The Burger Court Opinion Writing Database

United States v. Reidel

402 U.S. 351 (1971)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 8, 1971

Re: No. 534 - U. S. v. Reidel

Dear Byron:

Please join me.

Regards,

WEB

Mr. Justice White

cc: The Conference

ND

March 17, 1971

Dear Byron:

In No. 534 - U. S. v. Reidel, would you kindly add at the foot of your opinion the following.

Mr. Justice Douglas, dissenting.

I have stated in Dyson v. Stein, decided February 23, 1971, my reasons for believing that all censorship of literature is by reason of the First Amendment unconstitutional and that a criminal statute outlawing literature which judges believe to be "utterly without redeeming social importance" (Roth v. United States, 354 U. S. 476,484) is too vague to pass muster under the requirements of Due Process.

W. O. D.

Mr. Justice White

WD
Adm

132

April 12, 1971

-534 -133

Re: Reidel and Photographs Cases

Dear Byron:

I am going to join your opinion in No. 534, the Reidel case. However, I am enclosing a memorandum, which I plan to turn into a concurring opinion, setting forth my own views as one of those who joined Stanley concerning the applicability of that case to Reidel's circumstances.

With regard to No. 133, the Photographs case, your revised typewritten draft on the Freedman point is generally satisfactory to me. I have only one suggestion: at page 12 of the draft, you treat Luros' invocation of a three-judge court in terms that really approximate a waiver concept: i.e., since the claimant was "responsible" for invoking the three-judge court procedure, see page 11 of your draft, he cannot claim prejudice from the resulting delay beyond the time periods we specify. Since Luros' challenge to the statute was certainly not frivolous, and since Congress has compelled him to make that challenge through the time-consuming three-judge court route, it seems to me that it would be better to treat the non-frivolous invocation of a three-judge court as a special circumstance warranting extension of the prior restraint beyond the specified time limits. Such delays will be very rare in any particular statutory context; a candid exception would be preferable to a "waiver"-type treatment, and I am sure you could phrase the point narrowly enough to satisfy Brother Brennan. Subject to this change, I will join Part II of your opinion as revised.

However, I cannot join Part I of your opinion, simply because I disagree with your conclusion as to the reach of Stanley to importation for private use. Further, I am clear in my own mind that we should not decide that issue in this case. I enclose herewith a Memorandum setting forth my views on this aspect of the case; I shall publish it as a separate opinion if you and the other Brethren who have joined your present draft of Part I still wish to decide that question. Of course, if you are willing to dispose of the private importation question in the manner I have suggested in my Memorandum, I will be happy to join your entire opinion in this case.

Sincerely,

JMH

Mr. Justice White

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: APR 15 1971

No. 534.—October Term, 1970

Recirculated: _____

United States, Appellant, v. Norman George Reidel. | On Appeal From the United States District Court for the Central District of California.

[April —, 1971]

Mr. Justice Harlan, concurring.

I join the opinion of the Court which, as I understand it, holds that the Federal Government may prohibit the use of the mails for commercial distribution of materials properly classifiable as obscene.* The Court today correctly rejects the contention that the recognition in *Stanley* v. *Georgia,* 394 U. S. 568 (1969), that private possession of obscene materials is constitutionally privileged under the First Amendment carries with it a "right to receive" such materials through any modes of distribution as long as adequate precautions are taken to prevent the dissemination to unconsenting adults and children. Appellee here contends, in effect, that the *Stanley* "right to receive" language, 394 U. S., at 564–565, constituted recognition that obscenity was constitutionally protected for its content. Governmental efforts to proscribe obscenity as such would, on this interpretation, not be constitutional; rather, the power of both the state and federal governments would now be restricted to the regulation of the constitutionally protected right to engage in this category of "speech" in light of otherwise permis-

*Of course, the obscenity *vel non* of the materials is not presented at this juncture of the case.

WB

WM

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

From: Harlan, J.

Circulated: _____

Recirculated: APR 28 1971

SUPREME COURT OF THE UNITED STATES

No. 534.—October Term, 1970

United States, Appellant, *v.* Norman George Reidel. } On Appeal From the United States District Court for the Central District of California.

[May —, 1971]

Mr. Justice Harlan, concurring.

I join the opinion of the Court which, as I understand it, holds that the Federal Government may prohibit the use of the mails for commercial distribution of materials properly classifiable as obscene.* The Court today correctly rejects the contention that the recognition in *Stanley* v. *Georgia,* 394 U. S. 568 (1969), that private possession of obscene materials is constitutionally privileged under the First Amendment carries with it a "right to receive" such materials through any modes of distribution as long as adequate precautions are taken to prevent the dissemination to unconsenting adults and children. Appellee here contends, in effect, that the *Stanley* "right to receive" language, 394 U. S., at 564–565, constituted recognition that obscenity was constitutionally protected for its content. Governmental efforts to proscribe obscenity as such would, on this interpretation, not be constitutional; rather, the power of both the state and federal governments would now be restricted to the regulation of the constitutionally protected right to engage in this category of "speech" in light of otherwise permis-

*Of course, the obscenity *vel non* of the materials is not presented at this juncture of the case.

WP
(WJ)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 3, 1971

534 - United States v. Reidel

Dear Byron,

If you would be disposed to delete the phrase "Stanley to purchase or in others" in the 9th line from the bottom of the first full paragraph on page 5, and to substitute therefor the word "Reidel," I would be glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

WO

Returned to BW - 4/9/71

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: White, J.

