 Cal. App. 3d 59, 62, 121 Cal. Rptr. 429, 431 (1975) (deceased's relatives may not assert California constitutional privacy right in publication of deceased's criminal conviction). *Cf.* United States v. Salvucci, 48 U.S.L.W. 4881, 4882 (June 25, 1980) (in seeking suppression of fruits of search, defendant may not assert another's expectations of privacy); United States v. Payner, 48 U.S.L.W. 4829, 4830 (June 23, 1980) (same); Rakas v. Ill., 439 U.S. 128, 138-40 (1978) (same). *But see* Griswold v. Conn., 381 U.S. at 481 (physician and directors of planned parenthood league may assert constitutional rights of married persons with whom they had professional relationship); Comm'r v. Mun. Court, 100 Cal. App. 3d 69, 161 Cal. Rptr. 19 (1979) (in resisting discovery of names of arrested persons Highway Patrol may assert California constitutional privacy right of arrestees).

in preventing public access to the documents at issue. Even in the context of this case, then, we think the fact that objection to access is made by a third party weighs in favor of non-disclosure.

4. Strength of the Generalized Property and Privacy Interests Asserted

That the documents were seized from non-public areas of Church premises is undisputed. Accordingly, the Church's "standing" to assert the kinds of generalized interests which derived from the fact of seizure from its premises—interests which we have discussed above in connection with the Church's procedural rights[100]—is unquestionably strong.[101] By this we mean its interest on

---

[100] See text at notes 23-53, *supra*.

[101] The documents are of course presumed to be the property of the Church, from whom they were seized, and if the government contends otherwise, it carries the burden of proof. *See* United States v. Wright, 610 F.2d at 939 ("seizure of property *from someone* is *prima facie* evidence of that person's entitlement") (emphasis in original); United States v. Palmer, 565 F.2d at 1065 ("We conclude that in absence of any cognizable claim of ownership or right to possession adverse to that of appellant, the district court should have granted appellant's motion and returned to him the money taken from him by government seizure.")

The privacy interests asserted, though perhaps not presumptively protectible, are equally strong on this record. In fourth amendment terms, the reasonability of the Church's expectation of privacy in the areas searched is unquestionable on this record. *See* G.M. Leasing Corp. v. United States, 429 U.S. at 354; Coolidge v. N.H., 403 U.S. 443, 474-75 (1971). *See also* Payton v. N.Y., 48 U.S.L.W. 4375, 4378-4380 (Apr. 15, 1980). *But cf.* Pearson v. Dodd, 410 F.2d at 704-06 (no actionable claim for invasion of privacy stated by United States Senator against newspaper columnists who publicized information derived from copies of documents taken from Senator's office without Senator's knowledge or authorization by Senator's staff members and former staff members).

this record is direct and substantial, substantial enough, given the other factors to be considered in weighing the generalized interests in public access against the generalized interest in nondisclosure here asserted, to require retention of the documents under seal.

The "standing" of the individual defendants to assert these generalized interests in the documents at issue is less clear. Because the Church's asserted interests are strong and the defendants assert no conflicting interest, we need not determine the precise scope of the individuals' generalized interests in the retention of the documents under seal. We note, however, that the defendants' standing to assert certain of these generalized property and privacy interests may be broader than the scope of their "standing" to object to an unlawful search and seizure.[105]

5. Possibility of Prejudice

Two defendants whose extradition has only recently been accomplished remain to be tried. In addition, the government has the right to try the nine convicted defendants on any of the remaining counts should their single-count convictions be overturned on appeal. Thus, the possibility of prejudice to the defendants by sensational disclosure is a factor which may weigh in favor of denying immediate public access.[106] The likelihood of prejudice will in turn depend on a number of factors, including, most importantly, the nature of the materials disclosed. Until such an examination is undertaken, the weight of this factor cannot be determined. The trial judge's conclusion that the possibility of prejudice is

---

[105] *See* note 102, *supra*. *See also* note 50, *supra*.

[106] *See* text at note 84 and note 84, *supra*.

remote [10]—ostensibly reached without complete familiarity with the documents—cannot, therefore, favor public access.

6. The Purposes for Which the Documents Were Introduced

The single most important element in our conclusion that the proper balance has not been struck in this case is the fact that the documents at issue were introduced by the defendants for the sole purpose of demonstrating the unlawfulness of the search and seizure. Whatever the purposes served by the exclusionary rule, the fundamental

---

[10] The defendants' argument that disclosure would jeopardize fair trial rights was rejected by the district court in the following analysis:

> The government has indicated that other criminal prosecutions based on the documents seized in California may be forthcoming. Moreover, there are two defendants who will have to stand trial before this Court if they are extradited from Great Britain. The defendants contend that release of the documents will taint their ability to receive fair trials. With respect to prosecutions in other jurisdictions, the defendants concern is merely hypothetical. The Court has no hard information that other prosecutions will be forthcoming, but even if this happens that can be dealt with at a later day by another court or this one. If court records were kept sealed on such "potential" grounds, none would ever be released. With respect to the other two defendants awaiting extradition, most of the alleged "taint" against them may result from the records attached to the stipulated record and these records are not at issue on the instant motion. Furthermore, with respect to all other criminal proceedings, if any, a careful voir dire can be used to eliminate any prejudice. *United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) (*per curiam*) (*en banc*) *cert. denied*, 431 U.S. 933 (1977).

United States v. Hubbard, Cr. No. 78-401, slip op. at 4-5 (D.D.C. Oct. 30, 1979), Hubbard App. at 226-27.

thrust of the fourth amendment is at bottom the protection of privacy and property interests.[108] Putting aside for the moment the prospect of untoward invasions of third-party interests, it would be ironic indeed if one who contests the lawfulness of a search and seizure were always required to acquiesce in a substantial invasion of those interests simply to vindicate them.[109]

It must be remembered that the documents here were not determined by the trial judge to be relevant to the crimes charged; they were not used in the subsequent "trial"; nor were they described or even expressly relied upon by the trial judge in his decision on the suppression motion. Their *only* use by the parties and the *only* purpose for which they were admitted in the criminal proceedings was to assist the court in its determination of whether the search and seizure were unlawfully overbroad. If such a connection with the proceedings were enough by itself to justify public access, there would be very little left of fourth amendment and common law rights to privacy. For, by the act of attempting to show the excesses of the search by the extent of the documents seized—documents which may not be relevant to criminal charges or necessary to trial—defendants in criminal proceedings and nondefendant owners in Rule 41(e) proceedings will invite public dissemination of the contents of the documents and thereby impair the very privacy rights they seek to vindicate, regardless of the use ultimately made of the documents by the court.

---

[108] *See, e.g.*, Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966) (fourth and fifth amendments are concerned with "constitutional values . . . reflecting the concern of our society for the right of each individual to be let alone); Mapp v. Ohio, 367 U.S. 643, 656-57 (1961). *See also* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[109] *Cf.* Simmons v. United States, 390 U.S. 377, 389-94 (1968).

The risk is especially grave in document searches not only because the protected position occupied by personal papers has traditionally been closely guarded[10] but because determination of a claim of overbreadth may require the court to examine the documents' contents. However, in this case it is not clear that such an examination was undertaken in the course of ruling on the suppression motion; the unsealing decision is thus especially difficult to reconcile with the purposes underlying the documents' inclusion in the record of the suppression proceedings.

Finally, one factor not crucial to our decision is nevertheless worth emphasizing: that is, that the lawfulness of the search and seizure was certain to be appealed at the time the trial judge entered his unsealing order.[11] That appeal has been filed and is still pending in this court. Until the appellate route has been exhausted, the lawfulness of the search and seizure has not been finally determined. The possibility of reversal on appeal contributes to the irony inherent in the decision to unseal the documents at issue.

Given all the factors discussed above we conclude that on the present state of the record the seal on the documents at issue here should not have been lifted, and should continue unless on remand some substantial factors are identified which weigh in favor of public access to particular documents.

B. *Particularized Factors That May Have Weighed Against Nondisclosure*

To facilitate the proceedings on remand, we set forth below several reasons based on the documents' contents

---

[10] *See generally* McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 43 IND. L. J. 55 (1977); Note, *Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis*, 69 NW. U. L. REV. 626 (1974).

[11] *See* note 15, *supra*.

which might have been thought by the trial judge to justify his unsealing order. On this record, of course, we cannot determine whether these reasons were relied upon; our discussion of them represents merely the observations of an appellate court, and no inference should be drawn from our discussion that would conclude our review of the reasons actually given by the trial judge when the matter is again before us.

One possible reason for unsealing is that the documents were already made public through other means; the government has made this claim, at least in this court, as to some of the documents.[112] A second is that the documents were stolen or contraband, hence forfeitable. The government asserted below that some of these documents meet that standard.[113]

---

[112] The claim was specifically made as to two documents in a supplemental post-argument memorandum filed by the government in this court. "[W]hile the Church of Scientology has sought to have this Court order that all documents in the Clerk's custody be re-sealed, on the ground that public accessibility to these documents constitutes an invasion of Church members' privacy, the Church itself has selectively chosen to publish certain of those documents for the apparent purpose of demonstrating to that same public that the Church and its members have been victims of governmental harrassment." Supplemental Memorandum for Appellee in Nos. 79-2313 & 79-2324 at 2.

[113] In his oral ruling denying the Church's application for temporary relief, Judge Richey stated:

> [T]here has been no determination as to which of the documents in the court's custody at this time are subject to forfeiture, or may later be subject to forfeiture.
>
> There are allegations that many of the documents were stolen from government agencies and private organizations.
>
> No documents will be returned, or can be returned, until such a determination can be made.

[Continued]

A third possible reason, and the most troublesome as a matter of policy, is that the documents were evidence of crimes—whether additional evidence of the crimes charged, or evidence of other crimes committed by the defendants then before the court, or even evidence of crimes committed by persons not charged in the instant proceedings or then before the court. Of course, copies of the documents can be made available by the court to appropriate law enforcement authorities; no one disputes that here. But public access is more bothersome. Wholesale public access even of materials apparently relevant to criminal activity does not allow for the safeguards of the criminal process as to what is admissible evidence and what is not.[114] As to potential defendants not involved in the proceeding, or even as to evidence of other crimes of the same defendants, premature publication can taint future prosecutions to the detriment of both the

---

[113] [Continued]

Transcript of proceedings, Church of Scientology of Cal. v. United States, Civ. No. 79-2975, Nov. 2, 1979 at 52, Church App. Doc. 11.

However, in considering the presumptive owner's right to return of seized property this court cautioned in United States v. Wilson, 540 F.2d at 1104:

> It goes without saying, that if the Government seeks to forfeit the property a proper proceeding should be instigated to accomplish that purpose. A claim by the owner for the return of his property cannot be successfully resisted by asserting that the property is *subject* to forfeiture. If the property is subject to forfeiture, appropriate proceedings should be started expeditiously.

(citation and footnote omitted) (emphasis in original).

[114] In *Nixon*, 438 U.S. 589, the tapes sought had already been carefully screened *in camera* for their relevance to the crimes charged, *see* Nixon v. United States, 418 U.S. 683, 715-716 (1974); United States v. Mitchell, 386 F. Supp. at 642, and had been introduced in evidence during trial of the charges. See note 97, *supra*.

government and the defense. If the additional evidence be merely cumulative evidence of the same criminal acts on which the disposition agreement was based, public access would seem to serve little purpose, except perhaps if and when the materials are relied upon in sentencing.[118]

It is, however, possible to conjure up exceptional cases. For example, there may be cases where massive scale crimes would go unpunished if documents were not released to permit the public to take the steps necessary to ensure prosecution. Release for this reason might be considered justifiable under circumstances where the integrity of the law enforcement process would be substantially served by permitting public access: for example, where a governmental failure to prosecute in the light of overwhelming probable cause substantially impugns the integrity of the prosecutorial function. Another circumstance where access might be thought warranted is where the remedies of grievously injured and unknowing victims would be jeopardized if the documents never entered the public domain. Whether the trial judge justified unsealing on these or other bases is unclear. We think it incumbent on Elm to identify the reasons for his action with respect to the particular documents at issue.

C. *Particularized Privacy Interests Which May Weigh in Favor of Denying Public Access*

To be weighed against the particularized reasons which may justify public access are the particularized privacy or other interests that the Church or the individual de-

---

[118] *See generally* FED. R. CRIM. P. 32(c)(3). *But see* McLauchlan, *Privacy and the Presentence Report*, 54 IND. L. J 347 (1979).

fendants may assert.[116] Some of these interests have already been weighed by the trial judge.

In his order of October 30, denying reconsideration of the earlier unsealing order, Judge Richey explained:

> The defendants cite instances in which documents discuss the sex lives of members of the Church, tax returns of individuals, and attorney-client material of law firms. In order to make certain that such material, which would violate rights of innocent third-parties is not released, the Court will examine the documents at issue and will keep under seal those documents or portions of documents which would result in an unwarranted invasion of privacy. Of course such an exercise will be time consuming; however, fairness requires such a procedure.[117]

The kinds of interests cited by the defendants below do not, we think, exhaust the types of particularized privacy interests that might be asserted in the supplemental proceedings, nor do we think that the privacy interests to be protected are limited to those of "innocent third-parties." Valid privacy interests might be asserted either by the Church or by the individual defendants in documents as to which they (or Church members if the Church proceeds representatively) could assert a privilege

---

[116] As suggested above, the potential for prejudice inherent in the documents' release must be assessed with specific reference to the documents' contents. The possibility of prejudice is thus another "particularized" interest which may be asserted to deny public access.

In the district court neither the Church nor the individual defendants attempted to itemize their interests in particular documents. Given the time constraints under which their arguments were fashioned and presented and the extremely large number of documents at issue, this is understandable.

[117] United States v. Hubbard, Cr. No. 78-401, slip op. at 6 (Oct. 30, 1979), Hubbard App. at 228.

against evidentiary use[119] or in documents which reveal the intimate details of individual lives, sexual or otherwise,[120] whether or not they concern "innocent third parties." Other valid privacy interests might also be asserted; we do not decide now which are valid and which are not.

IV. The Procedures to Be Followed in the Supplemental Proceedings

We contemplate that on remand the district court will review its decision to unseal the documents. In doing so, the court should bear in mind: the Supreme Court's injunction that judicial officers attempt to minimize the

---

[119] Evidentiary privileges serve to protect at least some aspects of the amorphous concept of privacy. *See* McCormick's Handbook of the Law of Evidence 157 (2d ed. E. Cleary ed. 1972):

> [P]rivileges have survived largely unaffected by . . . [the criticisms of] eminent scholars and jurists who saw them as suppressing the truth, for it is evident that for many people, judges, lawyers and laymen, the protection of confidential communications from enforced disclosure has been thought to represent rights of privacy and security too important to relinquish to the convenience of litigants.

[120] Concerning privacy tort actions against the press, Professor Emerson has suggested that

> protection . . . be extended only to matters related to the intimate details of a person's life: those activities, ideas or emotions which one does not share with others or shares only with those who are closest. This would include sexual relations, the performance of bodily functions, family relations, and the like.

Emerson, *The Right of Privacy and Freedom of the Press*, 14 Harv. C. R.—C. L. L. Rev. 329, 343 (1979). However, as noted earlier, he has also suggested a broader scope of protectible privacy against governmental activity. *See* note 44, *supra*.

intrusiveness of document searches;[12] and 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.

The record does not permit us to determine how the trial judge's analysis of the generalized interests at stake differed from our own, nor whether he may have justified disclosure on the basis of the "particularized" factors we suggest or on some other basis. If, upon reconsideration in light of our analysis, the trial judge determines to abide by his unsealing order in whole or in part, the reasons relied upon should be identified in a supplemental rationale with specific reference to the particular documents or group of documents to which each reason is applicable.

This supplemental rationale should be supplied to the parties, including the Church. The defendants on their own behalf and the Church on behalf of itself and its constituent members may then, by motion for reconsideration and accompanying affidavit, contest the reasons given in the supplemental rationale and articulate any particularized privacy interest they wish to assert with respect to a document that is to be released. The district court may then grant or deny the motions in whole or in part. It may be that where both the public interest in access and the private interest in non-disclosure are strong, partial or redacted disclosure would satisfy both interests. Such portions of the supplemental rationale, responses thereto and any order on reconsideration that are revealing of the contents of the documents at issue should be filed under seal. The record of the supple-

---

[12] Andresen v. Maryland, 427 U.S. at 482, n.11.

mental proceedings should that be transmitted to this court where our consideration of the orders will continue.[121]

V. Conclusion

We vacate the orders denying intervention and temporary injunctive relief, appealed in Nos. 79-2313 and 79-2324;[122] stay the unsealing orders appealed in No. 79-2312 and remand the record for the proceedings which we direct. This division of the court retains jurisdiction over the matter and orders all documents here at issue sealed pending our decision following remand.

So ordered.

---

[121] It is in the nature of our judicial process that we decide only the few questions presented by the facts of the case before us. This case presents narrow questions which we have undertaken to answer above. Nevertheless, we are acutely aware of the proximity, gravity and difficulty of several questions not answered. In particular, we wish to emphasize that we do *not* decide: (1) The rights of defendants or any third party to exclude the public from the courtroom conduct of a criminal case or from the records of the trial of criminal charges; (2) The public right of access to seized materials used for any purpose other than to demonstrate on a motion to suppress, the unlawfulness of the search; and (3) The procedural and substantive rights of third parties who seek to assert a privacy interest in materials not compulsorily taken from their persons or premises.

[122] For the reasons given, *supra*, 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 documents seized.

subsistance, commissions, reimbursement for personal expenses, and other emoluments, potentially falling within the rationale of Founding Church of Scientology v. United States, 412 F.2 1197 (Ct. Cl. 1969).

(f) Substantial commercial activity within the meaning of Better Business Bureau v. United States, 326 U.S. 279 (1945) and Scripture Press Foundation v. United States, 285 F.2d 800 (Ct. Cl. 1961).

(g) The deductibility of amounts described as "charter mission expense."

(h) The deductibility of payments to the Central Defense and Dissemination Fund (U.S. Church of Scientology Trust).

22. In addition to the foregoing, the Service's Audit Report raises doubts and questions with respect to (a) the use by the United States Churches of Scientology Trust of Swiss and Luxembourg bank accounts as the depositories for millions of dollars of trust funds; (b) the application and control of the Trust's funds; (c) the maintenance of large amounts of currency belonging to petitioner aboard the ship Apollo for an extended period of time; and (d) the degree of control still effectively exercised by L. Ron Hubbard over petitioner's affairs and policies.

23. A draft of a Technical Advice Memorandum (prepared in respondent's National Office during February 1977 and revised in March 1977) contains the recommended conclusion that, although petitioner is a religious organization, it has failed

MACKINNON, *Circuit Judge, dissenting*: To my mind the majority opinion confuses privacy with secrecy. The majority resolve this appeal by remanding the record for clarification by the district court of the grounds on which it removed the seal on documents introduced into evidence by the defendants at the suppression hearing. The majority accompanies its disposition with a stay forbidding further disclosure of the evidentiary documents until this panel, which retains jurisdiction over the appeal, issues a further order regarding them.

My dissent from this disposition is based on my conclusion that the disclosure was not only warranted, but required. I also find the record sufficiently detailed to support the action taken by the district court, making this remand unnecessary. Finally, I disagree with the court that the Church of Scientology of California[1] is entitled to intervene in the criminal proceedings.

I

The facts are fully set forth in the court's opinion and, except for several which bear emphasis, will not be repeated here.

