NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF COLORED
PEOPLE, a Corporation,

Petitioner,

—vs.— No. 91

STATE OF ALABAMA, *ex rel.*
JOHN PATTERSON,
Attorney General,

Respondents.

Washington, D.C.
January 16, 1958

Oral argument in the above-entitled matter was resumed, pursuant to recess,

BEFORE:

EARL WARREN, *Chief Justice of the United States*
HUGO L. BLACK, *Associate Justice*
FELIX FRANKFURTER, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
HAROLD H. BURTON, *Associate Justice*
TOM C. CLARK, *Associate Justice*
JOHN M. HARLAN, *Associate Justice*
WILLIAM J. BRENNAN, JR., *Associate Justice*
CHARLES E. WHITTAKER, *Associate Justice*

APPEARANCES:

EDMON L. RINEHART, ESQ., *Assistant Attorney General of Alabama, on behalf of Respondent, the State of Alabama.*

ROBERT L. CARTER, ESQ., *20 West 40th Street, New York, New York, on behalf of Petitioner.*

PROCEEDINGS

MR. CHIEF JUSTICE WARREN: No. 91, *National Association for the Advancement of Colored People*, petitioner, versus *State of Alabama*.

Mr. Rinehart?

ORAL ARGUMENT OF EDMON L. RINEHART, ESQ., ON BEHALF OF RESPONDENT—Resumed

MR. RINEHART: Mr. Chief Justice:

Just before closing you asked me a question concerning the Alabama statutes dealing with this, the domestication statutes and the enforcement thereof.

THE COURT: Yes.

MR. RINEHART: There are two criminal statutes. They are set out in the petitioner's brief at page 36 in a footnote. One of those denies a foreign corporation, which makes a contract in Alabama, their power to assert their rights under that contract.

THE COURT: Yes.

MR. RINEHART: It also sets certain penalties which are misdemeanors, and those are enforced by the solicitors of our respective circuits and counties, and on appeals the attorney general's office would handle those. Those are the only statutes in Alabama which deal with what we would call the enforcement, that is, a method of penalizing a corporation or its agents for coming in and doing business without a license.

We do not place our action or base our action in any way on those. In fact, part of the basis of our action is that those do not provide an adequate remedy at law.

THE COURT: What I was thinking about, Mr. Rinehart, was whether—as a penalty for having been delinquent in not filing—there was any authority in anyone to say to that corporation that: "You cannot not qualify." I can see that there would be any

number of penalties that might attach to it. But is there such a penalty as a denial of the right to register because of the delinquency in registering beforehand?

MR. RINEHART: Not a penalty, but we believe a power in the court of equity in its equity jurisdiction to police—perhaps "police" is not the correct word—supervise corporations, once it has jurisdiction of the subject matter; in this case to maintain the status quo. We petitioned not only for a temporary injunction, but a permanent injunction and ultimately an order of ouster, basing it on the power of the State to exclude a corporation completely if we had not in the first place let it in. Naturally, we concede if we let a corporation in, we allow it to qualify. We can't then turn around and then say: "We're sorry, we just don't like you any more"; or we can't ask them to waive their constitutional rights in advance in coming in as a condition precedent to entry.

But where they are interlopers, as we consider this corporation to be, doing business in Alabama without even the slightest action toward complying with our laws; that they are interlopers and that they have absolutely no right to be here, and that the equity power is the only effective way to protect and vindicate the constitutional provision which is involved here: the Constitution, that is, of Alabama, Section 232; and that the equity courts have that power. And if they have the power to oust, they have the lesser included power to restrain their qualifying.

In fact, that's one of the reasons we think that to get to the merits of this case, now—I mean the merits before the circuit court—it is so important in this case to determine whether or not they should be ousted in a proceeding at equity in the nature of *quo warranto*, such as Kansas did in *State ex rel. Griffith* against *Knights of the Ku Klux Klan*. That is the gravamen of the State's petition, a sworn bill—I might add, it's a sworn bill in equity—which was filed on June 1, 1956.

THE COURT: Does your statute regarding the domestication of foreign corporations have a provision that—until such a certificate of whatever you call it—foreign corporations can't sue in your court?

MR. RINEHART: If they are doing business in Alabama without qualifying, they cannot sue in our courts. That is correct.

I stand corrected on that. They may not enforce rights in our court growing out of that business in Alabama. Yes, a corporation may come in and sue, for instance, an insurance company, in certain conditions, and that is not considered doing business.

THE COURT: They are a legal person capable of coming into

court and being brought, as this case showed, into court.

MR. RINEHART: That is correct.

THE COURT: In other words they've got a legal existence, as it were, subject to handicaps—

MR. RINEHART: —of an extremely limited nature.

THE COURT: I know it, but they are subject to handicaps.

MR. RINEHART: That is correct, sir.

THE COURT: I'm not clear as to what you consider the relevancy of these records to be.

MR. RINEHART: Just this: We allege they are doing intrastate business in Alabama. One of the most important phases of that business—and there are others alleged, which are not admitted—is that they are soliciting members; we allege and believe a large number of members. That is a financial transaction, conducted in Alabama by agents of this organization to support branches which we allege they control in Alabama, and that that is doing business in Alabama. We are in a position of proving that, and the best way of proving how a corporation operates that I know of is to get their records and look at them and see what they really do, what their whole records show.

THE COURT: I thought Mr. Carter said yesterday that they were prepared to admit they were a business.

MR. RINEHART: No, they were prepared to admit—and if I may I shall read from the record. I am now reading from the record, pages six and seven, the last full paragraph on page six, beginning:

> On July 23, petitioner filed its answer, admitting: (1) That it was a New York corporation; (2) that it maintained its Southeast Regional Office in Birmingham; (3) that it hired and employed agents to operate this office; but (4) denied that it had organized local chapters in the state and that agents of the corporation solicited for said local chapters and the parent corporation; denied (5) that it employed or paid money to Autherine Lucy and Polly Myers Hudson to encourage or aid them in enrolling in the University of Alabama; admitted (6) furnishing legal counsel to assist Autherine Lucy in prosecuting her suit against the University of Alabama; admitted

> (7) that it had given moral and financial support to Negro residents of Montgomery in connection with their refusal to use the public transportation system of Montgomery and had furnished legal counsel to assist Rev. M. L. King and other Negroes indicted in connection with that matter, but denied all other allegations and inferences contained in that allegation and bill of complaint; and denied (8) that its officers, agents or employees have engaged in organizing chapters for the Corporation in Alabama in Montgomery County, collecting dues, soliciting memberships, loaning or giving personal property to aid present aims of the Corporation; admitted (9) that it had never filed with the Secretary of State Articles of Incorporation or designated a place of business or authorized agents within the State; but denied (10) that it was required by Sections 192, 193 and 194 of Title 10, Code of Alabama [1940] to do so. Petitioner denied that it has violated Article 12, Section 232, Constitution of Alabama, 1901 and Section-192, 193, and 194, Title 10, Code of Alabama, 1940; further petitioner denied (11) that its acts are causing irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama.

