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ARGUMENT OF:

P A G E

Robert H. Roberts, Esq., on behalf
of Respondents

24

- - - -

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1969

3 -----x

4 KENNETH R. JONES, :

5 Petitioner, :

6 vs. : No. 731

7 THE STATE BOARD OF EDUCATION OF :

8 AND FOR THE STATE OF TENNESSEE, :

9 et al., :

10 Respondents. :

11 -----x

12 Washington, D. C.

13 January 20, 1970

14 The above-entitled matter came on for argument at

15 10:33 a.m.

16 BEFORE:

17 WARREN BURGER, Chief Justice
18 HUGO L. BLACK, Associate Justice
19 WILLIAM O. DOUGLAS, Associate Justice
20 JOHN M. HARLAN, Associate Justice
21 WILLIAM J. BRENNAN, Jr., Associate Justice
22 POTTER STEWART, Associate Justice
23 BYRON R. WHITE, Associate Justice
24 THURGOOD MARSHALL, Associate Justice

25 APPEARANCES:

26 Counsel for Petitioner:
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1 MORNING SESSION

2 (At 10:33 a.m., Tuesday, January 20, 1970, the argu-
3 ment in the above-mentioned matter was resumed.)

4 MR. CHIEF JUSTICE BURGER: We will take up No. 731,
5 Jones against the State Board of Education where we left off
6 yesterday afternoon.

7 ARGUMENT OF ROBERT H. ROBERTS, ESQ.

8 ON BEHALF OF RESPONDENTS

9 MR. ROBERTS: Mr. Chief Justice, may it please the
10 Court:

11 I will conclude arguments for the respondents in this
12 manner. I would like to call the Court's attention to an article
13 written by Professor Charles Allen Wright in connection with a
14 speech he delivered on the Vanderbilt University campus in October
15 1969, entitled "The Constitution on the Campus." This is one of
16 the Oliver Wendell Holmes series and I think it is one of the
17 best-written articles I have ever read, and I commend it to the
18 Court if they haven't already seen it.

19 In it though, Professor Wright basically wound up by
20 saying that expression can be restricted, if at any time it
21 materially or substantially interferes with the normal procedures
22 of the university or with the rights of others.

23 Now it is our contention that the basic issue involved
24 here is just the action that this student had been accused and
25 found guilty of committing, based primarily under the First

1 Amendment rights.

2 Yesterday ---

3 Q There were additional findings of violations of
4 regulations?

5 A Yes, Your Honor, there was a finding that he had
6 committed a misdemeanor and found guilty in Court of the violation
7 of the Student Handbook, which had been a specific charge against
8 him in addition. They also found that he lied to the committee
9 while before it and openly before it, and I might say this: It
10 was not only just -- he just told the president of the fact that
11 he was lying in front of this outstanding faculty group and other
12 students and even the press were present when this happened, which
13 compounded the disrespect that he showed the president on this
14 occasion.

15 Yesterday I had the feeling that there was some ques-
16 tion in the mind of perhaps Associate Justice Marshall in regard
17 to why this action on the leaf-letting or the boycott literature
18 didn't result in any kind of a serious incident. I didn't call
19 the Court's attention to this, but I would like to at this time.

20 Mr. Jones at the time that he passed out this leaflet
21 had already been temporarily suspended from the school. He was
22 not on the campus at that time as a student when he passed out
23 this literature. He was awaiting his hearing to see whether or
24 not he would be admitted in the fall term or not.

25 This literature was passed out on August the 18th,

1 1967, which according to the calendar which you have in the
2 appendix in the Student Handbook part of it, which begins on
3 page 175 of the joint appendix, the calendar of the school year,
4 you will find this was the last day of final examinations for the
5 last term of the summer quarter when he did this. Therefore,
6 the baccalaureate service followed that by two days and school
7 was out then until the fall term started.

8 That is the reason there was no more commotion follow-
9 ing it. However, I direct your attention to the fact that this
10 was followed itself by just a couple of weeks or so -- a riot
11 on the campus and tensions were high. Now admittedly the faculty
12 hasn't in its findings written out as a result of this litera-
13 ture being passed out on the final examination day that John
14 Smith came to them and said, "Well, that bothered me and I couldn't
15 correctly answer one of the questions on the examination," or
16 anything like that, but they found it as a matter of their inter-
17 pretation. They were there on the campus.