The source of the documents which are the subject of this appeal was the seizure from the Church of Scientology of California, at two Los Angeles locations. Copies of the 50,000 pages seized were transmitted to Washington, D.C. for consideration by the trial court to determine the validity of the search against the contention that it was a constitutionally impermissible general search. There is no disagreement on the court that the legal effect of requesting the trial court to examine the entirety of the seized materials was that they became part of the "record" of the case. Slip Op. at 13 (quotation marks in

[1] Hereinafter sometimes referred to as the "Church" or "Church of Scientology."

originally. I agree with the factual conclusion of the majority that this reflects the contemporaneous understanding of the parties and the district court.[2]

In the criminal proceedings involving individuals who are employees or officials of the Church of Scientology, the trial court adopted a disposition of the charges that conformed to the negotiated plea agreement. Just before rendering guilty verdicts after a bench trial, the judge ordered that all seized documents which the defendants had caused to be admitted into evidence on the earlier suppression motion, and which had not been earlier returned as unnecessary to the prosecution or used in the examination of witnesses at the suppression hearing, be made available for public inspection. Attempts to stay the disclosure were ineffectual in the district court, before a motions division of this court, and before this Court *en banc*. Thereafter, the Chief Justice of the United States, acting as Circuit Justice, also denied an application for a stay. The disclosure of the documents was the question involved in such proceedings and the same issue is raised here a second time.

II

This proceeding reaches the court in a posture where the public disclosure of all the documents has continued

[2] The Church of Scientology attempted to impose an "agreement" on the trial court to retain the documents under seal. If the action taken was within the parameters of the trial court's inherent power over the proceedings before it, as I conclude, then the wishes of the defendants, even if acceded to by the government, did not in any way restrain the court. Parties do not by their agreements limit the powers of the court. Nor do parties "contract" with the court, as the record reflects the criminal defendants attempted to do. Parties legitimately, of course, make requests of the court through the medium of motions, which are applications for an order. That should not be confused with a power to dictate the actions of the court.

until the present date. The majority now orders that the documents be sealed to prevent public access. Further disclosure is prohibited pending review by this court after remand. I dissent from that disposition because there is an ample factual and legal basis for the order of the district court making such evidentiary documents available as court records in the case.

A

At the outset it is essential to consider the posture of the case when the judge removed the seal from the documents. The original claim by the defendants was that the search was illegal. This claim was based upon the allegedly overbroad language of the search warrant. In this respect the search warrant in California was the same as the one in the District of Columbia which had been held to be valid. *In Re Search Warrant Dated July 2, 1977*, 572 F.2d 321 (D.C. Cir. 1977), *cert. denied sub nom. Founding Church of Scientology v. United States*, 435 U.S. 925 (1978). In *Church of Scientology v. United States*, 591 F.2d 533 (9th Cir. 1979), *cert. denied* 100 S. Ct. 729 (1980) the court noted that "A similar warrant was obtained for a search of part of a building owned by the Founding Church of Scientology in Washington, D.C. The *affidavits in support of the warrants were substantially identical, and so were the warrants,* except for descriptions of the premises to be searched." (Emphasis added) 591 F.2d at 538. Nevertheless, the defendants in the criminal trial continued to press the claim by a motion to suppress. When the District Court in this Circuit, Judge Richey, ruled against the suppression motion all the evidence in the seized documents, in effect, became admissible as evidence against them. Apparently recognizing the probative force of such evidence to prove their guilt the defendants shortly thereafter entered guilty pleas as follows:

Sharon Thomas: Theft of government property—Count 17

Gerald Bennett Wolfe: Conspiracy—Count: 22

Cindy Raymond: Conspiracy—Count 23

Mitchell Hermann: Conspiracy—Count 1

Richard Weigand: Conspiracy—Count 23

Gregory Willardson: Conspiracy—Coun: 23

Duke Snider: Conspiracy—Count 23

Henning Heldt: Conspiracy—Count 23

Mary Sue Hubbard: Conspiracy—Count 23

Thus, the ruling on the motion to suppress effectively caused the disposition of the case and under normal court procedures the record upon which the court ruled would become available to the public almost as a matter of course. A different situation would exist if the seized documents had not been introduced into evidence, but they had—*all* of them. The Church contends that the documents had been introduced under seal "for the purpose of showing that the search and seizure was *unlawful*." They were admitted by the court as being *relevant* for that purpose. But the court ruled that such documents did *not* prove the search to be unlawful. The documents thus are at the core of the court's decision denying the suppression motion and it is customary and ordinary in such cases for the record to disclose the evidentiary basis for the ruling. And there is nothing to the point, that since the court ruled the search was *lawful*, and the documents had been offered by the defendants to prove the search was *unlawful*, that the documents upon which the court ruled may not be disclosed.

B

Additionally, there is nothing to the point that the Church has a different interest from the defendants.

The individual defendants were not acting for themselves. They were acting for the Church. As charged in the indictment the Church of Scientology was organized with "a department known as the 'Guardian's Office' [which] had responsibility to promote the interests of Scientology by *covertly* identifying, locating, and obtaining all Scientology-related information in the possession of various individuals, government agencies and private organizations. Each of the Guardian Offices was composed of five bureaus including the Information Bureau which was assigned the responsibility for the conduct of *covert* operations including the collection of data and documents of interest to Scientology." (Emphasis added).

Individual defendants, including the wife of the head of the world wide Church, held official positions in the Guardian Office, United States, of the Church of Scientology as listed below in the column entitled "Positions".

Individuals	Approximate Periods	Positions
Henning Heldt	Nov. 21, 1973-June 20, 1977	Deputy Guardian US (DG US)
Duke Snider	March 1974-Dec. 1, 1974	Deputy Guardian—Information US (DG I US)
	Dec. 1, 1974-June 20, 1977	Deputy-Deputy Guardian US (DDG US)
Richard Weigand	Dec. 1, 1974-May 15, 1977	Deputy Guardian—Information US (DG I US)
Gregory Willardson	Sometime 1974-Jan. 1, 1976	Information Bureau Branch 1 Director US
	Jan. 1, 1976-June 16, 1977	Deputy-Deputy Guardian Information US (DDG I US)
	June 16, 1977-June 20, 1977	Deputy Guardian Information US (DG I US)

Individuals	Approximate Periods	Positions
Mitchell Hermann a/k/a Mike Cooper	Jan. 1, 1974-March 1, 1975	Branch I Director, Guardian's Office, DC
	Jan. 1, 1976-March 1, 1977	Southeast US Secretary, Guardian's Office, US (SEUS SEC.)
Cindy Raymond	June 1, 1974-Jan. 1, 1976	Information Bureau Collections Officer US
	Jan. 1, 1976-Sept. 1, 1976	Information Bureau Branch I Director US
	Sept. 1, 1976-June 20, 1977	Information Bureau National Secretary US
Gerald Bennett Wolfe	Nov. 18, 1974-June 30, 1976	Covert Operative for Guardian Office in Internal Revenue Service
Mary Sue Hubbard	Nov. 21, 1973-May 27, 1977	Controller and Commodore Staff Guardian (CSG) supervising Guardian Office
Sharon Thomas	Feb. 29, 1976-Nov. 5, 1976	Covert Operative for Guardian Office in Department of Justice

The offense alleged in the first count to which Hermann plead guilty was an unlawful conspiracy "to commit offenses against the United States of America, that is, by various illegal and unlawful means, to locate and obtain illegally information and documents in the possession of the United States of America which were related to Scientology and to individuals, organizations and agencies perceived to be enemies of Scientology."

The conspiracy alleged in count 23 to which six (6) other officials of the Church of Scientology plead guilty had as its alleged objectives:

(a) to obstruct justice in violation of Title 18, United States Code, Section 1503;

(b) to obstruct a criminal investigation in violation of Title 18, United States Code, Section 1510;

(c) to harbor and conceal a fugitive from arrest in violation of Title 18, United States Code, Section 1071;

(d) to make false declarations in violation of Title 18, United States Code, Section 1623;

Thus, most of the defendants were *principal officers* of the Church and it was their activities as official "Guardians of the Church that generated most of the documents in question. That is the nature of the charges against the defendants and their guilty pleas are sufficient substantiation of the basic charges as the court noted in its order of December 7, 1979: "Each of the five defendants has admitted his or her guilt in open court. Moreover, never has this Court been faced with such overwhelming evidence of guilt." (JA 243).

Moreover, a corporation is responsible for the acts of its officers and agents committed within the scope of their authority. *E.g., United States v. Sherpix*, 512 F.2d 1361, 1367 n. 7 (D.C. Cir. 1975) I would thus not find the Church to have any separate interest in the seized documents. In addition some of the documents were admittedly stolen. Actually both the Church's officers and the Church have the same intent—concealment of the same improper activity.

C

Had not the trial judge ordered the release of the documents the complaint would have been loudly asserted that he had unconstitutionally restricted access to an essential basis for his decision in violation of the First Amendment. The important public interest in assuring the proper conduct of judicial proceedings would also have

been compromised by retaining a sealed record in a case where the materials had been an integral part of a judicial determination on a motion to suppress. Absent unsealing the record, there would have been no means to determine the basis for the trial court's ruling denying the defendant's claim of unlawfulness. Absent unsealing of the record, vital public information which had been involved in a serious and important judicial proceeding would have been unavailable for public inspection. In short, the trial judge was placed in a position where either action he elected in regard to the sealed documents would have been criticized. In my view, the only proper action was to remove the seal on the documents the court found *not* to support the defendants' claim that the search was unlawful.

D

Judicial proceedings are not secret in our society. Indeed, the judiciary scrupulously requires that all participants in a judicial proceeding be given equal access to the court, and that, particularly in criminal cases, the proceedings be open to the public, with severely limited exceptions. Where, as in this case, the criminal proceedings had been effectively completed, and the trial was to the court, there was no danger of adverse publicity affecting the rights of the defendants which might militate against an open proceeding. *See Gannett Co., Inc. v. Pasquale*, 61 L.Ed. 2d 608 (1979). Moreover, the defendants' guilty pleas had resolved all doubt as to their criminal conduct as reflected in the documents.

This leaves us with the question of the harm to the petitioning party, from whose premises the documents were seized, resulting from disclosure of the documents.[8]

---

[8] There is the additional issue of the Church's right to intervene in a pending criminal proceeding. That question is addressed in part III of this dissent, *infra*.

That, in turn, must necessarily be balanced against the harm to the important public policies favoring disclosure.

The Church of Scientology of California asserts that the seizure of documents from church buildings in Los Angeles necessarily demonstrates a sufficient interest in the question of the validity of the search to entitle the Church to intervene in the pending criminal proceeding involving only individual defendants. That contention has some appearance of reasonableness, but it does not withstand scrutiny.

Any assessment of the correctness of the trial court's action must acknowledge the fact that a number of the documents quite simply do not belong to the Church of Scientology of California in the first place. Indeed, certain of the documents belong to others and were obtained through illegal means. In addition to United States Government documents admittedly stolen from the Department of Justice (Count 17), an *amicus curiae* brief filed in this court on behalf of two Florida newspapers states that certain of the documents belong to it, and were stolen from its lawyers. The newspapers have waived all privacy rights in the materials. *Brief for Amici Curiae Times Publishing Co., and Clearwater Newspapers, Inc.* at 5. This waiver does not in itself resolve the issue involved in this appeal but it serves to identify some of the documents and to emphasize that the Church of Scientology wants secrecy not privacy. These two concepts are related only in the result they effectuate; their motivations are decidedly different.

The court by ordering this remand, and reimposing a seal, is ordering secrecy, despite its recognition of the "country's tradition of access to records of a judicial proceeding." This issue is best resolved by reference to the decision in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1977) where the Supreme Court addressed the question of access to court records:

> "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. . . .
>
> "It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.
>
> "It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the *decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.*"

(footnotes omitted) (emphasis added).

The Supreme Court has recently affirmed the public nature of criminal trials. In his opinion for the Court, in *Richmond Newspapers, Inc. v. Virginia*, —— U.S. ——, No. 79-243 (July 2, 1980), the Chief Justice stated "a presumption of openess inheres in the very nature of a criminal trial under our system of justice." Slip Op. at 16. In *Richmond Newspapers* the Supreme Court held that the public has a First Amendment right to attend a criminal trial, except in extraordinary circumstances where a closed proceeding is necessary to assure the defendant a fair trial.

Collectively, these decisions establish the clear and historically based presumption favoring public trials. The record of a trial is no less a part of the proceeding than the actual examination of witnesses. Where, as here, the controversy presented to the court was limited to a single

major issue—the validity of the search—and where the defendants contended that their claim of *invalidity* was proven by *all* the documents they caused to be admitted into evidence, making the documents available in the public record becomes even more important. Absent such access, the public's opportunity to assess the validity of the courts ruling as applied to these criminal defendants would be virtually nonexistent. (1) The central issue in the suppression proceedings, and (2) the factual basis for the acceptance of the plea bargain agreement, would be obscured from the public and the press. The confidence of the public in the judicial process, and the constitutional right of access to criminal proceedings, requires upholding the action of the trial court in this case.

The requirement for public *disclosure* of the evidentiary record in a court proceeding which results in a judicial ruling naturally flows from the constitutional requirement that the trial be public. Even though a motion to suppress may not be a "trial" there is no difference in the ultimate requirement that the *record* be public. A judicial proceeding cannot be said to be public if the public be denied access to the evidence admitted as relevant to the issues before the court. *It is as important to public disclosure of judicial proceedings that the public be able to read written evidence in the record as it is that they be able to hear oral testimony.*

One objective of a public trial of universal benefit to the public and defendants is that it prevents justice from being administered covertly or based on "secret bias or partiality." *Id.*, p. 12. It also protects judges from being improperly charged with bias, corruption or misapplication of the law. Had the motion to suppress been granted there is no question that the evidentiary record would have been available to the public, and it is just as available when the motion is denied.

The majority states that it cannot determine from the trial Judge's orders what factors entered into the decision to unseal, or whether he had appropriately balanced the generalized interests. The record does not support such criticism. The trial judge made explicit reference to his reasoning at the time he ordered the unsealing. The Court's order of October 25, 1979 stated:

> [T]his Court firmly believes that there is a right in the public to know what occurs before the courts. In addition, there is a public interest in access to Court records. As Justice Brandeis once said, sunshine is the best disinfectant. (JA 171)

Regardless of the references to the public right "to know" and sunshine being "the best disinfectant", the statement that "there is a public interest in access to Court records" is a correct statement and an adequate basis for decision. In fact, it could have been stated more forcibly as a "public right in access to Court records." Cf., *Richmond Newspapers, supra.* I would accordingly follow:

> the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct "although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran*, 302 U.S. 238, 245.

Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 88 (1943).

Necessarily inherent in the unsealing by the court was its decision to review the documents and specifically exclude those which were highly personal. This was done. Following the extraction of such personal documents the *remaining* documents involved in the suppression decision were unsealed to place them in the public record. The assertion that the learned trial judge did not thoroughly review the documents in their entirety is unsupported by the record, and is a complete unjustifiable assumption since the court's order explicitly acknowledged the need

to examine the record in its entirety despite the time intensive nature of the review.[4]

III

On remand of this case, the Church of Scientology of California will be allowed to participate as an intervenor. In my view such action is incorrect because it interferes with a pending criminal case, and because the Church's claim regarding the documents can be made in other proceedings.

By definition, the parties to a criminal proceeding are the government and the defendants. By definition, the issues in a criminal proceeding are concerned with the guilt or innocence of the defendants. While other issues ancillary to that central question of criminal responsibility are often involved, it is essential that pending criminal cases not be inhibited by the resolution of issues remote from the main case, particularly those involving parties other than the government and the criminal defendants. *E.g., In the Matter of An Application for a*

---

[4] In a memorandum dated October 30, 1979, filed in response to the defendants motion for reconsideration of the unsealing order the trial judge expressly stated that during the suppression hearing "*all* of the documents seized in Los Angeles were put into evidence by the defendants." (JA 223, 224) (emphasis in original) That same order makes an explicit reference to the need to review the entirety of the material relating to "sex lives of members of the Church, tax returns of individuals, and attorney-client material of law firms." JA 228. The final paragraph of the memorandum states that it is

"FURTHER ORDERED, that the seal shall remain on documents not used by the parties for examination of witnesses at the suppression hearing *until the Court examines each in light of issues raised by the defendants, and, the Court will begin such process today.*" JA 228 (emphasis added).

Search Warrant of Wiltron Associates, Ltd., 49 F.R.D. 170, 172 (S.D.N.Y. 1970).

The Church of Scientology is entitled to bring an action posited on the federal court's general supervisory power over federal law enforcement officials for a return of the property, or it may make application in the court where the criminal proceedings were pending. *United States v. Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976). These provide sufficient alternatives so that intervention in a pending criminal case should not be allowed. The majority is creating an unfortunate precedent which will unnecessarily obstruct criminal trials and greatly increase the already difficult case load which federal district courts must process. Accordingly, I dissent from allowing the Church of Scientology of California to intervene in a pending criminal proceeding to litigate its asserted interest in the seized documents.

IV

This appeal will again be before this panel after the learned trial judge has, in accordance with the court's opinion, explicated any *additional* reasons he may have had for removing the seal, and performed whatever further documentary review is required. Because the appeal is resolveable as it is presented to us, I respectfully dissent from the remand ordered by the court. Because in my view the court acted properly in opening the record to the public, I dissent from the sealing of the evidentiary documents. And because the trial court correctly denied the Church of Scientology of California leave to intervene in a pending criminal proceeding to assert collateral issues I dissent from the court's disposition of the remand issue.

UNITED STATES TAX COURT

CHURCH OF SCIENTOLOGY OF CALIFORNIA, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	Docket No. 3352-78

RESPONDENT'S MEMORANDUM CONCERNING REASONABLENESS AND REGULARITY OF DEFICIENCY NOTICE

N. JEROLD COHEN
Chief Counsel
Internal Revenue Service

OF COUNSEL:
EMORY L. LANGDON
Regional Counsel
PAUL G. WILSON
MARTIN D. COHEN
Attorneys
300 No. Los Angeles St.
P.O. Box 2031, Main P.O.
Los Angeles, CA 90053
Tel. No. (213) 688-4636

pending request for technical advice and certain problems raised by it. For a period of months thereafter, representatives of the parties exchanged views, by phone, correspondence and oral conferences, respecting issues raised by respondent upon the basis of the parties' audit reports.

The issues and adjustments which either were raised in the reports or discussed by the parties, or both, include the following:

(a) The accumulation of progressively increasing and substantial amounts of income [$3,367,873.91 by December 31, 1974], not expended for religious or other exempt purposes.

(b) Inurement to a privately-owned, Panamanian corporation ["OTC"] by reason of currency-exchange gains, amounting to $879,615.63, for the years 1971-1974, on funds belonging to petitioner.

(c) Some $470,000.00 paid by United Kingdom and Danish Scientology Churches directly to OTC during the years 1971-1974, but seemingly representing income to petitioner which was not accounted for in petitioner's filed Forms 990.

(d) Petitioner's failure to treat as current income for the audited years advanced payments in the following amounts:

Year	Cash received as advanced payment
1971	$ 786,704.96
1972	1,198,763.86
1973	1,635,786.00
1974	2,194,588.00

(e) Inurement to L. Ron Hubbard and his family, during the years 1971-1974, in the form of royalties, salaries,

(3) That it was petitioner's policy to commit and to attempt to commit acts so repugnant to public policy as to vitiate any tax exempt status for which it otherwise might qualify.

(4) That part of petitioner's net earnings inure to the benefit of certain individuals, L. Ron Hubbard and members of his family.

(5) That part of petitioner's net earnings inure to the benefit of certain private shareholders of OTC, a corporation for profit.

