

# The Burger Court Opinion Writing Database

*Samuels v. Mackell*

401 U.S. 66 (February 23, 1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



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

From: Black, J.

1

Circulated: NOV 27 1970

**SUPREME COURT OF THE UNITED STATES**

Recirculated:

Nos. 7 AND 9.—OCTOBER TERM, 1970

George Samuels et al., Appellants,

7 *v.*

Thomas J. Mackell, District  
Attorney, et al.

**Fred Fernandez, Appellant,**

9 *v.*

Thomas J. Mackell, District  
Attorney, et al.

On Appeals From the  
United States Dis-  
trict Court for the  
Southern District  
of New York.

[December —, 1970]

MR. JUSTICE BLACK delivered the opinion of the Court.

The appellants in these two cases were all indicted in a New York state court on charges of criminal anarchy, in violation of §§ 160, 161, 163, and 580 (1) of the New York Penal Law.<sup>1</sup> They later filed these actions in federal district court,<sup>2</sup> alleging (1) that the anarchy statute was void for vagueness in violation of due process, and an abridgment of free speech, press, and assembly, in violation of the First and Fourteenth Amendments; (2) that the anarchy statute had been pre-empted by federal law; and (3) that the New York laws under which the grand jury had been drawn violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment because they disqualified from jury service

<sup>1</sup> These provisions were repealed effective September 1, 1967, and a new criminal anarchy statute, in somewhat different form, took effect on the same date.

<sup>2</sup> The complaint in No. 11 was filed in the Southern District of New York. The complaint in No. 20 was originally filed in the Eastern District, but was later transferred to the Southern District by consent.

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

2

## SUPREME COURT OF THE UNITED STATES

From: Douglas, J.  
 Nos. 7 AND 9.—OCTOBER TERM, 1970

Circulated: 12/11/70

George Samuels et al.,  
 Appellants,

7 *v.*

Thomas J. Mackell,  
 District Attorney,  
 et al.

Fred Fernandez, Appellant,

9 *v.*

Thomas J. Mackell,  
 District Attorney,  
 et al.

Circulated:

On Appeal from the United  
 States District Court for  
 the Southern District of  
 New York.

[December —, 1970]

MR. JUSTICE DOUGLAS, concurring.

The same New York statutes on anarchy that were sustained in *Gitlow v. New York*, 268 U. S. 652, are involved in these cases. It was in that case that Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, said in dissent:

"It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at birth. The only difference between the expression of an opinion and in incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs

To: The Chief Justice  
 Mr. Justice Black  
 Mr. Justice Harlan  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice ~~MacCracken~~

## SUPREME COURT OF THE UNITED STATES

Nos. 7 AND 9.—OCTOBER TERM, 1970

George Samuels et al., Appellants, 7 v.	On Appeal from the United States District Court for the Southern District of New York.
Thomas J. Mackell, District Attorney, et al.	
Fred Fernandez, Appellant, 9 v. Thomas J. Mackell, District Attorney, et al.	

[December —, 1970]

MR. JUSTICE DOUGLAS, concurring.

The same New York statutes on anarchy that were sustained in *Gitlow v. New York*, 268 U. S. 652, are involved in these cases. It was in that case that Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, said in dissent:

"It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at birth. The only difference between the expression of an opinion and in incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to

February 20, 1971

Dear Hugo:

On Tuesday in No. 7 - Samuels v. Mackell and No. 9 - Fernandez v. Mackell, would you kindly say that I have filed a concurring opinion.

In No. 60 - Perez v. Kedesma, would you say that I have filed a separate opinion in which I agree with the Court that so far as the Parish ordinance is concerned the three-judge court had no jurisdiction.

In No. 2 - Younger v. Harris and in No. 4 - Boyle v. Landry, I will say a few words in dissent.

W. O. D.

Mr. Justice Black

WD

**SUPREME COURT OF THE UNITED STATES**

Nos. 7 AND 9.—OCTOBER TERM, 1970

George Samuels et al., Appellants,

7 *v.*

Thomas J. Mackell, District  
Attorney, et al.

Fred Fernandez, Appellant,  
9 *v.*

Thomas J. Mackell, District  
Attorney, et al.

On Appeals From the  
United States Dis-  
trict Court for the  
Southern District  
of New York.

[December —, 1970]

MR. JUSTICE BRENNAN, concurring in result.

I agree that the judgment of the District Court should be affirmed. All the appellants had been indicted for violation of the New York Criminal Anarchy Law before their suit in federal court was filed. They have not alleged facts amounting to bad faith harassment. Therefore, neither a declaratory judgment nor an injunction would be proper. *Perez v. Ledesma, post.*

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

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 7 AND 9.—OCTOBER TERM, 1970

circulated:

Recirculated: 1-29-71

George Samuels et al., Appellants, v.  
7

Thomas J. Mackell, District  
Attorney, et al.

Thomas J. Mackell, District  
Attorney, et al.

On Appeals From the  
United States Dis-  
trict Court for the  
Southern District  
of New York.

[February —, 1971]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, concurring in result.

I agree that the judgment of the District Court should be affirmed. All the appellants had been indicted for violation of the New York Criminal Anarchy Law before their suit in federal court was filed. They have not alleged facts amounting to bad faith harassment. Therefore, neither a declaratory judgment nor an injunction would be proper. *Perez v. Ledesma, post.* (Opinion of BRENNAN, J.)

**SUPREME COURT OF THE UNITED STATES**

Nos. 7 AND 9.—OCTOBER TERM, 1970

George Samuels et al., Appellants,  
7 v.

Thomas J. Mackell, District  
Attorney, et al.

9 Fred Fernandez, Appellant,  
*v.*

Thomas J. Mackell, District  
Attorney, et al.

On Appeals From the  
United States Dis-  
trict Court for the  
Southern District  
of New York.

[February 23, 1971]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, concurring in the result.

I agree that the judgment of the District Court should be affirmed. All the appellants had been indicted for violation of the New York Criminal Anarchy Law before their suit in federal court was filed. They have not alleged facts amounting to bad faith harassment. Therefore, neither a declaratory judgment nor an injunction would be proper. *Perez v. Ledesma, post.* (Opinion of BRENNAN, J.)

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 11, 1970

Re: Nos. 7 & 9 - Samuels v.  
Fernandez

Dear Bill:

Please join me in your opinion  
for this case.

Sincerely,



B.R.W.

Mr. Justice Brennan

Copies for the Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 28, 1970

Nos. 7 and 9 - Samuels; Fernandez v. Mackell

Dear Bill:

Please join me.

Sincerely,



T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 28, 1970

Re: No. 7 - Samuels v. Mackell  
No. 9 - Fernandez v. Mackell

Dear Hugo:

I wonder if the references to case numbers in footnote 2 on page 1 and again near the center of page 2 are correct. It looks to me as though the case numbers are those for the 1969 Term rather than the 1970 Term.

I hope I am not presumptuous in calling this to your attention.

Sincerely,

*Harry*

Mr. Justice Black

December 28, 1970

Re: No. 7 - Samuels v. Mackell  
No. 9 - Fernandez v. Mackell

Dear Hugo:

Please join me in your opinion for these cases.

Sincerely,

H. A. B.

Mr. Justice Black

cc: The Conference