In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Appellant,

v.

GEORGE JOSEPH ORITO,

Appellee.

No. 70-69

Washington, D.C.
January 19, 1972

Pages 1 thru 35

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GEORGE JOSEPH ORITO,

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Washington, D. C.,

Wednesday, January 19, 1972.

The above-entitled matter came on for argument at 11:45 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:

R. KENT GREENAWALT, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Appellant.

JAMES M. SHELLOW, ESQ., 222 E. Mason Street, Milwaukee, Wisconsin 53202, for the Appellee.

C O N T E N T S

[Afternoon session - page 14]

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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 70-69, United States against Orito.

Mr. Greenawalt, you may proceed whenever you're ready, now.

ORAL ARGUMENT OF R. KENT GREENAWALT, ESQ.,

ON BEHALF OF THE APPELLANT.

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

This case is on direct appeal from the District Court for the Eastern District of Wisconsin.

The court dismissed an indictment charging that appellee had transported 82 reels of obscene film interstate by means of a common carrier. The court held that the relevant statutory provision, 18 U.S.C. 1462, is, on its face, constitutionally invalid, because it is overbroad in forbidding the use of common carriers for the non-public transportation of obscene materials.

The government appealed directly to this Court pursuant to the old Criminal Appeals Act. Like Reidel, 37 Photographs, and the case just argued, this case arises from an expansive interpretation of Stanley vs. Georgia by district courts.

The precise issue in this case is the constitutionality of the statute that prohibits the known use of a common

carrier for the interstate transportation of obscene materials.

We believe that Reidel and 37 Photographs have effectively settled the issues raised here. Indeed, the judge who decided this case has subsequently sustained the constitutionality of this section, after those cases were handed down. That is not cited in our brief, and the citation for that case is United States vs. Saccer, 332 F. Sup. 833.

Q 833?

MR. GREENAWALT: 833, yes, Your Honor.

In trying to evade the clear import of Reidel and 37 Photographs, appellee makes two different arguments: One is that even when transportation is for the purpose of sale, Congress cannot prohibit the use of common carriers to transport obscene materials interstate.

The second argument assumes that commercial transportation may be forbidden, but contends that the statute is invalid as it applies to non-commercial transportation, and that this impermissible overbreadth renders the entire section invalid on its face.

It is the government's position that the statute is constitutional in both its commercial and non-commercial applications. If, however, it is considered unconstitutional in some or all non-commercial applications, it is our position that the statute should not be declared invalid on its face, but limited to its permissible application.

I turn first to the argument that even transportation for sale is constitutionally protected. In Reidel this Court refused to recognize the constitutional right to distribute or sell obscene materials, and reiterated the principle of Roth that obscenity and its distribution are outside the reach of the First Amendment.

In 37 Photographs, six Justices squarely held that importation of obscenity for commercial distribution is not constitutionally protected. Appellee concedes that the First Amendment would not protect a commercial distributor of obscene material, whose wish is to import such materials or send them through the mails. But he argues that the same commercial distributor, who wishes to transport materials in interstate commerce, is constitutionally protected.

Congress's plenary power to prohibit noxious materials from flowing in interstate commerce has long been a cornerstone of this Court's interpretation of the commerce clause.

In Givens vs. Ogden, the Court said that Congress's power over commerce among the States is vested, quote, "As absolutely as it would be in a single government."

And in the lottery case, as well as many others, it has sustained absolute prohibitions against items of commerce judged harmful.

In Hoke vs. United States, which is cited in our brief,

where the Court sustained the White Slave Traffic Act, the Court assumed the constitutionality of these provisions and used those as the premise to reach the result in that case.

Congress's powers over commerce are of course limited by the First Amendment. But the First Amendment is also relevant to what Congress can preclude from the mails or forbids from being imported.

Appellee cites a number of cases for the proposition that the government has special powers over mail because it operates the postal system. But in this First Amendment context, at least, these cases have no authority after Blount vs. Rizzi and Lamont vs. Postmaster General.

