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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

SALLIE M. HADNOTT; REVEREND WILLIAM McKINLEY BRANCH; JACK DRAKE; JOHN HENRY DAVIS; ROBERT P. SCHWENN; THOMAS WRENN; DR. JOHN L. CASHIN, JR.; and THE NATIONAL DEMOCRATIC PARTY OF ALABAMA, a corporation for themselves jointly and severally, and for all others similarly situated,

Appellants,

v.

MABEL S. AMOS, as Secretary of the State of Alabama; EDWARD A. GROUBY, as Judge of Probate of the State of Alabama, jointly and severally, who are similarly situated; ALBERT P. BREWER, as Governor of the State of Alabama; MacDONALD GALLION, as Attorney General of the State of Alabama, and their successors in each office,

Appellees,

EDWARD F. MAULDIN, as Chairman of Alabama Citizens for Humphrey-Muskie, for himself and all other persons similarly situated,

Appellee-Intervenor,

and,

JAMES DENNIS HERNDON, Judge of Probate of Greene County, Alabama,

Defendant.

No. 647

Washington, D. C.
Tuesday, January 21, 1969

The above-entitled matter came on for argument at 10:20 a.m.

BEFORE:

EARL WARREN, Chief Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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Tuscaloosa, Alabama
Counsels for Appellees

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 647, Sallie L. Radnett, et al, Appellants, versus Mabel Amos, et cetera, et al., Appellees.

Mr. Morgan.

ORAL ARGUMENT OF CHARLES MORGAN, JR., ESQ.

ON BEHALF OF APPELLANTS

MR. MORGAN: We are back today in a matter of great gravity on the start of a new era in national life even though it is not the beginning of another term of this Court.

The theme of the next few years is to bring us together. We are confronted today with a question, amongst others, which directly relates to Section 148 of the Alabama Code in both its aspects and a defendant, Judge of Probate, from the State of Alabama, James Dennis Herndon.

Both the United States and counsel for Defendant Herndon agree that for some reason this case is to be remanded to the District Court other than for a hearing on contempt.

It is this Court's order that was violated, if any, by Defendant Herndon, not the order of the District Court. This case is comparable to Shipp only in the sense that this Court is much more clearly involved than this Court was involved in Shipp.

The gravity of the case in Shipp, of course, involved a lynching and the loss of a human life. In this case, it

involves what we consider the theft of the right to vote.

Regardless of the evidence in the case, which quite clearly points, we believe -- the evidence has been compiled since we were last here -- which quite clearly indicates the defendant Herndon is in contempt of this Court's order.

I would cite to you the first part of Section 148, we challenge the constitutionality of the second part of that statute, which states, in effect, that the ballot shall not be printed until 20 days before the general election.

The defendant received a copy of the dissolution of the order of the lower court on the 14th. He had his ballots back by the 17th, the day on which he is required to have had a name removed from the ballot, by Alabama law, and in his haste, to delete the names of the Negro candidates from the ballot.

He not only violated the order of this Court, but violated the first provision of Section 148. Since this last election Alabama now has more elected Negro officials than any other Southern State, 72.

Additionally, one more official has been appointed. The 17 Negroes elected in this election to admittedly minor posts by the NDPA equals the entire number of elected Negro officials in the entire State of Florida, for instance.

There are now in the South, of the best ascertainable techniques that we have, Negro eelected public officials.

there may be up to 400 but those are the figures of the Southern Regional Council Voter Project.

During this four years, of course, we concern ourselves in the South, all of us, no matter which side of the political fence we are on, or otherwise, regarding the upcoming life that we are about to live.

For a number of years in the South men have contumaciously violated the order of United States Court. I have been involved in a case, involving a man standing at a door in a university.

We have witnessed riots in Mississippi at a university. We witnessed overtly contemptuous acts. We have seen district judges pilloried, and others too, and that is free speech, but free speech, of course, stops when the court order comes and you are ordered to obey it.

Defendant Herndon, in this case, was faced with the greatest threat a man in Greene County public office could be faced with, no doubt. Unlike Macon County, Alabama, where you do have a more coalesced movement for true integration and politics, in Greene County the Probate Judge found himself suddenly faced with the imminent election of four Negroes to the five-man county commission, and two Negroes to the five-man county board of education on which one Negro then sat.

This is not a large county, this is a small county. There are not a lot of folks there. You would think no one

knew each other to read the depositions. All the white politicians just get together every now and then. There is an affidavit in the record now that says, "Well, I have seen them playing dominoes most every day", but they just, sort of, never even see each other.

They all subscribe to newspapers but nobody seems to even read them, except the Defendant Herndon, he did admit that. They have all got television sets and they have got two television stations that they receive clearly, one from Birmingham and one from Meridian.

But the white public officials just didn't know anything about this, but they never campaigned for office.

Q Where is this?

A It is right over next to the Mississippi line. The NDPA candidates were elected from three counties: Greene, borders on Sumter, and Marengo, and those are two of the counties where they elect officials.

Q Southwest Alabama?

A Well, I would say it is more central ---

Q Central and west.

A Central and west. It is right up against this ---

Q What county seat?

A Sumter is next to the Mississippi line and then Greene is next to Sumter and the county seat is Eutaw.

Q How many counties are there in Alabama?

A Sixty-seven.

Q And the county seat is?

A E-u-t-a-w, Eutaw. It is a very small town, it is a couple thousand folks, 3,000.

It is just absolutely inconceivable that on the face of this record a deliberate, conscious decision was not made, that in the light of past history my best political judgment -- I can hear it now -- is to stand right now and take the consequences. Leave those names off that ballot.

They had the names put on the ballot. There were 1,938 straight ticket votes and the highest white candidate got 1,709. So, he was right in his judgment. He would have been serving with four Negro public officials on the county governing body.

Now, this is the county where the greatest risk occurred because this is where the NDPA had the number of candidates running for the county governing body. That was most important.

In nearby Sumter they had a man running for the chairmanship of the board of education. He got elected. I recall that they elected ---

Q Mr. Morgan, you are now stating your submission but this is not what the record shows, is it, as to the reasons prompting the respondents?

A The reasons -- to give his reasons ---

Q No, I would like to know what is in the record.

A Of course, the only reason we have ---

Q The only reason is his reason in the record.

A Right. He has several reasons. He says, first, that he has read the newspapers, he saw the order was reinstated, he knew something about it but he didn't know that it applied to the local candidates; that he didn't think he was covered by court order and that none was served on him, personally; that he wasn't represented in these proceedings before; and that he wasn't a party defendant to these proceedings; that he didn't have actual or constructive knowledge of the orders of this Court; that he did, as he says, read something about it but he just didn't understand it.

Now, in Alabama you don't have to be a lawyer to be a Judge of Probate, but it just happens that Judge Herndon is a lawyer. It just happens that Judge Herndon was also the Herndon in the case of Herndon versus Lee, which was the last election case in Greene County and in Greene County in 1966 the Circuit stayed the general election.

The sheriff there, whose name is Lee, is still in office, not by virtue of election, but by virtue of the fact that the matter is still being stayed and there has been no election. The situation in which we find ourselves now is we are right back in the same place.

For, all of a sudden, one of the parties in Herndon

versus Lee, the same James Dennis Herndon -- on the preening of the ballot, by the way, on the Section we are talking about, 148, under Section 145, talking about the preening of the ballot, the case of Herndon versus Lee is cited there again for the proposition that up to 20 days before the election the man has the right to remove his name from the ballot.

I am, of course, arguing from what I think is clear from the facts and circumstances. He has given varying reasons for doing it, I think. Perhaps they could be made to sound consistent, but I don't think that they are.

Q I suppose that there are issues of fact.

A There are issues of fact involved in this and I think it pretty well boils down, subjectively, to what did he do.

Depositions have been taken from everybody except -- we have offered affidavits of four of our candidates plus a fifth person. We have not offered affidavits of two candidates. We got these on Christmas Eve and our candidates did not get back home until Christmas, late Christmas.

We didn't have one candidate who was ill in Chicago. He is now ill down there, the chairman of the party, he was not a candidate, the two board of education candidates, I think one son that committed suicide or something. We just could not make that available.

We have taken depositions in the District Court,

a number of depositions and the United States has taken a number of depositions, also, and they have been forwarded to this Court by order of the District Court.

Q How did those depositions come to be taken? Was there earlier contempt proceedings involving the District Court's order?

A No, sir; the United States, in the District Court, filed proceedings there to enjoin the white candidates from assuming office.

In those proceedings, in this case, the District Court entered an order with the consent of the defendant on the 20th of December enjoining them from taking office.

Both the depositions were taken at that time, and prior to that December 20th order. The deposition of Defendant Herndon was taken. He, being fully advised of his constitutional rights, as I recall it, after that order was entered or around that same time, and it was then forwarded to -- and also with the understanding in the record that it would be sent to this Court.

Q Mr. Morgan, is there a question of law here whether this is our order?

A Well, sir, I think it would be convenient to be able to say so. I think that is the position ---

Q Am I correct, initially, that there was an order of the District Court, an injunction, wasn't there?

A Yes, sir.

Q And that, I gather, was phrased in the District Court, was written in the District Court?

A Yes, sir.

Q And then that was dissolved by the Court of Appeals?

A No, that was dissolved by the three-judge district court.

Q By the three-judge district court. And when you came here last, we, I gather, before the argument, was it, restored the Court's injunction?

A We went in and we took the words of Mr. Justice Stewart's order and pretty much wrote an order that way -- not a restraining order, a temporary restraining order out of the District Court on, as I recall, September 18th.

It was then dissolved on or about October 11. It was dissolved on the 10th, but wasn't filed until the 11th. We were here on the 12th. We then came back on the 14th and on that day, as I recall it, you restored the order ---

Q We restored it after the argument?

A Restoration of Temporary Relief. I am not quite sure how we titled it, but what we asked for was to have the original order of the District Court reinstated. But, of course, the District Court, by then, had dissolved its own order.

So what you did was you reinstated the order and then on the 18th ---

Q Can we use the word "reinstated"?

A It is a very short page. I can find it ---

Q We certainly didn't spell out any of the terms of the order, did we?

A No. "Temporary relief was restored", I think, are the words.

Q You don't think that that presents a question whether it is our order?

A I don't think it does, but even if it did it wouldn't matter.

Q Well, it would matter as to the contempt proceeding in this Court, wouldn't it?

A No.

Q Why?

A Because I think the Merrimack case clearly says that just because jurisdiction is in another court doesn't mean it is also not here for contempt and the same thing is true in the Snipp case.

Q Well, the decision doesn't have to be the order of one or the other, it could be the order of both.

A Sure.

Q And if it is the order of both, what do you suggest?

A Well, if it is the order of both, I would suggest that as far as judicial administration is concerned, this Court should speak to the question.

Q Why? Why, for heavens sake?

A Because I think it is in contempt of this Court.

Q Well, if it is the order of both, it is also in contempt of the lower court, isn't it?

A Surely, it would be, yes. You could be in contempt of both orders at the same time, but I think, technically speaking, they have dissolved their order.

I think the District Court might very well be a proper place to gather evidence.

Q There are certainly cases, which make it quite plain in this, the same action can be in contempt of both the lower court and this Court.

A Oh, yes, sir.

Now, Section 148 again has an additional sentence. The history of this section ---

Q Just to clarify, do you say that it is that it is just our order, period?

A Well, I think I have to take that position, because I really think that is what it is.

Q Why do you have to take that position?

A That is what I think it is.

