

US Court of Appeals for the 9th Circuit

Transcription of Court Recording 13-15085.wma

Recording from <http://www.ca9.uscourts.gov/media/>

Case Name: Peta Lindsay, et al v. Debra Bowen
Case Number: 13-15085
Case Panel: JUDGES KOZINSKI, O'SCANNLAIN, MURGUIA
Hearing Location: San Francisco, CA
Attorney for Appellants: ROBERT EDWARD BARNES
Attorney for Appellee: ALEXANDRA ROBERT GORDON

--- START OF RECORDING ---

00:00 ATTORNEY BARNES: Good morning. May it please the court, I'm Attorney Robert Barnes. I represent the Appellants, Peta Lindsay, the Peace and Freedom Party, and Richard Becker. In 2012, Peta Lindsay and the Peace and Freedom Party, and Richard Becker wanted to submit her name to be nominated as a potential nominee of the Peace and Freedom Party for the Presidency of the United States.

00:22 JUDGE KOZINSKI: But she's clearly ineligible for that office.

00:25 ATTORNEY BARNES: That would be a decision for Congress to make and that is our assertion here. Because what happened here is, in fact the procedural history is such, that she submitted it, the Election Code 60-41 provides that the Secretary shall place a candidate on the ballot if they're generally recognized as a candidate. It was unquestioned that she was generally recognized as a candidate. The

Secretary then took the position, initially just denied it, did not know on February 6, after court proceedings began the Secretary said that the reason was because of "age". But the only document they could cite was something that was one week after the Secretary had actually made her decision. But independent of that, the key question here, is whether the Secretary of State has the authority to interpret--

01:10 JUDGE KOZINSKI: Who disputes that she is under age? Underage in terms of the Constitutional standard. She is or was at that time less than 35, right?

01:23 ATTORNEY BARNES: Yes, your Honor, that is correct.

01:24 JUDGE KOZINSKI: OK, so you said something at the beginning that sounded like you were disputing - but you are not disputing that?

01:30 ATTORNEY BARNES: I'm not disputing that fact, your Honor, no. What we are disputing is the Secretary's authority to be the person to adjudicate, interpret, and enforce the qualifications provisions of the US Constitution.

01:39 JUDGE KOZINSKI: You mentioned something about the role of Congress in your response.

01:43 ATTORNEY BARNES: Yes, your Honor. The Constitution carefully creates a system whereby any dispute about the qualification of a person to hold the office of the Presidency is determined by the 12th Amendment, the 20th Amendment, and--

01:55 JUDGE KOZINSKI: Where does it say it's exclusive?

01:59 ATTORNEY BARNES: The interpretation of it being exclusive is that Congress is the one that it had been delegated to. The question of whether another state official can act in that capacity is definitely a novel question. Now in the context of adding qualifications, this court determined in Schaeffer v Townsend that the California State Legislature cannot add qualifications to what was explicitly delegated to Congress. In the term limits case it was determined that no additional qualifications could be added and that the Elections Clause gave Congress the preemptive right to--

02:28 JUDGE KOZINSKI: But this is not an addition, this is a qualification that is in the Constitution itself.

02:34 ATTORNEY BARNES: It is, your Honor. But for example, could the State of Arizona, which passed legislation, or attempted to pass legislation, that said a candidate had to have certain forms of documentary proof in order to meet the qualifications provision; would that statute be Constitutional? In fact--

02:49 JUDGE KOZINSKI: That's a hypothetical question we don't need to deal with, because in this case, if you are saying "Look, there is no proof she is less than 35, and we're disputing California's requirement that prove up that she is less than 35", then we would have that question. But we don't, because you've already said you don't dispute she's less than 35. So how the Secretary came to that knowledge, or what procedure she used, or whether she could use any procedures, is not before us. It's not something we need to decide right now.

03:25 ATTORNEY BARNES: The key question is whether she has this

authority in general. For example, in the incidents in both the Robinson case, in Robinson v Bowen, in the Northern District of California, and in the California Appeals Court case, in Keyes--

03:36 JUDGE KOZINSKI: I think its you can determine that it's a person. Like somebody ran a dog for President, she would have a, she would have a-- I mean let's say, some party, not the Peace and Freedom party, but some party nominated a dog for President. I take it the Secretary of State would have authority to keep that off the ballot, right?

