In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Appellant,

vs.

12 200-FT REELS OF SUPER 8 MM FILM, et al.,

Appellees.

No. 70-2

Washington, D. C.
November 7, 1972

Pages 1 thru 29

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Washington, D. C.,

Tuesday, November 7, 1972.

The above-entitled matter came on for argument at 11:01 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
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, N. W., Washington, D. C. 20036; for the Appellees.

C O N T E N T S

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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.

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 and the following one are here on reargument. Fortunately neither involves any factual question about obscenity. Each case involves a construction or application of the Constitution or of the statutes of the United States alone.

This case is a customs forfeiture proceeding, brought under Section 1305 of Title 19 of the United States Code.

As the Court will recall, that is, in form, an in rem proceeding against certain articles which were found in the customs, and it was begun by the filing of a complaint for forfeiture by the United States Attorney.

That appears on pages 2 and 3 of the Appendix.

The procedure was apparently somewhat informal, or the Appendix is incomplete; no motion to dismiss appears in the Appendix. And, as far as can be told from the Appendix, the owner of the materials never had a lawyer. He apparently

dealt with someone in the United States Attorney's office.

The next thing we know is an Order of Dismissal, which appears on page 5 of the Appendix, where Judge Ferguson said the case depends upon Section 1305; "it further appearing that a three-judge court in United States v. 37 Photographs, determined that Section 1305 is unconstitutional on its face; and it further appearing that this Court ought to abide by that decision pending its possible review in the United States Supreme Court.

"It is ordered that the action is dismissed."

Thus, the decision depends upon a determination that Section 1305 is unconstitutional on its face, a determination which this Court has subsequently rejected in this Court's decision in 37 Photographs, which reversed the District Court in California, and is reported in 402 U.S.

Up to that point there are no facts. There never was a trial. There was, however, a motion by the United States Attorney to stay the order of dismissal, which would have resulted in turning the items, which are called the defendants, over to the claimant, and there was, in connection with that, filed an affidavit by the claimant which appears on page 9.

I can only surmise, but I find myself with a feeling that it was probably written by an Assistant United States Attorney in cooperation with the claimant, because the claimant has not had counsel.

And in the affidavit, the claimant says "That none of the defendants were imported by me for any commercial purpose but were intended to be used and possessed by me personally."

And in the motion to stay the order of dismissal, the Assistant United States Attorney, on page 7 of the record, says: "The Court is further advised that the plaintiff has no evidence with which to contradict Mr. Paladini's affidavit, and, therefore, does not contest the fact that this was a private importation."

And that is the basis upon which the case is here.

It is thus purely a question of construing and applying the First Amendment with respect to articles which are conceded to be obscene for the purpose of the case, because the forfeiture was ordered dismissed, because the statute was held to be unconstitutional on its face. That could have been only under an application of the First Amendment, and so we are confronted here with an almost pure question of the construction and application of the First Amendment.

I find it very difficult to think of it in terms of construing the First Amendment, because I can find nothing in the First Amerdment that seems to deal with that.

"Congress shall make no law ... abridging the freedom of speech, or of the press ..."

Now, I think we can put speech aside. No one has undertaken to speak, no one has spoken, no one is being told that he can't speak anything he wants. With respect to the press, there is no prior restraint, and no one is stopping the presses. It has never been supposed that the First Amendment prevents legal action with respect to the product of the press, in cases where that is warranted.

QUESTION: But it's not your point, is it, that the First Amendment is wholly inapplicable to this case because these things were printed outside the United States?

MR. GRISWOLD: No, no. No, Mr. Justice. I think the First Amendment is applicable with respect to any action by officers of the United States.

QUESTION: Yes.

MR. GRISWOLD: The fact that they were printed abroad, we don't even know that they were printed abroad. They may have been reimported.

QUESTION: Well, we don't know.

QUESTION: Mr. Solicitor General, you're not suggesting that all of these defendants, so-called, are not forms of expression, are you?

MR. GRISWOLD: All of them are forms of --

QUESTION: Expression. Are they not? I see there are reels of film, brochures, --

MR. GRISWOLD: They are reels of film and printed

material.

QUESTION: -- photographs. There's a whole lot -- much more in this than I thought there was. A good many things. They are forms of expression, aren't they?

