Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 55

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE UNITED STATES, et al.,	
Appellants,	
vs.	
TONY RIZZI dba THE MAIL BOX,	
Appellee.	

Place Washington, D. C.

Date November 10, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

TABLE OF CONTENTS

* * * * *

HLER

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE UNITED STATES, et al., Appellants;	:	No. 55
vs.	:	
TONY RIZZI dba THE MAIL BOX, Appellee.	:	

Washington, D. C.
November 10, 1970

The above-entitled matter came on for argument at 11:06 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, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

PETER L. STRAUSS, Esq.
Office of the Solicitor General
Department of Justice
Washington, D. C. 20530
Counsel for Appellants

STANLEY FLEISHMAN, Esq.
6922 Hollywood Boulevard, Suite 718
Hollywood California 90028
Counsel for Appellee

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 55, Blount against Rizzi doing business as The Mail Box.

Mr. Strauss.

ARGUMENT OF PETER L. STRAUSS, ESQ.

ON BEHALF OF APPELLANTS

MR. STRAUSS: Mr. Chief Justice and may it please the Court:

In this case a three-judge District Court, sitting in the Central District of California, has held Section 4006 of the Postal Code as unconstitutional on its face. In The Book Bin case, which immediately follows, another such court, sitting in the Northern District of Georgia, also held Section 4006 unconstitutional on its face, together with Section 4007 of the Code. And because of the similarity of the issues the Government filed a single jurisdictional statement brief and appendix, and I believe it will be helpful now to make a statement in sufficient detail to eliminate the issue in both cases.

I may say parenthetically that while I will continue to refer to the statutes as Sections 4005 and 4006, under the Postal Reform Act passed in the middle of this summer they are now actually sections where they will shortly be Section 3005 and 3006. But they are otherwise unchanged.

The decisions in both Courts were limited to procedural questions arising under the statutes. One of the papers

for appellees contended that the publications in question are not obscene. My understanding is that the proceedings never reached that point, and that, in fact, neither of the three-judge Courts which decided these cases ever had the magazines in issue before them.

The decisions assumed that traffic in obscenity could be barred from the mail and considered only whether these two sections are constitutionally appropriate procedures for accomplishing that purpose.

Section 4006 provides that when the Postmaster General finds a person who is using the mails to sell or advertise obscene matter, he may administer an administrative order intercepting mail addressed to that person and directing that it be returned to the sender marked it is unlawful.

The section and its remedy are almost precisely the same as that provided in Section 4005 of the Code, again now renumbered Section 3005, dealing with the use of the mails to promote fraudulent enterprises, the section which this Court has twice sustained, most recently in an opinion by Mr. Justice Black in Donaldson v. Reed Magazine, 333 U.S. 178.

Administrative proceedings under Section 4006, again, are governed by the same regulations as those used in fraud proceedings under Section 4005. Section 4007 governs judicial relief of a preliminary nature for both Sections 4005 and 4006. The regulations concerned do govern the adminstrative proceedings

that are set out in extenso in our appendix to our jurisdictional statement.

Under these regulations the statute has much narrower scope than it might at first appear from its language. The proceeding starts when the Postmaster General discovers that possibly obscene matter is being sold or advertised through the mail. There is, that is, no obligation to submit any material to him for clearance of any kind or for any other purpose.

After complaint and notice, a trial-type administrative hearing, fully complying with the Administrative Procedures Act, is held. In that hearing the Government not only has the burden of initiating by complaint, but also establishing the obscenities in the materials or the fraudulent nature of the materials is challenged.

During the period in which the hearings are taking place, unless there has been judicial relief under Section 4007, the mailer receives to receive his mail completely unimpeded. The hearing officer is a regular departmental hearing examiner. His time typically is principally devoted to contractual issues and other departmental matters. He is required to write as full an opinion on as carefully preserved a record as any Federal district judge would be.

The regulations urge speed in conducting the hearings and disposing of the complaint, but, again, it is only when a final administrative determination has been made that the items

sold or advertised are indeed obscene, that any steps can be taken by the Post Office on the basis of the administrative proceeding to interdict the defendant's mail.

Like these procedures, the order entered by the Postmaster in the Section 4006 case is identical in form and in execution to that which is entered in fraud cases, which is under Section 4005. It directs the Postmaster to remove from the mail and return to the sender appropriately stamped all mail connected with the items which have been found to be obscene or fraudulent, as the case may be. It also directs the Postmaster to refuse to honor postal money orders drawn in payment for these items or in response to the fraudulent enterprise.

It may be clear from the form of address used or from information on the envelop that some mail is unconnected with the adjudicated item. That mail is immediately delivered. The rest, generally speaking, the Postmaster cannot inspect on his own, since the Constitution and statutes protect first-class mail from such inspection.

It is, therefore, held at the post office for inspection by the addressee and anything not concerned with the adjudicated items will be delivered to him when he inspects it. Only mail which is connected with the adjudicated items or which is not inspected within a reasonable time is stamped and returned to the sender marked as the statutes direct.

Once this Section 4006 order has become final in an

administrative proceeding, the order goes into effect automatically without any need for judicial enforcement. Review may be sought, however, in District Court, and in order to describe the effect that we believe that review has on the administrative order, it would be helpful now to turn to Section 4007, which is principally at issue here in the second of these two cases.

Section 4007 provides for preliminary judicial relief during the pendency of administrative proceedings under both the obscenity and fraud provisions. It has been prominently used in fraud cases and it might be instructive to give an example of that.