04:00 ATTORNEY BARNES: I believe that too would be submitted to Congress. And the reason for that is this. Let's take the logical conclusion the other way. In the McCain case, it was undisputed that Senator McCain was not born inside the United States. One interpretation of the Natural Born provision of the clause of the Constitution was that was required. Under the Secretary's interpretation, a future Secretary of State could have excluded Senator McCain from the ballot on her interpretation and application of that provision. For example, in the various "birther" laws that are being passed, and still being considered by states across the country, they were going to require certain forms of documentation that it was undisputed that Senator Obama and then President Obama would not have been able to meet. Under this interpretation of what the District Court allowed, a State official anywhere in the country could have excluded Mr Obama from the ballot on the grounds that the interpretation of the Natural Born clause provision he didn't suffice to meet the documentary proof. There's also another provision the President--

04:50 JUDGE KOZINSKI: But again, that's a question we would have if there were a dispute now as to whether or not she meets the Constitutional standard. But in this case she doesn't dispute it. If she said "Look, 35 doesn't mean 35. Thirty-five means 34 or 32", for whatever reason then,-- But she doesn't dispute it. She admits she doesn't meet the Constitutional standard.

05:19 ATTORNEY BARNES: She doesn't meet the standard to hold the office of Presidency. I believe she does meet the standard to be President-elect. The Twentieth Amendment provides for a provision where it says "If a President-elect"--

05:28 JUDGE KOZINSKI: But that's different, right? That's different from the McCain situation, right? Because of a "birther"-- Of the examples you gave, those are all disputes about whether somebody meets the Constitutional standard. But in this case, you've sort of given that up. You've said "We admit that she does not have the requirements under the Constitution to be President." So all these mechanics about what the State can do to figure that question out are not before us.

06:00 ATTORNEY BARNES: No. But what is before us is whether the Secretary of State has the authority to make that determination.

06:04 JUDGE MURGUIA: Well let me ask you. Are both the analyses conducted in the District Court and the State's brief rely on case law, discussing codified election regulations or laws? I'm just curious, does the analysis change because Ms Bowen was not acting pursuant to certain election law but under her discretion? Do we have to use the same test? I think the cases Amberson and Burdick, that those cases set out some tests. Do we use those tests?

06:38 ATTORNEY BARNES: Your Honor, here I would say the Secretary of State has a higher burden, because the California State Legislature has never authorized this for her. They've never said that unless a candidate is age 35, they are not allowed to be a candidate for Presidency in California. No such law has actually been passed by the State of California. The Secretary of State's interpretation is that because she took an oath to the US Constitution she can interpret it, adjudicate it, and enforce it wherever she wants. Today we face these particular facts, but tomorrow we may face an entirely different set of facts.

07:04 JUDGE MURGUIA: What's the harm? Is there any harm for your client, the Peace and Freedom party, when it has to place on the ballot a candidate who is 35 and older, versus someone who is 27 years of age?

07:20 ATTORNEY BARNES: Yes, your Honor. Because they are not being allowed the opportunity to have that issue or question, if she were to be elected, submitted to Congress, and be submitted. And the Twentieth Amendment anticipates that someone can be a candidate for Presidency, be qualified to be a candidate for Presidency, and not be qualified to yet hold the office. Hence, the Twentieth Amendment says that someone who has not qualified, but may at some future point qualify. That clearly applies to someone that wouldn't fit the Natural Born citizen provision. It likely wouldn't be the Fourteen Year Resident provision. Which, by the way, that would be another provision that election officials across the states could start to interpret, different states in the country. That provision could have excluded Eisenhower, and other people from the Presidential Ballot, if we are going to allow state officials to now interpret, adjudicate and enforce Constitutional

qualification provisions for the Presidency. So here, because she wasn't- What happens when a young candidate- For example in the past California has allowed underage candidates on the ballot, or people who didn't qualify for office on the ballot. For example, in State legislative race cases, including at Leland, 127 P 643; McGee, 226 P 2nd 1; Fuller, 138 California Reporter 3d 396; a person was clearly not a resident and didn't meet the residency qualifications to be, to run for California legislative office. It was challenged. The Court said neither the Secretary of State, nor the County official, nor the Courts, could determine whether or not that person was qualified. Qualifications of an elected official are best left to the elected body, for a lot of very good and sound reasons. It may be easy to say that this age one is simple, so let's open up Pandora's box just a little bit and see how it goes. But once it gets opened, all those other qualifications are going to come into question and state officials are going to start--

09:01 JUDGE O'SCANNLAIN: What about segregating the obvious disqualifications from those that are marginal, such as you have suggested, the "birther" issue and so forth? Where it's clear that age is expressed in the Constitution. What's the problem?

09:18 ATTORNEY BARNES: I think the problem is that it should always be- Like the residency issue. Here there are several residency--

09:24 JUDGE O'SCANNLAIN: Well I can see. Residency, room for discussion. But when it's age, and this person was at that time 8 years below eligibility?