Q If it is the order of the District Court, too,

do you still insist that the order to show cause should issue from here?

A I couldn't hear you, I am sorry, the last part.

Q If it is also the order of the District Court, do you still insist that the order to show cause should issue here?

A Yes, sir.

I believe that the order should issue here and the policy reasons that I believe and disagree on show with Solicitor General and with many others.

The reason that I think the order should issue here is because I think that this Court sets the pace for every District Court in the South, and across the land.

I believe that this Court should show the way.

Now, another sentence in Section 148 which we attack the constitutionality of, and that is the last sentence that says a person cannot appear under more than one party label or emblem on the ballot. His name cannot appear twice.

Well, this sentence was added to the Alabama statute which previously contained no such prohibition. In the year 1909 it was added by amendment following, of course, the disenfranchisement of Negro voters in the South.

The primary came into existence in Alabama about 1903. Alabama used literacy tests, property qualifications and we also had a grandfather clause of a type, we called it a

fighting grandfather clause if you fought in any war.

Just preceding that in 1892 in Alabama there was great political turmoil, Rubin F. Cobb was running on the Populace Ticket. Coalition and fusion was taking place all over the South.

1894 you had the same, Cobb lost by 11,000 votes. 1894 he lost by a greater margin. In 1896 you will recall that William Jennings Bryant was nominated by two political parties for President, by three, really, I think the pre-Civil Republicans were with him also.

At that time, there was a dispute over who would be vice president. The Democrats nominated Sewell and the Populace nominated Tom Watson. The fusion movement in the South, at that time somewhat different in New York and the rest of the country. The fusion movement offered an opportunity for a minority political party to attempt to reach out and bring Negro voters into its grasp, and in those elections in Alabama, there was competition for the Negro vote.

There was racism that resulted after the elections of 1896, North Carolina. It resulted in a terrifying political problem to a number of urban Southerners and a number of Populace, because there were about 1,000 elected Negro officials in the State of North Carolina in year 1896, and in that context, the Populace party went down into destruction.

Now, this political movement in this State with

Section 148 on the ballot cannot accomplish fusion, they cannot win a Democratic primary election, and the practical reason they can't win a primary election is because by the State's own documents approximately one-third of the voters in Alabama now are illiterate or semi-literate.

If you walk into a polling place in a primary election, the ballots are arranged differently in each polling place by alphabet. So, consequently, you have to walk in and mark and mark and mark.

These same candidates here ran once and lost and come back and win again when they can vote a straight ticket. If you cannot combine in Alabama you are not going to be able to have this party move out in an integrated effort to bring forth the best candidates it can find from all political parties as well as its own.

Q Where is our order?

A Your order ---

Q The one you are talking about, the order that this Court issued.

A It is not in the ---

Q Well, I am sure it is here, I just can't find it.

A It must be in ---

Q I think you will find it in the journal.

A It says the order restoring temporary relief

is continued pending action upon the jurisdictional statement.

There was one that preceded that on the 14th and I think that was the one that restored ---

Q Which one are we talking about?

A I thought we were talking about both. Well, I think we are talking about both of them, sir.

Q I gather the -- we restored the one and then continued the restoration with the second.

A I reckon we are talking about the order of the 14th which was restored by the order of thel9th and that at least gets us to one order.

Section 148's last phrase, which we do have under attack here as a declaratory judgment and I think it is very important to think in terms of Williams v Rhodes and the problems of the administration of the law as far as the future is concerned so that there don'thave to be later elections cases brought on the eves of elections.

So that matters can be adjudicated long enough in advance so that people will know what they are doing.

I just point out to you that in 1960 -- we heard a great deal of talk in this election about the electoral college -- but in 1960 had it not been for the Liberal Party line in New York John Kennedy would not have carried New York, and had John Kennedy not carried New York, the 15 electoral votes that went to Harry Byrd, six from Alabama,

eight from Mississippi, and one from a defaulting Republican elector in Oklahoma would have been sufficient then to have thrown the election into the House and then to have thrown it also into the electoral college preceding that time.

There is no reason for the restriction that I can find for the anti-fusion movement other than to restrict the actions of third parties in the same manner that was condemned in Williams v Rhodes.

The party cannot place the names of other nominees on the ballot, then it finds itself in deep difficulty.

In this case, of course, we find that,with respect to the electoral vote -- and, incidentally,it is quite important with respect to that vote for the matters to be adjudicated.

We have some very real problems here with respect to the primary law in the State of Alabama which allows you to have a primary if you have a 20 percent vote in any county. In this last election the NDPA got more than 20 percent of the votes for office county-wide in 12 counties.

The combined vote of electors, AIDP and NDPA electors, would have allowed an additional 12 counties to allow us to come under the primary law and have this own party to have its own primaries in the future.

In short, I will reserve the rest of my time and simply say that we feel that the vindication of this Court's

order requires that the defendant to show cause why he should not be held in civil or criminal contempt.

MR. CHIEF JUSTICE WARREN: Mr. Claiborne.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.

ON BEHALF OF APPELLANTS

MR. CLAIBORNE: Mr. Chief Justice, may it please the Court:

First,a word about a matter of contempt. We don't wish to take any absolute position with respect to that matter. It seemed to us that the order of this Court,merely restoring a detailed order of the District Court, and the violation of the terms of the order of that District Court might be viewed as well as a contempt of the District Court's order as a contempt of this Court's order, perhaps of both.

If both, or if only of the District Court's order, it would seem to us appropriate for that matter to be explored more fully in the District Court, since there are, admittedly, disputed questions of fact to be explored.

On one hand, Judge Herndon, as we understand it, was served sometime back with a copy of the order of the District Court of September 18th. He was, therefore, presumably, fully aware of its terms and how it applied to him and the candidates in his county.

If he received notice that that very order which he had already received and studied and, presumably, was ready to

effectuate, had been restored by order of this Court, he needed no further notice in order to act on it.

It does appear, however, that he received no formal communication of the action of this Court, either from clerk of this Court, or from the attorneys representing Alabama before the Court.

Why he received no notice from the Attorney General's office in Alabama, is, perhaps, one of the matters that deserves exploration.

He did, admittedly, read some accounts of this Court's action in newspapers, but we are not clear whether that came home to him or not. Under those circumstances, it seems to us the matter is not yet ready for adjudication, that the District Court is obviously a more convenient forum, that, jurisdictionally, since it was the order of that court, however, effective by subsequent order here, it was violated, that court would have jurisdiction to explore the matter.

Q Precisely, what sort of order do you think we should enter, Mr. Claiborne, or, if we adopted that approach to the problem?

A Our suggestion, Your Honor, is that this Court, in its judgment, among other reliefs, direct the District Court to undertake such further proceedings with respect to the matter of contempt as it deems appropriate.

Q Contempt of what?

A Contempt of orders issued in the case by Judge Herndon or others.

Q Would that foreclose the possibility that there was a contempt of the order of this Court or would we, in effect, be asking the District Court to determine whether there had been a contempt of the order of this Court as well as of the District Court?

A I would suppose, Your Honor, the Court would wish to leave that open, that if the proceedings in the District Court indicated that any contempt, whatever, had been committed sufficient to cause issuance of an order to show cause or such further proceedings that might be appropriate, then the District Court might refer that matter back here or might proceed ahead on its own.

I wouldn't suppose this Court would need to foreclose itself from, at a proper time, considering whether a contempt on its own order had been ---

Q I am sure you see what is bothering me is a procedural matter and United States against Shipp there was appointment of a commissioner to take testimony and that was pursuant to an order to show cause, wan't it, why the defendant should not be held in contempt?

A As I understand the proceedings in Shipp, Your Honor is correct. The order to show cause issued here and in order to explore the factual setting a commissioner

was appointed by this Court.

I am not suggesting that the District Court stand in the place of that commission, but rather that since it appears that the District Court's order was violated, that it might, at least initially, undertake the proceeding in its own name on suggestion of this Court when jurisdiction is restored.

Q What the District Court might have to do is to proceed to determine whether there is a contempt of its own order and without some further specification this Court, for which I know of no precedent, maybe there is one, District Court, it would be a little awkward for the District Court to proceed to determine whether there has been a contempt of an order of this Court.

A Well, I would think one would follow from the other if the District Court should conclude that upon further exploration either there were no cause to proceed further in contempt, then I would think that while this Court would be free to reexamine the matter, that would be the end of it.

My ---

Q Has there been any contempt proceeding initiated in the District Court?

A Not by the United States, so far as I know, not by the plaintiffs in the case. The United States did

file, as this Court was made aware by memorandum filed months ago by the Solicitor General. United States did intervene in the proceedings there, became a party, and did secure orders, the purpose of which was to maintain the status to prevent the promulgation and effectiveness of election in Greene County on the ground that it was defective until such time as this Court could adjudicate the merits, not proceed by order to show cause.

Q Mr. Claiborne, if you will forgive me. I forget. Is there another reported instance of proceedings in this Court on contempt, in addition to Shipp, is there anything else on the books?

A I think there is a very old case in something-Dallas but I, frankly, forget the ---

Q Is that cited in any of the briefs?

A I think it is not. The only case I remember cited here is Merrimack, which, as I remember, involves a Court of Appeal and a District Court on that which involved an order issued directly by Court of Appeal but also involving orders of the District Court, and finally Shipp, which involved only an order of this Court, not even an order of the District Court.

The District Court having denied stays and habeas corpus to the prisoner. So, certainly in recent history, I think Shipp is the only precedence of a sort.

Q There will be procedural tangles, won't there? Ordinarily, I take it, if we issue an order to show cause and ask the District Court to take testimony on any factual controversy, I gather its conclusions as to fact would be subject to exceptions as in the case of any masters report?

A I may have muddied our own suggestion, Your Honor. It really was that this Court take no action itself with respect to the matter of contempt except to leave the District Court free to proceed on the theory of pro tanto, at least, that it was the District Court's ---

Q Should the District Court proceed if it determines that there was a contempt on its orders in a contempt proceeding in that court for contempt of that order and let alone any questions that concern a contempt of any order of this Court.

A I think so. I dare say that the implication of a provision in mandate of this Court expressly leaving the District Court free of proceeding in contempt would carry the implication that this Court, at least, tentatively viewed the violation, if any, as one of that Court's order, so be it restored here rather than an original matter here.

Q Well, the District Court quite appropriately should take no action, whatever, under your formula.

A Well, I should think that if the District Court took no action whatever on the ground that its own order

had expired and was no longer a viable court order which could be violated then this Court would have to examine the matter.

If, however, it took no action because it sounds from the facts already before it or then before it that there was no cause to proceed further, being no sufficient indication of criminal contempt, I would justify those proceedings.

This Court might, likewise, let the matter rest. I am not suggesting which outcome is more likely or more appropriate.

If I may, I would like to turn to the merits because really United States has participated here with a view to speak to the merits rather than to the matter of contempt.

As we see this case, it does involve a serious abridgment of the rights of Negro citizens of Alabama to fully participate in the political process, and that comes at a time when they are registered to vote.

The question is whether they shall be permitted to cast their ballots for the candidate of their choice. It seems this effort, like previous efforts, must be condemned and that is so even if one does not assume that this is a deliberate discrimination on account of race, even though in light of history, ancient history and recent history, it is difficult to indulge in that assumption.

What its stake is here, or its three rights, the

right of persons to associate together for political purposes to form an effective party, in this case, something of a splinter party from the Democratic Party.

