# Supreme Court of the United States



OCTOBER TERM, 1970

**In the Matter of:**

**Docket No.** 58

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| UNITED STATES, et al. | |
| Appellants, | |
| vs. | |
| THE BOOK BIN, | |
| Appellee. | |





**Place** Washington, D. C.

**Date** November 10, 1970

**ALDERSON REPORTING COMPANY, INC.**

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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| UNITED STATES, et al., Appellants; | : | |
| vs. | : | No. 58 |
| THE BOOK BIN, Appellee. | : | |

Washington, D. C.
November 10, 1970

The above-entitled matter came on for argument at 1:16 p.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:

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Counsel for Appellee

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in the United States against The Book Bin.

Mr. Strauss, you may proceed whenever you are ready.

ARGUMENT OF PETER L. STRAUSS, ESQ.

ON BEHALF OF APPELLANTS

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

Obviously this case concerns the same legal questions and so I will be making a continuous argument in that sense. But if I may, I should like to take just a moment to correct a couple, I think, factual overstatements regarding the case just concluded.

My understanding is that the stays that are in effect concerning the mail received by The Mail Box in this case were concented to -- or at least not opposed to -- by Mr. Fleishman on behalf of his client. And while he may have given a contrary impression, the original orders in this case came on as a result of unsolicited advertisement which postal inspectors received from The Mail Box.

Proceeding to The Book Bin then, I think my statement may be brief. The appellee advertises and sells through the mail, like The Mail Box, a substantial number of publications of the character suggested by the advertising exhibit reproduced at pages 58 and 59 of the record. A Section 4006 proceeding was

brought against The Book Bin, alleging that one of these publications, entitled "Models of France," was obscene. And on June 6, 1969, the Government set out a Section 4007 protective order in the United States District Court of the Northern District of Georgia.

Appellee's counterclaim for an injunction forbidding enforcement of Sections 4006 and 4007 was made. A three-judge district court was convened and granted the counterclaim. The court found the procedures for examining mail possibly connected with the challenged publications were overbroad and that the procedures generally failed to meet the standards of Freedman v. Maryland.

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

If I may turn first -- and I note your question, Mr. Justice Harlan, regarding scope of relief in this case remains open and is perhaps the most serious of the questions in this case. But I do want, first, to examine briefly the other procedures of Section 4007, the operative procedures as it were, the procedures that were put into operation because the scope of the relief question is really shared with Section 4006.

Section 4007, as I stated at the beginning of the prior case, is basically a reference to Rule 65 of the Federal Rules of Federal Procedure. It entitles the Government to get interim relief against the distribution of the magazines of this type or

against fraudulent enterprises in circumstances in which such relief could be obtained under Rule 65. That means, among other things, that the proceedings cannot be ex parte and, therefore, the consideration which principally, I think, animated this Court's decision -- or the concern, I should say, in Kingsley Books and subsequent opinions construing that case, is absent.

In addition, there is the necessity of showing probable cause in two respects: First, to believe that the magazines are obscene, and that would be a judicial finding; and, second, probable cause to believe that, indeed, the Government will be irreparably injured, that there is some need for emergency relief.

And Kingsley Books spoke to both of those issues. The Court said, at page 440 of Volume 354 before the court, authorization of an injunction pendente lite as part of this scheme during the period within which the issue of obscenity must be promptly tried and adjudicated in an adversary proceeding for which adequate notice of judiciary hearing and fair determination are assured is a safeguard against frustration of the public interest in effectuating the judicial condemnation of the obscene matter. It is a break on the temptation to exploit a filthy business offered by the limited hazards of piecemeal prosecution sale by sale of a publication already condemned as obscene.

And I think Mr. Justice Harlan in his concurrent -- or am I characterizing it accurately -- his dissent, rather, in A Quantity of Books stated the grounds that were important to

that decision and to the distinction of that decision that was made by this Court in the Marcus case -- first, that the Court could exercise an independent check on the judgment of the prosecuting authority at a point before any restraint took place; second, that the restraints ran only against the main publication; third, that no extensive restraints were imposed for an adversary proceeding; and fourth, that the New York Code required a decision within two days of the trial on the obscenity question.