MR. GRISWOLD: They are forms of expression, but no one is abridging the freedom of the press here. No one is seeking to prevent the printing of material. They are seeking to prevent the importation of material. But that is not preventing the printing of the material.

But let me move to the next aspect of the argument.

Actually, I suppose, this case turns entirely on the meaning and application of four decisions of this Court. There are, of course, a good many others which are in the area. But the four are the Roth case, decided in 1957; Stanley v. Georgia, decided in 1969; United States v. Reidel, decided in 1971; and United States v. 37 Photographs, also decided in 1971.

The first of those is the Roth case, and I believe there are only two members of the Court now sitting who participated in that case.

The Roth case refers -- the opinion of Justice Brennan refers to the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations and the obscenity laws of all the 48 States, and in the 20 obscenity laws enacted by the Congress from

1842 to 1956, and continues, this is the same judgment expressed by this Court in Chaplinsky v. New Hampshire, where the Court said that there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene.

"It has been well observed that such utterances are no essential part of any exposition of ideas." That was why I was a little hesitant in answering your question. "And are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

And then follows the key sentence: "We hold that obscenity is not within the area of constitutionally protected speech or press."

Now, that sentence has, of course, been quoted many times since, but if these materials which are conceded to be obscene on this record are not within the area of constitutionally protected freedom of speech and press, this is not a First Amendment case.

Now, that case was 15 years ago, a lot of water has gone over the dam, this is an extremely difficult area, on which there have been sharp differences of opinion; but through it all, Roth and that passage have survived. And I find it very difficult to see, in 1972, if the Court's

position is that obscenity is not within the constitutionally protected area of freedom of speech and the press, that there is any First Amendment problem here.

QUESTION: Well, I just wonder, you say that notwithstanding Stanley?

MR. GRISWOLD: Yes, Mr. Justice, because in Stanley, the Court --

QUESTION: I know Stanley said that this didn't affect Roth, but -- I know it said that, but --

MR. GRISWOLD: Well, --

QUESTION: Actually, Roth suggested, I suppose, did it not, that whatever is obscenity, it's something that the government has complete power to suppress, suppress absolute; but Stanley sort of cut into that a bit, didn't it?

MR. GRISWOLD: All that we on this side of the bar can do, Mr. Justice, is to --

QUESTION: I know.

MR. GRISWOLD: -- try to --

QUESTION: Well, Mr. Solicitor, I'm just suggesting -- what Stanley stands for, at least, is that in the circumstances involved in Stanley, that the government has no power to suppress something called obscenity.

MR. GRISWOLD: Mr. Justice, I would think that the way to combine Stanley with Roth would be to say that Stanley is applicable --

QUESTION: Only I did not join in Stanley, as you know.

MR. GRISWOLD: I'm sorry?

QUESTION: I did not join Stanley.

MR. GRISWOLD: I understand that, Mr. Justice. But I would --

QUESTION: He only joined in Roth.

[Laughter.]

MR.GRISWOLD: I am well aware. I have counted very carefully, in connection with this case.

The only way that I can combine, I didn't say reconcile, Roth and Stanley is to limit Stanley to its facts, namely, the privacy of the home. A fact which was repeatedly referred to in the opinion in Stanley, that when a man is in his home he can have there things which are beyond the power of the State to seize or interfere with.

I have some trouble finding --

QUESTION: Stanley was a bachelor, and there was nobody in the house but him.

MR. GRISWOLD: Mr. Justice, I didn't expect you to accept this reconciliation of Stanley and Roth.

In my own private view --

QUESTION: I don't -- I agree. It seems to me that Stanley was based on the sanctity of a man's home, period.

MR. GRISWOLD: Yes. And, may I say so, with respect,

on the Fourth Amendment.

There is a great deal of talk about the First Amendment in Stanley, the dissenting opinions, -- or the concurring opinions rested it on the Fourth Amendment. I find it quite easy to handle the two cases on that basis. I find it very difficult to find consistency between Roth and the statement in the Stanley opinion. "Roth and the cases following that decision are not impaired by today's holding."

Now, they certainly are impaired as to the privacy of a man's home. And if that sentence had said, "except with respect to the privacy of a man's home, Roth and the cases following that decision are not impaired by today's holding," I could follow it better.

