

In the

# Supreme Court of the United States

UNITED STATES OF AMERICA,

Appellant,

v.

12 200-Ft. REELS OF SUPER

8 MM. FILM, et al.,

Appellees.

No. 70-2

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

January 19, 1972

Pages 1 thru 29

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546-6666

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12 200-FT. REELS OF SUPER :  
8 MM. FILM, et al, :  
:  
Appellees. :  
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Washington, D. C.,

Wednesday, January 19, 1972.

The above-entitled matter came on for argument at  
10:54 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM O. DOUGLAS, 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  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ERWIN N. GRISWOLD, ESQ., Solicitor General of the  
United States, Department of Justice, Washington,  
D. C. 20530, for the Appellant.

THOMAS H. KUCHEL, ESQ., Wyman, Bautzer, Rothman &  
Kuchel, 1211 Connecticut Avenue, Washington, D. C.  
20036, for the Appellees.

C O N T E N T SORAL ARGUMENT OF:PAGE

Erwin N. Griswold, Esq.,  
for the Appellant

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Thomas H. Kuchel, Esq.,  
for the Appellees

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-2, United States against 12 Reels of Film.

Mr. Solicitor General, you may proceed whenever you're ready.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,  
ON BEHALF OF THE APPELLANT

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

This case comes here on appeal from the Central District Court of California, which held unconstitutional an Act of Congress providing for the forfeiture of obscene material imported into the United States.

The present case, and the one which follows, are sequels to the decisions of the Court last term, in United States v. Reidel, and United States against 37 Photographs. Those cases involved transmission through the mails and importation of obscene materials for commercial purposes.

The distinctive feature of this case is that the importation here is alleged to be for private use.

The present proceeding is an in-line proceeding against a number of items which were imported by the claimant, some of those have been returned to the claimant as not obscene; the others are on file at the Court.

I believe it can be said that if anything is obscene,

these items are. And particularly the printed material.

These, in my view, are not borderline materials. If the Court is disposed to hold that there is nothing that can be held to be obscene under the Constitution, that will dispose of this case. But if obscenity still has any constitutional meaning, then I believe that these materials would have to be found to be obscene by any standard which has ever been suggested by the Court.

When the complaint for forfeiture came on to be heard, the District Court granted a motion to dismiss, relying on the prior decision of the same court in the 37 Photographs case, the one which was reversed last term.

At that time the claimant filed an affidavit stating that the items were not, and I quote, "were not imported by me for any commercial purpose but were intended to be used and possessed by me personally."

And in response, the United States Attorney filed a motion for a stay of the order of dismissal, in which he stated that the United States had, and again I quote, "no evidence with which to contradict Mr. Paladini's affidavit and therefore does not contest the fact that this was a private importation."

There are at least two lines of reasoning on which the government's case may be rested. In the first place, if these materials are obscene, as I have contended, or if they



must be regarded as obscene, since the court below has granted a motion to dismiss without determining the question of obscenity, then the materials are not entitled to the protection of the First Amendment, and that would seem to dispose of the matter, since no Fourth Amendment question is involved.

Nearly 15 years ago in Roth this Court decided that obscenity is not within the area of constitutionally protected speech or press.

There is nothing in this Court's subsequent decisions to indicate that this is not still the law. Quite the contrary. In Stanley v. Georgia, which is the basis of the decision of the court below, this Court said Roth and the cases following that decision are not impaired by today's holding. That was in 1969.

And last term, in Reidel, the Court quoted the language from Roth and said, Roth has not been overruled, it remains the law in this Court and governs this case.

And in 37 Photographs, decided the same day, Mr. Justice White, speaking for four members of the Court, reiterated the statement that obscenity is not within the scope of First Amendment protection.

If this material is obscene by any standard, as I have contended, and if obscenity is not protected by the First Amendment, then it would seem to follow that there is no constitutional basis --

Q May I ask, Mr. Solicitor General: I didn't find that there's any disagreement that these materials are obscene. Two things were returned, as I understand it; one a sealed film, and something else. But I thought there was no disagreement with your submission --

MR. GRISWOLD: I think that is correct.