The government can no more exclude protected materials from the mail on the basis of their content than it can exclude them from commerce. And, conversely, if commercial distribution of obscenity through the mails can be prohibited, so also can any sort of transportation in interstate commerce for commercial purposes.

Assuming that Congress may validly prohibit the use of common carriers traveling interstate for the commercial distribution of obscene materials, the order of the district court in this case should be reversed, either if transportation for personal use may also be prohibited, or if invalidity as to transportation for personal use does not require striking down the entire section.

We believe the statute is constitutional in its non-commercial as well as its commercial application. But I consider the overbreadth point first, because we believe it's fully supported by 37 Photographs.

First, I'd like to clear up what seems to be an issue from appellee's brief, but is not really an issue.

We do contend that it is inappropriate to hold the section invalid on its face, but we do not contend that appellee lacks standing to make that claim.

Appelle does have standing to make the claim that invalidity in some applications renders this section invalid for all applications, whether or not he is a commercial distributor.

If, on the other hand,as we contend, invalidity in some applications would not render the statute invalid as to all applications, then the district court could determine in subsequent proceedings in this case the purpose of the transportation here.

In neither event is this Court required to determine appellee's purpose from this record. So that really is not in issue at this point in the case.

In 37 Photographs, the same six Justices who held that importation for commercial purposes can be prohibited also held that the district court in that case was wrong to strike down the entire section in its application to commercial importa-

tion, because importation for personal use might be constitutionally protected.

Mr. Justice White's majority and plurality opinion said, quote, "The proper approach was not to invalidate the section in its entirety but to construe it narrowly and hold it valid in its application to law."

And Justices Harlan and Stewart concurred on the same ground.

As these opinions indicate, a holding of facial invalidity for overbreadth is not appropriate when a statute can be clearly narrowed to constitutional applications in a way that will eliminate virtually all of the possible chilling effect on effective communication.

Q In this case, Mr. Grennawalt, all we have as far as the facts go is the indictment which appears on pages 1 and 2 of the Appendix; is that right?

MR. GREENAWALT: Yes, Your Honor.

Q There is no affidavit or anything?

MR. GREENAWALT: As to the nature of these materials?

Q Exactly. Or as to the -- not only as to the nature of the materials, but as to the purpose of the defendant's transportation?

MR. GREENAWALT: That is correct.

Q We have the indictment and then a motion to dismiss, and that's it?

MR. GREENAWALT: That is right, yes.

As far as the overbreadth point is concerned, the language of Section 1462 involved in this case is virtually indistinguishable from the language of Section 1305(a) involved in 37 Photographs.

Section 1462 involved here forbids the use of common carriers to transport obscenity interstate without respect to purpose, just as Section 1305(a) had provided forfeiture for importation of obscene materials, without respect to purpose.

Section 1462 dates back to 1897, and it is the primary prohibition against interstate transport of obscene materials in the federal law.

It is clear that Congress would prefer this section to stand in its valid applications rather than be declared invalid on its face.

And this case does not involve the kind of interrelated set of administrative provisions, such as were present in Blount vs. Rizzi, and Freedman vs. Maryland. In those kinds of cases the Court declined to rewrite an administrative setup as to find certain provisions constitutionally invalid.

But here we have a straightforward criminal statute that can be validly applied in certain applications, and plainly the lower court erred in striking down the entire section on its face.

We believe the court also erred in quite a different

respect, by deciding that interstate transportation of obscenity for personal use could not constitutionally be proscribed.

We now get back to the territory that's been covered in the previous argument, to some extent.

Reidel and 37 Photographs made clear, as had Roth, that obscenity is not protected by the First Amendment. And congressional power to decide what goods may cross State lines extends to this unprotected material.

What the plurality said in 37 Photographs with respect to foreign commerce, a passage that the Solicitor General read to you in his argument, "Obscene materials may be removed from the channels of commerce even though intended solely for private use" is equally true of interstate commerce.

The majority opinion in Stanley vs. Georgia indicates that the government may not invade a person's home to ascertain if he possesses forbiddan material.

