The Burger Court Opinion Writing Database

Communist Party of Indiana v. Whitcomb

414 U.S. 441 (1974)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 20, 1973

Re: No. 72-1040 - Communist Party of Indiana, et al v. Edgar D. Whitcomb, Etc., et al

Dear Lewis:

Please join me in Part I of your concurring opinion.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

October 19, 1973

Dear Chief:

As I indicated in Conference I suggest that 72-1040, Communist Party v. Whitcomb be assigned to Bill Brennan.

SP for WOD

WILLIAM O. DOUGLAS

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 21, 1973

Dear Bill:

Please join me in your opinion in 72-1040, Communist Party v. Whitcomb.

William O. Douglas

Mr. Justice Brennan

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Brennan, J.

Circulated: 11-21-73

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 72–1040

Communist Party of Indiana et al., Appellants. v. Edgar D. Whitcomb, Etc., et al.	On Appeal from the United States District Court for the Northern District of Indiana.

[December —, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This is a loyalty oath case. The question for decision is whether the First and Fourteenth Amendments are violated by Indiana's requirement, Ind. Ann. Stat. § 29–3812, that "[n]o existing or newly-organized political party or organization shall be permitted on or to have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under oath, that it does not advocate the overthrow of local, state or national government by force or violence . . ."[1]

[1] Section 29–3812 reads in pertinent part as follows:

"No political party or organization shall be recognized and given a place on or have the names of its candidates printed on the ballot used at any election which advocates the overthrow, by force or violence, of the local, state or national government, or which advocates, or carries on, a program of sedition or of treason, and which is affiliated or cooperates with or has any relation with any foreign government, or any political party or group of individuals of any foreign government. Any political party or organization which is in existence at the time of the passage of this act, or which shall have had a ticket on the ballot one or more times prior to any election, and which does not advocate any of the doctrines the advo-

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice J.

Circulated: _____

Recirculated: 11/26/73

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1040

Communist Party of Indiana et al., Appellants, *v.* Edgar D. Whitcomb, Etc., et al.	On Appeal from the United States District Court for the Northern District of Indiana.

[December —, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1040

Communist Party of Indiana et al., Appellants, v. Edgar D. Whitcomb, Etc., et al	On Appeal from the United States District Court for the Northern District of Indiana.

[December —, 1973]

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: Brennan, J.

Circulated: _____

Recirculated: DEC 28

SUPREME COURT OF THE UNITED STATES

No. 72–1040

Communist Party of Indiana et al., Appellants, v. Edgar D. Whitcomb, Etc., et al.	On Appeal from the United States District Court for the Northern District of Indiana.

[December —, 1973]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 27, 1973

No. 72-1040 - Communist Party v. Whitcomb

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 23, 1973

Re: No. 72-1040 - Communist Party of Indiana v. Whitcomb

Dear Bill:

I hope you could drop the last paragraph of your proposed opinion in this case. I hadn't thought you needed to reach overbreadth. The Party is complaining about the violation of its constitutional rights, not those of others. I also have some troubles with some of the material at the cited pages of 83 Harvard Law Review.

This was done in 2nd draft

Sincerely,

BRW

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 27, 1973

Re: No. 72-1040 - Communist Party of Indiana v. Whitcomb

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 28, 1973

Re: No. 72-1040 -- Communist Party of Indiana et al., v. Whitcomb

Dear Bill:

Please join me in your opinion.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 17, 1973

Re: No. 72-1040 - Communist Party v. Whitcomb

Dear Bill:

Will you please add the following at the end of your opinion:

"Mr. Justice Blackmun concurs in the result upon the equal protection grounds enunciated by Mr. Justice Powell in the second paragraph of his concurring opinion, post, _____."

Sincerely,

H.A.B.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 18, 1973

Dear Lewis:

Re: No. 72-1040 - Communist Party v. Whitcomb

I now have your recirculation of December 17. Would you please join me in part I of your restructured opinion. I am asking Bill Brennan not to add the addendum I suggested with my note to him of December 17.

