

Conscience Voting at a National Convention

Correll v. Herring (Robert E. Payne, E.D. Va. 3:16-cv-467)

A delegate to a national presidential nominating convention sought an injunction against a state statute that criminalized failure to vote for the state's primary election winner on the first ballot. The district judge concluded that the statute unconstitutionally infringed on the plaintiff's right to vote his conscience consistent with party rules.

Subject: Getting on the ballot. *Topics:* Party procedures; primary election; class action; intervention; laches; attorney fees.

A delegate to the 2016 national convention for the Republican Party filed a federal class action complaint on June 24, 2016, in the Eastern District of Virginia's Richmond courthouse against commonwealth election officials, seeking relief from a Virginia statute requiring the plaintiff to vote on the first convention ballot for the winner of the commonwealth's primary election.¹ With his complaint, the delegate filed a motion for a temporary restraining order and a preliminary injunction.²

On June 27, Judge Robert E. Payne set the case for hearing on July 7.³

At a June 28 morning conference call, Judge Payne informed the plaintiff that the court would need copies of relevant party rules.⁴ Judge Payne also asked the plaintiff to take a stand on whether proceedings would be necessary following a preliminary injunction and whether class certification had to be determined before a decision on the preliminary injunction.⁵ The plaintiff's attorney agreed to reflect on the matter and address it at an afternoon conference call.⁶ Another plaintiff's attorney reported in the afternoon that "the State and the plaintiff would stipulate to the requirements for certification for a class of Republican delegates but not Democrat delegates."⁷

1. Complaint, *Correll v. Herring*, No. 3:16-cv-467 (E.D. Va. June 24, 2016), D.E. 1; *Boston Correll v. Herring*, 212 F. Supp. 3d 584, 592 (E.D. Va. 2016); see Louis Llovía, *Va. GOP Delegate Sues for Right to Not Vote for Trump at Convention*, *Richmond Times-Dispatch*, June 25, 2016, at 2A.

2. Motion, *Correll*, No. 3:16-cv-467 (E.D. Va. June 24, 2016), D.E. 4; *Boston Correll*, 212 F. Supp. 3d at 593.

3. Scheduling Order, *Correll*, No. 3:16-cv-467 (E.D. Va. June 27, 2016), D.E. 11; *Boston Correll*, 212 F. Supp. 3d at 593; see Transcript, *Correll*, No. 3:16-cv-467 (E.D. Va. July 7, 2016, filed July 11, 2016), D.E. 42 (232 pages); Minutes, *id.* (July 7, 2016), D.E. 46; see also Graham Moomaw, *Anti-Trump Suit May Strike Down Delegate Voting Law in Virginia*, *Richmond Times-Dispatch*, July 8, 2016, at 1A (reporting that the hearing lasted roughly six hours); Jenna Portnoy, *In Federal Case, Anti-Trump GOP Delegate Argues He Can Vote His Conscience*, *Wash. Post*, July 8, 2016, at B3 (same).

4. June 28, 2016, Morning Transcript at 9–10, *Correll*, No. 3:16-cv-467 (E.D. Va. June 28, 2016, filed June 28, 2016), D.E. 16.

5. *Id.* at 3–9.

6. *Id.* at 8–9, 16–17.

7. June 28, 2016, Afternoon Transcript at 5, *id.* (June 28, 2016, filed July 5, 2016), D.E. 31.

The defendants' injunction opposition brief was originally due on June 30.⁸ Judge Payne urged the defendants to also file their answer before the July 7 hearing:

I think it's a good idea to get the answer in before you actually have the hearing and before all the briefing is in, because the issues can get framed differently depending on what defense you're going to raise

. . . .
. . . [E]xperience has taught me the hard way that it is preferable from the standpoint of a litigant to answer before you file other papers if you can in this kind of situation so that you are not at cross-purposes with each other.⁹

Defense counsel informed Judge Payne that answering a verified complaint requires party signatures, "and our clients are sometimes difficult to get ahold of."¹⁰

THE COURT: Let me put an end to that right now. You call them and tell them they're not going to be difficult to get hold of.

[DEFENSE ATTORNEY]: Okay.

THE COURT: And they have homes, they have—and you can do anything by electronic signature and all kinds of different things in this world, and in this case, they're not going to be hard to get hold of.

