

Supreme Court of the United States

OCTOBER TERM, 1969

Supreme Court, U. S.
FEB 5 1970

In the Matter of:

Docket No. 731

----- X
KENNETH R. JONES,

Petitioner,

vs.

THE STATE BOARD OF EDUCATION OF
AND FOR THE STATE OF TENNESSEE,
et al.

Respondents.
----- X

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NA 8-2345

TABLE OF CONTENTS

	<u>ORAL ARGUMENTS:</u>	<u>P A G E</u>
1		
2	Reber R. Bault, Jr., Esq., on behalf of Petitioner.	2
3		
4	Robert H. Roberts, Esq., on behalf of Respondnet.	14
5		
6		
7		
8		
9		
10		
11		
12	* * * * *	
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14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
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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

11 Washington, D. C.
12 January 19, 1970

13 The above-entitled matter came on for argument at
14 1:55 p.m.

15 BEFORE:

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

24 APPEARANCES:

25 Counsel for Petitioner:
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lsj
1

P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: Case No. 731, Kenneth R.
3 Jones, petitioner, versus The State Board of Education of and
4 for the State of Tennessee, et al.

5 Mr. Boulton, you may proceed whenever you are ready.

6 ARGUMENT OF REBER R. BOULT, JR., ESQ.

7 ON BEHALF OF PETITIONER

8 MR. BOULT: Mr. Chief Justice, Mr. Associate Justices,
9 this case concerns a college student, not a school child, a
10 college student, who was dismissed from the state university for
11 handing out one leaflet on the campus not in or about any class-
12 room.

13 The issues break down into four. The regulations
14 involved prohibit disrespect for authority and any other conduct
15 requiring severe discipline. We contend that these are void for
16 vagueness and overbreadth. Primarily a first amendment conten-
17 tion the fourteenth amendment due process notice is also sub-
18 sumed in the question.

19 Next, we contend simply that they are void as applied that
20 you cannot outlaw the distribution of literature or more specific
21 to this case put somebody out of school for it.

22 Q As I understand this record, there were six stu-
23 dents who were dismissed?

24 A Three in this package, Your Honor.

25 Q What happened to the other two?

XXXXX

1 A Certiorari was denied as to the other two.

2 Q So, we have only this one student in this one
3 case.

4 A Yes, Mr. Justice Douglas, the four issues, three
5 of the four issues were identical to all three petitioners. The
6 factual issues varied as to each of the three.

7 Q If we agree with you that his distribution was
8 not objectionable conduct, do we have to reach the other issues?

9 A You do not have to, Your Honor. In some cases
10 it is done. For example, Herndon v. Lowrey held the Georgia
11 statute both unconstitutional on its face and as applied.

12 There is no choice between the two issues, between
13 the two approaches on ---

14 Q I am thinking particularly of the issue on your
15 point of vagueness of the regulations whether we have to reach
16 that if we agree in any event that conduct had constitutional
17 protection.

18 A That is correct, Your Honor. I would suggest
19 that in the way first amendment litigation is going nowadays,
20 so many Dombrowski-type actions that the first point of reference
21 is more often the facial unconstitutionality rather than the
22 applicatory.

23 Q Is the leaflet that he was charged with distribut-
24 ing in the record, is it?

25 A Yes, it is Plaintiff's Exhibit 6 which appears

3
1 appears at page 175 of the record.

2 The other two issues involved are due process issues,
3 one having to do with the composition of the panel and its
4 conduct, the Faculty Advisory Committee, that is the University's
5 disciplinary committee, its confusion of functions being essen-
6 tially everything and, therefore, inherently biased, presumptive-
7 ly biased. I think in this case also biased as a matter of
8 proof.

9 Fourth, procedural due process, time and type of
10 notice and the fact that a new contention was brought in at
11 the hearing. They found without ever bringing up at the hear-
12 ing the Faculty Advisory Committee's findings said that the
13 student had not told the truth at the hearing. Of course, he
14 never had a chance to rebut this.