Q -- that the real question -- yes.

MR. GRISWOLD: I am simply saying that they are obscene. But --

Q But I thought the real question here was whether the fact that they brought in, assuming obscenity, for personal use rather than commercial use?

MR. GRISWOLD: Yes, Mr. Justice. That is the question, but I don't think that question can be escaped by examining the material and saying it is not obscene; and that is the -- for example, if it were blank pieces of paper, this is not a feigned issue, this is a real case.

Q Well, speaking for myself, I had not thought, in preparing for this argument, that, as I have felt I had to in other cases, that I had to examine the material; because I didn't think any issue of obscenity was contested here.

MR. GRISWOLD: I think that is accurate, Mr. Justice, except that I think that these materials are obscene.

Q Well, I don't have to look at them, do I?

MR. GRISWOLD: Not if you assume that they are

obscene.

Q Well, no one seems to contest it.

MR. GRISWOLD: Or if you say that obscenity is not relevant in the case. It seems to me that it should not be disposed of on the ground that obscenity has not been established.

Another approach leads to the same result. Stanley v. Georgia held that obscene material seized in a man's library in his home, under a search warrant authorizing a search for evidence of gambling materials, could not be made the basis of a criminal prosecution for possessing the obscene item.

I find no basis for objecting to the result, though, as I contended last week in Councilmen v. Hitchcock, some of the language used may have been unnecessarily broad.

As was pointed out by the three concurring Justices in that case, the decision is perhaps best rested on the Fourth Amendment as an illegal search, not adequately supported by the warrant which the officers had obtained.

But on that basis it is not a First Amendment case, and has no application here.

This is borne out by the Court's decisions in the Reidel and 37 Photographs cases. The Reidel decision held that the rationale of Stanley was not sufficient to bar a prosecution of a person who, on a commercial basis, mailed obscene



material to a recipient at his home. Though Stanley had referred to the right to receive information and ideas, this right to receive was not sufficient to allow the recipient to obtain obscene material through the mails from a commercial mailer, as against the right of the United States constitutionally to forbid its passage through the mails.

And in 37 Photographs, this conclusion was reached with respect to obscene material, a single set of 37 photographs, which an individual had acquired abroad and sought to bring into the United States through customs, with a view to using them in a commercial publication.

As indicated by my response to Mr. Justice Brennan's question, the sole difference between this case and 37 Photographs is that here the importation is alleged to be for the personal use of the importer. And we have no evidence to the contrary.

In view of Reidel, however, that would seem to be a distinction without a difference. If a person cannot have things mailed to him without causing the mailer to commit a crime, it is rather hard to see that he should be able to bring things into the country himself, as against the broad and sweeping powers of Congress to regulate foreign commerce and the traditional comprehensive power of this and all other nations over all materials entering the country at the borders.

This was the view of the four Justices constituting the plurality in 37 Photographs. They said, in 37 Photographs, the trial court erred in reading Stanley as immunizing from seizure obscene materials possessed at a port of entry for the purpose of importation for private use.

And then, obscene materials may be removed from the channels of commerce when discovered in the luggage of a returning foreign traveler, even though intended solely for his private use.

And, finally, a port of entry is not a traveler's home.

As I have contended, the First Amendment does not apply, since the material is obscene or must be taken as obscene, and it is no less obscene because it is imported for private use.

The Court would not hold, I suppose, that a person could lawfully bring in narcotics or a hand grenade on the ground that he was going to use the narcotics or the hand grenade personally.

I know of no basis on which it can be determined, either under the First Amendment or otherwise, that personal use provides some sort of a protection against otherwise applicable laws.

Nor, I suppose, would the Court hold that as person can import a foreign printed book which violates an American

copyright, on the ground that he is going to use the book himself.

