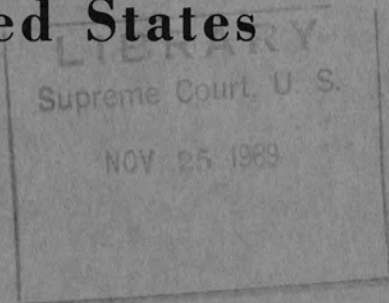


# Supreme Court of the United States

October

██████████ TERM, 1969



In the Matter of:

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	:
ANGHEL GOLDSTEIN, a/k/a	:
ANDREI PEITRARU, et al.,	:
	:
Appellants	:
	:
vs.	:
	:
JOSEPH A. COX, et al.,	:
	:
Appellees	:
-----	X

Docket No. 66

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SUPREME COURT, U.S.  
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Place        Washington, D. C.

Date         November 17, 1969

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TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
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ORAL ARGUMENT OF:

P A G E

John R. Vintilla, Esq., on behalf of Apellants	2
Daniel M. Cohen, Assistant Attorney General, State of New York, on behalf of Appellees	19

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IN THE SUPREME COURT OF THE UNITED STATES

October

TERM 1969

ANGHEL GOLDSTEIN, a/k/a  
ANDREI PIETRARU, ET AL.,

Appellants

vs

JOSEPH A. COX, ET AL.,

Appellees

No. 66

Washington, D. C.  
November 17, 1969

The above-entitled matter came on for hearing at  
11:15 o'clock a.m.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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DANIEL M. COHEN, Assistant  
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Counsel for Appellees

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 66. Goldstein  
against Cox.

ORAL ARGUMENT OF JOHN R. VINTILLA, ESQ.

ON BEHALF OF APPELLANTS

MR. VINTILLA: Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Vintilla.

MR. VINTILLA: And may it please the Court: We have  
here before the Court today a problem which this Court had  
occasion approximately two years ago to review and pass judgment on it.

We have in review here the so-called Iron Curtain  
Statute in the State of New York, known as the New York  
Surrogate's Procedure Act, formerly Sec. 269-A. Now, for the  
recent amendment of June 1968 known as Section 2218.

Now, this statute in substance, provides that an  
heir or legatee or beneficiary of funds from an estate or other  
source, in New York who happens to reside in one of the so-  
called Iron Curtain countries, that the State of New York will  
protect this particular citizen national of that country by  
withholding the transmittal of his distributed share of the  
funds that he's entitled to if he would not have the benefit  
or use or control of the money or other property due him; or  
if there are other special circumstances that make it desirable  
that payment should be withheld.

1           Now, this law of New York is substantially identical  
2 to one of the three provisions of the Oregon statute which this  
3 Court struck down as an impermissible interference of Federal  
4 power over foreign affairs.

5           Q       Is there any escheat provision in the New York  
6 law?

7           A       Your Honor, the New York laws are custodial  
8 in nature. It does not provide for escheat.

9           Q       Under any circumstances?

10          A       Under any circumstances. The money is placed;  
11 and ultimately it is placed in the deposit in one of the banks  
12 in New York until such time as the particular heir or bene-  
13 ficiary or his representative can come in and satisfy the Court  
14 that he will have the use and benefit, or that circumstances  
15 have changed and then the Court can reconsider the matter.

16          As a practical matter funds belonging to Romanian  
17 Nationals who have been blocked in excess of 25 years, as the  
18 matter now stands, there was one challenge to this statute by  
19 Romanian heirs, the Greenberg case which we mention in our  
20 brief. And in that case the heirs sought to establish to the  
21 satisfaction of the Surrogate of New York County that they do  
22 have the use, benefit and control and that circumstances are  
23 such in Romania that they ought to be permitted to have the  
24 money.

25          And the Surrogate there found that the evidence was

1 not of such a nature to convince him that they would have the  
2 use and control or that the circumstances have changed. Now,  
3 this matter was appealed to the Court of Appeals of New York  
4 and denied leave to appeal. Allowed the Surrogate's decision  
5 in the Appellate Court which affirmed and allowed that decision  
6 to stand.

7 Now, in our case, citizens who are entitled -- have  
8 been and are entitled to funds which have been withheld from  
9 them, challenged the New York statute by filing an action in  
10 the United States District Court for the Southern District of  
11 New York; challenged the constitutionality of that statute and  
12 sought to have its application enjoined insofar as the rights  
13 of Romanian nationals are concerned.

14 AT the same time they asked for the convening of a  
15 three-judge court to hear the constitutional challenges to the  
16 New York statute. The District Judge initially denied the  
17 convening of a three-judge court on the grounds that he  
18 thought the constitutional challenge was frivolous. On appeal  
19 to the United State Court of Appeals the Court right from the  
20 bench affirmed the District Judge in holding that the con-  
21 stitutional challenge is not serious enough to convene a court;  
22 and upon certiorai granted by this Court, this Court summarily  
23 reversed and remanded the case back to the United States Court  
24 of Appeals for further consideration in the light of Zschernig  
25 versus Miller, which this Court has decided while the petition

1 for certiorari was pending initially.

