

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner v. UNITED STATES AND FRANK S. ZOLIN

CASE NO: 91-946

PLACE: Washington, D.C.

DATE: October 6, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 CHURCH OF SCIENTOLOGY OF :
4 CALIFORNIA, :
5 Petitioner :
6 v. : No. 91-946
7 UNITED STATES AND FRANK S. :
8 ZOLIN :
9 - - - - - X
10 Washington, D.C.
11 Tuesday, October 6, 1992
12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:58 a.m.
15 APPEARANCES:
16 ERIC M. LIEBERMAN, ESQ., New York, New York; on behalf
17 of the Petitioner.
18 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
19 Department of Justice, Washington, D.C.; on behalf of
20 the Respondent.
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1 P R O C E E D I N G S

2 (10:58 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 91-946, Church of Scientology of California v.
5 United States and Frank S. Zolin.

6 Mr. Lieberman, you may proceed whenever you're
7 ready.

8 ORAL ARGUMENT OF ERIC M. LIEBERMAN

9 ON BEHALF OF THE PETITIONER

10 MR. LIEBERMAN: Thank you. Mr. Justice and may
11 it -- Mr. Chief Justice, and may it please the Court:

12 This case raises the question whether compliance
13 with a district court order enforcing an Internal Revenue
14 Service summons renders any subsequent appeal moot.

15 The district court below on remand enforced an
16 IRS summons for production of audio tapes held by a
17 disinterested third party record holder, the clerk of the
18 Superior Court of California. While the case was on
19 appeal, after the notice of appeal was filed, the clerk of
20 the Superior Court complied with the district court's
21 order and permitted the IRS to inspect and copy the tapes.

22 Subsequently, the Ninth Circuit Court of Appeals
23 dismissed the appeal from the production order as moot
24 without considering or hearing argument on the merits. In
25 doing so, the court of appeals held that once a district

1 court enforces an Internal Revenue Service summons for the
2 production of documents, and once the documents are turned
3 over to the IRS by either the taxpayer or by a
4 disinterested third-party record holder, the case becomes
5 moot. This rule applies no matter what proprietary,
6 privacy, or other interests the taxpayer may have in the
7 documents and, of course, no matter how meritorious the
8 taxpayer's appeal may be on the merits, even if the
9 taxpayer is claiming privilege, IRS bad faith, or that
10 there is no legitimate, ongoing Internal Revenue Service
11 investigation.

12 The court of appeals' rule here is contrary to
13 well-established mootness doctrine as enunciated by this
14 Court and by the lower Federal courts. Determination of
15 whether a case is moot has long rested on two interrelated
16 considerations: first, the existence of an actual, live
17 controversy between the parties; and second, whether the
18 courts may grant any effectual relief to the prevailing
19 party. The emphasis here is upon the question of whether
20 any relief may be afforded even if it is only partial
21 relief or relief other than that originally sought at the
22 outset of the case.

23 QUESTION: Well, Mr. Lieberman, I take it all
24 the issues on the merits in this litigation are finished.
25 They're decided. They're resolved, are they not?

1 MR. LIEBERMAN: Well, no, Your Honor, I don't
2 believe that's true.

3 First of all, when this Court decided the first
4 Zolin case, it found that in deciding the crime-fraud
5 issue on an attorney-client privilege issue, the district
6 court could look at any evidence not privileged and
7 lawfully obtained by the Government, and it specifically
8 noted that the question of whether the partial transcripts
9 in this case were lawfully obtained.

10 It then remanded to the Ninth Circuit, which
11 again declined to reach the issue of whether the
12 transcripts were lawfully obtained, and remanded to the
13 district court for determination of whatever other
14 objections the parties may raise, specifically noting that
15 it was not reaching that particular issue.

16 Secondly --

17 QUESTION: And you did not take -- certiorari
18 was not granted from that order. That order is final.
19 That's the June 20 order, and that is final.

20 MR. LIEBERMAN: That's correct, Your Honor.
21 That's correct.

22 But certiorari was not sought on that issue.

23 QUESTION: So, it's the law of the case that the
24 court is not going to consider these transcripts.

25 MR. LIEBERMAN: Oh, no, Your Honor. We did not

1 seek certiorari on that issue, and the court of appeals
2 did not hold that that issue was precluded from the
3 district court. It simply said on this appeal, we are not
4 going to be considering that issue. It did not say that
5 the issue had been waived, and it remanded to the district
6 court to consider that issue and any other objections the
7 party might raise. In our petition for certiorari from
8 that particular Ninth Circuit Court of Appeals decision,
9 the question of whether or not the transcripts had been
10 obtained lawfully, either on the merits or how it was
11 dealt with procedurally, was not even raised.

12 Now, the other issue --

13 QUESTION: Well, but isn't that the problem?
14 You didn't even raise it in your original appeal.

15 MR. LIEBERMAN: Well, there was no reason to,
16 Your Honor, because we were being remanded for the
17 opportunity to raise it in the district court. The court
18 of appeals did not preclude us from raising it on the
19 remand that the court of appeals was then ordering to the
20 district court. The court of appeals said subject to
21 whatever other issues the parties may raise, and footnoted
22 right at that point, that it is not reaching the issue of
23 unlawfully obtained. It does not say it is precluded.

24 QUESTION: Are these transcripts just duplicate
25 copies of the materials that are -- the principal

1 materials in issue?

2 MR. LIEBERMAN: Well, they're partial
3 transcripts, Your Honor, and --

4 QUESTION: So, everything in the transcript was
5 covered by the documents themselves, and we've said you
6 can look at the documents themselves in order to determine
7 the privilege. So it seems to me that that's another
8 reason this case is over no matter what we do.

9 MR. LIEBERMAN: Well, one thing that we were
10 urging below, Your Honor, was that the district court look
11 at the entire tapes because we believe that they would
12 show that the privilege still remained. Now, if it's true
13 that it was improper for the court of appeals to look at
14 the partial transcripts, then the whole issue of
15 looking -- of what evidence the district court has
16 available to it to look at becomes a live issue, and it
17 must look then, if it is going to look at anything, at the
18 entire case.

19 But there is another issue -- live issue before
20 the district court as well, which arose even subsequent to
21 the Ninth Circuit's decision, and that issue is whether or
22 not there is at the time of the production order in this
23 case, whether there was a live, ongoing Internal Revenue
24 Service investigation. As we showed to the district
25 court, which refused to consider the issue on the

1 merits --

2 QUESTION: But if the district court wouldn't
3 consider it, and you say it has happened since the Ninth
4 Circuit ruled in this case that we're hearing now --

5 MR. LIEBERMAN: It gets a little confusing, Your
6 Honor.

7 QUESTION: It certainly does.

8 MR. LIEBERMAN: Since the Ninth Circuit ruled
9 and the opinion reported at 905 F.2d, which is not the
10 opinion from which this certiorari petition was granted,
11 the Ninth Circuit remanded to the district court. When
12 the case was back before the district court, evidence was
13 developed at the -- from the testimony of Internal Revenue
14 Service agents in other cases that there was no ongoing
15 investigation.

