

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.

Circulated: NOV 27 1970

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1

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 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.¹ They later filed these actions in federal district court,² 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

¹ These provisions were repealed effective September 1, 1967, and a new criminal anarchy statute, in somewhat different form, took effect on the same date.

² 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

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Nos. 7 AND 9.—OCTOBER TERM, 1970

From: Douglas, J.

Circulated: 12/1/70

George Samuels et al.,
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 7 v.
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 et al.
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On Appeal from the United
 States District Court for
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 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

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12/8/70

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. Ledesma, 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

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SUPREME COURT OF THE UNITED STATES

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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 Brennan, J.

Nos. 7 AND 9.—OCTOBER TERM, 1970

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Recirculated: 1-29-71

George Samuels et al., Appellants,
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On Appeals From the
United States Dis-
trict Court for the
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of New York.

[February —, 1971]

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

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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
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BRENNAN, J.)

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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

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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,



Mr. Justice Black

*Book -
A. M. S.
Orr*

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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