2 Now, at that stage we had thought, upon reading the  
3 Zschernig decision, because of the sweeping rationale of the  
4 majority and the concurring opinion and the New York statute  
5 being so similar to the Oregon statute that that question was  
6 put to rest. That similar statutes which -- such as New York  
7 were unconstitutional because they were enacted in such a  
8 fashion that they compel the courts to intrude into an area  
9 that is the exclusive domain of the Federal Government.

10 Upon a hearing by the three-judge court, the three-  
11 judge court found otherwise. The matter was heard before the  
12 three-judge court on June 25, 1968 and shortly before that the  
13 New York Court of Appeals had occasion for the first time since  
14 Zschernig to review the New York law in the light of the  
15 Zschernig decision. And that was the case which is mentioned  
16 in both briefs, the matter of Leikind. And in that case the  
17 New York Court of Appeals felt that on the record of that case  
18 there was no showing that the New York courts have engaged in  
19 any of the activities that were proscribed by Zschernig, and  
20 felt that the statute of New York is not unconstitutional.

21 Well, this same conclusion was reached by the three-  
22 judge court. The three-judge court felt that on the record  
23 before it that there was no showing that the New York courts  
24 had engaged in the activities proscribed by Zschernig.

25 Now, the matter of the -- the three-judge court in

1 our case had the matter before it on a motion for summary  
2 judgment. The matter was filed before the decision in  
3 Zschernig and after the decision of this Court in Zschernig  
4 the Appellants filed a motion for summary judgment on the  
5 strength of the conclusions that were to be drawn from  
6 Zschernig. And in support for that motion for summary judgment  
7 the Appellants attached an affidavit in which set forth many  
8 cases and instances which Appellants sought to establish that  
9 the New York courts in interpreting and construing the New York  
10 statute, were, in effect, were engaging in activities pro-  
11 scribed by Zschernig.

12 Now, in the case of the Romanian interest, Greenberg  
13 had established a precedent that as a result of the finding in  
14 Greenberg that all other courts followed Greenberg as holding  
15 that the mere fact that you were a resident or citizen of  
16 Romania thereby you were not entitled to have your money be-  
17 cause of that decision and the policy of the State of New York  
18 in withholding these funds from these Appellants.

19 Now, it is interesting that in Greenberg the three-  
20 judge court had determined that there was no showing that  
21 any courts had engaged in any proscribed activities yet. The  
22 Greenberg decision which was before the court, very clearly  
23 shows that the court engaged in such proscribed activities.  
24 In seeking to convince the court that the money should be  
25 released, the parties -- the Romanian plaintiffs in that case



1 had summoned the Chief of the Counsellors Section of the  
2 Romanian delegation at that time to testify with refernece to  
3 the inheritance laws of Romania and to the relevant laws with  
4 reference to the problem at hand. And after establishing his  
5 expertise in the matter, and testifying that there are no  
6 restrictions, the Court refused to give any credence to the  
7 testimony of this expert who, according to my understanding  
8 of that record, was not impeached in any way.

9 And moreover, the Court, in reaching its conclusion,  
10 had to consider the foreign exchange control laws of Romania,  
11 and in doing so the court found that it did not like the rate  
12 of exchange that these citizens of Romania were receiving and  
13 therefore held that in effect, they were confiscatory and by  
14 reason of that, that they would not have the use, benefit and  
15 control of the funds.

16 This same position on the foreign exchange laws was  
17 also taken by the Appellate Court which affirmed the decision  
18 of the Surrogate and the Surrogate somehow, and I am not  
19 familiar where the Surrogate came to the conclusion that  
20 Romania leu, which is the Romanian currency, could be purchased  
21 here in the United States and New York at a very high rate of  
22 exchange; certainly very much higher than the official exchange  
23 and that was the basis to conclude that since there was such  
24 a discrepancy in that you can buy currency in New York and what  
25 the official exchange is that therefore these people were not

1 getting all they were entitled to.

2 Now, I don't know where the Greenberg court had  
3 gotten the exchange of 31 and three-fourths. My understanding  
4 of Romanian law does not permit any of their currency to come  
5 in from abroad. They do not sell it as far as I could ascer-  
6 tain, officially anywhere in the world, 31 and three-fourths  
7 leu to a dollar presumably there is a black market in that  
8 exchange, but I don't see how a black market rate of exchange  
9 could furnish the basis of a legal decision.

10 But in any event, we have other showings in the  
11 affidavit in support of the motion for summary judgment, showing  
12 that the various attitudes of the state comptroller, who has  
13 some of these funds under his custody, and the courts, that  
14 they have engaged in attitudes that certainly clearly are  
15 proscribed by Zschernig.

16 Now, interestingly enough, the only authorities in  
17 the United States that I have knowledge of, who still adhere  
18 to this Iron Curtain statute and type law is the State of New  
19 York and the Attorney General of Montana, that in my experience  
20 in the last ten years in many of our other jurisdictions:  
21 Florida, Maryland, Connecticut, New Jersey and Ohio and  
22 Michigan all have statutes which I think are copied from the  
23 New York statute which are substantially identical. And all  
24 of these jurisdictions and the courts in these jurisdictions  
25 have not applied their Iron Curtain statute to the rights of

1 Romanian interests once they were aware and were acquainted  
2 with the financial agreements of 1960 between our country and  
3 Romania, whereby our country has released all blocking controls  
4 and restrictions of transmittal of public funds to Romania and  
5 ever since then they have been sending such things as Social  
6 Security benefits and veteran's pensions and other public funds

7 And more interesting, since Zschernig, the State of  
8 Oregon has held its statute to be unconstitutional; California  
9 in a recent appellate decision on October 9th of this year  
10 in California State of Kramer also follows Zschernig and said  
11 that by reason of the holding in Zschernig that their statute  
12 is unconstitutional.