An advertisement was recently placed in a California newspaper offering a very low-cost Hawaiian vacation, since the person responding would only send in a $25 registration fee. The Post Office, suspecting fraud and able to convince the judge that there was probable cause to believe that the advertisement was fraudulent, obtained a Section 4007 order and under that order was able to intercept $250,000 in remittances that had been sent to the advertiser, who indeed did prove, as I understand, to be conducting a fraudulent campaign.

Similarly, in a 4006 case that is an obscenity case, use of the Section 4007 order might be proper or helpful in preventing widespread dissemination of the materials concerned before an administrative proceedings could be complete.

Procedures under Section 4007 are those which govern injunctive relief generally in Federal courts and, in particular those specified by Rule 65 of the Federal Rules of Civil Procedure.

Q Mr. Strauss, let me try to get the procedure in this interception case that you speak of, the tourist travel fraud. The mail is impounded in that interim period, I take it?

A That is right.

Q And that is the situation until a final decision, is that correct?

A Correct. And of course the same situation here, the mail may continue -- when I speak of the mail, the person to whom it is directed may continue to advertise and may continue to solicit remittances, and if he ultimately prevails, why, he will receive all of those orders and remittances.

Q But the remittances are impounded and the mailings are impounded as well?

A Any letter to him would be dealt with in the same way as under the statute, except that it wouldn't be returned. That is, mail that is clearly not connected with the enterprise would be delivered, and mail which might be would be held for inspection and could be removed if it could be found to have been connected.

The relationship of the statute to Rule 65, I think, is significant, because of that section's limitations on the

possibility of ex parte relief, that the Government knows the mail is addressed to the purpose of getting relief under Section 4007, it also knows it is addressed for the purpose of serving notice of the proceedings. And for this reason such proceedings can never be ex parte.

In order to justify interim relief, the Government must produce the material thought to be obscene and must satisfy the judge that there is probable cause to believe that it is obscene. The interim relief granted, as I just explained, is the impounding of the incoming mail, with delivery of mail which seems not to be concerned with the enterprise in question, and possible delivery of other mail if upon inspection it is found not to have to do with it. In addition, as in the case of all interim relief in this nature, there is always available through judicial processes the possibility of modification of the order when either delay or other circumstances would tend to warrant that relief.

Because Section 4007, if I may return now to Section 4006, provides only for impounding the mail during the review of an administrative order, and Section 4007 specifically states that it is preliminary relief both during the administrative proceedings and during any appeal therefrom. The co-section, 4007, provides only for impounding of the mail during a review of the order.

We have interpreted Section 4006 as subject to the

same limitation. That is, if review of the Section 4006 order is sought, the Post Office can only impound incoming mail until its order has been judicially approved. The statute on its face is subject to the contrary interpretation and, indeed, if no review were sought, the Post Office believes that the Section 4006 order is immediately effective. But we think that the necessary consequences of Section 4007 is at least that where review of the Section 4006 order is sought, that has the effect of transmuting the relief to the simple impoundment. Only when judicial approval has been obtained where review is sought will the Post Office begin to return mail to the sender stamped as the statutes direct.

And, indeed, as we point out in our brief, one of the possibilities open in this case -- we don't urge it, but we don't believe it will wrench the statute if it were necessary -- would be to give an even more strict interpretation to Section 4006 and hold that where review is sought, no effect could be given to a Section 4006 order so that interim relief would depend entirely on the availability and the obtaining of judicial under Section 4007.

Turning very briefly to the facts of this particular case, appellee publishes, advertises and sells through the mails a variety of magazines of the character described in our brief. In the fall of 1968 the Postmaster General became aware of seven of these in particular and directed Section 4006 proceedings be

brought. A complaint was filed and an administrative hearing was set for December 3, 1968; on the same day as the hearing, December 3rd, the Post Office secured a temporary restraining order under Section 4007, specifically limited to the seven magazines charged on the basis of probable cause finding, believing them to be obscene.

On December 31st the judicial officer filed the lengthy opinion set out in our brief and in our jurisdictional statement, finding that each of the magazines was obscene. Appellee then brought this injunctive action to bar enforcement of the resulting administrative order.

A three-judge court was convened and held that Section 4006 was unconstitutional on its face. The sole stated ground of decision was that the statutes failed to meet the standards set by this Court in Freedman v. Maryland, 380 U.S. 51.

On the Government's appeal the Court noted probable jurisdiction on March 2 of this year.

Now I think there are three principal points on which I have to address myself. One of them is not decided by either one of the Courts below, but suggested, I think, almost inevitably by intervening decision which, as this Court knows, we have appealed here, and that is the question ostensibly settled in Roth v. United States, whether indeed the Congress can regulate the use of mail for the sending of obscene matter.

The second question is whether the particular procedures,

administrative procedures in this case -- as I mentioned, this case, The Mail Box case, deals only with Section 4006, and while they refer to Section 4007, any discussion of it, I think, would be appropriately referred to the Book Bin case: Whether the administrative procedures for determining obscenity are appropriate under this Court's decision in Freedman v. Maryland, and that was the sold ground of decision below.

The third point, which was the ground of decision in The Book Bin case, is the issue of whether the orders which may be obtained as relief are a proper form of relief in light of this Court's decisions and, in particular, the decision in Lamont v. Postmaster General.