Q I take it what you're saying there, that if Mr. Stanley, for example, wanted to give the material involved in the Stanley case to someone else, he would be violating the statute if he sent it through the mails, but could he get in his car and drive from wherever he lived to some other place and deliver it to a friend as a gift?

MR. GREENAWALT: Our position would be, as a matter of constitutional law, that that could be forbidden. This section covers only transportation by common carrier, and 1465

would be the relevant federal section for that. I think that includes transportation for sale or distribution.

Yes. Now, then, I suppose you'd have a nice statutory question as to whether, if you give a book to a friend, that's distribution or not within the terms of the statute. But --

Q The context of that statute would indicate that it was intended for -- to deal with the commercial distribution, isn't it?

MR. GREENAWALT: That is clear, Your Honor, that that was the purpose of the statute, and certainly there would be a strong statutory argument that that would not be distribution within the meaning of the statute.

Q How about a gift to the Library of Congress?

MR. GREENAWALT: Well, for somebody who didn't start in the District of Columbia, -- well, I would think that is not distribution. It is our position that if it is obscene material and someone used a common carrier to give the material to the Library of Congress, then unless you read in the statutory exception for that kind of thing, that that could constitutionally be covered.

Q What about in Texarkana, if they handed the book across the middle of the street? You know, in Texarkana, Arkansas and Texas come down the middle of the main street, does it not?

MR. GREENAWALT: Yes. Yes.

We would say that constitutionally could be covered.

For similar reasons that we think that if there was a town that -- which there may be -- in which Canada and the United States would split the border, we think that that could be covered as well.

Q Yes, the bridges.

MR. GREENAWALT: Right.

Q Mr. Greenawalt, earlier in your argument you gave us a citation, 332 F. Sup. 833, as I got it at least, and I sent for that, and it's not the correct citation. Over the lunch period, could you check that?

Q Here it is.

Q Maybe I got the wrong --

MR. GREENAWALT: Did you find it, Mr. Justice Douglas?

Q Just over the lunch period, if you could.

MR. GREENAWALT: Yes, certainly.

Well, it is our contention that Stanley vs. Georgia does --

Q No, it's not the right citation.

MR. GREENAWALT: Oh, I'm sorry. I will check that.

-- does not require the government to stand aside while the channels of commerce are employed by individuals who are interested in constitutionally unprotected material.

Moreover, the government does have a special interest in the use of common carriers, which are open to the general public, and closely regulated in the public interest.

If persons choose to use such carriers, they must do so in ways not deemed inconsistent with the public interests.

Practically, there are substantial reasons for allowing the government to forbid the use of common carriers to transport obscenity, irrespective of purported purpose. The reasons that we do not believe were applicable in Stanley.

Each State Legislature has the power to set its own policy with respect to the sale and purchase of obscene materials. One State may forbid the sale of all constitutionally unprotected material; another may permit their sale, as Oregon has chosen to do.

If the Federal Government is powerless to stop transportation across State lines --

MR. CHIEF JUSTICE BURGER: I think we'll pick up at that point after lunch.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

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

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

I had mistranscribed one of the page numbers, and it's 332 F. Sup. 883.

Q Thank you.

MR. GREENAWALT: Instead of 833, as I had said before.

I was in the middle of the argument that this statute is constitutional as it reaches non-commercial transportation, and I had made the basic argument that the material is unprotected and therefore Congress can prohibit its passage in interstate commerce. And I turn to some of the practical reasons that support that conclusion.

I had mentioned that State Legislatures may forbid constitutionally unprotected material from being sold, but that other States may permit their sale, such as Oregon has chosen to do. And that if the Federal Government is powerless to stop transportation across State lines, citizens of a State that forbids the purchase of pornography can circumvent the policy of that State by buying the material in a more permissive jurisdiction and bringing it back to their own State.

More significant, perhaps, in terms of actual impact

on prosecution is the fact that if only commercial transportation may be stopped, it may sometimes be difficult to prove a commercial motive, although that is the real reason for the transportation. And I remind you of the Solicitor General's argument about the difficulties of drawing that particular line.

