In the District Court of the United States for the Eastern District of Louisiana

Crim. No. 20067

UNITED STATES OF AMERICA

v.

PATRICK B. CLASSIC, JOHN A. MORRIS, BERNARD W. YEAGER, JR., WILLIAM SCHUMACHER, AND J. J. FLEDDERMANN

STATEMENT OF JURISDICTION

(Filed November 7, 1940)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith the statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this case.

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by United States Code, Title 18, Section 682, otherwise known as the "Criminal Appeals Act," and by United States Code, Title 28, Section 345.

B. The statutes of the United States, the construction of which are involved herein, are U. S. C., Title 18, Sections 51 and 52 (Sections 19 and 20 of the Criminal Code).

SECTION 51. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, * * * they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States (R. S. § 5508; Mar. 4, 1909, c. 321, § 19, 35 Stat. 1092).

SECTION 52. Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both. (R. S. § 5510; Mar. 4, 1909, c. 321, § 20, 35, Stat. 1092.)

C. The opinion and judgment of the District Court sought to be reviewed were entered October 9 and 14, 1940, and the petition for appeal was filed November 7, 1940, and it is presented to the District Court herewith, to wit, on the 7th day of November 1940.

The indictment in this case contains six counts.

A demurrer was filed as to all of the counts. The District Court sustained the demurrer as to the first four counts but postponed hearing as to the last two counts. Subsequently on October 31, 1940 the District Court overruled the demurrer as to counts five and six. The Government appeals only from the ruling of the District Court sustaining the demurrer as to Counts 1 and 2 and dismissing and quashing those counts.

Count 1 is based upon that portion of U. S. C., Title 18, Section 51, which is quoted *supra*. This count charged that the defendants named served as Commissioners of Election, under the laws of the State of Louisiana, in the Second Precinct of the Eleventh Ward of the City of New Orleans at a primary election held on September 10, 1940, for the purpose of nominating a candidate of the Democratic Party for Representative in Congress from the Second Congressional District of Louisiana. It was alleged that these defendants conspired to injure, oppress, threaten and intimidate citizens of the United States in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States, *i. e.,* (1) the right of registered voters who cast their ballots at this primary election to vote and to have their votes counted as cast for the candidate of their choice, and (2) the right of certain candidates at this primary election to have all

votes cast for them counted as cast.[1] The count charged as overt acts that the defendants changed numerous ballots which were cast for one candidate and marked and counted them as votes for another candidate, and that they falsely certified the number of votes cast for the respective candidates.

The second count is based upon U. S. C., Title 18, Section 52, which is quoted *supra*. It charged that the same defendants, acting under color of a statute of Louisiana, wilfully subjected registered voters at the same primary, which voters were inhabitants of the State of Louisiana, to the deprivation of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States, *i. e.,* their right to cast their votes for the candidate of their choice and to have their votes counted as cast. The count further charged that this deprivation was effected by the failure and refusal of the defendants to count votes as cast, by their alteration of ballots, and by their false certification of the number of votes cast for the respective candidates.

The District Court in sustaining the demurrer to Counts 1 and 2 construed Sections 51 and 52 as not embracing the offenses charged in those counts.

[1] The Government in this case is not seeking to sustain the application of Sections 51 and 52 to the rights of candidates at primary elections. Consequently, it is not challenging the ruling of the District Court insofar as it applies to the second object of the conspiracy charged in the first count and to the third and fourth counts.

In reliance upon the majority opinion of this Court in *Newberry* v. *United States,* 256 U. S. 232, and the construction therein of Section 4 of Article I of the Constitution of the United States, the District Court held that the right or privilege of voting at primary elections for the nomination of candidates for the office of member of the House of Representatives was not "secured" or "secured and protected" by the Constitution or laws of the United States, and hence was not a right the deprivation of which could be punished under Sections 51 and 52. The Court also held that the application to the facts charged of Sections 51 and 52, which were enacted before primary elections came into existence, would result, in the language of *United States* v. *Gradwell,* 243 U. S. 476, in "stretching old statutes to new uses, to which they are not adapted and for which they were not intended."

The questions presented in the instant case are, we believe, of paramount public importance. The relationship between a primary election and the ensuing general election is so intimate that the outcome of the former is often determinative of the latter. This is particularly so in those sections of the country where nomination is tantamount to election and the election becomes merely perfunctory. Hence, a voter may be as effectually deprived of his right or privilege of participating in the final selection of Senators and Representatives where acts such as those charged in the indictment were

committed at a primary as where they took place at the general election.