On the question of authority to close the mails to this kind of matter, the general authority of Congress over the mails is firmly established in, as I mentioned before, precisely similar circumstances, except that the occasion was fraud and the other was obscenity. This Court has upheld by a substantial margin precisely the same form of relief. That is the Donaldson case, which we discussed at some length in our brief, but it might be helpful, I think, to simply read one short passage from the opinion appearing at page 190 of the report, which it seems to us is equally applicable here.

All the foregoing statutes and others, which need not be referred to, manifest the purpose of Congress to utilize the powers to protect people against fraud in that case, this

Government power has always been recognized in this country, is firmly established. But the particular statutes here attacked have been regularly enforced by the Executive offices and the courts for more than half a century. They are now part and parcel of our governmental fabric.

The same may be said with equal strength, I think, of the obscenity statutes, which were upheld about six years later -- not this particular statute, but other statutes -- dealing with the Government's authority over the mail in the Roth case.

Q When was that particular statute first granted?

A This statute was enacted in 1950, two years after the decision in Donaldson, and on the model ---

Q I take it that if you feel that if an affirmand comes along here, then Section 4005 and the integrity of the Donaldson holding are both placed in jeopardy?

A Well, obviously, Mr. Justice Blackmun, it would depend somewhat on the character of the affirmand. I think there is a particular risk in that direction under 4007, which treats both statutes, and the objections to which seem to me run equally to the fraud statute as to here. The Court may be able to discern some differences between fraud and obscenity. The Government does not.

Other than that, the answer to your question is certainly "yes."

The interest of the Government in regulation of the

mail has sometimes been questioned. I realize that there is a position which now has a substantial adherence in the courts that the Federal Government has somewhat less interest in the regulation of these matters than perhaps the states have, but I think it fair to observe that position has always been articulated in terms of a level of obscenity rather than the question whether the relation is or is not possible.

The materials in question must be hard-core or not, which might be insisted upon by the Federal Government and not by the states, and not whether a particular form of regulation would or would not be possible. And I think it incumbent upon me to point out that the consequences for the Government and for the Government's posture here are not at all abstract.

As the Court knows, use of the postal services, which is a Government enterprise, is a very valuable tool for distributors through the mail and I think any time that the Government becomes involved in this enterprise by lending this aid, there must be some appearance to the people of the country that this legitimizes in some sense the enterprise which is taking place. And if, indeed, it is an illegal and illegitimate enterprise, one which the Government has a right to interfere with, why then the Government cannot tolerate and indeed will not tolerate that situation. It is not irrelevant in these circumstances that these mailers have a claim not simply to pay their own way, but to have the Government pay part of the way for them through the use

of second- or fourth-class mailing privileges.

Q You say the Government pays that. All the public pays that.

A Of course.

Q Is the particular material involved in issue in this case?

A I don't believe so, Mr. Justice Harlan.

Q I just wanted to make sure.

A No, I think this case must be decided on the proposition that any material could be sent.

If I may turn now to Stanley v. Georgia only briefly, As the Court knows, I expect to be back on that question later on. But the suggestion has been made now, well now we have some transactions that take place through the first-class mails, sealed mail. Isn't this a special situation in which the Government could not interfere?

Q Is it second- or fourth-class mail?

A The publications might be so sent. The remittances to this particular statute interfer with the remittances which are received by the publishers, and those would be generally sent by first-class mail.

Q This case involves what? Second- and fourth-class mail?

A No, first-class mail.

Q First-class mail.

A In referring to that, I would simply try to lay some groundwork on the proposition established by Roth which is thought to be called in question by Stanley, that indeed there is some interest in regulating in this area, that the Government has some very substantial interest in dealing with this field.

Q Well, your argument earlier was that the Government is much broader on obscenity and pornographic materials.

A That is also true.

Q Well, what is the whole range besides fraud? Is there stock fraud?

A Any sort of fraud that is dealt with through the mail. There is also a section which was initially the section thought to deal with obscenity, since that is the way the purveyors originally conducted their business having to do with the use of false names and addresses.

I might point out again that it is the special character of the mail, and that even if one gave Stanley the broadest reading, it would be difficult to say that it necessarily forclosed the type of relief which this type of statute embodied, in that one cannot know, as one can where material is sold all over the counter, one cannot know whether the sale involved is indeed to an adult or to a consentual, the two parameters of the Stanley opinion on which a considerable weight has been placed.

But going beyond that, I think it is sufficient to

observe at this point that the Stanley opinion carefully preserves the right of state and Federal governments to proceed against commercial enterprises in this field, and it is not hard to discern in that opinion, which cites the First Amendment, nonetheless a considerable degree of emphasis on the Fourth Amendment and on considered notions of privacy which are especially appropriate there.

Indeed, as we suggested, it seems more appropriate to deal with Stanley as a case in imposing a disability on the Government because of the particular dangers of the situation with which the Georgia statute in that case attempted to deal, than in a case which recognizes a kind of right to receive on the part of the individual involved and which therefore might be used as a tool, as indeed the purveyors of this material are seeking to use it for a stand in the area for which they operate free of Government interference or supervision.

Turning to the Freedman question, it seems to us, as we set out in our brief, that this case is entirely different from the situation which confronted this Court in Freedman v. Maryland. If I may recount that briefly, that case was concerned with movies and the law before the Court required that anyone who wished to show a movie in Maryland, before he could show it, must submit it to a board of censors, and that board would then decide whether or not he would be permitted to show it in the state.

There was no particular certainty about how long they

would take about that process. There was no particular certainty about how long it might take in the Court of Appeals to have it reviewed.