16 We wished then to raise with the district court
17 that there no longer could be a basis for an order
18 disclosing documents since there was no longer a
19 legitimate purpose. That issue was denied us by the
20 district court. That was the -- one of the issues we
21 wished to raise on the merits on the appeal back to the
22 Ninth Circuit, which the Ninth Circuit refused to hear on
23 the grounds that the case was now moot because the IRS now
24 had the documents.

25 QUESTION: Well, what relief could the Ninth

1 Circuit have granted you had it heard your appeal on the
2 merits?

3 MR. LIEBERMAN: The Ninth Circuit could have
4 granted us the following relief. One, it could have held
5 that there -- at the time of the production order, there
6 was no -- we had proved that there was no ongoing
7 legitimate Internal Revenue Service investigation.

8 QUESTION: What good would that do you?

9 MR. LIEBERMAN: The IRS wouldn't get the
10 documents.

11 QUESTION: But they have the documents, don't
12 they?

13 MR. LIEBERMAN: Well, but -- oh, and then it
14 could have required the IRS to return the documents and
15 the copies, just as this Court ordered, for example, the
16 Justice Department to do in the Sells case.

17 QUESTION: Well, but the documents wouldn't go
18 to you. They'd go to the clerk of the Superior Court of
19 Los Angeles County, wouldn't they?

20 MR. LIEBERMAN: Under seal, Your Honor.

21 QUESTION: Well, what good would that have done
22 you?

23 MR. LIEBERMAN: It would have protected our
24 privacy interest in the documents.

25 QUESTION: After they've already copied what

1 they want to copy?

2 MR. LIEBERMAN: No. We were asking for return
3 of the copies as well, relief twice afforded in this case
4 by the district court.

5 QUESTION: Well, but to say to return the copies
6 as well suggests that you want an order precluding their
7 use in any future proceedings.

8 MR. LIEBERMAN: No, that's not right, Your
9 Honor. No more true -- that is no more true in this case
10 than it was in the Sells case or in the G.M. Leasing case.
11 In both of those cases -- first, take Sells.

12 In the Sells case, where the grand jury,
13 pursuant to court order, had turned over records to the
14 Civil Department of the Justice Department and the
15 Government claimed that therefore the appeal from that
16 order was moot, the Ninth Circuit and this Court both
17 agreed that the case was not moot because the court of
18 appeals had the power to order the Civil Department of the
19 Justice Department to turn over the originals and the
20 copies of the record, and that would afford partial relief
21 to the individual.

22 Similarly, in each and every one of the cases
23 involving Federal Trade Commission subpoenas, for which
24 the Government must seek a court order of enforcement, in
25 numerous cases, the similar situation has arisen where in

1 the course of the appeal, because of a lack of a stay, the
2 documents were, in fact, turned over to the Federal Trade
3 Commission and --

4 QUESTION: I thought in Sells, the Court said we
5 can prevent future disclosure or further disclosure.

6 MR. LIEBERMAN: Let me be quite clear about
7 that.

8 QUESTION: Well, I think you should be clearer
9 than you were when you just described Sells.

10 MR. LIEBERMAN: In Sells, the issue was not
11 whether there were going to be further disclosures from
12 the grand jury to the Justice Department. That disclosure
13 had been --

14 QUESTION: Further disclosures within the
15 Justice Department.

16 MR. LIEBERMAN: That's right. Further
17 disclosures within the Civil Division of the Justice
18 Department and, as this Court noted in Sells, to prevent
19 the continuing access of those to whom the materials have
20 already been disclosed.

21 QUESTION: So, you're talking about something
22 that is going to happen in the future.

23 MR. LIEBERMAN: No. We are talking about
24 something that's --

25 QUESTION: Continuing access.

1 MR. LIEBERMAN: -- going on today, tomorrow --

2 QUESTION: Well, but not in the past.

3 MR. LIEBERMAN: Not in the past. That's right.

4 QUESTION: And so, what good is an order like
5 that to say that the IRS shall not further look at your
6 copies, which perhaps would be the counterpart of the
7 Sells order? What good is that going to do you?

8 MR. LIEBERMAN: Well, precisely the same good
9 that it was going to do the person in the Sells case, Your
10 Honor.

11 QUESTION: Well, but the complaint in Sells was
12 that these people were disclosing things among themselves,
13 and that it would keep right on going.

14 MR. LIEBERMAN: Precisely the same thing as here
15 too. The IRS has these tapes and is disclosing these
16 things among itself, and the people who have had access
17 have continuing access, just as in Sells.

18 Similarly, in G.M. Leasing.

19 QUESTION: Well, how is it that so many courts
20 of appeals haven't really caught on to this argument of
21 yours?

22 MR. LIEBERMAN: Well, that's a very good
23 question, Your Honor, and I think if you look at the
24 cases --

25 QUESTION: There are only 10 of them, aren't

1 there?

2 MR. LIEBERMAN: That's right. That's right.

3 If you look at the cases, other than the Third
4 Circuit cases which, of course, hold in our favor, you
5 have about 28 decisions. I submit not one of them
6 analyzes the question. The first case, Lawhon or
7 Lawhon --

8 QUESTION: Well, you mean they haven't analyzed
9 it like you have.

10 MR. LIEBERMAN: I submit that if you look at
11 them, they haven't analyzed it very much at all.

12 The first case, Lawhon, Fifth Circuit, appeal
13 dismissed as moot because the documents, says the Fifth
14 Circuit, were already turned over to the IRS and were
15 returned to the taxpayer. So, that case was correctly
16 decided. That was moot.

17 The next case and the next case after that --

18 QUESTION: Excuse me. Were the copies returned
19 to the taxpayer too?

20 MR. LIEBERMAN: That's not clear from --

21 QUESTION: Well, then it's not clear that it was
22 moot.

23 MR. LIEBERMAN: Well, that's true.

24 QUESTION: That's not what you said.

25 MR. LIEBERMAN: That's true. From everything we

1 can tell, it would appear that it was --

2 QUESTION: I suggest you try to be more
3 accurate, Counsel, in your description of the cases.

4 MR. LIEBERMAN: Your Honor, the Fifth Circuit in
5 Lawhon specifically stated the documents were returned to
6 the taxpayer. I don't know whether there may have been
7 additional copies or not.

8 But if you look at every subsequent decision, it
9 says we rely on Lawhon -- or we rely on the last case,
10 which relied on Lawhon. This is moot. There is no
11 analysis in those cases.

12 The only cases dealing with IRS summons
13 enforcement, which analyzed the question --

14 QUESTION: Well, if I take you literally, every
15 single case was like the Fifth Circuit case; namely, the
16 documents had been returned.

17 MR. LIEBERMAN: No, but that's not true.

18 QUESTION: Well, that isn't what you --

19 MR. LIEBERMAN: That's not true. That's
20 precisely my point, Justice White. In Lawhon, from what
21 we can tell --

22 QUESTION: All right. How about the other
23 cases?

24 MR. LIEBERMAN: The other cases, the documents
25 weren't returned, and therefore we think they were

1 incorrectly decided.

