Supreme Court of the United States

OCTOBER TERM, 1969
1970

In the Matter of:

GEORGE SAMUELS, ET AL., Appellants; vs. THOMAS J. MACKELL, DISTRICT ATTORNEY, ET AL. Appellees.	**Docket No.** ~~41~~ 7
FRED FERNANDEZ, Appellant; vs. THOMAS J. MACKELL, DISTRICT ATTORNEY, ET AL. Appellees.	Docket No. ~~20~~ 9

Place Washington, D. C.

Date April 29, 1970

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C O N T E N T S

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

GEORGE SAMUELS, ET AL.,

Appellants;

vs. No. 11

THOMAS J. MACKELL, DISTRICT ATTORNEY, ET AL.,

Appellees.

FRED FERNANDEZ,

Appellant,

vs. No. 20

THOMAS J. MACKELL, DISTRICT ATTORNEY, ET AL.,

Appellees.

Washington, D. C.
April 29, 1970

The above-entitled matter came on for argument at 1:12 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, ASsociate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument in No. 11, Samuels against Mackell, and No. 20, Fernandez against Mackell.

Mr. Rabinowitz?

ARGUMENT OF VICTOR RABINOWITZ, ESQ.

ON BEHALF OF APPELLANT SAMUELS

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

This is an appeal from the judgment of the three-judge court sitting in the Southern District of New York, denying to the plaintiffs an injunction of declaratory judgment against the District Attorney of Queens County and the Attorney General of the State of New York. The plaintiffs seek to enjoin their prosecution under the New York State Criminal Anarchy statute.

The eleven plaintiffs and five others were indicted on charges of, one, advocacy of criminal anarchy; two, conspiracy to commit advocacy of criminal anarchy; and in the case of one of the plaintiffs, permitting his premises to be used for assemblages of anarchists.

The indictment contained altogether 48 counts, of which only six are under consideration here. The other 42 counts related to offenses such as illegal possession of guns and illegal possession of explosives and weapons and conspiracy to commit arson, and a whole series of other conventional crimes.

We are concerned here, and we attack only that much of the indictment, as relates to the New York Criminal Anarchy law. Now that law, as this Court will recall, was passed in 1902 and was applied once in 1921 in the Gitlow case. It was was used again until 1964 when it was used to convict Mr. Epton. The indictment was handed down here months after the New York Court of Appeals decision in Epton and it raised fears in the minds of not only the plaintiffs, but many others who are interested in civil liberties issues, of a widespread use of the state's sedition statutes, which had long been considered moribund, but which had effectively stifled radical thought in the '20's and like the Federal acts in the '50's.

In addition to the possession of guns and the conspiracy to commit arson and the other what I referred to as conventional crimes, two of the plaintiffs in this case were charged in simultaneous indictments with conspiracy to commit murder. They were convicted and that case is pending here on a writ of certiorari.

I mention this merely to indicate that to stress the point and to emphasize the point, there are on the books of New York, of course, many statutes, including those that are charged in this case, to protect public order and to take people who collect guns in order to seek to overthrow the Government or for any other purpose.

There are three principal points raised by the appellants here. The first is that the New York Criminal Anarchy law on its

face and as applied here violates the First and Fourteenth Amendments to the Constitution, both with respect to freedom of press, speech and assembly, and also with respect to due process of law.

Second, that the New York statutes with respect to the selection of grand jurors has a monetary qualification at that time for services of a grand juror and that, therefore, the Grand Jury which indicted these defendants was illegally convened.

And, finally, that the Federal Government through the Smith Act has preempted the field of sedition, including sedition against the state. I shall argue only the first of these points here today and I am not abandoning the other points. I think they are good. We are relying on them, but they have been briefed and I know that those issues are not essential to the concern of the Court here today and I shall just rely on my brief. We are limited by current limitations and I would prefer to use my time to address myself to the subject which I know concerns the Court most.

The first aspect, however, the New York Criminal Anarchy law, is unconstitutionality and is, of course, a critical matter. And this aspect of the case has also in its turn, I thik, three aspects.

The first is whether Section 1983 of the Civil Rights Act of 1871 is an exception to 2283 of this Judiciary Code, and I think that issue must be met head-on.

The second is assuming that we can cross that threshold, whether the Court should nevertheless abstain, and I think that

that issue has to be met head-on; and finally, we get, I hope, to the merits of the case, namely, whether the Act on its face and as applied in this situation is unconstitutional.

Now, the first question of the interrelation of 1983 of the Act of 1871 and Section 2283 of the Act of 1789, I guess it is, is a matter which, of course, has been discussed almost endlessly. It is hard to think of any question within the general area of procedural rights in a -- with respect to Federal jurisdiction over criminal cases that has caused quite as much judicial and law review over the last two or three years.

The issue was faced by a three-judge court in Cameron [sic] against Jackson. It was argued and briefed in that case in this Court, but this Court never reached the problem and sent it back to the District Court for decision on the merits.

We have collected the cases or tried to collect the cases -- the cases are not completely up to date in footnote 11, page 24 of our brief on the argument. Since then other cases have been called to our attention, including Sheraton against Garrison and McChevsky again Frizzell, both in the Fifth Circuit. There have been extensive law review articles on the subject, 21 Rutgers Law Review, and unsigned articles and an article in 113 University of Pennsylvania Law Review, signed I believe by Professor Amsterdam.

Whatever I saw here is, I fear, going to be an echo of those law review articles and those court decisions which have

decided this case in my favor. It is our contention that Section 1983 of the Civil Rights Act of 1871 was intended by Congress as an exception to 2283 of the Judiciary Code.

Mr. Mackell in his brief points out that 2283 was enacted at a time in our history when the rights of the states were primarily concerned. That is quite true. But 1983 was passed at a time in our history when Congress was primarily concerned with protecting the individual from injustices which they feared would be perpetrated upon them by the state courts as a result of the antagonisms, the tensions and the problems that had arisen out of the Civil War.

It was passed by the Reconstruction Congresses, and to say that those Congresses did not intend to interfere with state prosecution in certain kinds of cases was directly contrary to the legislative history of that statute. It has been argued by the appellees here and by the persons in other cases that our interpretation of the 1983 will impeded the state courts in the normal operation of the criminal laws. It will, and that is exactly what was intended by Section 1983 of the Civil Rights law and the legislative history makes it clear, not in all cases, but in certain kinds of cases coming within Section 1983 that it was the intent of Congress to protect persons whose rights were being interfered with by state officials, including state courts to protect them by giving them resort to a Federal Court.

And I cannot see how it is possible to read the

legislative history, all of which is set forth in the Rutgers Law Review article at considerable length, and some of which is referred to also by Professor Amsterdam in his University of Pennsylvania Law Review article. I do not see how -- I can quote Professor Amsterdam. It is impossible to read the debates without concluding that the Federal Legislatures were intensely aware of the hostility and the anti-Union, meaning Northern and not trade union, prejudice of the Southern state courts and the use of state court proceedings to harass those whom the Union had an obligation to protect.

That is the law that we are talking about today. It is Section 1983 of the Civil Rights Act of 1871, and to say that Congress intended that a person who is being improperly prosecuted, who is being harassed, whose rights are being taken away from him by a state official may not apply to a Federal Court for assistance under Section 1983 is to fly in the face of the direct intent of Congress in passing that law.

