In the

Supreme Court of the United States

STANLEY T. KUSPER, JR., et al., Appellants,	)	
v.	)	No. 71-1631
HARRIET G. PONTIKES, et al., Appellees.	)	

Washington, D.C.
October 9, 1973

Pages 1 thru 43

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

STANLEY T. KUSPER, JR., ET AL., Appellants	:	
v.	:	No. 71-1631
HARRIET G. PONTIKES, ET AL., Appellees	:	

Washington, D. C.

Tuesday, October 9, 1973

The above-entitled matter came on for argument at 11:50 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ALDUS S. MITCHELL, ESQ., 110 South Dearborn Street, Chicago, Illinois, 60603, for the Appellants.

RAY JEFFREY COHEN, ESQ., One East Wacker Drive, Chicago, Illinois, 60601, for the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-1631, Stanley T. Kusper, Jr., et al., against Harriet G. Pontikes, et al.

Mr. Mitchell, you may proceed whenever you are ready.

ORAL ARGUMENT OF ALDUS S. MITCHELL, ESQ.

ON BEHALF OF THE APPELLANTS

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

I represent the Board of Election Commissioners of the City of Chicago.

Our case is here on appeal from a decision and judgment of a three-judge District Court in the Northern District of Illinois, finding a section of the Illinois Election Code unconstitutional.

The section that's involved is Chapter 46, Section 7-43(d) of the Illinois Revised Statutes. That section provides that there can be changes in participation in political party primaries only if 23 months has elapsed since the time that the voter has last participated in a primary election.

I think it is important here that this Court understand that the territory of the Board of Elections Commissioners of the City of Chicago encompasses the City of Chicago and four suburban towns at the time that this case came to the court.

Those towns were the towns of Berwyn, Cicero, Stickney and Lyons.

In addition, the City of Chicago is divided into fifty wards and in the fifty wards and the four suburban towns there are approximately 3,500 precincts.

What we have in this case, is a single voter from the 36th Precinct of the fiftieth ward in the City of Chicago who brought an action claiming that Section 7-43(d) of the Illinois Election Code deprived her of the right to participate in the primary election to be held on March 21, 1972.

She filed a complaint, asking that Section 7-43 be declared unconstitutional. In that complaint, she alleged that she had voted in the Republican Primary in 1971, the Republican Party Primary for the Chicago Municipal Officers, that there was Section 7-43(d) of the Code that prohibited her from voting in the March 21, 1972, Democratic Party Primary election, and she asked the court to find that that section deprived her of rights guaranteed and protected by the Constitution of the United States.

I think that this case presents two basic problems, two basic differences, between the plaintiff, the appellants here, and the defendants who are appellants here, and the plaintiffs, and that is whether or not the courts, the Federal Court system, has a right in every claim made by a voter to take jurisdiction and to decide that question, or whether or

not the Federal Courts are limited by the terms of the Constitution of the United States, particularly the Tenth Amendment, to those situations in which there is a demonstrated interference with a right that is granted by some other section of the Constitution.

I don't think that there is any question here that there is a right to vote, but in the case that is before the Court, the claim that there was a denial by any section of the Illinois Election Code, is erroneous.

What Mrs. Pontikes complains about is that she is not permitted to participate in primary elections as she sees fit.

The State of Illinois has seen fit to set up regulations which, in their effect, are to protect the integrity of political parties, and it is not just the integrity of the Democratic and Republican parties, but it is designed to protect the integrity of any political group which comes together and asserts itself under the terms of the Election Code.

The complaint that Mrs. Pontikes brought, we believe, was insufficient to warrant the District Court, in undertaking to hear and decide the case, to bear on its face-- the most tha she says is that she desires to participate in an election, a Democratic Party Primary Election, and that the section of the statute involved here would prevent her doing so.

I think that a look at the statute discloses that that

just is not true.

Q Mr. Mitchell, Judge Marovitz who was with you on the merits below, disagreed with you on your procedural point here, didn't he, and agreed with the majority of the District Court?

MR. MITCHELL: Yes, Mr. Justice, but we take the position that Judge Marovitz was wrong on the procedure. This was a case that should never -- in which a three-judge court should never have been convoked, because the complaint, on its face, was insufficient to state a claim upon relief could be granted in the District Court.

There is certainly no claim here of any discrimination by the Illinois Election Code between the plaintiff and any other citizen in the State of Illinois, and there is no claim that there is any denial of due process as might have been involved in Williams v. Rhodes. It is just the flat assertion that she will not be permitted to participate in the Democratic Party primary in 1972, that's a statewide election, because she had participated in the primary election for the Republican Party for municipal officers in the prior year -- within twenty-three months of the election that was to be held on March 21, 1972.

I think that there were a series of problems that were overlooked by the judge to whom the case was originally assigned.

Even if you get past the hurdle of whether or not the complaint states a claim upon which relief may be granted, I think you run head-on into the question of whether or not it is a case that ought to be heard by the Court.

