IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 43 Original

STATE OF OREGON, *Plaintiff,*

—vs.—

JOHN N. MITCHELL, Attorney General of the United States, *Defendant.*

BRIEF AMICUS CURIAE OF THE DEPARTMENT OF ARMED SERVICES AND VETERANS AFFAIRS OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

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BRIEF OF THE DEPARTMENT OF ARMED SERVICES AND VETERANS AFFAIRS OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*, IN SUPPORT OF DEFENDANT

Interest of the *Amicus Curiae*

The *amicus* is a unit within the National Association of Colored People, a membership organization, national in scope, of nearly one half million members. It shares with its parent organization the objective of extending the right to vote to all citizens, free from discrimination of any sort. Its parent organization has, for over sixty years, opposed, in the courts and in state and national legislatures, restrictions on the franchise such as the grandfather clause, poll taxes, literacy tests, property qualifications and other undue limitations on the right to vote. It supported passage of the legislation challenged in this case. In addition, the Department of Armed Services and Veterans Affairs seeks to protect and advance the rights of members and veterans

of the armed services, without regard to race, color or national origin. It believes the legislation here considered to be in the interest of servicemen and veterans.

ARGUMENT

On June 22, 1970, President Nixon signed into law Public Law 91-285, the Voting Rights Act Amendments of 1970.

Section 302 of said law provides:

> "Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older."

The instant case was instituted by the State of Oregon, which has constitutional provisions contrary to the provisions of Section 302. It seeks a declaration of unconstitutionality of Section 302 and other provisions of Title III of Public law 91-285.

Your amicus believes that Section 302 is constitutional under the 14th Amendment and Article I, Section 8, of the Constitution, and it is the purpose of this brief to so demonstrate.

I. Congress has power under Section 5 of the 14th Amendment to prohibit discrimination in voting based on age

The right of Congress to prohibit discrimination based on unreasonable requirements of a minimum age for voting is granted by Section 5 of the 14th Amendment, as interpreted by this Court in *Katzenbach* v. *Morgan,* 384 U.S.

641 (1966). See also *Everard's Breweries* v. *Day,* 265 U.S. 545 (1924), for interpretation of a similar provision of the 18th Amendment.

Amicus does not develop this argument further, as it is assured that it will be fully developed by the defendant and by other amici.

II. Congress has the authority to pass the 18 year voting provisions of this statute under its National Defense Powers

Article 1, Section 8, of the Constitution grants to Congress the powers to: "provide for the common defense" (clause 1); "declare war" (clause 2); "raise and support armies" (clause 12); "provide and maintain a navy" (clause 13); "make rules for the government and regulation of the land and naval forces" (clause 14).

We submit that the legislation under consideration may be held constitutional on the basis of these "war powers" of Congress [as they have been collectively treated by this Court, *Lichter* v. *U.S.,* 334 U.S. 742, 755-8 (1948).]

In considering the question of the constitutionality of a statute, the courts must concede every possible presumption in favor of its constitutionality. *Nebbia* v. *New York,* 291 U.S. 502, 538 (1934). If the court can find a rational basis for the action taken by Congress, "it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." *Fleming* v. *Nestor,* 363 U.S. 603, 612 (1960), rehearing denied, 364 U.S. 854. As applied to this case these constitutional principles would require upholding of the validity of the statute if there is any basis for finding it constitutional, regardless of whether Congress enunciated that basis in the text of the statute, or in debate thereon.

If the statute is found to be "necessary and proper" to the exercise of the war powers [this Court equates "appropriate legislation" with this; see *Katzenbach* v. *Morgan,* 384 U.S. 641, 650, (1966)], it must be held constitutionally valid.