13 And in Montana we have the situation in that Gorun  
14 case that was up before this Court and decided in January of  
15 this year, where the Probate Court found that in view of  
16 Zschernig and comparing the opinion of the court in Gorun  
17 versus Fall, that there was no question that the statute cannot  
18 be applied constitutionally and therefore did not follow it.

19 However, the Attorney General disagreed and presently  
20 has filed an appeal to the Probate Court's decision; an appeal  
21 to the Supreme Court of Montana.

22 Now, we have a recent decision from a three-judge  
23 court for the Northern District of Ohio, Eastern Division,  
24 which, to my knowledge is not reported, where an identical  
25 action was filed challenging the Iron Curtain statute of Ohio

1 by certain Czechoslovakian heirs and the statute in Ohio is  
2 substantially identical as the New York statute. It's a  
3 custodial statute; it provides that the heir has the burden to  
4 prove he has the use or control of -- would have the use and  
5 control of the funds or that circumstances -- special circum-  
6 stances in the country of his residence would not prevent him  
7 from using and enjoying his property without confiscation in  
8 whole or in part.

9 I think that my position with reference to the New  
10 York statute is very well set out by the three-judge District  
11 Court in this Ohio case of Maro versus Batten, M-a-r-o

12 Q Is that in your brief?

13 A No, I don't believe we have it in our brief.

14 Q Could you make that available to us? If you  
15 want to have any reliance on it.

16 A Well, the matter was unreported and I thought  
17 we would be recorded and therefore I guess we overlooked it,  
18 and we have not cited it in our brief. It was decided in July  
19 of this year by a three-judge Court and we certainly will  
20 furnish the Court --

21 Q Is it still unreported?

22 A As far as I know; yes, Your Honor; it is  
23 unreported. And in that they had the same problem; the same  
24 action challenging the constitutionality; asking for the con-  
25 vening of a three-judge court. And that court, in striking

1 down and following Zschernig, stated it as follows:

2 "The so-called Iron Curtain statute, such as 211381,  
3 that is the Ohio statute, were recently considered by the  
4 United States Supreme Court in Zschernig versus Miller." And  
5 then it goes on to elaborate on the type of statute Oregon had,  
6 the three provisions.

7 And then its opinion, the Court went on to say, and  
8 I quote: "In passing upon the validity of this statute the  
9 Supreme Court considered the whole area of reciprocal inheri-  
10 tance statutes. The Court drew a distinction between recip-  
11 rocal inheritance statutes which permit the state court only  
12 to reconstrue and apply laws of foreign nations and those which  
13 permit the state court to launch inquiries into the type of  
14 governments that obtain in a particular foreign nation.

15 Citing its earlier decision in Clark versus Allen,  
16 the Court noted that state courts are not really precluded  
17 from construing and applying laws of a foreign nation. The  
18 Court held, however, that where a statute permits inquiry into  
19 the type of government existing into a foreign nation, or in t  
20 the operation of that government, or into the question of  
21 whether the legal rights guaranteed by the nation are rights,  
22 in fact, or into the question of whether statements by the  
23 representative of foreign nations are credible or made in good  
24 faith; or into the likelihood that the legatees will actually  
25 receive the property left to them, such a statute so applied

1 intrudes into the exclusive right of Congress to regulate for-  
2 eign policy."

3 Section 211381 Ohio revised code, which is the  
4 statute at issue in the present case, is somewhat different  
5 from the Oregon statute involved in Zschernig. In Ohio the  
6 statute requires the public court to determine whether or not  
7 the foreign legatees will have the benefit or use or control  
8 of the money left them because of circumstances prevailing at  
9 the place of residence of such legatee.

10 The Ohio statute thus appears to be directed at an  
11 inquiry into the operations of the foreign government and into  
12 the political economic and social conditions prevailing in the  
13 foreign country. This type of inquiry is specifically pro-  
14 hibited by the doctrine of Zschernig versus Miller.

15 And we say that that exact language -- that exact  
16 argument is applicable to the New York statute here under re-  
17 view, because this statute also provides that if there are  
18 special circumstances at the place of residence which would  
19 make it appear that the party would not have the money, then  
20 the court could withhold the funds.

21 Now --

22 Q Do I understand, Mr. Vintilla, that you are  
23 going to supply us with copies of that --

24 A Maro versus Battin.

25 Q Maro versus Battin. What is that, the Northern

1 District?

2 A Northern District, Eastern Division.

3 Q Last summer.

4 A Yes, it was a three-judge court.

5 Q What was the name again?

6 A Maro, M-a-r-o versus Batten, B-a-t-t-e-n.

7 Q M-a-r-o.

8 A Yes, Your Honor. It was decided in July of  
9 1969, but it, so far as I know, and as I have been able to  
10 ascertain, it is unreported.