I well remember the --(Toutenage?)-- editions of American books, which we used to buy in Europe a generation ago, and their clear statement that they could not be imported into the United States under the copyright laws. I read "A Farewell to Arms" in a Toutenage edition, and took care to have it finished before I came home.

Perhaps this was unnecessary, if the decision below is sound, but I did not think so then.

Q Of course that was a little before Stanley was decided, wasn't it?

[Laughter.]

MR. GRISWOLD: That was before Stanley was decided, but it was the same Constitution, Mr. Justice, and the same First Amendment.

Congress has sweeping power at our borders, though its power -- through its power to regulate foreign commerce. Not power, of course, to violate the Constitution but power under the Constitution to regulate foreign commerce in terms which are not qualified by the Constitutional provision itself.

I can find nothing in the terms of the First Amendment which limits the power of Congress to bar the importation of obscene materials, even when they are intended for private use. It can be done, I suggest, only by erecting a very substantial

penumbra around the First Amendment, extending quite far beyond its terms and beyond the privacy of the home or the person which were involved in the Stanley case and in Griswold v. Connecticut.

Such an extension is not warranted by any constitutional precedent or standard that I know of. If it were done, it is hard to tell how the limits of the penumbra could be determined. It would be, I suppose, whatever this Court thinks it should be. Of course constitutional provisions cannot always be interpreted literally. But finding support in the First Amendment for the result reached by the court below would carry the Court farther away from the constitutional language, I submit, than the Court ought to go. And farther away from the language than is required or authorized by any prior decision of the Court.

Finally, let me suggest that any construction that materials can be imported for personal use against the rule of Congress, though not for commercial purposes, is not only unsupported by anything in the Constitution, but is too illusory and gossamer a distinction to be erected into constitutional terms.

How is the fact of personal use to be determined? Is the importer's statement to be conclusive, either legally or as a practical matter? How binding is the claimant's assertion on him? How long must the intention last? Now, what

happens when it changes? How, in the ordinary case, can the government counter the assertion of the importer, that his importation is for private purposes?

Of course, if he brings in a bale of duplicate copies, it will look like a commercial importation. But the sophisticated will not do that. With the ready availability of duplicating machinery these days, a single copy suffices to make possible wide-scale distribution.

How can the government, as a practical matter, police this? What happens if the importer for private use dies? Or goes bankrupt? Can his trustee in bankruptcy sell the material along with the rest of the bankrupt's valuable library, on the ground that it was lawfully imported? Indeed, constitutionally imported for private use; and if not, why not?

Suppose the importer for private use tires of the material? Can he give it to a friend? Or perhaps sell it for a good price, after a decent interval has elapsed since the importation? If not, again why not?

Q Well, I think the "why not" is Reidel, isn't it? Reidel v. United States. That covers the seller, doesn't it?

MR. GRISWOLD: It covered -- ?

Q The seller, the seller of such material.

MR. GRISWOLD: Yes.

Q That's squarely covered by the Reidel case, is it not?



MR. GRISWOLD: The Reidel case is to transportation through the mails. There is nothing in the Reidel case that has anything to do with a simple sale or hand delivery.

Q I didn't know you thought it was such a narrow decision.

MR. GRISWOLD: Well, Reidel involved a prosecution under a statute which makes it a crime to transmit through the mails, and as far as I know that's the only thing that was there decided. I don't know of any federal basis for jurisdiction with respect to a simple transfer between man and man, of obscene or other material wholly within a State, not involving interstate commerce or the use of the mails.

Q Well, the Federal Government has no legitimate --

MR. GRISWOLD: This, I think, is exactly my point, that once this material is admitted on the ground that it is for private use, there is no way that I know of by which that can be controlled, or a change in the importer for private use deciding he's tired of it and would like to sell it, indeed, or give it away.

Q Except possibly by State law?

MR. GRISWOLD: There might be under State law, but the Federal Government would have to rely on State law, and I suggest that a restriction on such a sale couldn't be found in the First Amendment, and I don't know where else it would be found.