There is also the rights of the candidates themselves, the specific candidates involved here, to run for political office, that is to be on the ballot.

Finally, and perhaps most important, the rights of a group of citizens, here, as it happens, a majority of the citizens in these counties, to vote for, to select, cast their votes for the candidate of their choice.

If they are not permitted to do that, as in Greene County, if they have only one slate, they are effectively disenfranchised. They don't want to vote for these other candidates. Their own candidates are taken off the ballot and their votes for all practical purposes are defeated.

Now, that was done in this case. There were 67 candidates to begin with, that is local candidates, I am only speaking of local candidates because candidates for Presidential-elect, for national office, for State-wide office were defeated.

Therefore, it seems to us, as a practical matter, perhaps, legal matter, the cases lie only with respect to the local candidates and then only with respect to those 23 of them who prevailed or would have prevailed, 23 out of 67, approximately one-third prevailed or would have prevailed.

Seventeen of those were, in fact, elected in three counties: Marengo, Autauga and Sumter Counties. They were elected, however, to very minor posts: Justice of the Peace, Constable and, in one case, chairman of the Board of Education.

There was more at stake in Greene County. Four seats on the five-man board of commissioners,which governs the county were up for election, and they were NDPA candidates for each of those four posts. The statistics make it perfectly clear they would have prevailed had they been on the ballot.

Also, there were two seats on the five-man board of education, and Mr. Morgan pointed out the local head of this party was already sitting on the board of education and they were now two more seats up and again the Negro candidates from all that appears would have prevailed for those seats.

Q Now, what do you mean by that? How can you assert that?

A The way we judge the actual votes cast for the white candidates were, at the best, taking the one with the highest number, as I remember, 1,709, the number of straight party votes for the NDPA ticket, which was officially reported to the District Court on its order, was something like 1,938.

Those votes, straight party votes, for the NDPA ticket would, of course,have counted for the local candidates, had they been on the ballot. This is rather clearly seen if one looks at the sample ballots we have in the back of our

brief, the first one being the one used for all except absentee voters, the second being the one used for absentee voters which includes the six local candidates.

Now, the general impression one gets from reading what there is of the record, in this case, is at best, one wonders whether it is entirely an accident that where there was most at stake, somehow, these candidates didn't appear on the ballot.

Then one has a strong impression that there has been a tremendous amount of vacillation; the Secretary of State said she would certify these people, then she wouldn't, then she would, finally, she didn't.

The reasons given vary, from time to time. The final and only serious reason that was ultimately given was given only after this law suit was filed and never invoked before, nor was it invoked in other counties, apparently it was thought appropriate to invoke it in Greene County.

The net result, in any event, is that the majority of voters in these four counties were denied an opportunity, if the judgment of the District Court prevails, to cast their vote for the candidates of their choice.

Now, the provision most immediately involved is Section 274 of the Corrupt Practices Act, which provides that within five days after a person designates himself to run for elective office, he must file a designation of his finance

committee that failure to do that, it is alleged, is the reason why these candidates were kicked off the ballot in Greene County and should have been kicked off the ballot, according to the State, elsewhere though the Judges of Probate of those other counties didn't seem inclined to invoke this provision.

It is not a very critical provision of the election laws. At least with respect to local office, if you look at some of the appendices we filed there, you will see that these candidates spent something approaching $150 in the primary and general election campaign.

The question of having a finance committee, a treasurer, a disbursement of expenses, a tally of contributions is not critical, it seems to us with respect to that kind of office. Nor does it appear that Alabama took this requirement very seriously.

As I just said, in some counties it appears to have been waived altogether. It doesn't appear, as Judge Johnson pointed out, that the State officials themselves invoked this provision sua sponte. Nor is it easy to see why it would matter assuming there is no corrupt purpose, but simply an oversight, why it would matter if this designation were filed a few days late if it been brought to the attention of the cabinet.

What is more, the provision isn't very clear on its

face. It is not clear when the five days start to run. For the white candidates five days apparently started to run from the time they first announced themselves as candidates on March 1st, but they never filed anything else.

They then filed a designation, first an announcement in the same form they designated themselves as their own committee, which is what the form provides for as though it was a very pro forma operation.

Q They all did that at that stage?

A They all did that, white and Negro candidates. For the white candidates that was apparently sufficient. For the Negro candidates it was not; it was held that they should have filed a second designation of themselves as their own finance committee, if that is what they chose to do, after they formally submitted their nominations as candidates of this MDPA party on September 5th.

Q Is there any Alabama statute that requires double filing?

A The Alabama statute,which is reprinted in our brief at Page 3-A, I believe, is unclear whether more than one such designation is necessary. It reads as follows: "Within five days after the announcement of his candidacy for any office each candidate" -- this is for a State office -- "shall file with the Secretary of State, and each candidate for a county office shall file with the Judge of Probate, and each

candidate for a circuit", and so forth, -- "a statement showing the name of not less than one nor more than five persons selected to receive, expend, audit", and so forth, "money."

Nothing whatever about doing it again after the primary. It seems to be clear, as a matter of Alabama office, applies to primaries, no suggestion that it must be done twice and, indeed, the implication in this record is that it need not be done twice at least when you are successful in the primary.

Nor does this requiement say that you must announce the party to which you are affiliated. That is part of the Garrett Act and as to the Garrett Act we say that it was not properly cleared under the Voting Rights Act of 1965, and, therefore, cannot be made applicable to this election.

Q Are there Alabama judicial decisions on the designation point?

A There is decision involving people in Greene County, Herndon v Lee. There is Judge Herndon and Lee is presently Sheriff Lee whom you were told is still sheriff though the election of 1966 was enjoined by Federal Court.

It was there held that the Negro candidate, the Sheriff, Gilmore, could not be placed on the ballot because he had filed his designation within five days after he had accepted the nomination of the Freedom Party, rather than five days after the party had certified his nomination.

That is inconsistent with the way in which it was applied to the white candidates here. The Democratic Party certified these white candidates and nothing further was filed by the candidates. Their designation was deemed sufficient back on March 1st, two months before they were ever nominated, before the primary had been held.

Finally, it seems to us that, in this case, generally, but especially in this case, this requirement of Alabama law was employed unfairly because no opportunity was afforded to these candidates to correct what is, in the circumstances, a mere technical defect and that depriving them a place on the ballot and depriving their constituents of a vote is to make too much turn on too little.

For that reason, we submit the judgment of the law should be reversed and new elections ordered in Greene County.

MR. CHIEF JUSTICE WARREN: Mr. Redden.

ORAL ARGUMENT OF L. DREW REDDEN, ESQ.

ON BEHALF OF APPELLEES

MR. REDDEN: Mr. Chief Justice, may it please the Court:

The argument that I propose to make for the appellees I represent here does not cover the contempt question. Judge Herndon is separately represented on that so I will not be touching that.

I feel a little at a disadvantage in a part of the response for the reason that I consider the counsel for the appellants insofar as he did refer to the merits of this case, referred only, and then only briffly, to an attack title 17, Section 148 or the last sentence, thereof, and did not make reference,as I see his argument, to the other matters that are raised in brief and that were raised in the submission that the parties had attending itself to the merits here the last time.

I do consider, however, that the Solicitor General and his argument explored most of these avenues and I want to direct myself, if I may, to these merits.

I think that there is a little misconception as to the facts and I would like to ask the Court to bear with me just a moment.

To go back to the beginning of this entire picture, initially, the Solicitor General makes a point, for example, in brief, that this case has now been mooted as to the rights of all persons except, one, those in Greene County who were not on the ballot and who, the argument proceeds, were due to be placed on the ballot.

Then those in three other counties, Autauga, Marengo, and Sumter Counties, who were victorious, some of whom were opposed to these offices, some of whom were not opposed, some

of whom were the only persons on the ballot, because the status of their election is affected.

Certainly, we agree with that. But we don't intend to let the picture be confused for this reason: That we consider the third point that the Solicitor General mentions in brief to be the most important point as far as the State of Alabama is concerned, and that is the validity of these statutes: The validity of the Corrupt Practices Act, the validity of the Garrett Act, the validity of the other statutes under attack, the question of whether the Garrett Act is due to be subjected to the Voting Rights Act of 1965, prior to its efficacy.

Those are the questions in the case. Those are the questions that gave rise to the case and that is what we came here on the first time and, as far as the State of Alabama is concerned, we are still here.

Now this is not to demean or belittle the fact that this Court probably has to decide the fate of particular people, that it has to decide, for example, whether there will be, perhaps, an election in Greene County or not, a new election, maybe it has to decide that.

It is asked to. It has to decide then, perhaps, whether certain persons who were elected under the NDPA banner in these three other counties are due to continue holding their office, but I think it has to decide this because it has to

decide the validity of the statutes and then their application to these particular persons and I make this point only to say this, that the Solicitor General is in error, and I think completely unwittingly, when he says that the Negro candidates, as he says, the NDPA candidates because they were not all Negro, there were some white and some Negro, but the candidates of the National Democratic Party of Alabama, he said, filed a declaration of intent and a designation of committee on or before March 1, 1968 and that then he says the white candidates, I presume by that he means the candidates of the Regular Democratic Party of Alabama for nomination in this primary, filed such a statement.

Then he said that the law is so unequally applied, or, at least, I understand him to say this, that the law is so unequally applied in Alabama that such a filing was held to be good for all time as far as what he called the white candidates were concerned, and not good so far as what he called the Negro candidates.

So we ---

Q Did the District Court consider that allegation?

A I don't think that allegation has actually been made before for the reason ---

Q Well, there has been no finding one way or another as to the discriminatory ---

A That is right. This is a point that ---

Q The District Court just upheld the law.

A The District Court found that the statutes attack, one, were not unconstitutional on their face, two, were not shown to have been unconstitutionally applied, and three, the holding was that the Voting Rights Act of 1965 was not involved.

Now, this, as I understand it, is the decree that was appealed from. It said one other thing in the decree and that is it was not then going into details. We were dealing with 123 people to start with, not the 67 that counsel speaks of. We were dealing with 123 people and it said since we have made these rules, then what we are concerned with is a question of State law and we are not going into the detail of it. It can be handled in the customary fashion.

So that it didn't make that examination. But the point is that the record in this case will reflect that counsel's statement was wrong with reference to the 67, approximately, of the NDPA candidates who survived the original agreement that they weren't qualified, and this was done by letters of counsel. The Court is familiar with that. It is in the record in this case. This was done by letters of counsel back and forth written at the order of the Court.

It certainly is true that some NDPA candidates filed declarations of intent prior to March 1 and that they filed on the same form that was used by other candidates, and

that that declaration of intent contained a designation of committee and designated themselves as counsel pointed out.

Now, some did and some did not. With reference to the six people in Greene County who were left off the ballot, my understanding is, and I believe that these are the facts, that all six of those individuals had qualified as candidates in the Democratic primary of the Regular Democratic Party of Alabama which was held on May 7, 1968, that in the primary, there were two candidates for each of the positions.

One, the NDPA candidate, of these six, the other the candidate of the Regular Democratic Party of Alabama. So, it was a two-man race, as I understand it, in each one of these.

They filed identical papers. There is no question about that as far as I am concerned, and they were placed on the ballot, they were held to be qualified to be on the ballot of the Democratic primary.

Now, each of these six was defeated in the Democratic primary and, though I am not trying to contempt the case, I do point out, as we noted in the brief, that this is an unrestricted primary, that everyone is allowed to vote in it, it is not a closed primary; counsel, in his brief, called Alabama a no-party State when it comes to holding its primary.