Sincerely,

Harry

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 30, 1973

No. 72-1040 Communist Party v. Whitcomb

Dear Bill:

I am not yet at rest in this case, and may try to write something.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: DEC 10 1973

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1040

Communist Party of Indiana et al., Appellants, v. Edgar D. Whitcomb, Etc., et al. | On Appeal from the United States District Court for the Northern District of Indiana.

[December —, 1973]

MR. JUSTICE POWELL, concurring.

I concur in the reversal of the judgment below but for reasons different from the majority's. In my view it was quite unnecessary to reach the issue addressed by the Court.

It was established at trial that appellants had certified the Democratic and Republican parties despite the failure of party officials to submit the prescribed affidavits under Ind. Stat. § 29-3812. In *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968), this Court held that a discriminatory preference for established parties under a State's electoral system can be justified only by a "compelling state interest." In the present case, no colorable justification has been offered for placing on appellants burdens not imposed on the two established parties. It follows that the appellees' discriminatory application of the Indiana statute denied appellants equal protection under the Fourteenth Amendment.

In addition, after receiving the appellants' application for certification, the Indiana Election Board requested and received an official opinion from the Attorney General of Indiana. The opinion stated that the oath provision of Ind. Ann. Stat. § 29-3812 was "valid and binding" and further that "the Communist Party would not be eligible to appear on the Indiana ballot even if the offi-

✓ ——

changes pp 1, 2

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
—Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

3rd DRAFT

From: Powell, J.

Circulated: _____

Recirculated: DEC 17 1973

SUPREME COURT OF THE UNITED STATES

No. 72-1040

Communist Party of Indiana et al., Appellants, *v.* Edgar D. Whitcomb, Etc., et al. | On Appeal from the United States District Court for the Northern District of Indiana.

[December —, 1973]

MR. JUSTICE POWELL, concurring.

I concur in the result. In my view it was quite unnecessary to reach the issue addressed by the Court.

I

It was established at trial that appellants had certified the Democratic and Republican parties despite the failure of party officials to submit the prescribed affidavits under Ind. Stat. § 29-3812. In *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968), this Court held that a discriminatory preference for established parties under a State's electoral system can be justified only by a "compelling state interest." In the present case, no colorable justification has been offered for placing on appellants burdens not imposed on the two established parties. It follows that the appellees' discriminatory application of the Indiana statute denied appellants equal protection under the Fourteenth Amendment.[1]

[1] In view of this patently unconstitutional application of the statute, there is no occasion to reach the broader issue addressed by the Court today. Although I express no conclusion on that issue, it should be noted that this is the first case touching upon the type of oath which may be required of a candidate for the office of President of the United States. The Indiana oath, of course,

P 1, 2, 3, 4

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

4th DRAFT

Powell, J.

Circulated: _____

Recirculated: 12/19/73

SUPREME COURT OF THE UNITED STATES

No. 72-1040

Communist Party of Indiana et al., Appellants, v. Edgar D. Whitcomb, Etc., et al.	On Appeal from the United States District Court for the Northern District of Indiana.

[December —, 1973]

MR. JUSTICE POWELL, concurring.

I concur in the result. In my view it was quite unnecessary to reach the issue addressed by the Court.

I

It was established at trial that appellants had certified the Democratic and Republican parties despite the failure of party officials to submit the prescribed affidavits under Ind. Stat. § 29-3812.[1] In *Williams* v. *Rhodes*, 393 U. S.