Here, entirely in contrast, the magazines were being advertised and sent through the mail, I assume, from the moment that they came off the press. There was no governmental interference, no governmental control of any kind.

Similarly, the board which reviewed the movies in Freedman was a board which did nothing else. Here the matter goes to a Federal hearing examiner or judicial officer, someone within the administrative process, to be sure, but a person who has many of the insulations which judges enjoy. He sees a broad range of problems come before him, one of which could not be said is that the Court remarked that the board in Freedman v. Maryland, that his business is to censor.

There is the necessity here that the Government go forward by filing a complaint. There is no burden of going forward on the part of the mailer. There is the necessity here that the Government prove that the matter is obscene. There is no burden to be carried by the person using the mails. Indeed, the only point at which the appellees here have been able to rely on Freedman is in the singular question of appealing.

It is true that Section 4006 order goes into effect automatically, and if they don't appeal, then it will effect on them, and to that extent it can be said that the statutory scheme

does not require a judicial involvement. But that, we submit, is no different from the possibility of the fraud, which is always in any kind of a process. There is every incentive under this statute for these individuals to appeal to the court. If they do so, at least on the reading of Section 4006 which we consider mandatory, they will have preserved their mail to the possibility that on judicial review it will found not to have been obscene and during that period, of course, they are free to go forward and continue to solicit remittances to these magazines, remittances which they know, if they succeed, they will receive. And if they don't succeed, I suppose in this kind of an enterprise it might even be some kind of a badge on their sleeve as well.

Q Mr. Strauss, you mentioned just now a burden on the other party. As I read the decisions below, each of them placed great emphasis on the burden aspect of the case. Do you wish to comment any further on that? Do I correctly to interpret your remarks to mean that there is no burden of any consequence in this administrative procedure that is placed upon the advertiser here?

A I think that the only burden is the burden to file an appeal. There are possible issues of timeliness, but as I shall discuss in The Book Bin case, I think those are amply dealt with by Court's powers to modify Section 4007 relief. Certainly the question has been raised that on appeal will the

sender carry some kind of a burden, showing that his material was not obscene, that the Post Office decided his case wrongly?

At least as long this Court's present practice continues, I think it must be clear to any court in this country that they may not accept a judgment which someone else may have made about whether the material is obscene or not. They must themselves inspect and consider the materials in light of the record which has been made, yes, but it is a full record with transcript and everything else which could be hoped for.

They must themselves reach the conclusion that the Constitution protects it or does not do so. And as long as that line of cases persists, certainly then the question is, the only burden on the appellees in a case is a burden of filing an appeal. And, indeed, in the Interstate Circuit case, Note 22 ---

Q It also has a burden of going and satisfying the Postmaster General over a particular piece of impounded mail being held up is not connected with the original stop order, so to speak, the material that was stopped?

A Yes, that is true. I think that gets to the other -- the third aspect of the case. At one point I might call it the Lamont issue, although I don't think it is precisely that scope of relief as distinct from a question of the regularity of the proceedings, and I have been dealing with Freedman as directed principally at questions of proceedings, and whether

the proceedings are themselves adequate.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Strauss.

Mr. Fleishman.

ARGUMENT OF STANLEY FLEISHMAN, ESQ.

ON BEHALF OF APPELLEE

MR. FLEISHMAN: Mr. Chief Justice and may it please the Court:

If the Court please, this case started when a postal inspector, representing himself as being over 21 years of age, ordered seven magazines which he said he wanted. Thereafter the Post Office started the administrative proceedings that were discussed by Mr. Strauss and had the order, the effect of which was to keep every adult person who may similarly have wanted to order these magazines from getting them.

It also had the effect of invading the privacy of the mail because persons who sent first-class mail to appellee had their mail poked over by post office persons in the office to see whether or not this was mail that could or should be delivered to appellee. So that a person who may privately have wanted to obtain these magazines for his own entertainment, for his own amusement or for his own information, would have this fact known to the postal authorities, whether he wanted them to know about it or not.

We have here, in short, the kind of Federal censorship which this Court has repeatedly stated was not tolerable under

the First Amendment.

Very interesting to me is the fact that counsel have not mentioned at all the most recent case decided by this Court, Rowan, which seems to me to be dispositive of the issue. Because, after all, in Rowan this Court said that the householder, the free American citizen, was to decide what came into his home or what did not come into his home, so that in Rowan the focus was on the right of the free citizen to say, "I do not want this."

This case deals with the question of the right of the free citizen to say, "I do, yes, want this," and the right of the Government to say, "In spite of that, you cannot have it."

The question is not, as the Government has put it, whether the First Amendment confers complete freedom on control by Congress to use the mails for commercial purposes. We, of course, do recognize the binding effect of Rowan, which puts a limitation on the use of the mails and not yet in effect, Congress has already implemented -- perhaps without knowing it -- important portions of the Lockhart Commission Report on Obscenity on Pornography.

Congress has enacted, 39 U.S.C. 3010-11, which now makes it a criminal offense -- no, I'm sorry, that is Section 18 U.S.C. 1735 and 1737, which now makes it a criminal offense to mail to unwilling persons material dealing with sex. And Section 3010 and 3011 impose additional burdens on a mailer, to

make sure that a mail order person does not mail to those persons who don't want it and does not mail to minors. Those sections provide for the Post Office Department to make up a list throughout American of everybody who doesn't want to be contaminated by sex. If a person doesn't want anything to do with sex, he can put his name on a list and he won't have any. Fine.