Are we not reading too much into the First Amendment, when we get into this area at all? Is it not sounder to say that the First Amendment has nothing to do with this case, since, as this Court has said, and reaffirmed not long ago, obscenity is not within the area of constitutionally protected speech or press.

The judgment below should be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Kuchel.

ORAL ARGUMENT OF THOMAS H. KUCHEL, ESQ.,

ON BEHALF OF THE APPELLEE

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

Appearing as a friend of the Court, we would urge that the statute in this case is unconstitutional because of overbreadth, because it would seek to deprive one Paladini, the citizen whose luggage was inspected on his way back to this country, of the right to receive information and ideas and to his private possession of that information.

In Stanley vs. Georgia, the Court recognized two fundamental liberties encompassed within the First Amendment. It recognized the right to receive information and ideas regardless of their social worth, and it recognized the right of privacy from unwanted government intrusion to films or books

for personal use.

Mr. Chief Justice, whether or not materials possessed for private use are obscene is completely irrelevant to the recognition of the fundamental liberties described in Stanley vs. Georgia. And I quote two sentences from Reidel:

"The personal constitutional rights of those like Stanley", said this Court, "to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and to view that material in private are independently saved by the Constitution." End of quotation.

The right to have --

Q What about the quotation in 37 Photos? On page 376, which says Stanley doesn't apply to a search at the border. Period. Right?

MR. KUCHEL: There is that language in 37 Photos. I would most respectfully urge that --

Q It says: "Stanley's emphasis was on the freedom of thought and mind in the privacy of the home; but a port of entry is not a traveler's home." Period. End of quote.

Doesn't that take care of this case?

MR. KUCHEL: No, sir; it does not.

Q In the first place, that's not a Court opinion.

Q Only for four people.

MR. KUCHEL: Sir?

Q That was only for four people.

MR. KUCHEL: Mr. Justice, I do want most respectfully to comment on that particular language in the --

Q But it was only for four Justices.

MR. KUCHEL: Yes, sir; but I would not argue from that point of view.

Q Senator, may I -- getting back to my colloquy with the Solicitor General, I am right, am I not, that we may decide this case on the premise that the materials here involved, by any definition, are obscene?

MR. KUCHEL: You are. Yes, Mr. Justice.

The right to have and to view materials in privacy can be meaningful at all only if all places of privacy are given equal dignity. Materials can be possessed privately outside the home, such as in one's office, something which the appellant's brief, incidentally, recognizes; in one's luggage or in one's clothing.

If Stanley had a right to possess for private use, obscenity in his home, surely it would be a rather narrow constitutional right if, as he stepped off the steps leading to his home, with whatever he had in his pocket, that at that point the protection of the First Amendment would evaporate. It would be illogical and destructive of privacy to permit intrusion into the freedom of mind and thought in private places

other than the home. And it could lead to an absurd result, that a man could be prosecuted for private possession of materials when he left his home possessing books on his person on his way to his office, or to take up another residence, or to retire to the privacy of a mountain cabin.

The law recognizes that privacy is not restricted to one's home. This Court has said that the law protects people, and not places.

Stanley vs. Georgia clearly does not derive its vitality from the fact that Stanley's home was involved. The home is not a searchproof haven for possession of illegal materials; to the contrary, in Stanley itself a valid search warrant took both local officers and federal officers into Stanley's home. But this Court vindicated Stanley's right to keep certain articles, and there can be no difference between the kind of inspection under the Fourth Amendment in Stanley than the customs inspection which took place with respect to the luggage of Paladini as he returned to this country.

If Stanley had a right of privacy, if he had a right regardless of the type of materials which he had, to possess in his home, should he not have a right to bring similar materials into this country? And is it not irrelevant that a customs inspection took place? As he arrived back in this country.



