Fla Primary

Tampa

Bryan

December 24, 1941

MEMORANDUM

FROM: Thurgood Marshall
TO : E.L. Bryan, Esq. (cc: Tampa Branch offices)
RE : Tampa Primary Case

The decision of the Supreme Court of Florida on November 5, 1941, raises a new question as to whether or not the case should be presented to the United States Supreme Court at this stage. My first reaction is that it should not be presented to the United States Supreme Court. I regret very much that I cannot get into the City Lawyers' Library until Friday of this week. You will therefore realize that my opinion is subject to further check when I can get into the Library.

The present case is an action for writ of mandamus seeking to compel the respondents to permit the relators to register and vote in both the primary and general election for municipal officers in 1941. The Judge signed an order on July 29 that the relators, and all others similarly situated, be registered either before the primary election or before the general election, and to permit them to vote in the general municipal election. The Judge, however, refused to permit the relators to vote in the primary. The appeal was dismissed on November 5, on the ground that the case was moot.

At this stage of the proceedings we are faced with the decision of the United States Supreme Court in the case of Giles v. Harris, 189 U.S. 475 (1903). In that case there was an action in equity seeking to declare the entire election law of the State of Alabama invalid because it prevents Negroes from voting. By the time the case reached the United States Supreme Court the elections were over, and this, among other reasons, prompted the United States Supreme Court to deny relief in the case. Mr. Justice Holmes, however, pointed out in the opinion for the Court, that "On these assumptions we are not prepared to say that an action at law could not be maintained on the facts alleged in the bill." This decision is still in full force and effect and was referred to in the case of Lane v. Wilson, 307 U.S. 268 (1939). In

the Lane case, which was one of our cases attacking the registration laws of Oklahoma, an action was filed in the federal court for damages against the election officers, rather than seeking an injunction or other mandatory relief. By doing this we were able to get around the decision in Giles v. Harris and get the relief we were desiring by using another method of attack. When we consider this state of the law, it seems that it would be far better to go back and start again in the federal court with an action for damages against the election officials, and bring it under Sections 31 and 43 of Title 8 of the United States Code.

All of this will have to be checked in the Library, and I suggest that in the meantime you check the cases of Giles v. Harris; Lane v. Wilson; Guinn v. U.S., 238 U.S. 347; Myers v. Anderson, 238 U.S. 368.

There is another point that immediately comes to mind, and that is as to whether or not the decision in the instant case can be pleaded as res Judicata as to the new case in the federal courts. We should check this also.

For some "unknown" reason, quite a few lawyers around Washington, including lawyers in the Department of Justice, take the position that the United States Constitution and laws only protect the right to vote in elections where federal officers are involved. I have never subscribed to this theory, and believe that we will eventually break it down. However, as a matter of strategy, we feel it far better and more advisable to have the next case that reaches the United States Supreme Court on primaries to be one involving an election for the nomination of federal officers. This, of course, is to be followed by an action involving municipal officers. Our new Primary Case in Texas was filed on November 15, 1941, and we would prefer to have that case reach the Supreme Court before any municipal election cases reach the United States Supreme Court. As a matter of fact, the Texas case should reach the Circuit Court of Appeals before any municipal cases reach there. We do expect to file a case involving municipal elections in Texas after the favorable decision which is expected in our present case on federal officers. The Tampa case is a better case for municipal elections than the proposed Texas case on municipal elections, because of the question of who pays the expenses. The chief difficulty concerns the question of keeping up the morale of the Negroes in Tampa. We cannot keep up this morale by merely dropping the present case. We can keep up the morale if at the same time the case is dropped we file a new case. I believe that the best way to handle this situation is for me to come to Tampa as soon as possible and have a conference with you and other interested persons on this entire question. My schedule is pretty well filled up for January, but I can get to Tampa on the weekend of January 17 for at least two days. If the case in New Orleans is called before that time, I will arrange to stop off in Tampa on my way back from New Orleans. At any rate, I will try to keep the weekend of January 17 open for the trip to Tampa. The only thing that will prevent this will be that one of the other cases is called for hearing or trial during that time.

I hope that the above is fairly clear, and it is sent in the idea of suggestions for future action. I think we can straighten out the entire matter when I get to Tampa.