Q Did not the law also say that that was the reason for the removal of the statute?

A I think he did say that was the reason for the removal of the statute.

Q Do you think you have two chances to get into Federal Court?

A Well, this Court has held --

Q I am talking about what Congress meant.

A It may be that they were giving them two chances to get into the Federal Court, yes. I think that Congress was much concerned with giving as much protection as possible to the persons to whose problems it was addressing itself in these statutes.

Q Well, that would leave it up to the choice of the person involved as to whether or not he wanted a removal or whether he wanted an injunction?

A Yes, I think that would be true.

Q And if he had removal, it would involve just that one case?

A If it had removal, it would involve that one case. If he had injunction, it might involve that one case. There is no particular reason to believe that every injunction ---

Q I can see where there is a considerable reason between enjoining the prosecution willy-nilly and saying that we will try it in a different court. One is that the man goes free

A That is true, there is a difference. There are other differences also. There is the fact, for example, that under the ---

Q But in this type of case if you went into Federal Court, the Government against the state cannot try the man.

A That is true, but that kind of case would be available. That is, a 1983 case would be available to the plaintiff only in a case where he could come within the four corners of the

Act, namely, that his constitutional rights were being interfered with by state officers acting under the color of the law. And he would have to come within that kind of a case.

If he came within that kind of a case, the Congress intended ---

Q I think 1983 says a little more than that, because I would assume that every arrest is by an officer acting under state law. I would assume ---

A Well, no. Obvious every arrest certainly is under the color of the state law. However, the state refers to a person who --

Q Who is denied his Federal rights under the Constitution of the United States.

A Deprived of any rights, privileges or immunities secured by the constitutional laws of the United States.

Q I thought that was what it said.

A And it is in that kind of a case, not in a robbery case, not in a blackmail case to refer to some of the situations that have been referred to here this morning, but only in the case where a person has been deprived of his rights secured by the constitutional laws of the United States.

Q That could be by a robbery indictment or a blackmail indictment? I mean, you could simply allege that I was exercising my right of free speech on the street corner, and as a result of which the policeman came up and arrested me for

blackmail or something.

A I presume that in order to secure an injunction from a Federal Court, you would have to show more than a mere allegation. You would have to present the situation in which either the statute involved was on its face unconstitutional because it deprived the petitioner or the plaintiff in that situation of rights, privileges and immunities secured to him by the Constitution of the United States, or some other action to come within this statute.

A mere allegation that I am being arrested for blackmail, and this is a violation of my constitutional rights, is not sufficient to come within this statute, and I assume that any Federal District Court confronted by this problem will so hold.

Q I don't really see why. I mean, that could be true. It could be an abuse of the criminal laws against blackmail in the particular jurisdiction. A policeman might just get in the habit, every time he saw somebody making a speech on a street corner, to walk up to him and arrest him for blackmail.

A That is what happens and I think he may be entitled to Federal protection.

Q So it is not -- it can come within this statute in your opinion?

A It may very well and I think it quite possible that in a setting of 1871 it may be that many offenses would normally

have come within the purview of Congress, which today we would not normally think as coming within this statute. But I submit that that, it seems, is what Congress intended. And if it is too broad a jurisdiction, then the remedy is a remedy of Congress.

Q What about an ordinary criminal prosecution, a narcotics ring or anything else and the defendant comes to Federal Court, saying that the pending prosecution against him rests on evidence which was seized and involves a constitutional search or seizure?

A I believe that this Court has held -- I don't know whether it is this Court or other Federal Court -- has held that that is not within 1983.

Q Yes, I know, but what about your position?

A Well, I suppose a different argument could have been made. We are not confronted with that case.

Q Why wouldn't it be included in your argument, the way you presented it, it seems to me, it would squarely fall within your argument.

A Perhaps it would.

Q It is denial of a Federal right, isn't it?

A Perhaps it would. It doesn't shock me, Your Honor. Perhaps it would.

Q I just wondered whether your argument -- how you could react to it.

A Perhaps it might come to that point.

Q That would mean that virtually -- well, the very large percentage of criminal prosecutions would be subject to a three-judge court's scrutiny before they could get into the regular stream.

A If the Court felt that it was prepared to extend the statute to cover that kind of a situation. Now it may very well be and, as I say, I believe that the Court has held that mere matters of evidence do not rise to the height required by this statute. We are not concerned in our case with the mere matters of evidence. We are concerned with the application of the statute, which I submit is unconstitutional.

And it may be that on the outer reaches of this problem there will be questions raised, but we are not at the outer reaches at the moment. We are right at the center.

Q What is the action of the circuits and divisions?

A Well, the circuits have not only divided, but within the circuits there have been divisions. And where there have been in many situations -- where there have been decisions, for example, in the Fourth Circuit. I believe that the Fourth Circuit has held that 1983 is not an exception to 2283, but there is a very strong dissent by Chief Judge Sobeloff.

In several cases in the Fifth Circuit the same conclusion, but again there have been dissents by Judges Reid and Risdo, so that -- though in the Third Circuit, I think Cooper against Hutchison, the decision is the other way. There are two

very recent Fifth Circuit ---

Q It held that it was within?

A It held that 1983 an exception to 2283. There are two recent decisions in the Fifth Circuit. One is a decision by Judge Thornberry and the other a decision by Judge Bell, which hold that Section 1983 is an exception to 2283. Both of them are unanimous decisions, and have -- and those two courts have held that 2283 is not a jurisdictional statute at all, but that 2283 is a discretionary statute and that it is, I suppose, equivalent to the whole question of abstention.

I must get on, if I may, Your Honors. I know this is critical.

On the question of abstention, leaving the statute aside, because I would assume that the general rules of Douglas against Jeannette and so forth might cause a court to hold that he is going to abstain, even if he has jurisdiction under 2283. It still may abstain, and I raise the question as to whether abstention has any justification at all in this case.

Incidentally, the right of the court to abstain, Mr. Justice White, is perhaps the answer to your question, that where there are merely matters of evidence involved that the Federal Court, out of consideration for comity and all the considerations in Douglas against Jeannette will decide that it will abstain.

In this case there is no reason for abstention at all.

We know, as a matter of fact, because it has decided the matter in the Epton case, what the state court is going to decide with respect to this case. We know that its interpretation of the law will be. There is no reason to wait to find out. This is exactly the situation in the Allegheny against Mashuda case except for the complicating circumstances which led to the dissent in that case are not present here.

This is the situation in Koota against Zwickler. This is the situation where a state law is clear. Not on its face, because it is very unclear on its face, but it is clear because there has been a limiting construction, we contend, and an unconstitutional application. It has given that limiting construction an unconstitutional application in the Epton case.

Epton, in effect, has been running interference for us. He has cleared a way. There are ambiguities in the statute and there is no reason for further abstention by this Court, because nothing will be done by a statute. We know what the New York Court of Appeals is going to hold, and what it is going to hold is that it has amended the Gitlow statute so that it now has a limiting construction.

Q What did we do with Epton?

A Epton was ---

Q It came here, I know.