In Illinois, there had been an interpretation, a construction of the statute involved, in Faherty v. The Board of Election Commissioners, in which the Illinois court had decided that participation in a statewide primary would determine how you could participate -- the party's primary, that you could participate in is at the municipal officers level.

Now, I think that in the opinion of the District Court, they mentioned that they did not believe that the Constitution required, or permitted, that these people -- that citizens, voters, be locked into a particular political party at every level of Government, or at every level of politics.

We do not argue --

MR. CHIEF JUSTICE BURGER: We will resume there after lunch.

(Whereupon, at 12:00 o'clock, noon, oral argument in the above-entitled matter was recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Mitchell, you may continue.

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

I think as we broke, I was speaking to the question of the complaint which had been filed by Mrs. Pontikes in the case at bar.

I had just suggested that she had not made any allegations in that complaint indicating that she claimed any denial of equal protection, nor had she made any claim that the statute denied her due process of a sort that the Court had spoken to in Williams v. Rhodes.

I think that these -- the fact that these allegations were not made raised serious question as to her standing to maintain the action.

I think that the Court for quite a long time and, more recently, in Jenkins v. McKeithen had decided that unless the person bringing the lawsuit could indicate in some fashion that they were going to be harmed and damaged in some way differently from the way in which the other members of the community would be harmed by the statute, that they had no right to maintain the lawsuit.

I think that all of these are questions that were

in the busom of the judge to whom the case was originally assigned in the District Court, at the time that a motion was made to convene the three-judge court pursuant to the statute. I think that the District Judge, at that point, did not carry out his responsibility under the laws, the rules and the law, by searching this complaint and deciding all of these questions before convoking that three-judge court -- before asking the chief judge of the Seventh Circuit to convoke that three-judge court.

Q The complaint seems to mention only the alleged right of -- right to be free from an invasion privacy, allegedly protected by the First and Fourteenth Amendments, is that right?

MR. MITCHELL: I think that -- well, they allude to the First and Fourteenth Amendments --

Q That's all, isn't it? The right to be free from an invasion of privacy protected -- allegedly protected by the First and Fourteenth Amendments. That's all there is in the complaint, isn't there, so far as the Federal Constitution goes?

MR. MITCHELL: That's correct.

Q But you only raise one question on your question presented.

MR. MITCHELL: I don't understand.

Q You only raised one question on your question presented, and I don't see it any place in there. This point

you are now making.

MR. MITCHELL: Well, I think that we have raised this in the section of the brief where we suggest that the --

Q What about your question presented on page 3 of your jurisdictional statement?

MR. MITCHELL: Well, I think that this is necessarily included in the questions that we presented in the jurisdictional statement. And I think that the rules provide --

Q You keep saying questions. It was one.

MR. MITCHELL: But, I think that the jurisdictional questions, or questions that were necessarily included in any question that is presented in this Court -- if there was no jurisdiction, I think that this Court has determined that it has a right to look at that question, and to decide that question, no matter what other questions might have been raised by the parties.

Q Well, I would submit that in the future if you had those it would be better if you raised them --

MR. MITCHELL: I will take note of that --

Q Specifically.

MR. MITCHELL: And do that, Mr. Justice Marshall.

Q You did set them out on page 4 of your brief, as I recall.

MR. MITCHELL: On page 4, we did set out the questions, but we thought that those were necessarily included in the

questions that we had set out in the jurisdictional statement.

The -- I think that once the question of the three-judge court had been presented to the District judge, and the court had been convened, that there were two questions that faced both the District judge before the court was convened and the court at the time it was sitting, and that was whether or not this was a -- the sort of question that the Statute 2281 had considered to be within the jurisdiction of the three-judge court, whether or not this was a local question which should be decided by a single judge. And if that question was answered in the affirmative, i.e., that it was a local matter, the three-judge court should have returned the matter to a single judge.

In this case, we have a single individual who is a resident of one precinct out of some 3,500 precincts within the jurisdiction of the Board, who claims to be affected by a statute which, on its face, seems to show that there are some areas in the State of Illinois which will not be affected by the terms of that statute.

The jurisdiction of the Board of Elections Commissioners in this case, is limited to the City of Chicago. The other areas in the County of Cook do not have the Republican and Democratic Parties presenting candidates for election for municipal offices. And we suggest that, in that circumstance that this is the local situation that is not included within the

jurisdiction of the statutory three-judge court.

But, I think, even more important, even if there is jurisdiction, I think the Court faces a further problem and that is the question of whether or not the Court should hear and decide the particular case that it is presented with.

We would suggest here that in the light of the fact that the Illinois Supreme Court had not considered this statute on the factual situation that was presented in this case, that this was a proper case for the Court not to construe that statute, but to allow the Illinois courts to construe it.

The Illinois Court had considered the case -- considered the statute -- in the case of Faherty v. The Board of Election Commissioners of the City of Chicago -- in determining whether or not participation at the statewide primary level would determine the political party primary that a voter could participate in in the municipal officers primary. They had decided that it did.