2 QUESTION: Mr. Lieberman, there's a similar
3 statute for subpoena power that covers the FTC. Is that
4 right?

5 MR. LIEBERMAN: That's precisely right, Justice
6 O'Connor.

7 QUESTION: Is the language of that statute the
8 same as here?

9 MR. LIEBERMAN: The language of that statute, as
10 with this statute, permits -- authorizes the Federal
11 courts to enforce a subpoena order when the FTC brings a
12 proceeding. In those cases -- and here there is a line of
13 authority which is also fairly uniform, and it's in direct
14 contradiction to the line of authority in the summons
15 enforcement cases.

16 QUESTION: There are a series of cases in which
17 the FTC has subpoenaed material in the course of its
18 investigations, I suppose.

19 MR. LIEBERMAN: That's correct.

20 QUESTION: And in which the appellate courts
21 have held that they still have jurisdiction to order a
22 return of the documents --

23 MR. LIEBERMAN: That's correct.

24 QUESTION: -- subpoenaed and the copies?

25 MR. LIEBERMAN: That's precisely correct.

1 And the Government attempts to make a
2 distinction with the FTC cases by saying that those cases
3 are all adjudicatory subpoena cases and, therefore, that
4 it's the equivalent of a suppression order, but that's not
5 true. Some of the cases are adjudicatory. Some of them
6 are investigatory subpoenas. The most recent case, the
7 Invention Submission case, cited in our briefs, in the
8 D.C. Circuit, was clearly an investigatory subpoena, and
9 the Government acknowledged that the case was not moot
10 merely because the documents had been turned over to the
11 FTC because, it said, the documents and the copies can be
12 returned or the copies can be destroyed, just as in Sells.

13 In the search and seizure area, the Government
14 cites the General Motors Leasing Corporation case to
15 support its view, and quite frankly, I find that rather
16 peculiar because I think, if anything, G.M. Leasing
17 suggests that we are correct in this.

18 QUESTION: Well, why don't you just say that the
19 case can't possibly be moot since at least the original of
20 the tapes is your property?

21 MR. LIEBERMAN: Well, Your Honor, because the
22 original of the tapes is still --

23 QUESTION: Well, whatever --

24 MR. LIEBERMAN: -- with the Superior Court of
25 Los Angeles County. The Government inspected and copied

1 the tapes. It did not keep the originals.

2 QUESTION: And so, you have no right to the copy
3 unless you win the -- this case on your ground.

4 MR. LIEBERMAN: That's right. That's right.

5 QUESTION: May I ask kind of a general question
6 that -- I always have trouble figuring out what the people
7 are fighting about here. If I understand, one of your
8 submissions was that the civil investigation is all over.
9 So, they have no right to keep this stuff.

10 MR. LIEBERMAN: That's correct.

11 QUESTION: And the other thing that's in the
12 back of my mind is your -- the individual client is
13 deceased now, so there's no danger of criminal proceedings
14 against him.

15 What is the risk of something happening to
16 somebody that may be affected by the outcome of this case?

17 MR. LIEBERMAN: Well, Your Honor, if we're
18 correct that there is no ongoing investigation, then the
19 risk is simply the risk that any citizen faces in having
20 his or her private papers in the possession of the
21 Government for it to rummage through or use as it wishes
22 when there's no particular legitimate law enforcement or
23 other purpose for it having done so. And that is --

24 QUESTION: Well, that's just some imaginary
25 person.

1 MR. LIEBERMAN: Well, I don't know whether it's
2 an imaginary person. This is a live -- there is a live
3 party here who has live records involving conversations
4 and private activities which it retains an interest in.
5 In fact, Congress specifically recognized this interest.

6 QUESTION: Is it going to hurt your clients if
7 the investigation is all over?

8 MR. LIEBERMAN: Well, Congress thought it would,
9 Your Honor, because Congress provided a scheme whereby the
10 IRS, when it seeks documents in the summons
11 proceeding -- its summons is not self-executing. It must
12 go to the Federal court. It must invoke the jurisdiction
13 of the Federal courts to obtain the documents, and it
14 provides the taxpayer with a defense, a defense that the
15 IRS is not entitled to the documents unless it can show,
16 one, that there is an ongoing investigation, and two, that
17 they're relevant to that investigation. If there's not an
18 ongoing investigation, the taxpayer has a right to the
19 privacy of his documents.

20 QUESTION: But that's just another argument on
21 the merits, isn't it? The -- you're saying the district
22 court's order of disclosure was wrong.

23 MR. LIEBERMAN: That's right. That is our
24 argument on the merits.

25 QUESTION: That's not an argument why this case

1 isn't moot.

2 MR. LIEBERMAN: Well, I was addressing the
3 specific question.

4 QUESTION: You're addressing the merits of your
5 argument --

6 MR. LIEBERMAN: Yes.

7 QUESTION: -- for reversal of the district court
8 order.

9 QUESTION: Mr. Lieberman, if the investigation
10 is over, can members of the public gain access to these
11 copies, do you suppose?

12 MR. LIEBERMAN: No, not under the order that the
13 district court granted in the original case and which the
14 court of appeals affirmed and which this Court affirmed by
15 an equally divided Court. The IRS is precluded from
16 making those documents public.

17 QUESTION: So, the risk of further disclosure is
18 limited to employees of the IRS?

19 MR. LIEBERMAN: That's right. It's within the
20 IRS for use as it may deem fit and where there is no
21 continuing investigation. Congress --

22 QUESTION: So, it may be a smaller risk, in
23 effect, than would be the case with the FTC, I suppose,
24 where very significant client information or even
25 information about how goods are made or produced could be

1 obtained by the public if they weren't returned. Is
2 that -- is there a difference at all in the risk?

3 MR. LIEBERMAN: Well, I'm not sure that the FTC
4 would ordinarily be free to just make public documents it
5 obtained through a subpoena in a situation like that. I
6 mean, if it wound up introducing them into a court
7 proceeding, then of course, they would become public. But
8 in the FTC situation, the party who turned over the
9 documents would certainly have an interest in receiving
10 return of those documents and destruction of copies if the
11 FTC, it turned out, was not conducting an investigation
12 and that they served no legitimate purpose for the FTC.

13 Congress also -- I just want to point out a
14 second way in which Congress has recognized this interest.
15 When Congress amended section 7609 to provide for the
16 automatic right of a taxpayer to intervene when a summons
17 is directed to a disinterested third-party record holder,
18 Congress took the position that the taxpayer -- and this
19 is made manifest in the legislative history -- taxpayer
20 may have civil or privacy rights in those documents and
21 thus has a right of intervention, per se, to protect that
22 interest.

23 QUESTION: Have you exhausted your remedies
24 below to get these papers back now that the investigation
25 is over?

1 MR. LIEBERMAN: I think we've done everything
2 that one could possibly imagine. We certainly sought
3 stays of the production order pending appeal.