A Yes, certiorari was denied because there was an independent state ground for the decision. There had been

concurrent sentences, exactly the same thing -- not only can, but most certainly will happen here. So that we will be confronted with once again with a situation where this Court may not accept certiorari because there is an independent state ground for the sentence and we will faced with the possibility of still further conspiracy, criminal anarchy prosecutions in New York, and so long as it is paired with the conventional state crime, we can never get a decision from this Court as to the constitutionality of the state's sedition laws.

Now my time is about up. I would just like to mention one thing. There are other mentioned in the brief, but let me get to this one thing, because I think it is decisive on the question of constitutionality. And that is what I have referred to as the amendment of the Gitlow statute by the state court.

The state court at the very opening of its decision says, "We are thus presented with a statute which is unconstitutional as interpreted."

And they then go ahead to reinterpret.

Now the difficulty with that, when we pointed that out to the three-judge court, the three-judge court, "This is a matter for the state to decide. If they want to give their Court of Appeals the right to amend the law, that is their business It is not a Federal question."

But it is a Federal question, because if the Legislature had made this amendment, we would have an ex post facto situation

here. But because the court amended the statute, we have no ex post facto situation, because this law was amended or reinterpreted, or whatever you want to call it, by the State Legislature after the act complained of in this indictment.

Incidentally, it is the subject of a dissent, a very strong dissent by Judge Berg in our Court of Appeals, in which he pointed out that there was no notice to the defendant that this statute was going to be reinterpreted. The defendant, if he had consulted any lawyer in New York, would have found that there was no valid criminal anarchy law in New York because Gitlow was no clearly unconstitutional, and no one could have had the clairvoyance to have seen that the New York Court of Appeals was going to amend the law.

Q Pardon me. As to the ex post facto, do you think the reinterpretation of the old statute would satisfy the constitutional requirements?

A I think not, Your Honor.

Q You think not.

A I have discussed the matter in my brief and I just don't have time.

Q Yes.

A Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Piel?

ARGUMENT OF ELEANOR J. PIEL, ESQ.

ON BEHALF OF APPELLANT FERNANDEZ

MRS. PIEL: My client in this case is Fred Fernandez. He is one of the 15 subject to the indictment.

I want to commence my argument, going on from Mr. Rabinowitz's argument, on the theory that the issue of 2283 and 1983, I think, can well be answered, as Mr. Rabinowitz answered it. But I am not sure that that is an adequate answer, because after one says, "Yes, there is the power to enjoin," it is obviously not a principle which is promotive of peace in the states to have the Federal Courts interfering whenever there is a claim of unfairness below.

And so I have culled over some of the opinions of this Court and some of the writings of the American Law Institute with regard to their consideration of this subject. It seems to me that we can set up four considerations or reasons which all obtain in this case, which would persuade a court not to abstain from a decision with regard to a constitutional issue.

The general premise is that a Federal Court will abstain and permit a state court to decide the issues of constitutionality where they are raised.

Now the first consideration has to do with the First Amendment and, generally speaking, this Court has been more sensitive to issues of First Amendment, particularly when there is a rise in the states, and for a number of reasons -- in order to

create the uniformity of law in the United States and in order to protect the First Amendment, which sometimes in the heat of the battle below, or whatever, state jurisdictions are not as sensitive to the issues.

I am going to mention these four factors and then go back over them.

The second one ties into the First Amendment and it has to do with when the issue involving the First Amendment has to do with the public business. I am referring to the language used by Mr. Justice White when in the Red Lion case, when he referred to the kind of public business that Alexander Michel-john talks about the First Amendment. He is talking about the right of people to hear arguments and the right of people to speak.

When we are in the area of sedition, you are in the area of the public business, because you are talking about governments and some peoples' idea about what is wrong with it.

Then the third factor has to do -- and it is a very important question -- and that is, can the constitutional issue, even though it involves the First Amendment, even though it involves the public business, can it be solved by the state route? Is the issue something that the state court has not yet had an opportunity to rule on? Perhaps there is even an independent state ground, as in the recent case that had to do with Alaskan fishing rights. This Court abstained. Mr. Justice Douglas

wrote the opinion. This Court abstained because there might even have been a decision there based upon the Alaska Constitution, so that even though there were important issues, it is not appropriate for this Court to interfere.

Then there is a fourth ground, which is that the Constitution itself is unfair and discriminatory and perhaps a law which is not ordinarily invoked against a defendant is used. And that is the fourth basis, and that fourth basis was mentioned in the American Law Institute series of reasons given when they decided -- of course, they are not the Supreme Court -- but there are a number of judges sitting on it, and they decided that 1983 -- or there is an exception, there should be an exception in the law to the absolute caveat against the Federal Court issuing an injunction against the state court and constitution.

Q (Inaudible)

A Well, it hasn't been with regard to the Banking Act. I believe that there is a whole line of opinions that show as to other instances when it is not written in.

Certainly the way 1983 is phrased, which gives a litigant a right to relief, equitable or otherwise, would suggest that it is an express exception.

Now in all of these consideration I think we start out with the fact that we are talking about equity, so it is all of these considerations which do not obtain or are not persuasive, then it is something that perhaps should be sent back to the state

court. But Mr. Justice Marshall mentioned removal might be an adequate remedy. May I say that is a very narrow remedy and although originally it may have been intended to overlap 1983, I think today a litigant would have a pretty hard time using it in one of these cases.

As a matter of fact, ---

Q I didn't say it was an argument. I wanted to know whether it was or not.

A It is written that way. May I say that it is written that way, but not interpreted.

Now with regard to ---

Q Aren't these conditions changed ---

A I'm sorry, I didn't ---

Q Aren't these conditions changed when 1983 was adopted and today?

A They are changed, but I think in some ways there are challenges ---

Q I mean, for example, in this case there is a possibility that these people will be tried before a Negro judge and an all-Negro jury.

A Not in Queens.

Q It is not possible?

A Oh, I wouldn't say that, Your Honor. I couldn't say that. But I don't think -- I don't want to make this ad hominem argument. I think there are as compelling reasons today

to be interested in the First Amendment and the consideration for fairness and the four considerations I mentioned as there were during the Civil War period and its aftermath.

Now with regard to this application to the instant case, the question was asked was the Court of Appeals opinion in Epton the knowing interpretation is that narrowing interpretation constitutional? And I submit that it is not, for the reason that the highest court in the State of New York, in trying to read into 160 and 161, and presumably if that obtains, it would also be read into the new statutes which supersede 160 and 161, which it already passed but was not yet effective at the time the highest court of the State of New York interpreted the statute.

That highest court left out of its language language which appears in Brandenburg, which has to do with the requirement for the validity of a sedition statute that the danger of overthrow or of lawful action be imminent. Now that has been left out of the interpretation of the -- in Epton and it is left out of the statute's interpretation and it also is missing from the indictment. If you will read the indictment in this case, you will read that there are no considerations of clear and present danger in the indictment and all you have is the allegation that these defendants with regard to the anarchy counts advocated the overthrow of the Government by force and violence with intent that it take place, but not any allegation as to the likelihood of it taking place or any allegation -- and this is

another consideration that comes out of Yates and Dennis and Bradenburg, but Brandenburg not so much -- that the group doing the advocacy of the overthrow of the Government be of sufficient size and strength to actually prevent such a threat.