Also in this situation, a holding of constitutional protection of private transportation would cast in jeopardy scores of convictions under 1462, where transportation was in fact for commercial purposes, but in which the jury determination of guilt, of course, did not require a finding to that effect.

Finally, there is the danger that materials taken by common carriers will be seen by other members of the public, who may be offended.

Q This is -- going back to your last point, you say there have been scores of convictions under this statute?

MR. GREENAWALT: I am informed that there are approximately 25 prosecutions a year under 1462, something in that range.

Q And we would be concerned here, of course, with people that are still serving sentences, I suppose? Or are we not --

MR. GREENAWALT: Yes, on those problems about collateral attack of people.

Q We're not talking about convictions of thirty

years ago?

MR. GREENAWALT: No, except that the Court's rules now about mootness are rather liberal toward people that have been convicted of crimes, and their ability to challenge crimes that may have adverse effects in some future proceedings.

Q Collateral challenges?

MR. GREENAWALT: Yes. Even though they're out of prison. Yes.

Q You don't know how many -- I suppose the typical prison sentence would be, like -- what is the maximum, five years?

MR. GREENAWALT: For first offenders; there's a maximum of ten years for second offenders. But I would guess that, as I think you're suggesting, that the usual sentence is not terribly long.

Q I was just wondering about the practical impact of the argument you just made.

MR. GREENAWALT: Yes. I don't know what the average sentence is, or how many people are still in jail.

The wisdom of trying to stop the transportation for private use may be arguable, and in fact the government does not prosecute those whom it believes are transporting for personal use.

But it is our contention that there is no constitutional bar to such prosecution.

Because Section 1462 is patently constitutional as to the use of common carriers to transport obscenity for sale, and both because its coverage of transportation for personal use is also constitutional, and because the proper approach, if the section is unconstitutional in some applications, is to limit the section rather than to invalidate it on its face, the order of the district court in this case should be reversed, and the indictment should be reinstated.

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

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Greenawalt.

Mr. Shellow.

ORAL ARGUMENT OF JAMES M. SHELLOW, ESQ.,

ON BEHALF OF THE APPELLEE

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

My friend misconceives the thrust of our argument. We do not seek any derivative rights under Stanley. We do not seek any correlative rights under Stanley.

The appellee in this case is charged with the private possessory transportation of obscene material. We assert that if Stanley holds any meaning, it says that one cannot be prosecuted for the private possession of obscene material; and that's precisely what's charged in this case.

The private possession of obscene material, and the First and First and Ninth Amendment underpinnings of Stanley protect the man who is carrying the obscene or pornographic book, which he is reading, on an airplane, just as it would protect him if he were reading it in his home; provided that he doesn't read it in such a way that he exposes it to persons who don't want to see it, or who would be offended by it.

Q Let me see if I follow you. Suppose, instead of a book, it was pictures, and he had a suitcase full of them on the airplane, it's private possession, I suppose, in one sense; would you say that's protected, if it's --

MR. SHELLOW: Yes.

Q -- 500 of those pictures?

MR. SHELLOW: Yes. If he had 500 pictures in his luggage on an airplane --

Q All the same picture.

MR. SHELLOW: Well, the only -- I submit that the only inference that can be drawn from 500 pictures, all the same, is that he's threatening to go into the business and do something with these pictures. And if this Court wishes to draw the line and say that 1462 applies only to commercial transportation, then I should think it would be a fairly easy matter of proof, that in fact this was a commercial venture.

If, however, he has one picture, or ten pictures,

and he has them in his pocket,on the airplane, that he's protected. If he has one picture or ten pictures in his luggage, on the airplane, I submit this is protected under the direct holding of Stanley.

Stanley doesn't have to be extended. Stanley was not actually viewing obscene film at the time the officers arrived with the search warrant. Stanley was merely possessing them, with the intent to, at some future date, view them.

Just as the man on the airplane, whether in his pocket or in his luggage, is possessing the material with an intent, at some future time, to privately enjoy his collection of erotica.

Similarly, it's no extension of Stanley to protect the possession in his suitcase on the airplane. He's on the airplane, the suitcase is on the airplane; this is as protected as it would be if it were in Stanley's house or in the traveler's pocket.