4 QUESTION: Well, I know, but what has happened
5 since the investigation is over?

6 MR. LIEBERMAN: Well, it's very interesting,
7 Your Honor.

8 QUESTION: Well, have you asked for the papers
9 back where you say, look, the investigation is over, and
10 you've made copies of our papers, and we have an interest
11 in getting them back?

12 MR. LIEBERMAN: Well, not since this case went
13 up, Your Honor. I must say that. The Government has
14 maintained its position on this appeal that it has a
15 continuing right to these documents. If it --

16 QUESTION: Mr. Lieberman --

17 MR. LIEBERMAN: If it -- I'm sorry. Yes?

18 QUESTION: Would you go back? Am I wrong in my
19 understanding that the Ninth Circuit has already ruled
20 that the crime fraud exception applies to the
21 conversations in question and that, therefore, the
22 documents have to be turned over? Am I wrong in that?

23 MR. LIEBERMAN: Well, you're right that the
24 Ninth Circuit ruled that based upon the evidence before it
25 at the time, the crime fraud exception had been made out,

1 but it did not rule that the documents had to be turned
2 over. It remanded for further objections, including
3 objection to the question whether the evidence that was
4 the -- upon which the Ninth Circuit was ruling was
5 properly before it and also for determination of any
6 further objections the taxpayer might make. That was the
7 specific basis for the remand. So, the Ninth Circuit did
8 not end the case. The Ninth Circuit remanded with an
9 opportunity to make further objections and specifically
10 reserved one of the particular objections we're making.

11 QUESTION: Could the Ninth Circuit then in this
12 case, instead of dismissing on mootness grounds, simply
13 say the taxpayer has had an opportunity to raise any
14 further objections? It has not. The crime fraud
15 exception, therefore, is dispositive and we have already
16 ruled on the case and, therefore, hold against you on that
17 ground.

18 MR. LIEBERMAN: Well, the issue on the appeal
19 -- on the merits of the appeal -- of course, we think we
20 were correct that we had meritorious issues. Certainly
21 it's possible that we could have lost the appeal.

22 QUESTION: But you think you're correct, but the
23 Ninth Circuit had held against you. And could they simply
24 have said you have raised no new evidentiary issue. There
25 is no investigation, in fact. I suppose the simple way to

1 do it is that the investigation is over. There's no
2 evidentiary issue to raise. The only possibility for them
3 to bar the IRS from getting this was crime fraud
4 exception. We've already ruled on it. They've lost. We
5 hold against them on the grounds that we've already
6 decided the only remaining issue. Could they have done
7 that?

8 MR. LIEBERMAN: Well, it's conceivable they
9 could have done that, certainly.

10 QUESTION: Well, they would have been right,
11 wouldn't they?

12 MR. LIEBERMAN: They wouldn't, no. I think they
13 would have been incorrect.

14 QUESTION: Why?

15 MR. LIEBERMAN: For the reasons I've stated.
16 The remand order left open certain questions. Those
17 questions -- take --

18 QUESTION: Yes, but those -- weren't those
19 questions about evidentiary use? Maybe I'm not
20 remembering accurately.

21 MR. LIEBERMAN: Well, the Ninth Circuit remand
22 order was somewhat --

23 QUESTION: The investigation is over. There's
24 not going to be any issue. If the investigation is over,
25 there's not going to be any further issue of evidentiary

1 use unless there's a new investigation, I suppose.

2 MR. LIEBERMAN: Well, there was -- actually
3 there was never any question of evidentiary use, and the
4 Ninth Circuit's remand --

5 QUESTION: Well, there never was in the sense
6 that you claim -- and perhaps rightly -- that there was no
7 such objection that could have been raised, but the Ninth
8 Circuit at least left it open.

9 MR. LIEBERMAN: Well, that's right. And when on
10 remand -- I'm sorry. On remand, when it went down to the
11 district court, the district court noted that the Ninth
12 Circuit obviously was somewhat confused about the status
13 of the case. The question wasn't whether the tapes were
14 to be introduced or not introduced into an ongoing
15 proceeding. The question was whether they were to be
16 produced to the Internal Revenue Service.

17 QUESTION: But that was an explanation for the
18 objections that the Ninth Circuit won't hear it -- heard
19 it. The order is at page 15a of your appendix, and I
20 agree that it's imprecise. But it seems to me the best
21 reading of it is that the Ninth Circuit thought that these
22 were going to be admitted into evidence and said if you
23 have any other evidentiary objections, you can make those
24 objections. But so far as the crime fraud exception,
25 we've ruled. It seems to me that that's the most

1 plausible reading of the order.

2 MR. LIEBERMAN: Well, Your Honor, I must take
3 exception with that, precisely because they footnoted
4 right there the question of not reaching the issue of
5 whether the documents were lawfully obtained.

6 In addition, there is the additional objection
7 we raised of whether there was an ongoing investigation.

8 Now, I think the important issue, the thing to
9 keep in mind here, is that the issue before this Court is
10 whether or not our appeal was moot, not whether or not we
11 would have won or lost that appeal. This is an issue
12 which has broad reference to summons enforcement cases.
13 As has been noted, there is a split in the circuits on it.
14 Most of the circuits go against us, and -- but most of
15 those circuit decisions against us, I submit, are contrary
16 to parallel lines of authority dealing with the Federal
17 Trade Commission cases, dealing with the Sells Engineering
18 case, and that those cases really do not come to terms
19 with the issues.

20 I reserve the rest of my time.

21 QUESTION: Very well, Mr. Lieberman.

22 Mr. Wallace, we'll hear from you.

23 ORAL ARGUMENT OF LAWRENCE G. WALLACE

24 ON BEHALF OF THE RESPONDENT

25 MR. WALLACE: Thank you, Mr. Chief Justice, and

1 may it please the Court:

2 In the current appeal to the Ninth Circuit that
3 is under review, we argued both that petitioner's claims
4 were res judicata and that the appeal was moot because all
5 of the materials had, in fact, been produced because of
6 the denial of stays and the originals had been returned.

7 The court of appeals did not reach our res
8 judicata contentions, but decided only that the appeal was
9 moot. We argued both that the claims that are being made
10 are claims that have already been resolved against
11 petitioners, and even if some of the claims were not, they
12 could have been raised at the earlier stage, and unlike
13 collateral estoppel, under principles of res judicata, the
14 claims are barred because it's the same litigation between
15 the same parties, and petitioner is not free to raise
16 these claims seriatim rather than all at once.

17 But we have not urged the court -- we've pointed
18 out this obstacle to petitioner's prevailing, but we have
19 not urged this Court to reach and sort out the res
20 judicata issues which the court of appeals did not reach.
21 We assumed that the Court granted certiorari to decide the
22 question presented in the petition, which was the mootness
23 question on which there is a conflict in the circuits, and
24 that is what we have addressed.

25 It's possible that the Court would conclude that

1 the res judicata obstacle to petitioner's prevailing is a
2 reason to dismiss the writ as improvidently granted, but
3 we have not urged that either.