Now we do not concede that that is an admission of doing business in Alabama. In fact, it is one of those things that say, "We're admitting we're doing a, b, and c, but we deny these other things, and when you get all finished your laws don't apply." Now, Section 232 is all-inclusive. It says, "all corporations doing business in Alabama," and I could only construe that to mean that they're saying that while we admit doing certain things, we're not doing business in Alabama within the meaning of your law.

THE COURT: Well, Mr. Rinehart, doesn't the next paragraph, though, bear on that?

MR. RINEHART: You mean the assertion that—

THE COURT: It's a short paragraph. Suppose you read that?

MR. RINEHART: Yes, Your Honor.

> In addition to the various defenses to the Bill of Complaint, petitioner, while asserting

> that Title 10, Sections 192, 193 and 194 of the Code of Alabama, 1940, was not applicable, had procured the necessary forms from the Office of the Secretary of State, Montgomery, Alabama, and had filled in the forms as required by law and offered to file same. Said forms were attached to its answer and petitioner stated that it would file these forms if the court would dissolve its orders barring petitioner from registering and would permit petitioner to file the forms attached to its answer.

We submit it does not, and for some very definite reasons: (1) on reviewing the chronology of this case you will see that petitioner didn't file any pleadings until 31 days after the temporary injunction; that on the 5th of July, which was three days after—and I might add that then the trial judge set down the hearing on the motion to dissolve the temporary injunction for the 16th of July. The State then moved to produce—or rather, moved for an order for them to produce—which motion was heard on the 9th of July, for which counsel for the petitioner was present. The case was fully argued and presented on that question, purely of the production, and the order was granted on the 11th.

Then their time was extended, and the order said produce on the 16th which was the day before the hearing on the motion to dissolve the temporary injunction.

Now Alabama procedure is that while oral testimony may not be introduced on such a hearing as a matter of right, you can put it in if it isn't objected to. But in addition, the hearing could be on affidavits of both sides. We thought it extremely important to have those records to sustain and buttress the allegations of the Bill, to prepare affidavits, to obtain affidavits from people.

Well, then the trial judge extended their time to produce. He correspondingly extended our time for the hearing, because we needed those documents in connection with the hearing.

Now, then at the last hour—if not the twelfth hour, at least the eleventh hour—they come in with an answer. Now we're not interested in a corporation filing these papers if they don't have to file them. If they are exempt, they don't need to tender it. Alabama isn't interested in a corporation not doing business in Alabama filing these documents. We're not trying to assert a right we don't have. But we think we're entitled to a hearing on the merits as to whether or not they're doing business in Alabama, because our ultimate aim in this admittedly—I couldn't deny it on what

we've alleged here—is that we think their long past record of ignoring our laws warranted something more than a slap on the wrists saying, "Well now you can pay it and go now and sin no more." But we felt that, like Kansas, we had a right to oust them completely.

THE COURT: May I ask you this—you correct me if my understanding is inaccurate: You brought ouster proceedings against the NAACP. They said they didn't come within your laws, either because they're a membership corporation of New York or because what they did in Alabama doesn't amount to what legally speaking is doing business in Alabama. But they said, as people often say—I think too seldom say on the advice of counsel—"Well, whether we're right or wrong, it's easy for us to comply." So they say: "We're ready to file this certificate if this is what you want." But they did contest the coercive power of Alabama to make them file. That's correct, isn't it? Didn't they deny that they come within your law requiring them to do anything, including what they did do in Alabama?

MR. RINEHART: I agree—what they offered to do in Alabama.

THE COURT: Well what you say they have been doing over these years during which they didn't file, as they should have filed, a certificate and domesticate themselves—isn't that true?

MR. RINEHART: Well—

THE COURT: You say they've been doing business for a good many years in Alabama, certainly since way back in 1918 and probably earlier, in connection with their purposes.

MR. RINEHART: That is correct.

THE COURT: So that you said, "You've been doing business without the requisite permission of Alabama." They said, "We don't come within your law. We didn't have to satisfy the requirement of getting a certificate; but, in the interest of—whatever it is—convenience, we're ready to file a certificate." And you said, "No, we don't have to accept it." Is that right?

MR. RINEHART: That is correct.

THE COURT: And on the basis of the facts as quickly summarized, the State got a restraining order against them calling for the cessation of all business, although they raised what I suppose is not a frivolous or a ridiculous objection to the claim asserted by the State. Is that right?

MR. RINEHART: I think—

THE COURT: You don't think there's much to the point, but I am sometimes surprised how often a majority of my brethren think there's something to a point which I think there's nothing to, or vice versa.

[Laughter.]

MR. RINEHART: I accept everything except the very last statement with a reservation as being absolutely a correct statement.

THE COURT: Correct it.

MR. RINEHART: All right. What we say is this: The first statement I will make is that the offer which they made was after the—and I admit—*ex parte* restraining order. And the offer wasn't made until after we were going to get down to the nub of the case, the facts of the case. And that is something I think which should be borne in mind in dispelling this—which I think petitioner has tried to create—this aura of unfairness in Alabama.

THE COURT: What I stated was merely preliminary to the—

MR. RINEHART: Oh, I'm sorry.

THE COURT: —my real question. I didn't think on that statement, that Alabama did anything that was wrong. I merely wanted to see that the preliminary facts that seemed to me relevant to the question I'm going to put to you were correct.

MR. RINEHART: They are, sir.

THE COURT: Very well then, you get a restraining order against them not to do business. They must shut up shop. Is that right?

MR. RINEHART: They had not, however, at that point made any offer of compliance whatsoever.

THE COURT: No, but you told them they must shut up shop, is that it?

MR. RINEHART: That is correct.

THE COURT: Before the validity of that order—not only the validity of the order, but the scope of the decree—could be contested, the State begins another proceeding and says: "Produce certain documents." That's correct, isn't it?

MR. RINEHART: That is correct.

THE COURT: They say: "You're asking us to produce documents which we are entitled, by whatever rights we have under the United States Constitution, to withhold." That certainly is not a frivolous question.

MR. RINEHART: No, that is not a frivolous question.