The statement, however, made in the opinion of the Court was quite unqualified.

And then we have, a year and a half ago, United States v. Reidel, where five members of the Court concurred in a majority opinion, and Mr. Justice Harlan filed a concurring opinion, and three members of the Court dissented.

But in Reidel, the majority -- the majority, and, may I say with respect, including Mr. Justice Stewart, joined in the statement: "Roth has not been overruled, it remains the law in this Court and governs this case."

And if the law is that obscenity, and the materials in this case are for the purposes of this case obscene, is

not protected by the First Amendment, that would seem to dispose of the case.

And it went on to say, "but it neither overruled nor disturbed the holding in Roth", and then quoted the language from Roth, which I have given, and reversed the district court in that case by saying that the district court gave Stanley too wide a sweep.

Finally, the Court said, on page 356, "but Roth has squarely placed obscenity" -- and this is a majority of the Court -- "Roth has squarely placed obscenity and its distribution outside the reach of the First Amendment, and they remain there today. Stanley did not overrule Roth, and we decline to do so now."

And then at the very close of the opinion, it says that these matters remain with State power, Roth and like cases pose no obstacle to such developments.

Now, Mr. Justice Harlan concurred, and Justices Marshall, Black, and Douglas dissented. Immediately following that decision there was decided United States v. 37 Photographs, where, as you will recall, there were two questions, one might be called the time question, the question of the speed with which the government can operate in this; and there was a clear majority on that issue. And we are endeavoring to carry out that determination of the Court.

But then the Court went on to decide two further

questions, one with respect to the fact that the district court in 37 Photographs had ruled in favor of the defendant, even though the importation there was for commercial purposes, on the ground that the statute was overbroad, because it was also applicable to a private importation. And if the statute was overbroad, then it was unconstitutional, and then it fell as to commercial importation, too.

And a total of six members of the Court joined in saying that that application of the statute was wrong, that the statute was valid as applied to commercial importation.

But only four members of the Court joined in a plurality opinion with respect to whether a private importation was covered by the statute.

That opinion by Mr. Justice White is, again, in strong terms, reiterates Roth, holds Roth fully applicable.

And then we come to Mr. Justice Stewart's opinion, which made up one of the six, along with Mr. Justice Harlan. Mr. Justice Stewart, turning to the private aspect of the importation, says: But I would not in this case decide, even by way of dicta, that the government may lawfully seize literary material intended for the purely private use of the importer.

And then he goes on to give his own private dictum, as I read it -- perhaps wrong -- that it would be invalid as applied to a private importer. He concludes: If the

government can constitutionally take the book away from him as he passed through customs, then I do not understand the meaning of Stanley v. Georgia; and I can only say, Mr. Justice, that I don't understand the meaning of Stanley v. Georgia, particularly in the light of its treatment in the subsequent cases.

And so we come to the question on which a majority of the Court has not yet spoken: whether an importation for private purposes is in some way, which I find hard to follow, brought within the language of the First Amendment, or is within the decision of the Court in Stanley v. Georgia, as that case has been explained in the case itself and in the two subsequent cases of Reidel and 37 Photographs.

Now, surely there is nothing in the Constitution about a distinction between private and commercial, with respect to the application of the First Amendment. Surely, the First Amendment applies to commercial publication. After all, our newspapers have always been commercial. Our television networks are one of the greatest commercial activities in the country, where very large sums are made by use of public facilities, resulting, among other things, in very high costs for election campaigns.

I don't disparage the slightest the business of the newspapers or of the television, I simply point out that a distinction between public and private, with respect to the

First Amendment, is -- between commercial and private with respect to the First Amendment is one which finds no application or support in any other area, and I find it very difficult to see why it should here.

Moreover, if, as the Court has not only decided but has reiterated in recent times, obscenity is not within the protection of the First Amendment, I cannot see how it makes any difference whether it is commercial or private, at least as long as it is not in the privacy of the home, which is the area which was involved in Stanley, and any application of Stanley broader than that is certainly not a decision in that case, but is a dictum of some sort which has not met full support from the Court in subsequent decisions.

Now, there are references in other cases to penumbras of the First Amendment. I recognize that the First Amendment ought not to be construed in strictly literal terms. I have even contended here that no law does not mean no law, and that still seems to me to be, in some applications, a sound argument.