15 The facts on the leafletting issue, very brief, he
16 was found to have handed out this Plaintiff's Exhibit 6, although
17 there is considerable doubt that he actually did hand it out
18 or not, handed to the President of the University.

19 The President was the only solid witness on this point.
20 One other witness testified that she saw him hand it out in the
21 cafeteria. However, she testified that she saw him do this some
22 two, three or four months before the leaflet was prepared. So,
23 we assume that there is only one witness against him, the Presi-
24 dent of the University.

25 The President, incidentally, only testified that he

1 received one personally. He did not see it handed to anyone
2 else. Jones, himself, mentioned that he offered one to the
3 President of the student body, but he didn't want it.

4 Q This Plaintiff's Exhibit 6 is supposed to be on
5 page 175 of the Appendix here, but this pagination is a bit con-
6 fusing to me at least.

7 A The confusion on the pagination, I believe, Your
8 Honor, comes from the inclusion in the Appendix of the Student
9 Handbook which runs from 177 to 178 but takes some-70 odd pages
10 to do it.

11 Q Yes, I see. I think I now have this. It is on
12 page 175 marked in the upper right-hand corner.

13 A Upper right-hand corner, yes, in the Appendix.

14 Q Getting in the early years of the Civil Rights
15 Movement?

16 A Yes, Your Honor.

17 Q Thank you.

18 A Also, at the disciplinary hearing, there was no
19 evidence presented whatsoever of disruption of the campus, immi-
20 nent disruption, proposed disruption, suspicion to disruption,
21 possible disruption, none. It was just not commented upon.

22 At the hearing in the District Court, there w no
23 evidence of actual disruption. The only evidence of possible
24 or prospective disruption was the President of the University's,
25 I can only use the phrase, vague and undifferentiated fears as

5
1 in Tinker. He referred to it as inflammatory, it gets students
2 all stirred up thinking about other things.

3 There was one other bit of testimony on that. The
4 Dean of Students objected that the students received the leaf-
5 let as they were walking across the campus and would stop and
6 read it.

7 The disciplinary action was not taken until at least
8 one month after the leaflet was handed out so that this is not
9 a case where we really need to rely on forecasts.

10 The idea on the first issue of whether the void for
11 vagueness doctrine should apply on the campus, I believe, is
12 amply covered in the brief. I will only mention here that it
13 just seems inconceivable that it shouldn't.

14 It seems much more reasonable to me to apply it there
15 where you have got people thinking about things, erudite,
16 scholarly, literary, talented, to write rules than in the small
17 towns that are held so rigidly to first-amendment standards as
18 specificity in drafting their ordinances.

19 As to what the standard might be, I think the same
20 approach as was taken in *Dombrowski v. Pfister*, *Dombrowski*
21 referred to the loyalty oath cases as setting forth an appro-
22 priate standard for other contexts. This is really not much
23 of a different context, though, because it is still on a campus,
24 at least not much of a different context.

25 Q But aren't these regulations in a different

1 category, they are provided for an institution of learning.
2 These don't have the status of the law, statute or city ordi-
3 nance.

4 A They have considerably greater effect on those
5 who must live by them than say a disorderly conduct statute
6 which ---

7 Q But on the other hand, the people who were doing
8 the drafting, at least at the time and in the context in which
9 they were originally drafting, were probably proceeding on the
10 assumption that these students were coming to these institutions
11 to study and to learn and they perhaps did not give them the
12 kind of detailed attention they would give them if they were
13 writing them today.

14 A Your Honor, I would hope they would give them
15 more detailed attention if they were rewriting them today. This,
16 I hope, will be one result of this case.

17 The regulations were revised every year, though. They
18 were quite current at the time, 1967, and some of the regulations
19 involved on the procedures followed by the Disciplinary Committee
20 had been rewritten that very year.

21 The regulations were rewritten immediately after this
22 case was brought. I do not know what the result is. Perhaps
23 opposing counsel can help us on that.

24 On whether we are talking about the facial or appli-
25 catory constitutionality of this situation, I think the case does

1 have to be considered in light of what the university is. First,
2 it is considerably more than just a group of scholars and
3 learners and second in light of what is happening in universi-
4 ties today.