So, I don't make any brief for the fact of who would

have won in November had both parties been on the ballot and campaigning against each other. But, in May that was the result. Now counsel makes a point, and I think this is a substantial question ---

Q They were running in the Regular primary.

A Yes, sir.

Q They were a candidate in that party.

A Yes, sir.

Q That is what their papers were filed with respect to.

A That is right. The Solicitor General makes a very good point. I think it raises a substantial question because we were not confronted with the particulars of it before.

Let me illuminate it just a little bit. They did file those papers identifying themselves, and the law allows it to be done in this fashion, as a candidate of or a candidate seeking the nomination of the Democratic Party, for a particular position in the primary.

Now, what they are maintaining is this, that on the same day that that election was held -- the primary election was held -- that the National Democratic Party of Alabama in that county also conducted a mass meeting on the same date because this is a method by which political parties can nominate in Alabama. But they conducted a mass meeting and I would be

frank to admit that I have learned in this case that a mass meeting can be two or more, but that is not a part of the issue here.

That issue was resolved unfavorably to the position the appellees in the District Court and the point on which decision was made and we are not raising it here.

They represent that on that same day they were nominated by the National Democratic Party of Alabama for the same offices in a mass meeting. What is said now to the Court is that the declarations of intent, the designation of committee, that they made for the handling of their finances for this primary in which they were eliminated and which for all that appears they were no longer a candidate because nobody knew of the candidacy of these people, these candidates and other candidates of the party, until about September 5 and I think that the Court will recall that the record shows very clearly that the certifications of nomination descended from Huntsville, Alabama simultaneously by registered or certified mail on the various probate offices in the six or seven counties of Alabama and in the office of the Secretary of State of the State of Alabama.

Now, I don't know and I say to the Court I think it has not been ruled on in Alabama where the designation of committee under the Corrupt Practices Act may in a situation in which a party individual does identify himself as a

participant in the primary election process of one party is in adequate compliance with the Corrupt Practices Act.

When he turns up later to be -- when he loses that race and turns up later to be the candidate of another party that nominated him in a different fashion, purportedly on the same day, where his candidacy, itself, was not known until a couple of months later because it was not declared.

I don't know the answer to that. I do suggest to the Court ---

Q Well, did these Regular candidates file anything after the "mass meeting"? Did they file any designation after the mass meeting?

A No, sir. The only things that were filed after would have been reports of expenditure. These would have been separate reports.

Q Well, doesn't the law require that once they become the nominee they have to file something?

A Only reports of expenditures.

Q That is all?

A Yes, sir.

Q Well, the other candidates didn't file that either.

A No, sir.

Q I understood the point was that the original papers that were filed were different simply because one group

won and the other group lost.

A Only in this fashion: The law provides that those papers may be submitted to the officer of a party where the party conducts the primary. This will constitute a satisfaction to the Garret Act and the Corrupt Practices Act. The only thing that has happened here is that there is not an identification of this individual as a candidate after May 7, 1968 because he lost the race.

Q I understand that there is no difference that there is no difference under Alabama law between the primary elections and a mass meeting.

A Each may legally designate a candidate of that political party.

Q Well, then I understand your position to be that, in this case, two things were held the same day, a primary election and a mass meeting.

A I say that that is what the appellants say. The appellants ---

Q Well, what do you say?

A I say that they say, and I assume it happened, because they say that they were nominated by a mass meeting on the same day that they lost in the primary election, that is what ---

Q That is what they say.

A Yes, sir.

Q So the other side is the line, the Regular Party is the line on the primary, and the appellants say that this was not only primary. It was also, within Alabama law, a mass meeting.

A Well, that would be a separate thing that they contend ---

Q And you say that there is nothing in the Alabama cases one way or the other on that.

A No, what I am saying is that there is nothing on the Alabama cases on is this: Certainly there is nothing in the Alabama law that would prevent, as I see it, a person from hedging his bet, if that is not uncouth to say; he can qualify as a candidate in the Democratic primary.

The law says that if another party not holding a primary is going to nominate candidates for office, it must do it by mass meeting.

The mass meeting must be held on the same day as the primary election. Now, he may also be a candidate there. He can lose in one and win in one.

Q They would have to be on the same day.

A Now, the law does provide that he can only be on the ballot once and only under one emblem, he couldn't be the candidate to both parties.

That, actually, if you are going to say that something has been mooted, as the Solicitor General says, that

question has been mooted in this case because the only persons who were on the ballot twice lost, as far as I know, I am not aware of any instances in which they won both offices, as far as that was concerned.

But what I am saying, merely is this, if this Court rules, for example, that whatever was done by six people from Greene County, in order to become candidates in the Democratic primary in the spring of 1968, constituted an adequate compliance with the provisions of the Garrett Act or Corrupt Practices Act.

It is not a basis for holding the statute, invalid or inconstitutional. This is the State of Alabama's interest. We are not pushing the situation of a particular candidate. What I am saying is that I recognize that there is a substantial question raised here and one that has not been resolved by Alabama law, that we have persons who filled out these forms.

Q Mr. Redden, I take it that your argument, thus far, is to only one branch of the submission of your adversary on this point.

The other branch of their argument, as I understand it, is reflected in Judge Johnson's dissent in which he says, as I recall, that the law has been discriminatorily applied here. That is to say that it has not been applied in the past and that for, whatever reasons, the State election

officials chose to apply that provision of the Corrupt Practices Act, in this case, to the people, and, what I would like to know is -- and I don't recall -- what, if anything, is there in the record to support the proposition that the law was discriminatorily applied; that is to say, that these instances were selected for the application of a law ---

A Yes, sir.

Q --- which had not been faithfully applied in the past.

A Your Honor, I think that the record does not support his conclusion. The record contains very little in a substantial way and I will give the Court my recollection of it.

The most populous county in Alabama is Jefferson County, where Birmingham is. It has approximately 3/4 of a million population. The Probate Judge of that county, Judge J. Paul Meeks, testified by deposition in the case, and he testified that there were approximately 2,000 compliances with the Corrupt Practices Act filed in his office alone in connection with the spring elections and nominations in Jefferson County.

That would be the compliances for local offices, and that everybody files them, that it is checked, which is a requirement before he will certify a nominee.

The only other testimony that I think is -- well,

let me resolve that -- Mr. Amos, the Secretary of State, testified that these are uniformly filed in her office and they are required of the candidates before he is certified.

Now, Dr. Cashin, who was the State Chairman of the National Democratic Party of Alabama, testified that his party was aware of the existence, both of the Garrett Act and of the Corrupt Practices Act, was aware of the requirements and that they called to be printed, and the record contains some copies of it, a form bearing the legend from the National Democratic Party of Alabama, or NDPA, I forget whether the name or the initials were used, but it was printed at the order of the National Democratic Party of Alabama containing the form of the declaration of intent which satisfies the requirements of the Garrett Act and the designation of committee and that these were disseminated to county chairman.

Q Is there any record of candidates, other than these, being disqualified in an Alabama election for failure to make this filing or for late filing?

A The only -- I think we would be disadvantaged to say how often this may happen for the reason that you may not know of it, unless the action of the certifying official either prompted litigation or publicity, one of the two.

Q I understand that. I was asking you, is there any such record?

A Yes, sir. We have three or four reported cases,

all of which are cited in brief and we have a couple of opinions of the Attorney General of Alabama, which resulted from this type of thing and, of course, this has led to the uniform holding of cases that the provisions of this Act are mandatory when raised in a direct proceeding prior to elections.

The United States Court of Appeals for the 5th Circuit has said that as to the constitutional question that that is a ruling that would be binding on it and found it to be so.

But I say that the record to the extent that it touches on the question of enforcement or use does not support the descending opinion as binding. It supports the majority opinion as binding. I think the cases do. Now, I don't think it is a crippling thing to this position that Judge Johnson found was that most of the time that it has been enforced, it was not done by the State at its own motion.

Well, I think it normally is true that the people who really keep in these political campaigns are going to be adversaries. I mean, that they certainly are going back faster. I don't think it is desparaging to the law, or to the enforcement of the law, to say that a private party often has brought the litigation, but the law has been enforced, and it has been the law for 54 years, since 1915, almost essentially without change.

But we make the point again that of course we have come down now, because of the fact that the election has been

held, we have come to the point where of those who remain, the winners and those who were left off the ballot, we would say that perhaps some did and some did not execute these documents.

As to the Greene County people, I think that someone, whether it is this Court or the United States District Court, for the proceedings this this Court might order, has a substantial question to decide, whether under this valid law, the Corrupt Practices Act, that what was done for the purposes of entering the Democratic primary, would suffice as a designation of campaign committee, to receive contributions, for any other race that that candidate might have made during that same year.

Q What is the Alabama law with respect to a man who gets on the ballot, is elected, and then his election is attacked on the ground that he failed to comply with the Corrupt Practices Act?

A The failure to comply with reference to this portion of it would be held where the issue was first raised after the election, not to void the election ---

Q Not to void the election.

A --- as I read the cases. Of course, I do make this point, that though we are standing now subsequent to the election we have been disputing with this issue since September of 1968 prior to the election and that period is

held mandatory.

Now, I think that there are some other provisions of the Corrupt Practices Act that would affect the ability to hold office after the election, but I don't make that point here because they are not involved.

We keep returning to this point. We are here to uphold the validity of these statutes. We say that the record shows that they have not been unconstitutionally applied and they certainly are constitutional on their face.

With reference to the Garrett Act, I would like to address myself to that very briefly. This Court is aware, from the record, from our briefs and our prior arguments that this piece of legislation was enacted subsequent to the Voting Rights Act of 1965, that the effect of it is to require anyone who desires to be a candidate for office to file a declaration of intent by March 1 of the election year.

I would like to emphasize, at this minute, the full picture with reference to the right or ability of people and political parties to get on the ballot in Alabama. I think we have got a situation that is exactly the reverse of Williams v Rhodes.

The point is made by the Court there that it is impossible or very difficult for a new party or small party or new large party to get on the ballot in Ohio, that no provision was made for write-in candidacies and that independent candidacies

were almost unknown under the law of Ohio.

In Alabama an independent candidate for a local position can get on the ballot by having a petition signed by 25 names, by 25 voters, in a State-wide election, by 300 votes. Now, the Court reviewed in Williams against Rhodes the laws of some of the States with reference to do these require more than one percent or less than one percent.

Ours is minimum, fractional, or if a political party, that party can nominate by primary, or by mass meeting or caucus as it is called.

Q I interrupt you long enough,Mr. Redden, to ask, I gather that our cases that say if a party nominates by mass meeting, this requirement of designation -- what is it -- within five days after what?

A Announcement of candidacy.

Q So if you have a mass meeting on May 7, or whatever this date is, that the announcement doesn't come until September, then there is five days within the announcement in September; is that it?

A That would very likely be true, because unless they did something that would amount, in the contemplation of the law, to an announcement of this candidacy, I would think that where there is no report of the mass meeting, that it is held, that it is held privately, it is not reported and that there is no activity, which would amount in substance to

an announcement of candidacy.

In other words, if I am running for sheriff, I may announce it by virtue of my campaign activity as opposed to some formal announcement.

Q In other words, well, then there is no requirement of a formal announcement, that you must file something with someone that you are a candidate for this office, nominated at a mass meeting.

A Yes, sir. There is that requirement. The law simply fixes the dead-end or far end of time within which it must be done which is at least 60 days prior to the election. That is the law for the elections and it is 55 days prior to primary elections, it is the same sort of thing.

