The Burger Court Opinion Writing Database

NAACP v. Claiborne Hardware Co.

458 U.S. 886 (1982)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1982

Re: No. 81-202 - NAACP v. Claiborne Hardware Co.

Dear John:

I join.

Regards,

WEB

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 1, 1982

RE: No. 81-202 NAACP v. Claiborne Hardware

Dear John:

I agree.

Sincerely,

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 16, 1982

81-202 - NAACP v. Claiborne Hardware Co.

Dear John,

Join me, please.

Sincerely yours,

Justice Stevens

Copies to the Conference

cpm

HAB

June 22, 1982

Re: No. 81-202 - NAACP v. Clairborne Hardware Co.

Dear John:

I, for one, am grateful for the labor you put into this "large" case. Something like this is never an easy assignment.

I offer the following trivia for your consideration:

1. It was, I am sure, Martin Luther King, Jr. who was assassinated, not his father. The elder King, I believe, is still living and active, or at least he was for a good while after his son was killed. Would it not be well therefore to use the "Jr." in designating the one who was assassinated? He is referred to on pages 14, 15 (in the footnote), 19 and 36.

2. I am convinced that this generation of law clerks never learned how to spell "accommodate." The misspelled form appears twice on page 31.

Sincerely,

HAB

Justice Stevens

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 22, 1982

Re: No. 81-202 - NAACP v. Clairborne Hardware Co.

Dear John:

Please join me.

Sincerely,

Harry

Justice Stevens

cc: The Conference

June 4, 1982

81-202 NAACP v. Claiborne Hardware

Dear John:

Although I intend to read your draft opinion more carefully before making a final decision, I express now several thoughts for your consideration.

First, I agree entirely that insofar as indiscriminate liability for damages was placed on all participants, the decision below must be reversed. And certainly I agree that liability may be imposed upon persons whose violence caused damage. At page 39, you say this. It would be helpful, I think, if this were repeated near the end of the opinion - possibly in the final paragraph - making clear that this question remains open on remand.

You exonerate the NAACP on a theory that I thought a majority of the Court rejected in Hydrolevel - i.e. the doctrine of apparent authority does not apply to unauthorized acts of members of voluntary, nonprofit associations. In light of Hydrolevel, despite my disagreement with it, I am not sure I could exonerate the NAACP if one of its full time employees - and regional representative - was found to have incited others to violent activity. I wonder, though, whether you need to consider this agency question at all. My understanding of your draft is that you conclude that Evers' activity was constitutionally protected because the major part of the violence occurred before his inflamatory oratory, and none could be traced proximately to it. If Evers is exonerated, would not the NAACP be free of liability also?

I do have a somewhat broader concern. The protection afforded "political" boycotts by your draft appears to be without any limiting principle. If, for example, a state had a law against boycotts of racial or religious groups, do you think it could be enforced in light

of this opinion. Also, suppose that all of the whites in a town decide that blacks have too much economic and political power, and refuse to deal with any black business people. There are, of course, federal laws against such "boycotts". I do not think the mere fact that the activity is concerted is sufficient to protect it. Participants in such a boycott can, I suppose, always claim it is "political".

Although the blacks in this town seem to have had just cause for strong political activity, in this age of numerous special interest groups - many with passionate and extreme feelings - it is well not to exonerate too broadly the type of activity present in this case. It was activity - on the edge of violence much of the time - that injured the innocent with the guilty.

I hesitate to add to your burdens, especially now. But I think it best to invite your consideration of these thoughts early. This must be as difficult a case to write as any we have had in this unusually taxing Term.

Sincerely,

Justice Stevens

lfp/ss

June 15, 1982

81-202 NAACP v. Claiborne Hardware Company

Dear John:

Over the weekend I read with care your second draft. It is a strong opinion, and meets some of the concerns I have expressed.

I am entirely comfortable with most of what you have written and the holding. I continue, however, to have reservations about some of the language that seems unnecessarily broad.

Perhaps some of my concern derives from the increasingly violent age in which we are living. Legitimate First Amendment rights must be safeguarded without encouraging incitement to violence. Pages 34-42 of your opinion come rather close, it seems to me, to making it extremely difficult to hold anyone responsible for the consequences of incitement to force or violence. You rely, of course, on language from prior opinions - written in varying circumstances. It may not be of universal application.

I agree with your holding as to Evers because "the acts of violence identified in 1966 occurred weeks or months after [Evers'] April 1, 1966 speech; [and] the Chancellor made no finding of any violence after the challenged 1969 speech". p. 42. This, therefore, is an easy case, and a good deal of the very broad language in the opinion seems unnecessary.

If there had been violence <u>within a reasonable time</u> span of Evers' "break your neck" speech, combined with the continuous but less physical forms of intimidation that prevailed, I would think the question of causation would be a serious one. Could you not say this? Reliance on the phrase "incite [to] imminent lawless action" can be viewed as meaning action within hours or even less. Causation should depend on the facts and circumstances, and they can vary widely. In this case the total circumstances (weekly rallies, Black Hats, "guards", intimidation threats, some carried out, etc.) well could have led to violence some time

after Evers' incitement. It is a credit to the petitioners that they did not.