As we move to more attenuated examples, I think Stanley still confers direct protection. The man who moves from a residence in California to a residence in Wisconsin, and ships, by common carrier, his collection of pornography. Where he is the shipper and the consignee, he's protected, the shipment is protected. This is a private use in a private setting. It's as protected as if he stayed in his residence in California.

And the man who takes the magazine to his hunting

lodge in another State by common carrier.

Each of these are examples of private possessory transportation. The key is the possession. There's no distribution of it.

And we submit that that's precisely the interdiction of 1462. 1462 permits such persons to be prosecuted, and flies directly in the mandate of Stanley.

We assert that, to the extent that Stanley or some of the opinions in Stanley would -- well, there's only two opinions in Stanley -- would have founded Stanley's right on a Fourth Amendment claim, as my friend has asserted that it might be. To that extent, our interstate traveler is protected as well.

In Katz, this Court said that the Fourth Amendment protects people not places. In Mancusi, this Court said that the Fourth Amendment protects places where the individual has a reasonable expectation that it will be free from governmental intrusion.

We submit that each of these considerations apply to the man who has the pornographic picture in his pocket, the film in his luggage, as he travels from one State to another.

Q Mr. Shellow.

MR. SHELLOW: Yes, Mr. Justice Rehnquist.

Q Would it be fair to say that the position you're

now taking is inconsistent with the language earlier mentioned by Justice Marshall in the prior case from the plurality opinion in the 37 Photographs case?

MR. SHELLOW: I don't think so. I think 37 Photographs, not only as pure private possessory transportation, but as a case in which Mr. Luros asked the affirmative assistance of the government, in bringing this material into the country. And perhaps the distinction can be drawn between he who imports privately and seeks to have some government customs agent authorize his importation, and the man who seeks nothing from the government and merely seeks to go to his hunting lodge in Utah.

That is how I would distinguish it, and that is how I believe that it doesn't conflict with 37 Photographs, with the plurality opinion.

We then come to the question: Can this Court narrowly construe Section 1462 so that the statute and the ambit of the statute applies only to commercial, to the distributive process. And I'm not certain whether the Court would approach it from the point of view of the commercial aspect or the distributive aspect.

Certainly one wouldn't be prosecuted who brought, in his luggage from Milwauke to Washington, the exhibits which form the basis of his argument. And yet that is, of course, within the ambit of 1462 as well.

We start, I think, in looking as to whether or not this Court can construe the statute narrowly, to exclude private possessory transportation. That's the words of the statute. The words of the statute clearly do not have any reference to commercial or distributive functions, unlike Section 1465.

We look to the words of the statute, and we remember the recent words of Mr. Justice Stewart in Campo-Sorono?, in which he stated the principle of strict construction of criminal statutes demands that some determinative limit be established, based upon the actual words of the statute. And there are no determinative limits that can be placed upon the actual words of this statute.

This statute would not require construction, it would require rewriting.

What this Court would be doing would be adding an additional element to the offense, which was enacted by Congress, in Section 1462 of Title 18.

The distinctions, of course, between what the appellee asserts you cannot do in this case, and you did do in 37 Photographs, are that, No. 1, 37 Photographs is not a criminal proceeding, it's a civil forfeiture proceeding.

Secondly, you don't have the same kind of severability clause to work with. The severability clause which applies to Title 19 permits the Court to sever out unconstitutional

applications. The severability clause, which is appended to Title 18, as we recite in our yellow brief, does not permit the severing out of unconstitutional applications. It's a different kind of severability.

Perhaps more important is a matter that we touched on tangentially in our brief, and now I would like to elaborate on in more detail.

The Court will recall that in its opinion in Blount vs. Rizzi, the issue was raised as to whether or not the legislation there could not be saved by a construction which would provide for judicial review. And this Court noted that that was what the Postmaster sought, he sought to avoid precisely that.

And so the Court wasn't free to impose a constitutional meaning on the section there involved.

