

# Supreme Court of the United States

In the Matter of:

Docket No. 3

Richard Allen, et al.,

Appellants,

vs.

State Board of Elections, et al.,

Appellees.

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Place Washington, D. C.

Date October 15, 1968

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# C O N T E N T S

## P A G E

Oral Argument of Norman C. Amaker, Esq.  
on behalf of Appellants

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Argument of R. D. McIlwaine, III  
on behalf of Appellers

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Rebuttal Argument of Norman C. Amaker, Esq.  
on behalf of Appellants

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 -----x  
4 Richard Allen, et al., :  
5 Appellants, :  
6 v. : No. 3  
7 State Board of Elections, et al., :  
8 Appellees. :  
9 -----x

10 Washington, D. C.  
11 Tuesday, October 15, 1968

12 The above-entitled matter came on for argument at  
13 1:25 p.m.

14 BEFORE:

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

24 APPEARANCES:

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P R O C E E D I N G S

MR. JUSTICE BLACK: Number 3, Richard Allen, et al.,  
versus State Board of Elections, et al.

THE CLERK: Counsel are present.

MR. JUSTICE BLACK: Mr. Amaker.

ORAL ARGUMENT OF NORMAN C. AMAKER, ESQ.

ON BEHALF OF APPELLANTS

MR. AMAKER: May it please the Court, this case on  
appeal here from a three-judge court for the Eastern District  
of Virginia presents two issues of first impression in this  
Court.

One is constitutional, and the other is statutory,  
respecting the right of illiterates, who, as a result of  
the passage of the Voting Rights Act of 1965, became eligible  
to vote for the first time in Virginia and elsewhere, to cast  
a secret ballot for the candidate of their choice and to  
have that ballot counted for their candidate just as every  
other qualified voter in the State of Virginia.

The constitutional question is whether these  
illiterates, who by the last census were more than three per  
cent of the persons in Virginia over fourteen years of age,  
can, consistent with the Fourteenth Amendment, be barred  
from the Equal Protection Clause of that amendment and be  
barred from protecting their right to a secret ballot by  
use of a gummed sticker bearing the name of the candidate



1 of their choice in the face of a Virginia statute requiring  
2 that any write-in vote be in the voter's own handwriting.

3 The statutory issue is whether the handwriting  
4 provision of this statute, which is Virginia Code, Section  
5 24-252, the text of which is at page 2 of our brief and at  
6 page 68a of the appendix, is a test or device prohibited  
7 by subsection 4(a) of the Voting Rights Act. The complete  
8 text of that section is at page 5, and begins at page 5 of  
9 our brief.

10 Our contention on the constitutional issue is  
11 that the Equal Protection Clause is violated because illiterates  
12 who want to cast a write-in vote without disclosing the  
13 nature of that vote to state officials are prevented from  
14 doing so, while Virginia has provided for the protection of  
15 the secrecy of the ballot for other classes of voters.

16 On the Voting Rights Act issue, we assert the  
17 refusal to count the illiterates' write-in ballots which  
18 occur here is a denial of the right to vote as defined in  
19 the Voting Rights Act of 1965, by using a prohibited test  
20 or device.

21 Now, at the threshold, because this Court postponed  
22 decisions as to jurisdiction, is the question of the Court's  
23 jurisdiction to decide these issues on this appeal.

24 The appeal, of course, is based on 28 USC Section  
25 1253, in that the appeal is from an order denying a

1 permanent injunction in a civil action required to be heard  
2 and determined by the District Court of three judges.

3 The argument that the case is one that is required  
4 to be heard by a three-judge court is of course based on  
5 28 USC Section 2281.

6 The argument is in our brief beginning at page 23.  
7 In sum it is as follows:

8 First, that 28 USC Section 2281 requires a three-  
9 judge court to hear a case seeking an injunction against  
10 the enforcement of a state statute on the ground of its  
11 unconstitutionality. That is the claim that appellant pre-  
12 sents to the District Court here.