11 Now, insofar as this statute is concerned I think  
12 this Court in the majority and Mr. Justice Stewart's concurring  
13 Opinion made it clear that the futility of the section that's  
14 involved is that this statute is framed in such a manner that  
15 compels the court to go into internal matters; to go into the  
16 nature of the government, the policy of the government, the  
17 laws of the government and the laws of the government in re-  
18 lation to their citizens and because these statutes are framed  
19 in such a way the conclusion is inescapable that these courts  
20 are intruding into an area that is the exclusive domain of the  
21 Federal Government.

22 Q Of course, Mr. Vintilla, in all modesty, you  
23 can't really rely on a concurring opinion. If that's what the  
24 court opinion said, presumably it would not have been a  
25 necessity for a concurring opinion to say something different.

1           A       Well, that is true, but we believe that the  
2 majority opinion not so succinctly, not so directly, has said  
3 about the same thing that these courts are injected into this  
4 area whether they are caused to make these inquiries and to  
5 make inquiries based on considerations which are political in  
6 nature; which are in an area that involves the conduct of  
7 foreign relations and because of that, this statute is uncon-  
8 stitutional.

9           Q       But haven't the courts been dealing with the  
10 operation of foreign laws, taking evidence, making findings on  
11 the operation of foreign laws in other areas for many years?

12           A       Oh, yes; and they still do, but I think  
13 Zschernig makes it clear that they still have a right to apply  
14 and construe and the Maro case says so, but in our situation  
15 they are not applying and construing; they're going much further.  
16 The way the statute is framed, it's even difficult to determine  
17 what evidence you need to convince a court that they have the  
18 use and benefit. From all the cases -- and the cases are  
19 replete with examples where you bring an expert -- you bring  
20 an expert to testify; you have that case -- we have a case in  
21 New York in the matter of Draganoff involving a Bulgarian  
22 heiress. And they brought a specialist -- an attorney from  
23 Bulgaria who specializes in civil family law and inheritance  
24 law and a member of a firm/and this is what the court said with  
25 reference to his testimony: "The Court cannot disregard the



1 fact that Mr. Stephanov is not a free and independent attorney,  
2 an impression he sought to create; but is a member of a lawyer's  
3 collective subject to the restrictive pressures commonly applied  
4 to Iron Curtain countries. As he was about to return to  
5 Bulgaria he could not be expected to say anything in derogation  
6 of his government or its fiscal policies --

7 Q Mr. Vintilla, has the State Department shown  
8 any interest in this case?

9 A Well, the State Department is sometimes on  
10 both sides.

11 Q Well, they filed briefs as amicus in the  
12 Zschernig case and --

13 A Not in this case, Your Honor.

14 Q Not in your case?

15 A No, not the present case. There is a letter  
16 that the State Department sent to Governor Rockefeller after  
17 the financial agreement of 1960 requesting that he advise the  
18 New York authority that the Federal policy now permits the  
19 transfer of funds to Romania and that, evidently, was ignored  
20 by the state authorities, the Surrogate judges and at the  
21 same time we have had letters from the State Department saying  
22 that this is purely a matter of a state law, the administration  
23 says.

24 Q Well, the reason I asked the question: my  
25 recollection is -- I may be wrong, but I think I'm correct,

1 that in the Zschernig case they filed amicus briefs saying that  
2 these laws and their administration had caused now embarrass-  
3 ment to foreign relations.

4 Now, I'm wondering whether or not their point of view  
5 had changed or whether you --

6 A I know that they have not filed any brief here  
7 as amicus, or in any capacity, whatsoever. They have not taken  
8 any official position insofar as I am aware, in this problem  
9 before the Court.

10 We feel that the State Department is not injecting  
11 itself directly, perhaps. I think there have been some letters  
12 to other attorneys, and I think there is an amicus brief that  
13 they shall await the outcome of this particular problem before  
14 the Court today.

15 But, I think that the reading of Zschernig -- I  
16 think that the reasonable conclusion to be drawn from that is  
17 that New York enacted such a statute because it dislikes the  
18 particular governmental systems and the policies of these  
19 countries and that was New York's way of reacting in a hostile  
20 fashion, saying well, you appropriate properties of our  
21 nationals and you will have a system where you deny your  
22 citizens the right to private property and because of that they  
23 have enacted this statute to react, to say, "well, if you do  
24 those things, we are going to withhold funds belonging to your  
25 citizens and this type of conduct is the one that causes the

1 statute to be invalid because this is not a function of the  
2 state.

3 If every state in our union would react in such a  
4 fashion and go different ways on a purely international problem  
5 we'd have chaos.

6 Q Of course there would be no question of the  
7 power of Congress to step in and pass a law preventing the states  
8 from enacting these sorts of statutes; wouldn't it?

9 A Well, Congress, certainly and the Federal  
10 Government, this is an area that they can legislate. Certainly  
11 Congress can act in this area and any action taken by the  
12 Federal Government would certainly be overriding and certainly  
13 any state law that contravenes it would have to fall.