[DEFENSE ATTORNEY]: That, Your Honor, makes it much simpler.¹¹

The parties and the court agreed to a one-day extension, until Friday, July 1, for the defendants to file their answer and brief, and the plaintiff agreed to keep to his July 5 deadline for his reply, a day that was a federal holiday because Independence Day fell on a Sunday.¹² It was also agreed that the plaintiff would file an amended complaint on June 29 limiting the case to the Republican convention.¹³

Judge Payne specified several additional issues for the parties to address, such as whether the Virginia statute was enforceable outside of Virginia and the risk of prosecution for violating the statute.¹⁴

On June 30, eight Virginia delegates to the Republican national convention, who otherwise would be part of the plaintiff's class, moved to intervene in opposition to the plaintiff.¹⁵ Judge Payne held a conference call on the following day¹⁶ and then granted intervention by right.¹⁷

8. Scheduling Order, *supra* note 3.

9. June 28, 2016, Afternoon Transcript, *supra* note 7, at 16–17.

10. *Id.* at 14.

11. *Id.*

12. *Id.* at 17–19; Order, *Correll*, No. 3:16-cv-467 (E.D. Va. June 28, 2016), D.E. 18; *see* Graham Moomaw, *Herring Asks Court to Toss Anti-Trump Suit*, Richmond Times-Dispatch, July 2, 2016, at 9A.

13. June 28, 2016, Afternoon Transcript, *supra* note 7, at 25–26; *see* Amended Complaint, *Correll*, No. 3:16-cv-467 (E.D. Va. June 29, 2016), D.E. 20; *Boston Correll v. Herring*, 212 F. Supp. 3d 584, 592 (E.D. Va. 2016).

14. Order, *Correll*, No. 3:16-cv-467 (E.D. Va. June 28, 2016), D.E. 15, 2016 WL 9211719; June 28, 2016, Morning Transcript, *supra* note 4, at 14–16.

15. Intervention Motion, *Correll*, No. 3:16-cv-467 (E.D. Va. June 30, 2016), D.E. 22; *Boston Correll*, 212 F. Supp. 3d at 592.

16. Transcript, *Correll*, No. 3:16-cv-467 (E.D. Va. July 1, 2016, filed July 5, 2016), D.E. 32.

On July 11, Judge Payne granted the plaintiff an injunction.¹⁸ “There has been no motion for class certification and, given the position of the Intervenor, it is doubtful that even the modified class identified in the Amended Complaint could be so certified.”¹⁹

Virginia Code § 24.2-545(D) provides,

The State Board shall certify the results of the presidential primary to the state chairman. If the party has determined that its delegates and alternates will be selected pursuant to the primary, the slate of delegates and alternates of the candidate receiving the most votes in the primary shall be deemed elected by the state party unless the party has determined another method for allocation of delegates and alternates. If the party has determined to use another method for selecting delegates and alternates, those delegates and alternates shall be bound to vote on the first ballot at the national convention for the candidate receiving the most votes in the primary unless that candidate releases those delegates and alternates from such vote.²⁰

The plaintiff was selected as a delegate to the Republican national convention on April 16 at a local convention (“another method for selecting delegates and alternates”) following a March 1 presidential primary election in Virginia.²¹ The plaintiff regarded the winner of the Republican primary election as unfit and alleged that a vote for the winner would violate the plaintiff’s conscience.²² Violation of the Virginia statute is a class 1 misdemeanor, and Judge Payne found the plaintiff’s fear of prosecution to be objectively reasonable.²³ Virginia argued that it was proper for the commonwealth to require that a primary election that it held at commonwealth expense be consequential.²⁴

Judge Payne determined that the statute violated the plaintiff’s First Amendment rights to vote his conscience so long as party rules permitted such a vote, and Judge Payne found that party rules did that.²⁵

The litigating parties reached a settlement on attorney fees and costs.²⁶

17. Order, *id.* (July 1, 2016), D.E. 29; *Boston Correll*, 212 F. Supp. 3d at 592–93.

18. *Boston Correll*, 212 F. Supp. 3d 584 (E.D. Va. 2016); see Graham Moomaw, *Judge Strikes Down Va. Primary Law at Center of GOP Feud*, Richmond Times-Dispatch, July 12, 2016, at 1B; Jenna Portnoy & Ed O’Keefe, *Judge Rules for Anti-Trump Delegate*, Wash. Post, July 12, 2016, at B5.

19. *Boston Correll*, 212 F. Supp. 3d at 593.

20. law.lis.virginia.gov/vacode/title24.2/chapter5/section24.2-545/.

21. *Boston Correll*, 212 F. Supp. 3d at 595–96.

22. Amended Complaint, *supra* note 13, at 5; *Boston Correll*, 212 F. Supp. 3d at 596.

23. *Boston Correll*, 212 F. Supp. 3d at 597, 600–04 (noting that it was reasonable to assume that the statute was adopted with the intention that it would be enforced).

24. Opposition Brief at 1, *Correll v. Herring*, No. 3:16-cv-467 (E.D. Va. July 1, 2016), D.E. 25.

25. *Boston Correll*, 212 F. Supp. 3d 584.

26. Notice, *Correll*, No. 3:16-cv-467 (E.D. Va. Aug. 10, 2016), D.E. 51.