13 Second, it met the formal requirements for invoking  
14 the three-judge court jurisdiction -- the single district  
15 judge who received the application for the three-judge court  
16 acted routinely on the application, and indeed the three-  
17 judge court itself never raised any question as to its juris-  
18 diction.

19 It proceeded to decide the case on the merits of  
20 both the constitutionality and the statutory issue.

21 Fourth, the appellees never raised any question  
22 as to jurisdiction in the District Court, and I could not  
23 understand their brief in this Court to be raising any ques-  
24 tion as to jurisdiction now.

25 Certainly, the constitutional question is a

1 substantial one, it is one of first impression, and conse-  
2 quently it has not been foreclosed by any prior decisions  
3 of this Court.

4 The inclusion of the statutory claim under the  
5 Voting Rights Act did not operate to divest the three-judge  
6 court of the jurisdiction that it acquired as a consequence  
7 of appellants' constitutional claim.

8 Finally, what is obvious, Virginia Code, Section  
9 24-252, is a statute of statewide applicability in Virginia,  
10 and so there is no question of dealing with a statute on  
11 the local application.

12 We also join in our brief in arguments beginning  
13 at page 28 an alternate jurisdictional ground under the  
14 Voting Rights Act, but it seems that the constitutional  
15 basis for the jurisdiction of the three-judge court is  
16 sufficient and, with the Court's permission, I would like  
17 to pass on to the merits.

18 Turning to the merits, I think it is important to  
19 state a couple of propositions.

20 First, the Court is not being asked to rule on the  
21 question of whether the Fourteenth Amendment prevents the  
22 state from barring the use of stickers by all segments of  
23 the electorate at any time.

24 To the extent that the state courts, a handful of  
25 them, have dealt with that question, the majority view had

1 upheld the right to use stickers, and those cases are cited  
2 both in our brief and in the brief of the appellees.

3 Nor is the Court being asked to deal with the  
4 question of whether Virginia would have a right to set a  
5 voter qualification, because the effect of the Voting Rights  
6 Act on this proceeding was to enfranchise illiterates, and  
7 so the real question before this Court is one of the State's  
8 responsibility toward illiterates who are qualified voters  
9 with respect to two areas.

10 First there is the preservation of the secrecy  
11 of their ballot, and, second, with respect to the assurance,  
12 the certainty to them, that the ballot will be counted for  
13 the candidate of their choice, thus preserving their right  
14 to choose.

15 Now these issues arise out of the following circum-  
16 stances:

17 Samuel Tucker, a well-known Negro civil rights  
18 lawyer, was running as a write-in candidate for Congress  
19 in the last Congressional election, in 1966, from Virginia's  
20 Fourth Congressional District.

21 Now the Fourth Congressional District of Virginia  
22 is in an area that is commonly called southside Virginia,  
23 and it is an area in which there exists the largest black  
24 population in the State, and also the largest percentage of  
25 the State's illiterates.



1           The last census indicated that of persons over  
2 fourteen years of age in that district, approximately 94,000  
3 were persons who were illiterate.

4           Q     That was over fourteen?

5           A     I am sorry. The figure I gave you was for  
6 the State of Virginia at large, the State as a whole. The  
7 Fourth Congressional District had 22.9 of persons over 25  
8 years of age who were illiterates.

9           On the ballot were listed two white candidates,  
10 the incumbent, Mr. Watkins Abbott, who had been, to that  
11 point, serving the Congress for twenty years, since the 80th  
12 Congress, and his opponent, the Republican candidate, Mr.  
13 Silverman.

14          Mr. Tucker who had run in the previous Congressional  
15 election and who was then listed on the ballot did not qualify  
16 in time for his name to be listed on the ballot in this  
17 election, and he was later urged to run as a write-in  
18 candidate by his supporters who were in the main Negroes who  
19 wanted no part of either candidate who was listed on the  
20 ballot.

21          Now, they sought to maximize the vote for Tucker  
22 by inclusion of this relatively substantial number of newly  
23 enfranchised illiterates who, as the District Court found,  
24 were, and I think this language is of some significance,  
25 who were registered voters but who were unable to spell

1 accurately or to write legibly.

