In the

Supreme Court of the United States

C.1

COMMUNIST PARTY OF INDIANA, et al.,	)	
	)	
Appellants,	)	
	)	
v.	)	No. 72-1040
	)	
EDGAR D. WHITCOMB, ETC., et al.,	)	
	)	
Appellees.	)	

Washington, D.C.
October 16, 1973

Pages 1 thru 46

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

IN THE SUPREME COURT OF THE UNITED STATES

COMMUNIST PARTY OF INDIANA, ET AL., Appellants,	:	
v.	:	No. 72-1040
EDGAR D. WHITCOMB, ETC., ET AL., Appellees.	:	

Washington, D. C.
Tuesday, October 16, 1973

The above-entitled matter came on for argument at 1:00 o'clock p.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:

SANFORD JAY ROSEN, ESQ., 145 Ninth Street, San Francisco, California 94103; for the Appellants

THEODORE L. SENDAK, ESQ., Attorney General of Indiana, Indianapolis, Indiana 46204; 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 No. 72-1040, Communist Party of Indiana v. Edgar D. Whitcomb, Inc.

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

ORAL ARGUMENT OF SANFORD JAY ROSEN, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This appeal brings before the Court a challenge to a provision of the Indiana election law that conditions political party access to the ballot on the making of a disclaimer that the party does not advocate overthrow of government by force or violence.

Plaintiffs tendered signatures on petitions for inclusion on the ballot on August 31, 1972. The defendants, the Election Board of Indiana, rejected the petitions the same day, relying on the provision of Indiana law and an opinion rendered on August 28th by the Indiana Attorney General. The statute specifically provides that the affidavit must state the party does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any government -- any foreign government or political party or group of individuals of any foreign government.

The opinion of the Attorney General took the statute a step or so further, stating as to the particular appellants, the party appellants, the Communist Party of Indiana, that "The Communist Party would not be eligible to appear on the Indiana ballot even if its officers should sign an affidavit because that would be an obvious perjury in view of the Communist Party's stated purposes, and those Indiana officials who would be responsible for placing the Communist Party on the ballot could be subject to federal criminal prosecution as well under the Smith Act and the Communist Control Act, somewhat in terrorem.

The plaintiffs in this action, the Communist Party of Indiana, candidates for the presidency and vice presidency under that banner, candidates for electors of the president and the vice president under that banner, a voter and the class of voters she would represent sued for injunctive declaratory relief against the enforcement of this Indiana statute. The amended complaint, which is the basic document before the Court, was filed on September 8, 1972.

A hearing was held on September 28, 1972, and a decision was conducted on the same day. The three-judge District Court in Indiana ruled that the affiliation clause of the statute, a statute prohibiting affiliation with a foreign government or segment thereof, was unconstitutional on its face. It, on the other hand, specifically validated the advocacy

clause. The Communist Party, as a consequence of this action, and a consequence of the fact that it had very little limited time in which to get on the ballot or to take steps to get on the ballot for the 1972 election, submitted a qualified affidavit pursuant to the order of the court. In that affidavit the party stated by its officers that it did not engage in the unlawful advocacy or the proscribed advocacy.

It went on to state, concerned obviously with the opinion of the Attorney General about perjury sanctions, that the term "advocate" used herein has the meaning given by the Supreme Court of the United States in Yates, "The advocacy in teaching of concrete action for the forcible overthrow of government and not of principles divorced from action."

This affidavit was tendered and rejected by the Election Board on September 29 by a vote of two-to-one. Thereafter, the plaintiffs went back to the District Court, requested an order enforcing the previous mandate of the court, that order was denied on October 4th. A motion to amend subsequently was made, was denied on October 31st, and various attempts by the appellants here and the appellees on the other side were also rejected in an emergency posture by this Court. Both sides then took appeals from the two different decisions of the three-judge court.

On March 19, 1973, this Court summarily affirmed the decision of the three-judge district court to the extent that

that court had invalidated the affiliation clause of the Indiana statute. At the same time, the instant case, the appeal by the Communist Party, its candidates and voters, the court entered an order stating that the question of jurisdiction has been postponed to the hearing of the case on the merits.

Now, what appellants take to be the question of jurisdiction in this case at this point, after all the emergency appeals had been rendered, and after the various actions have been taken in the District Court, is the question of the timeliness of the appeal. And I would like to rest so far as that question is concerned on the brief, we brief that extensively, possibly too extensively, but since the question was reserved and this was the question that appeared to us to be the jurisdictional question, we brief that from page 13 to 15 in the appellants' brief, and unless the Court desires specific argument on that issue, I would rest on the brief and turn to the merits.

Plaintiffs request this Court to reverse and remand to the District Court with instructions to void the advocacy provision of the Indiana statute. We have a number of arguments which I think we have very extensively briefed, but it might be helpful to go over them in order.

Our first point concerns the nature of voting, of standing for public office, and of political parties. These are clearly fundamental interests. Innumerable decisions of this

Court have stated that the right to vote is the fountainhead of democratic rights in our society. In the Bullock v. Carter decision, the Court indicated that the rights of candidacy are so bound up with the right to vote that they are basically inseparable. And of course in Williams v. Rhodes, in other decisions, the Court has indicated its extreme sensitivity to the need of candidates and voters to be affiliated with political parties that are able to place on the ballot of a state or of a national election candidates who are sponsored and clearly stated to be sponsored by given political parties.