Looking to the exercise of the war powers by Congress, one sees that this Court has granted it great latitude in its exercise of legislative authority. A few examples are:

> The Court upheld the wartime prohibition act forbidding manufacture of malt liquor, whether or not intoxicating, in a decision rendered after cessation of hostilities. *Jacob Ruppert* v. *Caffey,* 251 U.S. 264 (1919).
>
> The Court sustained the authority of the federal government to build Wilson Dam and operate the hydro-electric plants of TVA, *Ashwander* v. *TVA,* 297 U.S. 288 (1935), and its right to create, manage and operate the Panama Canal. *N.Y. ex rel. Rogers* v. *Graves,* 299 U.S. 401, 406 (1937).
>
> It sustained the Emergency Price Control Act as applied to limit the price of public land sold by the State of Washington, despite that State's constitutional requirement that such land be sold to the highest bidder. *Case* v. *Bowles,* 327 U.S. 92 (1946).
>
> The Renegotiation Act was upheld over objections that it violated the right of contracts and amounted to taking of property without due process of law. *Lichter* v. *U.S., supra.*
>
> The Court permitted the invalidation of California's community property law insofar as it conflicted with provisions of the National Service Life Insurance Act allowing servicemen to designate their beneficiaries. *Wissner* v. *Wissner,* 338 U.S. 655 (1950).
>
> The right of Congress to immunize personal property of non-domiciled servicemen from state taxation was upheld, as being directly related to the defense powers. *Dameron* v. *Brodhead,* 345 U.S. 322 (1953).

Congress has recognized, in passage of the Soldiers and Sailors Civil Relief Act, 50 U.S.C. App. 501 et seq., its

broad powers in providing for national defense. In this Act it has set aside state law and established procedures for state and local, as well as Federal, courts to follow. The provisions of the Relief Act, which invade the powers otherwise reserved to the states to a much greater degree than the 18-year old voting law, are so clearly constitutional under the national defense powers that they have been challenged little. When subjected to constitutional attacks, they and the provisions of a predecessor law, the Relief Act of 1918, have been consistently upheld. For examples, see *Hoffman* v. *Charlestown Five Cents Savings Bank,* 121 N.E. 15; 231 Mass. 324 (1918); *Wenatchee Produce Co.* v. *Great Northern Railway Co.,* 271 F. 784 (E. D. Wash., 1921); *Erickson* v. *Macy,* 131 N. E. 744; 231 N. Y. 86 (1921); *Van Heest* v. *Veech,* 156 A 2d 301; 58 N. J. Super. 427 (1959).

The national defense needs and conditions that exist in the Nation can reasonably be held to warrant the exercise of Congressional power to grant the vote to 18 year olds.

For a period of thirty years the Nation has been engaged in war or preparation for war. In this period it has participated in three major wars. In the interim between actual warfare it has been in a state of national emergency, *de jure* or *de facto.* Young persons, during this entire period, have been subject to compulsory military service. At present the resistance to both war and military service has manifested itself by bombings, riots, desertions by servicemen and draft evasion by civilians, illegal occupation of armories and selective service headquarters by protestors, destruction of military and defense industry property, etc. Congress could conclude that this resistance impedes the national defense effort. Much of this anti-war effort is carried on by college and high school students, most of them in the 18 to 21 year old age brackets affected by the legislation under consideration. It is obvious that much of their disaffection is influenced by the fact that they are called

upon to implement national policies which they cannot affect through the democratic processes of political participation. Courts are bound to recognize that the legislature, whether or not it conducts a special investigation, is aware of the conditions and needs that exist. *Townsend* v. *Yeomans,* 301 U.S. 441, 451-2 (1937).

We submit that, given these facts, Congress, aware of its limitations under the Bill of Rights, and preferring remedial to punitive action, could make a rational decision that the extension of the vote to persons of the age 18 to 21 would lessen obstructions to the defense effort, support the morale of servicemen, and in doing so, "further the common defense." If such a decision is a reasonable one, and not forbidden by the Constitution, as we argue, then the legislation is necessary and proper to carry out Congressional responsibility to defend the Nation.

There is precedent for the exercise of Congressional authority to set aside state voting qualifications in the interest of national defense. In 1942 Congress provided in P.L. 77-712 that no person in military service in time of war could be required to register with state authorities or to pay a poll tax as pre-conditions to voting in Federal elections. This remained in effect until 1955, when it was repealed (P.L. 84-296). The poll tax as a precondition to voting was constitutionally permissible during this period, and registration is almost universally required.

Although Congress, in passing this legislation also relied on Article I, Section 4, of the Constitution, the Congressional debate shows that it was considered a defense measure.

