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Elections -- Federal Laws Applied to Primaries

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tutions to insure to the accused in such cases jury trial and the other protections afforded by criminal prosecution. Thus, the court says: "If petitioners can be punished for their misconduct, it must be under the criminal code, where they will be afforded the normal safeguards surrounding criminal prosecutions".[31]

There are, however, countervailing considerations, as pointed out by Mr. Justice Stone (now Mr. Chief Justice Stone) in the dissent.[32] The criminal process is slow and cumbersome and likely to be defeated by sundry interferences. The danger of judicial tyranny in summary contempt proceedings is less than the danger that a weakened judiciary will be unable to protect its litigants against outside obstructions of justice. It is therefore urged that Congress amend the statute. Unless this action is taken such offenses as trial by newspaper of pending causes and noncorrupt influencing of witnesses and jurors will, under the present ruling, escape punishment altogether, either as contempts or as crimes.

FRED R. EDNEY, JR.

Elections—Federal Laws Applied to Primaries

Defendants, election officials, were charged with having altered, falsely counted and certified the returns of ballots cast in a Democratic primary election in Louisiana. The primary was held for nomination of a candidate for Representative in Congress. By Louisiana law no candidate unsuccessful in the primary could receive any votes in the general election, "write-in" votes for such persons being disqualified as having been cast for an ineligible candidate.[1] Because of these laws and the one party character of Louisiana politics, the outcome of the Democratic primary has always been tantamount to election. Indictments were secured under statutes providing penalties for injury or oppression of any citizen in the free exercise of rights secured to him by the Constitution or laws of the United States. *Held:* (1) Congress has the power to control fraud in such a primary election, and (2) it had exercised that power through Sections 19[2] and 20[3] of the Criminal Code, under which the indictments were secured.[4]

[31] Nye v. United States, 61 Sup. Ct. 810, 817, 85 L. ed. Adv. Ops. 733.

[32] *See,* Nye v. United States, 61 Sup. Ct. 810, 818, 85 L. ed. Adv. Ops. 733 (1941) (Mr. Justice Stone dissenting: "The question is important, for if conduct such as the record discloses may not be dealt with summarily the only recourse of a federal court for the protection of integrity of proceedings pending before it, from acts of intimidation and corruption outside the court room, is to await the indictment of the offender, with or without adjournment of the pending proceedings as the exigencies of the case might require").

[1] Serpas v. Trebucq, (La. app.) 1 So. (2d) 346 (1941); rehearing denied with opinion, 1 So. (2d) 705 (1941).

[2] R. S. §5508; c. 321, §19, 35 Stat. 1092; 18 U. S. C. A. §51 (1927).

[3] R. S. §5510; c. 321, §20, 35 Stat. 1092; 18 U. S. C. A. §52 (1927).

[4] United States v. Classic, 61 Sup. Ct. 1031, 85 L. ed. Adv. Ops. 867 (1941).

The second section of Article 1 of the Constitution provides that the House of Representatives shall be "composed of members *chosen* every second year *by the people* of the several States. . . ." The fourth section of Article 1 further provides that, "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."[5]

Manifestly these sections invest Congress with power to control general federal elections.[6] This power is recognized to be restricted only in the sense that Congress has *permitted* the states to regulate federal elections held within their borders.[7] It was long tacitly assumed that the power of Congress to control elections if it saw fit did not extend to primaries. The question was expressly reserved[8] until presented to the Supreme Court in *Newberry v. United States* in 1921.[9] Federal legislation purporting to regulate primaries as well as general elections was declared unconstitutional.[10] But in the instant case the court unanimously asserts the Congressional power to regulate primaries involving a federal office where by state law the primary is constituted an integral part of the election or, as a practical matter, almost invariably controls the outcome of the general election.[11]

In the *Newberry* case the issue was directly presented by indictment under the Federal Corrupt Practices Act.[12] The court divided four to four, a ninth judge reserving his opinion on the Congressional power over primaries under the Seventeenth Amendment but declaring the

[5] U. S. CONST. AMEND. XVII providing for popular election of Senators instead of appointment by the various state legislatures eliminates any distinction between Senators and Representatives as to the question of federal control of elections.