Despite petitioner's efforts to alter the outward appearance of things in order to escape the force of the opinion in Founding Church of Scientology v. United States, 412 F.2d 1197, (Ct. Cl. 1969), certiorari denied, 397 U.S. 1009, cumulative evidence was developed and is described in the Service's Audit Report establishing prima facie, that the inurement described in The Founding Church case continued unabated in the years 1970-1974, inclusive. The evidence of inurement to Hubbard includes, but by no means is it limited to, his receipt of royalties amounting, by 1974, to $194,087.37 annually; 2/ his possession of keys to a chest aboard the Apollo containing millions in cash; 3/ his receipt of checks purportedly reimbursing him for "research," without documentation that such

2/ Service Audit Report, Page 89.

3/ Id. page 80.

research related to petitioner's exempt purpose; 4/ the power, exercised by him on July 30, 1972, to direct a Swiss Bank to cash "on my behalf" checks drawn on the Church's Trust fund and on seemingly related but unexplained accounts in very large amounts; 5/ and the fact that he and his family without cost to themselves lived aboard the Apollo in the manner one might expect the "Commodore" and his family to enjoy. 6/

It well may be that petitioner's evidence at the trial will explain away the foregoing indicia of inurement. But how can it be seriously argued that respondent acted arbitrarily in view of such evidence, particularly with The Founding Church case on the books as a precedent? In like manner, the substantial currency exchange profits earned by O.T.C. on funds belonging to petitioner reasonably support a finding of inurement to O.T.C. and its shareholders.

In respondent's view, and as further support for the reasonableness of the statutory determination, the commercial activity of petitioner permeates its entire operation. It includes such features as extensive advertising and solicitation of business; the payment of commissions to persons who produce customers; the granting of discounts; an ever-increasing accumulation of earnings; granting first priority to the customer who makes the largest advance cash payment, rather than the one in greatest need of petitioner's services;

4/ Id. page 116.

5/ Id. page 79 and Exhibit 82.

6/ Id. pp. 94, 116-117.

and the use of drastic, insensitive procedures for the collection of delinquent accounts.

A good example of petitioner's profit-motivated commercialism can be found on pages 120-121 of the Service's Audit Report, where reference is made to 5000 sets of OEC volumes [The Organization Executive Course written by L. Ron Hubbard] which cost petitioner $190,000.00 to print, and whose sales value is $1,500,000.00. Is it unreasonable to view a mark-up factor of 789% as indicative of profit-motivated commercialism?

The remaining grounds for determining that petitioner does not qualify for tax exemption did not come to respondent's attention until more than a year after the Service Audit Report was completed.

However, by December 1977, there was reason to believe that high ranking Scientologists had conspired to commit crimes and perform serious anti-social acts, and that they did so in obedience to policies adopted by petitioner. If criminal convictions for such offenses were to eventuate, as seemed possible at the time, their impact on petitioner's qualifications under section 501(c)(3) would have to be carefully weighed.

In the hope of avoiding "massive litigation," respondent sought petitioner's consent to extend the period of limitation beyond December 31, 1977. Petitioner refused to do so. Respondent, in order to protect the revenue, issued the deficiency notice on December 28, 1977. Since then petitioner's highest ranking officials have been convicted of serious felonies.

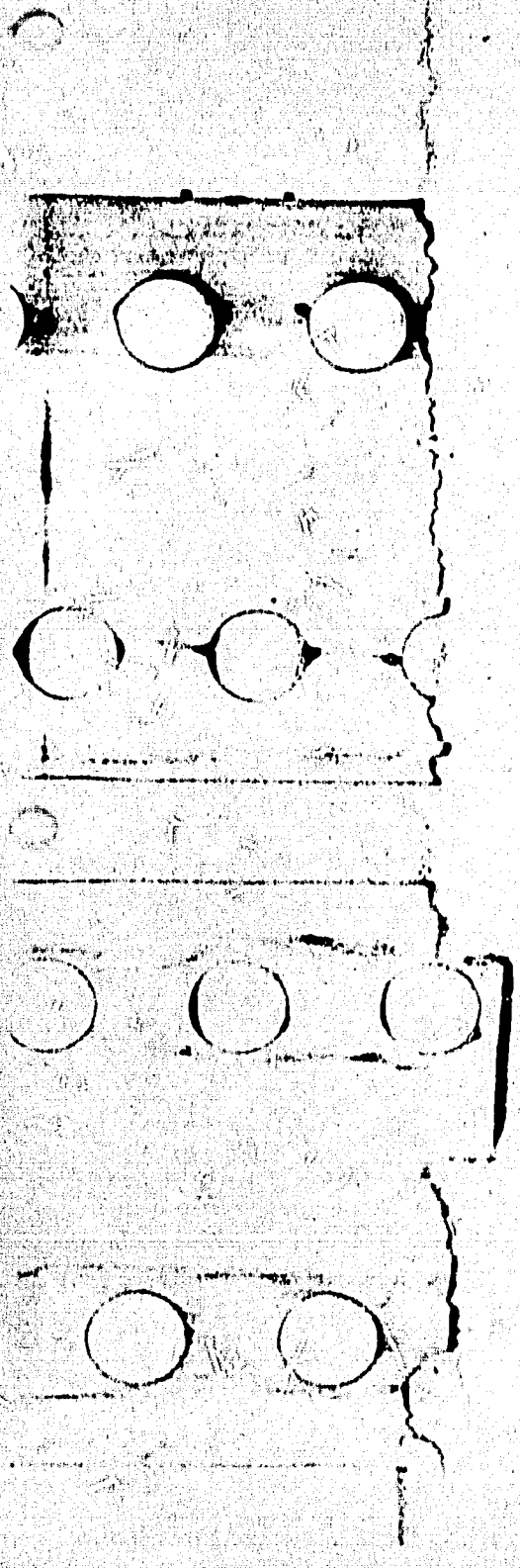
US v MSH

p 19 def of "the documents at issue" only unsealed and not part of record

p 56 limitation re public's prin access

p. 66 grievously injured st. to access

p. 67 - Cite collateral - client privilege for documents stolen from law firms



was not so pervasive as to transform the private agency into a federal instrumentality for purposes of an employee's claim of due process violations. As a private employer, defendant UCCAC was not bound by the due process clause of the Fifth Amendment. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961), and therefore, this claim must also be dismissed for lack of subject matter jurisdiction.[12]

Conspiracy claim under § 1985

[4] Plaintiff also asserts that defendants conspired to deprive him of his right to due process of law and bases this claim on 42 U.S.C. § 1985[13] and its jurisdictional counterparts 28 U.S.C. § 1343(1) and (2).[14] For the reasons hereinafter stated, we also dismiss this claim.

Neither the facts alleged nor the evidence before us provides any basis for a § 1985 claim. To the contrary, it is undisputed that the Board of Directors, in December, 1975 and in January, 1976, provided plaintiff with several opportunities to rebut the charges against him in a trial type hearing. Inasmuch as the Board provided these opportunities to plaintiff, the plaintiff cannot now claim that the Board's decision in May to deny his request for a hearing was the result of a conspiracy.

Moreover, the plaintiff does not claim, nor do the facts suggest, a "class-based invidiously discriminatory animus" on the part of defendants, required as an element of a § 1985(3) cause of action.[15] *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); *Weise v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975). Rather, plaintiff's complaint indicates only that opposition to plaintiff among the staff and Board members was based on opposition to plaintiff's job performance.[16]

Therefore, we conclude that plaintiff's claim of conspiracy must be dismissed for failure to state a claim upon which relief can be granted.

SO ORDERED.

12. Our finding that UCCAC was a private employer makes it unnecessary to consider whether the Board which originally fired plaintiff was illegally constituted. Even if plaintiff was not validly terminated until the reconstituted board acted, his due process claims still fail because UCCAC, as a private employer, was not subject to the requirements of the due process clause.

13. This section provides in relevant part:

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U.S.C. § 1985 (1974).

14. These sections provide in relevant part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;"
28 U.S.C. § 1343(1), (2) (1976).

15. Plaintiff's allegations are devoid of any suggestion that racial discrimination was a factor in his termination.

16. See Plaintiff's complaint, ¶ ¶ 19-29.

CHURCH OF SCIENTOLOGY OF CALIFORNIA and Founding Church of Scientology of Washington, D. C., Plaintiffs,

v.

James SIEGELMAN, Flo Conway, J. B. Lippincott Company and Morris Deutsch, Defendants.

No. 79 Civ. 1166 (GLG).

United States District Court, S. D. New York.

Aug. 27, 1979.

Religious organization brought defamation suit against authors, publisher, and a former member of the organization, and defendants counterclaimed for prima facie tort, abuse of process, and conspiracy to deprive defendants of their constitutional rights. The District Court, Goettel, J., held that: (1) statements which were made by defendant authors and which were replete with opinions and conclusions about methods and practices used by religious organization and the effect such methods and practices had, recounts of what authors had been told during the course of their investigation, and some unflattering factual statements did not go beyond what one would expect to find in a frank discussion of a controversial religious organization, which was a public figure, and thus such statements could not be the basis for religious organization's defamation action; (2) fact issue existed as to whether defamatory statements of fact made by former member of religious organization were made with actual malice, precluding summary judgment as to that defendant; and (3) counterclaim sufficiently alleged cause of action against plaintiff religious society for prima facie tort; however, defendants' counterclaim failed to allege cause of action for abuse of process and conspiracy to deprive defendants of their constitutional rights.

Order accordingly.

1. Constitutional Law ⇐84

Testing in court the truth or falsity of religious beliefs is barred by the First Amendment; courts must remain neutral in matters of religious doctrine and practice, avoid involvement in affairs of any religious organization or group, and resist the making of any type of ecclesiastical determination. U.S.C.A.Const. Amend. 1.

2. Constitutional Law ⇐84

Where alleged defamation relates to secular matters and where issues can be resolved by neutral principles of law, the First Amendment does not bar a defamation suit brought by a religious organization. U.S.C.A.Const. Amend. 1.

3. Constitutional Law ⇐84

The First Amendment did not bar defamation suit brought by religious organization, since the allegedly defamatory remarks did not, on their face, relate to the validity of religious beliefs or practices, but dealt with the allegedly debilitating physical and psychological effects certain actions by the religious organization had upon its members. U.S.C.A.Const. Amend. 1.

4. Libel and Slander ⇐73

Religious organization was not precluded from bringing defamation suit merely because it was an association and not an individual.

5. Libel and Slander ⇐48(1)

Plaintiffs that were component parts of a large worldwide religious movement which claimed to have over 5 million adherents, which had taken affirmative steps to attract public attention, and which had actively sought new members and financial contributions from the general public were "public figures," and were thus required to prove that defendants made statements knowing them to be false, or with reckless disregard as to whether they were false or not, in order to recover in their defamation suit.

See publication Words and Phrases for other judicial constructions and definitions.

6. Federal Civil Procedure ⇐2515

In defamation suit brought by religious organization against coauthors of a book, publisher of the book, and a former member of the organization, fact issue existed as to whether the allegedly defamatory remarks were made with actual malice.

7. Libel and Slander ⇐123(1)

In defamation action, whether a particular statement itself could constitute a fact or an opinion is a question of law to be determined by the court.

8. Libel and Slander ⇐6(1)

Statements which were made by defendant authors and which were replete with opinions and conclusions about methods and practices used by religious organization and the effect such methods and practices had, recounts of what authors had been told during the course of their investigation, and some unflattering factual statements did not go beyond what one would expect to find in a frank discussion of a controversial religious organization, which was a public figure, and thus such statements could not be the basis for religious organization's defamation action.

9. Federal Civil Procedure ⇐2515

In defamation action brought by religious organization, fact issue existed as to whether defamatory statements of fact made by former member of religious organization were made with actual malice, precluding summary judgment as to that defendant.

10. Conspiracy ⇐18
Process ⇐171
Torts ⇐26(1)

Counterclaim filed by authors and publisher named defendants in defamation action sufficiently alleged cause of action against plaintiff religious organization for prima facie tort; however, defendants' counterclaim failed to allege cause of action for abuse of process and conspiracy to deprive defendants of their constitutional rights.

Cohn, Glickstein, Lurie, Ostrin & Lubell, New York City, for plaintiffs by Jonathan W. Lubell and Audrey J. Isaacs, New York City, of counsel.

Clark, Wulf, Levine & Peratis, New York City, for defendants Siegelman and Conway by Melvin L. Wulf, New York City, of counsel.

Lester, Schwab, Katz & Dwyer, New York City, for defendant Lippincott by Patrick A. Lyons, New York City, of counsel.

Rosner & Rosner, New York City, for defendant Deutsch by Jonathan Rosner, New York City, of counsel.

OPINION

GOETTEL, District Judge:

In this latest libel action brought by the plaintiffs, two branches of the litigious Church of Scientology,[1] motions have been made by the various defendants to dismiss the complaint for failure to state a claim upon which relief may be granted, Fed.R.Civ.P. 12(b)(6), for judgment on the pleadings, Fed.R.Civ.P. 12(c), and for summary judgment, Fed.R.Civ.P. 56. The plaintiffs have cross-moved to dismiss the counterclaims raised against them.

The defendants Siegelman and Conway are the co-authors of the book *Snapping: America's Epidemic of Sudden Personality Change*, which was published by defendant J. B. Lippincott Company in 1978. In this book the authors attempt to explore what they describe as the "phenomenon . . . [of] sudden and drastic alterations of personality," investigating in the process the effects on personality of the techniques used by many of the current religious "cults" and mass-marketed self help therapies. Included among the many groups studied and commented upon was the

1. A lexis scan provided this Court of reported decisions in the United States courts in which the Church of Scientology was a party revealed the existence of thirty such cases. *See* Exhibit C, Motion of Defendant Deutsch to Dismiss Complaint, for Judgment on the Pleadings, or for Summary Judgment Dismissing the Complaint.

...logy.[3] The plaintiffs now ...cluded among the passages ...lating to the Church of Scien... number of highly defamatory

...ublication of *Snapping*, and ...f the interest generated by it, ... generally, the defendant Sie... ...g with the defendant Deutsch, ...nber of the Church of Scientol... ...d as guests on the syndicated ...gram "The David Susskind ...laintiffs allege that during ...the program both of these ...response to certain questions ...efamatory comments about ...he plaintiffs additionally as... ...defamatory remarks were ...man and Conway in an in... ...was published in *People*

...n the instant action, the ...tology of California, which ...California as a non-profit, ...tion, and the Founding ...gy of Washington, D.C., ...ashington, D.C. as a ... corporation, are part of ...ntology religion of which ...rt there are more than ...rs, over three million of ... States. Numerous local ...ntology are located ...ed States and in vari... ...s.[4] The plaintiffs as... ...ividual churches have ...ed by the defendants' ...tatements, and that as ... to function as a non... ...as been seriously im... ...s now seek damages ...ndants.

...*Snapping* covers two... ...ges, only seven and one... ...fically with the Church

...d took part in the dis... ...any of the television ...defendants in this ac...

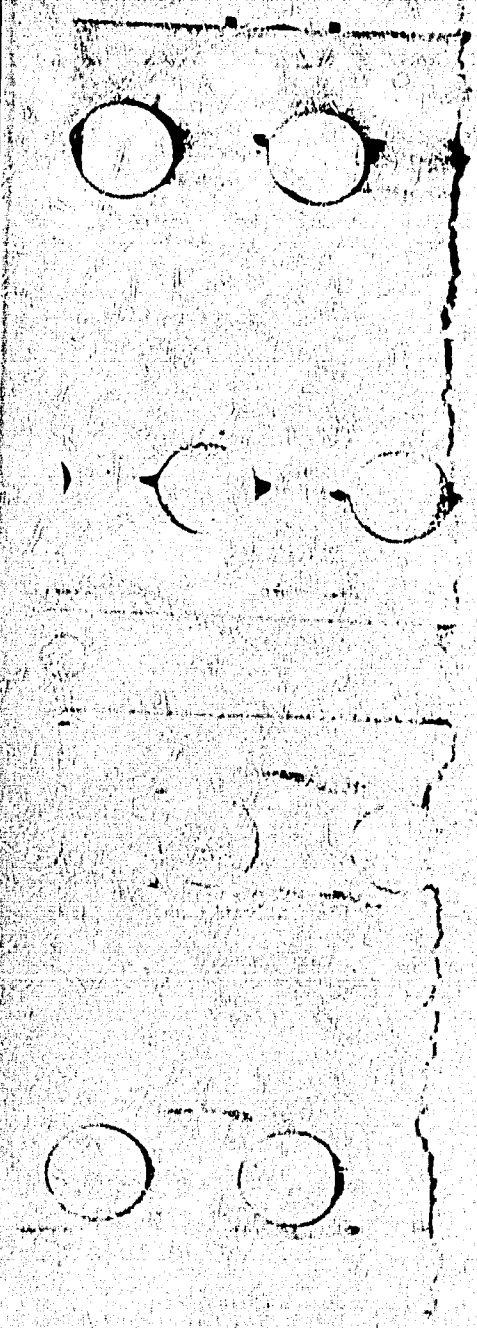
The defendants have alleged a number of grounds upon which the complaint should be dismissed. They first assert, characterizing this action as one concerning statements of religious practice and beliefs, and citing to a long line of Supreme Court cases, that this suit is barred by the free exercise and establishment clauses of the First Amendment.[5]

[1] It is well established that "testing in court the truth or falsity of religious beliefs is barred by the First Amendment." *Founding Church of Scientology v. United States*, 133 U.S.App.D.C. 229, 243, 409 F.2d 1146, 1156 (D.C.Cir.1969). *See United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944). Courts must remain neutral in matters of religious doctrine and practice, *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), avoid involvement in the affairs of any religious organization or group, *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977), *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), and resist the making of any type of ecclesiastical determination, *Presbyterian Church in the United States v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969), *see Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1975). As has been noted, the First Amendment rests "upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum v. Board of Education*, 333 U.S. 203, 212, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948).

[2] The defendants assert that this doctrine of non-entanglement with religion bars the bringing of a libel action by a religious denomination, such as the Church

4. Apparently all of these local churches are separately incorporated in a state in which they conduct their activities.

5. The First Amendment states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, ..." U.S.Const. Amend. 1.



of Scientology,[6] when the alleged libel relates to the validity of religious beliefs and practices. The Court agrees that where validity of religious beliefs are at issue involvement by the judiciary would be inappropriate. *See Cimijotti v. Paulsen*, 230 F.Supp. 39 (N.D.Iowa, 1964). It does not follow from this, however, that simply because a religious organization is a party to an action that that action should be immediately categorized as a theological dispute. Where the alleged defamation relates to secular matters, and where the issues can be resolved by neutral principals of law, no First Amendment bar exists. As was noted by the Supreme Court in a somewhat different context, "[c]ivil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property." *Presbyterian Church in the United States v. Hull Memorial Presbyterian Church*, 393 U.S. at 449, 89 S.Ct. at 606.

[3] In the instant action the alleged defamatory remarks do not, on their face, relate to the validity of religious beliefs or practices. Rather, these statements deal with the alleged debilitating physical and psychological effect certain actions by the Church of Scientology have upon its members. While the Court will be vigilant to avoid any entanglement with theological questions should they arise, at this time no such questions are presented. Accordingly, the Court finds that the free exercise and establishment clauses to the First Amendment are no bar to this action.

[4] Having determined that this action is not precluded by the free exercise and establishment clauses, the Court must next turn to more traditional defamation concerns and determine whether the plaintiff churches constitute public figures within the doctrine of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).[7]

In *New York Times* it was held that a public official could not recover in defamation absent proof that the defendant made the statement knowing it to be false, or with reckless disregard as to whether it was false or not. This standard of proof has been extended so as to apply to public figures as well as public officials. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). Thereafter, the Supreme Court, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789 (1974), attempted to define the ways in which a person could become a public figure:

"For the most part those who attain this status have assumed roles of especial

6. In *Founding Church of Scientology v. United States*, 133 U.S.App.D.C. 299, 409 F.2d 1146 (D.C.Cir.1969), the court held, in view of the plaintiff's having made out a *prima facie* case that Scientology was a religion, and of the defendant's decision not to contest such a characterization, that for the purposes of that action the Church of Scientology was to be treated as a religion entitled to the protection of the free exercise clause. None of the defendants in the instant action have, as of this time, challenged the plaintiffs' description of themselves as religious institutions.