Now the only issue regarding those four statements in this case, I believe, is the matter of time, and it is the Government's position basically that that question is adequately controlled by the power which a court of equity always obtained to modify its judgments when subsequent events show that indeed the person against whom a temporary restraint runs is being improperly or unfairly injured by the pendency of the proceedings by the continuation and relief during a period of undue delay.

In that respect I would like to clear up some confusion which I think may exist regarding the relationship that we see in Section 4007 and Section 4006. 4007 in no event takes effect before a final administrative decision has been reached. Once a final administrative decision has been reached, it does take effect of its own force and without need for enforcement.

The person against whom the order is entered may then seek review, as was done in these cases essentially. And the issue is then, what is the effect of that petition for review?

The Government's principal position is that that petition for review operates to convert the Section 4006 order into what is, in effect, a Section 4007 order, an order impounding the mail for the duration of the proceedings, to challenge the administrative decision. So that there would be no return of the mail once an appeal had been filed. Now there might be in the intervening period of some slight length of time during which mail would be returned. There would in that sense be ---

Q There would be an act of the final administrative order before the appeal?

A That is right. During that brief period, the length of that period is in counsel's control and I am sure that if representations were made that an appeal would be taken, that an appropriate stay would be issued. It takes time to transmit these orders, after all, from Washington where they are entered to the postmasters out in the field, and if such a stay wouldn't be entered, I am sure this Court and other courts would be quick to grant one.

That is the necessary effect of an appeal, and now we say, in addition, although we don't urge it, that if the Court feels it incumbent upon it, it would not disturb the statutory scheme in view of the history of Section 4007 to say that the appeal has a more radical effect, that is, it suspends any impact whatever of the administrative order and leaves the Government completely dependent on its ability to get a judicial order under

Section 4007.

So that under that second reading, I think you were correct, Mr. Justice Stewart, in your question that there would be no burden so far as Section 4006 is concerned on the person subject to the order other than the burden of filing his appeal and seeing to it that ---

Q Then it is your alternative -- you are talking about your alternative construction of the statute?

A No, now I am talking about Section 4007, and -- the Government need not wait. I don't mean to suggest that the Government cannot invoke Section 4007 before there has been an administrative decision.

Q The purpose of it was, as I understand your brief, that.

A No, the purpose was to keep ---

Q Stop matters during the time necessary for the administrative procedures?

A That's right and therefore I think it is certainly appropriate for the Government to seek such an order, as it did in the Mail Box case when the hearing began.

Q Yes.

A That, of course, would be before the decision in the particular case. It was a month before the decision, so that there will be possibly a period of time during which there is not yet any administrative decision. There could not yet be

any administrative restraint, but there may be a judicial order outstanding which does impose a restraint of impounding the mail and ---

Q Of course that, too, is appealable.

A Of course. That is appealable and it may be stayed. It requires, as I said before, that the judge have the specific materials before him and that he inspect them and determine that there is probable cause to believe that they are obscene, and indeed that was precisely the procedure.

The Court will see we have reproduced at the rear of our brief in this case the temporary restraining order and preliminary injunction which were, in fact, entered in The Mail Box case, and the Court will see that they refer specifically to seven magazines which were at issue here.

And I may say, too, Kingsley itself is probably sufficient authority or sufficient demonstration of the need for this sort of pendente lite relief. If it were necessary to give any more, the question arose with regard to this specific provision, Section 4006.

Before passage of Section 4007 the Postmaster General attempted to forge his own impoundment authority, which was ultimately unsuccessful in the Courts of Appeal. But in the interim a motion for stay came before Mr. Justice Douglas. He wrote a lengthy opinion which is recorded and commented upon by the appellees here.