18 We are not talking about a rural constable or something
19 like that that might be found in my home county of Pickett. We
20 are talking about nine of the outstanding members of the faculty
21 on Tennessee State University's campus. We are talking about
22 the vice president emeritus, who is the chairman of the Faculty
23 Advisory Committee, with some 30 years of experience as a school
24 administrator.

25 We are talking about Dr. J. A. Paines, who acted because

1 of Dr. Basil's poor health as the presiding officer over this
2 faculty advisory meeting, with a great many years of experience
3 on the campus and as Dean of Students.

4 We are talking about the Dean of Women and the Dean of
5 Men. School administrators practically all, if not all of them,
6 hold doctorate degrees and had a combined experience of well in
7 excess of a hundred years there on the campus. That is who we
8 are talking about substituting the judgment on, as to whether ---

9 Q Supposing that this intemperate document hadn't
10 been passed around on the streets outside the university, what
11 would you say about that? Just just as uncouth, still just as
12 intemperate.

13 A Yes, sir, and I think it would have been an
14 altogether different situation. I think he could have perhaps even
15 gone across the street a little way to Centennial Park and got
16 upon a bench and maybe made a speech on it and it would have
17 been somewhat different.

18 Here it was calculated to do one thing, cause unrest
19 and try to prevail his ideas and his desires onto the student
20 body there. He had already been suspended. It wasn't a matter
21 for him not to register. He was trying to ask everybody else to
22 join with him, because his conduct had caused him to be suspended
23 to where he wasn't permitted to continue during the summer quarter
24 and was calling on them to do so.

25 Now as to the type of thing that was in this, I think

1 it is very important. There was really more to it than just
2 boycott so far as it being designed to create unrest, and we
3 have to keep in mind now that this was following a great deal of
4 disturbance on the campus where property was destroyed and people
5 were injured.

6 Some of the things that he said, for example: "If the
7 puppets' -- talking about the school administrators -- that is
8 the reference he makes to them. He calls them "puppets" through-
9 out this -- "want to adopt the uncivilized tactics used by the
10 man" -- and that sort of thing. Then he goes on with words like
11 "Thus the campus will become a concentration camp controlled and
12 contained by the legislation of the racist dogs downtown, the
13 acts of the puppet administrators" -- here again referring to
14 these people before whom he had already been advised that he was
15 going to have to come and clear himself with before he could be
16 re-enrolled -- "the billy clubs and guns of Nashville's racist
17 cops and ultimately the ghetto tactics of the honorable National
18 Guard whose pale faces have already been seen in Memphis, Nash-
19 ville and Chattanooga.

20 "We as intelligent black students will not be guarded
21 by trembling and perilous idiots who call themselves administra-
22 tors."

23 Now that is what he is saying about the school admin-
24 istrators. He said earlier that he came down to Tennessee to go
25 to school because he investigated and found that it was a great

1 school and he wanted to go down there. Yet in his first year as
 2 an 18-year-old boy he conducted himself in such a way and has
 3 the audacity to come out with something like this and talk about
 4 the very school administrator to whom he had chosen to go and
 5 earn an education.

6 And he closed then with this article in caps, and
 7 bright heavy caps: CAST YOUR VOTE FOR STUDENT POWER. BOYCOTT
 8 REGISTRATION SEPTEMBER 23 AND FOR AS LONG AS THE PUPPET ADMINIS-
 9 TRATION REFUSES TO ACKNOWLEDGE THAT THIS IS OUR UNIVERSITY.

10 Q What did he mean by boycott?

11 A Registration. He was asking them not to come in
 12 and register for classes and just to freeze the university, so
 13 he could bring it to a complete stop. That would be the effect
 14 of it.

15 Q When was this?

16 A This happened ---

17 Q When were these leaflets handed out?

18 A On August the 18th, which was the last day of the
 19 summer term. They have two terms here during the summer and
 20 operate on the quarter-hour basis.