I am troubled also by your saying that Evers did not "authorize", "ratify" or "directly threaten" acts of violence (p. 42). If this excused actual incitement, it would be virtually impossible to hold one responsible for action or speech that caused lawless conduct. Such a person rarely would be stupid enough to "authorize" or "ratify" such action. At another point, I read the draft as drawing a distinction between "inspired" and "authorized". (p. 40) Again, specific authorization, direction or approval of tortious activity - as these terms normally are used - would not be necessary in my opinion. Inspiration and incitement, especially where mobs are concerned, can accomplish fully as much to encourage lawless conduct as unlikely specific authorization of the conduct.

The discussion with respect to "damages" also seems unnecessarily restrictive. Relying on Noto and Healy - cases that are not entirely apposite - your opinion may be read as saying that there must be "clear proof that a defendant specifically intended . . . resort to violence". Both Noto and Healy involved organizations. Here the NAACP certainly does not intend violence, but its members should be held responsible under tort law principles for violence regardless of NAACP intent. I also view this case differently from Gibbs as Congress has legislated extensively with respect to labor law. I agree, of course, that membership in a group alone is not sufficient but I also wonder if it is sufficiently clear that your requirement of "strict proof" (p. 33) is limited to a claim based on association alone. As a practical matter, it will be near to impossible to prove damages in a case like this where no one can be entirely sure as to what damage was caused by what specific action.

Finally, I remain unpersuaded that Evers lacked apparent authority from the NAACP. I agree that there was no actual authority beyond directing and encouraging the boycott. But the very fact that Evers had this authority would certainly lead the blacks in question to believe he was acting on behalf of the respected NAACP organization. In a sense, I welcome what seems to me to be a retreat from Hydrolevel - a case with which I wholly disagree. But I must say that Evers' apparent authority seems as evident as that of the Association members (not officials, as was Evers) who perpetrated the fraud in Hydrolevel. I also continue to think, John, in view of the remoteness of the violence to Evers' most provocative incitement, that it is

unnecessary to get into the agency question. As you argue, NAACP will be exonerated when we clear Evers. (p. 43).

In view of the foregoing, I hope you will consider qualifying some of the rather broad language. If not, I am inclined to join only Parts I, IIA, IV, and the judgment.

Even with respect to IV, I would appreciate your making a couple of minor changes. Perhaps you would be willing to change the third sentence of Part IV to read as follows:

> "And yet <u>one of</u> the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by <u>lawful means</u>." (additions underscored)

And on page 47, it seems to me that the first two full sentences on the page need some qualification. Some picketing can be the basis for a damage award. And, in the next sentence, the word "agreement" to use violence again is used. As I have indicated, I think incitement is more appropriate where violence occurs within a reasonable time. Proof of an agreement, certainly when dealing with large numbers of people, normally will be impossible.

I appreciate that you have had to write what probably is the most difficult case of this Term, and therefore apologize for causing you even to read this long letter. Perhaps I am unduly pessimistic, but it does seem to me that world order is showing signs of unraveling. The difference between the essentially peaceful picketing involved in this case and mindless mobs in the street will not always be easy to define. The language of some of the First Amendment cases you cite, decided in a different era, may be relied upon to justify even serious threats to the rule of law.

There is no occasion for you to respond to this letter. If you make changes, I will see them in your next draft. I can then decide whether to join your entire opinion - as I would like very much to do.

Sincerely,

Justice Stevens

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 19, 1982

81-202 NAACP v. Claiborne Hardware

Dear John:

Please join me.

Sincerely,

Lewis

Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 24, 1982

Re: No. 81-202 NAACP v. Claiborne Hardware

Dear John:

Will you please show at the end of your opinion that I "concur in the result?"

Sincerely,

wht/cms

Justice Stevens

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: MAY 30 '82

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–202

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL, PETITIONERS *v.* CLAIBORNE HARDWARE COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

[June ——, 1982]

JUSTICE STEVENS delivered the opinion of the Court.

The term "concerted action" encompasses unlawful conspiracies and constitutionally protected assemblies. The "looseness and pliability" of legal doctrine applicable to concerted action led Justice Jackson to note that certain joint activities have a "chameleon-like" character.[1] The boycott of white merchants in Claiborne County, Mississippi, that gave rise to this litigation had such a character; it included elements of criminality and elements of majesty. Evidence that fear of reprisals caused some black citizens to withhold their patronage from respondents' businesses convinced the Supreme Court of Mississippi that the entire boycott was unlawful and that each of the 92 petitioners was liable for all of its economic consequences. Evidence that persuasive rhetoric, determination to remedy past injustices, and a host of voluntary decisions by free citizens were the critical factors in the boycott's success presents us with the question whether the State Court's judgment is consistent with the Constitution of the United States.

[1] See *Krulewitch* v. *United States*, 336 U. S. 440, 447–449 (Jackson, J., concurring).

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 7, 1982

Re: 81-202 - NAACP v. Claiborne Hardware Co.

Dear Lewis:

Many thanks for your letter providing me with your preliminary reaction to my opinion. The circulation that we made earlier today includes changes that were drafted before receiving your letter.