What is notable about that action, I think, is that he did not interfere with the impoundment, that he acknowledged there are many situations. One of the burdens of litigation may be putting things aside for the time and in order to preserve the status quo. That was Stanard v. Olesen, which is reported in the Supreme Court Recorder, Volume 74, page 768.

So, as I say, the principal things to be said here are that there is this need. The Government must show probable cause, it must show a need for emergency relief. There is complete judicial control over the period of time during which the order remains in effect. It is at once appealable on the issues of probable cause and the need for emergency relief. There is the constant possibility of modification and we submit that all of this would be sufficient to establish the correctness of the procedure, even if what were involved was some form of censorship. Of course that is not the case. It is a simple postponement.

The Mail Box and, for all we know, The Book Bin may and, for all we know, continued to solicit orders, and those orders come in and are kept. And at the conclusion of the period of time, they may, indeed, be received.

There is nothing to prevent The Mail Box or The Book Bin from recirculating their list with a letter saying, perhaps we didn't receive some orders that you sent to us. We want you to know that we are in this trouble and while in many industries advertisement of troubles like that might not be to a commercial

advantage, it seems to me conceivable that in this industry it would be.

There is a further point that Mr. Justice Harlan has averted to in some of his decisions, and that is that there is involved in these materials here, unlike movies that communicate ideas or political speeches that have a certain timeliness to them, that the materials involved in this case really carry no urgency of that sort whatever. They are essentially timeless. The Court knows from the description of the material there is against that balance the need of the Government for relief.if the scheme of the statute is to be upheld.

Now if I may turn to what I call the Lamont issues, which I agree were the more troublesome in the case, still it does seem to me that they were principally settled by the decision of this Court in Donaldson, because as to this question the way in which an order interferes or may interfere with a person's incoming mail, it seems to me the effect of this order is indistinguishable from the mail which was involved in the Donaldson case.

As the Court may recall, ---

Q You say "the incoming mail." With whose incoming mail? You are talking about the target of these proceedings?

A The target of the proceedings.

Q Or of the incoming mail of the public who send in for this material?

A The only mail that this order operates on is incoming mail to the target of the proceedings.

Q That is to prevent members of the public who order this material from getting it, to that extent it interferes with their incoming mail.

A Well, I should say "directly operates upon." It doesn't prevent them from getting it from some other source or at their neighborhood bookstores. It doesn't in that sense suppress or remove materials from the market. It does remove them from this one particular market.

In this respect, as I say, I think the order is essentially the same impact and is essentially indistinguishable from the situation in Donaldson. I might remind the Court, and that while it may be unusual, nonetheless in Donaldson was dealing, indeed, with a magazine, Facts Magazine, Reed Magazine -- these were magazines with subscription lists, these were magazines which undoubtedly had persons writing to them for proper purposes. As the case started out, the order entered against the magazines in question was quite broad. The Court was evidently, properly I would say, alarmed at the breadth of that order.

It heard argument once and then set the case for reargu-ments specifically on the question of the breadth of the order. In the interim the order was modified and the Court then concluded that with that modification, a modification which

essentially narrowed the order so that its predictable impact was principally on the transactions in question and the order was not overbroad, and indeed was proper.

The problems here stem from the necessity of honoring the privacy of the mail in the sense that the Government may not open a person's domestic first-class mail out of his presence, and that means if the statutory remedy is to be applied, it must either be applied against all mail incoming to the person, which we don't assert would be proper and do not attempt, or there must be some provision made for an inspection procedure. And the provision for an inspection procedure is what is at issue here.

I don't think it is irrelevant to point out that here, distinct from a case like Lamont, we are not dealing with an innocent party whom the Government presumes to protect. We are dealing with an individual who has either been adjudicated or whom it has been adjudicated that there is probable cause to believe that he is using the mail for an illegal, improper purpose. And it is upon the basis of that adjudication, a specific adjudication directed to him, directed after adversary proceedings fully consonant with due process that this remedy is applied.