5 As obviously there is much unrest, various authorities
6 have attributed this to the failure to extend constitutional
7 rights in the universities.

8 Q Is the leaflet that is in controversy printed on
9 page 175 of the Appendix?

10 A Yes.

11 I think we should also consider that this University,
12 Tennessee State University, as is true with so many of the
13 smaller universities, state universities, around the nation
14 trains a lot of teachers.

15 As this Court has recognized for many years, McClaren
16 v. Oklahoma, they are training someone to be a leader and
17 trainer of others. I would rather say that they are educating
18 someone to be a leader and educator of others, but I think it
19 is more accurately stated the first way.

20 Further, that those who will come under his guidance
21 and influence must be directly affected by the education he
22 receives. The education that the students at the Tennessee
23 State University are receiving is not one calculated to make
24 them sensitive to the demands of the Bill of Rights.

25 I think this statement is accurate with regard to

1 other state universities. I think there is another one before
2 the Court right now in the record of Norton v. Disciplinary
3 Committee of the East Tennessee State University, petition of
4 certiorari filed approximately a month ago.

5 It is our position that the full first amendment
6 panoply of rights should apply, in fact must apply to students.
7 There has not been a college student case on his rights in this
8 Court for many years. I think it is appropriate in this case
9 to state that henceforth when they come the issue will be
10 whether or not the first amendment has been violated and will
11 be treated in the same terms as if it were a non-student case.

12 The tests under the first amendment and they were
13 quite ample either for vagueness , overbreadth or for the actual
14 activity, ample to deal with problems on the campus. There
15 were no protests of preparing a group for violent or lawless or
16 destructive or disruptive action and speaking it to that action
17 is necessary before speech can be curtailed -- the Brandenburg,
18 Whitney, DeJune tests. Imminent lawless action must be there.

19 Q Do you say that the standards which you are
20 challenging are not adequate to give warning that language used
21 in the exhibit 6 about puppet, fools and racist dogs and so forth
22 addressed toward the University authorities is not covered?

23 A In other words that those words would be dis-
24 respectful.

25 Q You say that that does not give notice that the

9
1 University would regard that as disrespectful.

2 A I think a direct insult would generally be
3 considered disrespectful. Now the first amendment void for
4 vagueness doctrines do not look to specific conduct involved
5 where overbreadth is involved.

6 Q If we were dealing with a libel case under Times
7 and Sullivan, I would understand your argument a little bit
8 better.

9 Under Times and Sullivan you can call the president
10 of a university or a senator or almost anyone else a racist
11 pig or what not with considerable impunity, but this is not a
12 libel case.

13 This is a situation where regulations were trying to
14 govern conduct to that civilized people could function in a
15 university complex without friction and without conflict with
16 each other.

17 A I have never observed a university yet in which
18 people functioned without friction and without conflict with
19 each other.

20 Q Well they have existed in the past.

21 A The one I went to in very quiet times 10, 15 years
22 ago, it was there.

23 More basically, the reason for Times v. Sullivan was
24 the first amendment and the reason s person under Times v.
25 Sullivan can call one a racist pig or liar or whatever it was

1 is the first amendment, and the fact that it was a libel case
2 was simply a fact of the case as the fact that this is a student
3 case is simply a fact of the case. We are relying on the first
4 amendment.

5 Q In this Court when a lawyer is admitted, you
6 have heard the oath many times and you took it yourself, it is
7 an oath to conduct oneself uprightly and according to law.

8 Suppose in the course of an argument one counsel
9 addressed another as a rascist pig, do you think that would be
10 beyond the reach of that rule because that rule is too vague,
11 it is overbroad, that oath of office, the rule of conduct within
12 the chambers of this Court?

13 A No, and we do not contend and it is not contended
14 generally.

15 Q The first amendment prevails in this room.

16 A Certainly, but we are talking about outdoors on
17 the campus. We are not talking about inside the classroom. We
18 are not talking about inside a courtroom.