2 Now, would you consider the choice that confronted  
3 these persons in these situations.

4 One, of course, was not to vote at all. Second,  
5 of course, was to vote for someone whose name was on the  
6 ballot that they didn't want. And, third, it was to disclose  
7 their vote to white state election officials who, pursuant  
8 to Virginia law, are appointees of the dominant political  
9 parties in the State, in an area like southside Virginia,  
10 an area which includes Prince Edward County, which is familiar  
11 to this Court from prior litigation, an area in which they  
12 could anticipate the kinds of things that the Civil Rights  
13 Commission report has highlighted and, indeed, the kinds  
14 of things that resulted in the passage of the Voting Rights  
15 Act in the first place.

16 So to solve the dual problem of being able to  
17 exercise a choice, but at the same time trying to keep that  
18 choice hidden from the dominant white political apparatus  
19 which had opposed for decades the participation of black  
20 members of the electorate, they used what to them was a  
21 very simple means of having printed, gummed stickers, just  
22 the form that I am illustrating here, which is Plaintiff's  
23 Exhibit Number 1, which simply said, "S. W. Tucker", the  
24 point being that the illiterate person when he went to the  
25 polls could simply put that on the ballot, fold his ballot

1 and in accordance with the Virginia procedure hand it to  
2 the election official to deposit in the ballot box.

3 Now, the proposition that is urged by Virginia is  
4 that the use of stickers is, per se, invalid.

5 Apparently, in reading the District Court's opinion,  
6 that court thought that this was a central issue in the case  
7 and that the Virginia Legislature had forbidden their use  
8 in toto.

9 But I think this, of course, misses the point,  
10 which is that once these persons were enfranchised by the  
11 Voting Rights Act of 1965, it became Virginia's responsibility  
12 to provide some means for assuring the secrecy and the cer-  
13 tainty of the ballot among all of its qualified voters.

14 In fact, Virginia has, and prior to the 1965  
15 Voting Rights Act, made accommodations with respect to these  
16 qualities with respect to other classes of voters.

17 Virginia's constitution, itself, guarantees the  
18 right of secrecy of a ballot, and there are several other  
19 provisions in the State's Code, all of which fix on the  
20 importance of keeping the ballot secret.

21 But Virginia has not done this in the case of these  
22 illiterates. Rather, among all of the voters who are quali-  
23 fied, it has set up classes of voters and discriminated among  
24 them both with respect to the question of the secrecy of the  
25 ballot, with respect to assurance to the voters that the

1 vote will in fact be counted for the candidate of his choice,  
2 and in an additional respect, too, particularly as regards  
3 illiterates, Virginia has made it easier for the illiterate  
4 to vote for a candidate whose name is listed on the ballot,  
5 but it has discriminated with respect to an illiterate who  
6 chooses to vote for a candidate who is running a write-in  
7 campaign.

8 Q But the Virginia statute does try to make an  
9 effort to insure the secrecy of the ballot of a write-in  
10 by placing the judge who presumable knows, making it incumbent  
11 upon him to have some confidentiality of what the voter does,  
12 and make it a crime if he doesn't, isn't that right?

13 A That is not entirely right, Mr. Justice Fortas.

14 First of all, there is no Virginia statute which  
15 does that. What you have reference to is a bulletin which  
16 was sent by the secretary of the State Board of Elections  
17 to all of the judges of election in October of 1965. It is  
18 Defendant's Exhibit 4.

19 Q I was talking about 24-251 of the Virginia  
20 Code, but your point is that that does not apply to an  
21 illiterate except by virtue of the subsequent directive?

22 A That is right.

23 Q Thank you.

24 A So the question is what about the illiterates  
25 who desire to cast write-in votes as did the appellants



1 here when it is obvious that under the State's own categories  
2 that they set up for protecting the secrecy of the vote  
3 they are the least favored class. Let us see what these  
4 differences are.