[6] Devoe v. United States, 103 F. (2d) 584 (C. C. A. 8th, 1939); *Ex parte* Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. ed. 274 (1888); *Ex parte* Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. ed. 274 (1884); *Ex parte* Clarke, 100 U. S. 399, 25 L. ed. 715 (1879); *Ex parte* Siebold, 100 U. S. 371, 25 L. ed. 717 (1879).

[7] Lackey v. United States, 107 F. 114 (C. C. A. 6th, 1901); *Ex parte* Siebold, 100 U. S. 371, 25 L. ed. 717 (1879); for collected cases see Note (1902) 53 L. R. A. 660.

[8] Blair v. United States, 250 U. S. 273, 39 Sup. Ct. 468, 63 L. ed. 979 (1919); United States v. Gradwell, 243 U. S. 476, 37 Sup. Ct. 407, 61 L. ed. 857 (1917); affirming United States v. O'Toole, 236 F. 993 (D. C. S. D. W. Va. 1916).

[9] Newberry v. United States, 256 U. S. 232, 41 Sup. Ct. 489, 65 L. ed. 913 (1921); Notes (1921) 92 CENT. L. J. 445, (1922) 22 COL. L. J. 54, (1921) 19 MICH. L. REV. 860.

[10] Federal Corrupt Practices Act, c. 392, 36 Stat. 822-824 (1910); c. 33, 37 Stat. 25-29 (1911) (regulation of primary and general election campaign expenditures).

[11] The words "primaries" and "elections" as used in this note apply only to those primaries or elections where a federal office is involved. There will be no mention of primaries or elections other than these.

[12] See *supra* note 10.

Act unconstitutional in that it was passed before the Amendment was ratified.[13] The otherwise even division of the court was rooted in the philosophical question of whether the above-mentioned sections of Article 1 of the Constitution were grants of power from individual states to the Federal Government, or from the Federal Government to the states. Four justices considered Article 1, Sections 2 and 4 as grants to the states of part of the inherent power of the Federal Government, and therefore urged that powers not granted (over primaries) were reserved to the granting government. Moreover, that the Constitution should not be narrowly construed, but rather that the word "elections" in the latter section should be recognized as including *any process or phase* in the designation of representatives by popular choice. The remaining four justices maintained conversely that the Federal Government could control elections only in so far as the power was directly conferred by Article 1, Section 4. For, as they urged, this being a grant of power from the states, no implied or inherent power could be said to exist outside of the technical words of the grant. The framers of the Constitution had no knowledge of primaries and therefore they must have intended the term "elections" to apply only to the final act in the designation of the officeholder. These justices considered it immaterial that the primary might have a pronounced effect on the outcome of the general election.

Admirably, the court in the instant case, faced only with the complete diversity of opinion in the *Newberry* case, acted as a whole in deciding that Congress did have the power in question. Following closely the ideas of one bloc of justices in the *Newberry* case, the court reasoned as follows: Article 1, Section 4, as a grant from the Federal Government to the states, expressly reserves to Congress the power to regulate the manner of holding "elections". This power is not lost by permitting the states to split their federal elections into two or more steps, nor is its application in any way limited to the final step in such elections. The Louisiana primary, statutes having eliminated defeated primary candidates from the general election and in effect made the primary an integral part of the election,[14] was an "election" within the meaning of the term as used in Article 1, Section 4, and is therefore subject to Congressional regulation. However, the court did not stop at that point but went on to base their decision on grounds more fundamental in political philosophy: Article 1, Section 2 provides that Representatives shall be "*chosen* . . . by the people. . . ." As a practical matter the choice of Representative in Louisiana is always made in the

[13] See *supra* note 5.