The following excerpts from the debate on P.L. 712, 77th Congress, in Volume 88 of the Congressional Record, will show that Congress exercised the war powers in passing the law:

Representative Dirksen:

"In the first place, let us not forget that this is a bill of limited application. The very language says, 'In time of war.' It does not pretend to suspend state laws in time of peace. War is an abnormal condition. Allowances have to be made . . ." p. 6549

Representative Bradley of Pennsylvania:

"I want to make the observation that if there is any State law that deprives an American soldier, fighting for his country, of his right to cast a ballot in a Federal election, it should be set aside." p. 6550.

Representative Marcantonio:

"I say that if we can send out the message to members of the armed forces . . . that we, the Congress of the United States, will perpetuate . . . the poll tax —by which we deprive hundreds of thousands of men in the armed services of their vote, we shall be rendering a service to our Axis enemies.

"This legislation is in the interests of victory." p. 7068

Representative Heidinger:

"These men in the service will bear the greater part of the burden of defeating the Axis Powers in this war, and the only voice they will have in making the peace treaty is the right to vote for the men who will make that treaty. If they make the sacrifice to win this war, then why should not they have a voice in the selection of the men who will write the peace treaty when this war has been won?" p. 7072

Representative Ludlow:

"The principle of fundamental justice . . . is that if we send our boys to the far-flung battle fronts . . . we should not deny them the right to vote, even though the exercise of suffrage in their cases involves certain irregularities and the cutting of a lot of legislative red tape." p. 7075

Subsequent history indicates that Congress did not rely only on Article I, Section 4. When it decided to prohibit the use of the poll tax as a precondition to voting in federal elections on a permanent basis, it concluded said provision was not an adequate basis and passed the 24th Amendment.

We desire to draw an anology here to the authority of Congress to regulate interstate Commerce. We believe that as Congress can regulate rather minute details of intrastate commerce as an adjunct to its authority to regulate interstate commerce [*Wickard* v. *Filburn,* 317 U.S. 111 (1942)], so it can, in providing for the rights of servicemen, provide for the rights of all potential members of the armed services. This would mean that all persons 18 years old and above, being subject to long standing legislation obligating them to military service, or permitting them to serve, are proper subjects of Congressional concern to whom the rights here questioned may be granted.

Carrying the analogy to the interstate commerce power further, we believe that as the argument was advanced by the United States in *Heart of Atlanta Motel* v. *U.S.*, 379 U.S. 241 (1964) that the sit-ins and other demonstrations were in themselves an obstruction to commerce that Congress could remove by enactment of the public accommodations provisions of the 1964 Civil Rights Act (See 33 L.W. 3111), the anti-war, anti-conscription demonstrations of today place a burden on national defense that Congress can remove or alleviate by extending to persons likely to participate in such protests a channel for expressions of dissent that is less disruptive of the war effort. It is well established the Congress can remove burdens on interstate commerce, including those imposed by State law. *Northern Pacific Railway Co.* v. *Washington,* 222 U.S. 370 (1912); *NLRB* v. *Jones Laughlin Steel Corp.,* 301 U.S. 1 (1937); *Mitchell* v. *U.S.,* 313 U.S. 80 (1941); *Heart of Atlanta Motel, Inc.* v. *U.S., supra.* We submit that Congress can likewise remove burdens on the defense effort.

Although Congress did not, in passing this legislation, specify in the text of the statute it was doing so pursuant to its war powers, it was quite aware of the connection between the vote and the war effort.

Senator Mansfield, the principal sponsor of the 18 year old voting amendment, made it clear that the main reason he favored the 18 year old vote was to extend the franchise to all who participated in the national defense effort. He said, in the course of debate of his amendment:

> "They fight our wars. You can brush aside that argument all you want, but that is a most important argument, and I think these youngsters who are called because of our responsibility, because we have laid down the policy, should have a right at least in some part, to influence the setting of that policy." 116 *Congressional Record.* S.-3502, daily edition.