5 With respect to each of the three things which I  
6 think are extremely important here, the question of secrecy,  
7 and the question of what I call certainty, or surety that the  
8 vote will in fact be cast for the person that the person  
9 intends it to be cast for, and with respect to the difference  
10 between voting for a listed candidate as opposed to a write-in  
11 candidate.

12 Now, of course, the literate voter is fully pro-  
13 tected on all of these scores. Whether it is a voting  
14 machine or whether it is a ballot, he can vote in absolute  
15 secrecy, and he can, himself, assure that his vote is cast  
16 for the candidate of his choice, and there is no discernible  
17 problem between voting for a candidate whose name is on  
18 the ballot as opposed to writing in a name, except the  
19 small amount of inconvenience that it takes to write the  
20 name.

21 The statute that Mr. Justice Fortas referred to,  
22 24, Section 251, is reproduced in our brief at page 3. It  
23 sets up other categories with voters who in some sense have  
24 to be singled out for special treatment, and let us see what  
25 Virginia has done with them.

1 First, there is a category of a blind voter.

2 Now, obviously, because the blind voter is under a special  
3 disability, Virginia has taken some steps to assure capacity  
4 for him to make his vote effective in all of these ways that  
5 I have indicated.

6 But what it has done is to say that the blind  
7 voter can be assisted in casting his vote, either a write-in,  
8 or a voting for someone listed, by a person of his own selec-  
9 tion. That person, of course, can be a trusted friend.

10 It has done one additional thing. It has provided  
11 criminal sanctions to enforce the right of the blind voter  
12 to secrecy, the right of the blind voter to make sure that  
13 his ballot is, in fact, cast for the person that he intended  
14 it to be cast for.

15 Now the physically handicapped voter is one who  
16 can be assisted only by an election judge which he can desig-  
17 nate, and there are criminal sanctions as in the case of a  
18 blind voter. But what the physically handicapped voter has  
19 to do then, even though he is protected with respect to  
20 being himself physically to see how his vote is cast, so  
21 that he can himself determine whether in fact the vote is  
22 being cast for the person that he intended, he has to give  
23 up some measure of the secrecy.

24 But again there is a sanction.

25 The same applies to that small category of persons

1 born before 1904, persons who would be over 80 years of age,  
2 persons who were registered before 1904.

3 But the illiterate, under Virginia law as it  
4 presently stands, must first sacrifice his secrecy to a  
5 state official that he chooses to vote in accordance with  
6 the election vote. There is no criminal sanction to enforce  
7 his right of secrecy as opposed to the state election  
8 official. He has no assurance, both because he is very much  
9 like the blind voter, he cant see how the ballot is being  
10 marked and because there is no criminal sanction, he has no  
11 real assurance that the vote is going to be cast for the  
12 candidate that he intended it to be cast for, and he suffers  
13 also a substantial discrimination with respect to his capacity  
14 to vote for a write-in candidate as opposed to a listed  
15 candidate.

16 What we have called in our brief this crazy quilt  
17 of classification has been condemned by this Court in a  
18 variety of ways under the Fourteenth Amendment.

19 We have cited some of those cases in our brief.  
20 There is the Harrington case, and the Skinner v. Oklahoma  
21 case, and others.

22 Q But I notice in the bulletin sent to state  
23 judges of election, on page 15 of your brief, there is an  
24 admonition that the judge of elections shall assist the  
25 voter upon his request, and shall not in any manner divulge

1 or indicate the name or names of the person for whom any  
2 voter shall vote.

3 Is it your point that there is no sanction behind  
4 that?

5 A Yes.

6 Q There is nothing provided in the law to  
7 enforce that?

8 A There is no sanction, and the Equal Protection  
9 point, of course, is with respect to the other classes of  
10 voters, all of whom, like the illiterates, are qualified  
11 persons.

12 Q I understand, but I was talking about this  
13 specific question, is there anything in Virginia law that  
14 authorizes the State Board of Elections to issue something  
15 like this and if there is, does that provision of Virginia  
16 law provide any sanction?