7. The defendants have also asserted that, since the plaintiffs are religious associations and not individuals, their rights to compensation for damages is non-existent, and that therefore the action should be dismissed. The Court, however, finds no merit to this claim for, while it is true that the great majority of defamation cases have been brought by individuals to protect their reputation, *see, e. g., Herbert v. Lando*, — U.S. —, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 1057, 43 L.Ed.2d 773 (1976), corporations have also been allowed to maintain such actions. *See, e. g., Friends of Animals, Inc. v. Associated Fur Manufacturers*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790, 390 N.E.2d 298 (1979); *Cole Fischer Rogow, Inc. v. Carl Ally, Inc.*, 29 A.D.2d 423, 288 N.Y.S.2d 556 (1st Dep't. 1968). In *Cole Fischer Rogow, Inc., supra* at 427, 288 N.Y.S.2d at 562, it was held that for a corporation to recover in defamation it was necessary that:

"the language used must tend directly to injure plaintiff in its business, profession or trade, and must 'impute to the plaintiff some quality which would be detrimental, or the absence of some quality which is essential to the successful carrying on of his office, profession or trade.'"

Thus, if the plaintiffs, after having established the liability of any or all of the defendants, can meet the *Cole Fischer* test and show direct figures they would then be entitled to compensation for damages.

prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."

[5] Applying this standard to the facts of the instant action the Court finds the plaintiffs, the Church of Scientology of California, and the Founding Church of Scientology of Washington, D.C., to be public figures. The plaintiffs are component parts of a large world-wide religious movement which claims to have over five million adherents. Unlike the plaintiff in *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976),[8] the instant plaintiffs have taken affirmative steps to attract public attention, and actively seek new members and financial contributions from the general public.[9] See *James v. Gannett*, 40 N.Y.2d 415, 386 N.Y.S.2d 871, 353 N.E.2d 834 (1976). As was found in regards to another religious institution (the Gospel Spreading Church) this Court believes the Church of Scientology to be "[a]n established church with substantial congregations . . . [which] seeks to play 'an influential role in ordering society.'" *Gospel Spreading Church v. Johnson Publishing Co.*, 147 U.S.App.D.C. 207, 208, 454 F.2d 1050, 1051 (D.C.Cir.1971). The Church of Scientology has thrust itself onto the public scene, and accordingly should be held to the stringent *New York Times* burden of proof in attempting to make out its case for defamation. See *Church of Scientology v. Cazares*, 455 F.Supp. 1978); *Church of Scientology v. Dell Publishing Co., Inc.*, 362 (N.D.Cal.1973).[10] See also *Friendmals, Inc. v. Associated Fur Manuals, Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d N.E.2d 298 (1979).

[6] Holding the plaintiffs to the *New York Times* burden of proof, however, does not resolve the issue before the Court. The defendants Deutsch and Lippincott[11] (defendants Siegelman and Conway have not joined in this motion) assert that the plaintiffs cannot satisfy the requirement of proving actual malice, and that therefore summary judgment should be granted. They further state that such summary disposition is particularly appropriate, and in fact may be "the 'rule' and not the exception," *Guitar v. Westinghouse Electric Corp.*, 396 F.Supp. 1042, 1053 (S.D.N.Y. 1975), in defamation actions, and is necessary so as to prevent the litigation from having any potentially chilling effect on the exercise of free speech. See *Bon Air Hotel v. Time, Inc.*, 426 F.2d 858, 864 (5th Cir. 1970); *Oliver v. Village Voice, Inc.*, 417 F.Supp. 235 (S.D.N.Y.1976).

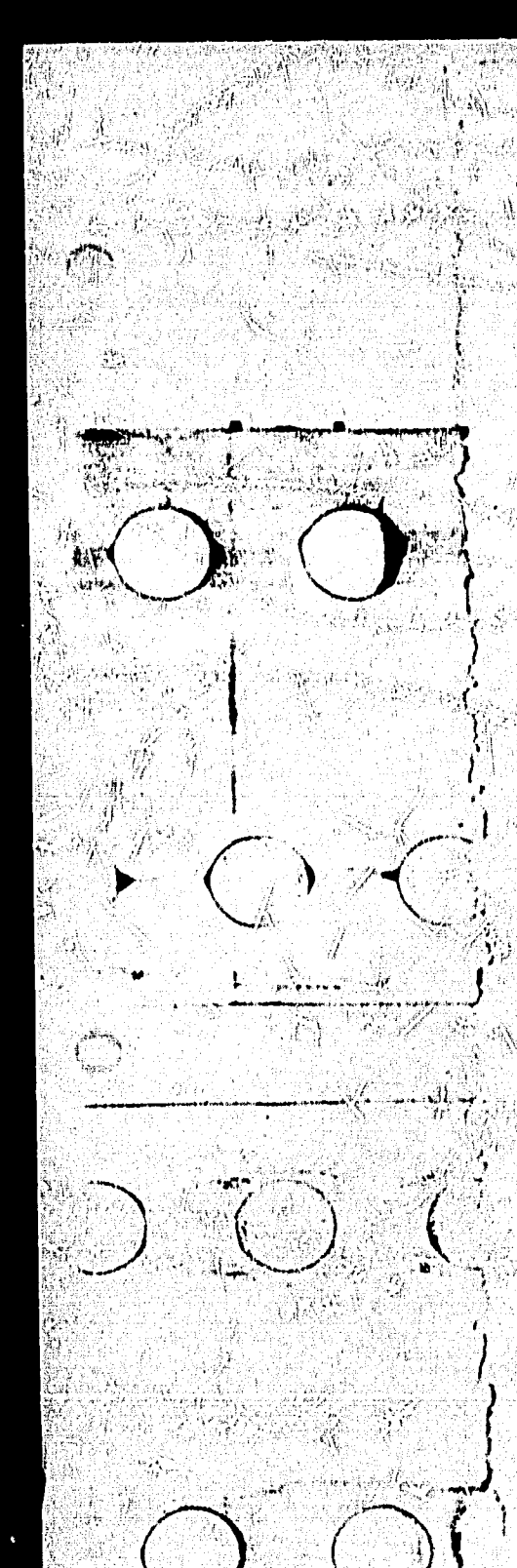
The Court is similarly concerned over the damaging effect a frivolous suit could have upon the exercise of First Amendment rights. The propriety of granting summary judgment where actual malice has been alleged, however, has been cast into great doubt by the Supreme Court's recent pronouncement in *Hutchinson v. Proximire*, — U.S. ——, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979). In its decision the Court noted

8. In *Firestone* it was held that a prominent socialite involved in a heavily publicized (with extensive media coverage) divorce action was not a public figure since such publicity had been involuntarily obtained as a result of the plaintiff being "compelled to go to court by the State in order to obtain legal release from the bonds of matrimony." *Id.* at 454, 96 S.Ct. at 965.

9. The plaintiffs, in order to attract both contributors and new adherents to their religion, utilize street-side solicitations, distribute large amounts of printed matter, and send unrequested literature through the mails.

10. In *Dell Publishing Co.* the court, although not directly addressing the public figure issue, applied the *New York Times* actual malice standard in determining the motion before it.

11. The plaintiffs assert that as a result of defects in the defendant Lippincott's moving papers, such papers should not be treated as ones for summary judgment (but simply as additions to the papers moving to dismiss the complaint.) In view of the Court's disposition of this motion, however, there is no need to reach this question.



its doubt as to the validity of the "so-called 'rule' that summary judgment is more appropriately granted in defamation actions than in other types of suits, and stated that "[t]he proof of 'actual malice' calls a defendant's state of mind into question, *New York Times v. Sullivan*, 376 U.S. 264, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and does not readily lend itself to summary disposition."

The plaintiffs have alleged that the defamatory remarks were made with actual malice and that therefore the *New York Times* standard can be met. While the supporting material submitted as to this point is far from convincing, the plaintiffs have managed to place the defendants' state of mind into question, and, in view of the Supreme Court's statement in *Proximire*, the Court does not believe it appropriate to grant summary judgment at this time. This determination is made, however, without prejudice to any future motion being made after additional discovery has been conducted.[12]

[7] Finally, the defendants argue that even if the Court does not accept their theoretical arguments as to the free establishment and exercise clauses, or as to the lack of actual malice, it must still dismiss the complaint because the alleged defamatory statements either are not libelous, or constitute expression of opinion. In this regard it has been held that "[u]nder the First Amendment there is no such thing as a false idea," *Gertz v. Robert Welch*, 418 U.S. at 339, 94 S.Ct. at 3007, and thus an opinion, "[h]owever pernicious" cannot be the basis for an action in defamation. *See Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976). Whether a particular statement is held to constitute a fact or an opinion is "a question of law," *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 381, 397 N.Y.S.2d 943, 950, 366 N.E.2d 1299, 1306 (1977), to be determined by the Court. *See Letter Carriers v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).

The plaintiffs have alleged in their complaint the utterance of twenty-three defamatory statements by the various defendants: ten by Siegelman, Conway and Lippincott arising from the publication of *Snapping*, and contained in count ten; one by Siegelman, contained in count eighteen, and eight by Deutsch, contained in count nineteen, arising from the Susskind interview; and four by Siegelman and Conway arising from the People magazine interview, and contained in count twenty-seven. After careful examination of these statements the Court finds that many of them are clearly either non-libelous, or statements of opinion, and thereby may not be the basis for an action in defamation.

[8] Turning first to the allegations against Siegelman, Conway and Lippincott contained in count ten, the Court can find nothing in these statements capable of rising to the level of a malicious false utterance necessary for recovery in defamation. These statements are replete with opinions and conclusions about the methods and practices used by the Church of Scientology and the effect such methods and practices have,[13] recounts of what the authors had been told during the course of their investigation,[14] and some unflattering, though not

12. In light of the Court's ultimate determination as to the action against defendants Siegelman, Conway, and Lippincott, *see infra*, any such subsequent motion would, of course, only apply as to defendant Deutsch.

13. *See, e. g.*, ¶ 10(d) of the complaint:
"In our opinion, however, Scientology does not lead people beyond faith to absolute certainty—it leads them to levels of increasingly realistic hallucination. The crude technology of auditing is a direct assult on human feeling and on the individual's ability to distinguish between what he is actually experiencing and what he is only imagining. The bizarre folklore of Scientology is a tour de force of science fiction. . . ."

14. *See, e. g.*, ¶ 10(B) of the complaint:
"It may also be one of the most powerful religious cults in operation today: The tales that have come out of Scientology are nearly impossible to believe in relation to a religious movement that has accumulated great credibility and respect around the world in less than twenty-five years. It has also gathered an estimated 3.5 million followers. Nevertheless, the reports we have seen and heard in the course of our research, both in the media and in personal interviews with former Scientology high-

defamatory, factual statements.[15] None of these statements go beyond what one would expect to find in a frank discussion of a controversial religious movement, which is a public figure, and thus none of these statements may be the basis for an action in defamation.

Similarly, the alleged utterances in counts eighteen and twenty-seven cannot survive judicial scrutiny. After examining the defamatory language attributed to Siegelman in count eighteen the Court finds it to be a statement of opinion, albeit a rather negative one, by the defendant about the plaintiff, and thus not actionable. As to the alleged defamation contained in count twenty-seven the Court once again finds the statements to be a mix of opinion and unflattering, but non-defamatory, factual statements, none of which is actionable.

[9] Turning finally to the alleged defamatory remarks made by defendant Deutsch on the Susskind show, the Court finds that questions exist which preclude disposition at this time. The statements attributed to Deutsch are, unlike the ones attributed to the other defendants, defamatory statements of fact. Deutsch asserts as a defense both that he believes the statements to be true, and that, in any event, they were all made without actual malice. He also asserts that the statements alleged were not addressed to these plaintiffs but rather to Scientology in general, and thus that these plaintiffs were neither defamed nor damaged. Finally, he claims that the utterances in the complaint were so edited and placed out of context as to be thoroughly misleading. These defenses, however, raise questions of fact which cannot be decided at this time. *See Proximire v. Hutchinson*, ___ U.S. ___, 99 S.Ct. 2675, 61 L.Ed.2d 411.

Accordingly, the motion to dismiss of defendants Siegelman and Conway, and the motion to dismiss of defendant Lippincott, are hereby granted. The motion of defendant Deutsch is, at this time, denied.[16]

[10] Having thus disposed of the defendants' motions, the Court next turns its attention to the plaintiffs' motion to dismiss the counterclaims for *prima facie* tort, abuse of process, and conspiracy to deprive the defendants of their constitutional rights,[17] which have been alleged against them.

---

er-ups, are replete with allegations of psychological devastation, economic exploitation, and personal and legal harassment of former members and journalists who speak out against the cult."

15. *See, e. g.*, ¶ 10(C) of the complaint:

"But for the casual customer choosing among a vast assortment of currently available techniques for self-betterment, the Scientology procedure is well-known, attractive, and inexpensive to begin. The auditing process takes place in private sessions between subject and auditor, in which the subject's emotional responses are registered on a device called an E-meter, a kind of crude lie detector. The subject holds the terminals of the E-meter in his hands, and the rise or fall of electrical conductivity in response to the perspiration emitted from the palms is explained as a measure of emotional response to the auditor's course of questioning. The average response registers in the normal range on the meter, with abnormal indicating an overreaction, "uptightness," or sign of trauma on the part of the subject.

The goal of auditing is to bring all the individual's responses within the range of normal on the E-meter. Using a technique that bears only superficial resemblance to the popular method of biological regulation known as biofeedback, the individual watches the E-meter and follows precise instructions given by the auditor to learn how to reduce his emotional response to the auditor's questions about past and painful experiences. When the individual has mastered this ability, he becomes eligible for admission to the elite club of Scientology clears."

16. Although the Court feels constrained, in view of the *Proximire* footnote, to deny the motion of defendant Deutsch at this time, should it be ultimately determined that this suit was brought without cause, or for the purpose of harassment, the Court will not hesitate to order the imposition of counsel fees upon the plaintiff. *See Nemeroff v. Abelson*, 469 F.Supp. 630 (S.D.N.Y.1979).

17. The defendant Deutsch had initially also alleged a counterclaim based upon 42 U.S.C. § 1983. Upon the plaintiff's bringing of the instant motion, however, the defendant chose, quite correctly in view of the facts of this case, to consent to the dismissal of this claim.



It has been held that in order to be liable for a *prima facie* tort a party must be found guilty of having inflicted intentional harm, resulting in damages, without legal excuse or justification, by an act or series of acts which would otherwise be lawful. *Sommer v. Kaufman*, 59 A.D.2d 843, 399 N.Y.S.2d 7 (1st Dept., 1977). In the instant action, the defendants allege that the plaintiffs, acting with malice and without excuse or justification, brought this lawsuit solely for the purpose of punishing the defendants for their expression of adverse opinions about Scientology, and that as a result they have suffered monetary damages. Proof of such intentional infliction and resulting damage would establish a *prima facie* tort, *Rager v. McCloskey*, 305 N.Y. 75, 111 N.E.2d 214 (1953), and would thereupon shift the burden to the plaintiffs who would have to prove that such conduct was privileged. While the facts before the Court at this stage of the litigation are sparse, it is certainly not clear, contrary to the plaintiffs' claim, that the defendants will not be able to meet their burden of proof. Accordingly, the motion to dismiss this counterclaim is denied.

The defendants' second counterclaim alleges "abuse of process" by the plaintiffs. Abuse of process has been defined as the "misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process." *Board of Education of Farmingdale v. Farmingdale Classroom Teachers Assoc.*, 38 N.Y.2d 397, 400, 380 N.Y.S.2d 635, 639, 343 N.E.2d 278, 280 (1975).[18] The defendants allege that the plaintiffs so abused process when they served each defendant with a summons and complaint for the sole purpose of harassing, discouraging and intimidating them from further criticizing Scientology. Upon close examination, however, the Court believes that while such allegations may succeed in a suit for malicious prosecution (brought after a successful termination of this litigation), they are insufficient to sustain a cause of action for abuse of process. *Hoppenstein v. Zemek*, 62 A.D.2d 979, 403 N.Y.S.2d 542 (2d Dep't. 1978) (the mere institution of a civil action by summons and complaint is not legally considered such process as is capable of being abused and thereby does not afford a basis for a cause of action for abuse of process). The plaintiffs' motion to dismiss the defendants' counterclaims for abuse of process is granted.

The defendants' final counterclaims allege that the plaintiffs, along with other not-for-profit corporations and organizations affiliated with the Church of Scientology, have engaged in a conspiracy to deprive a class of individuals, of whom the defendants were a part, (described essentially as consisting of critics of the Church of Scientology),[19] of their constitutionally-protected rights in violation of 42 U.S.C. § 1985(3). The plaintiffs have moved to dismiss, asserting that such class was not formed on the basis of any invidious criteria, and thus that the defendants cannot satisfy the prerequisites for maintaining a section 1985 action. *Griffen v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); *Jacobson v. Organized Crime and Racketeering, etc.*, 544 F.2d 637 (2d Cir.), *cert. denied*, 403 U.S. 955, 97 S.Ct. 1599, 51 L.Ed.2d 804 (1977). Although the Court finds this to be a close issue, we conclude that this vague and amorphous alleged class was not formed on the basis of any invidious criteria. *See Rodgers v. Tolson*, 582 F.2d 315 (4th Cir. 1978) (critics of city commissioners not a valid class); *Harrison v. Brooks*, 519 F.2d 1358 (1st Cir. 1975) (residential property owners who own adjacent residential land illegally crossed by industrial access driveways not a valid class); *Kimble v. D. J. McDuffy, Inc.*, 445

18. In this regard it has been noted that even a pure spite motive is insufficient to show abuse of process where process is used only to accomplish the result for which it was created. See Prosser, *Law of Torts*, § 121 (4th ed. 1971).

19. Defendant Deutsch characterized the class as consisting of members and former members, and persons disseminating information about, the Church of Scientology.

F.Supp. 389 (E.D.La.1978) (oil industry workers who had made any prior claim for personal injuries not a valid class).[28] In addition, the defendants have not even made a minimal showing that the two plaintiffs, as opposed to the world-wide Scientology movement in general, have conspired with each other for the purpose of depriving the putative class of their constitutional rights. Accordingly, the plaintiffs' motion to dismiss the defendants' counterclaim based upon 42 U.S.C. § 1985(3) is hereby granted.

Conclusion

The action against defendants Siegelman, Conway and Lippincott is hereby dismissed. The motion of defendant Deutsch is denied, without prejudice, however, to a subsequent motion upon completion of additional discovery. The plaintiffs' motion to dismiss all counterclaims is denied in part and granted in part.

The Clerk will enter judgment dismissing the action against defendants, Siegelman, Conway, and Lippincott.

SO ORDERED.

28. For cases which have found a valid class for § 1985 purposes, see *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975); *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975), *vacated as moot*, 507 F.2d 215 (5th Cir. 1975); *Selzer v. Berkowitz*, 459 F.Supp. 347 (E.D.N.Y.1978); *Bradley v. Clegg*, 403 F.Supp. 830 (E.D.Wis.1975).

Tommie W. TAYLOR and Larry C. Peyton, Plaintiffs,

v.

TELETYPE CORPORATION, Defendant,

James H. Bibbs, Ike Bolden, Virginia Burke, Bowman Burns, Jr., Fred Donley, Ray Jackson, Ray Kennard, Will Simmons, William Walker, James Walters, Jr., Cato Conley, Joseph Harris, Earl Jones, and Godfrey Hill, Intervenors.