We suggest that that decision does not -- is not a decision, or an indication, that it would decide the obverse of that question, that is, the question of whether or not participation in a municipal primary, which Mrs. Pontikes alleged here, also prevents a change in political party primary when the statewide primary is being held, that these are questions that should be left to the Illinois courts.

I think that the Court has, in numerous cases, decided that where a statute is capable of a construction which would prevent the statute from being determined to be unconstitutional, that the presumption should be that it will be construed in that fashion and the courts that were primarily concerned with statutory construction should be allowed to construe the statute. It was not done in this case though there is a ready means of that in the State of Illinois because there is a declaratory judgment statute, and the Illinois Supreme Court has decided that election matters, or matters which can be determined under that declaratory judgment action -- declaratory judgment statute -- and under that statute, declaratory judgment matters were given preference over other matters that are pending in the courts.

So that this could have been quite rapidly done, probably in time for a decision to have been made on the construction to be given to that statute before the election, in all probability in time for the Federal court to have considered the matter if the plaintiff felt that the construction was erroneous and left open the question of whether or not the statute was constitutionally deficient.

We think that in these circumstances the Court should have abstained and the matter should be returned to the Illinois court, so that they might consider the statute rather than having to live with an interpretation by a Federal court which

is not used to dealing with the vagaries of the Illinois Election Code.

The statute here is a part of an integrated scheme for carrying on elections and there are numerous other aspects of the Election Code that are affected by a decision that Section 7-43(d) of the Illinois Election Code is unconstitutional

We have the matter of determining who will participate in the election as election judges, who can be canvassers, who can sign nominating petitions, and that sort of thing. With no provision for identifying these people, of course, we are left open with the -- with no means of identifying them, other than what they say, and the Code does not provide for any affidavit of identity, as some States seem to provide for.

Q Mr. Mitchell, as I understand it, the Illinois courts have held that this statute is applicable to somebody who has voted in a one party primary in a State primary, and now wants to vote in a different party primary in a municipal election, but you tell us, I think, that the Illinois courts have not decided the opposite side of the coin, which is presented here, and that --

MR. MITCHELL: That's correct.

Q -- at least arguably, the Illinois courts might decide that this statute is not applicable to the situation that this plaintiff found herself in. Is that right?

MR. MITCHELL: Well, the courts could decide that it

was applicable on -- both on the statewide level, 23 months, on the municipal level for 23 months, and there would be no cross effect between them.

Q Well, your courts have already decided there is a cross effect when you go from State to municipal, has it not -- or did I misunderstand it?

MR. MITCHELL: They have decided that.

Q They haven't decided whether there is a cross effect when you go from municipal to State?

MR. MITCHELL: That's correct. But we have also the problem, I think, that this statute and this case points up, and that is that there are just a few areas in Illinois that would be affected by this statute. And the Court, looking at it today, might well decide that it -- that the effect is not as you have raised the question that it might be, because it would be a denial of Equal Protection to some of the citizens in the State of Illinois.

Q You mean --

MR. MITCHELL: I don't know what the Illinois courts would do, but I think that it is a question that should be left to the Illinois courts, in view of the fact that Illinois is mandated by the Constitution to carry on elections.

I think it is mandated to protect the rights of citizens who participate in that election, and this Court has indicated that the Federal courts have the -- have jurisdiction

to consider whether the States' procedure for carrying on elections pass Constitutional muster.

I think, too --

Q What would be your position on the merits in the State court or in this Court as to whether it is a denial of Equal Protection?

MR. MITCHELL: Well, I think that it raises serious questions where some parts of the State of Illinois have to live with the effect of a statute like this and other areas don't, just because the major political parties decide to put forth candidates in some cities and not in others.

Now, I am not sure what my position would be. It would depend, I think, to be quite candid, the side that I was on. I would be an advocate -- at this point, we would make an effort to defend the statute as it stands.

Q As a statewide application?

MR. MITCHELL: No, as to the application in the various cities where the major parties present candidates.

Q In other words, limited application to sections of the State. Is that the position the State takes? That the statute is of limited application to sections of the State?

MR. MITCHELL: It is.

Q And your argument, then, is that not being of statewide application, it is not a case for a three-judge court?

MR. MITCHELL: That is correct. There are only ten

Boards of Elections Commissioners --

Q If in some manner we reach the merits here, or if it were referred to a State court and you had to take a position on the merits, would you find it difficult -- would the State find it difficult to defend this statute as its written, or not?

MR. MITCHELL: I would find it difficult in defending the statute. I think that I would have to urge that the application is on two levels, one on the statewide level and another on the municipal level, because of the fact that all of the political parties don't put forth candidates at both levels. At the municipal level --

Q Would you try to defend it if, in fact, it is to be read as having limited application only to certain sections of the State, this 23-months requirement; would you try to defend that against an Equal Protection challenge?

MR. MITCHELL: No, sir.

I think that the court below has in considering the constitutionality of the statute, has, in effect, just substituted its judgment for that of the Legislature of the State of Illinois. I think that this is in violation of the Constitution, particularly the Tenth Amendment, which gives to the State the right to carry on its affairs in any fashion that it sees fit, so long as it does not deny to the people the rights guaranteed by the Federal Constitution.