To this extent, then, this case involves what the Court has characterized as fundamental interests, and it renders this case, this appeal different from the cases in which the Court has evaluated oaths in other contexts. This is different from an employment oath context, it is different from a barred mission context. In neither of those other contexts, you have the interests being withheld as a result of the oath, achieve the kind of fundamental interests that this Court has defined voting and candidacy in political association. The interest itself, the vote, the candidacy, in those cases you have had a situation in which an interest, admittedly a valuable interest, has been conditioned upon the giving of an oath or an affidavit, and evaluating the oath or affidavit, the Court has been looking, however, so far as the constitutional dimension is concerned, only at the oath or the affidavit

itself.

Here you have to look at both. Both have First Amendment dimensions, the vote, the candidacy and all, and also the affidavit involves a First Amendment dimension.

Now, we submit that this context set of the primacy of voting, that the state has an enormous burden of persuasion of the necessity for any limitation upon voting or candidacy, particularly a limitation that may encroach itself upon First Amendment rights by inquiring into political motivation or ideology of a candidate or a party. The state has no such legitimate nor even -- well, certainly compelling interests in so conditioning voting and candidacy.

The state at one point or another has spoken of fraud and spurious candidacies. Well, it is a little late in the day for anybody to be suggesting that the efforts of the Communist Party of Indiana or of the United States to place candidates before the electorate are fraudulent or spurious. It is a political party. It has been a political party in this country for innumerable years, and it has fielded candidates for high office throughout most of the years that it has been a party in this country.

Subversion, the state points to, or the avoidance of subversion as being a legitimate and compelling interest -- indeed, that is a legitimate interest. Obviously, the state has an interest in avoiding its subversion. So does the

national government. Whether it is a compelling interest in this context is much more open to doubt, but we think that actually it isn't open to doubt, it is not of compelling interest. The state is asking an oath three steps away from office-taking itself. To get on the ballot, you have to execute the oath. To get to the point where you can subvert the government from within, if that is the state's interest -- and I can't conceive of another interest that the state might have and categorize as legitimate -- to get to the point of subverting the government, you have got to win the election, and then the government, by the Constitution, Article VI and Article II, can certainly give the support oath and screen out people who cannot take the support oath before office-taking occurs.

So this oath is placed three steps before office-taking. It is quite an enormous fence that the state is placing around its interests in avoiding subversion.

Q What do you understand the meaning of the phrase "compelling interest" to be?

MR. ROSEN: I understand it to mean that the state has to come forward with an interest that -- I don't want to use the term "out-balances," but --

Q Well --

MR. ROSEN: Well, I think the Court's analysis in the Robel case of how legislation is to be evaluated in terms

of compelling interest is perhaps the most apt. As I recall, it was in a footnote in the Robel case, that the Court discussed the fact that it wasn't talking about balancing as such, it recognized on the one hand that freedom of speech is an important interest to our society and our government; on the other hand, avoidance of subversion and sabotage is an important interest as well. When these two come at one another, seem to be in conflict, then the Court must fall back to a somewhat different analysis and not try to balance one against the other necessarily, but to try to evaluate whether the state has or the government has some alternative ways of securing the legitimate interests which is compelling, and in that case, as you recall, Justice Stewart, the Court ruled that the federal government didn't demonstrate it lacked alternative ways. And in this case, too --

Q Well, the availability of alternative means something else. I didn't mean that my question was an easy one, because I was really asking for information and for help. What do you think the phrase "compelling interest" means constitutionally?

MR. ROSEN: All right. Constitutionally, I think it first means that a burden of proof is shifted, a burden of constitutional proof; whereas, initially, one who comes in to challenge a state law has the burden of demonstrating that the state law is bad wholly on his or her shoulders. When you

establish a fundamental interest or if you are dealing with the equal protection clause, of course, the suspect classification. Then the burden of proof shifts. First the burden of going forward, if you want to talk in evidentiary terms, shifts to the government to come up with some legitimate reasons, some reasons that go beyond mere rationality, which would be the ordinary standard to be applied in the equal protection or the due process area.

Now, having coming up with these legitimate reasons, when the Court states that these reasons not only are to be legitimate but also must be compelling, it seems to me the Court is either talking about a balancing test, which some members of the Court don't view with favor, or it is talking about the least restrictive alternative test. And in either event, it still connotes or pertains I think to a burden of proof.

Q You would think then --

MR. ROSEN: It now has become the burden of proof question rather than the burden of going forward.

Q Do you think the phrase or the concept or the notion of whatever that phrase may mean or reflect compelling interest has any relevance at all in any area outside the area of the equal protection clause?

MR. ROSEN: Yes, I think so. I think Robel indicates that it has some relevance outside of that area. I know that it

first originated in the equal protection clause, but there seems to me in later decisions of the Court to be something of a spillover into the First Amendment area, because of the parallelity in the two tests.

Q Of course, the state -- this is semantics, but it seems to me a little more than that and a little more fundamental than that -- if a state law violates the First and Fourteenth Amendments clearly, then a state can't justify that violation by showing its compelling interests, can it?

MR. ROSEN: Certainly.

Q Because the law is simply unconstitutional.

MR. ROSEN: That's right.

Q Regardless of how compelling the state interest might be.

MR. ROSEN: I would certainly argue that, Your Honor, but the state I am sure would come back and try to fantacize circumstances in which the law could be justified even --

Q It could be unconstitutional and still contintutional?

MR. ROSEN: Correct. Precisely.

Q That is what I don't understand.

MR. ROSEN: And I wouldn't want to try to meet the hypotheticals at this point that the state might attempt to articulate. But I agree with you, Mr. Justice Stewart, that if it is an invasion of the First Amendment, the state is justified.

Q That is the end of it, isn't it?