I think the new footnote 49 on pages 28-29 may help a little with the third problem you raise. In addition, I plan to add the following to that footnote to address that problem: "Nor are we presented with a boycott designed to secure aims that are themselves prohibited by a valid state law. See Hughes v. Superior Court, 339 U.S. 460."

With respect to your concern about Hydrolevel, I had intended to make it clear that the NAACP could be held liable for acts of agents committed within their apparent authority as well as within their actual authority. Thus, at the bottom of page 43 we state that the NAACP may be held responsible "for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority." Furthermore, on page 44 we point out that no "NAACP member had either actual or apparent authority to commit acts of violence or to threaten violent conduct."

I think you probably are correct that the exoneration of Evers should also free the NAACP of liability, but it seemed to me that there is sufficient danger that some other NAACP member at a much lower level may be found guilty of violence that it is appropriate to make it clear that the mere fact that such a person may have attended a number of NAACP

meetings would not be enough to hold the national organization responsible. My reasoning is not that the doctrine of apparent authority is wholly inapplicable to the NAACP but rather that such a person surely cannot necessarily be thought to have apparent authority to engage in such conduct on behalf of the NAACP. In response to your helpful suggestion, I plan to make some changes to that portion of the opinion. I have enclosed those pages with the changes marked.

Finally, with respect to your first point, I think you are correct in suggesting that we should again emphasize the fact that persons who actually were guilty of violence may be held liable on remand. I begin the last paragraph of the opinion with the sentence: "The taint of violence colored the conduct of some of the petitioners." I will add the following: "They, of course, may be held liable for the consequences of their violent deeds."

If you do not feel that the changes that I plan to make are sufficient, or if you have additional concerns, please let me know. I really want to make an effort to achieve the maximum consensus possible and, entirely apart from that objective, particularly value your appraisal of the opinion because it is to a certain extent plowing new ground.

Respectfully,

Justice Powell

Enclosure

ings are not sufficient to establish that Evers had a duty to "repudiate" the acts of violence that occurred.[73] The findings are constitutionally inadequate to support the damage judgment against him.

The liability of the NAACP derived solely from the liability of Charles Evers.[74] The chancellor found:

> "The national NAACP was well-advised of Evers' actions, and it had the option of repudiating his acts or ratifying them. It never repudiated those acts, and therefore, it is deemed by this Court to have affirmed them." App. to Pet. for Cert. 42b–43b.

Of course, to the extent that Charles Evers' acts are insufficient to impose liability upon him, they may not be used to impose liability on his principal. ~~The judgment awarded against the NAACP may not stand, however, for an alternative and more fundamental reason.~~ On the present record, however, the judgment against the NAACP could not stand in any event.

The associational rights of the NAACP and its members have been recognized repeatedly by this Court.[75] The NAACP—like any other organization—of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority.[76] Moreover, the NAACP may be found liable

Cf. American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp. — U.S. —.

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but there is no suggestion that anything improper occurred on those occasions.

[73] See n. 69, *supra*.

[74] Indeed it is noteworthy that Aaron Henry—who was president of the Mississippi State Conference of the NAACP, president of the Coahoma County Branch of the NAACP, and a member of the Board of Directors of the national NAACP—was the only defendant dismissed by the chancellor on the merits.

[75] Cf. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449; *Bates* v. *City of Little Rock*, 361 U. S. 516; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293; *NAACP* v. *Button*, 371 U. S. 415; *Gibson* v. *Florida Legislative Comm.*, 372 U. S. 539; *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288.

[76] There is no question that Charles Evers—as its only paid represent-

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: JUN 7 '82

7. 28-29, 38, 39, 41-42, 47

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-202

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL, PETITIONERS *v.* CLAIBORNE HARDWARE COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

[June ——, 1982]

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The term "concerted action" encompasses unlawful conspiracies and constitutionally protected assemblies. The "looseness and pliability" of legal doctrine applicable to concerted action led Justice Jackson to note that certain joint activities have a "chameleon-like" character.[1] The boycott of white merchants in Claiborne County, Mississippi, that gave rise to this litigation had such a character; it included elements of criminality and elements of majesty. Evidence that fear of reprisals caused some black citizens to withhold their patronage from respondents' businesses convinced the Supreme Court of Mississippi that the entire boycott was unlawful and that each of the 92 petitioners was liable for all of its economic consequences. Evidence that persuasive rhetoric, determination to remedy past injustices, and a host of voluntary decisions by free citizens were the critical factors in the boycott's success presents us with the question whether the State Court's judgment is consistent with the Constitution of the United States.

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[1] See *Krulewitch* v. *United States*, 336 U. S. 440, 447–449 (Jackson, J., concurring).

29, 30, 33, 38, 40, 42-47
(footnotes renumbered)

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: JUN 18 '82

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-202

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL, PETITIONERS *v.* CLAIBORNE HARDWARE COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

[June ——, 1982]

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[1] See *Krulewitch* v. *United States*, 336 U. S. 440, 447–449 (Jackson, J., concurring).

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 24, 1982

No. 81-202 NAACP v. Claiborne Hardware Co.

Dear John,

Please join me.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference