In the

Supreme Court of the United States

William Cousins, et al.,

Petitioners,

v.

Paul T. Vigoda, et al.,

Respondents.

73-1106

Washington, D. C.
November 11, 1974

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM COUSINS, et al., Petitioners, v. PAUL T. WIGODA, et al., Respondents.	No. 73-1106

Washington, D. C.,

Monday, November 11, 1974.

The above-entitled matter came on for argument at 10:02 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:

WAYNE W. WHALEN, ESQ., 231 South LaSalle Street, Chicago, Illinois 60604; on behalf of the Petitioners.

JEROME H. TORSHEN, ESQ., Torshen, Fortes & Eiger, Ltd., 11 South LaSalle Street, Chicago, Illinois 60603; on behalf of the Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in 73-1106, Cousins against Wigoda.

Mr. Whalen, you may proceed whenever you're ready.

ORAL ARGUMENT OF WAYNE W. WHALEN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This is an unusual case. It arises out of the seating of delegates to the 1972 Democratic National Convention, and which of two competing delegations should be seated in Miami.

The State of Illinois held a primary on March 17, 1972, in which 59 respondents were elected as Delegates to the 1972 Convention.

On March 31st, 1972, ten petitioners filed a challenge in accordance with the rules of the Democratic National Party, contending that respondents had violated national party rules, and that they had discriminated invidiously and substantially on the basis of race against women and young people, and that they had held secret and closed slate-making meetings; all in express violation of the national party rules.

On April 19, 1972, the respondents filed a complaint in the Circuit Court of Cook County, alleging that respondents,

because they were elected in accordance with State law, were the only delegates who could be seated at the 1972 Convention.

Petitioners sought to remove that case to the Northern District of Illinois Federal Court. The motion to remand the case was granted on the grounds that no constitutional or federal question was presented by the case.

Petitioners also sought to enjoin the action in the State court, pursuant to Section 1983.

An injunction was issued for a time but was subsequently vacated by the Seventh Circuit Court of Appeals, and a stay of the Seventh Circuit Court was denied by Mr. Justice Rehnquist in chambers.

Pursuant to the national party rules, on May 31st, June 1st and June 8th, 1972, hearings were held in Chicago at which both respondents and petitioners participated, presenting argument, filing motions, presenting witnesses and documentary evidence, all before a Hearing Examiner appointed by the Democratic National Committee, Mr. Cecil F. Poole.

On June 25th, 1972, Mr. Poole issued a report in which he upheld the allegations of petitioners, and that is that respondents had discriminated invidiously and substantially on the basis of race and against women and young people.

He also found that respondents had conducted closed and secret slate-making meetings, in violation of national party rules.

And he also found that respondents had no rules for governing their procedures, although that, too, was required by Democratic National Party rules.

QUESTION: Who are the respondents?

MR. WHALEN: The respondents are the 59 delegates elected in accordance with the Illinois Election Code.

QUESTION: The delegates themselves.

MR. WHALEN: They were the delegates that were elected according to the Illinois law, that's correct.

QUESTION: Right.

MR. WHALEN: In late June 1972, petitioners held caucuses throughout the City of Chicago, in which they selected an alternative Delegation. The delegates, the candidates for Delegate, who had been on the ballot on March 17 but which had not violated the National Democratic Party rules, selected an alternative Delegation, essentially the 59 petitioners in this case.

On June 30th, 1972 --

QUESTION: Do the 59 petitioners include any of the 59 respondents who were elected?

MR. WHALEN: No, they do not. All the 59 respondents were found to have violated the national party rules, Your Honor.

On June 30th, 1972, after a highly publicized and intense debate before the Credentials Committee of the

Democratic National Party, the Credentials Committee ruled to seat petitioners and not to grant respondents credentials to the 1972 Convention.

The Credentials Committee expressly rejected respondents' claim that State law exclusively governs the selection of delegates to the 1972 Convention.

A minority report of the Credentials Committee, favoring respondents' position, was filed with the 1972 Democratic National Convention.

On Monday, July 3rd, 1972, respondents filed an action in the Federal District Court for the District of Columbia, in which they sought to reverse the decision of the Credentials Committee. They alleged that they had been elected in accordance with State law, and therefore were entitled to be seated. They also alleged violation of constitutional rights under the First and Fourteenth Amendments.

On the same day, July 3rd, the Federal District Court, Judge Hart, dismissed respondents' complaint.

Now, the Credentials Committee had also voted to unseat the -- part of the delegates which had been elected in accordance with the California Primary law, and to seat in its stead a delegation selected by appointment of the presidential contenders, other than Mr. McGovern.

That delegation, the unseated California delegates, also brought an action in Federal District Court, and their

complaint was also dismissed by Judge Hart.

On the 4th of July, the day after the dismissal by Judge Hart, the Court of Appeals for the District of Columbia combined both the California and the Illinois cases for oral argument. Oral argument was heard on the 4th of July, and on July 5th, the Court of Appeals issued its ruling.

The Court said, and expressly approved the resolution of the Credentials Committee seating petitioners and unseating respondents.

To protect its jurisdiction, the Court of Appeals also granted an injunction to prohibit the Illinois respondents from proceeding in any other court.

On the same day, the respondents petitioned this Court for a writ of certiorari and for a stay of the Court of Appeals of the District of Columbia decision.

On the evening of July 7th, 1972, this Court's opinion issued, granting a stay of both the Illinois and the California decisions of the Court of Appeals, but also expressly denying -- expressly refusing to act on respondents' petition for a writ of certiorari.

The following evening, July 8th, respondents petitioned the Circuit Court of Cook County for an injunction, to enjoin the petitioners from participating as the Delegates from the Chicago Districts in the 1972 Convention.