19 The first amendment in its prevalence, in its prevail-
20 ing, does take into account the circumstances. If I should do
21 that here, this is quite different from my writing it down and
22 having it out on the street.

23 Q You couldn't write it in a brief without getting
24 into very grave trouble, could you?

25 A I have such a difficult time conceiving myself

1 writing it in a brief. There are standard rules against scanda-
2 lous, impertinent matter in pleadings and briefs that would apply
3 and I should think it would be stricken.

4 Q A university cannot have a rule like that for
5 the conduct of the students on the campus and buildings?

6 A Not any different from say the city could have
7 it on the streets. We are not talking about inside the class-
8 rooms in the same sense that the city, when it passes ordinances
9 is not talking about in offices.

10 Q Well, if we disbarred a lawyer for this kind of
11 conduct, that would be a pretty severe penalty, wouldn't it?

12 A Yes.

13 Q And I take it you more or less concede that we
14 might take very severe action against a lawyer who engaged in
15 this kind of utterance?

16 A I really don't know, Your Honor. My first
17 assumption would be if it were written it would be immediately
18 stricken with a rather harsh reprimand. If it happened orally,
19 I don't know.

20 On the third of the issues involved, the composition
21 of the Disciplinary Committee, the issue illustrates a point
22 that runs throughout the case. The treatment of the issue in
23 the court of appeals, the same court below including one of
24 the same judges on the panel, cited several years ago the Ameri-
25 can Cyanamid case cited in our brief on confusion of functions

1 and presumptive bias not actual bias which would seem to apply
2 right down the line here. It was not even mentioned in the
3 opinion although the issue was amply raised and the case cited.

4 Here we have a situation where the panel which judged
5 these students, the sole witness before the panel was the review-
6 ing authority with absolute veto power what the panel did, or
7 the only essential witness.

8 He appointed the panel. One of the other panel mem-
9 bers had strong personal feelings about the person involved,
10 not about the issues that would not be a disqualifying matter,
11 but about the person involved.

12 The Student Personnel Committee overlapped with the
13 Disciplinary Committee. Therefore, it had done much investiga-
14 tion. The Dean of Students, the Chairman of the Committee had
15 compiled a list and investigated. The Faculty Advisory
16 Committee conducted an in-depth investigation itself of the
17 students, it drew charges, it counseled students, it called the
18 witnesses, it presented documentary evidence and did not even
19 follow its own rules as to how the matter should have been
20 handled.

21 CHIEF JUSTICE BURGER: You still have some time left,
22 counsel.

23 A I will save the remaining time for rebuttal.

24 CHIEF JUSTICE BURGER: Fine.

ARGUMENT OF ROBERT H. ROBERTS, ESQ.

ON BEHALF OF RESPONDENTS

MR. ROBERTS: Mr. Chief Justice and Associate
Justices.

CHIEF JUSTICE BURGER: Mr. Roberts?

A I want to first take care of a little matter of
the Reply Brief that was made to my Brief in which it was
alleged that I had made some erroneous statements.

There are only two points I want to raise in connec-
tion with that. One is to the effect that I have left the
impression, at least, that the leafletting activity that this
Petitioner has been charged with, and found guilty, of was connect-
ed in some way with the arrival on the campus of Mr. Stokley
Carmichael and an ensuing riot that occurred.

I am wrong about that and I apologize to the Court
and to opposing counsel. There had been a number of leaflets
passed out at about this time and some of them before and some
after the riot occurred there on the campus in the summer of
1967. There was one of them, for instance, that demanded that
the Administration invite Mr. Carmichael there. They later
did and the riot did result.

However, this particular leaflet which advocated and
urged the student body to boycott registration at the school
was passed out after the riot had occurred.

The second point that I would make to the Reply Brief

1 is in regard to the charge against this Petitioner of being in
2 violation of city, county or state laws. It is urged here that
3 by the words of Dr. Payne, who was the Dean of Students and who
4 presided over these hearings, that he agreed that this was
5 not used against the student in the hearings. The record will
6 not bear Mr. Boulton out on that. I think he has failed to read
7 the entire record in regard to it.