[14] La. Act No. 46, Regular Session, 1940, §87; Serpas v. Trebucq, 1 So. (2d) 346 (1941), rehearing denied with opinion 1 So. (2d) 705 (1941).

Democratic party primary—the election being a mere formality ratifying the results of the primary. Such being the case, Congress should be permitted to see to it that Representatives are in fact "chosen" by the people, and to protect the integrity of the step in which actual choice is made, as well as the final step which only confirms that choice.[15]

A further question presented to the court in the instant case was: Conceeding the power of Congress to maintain the integrity of the Louisiana primary, has it exercised this authority by appropriate legislation? Sections 19 and 20[16] of the Criminal Code are the only applicable statutes.[17] The former section penalizes acts of conspiracy to injure and oppress any citizen in the free exercise of rights "secured to him by the Constitution or laws of the United States." During its history the rights to testify before a land office,[18] to be secure in federal custo-

[15] This recognition of the political potency of the primary in one party states undermines the status of the notorious Texas racial discrimination cases. In Texas the political party is not supported by state funds or connected with state control. Grovey v. Townsend, 295 U. S. 45, 55 Sup. Ct. 622, 79 L. ed. 1292 (1935) therefore found the party to be a purely private organization and, as such, able to prescribe any qualifications it deemed expedient for membership or participation in the primary. The Democratic party in Texas found it advisable to permit only white voters to take part in the primary. Since the Fourteenth and Fifteenth Amendments prohibiting racial discrimination do not apply to the acts of purely private individuals or organizations the *Grovey* case allowed this arbitrary exclusion of negroes. Though the Texas primary has not been constituted an integral part of the election by law, its practical effect is the same as in Louisiana. In Texas the Democratic nomination is always tantamount to election. Unfortunately, the terrific practical significance of the primary failed to influence the decision. As a result the negro was almost completely disfranchised in Texas. The instant case considers such a primary of sufficient public importance to warrant its subjection to federal control, even though it is not conducted in connection with state laws. With proper application of this decision the Texas negro will get his vote back, at least in federal elections. Notes (1935) 35 COL. L. REV. 106, (1935) 2 U. OF CHI. L. REV. 640, (1935) 48 HARV. L. REV. 1436, (1935) 33 MICH. L. REV. 935, (1935) 22 VA. L. REV. 91.

[16] Originally R. S. §5508 (Act May 31, 1870, c. 116, 16 Stat. 141) and R. S. §5510 (Act May 31, 1870, c. 116, 16 Stat. 144). Repealed (1909) c. 321, §341, 35 Stat. 1153. Reenacted without significant change (1909) c. 321, §19, 35 Stat. 1092, and (1909) c. 321, §20, 35 Stat. 1092, 18 U. S. C. A. §§51 and 52. Originally passed as part of extensive Reconstruction legislation to protect the civil rights of the then recently freed negroes, these statutes were left in force when the other sections were repealed in 1894. *See* United States v. Bathgate, 246 U. S. 220, 225, 38 Sup. Ct. 269, 270, 62 L. ed. 676, 679 (1918); United States v. Gradwell, 243 U. S. 476, 483, 37 Sup. Ct. 407, 410, 61 L. ed. 857, 863 (1917); United States v. Moseley, 238 U. S. 383, 388, 35 Sup. Ct. 904, 906, 59 L. ed. 1355, 1357 (1915) (dissenting opinion). The applicable portion of §20 punishes the same acts which are prohibited under §19 when they are perpetrated under color of law. Although the last portion of §20 applies specifically to racial discrimination, it was held in the instant case that the first clause extends protection to all classes of citizens. Both sections protect the same rights; *i.e.*, those secured by the Constitution or laws of the United States, and statutory construction seems identical as to whether or not the particular privilege is in fact protected.