But that it must bedone by that far end. That is when the certification must be made. That is the last date. In other words, what you would, say, happen in some of these cases where nomination was by mass meeting occurring May 7, 1968, that nothing was said about it until September the 5th when a certification of nomination was sent either to the Probate office or to the Secretary of State's office depending on whether it was a State or local office.

Now, also, the law allows that candidates may be nominated by conventions where the delegates to the convention also are chosen in these caucuses held on May 7. In other words, the origin of nomination has to be on May 7 or the

party may hold a primary.

Now, ofthe requirements of the law, the most stringent in Alabama, far and away, are the primary. A political party nominating by caucus or mass meeting has no fixed format to follow.

The law says that simply it be held on that day, that is the primary election day and at or in the immediate vicinity of a polling place, in a hall, room or open space, I believe it says. That is it.

It does say that the report of the nominations must be signed, I believe, by the chairman presiding at the meeting and the secretary of the meeting, which was not done in a great many of these cases, but no one undertook to disqualify anybody for failure to do that.

So, that the primary election law is the most stringent. The party holding the primary has the most requirements to meet. It has long been the law in Alabama that a person seeking to run in the primary election must file his declaration of intent by March 1 of that election year.

Everything else has been geared to March 1, a political party eligible to hold a primary but desiring not to hold one but to nominate by convention or caucus or mass meeting must make known by approximately March 1, and this has long been the law,that it decides not to hold a primary

election.

The sole effect of the Garrett Act was to say to the person who seeks nomination by the party holding the caucus or mass meeting or who seeks to get on the ballot as an independent that by March 1, the same date on which the great majority of other candidates who are urunning in the primary, the same date on which they must make their declaration, you must file a declaration of intent to become a candidate.

Some of these people did it. Some of these remaining persons did it. Some did not. Again, the District Court did not direct itself to a finding among the 123 people we started off with as to which ones did or did not. It simply said,this is a valid law, it is to be complied with and they held it was not subject to the Voting Rights Act of 1965, then its application is a matter of determination by the proper authorities,whether ---

Q May I ask one other question, Mr. Redden?

A Yes.

Q I gather the victor in the primary does not have to make a second designation, does he?

A No. sir. That is correct, sir.

Q But the question here would -- you told us the Alabama courts have not yet decided whether the loser in the primary ---

A No, well, the loser in the primary if he seeks nomination by ---

Q That is what I say. The loser in the primary who, nevertheless, is to be on the ballot as a candidate of another party, whether he has to make a second designation is something that hasn't been decided, yet.

A Or conceivably as an independent candidate, had he moved.

Q But that issue has not yet been decided, I think you told us.

A No, sir. It has not.

Q Mr. Redden, what is your answer to the Government's Voting Right Act that you argue?

A We take the position that, in the first place, the District Court finding is correct. I think that ---

Q That is a question of law, of course.

A Yes, sir.

Of course, this Court has, I assume,under consideration at this time the three Mississippi cases and I am not aware of any decision that has come out on that yet. I think that Article 3, for example, if I could spend just a moment comparing them with our case, and I may get the names mixed up with the facts, but in oneof these cases, as I recall,the Mississippi law was changed to make an elective office an appointed office, the Office of Superintendent of Education in

11 counties in Mississippi.

This, I can't equate on the facts with this case, and another election was changed from a district election of Board of County Commission,or some similar office, to an at-large.

But, in one case, and this is the Whitley against Williams, you had a statute which did four things, one of which, only one of which, is what the Garrett Act does. This statute established a rule that no person who had voted in a primary election could run as an independent candidate in a general election.

Q This, of course, is not part of Alabama law?

A They regard independents candidates to qualify to run in the general election as the same kind as candidates must qualify to run in the primary election.

Now, this the Garrett Act almost does, but not quite. The Garrett Act requires that he declare his intent to be a candidate. Now, whatever acts a qualification or selection by petition may be involved; it does not require him to do that.

I think that the Voting Rights Act of 1965 is 15th Amendment oriented throughout. I think that justified every section of the Act with the possible exception of Section 1973c, makes specific reference to the 15th Amendment and it protects the 15th Amendment rights.

Of course, that section is applied only in locales

where it has been found that those rights have been violated and that there has been a finding through the process and established that there will be examiners and that other things will take place provided for in there.

Now, I say,in that context, that you can't find or justify a finding that the Garrett Act, which does only one thing, and that is it gives everybody who desires to be a candidate for an office, the same starting time to do only one thing, that is not to become the nominee, but it is to declare his intent to become a candidate, and to freeze into place, in effect, then, that for, at least, that election period.

But it creates or systematizes law that has existed for a long time and is not a black versus white proposition. Ninety-five percent of the people who run for public office have had to comply with that since about -- that time schedule -- since about 1945 -- I forget when the requirements were first put in. Maybe it was a little earlier than that.

This merely systematizes a system which itself is very liberal. It resulted in seven parties being on the ballot in Alabama this last election plus a column for independents plus a column for write-in's.

To such an extent that the complaint is made here that the ballot is too confusing because it is easy to get on it. We maintain that the District Court was right in its

decision that the Voting Rights Act does not govern.

Of course, we recognize that if this Court ordered to the contrary; it would not be a ruling that the Act was invalid; it would have the effect of suspending its application for a period of time until its validity could be determined. We understand that.

But we do press the point that the District Court was right. I don't know of any other decisions other than these four plus the Trussell case.

On this point, and in related cases, and I think that in all of them, with that one exception, are to the effect that it did not apply.

I would like to make only a few other points with reference to other statutes. I assume that counsel for the appellants will argue the provisions of Title 17 Section 125 of the Code of Alabama in which he says that the constitutional rights are being deprived appellants because they are not allowed to select officials for the polling places.

Well, there are six polling officials at each polling place. This law that is under attack provides that where two or more lists of suggested polling officials are submitted by political parties, that the list submitted by the two parties receiving the highest number of votes in the last election will be used to appoint the voting officials. They will come from those two parties.

Maybe this is moot as to last election. But, I would agree that if something like this -- if an attach on a statute like this could have the effect of voiding the election, then somebody should say whether it is constitutional or not, whether it is valid or invalid.

Counsel says we wouldn't want to be back next time with reference to it. I simply point out that not everybody -- we had seven parties, we have six polling officials at the voting place, well, from the beginning, somebody had to be eliminated, somebody couldn't have one.

But, secondly, everyone can have a representative. The statute which we cite in the appendix to our brief points out that every candidate, every party, is entitled to a watcher who has rightful access to the polls, to stand there to observe the operation and not only that, to be present when the votes are counted, the right to observe the count of the votes, the right to see the ballot, the right to observe the tabulation.

We say that this is probably the weakest argument, actually, that they make.

Q Can I go back a moment ---

A Yes, sir.

Q --- to your Corrupt Practices Act, that you indicated that whether or not filing for the primary would carry over and satisfy the requirement for a losing candidate who ran on another party ticket, had not been decided under

Alabama law.

Was that issue raised in the District Court at all? Was the claim made that those previous filings did satisfy all of the requirements?

A I don't think so.

Q If it had of been I suppose the three-judge court would have decided it.

A I have absolutely no recollection of it as an issue ---

Q Because it isn't in the opinion of the lower courts, I gather.

A There is one issue that came up with reference to some ----

Q If it is an issue of State law, that the three-judge court, like they usually do, can decide.

A Right, though they undertook to decide no issues of State law, actually, in this case.

Q Well, was it an issue?

A I don't recall it being raised by the pleadings at all.

Q As just whether or not under the Alabama law, the one filing, that does the job.

A There was raised a parallel issue that was not decided which probably now is moot as to some candidates. That is the fact that a person would declare as a candidate

for one numbered position and ultimately become a candidate or nominated for another numbered position on the same title of office.

For example, elector, or ---

Q Another point, Judge Johnson agreed, as I remember, the Corrupt Practices Act was valid on its face.

A Yes, sir.

Q And just said that it had been -- in its application in these circumstances, it had been discriminatorily applied and he based that, I take it, on the fact that this was the first time in history that the law had been invoked by the Secretary of State.

He said that this is the first time that the law had ever been invoked by the Secretary of State sua sponte.

Is that true, or is that contrary to the testimony of the Secretary of State?

A I think that you would have to say that the only answer probably that the testimony gives to that is a general answer. I don't think that the testimony of the Secretary of State said here are cases in which I have refused of my own motion to accept.

I think she said that they always are examined. We always require compliance with this Act. We don't certify people who have not complied with the Act. I don't think that any examples were given or any names were called

or instances cited, where that, in fact, had been the situation.

Q Did she also say that she had, at time, certainties?

I think that she also said that she had at one time indicated that they would be accepted.

Q Well, how does that fit in with the fact that she never does it?

A That she never did do it?

Q Yes.

A Well, the only thing that I ---

Q Well, what about the Government's argument that this was all an afterthought.

A This ground of disqualification as an afterthought? Well let me just remind you the time frame of it. The disqualifications could only come after the certification was made and most of these nominations were said to have occurred on May the 7th of 1968, some on July 20th, where nomination was by a convention.

None of the certifications were made until September 10th of 1968.

Q Most of the filings would have had to have been with the Probate Judge, anyway, wouldn't they?

A Yes -- pardon me, I had the date wrong, September 5th of 1968. This was true whether the filing was

with the Secretary of State or with the Probate Judge.

Ninety percent, or more, of the filings were with Probate Judges, who will say nothing, as far as that was concerned. Of course, we made the point in brief, that the Probate Judges had not done anything except receive by mail certificates.

Now, by September 10th she had acted and she had declined to accept.

Q That is only as to the State-wide officers?

A As to State-wide officers.

Q Now, do we have any evidence at all as to what happened as to local officers which, I gather, any action such as she took, not accepting after September 10, would have had to have been taken by the Probate Judges, as to local officers; is that correct?

A That is correct, but what, in the development of this case, and in order to expedite its presentation, let me relate to you how it happened.

What you are confronted with first is a list of prospective candidates which, I believe, was in approximately 24, at that time, of Alabama's 67 count for local office.

Then, the court, by order,and required that the parties communicate and that any grounds of disqualifications of any of those locals be communicated in writing, transmitted back and forth between the parties.

As a result of that, all of the candidates in southern counties were eliminated. I think we came down to 17 counties in which there were candidates for local office, when I say all the candidates, of course, there were State-wide candidates who remain throughout.

But, these disqualifications were based on every statement of actual disqualification. Now, the charge was made as a blanket charge, at that time, by the State because it was made before time was even available to check every one of them, that there was a failure to comply with the Corrupt Practices Act, that there was a failure to comply with the Garrett Act and this issue was raised in the answer.

Now, as to other candidates, as to which there was some disqualification that the parties agreed on that these were eliminated. We came down to 67 candidates in 17 counties, I believe, maybe I am wrong a little bit.

Now, as to that number, as to that 67, the great majority did not file the declaration of intent required by the Garrett Act or the statement ---

Q With the Probate Judge?

A With the proper person.

Some of the disputed candidacies still were State-wide, yes, sir. But basically it would have been with the Probate Judge.

Q Well, what about historically, in terms of

the Probate Judges in booking this law in their own, rather than leaving it to opposing candidates to invoke.

A Directive does not really develop anything on that except ---

Q Either ---

A Except the testimony of Judge Meeks that it is always complied with, that this is something that is done as a matter of routine by a candidate that he had over 2,000 of them in his office this year.