8 What actually took place Mr. Hedgepath on page 12 of
9 the proceedings at the F.A.C. hearing made it clear that we
10 were, the school was, relying upon any disorderly conduct or
11 conduct unbefitting a student or any that violated the rules
12 of the Handbook there at the Institution. Further on at about
13 70 - 78 there was about 8 full pages where it was developed
14 what Mr. Jones had been convicted and paid a fine in the Metro-
15 politan Court for.

16 Those are the two points I wanted to raise on that.

17 We have made two issues out of the four that Petitioner
18 had. We feel that there are only two things involved. One is
19 the entire matter of the procedure including the due process
20 rights of these Petitioners.

21 As stated earlier, there were five original Petitioners.
22 Two of them were dismissed at the time of the hearing. I mean
23 the charges against them were dismissed. The other three were
24 found guilty of acts that warranted their suspension.

25 That is another thing that I want to make clear to

1 the Court and that is the fact that these students were not
2 expelled. They were suspended. They have not, this Petitioner
3 has not gone back to the school and sought readmission since
4 the suspension. I don't know whether the school would allow him
5 readmittance or not. He was an out-of-state student and he came
6 down there and he did things that they felt to be and found to
7 be disruptive.

8 This one piece of literature tried to impress his
9 will upon the other students, for example, and cause them not
10 register for school and thereby disrupt the entire procedure.

11 Q Is there anything Petitioner did other than to
12 pass out that leaflet which is in there?

13 A Yes, sir, one thing else that he did there in
14 connection with the leaflet, he lied about it. He said that
15 he did not do it despite the fact that the President of the
16 University says, "He handed me one himself right in front of the
17 Administration Building and he had about 50 of them in his hand
18 when he did it."

19 A lady down in the cafeteria testified, there was some
20 discrepancy about the date that she claimed that it was passed
21 out, but she said that there wasn't any question in her mind
22 but that was what the piece of literature was. She went over
23 and picked it up and read it.

24 Q With the exception of passing out the leaflet
25 and lying about it, that is all?

1 A No, sir, then the third thing is that he violated
2 the rules of the Student Handbook in that he was convicted and
3 fined in the Metropolitan Court for two charges of disorderly
4 conduct.

5 Q Involving the same thing?

6 A No, sir, this didn't have anything to do with
7 the ---

8 Q Were they passing out leaflets?

9 A No, sir.

10 Q What was it?

11 Q Did they find that ---

12 A Yes, sir. They found that he was guilty of
13 conviction for -- "We, the Committee, find that Mr. Jones has
14 seized upon the opportunity on different occasions to promote
15 unrest on the campus by such actions as distributing literature
16 designed." Then at the hearing he demonstrated it as a matter of
17 proof.

18 Q But they didn't find anything about his conviction,
19 that was just in the charge?

20 A "After considering all of the matters before this
21 Committee, we feel that Mr. Kenneth Jones has violated the rules
22 of conduct governing students at this University to such an
23 extent that he should be suspended."

24 Q But they never made any express finding on
25 anything but the leaflet matter, on any specific conduct?

1 A No, sir, no more than one of the things specifi-
2 cally in there and that was that if he was found to be in
3 violation of any state, county or city or Federal law that that
4 is one of the things that is listed as being requiring severe
5 discipline.

6 Q Was he charged with the lying about the leaflet?

7 A No, sir, he had not been charged for that. Of
8 course, we are -- we insist that he ---

9 Q You don't rest the defense ---

10 A Yes, sir, I do.

11 Q How can you if he wasn't charged with it?

12 A For this reason, he -- of course, we think that
13 the notice required for most things wouldn't apply to personal
14 conduct of that kind which he did knowingly. He had the first
15 notice of anybody when he made the resolve within himself to
16 tell a lie to that Committee.

17 Q But my difficulty is I would have supposed the
18 Committee would have to rest the discipline on a charge that he
19 had lied about it before you could support the discipline on
20 the basis of his lying about it, wouldn't you?