THE COURT: That being so, what I want to put to you is that: Pending the determination of what is not a frivolous question; what is a substantial—at least a question that respectable lawyers can raise, and do raise, and have raised? Alabama takes the position that although this organization has been in Alabama all these years without any objection or attention from the authorities of Alabama—I'm not talking about estoppel; I'm addressing myself to the nature of the remedy—although that has been so, and although they raise a question ancillary to the proceeding of ouster, Alabama says: "You go out of business until this long trail of litigation ends, because you have, standing on constitutional rights, said you don't have to obey this." Alabama then throws them into contempt.

But all this time they are executed, they get a death sentence *pro tem*, although in the end it may turn out that they were constitutionally right. Isn't that a fair statement of this litigation?

MR. RINEHART: I'm going to make one correction, and I think—

THE COURT: Please do.

MR. RINEHART: —a most important correction: Alabama did not throw them into contempt. They need never have been in contempt. They could have tested the order to produce without ever the slightest risk of contempt.

THE COURT: They tested it in the way in which they thought they could test it, according to your cases.

MR. RINEHART: Our cases don't hold that is the proper way.

THE COURT: But that is a question before us, whether they raised it by certiorari—whether the certiorari by which they sought to raise it, raised all these issues. And even your supreme court said: "We don't have to consider this, but we do consider them." Is it allowable for counsel to think they had a right to pursue it this way?

MR. RINEHART: I would like to address myself to that specific question in considerable detail, and explain the fairness of the Alabama procedure, and that is this: The Alabama procedure on a subpoena *duces tecum* if it's in the case of a third party, or an order to produce documents, is: That is an interlocutory order not appealable? The proper remedy is petition for a writ of mandamus. And why is that? Because the person does not have to set

himself up as the sole judge of relevancy—the sole judge of constitutionality—and bring himself to the position of flat-out, as this petitioner did in open court of saying: "We don't need any more time. We choose to stand on these rights."

THE COURT: Now, so far as I'm concerned—and I'm the only person for whom I can ever speak—so far as I'm concerned, if it can be established that the orderly, traditional, settled procedure of Alabama requires the raising of this question solely by mandamus, then I think the other side is out of Court so far as I'm concerned—because Alabama has a right to say it should be raised by mandamus, and not by certiorari, if you're right.

MR. RINEHART: —if I'm right. Well, we have cited in our brief, at pages 9 and 17 thereof, *Ex parte Monroe County Bank*, 254 Alabama 515. Now that—I will grant you the Monroe County Bank was not a party to the action; this was a subpoena *duces tecum*—in that case they didn't choose, or felt that they did not have the duty, to produce certain records in a divorce proceeding—husband against wife, and of course the financial matters become very important. They proceeded by writ of mandamus to test the validity of that subpoena *duces tecum* in the Alabama courts. And it went to the supreme court and all the questions were passed on.

Now that isn't enough. That isn't a great long line of cases. In addition, *Ex parte Hart*, cited in the supreme court's opinion, had a similar question of an order to produce. The court didn't discuss that thing at length. It was just the well-accepted method in Alabama.

THE COURT: If my reading—with all the consciousness that one should have about reading the decisions of a State, of a law that isn't familiar except by reading it—if my reading of your cases were a consistent doctrine that mandamus is the exclusive remedy, I would have to go with you. But if my reading of your cases is that sometimes Alabama does and sometimes Alabama doesn't allow all the substantive questions to be raised on certiorari, then I say to you that it can't invoke that doctrine when a Federal right is asserted when it doesn't invoke it in other instances.

MR. RINEHART: I don't know of a case where a petition for certiorari has ever been treated as a petition for writ of mandamus.

THE COURT: That isn't what I suggested. I don't think this Court—I don't think I—can say that that which the Supreme Court of Alabama treats as certiorari should be deemed to be a

mandamus. That's not my function. But if I find that on certiorari it has intermittently considered all substantive questions, then it can't draw the curtain when a Federal question is raised.

MR. RINEHART: The cases which both parties have cited—*Ex parte Morris*, at pages 8, 14 and 15 of the respondent's brief—is a case which comes to mind, as well as the instant case. Of course, we submit in the instant case the Supreme Court of Alabama said: "We are going to exposit, essentially; we're going to demonstrate for future guidance our views." But they did not make them the basis for the decision. Now, I think that's a very important distinction to make, and it's an extremely important one in this case and also in *Ex parte Morris*.

Ex parte Morris concerned this question: An officer of the Ku Klux Klan was directed to bring before the grand jury the records of that corporation, of that organization.

THE COURT: Is this the Kansas case?

MR. RINEHART: No, this is not, sir.

THE COURT: This is in Alabama?

MR. RINEHART: This is an Alabama case. This was a grand jury proceeding preliminary, I suppose, to some criminal action.

THE COURT: Yes.

MR. RINEHART: And he said he stood on his constitutional rights not to do it, and was held in contempt. He was brought in before the judge and the judge said: "You'll produce them." Now he then filed a petition for certiorari, which is the established law of Alabama for reviewing contempt citations whether civil or criminal, and the writ for certiorari was denied because on the face of the proceedings the court had jurisdiction. Nice little memorandum decision. Then they said: "However, we're going to exposit our views on these constitutional questions, not as a basis of decision"—as I read the case—"but merely because we'd like people to know that corporations, for example, don't have a privilege against self-incrimination, don't have a right of secrecy."

Now those are the chief cases which I have studied on this and that I know of myself that really face up to these problems except *Ex parte Dickens*, also cited in petitioner's brief and our brief. If you wish I'll refer to the page number and I think I can explain that case, too, and show that the merits of the case were not considered. In that case, a petition for certiorari, what was considered was contempt of an order to deliver certain bonds and other documents to a receiver in equity. The court reiterated the

traditional view that certiorari—you look at the face of the proceedings; you see whether there is jurisdiction of the person, the parties I should say, jurisdiction of the subject matter; whether there was a contempt; whether all the procedural aspects of a contempt proceeding were followed—remembering that it is a completely ancillary proceeding.

Now they held that in fact since the face of the proceeding showed that in fact that he had obeyed the order, and that there hadn't been any new order even though a new receiver had been appointed, there was no contempt. They went on to say that if there was a question of a payment of a debt, that that could be reviewed on petition for habeas corpus. Now they didn't say—they didn't do, as in the *Morris* case and as in this case—they didn't say: "Well now, we've said all we have to say." They just went on and discussed this question of writ of habeas corpus, that had he been imprisoned—in this case to pay a debt—which might well have been the case. Why, then he could have reviewed it through petition for a writ of habeas corpus.

Now there may be other cases in Alabama. I regret I don't know of any others which bear on this issue.