The election process, I think, on the basis of past cases, is suspect where there are classifications which this Court has described as being invidious, and I think that most of these have been on racial basis, or geographical basis, or wealth or age, or sex, I think, most recently.

There is none of this involved in this case. The only questionis whether or not, if we get to the question of the constitutionality of the statute, is whether the 23 months that the State of Illinois feels is a proper time for persons to be identified with a political party before you are allowed to participate in the affairs -- participate in the primary of that party, is too long.

I think that the State of Illinois has decided that, in their judgment, it is necessary to have this length of time or some length of time, and the 23 months becomes a convenient time. In view of the fact we only have elections approximately every 23 months, as a usual matter, at the State level, that this is a reasonable length of time to protect the identity and integrity of these political parties.

I think that this Court, in prior cases, has determined that protection of political parties is a matter of legitimate State concern, and has approved means of protecting those parties.

I think that there is nothing in the Constitution of the United States which would suggest that the 23 months is too

long, where the only effect of that 23 months would be that the participation in some bi-election might be affected by that 23-month rule.

It is only in the case of the special election that that would be effected.

If the Court construes the statute as being a limitation on participation at separate levels of Government, i.e., the municipal level and the State level of Government, I think --

Q Would you care to say whether you think the interests of the State of Illinois could be served by, let us say, a 12-month period? And if 12 months isn't enough, why not?

MR. MITCHELL: Well, Mr. Chief Justice, the question of whether or not the interests of the State would be served by 12 months, I would say that, yes, it could be, but there is no reason for this Court to so limit the Legislature of the State of Illinois.

Q I am not suggesting that we would. I was just probing to see whether -- what your reaction was to that time factor.

MR. MITCHELL: Well, we look at the time factor in terms of other sections of the Code, those sections that require -- to be a candidate, that you must demonstrate your allegiance to a party for a period of 24 months prior to the filing date of your nominating papers, for periods of time to be

election judges, for periods of time to be signatories on nominating petitions. I think that all of this has to be considered in considering this section of the statute, which only serves identification, does not change the other sections of the statute which have these other time requirements. They are just not involved in this case, but they are affected by it, and it leaves the election code in Illinois somewhat up in the air and makes it quite difficult to protect the rights of these people who cast votes, in protecting the integrity of the vote, and the integrity of the election process.

Q Mr. Mitchell, does the fact that a statute could be more narrowly drawn mean that it is necessarily unconstitutional

MR. MITCHELL: No, sir. I think that this is a matter, that unless the Court finds that it does deprive the citizen of some right which is in some significant way, it should not interject its views into the judgment of the State Legislature in determining these times that they feel are proper.

Q What if, in order to change parties, it was essential -- the waiting period was so long that you would have to miss a primary?

MR. MITCHELL: I would have problems with that, but that is not the case that we have here.

Q It is if it applies to municipal elections.

MR. MITCHELL: I would agree. That would be the case if it applies to municipal elections.

Q Well, it reads that way on its face, doesn't it?

MR. MITCHELL: But that fact is an accident because -

Q But, didn't this come from the three-judge court?

MR. MITCHELL: That's correct.

Q Didn't the three-judge court assume, or hold, that it applied to municipal elections?

MR. MITCHELL: It assumed.

Q But, if it does, do you concede you have a problem with Equal Protection?

MR. MITCHELL: In the case before the Court, it was an accident that this could be raised. If the case had been filed in 1973, that fact could not have been stated -- could not have been alleged truthfully.

Q Why?

MR. MITCHELL: Because we do not have a municipal election until 1975, so that if the case had been brought this year, she could not say that she would have been affected. And I don't think that she would have --

Q Are municipal primaries every year?

MR. MITCHELL: Four years.

Q Every four years. And your statewide primaries are every two years?

MR. MITCHELL: Every two years.

Q But they don't occur in the same year, that's the trouble.

MR. MITCHELL: That's correct. In the new Election Code, that will be changed.

Q How is it going to be changed? Right now, municipal elections are off-year; that is, if they are even numbered years, they are statewide. It is odd-numbered years when you have the municipal primaries?

MR. MITCHELL: That's correct.

Q And how is the new Election Code going to change that?

MR. MITCHELL: Well, number one, it will make all elections at the same time, the same period, same days in the month --

Q In other words, they will all be in the same primaries, whether municipal or Statewide, will all be in the same year?

MR. MITCHELL: No, sir, that they will be in the same month of whatever year they are held. Right now, even that --

Q Does the new code change the 23-months requirement?

MR. MITCHELL: Is it difficult to change it?

Q No, does the new code change the 23-months?

MR. MITCHELL: It does not.

MR. CHIEF JUSTICE BURGER: Mr. Cohen.

ORAL ARGUMENT OF RAY JEFFREY COHEN, ESQ.,

FOR THE APPELLEES

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

I would first like to cover the history and the chronology of the election, since it has been raised.

First of all, the new election code has not passed the General Assembly yet.