MR. ROSEN: That should be the end of it. However, once you move through the opinions of this Court, we are caught up with sometimes analysis that talks about compelling interest and sometimes analysis that talks about least restrictive alternative. I think in large part, on the basis of a legitimate desire on the part of the Court to avoid facing the pure First Amendment question unless it has to, so the Court presumably would decide the case on over breadth and vagueness grounds.

Q Well, those are First Amendment concepts. But you do stick to your answer that this compelling interest phrase and whatever concepts or ideas it may represent has applicability beyond the area of the equal protection clause?

MR. ROSEN: Well, no, I would say that that is a secondary argument, that we would agree with your initial argument, that if this is an invasion of the First Amendment, an over breadth, say, resides in the statute --

Q I wasn't arguing. I am asking a question.

MR. ROSEN: Excuse me, your question -- that would be the end of it. If the Court is compelled then by its own decisions or by its own analysis of the issues to look beyond that into something like a compelling state interest or compelling governmental interest notion, or a least restrictive alternative notion, then we would suggest the state cannot meet the burden of proof, of constitutional proof that we lodged

on its shoulders.

Q Mr. Rosen, this colloquy prompts me to ask, do you know of any case where the court has spoken in terms of compelling interest or least restrictive alternative where it has found such to exist? And if not, is it just a means of striking down the statute?

MR. ROSEN: It might be shorthand for another kind of decision. I think that from time to time in the opinions of the Court there is discussion of the compellingness or the legitimacy of the government's interests in taking one course of action or another, even in some of the decisions that involve overbreadth. I can't put my fingers on them. I recently read the Broderick decision and I have some vague recollection. Of course, that is from last term, but there may have been an intimation of that, if not an explication of it.

Q Is part of your position then that the right to run for office is a federally protected right?

MR. ROSEN: Yes, Your Honor.

Q A First Amendment guaranteed right?

MR. ROSEN: First Amendment, also it is protected by our federalism, to use Justice Black's phrase, it is protected by Article I and Article II. So far as the --

Q How about the right to vote?

MR. ROSEN: And the right to vote, yes.

Q In state elections?

MR. ROSEN: This case, for the moment, only involves federal elections, the president and vice president and the electors.

Q But you say that the right to vote in federal elections is a federally guaranteed right, don't you?

MR. ROSEN: Yes, we would, that it is a federally guaranteed right.

Q Well, by statute or --

MR. ROSEN: Well, it is guaranteed of course by a myriad of statutes, but we think it is also guaranteed by Articles I, II and the various amendments to the Constitution bearing upon voting. We think that --

Q Well, certainly the right of women not to be discriminated in voting is explicitly guaranteed, the right of Negroes not to be discriminated in voting is specifically guaranteed by the Fifteenth Amendment. But we are talking about --

MR. ROSEN: The right --

Q I thought the question to you was some sort of a right at large to vote that you say is --

MR. ROSEN: Yes, we think there is a First Amendment right to vote which is intimated -- well, it is not intimated in Bond v. Floyd, but something like it is intimated in Bond v. Floyd, the correlative right of the candidate to take his office. We think that in Powell v. McCormack there was a good

deal of discussion about the interests of the polity in being represented by people they chose. I don't -- I can't say to the Court that there was an explicit ruling of the Court that states in so many words that there is a First Amendment or otherwise guaranteed federal right to vote in federal elections. I think that is the thrust of many decisions of the Court.

Q The only explicit, absolutely explicit blunt holding on the subject with which I am familiar is the one in Minor v. Happistat that says there is no constitutional right to vote.

MR. ROSEN: Yes, but there has been a lot of constitutional --

Q There have been a lot of cases since, a lot of water has gone over the dam since. But I doubt that you can find that that case has ever been overruled.

MR. ROSEN: I doubt that it has been overruled and, as I say, I don't think there has been an explicit statement that there is a federally protected right to vote. I think there is an intimation in many decisions.

Q You said earlier that first you establish your claim and then the state has the burden of moving forward, et cetera, et cetera. I am waiting for you to say just what is your claim.

MR. ROSEN: Well, one of our claims, of course -- taking up from Justice Stewart's question -- is that there is

a First Amendment dimension to the right to vote and candidacy. The Court certainly had to make --

Q Well, how does the advocacy provision interfere with that? That is what I want to hear you say.

MR. ROSEN: All right. In various ways. First, how does the advocacy provision interfere. Well, first, in the very pragmatic way, it interferes because the Communist Party was precluded from the ballot. It attempted to articulate an advocacy affidavit which was consistent with decisions of this Court, namely the Yates case, which was then rejected by the defendants and appellees.

Q Well, why is it the party can't take this oath?

MR. ROSEN: I beg your pardon?

Q Why is it the party cannot assert that it does not advocate the overthrow of the government by force and violence?

MR. ROSEN: Why is it that it cannot?

Q Yes.

MR. ROSEN: It does not believe that it should. It believes that it is protected in its right not to have to make that kind of a statement in order to gain access to the ballot, because for several reasons. The oath that it does not advocate the overthrow of government by force and violence, without any further qualifications, goes well beyond all of the oaths that this Court has heretofore validated in any other

context, leave aside now the fact that we think voting and candidacy is a special context. This is not the functional equivalent to the support of, and in recent years at least the only kind of oath that this Court has validated has been validated only on the basis that it is either the functional equivalent to the support of or it is invoked strictly speaking to determine whether the person making the oath is doing it consciously in terms of the purposes behind the support of. That is the Wadsman case and the Cole v. Richardson case.