14 I think that in our situation here with this finan-  
15 cial agreement I think, as MR. Justice Douglas said in the  
16 Gorun case and in which he was joined by Mr. Justice Harlan,  
17 Mr. Justice Black and Mr. Justice Fortas. He said, "Federal  
18 policy permits a free flow of funds to Romania." Which is  
19 true. "and that no state judge may make or apply a rule that  
20 is contrary to that policy," which is true. I don't think  
21 the problem is so difficult to see, in our estimation.

22 Perhaps we're so obsessed and have studied it for  
23 many years, but if your Federal Government does one thing and  
24 the state comes and says, well, the Federal Government for  
25 a while was not permitting funds and there are still countries

1 where it has stepped in and acts in this area. But once a  
2 step in the area made a determination that these people will  
3 have the use and benefit, there is a reasonable assurance,  
4 conditions are such, for a state to come in and make a contrary  
5 determination to that made by the Federal Government which is  
6 entrusted with this matters, which is in a better position to  
7 make such a determination and New York has said this.

8 And, interestingly enough, in the area where they  
9 refuse to transmit money they rely on Federal policy. They  
10 rely on Federal policy. They have said in the leading case --  
11 the Braier case -- that the Federal Government is in a better  
12 position to know what the situation is in Romania, therefore,  
13 since the Federal Government does not permit the sending of  
14 funds we can rely and follow that policy and withhold the trans-  
15 mittal of funds.

16 Yes, when the Federal Government has taken the  
17 position of free-flow New York has still maintained the other  
18 position. That is, they followed Federal policy when it satis-  
19 fied them, when they liked Federal policy; when they didn't  
20 like Federal policy they refused to go along with it. And I  
21 think that is the problem here. There is no question about it.

22 And all the states have seen it, except New York;  
23 all the authorities have seen it and the United States which  
24 would not enact such a law. Illinois refused; Governor Kerner  
25 refused to approve such a law, defeated the law because he said

1 we're getting into an area that will exceed the constitutional  
2 authority of the states and we shouldn't act in such an area  
3 and let the Federal Government act in such an area.

4 And, therefore, I submit that the decision below is  
5 clearly contrary to the constitutional conclusions of this  
6 Court in Zschernig and should be reversed and these people who  
7 are in dire need of their money -- many of them passed away  
8 many amounts are very modest and they should have their money  
9 at the earliest possible moment.

10 Q Did the State of New York pass the statute that  
11 no nonresident alien could inherit in New York.

12 A Well, I think that that may -- they treat  
13 everyone equally without discriminating with aliens. It's  
14 traditionally the authority of a state in that area to perhaps  
15 eliminate, but I think they have to do it in a constitutional  
16 fashion. And it was in the confines of the traditional probate  
17 authority, without exceeding, as they have here. And without  
18 trying to make foreign policy as New York, in our opinion has  
19 done.

20 Thank you very much.

21 MR. CHIEF JUSTICE BURGER: Mr. Cohen.

22 ORAL ARGUMENT OF DANIEL M. COHEN, ASSISTANT

23 ATTORNEY GENERAL, STATE OF NEW YORK, ON

24 BEHALF OF APPELLEES

25 MR. COHEN: Mr. Chief Justice and may it please the

1 Court: this appeal is before the Court after the denial of a  
2 motion for summary judgment by the Appellants.

3 The matter was before the three-judge court solely  
4 upon the basis of affidavits. The Attorney General was prepared  
5 in connection with this case, to go ahead with a trial of the  
6 issues as have been presented by the pleadings here, in order to  
7 to have determined the issue which is presented by these plead-  
8 ings of whether New York statute which has under prior decisions  
9 been held to be valid on the state, determine -- have the three-  
10 judge court determine whether the statute is being applied in an  
11 unconstitutional manner.

12 Now, this Court had before it a similar appeal from  
13 the denial of a motion for summary judgment in Gorun against  
14 Fall. And the Court, as I see it, pretty much unanimously  
15 decided in that case that the summary judgment motion in --  
16 on appeal from the Montana District Court had been properly  
17 denied.

18 There was a dissent in Gorun which was predicated on  
19 the fact that in Gorun the District Court had completely dis-  
20 missed the complaint which had been filed in that case in  
21 Montana and the dissent was based upon the theory that this  
22 Court, whatever its prior decisions with relation to that  
23 extension, should have directed the Montana District Court to  
24 retain jurisdiction of the case to see what the state court  
25 would do with relation to the decision of this court in the

1 Zschernig case.

2 Now, in the instant case the Attorney General has  
3 never moved to dismiss the complaint in this action, despite  
4 the provisions of Section 2283; despite the fact that there  
5 are proceedings pending that are referred to in the complaint.

6 Before the Surrogate's Courts, before the various  
7 Surrogates that are named as defendants in this case; despite  
8 that there are actual, pending state court proceedings which  
9 the complaint seeks to enjoin and despite the fact that as I  
10 pointed out to this Court in the Ioannou case, which was before  
11 this Court several years ago, that the orders of the Surrogate  
12 Court are constantly open to the making of any application to  
13 withdraw these funds so that, instead of coming into the Federal  
14 Courts through the District Courts, through the three-judge  
15 court and up to the Supreme Court, these Romanian heirs are  
16 still in the position where they can go to the District, to the  
17 Surrogate's Court in New York and apply for the withdrawal  
18 of the funds that have been withheld.