Now the order, of course, is a restraint in some respects, but that is a restraint which can readily be reduced in its impact. Commercial publishing houses and commercial mail orders regularly use special forms of address in connection with

their order blanks. Where that is done only envelops with that form of address are intercepted and detained or returned, as the case may be, and again that was the situation in Donaldson.

As a practical reality there are not terribly many situations where an individual would receive private mail or anything of that sort at a commercial address which would be used in this kind of situation. There are specific provisions made for forwarding mail without interference, which appears from its cover, and not to be related to this specific publication which has been adjudicated. In some, as demonstrated by the Donaldson opinion, there may be some problems in particular cases about an order being overbroad. I think there is not a problem about the statute necessarily being so.

Even the inspection itself, when it occurs, I might point out need not and, in fact, probably is not in the realities of the situation a reading of the person's mail as such. We know that the way these publishing houses operate is on a cash basis. They do not accept orders COD. Consequently, any letter which when opening was found to include no check would immediately be a candidate for passage on. There is no necessity to see whether it is an order or not. One knows it on this type of a commercial reality. Usually there will be order blanks or something of the sort which would also serve an identifying function.

Q What distinction do you see in the usual finding

of something that is obscene or not, and the usual finding that there is probable cause to believe that something is obscene?

A Well, I think there are some issues of fact that might be explored. There might be some questions of social utility, of maybe special evidence that could be introduced in one way or another on various of the elements of the Court's obscenity standards as they have evolved. But I must say that certainly in this Court's practice, it does seem to come principally down to a matter of inspecting the materials themselves and to the extent, of course, that that is the test, there is no difference.

Q I suggest maybe the judge thinks he needs a little more time to ponder the problem.

A That's right, and I think any conscientious judge in that situation would take more time rather than issue the order.

Well, I might say again that there are substantial interests on the Government side warranting this procedure. Whatever certificates of age there may be in the mail is nonetheless impossible to know whether in fact the person is saying that he is 21, that he is 21. If you sell this material over the counter, you can at least make some obvious sorts of differentiations along that score.

There is the need, I think recognized by Mr. Justice Harlan's opinion in Memoirs, for cooperating in a sense with the

state for inhibiting the spread of this material to all states of the Union from a point obnoxious. If within constitutional bounds, this is properly so. And as Kingsley itself recognized, that cannot be effectively done without some form of restraint. There is the matter of Post Office involvement, indeed, with what is an offense under the laws of the United States and the time for the prosecution of the criminal case, again, is a time during which the material may continue to be sent.

In some I believe this is a remedy which is as narrow as possible under the exigent circumstances of the Act, something which this Court indicated in the Burstyn case it would consider as a proper consideration on passing on constitutionality of regulation in this field.

There are a few concluding observations that I would like to make. Regarding this Court's decision in Stanley and the meaning that ought to be given to it, I think the Government's approach or understanding of that opinion may be reflected not only in Griswold v. Connecticut, but perhaps better than elsewhere in the language of Mr. Justice Harlan's dissent in Pope v. Ulman.

We are not presented simply with a moral judgment to be passed as an abstract proposition. The secular state is not an examiner of consciences. It must operate in the realm of behavior of overt actions, and where it does so operate, not only the underlying moral purpose of its operations, but also the choice

of means becomes relevant to any constitutional judgment on what is done.

I believe that Stanley was a decision about the choice of means for regulating obscenity and as such the Government has no qualms with it. I do not believe, as the Court said, it was was not that the opinion was meant in any way to interfere with general Government regulations in this particular area. But someone suggested that the Roth opinion has proved a debacle. I find it hard to imagine back to what was available on the news stands and through the mail in 1957 in considering what is there now, that it was a debacle at least for anyone on the side of the fence represented by the person who made the observation.

Nor do I think that the issue of social value can be equated with monetary value. No one suggested that surely the authors of the Roth opinion understood that obscenity was handed out for no compensation, because people wouldn't pay for it. Obviously it has some social value in that sense, but I do not think that any value which has been suggested for it amounts to the type of value that the Court was discussing in Roth about value connected with ideas.