No. LR-C-77-65.

United States District Court, E. D. Arkansas, W. D.

Aug. 29, 1979.

Plaintiffs brought employment discrimination suit, alleging discrimination in employment based on race. The District Court, Arnold, J., held that: (1) plaintiffs made prima facie case with respect to black employees demoted between February 28, 1974, and the end of 1976 but failed to make a prima facie case with respect to demotions in 1977, 1978, and 1979; (2) employer rebutted certain employee's prima facie case with respect to first demotion but not second demotion and subsequent layoff; (3) evidence established that certain employee's demotion was based at least in part on his race; (4) employer rebutted prima facie case with respect to other employee's demotion, and (5) employer rebutted prima facie case of discrimination with respect to employee who was terminated for excessive absences.

Ordered accordingly.

1. Civil Rights ⇐44(1)

In employment discrimination suit, plaintiffs made prima facie case with re-

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

No. 9583

BETWEEN:

CHURCH OF SCIENTOLOGY MISSION OF EDMONTON, CHURCH OF SCIENTOLOGY MISSION OF CALGARY, AND CHURCH OF SCIENTOLOGY MISSION OF OLD STRATHCONA,

Plaintiffs

- and -

EVELYN HAMDON, LES JACKMAN, LORNA LEVETT, BETTY McCOY, BRENDON MOORE, WILLIAM REID, NEOL TAYLOR, and DAVID WALLACE,

Defendants

ORAL JUDGMENT

of The Honourable Mr. Justice Agrios

THE COURT: I am cognizant of the well established rule that one must be extremely cautious in departing from the general rule that costs to be awarded to a successful litigant are to be taxed as between party and party on the basis of an authoritative and well recognized tariff.

Having reviewed the history of these proceedings, I am of the view that the case at bar is

the rare and exceptional case in which costs should be awarded on a solicitor/client basis rather than on a party/party basis.

Counsel for the Plaintiffs has referred to two recent decisions of our Court, firstly by Chief Justice Sinclair in McCarthy vs Board of Trustees of Calgary Roman Catholic Separate School District No. 1, and secondly by Mr. Justice Kirby, in Mobil Oil Canada v Canadian Superior Oil.

The general principles are recited in both decisions. Both of these cases went to trial and it was held that the difficulty and complexity of the proceedings is not of itself a reason for departing from the general rule. However, in the case at bar, the issue will never be tried. It is apparent that throughout the proceedings the Defendants and not the Plaintiffs were endeavouring to have the trial heard.

I need not repeat the entire and rather remarkable history of this case. The record submitted by counsel for the Defendants speaks for itself. The contempt of court, the failure to comply with innumerable court orders, the need to formally settle minutes of appeal; the entire conduct of the Plaintiffs is not one that should be countenanced by our courts.

In my view, the proceedings and the action of the Plaintiffs amounted to a clear abuse of process and accordingly, I award costs on a solicitor/client basis to the Defendants in the sum of $60,500 plus additional costs of this Applicant to be calculated in the same fashion as

the prior account submitted by the Defendants' solicitors to their clients.

Counsel for the Plaintiffs in a very pursuasive manner suggested it would be more appropriate to award cost on a party/party basis using a multiple of column five of schedule C of our Rules of Court. I can not, with respect, agree with this submission.

I did suggest that on the basis on a number of Ontario cases set out in the Defendants counsels' brief, and particularly as noted in the case of McGee vs the Ottawa Separate School Board, that there may be a distinction as to solicitor/client costs where there is evidence that they are being paid by a third party. It is not clear to me that such a distinction is appropriate in Alberta, however, counsel for the Plaintiff indicated in his view any such distinction would not apply in this case.

DELIVERED at Edmonton, Alberta,
the 6th day of October, A.D. 1980.

Mr. D.A. McGillivray
For the Plaintiffs,

Mr. C.D. Evans
Mr. K.E. Staroszik, and
Mr. H. Joffe
For the Defendants.

D. Johnson
kw/2

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

CHURCH OF SCIENTOLOGY MISSION OF EDMONTON, CHURCH OF SCIENTOLOGY MISSION OF CALGARY, and CHURCH OF SCIENTOLOGY MISSION OF OLD STRATHCONA

Respondents (Plaintiffs)

- and -

EVELYN HAMDON, LES JACKMAN, LORNA LEVETT, BETTY McCOY, BRENDON MOORE, WILLIAM REID, NEIL TAYLOR and DAVID WALLACE

Applicants (Defendants)

I hereby certify this to be a true copy of the original ... which is deemed to be a copy and dated this ... day of ... 19 ...
for Clerk of the Court

BEFORE THE HONOURABLE MR. JUSTICE J. AGRIOS IN COURT ON OCTOBER 6TH, 1980 AND IN PRIVATE CHAMBERS ON OCTOBER 21ST, 1980.

At the Court House, in the City of Edmonton, in the Province of Alberta, on Monday, the 6th day of October, 1980 and on Tuesday, the 21st day of October, 1980.

O R D E R

UPON THE APPLICATION of the Applicants (Defendants) for an Order to determine the quantum of costs in this action; AND UPON HEARING counsel for the Applicants (Defendants); AND UPON HEARING counsel for the Respondents (Plaintiffs);

IT IS HEREBY ORDERED THAT

1. The Court has jurisdiction to hear the application.

2. The Applicants (Defendants) are not entitled to call viva voce evidence.

3. The Applicants (Defendants) are entitled to the costs of this action as determined on the scale of solicitor/client.

4. The solicitor and client costs for the Defendants LORNA LEVETT, BETTY McCOY, BRENDON MOORE, WILLIAM REID, NEIL TAYLOR, DAVID WALLACE and LES JACKMAN are in the sum of $60,500.00.

AND UPON IT APPEARING that the Defendant LES JACKMAN had settled his pro rata share of the application for costs prior to the said hearings, solicitor/client costs in the sum of $60,500.00 are reduced by 1/7th and are hereby set in favour of the Defendants LORNA LEVETT, BETTY McCOY, BRENDON MOORE, WILLIAM REID, NEIL TAYLOR and DAVID WALLACE in the lump sum of $51,857.15.

5. The Applicants (Defendants) shall have the costs of this application calculated on a solicitor/client basis.

M.A. GRACOWSKI
Clerk of the Court of Queen's Bench of Alberta

Approved as being the Order granted

Solicitors for the Respondents
(Plaintiffs)

Entered this 27 day of October, 1980.

Clerk of the Court

ACTION NO. 95393 OCTOBER A.D. 1980

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

B E T W E E N :

CHURCH OF SCIENTOLOGY MISSION OF EDMONTON, CHURCH OF SCIENTOLOGY MISSION OF CALGARY, AND CHURCH OF SCIENTOLOGY MISSION OF OLD STRATHCONA

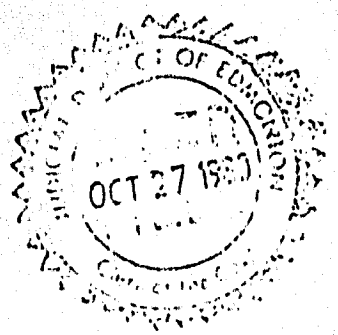
Plaintiffs
(Applicants)

- and -

EVELYN HAMDON, LES JACKMAN, LORNA LEVETT, BETTY McCOY, BRENDON MOORE WILLIAM REID, NEIL TAYLOR and DAVID WALLACE

Defendants
(Respondents)

O R D E R



MESSRS. WALSH YOUNG
Barristers and Solicitors
1500 Guinness House
Calgary, Alberta
T2P 0G8

File No. 5728

LEVEL 1 - 144 CASES

1. 79-529 CHURCH OF SCIENTOLOGY OF CA V. UNITED STATES, SUPREME COURT OF THE UNITED STATES, SLIP OPINION, JANUARY 21, 1980

2. NO. 78-1166. CHURCH OF SCIENTOLOGY OF CALIFORNIA ET AL. V. BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL., SUPREME COURT OF THE UNITED STATES, 441 U.S. 938, MAY 14, 1979

LEVEL 1 - 144 CASES

3. NO. 77-1568. MISSOURI CHURCH OF SCIENTOLOGY V. STATE TAX COMMISSION OF MISSOURI ET AL., SUPREME COURT OF THE UNITED STATES, 439 U.S. 803, OCTOBER 2, 1978

4. NO. 77-1090. FOUNDING CHURCH OF SCIENTOLOGY V. UNITED STATES., SUPREME COURT OF THE UNITED STATES, 435 U.S. 925, MARCH 20, 1978

5. NO. 76-523. CHURCH OF SCIENTOLOGY OF CALIFORNIA V. ALLARD., SUPREME COURT OF THE UNITED STATES, 429 U.S. 1091, FEBRUARY 22, 1977

6. DONALD C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE, PETITIONER V. "AMERICANS UNITED" INC., NO. 72-1371., SUPREME COURT OF THE UNITED STATES, 416 U.S. 752; 74-1 U.S.T.C. P9439, MAY 15, 1974, DECIDED

7. DONALD C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE, PETITIONER V. "AMERICANS UNITED" INC., NO. 72-1371., SUPREME COURT OF THE UNITED STATES, 416 U.S. 752, MAY 15, 1974, DECIDED

8. NO. 51, ORIG. FOUNDING CHURCH OF SCIENTOLOGY V. CROMER ET AL., 404 U.S. 803, NOV. 9, 1971.

LEVEL 1 - 144 CASES

9. NO. 1175. FOUNDING CHURCH OF SCIENTOLOGY V. UNITED STATES., 397 U.S. 1009, MAR. 30, 1970.

10. NO. 598. FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., ET AL. V. UNITED STATES., 396 U.S. 963, DEC. 8, 1969.

11. WYLLIE GATEWOOD, APPELLANT V. FIAT, S.P.A, ET AL, NO. 78-1578, UNITED STATES

UNITED STATES.; 396 U.S. 963; Dec. 8, 1969.

11. WILLIE GATEWOOD, APPELLANT V. FBI; I.R.A; ET AL; NO. 78-1578; UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT; SLIP OPINION; JANUARY 24, 1980

12. UNITED STATES OF AMERICA, APPELLANT, V. GEORGE ANTHONY PAPPAS, DEFENDANT, ELLEE.; NO. 78-1474; UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT; SLIP OPINION; DECEMBER 28, 1979; AS AMENDED JANUARY 25, 1980

13. UNITED STATES OF AMERICA AND ANTHONY CAPSANAPO, REVENUE AGENT, INTERNAL REVENUE SERVICE, PETITIONERS-APPELLEES, V. THE FREEDOM CHURCH AND REVEREND RICHARD M. DONCASTER, RESPONDENTS-APPELLANTS.; NO. 79-1281; UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, 80-1 U.S.T.C. P9132, DECEMBER 28, 1979

14. CHURCH OF SCIENTOLOGY OF CALIFORNIA, A NON-PROFIT CORPORATION, APPELLANT, V. UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM B. SAXBE, ATTORNEY GENERAL OF THE UNITED STATES; DRUG ENFORCEMENT ADMINISTRATION, APPELLEES.; NO. 78-2506; UNITED

STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, SLIP OPINION, NOVEMBER 8, 1979

15. CHURCH OF SCIENTOLOGY OF CALIFORNIA, A NONPROFIT CORPORATION, PLAINTIFF-APPELLANT, VS. UNITED STATES DEPARTMENT OF THE ARMY; HOWARD H. CALLAWAY, SECRETARY OF THE ARMY; U.S. INTELLIGENCE AGENCY; MAJOR AARON, ASSISTANT CHIEF OF STAFF FOR ARMY INTELLIGENCE, DEFENDANTS-APPELLEES; CHURCH OF SCIENTOLOGY OF CALIFORNIA, A NONPROFIT CORPORATION, PLAINTIFF-APPELLANT, VS. UNITED STATES DEPARTMENT OF DEFENSE; OFFICE OF THE SECRETARY OF DEFENSE; JAMES R. SCHLESINGER, SECRETARY OF THE DEPARTMENT OF DEFENSE; UNITED STATES DEPARTMENT OF THE NAVY; J. WM. MIDDENDORF II, SECRETARY OF THE NAVY; NAVAL INTELLIGENCE COMMAND; REAR ADMIRAL E. F. PECTANUS, DIRECTOR OF NAVAL INTELLIGENCE, DEFENDANTS-APPELLEES.; NO. 78-1168; NO. 78-1169, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 607 F.2D 1282, NOVEMBER 7, 1979

16. UNITED STATES OF AMERICA AND JOHN DEZELAR, REVENUE AGENT, INTERNAL REVENUE SEVICE, APPELLEES, V. LYLE MILLER, AS DIRECTOR AND TRUSTEE OF BASIC BIBLE CHURCH OF AMERICA, AND BASIC BIBLE CHURCH OF AMERICA, APPELLANTS.; NO. 79-1226, UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, 609 F.2D 336; 79-2 U.S.T.C. P9665; 44 AFTR 2D 79-6002, OCTOBER 30, 1979, FILED

17. THOMAS E. HAYDEN, APPELLANT V. NATIONAL SECURITY AGENCY/CENTRAL SECURITY SERVICE, ET AL; JANE S. FONDA, APPELLANT V. NATIONAL SECURITY AGENCY/CENTRAL

SECURITY SERVICE, ET AL.; NO. 78-1728; NO. 78-1729, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, 609 F.2D 1381, OCTOBER 29, 1979

18. FEDERAL ELECTION COMMISSION, APPELLEE V. COMMITTEE TO ELECT LYNDON LA ROUCHE, ET AL.; APPELLANTS, NO. 77-1887, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, SLIP OPINION, AUGUST 23, 1979

19. THE FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., INC., APPELLANT V. GRIFFIN B. BELL, ET AL.; NO. 78-1391, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, 603 F.2D 945, JUNE 25, 1979; AS AMENDED

20. LOUIS STUDS TERKEL, PLAINTIFF-APPELLANT, V. CLARENCE KELLY, EDWARD LEVI, FEDERAL BUREAU OF INVESTIGATION AND THE DEPARTMENT OF JUSTICE, DEFENDANTS-APPELLEES.; NO. 78-1315, UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, 599 F.2D 214, MAY 25, 1979

21. THE FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., INC., APPELLANT V. NATIONAL SECURITY AGENCY, ET AL.; NO. 77-1975, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, SLIP OPINION, MAY 15, 1979

22. CHURCH OF SCIENTOLOGY OF CALIFORNIA, A NON-PROFIT CORPORATION,

20. LOUIS (STUDS) TERKEL, PLAINTIFF-APPELLANT, V. CLARENCE KELLY, EDWARD LEVI, THE FEDERAL BUREAU OF INVESTIGATION, AND THE DEPARTMENT OF JUSTICE, DEFENDANTS-APPELLEES., NO. 78-1313, UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, 599 F.2D 214, MAY 25, 1979

21. THE FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., INC., APPELLANT V. NATIONAL SECURITY AGENCY, ET AL., NO. 77-1979, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, SLIP OPINION, MAY 15, 1979

22. CHURCH OF SCIENTOLOGY OF CALIFORNIA, A NON-PROFIT CORPORATION, PLAINTIFF-APPELLANT, V. UNITED STATES POSTAL SERVICE, BENJAMIN BAILER,

LEVEL 1 - 144 CASES

POSTMASTER GENERAL, POSTAL INSPECTION SERVICE, WILLIAM J. COTTER, CHIEF INSPECTOR, DEFENDANTS-APPELLEES., NO. 76-1610., UNITED STATES COURT OF APPEALS, NINTH CIRCUIT., 593 F.2D 902, MARCH 26, 1979.

23. CHURCH OF SCIENTOLOGY OF CALIFORNIA, PETITIONER-APPELLANT, V. UNITED STATES OF AMERICA, RESPONDENT-APPELLEE., NO. 78-2434., UNITED STATES COURT OF APPEALS, NINTH CIRCUIT., 591 F.2D 533, FEB. 22, 1979; AS AMENDED

24. MALMAK, ALAN B. AND EDWINA K. MALMAK; HARRY C. BOONE AND EVELYN M. BOONE; HARRY C. BOONE AND EVELYN M. BOONE AS GUARDIANS AD LITEM FOR THEIR INFANT SON DAVID; WILLIAM E. GURY AND MARGARET M. GURY; WILLIAM E. GURY AND MARGARET M. GURY, AS GUARDIANS AD LITEM FOR THEIR INFANT DAUGHTER LAURA JEAN; JOSEPH G. LERNER; JOSEPH M. DUFFY; REV. DR. SAMUEL A. JEANES; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, A NON-PROFIT CORPORATION; SPIRITUAL COUNTERFEIT PROJECT, INC., A NON-PROFIT CORPORATION; COALITION FOR RELIGIOUS INTEGRITY, AN UNINCORPORATED ASSOCIATION V. YOGI, MAHARISHI MAHESH; SPIRITUAL REGENERATION MOVEMENT FOUNDATION; WORLD PLAN EXECUTIVE COUNCIL - UNITED STATES AMERICAN FOUNDATION FOR CREATIVE INTELLIGENCE; MAHARISHI INTERNATIONAL UNIVERSITY; CHARLES F. LUTES; JEROME W. JARVIS; ROBERT B. KORY; JANET AARON; BOARD OF EDUCATION OF MAPLEWOOD - SOUTH ORANGE, NEW JERSEY SCHOOL DISTRICT; BOARD OF EDUCATION OF GLEN RIDGE, NEW JERSEY SCHOOL DISTRICT; BOARD OF EDUCATION OF WEST NEW YORK, NEW JERSEY SCHOOL DISTRICT; BOARD OF EDUCATION OF UNION CITY, NEW

LEVEL 1 - 144 CASES

JERSEY SCHOOL DISTRICT; NEW JERSEY STATE DEPARTMENT OF EDUCATION; NEW JERSEY STATE BOARD OF EDUCATION; FRED G. BURKE, AS NEW JERSEY COMMISSIONER OF EDUCATION; CHARLES WILSON; STATE OF NEW JERSEY; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; AND UNITED STATES OF AMERICA; DAVID MATHEWS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, WORLD PLAN EXECUTIVE COUNCIL - UNITED STATES, JEROME W. JARVIS, ROBERT B. KORY, AND JANET AARON, APPELLANTS., NOS. 78-1568 AND 78-1882, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 592 F.2D 197, FEBRUARY 8, 1979

25. ADELE HALKIN, ET AL., APPELLANTS V. RICHARD HELMS, DEPARTMENT OF STATE, ET AL., ADELE HALKIN, ET AL. V. RICHARD HELMS, DEPARTMENT OF STATE, ET AL. HAROLD BROWN, SECRETARY, DEPARTMENT OF DEFENSE IN HIS OFFICIAL CAPCITY, APPELLANT, NO. 77-1922; NO. 77-1963, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, 26 FR SERV2D 1019, JANUARY 16, 1979, FILED

26. ALCOA STEAMSHIP COMPANY, INC., PLAINTIFF-APPELLANT, V. M/V NORDIC REGENT, HER BOILERS, TACKLE, MACHINERY AND OTHER APPURTENANCES IN REM, AND NORCROSS SHIPPING CO., INC., AS HER OWNER, IN PERSONAM, DEFENDANT-APPELLEE., DOCKET NO. 78-7054; NO. 826 - SEPTEMBER TERM, 1977., UNITED STATES COURT OF APPEALS FOR THE 2ND CIRCUIT, SLIP OPINION, JANUARY 10, 1979; PETITION FOR REHEARING FILED SEPTEMBER 18, 1978

LEVEL 1 - 144 CASES

27. UNITED STATES OF AMERICA, APPELLANT, VERSUS ARTICLES OF HAZARDOUS SUBSTANCE,

LEVEL 1 - 144 CASES

27. UNITED STATES OF AMERICA, APPELLANT, VERSUS ARTICLES OF HAZARDOUS SUBSTANCE, ETC., AND IRONLEP HOSIERY CO., INC., APPELLEES. UNITED STATES OF AMERICA, APPELLEE, VERSUS ARTICLES OF HAZARDOUS SUBSTANCE, ETC., AND IRONLEP HOSIERY CO., INC., APPELLANTS. IN RE: UNITED STATES OF AMERICA, PETITIONER., NO. 78-1066 NO. 78-1110 NO. 78-1142, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, 588 F.2D 39, OCTOBER 30, 1978

28. CHURCH OF SCIENTOLOGY OF CALIFORNIA, A NONPROFIT CALIFORNIA CORPORATION, PLAINTIFF, V. JAMES E. ADAMS, ELAINE VIETS, PULITZER PUBLISHING CO., INC., ET AL., DEFENDANTS., NO. 75-1954., UNITED STATES COURT OF APPEALS, NINTH CIRCUIT., 584 F.2D 893, OCT. 23, 1978.

