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Civil Rights - Elections - Federal Injunction Against Racial Discrimination

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CIVIL RIGHTS—ELECTIONS—FEDERAL INJUNCTION AGAINST RACIAL DISCRIMINATION—In September 1958, in its first complaint under the Civil Rights Act of 1957,[1] the United States sought to enjoin certain election

[1] 16 Stat. 140 (1870), as supplemented by the Civil Rights Act of 1957, 71 Stat. 637, 42 U.S.C. (1958) §1971, which provides in part: "(a) All citizens of the United States who

registrars and deputy registrars in Terrell County, Georgia from continuing racially-discriminatory practices in their registration of voters.[2] The defendants, claiming the 1957 statute to be unconstitutional, moved for dismissal. The district court granted defendants' motion,[3] rejecting government arguments that the subsection authorizing suit by the United States was limited to cases, like the case before the Court, of discrimination by the state. On direct appeal to the Supreme Court, *held,* reversed. Because the alleged racial discrimination by defendants occurred in the performance of their official state functions, they are subject to congressional power under the Fifteenth Amendment. The Court concluded that the defendants could not attack the statute on the ground that as applied to others it might be unconstitutional. *United States v. Raines,* 80 S.Ct. 519 (1960). In a second case under the 1957 act, the United States sought to annul the cancellation of the voting registrations of practically all Negro voters in Washington Parish, Louisiana, which had resulted from challenges[4] made by members of a White Citizens Council for such irregularities as the inaccurate computation of the registrant's age. In addition, an injunction was sought against future discrimination not only by the defendant registrar, who gave effect to the discriminatory challenges, but also by the White Citizens Council and its members. The district court, in granting the relief sought,[5] found that all the defendants were engaged in supervising the state election process, and that therefore their discriminatory conduct constituted

are otherwise qualified by law to vote . . . shall be entitled and allowed to vote . . . without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. . . . (c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. . . ." For a discussion of this statute, see note, 71 HARV. L. REV. 573 (1958).

2 The complaint charged discrimination "against five Negroes (including four teachers) in rejecting their applications to register because of their alleged inability to read and write correctly and intelligibly, and for delaying hearings on applications." The complaint further stated that only 48 of 5,036 Negroes of voting age within the county were registered, as compared with 2,679 of 3,233 Whites. 4 CIVIL LIBERTIES DOCKET 27-28 (Nov. 1958).

3 United States v. Raines, (M.D. Ga. 1959) 172 F. Supp. 552.

4 La. Rev. Stat. (1952 Supp.) §18:245 provides that "upon a written affidavit signed and sworn to in duplicate before and filed with the registrar or his deputy by any two bona fide registered voters of the parish, to the effect that after reasonable investigation and on information and belief certain persons are illegally registered, or have lost their right to vote . . . the registrar shall . . . notify the registrants . . . requiring them to appear in person . . . within ten days . . . and prove their right to remain on the registration rolls. . . ." Failure to appear, or, if appearing, failure to establish one's right to vote, results in the striking of one's name from the rolls.

5 On October 7, 1959 the district court denied motions to dismiss the complaint. United States v. McElveen, (E.D. La. 1959) 177 F. Supp. 355. Findings of fact, conclusions of law and the decree were entered on January 11, 1960, but are not officially reported. For text of the January 11th entries, see appendix of the Brief for the United States (filed January 29, 1960) in the Thomas case.

state action. On appeal by Thomas, the defendant registrar, the Court of Appeals for the Fifth Circuit stayed the injunction of the district court as to him pending decision of his appeal. The United States then petitioned the Supreme Court for certiorari, and applied for an order staying the order of the court of appeals. *Held,* the district court's judgment affirmed, as to defendant Thomas, in a per curiam opinion citing the *Raines* decision. *United States v. Thomas,* 80 S.Ct. 398 (1960).

Although it seems that the rather technical argument employed by the district court in the *Raines* case to invalidate the statute on which the United States relied[6] could be rebutted on the merits,[7] in its decision the Supreme Court instead followed an established policy of allowing litigants to "challenge the constitutionality of a statute only in so far as it affects them."[8] Racially-discriminatory conduct of a state election registrar qua election registrar is clearly discrimination by a state within the prohibition of the Fifteenth Amendment, and hence subject to congressionally-prescribed sanctions.[9] The *Thomas* case stands for the further proposition that such discrimination by a registrar occurs, even though he may not himself entertain a discriminatory intent,[10] when he permits others to avail themselves of state machinery in order to fulfill a discriminatory scheme. Indeed, were this not the rule, a state could avoid the impact of the Fifteenth Amendment merely by recognizing an appropriate right in a reasonably-defined class, which class could be expected to exercise that right in a discriminatory manner. Here the Louisiana statute[11] which recognized the general right in registered voters to challenge the propriety of voting registrations was perhaps designed to achieve such an avoidance.

6 The district court reasoned that "any person" capable of violating 42 U.S.C. §1971 (a) could be reached under 42 U.S.C. §1971 (c), and concluded that while only a state might violate the "entitled" language, a private individual could "disallow" another the physical opportunity to vote within the meaning of subsection (a). For text of these subsections, see note 1 supra.