In this case, this isn't a case in which Congress in Section 1462 never considered the commercial applications of it. When this statute was first enacted in 1897, the final clause, which prohibits one who takes from a common carrier obscene material, was limited to commercial distribution and it was in that statute that it said whoever takes from a common carrier with the intent to sell, distribute, or circulate. That was the way the Act was in 1897; that was the way it was reenacted in 1905. And when it went into the 1907, 1908, 1909 general revision of the penal laws, the Joint Committee, the

Joint Committee of the Senate and House, which reported it out, reported it out changed from the earlier statute in two material respects.

The first respect, the committee added to the first clause, the importation clause, that it must be for the purpose of disposing of the material, that importation would not be unlawful unless it was for the purpose of disposing; and retained in the final clause this "with intent to sell, distribute, or circulate".

When it came to the Floor and was reported out on the Floor of the House, Congressman Houston amended the Senate proposal, the Joint proposal, by striking both of those provisions. And 1462, for practical purposes, appears now, at least as far as this aspect is concerned, as it was amended by Congressman Houston of Tennessee.

Thus Congress on at least three occasions, and probably four, if you consider the predecessor bill that was passed by the Senate and not by the House, on four occasions has addressed itself to whether the statute should be limited to commercial activity.

And on at least four occasions -- three occasions, they said no.

And so I think that in the face of that kind of legislative history, we can't distort the language of the statute; we can't add an additional element to this offense.

We can't -- we can't indict individuals for offenses which were not enacted by the Congress.

The construction which would narrow 1462 to commercial applications would pose all sorts of problems of proof.

As the Solicitor General pointed out in his previous argument, and my friend pointed out in this argument, to limit the construction would impose an unreasonable burden on the government in how you go about proving that it was for commercial purposes, and will the self-serving declarations of defendants be sufficient to defeat a prosecution?

Further, should this Court then enact some sort of presumption as appears in 1465 to make proof easier? 1465, it is of interest by its terms, would apply also to transportation by common carriers.

The legislative history of 1465 suggest that it was to fill the loophole and to permit prosecution of private carriers, but certainly nothing in the language of the statute is that restrictive.

And so, would this Court then enact a presumption so that if you had five or more copies of a magazine, or two copies of one magazine and three of another, that this is presumptive evidence of a commercial purpose?

Also, I submit that the statutes which are enacted, most of the statutes which are enacted which prohibit some form of transportation of something around the country, from

one State to another --

Q Can you think of any statutes, Mr. Shellow, that permit a jury to draw inferences of the kind that are involved in drawing inferences about commercial purposes from the number that were carried?

MR. SHELLOW: Oh, certainly. I think that 1465, if they don't have the requisite number to permit the instruction on the presumption, then I think the jury can be instructed: "You may consider, although you do not need to, the number of magazines possessed by this defendant."

Q Well, maybe I misunderstood you. I thought you were suggesting that it imposed an impossible or very unrealistic burden to let a jury decide issues like that.

MR. SHELLOW: It poses problems, I don't know -- I guess, perhaps that was a little strong. But, for example, in the Leary, the post-Leary cases, without the presumption of unlawful importation and knowledge thereof, the prosecutions have been few and far between.

And I would submit that it's a difficult problem. It's not impossible.

Q Mr. Shellow.

MR. SHELLOW: Yes, sir.

Q Your opposition referred to this recent case by Judge Gordon. I haven't read it. Do you have any comment on his changing his position?

MR. SHELLOW: Yes. First, it's an interesting case. The indictment in Saccer is identical to the indictment in this case. That is, that both Saccer and Orito were charged with the same transportation at the same time and the same place. It appeared they were both on the same airplane, and it's difficult to determine in whose luggage it was.

That appears to be the case.

As far as Judge Gordon's opinion is concerned, Judge Gordon misses the thrust of our argument, and, to be perfectly fair, this argument was never made to Judge Gordon, this concept of possessory transportation. It wasn't necessary. It wasn't necessary that it be elaborated in the detail in which I present it to you. Or it was not necessary that he thread his way through Reidel and Luros, -- Reidel and 37 Photographs.