We have that kind of protection in the law now. But the question that we have here is, what about the right? What about the right of the people who want to have material dealing with sex? And it is as to that that I want to address myself.

The Government takes interesting positions. In Rowan the Government said, perhaps a most private kind of communication is by the mail. Perhaps if ever Stanley can be appropriately given full bloom, it is when you have distribution by first-class mail to consenting adults.

In its brief the Government does say, "If Stanley does protect such activity, then it might appear that use of the mails, inherent private, and the case of a mailed order blank ordinarily consentual is, indeed, protected from Government regulation."

On that reasoning only the uninvited advertisement or mailing obscene matter to a minor could be made an offense and Roth would not only have been limited, but the Government says "overruled."

Q Wasn't there in Stanley something which deals with

mail?

A There is nothing in Stanley that deals with mail. There is a lot in Stanley though ---

Q In Stanley nobody knows yet where he got it from.

A Well, I know where I got it from, Mr. Justice.

Q But nobody knows where Stanley got the films from.

A I see. That's true. But we were---

Q He might have made them himself.

A He might have, Your Honor.

Q But what does that have to do with this case?

A Everything.

Q Oh?

A Everything, because as I read Stanley, Stanley was decided on First Amendment grounds. Mr. Justice Stewart didn't join in that opinion. I think that it ought to have gone off on privacy grounds or Fourth Amendment grounds. And as I read the statement by Mr. Justice Stewart, and he is here to correct me, he said he was not anxious to hurry on to new constitutional frontiers.

Now I read Stanley as going on to new constitutional frontiers and rightly so, because Roth was a debacle in its application. After 13 years of using Roth, ---

Q As I read Stanley, Stanley said that every man's home was his castle.

A Your Honor, I ---

Q It's a damned nuisance.

A Your, Honor, you wrote the opinion and all I can do is read the opinion. But in Stanley you went back to Winters. The key to Roth, the whole key to Roth, was that obscenity was without redeeming social value, and because it was utterly without redeeming social value, then it was outside of the protection of the First Amendment.

Now Your Honor twice in Stanley said that a person has a right to obtain a free material, so-called explicit material, whether or not it had any redeeming social value. Twice you cited Winters.

Winters says that material is protected whether or not it has any social value. That is the underpinning of Roth. Now it may be that because Roth had as its premises two things, both of which are now gone.

The first was to rely on Beauharnais. In Roth Justice Brennan said that Beauharnais had recognized that there was a kind of speech in obscenity which was outside of the protection of the First Amendment. Since then Beauharnais has been significantly changed, as we see it, by the New York Times case and cases which have followed it.

The other underpinning for Roth was this social value test. And Stanley rejected the social value test. I don't know what else was in your mind, Mr. Justice Marshall, but that was

the underpinning and that was ---

Q There was an opinion which said that Roth stood and is still the law?

A No, I hesitate to quarrel with the author of an opinion.

Q Well, maybe we might have to make that clearer.

A Well, perhaps, Your Honor, I would hope that it would be clearer to bring about the kind of rationality that we need in this area, because if we are going to follow the confusion that has been brought about by saying that obscenity is outside of the protection of the First Amendment, I very much fear, Mr. Justice Marshall, that we will have really the kind of witch hunt that we have not had for a very long period of time in this country.

So I would hope that when this is clarified, the clarification would be in the direction of sanity, which is basically that consenting adults should have the right to choose their own reading matter even if the reading matter has to do with sex. I have never understood ---

Q I assure you that I as one will do my best to do something with an insane opinion.

A With a what?

Q With an insane opinion. You want to put sanity in it.

A Well, I agree -- well, I know the whole Court

would because this Court has dealt with the problem for 13 years. It was a difficult problem and I don't think that anybody sitting on the Bench who has considered the problem at all could be satisfied with what has happened in the area of obscenity and the First Amendment.

No one knows to this day what obscenity. Mr. Justice Harlan had occasion to comment on this in the Sam Ginzburg case. Anyone looking at the opinions in the 13 years would find themselves in total and complete bewilderment, and the reason is that it seems to me after 13 years that the rule isn't working, then there is something wrong with the rule.

Now what was wrong with the rule, I submit, is that the notion that such speech was not speech and therefore it was outside of the protection of the First Amendment, was a false premise. Obscenity, after all, is nothing but sex speech, which a lot of people don't like. That is all it is.

It is like saying that religious speech that we don't like is somehow outside the protection of the First Amendment. Now there is a great deal of additional knowledge that we have obtained since Roth came down, which ties into the correctness, Mr. Justice Marshall, of your statement that a social value is not a correct test.

And it is very interesting in the Lockhart Commission Report, where they spent something like $2 million and two years, the Commission came to the conclusions that this material we have

all been calling obscene, in fact does have social value. That is to say, that the people who have been buying the material and reading it had benefitted by it. They have learned about sex in a way that was helpful to them. They have had their entertainments satisfied, they have had their curiosity satisfied, so that the whole assumption of Roth that explicitly sexual material was totally without any value, I submit, is factually untrue, Mr. Justice Brennan, and that is what the Lockhart Commission has concluded.

Now also in Stanley, as I read it, is the recognition of the right to receive material. Again the right to receive material regardless of the social worth of the material, so that if a person has the right to possess it and if he has the right to receive it, then we submit that there must be the right to distribute it subject to the legitimate state interests, and we grant that there are legitimate Federal interests. Those interests are represented, in part, by the Rowan decision. That is one of them. Unconsenting persons and minors are out. You can't thrust this kind of material on those who do not want it.