21 Q Suppose he got these boys and girls not to regis-
 22 ter and lost a considerable number of people. What do you say
 23 about that?

24 A If it please the Court, I think it would be
 25 serious enough without urging the boycott. But you can't separate

1 it, it was all one article. He did all of it designed for one
2 purpose. The administrators found that it was for the purpose
3 of disrupting the school and that it didn't entitle him to remain
4 on the campus any longer as a result of it.

5 Now if the Judicial Branch is going to substitute its
6 judgment for people of the character that I have described, of
7 this Faculty Advisory Committee on this question of fact, and it
8 really is a question of fact of whether or not these things,
9 these acts committed, were a type that would be disruptive on a
10 school campus or were just plain free expression or not, and they
11 found otherwise.

12 Now if we are going to get into this field, where are
13 we going to stop? Wouldn't the next logical place be to examine
14 the examination papers given to a student and determine whether
15 the professor should have given him a passing mark or not?

16 After all, you can effectively expel him that way.
17 If he doesn't at practically any university in the country, if
18 he doesn't make his grades, he is not entitled to enroll the
19 next quarter. You could eliminate him in that manner.

20 I just respectfully urge the Court to give some sup-
21 port and some credit to these men with outstanding ability in
22 making a determination that involves a factual matter, and if
23 you do so, I feel the Court will affirm their action in it and
24 I thank you for your kind attention.

25 MR. CHIEF JUSTICE BURGER: Mr. Boulton, you have about

1 nine minutes left.

2 REBUTTAL ARGUMENT OF REBER F. BOULT, JR.

3 ON BEHALF OF PETITIONER

4 MR. BOULT: Yes, Your Honor.

5 Q What about the previous convictions?

6 A Mr. Justice Marshall, if those two convictions
7 are to be considered, we have to reopen the entire disciplinary
8 proceeding.

9 Q Is it in the record anyplace?

10 A They are mentioned at several places in the record,
11 at page 48, for example, and various other places. The sequence
12 of that is ---

13 Q It appears to be contradictory in the record.

14 A Certainly, he was convicted and it was on appeal
15 at the time the hearing was going on. There is no ---

16 Q It was a part of the charge against him?

17 A It was a part of the charge against him.

18 Q And it wasn't answered.

19 A There was no conviction, so to speak, of the
20 Faculty Advisory Committee on these charges.

21 Q Well, isn't that sufficient to discipline him,
22 to be convicted in a criminal court?

23 A I don't think this is the issue of the case, Your
24 Honor. I doubt it. If I was to argue the point, if I thought
25 the point were in the case ---

1 Q Doesn't it violate these rules on 75 or not?

2 A The rule on being convicted of any city, county or
3 Federal offense?

4 Q Yes.

5 A I don't think it does, because it was on appeal.

6 Q It was not found?

7 A It was not. The conviction was not final. The
8 cases were on appeal at the time of the proceeding.

9 Q But that doesn't appear in the record.

10 A Yes, I believe it does, Your Honor, on page 48.

11 Q What has happened since?

12 A I don't know, Your Honor.

13 Q You don't know?

14 A No, I don't. You see, this issue has really
15 been in the case throughout any of the lower courts because the
16 Faculty Advisory Committee exonerated him on these charges. He
17 was not dismissed from school for having violated that particular
18 rule.

19 The chairman of the committee so testified. The
20 charges make no mention of it.

21 Q Now does that mean that they ignored it? You say
22 they exonerated him on that.

23 A Well, they did not dismiss him from school for
24 that charge.

25 Q They must have had adequate other grounds.

1 A Possibly so. There were half a dozen charges
2 against him and of the three students involved in the whole
3 thing, there were about 18 charges and there was only findings
4 of, shall we say, guilt on a small number of these charges. We
5 assume -- it has been assumed up to this level, all the way
6 through case, that if the Faculty Advisory Committee did not
7 make a finding that a student had done on a particular charge,
8 then they were not disciplining him for it.