4 QUESTION: I suppose our problem is that if
5 we're going to discuss mootness, we should undertake some
6 analysis of the remedies that might be available below,
7 and in this case, it doesn't look like the petitioner is
8 going to prevail in any event. And so, it's just an
9 awkward posture to hear the case.

10 MR. WALLACE: It is indeed, and I thought we had
11 satisfied our duty to the Court in pointing out these
12 problems in our brief in opposition, perhaps not as
13 elaborately as one might. Briefs in opposition are done
14 in quantities.

15 QUESTION: Well, Mr. Wallace, I think my concern
16 is really the effect of saying this case is moot, what
17 effect that would have in the FTC context where I think
18 people have a lot at stake there in getting back their
19 documents. And it seems to me that courts have followed
20 two different tracks under virtually identical subpoena
21 statutes.

22 MR. WALLACE: I quite agree with you that the
23 courts have followed a different track, certainly the D.C.
24 Circuit, in the Federal Trade Commission cases. We would
25 not urge in this case for the Court to resolve how those

1 questions should be decided under the Federal Trade
2 Commission Act.

3 QUESTION: Well, I mean, the plain fact is
4 there's a lot at stake in leaving some of this privileged
5 information in the hands of offices that have no further
6 use for them.

7 MR. WALLACE: There can be protective orders,
8 and there are various statutory restrictions on disclosure
9 of confidential information. The ones in the Internal
10 Revenue Code happen to be among the most comprehensive in
11 any Federal statute. There are specific provisions in the
12 Internal Revenue Code governing the Service's disclosure
13 of confidential information. We summarize these in some
14 detail in the brief that we filed in this Court the last
15 time around in this case in United States against Zolin.

16 QUESTION: Yes, Mr. Wallace, but those are
17 statutory protections for the taxpayers.

18 MR. WALLACE: That is correct.

19 QUESTION: And one of the issues before was
20 whether in addition to the statutory protections, the
21 district court had any authority to enter specific
22 protective provisions. What's your position now on that?
23 Do you still take the position there's no such authority?

24 MR. WALLACE: Well, that is our position in
25 litigation in other cases. This Court, by an equally

1 divided Court, affirmed the judgment in this case.

2 QUESTION: Right.

3 MR. WALLACE: So, that issue is no longer open
4 in this case. The law of this case is that the particular
5 restrictions entered in this order have been upheld by
6 this Court in affirming that judgment, but we have won an
7 en banc decision to the contrary in another circuit, and
8 we continue to litigate that issue elsewhere. But that
9 is --

10 QUESTION: Isn't your -- can I just kind of ask
11 you? I'm not as familiar nearly as you are with these new
12 statutory provisions, but the case that runs through my
13 mind is supposing I've got some corporate minute books
14 that are subpoenaed, and I resist the subpoena on the
15 ground that it's not relevant or burdensome or something
16 or other. And the judge rules against me and says you got
17 to -- you must deliver the corporate minute books, and I
18 deliver them. Could the judge have said, I'm entitled to
19 get copies of those from the -- say I've complied with the
20 subpoena and delivered the books. And would the judge say
21 to the -- have the power to say to the Government, you
22 must give copies of these -- either return them within 30
23 days or give them copies so they can work -- run the
24 office?

25 MR. WALLACE: Well, there probably is authority

1 in dealing with subpoenas under other statutes.

2 QUESTION: No, no. I'm talking about this
3 statute.

4 MR. WALLACE: Under this statute, there is a
5 statutory requirement that production, when it's ordered,
6 be for a reasonable time and under reasonable
7 circumstances. I'm referring to section 7605(a), and that
8 generally has been understood to mean that we can keep the
9 originals only for a reasonable time and then should
10 return the originals.

11 QUESTION: But can the order -- my question is
12 really can the district court say to you I think the
13 reasonable time is 30 days, return them after 30 days?
14 Would that be within the authority of the district court
15 to fix the reasonable time?

16 MR. WALLACE: It's rather seldom done in these
17 summons enforcement orders, but there would be nothing
18 wrong with that because one could even argue that there's
19 a condition implied in law when the summons is
20 enforced --

21 QUESTION: Well, then if he has that
22 authority --

23 MR. WALLACE: -- that we can only keep the
24 originals for a reasonable time under 7605(a).

25 QUESTION: If the judge has that authority,

1 could he not say there's no request for it at the time of
2 the delivery? Could the subpoenaed party go into court 10
3 days later and say we find we need the documents, would
4 you direct the Government to give us -- give them back to
5 us in the next 3 weeks or else give us copies? Could they
6 do that?

7 MR. WALLACE: Well, we think that once a
8 production has occurred, the jurisdiction of the court has
9 ended under the narrow jurisdiction conferred to enforce
10 an Internal Revenue summons, but that the court, as any
11 court does, retains authority to enforce its order. And
12 if, in fact, an implied in law condition of the order is
13 that the originals can be kept for inspection only for a
14 reasonable time, because that's what 7605(a) says, then
15 the court retains authority to see whether we have
16 exceeded that implied condition in his order.

17 QUESTION: Well, why wouldn't there be an
18 implied condition in a case like this that the
19 copies -- if the original or copies are being used by the
20 Government, they shall not be kept any -- for any period
21 of time beyond the time they serve some useful purpose?

22 MR. WALLACE: Well, because that --

23 QUESTION: If that was an implied condition,
24 then under your explanation, the judge would have the
25 power to say, well, look, you've had these things for 7

1 years and you haven't done anything. Give them back.

2 MR. WALLACE: That would be an implied condition
3 that would contradict the overall pattern of statute and
4 decision law concerning judicial anticipation and
5 direction of Internal Revenue Service investigations.

6 I think the answer to this case emerges with
7 greater clarity if we put the particular summons
8 enforcement question into the landscape in which the
9 summons authority is placed. There is -- throughout the
10 U.S. Code, there's a thematic pattern that this Court has
11 recognized in its decisions repeatedly, and that is that
12 Congress has, with only very narrowly delimited
13 exceptions, prohibited preassessment litigation about tax
14 controversies because that litigation could interfere with
15 the Service's investigatory and collection efforts.
16 There's the Tax Anti-Injunction Act. There's the Tax
17 Exception to the Declaratory Judgment Act, and there are
18 these comprehensive provisions governing disclosure of
19 confidential information in the hands of the IRS in
20 section 6103, which is very elaborate and detailed with
21 many subsections.

22 And this applies to a very broadly defined
23 return information which includes any data collected by
24 the Secretary with respect to a return or with respect to
25 the determination of the existence or possible existence

1 of liability under the Code. So, it would apply to
2 information received through summons enforcement
3 proceedings or received through voluntary compliance with
4 a summons without any court order or otherwise received by
5 the --

6 QUESTION: On that very point of voluntary
7 compliance, supposing I turned over the minute books, I
8 got the subpoena, I gave you the minute books, and you
9 used them. And about 4 years later, I think, gee, I need
10 those because I got to make -- bring my minute books up to
11 date. How does the -- what right does the taxpayer have
12 to get those minute books back? Is there any statutory
13 provision for that?