THE COURT: Now suppose one finds that while—as a matter of nicety, your court thinks mandamus is the way to do it—but suppose as a matter of fact that one finds that in fact they do consider, in fact, as a matter of judicial habit or course of judicial practice, they do consider the merits and that one further finds that they drew the distinction in this case which they haven't drawn in others, and reaches the merits. Just make that assumption—

MR. RINEHART: I understand.

THE COURT: —if you can. We lawyers can see both sides—at least we're supposed to.

What do you say then: Assume that petitioner is here in other words, and is not to be dismissed because of want of a Federal question, or want of a disposition on local grounds, what do you say to the procedure, to the decree, to the restraining order which put an enterprise out of business, although it raised, fairly raised, a Federal constitutional question, and although no grounds—at least none that I have heard mentioned; I may be forgetting some—no serious grounds for saying anything will happen, there will be irreparable damage if you for the time being don't put a body out of business, although ultimately it may be found that you had no business to restrain it at all?

MR. RINEHART: I am to assume this fact, and this is the only

one, as I understand: that the case history of Alabama shows that while they pretend to this nicety of pleading and practice, that in fact when they get one of these important questions, why they simply just say: "Well, we're going to look at the thing anyway." That's what I am to assume?

THE COURT: And that they drew the line here that you're asking us to draw; they drew the line here. But we find in the case, that as a matter of fact your court did review it, did review the issue, the Federal question that is sought to be brought here, and that is here: And that therefore it is here—just that.

MR. RINEHART: Then I think that the State of Alabama has an extremely dubious case of no Federal question. In other words, that if you can reach this position to which it would seem to me you were heading, that they decided to make some sort of an exception in this case, then I think that we're perilously close to a case which was decided here Monday, this *Baxley* case.

THE COURT: Mr. Rinehart—

MR. RINEHART: I don't concede entrapment, however, or springs in this case.

THE COURT: Mr. Rinehart, how in Alabama do you raise the question of whether or not a preliminary injunction was legally or illegally entered?

MR. RINEHART: On a motion to dissolve.

THE COURT: Well, that's what I thought. Now, until the motion to dissolve has been heard you have—you're not out of the trial court and there's nothing yet to review.

MR. RINEHART: That is our contention and that is correct under my understanding of the law.

THE COURT: Now you have two aspects here: One is the temporary injunction. But as a collateral appendage to the determination of the question of whether or not the injunction might be maintained, an order was entered by the trial court for the production of certain documents.

MR. RINEHART: That is correct.

THE COURT: Under the law of Alabama does the court have an inherent or a statutory power to impose penalties for disobedience of his order?

MR. RINEHART: It has an inherent power—

THE COURT: All right. Now—

MR. RINEHART: —and also a statutory in the case of criminal contempt.

THE COURT: Now what's the remedy—that's final when the penalty's assessed, isn't it? That's immediately reviewable whether by appeal, certiorari, mandamus, or whatnot; isn't it?

MR. RINEHART: That's correct.

THE COURT: Now how do you get a review on that issue? You say by mandamus, is that right?

MR. RINEHART: Because we break it down into two sets, you have really two ancillary proceedings and ancillary questions. You have first the validity of the order to produce, which is tested by mandamus. And secondly then, if they choose to just say, as petitioner did, "We're not going to; we ignore"—I don't know why they didn't file petition for a writ of mandamus, but they didn't—to test only the order to produce. And if you then choose the route—

THE COURT: To test only the conviction for contempt for disobedience to the order to produce, is what you mean, isn't it?

MR. RINEHART: No; first, the mandamus goes only to test the validity of the order to produce, and may be commenced at any time after the order is entered, it being an interlocutory, non-appealable order.

THE COURT: In Missouri you would have to do this not by mandamus, but by a prohibition. But in your State you do it by a mandamus?

MR. RINEHART: Frankly if I may say so, the writ of mandamus and writ of prohibition are—if I were a purist, I would say—often that what appeared to be mandamus is a writ of prohibition.

THE COURT: Now let's go back to the injunction feature, the temporary injunction. How is that reviewed after the motion to dissolve has been overruled? How do you review that?

MR. RINEHART: By appeal.

THE COURT: By a direct appeal?

MR. RINEHART: That is correct.

THE COURT: Mr. Rinehart, one more question: Is certiorari a discretionary writ in Alabama?

MR. RINEHART: Absolutely, and there's a very important point to be made in connection with that.

THE COURT: Let me be sure I understand this. Are you suggesting that, on your analysis of the Alabama cases, there is none where in fact, in review on certiorari of an order of civil contempt, your supreme court has ever reviewed the merits of an order, of the underlying order which was disobeyed and upon which the contempt finding was made?

MR. RINEHART: That is correct. Now there was a case cited yesterday, which I was not personally aware of. I believe I have that citation—68 Southern Second 834, this *Armstrong* case, which is a—we maintain the court did not look at the merits. This isn't one of those cases where they applied for certiorari and it was treated as mandamus. The case isn't at all that case.

THE COURT: I'm not addressing myself to that. I'm addressing myself to what happens when in fact an order of civil contempt is reviewed on writ of certiorari. Does your supreme court entertain argument and dispose of any arguments addressed to the validity of the order alleged to have been disobeyed?

MR. RINEHART: That *Armstrong* case is the only case that I know of that seems to even bear on it. And that in fact was an appeal from the denial of the court to hold the man in contempt, to take contempt proceeding against him even though he had very possibly on the record violated the order. And then they threw in a sort of a general prayer on top of the appeal. And the court reviewed the portion of the contempt proceedings. They also reviewed other matters on the merits of the whole case, as I see it, on the appeal feature. But specifically on the contempt feature they said: "Well, as far as this pure contempt angle, we'll consider it to that extent, certiorari." And they did in fact—they didn't look at the merits except to this extent, which is the established Alabama law: to see whether or not there was a contempt.

THE COURT: Well does that involve whether or not there was a contempt, that is, whether or not there was a disobedience to the order?

MR. RINEHART: That is correct.

THE COURT: And to decide whether he's been disobedient to the order, don't you have to decide whether the features of the order alleged to have been disobeyed are valid or not?

MR. RINEHART: I see absolutely what you're getting at.

THE COURT: I'm just looking to the scope of the actual review on certiorari in a civil contempt proceeding.

MR. RINEHART: In that case, they did in fact hold that this was a proper order. And as I say, it seemed to me they looked at it on the appeal feature. In other words the appeal, in this question of the appeal, whether the order was an order which was proper, they did in fact—

THE COURT: In relation to the injunction feature?

MR. RINEHART: Not in our case; I'm not speaking of that, Mr. Justice Whittaker.

THE COURT: Oh, oh.