17 A I know of none. Virginia says that the  
18 reason for the issuance of the election bulletin, which is  
19 clear, was the passage of the Voting Rights Act.

20 Virginia, as did several other states prior to the  
21 passage of that, made no provision for illiterates at all.  
22 It obviously, particularly as a consequence of this Court's  
23 decision in Lassiter, felt it was under no obligation.

24 When the Act was passed in 1965, Virginia for the  
25 first time tried to accommodate itself to the new requirements,



1 and this electoral bulletin is the result. That is deficient  
2 in several respects but the most important respect, it seems  
3 to me, in addition to the fact that there is no sanction, is  
4 the fact that even assuming the sanction the other very  
5 important consideration, very important at least in the  
6 minds of the persons who attempted to use the stickers in  
7 this election, is the fact that they would nevertheless  
8 have to divulge the nature of their vote to a state election  
9 official.

10 So the electoral bulletin really doesn't meet that  
11 aspect of the problem.

12 Q Well, what it does do, doesn't it, is include  
13 illiterate people in that group covered by Section 24-251?

14 A I am not sure it does. I think that is what  
15 it attempts to do. I think it is interesting to note that  
16 certainly in terms of the last election that nobody who  
17 voted at that time knew anything about this. This bulletin,  
18 the first time anybody heard about it, when it was introduced  
19 and when it was raised in the brief that was filed in the  
20 District Court, in response to a motion for summary judgment.

21 Q That was about two years ago, the election  
22 two years ago?

23 A Yes, the election was two years ago, but the  
24 bulletin had been issued in October of the previous year.

25 Q I suppose whether or not there was authority

1 to do it is probably a matter of state law. If Virginia  
2 tells us that it is a matter of state law, that is probably  
3 the answer, isn't it?

4 A I dont think that that is the answer insofar  
5 as you have to give up a very substantial part of your  
6 secrecy to a voting official.

7 Q So does anybody else who is physically unable  
8 to prepare his ballot without aid, so you may be right,  
9 but it is hardly an equal protection claim except insofar  
10 as those people approach it differently from blind people.

11 A I think the closest approximation, if you are  
12 going to make one, is to the persons who are blind. The  
13 illiterate, like the blind person, is incapable of really  
14 seeing the ballot in terms of making sure his wishes are  
15 being carried out. But it seems to me the responsibility  
16 is broader than that.

17 The responsibility is not to do the very least  
18 but to do the very most to assure that the ballot is secret  
19 for everyone. I think it is in that respect that Virginia  
20 has failed.

21 Q What Virginia has prohibited is the use of  
22 stickers to anybody, illiterate or literate, handicapped  
23 or unhandicapped, and blind or not blind. No voter in  
24 Virginia can use a sticker.

25 A That is not entirely sure. I do know that that

1 is what they claim in this case, but the claim is as a conse-  
2 quence of the statute that is under attack, and the addi-  
3 tional argument --

4 Q It was the Attorney General's opinion.

5 A They have raised the Attorney General's  
6 opinion, whatever effect that has. The Virginia statute that  
7 we are challenging is one that was suspended by the Voting  
8 Rights Act of 1965, and they so indicate. I am not sure  
9 it is correct to state that Virginia has prohibited the use  
10 of stickers.

11 But if you recall, I did not cast the issue in  
12 that narrow focus. What the submission is here is on the  
13 question of whether Virginia, consistent with the Equal  
14 Protection Clause, has fulfilled its responsibility to make  
15 sure that these illiterates have the right to a secret  
16 ballot, and also have the right to somehow be certain that  
17 when they cast that vote, whether for a listed candidate  
18 or write-in candidate, that that vote will be effective,  
19 because this is the thing that was uppermost in the minds  
20 of the appellants here.

21 I have about three minutes which I would like to  
22 reserve for rebuttal.

23 MR. JUSTICE BLACK: Mr. McIlwaine.  
24  
25

1 ARGUMENT OF R. D. McILWAIN, III

2 ON BEHALF OF APPELLEES

3 MR. McILWAIN: Mr. Chief Justice, as counsel for  
4 the various Virginia election officials in this matter, I  
5 should like to establish at the outset, if I may, just what  
6 this case involves.