7 In the Civil Rights Cases, 109 U.S. 3 (1883), in interpreting the word "deprive" in §1 of the Fourteenth Amendment, it was said at 17: "The wrongful act of an individual . . . is simply a private wrong . . . an *invasion* of the rights of the injured party. . . . An individual cannot *deprive* a man of his right to vote. . . ." (Emphasis added.) One could argue that although individuals might *invade* the right to be "allowed to vote . . . without distinction of race" they could not *deprive* another of this right, only the latter giving rise to a government cause of action under subsection (c).

8 Fleming v. Rhodes, 331 U.S. 100 at 104 (1947). See, generally, Justice Brandeis' concurring opinion in Ashwander v. TVA, 297 U.S. 288 at 345-348 (1936). The principal case recognizes several exceptions to the general rule, particularly where "if the Court had not passed on the statute's validity *in toto* it would have left standing a criminal statute incapable of giving fair warning of its prohibitions," citing United States v. Reese, 92 U.S. 214 (1875), on which the district court relied. Principal case at 524.

9 See, generally, "State Action: A Study of Requirements Under the Fourteenth Amendment," 1 RACE RELATIONS LAW REP. 613 (1956).

10 Cf. Shelley v. Kraemer, 334 U.S. 1 (1948) (affirmative equitable enforcement of a racially-discriminatory real property agreement); Barrows v. Jackson, 346 U.S. 249 (1953) (damage award for breach of a racially-discriminatory real property agreement); Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957) (administration of a racially-discriminatory trust).

11 Summarized at note 4 supra.

That a purge of Negro registrants would be initiated by Caucasians might have been anticipated, while it would be extremely doubtful that Negroes fortunate enough to be enrolled would attempt to challenge the registrations of White citizens.[12] More difficult questions concerning the definition of state action are suggested, however, by the district court decision with regard to registrar Thomas' co-defendants. The district court enjoined the White Citizens Council and its members on the basis of a broad concept of state function,[13] precedent for which it found by rather liberally interpreting *Terry v. Adams*.[14] Regardless of whether this action of the district court in the *Thomas* case has a thoroughly sound legal foundation,[15] it would seem, nevertheless, to be a practical necessity for entry of a meaningful decree, for if only the individual election registrar could be enjoined the entire proceeding would lose significance upon that individual's retirement from office.

Prior to 1957, impingements upon the free exercise of the right here involved, which was first recognized by Congress in the Enforcement Act of 1870,[16] were subject to private civil damage[17] and to criminal sanctions.[18] By affording only retrospective relief, and relying upon possibly unsympathetic southern juries for vindication of the Negro's right to vote, these remedies suffer from inadequacies which are avoided by the present statute's authorization of injunction proceedings instituted on behalf of the government. Inasmuch as the practical effect of this extension of the federal injunction into yet another area[19] is to substitute contempt proceedings before a judge for a criminal trial before a jury, a serious question as to the integrity of the constitutional right to trial by jury would appear to be raised.[20] This dilemma, which posed no problem for Justice Brewer in

12 The scope of the southern Negro's voting problem is suggested by Gomillion, "Civic Democracy and the Problems of Registration and Voting of Negroes in the South," 18 LAW. GUILD REV. 149 (1958), who concludes at 150 that if all other methods of preventing them from voting fail, Caucasians "threaten the Negroes with loss of credit or jobs, or with physical violence."

13 Conclusion of Law No. 2, entered January 11, 1960. For text see Brief for the United States (filed January 29, 1960) in the Thomas case at 8a.

14 345 U.S. 461 (1953).

15 In holding the Jaybird Democratic Association subject to the Fifteenth Amendment, Justice Black, joined in the opinion of the Court by Justices Burton and Douglas, emphasized that Jaybird elections effectively determined the result of general elections. Terry v. Adams, id. at 462. Justice Frankfurter relied in part on participation by county officials in Jaybird elections. Id. at 470. Justice Clark's concurring opinion, joined by Justices Jackson, Reed and Vinson, comes closest to enunciating a "state function" theory when it observes that the Jaybird Association "takes on those attributes of government which draw the Constitution's safeguards into play." Id. at 477. This seems to be Justice Clark's conclusion rather than major premise.

16 16 Stat. 140 (1870), 42 U.S.C. (1958) §1971(a). For text see note 1 supra.

17 17 Stat. 13 (1871), 42 U.S.C. (1958) §1983.

18 18 U.S.C. (1958) §242.

19 E.g., Labor-Management Relations Act of 1947, §208, 61 Stat. 155, 29 U.S.C. (1958) §178, applied in United Steelworkers of America v. United States, 361 U.S. 39 (1959) (industry-wide strike affecting the national health and safety).

20 For the American Civil Liberties Union position, approving the 1957 injunction provisions, see 154 CIVIL LIBERTIES 1 (Sept. 1957).

In re Debs,[21] probably cannot be resolved, but only compromised, much in the manner of the 1957 statute which allows a trial de novo before a jury in cases of severe contempt punishment.[22]

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[21] 158 U.S. 564 (1895). Inquiring as to whether the only vindication of federal interests might be through jury trial, Justice Brewer pursued an argument *reductio ad absurdum*. He observed that "if all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce . . . , prosecutions for such offences had in such a community would be doomed in advance to failure." He concluded that "there is no such impotency in the national government." Id. at 581-582.

[22] 71 Stat. 637, 42 U.S.C. (1958) §1971 (d). The right arises if a fine of over 300 dollars or imprisonment in excess of 45 days is imposed.