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United States v. 12,200-ft. Reels of Super 8 MM. Film

413 U.S. 123 (1973)

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

February 29, 1972

MEMORANDUM TO THE CONFERENCE:

RE: No. 70-2 -- United States v. 12,200-Ft. Reels of Super 8 MM. Film, et al.

On April 22, 1970, Mr. Ariel Paladini sought to import a variety of printed and graphic materials into the United States at Los Angeles. The materials were seized by customs agents upon inspection under authority of 19 U.S.C. 1305(a), and the United States then commenced this forfeiture proceeding on the ground that the materials were obscene. This District Court dismissed the forfeiture complaint on the ground that 19 U.S.C. 1305 is unconstitutional on its face.[1/] In connection with the application of the United States for a stay, Mr. Paladini filed an affidavit with the court stating that "none of the [materials] were imported by me for any commercial purpose but were intended to be used and possessed by me personally." The United States responded that it had no evidence to contradict this statement, and, in denying the stay, the District Court found that the importation was "for private rather than commercial purposes."

1/ The District Court acted on the basis of a previous decision by a three-judge court in United States v. Thirty-Seven (37) Photographs, 309 F. Supp. 36 (C.D. Calif.), subsequently reversed, 402 U.S. 363.

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

March 14, 1972

CHAMBERS OF
THE CHIEF JUSTICE

MEMORANDUM TO THE CONFERENCE:

Re: No. 70-2 -- United States v. 12,200-Ft. Reels of Super 8 mm. Film, et al.

Several of you have commented on my February 29 memo.

I emphasize what I said at Conference before this memo went out that it is in a sense merely a "trial balloon." For me, this case is part of the whole fabric of the obscenity problem and I have not abandoned the view shared in part with John Harlan and Harry Blackmun that this whole area ought to be primarily a state problem, with this Court reviewing only egregious departures. I do not now, and never have, accepted the idea that every "chill" on expression or conduct is a threat to the Republic. There is a lot of conduct passed off as speech that ought to be put in deep freeze.

I hope to have something on the Miller case before long and then we can see how "alone" I am.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1972

MEMORANDUM TO THE CONFERENCE:

No. 70 -2-- U.S. v. 12,200 Ft. Reels of Super 8 mm. Film
No. 70-73 - Miller v. California
No. 70-69 - U.S. v. Orito

In the present posture of the above cases neither Justice Brennan nor I can make specific recommendations as to the disposition of cases held for opinions in the above. We will discuss at Conference, June 22.

Regards,

WEB

Oct 72
W. Douglas

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–2

United States, Appellant, v. 12 200-Ft. Reels of Super 8mm. Film et al. | On Appeal from the United States District Court for the Central District of California.

[March —, 1972]

MR. JUSTICE DOUGLAS.

I concur in the judgment. My difficulty with the case is that I know of no constitutional way by which a book, tract, paper, postcard, or film may be made contraband because of its contents. The Constitution never purported to give the Federal Government censorship or oversight over literature or artistic productions, save as they might be governed by the Patent and Copyright Clause of Art. I, § 8, cl. 8 of the Constitution.[1] To be sure, the Colonies had enacted statutes which limited the freedom of speech, see *Roth* v. *United States,* 354 U. S. 476, 482–484 nn. 10–13, and in the early 19th century the States punished obscene libel as a common law crime. *Knowles* v. *State,* 3 Conn. 103 (1808) (signs depicting "monster"); *Commonwealth* v. *Holmes,* 17 Mass. 336 (1821) (John Cleland's Memoirs of a Woman of Pleasure); *State* v. *Appling,* 25 Mo. 315 (1857) (utterance of words "too vulgar to be inserted in this opinion"); *Commonwealth* v. *Sharpless,* 2 Pa. 91 (1815) ("lewd, wicked, scandalous, infamous, and indecent posture with a woman").

[1] Even the copyright power is limited by the freedoms secured by the First Amendment. *Lee* v. *Runge,* 404 U. S. 887, 892–893 (DOUGLAS, J., dissenting); Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 U. C. L. A. L. Rev. 1180 (1970).