19 Now, in the Iannou case where the matter came before  
20 this Court, after the decision in Zschernig the -- a dissent  
21 was written by Justice Douglas, saying: "This Court should not  
22 compel the Applicant to go all the way down to the Surrogate's  
23 Court and come back up here again."

24 In Iannou an application was made to the Surrogate for  
25 the funds and the application that was made in that case by an

1 assignee of a nonresident alien, was approved despite the fact  
2 that there was conflict between the assignee and another  
3 claimant who had a power of attorney from the nonresident alien  
4 beneficiary.

5 The Surrogate determined the dispute between the  
6 two conflicting claims and directed payment to Iannou in the  
7 Marek estate, Iannou getting the amount which was on deposit  
8 with the New York Surrogate.

9 Now, to a certain extent the Appellants here are pretty  
10 much beating a dead horse because they are talking about a  
11 situation to a certain extent, which existed at the time that  
12 the complaint was filed in this action. They disregarded all  
13 of the things that have occurred in the Surrogate Courts in  
14 New York since that time.

15 The fact of the matter is that with relation to  
16 claims by Romanian nonresident aliens all of the judges within  
17 the limits of the City of New York who are designated as  
18 defendants in this suit, Surrogates within that area have been  
19 transmitting funds to nonresident aliens. The amounts that  
20 have been involved in these estates have varied from \$5,000 to  
21 \$35,000. This is my up-to-date information and these sums have  
22 been directed to be transmitted by the Surrogates and MR.  
23 Vintilla, if he goes into the Surrogate's Court at this  
24 particular point, I think we will have no real difficulty if he  
25 is able to supply proof to the Surrogates in relation to the



1 validity of his claim.

2 The Attorney General, as I stated was prepared in  
3 connection with this matter before the three-judge court, to  
4 indicate that even at the time of the hearing before the three-  
5 judge court a year ago, in a substantial portion of the cases  
6 that were coming before the New York Surrogate directions were  
7 being made to transmit funds conditioned in some cases with  
8 relation to some of the countries that the amounts be limited  
9 with relation to, say -- to Poland, \$5,000 in two-check cer-  
10 tificates with relation to Russia that the amount that is  
11 transmissible should not exceed the sum of \$10,000 to any  
12 beneficiary.

13 The Court of Appeals for the State of New York in the  
14 Leikind case which was decided just a few days before the  
15 argument/ before the three-judge court, held that the New York  
16 statute was a statute which was capable of being enforced  
17 without animate versions with relation to the Governments of  
18 foreign countries.

19 The District Court here has indicated clearly that  
20 they find that this record is inadequate to justify this  
21 Court in holding summarily that Section 2218 is unconstitutional  
22 under the Zshcernig rules.

23 Without any evidence, and this was the situation  
24 before the District Court, Mr. Vintilla was given the opportunity  
25 to present evidence and did not. Without any evidence

1 whatever as to how Section 2218 has been applied in this case,  
2 we are unable to say that it has been applied in such a way as  
3 to interfere with the foreign relations of the United States.  
4 We interpreted the Supreme Court's recent ruling denying a  
5 rehearing in Iannou as at least an indication of evidence of  
6 improper application of that statute is necessary.

7 Q How much money is involved in this case?

8 A I this case -- this is an attempt to set up a  
9 representative lawsuit on behalf of various Romanian bene-  
10 ficiaries. They are all fairly small estates, as I understand  
11 it, that are represented by these particular plaintiffs and  
12 the actual disposition that would be made in relation to a  
13 claim if they went back into Surrogate's Court would, undoubt-  
14 edly, at this particular stage, be favorable.

15 Q How did the complaint start? What warranted  
16 the complaint.

17 A The complaint alleged --

18 Q Before the Court was involved in it.

19 A The complaint was a complaint filed in the  
20 Southern District of New York stating that the plaintiffs were  
21 nationals of Romania and specified that certain particular sur-  
22 rogates -- there are 62 counties in New York State and these  
23 are surrogates just in four of the counties in the State of New  
24 York, stated that these surrogates were withholding monies of  
25 these beneficiaries, these Romanian nationals who were residents

1 in Romania.

2 Q Did it name who they were?

3 A It named certain specified --

4 Q Is it a genuine lawsuit?

5 A Yes. There are lawsuits pending to the extent  
6 that there are claims that have been filed with Surrogates in  
7 Bronx County, New York County, Queens County, and Kings County,  
8 where funds have been withheld where they can still go back into  
9 the various Surrogates before these various Surrogates.

10 Actually, two of these Surrogates that are named here are no  
11 longer serving in the particular offices which they held at the  
12 time by reason of the expiration of their term. Their  
13 successors are paying out monies, not only to the applicants  
14 from these countries, but I understand that one of them views  
15 the Zschernig decision as a sufficient warrant to pay the --  
16 pay monies to certain of the countries as to which funds are  
17 blocked. Red China --

18 Q What relief was asked for?

19 A The relief that was asked for here was a  
20 declaratory judgment and an injunction against the Surrogates,  
21 enforcing the statute of the State of New York which was then  
22 269(a) of the Surrogate's Court Act and now is Section 2218 of  
23 the Surrogate's Court's procedure act.