I think that Judge Gordon misconceives the thrust of our argument, although we did not argue that. He misconceives the thrust of it in that we are not asking that this Court or that court extend Stanley one iota. Saccer and Orito were engaged in a private possessory transportation.

And Stanley protects those who privately possess. Neither of them were distributing, no inference of distributing can be drawn. Their activity is protected by the First and Ninth Amendments.

As we thread our way through Reidel and 37 Photo-

graphs, we note but do not rely upon the fact that those who ship or carry on common carriers in interstate commerce obscene material do not seek the affirmative intervention of our government for their enterprise, for their private enjoyment of obscenity.

It may be that the government and this Court can hold that if you wish to enjoy obscenity in the privacy of your home, or the privacy of your railroad car, that's all right; but don't ask us to help you with it.

That is, don't seek the affirmative assistance of the government in permitting you to enjoy your sordid reading habits.

I submit that, on that basis, some distinction can be drawn between Reidel, 37 Photographs, Gable vs. Jenkins, which, in a sense, there the defendants -- plaintiffs, I think, in that case -- there they sought to acquire derivative rights. They sought to take Stanley and say that because Stanley has the right to read, we have the right to sell to him. Because Stanley has the right to possess, we have the right to deliver.

The Court made short shrift of that argument. I don't think that the opinion, the one-sentence opinion in Gable vs. Jenkins, poses any problems to us. For we do not seek any derivative benefit.

We place ourselves squarely within Stanley. We claim that those who possess obscene material, as long as they

possess it in a way in which it is unlikely that it will be exposed to unwilling adults, or exposed to children, or foisted upon a member of the public, as long as they privately possess it in an area in which there is this reasonable expectation of privacy, then they're protected. They're protected by the Ninth Amendment and by the First Amendment, and,to the extent that Stanley is a Fourth Amendment question, by the Fourth Amendment as well.

Q Do you suggest that Stanley would have been decided in the same way if Mr. Stanley had had 100 or 200 copies of whatever it was that was involved there?

MR. SHELLOW: I submit that if Stanley had 100 or 200 copies, and he was prosecuted under the Georgia statute that makes it unlawful to possession for purposes of sale, that the prosecution could not have been blocked by the Stanley opinion.

That is, the Stanley opinion does not extend to those who possess for purposes of sale, any more than it extends to those who possess for purposes of distribution.

Leaving aside for the moment the thorny question of what would this Court do about private distribution, the issue of "May I send my obscene book by common carrier to the Library of Congress", "May I bring with me in my luggage the obscene exhibits" before I argue to this Court?

Leaving aside that thorny question, Stanley does not reach the commercial distributor, Stanley does not reach the one

who has not yet engaged in his commercial distribution but is possessing preparatory to such distribution.

So, I find that is no problem.

What I find as the basis problem here is that 1462 extends to purely private possessory transportation, and the statute, from its legislative history, from the words that are use, from the fact that it was amended at the same time that 1465 was enacted, Congress was perfectly aware of the problems of private possessory transportation. That the statute can't be construed such as to emasculate the clear congressional intent that it was intended to apply to what this Court has held to be protected.

I submit that when this statute, which the intent of the framers clearly and unequivocally demonstrates that the statute is intended to impose criminal sanction upon protected conduct, then the statute cannot be permitted to stand.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Greenawalt, you have a little time left.

REBUTTAL ARGUMENT OF R. KENT GREENAWALT, ESQ.,

ON BEHALF OF THE APPELLANT

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

I have only a few very brief comments.

I don't think this issue was raised by this case, but

I think that the -- what may seem to be the troubles with hypotheticals is someone who carries in his pocket one obscene book.

There is, I think, a question as to whether the statute covers that person. The language in the statute before the 1955 provision, I believe, was "deposit with a common carrier". And the change in language was designed to extend the venue provision, so that people could be prosecuted in the jurisdictions which they traveled through as well as the place that they put the materials on the carrier.

So I think there might be an argument that use of the common carrier doesn't cover that situation. I don't say that that's right.

Q Well, Mr. Greenawalt, what if he sends a box of 25 or 100 books, all different, and all obscene? Sealed and sent by common carrier to his country home.