Q Did he say he insists on it being complied with?

A Whether he uses those words or not I think this would be the fair intentment of his testimony. I, frankly, did not read it recently. I do not think he used those words, precisely.

Q Mr. Redden,were you counsel for the State officials when we issued our order restoring, or whatever it was, the order of the District Court?

A Yes, I made the argument here when I first appeared ---

Q I know you don't want to make the argument on the contempt matter but if you have time now or after the luncheon recess, I should certainly appreciate your telling us what you did to see that our order was communicated to the various officials.

A I have got to confess that I don't know how

long I have spoken.

I would say in response to that, at this time, that I actually did not initiate any action myself. Now, when I first appeared in the case I was counsel for Secretary of State. I don't think that I appeared for the defendants, generally, until we operated on a limited time schedule in the District Court.

I think we had a 30-minute time for presentation and on that occasion, for the first time, I made the argument or presentation on behalf of all defendants in that case and I did the same thing in this Court, where, on the summary count I think we had 30 minutes to a side on that last occasion.

Q You were especially retained for this case. You are not ---

A That is correct. My office is in Birmingham, Alabama. I am not ---

Q You are not a State official.

A No.

With reference to what occurred after that, on Sunday, I believe our hearing was on Friday, this Court reached its decision either Friday or Saturday, I am not certain which, that out of which the order came.

On Sunday I had my first knowledge that an order had been rendered by a report in the Knoxville newspaper. I had gone there, unfortunately, to the Alabama-Tennessee football

game, and I saw the order at that time.

I would have to say that ---

Q You saw the order ---

A No, I saw the newspaper report, I am sorry, on the Sunday issue of the Knoxville paper, and I was not quite clear as to what had occurred at that time. I didn't see anything in any Birmingham paper, I believe, until Tuesday, of that week.

At some time after Tuesday would be my recollection. I didn't see ---

Q Tuesday was the week before election day?

A Well, we were here on the 18th, I believe, of October.

Q So, I guess Tuesday was two weeks before election day.

A Yes.

So, then this order is dated the 19th of October, I didn't know whether it was the 19th or the18th, and I would gather probably Wednesday of that week, I got a copy of this, which I assume was received also in the Attorney General's office in Montgomery.

I didn't do anything. Mr. Bolt called me on Friday or Saturday of that week and asked me if I knew of the order and I told that him that I had received this and whatever other knowledge I had, and he asked me whether the

people who would be involved knew of it and I told him that I had not done anything.

He asked me if I would object to a letter being written from his office to the Probate Judges or I guess to Mrs. Amos, too.

I told him I didn't have any objection. I didn't know what position the Attorney General of Alabama would take about a matter like that because of the fact that I was not Attorney General and that I didn't know what knowledge the various people had of it.

My recollection that this would have been on a Friday afternoon or Saturday morning, one of the two, because I know I had the feeling that the Attorney General's office was not open or available to me at the time he and I talked.

Then, on Monday I called for Mr. Bookout in Montgomery to ascertain whether it was felt that everybody knew of it or what action had been taken, and I didn't know ---

Q Who was that you called?

A The Deputy Attorney General from Montgomery. I didn't know, of course, whether copies of the order had been disseminated to various people. I knew that they had been -- I am not sure that I was then aware that there had been a District Court where I am now that the District Court orders were disseminated.

I was unable to get him ---

Q We are about up to eight days before the election.

A That would be right. That would be right. Then, I was unable to get him on that day. I did talk to another attorney in the office who was not involved in this case and had no knowledge of it except that he said thathe would have Mr. Bookout get in touch with me.

My recollection is that he and I talked either once or twice. I know we talked once and also that he either told me or his office reported to mine that he had checked with the Secretary of State's office, that the only certification that we had ever made or the only communication ---

MR. JUSTICE DOUGLAS: We will recess.

(Whereupon, at 12:00 p.m. the argument in the above-entitled matter recessed to reconvene at 12:30 p.m. the same day.)

(The argument in the above-entitled matter resumed at 12:30 p.m.)

MR. JUSTICE DOUGLAS: Mr. Redden.

MR. REDDEN: I was making a response to a question Mr. Justice Fortas asked and I had almost completed it. I will continue with that, if I may.

I talked to Mr. Bookout, the Deputy Attorney General who, I believe on two occasions, and he did some checking apparently with the office of the Secretary of State, and the message came back to this effect that all knew or all had been advised but I had come to learn that the basis of this probably was that the Secretary of State advised that the only message that she had sent to the various Probate Judges,which would be all 67 Probate Judges, not just the few involved in local offices, was that the message that pursuant to the decree of the District Court, the following persons would be certified, and that she had not ever rescinded that message though that was a period of time within which it could have been rescended and I believe she testified, as a matter of fact, that she was working on a recision message at the time she learned of the order here, which I believe she says she recalls learning, in all probability, from the Attorney General's office.

So, that, what had been sent to them from the office of the Secretary of State was a message that pursuant

to the order of the District Court that the following names would be certified. Of course, they had received a similar order -- well, I say they had received -- a copy of the order of the District Court, which named all of the persons.

I assume that the message from the Secretary of State did not name any but the State-wide candidates. The only other piece of information I have with reference to notification of us -- I didn't know this at the time -- but Mr. Bookout testified, when his deposition was taken, that he learned of the fact that the order had been entered by this Court on Saturday afternoon, the 19th of October, which would have been the day that it was entered.

He was called at his home by the clerk or by a deputy clerk in Montgomery and was given that message directly and was asked to write it down, which, I believe he testified he did.

The order was entered approximately, either 16 or 15 days prior to the date of the election, depending on how you would count. Under the arrangement, there is a division of time with Judge Herndon's counsel.

I would like to make just a couple of other points, if I may. One is this: The Soliticor General said that he considers that on the merits there has been a serious abridgment of the right to participate in a political process and he relates three areas in which he says that this abridgment

result.

One is the right of association, the other, the right of candidates to run for office and the third, the right for citizens to vote for the candidates of their choice.

Maybe I reiterated too often, but our position, again, or the position of the State of Alabama. We are not concerned with individual positions or individual candidates. We are concerned with the validity of the statutes under attack, and also, of course, with maintaining that as to the facts of this case that they were not unconstitutionally applied.

Now, those two determinations were made by the District Court and we say that they are due on this record and on the facts to be upheld.

We maintain that this case can't be viewed solely on the basis of whatever history of discrimination there might have been in Alabama or in any other State in the past.

We acknowledge that through decisions of this Court, and decisions of other places, the State has stood convicted of particular acts that the Court has found to be discriminatory on other occasions.

We don't maintain to this Court that that is not true, but we do maintain that to give those an overwhelming importance here when we have to view legislation in the context of when it came into being, what its purposes are, and, finally, how little burden, how little burden it imposes.

I think that is one thing that, of course, appellants de-emphasize in their argument. They tend to argue that this creates a tremendous burden on one who is seeking to run for public office.

We think that the statutes, the ballot, itself, in Alabama demonstrates how easy it is to be a candidate. The District Court, again, and this point has been brought up earlier today, made the findings I have recited in favor of appellees, and then it said that it would not determine the issues of State law that were involved, having made those findings.

Of course, as this Court has pointed out today, during this argument, it had the authority to. It was not a matter of its saying that we had no authority to decide this. It determined that it would not.

Now, we say,to this Court, that that order or judgment is due to be upheld, the judgment appealed from is due to be affirmed. At the same time it would not be improper in our judgment that that Court, that is the District Court, make those determinations of State law or that it be directed through a remand from this Court to make those determinations, but as a preliminary, there has to be a determination on the validity of the statutes and on their application in the facts and circumstances of this case.

The State of Alabama is not here arguing to set

aside the election of any particular individual who was elected, or to say that if there was someone who was kept off the ballot in Greene County who was due to put on that their shouldn't be a new election. This is not our position.

Our position is that the statutes are valid. The record does not support any conclusion but that they were validly enforced and applied in this case. Then there is a matter of detail as to the question of whether a particular person satisfied the statute, whether a particular person's election is due to be upheld.

To this point, then, we finally agree with the Solicitor General that it has become moot as to everybody but these people. But the important question still has to be resolved and would have to be resolved as long as one of them remained and that is the validity of the statutes. That is what we are interested in.

We think that the mechanics of the thing might well be, after that, that this Court would direct the District Court to ascertain what should be the result in the application of these valid statutes to the particular persons whose fate yet remains unsettled.

I reserve the remaining time for Mr. Hubbard. Thank you.

MR. JUSTICE DOUGLAS: Mr. Hubbard.

ORAL ARGUMENT OF PERRY HUBBARD, ESQ.

ON BEHALF OF APPELLEES

MR. HUBBARD: May it please the Court:

I am here on behalf of the defendant and the petition for rule to show cause, James Dennis Herndon. I will direct my remarks only as to the issues that involve him.

The question presently presented to this Court is on motion of the appellants for a rule to show cause why Judge Herndon should not be a judge in contempt of this Court.

As has been previously pointed out, this inquiry is, in part, a factual inquiry and is, in some respect, a question of law or procedure.

I consider it, at this time, premature in the absence of a full investigation of the facts to undertake to argue to this Court the facts of the alleged contempt. I would like to point out only this, that in the Democratic primary in May of 1968 Judge Herndon, by virtue of the duties of his office, was required to have the ballot printed for this election.

In that election the NDPA candidates ran and also the candidates who were ultimately the nominees of the Regular Democratic Party. These were the only two candidates running in the Democratic primary.

At this time, there was no pending suit, no judicial compulsion, no coercion, no commotion. Nevertheless, without

any question, without any problem, these names were all placed on the ballot by Judge Herndon. The race was run without event. The county officials asked and obtained election observers in to assure the proper conduct of the election. This was done.

The election was held uneventfully. Subsequently, in September a certificate of mass meeting as to the nomination by mass meeting of these NDPA candidates was filed with Judge Herndon.

No additional qualification or designation under the Corrupt Practices Act was filed. However, a suit was filed in the United States District Court for the middle district. That court entered an order, a copy of which was sent to Judge Herndon, directing that he include the NDPA candidates on the ballot.

During the pendency of this order, temporary restraining order by the U. S. District Court for the middle district, it became necessary, by virtue of the time limits, to print the absentee ballot,which is required to be available substantially in advance of the time that the regular ballot is available, for the absentee ballot for this election where he had in his hand and was aware of the order of the District Court, was printed so as to include the NDPA candidates.

It was only after he was served by the clerk of the U. S. District Court with a copy of its order dissolving

the temporary restraining order that the ballot for the general election was printed.

Now, Mr. Morgan has suggested that this printing was an unusually ---

Q Now, on what date was that?

A That was on October 14th.

Q That the ballot for the general election was printed.

A It was actually ordered by him on the 14th. It was apparently delivered on about the 17th.

Mr. Morgan has suggested that this printing was an unusually early printing of the ballot. Actually, I think that an investigation of the facts will demonstrate that this was one of the last ballots to be printed, that the printer had been insisting on going ahead and finalizing the order and it was done when the dissolution of the temporary restraining order was made, or received by him.

Now, it is not controverted in this case that subsequent to that time there was no delivery of any order. This is not the problem, nor do we controvert that if he had actual knowledge of the order that he would be equally in contempt of it, as if one had been served on him. This is not the problem at all.

Judge Herndon, by his response to the motion for rule to show cause, has asserted that he was absolutely without

knowledge of the applicability of restoration of this temporary restraining order in its effect as to him and to local candidates.