Similarly, the First Amendment need not be construed literally in its broader application. But a penumbra, I am told, is an area of partial darkness between the light and total darkness. It is also a realm of great uncertainty, where the conclusions, I would suggest with great respect, are not found in the Constitution, but are found in the mind

of the person who is writing about the particular problem.

I find it extremely difficult to see how it is appropriate to extend -- I won't say the Constitution; but to extend the application of the Constitution to a matter which, for a century and three-quarters, has been regarded as within the complete control of Congress, under its power to regulate foreign commerce, the importation of items into the United States.

The mere fact that it's private does not seem to me to justify the conclusion that Congress cannot regulate the importation. That would be equally true of narcotics or explosives, or other material which a person might want to bring in on his person, a diamond ring or something else that he had acquired abroad. He is subject not only to having to declare those and pay duty on them, but in certain cases to be searched and to have the property seized. The mere fact that it's private does not seem to me to support it.

The fact that it is in print doesn't seem to me to help any, at least if there is any vitality to the repeatedly declared statement in Roth that obscenity is not within the protection of the First Amendment.

That decision in Roth seemed to me to be sound at the time. The Court has taken occasion, in a number of decisions, to reiterate its support for that decision in Roth, and that seems to me to be sufficient to dispose of this

case.

Accordingly, we urge that the judgment below be reversed.

QUESTION: Has this statute got any relevant legislative history? It seems to have been enacted in 1930. Is there anything in the legislative history that indicates the evil to which it was addressed?

MR. GRISWOLD: Mr. Justice, I cannot answer that. I think, though this statute was enacted in 1930, that it had predecessors, and that the full legislative history would be long and complicated, and I cannot give it to you.

MR. CHIEF JUSTICE BURGER: Senator Kuchel.

ORAL ARGUMENT OF THOMAS H. KUCHEL, ESQ.,

ON BEHALF OF THE APPELLEE

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

As the Solicitor General has indicated, one Paladini, an American, returned home from abroad with certain motion picture films and printed materials, which were seized by Customs officials after a search. A complaint of forfeiture was filed. The district court found that U. S. Code 1305(a), unconstitutional.

In a motion for stay in the district court, the United States advised the court, and I quote: does not contest the fact that this was a private importation.

Also, as the Solicitor General has indicated, the obscenity of the seized articles is assumed, for the purposes of this argument. It is our position that 19 U.S.C. 1305(a) cannot be constitutionally applied to the facts in this case, which we believe fall within the scope of Stanley v. Georgia.

In Reidel, Mr. Justice White said for this Court, quote, "The personal constitutional rights of those like Stanley 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."

If a man, as Reidel indicated, has the constitutional freedom of mind and of thought, if he has a constitutional right to possess and to read, in private, any material, however shabby or outrageous or offensive it might be to the rest of us, then the content of that material is completely irrelevant to his exercise of those rights. And well it should be.

For any theory by which our government would exercise any control over a man's mind or his thoughts, over what, in his own privacy, he chooses to read or to view is surely repugnant to our concept of constitutional freedom of the individual under this system.

Stanley holds, and I quote it, "The First and

Fourteenth Amendments prohibit making mere private possession of obscene material a crime. Roth and the cases following that decision," said the Court in Stanley, "are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity, that power simply does not extend to mere possession by the individual in the privacy of his own home."

"We think," said the Court in Stanley, "that mere categorization of these films as obscene is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and the Fourteenth Amendments."

And so, one more quote from that decision, "whatever the power of the State to control public dissemination," that is the word, "public" not "commercial", "public dissemination of ideas inimical to public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."

And that sound doctrine, it seems to me, ought to prevent the State from interfering with the private thoughts of a person wherever he may be. The right to be let alone, the right to be free from unwanted governmental intrusions into one's privacy, except in very limited circumstances, are rights which this Court has said protects the individual in whatever he intends to preserve as private, away from the scrutiny of the public.

In Katz vs. United States, the Court said, "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

And in Hoffa vs. United States, the Court said, "What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. There", said the Court, "he is protected from unwarranted governmental intrusion. And when he puts something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure."

The home, just as any other place, may be searched on the basis of a warrant issued on probable cause, defining with particularity the subject matter of the search.