Without any further qualification, the clause just encroaches well beyond a person's duty as a citizen to stand up and say that he will support and defend the constitution. It says -- it requires him to say "I do not advocate overthrow by force or violence." That language is very, very dangerous language. It is dangerous language, as this Court has recognized, in the line of cases running from Dennis through Yates through Noto and Scales and Robel and Brandenburg, because there is a lot of advocacy of force and violence that is constitutionally protected. So long as that advocacy is not directed to inciting action -- and we think immediate action, but we needn't even get close to that in this case -- so long as the advocacy is not directed to the incitement of action, it is constitutionally protected in and of itself.

Now, we have a number of other arguments which go back to the basic nature of our federal system. We submit --

Q Does the Communist Party advocate it or not?

MR. ROSEN: Does it advocate?

Q Yes.

MR. ROSEN: I'm sorry, I didn't ask the party or any of its agents.

Q I mean that is not the reason he is not taking the oath? That is not the reason, right?

MR. ROSEN: That it advocates force and violence?

Q Yes. That is not the reason?

MR. ROSEN: I have no idea. The issue never came up in the proceedings and I didn't think it was my obligation to ask in the particular context.

Q Well, one of your problems is that you, for the very reason that you are arguing that this oath is invalid, that question is impossible to answer.

MR. ROSEN: It is impossible to answer, Your Honor. I wouldn't want to have to answer that personally in some circumstances, the point being that it is too abstract and open-ended a question. All right. But we do have certain other positions, and that is that so far as candidacy in federal elections is concerned, so far as that kind of candidacy is concerned, the state is limited to no more than the constitutional oath of office and, as we have already argued, this goes well beyond the constitutional support of and --

Q How can that position be limited to federal

elections if you are talking about the states --

MR. ROSEN: Would it be limited?

Q Well, your statement was that insofar as the state can move in the area of federal elections, if you are rguing constitutional grounds, I would think it would be across-the-board.

MR. ROSEN: We do argue across-the-board, Your Honor, but in --

Q Why do you say in federal elections, as if that is a limiting --

MR. ROSEN: We say federal elections only because alas the facts involve a federal election in this particular case, otherwise I assure you, Your Honor, I would be here arguing that it cuts across-the-board and we have intimated such an argument in our brief. We would invite the Court to go that far.

Q Are you familiar with United States v. Classic?

MR. ROSEN: I am familiar with it, yes.

Q Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within the state to cast their ballots and to have them counted at congressional elections. This Court has consistently held that this is a right secured by the Constitution.

MR. ROSEN: We would rest on that statement, Your Honor. Thank you.

Q Mr. Rosen, if you please, you mentioned the fact that this oath was three steps beyond the critical oath that one takes when he is elected.

MR. ROSEN: Beyond the office-taking.

Q Right. Would you consider that this oath was appropriate and constitutional for one about to take the oath of office?

MR. ROSEN: No, Your Honor.

Q So what difference does the three steps make?

MR. ROSEN: It just makes it that much more attenuated in terms of any interest the government might assert. If this were the oath that the State of Indiana required of its office-takers, we would be here challenging it on grounds of overbreadth. It is not the functional equivalent of the support of.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General.

ORAL ARGUMENT OF THEODORE L. SENDAK, ESQ.,

ON BEHALF OF THE APPELLEES

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

Accompanying me, Your Honor, are the chief counsel of my office, Mr. Sheldon Breucce, Assistant Attorney General Darrel Diamond, and one of the named defendants, Mr. Karl Stipher of Indianapolis, who is a member of the bar of this Court as

well.

The matter of the jurisdictional question which the Court has reserved, we too would pass to our brief on pages 5 and 6 and would defer on that and prefer to argue on the merits of the case.

The State of Indiana, as represented by its Indiana General Assembly and upheld by the Indiana Supreme Court, decided long ago that in conformance with the cases of this Court that the state has a right of self-preservation and that in balancing the rights of all of the amendments of the Constitution, that this Court has never held that the First Amendment rights are absolute or that any rights are absolute, that there has to be a balancing of the rights. And the history of Indiana would show that we have had difficulties and, as the reading of our oath would imply, our oath as it has been trimmed down by the federal court below and which we defend, is to the effect that the political parties or political group seeking the official status of the political parties must have their officers sign this oath and submit it along with their petitions to the state election board. Now, our law applies to all political parties, unlike the Ohio law in Gilligan, which this Court ruled upon last year, our law applies to Republicans, Democrats and every other party before they get on initially and then each year that there is an election they are required by the same law to submit a statement in their platform

officially stating the substance of this same oath, and all parties which get on the ballot, including the Socialist Labor Party, the Socialist Workers Party, and the others -- the Peace and Freedom Party in 1972 so complied -- but all that we ask now is that these party officials state that they do not advocate the overthrow of local, state or national government by force or violence. And besides the history of the thing which would show you some background on Indiana's consideration here, we have the feeling, as expressed so well by Mr. Chief Justice Burger in the Cole v. Richardson case, that since there is no constitutionally protected right to overthrow a government by force, violence or illegal or unconstitutional means, no constitutional right is infringed by an oath to abide by the constitutional system in the future. Our feeling is that once you pass the threshold of moving from the college or the coffee klatch or the parlor discussion into the status of an official political party where you are recognized by the state and start out with an equal opportunity, no matter what the odds are, for taking over the reins of government, that the state has the right to ask you to abide by the rules once you cross that threshold. To move from potential to kinetic in terms of the battle for political power.