Q Senator Kuchel, let me ask you this: Let's assume for the moment that we accept that proposition, that the right of privacy which attaches to Stanley in his home follows him wherever he takes that material; that is, if he takes it to his office, or, as you have said, to his summer place or out in the park, as long as he's not bothering anyone else with it, does that necessarily -- does it necessarily follow that that right of privacy attends the bringing into the United States, at the borders, having in mind the broad powers of government to deal with importation; or do you not have to carry it one step beyond? That's really what I'm after.

MR. KUCHEL: Mr. Chief Justice, I would urge -- no. I would urge that Congress has under the Constitution a broad power with respect to post offices and post roads. I would urge that Congress has a broad power with respect to regulation of commerce.

But this Court, in determining the power of Congress in those fields, must take into consideration the liberties guaranteed in the Bill of Rights, and particularly, with respect to this case, the First Amendment. That is what makes a book or a film, Mr. Chief Justice, I most respectfully say, different from narcotics or a still. The government of the United States can obtain the right to search a home in order to determine whether or not narcotics are possessed by the individual who lives there and seize them.

The difference which makes the film or the print or the book a greatly different problem is because of the First Amendment guarantees.

Q Senator, I take it the Solicitor General's argument is that since all concede that the material here was obscene, and since Roth says obscenity is not protected by the First Amendment, that therefore the fact this may have been in form of book doesn't really make it any different from narcotics.

What is your response to that line of argument?

MR. KUCHEL: My response would be that this Court, Mr. Justice Rehnquist, in Stanley, particularly determined that Stanley was entitled to possess obscenity in his home for private use. That is the decision of this Court. It was a First Amendment decision.

I respectfully disagree with the Solicitor General. It was on the basis of the First and the Fourteenth Amendments that this Court's opinion was written.

My argument would be that if there is a right under Stanley for a person to have a right of privacy in his home to obscenity, that right does not rest upon the fact that it is in his home but that it is protected by the First Amendment.

Q And I suppose, Senator, -- or may I ask: Would that be your answer also, you know, under the Fourth Amendment, I think, there have been decisions, largely I guess of Courts

of Appeals, certainly in the Ninth Circuit, that for Fourth Amendment purposes border searches allow more latitude than would searches elsewhere, particularly searches in the home? Would your answer be the same, this gets to the colloquy you were having with the Chief Justice --

MR. KUCHEL: Yes.

Q -- you don't make a distinction between border and other inspections, in light of the greater latitude that usually attends under the Fourth Amendment border search?

MR. KUCHEL: No, Mr. Justice, it seems to me that the customs inspector was performing a function with which he was clothed by law. He had a responsibility to make that search in a reasonable fashion, but the fact that he made that search should not interfere with Paladini's right to possess for private purposes the films that are involved in this case.

What is the difference between Stenaley's right --

Q Well, what I was trying to get to is, I gather you're saying that Stanley rests the privacy aspect more on the First Amendment than it does on the Fourth?

MR. KUCHEL: Yes, sir; yes, Mr. Justice.

Q So that would be your answer to why there's no difference that it's a border search or border inspection than in a seizure in the home; is that right?

MR. KUCHEL: Yes, sir.

Q Stanley's home and the things in it certainly

could have been entered and searched by -- and were, under a search warrant.

MR. KUCHEL: Precisely.

Q There may have been more rigid standards under the Fourth and Fourteenth Amendments than a border search under the Fourth Amendment, but in each, it was searchable under the proper Fourth Amendment standards. But that did not deter the Court from saying that he absolutely could not be prosecuted or convicted substantively because of the First and Fourteenth Amendments. Is that your point?

MR. KUCHEL: It is, precisely, Mr. Justice Stewart.

Q I suppose, then, separating the search from the seizure, what you're really saying is that you don't want to inhibit their right to search, which is for broad prophylactic purposes, narcotics, guns, hand grenades; but that what they find in that search then falls under the ban of Stanley?