14 MR. WALLACE: Without a court order in the first
15 place, you said --

16 QUESTION: Just -- they just complied with the
17 subpoena.

18 MR. WALLACE: -- turned over by voluntary
19 compliance.

20 QUESTION: And then 3 years later, I say, gee, I
21 want those -- my records back. Does he have a right to
22 get the records back, and if so, what is the statutory
23 basis for getting them back?

24 MR. WALLACE: The answer would be that he could
25 sue for a violation of his rights to get his property back

1 the way he would from any other agency of the Government
2 that property has wrongfully been withheld.

3 QUESTION: Is there any statutory provision --

4 MR. WALLACE: There's no particular statute.

5 QUESTION: Sort of the common law rights of --

6 MR. WALLACE: He would have to -- he would have
7 to do that and bring a Federal question case and come
8 within the very narrow exception to the Tax
9 Anti-Injunction Act that this Court has recognized. The
10 leading case is Enochs against Williams Packing Company,
11 370 U.S. 1, a standard that was articulated with great
12 care. If it's clear that under no circumstances could the
13 Government ultimately prevail under the most liberal view
14 of the law and the facts, then there is this narrow
15 exception to the Anti-Injunction Act, which the Court
16 reaffirmed that standard in Commissioner against Shapiro
17 in Volume 424 U.S., and that would be the only avenue.

18 QUESTION: Well, what does the -- what does the
19 statute requiring production for the IRS -- does it say
20 anything more than that the taxpayer shall produce certain
21 books?

22 MR. WALLACE: Nothing more than that at all.

23 QUESTION: Well, certainly that can't
24 contemplate that the property interests in the books turns
25 -- goes over to the Government.

1 MR. WALLACE: Well, that is correct, Your Honor,
2 and we can only examine them for a reasonable time, but we
3 can during that time and, of course, in the modern
4 practice, make copies of them. Or in some instances,
5 records are now on computers, and we just get a printout
6 that they don't even want back.

7 QUESTION: But the originals of these records
8 have been returned to where they got them from --

9 MR. WALLACE: That is correct.

10 QUESTION: -- which is the clerk of the Superior
11 Court.

12 MR. WALLACE: That is correct.

13 And the controversy now is about getting us to
14 turn over the copies that we made. The copies were not
15 anyone else's property. They are a form of fruits of the
16 original disclosure.

17 QUESTION: Mr. Wallace, there were two previous
18 occasions when the tapes were surrendered to the IRS and
19 then ordered returned. Did those both deal with the
20 originals, or did those orders deal also with copies? In
21 this case, were there not two previous occasions?

22 MR. WALLACE: They were and they dealt with the
23 originals. I don't know whether they also dealt with
24 copies, but I know they dealt with the originals.

25 QUESTION: Did the Government in those

1 cases -- in those instances argue mootness or raise this
2 same --

3 MR. WALLACE: We did not because, as I recall,
4 we had not even made copies at that point, as we explained
5 in our brief. So, whether the order would have addressed
6 copies or not, there were no copies to be turned over.
7 And our view -- we've set this forth in a footnote -- is
8 that the proceeding had not become moot at that point
9 because this wasn't full production until we had an
10 opportunity to examine and use the materials. So --

11 QUESTION: Mr. Wallace, can I ask you another
12 question about -- just a general question, not the details
13 of this very complex case. You've explained to me that
14 when there's a production of originals, there's a kind of
15 an implied condition of keeping them for a reasonable
16 period of time.

17 Is there also an implied condition that if the
18 Government decides to make copies and return the
19 originals, that the copies will be returned within a
20 reasonable period of time if they've served their purpose
21 and so forth?

22 MR. WALLACE: The copies are not to be -- we
23 recognize no obligation to return copies to anyone.

24 QUESTION: So, your view is --

25 MR. WALLACE: The copies are not anyone else's

1 property.

2 QUESTION: Just so that I understand this, if
3 you do manage to get -- successfully subpoena something
4 and overcome an objection to production, you have an
5 absolute statutory right to retain copies forever.

6 MR. WALLACE: Well, of course, we don't for our
7 own purposes do that.

8 QUESTION: I know you don't do that, but that's
9 what the law would authorize you to.

10 MR. WALLACE: But that is correct, as well as
11 anything else that we have learned in our investigation as
12 a result of having scrutinized the originals, whether we
13 made copies or not.

14 QUESTION: No. I understand. But just so I'm
15 clear on it, your position is that the law entitles you to
16 retain the copies forever if you lawfully get possession
17 of the originals pursuant to a subpoena.

18 MR. WALLACE: Copies like notes or like
19 further --

20 QUESTION: I mean, the answer is yes. Is that
21 right?

22 MR. WALLACE: The answer is yes. Copies like
23 notes or like further inquiries that we made on the basis
24 of scrutinizing the original are a species of fruits.
25 They are not the original materials that were produced.

1 In their reply brief in support of their
2 petition, what petitioners emphasize -- and I'm reading
3 from their reply brief at the top of page 4. Effective
4 relief is available to the Church here by way of an order
5 that the tapes and any documents derived from the tapes be
6 returned to the custody and control of the district court,
7 and that any information derived therefrom not be further
8 disclosed to any other person or otherwise used by the IRS
9 which would effectively return the parties to the status
10 quo ante.

11 QUESTION: Mr. Wallace, leaving aside the
12 question of whether that argument should succeed or not,
13 are they barred from raising it below?

14 MR. WALLACE: Well, we think that it was all res
15 judicata, but as I said, we argued that to the court of
16 appeals, but they didn't reach that argument because they
17 accepted our other argument, that the contention was moot.

18 QUESTION: But it's not moot if, in fact, they
19 may raise this issue. So, are you saying that the
20 mootness issue necessarily subsumed this claim?

21 MR. WALLACE: Well, that -- they do -- there is
22 a controversy asserted between the parties. Our position
23 is that that controversy is not right, that that is a
24 premature claim, as this Court said in the G.M. Leasing
25 claim.

1 QUESTION: Okay, no. I recognize that as being
2 your position, but so far as their opportunity to raise
3 that issue and for you to assert that position now, you're
4 saying that the mootness determination necessarily
5 subsumed that.

6 MR. WALLACE: Well, that is the mootness issue.
7 They say that that's --

8 QUESTION: So, that's properly -- so, that's
9 properly before us.

10 MR. WALLACE: Exactly. They say that that's --

11 QUESTION: And if we think that issue ought to
12 be explored, we could remand for that purpose.

13 MR. WALLACE: Well, but the --

14 QUESTION: Couldn't we?

15 MR. WALLACE: Well --

16 QUESTION: Couldn't we say that they were
17 entitled to explore that on the merits before the Ninth
18 Circuit and they were not allowed to do so?

