IN THE

Supreme Court of the United States

OCTOBER TERM 1971

Consolidated Cases Nos. 1024, 1145

SIXTY-SEVENTH MINNESOTA STATE SENATE,
Appellant-Intervenor,

vs.

RICHARD A. BEENS, PHILLIP KRASS, and LAWRENCE E. MEUWISSEN,
Appellees,

ARLEN ERDAHL, GEORGE B. HICKEY, CHARLES LeFEBVRE, JOSEPH W. NOTERMAN, and WILLIAM J. SCHNEIDER,
Appellees,

ROLLIN H. CRAWFORD, JAMES M. KING, and ROBERT C. VOSS,
Appellees-Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

APPELLANT'S BRIEF IN RESPONSE TO MOTION TO DISMISS OR AFFIRM

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This response to Appellees' Rule 16 motion to dismiss or affirm, for the convenience of the Court, will follow the Appellees' sequence of argument.

I

Appellant Has Authority to Prosecute This Appeal

Senate Resolution 3 clearly authorizes this appeal concerning the reduction of members in the Minnesota State Legislature. The full text of the Resolution may be found at Motion to Dismiss or Affirm, A-45 - A-47. The Office of Senate Counsel is

> "authorized and directed to take such steps as may be necessary to represent the interests and will of this body (the Senate) to the extent deemed necessary in both state and federal court actions involving the prescription of the bounds of senatorial and representative districts, the apportionment of senators and representatives among those districts, and the orderly process of election therefrom." Senate Resolution 3.

Obviously the Office of Senate Counsel deems this appeal necessary, it is related to the subject of apportionment, more specifically the number of senatorial and representatives districts, and this appeal is an action in a federal court within the meaning of the resolution.

Appellees correctly recognize that a motion to reconsider Senate Resolution 3 failed of passage. (Motion to Dismiss or Affirm, A-48). Hence, the resolution remains in force as expressing the will of the body. Neither affidavits by dissident

members nor attempted intervention by other members can alter the authority granted the Office of Senate Counsel by Senate Resolution 3 to prosecute the present appeal.

Appellees' contend that the Sixty-seventh Minnesota State Senate is not a legal entity for purposes of intervention or appeal. This Court has squarely rejected this contention. *Silver v. Jordan,* 241 F. Supp. 576 (N.D. Cal. 1965), *aff'd* 381 U.S. 415 (1965). In *Silver v. Jordan, supra,* the California State Senate was permitted to intervene as a matter of right:

> The California State Senate's motion to intervene as a substantially interested party was granted because it would be directly affected by the decree of this court. F. ed. R. Civ. P. 24(a)(2); . . . *California v. United States,* 180 F. 2d 596 (9th Cir. 1950); *Kozak v. Wills,* 278 F. 2d 104 (8th Cir. 1960); *Ex Parte D. O. McCarthy,* 29 Cal. 395 (1966). 241 F. Supp. at 579.

See also *Dungan v. Sawyer,* 250 F. Supp. 480 (D. Nev. 1965). The trial court has also properly rejected this contention in the instant action. (Motion to Dismiss or Affirm, A-24 - A-25).

II

This Court Has Jurisdiction of the Appeal Pursuant to 28 U.S.C., § 1253

A. The appeal is from an injunction restraining the enforcement, operation or execution of any state statute.

It is clear that the plan or apportionment promulgated by the District Court is an order granting an injunction. It restrains "the action of any officer . . . in the enforcement or execution of . . . [a] statute." 28 U.S.C. 2281. The order appealed from provides:

> We modify our injunction of November 15, 1971, to the extent that we enjoin the defendants herein, including Arlen Erdahl, Secretary of State of the State of Minnesota, and all County Auditors of the State of Minnesota, from holding or conducting any future elections for the Minnesota Legislature under any apportionment plan except that which we adopted today . . . Motion to Dismiss or Affirm, A-11.

The Minnesota election officials are enjoined from conducting elections pursuant to Minnesota Statutes 1969, Sec. 2.021-2.712, and except as provided in the mandatory injunction in the Court's order. Appellant certainly does not and has not conceded the propriety of the injunctive order. Appellees' statement to the contrary is a flagrant misstatement of fact. See e.g. Motion to Dismiss or Affirm, 13; 14, passism. Appellant State Senate contends that Minnesota Statutes 1969, §§ 2.021 and 2.031 do not violate the Constitution of the United

States and are binding on the Court as expressions of a valid state apportionment policy.

B. The appeal was from a suit required to be heard and determined by a three-judge court.

As previously noted the District Court's order and plan of apportionment restrained "the action of any officer . . . in the enforcement or execution of . . . [a] statute." 28 U.S.C. 2281. The final plan of apportionment was a mandatory injunction enjoining the operation of a statute of statewide application and imposing a new scheme of apportionment. Hence, a three-judge panel was required to issue the relief prayed for by Appellees. This Court has often held that the issuance of a plan of reapportionment is a proper function of a three-judge panel and supports a direct appeal to this Court. *Ely v. Klahr,* 403 U.S. 108 (1971); *Whitcomb v. Chavis,* 403 U.S. 124 (1971); *Connor v. Johnson,* 402 U.S. 690 (1971). Finally, it would appear that Appellees, having earnestly requested the three-judge court to issue the plan of legislative apportionment, would now be estopped from contesting the necessity for them to do so. This argument of Appellees appears frivolous.