Now Epton did one more thing. Although the Court said in Epton -- that is, the Court of Appeals -- that clear and present danger has to be read into the statute, when it applied that doctrine to Epton, what it really said was that the clear and present danger would not have to be the clear and present danger of the overthrow of the Government of the United States. All it had to be was clear and present danger of the riots then rocking Harlem continue.

I submit that that is the real meaning of Epton, and looked at that way, the State of New York has an unconstitutional statute which it is trying to apply to these defendants.

Now when I speak of the public business, I think it is very important that you know how this case fits into the public business. We do allege in our complaint that this is a harassing action against these defendants and in the harassing we mention, and it is attached to the appellant's brief and also filed with the Court, we attach a number of newspaper stories, all of which were released by the District Attorney at the time that these people were indicted and it is very clear from the language used in these press releases that the direction of the action is against the thought of these defendants.

Now, quoting the District Attorney on page 67 here, the press releases that appeared in the press, he said that Stokely Carmichael, a leading black power advocate, had connections with RAM -- that is the Revolutionary Action Movement, which was dedicated to the overthrow of the capitalist system in the U. S. by violence, if necessary.

Now parenthetically this is anarchy or the attempt to overthrow the government of the State of New York, that all of these press releases have to do with the attempt to overthrow the Government of the United States.

Again Mackell said the arrested RAM members are followers of Premier Mao Tse-tung and are associated with another Negro organization called "Black Americans Unite or Perish," headed by Robert Williams. And again their intent was to stir Negro militants across the nation, following rioting in Atlanta, Tampa, Dayton, Cincinnati and Watts.

And then finally -- I think this really caps the First Amendment public business part of my argument -- in discussing the defendants, Mackell said that Fernandez -- that is my client -- who headed a group of approximately 20 youths between the ages of 16 and 21, may well have tried to influence with Revolutionary Action Movement ferocity.

And finally, Queens District Attorney Mackell said that that 16 arrested on various charges were members of RAM's anarachist group which Federal authorities say is pro-Communist, pro-China

and pro-Cuba. That is the final one.

"The police investigation into this matter dates back two years," Mackell declares. "I have had Assistant District Attorney Thomas di Marcos of Jackson Heights on this case everr since we were informed about it. He and Lieutenant James Murphy of my squad have been working together on it. Di Marcos had to do a tremendous amount of reading and had to digest hundreds and thousands of words before we felt we were ready to proceed."

Now this, I say, goes to the heart of the First Amendment. This is an accusation against these defendants with regard to the anarchy laws that is squarely violated for First Amendment consideration.

Now we cannot solve this case by the state route, because when it gets up to the State Court of Appeals, the State Court of Appeals is bound by its own decisions. And there is another problem. By the time this case is tried there is, as you have heard, 48 counts in this indictment. Only five of these involve my client, four of which involve anarchy and the fifth one involves conspiracy to commit arson in the third degree.

Now by the time the jury has heard all of the testimony with regard to anarchy, I predict that my client will be convicted of arson in the third degree. This is, of course, a distinction from Dombrowski where the contention was made that the criminal charges were brought against the defendant with no possibility of their being a conviction.

In this case we say that there is a strong possibility of a conviction and that the anarchy serve to prejudice the case as a trial before the jury. And, in fact, it is argued by the District Attorney in his brief that he needs the anarchy charges in order to supply the factor of intent as to the illegal gun charges, which he raised not against my client, who is a casualty perhaps of this entire adventure, but he attached intent to the gun charges against the other defendants.

Now the other aspect of what can happen is exactly what did happen in Epton. In Epton there was a conspiracy to riot charge, which was attached to the anarchy charges. And when he was convicted, the judge gave him a sentence which was concurrent and which covered the conspiracy to riot charge, and was one year. And, therefore, it never appeared what part the anarchy charges, which I can assure you played a great part in the trial, it was never clear nor was it capable of being properly reviewed.

So you have a record where it will be impossible in this case for the defendant, plaintiffs in the action in the Federal Court, to secure a fair trial and absolution by the state method. You have, as I have indicated, a discriminatory prosecution by statute and I do think it is important for the Court to consider this. This is not a robbery statute, as is invoked how many times throughout the United States today. This is not a burglary statute. This is a sedition statute, and its use in New York has only been three times -- at least in our recorded

history.

It has been used in Gitlow in 1920, and it was revived 44 years later in Epton, and it was only upon the heels of the Court of Appeals opinion in Epton, which came down May 16, 1967, that these indictments were brought in against these 15 defendants.

So, it is clearly a discriminatory prosecution. Now it seems to me that if there is ever a case for the kind of relief which is available for Federal intervention, this is it. There is a further argument that was made, and I want to make it because I think it dramatizes the validity of the relief request. And that has to do with the Grand Jury point.

Since this case was argued, this Court has come down with two decisions which suggest that the 250 property limitation might well be invalid, but in another decision you have said that the subjective standards that we claim here might be administered fairly, so that the statute on its face would only be a little bit unconstitutional. I say "a little bit" advisedly.

I think that against the standards that I have just set up, straw standards, that it is a challenge to the statute on the basis of the First Amendment. A Grand Jury statute wouldn't make that. Also that is a public business, I don't think it would quite do that. That it can't be solved by the state route. Well, a year ago when I was before you I told you it couldn't be solved by the state route and I cited a lot of cases in my brief showing

that the state hadn't considered this issue.

But on the 22nd of April of this year, Chestnut against the People of the State of New York was argued in the Court of Appeals, and the issues were presented to the Court of Appeals, not as to Queens County -- that is a New York county -- but accordingly, we can say that as to the Grand Jury issue there is something which perhaps can be solved by the state route, but I am going to make a suggestion here as to that.

Q That is under submission to the Court of Appeals?

A Yes.

Q Undecided.

A Yes, it was only argued on the 22nd of April. Of course, that case may come here, too, before we are through.

But I am suggesting that one does not dismiss such a case out of hand, but one can well send it back to the District Court with the instructions to await the decision of the New York court.

There is one problem, and that is another argument, I think, in support of not abstaining here, and that is the right of the defendant in a criminal case and plaintiff in an action such as this to finally get some kind of relief from the court. In other words, these actions pending over a long period of time do not result in justice to all.

I will reserve any time I have for rebuttal.

Q This is all collateral, but what has happened to

that one, if I may?

A Well, this case may come before Your Honors one day. He is out on $25,000 bail pending another kind of relief, which I did not mention. That is habeas corpus in the Federal Court, and the habeas corpus is awaiting the action of the Court of Appeals in the State of New York in the Chestnut case, because that is the same Grand Jury which indicted him. And also the action of this Court in this case.

MR. CHIEF JUSTICE BURGER: I think you have consumed all of your time, Mrs. Piel.

MRS. PIEL: Thank you.

ARGUMENT OF FREDERICK J. LUDWIG, ESQ.

ON BEHALF OF APPELLEE MACKELL

MR. LUDWIG: My name is Ludwig and I am the Chief Assistant District Attorney of Queens. This is the second time this case is being argued. On the first time, on April first, you, Mr. Chief Justice, and Justice Douglas were not on the Bench.