[17] Though both sections protect rights secured by the Constitution *or laws* of the United States they themselves are the only laws in point with the offense alleged. The Hatch Act, c. 410, §1, 53 Stat. 1147, 18 U. S. C. A. §61, *et seq.*, does not regulate primaries in this respect, and applies only to persons or organizations receiving federal funds.

[18] Foss v. United States, 266 F. 881 (C. C. A. 9th, 1920).

dy,[19] to inform officers of the commission of a federal crime,[20] to prove up a federal homestead,[21] to be free from involuntary servitude,[22] to enforce obedience to a decree of a federal court,[23] among others, have been held to be secured by the Constitution or laws of the United States, and so to fall within the meaning and protection of the statute.[24] In many of these cases the rights protected were founded on implication from the Constitution and not secured by express words.[25] Applying the statute to elections, it has been held to protect the right to cast a vote in a general election,[26] and to have that vote counted as cast.[27] However, in *Gradwell v. United States,* the court refused to extend these decisions to a primary election and gave as their reason the fact that the primary had only an indirect effect on the results of the general election.[28] The theory of the court was that, regardless of the injury to the public, the statute had no application where no definite personal right had been invaded by the acts of the defendants.[29]

The majority of the court in the principal case, in holding that Congress had exercised its power to control primaries through the above-

[19] Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. ed. 429 (1892).

[20] Motes v. United States, 178 U. S. 458, 25 Sup. Ct. 993, 44 L. ed. 1150 (1900); *In re* Quarles, 158 U. S. 532, 15 Sup. Ct. 959, 39 L. ed. 1080 (1895).

[21] United States v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. ed. 673 (1884).

[22] Smith v. United States, 157 Fed. 721 (C. C. A. 8th, 1907).

[23] United States v. Lancaster, 44 Fed. 885 (C. C. W. D. Ga. 1890).

[24] For collected cases see Note (1937) 107 A. L. R. 1363.

[25] Nicholson v. United States, 79 F. (2d) 387 (C. C. A. 8th, 1935); Hoffman v. United States, 68 F. (2d) 101 (C. C. A. 10th, 1933); *In re* Quarles, 158 U. S. 532, 15 Sup. Ct. 959, 39 L. ed. 1080 (1895) (right to inform of crime); Foss v. United States, 266 F. 881 (C. C. A. 9th, 1920) (right to testify); Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. ed. 429 (1892) (right to be secure in custody).

[26] Guinn v. United States, 238 U. S. 347, 35 Sup. Ct. 926, 59 L. ed. 1340 (1915) (grandfather clause); *Ex parte* Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. ed. 274 (1884) (Ku Klux cases); United States v. Pleva, 66 F. (2d) 529 (C. C. A. 2d, 1933); Aczel v. United States, 232 Fed. 652 (C. C. A. 7th, 1916); Felix v. United States, 186 Fed. 685 (C. C. A. 5th, 1911).

[27] United States v. Moseley, 238 U. S. 383, 35 Sup. Ct. 904, 59 L. ed. 1355 (1915); Devoe v. United States, 103 F. (2d) 584 (C. C. A. 8th, 1939); United States v. Clark, 19 F. Supp. 981 (D. C. W. D. Mo. 1937); Diulius v. United States, 79 F. (2d) 371 (C. C. A. 3d, 1935); Connelly v. United States, 79 F. (2d) 373 (C. C. A. 3d, 1935); United States v. Pleva, 66 F. (2d) 529 (C. C. A. 2d, 1933).

[28] Gradwell v. United States, 243 U. S. 476, 37 Sup. Ct. 407, 61 L. ed. 857 (1917), affirming United States v. O'Toole, 236 Fed. 993 (D. C. S. D. W. Va. 1916). *Held:* no injury to rights of primary candidates where persons unsuccessful in the primary could be nominated by certificate signed by at least five percent of the entire vote polled at the last preceding general election. Notes (1917) 31 HARV. L. REV. 302, 313, (1917) 3 VA. L. REG. (n. s.) 131, (1917) 27 YALE L. J. 137.