09:37 ATTORNEY BARNES: Two different reasons, your Honor. I think

that the Twentieth Amendment provides for an underage person to be elected, and not hold office. It allows the Vice-President instead, or the Congress, to make a determination until they're qualified. It's almost the only reasonable--

09:48 JUDGE O'SCANNLAIN: But she's not running for Vice-President.

09:50 ATTORNEY BARNES: No she isn't. But you usually have a ticket and the Vice-President would be elected. So they anticipated this possibility and they left it to the public and to Congress to make a decision. And that's the best place to do it. Once we open the door and say executive officials can start to interpret the Constitution and apply it. Even if it may seem simple--

10:07 JUDGE KOZINSKI: Well, it's one thing to say they may have anticipated the problem of this arising. It's another thing to say that they are the only ones who have authority to deal with it. It's not clear to me why, well-- If a state were to nominate somebody who's underage and they were to get elected, then Congress is who should deal with it. But what precludes, what makes exclusive remedy? Why can't state officials anticipate along the way, and say "Look, we don't want to create these kinds of problems. We don't want to have a candidate from our state who gets disqualified, we know will get disqualified."

10:44 ATTORNEY BARNES: What the District Court in the Northern District of California in the Robinson case, William Alsop determined was that it was the kind of question that should always be submitted to an elected body. At a minimum that elected body should have the first choice. And given the Twelfth and Twentieth Amendments role in Federal elections, it's too risky to give a state official any role in that

process. The California Court of Appeals in *Keyes v Bowen* went further. Where they said "It would be a truly absurd result if every state election official could determine the qualifications of the criteria and whether they meet the eligibility criteria of the Presidency." I would note that the Secretary of State actually urged that position before the California Court of Appeals in 2010, when it served its interests to do so. Here there would be a second question, independent of that first one, about whether or not the Secretary of State should be afforded this power, or is Constitutionally, or is under California legislation. Here, the only person the Secretary of State has ever asserted this authority concerning, has been two candidates of the Peace and Freedom party, Eldridge Cleaver in 1968, and this candidate in 2012. Both of them were African-American candidates for small parties. She has never asserted this power or this authority in any other context. We asserted that that raised an equal protection question at least worthy of doing discovery. As to what the Secretary of State's actual motivation--

11:59 JUDGE KOZINSKI: Just a second, it would have been March Fong Yu probably who would have been Secretary of State then.

12:06 ATTORNEY BARNES: In 2010. In 1968 it was a different Secretary of State, your Honor.

12:11 JUDGE KOZINSKI: Probably March Fong Yu, right? Secretary of State forever. OK, thank you. You're out of time.

12:23 ATTORNEY BARNES: I'd reserve my last two minutes if I can for--

12:24 JUDGE KOZINSKI: You have minus two minutes.

12:25 ATTORNEY BARNES: My apologies. Thank you, your Honor.

12:31 JUDGE KOZINSKI: We'll hear from the Secretary.

12:32 ATTORNEY GORDON: May it please the Court, Alexandra Robert Gordon, from the office of California Attorney General for Appellee California Secretary of State Debra Bowen. So just to remind the court of the procedural posture of this case, this is an appeal from a dismissal of Plaintiff's complaint with prejudice. So there are really only two questions before the Court. Did Plaintiffs meet their pleading burden? Does the complaint state claims for relief under the First and Fourteenth Amendments, the Equal Protection clause, or the Twentieth Amendment? And two, could Plaintiffs state claims under these provisions as a matter of law? And since the answer to both of these questions is "no", the District Court should be affirmed. Just to sort of touch briefly on some of the things Counsel has said, as the Court has noted, it is undisputed that at the time that she was running in 2010, Ms Lindsay was 27 years old, and a person under the US Constitution has to be 35 to be President of the United States. Although Plaintiffs maintain that the Secretary does not have the authority to exclude Ms Lindsay from the ballot, that's wrong as a matter of law--

13:50 JUDGE O'SCANNLAIN: As a matter of State or Federal law?

13:52 ATTORNEY GORDON: Actually, as a matter of both, Your Honor. The Supreme Court has made it clear, in cases such as Storer vs Brown for example, that state elections officials, and the Secretary of State is the chief elections official of the State of California, and under

the Government Code she has the power to make sure that all of the State election laws, as well as the Federal election laws, are enforced. States maintain a lot of discretion over elections generally in the US Constitution, and over the ballot, and the Supreme Court has made it clear that a state official certainly can protect the integrity of the electoral process by not clogging the ballot with frivolous candidacies.

14:33 JUDGE O'SCANNLAIN: Suppose you had a Secretary of State that was part of the "birther" movement, and declined to let Barack Obama on the ballot. What then?