7 Perhaps the best way to do that is to call atten-  
8 tion to the opening paragraph of the court's opinion below,  
9 and which contains all of the operative facts out of which  
10 this case arose.

11 In four brief sentences the court below has stated  
12 the entire case presented by the plaintiffs in the trial  
13 court. It was to the effect in sentence one that plaintiffs  
14 are registered voters who are unable to spell accurately  
15 or write legibly, who attempted to cast a write-in ballot  
16 in the 1966 Congressional elections in the Fourth District  
17 of Virginia.

18 Second, each one attempted to do this by pasting  
19 on the official ballot a sticker in which the name of a  
20 write-in candidate had been printed and voting for the name  
21 printed on the sticker.

22 Third, these ballots were not tabulated in the  
23 official returns for the write-in candidate.

24 The fourth sentence begins, "Upon these undisputed  
25 facts, the Plaintiffs seek a declaratory judgment that rights



1 secured to them by the Fourteenth Amendment of the Constitu-  
2 tion of the United States and the Voting Rights Act of 1965  
3 have been denied."

4 Now, we submit that the only question that can be  
5 raised by that set of facts is whether or not the refusal  
6 of the Virginia election officials pursuant to Virginia law  
7 to count these votes which were cast by means of labels and  
8 stickers or pasters violated some right secured to illiterates  
9 in the Fourth District of Virginia, a right secured by the  
10 Fourteenth Amendment or by the Voting Rights Act of 1965.

11 We know full well that the Fourteenth Amendment  
12 to the Constitution of the United States does not secure  
13 that right to anyone else in the United States. The Four-  
14 teenth Amendment per se does not even secure to an illiterate  
15 the right to vote at all, much less to select the means by  
16 which he will vote.

17 The cases are perfectly clear that the matter of  
18 whether or not stickers and pasters shall be permitted as  
19 an appropriate means of voting is a matter to be determined  
20 by each individual State, and regardless of whether the State  
21 prmits it or rejects it, neither determination of that question  
22 is violative of the Fourteenth Amendment.

23 The case in the Seventh Circuit and the case of  
24 Morris versus Fortson, the recent case in Georgia, since  
25 the enactment of the Civil Rights Act, clearly settles this

1 matter.

2 So the assertion of the plaintiffs on this matter  
3 is that of all of the people in the United States they alone  
4 as illiterates have the right to vote with stickers.

5 Q How could the vote be secret otherwise?

6 A I don't know how it could be secret otherwise,  
7 but I am of the opinion, as the lower court is, that they  
8 are not entitled to a secret ballot.

9 Q I was just wondering if the elected official  
10 wrote the name, and the illiterate person took it in the  
11 booth, he could tell the difference between handwriting  
12 and printing, he could vote.

13 A He could do that under Virginia law. He is  
14 simply requested to furnish him assistance and to insure that  
15 his ballot is marked in accordance with the way he wants it.  
16 There is no requirement --

17 Q No, my point is all the official does is to  
18 write in the name of Joe Doe, and then the voter takes that  
19 ballot in by himself without the official, and he puts an  
20 X, which he can do, either in front of a printed name or  
21 the handwritten name, by himself without anyone seeing what  
22 he does.

23 A That could be done, if Your Honor please.  
24 Of course the secrecy of the ballot would be compromised in  
25 any event, to the extent that he carries a ballot to an

1 election official and asks him to write Joe Doe's name on it.

2 Q How can he do it then in a secret manner?

3 A I don't understand that he can, and I don't  
4 understand that he is required or entitled to complete  
5 secrecy of the ballot either by the Fourteenth Amendment  
6 or the Voting Rights Act.

7 Q How about the Constitution of Virginia?

8 A Only to the extent that regulations issued  
9 by the General Assembly of Virginia statutes pursuant to  
10 Section 36 of the Virginia Constitution state that in order  
11 to obtain the uniformity in elections, the General Assembly  
12 shall enact laws governing the conduct of elections.