Petitioners did participate in that Convention, and

after a hard-fought political battle, after which numerous compormises were offered and rejected by various parties, the 1972 Convention upheld the ruling of the Hearing Examiner and the holding of its Credentials Committee, that respondents had violated national party rules, and that national credentials should be awarded to petitioners and not to respondents.

On August 2nd, 1972, briefly after the Convention was over, respondents again went to the Circuit Court of Cook County and sought an injunction against petitioners, from participating in the selection of national committeemen and committeewomen from Illinois.

On October 10th, 1972, this Court remanded the case of Keane v. National Democratic Party to the Court of Appeals for the District of Columbia.

And on February 16th, 1973, the Court of Appeals for the District of Columbia found that the National Convention had acted within its competence in granting its credentials to petitioners and refusing the credentials to respondents.

The Court of Appeals found the case moot, but nonetheless affirmed the decision of Judge Hart, dismissing respondents' complaint.

On September 12th, 1973, the Illinois Appellate Court affirmed the two injunction orders of the Circuit Court of Cook County. The Illinois Appellate Court found that Illinois law was exclusive and Convention rules and national rules were

of no effect, and that the Illinois law exclusively governed the election of delegates to the Convention, and the Convention was without power or authority to refuse to seat them.

The Supreme Court of Illinois declined to review the Illinois Appellate Court decision.

QUESTION: Under Illinois law, did that delegation at that stage have any authority or power other than the election of the members of the National Party Committee?

MR. WHALEN: That was the --

QUESTION: Or had all of their other functions expired?

MR. WHALEN: All of their functions had expired, with the exception of the power to select the National Committeemen and Committeewomen.

QUESTION: Is the -- are the delegates then discharged once that function is performed?

MR. WHALEN: No, they're not. They still continue to hold office, as delegates to the --

QUESTION: Until the next Convention?

MR. WHALEN: Until the next Convention.

QUESTION: Or the next primary, which -- if the Illinois law is operative, I take it there will be another primary for the selection of delegates?

MR. WHALEN: There will be another primary, Your Honor, but our position is that a person is not a delegate

until he's been granted the credentials by the appropriate authority of the national party.

QUESTION: Well, what I'm trying to get at is that if the Illinois Appellate Court is correct, then, under Illinois law, there will be another election, will there not, of delegates?

MR. WHALEN: The Illinois Appellate Court simply sustained the injunction of the Cook County Court, which prohibited petitioners from acting in any way as delegates.

QUESTION: Or holding themselves out as delegates?

MR. WHALEN: But the respondents --

QUESTION: Act as delegates only until they are replaced, under Illinois law, by another election; isn't that true?

MR. WHALEN: That's correct.

QUESTION: And that will be when?

MR. WHALEN: The next Primary election will be in March of 1976.

QUESTION: Unh-hunh.

QUESTION: I thought you said until another election and until that election had been acknowledged and approved by the National Party Convention?

MR. WHALEN: If I didn't say that, I certainly meant to imply that, Mr. Chief Justice.

QUESTION: In the meantime, the people elected are

merely delegate-designates --

MR. WHALEN: By the State of Illinois.

QUESTION: And they remain in that posture until their credentials are accepted by the Convention.

MR. WHALEN: On the other hand, the petitioners are the certified delegates to the Convention and have the credentials, which have been granted by the national party.

QUESTION: Mr. Whalen, we have certainly taken jurisdiction of some cases where there's been an appeal from an injunction without any contempt citation, where the party has yet to disobey the injunction, and we've taken jurisdiction of cases where a party has disobeyed an injunction and had a contempt citation or contempt penalty imposed on it.

But I'm a little bit troubled about the posture of your case. You have had an injunction issued against your clients, your clients have disobeyed the injunction, so the injunction didn't frustrate anything they wanted to do. And there's a possibility of contempt proceedings against them, but, as I understand it, no actual contempt penalties have been imposed on them.

MR. WHALEN: There are two injunctions involved, Your Honor. One injunction is the August 2nd order, which currently restrains petitioners from acting as delegates in selecting national committeemen and committeewomen. That's the August 2nd order.

QUESTION: Now, what practical effect does that injunction have on your clients at this time?

MR. WHALEN: It is preventing the clients from holding a meeting, selecting a national committeeman and committeewoman from Illinois, and presenting them to the Democratic National Committee.

QUESTION: Well, what -- does that come up every two years?

MR. WHALEN: That comes up under national party rules as a duty and responsibility of the certified delegates from each State.

QUESTION: Well, the national committeeman or committeewoman, then, doesn't have any particular term?

MR. WHALEN: It's a four-year term.

QUESTION: Well, when was -- when were they elected last in Illinois?

MR. WHALEN: Respondents participated in an election, because petitioners were enjoined, on August 5th, 1972. So the term of national committeeman and committeewoman from Illinois will run from the National Convention in 1972 until the end of the National Convention in 1976.

QUESTION: And by that time there will be new delegates by anybody's rules, won't there?

MR. WHALEN: That's correct.

QUESTION: Well, I gather, then, that the national

committeeman's post is filled now?

MR. WHALEN: It is, Your Honor.

QUESTION: And committeewoman?

MR. WHALEN: It is filled --

QUESTION: And did the National Committee accept those elections by respondents?

MR. WHALEN: It accepted them subject to challenge. We -- the petitioners were unable to challenge because they were enjoined by the Cook County Court.

QUESTION: Well, let's assume that you win this case, what will happen with respect to the National Committeeman and woman?