14:43 ATTORNEY GORDON: Well, Your Honor, that's a different question.

14:45 JUDGE O'SCANNLAIN: Why?

14:46 ATTORNEY GORDON: Why is it a different question? Because I think we can all agree that whether or not President Obama is a US Citizen is very much in dispute. There's no dispute here that Ms Lindsay is 27 years old. And so what the courts have said in the cases that Plaintiffs have cited, Keyes and Robinson, is that the Secretary of State has, one, that the Secretary of State has no ministerial duty to investigate the qualifications. So in all these case where they're alleging that President Obama, or Senator McCain is not a US citizen, and she should, the Secretary of State, should get verification. Or he's using a forged birth certificate. The Secretary of State has no ministerial duty to investigate. And it is in fact committed to Congress to resolve disputes about a candidate's qualifications. However it's a stretch to say that the Constitution gives to Congress the sole ability to resolve disputes about qualifications and then say

that, for example, if a party wanted to run a dog on the ballot that that would go to Congress. That a state election official couldn't say "My goodness, that this is not a human, or that this party would like to put an inanimate object on the ballot."

15:57 JUDGE O'SCANNLAIN: Well, opposing Counsel suggests that she might qualify as President-elect. What's your response to his argument?

16:05 ATTORNEY GORDON: My response to that argument is that I suppose she could qualify as President-elect until such time I guess as someone made an objection, found out she wasn't qualified, and then she's not qualified to be President. So I'm not sure that that sort of changes the legal analysis about whether or not a state official can keep someone who's manifestly and admittedly unqualified off the ballot.

16:29 JUDGE MURGUIA: So it doesn't matter that the California Code, Elections Code, states very clearly that the Secretary of State shall place the name of a candidate upon the Peace and Freedom Party Presidential preferential ballot, and so on. You're saying that despite that language or any other codified law, statute, or anything like that, the Secretary of State's discretion is enough. What's the authority? Just the discretion is enough?

17:05 ATTORNEY GORDON: Right, so the authority is-- First of all, in Keyes vs Bowen, a case that Plaintiffs have cited today, and we have cited in our brief, the Court made clear that under the provision-- It's actually the Democrat-- It's the Democratic primary provision, but it's identical to the Peace and Freedom, that the Secretary actually does maintain some discretion to exclude people from primary ballots,

but not from the General Election ballot. And although it's not really explained why that's the case, and this is beyond the scope of the briefing, I will answer it. Under the California Supreme Court's interpretation of "shall", "shall" is not always mandatory. "Shall" is construed by looking at the statutory scheme as a whole. And where the statutory scheme calls for an exercise of discretion, which it does here, for example even to determine whether a candidate is generally recognized calls for an exercise of discretion. "Shall" is not construed to be as mandatory, and still allows for an exercise of discretion by an official. And I'm happy to cite some cases if you would like them.

18:14 JUDGE MURGUIA: The Secretary of State sounds like has been confronted with similar types of issues. I guess the residency requirement, are those similar to the age requirement?

18:25 ATTORNEY GORDON: No, they're not your Honor. Because what happens in cases about residency requirements, or asking for additional proof of citizenship for example in Arizona, what's being litigated is the burden that those laws place. The Constitutionality of those laws. Here the US Constitution says you have to be 35 years old to be President of the United States. That's the law. We're not revisiting that. The Secretary of State has not added a qualification to what one has to be to exercise a right to vote or be President. She's merely reading the US Constitution and enforcing it.

19:02 JUDGE KOZINSKI: Does the record show how does the Secretary of State know how old Ms Lindsay is?

19:13 ATTORNEY GORDON: It's not alleged in the complaint, but the way

the Secretary of State knows is that in doing the investigation to find whether or not Ms Lindsay is generally recognized, which means things like, does she have a campaign office in California, is she on the ballot of any other state, does she qualify for Federal Matching Funds? It became clear that Ms Lindsay was 27 years old. The Secretary of State is required to publish a preliminary list, which she did on February 6, 2012. It did not have Ms Lindsay's name in it. Ms Lindsay's counsel wrote a letter to the Secretary of State, demanding that she be put on the ballot, and in that letter, which is part of the supplemental excerpts of record, and it was judicially noticed by the Court, her counsel admits that she is 27 years old. So when she was excluded from the ballot there was absolutely no dispute that Lindsay was 27. The sole argument is whether the Secretary of State can exclude someone who is admittedly and indisputably unqualified from the ballot.

20:18 JUDGE MURGUIA: Do you dispute whether this is moot?