This is the factual question that would be presented.

Q Let's see if I understand that. On October 14 Judge Herndon ordered the Greene County ballot printed.

A Yes, sir.

Q That Greene County ballot was delivered to him on October 17.

A Yes, sir.

Q When did he first get notice that this Court had entered some sort of an order in the premises?

A I believe probably in the interim. As I recall his deposition, he said that he thought he saw some memorandum in the paper or some article in the paper, on the 15th or thereabouts.

Q On the 15th he learned that this Court had entered an order with respect to the pending controversy; is that right?

A Yes, sir.

Q And, what did he do next? Did he take any steps to ascertain what was in that order?

A So far as I know, he took none.

Q Did he ever receive any -- does the record show whether he ever received a communication from a State

official or from somebody -- some other official?

A Not only does the record say that the reflecting communication, I don't think ---

Q This record, the record before us?

A No, sir.

In this record, there is no suggestion that he received a direct communication of any description from any State office or officer.

Q Did he testify as to what his understanding was of the nature of the order entered by the Court?

A Yes, sir. It was his understanding that the order had applicability to the Presidential-electors and State-wide candidates.

Now, if Your Honor will recall, this was the primary thrust of the case,at this time,apparently in the reporting of it and I have since read the same articles and they are susceptible to that interpretation.

Q Are those articles in the record before us?

A No, they were not incorporated into the copy of the deposition that I had, though they were read into Judge Herndon's deposition.

Q I don't believe they are in the printed record before us. We have printed appendix ---

A No, sir, they are not.

Q But they are in the printed record. I mean the

typed record.

A In the typed record, yes, sir.

They were read into Judge Herndon's deposition.

Q Mr. Hubbard, did he receive the original restraining order?

A Yes, sir, he did.

Q And did the story that he read in the newspaper say that this Court had reinstated that very order which he had a copy of?

A I don't have a sufficient familiarity to say with assurance whether it was done in precisely those terms. Knowing now what I know about the case it certainly says that there was a restoration of the order.

Q Which he already had?

A Yes, sir.

Q Do you know whether he tried to find out for certain, one way or the other?

A No, sir.

Now, with regard to the -- there is, in the brief, a suggestion with regard to constructive notice by virtue of notification of the Attorney General's office. I would like, in passing, to mention that Judge Herndon was not a party, I don't believe, in the original proceeding that was commenced in the middle district.

That was a class action which was begun against a

named Probate Judge and said and all other Probate Judges of Alabama who are similarly situated. He was not, of course, a named party. He was not served and did not appear in that case.

It is our position here that the notice to someone who represents the parties to a suit is not notice to a member of a class who is not actually a party to the suit. In other words, there is no -- and I can understand why there may have been no direct communication, because, indeed, Judge Herndon was not a defendant in the case, but merely a member of the class who, admittedly, would be bound by the decree.

Now, the real ---

Q Do you agree or disagree that it was somebody's duty to notify all of the Probate Judges of the order entered by this Court?

A I am sure that there is such a duty in existence, yes, sir.

Q And somehow or other that was not done; is that your position here?

A Yes, sir.

Q Your position is that the only notice or knowledge that Judge Herndon had was the article which he read in the newspaper?

A Yes, sir.

Q Now suppose that he had, I take it from what

you earlier said, that if this article had said plainly that the candidates for local office in Greene County were required by the order of this Court to be placed on the ballot, then Judge Herndon would have had a duty to do so, that is to say he would have had actual knowledge.

A I certainly accept this, yes, if he had had actual knowledge of this order that it would have been his duty so to do, absolutely.

Q So that the matter as far as Judge Herndon is concerned, regardless of what the position, if any, may be with respect to anybody else who did not notify the Probate Judges, so far as Judge Herndon is concerned, your submission, then, is that this turns on a question of fact.

A Yes, sir.

Q And that the record before us does not show that he had notice or knowledge, either formal or informal?

A Yes, sir.

Not only does it not show that he had notice, but he, unequivocally, states in his deposition and in his response to this Court that he did not have notice.

The more interesting question, from a legal point of view, I believe, involves whether or not in the event this Court should determine that a further exploration of the question of possible contempt should be made in this case, whether that exploration should be made in this Court or in

the United States District Court for the middle district of Alabama.

It is our position that the Solicitor General has adopted the correct recommendation to this Court and that a proper investigation would be in the United States District Court.

First, in this respect, the order which is ---

Q May I ask, Mr. Hubbard ---

A Yes, sir.

Q An investigation, you mean limited to ---

A If there is to be a further hearing, an ascertainment, judicially, to the fact.

Q But I mean an investigation by the District Court on behalf of this Court or an investigation by the District Court on its own?

A It is our position, really, that the order involved is the order of the District Court, and that if there is a contempt, it is, essentially, a contempt of the District Court.

Q Would we have to decide that?

A No, sir.

Q Do you think we might ask the District Court to determine whether there had been a contempt of its order, and, if so, to take appropriate proceedings and we have opened the question of whether there should be a proceeding involving

any possible contempt of an order of this Court?

A Yes, sir. I think that is entirely possible. I think this is entirely the correct procedure.

Q You mean we shouldn't decide here, now, that if there was a contempt, it was a contempt of the District Court's order and maybe a contempt of this Court's order?

A No, sir. I don't think ---

Q Or should we leave to the District Court the question of whose order was violated if any order was?

A I am sorry, I didn't hear you.

Q Do you think we should leave to the District Court the question, in the first instance, of determining whose order was violated if any order was violated?

A No, sir. I believe that it would be entirely correct for this Court to direct that the legal effect of what was accomplished was to revitalize the order of the District Court just as it would have had, if an appeal had been taken and a supersedeas filed to preserve the order of the lower court.

This, indeed, is the order that is involved and remanded to the District Court for a determination in accordance with the indications of the circumstances.

The question of whose order it is, is, frankly, without precedent. I have been unable to find any case that says -- that is sufficiently comparable to be an authority one way or

another in this case.

The Merrimack case, obviously, holds that one act may be a contempt of the order of both courts. This, however, is, I believe, a different type of act from that which is involved in Shipp and Shipp is, substantially, the only precedent for contempts in this Court.

The effect there was,of the act complained of, was to completely defeat the jurisdiction of this Court so as to render ineffective any judgment that it might render.

Here, obviously, this Court has the power to completely adjudicate this matter and give effect to its order. So this is not the type of act which would frustrate the jurisdiction of this Court, to adjudicate the controversy.

Now, there is a second consideration. The United States District Court has, indeed, assumed jurisdiction on motion of the United States, and has, since the action has been pending in this Court, issued an order enjoining the effectuation of the election and has preserved the status quo as it exists during the pendency of this, a number of depositions have already been taken there, that court views that it still has and is exercising jurisdiction in this case.

Finally, I would cite to the Court the expressions of Mr. Justice Black in the Barnett case in which he comments upon the respective functions of trial and of appellate courts and points out, in some instances, the impracticality of

undertaking a factual investigation in this Court.

Particularly, is this true, in view of the obvious necessity that if a hearing is conducted here it must be conducted by and before a commissioner not as a proceeding for this Court.

If the Federal rules which give credence and presumptions favorable to the findings of trial judges on evidence taken orally before them has a basis then the trying of a case before the judges on oral testimony is more apt to result in a correct result than would perhaps be accomplished by a hearing before a commissioner.

There are other arguments that could be advanced. However, by way of summary, let me say, that insofar as the factual issue is concerned, it is our sincere position that Judge Herndon's ignorance of the order of this Court is merely an unfortuante breakdown in communications and that he failed genuinely to receive notice or knowledge of that order.

The history of the man, I believe, shows that had he had notice of it, that he, indeed, would have complied with it.

Q Does that show in the record?

Does the history of that man show in the record?

A The history with regard to the May 5th primary and with regard to the absentee ballots show in the record, yes.

Q Shows what?

A Shows that on the May 5th primary in Alabama, each of the NDPA candidates was placed on the ballot for the same office.

Q Well, nobody disputed their right at that time, did they?

A No, sir.

Q Well, that is a little different from October.

A And, of course, in October when someone did dispute the right when the absentee ballot was printed during the effectiveness of the District Court order the name did appear on the absentee ballot.

Q But you say that the whole reason for his ignorance of the order was somebody else's and I say I think you are admitting the fact that he could have found out himself. After all, he was a lawyer.

A With regard to that, if I may, while Judge Herndon graduated from law school some 10 or 15 years ago, he has never practiced law. He was employed by a corporation, not as a lawyer.

Q Mr. Hubbard, before you sit down, may I ask you, I suppose that the test as to whether we should issue the order to show cause, which is the only thing that is before us in this branch of the case, is whether there has been a prima facie showing of contempt; would you agree?

A Yes, sir. I have tried to find some case which defines the propriety of issuing a rule to show cause and I have been unable to locate one.

Q Yes.

A But from a legal point of view, I think this does not consider the fact as to the proper forum for the investigation.

Q But let's say that we are satisfied as to questions of the law, then on the factual side I suppose a showing has to be made to us as to prima facie case of probable cause or something like that; isn't it?

A Yes.

Q Less than a conviction on our part.

A Surely.

Thank you.

REBUTTAL ARGUMENT OF CHARLES MORGAN, JR., ESQ.

ON BEHALF OF APPELLANTS

MR. MORGAN: May it please the Court to go directly to the question of Judge Herndon's notice, I would like to cite to you the deposition which is here in this Court of Judge Herndon's.

Judge Herndon testified elsewhere, other than Page 60 at which I now am, that he ---

Q Are you talking about the typewritten record?

A Yes, sir.

Q It is not in the printed appendix?

A There is no printed record and the appendix to the government and us contain only sundry references and we are allowed to proceed forward without a printed record. I have asked the clerk if we should file a printed record and they say, no, not at this stage, at least.

So we refer throughout briefs,and also here, to depositions which have been filed by the Court after motion being filed below, therefore.

In the Herndon deposition, it is quite clear that he does subscribe to two newspapers. He is the only person, of these candidates, who admitted that he read them.

The Tuscaloosa News is one. The Birmingham Post Herald is another, and he could have read either one of them. Mr. Dunball at the Department of Justice at Page 61 reads to him from the article and it states explicitly this: "The U. S. Supreme Court, Friday, will hear an appeal from the National Democratic Party of Alabama to get its 89 candidates placed on the States November 5th ballot Alabama Attorney General Garrett was told Friday."

Now, then, would you read this other paragraph on the second page started with an "Agreeing here." Answer: "In agreeing to hear the case, the Supreme Court granted restoration of an original order issued before last weeks Montgomery hearing that prohibited the State from excluding

any candidates already printed on the ballot."

On the next page the Tuscaloosa News article says approximately the same thing. We could move further than that and find that the Greene County Democrat, the official organ in which Judge Herndon, as Probate Judge, advertises for the county, contains an article.

Now, in that case it is very strange because the very man that printed the article, the publisher and editor of the paper, said he didn't read it either. A question came up earlier about the record, from Justice White with respect to whether or not these matters were in issue as to the application of the Corrupt Practices Act in the lower court.

On Page 55-A of the Amicus Curiae, United States brief herein, you will find representations made by the State in their answer below regarding the disqualification of all candidates from Greene County and referring thereto to some attached exhibits, J, K and L.

Those exhibits are found in the record of this Court, again not printed, Exhibit J, Page 307, an affidavit from Judge James Dennis Herndon in Greene County.