Circulated: 4-7-71

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 548.—October Term, 1970

Herbert L. Ely, Individually and as Chairman of the Democratic Party of Arizona, Appellant, *v.* Gary Peter Klahr et al.	On Appeal From the United States District Court for the District of Arizona.

[April —, 1971]

Per Curiam.

This appeal is the latest step in the long and fitful attempt to devise a constitutionally valid reapportionment scheme for the State of Arizona. For the reasons given, we affirm the judgment of the District Court.

In April 1964, shortly before this Court's decision in *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and its companion cases, suit was filed in the District Court for Arizona attacking the then-existing state districting laws as unconstitutional.[1] Following those decisions, the three-judge District Court ordered all proceedings stayed "until the expiration of a period of 30 days next following adjournment of the next session" of the Arizona Legislature. (App. 2–3, unreported.) Nearly a year later, on May 18, 1965, after the legislature had failed to act, the court again deferred trial pending a special legislative session called by the Governor to deal with the necessity of reapportionment. The special session enacted Senate Bill 11, which among other things provided one senator

[1] Throughout this litigation, congressional districting has been at issue as well and has suffered the same fate as reapportionment of the legislature. However, appeal has been taken here only with respect to the lower court's decree concerning legislative reapportionment.

WB

Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

From: White, J.

2nd DRAFT

Circulated: 3-1-71

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 534.—October Term, 1970

United States, Appellant, v. Norman George Reidel. | On Appeal From the United States District Court for the Central District of California.

[March —, 1971]

Mr. Justice White delivered the opinion of the Court.

Section 1461 of Title 18, U. S. C., prohibits the knowing use of the mails for the delivery of obscene matter.[1] The issue presented by the jurisdictional state-

[1] The statute in pertinent part provides:

"Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and . . . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; . . . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more

WB

B

pp 1, 5, 6

Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

From: White, J.

Circulated: _____

Recirculated: 4-1-7

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 534.—October Term, 1970

United States, Appellant, *v.* Norman George Reidel.	On Appeal From the United States District Court for the Central District of California.

[April —, 1971]

Mr. Justice White delivered the opinion of the Court.

Section 1461 of Title 18, U. S. C., prohibits the knowing use of the mails for the delivery of obscene matter.[1] The issue presented by the jurisdictional state-

[1] The statute in pertinent part provides:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

. . . . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed;

. . . . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating

WJ

B 1

p. 5

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

From: White, J.

Circulated: _____

Recirculated: 4-15-71

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 534.—October Term, 1970

United States, Appellant, v. Norman George Reidel. } On Appeal From the United States District Court for the Central District of California.

[April —, 1971]

Mr. Justice White delivered the opinion of the Court.

Section 1461 of Title 18, U. S. C., prohibits the knowing use of the mails for the delivery of obscene matter.[1] The issue presented by the jurisdictional state-

[1] The statute in pertinent part provides:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

. . . . . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed;

. . . . . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating

WJ

STYLISTIC CHANGES THROUGHOUT.
~~SEE PAGES:~~

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

5th DRAFT

From: White, J.

Circulated: _____

Recirculated: 4-23-71

SUPREME COURT OF THE UNITED STATES

No. 534.—October Term, 1970

United States, Appellant, *v.* Norman George Reidel.	On Appeal From the United States District Court for the Central District of California.

[April —, 1971]

Mr. Justice White delivered the opinion of the Court.

Section 1461 of Title 18, U. S. C., prohibits the knowing use of the mails for the delivery of obscene matter.[1] The issue presented by the jurisdictional state-

[1] The statute in pertinent part provides:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

. . . . . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed;

. . . . . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating

March 4, 1971

Re: No. 534 - United States v. Reidel

Dear Byron:

I hope you will not mind the following comments about the opinion proposed for this case:

1. Does footnote 1 set forth the pertinent provision of § 1461? Am I correct in assuming that the very first paragraph of the statute should be included and the second and fourth paragraphs, which are in the footnote and which bear upon contraceptive and abortive devices, should be excluded? The latter's inclusion, it seems to me, provides a misplaced emphasis.

2. Roth is cited several times, but the actual citation is never given. I scrambled for it at home the other night. Should it be inserted in the first line of Part II?

3. Reidel has not yet been convicted and, I suppose, his mailings have not yet been determined to be obscene. I wonder whether there are at least two places in the opinion where it is flatly stated that Reidel's stuff was obscene. One place is the tenth line on page 4, and the other is the fifth line on page 5. Perhaps you did this purposefully.

4. I wonder about the second sentence in the second full paragraph on page 5. It is true that Reidel asserts no need to prepare, read, or publish pornography, but I wonder whether it would make any difference in the case if he included an assertion to this effect. Should the sentence be omitted?

5. I do not feel strongly about it, but, c
I think I would prefer to omit Part III. If you wi
in, that is all right with me. I am bothered mil
third sentence in the second paragraph of Part
say "This may indeed be." I would feel a littl
able if that language were somewhat less posit
you think of replacing it with "This may prove
could be"?

Sincerely,

Mr. Justice White

March 4, 1971

Re: No. 534 - United States v. Reidel

Dear Byron:

Please join me.

Sincerely,

H.A.B.

Mr. Justice White

cc: The Conference

WD