29. SAMUEL F. DICKEY, APPELLANT, V. CBS INC., APPELLEE., NO. 77-2615, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 583 F.2D 1221, SEPTEMBER 12, 1978

30. UNITED STATES OF AMERICA, APPELLEE V. LESTER GENSER AND LAWRENCE FORMAN, APPELLANTS (D.C. CRIM. NOS. 76-146-1 AND 76-146-2), NOS. 76-2623 AND 76-2624, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 582 F.2D 292; 78-2 U.S.T.C. P9682; 42 AFTR 2D 78-5747, AUGUST 29, 1978

31. COMMUNITY-SERVICE BROADCASTING OF MID-AMERICA, INC., ET AL., PETITIONERS V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS, NO.

LEVEL 1 - 144 CASES

76-1081, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, 593 F.2D 1102, AUGUST 25, 1978; AS AMENDED AUGUST 25, 1978 AND SEPTEMBER 29, 1978

32. DANIEL NIX, APPELLANT, VERSUS UNITED STATES OF AMERICA, APPELLEE., NO. 76-1898, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, 572 F.2D 998, FEBRUARY 28, 1978

33. UNITED STATES OF AMERICA, APPELLEE V. LESTER GENSER AND LAWRENCE FORMAN, APPELLANTS, NOS. 76-2623 AND 76-2624, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 572 F.2D 406; 78-1 U.S.T.C. P9268; 41 AFTR 2D 78-816; WITHDRAWN AUGUST 29, 1978, FEBRUARY 23, 1978, FILED; AS AMENDED APRIL 6, 1978

34. IN RE: SEARCH WARRANT DATED JULY 4, 1977, FOR PREMISES AT 2125 S STREET, NORTHWEST WASHINGTON, D.C., NO. 77-1793, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, SLIP OPINION, JANUARY 4, 1978, FILED

35. IN RE: SEARCH WARRANT DATED JULY 4, 1977, FOR PREMISES AT 2125 S STREET, NORTHWEST WASHINGTON, D.C., NO. 77-1793, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, 572 F.2D 321, DECEMBER 1, 1977; PETITION FOR REHEARING EN BANC DENIED JANUARY 4, 1978; AS AMENDED DECEMBER 8, 1977

LEVEL 1 - 144 CASES

36. IN RE: POSSIBLE VIOLATIONS OF 18 USC 371, 641, 1503 ARTHUR MAPEN, APPELLANT, NO. 77-1704, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 564 F.2D 567, SEPTEMBER 2, 1977

37. JOHNNY BROWN, JR., ETC., ET AL., PLAINTIFFS-APPELLEES-CROSS APPELLANTS, V. DADE CHRISTIAN SCHOOLS, INC., ETC., ET AL., DEFENDANTS-APPELLANTS-CROSS APPELLEES., NO. 76-3260., UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT., 556 F.2D 310, JULY 25, 1977; AS CORRECTED.

38. UNITED STATES OF AMERICA AND RUSSELL T. WARD, SPECIAL AGENT, INTERNAL REVENUE SERVICE, PETITIONERS-APPELLEES, V. IRENE SCHURTMEIER, RESPONDENT-APPELLANT, BEN JOHNSON, JAN LINDER AND NATIONAL INVENTORY CONTROL SYSTEMS, INTERVENORS-APPELLANTS., NO. [illegible], UNITED STATES COURT OF APPEALS, NINTH CIRCUIT., 548 F.2D 1388; 77-1 U.S.T.C. P9298; 39 AFTR 2D 77-1102, MARCH 1, 1977.

SYSTEMS, INTERVENORS-APPELLANTS., NO. 76-2016., UNITED STATES COURT OF APPEALS, NINTH CIRCUIT., 548 F.2D 1389; 77-1 U.S.T.C. P9292; 39 AFTR 2D 77-1102, MARCH 1, 1977.

39. UNITED STATES AND DAVID J. FEDDOR, REVENUE AGENT, INTERNAL REVENUE SERVICE, PETITIONER-APPELLANT, V. J. RICHARD DEMA, RESPONDENT-APPELLEE., NO. 75-1894, IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, 76-2 U.S.T.C. P9763; 39 AFTR 2D 77-640, OCTOBER 2, 1976 • A1 THIS APPEAL WAS ORIGINALLY DECIDED BY UNREPORTED ORDER ON OCTOBER 2, 1976. SEE CIRCUIT RULE 35. THE PANEL HAS SUBSEQUENTLY DECIDED TO ISSUE THE DECISION AS AN OPINION.

LEVEL 1 - 144 CASES

40. WELDON M. KENNEDY, PETITIONER, RICHARD B. REEDER AND ROBERT R. COLLINGWOOD, PETITIONERS-APPELLANTS, V. LENARD F. MEACHEM, WARDEN, ROBERT R. ANKROM, CAPT. OF THE GUARDS, ORVILLE VENTLING, LT. OF THE GUARDS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES, RESPONDENTS-APPELLEES., NO. 74-1872, UNITED STATES COURT OF APPEALS TENTH CIRCUIT, 540 F.2D 1057, SEP 3 1976

41. UNITED STATES OF AMERICA AND P. S. PHILLIPS, SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE, PLAINTIFFS-APPELLANTS, V. WRIGHT MOTOR COMPANY, INC., WRIGHT DISCOUNT COMPANY, AND M. E. WRIGHT, PRESIDENT, WRIGHT MOTOR COMPANY, INC., AND WRIGHT DISCOUNT COMPANY, DEFENDANTS-APPELLEES., NO. 74-4227., UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT., 536 F.2D 1090; 76-2 U.S.T.C. P9605; 22 FR SERV2D 23; 38 AFTR 2D 76-5597, AUG. 12, 1976.

42. GEORGE T. APPLEYARD, III, APPELLEE, V. TRANSAMERICAN PRESS, INC., D/B/A/ OVERDRIVE, APPELLANT., NO. 75-2012, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, 539 F.2D 1026, AUG. 5, 1976

43. THE FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., APPELLANT V. HEINRICH BAUER VERLAG, ET AL., NO. 74-1789, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, 536 F.2D 429, JUNE 1, 1976

LEVEL 1 - 144 CASES

44. JAMES T. LYNN, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER-APPELLEE, V. A. E. BIDERMAN; RICHARD YAGLE; PRIORITY INVESTMENTS, INC. (WASHINGTON); CAPITAL INVESTMENTS, INC.; PEERLESS RESEARCH, INC.; AND PRIORITY INVESTMENTS, INC., (CALIFORNIA), RESPONDENTS-APPELLANTS. PRIORITY INVESTMENTS, INC., A WASHINGTON CORPORATION; CAPITAL LAND INVESTMENTS, INC., A WASHINGTON CORPORATION; PEERLESS RESEARCH, INC., A WASHINGTON CORPORATION; PRIORITY INVESTMENTS, INC., A CALIFORNIA CORPORATION; COUNTERCLAIMANTS-APPELLANTS., NO. 75-1617, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 536 F.2D 820, MAY 24, 1976; REHEARING AND REHEARING EN BANC DENIED JULY 8, 1976

45. DONALD H. BROWN, APPELLANT, V. COMMISSIONER OF INTERNAL REVENUE, APPELLEE., NO. 74-1989, UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, 523 F.2D 365; 75-2 U.S.T.C. P9718; 36 AFTR 2D 75-5885, SEPTEMBER 24, 1975

46. NATIONAL BROADCASTING COMPANY, INC., PETITIONER, V. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS, ACCURACY IN MEDIA, INC., INTERVENOR., NO. 73-2256., UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT., 516 F.2D 1101, JULY 11, 1975. • • DISSENTING OPINION OF JUDGE LEVENTHAL WAS PUBLISHED ON JUNE 2, 1975

LEVEL 1 - 144 CASES

47. UNITED STATES OF AMERICA, AND ROBERT H. CLUBERTON, INTERNAL REVENUE AGENT, INTERNAL REVENUE SERVICE, PETITIONERS-APPELLEES, VS. CHURCH OF SCIENTOLOGY OF CALIFORNIA [illegible]

[illegible] HANDELAND, PETITIONERS-APPELLANTS, VS. [illegible] REVENUE, RESPONDENT-APPELLEE., NO. 73-3185, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 519 F.2D 327; 75-2 U.S.T.C. P9586 JUNE 23, 1975

49. PAUL CUMMINS, PLAINTIFF-APPELLANT, V. PARKER SEAL COMPANY, DEFENDANT-APPELLEE., NO. 74-1607, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, 516 F.2D 544, MAY 23, 1975.

50. THE KING'S GARDEN, INC., PETITIONER V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS, NO. 73-1896, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, 498 F.2D 51, MAY 6, 1974

51. CHURCH OF SCIENTOLOGY OF HAWAII, PLAINTIFF-APPELLEE, VS. THE UNITED STATES OF AMERICA, DEFENDANT-APPELLANT., NO. 71-2761, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 485 F.2D 313; 73-2 U.S.T.C. P9659; 32 AFTR 2D 74-5784,

LEVEL 1 - 144 CASES

SEPTEMBER 6, 1973

52. UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE, V. ARTICLES OF DEVICE CONSISTING OF THE FOLLOWING: • • • "KUF DIATHERAPUNCTEUR, ETC. • • • DETECTEUR NIBOYET GMG SCHMIDT D'ACUPUNCTURE," ETC. ET AL, DEFENDANT-APPELLANT, AND F. K. BELLOKOSSY, M.D., CLAIMANT-APPELLANT., NO. 72-1210 - MAY 1973 TERM, UNITED STATES COURT OF APPEALS TENTH CIRCUIT, 481 F.2D 434, MAY 30 1973

53. CHURCH OF SCIENTOLOGY OF MINNESOTA ET AL., APPELLANTS, V. DEPARTMENT OF HEALTH, EDUCATION & WELFARE, ETC., ET AL., APPELLEES., NO. 71-1507., UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT., 459 F.2D 1044, MAY 3, 1972. DECIDED

54. THE CHURCH OF SCIENTOLOGY OF CALIFORNIA, PLAINTIFF-APPELLANT, V. ELLIOT RICHARDSON • ET AL., DEFENDANTS-APPELLEES. • ELLIOT RICHARDSON HAS BEEN SUBSTITUTED FOR HIS PREDECESSOR IN OFFICE, ROBERT H. FINCH, PURSUANT TO FED.R.CIV.P. 25(D) (1)., NO. 24276., UNITED STATES COURT OF APPEALS, NINTH CIRCUIT., 437 F.2D 214, JAN. 11, 1971.

55. PETITION OF AARON BARR FOR A WRIT OF HABEAS CORPUS, PETITIONER-APPELLEE, V. ROBERT W. WEISE, ADJUTANT GENERAL, DEPARTMENT OF THE ARMY; STANLEY R. RESOR, SECRETARY OF THE ARMY; MACON A. HIPP, COMMANDING OFFICER, FORT MCCLELLAN, RESPONDENTS-APPELLANTS., NO. 415, DOCKET 33032., UNITED STATES COURT OF APPEALS

LEVEL 1 - 144 CASES

SECOND CIRCUIT., 412 F.2D 338, JUNE 16, 1969.

56. THE FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D. [illegible] V. UNITED STATES OF AMERICA, APPELLEE., NO. 21483., UNITE[illegible] APPEALS DISTRICT OF COLUMBIA CIRCUIT., 409 F.2D 1146, FE[illegible] REHEARING DENIED APRIL 18, 1969. Wright [illegible]

57. UNITED STATES OF AMERICA AND RALPH G. NEUMANN, SPE[illegible] REVENUE SERVICE, PETITIONERS, V. HAROLD BONNELL, AS [illegible] MITCHELL & CO., AND PEAT, MARWICK, MITCHELL & CO., [illegible] AMERICA AND RALPH G. NEUMANN, SPECIAL AGENT OF THE [illegible] PETITIONERS, V. CHARLES RICE, AS ASSISTANT VICE PRE[illegible] CARGILL, INC., RESPONDENTS., CIVIL 4-78-190; CIVIL [illegible] DISTRICT COURT DISTRICT OF MINNESOTA FOURTH DIVI[illegible] [illegible]CEMBER 27, 1979

58. CHURCH OF SCIENTOLOGY OF CALIFORNIA AND FOU[illegible] WASHINGTON, D.C., PLAINTIFFS, AGAINST JAMES SI[illegible] LIPPINCOTT COMPANY AND MORRIS DEUTSCH, DEFENDA[illegible] STATES DISTRICT COURT SOUTHERN DISTRICT OF NE[illegible] 1979

59. THE SECURITIES AND EXCHANGE COMMISSION, APPLICANT, VS. WHEELING-PITTSBURGH STEEL CORPORATION, A CORPORATION, AND DENNIS J. CARNEY, ITS CHAIRMAN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, RESPONDENTS., MISCELLANEOUS NO. 7907, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, CCH FED. SEC. P97,214, DECEMBER 17, 1979

60. VINCENT A. CIANCI, JR., PLAINTIFF, AGAINST NEW TIMES PUBLISHING COMPANY, NEW TIMES COMMUNICATIONS CORP., MCA, INC., GEORGE A. HIRSCH, JONATHAN Z. LARSEN AND CRAIG WATERS, DEFENDANTS., 79 CIV. 0828, UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, SLIP OPINION, DECEMBER 13, 1979

61. SIGMUND DIAMOND, PLAINTIFF, AGAINST FEDERAL BUREAU OF INVESTIGATION, WILLIAM WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, GRIFFIN BELL, ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES DEPARTMENT OF STATE, AND CYRUS VANCE, SECRETARY OF STATE, DEFENDANTS., NO. 79 CIV. 3720 (RLC), UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, SLIP OPINION, OCTOBER 24, 1979

62. UNITED STATES OF AMERICA V. MARY SUE HUBBARD, ET AL., CRIMINAL CASE NO. 78-401, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, SLIP OPINION, OCTOBER 8, 1979

LEVEL 1 - 144 CASES

63. BLACKIE'S HOUSE OF BEEF, INC., PLAINTIFF, V. LEONEL J. CASTILLO, ET AL., DEFENDANTS., CIVIL ACTION NO. 78-2338, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, SLIP OPINION, OCTOBER 3, 1979

64. UNITED STATES OF AMERICA, PLAINTIFF, AGAINST AN ARTICLE OF FOOD CONSISTING OF 12 BARRELS, MORE OR LESS, LABELED IN PART: (BARREL) LUMPFISH ROE 100 KG NET COLORED BLACK, DEFENDANT., 78 CIV. 3090-CLB, UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, 477 F.SUPP. 1185, OCTOBER 2, 1979

65. JOHN L. NEUFELD, PLAINTIFF V. INTERNAL REVENUE SERVICE, DEFENDANT., CIVIL ACTION NO. 78-525., UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA., 79-2 U.S.T.C. P9610; 44 AFTR 2D 79-5841, 9/28/79.

66. PUBLIC CITIZEN HEALTH RESEARCH GROUP, PLAINTIFF, V. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE ET AL., DEFENDANTS; AMERICAN ASSOCIATION OF PROFESSIONAL STANDARDS REVIEW ORGANIZATIONS, INTERVENING DEFENDANT., CIV. A. NO. 77-2093., UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA., 477 F.SUPP. 595, SEPTEMBER 25, 1979.

67. UNITED STATES OF AMERICA V. MARY SUE HUBBARD, ET AL., CR. NO. 78-0401, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, SLIP OPINION, SEPTEMBER 13, 1979

LEVEL 1 - 144 CASES

68. CHURCH OF SCIENTOLOGY OF CALIFORNIA AND FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., PLAINTIFFS, AGAINST JAMES SIEGELMAN, FLO CONWAY, J. B. LIPPINCOTT COMPANY AND MORRIS DEUTSCH, DEFENDANTS., 79 CIV. 1166 (GLG), UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, 475 F.SUPP. 950, AUGUST 27, 1979

69. UNITED STATES OF AMERICA V. MARY SUE HUBBARD, ET AL., CRIMINAL CASE NO. 78-401, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, SLIP OPINION, AUGUST 27, 1979

70. IN RE: SEARCH WARRANT DATED JULY 9, 1977 FOR PREMISES LOCATED AT 2125 S STREET, NORTHWEST WASHINGTON, D.C., MISC. NO. 77-0151, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, SLIP OPINION, AUGUST 27, 1979

71. NATHAN KATZ, PLAINTIFF, [illegible]

COURT FOR THE DISTRICT

71. NATHAN KATZ, PLAINTIFF, AGAINST THE DEPARTMENT OF JUSTICE, DEFENDANT., 76 CIV. 3813(MJL), UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, SLIP OPINION, AUGUST 21, 1979

72. UNITED STATES OF AMERICA, PETITIONER V. VICTOR SHERMAN, RESPONDENT., NO. 79-2328-MML, UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, 2 U.S.T.C. P9553; 44 AFTR 2D 79-5899, 08/16/79.

LEVEL 1 - 144 CASES

73. JOHN CARY SING AND SIDNEY M. WOLFE, M.D., PLAINTIFFS, V. CENTRAL INTELLIGENCE AGENCY, DEFENDANT., CIVIL ACTION NO. 78-2251, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 479 F.SUPP. 84, AUGUST 7, 1979

74. UNITED STATES OF AMERICA V. MARY SUE HUBBARD, ET AL., CRIMINAL CASE NO. 78-401, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, SLIP OPINION, JULY 30, 1979

75. ROCKWELL INTERNATIONAL CORPORATION, ACTING BY AND THROUGH ITS COLLINS RADIO GROUP VS. KND CORPORATION; ROCKWELL INTERNATIONAL CORPORATION, ACTING BY AND THROUGH ITS COLLINS RADIO GROUP VS. WINDHAM BROADCASTING GROUP, A PARTNERSHIP COMPOSED OF KENNETH M. DAWSON AND RANDALL MAYER, KENNETH M. DAWSON, RANDALL MAYER, AND XLS BROADCASTING CORPORATION, CIVIL ACTION NO. CA 3-77-0866-F; CIVIL ACTION NO. CA 3-77-0868-F, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION, 83 F.R.D. 556, JULY 27, 1979

76. CORLISS LAMONT, PLAINTIFF, AGAINST DEPARTMENT OF JUSTICE, DEFENDANT., 76 CIV. 3092, UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, 475 F.SUPP. 761, JULY 2, 1979

77. CLAIRE BRITT, A/K/A CLAIRE FREIDUS, PLAINTIFF V. INTERNAL REVENUE SERVICE, DEFENDANT., CIVIL ACTION NO. 77-1325., UNITED STATES DISTRICT COURT, DISTRICT OF

LEVEL 1 - 144 CASES

COLUMBIA., 79-2 U.S.T.C. P9450; 44 AFTR 2D 79-5188, 06/13/79.