MR. KUCHEL: That is correct, Mr. Justice, because, if I read Stanley correctly, it was because of First Amendment rights that prevented the seizure of the items in the -- in Stanley.

Q Wasn't Stanley more narrowly a privacy than a broad First Amendment base?

MR. KUCHEL: I do not understand, I --

Q That Stanley was based on the right of privacy narrowly, rather than upon broad First Amendment rights with

respect to materials, publications, and that sort of thing.

MR. KUCHEL: Mr. Justice, I thought that Stanley determined that there was a right to receive and a right to possess, so long as those rights were exercised in private, so long as there was no indication of a public distribution, whether it be commercial or not, I think; so long as those rights were exercised by the individual himself in private, that he was protected. And I read that as an interpretation of rights accruing to the citizen under the First Amendment.

I think it also fair to say that Stanley put to rest any notion that the difficulties in prosecution of commercial distribution is the reason for denying First Amendment freedom of individuals to receive information and to be free from government intrusion.

Q Senator, what about Reidel, would you say Stanley -- how much of Stanley -- what part of your argument about Stanley can survive Reidel?

MR. KUCHEL: I would argue that Reidel represented a case involving public distribution, commercial distribution, and --

Q Well, what about -- let me give you a case: Suppose a book store owner is charged with selling an obscene item to a certain customer, and he responds, "Well, it's sold for his private use in his home." And the government concedes that that's quite true, but, nevertheless, says that this was



a commercialization of obscenity, and Reidel permits prosecution for that?

MR. KUCHEL: Do we assume that the book is obscene under --

Q Oh, yes.

MR. KUCHEL: -- that first definition?

Q Oh, yes.

MR. KUCHEL: Then it is a sale. Then it is a public distribution. And that is something entirely different.

Q So you would say Stanley would permit, even under your position Stanley would permit prosecutions for selling to a person for his private use in his home?

MR. KUCHEL: That --

Q It doesn't bother you at all?

MR. KUCHEL: I would, but that is not -- that is not this case.

Q Not this case. But what is it -- do you think your position is inconsistent with that?

MR. KUCHEL: Not at all. Not at all. I think that -- I think that your and my rights of privacy, under the First Amendment, have got to be considered in every question that comes --

Q So you would say that you have the right to possess obscene material in your home, but you have no right to buy it?

In the sense that you don't have -- at least you don't have such a right to buy it that your seller is immune?

MR. KUCHEL: You've never had a purchaser before this Court in a lawsuit.

Q Well, you've had sellers, though, and --

MR. KUCHEL: Indeed you have.

Q -- so you would say the seller, even if the purchaser has the right to have it, even if the man has a right to have it in his own home, a seller doesn't necessarily or just doesn't have the right to sell obscene material to him?

MR. KUCHEL: Mr. Justice White, I believe that Roth and Reidel may stand alongside of Stanley and alongside of the judgment in the District Court in this case. And I most respectfully say to you that with respect to Reidel there, I do not quarrel with the decision in that case; but I do quarrel with the language which then went on in that case and indicated that even for private use a person would be guilty of --

Q 37 Photographs.

MR. KUCHEL: Excuse me.

Q Yes.

MR. KUCHEL: Excuse me.

Q What you're saying, I take it, is that the individual in Stanley's posture may go somewhere and buy, or go abroad and bring it back, and it is protected by the privacy in the home under Stanley, even though the seller from

whom he acquired it in the United States, if he bought it here, might be prosecuted for the sale?

MR. KUCHEL: Yes. I would not urge any rights of the seller of obscenity in this country. And there is -- the question of where the material which Paladini in the case at bar acquired is unanswered. Presumably he purchased it abroad, and flew back into this country with it in his luggage.

But I do not believe it is necessary, in order to vindicate First Amendment rights of privacy, to protect the seller of obscenity.

Q Tell me, Senator, we've had a number of cases that recognize the time and location limitations on the exercise of First Amendment rights; for example, that someone couldn't get up here and make a speech in the middle of your argument from the audience. Isn't there something of that involved here, a distinction between the home and the exercise of the right, as you describe it, at the border?