And the Indiana law is clear. It is continuing. It applies to all political parties, reasonable men can understand it, there are no criminal penalties attached. Appellants'

counsel refers to an official opinion of the Attorney General to the Election Board. Official opinions of the Attorney General in Indiana are not the official construction of the law. The construction of the law in Indiana is by the Indiana Supreme Court. All official opinions in Indiana are merely advisory. The Attorney General of Indiana has no general criminal powers. All he was doing in that opinion is stating a fact upon reading the Communist platform as circulated in Indiana and reading the fact that they failed to take the oath, he was stating the fact that if they did take the oath, as they state in here that they might not be telling the truth or might be using semantics to disguise their actual advocacy of action -- if I may refer to page 32a of the Appendix prepared by appellants, in which they state in their petition of October 3rd submitted to the court below:

"In order to make it perfectly clear to the State Election Board, the Court and the citizens of Indiana, that said party" -- the Communist Party -- "was not perjuring itself, the last sentence of said affidavit was attached." That last sentence was their qualification with reference to a statement taken out of context in Yates. And then this statement in that same paragraph, "Thus, the plaintiff, Communist Party, can with a clear conscience sign the attached affidavit." In other words, they reserved the right, they impliedly admit that they do advocate the violent overthrow of the government, but they

reserve the right to specify the time and the place and the method.

Q Mr. Sendak, what is the state's position, as you represent it here, with respect to whether the Indiana Election Commissioners could refuse a place on the ballot to a party that signed the oath as upheld by the District Court just because the Election Commissioners felt that perhaps the oath was not truthful?

MR. SENDAK: The state's position has been changed by the District Court below in our failure to get the jurisdiction docketed here on the other issue. But the basic law in Indiana is that the State Election Board must strictly comply with that requirement. That is, if a group presents a petition with the requisite number of signed registered voters and presents the affidavit, the State Election Board must receive it. The law also states that the State Election Board shall then make an investigation as to the accuracy of the petitions, which it had no opportunity to do here because of the time element, and as to the veracity of the affidavit. It provides no criminal penalties, however, and the only action it can take at that point, if it finds either the affidavit is wrong, as it did in another case and in this case, or that the petitions are insufficient, it just rejects the party's position on the ballot.

In 1968, the same issue came up before the Indiana Supreme Court, the Socialist Labor Party v. State Election

Board. They submitted the required number of petition signatures, but their affidavit was incorrect, it didn't strictly follow the law, so they were thrown off the ballot and the Indiana Supreme Court said that the State Election Board has a duty of strict compliance with the law.

Q I thought what Justice Rehnquist was asking, suppose there was strict compliance and the party did execute an affidavit in precisely the form that the law requires, but the Election Board thought that it was an untrue affidavit?

MR. SENDAK: The Election Board, being obligated to comply strictly, would have to put them on the ballot.

Q Is there anything in the record as to when this law was passed?

MR. SENDAK: Yes, on the -- this law was passed in 1945 at the height of World War II, and referring again to Indiana's experience --

Q I thought you said it applied to all parties equally.

MR. SENDAK: Yes, sir.

Q Well, you had Republican and Democratic Parties long before then, didn't you?

MR. SENDAK: Yes, sir, but they had to submit this affidavit in 1945 to get on the ballot.

Q But they didn't before then?

MR. SENDAK: No party did before.

Q That is what I mean.

MR. SENDAK: But it applies to all equally and it is a continuing requirement now.

Q When did the Communist Party first start operating in Indiana, around the same time?

MR. SENDAK: Sir?

Q Around the same time?

MR. SENDAK: I believe the Communist Party started in Indiana long before that, along around 1919-20. We had a case upon which we relied for the state's construction, for example, of the word "advocacy," and that was the Butash case in 1937, a criminal syndicalism case but which the Supreme Court reversed on the facts but defined advocacy in Indiana to mean incitement to action. And so apparently they were involved in activities prior to 1945. The 1945 law, if I may take --

Q The Communist Party was operating before then, back in --

MR. SENDAK: Not as a political party, no, sir. They have never been on the ballot in Indiana.

Q I thought that was my question.

MR. SENDAK: I'm sorry, I misunderstood.

Q Thank you.

MR. SENDAK: If I may, I would like to proceed to the state's interests. The Bullock case, to which counsel for appellants referred, makes the statement that the state has an

interest if not a duty to protect the integrity of its political processes from frivolous or fraudulent candidacies. This Court has upheld a loyalty oath in Pennsylvania for political candidates in Lisker in 1971, where the loyalty oath was much more loosely worded. It read something to the effect that the potential candidate was not a subversive person, whatever that would be. And then again in the Gerende case in 1951, where it upheld the oath in Maryland for political candidates, where they stated they were not engaged in one way or another in activities of this nature. The Healey case in 1971, involving the SDS, this Court made a statement, a holding, I believe, that recognition may be denied to any group which reserves the right to violate any valid rule with which it disagrees, and that is our connection here, that by their do-it-yourself oath or customed oath, appellants presented to the federal court below, which rejected it by the way, that they are attempting to reserve the right to engage in this action and therefore their oath is not valid, they are performing at all with a mental reservation.

As to the question that the oaths must exactly parrot the oath that the President of the United States takes, this Court has many times held that that is not so. In the Olsen case in 1971, I believe it was, or 1970, this Court held specifically -- those are almost the exact words -- that the oaths administered do not have to parrot the oath of the

President.

As to the use of the words "the converse elements," I like the wording in the -- and since there seems to be a battle of semantics in some sense of the word, in Cole v. Richardson, which I just quoted --

Q Well, let's assume that an oath requiring a candidate to oppose the overthrow of the government by force and violence were constitutional --

MR. SENDAK: According to this Court, it is, sir.

Q -- as Cole would -- Cole wasn't a candidate but was an employee.

MR. SENDAK: Yes, sir.

Q Suppose for a candidate that was constitutional. Would that subsume or cover this oath of yours, namely that I will not advocate?