MR. WHALEN: The petitioners will hold a meeting, which they were enjoined from holding by the August 2nd order; they will select nominees for National Committeemen and Committeewomen, and present them to the Democratic National Committee.

I might say that the July 8th order, 1972, is, in our judgment, still has some force in that the trial judge in Cook County has deferred any action on the contempt proceedings until such a time as this Court has had an opportunity to rule.

Petitioners respectfully submit that all the proceedings in the Cook County Court after the July 5th, 1972, judgment of the Court of Appeals for the District of Columbia,

were barred by clear and unambiguous principles of res judicata.

The Court of Appeals for the District of Columbia expressly held, first, that all the parties in the federal forum were the same as all the parties in the State forum.

Secondly, the Court of Appeals for the District of Columbia expressly approved the resolution of the Credentials Committee seating petitioners and unseating respondents, and granting petitioners National Convention Delegate certificates.

QUESTION: Mr. Whalen, --

MR. WHALEN: Yes?

QUESTION: -- if I may go back to the matter of the committeeman and committeewoman, you say they were elected by the 59 respondents -- when?

MR. WHALEN: On July 5th, 1972.

QUESTION: And that was before the National Convention, was it?

MR. WHALEN: That was after the --

QUESTION: Oh, that was after?

MR. WHALEN: Oh, I -- it was August 5th, 1972.

QUESTION: But after the National Convention?

MR. WHALEN: After the National Convention. And that was -- the National Party --

QUESTION: Are they now seated by the National Committee, in office?

MR. WHALEN: They are seated subject to challenge.

QUESTION: Subject to challenge before whom?

MR. WHALEN: The Democratic National Committee.

QUESTION: Well, has the National Committee permitted them to participate in the National Committee?

MR. WHALEN: Yes, they have.

QUESTION: Subject to challenge?

MR. WHALEN: Yes.

QUESTION: And when is the Committee going to rule on the challenge?

MR. WHALEN: The Committee can't rule on the challenge because the petitioners are currently enjoined from bringing it.

QUESTION: I see.

I thought this case was moot. Maybe I hoped so!

[Laughter.]

MR. WHALEN: I might say, Your Honor, that it's a continuing, reoccurring question, which inevitably will arise at the last minute, just as this case did.

QUESTION: With Democrats, it sure will!

[Laughter.]

MR. WHALEN: I said before that the Court of Appeals for the District of Columbia expressly held that all the parties were the same. It also expressly approved the resolution granting petitioners credentials and denying respondents credentials.

It further held that respondents' State court claim was to be rejected, and if it were to be considered that there would be an impairment of the First Amendment rights of association.

This Court expressly refused to grant respondents' petition for writ of certiorari. And under unambiguous law, a stayed but unreversed judgment is res judicata, and an absolute bar to subsequent proceedings.

For this reason, we respectfully request that the judgments below should be dismissed.

For over a hundred --

QUESTION: What of the consequent vacation by the Court of Appeals of its judgment?

MR. WHALEN: The Court of Appeals did not vacate its judgment, Justice Rehnquist. On October 10th, 1972, this Court vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals for a determination of whether the case was moot.

So, at the time that both orders were entered by the Cook County Court, July 8th and August 2nd, the judgment of the Court of Appeals was outstanding but stayed.

QUESTION: Would you concede that after the vacation of the judgment of the Court of Appeals by this Court that that judgment was no longer in effect?

MR. WHALEN: That judgment was no longer in effect at

that time, but then, on February 16th, the Court of Appeals acted again on remand from this Court, and at that time the Court said that the Convention had acted within its competence in seating petitioners and refusing credentials to respondents; and, further, it affirmed Judge Hart.

Under the Munsingwear decision, the affirmance is important, because that decision holds that even though the case was found to be moot, that Keane v. National Democratic Party continued to have a res judicata bar.

For over a hundred and fifty years, the National Parties have met in quadrennial conventions to select their nominees, and citizens from the States have brought credentials challenges to assert principles ranging from party loyalty, racial discrimination, basic principles, silver or gold, or oftentimes just to establish a true National Republican Party or a true National Democratic Party.

And credentials challenges are the proven and historic means for citizens, in exercise of this First Amendment activity, to uphold Party principles and to assert the rights of the National Party.

QUESTION: Are there any cases in the State courts other than the two that you mentioned in this period, in which the power of the National Conventions to seat their own delegates, pass on credentials, have been questioned?

MR. WHALEN: The two reported cases were the McQueen

case and the Houser case, which are in our brief, --

QUESTION: Any besides those two?

MR. WHALEN: Mr. Chief Justice, you're aware of the lower court decision in the State of Georgia, which purported to pass on the credentials of the -- which was the lawfully elected delegation from Georgia.

QUESTION: Did that go to the Supreme Court of Georgia, or was that in the intermediate and lower courts?

MR. WHALEN: That was in the intermediate and lower courts.

QUESTION: Yes.

MR. WHALEN: That same year there was a decision by the trial court in Mississippi, on a Mississippi challenge to the Republican National -- in the Republican National Committee.

In 1972, in the Riddell case, there is a decision in which the Federal District Court in Mississippi held that the loyal Democrats not selected in accordance with State law could be seated at the National Convention, and the regular Democrats elected in accordance with State law were properly excluded.

The interests of a State are, in large part, at odds or could be at odds with the interests of the National Democratic Party. This has certainly been true in the area of Party loyalty; it's been true in the area of racial

discrimination.

QUESTION: Mr. Whalen, what is the -- what's the federal question here? What's the question of federal law?

MR. WHALEN: Your Honor, the complaint, by its terms, does not raise a federal question. And indeed that was established by Judge Will in the Seventh Circuit on respondents' motion to remand.