And, as I say, Rowan is one recognition of this aspect. The other recognition is in the recently passed laws which have not yet gone into effect.

Q Did the Lockhart Commission undertake to address itself to keeping materials of this kind out of the hands of minors and the unsolicited?

A Yes, Mr. Chief Justice, it does, and as a matter of fact the two Federal statutes, which have been passed, are modeled -- although they are parallel, I don't think the Congress modeled it upon the Lockhard Report. But they come out about the same.

The Lockhart Report says they think there were two alternatives, and that the Commission believes that the path that Congress took in terms of making it a criminal offense, in addition to what Rowan did, let's say, to keep it out -- but I will say criminal offense to mail to unconsenting adults or to minors, and the Lockhart Commission has stated that that was the preference to them so far as Federal is concerned.

Q Is the mailer protected by simply having the recipient who sends in an order fill in a blank that I am over 21 years of age?

A That is part of it, but the new legislation, Your Honor, goes further than that, because the new legislation permits the Post Office Department to prepare a list of persons who either do not want any material that is expressly sexual or do not want it for their minors. So that any family that wants to can get themselves on the list, and then that material is sent to that house under penalty of being a criminal offense, because then the mailer is told not to send it there.

So that actually under the new legislation, which may raise some problems -- I don't want to, you know, talk to those --

but at least that is where the Lockhart Commission went in terms of giving maximum freedom really to everybody, freedom to those who don't want material and freedom to those who do. It is one of the few ---

Q How about the boys over 18 who are old enough to vote?

A Well, it is actually 19 under the terms of the congressional act. Between 18 and 19 the minors would be denied that right, even though they ---

Q They could vote even if they couldn't receive the literature.

A Yes, Your Honor. They can also go to war in Vietnam and not receive the literature.

Now in Rowan this Court repeatedly, it seems to me, made two points: No. 1, that we do not want to have Federal censorship or the appearance of Federal censorship, and even in order to even prevent the appearance of Federal censorship, that the householder would be given total and complete discretion to decide what should be kept from his home even if this were a Sears, Roebuck catalog, which is one of the illustrations.

And instinct with that whole opinion was the other side of the coin of being told that if he didn't want anything, he could keep it out; and if he did it, he had every right to have it come into his home.

In the Rowan brief -- and I understand really why the

Government did not cite Rowan, because in Rowan the Government made an awful lot of concessions that are totally inconsistent with the position that the Government is taking here. For example, in its brief on Rowan, on page 6, at footnote 1 the Government said that adults who want to receive obscene material can receive it under this bill.

That is that Section 4009, which was involved in Rowan. But a free society does not compel people to receive sexually provocative material. It does not compel them to be part of a captive audience. Just so.

But in our case we are not talking about a captive audience. We are talking about adults who say they want to get these seven girlie magazines. And incidentally, that is all they were. They were girlie magazines of the kind that this Court in Bloss held was constitutionally protected, so that what we have is the Government saying, "You can't get these magazines even though you want it, because poppa knows best. We are going to protect you."

Again in their brief in Rowan, this is what the Government said, and compare it with their argument here that there was no right to receive. In Rowan they say in making the assessment, that is with regard to Section 4009, Congress was of course aware that the freedoms of speech and press embrace the rights necessary to effectuate those freedoms, including the right to circulate and receive publications, the right to listen and the

right to read, citing Stanley, Martin and Lamont.

And then they went on to say, "As this Court suggested in Martin, Section 4009 leaves the decision to accept or reject the material with the home owner himself." And again the Government goes on to say, "The constitutionally protected rights of willing recipients are unimpaired by Section 4009. They are put under no burden of action or self-identification to receive the material they desire."

Q Where are you reading from now?

A This is the Government's brief in Rowan.

Q Oh, in Rowan.

A It is the Government's brief in Rowan, yes.

And then finally from the Rowan brief, at page 36, the Government said, "The determination of affront ought to be left to individual discretion where that is possible without impinging on free circulation of ideas." That course is possible in the mails as it is perhaps nowhere else.

Now this is a situation where the Government has told us, and quite correctly so, that the first-class is just as private as the home. This case, Mr. Justice Stewart, does involve first-class mail only. People by first-class mail ordered material, they sent their money in, they signed an order blank in which they say that they are 21 years of age or over and they want this material for their own entertainment.

Q Where do they order it?

A From the mailer. We send out the brochure and the persons who want it fill in.

Now we know, of course, that Rowan keeps us from mailing to people who don't want it. If they don't want it, they don't have to receive the mail in the first place. But we invite them to buy if they want, so that what the Post Office is doing is saying that those persons who say that they are adults, who say that they want the material, who spend their money to get the material, the Government says, "You can't have it."

Q But doesn't your brochure itself contain the very materials which the publication you were trying to sell contained?

A I don't believe that is in the record and I am not sure that I should answer it. There is in the record that the brochure in the second case, in Section -- the Tipton one. I don't believe the brochure is here. But I would call Your Honor's attention to the record where they describe the brochure. On page 55 of the Government's brief they say, in the middle of the page, they say: "For accuracy, none of the advertising can surpass Exhibit F2(1) which, in touting "Girl Friend," "Bunny," "Golden Girl" and "Match," promises:

"'Unusual photographic techniques, exploring every nook and cranny of the female form. Additional emphasis is placed on the inner beauty of our models, as the camera explores bodily regions never attempted before. Close attention to detail * * *."

