

NATIONAL POLITICAL PARTY SELECTION OF PRESIDENTIAL NOMINEES: CONSTITUTIONAL AND POLICY QUESTIONS

REMARKS OF RONALD D. EASTMAN

Any discussion of the process of selecting a presidential nominee must include an evaluation of the degree to which the first and fourteenth amendments of the Constitution afford national political parties the freedom to shape their nominee selection processes and the consequences of restricting that freedom. This issue was squarely presented to the United States Supreme Court in *Democratic Party of United States v. La Follette*.¹ *La Follette* concerned Wisconsin's open primary statute, which permits Wisconsin voters to vote in either primary, regardless of party affiliation. Republicans, Independents, and Democrats may vote in the Democratic primary, just as anyone may vote in the Republican primary. The Democratic Party has had a rule which allows only publicly affiliated Democrats to participate in the selection of the Democratic nominee. This is not a particularly controversial rule. It seems sensible not to require the Democratic Party to invite Republicans to help select the Democratic presidential candidate. The state of Wisconsin violated the rule of the Democratic National Party by requiring the party to accept Wisconsin delegates who were bound by the open primary's results. The party indicated that it therefore would not seat the Wisconsin delegates.

The Attorney General of Wisconsin thereafter initiated a suit in the Wisconsin Supreme Court. The Democratic National Committee, which is the institutional embodiment of the Democratic Party, had an interesting strategic decision to make at the outset: should we remain in state court or attempt to remove the case to federal court, preferably in the District of Columbia? We realized that good "normal" law practice is not necessarily good political law practice. The Attorney General of Wisconsin is La Follette, a very popular person in Wisconsin. Likewise, the open primary is very popular in Wisconsin. That being so, my clients, the politicians who really run the Democratic National Committee, really didn't want to take the steps we thought might be necessary to get the case out of the Wisconsin Supreme Court. So we went forward in state court. The basic questions were whether Wisconsin could enforce its statute against the Democratic Party, and whether it could force the Democratic Party to accept delegates that were selected in accordance with the open primary statute. The Democratic Party's argument was that the party's first and fourteenth amendment rights, particularly that of free association, would preclude Wisconsin from insisting that the party accept Independents and Republicans, and would

1. 101 S. Ct. 1010 (1981).

allow them to influence the Democratic Party's nominee selection process. In a unanimous decision, the Wisconsin Supreme Court ruled against the Democratic Party.²

The party appealed to the United States Supreme Court on the last day of last term. The Court noted probable jurisdiction and stayed the order of the Wisconsin Supreme Court.³

There are great dangers in cutting back the recent decisions of the Supreme Court and of lower federal courts. These courts have expanded the freedom of the national parties and strengthened the parties' ability to devise their own nominee selection processes. One example which illustrates these dangers is the recent controversy concerning the Democratic Convention's Rule 11(H). Rule 11(H) requires that delegates selected to the convention are bound to vote the preferences they were elected to express. Those who were unhappy with what would be the certain renomination of President Carter under that rule argued that a delegate to the convention is supposed to exercise discretion, not simply act as an automaton. Supporters of the rule rejected this view of the delegate's role. They asserted that a delegate is supposed to be faithful to those who cast ballots; anything to the contrary would distort the process.

To a certain extent, the debate ignored a more fundamental issue which cannot be brought into the public eye in a very simple way. One cannot evaluate Rule 11(H) without understanding that it is an integral part of the reforms undertaken by the Democratic Party since 1968. Following the disruption and violence of the Democratic Convention in 1968, the Democratic Party set out on a course of reform that has had great impact on the party and presidential nominees. The fundamental premise underlying the reforms established in 1968 is that the rank and file were not heard effectively or forcefully, and that they did not really control the selection of the nominee. The reforms were intended to democratize the party to make sure that there are expanded opportunities for those who want to participate in the primaries or caucuses and have a real voice in selecting the nominees. The notion that the delegate who actually attends the convention has to be bound to reflect rank-and-file preferences is pretty fundamental. If that rule

2. 93 Wis. 2d 473, 287 N.W.2d 519 (Wis. 1980).

3. Editor's Note: The Supreme Court handed down its decision on February 25, 1981. 101 S. Ct. 1010 (1981). The Court reversed the decision of the Wisconsin Supreme Court. Writing for the majority, Justice Stewart stated that the question at issue was not the constitutionality of Wisconsin's open primary, but whether the national party could be forced to accept Wisconsin's delegates if the delegate selection process violated the national party's rules. *Id.* at 1012. The Court held that *Cousins v. Wigoda*, 419 U.S. 477 (1975), controlled. *Id.* at 1018. Only a compelling state interest could justify infringement of the party's first and fourteenth amendment rights of political association. The state's interest in preserving the integrity of the electoral process and in increasing voter participation was compelling, but it implicated only the open primary, and not the separate process of delegate selection. *Id.* at 1021.

is undone, the reforms may work in a way which is somewhat inconsistent with the rule's premise. Rule 11(H) is an extension of the whole reform movement in the Democratic Party. The issues of whether the reforms and Rule 11(H) are good or bad, and whether they should be retained are closely tied to the freedom of political parties to determine how the nomination and delegate selection process should function.

In evaluating the nominating system as it presently exists, including the so-called "reforms," one question which must be asked is whether the reforms have gone too far. It is arguable that these reforms have put the process totally in the hands of the electorate, thereby negating incentives for the development of leadership. A second consideration is whether the reforms have led elected officials to refrain from participating in party affairs between elections and during the nominating process. We need to find a way to get congressional Democrats back into the process. The problem, however, is that under current procedures, elected officials cannot come into the process without running as delegates themselves. Understandably, a United States Senator does not want to go back to his congressional district and enter a race to become a delegate to the convention. Another question involves affirmative action: should we require that delegations reflect the percentage of minorities and women comprising the electorate? Another issue involves political "backscratching"—I'll support abandonment of the rule if you'll do X for me. The question is what, if anything, should be done about this?

These issues also raise a crucial legal question of justiciability. The ability of the courts to make the complex and subtle judgments concerning a political decision in both a juridical and practical sense must be considered. This issue in turn raises the more difficult question of whether a court should be involved in making political decisions. Similarly, the role of the state legislatures should not be overlooked with respect to their ability and right to determine how political institutions should operate.

I believe that there should and will be a reaffirmation of the first and fourteenth amendment rights of national political parties to conduct and organize their own affairs. The Supreme Court paved the way for this reaffirmation in *Cousins v. Wigoda*,⁴ a 1975 case which held that when a conflict arises between a state statute and a party rule defining how nominees will be selected, the state statute must yield since the process of nominating candidates is ultimately determined by the national political party. Despite the broad language in *Cousins*, the holding is probably intended to be construed more narrowly. The *La Follette* decision should provide a clarification of the role of the parties and a reaffirmation of a high degree of freedom and protection for the party's processes.

4. 419 U.S. 477 (1975).