The locus of the articles in Stanley's home clearly is not what protected Stanley. What protected Stanley was that the articles were motion picture films and printed material, articles with First Amendment implications. Any other contraband which might have been found in Stanley's home in the course of a lawful search would not have been so

protected. For example, during the search of Stanley's home, if the officers discovered, in plain sight, an illegal machine gun or an unregistered whiskey still, they would have been authorized to seize it and to prosecute Stanley for illegal possession of it. It is therefore clear, I submit, that the result in Stanley is deeply rooted in the First Amendment.

The right to private possession is in no sense inconsistent with the government's right of customs inspection. In a sense, customs officials are clothed with a blanket statutory search warrant authority. To determine what articles are being imported, whether they may be lawfully imported and whether and to what extent they might be dutyable. And, in accordance with Thirty Seven, since obscene materials, intended for commercial use, may be excluded, inquiry can be made as to the intention of an importer, of allegedly obscene materials.

I want to observe that Thirty Seven was not a case of private importation.

The fact that customs officers may not seize material intended for private use should have no adverse effect at all on law enforcement responsibilities of the customs people.

In its brief, the United States argues, and I quote from page 10 of that brief, that "to subject homeowners to searches for possession of obscene materials would induce

self-censorship reaching to protected speech, and would generate a 'chilling effect' upon the exercise of the First Amendment right to peruse materials that are not obscene." Unquote.

That apparently is sound argument. We submit that it applies with equal impact on the American traveler, who is returning from abroad. He has, of course, the unquestioned right to import non-obscene material. But would there not be an equally chilling effect upon him, as he ponders the purchase, for example, of a book which he believes to be non-obscene but still is consumed with the fear that some customs people may disagree with him?

That same chilling effect could easily deter an American down the street, in this country, from ordering even a possible classic from a foreign source.

QUESTION: Senator Kuchel, I suppose one could carry that one step further and say that the commercial importer might engage in self-censorship if he has to draw the line somewhere between obscene publications and non-obscene, and that would have a chilling effect on him.

MR. KUCHEL: What I'm trying to do is to speak for the facts in this case, and so far as a commercial importer is concerned, I rather doubt that the fear would run against the non-obscenity possibility, but it would be the other way around. He'd want to import those that would clearly be

obscene, if he is interested in commercial distribution.

The Solicitor General, in his argument, referred to hand grenades and narcotics, privately sought to be brought into this country, except for the law. I know of no basis on which you can equate hand grenades or narcotics with rights guaranteed to the American people under the First Amendment. And I would say that that is not an argument against the findings of the district court.

Mr. Chief Justice, may it please the Court:

What kind of a constitutional right is the right to read or to view, undisturbed by the State, if it may only be asserted behind the closed doors of one's home? Should not that right accompany a person wherever he goes, to his office or on returning from a trip abroad, as well as in his home?

And why should his constitutional rights, under the First Amendment or the Fourth Amendment or the Fourteenth Amendment or any part of the Bill of Rights, be abridged or shriveled by equating him with a public distributor of obscenity?

QUESTION: Do you think that that means that he has the right to go somewhere and buy it if it's admittedly forbidden hard-core pornography? Or just -- are you limiting it to the right to carry it in his briefcase or his pocket, have it in his office or on the train or in an airplane?

MR. KUCHEL: Mr. Chief Justice, this Court, in

Stanley, recognized a right to receive information. It did not comment on whether the reception should be free of charge or for money.

But if it is the intent, as I would urge it is, which makes the difference with respect to the intent of for private use or for public use, then I would take the position that an individual American citizen, desiring to obtain any printed information for private use, would have the right to obtain it, in a lawful manner.

QUESTION: Does that include the right of someone else, vicariously through the individual's First Amendment right, to sell it to him?

MR. KUCHEL: I cannot stand before this Court and say no. I would say that there is a right on the part of the State to prohibit the dissemination of material which it would find was obscene.

QUESTION: So that you --

QUESTION: That means the seller could go to prison but not the buyer?

MR. KUCHEL: I regret that I find myself in the position where I'm seeking to apply the rights to receive, as Stanley has laid down, but I offer no argument against a law under which a seller would be guilty of a breach of a statute.