21 A If the Court please, I think it would be some-
22 what comparable to this.

23 This morning you graciously permitted me to practise
24 before this Court. Part of what you based that on was an appli-
25 cation that I filed. Suppose that I lied in that application and

1 you brought me in here for a hearing to determine whether I
2 should have that privilege that you gave me revoked, and while
3 in here, I openly and blatantly lied to you.

4 Q I don't think we would do that without making
5 a charge to that effect, and then if you came here in defense
6 of that charge and lied again, I expect we would have to ---

7 A Yes, sir, of course, I think that it really be-
8 comes moot anyway. You might recall that after this hearing
9 and after he certainly had notice at that time about it and was
10 accused of lying to them, we had a full-dress court hearing in
11 the U.S. District Court of Tennessee in Nashville. Judge Miller
12 agreed, of course, with the University officials in connection
13 with all of these things that they found against him.

14 Q Do you contend that, and I take it that you do,
15 soliciting or handbilling students not to register, soliciting
16 or handbilling them to boycott registration is enough of a
17 disruption in University affairs to warrant exclusion from
18 the University.

19 A Yes, sir, I certainly do. Mr. Jones claimed that
20 he only passed out some other leaflets, one of them, I think,
21 was called The Black Thesis which was more or less a philosophi-
22 cal piece of writing. Well now that wasn't, so far as I could
23 see, anything in there that would have been disruptive.

24 But suppose that he had been able to persuade even
25 a substantial number of these students to refuse to register

1 when the term started certainly that would disrupt the school.

2 Q How many days was it before he distributed these
3 and then was brought up on charges?

4 A It was approximately a month and a half.

5 Q And had there been any disruption as a result
6 of them that you can point ---

7 A No, sir, they didn't permit him to go that sum-
8 mer. This happened during the summer and they had already sent
9 him notice that he had not been cleared for attendance during
10 the Summer Term of school.

11 Q But he didn't disrupt anything, did he?

12 A It didn't turn out that way, but I don't believe
13 you have to wait until the horse is out of the barn before you
14 close the door.

15 Q Will you show me in the record where those two
16 convictions are that you were talking about?

17 A Yes, sir.

18 Q If you don't mind.

19 A The charge itself charged him with them and they
20 readily admitted it, and they are on page 70 to 78.

21 Q In the record, where is the charge against him
22 printed in the record?

23 A It is in my brief on page 5.

24 Q But where is it in the record, do you know? If
25 you don't, I'll look at the brief.

1 Q It is in the lower court's opinion. Record No.
2 186 is the charge against Jones.

3 A Yes, sir, and the entire discussion about the
4 criminal activity that he was charged with takes place between
5 pages 70 and 78 of the transcript of the F.A.C. hearing. It
6 is also, of course, in the transcript of the court hearing be-
7 fore Judge Miller.

8 Q It is between 70 and 78? You don't mean, apparent-
9 ly, 70 and 78 of this printed Appendix. I have looked there
10 and found nothing.

11 A No, sir, part of the record up here, though, is
12 the F.A.C. transcript of the hearing.

13 Q But the excerpts from that transcript containing
14 the evidence we are now discussing; that is, of his convictions
15 is not anywhere in this Appendix, am I correct about that?

16 A That is where it should be. It is on page 48
17 of your ---

18 Q Thank you.

19 A Of course, we feel that the most serious thing
20 that took place was the matter of this leaflet by which he
21 attempted to disrupt orderly activities of the school, and even
22 in Tinker it is stated clearly that the orderly activities of
23 the school is not subject to first amendment rights.

24 We think that registration certainly is an orderly
25 and part of the regular functions of the school.

1 Our time has expired.

2 CHIEF JUSTICE BURGER: Thank you Mr. Roberts. Thank
3 you Mr. Boulton.

4 (Whereupon, at 2:00 p.m. the argument in the above-
5 entitled matter recessed, to reconvene at 10:00 a.m., Tuesday,
6 January 20, 1970.)