The federal question from the point of view of petitioners is at least threefold.

First of all, our basic rights of association have been violated by the injunction --

QUESTION: By the State of Illinois, you say?

MR. WHALEN: By the State of Illinois.

QUESTION: Unh-hunh.

MR. WHALEN: Secondly, we think that the privileges and immunities clause guarantees us as citizens of the United States the right to participate in the national process. So we believe that our rights under the Fourteenth Amendment have been bridged by the injunction.

And thirdly, we think that this process is inherently national in nature, and if any State could abridge the rights to participate in a National Convention, the National Party would lose its effectiveness.

QUESTION: Well, that's the same as your first point, your first and second.

MR. WHALEN: I think that's right --

QUESTION: I mean the National Chamber of Commerce is national in nature, and the State presumably can't interfere with the right of those people to associate.

MR. WHALEN: That's right. What we had in mind there were the interests which this Court has expressed in cases such as Shapiro v. Thompson, Nelson v. Pennsylvania, where -- the City of Burbank, where there is a national interest at stake, and therefore --

QUESTION: Not a federal governmental interest, --

MR. WHALEN: That's it.

QUESTION: -- is that what you say? It's a private associational interest, is it not?

MR. WHALEN: It is a private associational interest, but to the --

QUESTION: Of course, the Court of Appeals, I know, held it was governmental.

MR. WHALEN: But if there's to be any regulation, it certainly has to be federal, it couldn't be State.

QUESTION: Do you feel you have a fundamental right to travel to the National Convention?

MR. WHALEN: We certainly do, but I don't think that that's what's at stake here, because the injunction order did not prohibit us from traveling by its terms, it simply prohibited the petitioners from presenting themselves as delegates.

QUESTION: Your basic claim is that the State of Illinois, through this injunction, has interfered with your First and Fourteenth Amendment right of association, is that it?

MR. WHALEN: That is correct, Your Honor.

QUESTION: Outside of the State of Illinois.

MR. WHALEN: Yes.

If the law were any different, on the eleventh hour of every Convention State courts of general jurisdiction would be issuing injunction orders in accordance with State law, which would affect the outcome of the National Conventions.

As Judge Will pointed out in his decision, this is obviously an intolerable result.

QUESTION: But what you're suggesting also, I suppose, that Conventions have no business -- or political parties do have the business of saying how delegates to their Convention could be elected, if they are going to be given credentials?

MR. WHALEN: Yes. And as a matter of --

QUESTION: You could say, I suppose, according to you, that the Party could say: Delegates must be chosen in the Convention process rather than by election.

MR. WHALEN: That is correct.

QUESTION: And the State has -- would have no business

insisting that delegates be elected rather than chosen at Conventions?

MR. WHALEN: That is correct.

QUESTION: Well, as a matter of fact, I gather you go so far as to say States have absolutely no role to play if the National -- if the Convention sets up the procedures and methods by which its delegates shall be elected?

MR. WHALEN: I don't think we need to reach that decision here. The National Conventions, as a practical matter, and indeed in most cases, defer to the State's processes, just as --

QUESTION: Well, that's all right, but you say that's the business of the National Convention to defer or not.

MR. WHALEN: It might not be if constitutional questions were presented, which are not involved in this case, or if there were federal regulation, which is not involved in this case.

QUESTION: On the other hand, the Convention has no business interfering with the State's constitutional prerogatives with respect to the selection of Electors.

MR. WHALEN: That is correct, other than --

QUESTION: But Electors are not involved here, are they?

MR. WHALEN: Electors are not involved. And other than -- to the extent --

QUESTION: Well, the State needn't, I suppose, accept the Party's -- the results of the Party's work at the National Convention?

MR. WHALEN: And, as you know, Your Honor, that has repeatedly happened.

QUESTION: Yes.

MR. WHALEN: To support the injunction in this case, the respondents have argued that there is a compelling State interest. While they don't argue that there are any constitutional rights at stake, they say that the State has an interest in protecting its election process and to achieve this protection they would have that an injunction be issued.

But the effect of that injunction is one of two things:

First, it would force the National Party to seat respondents -- that's what the Illinois Appellate Court said, individuals who the National Party has expressly found violated their most fundamental principles and with whom the National Party did not want to associate;

Or the second thing would be that there would be no persons from Illinois seated at the National Convention.

It's not conceivable what State interest is protected by having no citizens from the State of Illinois, and that was certainly the interest which persuaded the Court of Appeals

for the District of Columbia and the Riddell court.

Also that argument ignores the strong national interests of the Party to associate so it can rally its members for its nominee to win the November election. The argument ignores that.

For these reasons, we would respectfully request that the judgments below be reversed.

QUESTION: The only impact of the decision here -- am I correct -- as to the immediate situation would be the identity of the members of the National Committee from the State. Is that not the only remaining question?

I'm not talking about what's going to happen in 1976, but presently the only impact of what we would decide.

MR. WHALEN: There is that. There is also the problem that if persons wanting to participate in a National Convention can have injunctions issued against them, and if the judgments are subsequently reversed, but those individuals have to stand for contempt, that certainly will chill in the future any First Amendment rights or incentive to bring this kind of challenge.

QUESTION: I was excluding the future consequences; just the present ones.

The decision of this Court now would decide who -- which body is going to elect the National Committee members from the State of Illinois.

MR. WHALEN: It will decide that. The trial -- the Cook County Judge has also deferred any further action pending review of this case. So --

QUESTION: It will also decide whether or not your clients are going to go to jail.

MR. WHALEN: That's correct.

QUESTION: That's also future.

MR. WHALEN: Right.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Whalen.

Mr. Torshen.