Secondly, we have municipal elections in different municipalities at the same time we have them in Chicago, and the are partisan elections, where there is a Democratic party and a Republican party.

Q Well, is that to say that municipal primaries are all on the same date throughout the State wherever a municipality has a primary?

MR. COHEN: No, but many are the same date. Going back, historically, in April of 1968, certain of the 102 counties in the State of Illinois had primaries where candidates were running in the Democratic and Republican primary.

In June of '68, there was a statewide primary. That was before the timing of it was changed.

In October of '69, there was a special Congressional election which affected one-twenty-fourth of the voters of the State after Congressman Rumsfeld was appointed to the Federal position by President Nixon.

In March of 1970, there was a statewide primary with a new change, changing it from June to March.

In February of '71, the City of Chicago, the City of Waukeegan, which, I believe, is about the fifth or sixth largest municipality in the State, and several other municipalities, held their primary, where Democratic and Republican parties fielded candidates.

March of '72, was the State primary, which was in question here.

In April of '72, there were again county elections in certain -- county primaries, excuse me -- in certain of the counties of the State, including DuPage County, which is the second largest county in the State.

In April of '72, excuse me, in June of '73, there was a special Congressional election in the City of Chicago which included the town of Berwyn, which is part of the Chicago Board of Elections Commissioners aegis, to fill the vacancy created by the death of Congressman Collins.

Q Those were general elections.

MR. COHEN: No, sir.

In June of '73, was a special Congressional election --

Q That wasn't a primary.

MR. COHEN: It was a special primary. I am sorry, sir.

Q All right.

MR. COHEN: June 5th was the special primary. July 3rd was the special election.

And, again, in March '74, the statewide primary is scheduled, and in February of '75, will be the municipal primary in Chicago, and hundreds of other municipalities throughout the State.

So, the idea that this is not -- does not have statewide effect simply isn't so.

As I read the Faherty case, the Court was asked then was, by the plaintiff, "Does this statute apply to me. Will this bar me from changing party affiliation in the primary?" And the Court said yes.

Q In the municipal primary.

MR. COHEN: In the municipal primary, yes, sir.

Q Because she had voted in the statewide.

MR. COHEN: Voted in the statewide primary in '54 as a --

Q Republican, or whatever it was, and wanted to vote in the municipal. And the Court said, in Faherty, no, you can't, because of the statute.

MR. COHEN: Exactly.

And even the dissent of Judge Marovitz, where he disagreed with the finding that this statute was unconstitutional, did not rest it on the fact that it was a municipal primary,

but simply rested it on the fact of compelling State interest which was raised at some length in the brief.

Q What do you have to say about the statewide aspect of this particular --

MR. COHEN: Statute?

Q Well, as it is applied here.

MR. COHEN: Well, it was applied statewide. The Board of Election Commissioners issued a document which went out to every election judge in the 3,500 precincts advising them that the 23-month rule was not in effect. They had a banner which was about this long which was placed over the section of the poster and which stated eligibility to vote which changed that since the decision came so soon before the election. It was given statewide effect.

As is pointed out on page 13 of the appellees' brief, the Board of Elections Commissioners is charged with the responsibility for maintaining the election code within their jurisdiction. There are 103 jurisdictions for elections under the current election code, two within Cook County. The Board of Elections Commissioners and the county handles the rest of the area, and each of the other 101 counties handle their own election. So they each have an election officer who handles it and they must handle it, of course, in the same way. So there is statewide effect to it, and I am certain that no one would say that someone could have one right to vote in

Chicago and another right somewhere else in the State, based on the same statute.

I think -- excuse me --

Q Are you suggesting that no matter what differences there may be in the dates on which municipal primaries are held this statute would disqualify anyone who voted in the statewide primary from voting in any municipal primary for 23 months?

MR. COHEN: In the opposite primary.

Q In the opposite party.

MR. COHEN: In the opposite party, excuse me. Absolutely, of course.

And, what I attempted to point out with the dates, and I hope that I didn't confuse rather than illuminate, was that there will almost always be two elections within a 23-month period. So, very frequently, rather than very rarely, will you have to forfeit your right to vote in one election to vote in another. And I think counsel's use of the term "participate" in a primary is really a misnomer, because you are voting in a primary. I would probably exhaust the rest of my time if I recited the citations of the cases that this court and lower courts have held that your right to vote in the primary is as sacrosanct as your right to vote in a general election.

Q Is it a common thing -- I'll alter that -- I was going to ask you whether it was common in Illinois that as a

matter of general understanding isn't it common that many people will vote in one party in their local elections and prefer the other party in statewide elections? Just because of the experience they have with the results.

MR. COHEN: It would not be my reading of Illinois electoral history that that would be so. The City of Chicago has elected a Democratic mayor consistently since 1931. There are less than five Republican candidates have ever carried the City in any election at any time on a State or national basis since then. Likewise, there are other counties that have not -- that are traditionally Republican both at the local level and at the national level. So there is a great deal of consistency in the State of Illinois. Now, I am not, of course, as familiar with other areas.