MR. RINEHART: I'm talking about the *Armstrong* case, which was one of these custody of children cases among other things, and also a question of accrued alimony. There were a number of complicating features. I see not only the drift of the question, but—you do get sort of to that point. All I can say is that as far as the way the court talks, they say: "We're looking strictly at the face of these contempt proceedings, for jurisdiction"—

THE COURT: What I'm getting at: Anybody reading the Alabama cases and finding that in fact on a writ of certiorari to review a civil contempt order that the Supreme Court of Alabama actually inquires into the validity of the order alleged to have been disobeyed. Would he not think that that was an appropriate—he might appropriately believe that the next time he came up by certiorari not only would the contempt itself, whether there has been a disobedience, but as well whether or not what was disobeyed was valid, would be considered by your supreme court?

MR. RINEHART: I think that if the cases in fact ran that way, I think that you would be correct. I don't know of any cases that do go that way. The *Armstrong* case is the closest thing to that.

THE COURT: Frankly, what I'm addressing myself to: I notice that you have—your supreme court had a *per curiam* which is in 91 Southern Second 221, and at the time there was an application for a stay to the supreme court. I think that was the application of July 31st, wasn't it?

MR. RINEHART: I would like to explain exactly what happened in that case. They made an application for a stay. There was no petition for certiorari, there wasn't any kind of pleading. They just went up there and said: "We're in a terrible fix." There was no fact or anything. Just: Stay the proceeding. And the court said when there's a question of a contempt proceeding—review of a contempt proceeding—we have to have a petition for certiorari.

THE COURT: Well, that's just the point. But the way the *per curiam* reads is:

> It is the established rule of this Court that the proper method of reviewing a judgment for civil contempt of the kind here involved is by a petition for common-law writ of certiorari. And this Court has through the years felt impelled to grant the writ for purposes of review where a reasonable ground for its issuance is properly presented in such petition.

And it was after that decision and that *per curiam* that the first petition for certiorari—I see it's all on the same page—on August 13 rather cryptically was denied on the ground that it was insufficient to warrant the issuance of the writ, the averments of the petitioner are insufficient. It doesn't say in what respect insufficient. And then it was followed in August—the petition which led to the judgment and opinion before us. And I'm just wondering how anyone involved in this very case if—reading your cases before this one—he felt that there was going to be a review both of the underlying order as well as of the contempt itself, could help but take this as an instruction of your supreme court: Go ahead, follow the rules of writ of certiorari, and we'll consider both the contempt and the order upon which it was based.

MR. RINEHART: First of all, taking what was actually before the court in the second petition, it had no facts alleged. There were merely what we can call assignments of error, which are set out in our brief—I stand corrected on that.

THE COURT: I can't find anywhere in the record any of these papers that underlie either of these applications. Are they in this record, do you know, Mr. Rinehart?

MR. RINEHART: No, I stand corrected.

THE COURT: They have not been with this Court?

MR. RINEHART: They have not.

THE COURT: None of these underlying papers?

MR. RINEHART: Not to my knowledge. The printed record in this case, which consists of petition for writ of certiorari and exhibits, is the record in the case.

THE COURT: Is the original petition on which the contempt order was issued in the record before us? I can't find it.

MR. RINEHART: It is included—

THE COURT: The State's petition?

MR. RINEHART: The State's petition is included in the record.

THE COURT: Where is it?

MR. RINEHART: Record pages one, two, and three.

THE COURT: No, that's their petition.

MR. RINEHART: I stand corrected. What I should say is that this is a synopsis and record of our petition. It is not the petition itself. I stand corrected. The petition itself that we filed in the initial proceedings is not in this record.

THE COURT: Mr. Rinehart, do you suppose—I don't know whether this is appropriate or not; tell me if you don't think so, if you don't believe it is—could we have provided the records on all of these applications to your supreme court, the petitions that were filed and all of that?

MR. RINEHART: I do not have them with me here. I am certain they will all be supplied. All that was before the supreme court was sent up, that was asked for from the supreme court. Now in addition, there was this initial petition for certiorari. I'm not addressing myself now to our petition, but this initial petition for certiorari, which appears at pages 16 and 17 of the record. I should again qualify that statement by saying that these are the grounds alleged in that, and that all that was alleged in it was what I call an assignment of error.

THE COURT: As I understand, the only one we have here is the petition which was filed on the 20th of August—

MR. RINEHART: That is correct.

THE COURT: —and apparently there was a petition filed somewhere around August 13th, which we do not have and as to which your supreme court said that the averments were insufficient. Then before that, on July 31, there must have been some kind of paper filed in connection with the motion for stay; and we don't have that paper either.

MR. RINEHART: That is correct. We didn't—we concurred in the record in this case.

THE COURT: I noticed that from the file in the Clerk's office.

THE COURT: Mr. Rinehart, your time is just about up. I wonder if you would address yourself to the merits—

MR. RINEHART: I would be happy to, Your Honor.

THE COURT: —just for a moment before you leave.

MR. RINEHART: Now there are really several questions of the merits involved here. There is first the question of the State's power to take any such initial action. And we base that on a plenary common-law power of the Attorney General of Alabama to vindicate and enforce the public policy of Alabama concerning the domestication of foreign corporations. I'm talking about that constitutional provision, Section 232, which is self-implementing. We think that an Attorney General has the inherent right and in fact—

THE COURT: Where is that printed, that constitutional provision?

MR. RINEHART: It is not set out in the brief; I have it here. I'm now reading from the Alabama Code of 1940, which also includes the Alabama Constitution, Article 12, Section 232—

THE COURT: What is it? Would you mind reading it?

MR. RINEHART: Right now:

> No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein, and without filing with the Secretary of State a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business by service of process upon an agent anywhere in the State. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State. Strictly benevolent, educational, or religious corporations shall not be required to pay such tax.

MR. CHIEF JUSTICE WARREN: Your time has expired, but you may have five minutes more to summarize the merits.

MR. RINEHART: I certainly shall.

I was saying that we have the plenary common-law powers, that the Attorney General of Alabama is a constitutional officer who has the same powers which the Attorney General of Great Britain had at common-law. We depend upon those cases, a long line of cases which say that a corporation doing intrastate busi-

ness in a state—or rather, the Supreme Court decisions which say that a corporation may be prevented doing intrastate business within a state if it hasn't first gone there and conformed to the laws of that State.

THE COURT: Is there any law of Alabama which tells a delinquent corporation it cannot register?

MR. RINEHART: Absolutely not, no statutory law whatsoever.

THE COURT: In considering the merits, the means to be used, would you tell me what issue was left upon which an order could rest to produce the lists, after you had on your petition to oust these people because they were delinquent—after they had offered to file with the Secretary of State their certificate which, if they had been permitted to file, he could not have refused? What issue was left upon which orders could be issued, in your pleadings after that?