I would just like to say at the outset that the question of publicity in this case was brought to the attention of one of our best Supreme Court Justices, Justice Shapiro of Queens, and he in an exhaustive opinion, which is appended to my brief, went into all facets of the question and his conclusion was that by no stretch of the imagination could the District Attorney in this case be accused of issuing any inaccurate, unfair, prejudicial

statements regarding this matter and that any statement the District Attorney ever made or I made in connection with this case was proper, justified and something that the public had a right to know.

Many of the quotations that were read by Mrs. Piel are not quotations of the District Attorney, but of some newspaper reporter writing the story without quotation marks. And I think in all candor that this Court ought to know that.

Now the defendant in this case is the District Attorney of Queens. Actually the defendant should be a Grand Jury of 22 people in Queens, who saw fit to accuse these defendants. But this District Attorney did not accuse them. They were accused by the Grand Jury.

The District Attorney knew nothing of this investigation while it was going on for a year and a half or two years, until approximately a month before the matter was presented to the Grand Jury. The evidence in this case was obtained by an undercover police officer who had infiltrated this group, became a part of it and, in fact, was the vice president of it, and who gained enough information about what was happening to present this case to the Grand Jury.

Now this indictment is one that involves 15 defendants. Eleven of them are appellants in this case. The other four did not appear. The indictment contains 48 counts and deals with five crimes. It is a superseding indictment. The first indictment

was found on June 20th, 1967. The case was presented on June 20th and the foreman handed up the indictment that night. It was a one-day presentation in great confidence and secrecy before the Grand Jury.

The foreman handed it up on June 20th and the defendants were arrested pursuant to an arrest warrant and these weapons and arms and arsenal were seized pursuant to search warrants signed by a Supreme Court justice, particularly describing what to be seized the following morning, June 21st.

Now two indictments were handed up by this Grand Jury as the result of the testimony, and the testimony consists of 151 pages, and I offered it to the Court on two occasions. The first time I argued here a year ago, and no action was taken, these minutes of the Grand Jury, unlike Harris against Young in California, cannot be printed in the record and are not printed. Customarily in our state appellate court the judges ask the District Attorney to hand up a copy of the minutes, because we have a very strict rule on indictments in the state courts.

The rule is, there must be proof beyond a reasonable doubt in the Grand Jury minutes that the defendants are guilty, if unexplained. In the Federal Courts and elsewhere you don't need that quantum approach. And we also have another rule ---

Q Is that true throughout the State of New York?

A That is true, sir.

Q Before a Grand Jury can bring in an indictment there

has to be proof beyond a reasonable doubt, at least unexplained.

A Unexplained. And further than that, in People against Jackson and People against Nicksburg, our State Court of Appeals imposed another rule upon us, that if you have the proof beyond a reasonable doubt at the time of trial but you didn't have it at the time of accusation before the Grand Jury, then that is sufficient to justify reversal as a matter of law.

Q That is so extraordinary.

A Yes.

Q Is that a statute or a court rule?

A Many motions are made attacking our indictments on the insufficiency of the evidence before the Grand Jury, and I regret to report that they are dismissed, because the judge reached the verdict and said, "I don't think you have made a case out of that."

Q But now are there a good many prosecutions in your state then? This is by way of information.

A None on the felony level. The State Constitution requires for a felony indictment by a Grand Jury can't even be waived by a defendant.

Q It cannot.

A It is unwaivable. It has to be a misdemeanor.

Q I didn't quite get clear your response to Justice Harlan's question. Is this by virtue of a statute or by virtue ---

A No, by virtue of the State Court of Appeals in

interpreting the Constitution of the State that requires indictment by the Grand Jury, and also a provision of the Code of Criminal Procedure of the State of New York that requires sufficient proof to convict at trial if unexplained.

Those are the words of the statute.

Now I would like to go ahead and -- these minutes are here. If the Court will accept them, I will hand them to the ---

Q Well, let me ask you a further question on that, if I may. Does that mean any more than what Justice Stewart suggested, the same as making a prima facie case to the Grand Jury, the same kind of a case that would carry it to the jury if the defense put in no evidence?

A Yes, Your Honor. Otherwise, it will be reversed.

Q And that is by decision of the ---

A The highest court of the state, these two cases, People against Jackson and People against Nicksburg.

Q Does the New York Constitution fix the quantum of proof?

A It does not, Your Honor. It merely -- it is done by the Legislature of New York in the current Code of Criminal Procedures, but it has been there for many years.

Q Thank you.

A Now in this indictment we could have had 131 indictments here if we were proceeding strictly according to common law, which requires a single crime and a single defendant for each

indictment. But again our Code of Criminal Procedures, and those sections are set forth at page 8 and page 9 of my brief on reargument and also the original brief, allows us to combine defendants and charges in one indictment, provided we separately number each crime in a count, and that provision appears in Section 279 of the Code of Criminal Procedures. The reason I make mention of it is this, at this stage: Because we have combined in one indictment the indictment now before the Court 15 defendants and 48 counts. We could have had 111 different indictments and then moved to consolidate them on the ground of the common issues.

The test for putting these counts in one indictment is there are four different circumstances in 279. The one that we selected is where the crimes charged were connected together and are part of a common scheme or plan.

Now by motion before the Appellate Court you can -- before the trial court these indictments can be settled. Now these things, then, are by law, by the law of pleading in criminal matters in our state inter-related charges.

I want to also state that in these 48 counts the first four of them deal with criminal anarchy and charge all the defendants with the commission of that crime. The first three deal with anarchy and the fourth is conspiracy to commit a criminal act.

Now the other counts in the indictment have nothing to

do with criminal anarchy, but are there because they are interrelated with the ultimate purpose of this indictment.

Count 5 is a conspiracy to commit arson in the third degree. It does not -- that count is not charged against everybody. Many of these defendants are not charged with that in this case.

Counts 6 and 7 deal with permitting premises to be used for anarchy.

The remaining counts, 41 in all, deal with weapons. Now this may be a little bit abstruse, but it is important to make this one point, that four of these 41 counts that deal with weapons deal with handguns and 37 deal with shoulder guns. Under the Weapons Law of New York, as I told the Court last time I was the author of it, mere possession of a handgun in four of these 41 counts is all the prosecution has to establish to convict of a crime. But the shoulder guns -- rifles, shotguns, carbines -- you need of proof of intent to use unlawfully against another. And there is a good reason for that.

A lot of people have rifles to hunt animals. But pistols and revolvers and automatic weapons normally are used only to hunt other human beings.

The only proof of intent to use unlawfully against another we have for this indictment, and the only evidence that was before the Grand Jury at the time the case was presented, was the intent to paralyze and overthrow local government.

Consequently, when counsel said that you can't when irreparable injury is done raise an immediate because of the possibility of concurrent sentences in this case. That is not so, and I will demonstrate why it is not.

Because there are, first of all, four defendants in this case who are not charged with possession of weapons -- I will amend that, there are five who are not charged with possession of weapons -- Harriet Knowle, Raymond Smith, Fernandez, Miss West and Max Stanford. Those five are not charged with any possession of weapons in this indictment. It isn't because they didn't possess weapons, but because when these search warrants were executed, they were not found in possession of the weapons.