I think what we have when we get to the meat of this issue is a conflict in rights. We recognize the right of a State to regulate elections. The right of a State to protect, with limitations, party integrity, but we also recognize the right to vote. And it is alleged in the complaint -- in paragraph eight of the complaint which is found at page 4 of the Appendix, that plaintiff has been denied her right to vote by the application of this statute.

We say that this right, this right to vote must be held superior to the right to protect party integrity. In a case which, to the untrained eye, might seem controlling in this

case, I think the court anticipated that in Rosario. The Rosario decision which, interestingly, was decided one year to the date after the primary which was affected by our case, stated that the New York registration statute was valid. It was valid to require one to register some eight to eleven months prior to a primary, in which primary he was going to vote. But the majority said, in that case, that this was not locking in, and that's the language that's used at 93 Supreme Court, page 1250. Thus, New York's scheme does not lock a voter into an unwanted pre-existing party affiliation from one primary to the next. All that the voter had to do in that case, if he wished to vote in the primary of his choice, was simply register eight to eleven months beforehand.

There are many other States which have registration requirements. California requirement, which was by statute 56 days, has just been reduced by court to 30 days in the case of Gnoffs v. Young, which I believe certiorari was denied on, although I don't have the citation with me.

In California, you register at the time you vote as either a Democrat or Republican, or you register as unaffiliated. You cannot vote in a primary unless you are registered in that party, but you can change your affiliation or you can register affiliation at any time up to now 30 days beforehand. So there, you have the chance to affirmatively do something yourself to enable you to vote.

In the Pontikes case, under Illinois law, the only way you can qualify to vote in the Democratic primary at one point is if you did not vote in the Republican primary 23 months beforehand. So the exercise of the franchise will, in effect, disenfranchise you at any election in the succeeding 23 months where you might wish to vote for or against candidates in the other primary, which is your right.

There was one case on a very similar statute which was decided before our case, and there were two cases subsequent. In the prior case, Gordon v. Executive Committee of Charleston, which is cited in the brief, there is, in a sense, a calendar year requirement. You had to sign an affidavit that you had not voted in the opposite party primary within that year.

Q What State was this?

MR. COHEN: This was in South Carolina.

Q Three-judge court also?

MR. COHEN: Three-judge court. And there, the court -- unfortunately I am reading from a slip opinion that I have been using for the last two years and it is on page 5. I can't give you the citated page -- the court said, "No sound or compelling purpose can possibly justify locking a citizen into a party and denying to him for a full year freedom to change parties. Such an arbitrary restraint upon the voter is both unreasonable and unconstitutional."

Q Is that entirely consistent with Rosario, do you think,

that statement you just read?

MR. COHEN: Yes. I am not asking the Court to disapprove or overrule Rosario. I think that the majority opinion almost anticipated these cases in Rosario when they went on to say that the reason the person was denied the right to vote was not the statute, but his own forebearance from doing the simple act of registration. He was not losing the right to vote because of the way he voted before, but --

Q After the time for his registration had passed, it was the statute and not the time lapse that prevented him from voting in Rosario.

MR. COHEN: Right.

Q Only during a very limited party of the time involved during Rosario, was it his own failure that was responsible for his --

MR. COHEN: But, in New York, if he had voted in a primary in the Democratic party, for example, in 1970, he could have, up until eight or eleven months, whatever the exact figure was, prior to the next election, change his registration and register in the Liberal Party or the Conservative, or the Republican. And I think this was pointed out by the majority. And, I think that's why the Rosario decision differs here, and that's why it is not inconsistent to hold -- to affirm, in this case, despite Rosario.

Q No, I can see that, but I was questioning whether that

number of times up until the deadline without losing your right to vote.

Q Mr. Cohen, you are not here before us challenging the validity of any part of Section 7-43 except (d)?

MR. COHEN: That is correct. 43(d) is the part which refers to a voter changing his affiliation. And another case which is similar and where the implication is -- of our position -- is the Lippitt case in Ohio, where this Court decided that a person was not entitled to a change of affiliation in order to be a candidate for office. There is a very similar case in Illinois, the Bendinger v. Ogilvie case, which is cited extensively in our brief, which was cited by a three-judge panel of our circuit, which decided that a man who had voted in the Republican primary in '71 could not run for office as a Democrat in the primary of 1972. Again, they didn't discuss the problem of municipal. They just assumed that any primary would have the same effect.

Q Now, of course, the Lippitt case is a decision of this Court on the merits.

MR. COHEN: Yes, sir.

Q And how do you distinguish that? That was a four-year interval.

MR. COHEN: That was a four-year interval, and, as I recall, the man wished to change from the Republican Party to the Independent Party to run for Congress.

Q Well, he wished --

MR. COHEN: It was a candidate's case, not a voter's case.

Q So, how, constitutionally, is that different?