Other Senators also spoke of this relationship. Senator Kennedy stated "if young people are old enough to fight, they are old enough to vote" and cited the high percentage of those under 21 who are fighting and dying in Vietnam, op. cit., p. S.-3478. Senator Hartke referred to youth participation in the Vietnam struggle, the justifiable complaints of being excluded from decision making, and the channel of expression for complaints through the voting process, op. cit., p. S-3497. Senator Cook spoke of the high percentage of 18-20 year old servicemen and their losses in Vietnam, op. cit., p. S.-3499. Senator Young of Ohio did likewise, op. cit., p. S.-3500, as did Senator Pell, ibid. Senator Bayh made the same reference and spoke of the need to bring young people and their ideas into the system, op. cit., p. S.-3510. Senator Montoya, in supporting the amendment, noted the draft eligibility of those 18 years old and over, 116 *Congressional Record* p. S.-3583, daily edition. Senator Hatfield directly related the right to vote to the requirement to serve in wars, op. cit., S.-3584.

Taken as a whole, the debate in the Senate shows that one of the reasons, if not the reason, uppermost in the minds

of the members of the Senate for passage of the Mansfield amendment was the right of those who fight our wars to participate in the policy making affecting those wars.

In the House of Representatives, debate on the Mansfield amendment was limited because of procedural factors. Nevertheless, Congressmen found time to relate the amendment to the service of 18 to 20 year olds in Vietnam or to their eligibility to service in the armed forces. The following Representatives did so, as shown in the *Congressional Record* of June 17, 1970, the day on which the House passed the Voting Rights Act Amendments, including the Mansfield amendment:

Representative Matsunaga:

> "While we have revised the age for bearing arms to 18, we have kept the age for voting at 21. Surely, this discrimination was not intended by Congress. It is noteworthy in this connection that approximately one-half of Americans killed in combat in Vietnam fall within the age group of 18 to 21." p. H-5640

Representative Mikva:

> "Those who say 18 is too young to vote—are they prepared to change the draft laws to make 21 a minimum law for service?" p. H-5644

Representative McClory:

> "But today our young men are considered old enough—and strong enough to carry bullet-proof vests—and arms when they are 18. So, the original reason for the 21 years old minimum age is gone . . ." p. H-5645

Representative Long of Maryland:

> "I have here a list of 14 men from Maryland chosen at random, who died in Vietnam so far this year. Of the 14, 10 are under 21 years of age. These young people of 18, 19 and 20 are the ones who are carry-

ing the real burden of their country and are the ones who should have something to say about how it is run." p. H-5646

Representative Fascell:

"If an 18 year old is mature enough to bear arms in defense of his country . . . then we have surely discarded the notion of immaturity at 18 in every area except enfranchisement." p. H-5656

Representative Rodino:

"I need hardly remind Members of the House that 18 year olds are vulnerable to the military draft. Recent figures show that approximately one-third of the American troops in Vietnam are under 21. Nearly half of those killed in action are under 21." p. H-5657

Representative Annunzio:

"There can be no question, Mr. Speaker, that our young people deserve the vote. It is they who are being asked to give their lives in Vietnam." p. H-5658

Representative Cohelan:

"Our young people have assumed the responsibility of fighting our wars . . . Why should they be denied the right to vote?" p. H-5658

Representative Stokes:

"And the most familiar contention of all is still the most persuasive—if the young men of those ages can be required to fight and die half a world away, because of a handful of men here in Washington have the power to declare that their fighting and deaths are 'in the public interest,' then surely those young men have a right to determine who those men exercising such power will be." p. H-5661

Representative Tunney:

> "I say that their actions and their courage in South Vietnam and Cambodia prove them more than worthy." p. H-5667

Representative Robison:

> "The Congress, by means of the Selective Service Act, has determined that every male citizen who reaches age 18 must register for the draft and be available for induction. Indeed, our recent actions and those of the President place more of the burden of carrying on our wars on the younger men of our country. It is certainly logical to suggest that those who are subject to the draft should have some voice in their government." p. H-5673

We submit that the Congressional history of this amendment clearly indicates its passage was directly related to the national defense and is constitutional under Article I, Section 8 of the Constitution, and that regardless of whether such relationship is shown in the Congressional debate, it does in fact exist. Accordingly, the courts are required to recognize its existence "whether this reasoning in fact underlay the legislative decision." ***Fleming*** v. ***Nestor, supra.***

CONCLUSION

We believe that the Court should uphold the constitutionality of Title III of P.L. 91-285 on the basis of Congress' power, under Section 5 of the 14th Amendment, to enact appropriate legislation. We submit that, in addition to that authority, Congress has the power to pass this legislation under Article I, Section 8.

Respectfully submitted,

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