Counsel has made a great deal of our brief in Rowan. Those quotes were taken widely out of context. They were principally quotations which the Government had felt had made in its brief, one for example was from our statement of facts, page 6, where we quoted a member of the House of Representatives, who

was explaining his bill and quoting from the Harvard Law Review, and so forth.

The principal thing to be noted about the Government's position in that case is that deals with a statute which has much wider impact than on materials which this Court has held may constitutionally designated "obscene." And in that wider area where the individual may very well believe, and many individuals do believe, that materials this Court has held are not obscene, are nonetheless objectionable.

The mailer is given quite proper control over what comes into his home.

Q Some of these orders read "judicial officer." Who is he?

A The judicial officer is the judicial officer of the Post Office.

Q What's that?

A It is a position very much like the similar positions in the Department of Agriculture and other places defined by the postal laws, Section 308 of Title XXXIX, "He shall perform such quasi-judicial duties as the Postmaster General may designate. He is the agency for the purposes of requirements of the Administrative Procedures Act."

Q Does he have any judicial experience?

A Well, no more than a trial examiner for the National Labor Relations Board.

Q We don't call them judicial officers.

A They are the same.

Q In fact, it would be an acting judicial office. Now I am trying to find out what the difference is between him and the censor, except the title.

A Well, I think the censor deals strictly with these materials. 80 percent of the judicial officer's time is spent passing on contractual disputes involving the building of post offices.

Q Oh, is that what he does?

A That is a lot of what he does, yes. And he passes on issues of second-class mailability, any administrative dispute that may come up within the Department that has to be settled.

Q Then he is a judicial officer in the sense of being an adjudicator?

A That's right, precisely.

Q His job is adjudication and not administration.

A Precisely.

Finally, I think it is necessary to say that the Government does, indeed, assert that it does have the right not to deliver through its mail some of the materials and the people assert the right to send through it. That may ultimately be what is at issue in this case, although I thought it had been settled by Roth. It seems to me there is an overriding interest

because "carried through the mail" is simply not a neutral act. It involves the Government in this business. It in some sense puts a stamp of Government approval, if not Government subsidy, on it. That is why, quoting now from an editorial in the London Times, which is written on a somewhat different issue, but I think it is perfectly apt:

"That is why those that are of the opinion that material that pass the bounds of decency are justified in denouncing it in circumstances like these. It is not because they personally are affronted. They need not be so, but because it shifts the limits of public re permissible sexual display, and shifts them in a direction that they have reason to believe that it is hurtful to the values they are upholding to the well-being of their society."

I should like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Thank you. Mr. Smith?

ARGUMENT OF ROBERT EUGENE SMITH, ESQ.

ON BEHALF OF APPELLEE

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

The factual circumstances in the case involving The Book Bin are slightly different than the factual circumstances involving The Mail Box, and as to those differences as to not covered by my brother here I would like to mention those facts.

First, if it please the Court, the particular publication involved is just one, called "Models of France." The advertisement brochure sent out through a postal inspector, I call the Court's attention to pages 58 and 59 of the appendix, has a notation at the top that he inquired and the date 2-4-69, February 4, 1969.

Now in the context of this particular case what thereafter occurred is nothing for four months. And then in June, approximately June the sixth, a motion was filed which the petitioners filed to the complaint before the judicial hearing officer, as well as a motion for an expedited hearing because of the tremendous danger suggested in this particular regard.

And then almost instantaneously a motion was made under 4007 to have the court declare probable cause and the material as obscene.

But yet four months went by under the scheme as it operated by the Government's own exhibit as put into this particular case and we point out to the Court the material, the magazine "Models of France," which was the subject of the 1969 proceeding, was no more candid than the magazine this Court found "not obscene," applying the Redrup concept in exclusive -- in the magazine case involving Exclusive, which was Central Magazine Sales Ltd. v. United States in October of 1967.

So this is a year and a half later there is an attempt to take one magazine out of an entire brochure and we suggest that

these are separate facts and circumstances. What occurred is the U. S. Attorney sent a letter to The Book Bin, telling them that he was going to move for a temporary restraining order, and counsel appeared at the time and shortly thereafter filed a motion to dismiss the application as well as asking for a three-judge court to declare the constitutionality.

It is true in this case there was at no time any mail stopped, because of the action of counsel in this particular regard. Now in that context we show this is the difference in this case and the other case.

Now about our arguments in this other part. First is the concept of whether the administrative proceedings here are appropriate under the First Amendment dealing with presumptively protected publications. We have, as we suggested, a Post Office proceeding that does not have an adversary before a judicial officer, a court.

But what occurs is that the publication is displayed and an affidavit is obtained by the general counsel, the materials are then submitted to the hearing examiner, who then dockets a complaint and goes forward from there. Now in this instance there is to expertise to suggest in this hearing officer. You have heard that 80 percent of his time is spent on matters relating to contracts for post office buildings.

In the proceedings at that time there is no time period in which the hearing must be convened. There is no time period,

as we suggest, that is required under the decisions of this Court in Teitel Film Co. and in Freedman within which there must be a prompt judicial determination. And we say that in this regard this is a failure in this context.

Then there is obviously no jury in the context of the administrative proceedings to determine whether or not something is obscene. And we suggest that the publications in The Mail Box case were determined by that same hearing acting judicial officer to be obscene and, as Mr. Fleishman indicated, that these were comparable to the materials in Bloss and we suggest that Roth is also comparable to the materials in the Central Magazine case.

So, in that particular context we say that they are not -- these are not appropriate procedures. Now in the context of the 4007 order we suggest that there are several deficiencies in that particular section which are special to the Book Bin case.

First is, what is probable cause or what is the probable cause test? There is no guide left as to what is probable cause in the context of a 4007 hearing, because in no instance are we talking about an opportunity, a reasonable opportunity to be heard. Is one day or two days sufficient?

This is not a kind of situation like Carroll v. President and Commissioners of Princess Anne County wherein a speech is about to be heard that almost that evening -- and there are

emergency concepts involved and there was no opportunity -- there could have been an opportunity to be heard, and an immediate hearing could have been held.

In this context they waited, as we suggested, from February until June and then they moved for an immediate hearing and we saw that, unlike Carroll v. the President and Commissioners of Princess Anne County, there was no overriding emergency and in this regard probable cause consisting of due process. Is it one or two days' notice to go in and be prepared to demonstrate one's case?

In this particular court we also go on to the fact that there is no reasonable construction that could obtain to save what we consider to be an unconstitutional mail block, requiring an affirmative action on the part of the addressee under the doctrine suggested by this Court in Lamont.

The order, yes, could have been drawn very narrowly and the postal inspector could be delegated to sit down with the appellee on a day-by-day basis, sort through every piece of mail there to determine whether or not any of the material alleged to be obscene could be released to them, and only that material which was not should be released.

So we suggest that this, in effect, creates a chilling effect or self-censorship which we feel this Court has condemned on numerous and prior periods. But the trial court or the three-judge court suggests that under the broad wording of the statute

that under 4007 the United States could obtain a court order retaining all incoming mail. However, as has been suggested by the Solicitor General, that should be somewhat reduced.

We get, in part, to the concept that Mr. Fleishman has discussed and Mr. Strauss has discussed with respect to Roth and its applicability in this regard. In essence we say that an individual has a right to receive material which to him is for his amusement value or for the conveyance of ideology content. The individual asserts that right by ordering merchandise.

Now it is not suggested, we say, that this brochure necessarily goes to an unwilling or to an unsolicited individual and then he responds by ordering a magazine. There is a variety of ways that this man can get this material. He can buy a publication that is put out by a firm, he may have an advertisement in there and he may then say, "Send me a brochure," and the brochure is sent to him in response to this. And then in kind the publication is sent to him after reading from the brochure.

And this is, in effect, the part of the people of The Book Bin or The Mail Box trying to follow what has been suggested by this Court in the Redrup case where we are dealing with an individual who wants to avoid exposure to that type of material, and this is the unsolicited intrusive mailing.