He lists the names of the NDPA candidates who were left off the ballot and at the conclusion of that affidavit he states: "None of the six above-named candidates filed or offered to file in my office the name or names of persons selected to receive, disburse, audit and expend campaign funds

as required by Section 274 of Title 17, Code of Alabama," et cetera, "within the five-day period, nor has such been filed to this date", signed September 20th.

If you, then, return to the briefs of the United States, you will find there as Appendix E, Page 60-A, a qualification blank of the type that has been filed with this Court, which was filed by these candidates in the Democratic primary election.

With respect to the Corrupt Practices Act, these six candidates, before March 1st, 1968, stated, on Page 61: "I, hereby, certify and declare that I appoint myself and, hereby, accept the appointment as the sole and only person or committee to receive, expend, audit and disburse all moneys", et cetera.

Now, there are several questions about the case to one unfamiliar with Alabama politics and I am thinking now particularly about Mr. Justice White's comments regarding the Ohio primary election and its effective winnowing down of candidacies and its good effect, in that sense, and, certainly the State has an interest in doing so.

The State here makes no point that it was improper for any of these people to run in the Democratic primary election and, at the same time, to receive the nominations at a mass meeting.

As a matter of fact, on Page 22 of their brief, they

concede that it is not improper. Surely it is not improper because they have learned from history in Alabama, they learned from the election in Macon County where Sheriff Lucias Amos ran against three white opponents in 1966. He got around, after winning the primary election there, at the end of 1966 one of his white candidates had a write-in campaign and the other appeared on the ballot under Third Party for America, Inc.

The same thing happened in Selma, Alabama. After Jim Clark lost in the primary, he ran again in the general elections. Some question has been raised here about mootness.

Q Mr. Morgan, I would suppose the District Court, the three-judge court, either decided that under Alabama law a filing for the primary satisfies your requirement for filing for an independent party or didn't decide it? Now which?

A It did not decide it. Now, our problem there is ---

Q Why didn't they decide it?

A Well, we ---

Q I would suppose that if you would have made it an issue, they would have been required, or at least they should have decided this issue of Alabama law.

A Well, they didn't decide any, as they say in the opinion, complex factual issues involved.

Q That is not a factual issue, is it?

A Well, with respect to whether they filed it or

not would have been.

Now, quite, frankly, we relied -- what we did ---

Q Your main thrust was that unconstitutionality on the face.

A Of the Garrett law, certainly, or its illegality, its non-applicability under Section 5.

Q Let's assume that the Alabama courts construed this statute to mean that the filing for the primary is not satisfied by the requirement for filing for a candidate who has been nominated at a mass meeting of another party. Let's assume that is what was decided. What would be your position then?

A My position at that point would be that there is nothing in the statement filed -- first of all, these forms were obtained in the office of the Judge of Probate. They were provided to them by Judge Herndon. He gave them the forms. Now, they are Democratic party forms. But they do not specify in the Corrupt Practices part of the form that they are merely running in the Democratic primary.

Now, the form is the form is the form. It simply says what it says.

Q So, what would you say?

A I would say that they filed.

Q Well, I know, but what if the Alabama court said that they hadn't filed. They must make another filing

when they ran on behalf of another party.

A I would say then that by September 5th, when they finally filed, the statutory period began to run. The Secretary of State had, until a letter was written postmarked on the night of the 10th would have complied.

She told the statutory period to begin with, the law does not require you to do a useless act of course ---

Q What about the local candidates?

A With Probate Judges? I think she spoke for the Probate Judges and I think, certainly, in the case of these six, Judge Herndon has shown by past acts ---

Q Well, how can she speak for the local judges when they are the ones that have to make the certifications?

A Well, in the record we find the Probate Judges do contact Mrs. Amos, and we do set out in brief, almost in full, a letter from a Probate Judge saying: "I don't think this is worth the paper it is written on, and I am going to contact Mrs. Amos about this."

I think that pretty well clearson the record that everybody down there sort of works together in matters like this.

Q But it is not clear in the laws of Alabama, is it?

A I beg your pardon?

Q The law of Alabama says specifically, does it

not, that State go to the Secretary and local go to the Probate Judge?

A Yes.

Q Well, are you going to put practice over the law?

A In Alabama I think that sometimes happens, quite often.

Q Well, don't we have to follow the construction of the laws of Alabama as well as we do any other State?

A Yes, sir. The State of Alabama in the case of Herndon versus Lee -- you asked the question ago about what kind of man is this man as shown in the record.

I suggest that there is an excellent series of cases arising out of Greene County to judge this man. He has been a party in a number of cases. The case of Herndon versus Lee is the case with respect to the filing of these Corrupt Practices Act statements.

As we say, there the shoe was off the other foot, because there ---

Q So far as I am concerned, I love to hear you discuss this case and Judge Herndon's actions in this case.

A All right. In this case -- the case of Herndon versus Lee is the law we are referring to, though, with Mr. Justice White and the only opinion that I can talk to you about of Alabama law interpreting these, you know, the

statutes we are involved in.

It simply says that September 5th is the date to file with the Probate Judges or with the Secretary of State the sundry certificates that go to the different places.

Q Then you can file in either place?

A No, you have to file your county offices ---

Q In the Probate Judge.

A In the Probate Judge. You have to file your district offices, the State law ---

Q Is your position limited to the fact that because the Secretary of State says there is no use in you filing before the Probate Judge, that excuses you for not filing before the Probate Judge?

A No, that is not the sole position we take, no, sir. We have other positions. I will take them right now.

Q That is one of them, isn't it?

A That is a position. The second one is that, in fact, the -- when the Secretary of State acted, she acted for everybody, the second is that, in fact, some were filed, you know, across the State and that these complex factual issues were not determined by the District Court as to who had and who had not.

But, thirdly, we were turned back over to the same

Probate Judges, who, in some instances, turned us down to determine whether we had done it or not.

Fourth, there is no hearing in Alabama law granted anybody.

Fifth, that there was a discriminatory application of the statute because this is the first reported case where someone has acted a Probate Judge on his own initiative, all other reported cases have been otherwise.

That there is also an unequal application on the part of the Probate Judges and, certainly,on the part of the Secretary of State.

Q I was thinking about asking a case that said just about that but because the law is only applied once, that that is discriminatory.

A Well, Judge Johnson said that there has been a policy in the State of Alabama continuously, in his dissent, of private enforcement of the statute, never public enforcement, never before has anyone moved in to enforce it. In this particular case, this is the first instance.

We contend it is the first instance, that this is the first real threat that has come along since this Act.

Q So your only precedent is the dissent and opinio in this case?

A Our only precedent ---

Q Judge Johnson is a good judge.

A Thank you.

We do have one more though, and that is,certainly, with respect to Greene County,and I think your recent decision in Glover versus St. Louis-San Francisco Railroad Company,we say it is not necessary to do a useless act like go to a labor arbitrator, or, you know, to union officials, when you know you can't get adjudication.

I think we have something in the record that shows that we are in the same sort of position. Now, the question mootness was raised. The classic makes it quite clear that we have a right to have our votes counted, I am talking about across the board now, not just Greene County; we have a right to hold primary elections, that depends on the amount of votes we have.

It is a declaratory judgment. We need to decide these matters now rather than a later time.

The District Court opinion does, of course, uphold and did rule on the constitutionality of Sections 125 and 148 of the Alabama Code as well as the Garrett law and the Corrupt Practices Act.

The relief -- a question was asked about that and I just want to urge that the relief be as specific as possible. You know when we talk about primary elections in Greene County, just remember we are talking about either one of the two sets of figures we have got, 127 percent or 124 percent

of the white population of the counties registered to vote.

Now, we know that is not right. It can't be, but there are a lot of names there that don't live there. Accuse anybody anything with respect to that but I just say that they are there.

That is one of the criteria the Attorney General uses when sending examiners in and observers in for accounting, is have they purged the rolls.

Second, primary elections are run by the local Democratic party votes, always. In those elections there is always an alternate ballot position and in this case the only relief we have so far and, I believe, after the three Mississippi cases were argued here, and since there is such concern about, you know, setting aside elections, that the temporary relief of this Court could quite possibly have been utilized to forestall the setting aside of any alections.

In that way, not go back and disturb anything. But, in this case the only relief that we have now is that the incumbents are in office and hold over under Alabama law.

The sheriff has been holding over since 1966.

Q Mr. Morgan, what if the Court happened to agree with Judge Johnson but ultimately was found that Judge Herndon was not in contempt? What relief would be appropriate -- new elections?

A Yes, I think new elections, first new elections.

I think certain things with respect to the order of a new election should be done.

Q I mean whether or not Judge Herndon was in contempt, somehow there was a failure to bring the Court's order hometo those who should understand it ---

A If we accept the contentions, as I understand them, that he didn't have notice or the alternative contention, that, if he had, he didn't understand it, under those circumstances I think they are still entitled, of course, to a new election in Greene County.

Q Well, what if the Court decides, however, that all these statutes are valid, or at least that one of them is valid?

A If the Court decides that ---

Q Then what about Judge Herndon?

A Well, I think that as far as Judge Herndon is concerned, he is still in contempt.

Q Doesn't it make it irrelevant -- the validity of the statutes irrelevant to his ---

A I don't in light of Walker and I don't think in light of the statement ---

Q Then how about that if the Court holds that at least one of these statutes is valid then what about relief? There still might have been a violation of the Court's order.

A We are talking about the Garret law now or

Corrupt Practices?

Q Let's say they held the Corrupt Practices law as constitutional.

A Held it as constitutional.

Q And that these candidates did not deserve to be on the ballot.

A Then, in that case, if they did not deserve to be on the ballot, and you can't retroactively put them on there -- that has nothing to do with Judge Herndon's contempt, but it does have something to do with whatever relief is granted.

I do want to point out with respect to Section 125 on election officials that this record does disclose that there were 120 election officials in Greene County, 14 of them were Negroes and 81 percent of the population is Negro.

Q Mr. Morgan, are we to understand that since you don't seem to be independently arguing the merits, are you buying the government's argument; is that it?

A No, which one?

Q On the merits.

A On the merits.

Q On the constitutionality.

A On the constitutionality of the Corrupt Practice Act.

Q You haven't said much about it yet.

A The constitutionality of the Corrupt Practices Act -- I think that any act that deprives a man of the right to be on a ballot and the voters who could vote for him of the right to be on the ballot, by an arbitratry act, witho aright to a hearing, no right -- no due process right -- to a hearing at all, the Probate Judge says he is not entitled to be on the ballot, no statute that gives him a right to go in and get on the ballot, and in this instance it is September 5th, I just don't know what the man can do and I don't see how that can be constitutional, and that Corrupt Practices Act, I certainly think that Corrupt Practices Act generally should be an art.

This particular provision ---

Q That is a due process argument independently of any equal protection argument?

A I think that -- a due process independent of any equal protection argument at all.

Secondly, I think that the statute, itself, by its very wording is really rather vague as to what it does say, and it is essentially a criminally statute.

I don't know that you can read that statute and know really what you are supposed to do. I know you can't tell what day you are supposed to file.

Q Why do you say it is essentially a criminal

statute?

A I think so. Yes. It is a violation of the Corrupt Practices Act, they can go after them that way or they can keep them off the ballot, they can do that.

I really have nothing more, if there are no more questions except to say that,as the President said yesterday, the laws have caught up with our conscience and what remains is to give life to the law.

I think that is what this case is really all about.

(Whereupon, at 1:20 p.m. the argument in the above-entitled matter was concluded.)