[29] United States v. Bathgate, 246 U. S. 220, 38 Sup. Ct. 269, 62 L. ed. 676 (1918) (bribery at general election held injury to public and no invasion of personal rights); United States v. Kantor, 78 F. (2d) 710 (C. C. A. 2d, 1935) (mere inclusion of disqualified votes without subtraction of votes already cast held no invasion of personal rights).

detailed section, was able to impliedly distinguish the *Gradwell* case on the grounds that the Louisiana primary was an integral part of the election. The court reasoned: Since this statute secured the right to vote and to have ballots correctly counted in a general election, the acts of defendants, if committed in a general election, would have been within the statute. Since the primary before the court was an integral step in the election and an indispensable part thereof, both by state law and practical local politics, it followed that the false counting of the primary ballots was an act within the purview of the statute.[30] It was said that in view of the broad language of the statute its protection should not be denied merely because fraud in some primaries might be no interference with a Constitutional right—implying that the statute would not apply where the primary was not an integral part of the election.

On this phase of the case the majority met with vigorous opposition. The minority of the court pointed out the maxim that penal statutes are to be strictly construed.[31] The statute in question was intended to protect rights *secured* by the Constitution and therefore the court must find more in the Constitution than the power to afford protection—it must find the protection itself.[32] Finally the dissent interpreted legislative intent as limiting the application of the statute to rights involved in general elections only, because primaries were almost unknown when the statute was passed.[33] In rebuttal of the dissent it is tenable to argue that, though penal statutes are to be construed in favor of the accused, this rule is not strictly applied as was true in the old days when capital offenses were common.[34] Many rights have been protected by the statute which were only impliedly secured by the Constitution.[35] Furthermore, regardless of legislative intent, even penal statutes have been construed to cover everything subsequently falling within their scope.[36]

The principal objection to the conclusion that Sections 19 and 20 apply to offenses of the type charged in the instant case is seen in the fact that *this application seems dependent on the existence of the primary as an integral part of the election.* In order to determine whether there is any offense at all, the court must first determine that this is, in

[30] The court did not pass on the rights of candidates to run for office and to have ballots cast in favor of their nomination counted as cast. *See* Morris v. United States, 261 Fed. 275 (C. C. A. Ill. 1919) and *supra* note 28.

[31] United States v. Wiltberger, 5 Wheat. (U. S.) 76, 105, 5 L. ed. 37, 45 (1820).

[32] United States v. Sanges, 48 Fed. 78 (C. C. N. D. Ga. 1891). *Contra:* Foss v. United States, 266 Fed. 881 (C. C. A. 9th, 1920).

[33] *See* United States v. Moseley, 238 U. S. 383, 388, 35 Sup. Ct. 904, 906, 59 L. ed. 1355, 1357 (1917) (dissenting opinion).

[34] MAXWELL, INTERPRETATION OF STATUTES (6th ed. 1920) 462.

[35] See *supra* note 22.

[36] Browder v. United States, 312 U. S. 335, 61 Sup. Ct. 599, 85 L. ed. Adv. Ops. 537 (1941); Note (1940) 9 GEO. WASH. L. REV. 234.

fact, the status of the particular primary. Making the existence of the crime dependent on judicial research subsequent to the offense is highly undesirable where the sovereign has no common law criminal jurisdiction.[37] The accused has a right to be put on notice by statute as to whether particular acts constitute a federal offense. Where there are no laws making the primary an integral part of the election, fraud in the primary of the dominant party, under the strict language of the principal case, would constitute a federal offense, whereas the same acts in the primary of the minority party would not. The determination of whether there was a federal offense would necessitate judicial research into local laws and political customs—in effect, judicial legislation—in every case presented.[38] The majority in the instant case dismissed this seemingly powerful objection lightly by declaring that it presented a difficulty inherent in the judicial application of every federal criminal statute, since none could be extended beyond the limits prescribed by the Constitution.