19 MR. WALLACE: Well, that is the mootness
20 question. The Ninth Circuit correctly in our view agreed
21 with all other circuits except the Third by saying that
22 once production had occurred under this summons
23 enforcement order, the summons enforcement proceeding was
24 ended, and therefore the case is moot regardless of the
25 merits of these claims. The only reason to reach --

1 QUESTION: Well, your --

2 MR. WALLACE: -- the merits if they're correct
3 on mootness.

4 QUESTION: Well, did they -- excuse me, Chief.
5 No, I was going -- did they specifically make the argument
6 below about the -- about legitimate restrictions on use
7 that a court could enforce against you, or did they
8 attempt to make that argument below?

9 MR. WALLACE: Well, there were restrictions on
10 use in this order that this Court upheld by an equally
11 divided Court last time around, United States against
12 Zolin.

13 QUESTION: Were they the same restrictions that
14 they're talking about now?

15 MR. WALLACE: No. Now, they're asking for
16 further relief.

17 QUESTION: And so, you're saying they should
18 have raised any request for restriction the first time
19 around, and that goes back to your argument they can't
20 raise these things seriatim.

21 MR. WALLACE: That is correct.

22 QUESTION: Yes, okay.

23 MR. WALLACE: That's our res judicata point, but
24 that's not our argument to this Court.

25 QUESTION: I recognize that.

1 QUESTION: Well, your position with respect to
2 one of these issues, Mr. Wallace, is that, I take it, that
3 since you cannot, under G.M. Leasing, forbid future use in
4 yet unbrought proceedings, that is not a form of relief
5 which they could obtain that would do them any good to
6 prevent them from being moot.

7 MR. WALLACE: That is not a form of relief open
8 to the district court sitting in a summons enforcement
9 proceeding, and therefore the summons enforcement
10 proceeding, which is all that the court of appeals had
11 before it, is moot. That is correct. That is our
12 position, and that --

13 QUESTION: Mr. Wallace, why isn't -- you
14 acknowledge that any implicit terms of the order can be
15 enforced by subsequent action of the court. Why isn't a
16 reasonable implicit term of an order to produce that if I,
17 the district judge, am wrong about my decision that these
18 documents must be produced, why of course the Government
19 will return them and all copies of them, since they
20 shouldn't have had them in the first place? Why isn't
21 that a reasonably implicit term?

22 MR. WALLACE: Well, because there's no statutory
23 requirement that the Government return copies or other
24 fruits of the disclosure after the disclosure has
25 occurred.

1 QUESTION: I know that, but that's why it's
2 implicit. I acknowledge there's no explicit statutory
3 requirement, but isn't it fairly implicit?

4 QUESTION: If I may just add a further note to
5 that, that's the question before us, isn't it?

6 MR. WALLACE: The question before you is whether
7 that contention can be made in a summons enforcement
8 proceeding after the records have been produced, whether
9 that proceeding can extend to monitoring of the IRS'
10 investigation by requiring that what the IRS has learned
11 from the production be expunged from the IRS' records in
12 one way or another.

13 QUESTION: So, we could properly decide the case
14 based on Justice Scalia's suggestion.

15 MR. WALLACE: One could decide it except there
16 is no statutory basis for it as there is for return of the
17 originals after a reasonable time --

18 QUESTION: I thought the return of the
19 originals --

20 MR. WALLACE: -- in 7605(a).

21 QUESTION: -- after a reasonable time was also
22 implied.

23 MR. WALLACE: I said it's implied because of
24 the -- it's implied in the order because it's express in
25 the statute. It's not implied in the statute.

1 QUESTION: The Government doesn't have the
2 original anymore anyway, does it?

3 MR. WALLACE: It does not. It has returned the
4 originals. That's what this --

5 QUESTION: But when did you make the copies?

6 MR. WALLACE: I can't tell you precisely. I
7 don't even know if the record even shows it.

8 QUESTION: Well, at the second time -- the
9 second time that the Government was ordered to return the
10 documents, on March 13 the district court ordered that any
11 copies of the tapes and any notes or transcripts in
12 possession of the Government be returned to the district
13 court. On March 14, 1991, the Government complied with
14 that order. Did they comply with that order?

15 MR. WALLACE: Yes, we had nothing but the
16 originals.

17 QUESTION: So, the copies --

18 MR. WALLACE: And we returned them. We hadn't
19 made the copies at that point.

20 QUESTION: Oh, when did you make them?

21 MR. WALLACE: We made them later after we got
22 the records on this last go-around from the district
23 court.

24 QUESTION: Yes, but at the time of this order,
25 the original had already been returned, I think.

1 MR. WALLACE: But then we got them back in this
2 latest round at the district court.

3 All of these details about the case really only
4 obscure what is the legal question, which is whether, as
5 we contend, the limited jurisdiction given to the district
6 courts to decide under the statutory language that we have
7 set out on page 15 of our brief at the top to decide
8 whether to compel production in whole or in part or to
9 deny production, extends to something beyond doing what
10 the statute says, issuing an order about whether the
11 records should or should not be produced depending on
12 whether we've made the showing required in Powell.

13 This is a summary proceeding. Both this Court
14 and Congress have said it's a summary preemptory
15 proceeding that is just used because the summons is not,
16 like most administrative summonses are not,
17 self-executing, self --

18 QUESTION: But the statute says that the court
19 exercises its jurisdiction by appropriate process. Is
20 your position that that is narrower than if it said by
21 appropriate order, or is that the same?

22 MR. WALLACE: I think it's really the same. It
23 amounts to --

24 QUESTION: So, by appropriate order,
25 wouldn't -- if we can interpolate that with your consent,

1 would that not indicate that the court can use its
2 discretion in protecting the interest of the owner of the
3 documents?

4 MR. WALLACE: Well, as I started to explain, to
5 some extent, to the extent that it doesn't contradict
6 other provisions of the Code.

7 QUESTION: Well, it's just as a condition to
8 their being produced.

9 MR. WALLACE: Yes, and there were conditions
10 imposed here which were upheld by the court. We're not
11 quarreling with that at this point, although we do in
12 other cases. We think that the Code itself has a system
13 of remedies for improper disclosures and specifies what
14 disclosures and for what purposes may be made with
15 elaboration about redactions and the like.

16 QUESTION: But if the court could make all of
17 those orders in conjunction with the production order,
18 surely it could retain jurisdiction.

19 MR. WALLACE: It retains jurisdiction to enforce
20 its order. We admit that. Other than that, the
21 court -- the proceeding is over once production has
22 occurred pursuant to the order.

23 QUESTION: Mr. Wallace, what about the
24 originals? Suppose on appeal the appellate court found it
25 was wrong to compel the production of the originals. Do

1 you contest that the district court can require the
2 originals to be returned?

3 MR. WALLACE: Well, as I said, because of 7605,
4 we can only inspect originals that belong to the person on
5 whom we've served the summons for a reasonable period of
6 time. So, that could be an implied in law condition in
7 the order.

8 QUESTION: Oh, no. I'm not talking about a
9 reasonable period of time. It's still a reasonable period
10 of time. There's a really quick appeal. It's still a
11 reasonable -- well within the reasonable period of time
12 for the IRS to hold them, but they've been wrongly
13 required to be produced, and the court of appeals tells
14 the district court you did -- you made a mistake. Can the
15 court of appeals get them -- require them to be given
16 back?