Therefore, these five people -- of these five people, three of them are charged with no anarchy crimes at all. So in these five cases -- pardon me, with no nonanarchy crimes. In three of these five cases we have persons who could be convicted only of anarchy-connected crimes and not of any correlative crimes. The doctrine of concurrent sentences would not apply.

If I am not mistaken, as I read Benton against Maryland, this Court last term abandoned the concurrent sentence doctrine anyway. So that the reason for disposition of action no longer holds.

But in any case we have three persons that could be convicted solely of these anarchy-connected crimes under this indictment and would have full opportunity to bring the validity

of the New York statute before this Court.

By the way, the New York statute that we are talking about has been repealed by action of the Legislature on July 20, 1965. That is almost five years ago. The repeal was to take effect on September 1, 1967. This was in connection with an entire revision of the New York Penal Code.

Now a new anarchy section was substituted on July 20, 1965. Now so far as this indictment is concerned, it was handed we say, originally on June 20, 1967. The Court of Appeals in the Epton case began in July of 1964. Epton was tried in June of 1965 and convicted. He didn't get through the first intermediate appellate court until December of 1966 and the highest court of the state came down with their decision on May 16, 1967 one month and four days before the Grand Jury indicted the persons in this case.

Now it is true that some of the acts for which these people are accused took place prior to the announcement of the decision in Epton. But there is one other unusual feature of our weapons laws in New York, and that is the amnesty feature. And under the amnesty feature any person at that time, if they had read Epton when it came down on May 16th and following law as closely as counsel seems to suppose they would, could come into a police station during the month of June -- today they can come in during any month -- and hand over these guns with amnesty and immunity given by the Legislature.

That is Section 1900, subdivision 8(1) of the New York Penal Code in force and effect at the time this indictment came down. This is a defense of recantation and amnesty given by New York so that these people will be guided by what the highest court of the state on May 16th. They could have recanted and turned in their arms with impunity and, believe me, there would be no indictment in this case if all we had is what appears in the appendix in Harris against Young, namely, statements or pamphlets or speeches and abstract advocacy of the doctrine of anarchy.

What we are concerned was, in this case, the amassing of an arsenal for the purpose of paralyzing and overthrowing a government.

Now this Court in its most recent pronouncement on the question of free speech, Brandenburg at the last term on June 9th, said that you may punish a person for advocacy, for words, provided it is accompanied by inciting and producing lawless action and there is probably cause that that lawless action would occur.

Now the minutes of the Grand Jury which are here before this Court show that they assembled 9,000 rounds of ammunition. They assembled cans of gasoline, cans of oil, intending to burn the subways, the power plants, the lumber yards, the tire factories, public communications facilities in Queens County, and they had a detailed blueprint and a timetable for the execution

of this plan.

The speech involved in this case, the advocacy, only is the mortise and tenion, the cement-binding quality to put these acts for overthrow together.

As a matter of fact, on June 16th there was a dry run in which these weapons were used in some stores in the Jamaica section of Queens, the testimony before the Grand Jury so reveals. And this is set forth in my brief.

Bazookas ---

Q What happened if the Federal Court refused to enjoin this prosecution? It brought them to trial?

A We did not bring them to trial ---

Q Why not?

A We wanted to give this tribunal a chance, also for the guidance of the trial judge.

May I say this?

Q There was no stay issued?

A No stay has ever been issued, but it has been agreed that if there is a question, the Federal tribunal will dispose of it.

We have in a second indictment convicted two of these appellates in this case, Ferguson and Harris. They were convicted of conspiring to murder Whitney Young and Roy Wilkins. They had other people on the list as well, but they were the first two.

They had a trial before a jury and in the intermediate appellate court five judges found unanimously that there was sufficient evidence to convict them. But two judges dissented, of the five, on the grounds that because Senator Robert Kennedy, whose name was also on the list of those to be killed, was mentioned at a time when he was lying between life and death, that a new trial should be granted but the judge should have granted a continuance.

The highest court of our state, seven judges found identical, unanimously, that there was sufficient evidence to convict murder in the first degree and -- but three of them agreed that maybe the trial judge should have granted a continuance on the circumstance of the assassination of Senator Kennedy.

I would like to say this in connection with the question of Section 2291. I mean 2283. For 177 years we have had that statute on the books, since March 2, 1793, and never once has this Court in any way said that a lower court, that is a creature of Congress, must not observe that statute.

For 99 years -- since 1891 -- we had the provision of Section 1983, the so-called Civil Rights Act, which gives the person a course of action, an action at law, a suit in equity or other proper means of redress if any rights, privileges or immunities can guaranteed to him by the Constitution of the United States are taken away from him under color of state law.

Never in 99 years has this Court ever held that that

constitutes -- the three words "suits in equity" -- constitutes an exception to 1983.

Now recently this Court has taken up the question -- they took it up in Dombrowski against Pfister -- and very carefully Justice Brennan, in writing that opinion, observed the restriction of the Act of 1793, and Justic Harlan in his dissenting opinion also called the attention of the Court that if there had been an action pending at the time of application to the Federal Court, then of course this Court could not authorize intervention below.

Again it came up in several other cases, Cameron against Johnson is a good illustration of this. It came up from Mississippi and was sent back by this Court to the District Court in the Southern District of Mississippi, to have them determine whether 2283 was a bar, and District Court of Mississippi, a three-judge district court, came back and said, "Yes, we think the suit is barred by 2283." And this Court affirmed it.

But there was a footnote by Justice Douglas where he said, "Well, we don't have to decide the question of 2283." But still this Court did affirm the determination of the District Court of Mississippi.

Again in Brooks against Briley, Tennessee, the same thing. The District Court there, a three-judge district court, said you can't get by here with 2283. You can't get by, nor can you get by declaring a declaratory judgment. The case came up to

the Supreme Court affirmed.

These are all very recent cases, all involving 1983 as an exception to 2283.

Again in Zwickler against Bole, coming from Wisconsin, the same result, this Court affirming the District Court's denial. So the most recent authority in this Court is that 2283 is a hurdle.

Now you have two hurdles to surmount before you can get to the question of free speech. You have got two hurdles to surmount. One, you have got to get by this historic barrier of Congress since 1793. You have got to surmount that hurdle before you can go anywhere else.

The 26 words that were put in amending the parent statute, the Judiciary Act of 1789 -- 26 words have to be observed. Now this Court has repeatedly said -- in 1941 they said it, too, in the Toucey case -- they said that we must be scrupulous about the meets and bounds that become effect because of their own creation. They must be scrupulous.

And then in 1948, when Congress codified three exceptions, in 1951 this Court resisted it. Once again the statute of 1793 -- and at that time they said, "You have got to go by those three exceptions of Congress and you can't go any further."

Now there is another consideration involved here, interrupting, and that is the same as a Federal prosecution. And that is that this tribunal, which is a constitutional tribunal

-- it is not a circuit court or a district court, it is a constitutional tribunal -- cannot be abolished by Congress. The lower courts are created by Congress, by express authorization in Article III of the Constitution. Yet Congress in fixing, which they have the power to do in Article III, Section 2, the appellate jurisdiction of this Court carefully requires that there be a final judgment of a state tribunal and a decision by the highest court in which a decision can be had before state action may be reviewed, like this a constitutional tribunal.