But if John Doe, a postal inspector, wants to get on The Mail Box list and he wants to buy that type of material from The Mail Box, and ultimately, as this Court recognized in Rowan,

there is an exchange of lists in every commercial enterprise and mail order. What ultimately occurs is that this list is exchanged and he then gets an advertisement from The Book Bin or whatever, he is not in the category of the individual who says, "I want to avoid confrontation with this type of material." He is not that particular person, so it is not a solicitation. It is just simply widespread, which seems to us to have been suggested in the Stanley case when the Court took particular pains, as this counsel reads it, to point out in a footnote a quotation from those cases and said, "A court found" -- this is on page 548 of the latest edition:

"The Court found it unnecessary to reach the constitutional questions presented by the plaintiff, but did note its belief that the statement in Roth concerning the judgment of obscenity must be interpreted in light of the widespread distribution of the material in Roth."

And again in the particular case this Court, the Stanley case, this Court reiterated what was said in Mr. Justice Brennan's opinion in Roth, "The door barring Federal and state intrusion into (the area of First Amendment rights) cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

And at that particular point there was a footnote, which led us back ultimately to Breed v. City of Alexandria, which

seemed to be an expression of the kind of intrusion that we were talking about, that certain material could be disseminated.

Mr. Justice Stewart has suggested in Ginzburg v. U. S. that unless the materials had some intrusive quality about the nature of its dissemination before it should be prohibited. At least that is how this counsel has read the particular points.

So we will not rule this particular position that we are not engaged in a widespread indiscriminate circulation. We have an individual who by one form letter has gotten onto a mailing list as indicated by his prior correspondence or such that he wants to receive adult-type material. The characterization by Mr. Strauss of this being, you know, that these people are in a particular industry or they are involved for the monetary aspects, everyone is involved in the monetary aspects.

In this regard these people have suggested they want to receive something. They want to order. They write to The Book Bin to get it. The Post Office Department comes in and decides that they shouldn't get it for one reason or another the particular publication, which was known to them to be at least comparable to material in the Exclusive case, not even as candid as the material in the Roth case later determined by this Court, I think, on June 1, 19 ---

Q Do you know how one gets on one of those mailing lists?

A No, sir, the record is silent as to that particular

point.

Q Do you know how extensive your mailing list is?

A There was no factual inquiry conducted by the court in reaching the question in the abstract, Your Honor.

But I was answering, as I thought, Mr. Justice Blackmun's questions earlier regarding the manner of how someone might get and how someone may respond to it in this particular regard.

Q Well, do you agree really in neither of these cases are we concerned with the substantive question as to whether this material is fanable [?]? It is either under any kind of a standard, where there is a different standard for the Federal Government or what, we don't reach any of that in this case.

A Well, there is ---

Q It is simply a procedural question as to whether it is permissible procedure. Am I right about that?

A Well, Your Honor, that is correct. The Court did not get into the applicable of the law in this particular context, and ---

Q It is really nothing but a Freedman issue, whether Freedman controls this case or these cases, or whether it is a ---

A Yes, sir, I reluctantly admit that is correct.

Q Yes.

A We suggest that it is not just Freedman. We suggest also the Lamont issue, Your Honor.

Q Yes.

A And those two factors are the factors that we concern ourselves with. The burden for instituting judicial review at the conclusion of the Post Office upon determination is on the addressee. The burden is on the censor. This is suggested by and large in Freedman. There is no time period within which this administrative period process must be concluded.

We suggest that that is in violation of Teitel Film Corporation, which was in essence bottomed on Freedman v. Maryland. That the burden of carrying the persuasion certainly by virtue of an administrative determination of "obscenity" would then be on the person seeking to reverse or change that particular thing in the judicial review.

Then we say that these things are inaccurate.