ORAL ARGUMENT OF JEROME H. TORSHEN, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The issue in this case is whether the State's interest is sufficient to enable it to enforce voting and associational rights of its citizens to injunction proceedings against certain of its citizens from assuming party offices to which they were not elected, and from representing a particular electorate which did not choose them.

The facts underlying this issue have been largely totally ignored by petitioners, and have not been properly heard in any court until they were heard in the Circuit Court of Cook County.

Those underlying facts which give rise to the

injunction, and which were not heard, are the Illinois Election Law, the nature of the election itself, the voter in associational rights of Illinois citizens to choose their representatives, and to associate with each other in political parties, and the findings that were made concerning the nature of the petitioners' slate of delegates itself, and the manner in which they were chosen by the State.

With regard to all of these things, we are here on a record which is largely uncontested and in which the findings of fact, which came after two evidentiary hearings, at which all persons who participated were not objected to.

I would like to dispose, if I may, of the res judicata argument, because that has taken up a large part of the petitioners' brief. And in the context of this case, it creates a cloud which has to be dispelled.

If anything, res judicata requires an identity of issues in an opportunity to litigate those issues.

The issues before the District of Columbia Courts, both the District Court and the Circuit Court, were the constitutionality of certain guidelines of the Democratic Party. These included two guidelines concerning the imposition of quotas and two guidelines which dealt with slate-making and the endorsement of candidates.

When this came before the District Court, Judge Hart specifically refused to hear any questions concerning the

legality of the slates chosen in Illinois, but concerned himself only with the questions of constitutionality of the guidelines, holding three constitutional and one unconstitutional, and he refused to issue an injunction sought by the Democratic National Committee against State Court proceedings.

It should be noted that the original litigants in that case were the duly elected delegates in Illinois through a representative and the Democratic National Committee.

When the case went before the Court of Appeals for the District of Columbia on review, the Court sustained Judge Hart's finding with regard to the one particular guideline which he held unconstitutional.

The Court stated specifically, in part two of its opinion, which dealt with the Illinois challenge to the guidelines, that the issue before the court below was the constitutionality of the guidelines.

The Court then went on, in part three, which dealt with the Illinois counterclaim, and said: Because the Convention is hard upon us, the issue must be decided, not heard but decided. And thereupon issued its injunction against the proceedings in the Illinois Court.

The Court made clear in its opinion that Judge Hart stated that the legality of the slate of petitioners here was not before him, but nevertheless issued its injunction, which was subsequently stayed by this Court.

So that when the case went back to Illinois, with all parties present by counsel, for evidentiary hearing, there had been no finding concerning the legality of petitioners' slate, and this was the only and precise question presented to the Illinois Court.

So, in these circumstances, where there were no identity of issues, no opportunity to litigate, no pleadings or proof, and no findings concerning legality of that slate, it seems difficult to us to concede or assume that there was some res judicata or collateral estoppel effect left over, after the injunction had been stayed by this Court, at the time that this Court criticized the District of Columbia -- the Court of Appeals decision.

QUESTION: Your point is, I guess, that the federal litigation, culminating in this Court's stay, was not concerned with the legality under Illinois law of your slate, and, on the other side of the coin, that this case is not concerned with the constitutional legitimacy of the Democratic Party's guidelines?

MR. TORSHEN: That's correct, Your Honor. They're not at issue in this slate -- in this case. And, in fact, at the outset of the hearing before District Judge Hart -- and I should say there were two hearings; the first hearing was held about ten days prior to that which gave rise to the case which reached your Court. Judge Hart's ruling was held to be

premature at that time. Judge Hart specifically instructed the litigants that he would not hear any questions concerning the Illinois Election Law or the legality of these slates, but would concern himself solely with the constitutionality of the guidelines.

QUESTION: Was it open to respondents to raise the question of the legality of the petitioners' slate, before Judge Hart, in that proceeding?

MR. TORSHEN: No one raised it.

QUESTION: Well, that wasn't my question.

MR. TORSHEN: No. No, sir.

QUESTION: Was it open to you to raise it?

MR. TORSHEN: No, sir, Your Honor, it was not open.

QUESTION: Why not?

MR. TORSHEN: Judge Hart specifically precluded that question.

QUESTION: Did you attempt to open it? To raise it?

MR. TORSHEN: Well, when we came in, Your Honor, we alleged the bona fides of the respondent group, in other words, the duly elected delegate, and we alleged --

QUESTION: But did that imply the lack of bona fides in the petitioners' group?

MR. TORSHEN: No. No, sir. And we were even precluded from putting in evidence concerning the nature of the election in the manner in which we were chosen.

So we were held, in the District Court, to very narrow issues, and these were the issues that went up through the Court of Appeals, and then were suddenly expanded upon in part three of the opinion of that Court, which issued the injunction.

I should state the injunction, the complaint for injunction was, again, not based upon the bona fides of either of the slates, but only upon the rights of association of the National Party.

QUESTION: Now, in the present case, at least as I understand it, it's virtually conceded that your clients were the delegates chosen in accordance with Illinois law.

MR. TORSHEN: Not only that, but --

QUESTION: I don't think there's -- as I understand it, there's no dispute about that. The question is, the basic question in this case is whether the injunction of the Illinois State Court violated the petitioners' constitutional rights of free association.

MR. TORSHEN: Correct, Your Honor.

QUESTION: Is that about it?

MR. TORSHEN: Yes, sir. Yes, sir.

QUESTION: And that was an issue that was not really -- was not the issue in the previous federal issue; that's your point, isn't it?

MR. TORSHEN: That's correct. It was not in issue, nor were the facts which might give rise to a decision before

the Court.