III

The Judgment of the District Court Should Not Be Affirmed Summarily Because It Presents a Substantial Question Within the Meaning of Rule 16(1)(C), Supreme Court Rules

Appellant in its jurisdictional statement has already demonstrated that this appeal presents substantial questions worthy of plenary consideration by this Court. Appellees, upon cursory and superficial analysis, appear to contend the case is not worthy of plenary consideration, since it presents at most a question of degree. Few legal questions at bottom are not questions of degree. Appellant has demonstrated that the case presents a fundamental question of state sovereignty and the remedial powers of a federal court. No more substantial question vital to the concept of federalism may be imagined. Appellant contends that the District Court in fashioning a plan of reapportionment is bound by Minnesota Statutes 1969, § 2.031, Subd. 1, which provides:

> The representatives in the senate and house of representatives are apportioned throughout the state in 67 legislative districts.

The District Court, to the extent constitutionally permissible, is also bound by Minnesota Statutes 1969, § 2.021, which provides:

> For each legislature until a new apportionment shall have been made, the senate is composed of 67 members and the house of representatives is composed of 135 members.

Appellant, contrary to the assertion of Appellees' blatant misstatement of fact, does not concede the unconstitutionality of Minnesota Statutes 1969, §§ 2.021, 2.031. (Motion to Dismiss or Affirm, 23). Appellant contends that the District Court erred in arbitrarily disregarding the mandate of Minnesota Statutes 1969, §§ 2.021, 2.031.

Appellees have adopted the District Court's conclusion there is no controlling expression of state apportionment policy. (Motion to Dismiss or Affirm, 24-25). Prior to 1913 there appeared to have been no fixed state apportionment policy. Since 1913, however, the Legislature has provided for 67 legislative districts and has resisted consistently bills seeking to reduce the number of legislative districts and the number of members in the Minnesota State Legislature. The inability to discern a state policy disregards history and conveniently disregards the binding effect of Minnesota Statutes 1969, §§ 2.021, 2.031, to the extent that the same are consistent with the United States Constitution. The words "until a new apportionment shall have been made" are not found in Minnesota Statutes 1969, § 2.031, and there is no reason for reading in such a phrase. Moreover, the phrase, found in Minnesota Statutes 1969, § 2.021, obviously contemplates a legislative reapportionment, not a judicial one. That the District Court in fashioning equitable remedies in legislative apportionment cases is bound by state apportionment policy has been often recognized by this Court. See e.g. *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971).

Appellees apparently recognize no limitation on the authority of a Federal District Court in fashioning a reapportionment plan. That notion has not only been rejected by this Court, *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971), but it is also patently frivolous. If a District Court is free to reduce

substantially the number of members in the Minnesota Legislature, it might also require a unicameral legislature, or dictate the 10 member council of "philosopher-kings" desired by Plato. As should be apparent, such questions are matters of political philosophy for legislative determination, beyond the jurisdiction of a District Court. All parties to this action so argued before the District Court. The District Court went far beyond any concept of constitutional necessity and legislated its own precept of political philosophy in derogation of legislative authority and controlling state apportionment policy. Under such circumstances a decision by this Court is necessary to remedy this unprecedented usurpation of legislative authority.

IV

The Judgment of the District Court Should Not Be Affirmed Summarily as a Temporary Provisional Remedy

Appellees apparently contend that the transparent "provisional nature" of the court-ordered reapportionment plan should isolate it from judicial review. Appellees cite no authority for such a novel proposition since none exists. Any court-ordered plan of reapportionment is only effective pending an apportionment by a state legislature. *Connor v. Johnson*, 265 F. Supp. 492, 494 (D. Miss. 1967), *aff'd*, 386 U.S. 483 (1967). That the Legislature may rectify the error of the District Court provides no basis for arguing that this Court should not exercise its authority to correct the District Court for exceeding the proper limits of its equitable powers. This Court has rejected repeatedly the contention of Appellees. *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Ely v. Klahr*, 403 U.S. 108

(1971); *Connor v. Johnson,* 402 U.S. 690 (1971); *Scott v. Germano,* 381 U.S. 407 (1965).

V

Failure of This Court to Dismiss the Appeal or Affirm the Order of January 25, 1972, Will Work No Hardship Upon the Electoral Process of the State

Appellees contend that the first statutory step in the electoral process, the precinct caucuses, have already taken place and the political party conventions for the endorsement of candidates are now taking place. (Motion to Dismiss or Affirm, 32). In Minnesota, all members of the state legislature hold a nonpartisan office. Minnesota Statutes 1969, § 202.03, subd. 1. The non-partisanship of the members of the Legislature is the hallmark of the Minnesota State Legislature. Hence the activities of the political parties are totally irrelevant to the instant case.

That no harm would result to the electoral process by a plenary consideration of this case is readily demonstrated. The last legislative apportionment act, Extra Session Laws 1966, ch. 1, was not signed by the Governor until May 20, 1966, and no harm to the elective process of the state resulted. Finally, if necessary, the District Court may issue orders extending the time limitations imposed by state law that may interfere with the implementation of a second plan of legislative apportionment. *Whitcomb v. Chavis,* 403 U.S. 124 (1971); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15, (1971).

VI

CONCLUSION

For the reasons stated in the jurisdictional statements already filed by the Appellant and the grounds stated herein, this Court should note probable jurisdiction and order a plenary hearing on the merits.

Respectfully submitted,

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