The court below did not deny these self-evident facts but relied instead upon what is conceived to be the opinion of this Court in the *Newberry* case. But only a minority of the Court concurred in the chief opinion, which held broadly that the Federal Corrupt Practices Act was invalid as applied to primary elections for the nomination of Senators, and even that opinion emphasized that the statute was enacted prior to the Seventeenth Amendment (256 U. S. at 254). Four Justices thought the Act constitutional and one thought it invalid because enacted prior to the Seventeenth Amendment, but reserved opinion as to the power of Congress under that Amendment.[2]

The court below also intimated that a statute enacted in 1870 could have no application to a primary held in 1940, probably because primary elections were unknown when Sections 51 and 52 were enacted. But those sections punish, in broad terms, the deprivation of rights and privileges secured by the Constitution and laws of the United States. Nothing in their language indicates an intention to leave unprotected the exercise of those rights and privileges through procedures subse-

[2] Sections 51 and 52, of course, were also enacted prior to the Seventeenth Amendment, but the question here is not the general validity of the statute, as in the *Newberry* case, but the validity of the present application of Sections 51 and 52.

quently developed. *United States* v. *Gradwell,* 243 U. S. 476, is not necessarily opposed, for there the Court emphasized "some strikingly unusual features of the West Virginia law under which the primary was held" (243 U. S. at 487).[3] So far as it amounts to a broad holding that a statute legislating in general terms is to be restricted to the specific instances envisioned by Congress at the time of its enactment, the *Gradwell* case is no longer followed by this Court. See *Puerto Rico* v. *Shell Co.,* 302 U. S. 253, 257–259; *United States* v. *Thind,* 261 U. S. 204, 207–208; *Ozawa* v. *United States,* 260 U. S. 178, 195–196. In *Hague* v. *C. I. O.* 307 U. S. 496, 512–514, 532, four members of the Court agreed that free discussion of the National Labor Relations Act was a privilege and immunity of citizens of the United States and four members agreed that this purpose, together with others unknown to Congress when it enacted the jurisdictional provisions of the Civil Rights Act of 1871, were privileges and immunities secured by the Con-

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[3] The West Virginia provisions permitted candidates to be nominated by petition for the general election, irrespective of the outcome of the primary. In contrast, the Louisiana election laws prescribe that "all political parties shall make all nominations of candidates for * * * Members of the House of Representatives in the Congress of the United States * * * by direct primary elections," and prohibit the Secretary of State from placing on the ballot any candidate for any political party who was not so nominated. Laws of 1940, Act No. 46, Sec. 1.

stitution and laws of the United States. Neither ruling would be possible under any broad application of the *Gradwell* case.

If, as we submit, a primary election is such an integral part of the elective process that free election cannot be assured unless the rights of voters at the primaries are protected from corruption, fraud or violence, it would seem that their rights are as much within the protection of Sections 51 and 52 as are the rights of voters at general elections. It is well settled that the right to vote for members of Congress at general elections and to have such vote counted as cast is a right secured to the voter by the Constitution within the meaning of Section 51. *Ex parte Yarbrough,* 110 U. S. 652; *United States* v. *Mosley,* 238 U. S. 383.

D. The following decisions sustain the jurisdiction of the Supreme Court under that provision of the Criminal Appeals Act allowing a direct appeal to the Supreme Court "From a decision or judgment * * * sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the * * * construction of the statute upon which the indictment is founded":

> *United States v. Patten,* 226 U. S. 525, 535; *United States* v. *Birdsall,* 233 U. S. 223, 230; *United States* v. *Kapp,* 302 U. S. 214, 217; *United States v. Borden Co.,* 308 U. S. 188, 192–193.

It may also be suggested that the jurisdiction of the Supreme Court may be sustained on the ground that the judgment of the District Court is one sustaining a special plea in bar, when the defendants have not been put in jeopardy. See *United States* v. *Celestine,* 215 U. S. 278; *United States* v. *Barber,* 219 U. S. 72; *United States* v. *Oppenheimer,* 242 U. S. 85; *United States* v. *Thompson,* 251 U. S. 407; *United States* v. *Goldman,* 277 U. S. 229.

Appended hereto is a copy of the opinion of the District Court rendered on October 9, 1940.

Respectfully submitted.

(Signed) FRANCIS BIDDLE,
Solicitor General.

(Signed) RENE VIOSCA,
United States Attorney for the Eastern District of Louisiana.

(Signed) ROBERT WEINSTEIN,
Assistant United States Attorney.