In that regard, Your Honor, it should be noted that the Illinois Court found that the Illinois election was free, equal, open, and nondiscriminatory. That challenge was never -- that finding was never challenged.

Secondly, with regard to the particular election with which we're concerned, it should be noted that prior to the fight over the guidelines, there was certainly a great deal of federal intervention into the Illinois procedures.

For example, the delegates were chosen from single member -- from districts, congressional districts. These districts had been recently reapportioned by a plan approved by the United States District Court in the Northern District of Illinois, which enjoined State agencies from acting in any way to put forth their own plan. So the districts from which the delegates were chosen, the congressional districts, were established by the Federal Court: one-man/one-vote and no invidious discrimination.

Secondly, the prsons who could chose the representatives for the Democratic Party were also determined by the Federal Courts in Kusper vs. Pontikes, which voided the Illinois anti-raiding statute, which provided, then, that anyone could vote in the Democratic Primary.

This Court, in Kusper vs. Pontikes, subsequently affirmed that finding and said that the citizens of Illinois

had to have the right to associate with other members of the Party, to choose their representatives.

Thirdly, the Federal Courts, three years earlier, the Court of Appeals for the Seventh Circuit, in Weisberg vs. Powell, determined the method in which persons were to be placed on the ballot in situations such as this. It was to be by lot or hat-draw, if you will, based upon the day that your application was received by the Secretary of State.

So here we have a situation in which many aspects of this particular election, including the District, the Electorate from which the choice was to be made, and ballot position was determined by the Federal Court, and it now appears to be petitioners' position here that having done all this the votes should not be counted, especially after they concede that the election was free, open, and nondiscriminatory.

We think, Your Honor, that there can be no such result as that, but that the votes were entitled to be counted, and that the election was not a charade. The Illinois rules were very clear, anyone could run. There were minimal requirements. Anyone could vote. And, in fact, they did vote. There were challenge procedures at all phases of the election process, and yet not one of the 180 candidates for the 62 delegate positions were challenged by anyone throughout the election process.

And it's this particular election, this popular

election, held under these safeguards, that petitioners here say must be totally ignored.

We don't think that that's a result that can be reached.

And what was the State interest here that they were protecting?

We have to look to that, Your Honor, again to the hearings that were held in the State Court, because it's the only place that such hearings were held, and this concerns the manner in which the petitioners were chosen to represent the Illinois Democratic Election. They were chosen in private caucuses. The rules provided that only the lowers in the general election could vote.

Secondly, strict quotas on race, sex, and age were applied.

Third, as stated in the Appendix by one of the District Coordinators, one of the counsel for petitioners, the rights of the individual voters were to be ignored.

And lastly, again as in the record, developed on cross-examination from the co-leader of petitioners' slate, the voters who voted for those persons who won were disenfranchised, because their candidates were tainted, as were the candidates themselves. So all of these people were excluded from the election process, and yet sought to represent the Democratic Electorate of Illinois. And it's against this

group that the State issued its injunction.

Now, when I talk about quotas, the evidence is very clear on that.

For example, the First Congressional District of Illinois, which encompasses the Hyde Park area, is, in large measure, black, part white. And at the caucus meeting held in a private home it was stated: All of the delegates elected must be black, based upon the population, or there could be, at the very most, one white.

Now, anyone who lives in Hyde Park in Chicago shops at the Hyde Park Co-op, it's a large supermarket, and if you walk down the aisle there past the produce section, it's quite obvious that there are a large number of Orientals who live in Hyde Park; persons of Oriental descent.

And one of them asked at the caucus: May I be elected?

And the answer was no, you can't be elected; you're neither black nor white.

In the Eighth District, where only four persons came to attend, it took two votes to determine who the delegates would be, because the quotas weren't met.

So these were the people, and this was the selection process that was to be foisted upon the people of Illinois in connection with the Convention.

QUESTION: Was this upon the people of Illinois or

upon the Democratic Convention?

MR. TORSHEN: It was upon the nine -- I believe it's nine Congressional Districts involved, Your Honor.

QUESTION: But the question is as to whether they should be seated, not as to whether they shall be, or how they shall be elected in Illinois.

MR. TORSHEN: I think your --

QUESTION: Well, may I finish?

MR. TORSHEN: I'm sorry, Your Honor.

QUESTION: Or whether they shall be seated at the Democratic Convention.

Now, if I understand -- am I correct, that the State of Illinois can elect a Representative to Congress and Congress can refuse to seat him?

MR. TORSHEN: No, sir.

QUESTION: Am I right?

MR. TORSHEN: They cannot refuse to seat them.

QUESTION: Oh, they can't?

MR. TORSHEN: I believe that was Powell vs. McCormack.

QUESTION: Oh, no, that wasn't on seating.

QUESTION: Haven't there been a number of occasions in history when Congress refused to seat a member elected by a particular district in a particular State?

MR. TORSHEN: My recollection, Your Honor, --

QUESTION: Half a dozen or more of such cases.

For example, one that was recently referred to in one of our opinions, the man elected was a general and he was refused his seat because he wouldn't resign his commission. In another case, he was the United States Attorney, and he was refused his seat because he would not give up his position as United States Attorney.

MR. TORSHEN: He may have been refused his seat, Your Honor, but I don't think people were chosen in his place by Congress; but the submission went back to the process established by the States for the election. So that I don't think Congress reached out to choose a delegate.

QUESTION: I didn't say that. I said that there were instances where the State had exercised its rights, --

MR. TORSHEN: Correct.

QUESTION: -- and in this case the State exercised its rights, and I thought the Convention was exercising its rights.