MR. RINEHART: The authority to oust is in the courts of Alabama to punish—perhaps "punish" is too strong a word, but I believe it's the correct one—for having, for a long period of time, ignored our laws. And the questions of whether in fact they were doing business and how long and the extent and nature thereof were absolutely essential to the case.

Now we think that the power to oust for past misconduct included the power to maintain the status quo as between the parties and that is what this order denying the right to register did, through the traditional power of the court of equity.

THE COURT: Have they ever done that?

MR. RINEHART: No; we've never had a case like this before.

THE COURT: You never had a case where corporations were delinquent?

MR. RINEHART: We've had cases where corporations—oh, I won't say that. I don't know of any where corporations were delinquent in this manner.

There are other constitutional questions. I don't want to dodge that question, Your Honor.

THE COURT: But I don't want you to consume all your time on that. But I have been wondering, if they had been permitted to file this registration certificate with the Secretary of State, he could not have refused it, could he?

MR. RINEHART: There is a dispute. Our opinion, which has never been written, I admit, our opinion is that he could. First of

all, he has the duty to refer it to the franchise tax people for determination of whether or not in fact this is a benevolent corporation within the meaning of the law of exemptions, or a charitable and—

THE COURT: Well, suppose they offered to file it with both; could he have refused it?

MR. RINEHART: He doesn't in fact accept the filing and it is not accepted until the franchise people make a determination as to whether or not there are franchise taxes due. That's my understanding of the procedure.

THE COURT: Was there any basis for this action originally, except that they were delinquent in registration?

MR. RINEHART: That was—

THE COURT: The pleadings are not here, so that's the reason I'm asking.

MR. RINEHART: Basically the action is that they were delinquent—the basis of the action is a long-term, extensive delinquency, which we think is in derogation of the rights of the people of Alabama not to have corporations come in, foreign corporations, and just ignore their statutes.

THE COURT: What do you say about the membership list?

MR. RINEHART: You mean, why is that relevant?

THE COURT: About their position that even if they can be forced to register, the membership list cannot be disclosed.

MR. RINEHART: Well, I disagree with that contention entirely. I don't believe a corporation has any right of privacy and that any case of this Court has ever held any such thing. I can address myself to that. I think recent cases, such as *Watkins* and *Sweezy*, are questions of assertions of individual rights.

THE COURT: Well, before you sit down: You are doubtless familiar with the *Joint Fascist* cases.

MR. RINEHART: Yes, Your Honor.

THE COURT: And therefore you are doubtless familiar with the diversity of views expressed?

MR. RINEHART: I am.

THE COURT: So that one cannot say that there was anything but a single judgment. But you will recall Mr. Justice Jackson's opin-

ion in which he sustained standing to sue on the part of the corporate entity, the non-individual body that was before us in that case, on the ground that if the individuals cannot assert their constitutional claims—members, in other words, in an organization which is asked to make disclosure—and if the individuals who are members can't themselves come in to protect what they claim to be a constitutional right without frustrating, without nullifying the very right which they claim by making the disclosure, that then the corporate body can claim those individual rights. In short, assume that individuals in Alabama—Tom, Dick, and Harry—can say: "You can't ask us whether we belong to the NAACP. That's a territory that is protected." I'm making that assumption.

MR. RINEHART: I understand.

THE COURT: Otherwise there's no point. We can withhold. We don't have to tell Alabama or New York or anybody else to what club we belong, provided it isn't a seditious organization. I'm putting that to one side. That's our constitutional right. But if we have to go into court and say: "Here's what you are asking the organization to do—make inroads on my rights, and by that very proceeding you nullify your rights, then the corporate body having these undisclosable, this list of undisclosable membership, does have a standing to speak for the individual members."

MR. RINEHART: My first answer is, of course, I don't agree with that portion of the opinion. But I'll also address—

THE COURT: It was an individual's opinion.

MR. RINEHART: Individual's opinion, that's what I mean, Mr. Justice Jackson.

THE COURT: He was quite candid in saying that he thought the corporation would not have standing to sue except in this same situation where the individual rights come into action.

MR. RINEHART: All right; I would, if I may, address myself exactly to that question. First of all Mr. Justice Jackson, preliminary to making that statement, held that a corporation had no right of privacy; that in fact if all the order of the Attorney General in that case had done was hold individual members up to unpopularity and all of the things which, I might say, are speculative in the instant case—pure speculation—that if that were all, he would say the corporation didn't have any standing.

But what happened—and I want to remind you that it was entirely state action—both the first and second pressures brought

to bear were entirely state action. One was the *ex parte* action of the Attorney General in declaring the organization subversive which, insofar as there is a majority opinion, I would say is the basis of it. And then you get to the next step which was, by virtue of that order—here were a lot of innocent people who were going to lose jobs automatically. And the jobs which they were going to lose automatically were government jobs, so that was obviously government action.

Now, I perhaps haven't exactly answered the contention. That is how I explain that decision.

THE COURT: But I suggest, and I suppose what is behind this claim or refusal to disclose the individual members of the NAACP in Alabama, I take it—I haven't read the pleadings—but I take it the thought is and the reason for this claim and why the individuals don't step forward is because they are potentially in a damageable condition if they do make disclosure. That's why they don't step forward.

MR. RINEHART: Damageable from who, is an important question.

First of all, I want to make a point which bears precisely on—

THE COURT: Damageable by the State.

MR. RINEHART: Oh, the State isn't going to bring any pressure to bear on these individuals.

THE COURT: The pressure derives from the fact that the State compels disclosure, if they may. Just as in the *Joint Anti-Fascist* case, if one of these organizations on the Attorney General's list had to make disclosure that affects people, does it make any difference whether it's in private employment or public employment, so long as the governmental authority takes away something that it can't take away?

MR. RINEHART: I don't believe that there's anything in the law that says that the mere fact that a person may become unpopular as a result of a disclosure gives him a constitutional right to secrecy.

THE COURT: That isn't the implication of my question. Is it inconceivable that an individual might bring a suit in Alabama and say: "If I make a disclosure that I am a member of the NAACP, I'll lose my business." Is that an inconceivable hypothesis?

MR. RINEHART: I have a hard time feeling that that would be—probably an embarrassing word there—a justiciable issue there.

THE COURT: To lose a business?

MR. RINEHART: Unless he can allege extremely specific details in that; in other words, say that this person is, without justification, causing me to lose my business.

THE COURT: This person being—the deciding point being that the State of Alabama or any other—the State of Massachusetts; it doesn't make any difference as far as I'm concerned. Needless to say, the State is asking me to make a disclosure which I am entitled to withhold, and by making such disclosure my business will be shut down. The Government isn't shutting down the business, but it is taking action which results in the shutting down. And that's not justiciable?