24 Q Did I understand you to say previously that  
25 some of the Surrogates were ordering the money to be paid?

1           A       Some of the Surrogates are ordering the money  
2 to be paid and some of the Surrogates were ordering the money  
3 to be paid and --

4           Q       What about these particular Surrogates?

5           A       Well, they -- as to the particular Surrogates  
6 who are included in the -- as defendants here, names Cox. Cox  
7 is a Surrogate who is no longer sitting. Di Falco is sitting;  
8 he is paying. Silver is no longer sitting.

9           Q       What did you say about the second one?

10          A       The second one? Judge Di Falco is making  
11 payments and directing transmissions.

12          Q       Such as requested by this plaintiff?

13          A       Such as requested by this plaintiff.

14          Q       Now, what about the third one?

15          A       Silver is no longer sitting but his successor,  
16 Judge Sobel --

17          Q       Silver is no longer sitting. Has it been  
18 changed?

19          A       His term of office expired and he was succeeded  
20 by another Surrogate. And the successor Surrogate has been  
21 paying the monies not only to people who are like those represen-  
22 ted here, but also paying to the residents of countries which  
23 -- as to which funds are blocked.

24          Q       What about the fourth one?

25          A       Surrogate McGrath is awaiting the decision of

1 this Court with relation to the constitutionality, but in the  
2 meantime is paying the amounts out even to Romanian represen-  
3 tatives in small amounts.

4 (Whereupon, at 12:00 o'clock p.m. the argument in the  
5 above-entitled matter was recessed to resume at 12:30 o'clock  
6 the same day)

AFTERNOON SESSION

12:30 o'clock p.m.

1  
2  
3 MR. CHIEF JUSTICE BURGER: Mr. Cohen, you may  
4 proceed.

5 MR. COHEN: The Attorney General is not familiar with  
6 the decision which was called to your attention by Mr.  
7 Vintilla in his argument, but I have called to his attention  
8 Bar Review article which is about to be published in the  
9 Baylor University School of Law.

10 Q You said is about to be?

11 A Yes.

12 Shortly after I completed my brief and had it filed  
13 with this Court, I received a copy of a letter from an Assis-  
14 tant Professor Marian A. Faldwell at Stetson University College  
15 of Law, indicating that he had become familiar with this  
16 case and had a strong interest in the final outcome hereof;  
17 and had prepared an LLM thesis for his studies at George  
18 Washington University Law School.

19 Now, he sent me a copy in Xerox form which I have  
20 had duplicated and which I have left with the Clerk so that it  
21 will be available for the Court. Counsel for the Appellants  
22 have received a copy of it and I would like to just read a few  
23 sentences from the letter of transmission from Professor  
24 Faldwill.

25 "I corresponded with Counsel in most of the major

1 cases decided prior to your case. The subject of the thesis  
2 is: State Probate Laws, Alien Heirs, the Zschernig legacy.

3 "I corresponded with counsel in most of the major  
4 cases decided prior to your case, including Mr. Vintilla, with  
5 other law professors concerned with the problem and I was able  
6 to get some information from the various agencies involved when  
7 I was in Washington.

8 "This research, in my opinion, has turned up some  
9 interesting questions about Zschernig against Miller, its  
10 ramifications and which, to the best of my knowledge, have not  
11 been considered by the court or any of the academicians who have  
12 commented on the problem. It is my hope that the Court will  
13 not extend Zschernig to the point that it will be required to  
14 hold the New York statute and similar ones to be unconstitutional  
15 per se.

16 "I have taken the liberty of volunteering this thesis  
17 in the hope that you may find it of some use in the Goldstein  
18 case. My interest in the case is strong and I am hopeful that  
19 the Court will affirm the lower court's decision.

20 "In closing I wish you success, et cetera, et cetera."

21 The reason that particularly I want to have this  
22 thesis by a law professor before you is that in fact, most of  
23 the testimony that has been adduced in various proceedings in  
24 the New York Surrogate's Court in recent years has not been by  
25 continental ambassadors or representatives of foreign

1 governments, but the testimony has been that of a Professor  
2 Meyer, Harvard Law School, who has been testifying on the basis  
3 of a fee of \$500 per day for testimony, to show that in these  
4 various Iron Curtain countries the persons who are named as  
5 beneficiaries will actually receive the use, benefit and control  
6 of the legacies which are involved.

7 Now, the purpose of the New York statute is not  
8 what the plaintiffs have stated it to be. The statute of use,  
9 benefit and control is something to see that the persons who,  
10 when named in wills, persons who have been natural objects of  
11 bounty who get distributed shares under the New York Distribu-  
12 tion statutes, will actually receive their legacies or their  
13 distributive shares.

14 The statute on its face, contains no language which  
15 might be considered any sort of animadversions. I think that  
16 the thesis which was submitted by Professor Faldwell will  
17 indicate that probably a response to the Chief Judge's question  
18 many statutes which deal with problems of foreign law are  
19 regularly treated by our courts but they are treated in a way  
20 which does not require any animadversions, does not require  
21 any interference with foreign relations; that it is not  
22 necessary for the disposition of this sort of case to bring in  
23 a foreign counsel and to place him in a disparaging position.