17 MR. WALLACE: Well, I think the case would have
18 been moot before the court of appeals on the merits of the
19 production order.

20 QUESTION: You have to take my hypothetical, Mr.
21 Wallace --

22 MR. WALLACE: Yes.

23 QUESTION: -- and how I've given it there.

24 MR. WALLACE: Well, I'm taking your
25 hypothetical. The materials were produced. That made the

1 case moot except for enforcement of the district court's
2 order.

3 QUESTION: Cannot even get the originals back.
4 So, it's no use taking an appeal then, I guess.

5 MR. WALLACE: He can take an appeal if he thinks
6 the --

7 QUESTION: You have to get a stay.

8 MR. WALLACE: -- district court has misconstrued
9 his order and is erring in not enforcing it properly. And
10 that would become something of a legal question rather
11 than a question about the particular order if the
12 provision being enforced is one implied by law.

13 But, of course, stays are available. The issue
14 in the stay here was --

15 QUESTION: Well, I thought your position was he
16 had to --

17 MR. WALLACE: -- whether the case would become
18 moot.

19 QUESTION: -- put himself in contempt of court
20 in order to appeal. He has to just not produce the
21 documents, but if he does produce them, even if he -- the
22 judge was wrong, that's the end of the ball game in your
23 view.

24 MR. WALLACE: That's the end of this proceeding.

25 QUESTION: Well, how does one ever enforce

1 against the Government the obligation to return the
2 original within a reasonable time?

3 MR. WALLACE: The case is moot. The summons
4 enforcement case is moot except for enforcing the order
5 compelling the summons. If the materials were voluntarily
6 given over, there has to be an original proceeding brought
7 that is within the Enochs against Williams Packing
8 exception to the Tax Anti-Injunction Act. That's the only
9 way to do it.

10 QUESTION: Well, that might be for return of
11 property.

12 MR. WALLACE: Right.

13 QUESTION: But is that going to be broad enough
14 to allow for restrictions on use?

15 MR. WALLACE: We don't think restrictions on use
16 are proper to be posed.

17 QUESTION: You agree -- certainly you don't
18 think there should be any restrictions on use, but if a
19 taxpayer wants to raise it, can he at least have a shot at
20 raising it by the process you describe?

21 MR. WALLACE: Well, some of the cases we have
22 cited in our lengthy footnote about the Tax
23 Anti-Injunction Act were ones that said that attempts to
24 get restrictions on use were not within the Enochs against
25 Williams Packing Company exception.

1 QUESTION: So, therefore, if that's the law, he
2 will never have an opportunity to raise a restriction on
3 use unless he, in effect, refuses to turn it over, unless
4 the Government agrees to such a restriction.

5 MR. WALLACE: Or until proceedings are brought
6 against him, which is the time to move --

7 QUESTION: For involuntary --

8 MR. WALLACE: -- for suppression --

9 QUESTION: Right.

10 MR. WALLACE: -- under this Court's
11 jurisprudence and not in an anticipatory way getting the
12 courts in to supervise and delay the conduct of IRS
13 investigations and collections. That's what Congress has
14 said -- it should not be done.

15 QUESTION: You would say to wait in this case
16 wouldn't do them any good because it's res judicata.

17 MR. WALLACE: Well, it happens to be res
18 judicata in this case. That's correct.

19 And I would have a lot of basis for saying it.

20 QUESTION: Thank you, Mr. Wallace.

21 Mr. Lieberman, you have 3 minutes remaining.

22 REBUTTAL ARGUMENT OF ERIC M. LIEBERMAN

23 ON BEHALF OF THE PETITIONER

24 MR. LIEBERMAN: Thank you, Your Honor.

25 Mr. Wallace is incorrect in stating that the

1 Government never made copies and never returned copies
2 previously. As we point out on pages 9 to 10 of our reply
3 brief, the Government made seven copies of the tapes and
4 they reduced them to two cassette tapes and a computer
5 disk.

6 QUESTION: When? When?

7 MR. LIEBERMAN: When the Government returned the
8 copies on March 14, 1991, after having received them the
9 second time -- and this is noted on the docket --

10 QUESTION: So, they had copies at the time
11 the -- that the district court ordered them to return the
12 copies.

13 MR. LIEBERMAN: That's right. They had had them
14 for 50 days. Their action --

15 QUESTION: Had they had copies at the time the
16 district court first ordered them to return?

17 MR. LIEBERMAN: Yes, they did, and those were
18 returned as well.

19 QUESTION: And yet, the Government never claimed
20 the case was moot at that time.

21 MR. LIEBERMAN: That's precisely correct, and by
22 their action in seeking them for a third time, they
23 thereby demonstrated that the case was not moot because
24 the relief had been effectual.

25 QUESTION: Well, did they have --

1 MR. LIEBERMAN: They needed them again.

2 QUESTION: Did they have copies of each and
3 every document?

4 MR. LIEBERMAN: Yes, absolutely.

5 QUESTION: Well, so the Government is just wrong
6 in saying that they didn't have copies.

7 MR. LIEBERMAN: That's precisely correct.

8 QUESTION: How do we know that?

9 MR. LIEBERMAN: It's in the record, Your Honor;
10 if you look at the docket sheet on items number 75 and 77
11 on pages 74 and 85 of the excerpts of record.

12 I just want to clarify one other point. We are
13 arguing that there was no legitimate purpose -- no
14 legitimate investigation at the time of the disclosure
15 order, and therefore the Government never had a right to
16 obtain the documents, not that at some reasonable time
17 thereafter, the documents had to be returned. Therefore,
18 the original jurisdiction of the court invoked by the
19 Government pursuant to an act of Congress was still
20 applicable.

21 QUESTION: But you know, there are other areas
22 of the law where you -- you're compelled to stand on your
23 rights. If you want to challenge the Government action,
24 you have to do it right then and there, take your chances.
25 That's not unheard of. Why isn't this -- why isn't that

1 appropriate here in this area, where Congress has
2 displayed great sensitivity about staying the process of
3 tax collection?

4 MR. LIEBERMAN: Well, you raise a very
5 interesting question which we raise in this case, Your
6 Honor. We had no opportunity to stand on our rights
7 because this summons was directed to a disinterested
8 third-party record holder, and in -- we particularly urged
9 that in that context, the case cannot be deemed as moot
10 because even if in the taxpayer disclosure situation, you
11 can argue that the taxpayer, albeit it under threat of
12 contempt, gave up his interest in the controversy, that
13 certainly can't be said as here --

14 QUESTION: Yes, I had forgotten that.

15 MR. LIEBERMAN: -- where the taxpayer had no
16 opportunity to do so.

17 Thank you very much.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
19 Lieberman.

20 The case is submitted.

21 (Whereupon, at 11:56 a.m., the case in the
22 above-entitled matter was submitted.)
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of: 91-946

Church of Scientology of California, Petitioner v. United States

and Frank S. Zolin

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Lona M. May*

(REPORTER)