MR. RINEHART: Because the thing which may—and that's pure speculation, and the allegations in here are speculation—

THE COURT: Well, they may not be able to make good on it. They may not be able to make good on it. But suppose that in the *Joint Fascist* suit—that whole case turned on the fact that the Attorney General filed what was practically a demurrer and said: "Well, suppose everything you say was so. That's the only basis one has to meet these legal questions."

MR. RINEHART: Sure.

THE COURT: Assume it's so, that John Smith and whatever it is in Alabama, some town in Alabama says: "I received a request from the Attorney General to tell him whether I am a member of the NAACP, and I refused to do so." And he says: "Well, that's required by some decree of a court. And if I make this disclosure, which I'm entitled to refuse to make, I will suffer in my business." Would that be demurrable?

MR. RINEHART: I believe it would, and I'll explain why. I believe neither the *Sweezy* case nor the *Watkins* case, which seem to bear on this right not to have to testify about associations, are answered on this basis. In this case we have relevancy to a judicial proceeding, and we submit an extremely valid judicial proceeding. And I might add, in this particular proceeding—

THE COURT: Do you mean mandamus?

MR. RINEHART: No, to the central issue in the case, of whether they're doing business in Alabama and whether they should be ousted.

THE COURT: But suppose you win on that, suppose you can oust them, in the meantime—suppose you're entitled to oust

them—it doesn't follow from that that individuals may have to make disclosures that they were members of the ousted corporation—

MR. RINEHART: I agree.

THE COURT: In fact, if they can allege and subsequently prove that in fact the human, inevitable consequence is material, monetary, mundane punishment in their property interests.

MR. RINEHART: I don't think a person has such immunity from testifying in a case if he is properly subpoenaed.

THE COURT: Well, that goes to the merits of whether such an exaction can be made.

MR. RINEHART: Oh, it does. And I fail to find any judicial authority for that particular—

THE COURT: What you're saying is that Alabama tomorrow can subpoena a lot of individuals in this litigation. Suppose this proceeds; suppose you're allowed to proceed with the ouster proceedings. What you're saying is that as a matter of substantive constitutional law, if Alabama subpoenaed Smith, Jones, Robinson, and asked him or her on the stand: "Are you now or were you a member of the NAACP?," they could not say: "Your Honor, with every respect I decline to answer because I'm protected by the Constitution." That's what you're saying, isn't it?

MR. RINEHART: I think that we would have to show that our questions were relevant to the issues in the case.

THE COURT: I will assume they're relevant, yes.

MR. RINEHART: I don't believe that he could. In fact, I deny that he could.

THE COURT: Very well.

MR. RINEHART: I wish I could, but I'll not detain anyone further in this matter.

MR. CHIEF JUSTICE WARREN: Mr. Carter?

REBUTTAL OF ROBERT L. CARTER, ESQ., ON BEHALF OF PETITIONER

MR. CARTER: If the Court please:

Mr. Justice Brennan and Mr. Justice Black expressed some interest in some of these pleadings which are not here. As you know, this was an ancillary proceeding and this was the record which was certified and printed from the Clerk of the Supreme

Court of Alabama. Now if the Court desires and with the Court's permission, I would undertake to get the motions and all the other pleadings, if that is the desire with respect to the motion to stay, the first petition for certiorari, the bill of complaint filed by the State, and our answer. If the Court desires me to do that, I will certainly undertake to do that.

THE COURT: Do you have them here?

MR. CARTER: No, sir; we do not. I have them in my office in New York and I could have them printed, if that's what the Court wants me to do.

THE COURT: I don't think it's necessary to have them printed. But if you have a copy of them that could be delivered to our Clerk, please do so. And if you have any additional documents that you'd like to have filed with the Clerk, you may do so also, Mr. Rinehart.

MR. RINEHART: Thank you, Your Honor.

MR. CARTER: I think that the ultimate question—the preliminary question rather, of jurisdiction, of course, will be decided by this Court on a reading of the cases. But on the questions that were asked Mr. Rinehart, I would like to direct the Court's attention to page 15, an excerpt from *Ex parte Dickens* which we set out on page 15 of our petition for certiorari, which I think shows without question that on certiorari the court does go into the validity and the merits of the order which is disobeyed.

THE COURT: You said it does go. Mr. Rinehart very candidly admitted that in fact the Supreme Court of Alabama goes ahead and talks about things which it says it needn't talk about but that it does so, merely makes a speech as it were, because it restricts its decision to what it needs to restrict it to, namely, whether the jurisdiction is maintained on the face of the document. In other words, if the State says: "We go on this ground, on this state ground—you've taken the wrong turning, you've followed the wrong procedure. But we're loose up here and we talk about things we needn't talk about and so we make a speech."

MR. CARTER: I don't think, Mr. Justice Frankfurter, that a reading of the cases which we cite will sustain that position, except here. On certiorari the Supreme Court of Alabama talks about First Amendment freedoms, freedom from—privilege of self-incrimination and indicates, as this excerpt says, that they will go into the merits. And these opinions are not that: We will go no further. These opinions are clearly on point.

But as I say, the Court will read the decisions and come to its own conclusion.

THE COURT: May I ask, Mr. Carter: Are you suggesting that *Dickens, Wheeler, Blakey, Boscowitz, Sellers,* support your position, is that it?

MR. CARTER: Yes, sir.

THE COURT: And those are the ones you rely on particularly?

MR. CARTER: Those are the ones we rely on.

THE COURT: And what about *Armstrong*?

MR. CARTER: Well the reason I cited the *Armstrong* case was merely to show at times the Supreme Court of Alabama has treated these various papers filed—even though they were called something else—has treated them as the proper paper. In other words, *Armstrong* could have come up on—should have come up on, Alabama said, on certiorari. It was called a petition for a writ of mandamus, and the Supreme Court of Alabama said: "We will treat as a petition for certiorari."

THE COURT: Well it said the averments, as I read it, were sufficient so that it might be considered as a petition for certiorari.

MR. CARTER: Because of the fact that in the Alabama pleadings, one asks on these pleadings for "such other and further relief as the court may deem appropriate," and on the basis of that the Supreme Court of Alabama said that: "We will treat this as a petition for a writ of certiorari, which of course, is an entirely different question." And we merely raised this to show that the procedure is not as strict on this issue as the State attempts to maintain.

THE COURT: On what, or from what, did you take your petition for certiorari to the court, the supreme court?

MR. CARTER: We took our petition for a writ of certiorari to the supreme court from the interlocutory or the restraining order, from the first and second adjudications of contempt.