MR. SENDAK: I believe the Cole v. Richardson explanation goes even beyond ours. Ours just says that we will not take those actions, we will not advocate action to overthrow the government by force or violence.

Q I suppose then that the state would be equally satisfied with an oath to the effect that I will oppose overthrow?

MR. SENDAK: Well, I would assume so, but the State legislature has passed the act here and it simply said that I do not advocate the overthrow of local, state --

Q I gather, Mr. Attorney General --

MR. SENDAK: Sir?

Q I gather if there were substituted for the prescribed form of oath in the form of Cole v. Richardson, you would reject it, wouldn't you?

MR. SENDAK: The --

Q I think you told us earlier that --

MR. SENDAK: The State Election Board would have no choice. It has to follow --

Q It would reject it?

MR. SENDAK: Yes. But I thought perhaps Mr. Justice White meant if the State Legislature of Indiana were to pass such an oath, it would be fine.

Q Right.

MR. SENDAK: It would accomplish the same thing. In Cole v. Richardson, the words "to oppose the overthrow" in my opinion are not different from "not to advocate the overthrow." They are substantially the same. And our thinking does one have the right to advocate that which he has a constitutional duty to oppose.

In the very Fourteenth Amendment, I would like to refer to section 3 of the Fourteenth Amendment, which is very rarely discussed, where a discussion of the oath really takes place, where it says, using the negative to begin with, "No person shall be an elector or official, uphold any public

office" -- I put the word "public" in there -- "any office who, having previously taken an oath to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof." There must have been this same discussion at that time, and for the obvious reasons. And this would go back to the background as to why Indiana perhaps adopted this oath when it did and in view of the background.

The case of Ex Parte Milligan, with which this Court is well acquainted, besides the ruling on habeas corpus, the factual background was that Mr. Milligan was one of those who engaged with southern sympathizers in overthrowing several local units of government, and when General Morgan's raiders and others came in, they actually took over for a period of days local units of government. We had the same thing in Indiana's background in a sense during the 1920's and 1930's with the rise of the Klu Klux Klan, and we also had during the 1930's and up to World War II very radical areas as between the German-American Bundt and the Communist Party in Indiana, and these things caused the Legislature of Indiana during the height of the war to pass this law and to apply it to all political parties. That is the legislative background on that law.

As to counsel for appellants' reference to Brandenburg, Yates, Noto and those cases, they are all criminal

cases and have a much more strict standard of proof than a civil matter such as this. If we had to set up our standards, we would say that in Indiana, following the construction of the Indiana Supreme Court, that the advocacy has to be linked to action, and that you cannot reserve the right to take violent action if you are going to cross the threshold and become officially recognized as a political party.

One other thing, Mr. Chief Justice, I would like to refer to is the very platform of the Communist Party itself, which was copyrighted in May of 1970, Library of Congress No. 79127023, and circulated throughout the country, including Indiana, and as I mentioned earlier, a voter in the State of Indiana who is properly registered could vote in 1972 by an examination of his platform for everything for which the Communist Party stood except one, he couldn't vote in Indiana for those candidates who advocate -- who will refuse to say they don't advocate the overthrow of the government by force or violence. But the Communist Party goes on to say, if I may quote very briefly in point, that "they are campaigning for their rights free from all social and legal restrictions," page 61; page 64, "We Communists are not pacifists, we view violence from the class standpoint, accordingly we view nonviolence as a tactic of struggle in some instances, but we do not adhere to it as a principle or a philosophy," and then on page 93, speaking about whether or not there would have to be a bloody

ordeal or whether they could assume power through the electoral process without it, it says, "Of course, we must be prepared to meet any eventuality, while we seek a peaceful path as preferable to a violent one, this choice may prove to be blocked by monopolist reaction, socialist must be sought therefore by whatever means and circumstances may impose," and then, finally, and the words that they italicize are the words I will emphasize, "The very development of present-day struggles lays the basis for making clear now the need to change the system and for building now the movement for socialism in the United States, he who does not work for these goals now will never be prepared for revolutionary change." So they are advocating action now which may prompt its heirs to take some unlawful action as noted in Yates, page 322, quoting Dennis.

I mentioned the cases interpreting our law in Indiana. Indiana law is fair, it does not violate anyone's rights with respect to getting on the ballot if they will make a conscientious oath and effort and not reserve the right to overthrow the government by force or violence.

Q Could you tell us what "advocate" means?

MR. SENDAK: In its dictionary sense or in our sense?

Q No, sir, what it means in this statute.

MR. SENDAK: In this statute, as construed by the Indiana Supreme Court, it means promoting the taking of illegal action, either now or sometime in the future.

Q So advocacy and promotion are identical?

MR. SENDAK: In that strict sense.

Q Well, what do you mean by promotion?

MR. SENDAK: Taking active steps to incite. The word "incitement" would be more appropriate perhaps.

Q But it is not it.

MR. SENDAK: Sir?

Q The word "incitement" is not in there.

MR. SENDAK: No, but this was the construction put on it, Your Honor, by the Indiana Supreme Court.

Q Well, suppose somebody said "I think that things are so horrible, maybe the only way anything can happen is somebody else to overthrow the government."

MR. SENDAK: Anybody is free to say that in Indiana or anywhere else. It is when you become an official party in the electoral system that you have to take an oath that you are not going to take the --

Q Well, that person would be barred from taking the oath.

MR. SENDAK: I do not think so.

Q If somebody just said that is a possibility?

MR. SENDAK: Well, anything is a possibility, sir, in these days. I don't think he would be denied.