MR. TORSHEN: Correct, Your Honor. And I don't --

QUESTION: Isn't that what happened? That the --

MR. TORSHEN: Yes, sir.

QUESTION: That the Convention refused to seat them?

MR. TORSHEN: Correct. And we're not arguing that issue before this Court. I think the issue here, Your Honor, is whether the Illinois State Court had the power to enjoin

certain persons from acting as delegates from specific Illinois Congressional Districts.

QUESTION: Even if the Democratic Convention recognized them as such.

MR. TORSHEN: Yes, sir. Yes, sir.

QUESTION: That's a long-arm statute, really, isn't it?

MR. TORSHEN: Well, it may be a long-arm statute, Your Honor, but to say anything else, of course, would be to negate the idea of popular elections of delegates, nor do I think, Your Honor, that it's consistent with any great interest of the Convention. And I think, Your Honor, that that brings us to this problem of the associational rights that have been raised here.

QUESTION: Your Point, I gather, with respect to the purported congressional analogy is that it's not an analogy, that you're not complaining at all here of the Convention's refusal to seat the Illinois -- your clients?

MR. TORSHEN: Correct.

QUESTION: At all. That's not an issue here at all?

MR. TORSHEN: No, sir.

That is not before the Court. We think whether Illinois has an interest in its own election laws, which govern the selection of Party officials, to prevent its citizens from usurping those laws and acting for representa-

tives of Illinois citizens who did not elect them.

With regard to that, if I might, Your Honor, the right of association here is not the right of a few individuals to associate at the Convention with the Democratic National Convention. I think the associational rights here, as this Court pointed out in Pontikes vs. Kusper, are the rights of the voters to associate with other members of the Party in selecting their representatives.

And, secondly, to associate with other members in an election process that here is concededly free, equal, open and nondiscriminatory, to select those representatives.

And third, if we must, the right of the State Parties themselves to associate, through their duly elected representatives, with the representatives of other State Parties in the Convention, so that they can choose the nominee for one of our Major Parties.

QUESTION: What about the question that Mr. Justice White put to Mr. Whalen, Mr. Torshen: What if the Democratic National Party decides that we don't want popularly elected delegates to our Convention, we want ones just chosen by State Conventions; is it free to go ahead on that basis, even though Illinois law says that delegates to National Conventions shall be chosen in election?

MR. TORSHEN: I think they could say that, Your Honor, but I think it would have a serious -- would cause a

serious change in the nature of the Convention process itself; and I think what it would do, Your Honor, --

QUESTION: Well, what about an answer to his question? Isn't it --

MR. TORSHEN: They could say that. They could say --

QUESTION: And make it stick.

QUESTION: Yes.

MR. TORSHEN: Well, they could --

QUESTION: They just wouldn't seat your delegates.

MR. TORSHEN: Sure. They --

QUESTION: But your point is, I guess, that they can't seat anybody else, either.

MR. TORSHEN: I suppose that --

QUESTION: Is that your point?

MR. TORSHEN: Yes, sir.

QUESTION: So that if you concede the right of the Convention, that they must concede the State's right?

MR. TORSHEN: We concede the right of the Convention, I suppose the State would not have to recognize the nominee of the Convention --

QUESTION: That would be its remedy.

MR. TORSHEN: Right.

QUESTION: They say you don't get a spot on the --

MR. TORSHEN: Right. But I also think, Your Honor, that if that question were to arise, and it isn't before the

Court, we would have some other questions to consider.

First, the nature of State action, whether the Convention itself is State action and whether its exclusion and its method of selection of delegates, who will choose the nominee of one of our great Parties for President, is a proper method.

In other words, the Convention isn't a voluntary association. We don't have to reach the question here of State action, but it certainly is a great quasi-public body performing a very, very important function. And for all practical purposes, the only way in which --

QUESTION: I gather, then, if we sustain your view here, or if your view would have been followed in 1972, Illinois would not have had delegates at the Convention.

MR. TORSHEN: That's conceivable, Your Honor.

QUESTION: Well, if it's conceivable, you say that the Convention had no business seating anybody else.

MR. TORSHEN: Right. That's correct. Illinois might not have had delegates.

And we would submit, Your Honor, that that result would be preferable to the result which did occur, in which the Party sought to construct itself from the top up, rather than the bottom down, by picking out the people who would represent the Illinois Electorate.

QUESTION: So you say the State has the -- the Party

hasn't got the right to say who is going to represent the State.

MR. TORSHEN: Correct.

QUESTION: They can reject your delegates, but they can't do anything else.

MR. TORSHEN: Correct.

And I think, Your Honor, --

QUESTION: So that if you have a Convention under the proposed Party Rules in the State, you could get an injunction and stop them from going to the National Convention?

MR. TORSHEN: If the State's selection system has not been referred to a State Party, as it has been in some States, and if the State's selection system is as it was in Illinois, a popular election, which was free and open to all. And I think, Your Honor, the --

QUESTION: My question is: They have a State Convention, which the State of Illinois says is not lawful under the State law. And they elect delegates to the National Convention in Podunk, outside the State of Illinois. The State of Illinois could enjoin them from going to the Convention.

MR. TORSHEN: Yes, sir.

QUESTION: How -- under what rule of law do you get that?

MR. TORSHEN: Not enjoin them from going there, not enjoin them from participating, not enjoining them from serving on Convention Committees; but enjoining them from representing the Electorate as Delegates, Your Honor.

QUESTION: Well, what does that mean? They go to the Convention, they vote in the Convention, but if they say they vote as a Delegate of Illinois, they violate the injunction; if they say, "I vote as Joe Jones", they don't violate it.