THE COURT: Of contempt?

MR. CARTER: Yes, sir.

THE COURT: Has the Supreme Court of Alabama, unless in this case, made a specific repudiation of what it said in *Ex parte Dickens*?

MR. CARTER: No, sir.

THE COURT: In that case they had the question of certiorari as a proper remedy to review contempt. The court said: "We think that certiorari is a better remedy for mandamus, because the office of a mandamus is to require the lower court or judge to act, and not to correct error or to reverse judicial action."

Has that been referred to in later cases?

MR. CARTER: That has not been repudiated. That has been the law, as we understood it, until the decision in this case.

THE COURT: Was this case referred to in the decision of the supreme court?

MR. CARTER: *Ex parte Dickens* was referred to in the decision of the supreme court.

THE COURT: In this case?

MR. CARTER: In this case.

THE COURT: What was said about it?

MR. CARTER: Let me find it.

[Pause].

MR. CARTER: Beginning on page 24, the last paragraph, the court says of the record—I'm sorry, where we set out the court's opinion—the court says:

> On the petition for certiorari the sole and only reviewable order or decree is that which adjudges the petitioner to be in contempt. Certiorari cannot be made a substitute for an appeal or for other method of review. Certiorari lies to review an order or judgment of contempt for the reason that there is no other method of review . . .

citing *Ex parte Dickens.*

THE COURT: They also referred to it—did they distinguish it on the ground that one was civil contempt and one was criminal contempt?

MR. CARTER: As I understand the decision here, the distinction between civil and criminal contempt is not reached at certiorari, but the question of what fine the court below may impose. In criminal contempt under Alabama law, the court is limited by statute to the amount of fine. If an individual—they can incarcerate an individual; they can incarcerate for five days, and the fine is fifty dollars. On civil contempt the court's power is unlimited to

the kind of punishment it may impose. And this is the distinction which apparently—not apparently—which the court makes with respect to this case.

As we read the decision—and *Ex parte Dickens* is referred to throughout the opinion—the court really is misquoting and misciting its own decisions, because *Ex parte Dickens* specifically says that certiorari used to be limited to jurisdiction or questions of jurisdiction, but now it reaches the question of the merits.

I see my time is up, but I just want to—

MR. CHIEF JUSTICE WARREN: You may have five minutes in which to summarize your argument.

MR. CARTER: Thank you.

Well, our position here and our contentions are that: This is not appropriately a proceeding to require us to register. I think that's clear from what was said today and it's clear from the papers and what has happened in this case; that if Alabama wanted the corporation to register—we offered to register and we would have done so. So this is not really what this case is all about.

We think that Alabama, because of the ideas which we espouse, that Alabama has sought to use our failure to register—which they knew for a long number of years and which has been very obvious in Alabama for many years—our failure to register as a device to suppress the organization and to oust us from the State.

THE COURT: I don't want to take your time, but I don't understand why you argue this because, unless I completely misunderstand Mr. Rinehart, the State isn't arguing here that we have to pass on Alabama's right of ouster. That isn't the issue at all.

MR. CARTER: I understand the—

THE COURT: The issue here is the validity of the contempt order as against certain constitutional claims. Isn't that right?

MR. CARTER: Yes. But our position is, if the Court please, that at the very outset the Alabama court, the court in this instance took illegal action because the only action that we are aware of that Alabama could exert against the corporation for failure to register was the action for statutory penalties, which are set out in our brief at page 35. So that we are faced at the very outset with being put out of business without a hearing, and then being ordered, as a condition of having a hearing on the merits at that point, we are then required to either submit to unconstitutional conditions or, in effect, stay out and have a final judgment entered against us in effect because we cannot prosecute this claim until the contempt proceeding has been finally adjudicated.

As I indicated yesterday, our view is that the order requiring our members to—requiring the production of the names of our members has no relevance to the question of whether or not we are doing business in the State. And particularly we believe this is so since we have taken that issue out of the case by ourselves indicating to the State that we are willing to comply with the law insofar as registration is concerned.

THE COURT: Do you know, Mr. Carter, that the court's order required such, and that order stands until vacated by such procedure which Alabama affords?

MR. CARTER: Yes, sir.

THE COURT: Or until it's at least raised in some way which the Alabama law specifies.

MR. CARTER: You're talking of the temporary restraining order?

THE COURT: No, now I'm talking about the order to produce.

MR. CARTER: Yes, sir. I agree.

THE COURT: And isn't the same thing true on the temporary restraining order? Then the court had jurisdiction and the power to handle it, the trial court, whether it's right or wrong. Now until a motion to dissolve it has been denied, you're not out of that court, no way to go anyplace else. Isn't that right? And therefore you can't have a review of that temporary injunction until you have had an order or ruling on the motion to dissolve.

MR. CARTER: Well, we think that that order was put in issue, necessarily put in issue, by the opinion of the Supreme Court of Alabama which indicated that the court below had jurisdiction. That when it went to the question, we contend that it had no jurisdiction to oust us from the State on the basis of this pleading; and that therefore the temporary restraining issue is at issue, because we raised it in the Supreme Court of Alabama. In other words, we think that not only is Alabama wrong in ordering us to produce the names of our members, but we think that at the outset the state court was wrong in disolving, in fact, barring us from the State without a hearing, because our contention is that there is no authority under Alabama law and on the basis of this record for this to be done.

THE COURT: The thing that you say bars you from Alabama is the temporary injunction.

MR. CARTER: That's right.

THE COURT: Is that before us: Can there be a review of it until a motion to dissolve it has been presented and denied?

MR. CARTER: Well our theory, if the Court please, our theory is that it is before, properly before, the Court because Alabama acted arbitrarily in the first instance.

THE COURT: In issuing the order?

MR. CARTER: In issuing the temporary restraining order on the basis of this record, that there was no jurisdiction.

THE COURT: Well, can the Court [Inaudible]?

MR. CARTER: Well, our contention is that there was no jurisdiction under Alabama law to do what—to restrain us on the basis of this record, as a foreign corporation, for our failure to register. This is our contention. And that when the court, the Supreme Court of Alabama sustained jurisdiction, that it necessarily approved the jurisdiction of the court in this respect and that is before the Court here.

THE COURT: Well I would think it would naturally follow that if the court had no jurisdiction over the cause, then everything it did was of no import.

MR. CARTER: Well, our view is—that is our view. Our view is that they had no right; that the only thing—

THE COURT: Not right now; jurisdiction.

MR. CARTER: —no jurisdiction. The only power that the Alabama court had, on the basis of our failure to register, was to (1) require us to register or issue the statutory penalties set out on page 35 of our brief.

[Whereupon, argument in the above-entitled matter was concluded.]