Q Isn't advocacy -- I have a great problem with the word "advocacy."

MR. SENDAK: You're right, sir.

Q I just don't know what it means.

MR. SENDAK: Well, to me it means, as these three young persons took the oath here, that they would support the Constitution. I interpret the fact that these three young people before this bar --

Q Well, I see a lot of difference between "advocacy" and supporting.

MR. SENDAK: In that sense of the word, but advocacy in the sense of the word as contemplated by this statute, and as construed by the Indiana Supreme Court, means promoting the incitement --

Q Is the person who teaches an advocate? Is he an advocate?

MR. SENDAK: In a sense he is, yes.

Q So if a person who teaches military discipline -- this is getting me into a whole lot of trouble.

MR. SENDAK: It depends on the context. We are in the context of the combat arena of politics and the struggle for the reins of government. It has one meaning in the quiet surrounding of a school; it has another meaning here, and is less than oppose.

Q Does any other state have an oath similar to this?

MR. SENDAK: Yes, sir, this Court considered one in

Ohio in the Gilligan case last year, and their case is much -- I don't want to depreciate theirs, but ours is much more strict, our oath is, than theirs.

Q Well, Ohio doesn't have it any more, do they?

MR. SENDAK: Well, they may have changed it legislatively, but at the time this case came up in 1972, it had it.

Q Any others that you know of?

MR. SENDAK: I think other states do. I have not researched all the states on that, so I can't honestly answer that.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you Mr. Attorney General.

Mr. Rosen, you have about three minutes left.

REBUTTAL ARGUMENT OF SANFORD JAY ROSEN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. ROSEN: In answer to Mr. Justice Stewart's question about other states that may have similar statutes, I think there is a compendium note in Emerson, Haber & Dorsen, at pages 315 on, that tries to collect states, but that is out of date. I understand there is a new edition that is coming out. There have been states that have similar oaths.

Q Were there several at the time of that publication?

MR. ROSEN: Yes, I believe so, either candidate oaths or party oaths. They tended to merge them together, but there

were maybe as many as twenty that had one kind of an oath or another.

The second point I would like to make in rebuttal is of course I think that quoting from the 1950 Communist Party Platform is totally irrelevant to the issues in this case on innumerable grounds. It is not a part of the record in the case. If it were, it would be stale on the basis of many decisions of this Court involving Communist Party registration or prosecution, so that obviously is a sport.

On overbreadth, in addition to the cases already cited to the Court, so far as the Indiana Supreme Court's interpretation of this or similar statutes is concerned, there is one case that hasn't been cited so far, and that is State v. Levitt, 203 Northeast 2d 821, 1965, in which the Indiana Supreme Court impliedly upheld the constitutionality of a broad sedition statute.

Further, so far as the Attorney General's power to interpret and enforce law absent a definitive determination of the courts, we agree there is no literal power in Indiana law for him to bind officials; however, he is certainly authorized by statute to issue advisory opinions. The Election Board specifically relied upon his opinion in coming to its determination, and it would seem to us that the Court's analysis in Wademan and Broderick just last term, in terms of the power of an authority like the Attorney General to interpret a statute

would be of some relevance to a determination in this case.

Q Has there been any suggestion in this case anywhere along the line that the federal courts abstain for the purpose of permitting the Indiana courts to give an authoritative construction of the meaning of these words?

MR. ROSEN: No, there has been no such suggestion, as I note, in the proceedings. There was a parallel state court proceeding involving two sets of co-plaintiffs -- one set of co-plaintiffs, the Indiana Independent Party, in which again nobody surfaced that particular issue. Other counsel were representing the Independent Party and the Attorney General's office, whomever represented the Election Board did not address the issue of the oath, they were addressing other questions.

Q Because one of the problems in that case -- it seems to me offhand, as I understand you and your brother on the other side, that one of the problems here is that you disagree as to what these words mean as a matter of Indiana law. You say that the Attorney General has said they mean one thing and your brother says well the Attorney General doesn't have the power to construe the language, and yet the Supreme Court of Indiana has construed similar language in quite a different way from the way you understand it, and so on, and there does seem to be a difference of view as to what the words mean. Or have I misunderstood?

MR. ROSEN: I think you have. It seemed to me in the

colloquy that just preceded my rebuttal with Justice Marshall, the Attorney General came right back to in agreement.

Q Incitement, he said incitement.

MR. ROSEN: No, he also agreed that other --

Q Well, he has already told us that the Attorney General doesn't have the power to construe it.

MR. ROSEN: Technically, but he has the --

Q So whatever his answer is, it is not binding.

MR. ROSEN: -- he has as much power to construe it, I think, as the Attorney General of Oklahoma had to construe the --

Q Well, that is a matter of Indiana law and Oklahoma law. I was wondering about a judicial construction by your state court.

MR. ROSEN: The state court had one judicial attempt at this particular statute. That has been cited in both briefs. This Levitt case is a parallel statute, and the Butash case is a much earlier sedition statute. I think out of them you will find quite an ample indication by the state judiciary of what they mean by advocacy, and it is something more than incitement.

Q Something less than incitement.

MR. ROSEN: Excuse me, something considerably less than incitement.

Q What can you do with it?

MR. ROSEN: What can I do with it?

Q Yes.

MR. ROSEN: It seemed to me that in the Chief Justice's opinion in Cole he was at great pains to demonstrate that it was the functional equivalent, a perfect analog of support of, and he went through any number of steps to demonstrate that the first clause of the oath was just a slight rephrasing of the support of, and the second clause was just either surplusage or an additional rephrasing and a support of and was really controlled by the first clause. We have quite a different situation.