That is the brochure. They say that that describes it accurately, so that we have a situation where there is an advertisement which says you are going to get pictures of nudes, if you want them, and then you can pay your money and obtain it. So that there is no question here of any intrusion on any unwilling recipient.

The record shows only that, as I said before, a postal inspector in his money. He filled in the order blank and got his magazines, and based upon this postal inspector, who is over 21 years of age, getting these publications, all of these proceedings were held.

Q Well, suppose your brochure did contain some example pictures. Then is your case different?

A It is not. Then it would go into Section 4009. There might be a Section 4009 problem, but it would not change this case.

MR. CHIEF JUSTICE BURGER: We will continue after lunch.

(Whereupon, at 12:00 Noon the argument in the above-entitled matter recessed, to reconvene at 1:00 p.m. the same day.)

(The argument in the above-entitled matter resumed at 1 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Fleishman, you may continue.

ARGUMENT OF STANLEY FLEISHMAN, ESQ. (resumed)

ON BEHALF OF APPELLEE

MR. FLEISHMAN: Mr. Chief Justice.

Just one more word about the Stanley case and its relationship to the Lockhart Commission. I don't think I should go on without commenting on the fact that a large number of courts throughout the country, Federal and state, have interpreted Stanley generally the way we have been talking about it today.

The Lockhart Commission, after a great deal of study, came to basically the same conclusion: That in a free society there is no other way to handle the problem other than by permitting consenting adults to satisfy their curiosity and interest in matters pertaining to sex.

Q I suppose that was the satisfaction that the Lockhart Commission was dealing with questions of policy, not with constitutional law. I haven't read their report, but ---

A That's right. That is only partially true, Mr. Justice Stewart, because underlying the questions of law certain assumed facts -- for example, once we learn that there is social value in what we have always been calling "obscenity," then we

have a whole different legal question, the assumption upon which the law proceeded, which we now know is false if we accept the conclusion of the Lockhart Commission.

Q But did the Commission itself purport to determine reaching constitutional decisions, decisions of constitutional law?

A No, of course not.

Q It was just recommending policy?

A It was recommending policy based on facts instead of prejudice and fear, which I think makes a basic difference. It should also be observed, it seems to me, that most of the free world appears to be traveling in the same direction. And not only Denmark has abolished its obscenity laws, Sweden -- the last I heard -- was about to do so. I think they have by now. In West Germany the highest court has concluded, insofar as consenting adults are concerned, that they should have the opportunity to receive and there should be the opportunity of selling, too, to consenting adults.

There have been studies in both Israel and Great Britain which were comparable to the Lockhart Report, reaching basically the same conclusions, and indeed the whole area of saying that people should be able to read what they want in this area, touches upon in other areas of law that have a relevance, and that is that consenting adults ought to be able to do what they want to do -- at least in the area of sex.

You know about the modern penal code, tentative draft No. 4, which came out in 1954, which basically said that what adults do privately is no legitimate concern of Government. Whatever approach we take in that regard sure by 1970 we have to agree, it would seem to me, that we should be allowed to think about and dream about all of these sexual that are running through our heads anyhow.

There is one very interesting study in the Lockhart Report that perhaps bears repeating here. A group of persons were shown the most pornographic pictures that the researchers could get and then they were measured for the impact on the individuals, both in terms of heart beat, blood pressure, dilation of eyes and things like that.

Then the same people were told to just imagine, to draw their own pictures in their own heads, and the effect was twice as much. In short, the individual was able to create his own much better than any of the mailers could create it. The short of the matter is that you are going to dream anyhow, so we may as well accept it in terms of having a little ---

Q Do you think you have to paint with such a broad brush to prevail in this case?

A No, and I will ---

Q You haven't really addressed yourself at all yet to this point, which in the lower court at least, was dispose of.

A I will save the remaining five minutes for that and I will now address myself to that.

First of all, the statute plainly does violate the Freedman principle. Under this Federal censorship law the Post Office Department can execute its own order, so once the Post Office Department decides that the material is obscene, then the mail is interfered with. The burden is upon us to file a lawsuit if we want to do something and even if we were to file a lawsuit, there is no assurance that the mail will not be sent back.

When we file the lawsuit, there are no time requirements within which the Court would have to decide whether or not we are right and the burden of proof is placed upon us when we file the lawsuit.

The statute is also bad because it permits an administrative official, a Post Office judicial officer, who really is a censor in spite of what Government counsel said. It is a censorship. When this judicial officer acts, he is acting as a censor. He makes the determination rather than a jury, and as far back as the Kingsley Book case Mr. Justice Brennan suggested that obscenity could only properly be decided by a jury because it was so linked with the question of the average persons.

But here we have dispensation of the jury in favor of a postal censor. There is no requirements of scienter at all, and this Court has said although the obscenity is an especially vague law, that the scienter requirement compensates in some

regard. Here we do not have the compensation of scienter because scienter is irrelevant to it, so that we -- and we have also what is basically a Lamont point, because here what happens is if we think in terms of the householder who mails a letter to the appellee, then his mail is interfered with. As a matter of fact, what happens is a man will send in his money and he will never get a response because the Post Office Department has impounded really the mail.

Now it is true that under the unlawful order it can be sent back, but the way the Government handles it, while litigation is pending, it is neither sent nor is it delivered, so it is held. Now you take this case. For about a year and a half people have been sending in money to appellee and the Government has that money, so we have the kind of heavy hand that is an intrusion upon the mails that has been repeatedly, as I said, found upon by this Court.