78. WILLIAM M. BRINTON, PLAINTIFF, V. UNITED STATES DEPARTMENT OF STATE, ET AL., DEFENDANTS., CIVIL ACTION NO. 78-0112, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 476 F.SUPP. 535, JUNE 12, 1979; AS AMENDED SEPTEMBER 24, 1979

79. BETH-EL MINISTRIES, INC., PLAINTIFF V. UNITED STATES OF AMERICA, DEFENDANT., C.A. NO. 79-0894., UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA., 79-2 U.S.T.C. P9412; 44 AFTR 2D 79-5190, 06/06/79.

80. JAMES P. THORNWELL, PLAINTIFF, V. UNITED STATES OF AMERICA, ET AL., DEFENDANTS., C.A. NO. 78-1845, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 471 F.SUPP. 344, MAY 30, 1979

81. PRESTON E. PERDUE AND PATRICK D. GRIMES, PLAINTIFFS, AGAINST J.C. PENNEY COMPANY, INC., KENNETH S. AXELSON, WILLIAM M. BATTEN, GEORGE S. STEWART, CHRISTOPHER KALIADES, CATHERINE MORALES, JOHN HOOD, STUART M. LYON, ANDREW ISAMAS, CHARLES L. BROWN, WALTER J. HEPPL, DONALD V. SEIBERT AND ANDREW CUMMINS, DEFENDANTS., 78 CIV. 846 (CTD), UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, 470 F.SUPP. 1284, MAY 24, 1979

LEVEL 1 - 144 CASES

82. OLAGUIBEL A. LOPEZ PACHECO, ET AL PLAINTIFF V. FEDERAL BUREAU OF INVESTIGATION, ET AL DEFENDANTS, CIVIL NUMBER: 76-83, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, 470 F.SUPP. 1091, MAY 10, 1979

78-0401, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 474 F.SUPP. 64, APR. 25, 1979

84. UNITED STATES OF AMERICA AND JOHN A. JENKINS, SPECIAL AGENT, INTERNAL REVENUE SERVICE V. NASHUA TRUST COMPANY. UNITED STATES OF AMERICA AND JOHN A. JENKINS, SPECIAL AGENT, INTERNAL REVENUE SERVICE V. MERCHANTS SAVINGS BANK., NO. 78-4, 79-5, UNITED STATES DISTRICT COURT, DISTRICT OF NEW HAMPSHIRE MISC., 79-1 U.S.T.C. P9399; 44 AFTR 2D 79-5099, 4/24/79.

85. UNITED STATES OF AMERICA, AND HARLEY SIETSMA, SPECIAL AGENT, INTERNAL REVENUE SERVICE, PETITIONERS V. WEST SABINAH PLAZA SHOPPING CENTER, INC., RESPONDENT. UNITED STATES OF AMERICA, AND HARLEY SIETSMA, SPECIAL AGENT, INTERNAL REVENUE SERVICE, PETITIONERS V. NATIONAL PRODUCTS DISPLAYS, INC., RESPONDENT. UNITED STATES OF AMERICA, AND HARLEY SIETSMA, SPECIAL AGENT, NATIONAL INTERNAL REVENUE SERVICE, PETITIONERS V. STANLEY W. LUBEN, COMPTROLLER, NATIONAL PRODUCTS DISPLAYS, INC., RESPONDENT. UNITED STATES OF AMERICA AND HARLEY SIETSMA, SPECIAL AGENT, INTERNAL REVENUE SERVICE, PETITIONERS V. CAF-O-LITE,

LEVEL 1 - 144 CASES

RESPONDENT., NO. 679-03 MISC.-679-06 MISC., UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, 79-1 U.S.T.C. P9365; 43 AFTR 2D 79-1196, 04/05/79.

86. JOHN PIRRE, PLAINTIFF, AGAINST PRINTING DEVELOPMENTS, INC. AND TIME INCORPORATED, DEFENDANTS., 75 CIV. 3793, UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, 468 F.SUPP. 1028, MARCH 16, 1979

87. UNITED STATES OF AMERICA AND JOHN R. LANSDON, REVENUE AGENT, INTERNAL REVENUE SERVICE, PETITIONERS, V. BANK OF STOCKTON AND SAM YOST, MANAGER, STOCKTON AND SAN JOAQUIN BRANCH, RESPONDENTS; JOHN R. MARTHALER AND GRACE J. MARTHALER, INTERVENORS., CIVIL NO. S78-682-AAH, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, 467 F.SUPP. 306; 79-1 U.S.T.C. P9276; 43 AFTR 2D 79-743, FEBRUARY 23, 1979

88. MICHAEL KANTOR, MILDRED DUPACK AND SAMUEL REIKEN ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS, AGAINST ALFRED KAHN, THE CIVIL AERONAUTICS BOARD AND THE UNITED STATES OF AMERICA, DEFENDANTS., 78 CIV 4271 (LBS), UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, 463 F.SUPP. 1160, JAN. 18, 1979

LEVEL 1 - 144 CASES

89. JOAN C. BAEZ, PLAINTIFF, V. NATIONAL SECURITY AGENCY, ET AL. DEFENDANTS., CIVIL ACTION NO. 76-1921, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, SLIP OPINION, NOVEMBER 2, 1978

90. FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., INC., PLAINTIFF, V. DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ET AL., DEFENDANTS., C.A. NO. 78-0107 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 459 F.SUPP. 748; 26 FR SERV2D 933, OCT. 19, 1978

91. CHURCH OF SCIENTOLOGY OF CALIFORNIA, ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS, ET AL., PLAINTIFFS, V. WILLIAM SIMON, SECRETARY OF THE TREASURY, ET AL., DEFENDANTS., CASE NO. CV 78-2160-MML, UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA, 460 F.SUPP. 56, OCTOBER 13, 1978

92. CALVIN F. SMITH, PLAINTIFF, V. PETER FLAHERTY, DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, GERALD M. FARKAS, REGIONAL DIRECTOR, U.S. BUREAU OF PRISONS, CLARENCE M. KELLEY, DIRECTOR, F.B.I., DEPARTMENT OF JUSTICE, DEFENDANTS., CIV. A. NO. 78-6., UNITED STATES DISTRICT COURT, MIDDLE DISTRICT PENNSYLVANIA., 465 F.SUPP. 815, SEPT. 21, 1978.

93. CHURCH OF SCIENTOLOGY OF CALIFORNIA, PLAINTIFF, V. GABRIEL CAZARES,

93. CHURCH OF SCIENTOLOGY OF CALIFORNIA, PLAINTIFF, V. GABRIEL CAZARES, DEFENDANT., NO. 76-86 CIV. T-K., UNITED STATES DISTRICT COURT, MIDDLE DISTRICT

LEVEL 1 - 144 CASES

ORIDA, TAMPA DIVISION., 455 F.SUPP. 420, AUG. 15, 1978. • • ACTUALLY SIGNED BY JUDGE KRENTZMAN ON AUGUST 4, 1978 BUT FILED LATER.

94. JAMES H. LESAR, PLAINTIFF, V. UNITED STATES DEPARTMENT OF JUSTICE ET AL., DEFENDANTS., CIV. A. NO. 77-0692., UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA., 455 F.SUPP. 921, JULY 28, 1978.

95. UNITED STATES OF AMERICA, ET AL., PETITIONERS V. HAROLD BOONE, ET AL., RESPONDENTS AND UNITED STATES OF AMERICA, ET AL., PETITIONERS V. JOYCE BELO, ET AL., RESPONDENTS., C-78-151-G, C-78-152-G., UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF NORTH CAROLINA, GREENSBORO DIVISION, 78-2 U.S.T.C. P9619; 42 AFTR 2D 78-5737, 07/06/78.

96. UNITED STATES OF AMERICA ET. AL., PLAINTIFFS V. KEY OIL COMPANY, INC., ET AL., DEFENDANTS., CIVIL NO. 77-2120, UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY, 460 F.SUPP. 878; 79-1 U.S.T.C. P9134, JULY 3, 1978 AND SEPTEMBER 19, 1978

97. ARNOLD S. WELLMAN, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF, AGAINST FAIRLEIGH S. DICKINSON, LHIM, INC., AND SUN COMPANY, INC., DEFENDANTS; MORDECAI ROSENFELD, PLAINTIFF, AGAINST SUN COMPANY, INC., LHIM, INC., FAIRLEIGH S. DICKINSON, JR., ANN DICKINSON TURNER, JOHN DOE AND RICHARD

LEVEL 1 - 144 CASES

E (REPRESENTING 31 PERSONS, INCLUDING INSTITUTIONS, WHOSE NAMES ARE NOT PRESENTLY KNOWN), DEFENDANTS; JAY-GRO FABRICS, INC. PENSION TRUST, PLAINTIFF, AGAINST SUN COMPANY, INC., LHIM, INC., SALOMON BROTHERS, FAIRLEIGH S. DICKINSON, JR. AND F. EBERSTADT & CO., INC., DEFENDANTS; BECTON, DICKINSON AND COMPANY MARVIN A. ASNES, THEODORE J. BAUER, HENRY P. BECTON, SUZANNE B. CHAPMAN, BENEDICT I. HARTER, WESLEY J. HOWE, WILLIAM S. LITTLE, FOXHALL A. PARKER, FOXHALL A. PARKER AND R. MILTON BOYCE AS TRUSTEES OF THE MORGAN PARKER 1967 TRUST, C. ALBERT POLLEMHAGEN, HARRY ROTH, FRED R. SULLIVAN AND RAYMOND C. TROUBH, PLAINTIFFS, AGAINST SUN COMPANY, INC., LHIM, INC., FAIRLEIGH S. DICKINSON, JR., J. H. FITZGERALD DUNNING, SALOMON BROTHERS, F. EBERSTADT & CO., INC., CHEMICAL FUND, INC. AND SURVEYOR FUND, INC., DEFENDANTS; MORTON POPPO, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF, AGAINST FAIRLEIGH S. DICKINSON, JR., LHIM, INC., SUN COMPANY, INC., J. H. FITZGERALD DUNNING, SALOMON BROTHERS, F. EBERSTADT & CO., INC., CHEMICAL FUND, INC. AND SURVEYOR FUND, INC., DEFENDANTS; SECURITIES AND EXCHANGE COMMISSION, 500 NORTH CAPITOL STREET N.W., WASHINGTON D.C. 20549, PLAINTIFF, AGAINST SUN COMPANY, INC., LHIM, INC., SALOMON BROTHERS, KENNETH LIPPER, F. EBERSTADT & CO. INC., F. EBERSTADT & CO. MANAGERS AND DISTRIBUTORS, INC., ROBERT SELLER, FAIRLEIGH S. DICKINSON, JR., J. H. FITZGERALD DUNNING, DEFENDANTS. PUBLIC POLICE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF, AGAINST SUN COMPANY, INC., FAIRLEIGH S. DICKINSON, JR., LHIM, INC., SALOMON BROTHERS, AND F. EBERSTADT & CO., INC., DEFENDANTS., 78 CIV. 284 (PLC); 78 CIV. 291 (PLC); 78 CIV. 345 (PLC);

LEVEL 1 - 144 CASES

CIV. 539 (PLC); 78 CIV. 1025 (PLC); 78 CIV. 1059 (PLC); 78 CIV. 1156 (PLC), UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, 79 F.R.D. 341; CCH FED. SEC. R. 96,484; 26 FR SERV2D 294, JUNE 23, 1978

98. UNITED STATES OF AMERICA AND JOSEPH F. MOULEAU, SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE, PETITIONERS, V. SIDEON GOLDMAN, CERTIFIED PUBLIC ACCOUNTANT, RESPONDENT., NO. CV-78-1618-MML., UNITED STATES DISTRICT COURT, CENTRAL DISTRICT CALIFORNIA., 453 F.SUPP. 508, JUNE 22, 1978.

99. UNITED STATES OF AMERICA AND JOSEPH P. ROULEAU, SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE, PETITIONERS V. GIDEON GOLDMAN, CERTIFIED PUBLIC ACCOUNTANT, RESPONDENT., NO. CV 78-1618-PMI., UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA., 78-2 U.S.T.C. P9720; 42 AFTR 2D 78-6244, 06/22/78.

UNITED STATES OF AMERICA AND JOSEPH J. BOYLE, SPECIAL AGENT, INTERNAL REVENUE SERVICE, PLAINTIFFS, V. FIRST PENNSYLVANIA BANK AND FRANCES BERKO, CUSTODIAN OF RECORDS OF THE FIRST PENNSYLVANIA BANK, DEFENDANTS, AND DANIEL J. CALLAHAN, (INTERVENOR) INTERVENOR-TAXPAYER, CIVIL ACTION NO. 77-1712, IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, 453 F.SUPP. 457; 78-2 U.S.T.C. P9674; 42 AFTR 2D 78-5284, JUNE 14, 1978

LEVEL 1 - 144 CASES

101. NATIONWIDE MUTUAL INSURANCE COMPANY V. EVERETT FRIEDMAN, ET AL., CIVIL NO. Y-77-1200, IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, 451 F.SUPP. 736; 18 EPD P8786, MAY 26, 1978

102. UNITED STATES OF AMERICA AND HENRY M. HARRISON, SPECIAL AGENT, INTERNAL REVENUE SERVICE, PETITIONERS, V. FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION AND HUGH M. BRANTLEY, ASSISTANT VICE PRESIDENT, RESPONDENTS; UNITED STATES OF AMERICA AND HENRY M. HARRISON, SPECIAL AGENT, INTERNAL REVENUE SERVICE, PETITIONERS, V. FIRST NATIONAL BANK OF SOUTH CAROLINA AND JOHN I. POOLE, VICE PRESIDENT, RESPONDENTS; UNITED STATES OF AMERICA AND HENRY M. HARRISON, SPECIAL AGENT, INTERNAL REVENUE SERVICE, PETITIONERS, V. FROST, JOHNSON, READ & SMITH, INC., AND BARRY D. WYNN, MANAGER, RESPONDENTS; UNITED STATES OF AMERICA AND HENRY M. HARRISON, SPECIAL AGENT, INTERNAL REVENUE SERVICE, PETITIONERS, V. FIRST CITIZENS BANK AND TRUST COMPANY AND ROBERT RILEY, VICE PRESIDENT, RESPONDENTS., CIV. NOS. M-12-71, M-12-70, M-12-68 AND M-12-69., UNITED STATES DISTRICT COURT, DISTRICT SOUTH CAROLINA, SPARTANBURG DIVISION., 461 F.SUPP. 725; 42 U.S.T.C. P9455; 44 AFTR 2D 79-5005, MAY 11, 1978.

103. THOMAS E. HAYDEN AND JANE S. FONDA, PLAINTIFFS, V. NATIONAL SECURITY AGENCY, ET AL., DEFENDANTS., CIVIL ACTION NOS. 76-286 AND 76-287 (CONSOLIDATED), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 452 F.SUPP. 247, APRIL 27, 1978

LEVEL 1 - 144 CASES

104. UNITED STATES OF AMERICA, PLAINTIFF V. ARTICLES OF HAZARDOUS SUBSTANCE, ETC., DEFENDANTS, NO. C-78-23-G, IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA GREENSBORO DIVISION, 444 F.SUPP. 1260, FEBRUARY 8, 1978

105. GTE SYLVANIA INCORPORATED, PLAINTIFF, V. CONSUMER PRODUCT SAFETY COMMISSION, ET AL., DEFENDANTS., RCA CORPORATION, PLAINTIFF, V. CONSUMER PRODUCT SAFETY COMMISSION, ET AL., DEFENDANTS. THE MAGNAVOX COMPANY, PLAINTIFF, V. CONSUMER PRODUCT SAFETY COMMISSION, ET AL., DEFENDANTS. ZENITH RADIO CORPORATION, PLAINTIFF, V. CONSUMER PRODUCT SAFETY COMMISSION, ET AL., DEFENDANTS. MOTOROLA, INC., PLAINTIFF, V. CONSUMER PRODUCT SAFETY COMMISSION, ET AL., DEFENDANTS. WARWICK ELECTRONICS, INC., PLAINTIFF, V. CONSUMER PRODUCT SAFETY COMMISSION, ET AL., DEFENDANTS. HEPPOLITRONIC FORD CORPORATION, PLAINTIFF, V. CONSUMER PRODUCT SAFETY COMMISSION, ET AL., DEFENDANTS. ADMIRAL CORPORATION, PLAINTIFF, V. CONSUMER PRODUCT SAFETY COMMISSION, ET AL., DEFENDANTS. GENERAL ELECTRIC COMPANY, PLAINTIFF, V. CONSUMER PRODUCT SAFETY COMMISSION, ET AL., DEFENDANTS. MATSUSHITA ELECTRIC CORPORATION OF AMERICA, PLAINTIFF, V. CONSUMER PRODUCT SAFETY COMMISSION, ET AL., DEFENDANTS. SHARP ELECTRONICS CORPORATION, PLAINTIFF, V. CONSUMER PRODUCT SAFETY COMMISSION, ET AL., DEFENDANTS. TOSHIBA AMERICA, INC., PLAINTIFF, V. CONSUMER PRODUCT SAFETY COMMISSION, ET AL., DEFENDANTS., CIVIL ACTION NO. 75-104 CIVIL ACTION NO. 75-108 CIVIL ACTION NO. 75-115 75-112 CIVIL ACTION NO. 75-113 CIVIL ACTION NO. 75-114 CIVIL ACTION NO. 75-115

CIVIL ACTION NO. 75-116 CIVIL ACTION NO. 75-131 CIVIL ACTYON NO. 75-136 CIVIL ACTION NO. 75-150 CIVIL ACTION NO. 75-151 CIVIL ACTION NO. 75-152, IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, 443 F.SUPP. 1152, DECEMBER 8, 1977.

106. THE FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., INC., PLAINTIFF, V. CLARENCE M. KELLEY, ET AL., DEFENDANTS., CIVIL ACTION 77-0178, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 77 F.R.D. 378; 24 FR SERV2D 1268, NOV. 29, 1977

107. UNITED STATES OF AMERICA AND HAROLD J. BRESLIN, SPECIAL AGENT, INTERNAL REVENUE SERVICE, PETITIONERS V. AVCO FINANCIAL SERVICES; AND BUD MEYER, MANAGER, AVCO FINANCIAL SERVICES, RESPONDENTS., CIV. NO. S-77-482 PCW., UNITED STATES DISTRICT COURT, EASTERN DISTRICT CALIFORNIA., 78-1 U.S.T.C. P9117; 41 AFTR 2D 78-494, 11/22/77.

108. DR. JAMES E. MESEREY, PLAINTIFF, VS. UNITED STATES OF AMERICA, AND DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AND F. DAVID MATTHEWS, SECRETARY OF DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AND PUBLIC HEALTH SERVICE OF THE DEPARTMENT OF H.E.W., AND FOOD AND DRUG ADMINISTRATION, AND STEPHEN S. GROSS, DIRECTOR OF SAN FRANCISCO DISTRICT OF FOOD AND DRUG ADMINISTRATION, AND POO CHU, COMPLIANCE OFFICER, SAN FRANCISCO DISTRICT OF FOOD AND DRUG ADMINISTRATION, AND

LEVEL 1 - 144 CASES

DICK KLUGE, ASSISTANT FOR IMPORT OPERATIONS, FOOD AND DRUG ADMINISTRATION, AND ALEXANDER SCHMIDT, M.D., COMMISSIONER OF FOOD AND DRUG ADMINISTRATION, AND UNITED STATES CUSTOMS SERVICE, AND VERNON ACREE, COMMISSIONER OF THE UNITED STATES CUSTOMS SERVICE, AND ALBERT G. BERGESEN, REGIONAL COMMISSIONER OF DISTRICT 7 OF UNITED STATES CUSTOMS, AND GEORGE K. BROWN, AGENT FOR SAID ALBERT G. BERGESEN, AND UNITED STATES TREASURY DEPARTMENT, AND WILLIAM E. SIMON, SECRETARY OF UNITED STATES TREASURY DEPARTMENT, DEFENDANTS., CIVIL LV 76-218 RDF IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, 447 F.SUPP. 548, NOVEMBER 16, 1977

109. THE FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., INC., PLAINTIFF, V. F. RAY MARSHALL, ET AL., DEFENDANTS., CIVIL ACTION NO. 76-1131, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 439 F.SUPP. 1267, NOV. 8, 1977

110. FEDERAL TRADE COMMISSION V. GENERAL MOTORS CORP., ET AL., NO. C77-927., UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION., 1977-2 TRADE CAS. P61,705, OCTOBER 25, 1977, FILED

111. ALAN B. MALINA ET AL., PLAINTIFFS, V. MAHARISHI MAHESH YOGI ET AL., DEFENDANTS., CIV. A. NO. 76-341., UNITED STATES DISTRICT COURT, DISTRICT NEW JERSEY., 440 F.SUPP. 1284, OCT. 20, 1977.