How can we then say that this Court is going by statutory interpretation? This isn't a constitutional question, and give to lower courts a power it doesn't even arrogate to itself.

While Congress has the power, unless this Court wants to overrule ex parte McCardle -- Congress has the power to take this case and get away from this Court now by taking appellate jurisdiction over any question, let's say, of denial of injunction by three-judge courts below.

Unless we overrule ex parte McCardle, which involves free speech, that would be the result.

Now I believe as far as speech is concerned ---

Q Do you say that for Congress to do that, that we would have to repeal 1983?

A To take away jurisdiction from this Court, Your Honor?

Q Yes.

A I don't advocate it by any means. I am not asking that it oppose constitutional jurisdiction of this Court.

Q That law on equity is pretty precise. I don't think you can get much more.

A Well, I would say that this suit in equity in 1983, it is just those three words -- there were three phrases -- "action at law," "suit and equity" or "other proper proceedings for redress."

Q Well, let's don't get involved in the other.

A Yes. But the cases which this Court says are exceptions where the Federal Court can enjoin, there are quite a number of them. In 1851 a ship owner who deposits the money equal to the debt can relieve a lien against the ship. In 1875 a bankruptcy exception was allowed, namely, that all proceedings in state as well as Federal courts will be stayed.

Several other exceptions have been allowed by Congress under this statute. They allow in connection with the Frazier-Lenke Farm Mortgage Act during the Depression in 1930, the state collection proceedings. They have allowed in the famous Habeas Corpus Act. They can stop all proceedings in a state court.

They allow it in the Interpleader Act. But in all these cases that this Court said in Amalgamated Clothing against Richman in 1951 after the amendment, in all of these cases the language that Congress uses is pretty explicit. It doesn't have to refer to 1983 by number, but it has to be pretty explicit and

say that proceedings be stayed, either in a state court or in any court, or it may state that all proceedings shall cease, wherever they are. They use the connotation of words quite differently than merely a suit in equity.

Now a suit in equity can be brought for a lot of things, as Your Honors well know, an action for recision of a contract of a contract, et cetera. A lot of suits in equity can be brought without resorting to a state or an injunction. An injunction isn't the only type of equitable remedy.

Second, a suit in equity can be brought in a state court and a state court may stay it without running into a Federal Court.

And third, and this is important, the suit in equity can be brought even to stay a threatened proceeding in a state court, and in that respect this is the most restrictive interpretation, the limiting interpretation on 2283. Ex parte, of course, tells us that the memorable congressional statute requires that the proceedings be in a state court, and if it is not in a state court, then of course it is possible to get an injunction against a threat prosecution.

Now this Court has seven related cases involving injunctions by three, either denial or the granting of an injunction by three-judge district courts below. The first case, No. 4, Harris against Younger, in that case the three-judge court did grant an injunction and one of the three applicants for the injunction,

Harris, had an indictment pending against him. There you have a question of a clearcut violation of 2283.

In connection with the other two applicants, Broslowsky, Dan [illegible] Hirsch, nobody indicted them, and our interpretation of 2283 is that so far as enjoining the District Attorney of Los Angeles County from commencing a prosecution against Professor Broslowsky or the labor union leader, Dan Hirsch, that 2283 does not affect them because there was no proceeding in the state court.

Boyle against Landry, as I understand it, there was no pending case in the state court, so I question whether 2283 has any application there. In our case we had indictments. This indictment was pending in a state court for 265 days, 59 or 60 motions made before application was made to the Federal tribunal.

The next case after it ---

Q When were those returned?

A These indictments were returned on June 20 of 1967 and application was made on the first indictment ---

Q And what was ---

A -- to indictment on March 12, 1968 application first made for the first time to a Federal District Court.

Q What was the date of the three-judge court decision?

A I don't have the exact date at the moment. June 1968, Your Honor. This case was ordered reargued. That may account for it.

The next case, Gunn against the University Committee, is not yet argued. Again there you have no pending prosecution because the state tribunal had dismissed it.

Q There was a question from Justice Harlan just a while ago, but I didn't quite understand it. How long ago was that judgment rendered?

A About June of 1968.

Q And there was no injunction?

A No, the injunction was denied.

Q You explained, I think, why the state hadn't prosecuted but I didn't get it.

A We did prosecute two of these men.

Q Why didn't you prosecute them all?

A The reason is that it was agreed that the -- well, to be very honest, the Assistant District Attorney in our office agreed with the other side without my knowing about it and without District Attorney Mackell knowing about it, that he would await the outcome of decision from this tribunal. That is why.

Q And the prosecution of the two -- what were the charges?

A On the conspiracy to commit murder in a separate indictment.

Q Right.

A And they were convicted in June.

Q What are the charges against the others?

A Conspiracy to commit murder. They are also involved in ---

Q Conspiracy to commit murder of two named persons and there has been no injunction, and yet the state has held it up without prosecution. Is that right?

Q Counsel, I think you responded to the wrong question. Would you state again which were the ones on which the prosecution proceeded and which were the prosecutions which were postponed?

A We had two indictments based on the same Grand Jury menace, Mr. Chief Justice. One was the present indictment involving the 15 defendants. The other was against two defendants, who are also included in the 15.

The second indictment was the conspiracy to commit murder in the first degree.

Q And you proceeded with those.

A We proceeded and tried them because no application was made to a Federal tribunal, Your Honor. They were convicted and that case is now pending in this Court for certiorari under 1668 Miscellaneous.

Q What were the other charges?

A The charges in the first indictment were the possession of these weapons in 41 of the 48 counts, conspiracy to commit arson in one of the 48 counts?

Q How many weapons were there?

A There were 41 separate weapons.

Q 41 weapons, charged with having them contrary to law?

A Yes, Your Honor, under the laws of the State of New York.

Q How many people?

A Ten of the fifteen appellates in this case.

Q I do not fully understand why they were not prosecuted.

A I can't in one indictment proceed against you on the certain count and let the rest hang in abeyance. I can't separate them.

Our state court ---

Q Why did you have to separate them?

A Because they will regard that as double jeopardy. They will say jeopardy attaches if you go ahead with it. One counts an indictment and disposes of the conviction, then you can never prosecute for the other.

Q Well, you could have gotten more indictments if that is your trouble.

A We did not anticipate at this time that this indictment was returned that there would be any resort to the Federal Court. This is a ---

Q But there has been a resource and you don't take it was legal.

A I wouldn't want to commence to put this case in before a Grand Jury again while it is pending in this Federal tribunal. I think that would be a little unfair.

Q Well, why?

A Because I think those ---

Q Those are serious crimes that they are guilty of.

A There is no question about it. But may I add also that I do not want to prejudice any of these appellants in matters not connected criminal anarchy. Under pending indictments in our county alone we have a rope around them.

I may add this, too, if I may, that this type of interruption of a state criminal proceeding does not give us, the states, the opportunity to respond to charges in the indictment. Now in the Brandenburg case this Court pointed out that there was no refinement of the charge in that case either by the trial judge or by the highest court of the State of Ohio.