The case --

QUESTION: Do you see anything, senator -- are you familiar with our decision last term in Eisenstadt, the one that involved the sale of a contraceptive?

MR. KUCHEL: I am acquainted with Griswold vs. Connecticut, but --

QUESTION: Well, that's all right.

MR. KUCHEL: The case now pending squarely presents this question: May the United States constitutionally seize motion picture films and printed material intended for the private use of the importer?

The answer is in the negative, and the question really answers itself. If intended for private use, then the character or subject matter of the films and printed material can be of no concern to the government.

Fundamentally, therefore, and I repeat, it is the intent which we submit should be controlling. It may well be that the whole bundle of a person's private constitutional right to possess such literary material as he desires, to think as he wishes, and to view or read what he pleases, must give way to the authority of the State to prohibit or control, at the moment when he does not seek to exercise those private rights, but, to the contrary, intends to sell or otherwise distribute to the public any of the material he has in his possession.

But so long as what material he has he intends to keep

to himself in a personal or private way, he should be protected against the State, either because of Stanley or because of what Stanley foreshadows, not alone in his home but anywhere else where he keeps such material in private.

MR. CHIEF JUSTICE BURGER: Thank you, Senator.

Mr. Solicitor General, you have four minutes left.

REBUTTAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE APPELLANT

MR. GRISWOLD: I would like to make only two points in rebuttal.

The argument that there is a right to receive, and that this supports the distribution of material, was, in essence, the heart argument in the Reidel case, and was the argument which was rejected by a majority of the Court there.

QUESTION: Well, if I understood Senator Kuchel correctly, he would concede that the very material here sought to be imported by this man could, by the State of California or any State, be prohibited from sale in public. And he's tracing it just from the chain of getting it outside the country and getting it into his own home, his own office or his own pocket.

MR. GRISWOLD: I was undertaking simply to support Senator Kuchel's concession on that, to refer specifically to the Reidel case, which decided it, I believe, and also to the decision of the Court per curiam in Gable v. Jenkins, at

397 US 592, decided shortly after the Stanley case, in which the power of the State of Georgia to regulate the dissemination of such material was expressly confirmed.

The other point that I would like to make is that I think that for practical purposes the distinction between private and commercial in this area is illusory. It is appealing, in a sense, of course, in the sense that led to Stanley v. Georgia, the freedom of the man's mind to think what he wants to think. But there is no practical way to deal with a decision which says that if the matter is private it can be imported, but if it is commercial it can't be imported.

The only thing that you can go by would be the man's own statement plus, perhaps, the quantity of materials imported, and here there was a very substantial quantity. It's one thing to say it's in his luggage, it's in his pocket, it's in his home, but how are you going to keep them there?

QUESTION: But isn't that stipulated, conceded out of this case by the concession that it's for private purposes?

MR. GRISWOLD: It is stipulated that he claims that they are for private purposes and that the government has no evidence to the contrary. How would the government ever have any evidence to the contrary at the point of importation?

QUESTION: Well, let us say, Mr. Solicitor General, that the man had three convictions previously for selling this kind of material.

MR. GRISWOLD: Yes, Mr. Justice, Mr. Chief Justice, I can accept and recognize that there would be certain cases when it would be possible to do that.

QUESTION: And there's nothing to prevent the government from requiring him to sign a sworn statement that this will not be sold, is there?

MR. GRISWOLD: And then what?

QUESTION: Then if he violates it --

MR. GRISWOLD: What?

QUESTION: -- make a crime out of that.

MR. GRISWOLD: It would not at least be any crime under any existing law, if he then sold it. Moreover, by the time he has sold it, it is in the stream of commerce, and the purpose of Congress in trying to keep such materials out has been entirely frustrated. I simply repeat that it is not practical. A decision that things can be imported by a person -- does it have to be in his luggage accompanying him, or can he ship it in, as he comes in? Or can he ship it in while he's abroad, in order to have it home when he gets there?

How would anyone -- how would customs officers, officers of the government, endeavoring honestly to comply with the decisions of the Court, deal with it as a practical

matter? I submit that to decide that it can be imported for private purposes is, in effect, to overrule the consequences of 37 Photographs, which the Court decided last term.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:50 o'clock, a.m., the case in the above-entitled matter was submitted.]