9 Q Was the conduct from which these criminal charges
10 developed on the campus or off the campus?

11 A Off the campus, totally unrelated to the campus.

12 Q Do you suggest that he could not be dismissed --
13 laying aside the notice factor -- that he could not be dis-
14 missed for conduct off of the campus?

15 A It depends on the conduct, Your Honor. This
16 particular conduct, I would say not.

17 Q What was it?

18 A Disorderly conduct.

19 Q What was it?

20 A As I recall the facts of the case -- they are not
21 of record -- it was an argument with a police officer. I believe
22 it was vagrancy and disorderly conduct.

23 Q It was just an argument?

24 A It was just an argument. He was coming out of
25 his house. He was well known around town as unpopular. He was

1 arrested on one of these general dragnet laws.

2 Now I am talking outside of the record, because this
3 point would have been developed if it had been in the case at
4 the time, but it was not.

5 The vagrancy statute in Tennessee under which he was
6 arrested has since been declared unconstitutional and the dis-
7 orderly conduct, in fact, is similar to the one in the case
8 before this Court of John vs. University Committee. So this
9 particular conviction was probably unconstitutional.

10 Mr. Roberts has mentioned that the handing out of this
11 leaflet followed a riot by a couple of weeks. That is not true.

12 He mentioned that Mr. Jones had already been suspended
13 at the time he handed out the offending leaflets. The suspen-
14 sion was clearly unconstitutional on any of the lower courts'
15 decisions on student rights. There was no notice, no hearing,
16 no nothing, and ultimately it was rescinded.

17 He was suspended on three vague charges, none of which
18 were pressed later on in these proceedings.

19 Q Now the only findings against this man, as I under-
20 stand it, appear on page 31 -- at the bottom of page 30 and the
21 top of page 31 -- is that right?

22 A That is correct.

23 Q Which consist of the -- the only explicit thing
24 is the distributing literature charge, although it says "on
25 different occasions to promote unrest on the campus by such action

1 as distributing literature." It was designed for that purpose,
 2 that is one of the findings. And the other is that he didn't
 3 tell the truth?

4 A That's right, Your Honor.

5 In dealing with the case, we have given the benefit of
 6 the ambiguity to the university and assume that it was about
 7 the literature.

8 Q Well, you will hardly get it in.

9 A If, on the other hand, ---

10 Q They certainly find that he did that, that he
 11 promoted unrest by distributing literature, and the ambiguity
 12 is whether the findings include other ways in which he promoted
 13 unrest.

14 A Yes, and if there are other ways, we can say that
 15 due process has been violated because the man has not been told
 16 what he has been disciplined for.

17 Q Now he was charged. He was told what he was
 18 charged for, including those criminal convictions?

19 A Yes, but not disciplined for it -- not told that
 20 he had been found guilty of it.

21 Q Are you urging that a college would not have the
 22 right to expel a man if they caught him in an outright falsehood?

23 A I don't think that issue is in the case, Your
 24 Honor.

25 Q But they found him guilty of it?

1 A They never charged him with a falsehood. They
2 never gave him a chance to say, "I didn't tell a falsehood."
3 They just came down one day and said, "You lied." That is all.

4 Q If a falsehood is committed as a part of the
5 response to other charges, do you mean to suggest they have to
6 start all over and give him some new charges, when the very people
7 sitting in the room have heard him make what they regarded as a
8 falsehood?

9 A Just to analogize to the outside world, it would
10 be a perjury proceeding.

11 Q Well, this isn't a criminal decision, counsel.
12 You are trying to equate this to a criminal proceeding and all
13 the constitutional protection of a criminal proceeding.

14 A Not all, Your Honor, I think at the very least
15 notice and opportunity to defend has been settled, although this
16 Court has not directly passed on it. It has been considered to
17 be settled ever since the Dixon case in 1961 or '2.

18 Q Are you arguing that if a man is held up to
19 answer a charge before a board of college administrators and
20 he deliberately falsifies in their presence about the charges,
21 that they would not have the right to remove him from school?