MR. TORSHEN: In the Mississippi challenges earlier, Your Honor, what the Convention did was create positions of Delegate-at-large for certain of the members of the Mississippi Delegation. And I suppose here, if the Convention really wanted this particular group, they could have created offices for them.

QUESTION: But what right does the State of Illinois have to control the internal affairs of a National Party Convention, held outside of the State of Illinois?

MR. TORSHEN: The State of Illinois, we would submit, Your Honor, has a right to protect its own election laws and its own electorate, which participated in an election held under the auspices of the State of Illinois. And it could protect that by issuing injunctions which would prevent Illinois citizens, within the jurisdiction of its court, from subverting those laws.

QUESTION: These men could go down to the Convention

MR. TORSHEN: Oh, sure.

QUESTION: -- and vote and do everything that they wanted to, but when they got back to Illinois, they might have a little problem of being in contempt of court.

MR. TORSHEN: That's correct. They would have the problem of facing up to the consequences in Illinois. And in this particular instance, Your Honor, so that the contempt -- the status of the contempt proceeding is known, petitions for rule to show cause have been issued, the trial judge has held the case pending the resolution on appeal of the various issues raised. So that that case, although not formally stayed by order, is in fact stayed, really, awaiting the decision of the ultimate reviewing court; in this instance, this particular Court.

QUESTION: If this hypothetical situation that we were just talking about, that is, these delegates go to the Convention in violation of a State Court injunction, take their seats, perform all their functions, come back, are cited for and found in contempt, would the traditional remedies of federal habeas corpus be open to them?

MR. TORSHEN: I haven't considered that question, Your Honor. But I would assume, first, --

QUESTION: I suppose they would at the time, wouldn't they?

MR. TORSHEN: I would think, Your Honor, that not

only would habeas corpus be available, but of course there would be an appeal route from the contempt conviction itself. If there were such a conviction and a penalty imposed.

The normal appeal procedures would be in effect, through the Illinois Courts, and I suppose ultimately, on certiorari, by this Court, if the Court chose to take it, or if it went that far.

So, certainly the trial judge will not be the ultimate -- will not make the ultimate disposition in this case.

But the trial judge in this case was concerned, because the issue was raised in the Illinois Appellate Court that he had no jurisdiction to act at all, and it's come up to this case. [sic]

Your Honor, we think that in this particular matter, the delegates were elected by the people of the State in a proper and fair election. There was no fraud alleged in this election, and there were no challenges. They had bona fide credentials to represent the Democratic Electorate.

We do not think that the petitioners had such credentials, and we think, in the circumstances of this case, the Illinois Court was entitled to protect not only those people who voted in the Illinois Primary but those who took office, and also to protect the Illinois election structure itself.

And I should conclude, Your Honors, by stating that in the Appendix, at page 106, there's a transcript of what happened at one of the caucuses held by the petitioners, wherein their delegates or their slate was elected, and in answer to complaints raised by the assembled citizenry they said: Raise this question in the State Courts.

And this is precisely what was done, Your Honor, and we think it would be reversing the trend of history to say that the State Courts did not have a sufficient interest to enable it to protect its own election laws and its electorate.

QUESTION: You say 106 of the Appendix or of the transcript?

MR. TORSHEN: Of the Appendix, Your Honor.

QUESTION: It also says: raise it in the Credentials Committee.

MR. TORSHEN: Right.

QUESTION: That's in the same paragraph.

MR. TORSHEN: That's correct.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Whalen?

You have one minute left.

REBUTTAL ARGUMENT OF WAYNE W. WHALEN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. WHALEN: Thank you, Mr. Chief Justice.

I wanted to address the question of whether the exclusivity of Illinois law was raised in Keane v. National Democratic Party.

It was raised, indeed, at all three levels. In their complaint before Judge Hart, respondents asked that that Court declare, adjudge, and decree that the plaintiff and delegates, respondents, --

QUESTION: What page is that, Mr. Whalen?

MR. WHALEN: It's on page 9 of our brief.

-- have been duly elected in accordance with the provisions of the Illinois Election Code, and that therefore they be entitled to take their seats as delegates.

QUESTION: But you told us earlier, I thought, -- no point in laboring this thing very long -- that Judge Hart precluded consideration of that issue.

MR. WHALEN: Yes, he did, but then it came up again in the Court of Appeals.

QUESTION: And the Court of Appeals said no question of Illinois law is here involved, or words to that effect.

MR. WHALEN: No, Your Honor, the Court of Appeals said the challenged delegates claim that the National Party cannot abridge their rights under Illinois law to have the

delegates' seats for which they have been elected.

The relationship in this case, between the Illinois law and the Party regulations, offers no ground for relief.

QUESTION: Right.

MR. WHALEN: And then on page 5 of our Reply Brief, we quote the Court of Appeals, which states:

"The Resolution of the Committee which we have here approved provides that the 59 plaintiffs in this suit are not to be seated as the delegates to the Convention from their districts in Illinois. It also provides that 59 other persons shall be seated as the delegates from those districts."

And in their motion for a stay in this Court, following July 5th, the same arguments were raised, and the Illinois Election Law pleaded.

QUESTION: Well, as I understand it, it's not even an argument. "It's been conceded", or at least virtually conceded all the way through all of this litigation, that your adversary's clients are the delegates who were elected in accord with the Illinois law.

MR. WHALEN: That's correct.

QUESTION: Is that correct?

MR. WHALEN: Yes, it is.

QUESTION: There's no argument.

MR. WHALEN: There's no argument on that point, Your Honor.

QUESTION: Right.

MR. WHALEN: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:03 o'clock, a.m., the case in the above-entitled matter was submitted.]

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