As to 4007 there is no standard as to determination of what probable cause is and the probable cause issue -- once the Court finds probable cause, whether under any standard -- could something be said to be obscene, under any test could it be said to be obscene. If the Court finds that as to the issue of probable cause, then we have something tied up, we have correspondence tied up, we have obviously a chilling effect, we suggest, Your Honors, to the exercise of First Amendment freedoms and the public is in great measure deprived.

Whereas in this instance if the Court will look at the particular exhibits, quoted in this publication on page 58

and page 59 of the appendix, the material in "Models of France," the publication on the cover is indistinguishable from any of the other materials. So what we have is an invideous one-magazine proposition. We are coming in on one magazine and we are going to do it on one magazine.

It doesn't necessarily have to stop there. We suggest that in the area of First Amendment rights that there has to be, as this Court has said so many times, a very strict ---

Q How was that last?

A Yes, sir.

Q We can only hear one case at a time.

A Yes, sir, that is correct.

Q But about this particular point. You say they singled you out precisely?

A No, sir, I am not saying they singled us out. They singled a publication out. But this was a pilot procedure, we suggest, Your Honor, that the Post Office undertook in two different jurisdictions, one in California and one in Atlanta, Georgia.

Q You are not suggesting anything impermissible about that, are you?

A Oh, no, sir, I am suggesting that the Government can argue today one magazine is all that is involved out of all those publications. We say that if this procedure is allowed to go on unchecked, as is presently constituted, that it is the

beginning of and could be the beginning of and could have deleterious results upon the public's right to receive access to material which in this instance certainly not hard-core pornography by any definition that has been suggested by the Solicitor General. In times gone by it has been set out in the margin by Mr. Justice Stewart in the Ginzburg v. U. S. dissent.

We say that the Lamont issue controls as written and we feel certainly that the Freedman factors, as argued, control this.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Strauss, I am not sure how much time you have left.

MR. STRAUSS: I only have three very short points to make.

MR. CHIEF JUSTICE BURGER: You have two minutes.

REBUTTAL ARGUMENT OF PETER L. STRAUSS, ESQ.

ON BEHALF OF APPELLANTS

MR. STRAUSS: The first point is this was, as I think counsel stated, a test case and as test cases sometimes do, it had many flaws. It was brought in the hope of getting some kind of conflict with the proceedings on the West Coast and I don't think it should be evaluated as an ordinary case as to how the Department would proceed under this statute.

The second point I should make in connection with this issue is ---

Q What do you mean by that? I don't want to slow you up, but there are ---

Q Why shouldn't we consider this as the way the Department would ordinarily proceed under this statute? What did it do in this?

A Let me put it this way. The question whether that was the case and which it had come to an issue, the Government could have demonstrated that it was entitled to the extraordinary relief of Section 4007 is not at issue, which was decided and should not, I think, be assumed here.

Q You are talking about the nature of the ---

A That's right. That's right, the nature of the magazine and the nature of the Constitution I suppose, showing that four months had elapsed and the Government hadn't shown that there was any emergency, which would tend to persuade you that there was no need for this extraordinary relief.

Q Yes.

A Regarding the question of the amount of time these proceedings might take, I think there is one further observation I might make. I have already suggested that this is always under judicial control.

I would also suggest, as I believe we have in a footnote to our brief, that it is indistinguishable from the question of how long shall a criminal prosecution take? This Court has never suggested that once an indictment is brought in an obscenity

case, that case must be listed on the calendar over cases involving prosecutions for murder or interstate bank theft or the like. Similarly here, simply because an administrative complaint may have been filed, that fact alone doesn't produce any particular compulsions of time, although the existence of a 4007 order might.

Finally, I should also like to remind the Court of footnote 22 in the Interstate Circuit opinion again, in which the Court did indicate, I think clearly, that the simple burden of an administrative act to avoid the fault was not the kind of a burden which was involved in the Freedman holding. On these grounds we suggest that the decisions in both of these cases must be reversed.

Thank you.

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

The case is submitted.

(Whereupon, at 2:05 p.m. the argument in the above-entitled matter was concluded.)