MR. GREENAWALT: That is, assuming that it's in another State, the country home --

Q Sure, assume that.

MR. GREENAWALT: -- and that is clearly covered by the statute, and we think the statute is constitutional in that application. We go back to our original argument on that point.

And, as I -- this possible distinction I'm suggesting, we don't suggest is of constitutional vengeance.

Q Well, suppose the owner, the sole owner of the motor carrier, ships by his company the same way? The statute would cover it, wouldn't it?

MR. GREENAWALT: Well, if the --

Q Sure, it will.

MR. GREENAWALT: -- owner of a common carrier, I mean if a guy drives his own bus, whether that's still a common carrier, I'm not sure. So there would be that question as to whether it's a common carrier.

But putting it the owner of the railroad --

Q Well, no, this --

MR. GREENAWALT: -- owning his own train; then, that's covered.

Q No, no, you can't get out that easy.

[Laughter.]

This one has a certificate from the Interstate Commerce Commission. The Stanley Transportation Company. And they ship a box of 100 of the same -- his own books, that nobody has ever seen but him, to his country home which is 16 inches on the other side of the State line, he has violated this statute.

MR. GREENAWALT: If that's still a common carrier, yes, he has. And I think it would be.

Q And you would think the statute would cover the situation where a man calls up a book store and says, "Please

send me over -- please mail to me a copy of so-and-so" and it's mailed to him.

MR. GREENAWALT: There's a separate provision for mail. I mean if it's sent by -- that's 1461 --

Q And you would think that would be constitutional?

MR. GREENAWALT: Oh, absolutely. I mean Reidel makes that clear, I should think.

Q Well, Reidel was going against the seller, I take it.

MR. GREENAWALT: Oh, well, yes, we do think that if there is not a right to sell, there is also not a right to buy. And --

Q So that --

MR. GREENAWALT: -- we think that prosecution could be brought against the purchaser in those situations.

Q -- you say that the statute wouldn't be invalidated by Stanley if it authorized seizure of an allegedly obscene material in the mails, addressed to a user, would have Stanley rights if he ever got it inside his house?

MR. GREENAWALT: That is correct. Yes.

In other words, if you sent off to a book company asking them to send you something, and it was sent to you, we don't think there's be any constitutional bar to prosecute the purchaser as well as the seller.

On the severability point, I'd like to suggest the

language of United States vs. Jackson, 390 U.S. 570, an opinion by Mr. Justice Stewart. In a footnote on page 385 he said -- the Court said: whatever relevance such an explicit clause may have in creating a presumption of severability, the ultimate determination of severability will rarely turn on the presence or absence of such a clause. We think it's clear that,whatever the specific language of the severability provision, basically the question is trying to ascertain congressional intent as to whether it would want the remainder of the statute preserved or not.

Finally, as to the legislative history that's been suggested, it seems to me the major defect with the argument as it's been made is that the conclusion doesn't follow from the premise.

It is clearly true that Congress does mean to cover non-commercial transportation, but it does not follow from that that if it has to have only commercial transportation or nothing at all, it would choose nothing at all. And that worries the question here on the overbreadth point.

I might mention that, because I think in a sense this supports another point we were making, that this provision -- well, first of all, the original 1897 statute did not, if you deposited the material on the common carrier, there was no requirement of binding the seller to distributor, it was only the person who took the material from the common carrier

that had the limit that my brother has mentioned.

So that was relevant only to the receiver, not to the person who deposited the material.

Secondly, in 1909, when this change was made, a similar change was made as to Section 1461, and the Congressional Record in the House indicates that the reason that the change was made was because the -- it was very difficult to prove the element that was required in showing the purpose of the person who was receiving the material from the common carrier. So that the words were eliminated to require -- to eliminate a difficult element of proof.

And I think that supports our argument, that to draw that constitutional distinction does create a difficult element of proof which Congress has not wished to impose, and which is not required by any of this Court's decisions.

Thank you.

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

The case is submitted.

[Whereupon, at 1:31 o'clock, p.m., the case was submitted.]

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