22 A Not at all, Mr. Justice.

23 Q I thought they sentenced him.

24 A I am arguing that if he is thought to have deliber-
25 ately falsified something, they should charge him with that, and --

1 Q You mean, they have to charge him in advance?

2 A At least ---

3 Q The object of a school, I suppose, is to try to
4 get the students to learn and take part in the regular business
5 and I wouldn't suppose -- at least in the schools I went to,
6 they were compelled to give me formal charges of anything. If
7 they wanted to get me out, they could remove me without formal
8 charges, I would think. You don't think so?

9 A I don't think so, Your Honor. I don't think the
10 law has been so for the last six or eight years.

11 Q What cases have held to the contrary?

12 A Excuse me.

13 Q What cases have held to the contrary?

14 A Starting with Dixon vs. Alabama State Board of
15 Education, Knight vs. State Board of Education, probably I would
16 say 30 or 40 disciplinary cases in the meantime, ending most
17 recently with Scogan vs. Lincoln Memorial University ---

18 Q Any of those in this Court?

19 A None of those in this Court, Your Honor. A number
20 of them approved in a footnote in Tinker -- cited approvingly
21 in a footnote in Tinker.

22 Q May I ask, that sentence of 31 is at the hearing?

23 He demonstrated his indifference by denying that he passed out
24 such literature despite positive statements by cafeteria personnel
25 and the president of the university that he had done so. And

1 my question is: Did cafeteria personnel and the president of
 2 the university testify at his hearing and in his presence that
 3 he had done so?

4 A The cafeteria worker testified in his hearing
 5 in his presence.

6 Q Was the cafeteria worker -- was he represented by
 7 counsel at the hearing?

8 A Mr. Jones?

9 Q Yes.

10 A Yes.

11 Q And was that witness from the cafeteria cross-
 12 examined?

13 A Yes, and it was brought out that she was testify-
 14 ing that the leaflets were handed out three months before it was
 15 prepared. Her testimony was rendered fully incredible.

16 Q What about the president of the university? Did
 17 he testify at this hearing?

18 A He testified.

19 Q And was he cross-examined?

20 A Cross-examined. It appears in the record at page
 21 1254.

22 Q Then I don't quite understand your point that
 23 the charge was not -- or the fact that his lying, or the alle-
 24 gation that he had lied. I gather your point is that that was not
 25 a basis for the discipline that is imposed.

1 A It was not a basis for the discipline to anyone's
2 knowledge until the findings came out some ten days after the
3 hearing.

4 Q Surely he must have known at the hearing himself
5 that the issue of his veracity was in his case.

6 A Your Honor, the next event at the hearing after
7 the president testified was Mr. Jones' testimony. His testimony
8 contradicted that of the president, and it simply -- Mr. Jones,
9 we presumed, thought he was telling the truth.

10 Q Do you want us to reexamine the issue of credi-
11 bility in this Court?

12 A I don't think it is at all necessary, Your Honor.
13 I think a reexamination of the credibility ---

14 Q Yes, but the finding of the committee was that we
15 have no doubt that this person did not tell the truth. As between
16 his testimony and that of the president and the cafeteria workers,
17 at least this committee resolved the question against Jones,
18 didn't it?

19 A Yes, and when ---

20 Q And you suggest that was not a basis for its
21 action in imposing discipline?

22 A I don't think a man can be disciplined for defend-
23 ing himself.

24 Q You mean he has got a license to lie in his
25 defense with impunity? Is that the essence?

1 A The essence is if he is accused of lying, he should
2 have a chance to prove whether he was or not.

3 Q That is a new proceeding, like a perjury proceed-
4 ing in a criminal case?

5 A I think so, Your Honor.

6 Q What kind of a school is this?

7 A It is a state university for Negroes.

8 Q State run?

9 A A state university for Negroes.

10 Q Are colored people on that?

11 A It is ---

12 Q Are the instructors colored or white?

13 A Largely -- roughly 80 percent Negro, I think. It
14 has since been put under the association plan.

15 Q What was the president of the school?

16 A He was Negro.

17 MR. CHIEF JUSTICE BURGER: Thank you for your submission.
18 The case is submitted.

19 (Whereupon, at 10:58 a.m. the argument in the above-
20 mentioned case was concluded.)

21

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25