MR. KUCHEL: I do not believe so. I believe that --

Q How do you distinguish those cases in which we have said there are those limitations on the exercise of First Amendment rights?

MR. KUCHEL: Would you repeat that, Mr. Justice?

Q I say, how do you distinguish from this situation those cases in which we have said there are those limitations on the exercise of First Amendment rights?

On time and location, like you couldn't make a speech in this courtroom?

MR. KUCHEL: Simply because you are applying a rule of reason to the rights of free speech, and I think when you curtailed certain outbursts, it isn't because --

Q Well, I'm thinking of the speech that certainly the First Amendment might protect if delivered out on the steps, but not if it were delivered in this courtroom.

Q All of those cases, Senator, involve, do they not, interference with the rights of others, personal or private? That is, the use of the streets by the citizenry, or the use of a courthouse, as in the Cox case, and so on.

MR. KUCHEL: Yes.

Q Quite different from this case?

MR. KUCHEL: Yes. I misunderstood.

The Solicitor General asked how could a customs inspector counter the traveler's claim. I would say that that is not a basis, a question on which this Court should deny Paladini his First Amendment rights of privacy. There are statutory procedures under which a federal employee, working in customs, may ask questions, may make a determination on his own as to what the intent may be by which a person brings items of personal property back into this country; and Stanley itself went on to say: we are faced with the argument that prohibition of possession of obscene materials is a necessary

incident to statutory schemes prohibiting distribution.

That argument is based on alleged difficulties of proving an intent to distribute or introducing evidence of actual distribution. We are not convinced that such difficulties exist.

But even if they did, we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid federal laws.

To sum up, there is no question raised here about obscenity. This is a question of the private possession of obscenity for private use.

We would urge this Court to recognize that a citizen under this Constitution ought to have a right, in private, to read and to possess what he pleases. And we would urge that that right would be unnecessarily and unreasonably constricted if it were made to apply only to his home. That right against governmental thought control ought to follow him when he leaves his home with whatever kind of material, political or other, and goes to his office; and it ought also to accompany him when he returns from a trip overseas.

Therefore we would --

Q Let me ask you one question. To pursue a point



that the Solicitor General was making, I think he made the point of the difficulty of tracking this type of material once it got into the country.

Now, under your submission in this case, suppose two weeks after he got it safely at home, under your theory that it was protected to bring it back, he then made 100,000 copies and began to sell them. Then, under Roth and the other cases, I suppose your position would be that the State or the federal government -- well, the State can deal with him at that stage by prosecuting him, if they have an appropriate statute?

MR. KUCHEL: I would, indeed. I think he falsified his position when he returned to this country. And he should not be covered.

There is a statute, I believe, in the State of New York which finds that if there are more than half a dozen copies of something that an individual has, that is evidence of the intention of he who possesses it to sell. There are many ways that you might creditably judge the intent with which a person returns to this country with a book that he may have purchased abroad. But, surely, the difficulties involved in the enforcement of the law ought not to be used as a basis to punish the rights of the First Amendment.

Just one more sentence and I am through. There could be a chilling effect, Mr. Chief Justice and the Court

please, on an American citizen going abroad. If he wanted to buy a book to read and yet wondered whether he would be subjected to scorn when he returned to this country, because it might be a borderline case that someone in the government would determine was obscene, and therefore it would have a chilling effect on the traveling American.

All in all, we would most respectfully urge that the judgment of the District Court be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Solicitor General, do you have anything further?

Senator Kuchel, before you leave, you appeared in this case under unusual circumstances, and at our request. On behalf of the Court, we want to thank you for your assistance to us and of course the assistance to the -- your unknown client whom you represented here. Thank you.

MR. KUCHEL: Thank you, sir. I'm honored to be here.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 11:44 o'clock, a.m., the case was submitted.]

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