However, a finding that the legislation was inappropriate would have made it unnecessary to pass on the question of Congressional power to control primaries. If the question had remained undecided, as after the *Gradwell* case, Congress might have hesitated to pass more specific legislation of this nature for fear that it would be ruled unconstitutional under the *Newberry* case. It is possible, therefore, that the majority deemed itself compelled by reason of public necessity to "stretch an old statute to new uses" in order to establish an unequivocal holding that Congress *had the power* to control primaries involving federal offices.

Though the instant case settles the question of federal power to control primaries which are an integral part of the election by law, or are equivalent to election by local custom, its future application may present many problems. The court might deny the power of Congress to regulate minority party primaries not integral parts of the election by law. Such a view could be taken under the instant case by limiting its authority to facts such as were there directly presented. A ruling denying protection to minority party primaries would burden the courts with determining whether any particular primary was of sufficient im-

[37] United States v. Hudson, 7 Cranch (U. S.) 32, 3 L. ed. 259 (1812) (no common law offense against the United States).

[38] *Id.* at 34, 3 L. ed. at 260 (act must be made a crime by statute); *accord,* United States v. Lacher, 134 U. S. 624, 628, 10 Sup. Ct. 625, 626, 33 L. ed. 1080, 1083 (1890) (acts must be plainly and unmistakably within criminal statute); James v. Bowman, 190 U. S. 127, 23 Sup. Ct. 678, 47 L. ed. 979 (1903); United States v. Reese, 92 U. S. 214, 221, 23 L. ed. 563, 566 (1875) "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." Also see U. S. CONST. AMEND. VI.

portance to warrant federal control. This determination would be especially difficult in multi-party states. It seems evident that even the minority party primary has some effect on the general election.[39] The extension of protection to primaries equivalent to election because of the character of local politics, while denying protection to the minority party primaries, might be arbitrary discrimination in violation of the due process and equal protection clauses of the Constitution.[40] And though one party may have dominated a state for many years, and so brought its primaries under federal protection, a political upheaval might put the other party in power and its candidates in office, even though its primaries had not been under federal supervision. These questions must be resolved by future legislation or judicial decree. This decision, the court being divided four to three on the question of statutory construction, stands in danger of being overruled unless more definite laws are passed. Specific statutes would eliminate the idea of judicial legislation and greatly lighten the burden which the instant case places on the judiciary. Therefore it is submitted: (1) An appropriate Federal Primary Control Act should be enacted settling the difficulties inherent in the application of the instant case. (2) Full protection of the public in elections demands, in the event such legislation is passed, that the court shall not find it repugnant to the Constitution when applied to minority party primaries not integral parts of the election by law, but shall take the further necessary step of holding that federal control may extend to *all* primaries where a federal office is involved.

JOHN T. KILPATRICK, JR.

Evidence—The Opinion Rule—Use of Hypothetical Question as Basis of Expert Opinion

The *P*'s intestate was thrown to the center of the highway when the auto in which she was riding as a passenger failed to make a turn in the road and struck a bridge abutment. One of the *D* motor lines' trucks was immediately behind the car. *P*'s contention is that the truck ran over the girl's body, thereby contributing to her death. The *D* contends that its truck passed to the left of the prone figure. On trial, the *D* motor lines offered testimony of a physician who had examined the girl, and proposed to ask him the following question:

[39] See concurring opinion of Mr. Justice Pitney in Newberry v. United States, 256 U. S. 232, 275, 41 Sup. Ct. 469, 480, 65 L. ed. 913, 928 (1921).

[40] Defendants raised this point in their petition for rehearing. (Rehearing denied Oct. 14, 1941, 10 LAW WEEK 3125); Brief in support of petition for rehearing, p. 8, United States v. Classic, 61 Sup. Ct. 1031, 85 L. ed. Adv. Ops. 867 (1941).