24 We were prepared to show that even before the dis-  
25 position in the Zschernig case that various Surrogates



1 throughout the state had, upon appropriate testimony, directed  
2 distribution of shares where the records in the cases before  
3 them warranted such disposition.

4 In my 1967 brief before this Court in opposition to  
5 the petition for cert which was filed by the plaintiffs here,  
6 I cited the Sigler case. In that case money had been withheld  
7 and then despite my argument in the Third Department that the  
8 situation is not -- the Third Department of the New York Court  
9 system -- that the testimony was still substantially the same.  
10 as had been originally adduced before the Surrogate. The  
11 Appellate Division in the Third Department directed transmission.  
12 The monies involved there were Hungarian monies, but the situa-  
13 tion is no different from that involved in this Romanian case.

14 Now, we believe that New York, just like any other  
15 litigant before this Court is entitled to due process. A  
16 reversal of this decision would place New York in a situation  
17 where it had not actually been granted the hearing as to how  
18 the statute is being administered.

19 With relation to remarks that are made by or have  
20 been made by certain of the Surrogates or are alleged to have  
21 been made by the Surrogates that might have been disparaging,  
22 I might say this: This Court has sustained all sorts of other  
23 attempts at freedom of expression; freedom of speech; freedom  
24 of press. It seems to me that Surrogates of our courts, if  
25 they go beyond their duties, are in no worse position than

1 individuals who seek to state their own opinions with relation  
2 to matters that may affect public policy.

3           However, the statute which you have is the statute  
4 which deals with the transmission of private funds. It does  
5 not in any way contradict the State Department arrangements  
6 with Romania; which deals simply with the transmission of public  
7 funds.

8           In answer to the question that was addressed to  
9 Appellant's Counsel as to whether there has been any State  
10 Department expression, I have annexed as an appendix to my  
11 brief, a letter which was written to Counsel for the Amicus  
12 Curiae in this case which states that "since the administration  
13 of the states is not a Federal function, the remittances of  
14 inheritances to foreign beneficiaries, including those in the  
15 Soviet Union -- that was the country as to which the question  
16 was raised -- does not normally come to the attention of this  
17 department. The Department of State is therefore, not in a  
18 position to know or make judgment on the basis of the small  
19 number of cases of which the Department has become aware, in  
20 which Soviet heirs are believed to have received benefits from  
21 remittances from the state shares. Where the funds sent to  
22 persons resident in the Soviet Union from the United States  
23 are generally received by them and fully available to them for  
24 their use and benefit." This letter was dated June 1968.

25           Now, the Attorney General respectfully submits on the

1 record in this case, dealing solely with the question of  
2 whether the summary judgment should have been granted or denied,  
3 that summary judgment was properly denied and that this Court  
4 need not, at this time, pass upon the question as to what would  
5 happen if the Federal Government, through its Congress deter-  
6 mined to pass a law which prohibited this type of state statute.

7 Thank you, Your Honors.

8 Q Would you, as you submit the case, the question  
9 before us is really now. That is whether or not the three-  
10 judge district court was in error in failing and refusing to  
11 grant a summary judgment at the behest of the plaintiff; and  
12 that's it. It's just that narrow issue?

13 A I don't think it's necessary to pass upon any  
14 other question at this stage of this litigation.

15 Q But the question as to whether the statute  
16 should be invalidated on its face.

17 A Well, in prior decisions in this case, including  
18 the remission of this case to the District -- to the Court of  
19 Appeals.

20 Q Well, could it be -- if this statute were in-  
21 valid on its face there wouldn't be any need for a trial?

22 A Yes, you are right about that.

23 Q And you simply assert that Zschernig is an  
24 application question rather than a --

25 A Yes, Your Honor. As the opinion was written in

1 Zschernig by Mr. Justice Douglas, he indicated that when Clark  
2 Allen was before this Court the only question before the Court  
3 in Clark against Allen was whether the statute involved in that  
4 case was a statute which was valid on its face and it didn't  
5 have before it the application of that statute.

6 And it seems to me that as an opinion is written the  
7 opinion rests primarily with the relation to the misapplication  
8 to the statute upon various Law Review articles which indicate  
9 such misapplication.

10 Now, those Law Review articles, including the one  
11 which is written by Mr. Meyer, are not the product of our  
12 judicial system where you get into court and try a case where  
13 you find out what actually happened. The man -- I said Meyer;  
14 I meant Mr. Berman -- the Berman articles are written by  
15 somebody who has been testifying at the rate of \$500 per day as  
16 an expert witness to sustain the position that has been put  
17 forth in these various cases by Iron Curtain claimants.

18 Now, we believe that we are entitled to an opportunity  
19 to not only contest Mr. Berman's testimony upon a trial, but  
20 that possibly, as thorough a job as Mr. Justice Douglas did  
21 in analyzing Law Review articles at that time, but Perhaps  
22 Mr. Justice Harlan did his homework better.

23 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cohen.  
24 The case is submitted. Thank you for your submissions,  
25 gentlemen.

1 (Whereupon, at 12:45 o'clock p.m. the argument in  
2 the above-entitled matter was concluded)

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