[1] The complaint in this case expressly alleged that § 29-3812 subjected appellants to burdens not imposed on the Republican and Democratic Parties, and proof at trial was directed to that issue. The Court now maintains that this issue cannot be considered because it was not expressly raised in the jurisdictional statement. *Ante*, p. 5, n. 6. Supreme Court Rule 15 (1)(c) provides, however, that the jurisdictional statement "will be deemed to include every subsidiary question fairly comprised therein" and that "questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the Court." The issue of discriminatory application of the statute certainly falls within the gravamen of appellants' jurisdictional statement and should therefore be considered. See, *e.g.*, *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 371-372, n. 4 (1969). Moreover, the appropriate exercise of judicial power requires that important constitutional issues not be decided unnecessarily where narrower grounds exist for according relief. This consideration applies even though such grounds are not presented

changes pp 1, 2

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated:

Recirculated: DEC 27 1973

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1040

Communist Party of Indiana et al., Appellants, v. Edgar D. Whitcomb, Etc., et al. } On Appeal from the United States District Court for the Northern District of Indiana.

[December —, 1973]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE RHENQUIST join, concurring in the result.

I concur in the result. In my view it was quite unnecessary to reach the issue addressed by the Court.

It was established at trial that appellants had certified the Democratic and Republican parties despite the failure of party officials to submit the prescribed affidavits under Ind. Stat. § 29-3812.[1] In *Williams* v. *Rhodes*, 393 U. S.

[1] The complaint in this case expressly alleged that § 29-3812 subjected appellants to burdens not imposed on the Republican and Democratic Parties, and proof at trial was directed to that issue. The Court now maintains that this issue cannot be considered because it was not expressly raised in the jurisdictional statement. *Ante*, p. 5, n. 6. Supreme Court Rule 15 (1)(c) provides, however, that the jurisdictional statement "will be deemed to include every subsidiary question fairly comprised therein" and that "questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the Court." The issue of discriminatory application of the statute certainly falls within the gravamen of appellants' jurisdictional statement and should therefore be considered. See, *e.g.*, *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 371-372, n. 4 (1969). Moreover, the appropriate exercise of judicial power requires that important constitutional issues not be decided unnecessarily where narrower grounds exist for according relief. This consideration applies even though such grounds are not raised in the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 14, 1973

Re: No. 72-1040 - Communist Party of Indiana v. Whitcomb

Dear Lewis:

The discussion in your concurring opinion of the disparate treatment by Indiana authorities of the Democratic and Republican parties, on the one hand, and the Communist party, on the other, makes a good deal of sense to me. I think I probably overlooked this point during the Conference discussion, because I felt very strongly that the validity of the oath itself was governed by Cole v. Richardson, 405 U.S. 676 (1971). I would be more than happy to join that part of your concurring opinion, and also your discussion in footnote 5 of the Cole v. Richardson issue. I would prefer not to join your discussion of Bond v. Floyd, 385 U.S. 116 (1966), both because I am not willing to agree for constitutional purposes that a state House of Representatives may not assume the same plenary control over the seating of its members as the federal House of Representatives may under the terms of the Constitution, and because in Bond the petitioner asserted an unqualified willingness to subscribe to the oath as written, whereas here the Communist party neither made such an assertion nor, when the chips were down, did they in fact sign the oath as written.

If you could see your way clear to divide your opinion in two parts, and to put your last footnote in the first

part, I would be happy to join the first part. I am sending copies of this to the Chief and to Harry, both because they have not voted and because I had informally suggested to the Chief that I would be happy to join any dissent that he wrote based on Cole v. Richardson. I have in no way retreated from my feeling that Cole covers the validity of the oath, but I am persuaded by your discussion of the disparity in treatment between the Communist party and the established parties that I could not subscribe to an outright affirmance.

Sincerely,

WJW

Mr. Justice Powell

Copies to the Chief Justice
and Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 18, 1973

Re: No. 72-1040 - Communist Party v. Whitcomb

Dear Lewis:

I am exactly where Harry Blackmun's note to you of December 18th indicates he is. Will you please join me in Part I of the third draft of your separate concurring opinion in this case.

Sincerely,

W.H.R.

Mr. Justice Powell

Copies to the Conference