LEVEL 1 - 144 CASES

112. HERCULES PIGMENT, PLAINTIFF, V. DISTRICT OF COLUMBIA, ET AL., DEFENDANTS., CIVIL ACTION NO. 75-2115, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 439 F.SUPP. 519, OCT. 18, 1977

113. A.F. FERGUSON, PLAINTIFF, V. CLARENCE M. KELLEY, ETC., ET AL., DEFENDANTS., NO. 76 C 3898, IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION, 448 F.SUPP. 919, SEPTEMBER 29, 1977

114. IN RE SEARCH WARRANT DATED JULY 4, 1977, FOR PREMISES AT 2129 I STREET, NORTHWEST, WASHINGTON, D.C., MISCELLANEOUS NO.: 77-0151, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 436 F.SUPP. 689, JULY 27, 1977

115. FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, INC., PLAINTIFF V NATIONAL SECURITY AGENCY, ET AL., DEFENDANTS, CIVIL ACTION NO. 76-1494, UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF COLUMBIA; 434 F.SUPP. 632; JULY 21, 1977

116. CHURCH OF SCIENTOLOGY OF CALIFORNIA, PLAINTIFF V WILLIAM E. SIMON, ET AL., DEFENDANTS; CIVIL ACTION NO. 76-1719, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA; 433 F.SUPP. 1107, JULY 15, 1977

117. IN RE FTC CORPORATE PATTERNS REPORT LITIGATION IN RE FTC LINE OF BUSINESS REPORT LITIGATION; (MASTER FILE MISC. NO. 76-0126) (MASTER FILE MISC. NO.

LEVEL 1 - 144 CASES

76-0127).; UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA.; 1977-2 TRADE CAS. P61,544, JULY 11, 1977, FILED

118. RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF V. FIRST BAPTIST CHURCH OF NORTH CHARLESTON ET AL., DEFENDANTS.; NO. 76-37.; UNITED STATES DISTRICT COURT, DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION.; 82 CCH LAB. CAS. P33,548, JUNE 17, 1977.

119. PAUL E. SHAVER, PETITIONER, V. GRIFFIN B. BELL (AS SUCCESSOR TO EDWARD H. LEVI) ATTORNEY GENERAL, ET AL. RESPONDENTS.; NO. C75-1206A.; UNITED STATES DISTRICT COURT, NORTHERN DISTRICT GEORGIA, ATLANTA DIVISION.; 433 F.SUPP. 436, APRIL 20, 1977.

120. DAVID STEVENS ET AL., PLAINTIFFS, V. STEPHEN BERGER, INDIVIDUALLY AND AS COMMISSIONER OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL., DEFENDANTS.; NO. 76 C 1554.; UNITED STATES DISTRICT COURT, EASTERN DISTRICT NEW YORK.; 428 F.SUPP. 896, MARCH 3, 1977.

121. MARY LUZAICH, PLAINTIFF V. UNITED STATES OF AMERICA, DEFENDANT.; NO. 4-76-CIV. 442.; UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION.; 435 F.SUPP. 31; 77-1 U.S.T.C. P9250; 39 AFTR 2D 77-937, 02/16/77.

LEVEL 1 - 144 CASES

122. UNITED STATES OF AMERICA AND MARCO A. COHEN, REVENUE AGENT FOR THE INTERNAL REVENUE SERVICE, PETITIONERS V. MRS. EARL MATTHESSEN, RESPONDENT.; NO. CV-76-2832-MML.; UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA.; 77-1 U.S.T.C. P9351; 39 AFTR 2D 77-1280, 02/11/77.

123. UNITED STATES OF AMERICA AND GLENN MIYAMOTO, REVENUE AGENT, PETITIONERS V. THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, RESPONDENT.; NO. C-76-689 WHO.; UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, 424 F.SUPP. 220; 76-2 U.S.T.C. P9684, 09/14/76.

124. JOHN PAUL DUTTENHEIM, PLAINTIFF, V. YAMAHA INTERNATIONAL CORPORATION, A CALIFORNIA CORPORATION, AND A SUBSIDIARY OF YAMAHA MOTOR COMPANY, LTD., A FOREIGN CORPORATION, ET AL., DEFENDANTS.; NO. 4-75 CIV. 572.; UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION.; 416 F.SUPP. 542, JUNE 29, 1976.

125. UNITED STATES OF AMERICA, PETITIONER V. WOLF AND COMPANY AND ARNOLD BIEBAR, AS CUSTODIAN OF RECORDS OF WOLF AND COMPANY, 1101 17TH STREET, N. W. WASHINGTON, D.C. 20036.; MISC. NO. 76-0052.; UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA.; 76-2 U.S.T.C. P9505, 05/18/76.

LEVEL 1 - 144 CASES

126. CHURCH OF SCIENTOLOGY OF CALIFORNIA, A NONPROFIT CORPORATION, PLAINTIFF, V. UNITED STATES DEPARTMENT OF JUSTICE ET AL., DEFENDANTS.; NO. CV 74-3550-F.; UNITED STATES DISTRICT COURT, C. D. CALIFORNIA.; 410 F.SUPP. 1297, APRIL 2, 1976.

127. UNITED STATES OF AMERICA; ET AL.; PETITIONERS V. GERALDINE C. MEDINA; ET AL.; RESPONDENTS.; CIVIL ACTION NO. C76-103.; UNITED STATES DISTRICT COURT; NORTHERN DISTRICT OF OHIO; EASTERN DIVISION; 76-2 U.S.T.C. P9590; 03/05/76.

128. MISION INDUSTRIAL; INC.; ET AL.; PLAINTIFFS; V. RAFAEL HERNANDEZ-COLON ET AL.; DEFENDANTS.; CIV. NO. 74-587.; UNITED STATES DISTRICT COURT; DISTRICT PUERTO RICO.; 420 F.SUPP. 273; NOV. 21; 1975.

129. UNITED STATES OF AMERICA AND FRED D. STILES; SPECIAL AGENT; INTERNAL REVENUE SERVICE; PETITIONERS; V. CECIL E. LUCAS GENERAL CONTRACTOR; INC.; AND CECIL E. LUCAS; AS PRESIDENT OF CECIL E. LUCAS GENERAL CONTRACTOR; INC.; RESPONDENTS.; NO. A-12-38.; UNITED STATES DISTRICT COURT; DISTRICT SOUTH CAROLINA; COLUMBIA DIVISION.; 406 F.SUPP. 1267; 76-1 U.S.T.C. P9413; 38 AFTR 2D 76-5116; NOV. 10; 1975.

130. CHURCH OF SCIENTOLOGY OF HAWAII; PLAINTIFF V. UNITED STATES OF AMERICA; DEFENDANT.; CIVIL NO. 70-3138.; UNITED STATES COURT; DISTRICT OF HAWAII.; 75-2

Jaime - write to get this one

LEVEL 1 - 144 CASES

U.S.T.C. P9651; 36 AFTR 2D 75-5710; 8/4/75.

131. UNITED STATES OF AMERICA; PLAINTIFF; VS. 'ARTICLES OF FOOD... CLOVER CLUB POTATO CHIPS...'; D/EFENDANT; CLOVER CLUB FOOD COMPANY; CLAIMANT.; CIVIL NO. 1773-85; IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO; 67 F.R.D. 419; 20 FR SERV2D 295; MARCH 28; 1975

132. CHURCH OF SCIENTOLOGY OF CALIFORNIA; A NON-PROFIT CORPORATION; PLAINTIFF V. INTERNAL REVENUE SERVICE; DONALD C. ALEXANDER; COMMISSIONER OF INTERNAL REVENUE; DEPARTMENT OF THE TREASURY OF THE UNITED STATES; WILLIAM SIMON; SECRETARY OF THE TREASURY OF THE UNITED STATES; DEFENDANTS.; NO. CV74-3465-PJK.; UNITED STATES DISTRICT COURT; CENT. DIST. CALIF.; 75-1 U.S.T.C. P9197; 35 AFTR 2D 75-643; 12/12/74.

133. UNITED STATES OF AMERICA AND ROBERT H. CLOBERTON; INTERNAL REVENUE AGENT; INTERNAL REVENUE SERVICE; PETITIONERS V. CHURCH OF SCIENTOLOGY OF CALIFORNIA AND HENNING HELDT; VICE PRESIDENT; RESPONDENTS.; NO. 73-2100-HP; U.S. DISTRICT COURT; CENT. DIST. CALIF.; 74-1 U.S.T.C. P9107; 11/15/73.

134. PEACH BOWL; INC. V. GEORGE P. SHULTZ ET AL.; CIVIL ACTION NO. 17854; U.S. DISTRICT COURT; NO. DIST. GA.; ATLANTA DIV.; 370 F.SUPP. 685; 73-2 U.S.T.C. P9705; 9/28/73.

LEVEL 1 - 144 CASES

135. THE CHURCH OF SCIENTOLOGY OF CALIFORNIA A RELIGIOUS CORPORATION; AND REVEREND ROBERT H. THOMAS; PLAINTIFFS; V. BELL PUBLISHING CO.; INC.; A NEW YORK CORPORATION; AND GEORGE MALKO; DEFENDANTS.; NO. C-70-2088.; UNITED STATES DISTRICT COURT; N.D. CALIFORNIA.; 362 F. SUPP. 767; AUG. 3; 1973. AS CORRECTED SEPT. 17; 1973.

136. CHURCH OF SCIENTOLOGY OF CALIFORNIA; INC.; PLAINTIFF; V. BERNARD GREEN AND BARBARA GREEN; DEFENDANTS.; NO. 69 CIV. 5345.; UNITED STATES DISTRICT COURT; S.D. NEW YORK.; 354 F.SUPP. 800; FEB. 9; 1973.

137. UNITARIAN CHURCH WEST; A WISCONSIN CORPORATION; ET AL.; PLAINTIFFS; V. CHARD E. MCCONNELL; DISTRICT ATTORNEY; WAUKESHA COUNTY; AND HIS AGENTS; EMPLOYEES; SUCCESSORS IN OFFICE; ASSISTANTS; AND ALL OTHERS ACTING IN CONCERT OR COOPERATION WITH HIM OR AT HIS DIRECTION OR UNDER HIS CONTROL; DEFENDANTS.; CIV. A. NO. 72-C-122.; UNITED STATES DISTRICT COURT; E.D. WISCONSIN.; 351 F. SUPP.

138. THE NATIONAL BOARD OF THE YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE U.S.A.; PLAINTIFF; V. YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF CHARLESTON; SOUTH CAROLINA; DEFENDANT.; CIV. A. NO. 70-180.; UNITED STATES DISTRICT COURT;

138. THE NATIONAL BOARD OF THE YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE U.S.A., PLAINTIFF, V. YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF CHARLESTON, SOUTH CAROLINA, DEFENDANT., CIV. A. NO. 70-180., UNITED STATES DISTRICT COURT, D. SOUTH CAROLINA, CHARLESTON DIVISION., 335 F. SUPP. 615, DEC. 17, 1971.

LEVEL 1 - 144 CASES

139. UNITED STATES OF AMERICA, LIBELANT, V. AN ARTICLE OR DEVICE ... "HUBBARD ELECTROMETER" OR "HUBBARD E-METER," ETC., FOUNDING CHURCH OF SCIENTOLOGY ET AL., CLAIMANTS., NO. D.C. 1-68., UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA., 333 F. SUPP. 357, JULY 30, 1971.

140. CHURCH OF SCIENTOLOGY OF MINNESOTA ET AL., PLAINTIFFS, V. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE ET AL., DEFENDANTS., NO. 4-69 CIV. 86., UNITED STATES DISTRICT COURT, D. MINNESOTA, FOURTH DIVISION., 341 F. SUPP. 563, JULY 20, 1971.

141. PETITION OF AARON BARR FOR A WRIT OF HABEAS CORPUS V. ROBERT W. WEISE, ADJUTANT GENERAL, DEPARTMENT OF THE ARMY, U.S. ARMY ADMINISTRATION CENTER, ST. LOUIS, MISSOURI; STANLEY R. RESOR, SECRETARY OF THE ARMY, PENTAGON, WASHINGTON, D.C.; MACON A. HIPP, COLONEL, COMMANDING OFFICER, FORT MCCLELLEN, ANNISTON, ALABAMA., NO. 68 CIV. 3051., UNITED STATES DISTRICT COURT S.D. NEW YORK., 293 F.SUPP. 7, AUG. 26, 1968, ON REHEARING OCT. 10, 1968.

142. HOTEL CONQUISTADOR, INC., FOR ITSELF AND AS SUCCESSOR BY MERGER TO TROPICANA CASINO, INC. V. THE UNITED STATES, NO. 374-75, UNITED STATES COURT OF CLAIMS, 597 F.2D 1348; 79-1 U.S.T.C. P9337; 43 AFTR 2D 79-1148, APRIL 18, 1979; DECIDED; PETITIONS FOR REHEARING AND REHEARING EN BANC DENIED MAY 25, 1979; AS AMENDED MAY 25, 1979

LEVEL 1 - 144 CASES

143. CHARLES E. CRAFT V. THE UNITED STATES., NO. 96-74., UNITED STATES COURT OF CLAIMS., 589 F.2D 1057, DEC. 13, 1978.

144. HOTEL CONQUISTADOR, INC., FOR ITSELF AND AS SUCCESSOR BY MERGER TO TROPICANA CASINO, INC. V. THE UNITED STATES, NO. 374-75, UNITED STATES COURT OF CLAIMS, 78-2 U.S.T.C. P9765; 42 AFTR 2D 78-6006, OCT. 2, 1978

LEVEL 1 - 1 OF 3 CASES

FIRST NATIONAL BANK OF SEARCY, ARKANSAS, A NATIONAL BANKING CORPORATION, APPELLANT, V. JOSEPH P. COLLINS AND GENEVE H. COLLINS, HUSBAND AND WIFE, APPELLEES.

NO. 78-2113

DISTRICT COURT OF APPEAL OF FLORIDA, SECOND D[illegible]

MAY 18, 1979.

OPINION:
...2D DCA 1977).

TO RESOLVE THE ISSUE BEFORE US WE MUST FIRST DETERMINE WHETHER JURISDICTION OBTAINED IN COMPLIANCE WITH ARKANSAS' LONG-ARM STATUTE; AND IF SO, DETERMINE THE ASSERTION OF JURISDICTION COMPORTS WITH DUE PROCESS. FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON D.C. V. VERLAG, 536 F.2D 429 (D.C.CIR.1976).

THE JURISDICTIONAL PROVISIONS OF THE ARKANSAS STATUTE ARE SET FORTH IN SECTION 27-2502, ARKANSAS STATUTES, WHICH READS AS FOLLOWS:

LEVEL 1 - 2 OF 3 CASES

CHURCH OF SCIENTOLOGY OF CALIFORNIA, APPELLANT, V. RONALD SCHULTZ, AS PINELLAS COUNTY PROPERTY APPRAISER, AND O. SANFORD JASPER, AS PINELLAS COUNTY TAX COLLECTOR, APPELLEES.

NO. 78-1310

DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

371 SO.2D 502

MAY 9, 1979.

OPINION:
PER CURIAM.

THE CHURCH OF SCIENTOLOGY OF CALIFORNIA APPEALS FROM A FINAL ORDER DENYING TAX EXEMPT STATUS. APPELLANT RAISES SEVERAL POINTS IN ITS BRIEF; HOWEVER, ONLY ONE ARGUMENT HAS MERIT.

THE TRIAL COURT, AFTER HOLDING THAT APPELLANT WAS NOT ...

LEVEL 1 - 3 CASES

2. CHURCH OF SCIENTOLOGY OF CALIFORNIA, APPELLANT, V. RONALD SCHULTZ, AS PINELLAS COUNTY PROPERTY APPRAISER, AND O. SANFORD JASPER, AS PINELLAS COUNTY TAX COLLECTOR, APPELLEES., NO. 78-1310, DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT, 371 SO.2D 502, MAY 9, 1979.

3. CHURCH OF SCIENTOLOGY OF CALIFORNIA, A CALIFORNIA CORPORATION, AND SOUTHERN LAND DEVELOPMENT & LEASING CORPORATION, A DELAWARE CORPORATION, APPELLANTS/CROSS-APPELLEES, V. PAUL M. WADE AND SOPHIE G. WADE, HIS WIFE, ET AL., APPELLEES/CROSS-APPELLANTS., NO. 77-578, DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT, 358 SO.2D 885, MAY 17, 1978.

LEVEL 1 - 6 CASES

LEVEL 1 - 6 CASES

1. S. DOROTHY METZGER FOX, PLAINTIFF AND RESPONDENT, V. CITY OF LOS ANGELES ET AL., DEFENDANTS AND APPELLANTS., SUPREME COURT OF CALIFORNIA, 22 C.3D 792, DEC. 15, 1978.

2. JAMES FORSHER, PLAINTIFF AND APPELLANT, V. VINCENT BUGLIOSI ET AL., DEFENDANTS AND RESPONDENTS., FIRST DIST., DIV. THREE., 93 C.A.3D 475, MAY 29, 1979; HG. GRANTED AUG. 29, 1979 (S.F. 24062)

3. JACQUELINE KATZ ET AL., PETITIONERS, V. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, RESPONDENT; CARL KATZ ET AL., RESPONDENTS AND REAL PARTIES IN INTEREST., FIRST DIST., DIV. ONE, 73 C.A.3D 952, OCT. 6, 1977; AS MODIFIED NOV. 4, 1977, ON DENIAL OF PETITIONS FOR REHEARING HG. DEN. DEC. 15, 1977

4. LOS ANGELES POLICE DEPARTMENT ET AL., PETITIONERS, V. THE SUPERIOR COURT OF LOS ANGELES COUNTY, RESPONDENT; CHURCH OF SCIENTOLOGY OF CALIFORNIA, REAL PARTY IN INTEREST., SECOND DIST., DIV. TWO, 65 C.A.3D 661, JAN. 5, 1977; AS MODIFIED FEB. 2, 1977 ON DENIAL OF PETITION FOR REHEARING. HG. DEN. APR. 26, 1977

5. L. GENE ALLARD, PLAINTIFF, CROSS-DEFENDANT AND RESPONDENT, V. CHURCH OF SCIENTOLOGY OF CALIFORNIA, DEFENDANT, CROSS-COMPLAINANT AND APPELLANT., SECOND DIST., DIV. TWO, 58 C.A.3D 439, MAY 18, 1976

LEVEL 1 - 6 CASES

6. THE PEOPLE, PLAINTIFF AND RESPONDENT, V. JAMES BLAZURE WILSON, DEFENDANT AND APPELLANT., SECOND DIST., DIV. TWO., 20 C.A.3D 507, OCT. 13, 1971