80 —

#6.7

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 70–2

Circulated:

Recirculated: 5-22

United States, Appellant, *v.* 12 200-Ft. Reels of Super 8mm. Film et al. | On Appeal from the United States District Court for the Central District of California.

[March —, 1972]

Deletion

MR. JUSTICE DOUGLAS.

My difficulty with the case is that I know of no constitutional way by which a book, tract, paper, postcard, or film may be made contraband because of its contents. The Constitution never purported to give the Federal Government censorship or oversight over literature or artistic productions, save as they might be governed by the Patent and Copyright Clause of Art. I, § 8, cl. 8, of the Constitution.[1] To be sure, the Colonies had enacted statutes which limited the freedom of speech, see *Roth* v. *United States,* 354 U. S. 476, 482–484 nn. 10–13, and in the early 19th century the States punished obscene libel as a common law crime. *Knowles* v. *State,* 3 Conn. 103 (1808) (signs depicting "monster"); *Commonwealth* v. *Holmes,* 17 Mass. 336 (1821) (John Cleland's Memoirs of a Woman of Pleasure); *State* v. *Appling,* 25 Mo. 315 (1857) (utterance of words "too vulgar to be inserted in this opinion"); *Commonwealth* v. *Sharpless,* 2 Pa. 91 (1815) ("lewd, wicked, scandalous, infamous, and indecent posture with a woman").

[1] Even the copyright power is limited by the freedoms secured by the First Amendment. *Lee* v. *Runge,* 404 U. S. 887, 892–893 (DOUGLAS, J., dissenting); Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 U. C. L. A. L. Rev. 1180 (1970).

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–2

Circulated:

Recirculated: 5/22/72

United States, Appellant, *v.* 12 200-Ft. Reels of Super 8mm. Film et al.	On Appeal from the United States District Court for the Central District of California.

[May —, 1972]

MR. JUSTICE DOUGLAS.

My difficulty with the case is that I know of no constitutional way by which a book, tract, paper, postcard, or film may be made contraband because of its contents. The Constitution never purported to give the Federal Government censorship or oversight over literature or artistic productions, save as they might be governed by the Patent and Copyright Clause of Art. I, § 8, cl. 8, of the Constitution.[1] To be sure, the Colonies had enacted statutes which limited the freedom of speech, see *Roth* v. *United States,* 354 U. S. 476, 482–484 nn. 10–13, and in the early 19th century the States punished obscene libel as a common law crime. *Knowles* v. *State,* 3 Conn. 103 (1808) (signs depicting "monster"); *Commonwealth* v. *Holmes,* 17 Mass. 336 (1821) (John Cleland's Memoirs of a Woman of Pleasure); *State* v. *Appling,* 25 Mo. 315 (1857) (utterance of words "too vulgar to be inserted in this opinion"); *Commonwealth* v. *Sharpless,* 2 Pa. 91 (1815) ("lewd, wicked, scandalous, infamous, and indecent posture with a woman").

[1] Even the copyright power is limited by the freedoms secured by the First Amendment. *Lee* v. *Runge,* 404 U. S. 887, 892–893 (DOUGLAS, J., dissenting); Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 U. C. L. A. L. Rev. 1180 (1970).

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

No. 70-2

Circulate: _____

Recirculated: 5/29/72

United States, Appellant, v. 12 200-Ft. Reels of Super 8mm. Film et al.	On Appeal from the United States District Court for the Central District of California.

[May —, 1972]

MR. JUSTICE DOUGLAS.