MR. COHEN: Well, in the Bendinger v. Ogilvie case, they point out -- and I am sure I cited that section somewhere in my brief, or it must be in the Appendix in my brief before the three-judge panel, that you can preserve party integrity -- because that's the balancing factor -- by preventing a person from running as a Democrat this time and then as a Republican the next time and then a Conservative and then as a Liberal --

Q This man just wanted to change once. He didn't want to change back and forth and back and forth, so far as we know. He had been a Republican now he wants to change to the American Independent Party. He voted as a Republican in the 1970 Ohio Primary Election and now, in 1972, he wants to run as a candidate of the American Independent Party, and there is an Ohio statute that says he can't do that for four years.

MR. COHEN: I think the question of party integrity versus person's rights, there are other cases which have been decided that say almost -- say in effect that it is not a right to hold public office, but a privilege. So, in the face of protecting party integrity, this right or privilege to be a candidate must fall. What I am saying is that the right

to vote is superior to the right to be a candidate.

Q Where do you find that?

MR. COHEN: Where do I find that? In this particular -- it is not mentioned anywhere in the Lippitt case.

Q So how about in the Constitution?

MR. COHEN: I think it is implicit in the cases -- in Bendinger v. Ogilvie case, which I did cite, which was a 7th Circuit case, that there is a difference between the two rights.

Q There obviously is a difference but what -- why does one have a superior constitutional position than the other, and why does either have a constitutional position at all?

MR. COHEN: I think you've hit the nub of it. I don't think the right to be a candidate is constitutionally protected. I do think -- I am certain the right to vote is.

Q Where do you get that?

MR. COHEN: The right to vote?

Q Yes.

MR. COHEN: Well, I believe there are several cases where this Court has determined that it will protect one's right to vote, it will protect one from being disenfranchised.

Q It will protect that activity, as any activity, against a valid claim of denial of Equal Protection of the law, but that's something else again. It will protect your right to cross the street against that kind of a valid claim, but that

doesn't mean the right to cross the street against a red light is necessarily constitutional.

MR. COHEN: Well, Article 2 of the Constitution provides for the right for the people to vote for Members of the House of Representatives, and the right to vote for Members of the United States Senate was added by a later amendment.

Q Are you familiar with a case called Miner v. Haperstat decided by this Court, in which you can find the statement there is no constitutional right to vote. That's the case in which women, a woman, tried to say that the Constitution gave her a right to vote. She was -- except for the fact of being a woman -- she was equally well-qualified in the State to vote and this Court said there is no constitutional right to vote. And, that's, of course, what led to the amendment of the Constitution that gave women the right to vote. So now there is an equal right of women to vote with men, but that decision still stands, I suppose, that there is not a constitutional right to vote. That's the case of Miner v. Haperstat.

MR. COHEN: I submit that if the Suffrage Amendment was passed somewhere around 1920, that would mean that case would pre-date that.

Q Yes.

MR. COHEN: And I would suggest, respectfully suggest, that that should not, and is not, the current state of the law.

Q Well, of course, the Constitution pre-dated even that.

MR. COHEN: Yes, sir.

Q The Suffrage Amendment doesn't say women shall have the right to vote. It says they shan't be denied the right to vote by reason of their sex. It doesn't confer an affirmative right to vote.

Q It confirms a specific Equal Protection right.

Q Mr. Cohen, it seems to me that one could make the argument with some reason exactly contrary to what you are saying that if party raiding is a legitimate State interest that there is more to worry about in terms of party raiding in terms of voter crossover than there is in terms of candidate crossover, that you could have candidates crossing over without running any real risk of party raiding. Whereas, if you have voters crossing over, you do have a risk of raiding.

MR. COHEN: Well, of course, party raiding is a theory that we have. Nobody can determine exactly when it is happening.

Q Well, Judge Marovitz cites an article in the Tribune or the Daily News urging the Republicans to crossover and vote in the Democratic Primary. He thought it was real anyway.

MR. COHEN: I agree, and there are political theorists who would suggest that the results of the election in 1972, the primary, was affected by this, but we are not here to argue political theory. We are here to argue a person's right--

Q Not only political theorists but actual candidates have

been concerned about this. Is this not so? In your area of the country. I recall Senator Humphrey making the statement every two years in primaries in States I am familiar with, Wisconsin and Minnesota.

MR. COHEN: Well, of course, Wisconsin and Minnesota -- and I am glad you pointed that out -- have no requirement that I could find -- there is no bar to voting by past registration.

Q And that is what they were complaining about.

MR. COHEN: Well, perhaps, but Section 201 of the Minnesota Code states the requirements for registration, and it doesn't require party affiliation to be listed.

Q Those are so-called open States, and, as Justice Blackmun said, some political theorists and some practitioners think that an open State opens the candidate and the party to a very dangerous attack on the party system.

MR. COHEN: But, if the argument of party raiding and party integrity is taken to its logical conclusion, then, if this case is affirmed, there will be a disasterous effect on the political party system in the State of Illinois and South Carolina, Rhode Island and New Jersey, which have similar cases that have been decided.

Q How long has this law been in effect in Illinois?

MR. COHEN: Many, many years.

Q Well, I suppose there are those who say you've had a

disaster area there for all that period, but there might be others who would disagree.