In our case there are many more stages of refinement that this proceeding has interrupted. For instance, at page 89 of the appendix to my brief, Section 295-g of the Code of Criminal Procedure says, "Mandatorily in the form of indictment that we use, which is a short form indictment, the District Attorney shall deliver a bill of particulars to the defendant provided he applies to the judge for one."

The first stage of refinement is that we would have to particularize what we rely on to convict this defendant and we

must do so mandatorily. It is not in the discretion of the state court judge to deny it.

Second, at the trial in this case the trial judge will have to give instructions to the jury. At that time he can clearly state and incorporate anything that has been laid down by this Court in Brandenburg and by the highest court of our state in Epton.

Third, the highest court of the state will review this conviction and we are reminded in the 1947 case coming from New York County against New York -- the opinion by Justice Reid, the name escapes me, I worked on it myself -- that if the highest court of the state amends a statute by construing it, then those words of the highest court of the state must be taken to be part of the state statute itself.

I thank you.

May I ask just one thing, Your Honor. One of my assistants -- I have no reason to know why a greater privilege to use force is allowed when political dissent is involved than, for example, in self-defense or defense of another or defense of your habitation.

Just because you are attempting to overthrow the Government, it seems to me, does not give you a broader privilege to use force than if you are committing an ordinary crime of robbery.

Now as between robbery and criminal anarchy there is

this distinction. If a robber sets out and succeeds in getting the loot, taking it from a client, he is not home free, because he may later be apprehended and put in jail.

But if an anarchist overthrows the local government, sets out to do it and succeeds, then he is home free. There is an epigram from Sir John Harrington in the 17th Century. He says, "Treason doth never succeed. What is the reason? For if treason succeed, none dare call it treason."

In other words, the person who succeeds in overthrowing the Government has bought himself amnesty and immunity.

Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Marcus?

ARGUMENT OF MARIA L. MARCUS, ESQ.

ON BEHALF OF APPELLEE MACKELL

MRS. MARCUS: Mr. Chief Justice and may it please the Court:

Counsel for appellant Samuels in his brief his brief has asked that the clear and present danger case which this Court approved in Dennis be overruled. He has not suggested any substitute test. It is apparently his position that advocating the overthrow of the Government must always be a form of protected speech, regardless of the content, regardless of the contest or of the circumstances.

This interpretation of the First Amendment is erroneous because it totally ignores the physical danger that can be

created by speech, as in the real situation of a man setting fire in a crowded theater. We must look to the intent and possible consequences of speech in order to determine whether it is in the protected area.

In the case at Bar the entire fabric of the act in question was intent to use force against both state and local authorities.

Aside from the nonspeech elements, which have already been described, the act of speech was very far from an intellectual discussion of doctrine, but instead centered around organizing youth for active violence in Queens County, how to use pipes and gun power for the making of bombs, and proficiency in scare tactics.

Without the anarchy statute only the other counts not requiring sentence would proceed and the indictment would have to be dismissed against approximately ten defendants, even though their actions indicated clear and present danger.

It is not difficult to apply the clear and present danger test and the required showing of incitement to action to these charges. There are reasonable grounds to believe that the threat to the state function is imminent and about to commence.

This Court made clear in Dennis that even where an attempt to overthrow the Government is likely to fall short of complete achievement, it presents a sufficient evil for the state

to prevent. The Court said, and I quote: "The damage which such an attempt would create, both physically and politically, to a nation, makes it impossible to measure the validity in terms of probability of success."

These words are of particular significance in light of the indictment here. In New York City the cutting off of electrical power by sabotage combined with arson in the subway transportation lines would not only paralyze the central governmental services, but would create the kind of chaos which would prevent the state from organizing and governing effectively.

New York has a right to prevent advocacy, which is one step before the explosion. Counsel for appellant Fernandez pointed out that the clear and present danger test and the climate of the incitement is not contained on the face of the statute, but this Court made clear in Dennis that it does not have to be in high fervor in the statute, but that it is a case of judicial applicability that can be read in and New York Court of Appeals has already done so.

Appellant's claim that the statute at issue will have a deterrent effect upon activities, such as advocacy of unpopular ideas. Analysis will indicate that there can be no such deterrent in this case. Prosecutions under both the old and the new statutes must be governed by absence of conduct. This interpretation places mere advocacy outside the gambit of the statute. Thus the only group which not be affected by the Epton decision would

be a hypothetical group who was deterred by the statute prior to May 1967, but who cannot be prosecuted for any of their activities as the present law forbids penalizing advocacy which presents no clear and present danger.

Thus, this hypothetical group cannot even be identified and if they were deterred, it was by a statute which no longer existed. The hypothetical rights of this hypothetical group will certainly not present any actual controversy. And as this Court rests now in Golden vs. Zwickler, the decision rendered on such facts will be advisory and therefore inappropriate.

Appellants says that they were not given notice, that their conduct was included in the statute. The statute was made narrower by the Epton interpretation, therefore there is no question the statute is written to provide warning of its applicability of the conduct here involved.

Furthermore, the hard-core activity at issue, as the lower court pointed out, lie at the very center of the statute's circumference. As indicated by this Court on the procedural issue, Congress has constitutional power to provide that all Federal issues be tried in the Federal Courts, that all be tried in the state courts or that the jurisdiction of such issues be said.

Congress is constitutionally free to establish the conditions under which civil or criminal proceedings involving

Federal issues may be removed from one court to another.

While the right to free speech and the right to due process are conferred by the Constitution, the question of proper forum is statutory. Such is plainly precluded in injunctive relief pending prosecution.

The counsel for appellant Fernandez argues that declaratory relief would not violate the statute and would afford essentially the same remedy. However, the rendering of such relief would frustrate the purpose of Section 2283 and destroy the principles of comity between state and Federal courts, and an inevitable destruction of state prosecution would occur.

State courts have the same duty and power to rule upon Federal constitutional issues in the same ways as Federal Courts and in most cases where a prosecution is already pending, this would adhere in resolving the issues in the state courts.

The statute is over-broad. The states have the same power as the Federal Courts to strike it down and prevent a chilling effect upon First Amendment rights. I think the Federal removal of the statute which was referred to earlier by Mr. Justice Marshall provides evidence of congressional intent to keep places in the state courts where there they are pending prosecutions that are already commenced.

The removal statute allows the termination of state proceedings only in very narrow circumstances, and this provides congressional guidance on the issue of declaratory judgment.

As the clear and present danger test is one of judicial applicability, as this Court found in Dennis vs. The United States, the application of this statute to appellants can only be determined upon a full record in the state court. The need for such a record supplies a further ground for nonintervention in this case.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Marcus.

I think your time is fully used, Mr. Rabinowitz. Thank you for your submissions. The case is submitted.

?? MR. LUDWIG: May it please the Court, if the Court would relieve the District Attorney of Queens of the stipulation that was entered into long ago about delaying this prosecution pending the disposition by this Court, we will immediately prosecute him tomorrow morning.

MR. CHIEF JUSTICE BURGER: Well, I think at the moment at least we have no power to get into question. We have heard what you have had to say about it.

Thank you.

(Whereupon, at 2:40 p.m. the argument in the above-mentioned matter was concluded.)