20:23 ATTORNEY GORDON: The Court found that it was not moot because it falls into the repetition evading review.

20:30 JUDGE O'SCANNLAIN: Do you agree with that?

20:32 ATTORNEY GORDON: I understand why it would lend itself to repetition evading review, but this gets to another point, which is that Plaintiff's did not actually bring an action for violation of the Elections Code, which is very much what they're suggesting here, and to do that the Election Code specifies you bring a writ of mandate, and you have a specified time to do that, so that I don't actually think that Plaintiffs can ever bring the kind of claim they are bringing

here. And the second point would be that by the time they moved for a preliminary injunction, the Secretary had already distributed the certified list to the 58 county officials who print the ballot. At that point, by Code, she can't touch the ballot any more. She can't add and cannot subtract names to it. So it was already too late by the time they brought their action for them to get the relief that they were seeking from the Secretary.

21:20 JUDGE O'SCANNLAIN: Can I go back to your state authority issue. What is the specific statute you're relying on? Is it the Election Code 67-20?

21:30 ATTORNEY GORDON: I'm sorry, the specific authority for?

21:33 JUDGE O'SCANNLAIN: For deleting her name. For not allowing her name to be on the ballot.

21:39 ATTORNEY GORDON: The code at issue is 67-20.

21:43 JUDGE O'SCANNLAIN: And you're relying on the discretion that goes with determining whether she is generally advocated and so forth.

21:49 ATTORNEY GORDON: Yes, and as well looking at the Elections Code as a whole, and the Government Code which gives the Secretary of State significant power and authority to regulate--

21:57 JUDGE O'SCANNLAIN: But there's no other State statute that you're relying upon?

22:02 ATTORNEY GORDON: No.

22:03 JUDGE O'SCANNLAIN: Very well. Thank you.

22:05 ATTORNEY GORDON: Just briefly in the thirty seconds that have left, I want to explain that it was not actually the Secretary's position in Robinson that she had no authority to exclude an admittedly unqualified candidate. Just to be very, very clear, although it was undisputed that Senator McCain was born in Panama, the meaning of that was very much in dispute and required interpretation. Because he was born in the Panama Canal Zone in 1936 to two American born parents, there was some question about whether or not he qualified as an American citizen. That obviously is a legal determination that was going to be made by someone other than the Secretary. But that case has- It's that would require investigation and interpretation. That's not the case here. Finally I would just repeat that because the complaint is nothing more than boilerplate legal conclusions and because all of these claims have to fail as a matter of law I would just ask that this Court affirm the District Court. Thank you.

23:12 JUDGE KOZINSKI: Thank you. You are out of time. If you would like to take a minute for rebuttal, you can take it.

23:23 ATTORNEY BARNES: Just briefly, I know of no State or Federal Court that has ever authorized a Secretary of State to interpret or enforce a qualifications provision of the United States Constitution for the Office of Presidency or for Congress. That's a novel case that is presented here. In *Storer v Brown* the question was whether or not the Disaffiliation Provision could be utilized in terms of which party you could be associated with. So that provision has never been interpreted to be expanded past that to the actual--

23:49 JUDGE KOZINSKI: What happened with Eldridge Cleaver?

23:51 ATTORNEY BARNES: I'm sorry Your Honor?

23:52 JUDGE KOZINSKI: What happened with Eldridge Cleaver?

23:54 ATTORNEY BARNES: The cases all ended up unpublished. Mr Cleaver ended up still running but not being on the ballot. He was 34. He actually would have been 35 within the time of the Presidential election period. And the issue was left unresolved. When it was approached--

24:11 JUDGE KOZINSKI: But there were decisions, they just weren't published?

24:14 ATTORNEY BARNES: Yes, Your Honor. I just know that there was a denial of the Petition for Cert. Beyond that I don't know of what happened. I haven't found the underlying records.

24:22 JUDGE KOZINSKI: OK, thank you.

24:23 ATTORNEY BARNES: Thank you.

24:25 JUDGE KOZINSKI: Case assigned, it will stand submitted.

--- END OF RECORDING ---

AFFIDAVIT

State of Florida
County of Manatee

I, Terence Brennan, declare under penalty of perjury, that I am over 18 years of age, do not suffer from any mental impairment, and attest that to the best of my knowledge and belief, that this is a true and correct transcription of the recording made available to the public by the United States Courts for the Ninth Circuit as "13-15085.wma" at website www.ca9.uscourts.gov/media/ on February 15, 2014.



Terence Brennan

17 Feb 2014

Date



2-17-2014

LEONORE VANNORMAN
Notary Public, State of Florida
My Comm. Expires Nov. 03, 2016
No. EE 843750