Q Don't you think that analysis would apply here?

MR. ROSEN: No, certainly not. This oath is a negative disclaimer "I do not advocate" found within the context of --

Q It is a promise to oppose the overthrow. And you say you can promise to oppose overthrow and out of the other corner of your mouth advocate overthrow.

MR. ROSEN: No, I think promising to support overthrow is --

Q I know, but the language in Cole was "I would oppose the overthrow."

MR. ROSEN: Yes.

Q And you say that that can be perfectly -- that the state may extract that oath but may not extract another

promise that "I will not advocate overthrow."

MR. ROSEN: Well, I have a list of reasons for that, including the one that I just stated.

Q Well, give me one good one.

MR. ROSEN: Just one good one. The term "advocacy" itself has a different meaning than "oppose." It is a term that has been encrusted by innumerable decisions of this Court.

Q You say you can be advocating the overthrow and yet opposing overthrow?

MR. ROSEN: I could personally conscientiously take the support of, if it sakes I oppose overthrow of government, if I were put to such a support of, meaning that I oppose that as a policy so far as I know the conditions existing in this government at this time, I would support the Constitution and all of that. I might also refuse to take an oath that I do not advocate overthrow because the oath that I do not advocate overthrow is too open-ended. That really binds my options. It is really talking to if not the present but future time.

Q That is the purpose of the oath.

MR. ROSEN: But is it, Your Honor, constitutionally? That goes beyond the support of, says "I uphold and defend the Constitution." I can take that oath. I have taken it several times.

Q Does it go beyond the oath to oppose overthrow?

MR. ROSEN: Which has been ruled by this Court to be

the functional equivalent of the support of. The advocacy oath takes us several steps further. It requires me to bind my options even in terms of hypothetical consideration of a situation in which, say, there were a military takeover of the government that attempted to reside within the context but not the real fact of the Constitution. I might well advocate overthrow if such a contingency occurred. So I just don't think that that is -- that when you put it in the negative, using the term "advocacy," which has been encrusted with this kind of an interpretation by the court, I think rightfully so.

Q It is not any less burdensome on you than an oath to support.

MR. ROSEN: Well --

Q It is the same kind of a government that you would find objectionable.

MR. ROSEN: Well, I wouldn't take that oath, Your Honor. If I found the government objectionable when I found it in office, I would like to say that, as a conscientious citizen, I would not take that oath, if I found it objectionable in that way.

Q I thought you just said that you had several times taken oaths to support. Now, that oath is outstanding all the rest of your life.

MR. ROSEN: It certainly is.

Q And if this military organization hypothetically

took over, you would regard yourself not bound by the oath that you have given?

MR. ROSEN: Yes, I think I would regard myself as not bound by the oath as given.

Q You want to reserve the option and decide what kind of a government you will or will not serve.

MR. ROSEN: Well, not on such a day-to-day basis, Your Honor. I think that we could agree as reasonable men living under an institution that there are certain parameters within which the constitutional government must remain in order for us to be bound by the Constitution and the oaths. The advocacy provision, if it is encrusted, as I say, with the Dennis interpretation and the Yates interpretation and all that, says to the oath taker you really have to throw away that agreement on the parameters of constitutional government and tell us that from here on out you will never advocate violence, you are throwing away your option.

You do have -- I don't want -- I hope that the argument wouldn't focus entirely on this point because we think that we have some very powerful other points than the overbreadth point. We do think that Article II, to the extent that this is a case involving federal offices, is absolutely preclusive on the states, that the states really have no power whatsoever to impose any kind of a condition on candidacy for president or electors to the office of president, that the

oath of office really precludes everything that otherwise, putting any other condition on it, is an added condition of office which this Court said can't be done, at least in the legislative context, for example, in the Powell v. McCormack case. So I wouldn't want my argument to end on this note that we are relying entirely and exclusively on the overbreadth point. We think we have other arguments as well.

Q Mr. Rosen, on the abstension point, because I am a Circuit Justice for the Seventh Circuit, I remember a little bit about this case last fall, and it kind of came up there very rapidly, as I recall,--

MR. ROSEN: Yes.

Q -- so that the abstension probably wasn't at least thought to be practical at the time. You needed a decision rather quickly and the Election Board needed some advice rather quickly. Is that a fair statement?

MR. ROSEN: That is a fair statement but I really am not quite understanding the questionor how it is being formulated.

Q Well, Justice Stewart inquired whether anyone had suggested abstension in the case --

MR. ROSEN: All right.

Q -- the District Court abstaining to get a binding construction of the statute from the Indiana Supreme Court. And my recollection is that this was all pretty much a day-to-day

proceeding.

MR. ROSEN: Indeed it was very much a day-to-day proceeding with the party being put to fairly substantial deadlines which it undertook to me --

Q Well, on the board, too.

MR. ROSEN: On the board as well. But the Attorney General's opinion, for example, on the party's ineligibility even if it were to file an affidavit, and there is such an opinion by the Attorney General that preceded the District Court decision, was dated August 28th, and the party tendered its petitions on the 31st and the amended complaint was filed a week later, the hearing was three weeks later, the split decision came down and then these emergency proceedings took place, yes. So for that reason, among others, I think no abstension was suggested. I don't think abstension would have been appropriate under Baggett v. Bullitt and other decisions of this Court.

Q Of course, that situation is normal in election cases.

MR. ROSEN: It seems to be, Your Honor. It seems to be. We really do try to stage our cases in a more orderly fashion in the election context, but the deadlines do bar us.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rosen, Mr. Attorney General.

The case is submitted.

[Whereupon, at 2:01 o'clock p.m., the case was submitted.]