My difficulty with the case is that I know of no constitutional way by which a book, tract, paper, postcard, or film may be made contraband because of its contents. The Constitution never purported to give the Federal Government censorship or oversight over literature or artistic productions, save as they might be governed by the Patent and Copyright Clause of Art. I, § 8, cl. 8, of the Constitution.[1] To be sure, the Colonies had enacted statutes which limited the freedom of speech, see *Roth* v. *United States,* 354 U. S. 476, 482–484 nn. 10–13, and in the early 19th century the States punished obscene libel as a common law crime. *Knowles* v. *State,* 3 Conn. 103 (1808) (signs depicting "monster"); *Commonwealth* v. *Holmes,* 17 Mass. 336 (1821) (John Cleland's Memoirs of a Woman of Pleasure); *State* v. *Appling,* 25 Mo. 315 (1857) (utterance of words "too vulgar to be inserted in this opinion"); *Commonwealth* v. *Sharpless,* 2 Pa. 91 (1815) ("lewd, wicked, scandalous, infamous, and indecent posture with a woman").

To construe this history, as this Court did in *Roth,* as qualifying the plain import of the First Amendment

[1] Even the copyright power is limited by the freedoms secured by the First Amendment. *Lee* v. *Runge,* 404 U. S. 887, 892–893 (DOUGLAS, J., dissenting); Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 U. C. L. A. L. Rev. 1180 (1970).

1, 2, 8

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

6th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 70–2

Circulated:

Recirculated: 6-26

United States, Appellant, *v.* 12 200-Ft. Reels of Super 8mm. Film et al.	On Appeal from the United States District Court for the Central District of California.

[June —, 1972]

MR. JUSTICE DOUGLAS.

My difficulty with the case is that I know of no constitutional way by which a book, tract, paper, postcard, or film may be made contraband because of its contents. The Constitution never purported to give the Federal Government censorship or oversight over literature or artistic productions, save as they might be governed by the Patent and Copyright Clause of Art. I, § 8, cl. 8, of the Constitution.[1] To be sure, the Colonies had enacted statutes which limited the freedom of speech, see *Roth* v. *United States,* 354 U. S. 476, 482–484 nn. 10–13, and in the early 19th century the States punished obscene libel as a common law crime. *Knowles* v. *State,* 3 Conn. 103 (1808) (signs depicting "monster"); *Commonwealth* v. *Holmes,* 17 Mass. 336 (1821) (John Cleland's Memoirs of a Woman of Pleasure); *State* v. *Appling,* 25 Mo. 315 (1857) (utterance of words "too vulgar to be inserted in this opinion"); *Commonwealth* v. *Sharpless,* 2 Pa. 91 (1815) ("lewd, wicked, scandalous, infamous, and indecent posture with a woman").

To construe this history, as this Court did in *Roth,* and as MR. JUSTICE BRENNAN does today in *Miller* v.

[1] Even the copyright power is limited by the freedoms secured by the First Amendment. *Lee* v. *Runge,* 404 U. S. 887, 892–893 (DOUGLAS, J., dissenting); Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 U. C. L. A. L. Rev. 1180 (1970).

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 1, 1972

No. 70-2 - U. S. v. 12 Reels, etc.

Dear Chief,

I agree with your memorandum in this case.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 3-3-72

Recirculated:

No. 70-2 - United States v. 12 200 Ft Reels of Super 8mm Film

Mr. Justice White, dissenting.

My views on the constitutionality of proscribing importation of obscenity for private use were stated in United States v. 37 Photographs, 402 U.S. 363 (1971), and I perceive no reasons in the majority opinion or otherwise for now coming to a contrary conclusion.

There is another reason for my inability to agree with the majority opinion. That opinion characterizes as dictum that part of the prevailing opinion in 37 Photographs stating that importations of obscenity for private use could constitutionally be forbidden by federal law. This characterization is transparently erroneous; for the portion of the 37 Photographs opinion referred to was in response to appellees' argument that the challenged statute was overbroad because it reached not only importation for commercial distribution but also that for private use. Under prevailing overbreadth doctrine, that argument had to be met and could have been met either as I did in the prevailing opinion--by upholding the law as to private use--or as Mr. Justice Stewart seems to have done in

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 13, 1972

Re: No. 70-2 - U. S. v. Reels of Film

Dear Byron:

I take it that the writings in this case are far from being at rest. This is merely to let you know, however, that I am with you in adhering to Part II of 37 Photographs and, thus, would join your dissent to this effect.

Sincerely,

HAB.

Mr. Justice White

cc: The Conference