Q What is the Government doing with the money?

A Well, the Government is just holding the money, Mr. Justice Black. They don't return it and they don't give it to us. They say that when this case is finally decided, then they will either return it to the person who sent in their money or give it to us.

In the meantime though, something like a year and a half has expired while we have been proceeding this way and again I want to emphasize that we are talking about magazines which are

identical to magazines found not to have been obscene by this Court where the state proceeding was involved, not a Federal proceeding. And at least, so far as the Federal Government is concerned, it seems plain to us that there is no question but that the material is not hard-core pornography and, in fact, it is constitutionally protected material under this Court's standards, vague as they are, and as unsatisfactory as those standards are.

Q Do you know how much money has been impounded up to date?

A No.

Q The alternative construction of the statute that the Government suggests on pages 26 and 27 of the Government's brief would serve to eliminate that, at least the Freedman objections to this, in your submission, wouldn't it?

A No, no, Mr. Justice Stewart. It would go to some of it, but not really cure it, because what the Government says is that you can interpret the statute and say that, first of it, if we file a lawsuit -- first of all, the burden is still upon us to file a lawsuit, while in Freedman the burden was upon the censor to file the lawsuit to indicate a censorship.

So the first thing is it becomes our burden to go into Federal court and bring an action, which distinguishes it in the first instance. Secondly, ---

Q I thought the Government position was that they

would do it.

A No, sir.

Q Maybe issue a temporary restraining order against --

A No.

Q Unless they did, there would be no impoundment.

A That is not the Government's position at all. What the Government did say is that there is another section of the law, Section 4007, and that 4007 takes care of some of the problems. But if you are thinking in terms of Section 4006 alone, it is not the Government's contention that they have to go into Court to have that order enforced. They do not treat this as an FCC order, an NLRB order at all.

They still say that we would have to go into court. They don't say with what period of time. They don't say what really happens to the mail at all, but their proposal is that we could go into court, and then when we go to court, then the mail would be impounded and it would not be sent back to the person who sent it to us. But that does not meet Freedman really in any of the respects.

We have to court. It is our burden to prove, to satisfy the court that the administrative agency was wrong, and there would still be no time requirements of the kind required by Freedman.

Q Mr. Fleishman, your time is up, but I just wanted to question you, if I may.

A Yes, Mr. Chief Justice.

Q Could Congress constitutionally prohibit the kinds of mail that you send out for your advertising, your scouting, to people who did not request it in certain instances? You are talking about consenting adults. Lay that aside.

You only get the indication of the consenting adults by sending them some samples of your materials, in effect, as I read this.

Q Or at least Congress constitutionally ---

A What's that? There is another statute, Section 4009.

Q Yes. The householder gets mail and he is dissatisfied with it.

Q Are you talking now about the Rowan situation?

A Yes, that is Rowan. But under Section 3010, though, and Section 3011, which are new statutes which have just been passed under the reorganization law, there the Congress has said that there is a way of preventing the householder from getting even the first mailing, and that is when the householder can put himself on this list, saying "I do not want to receive any material dealing with sex."

If he put himself on that list, it becomes a crime to to send it to him. He doesn't get the first mailing.

Q But the householder takes the first step there. My question was, can Congress constitutionally prohibit you from

sending out any advertising material which discloses the kind of material that you are going to sell?

A Without knowing that the person receiving it does not want it? Is that the question?

Q No, without knowing anything about it.

A I don't think Congress can do that, because I believe just as people who do not want it have a right to say, "No, I don't want it," the avenues of communication must be left free for those, in fact, who do want it. As a matter of fact, the legislative history behind Section 4009 specifically stated that that is what they wanted to keep open, So those people who wanted to receive such material, Congress said, they should be permitted to.

The other side of the coin is that every way that is fair in terms of saying a person does not want it, then I think Congress can have a lot of free way there and free expression in preventing that where there is an unwilling audience. But I think that just blanketly to say that you cannot send out any advertisements dealing with sex, I do not think that Congress could constitutionally do that.

That is going too far.

Q That would be governed by Lamont, I should think.

A Yes, I believe that is exactly right.

Q Mr. Fleishman, let me ask you what I asked Mr. Strauss.

If you prevail here, is the integrity of the Donaldson decision in any way affected, in your view?

A Not necessarily.

Q So that you can -- there is a distinction between fraud, on the one hand, and obscenity, on the other, if I over-simplify?

A Those are very distinct ones. I must comment on it because we have a First Amendment, which protects the right to distribute books and magazines at least to willing persons. There is no comparable constitutional right to perpetrate a fraud.

Additionally, whatever else we may say about the vagueness in the term of "obscenity," we know that a Post Office hearing examiner, who is merely a censor, is the least qualified person to draw that fine line which separates unconditionally protected speech from criminal speech.

That is a different situation than you have with fraud, so that it is perfectly possible, in my judgment, to say that this docket is bad as it applies to obscenity, because we are either in the First Amendment basically if I read Stanley correctly, or we are faced with different principles which apply than would apply in a fraud area.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Fleishman.

Mr. Strauss, you have -- let's see whether you have any

time. No, I think you have used all your time.

Thank you, Mr. Fleishman, Thank you, Mr. Strauss.

Your case is submitted.

(Whereupon, at 1:16 p.m. the argument in the above-entitled matter was concluded.)