MR. COHEN: Again, we are in the realm of political theory. But my point is if Wisconsin and Minnesota and Michigan have been able to exist by having the open primary system, and seem to be thriving and doing quite well, then the argument that this case is the only State that protects the two-party system from dissolving, simply can't hold water, because these States are surviving without it.

Q But, you are talking about two States that have notoriously weak party structures, Wisconsin and Minnesota, where there have been third party elements. Now, that may be permissible as a matter of political judgment on the part of the Legislature, but I would think that if the Illinois Legislature decides it wants to strengthen the two-party system, it isn't required to apply the practice that Wisconsin and Minnesota have applied, perhaps, to get different results.

MR. COHEN: But, there is more at stake than strengthening the two-party system. They have the right to do that if they so choose, but not the point where it disenfranchises voters. The right to protect the party system only goes so far. And one of the cases which I cited in my brief, the Shakman decision, which was interestingly decided by Judge Marovitz, went to the question of what the parties' rights were with respect to patronage, and it recognized that a party can

only go so far and then it encroaches on the rights of individual citizens, and that it is not allowed to do.

Q I am still not clear how you distinguish this Court's decision in Cippollone, if that's the way it is pronounced.

MR. COHEN: Lippitt v. Cippollone?

Q Yes.

MR. COHEN: On the basis that the right to vote is superior to the right to be a candidate, and party integrity may outweigh one but not the other.

Q And how do you get this hierarchy of these two supposed rights?

MR. COHEN: Stratification? Well, number one, I don't think -- again, although Justice Rehnquist suggests that he disagrees, or suggests that somebody disagrees -- again, the question of which protects party integrity, and I refer to the Bendinger v. Ogilvie case.

Q That the right to vote is somehow the right, as you call it, to vote, and one would argue about whether or not there is a right to vote -- but in any event the -- that voting is superior, somehow or other, to being a candidate.

MR. COHEN: That is correct.

Q Whence do you derive that?

Q You say it is a Constitutional right, don't you?

MR. COHEN: Well, I must try to answer both questions at once.

Q I am sorry. Excuse me. I didn't realize I was interrupting --

MR. COHEN: I do believe, despite the decision that you cited -- the Women's Suffrage case -- that the right to vote is implicit, if not explicit, in the Constitution, because we are to elect a House of Representatives, and we are to vote for them. Somebody has to do the voting.

Q Well, I think the Constitution says more than that, doesn't it; doesn't it say that the States shall set the qualifications for those who vote?

MR. COHEN: Right. But we know that there are a long line of cases where the Federal courts have said, and this Court has said, that certain requirements that the State has set forth are unreasonable, and have gone too far.

Q Right.

MR. COHEN: And I think that the Lippitt case, being it is involving a candidate, I think that is where the distinction lies. And I think it is a valid one. The Lippitt case was cited both in Nagler v. Yeomans, which is the New Jersey case, where the New Jersey statute is in effect, where the three-judge panel held that the fact that you had to require two successive primaries to elapse before a voter can change his affiliation is patently over-broad in scope.

Q Cases such as Williams v. Rhodes and Genese v. Fordsen and so on, dealt expressly with the so-called right to

be a candidate. And, as I remember, it didn't denigrate that right below that of voting, did it?

MR. COHEN: I don't think there was ever a -- I don't think the question arose which is the superior right in that case. What Williams stands for, as I understand it, is that a State cannot arbitrarily place too heavy a burden on a candidate's attempt to get on the ballot, by signature requirements. Lippitt said it is a valid thing to require that if he is going to run as a candidate of a particular party, that he be a member of that particular party.

Q For four years.

MR. COHEN: For four years.

Q And that he can't run on a different party if he has voted in another party's primary within the last four-year period.

MR. COHEN: That is correct.

Q And that was affirmed by this Court less than two years ago.

MR. COHEN: Thank you.

Q Could I ask you just one more question?

MR. COHEN: Yes, sir.

Q In your case, would you find any difference between the validity of this statute as applied to State elections and as it applies to Federal elections?

MR. COHEN: Absolutely not, because State elections

are held at the same time that Federal elections are held in quadrennial years.

Q Would you say that a State may no more qualify the person's right to engage in a State primary than in a Federal primary?

MR. COHEN: Yes, I would.

Q Although the right to vote in State elections you wouldn't argue is guaranteed by the Federal Constitution, would you?

MR. COHEN: It is not stated specifically there, and I suppose that a State could have a system of appointing all its officials, I suppose, and that there would be no need to elect a general assembly or a governor or any officials.

Q Well, then, which way are you going? Are you saying, then, that the Federal and the State elections in this case stand on the same footing, that it is just a plain straight Equal Protection argument, unaffected by any constitutionally guaranteed right to vote?

MR. COHEN: No. What I am saying is that the State of Illinois cannot limit your right to vote in a Federal election or a State election in a different way. In other words, they could not say that you would be allowed to change primaries to vote for Federal officers but not change party to vote for State officers.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:50 o'clock, p.m., the case in the above-entitled matter was submitted.)