13 Q Where is the requirement for secrecy? I  
14 thought it was in the Constitution.

15 A That is also in the Constitution, Your Honor,  
16 in Section 26.

17 It would not apply to anyone who was physically  
18 handicapped or educationally handicapped. As the cases make  
19 clear, the secrecy of the ballot, of the physically handi-  
20 capped must to some extent be compromised. There is no  
21 other way you can do it.

22 Q Except that you treat the Blind differently  
23 from the illiterate.

24 A If Your Honor please, there are two things.  
25 Every state treats the blind differently, and every state

1 has different methods of solving the problem of what you are  
2 going to do with the physically handicapped.

3 Q Do you think the Equal Protection Clause is  
4 a substantial question in the case, or are you objecting to  
5 the jurisdiction?

6 A No, we do not object to the jurisdiction of  
7 the three-judge court with respect to whether or not they  
8 have a right to cast that ballot by means of stickers or  
9 pasters, which was the only operative fact in this case.

10 Q So there was a substantial Equal Protection  
11 Clause with respect to the three-judge court?

12 A I think in viewing the complaint, the assertion  
13 that the Virginia statute as it then stood forbade them to  
14 cast their ballots by this method and the prayer for relief  
15 was attempting to enjoin it, to require the voter to cast  
16 his write-in vote in his own handwriting, was sufficient for  
17 the District Judge in scanning that complaint to think that  
18 the question was not entirely clear and to call for a three-  
19 judge court.

20 Q The only issue in the lower court was the  
21 validity of the statute requiring handwriting?

22 A With respect to stickers or pasters on the  
23 ballot. In other words, until this case was argued here,  
24 I did not know that this was a race case. I don't find the  
25 word Negro in the complaint. I don't find it in the court's

1 opinion. It is not. It is a simple question of illiterates,  
2 and in the lower court it was simply argued that these persons  
3 were functionally illiterate without regard to race or color.

4 Q Well, would Section 4 of the Voting Rights  
5 Act, was that involved?

6 A No, sir. The only argument made on the Voting  
7 Rights Act was the test or device proposition, and that in  
8 requiring the individual to cast the ballot in his own hand-  
9 writing that constituted a device.

10 Q And it was suspended?

11 A Yes, but that was admitted, if Your Honor  
12 please, and so there was no controversy on that in the  
13 lower court.

14 Q And there still isn't?

15 Q And the statute was suspended?

16 A And within a week after the enactment of the  
17 Voting Rights Act of 1965, the State Board of Elections  
18 and the Attorney General of Virginia together issued a  
19 bulletin. Actually it was issued by the State Board of  
20 Elections which flatly states, which Your Honors will find  
21 in the record, the Voting Rights Act had superseded in so  
22 many words the Virginia statute requiring people to register  
23 to vote in their own handwriting and directing the registrars  
24 in Virginia to register people who were illiterate and couch-  
25 ing that regulation almost verbatim in the form of a Civil



1 Service regulation issued to federal examiners to guide  
2 them in the method by which they would enroll illiterate  
3 voters in States affected by the Act.

4 Then three weeks before the election, another  
5 bulletin was issued in which the election officials were  
6 instructed to assist illiterate voters in casting their  
7 ballots and broadening the provisions of the Virginia statute,  
8 which had heretofore limited assistance only to the physically  
9 handicapped, to include the illiterate.

10 Q Are you going to address yourself to the  
11 Memorandum filed by the Solicitor General?

12 A Only in the few remaining minutes of my  
13 argument, I had intended to touch upon it, but I am perfectly  
14 content to come to it now.

15 Initially significant with respect to that is the  
16 fact that the Solicitor General does not have one line in it  
17 which contains a hint that he was even remotely or con-  
18 ceivably supporting the position stated by the appellants  
19 in this case.

20 Q Do you challenge or do you contest the point  
21 that that issue is before us, or is it your position that  
22 that issue is not properly before us?

23 A Well, of course I take the position, Your  
24 Honor, that the issue is not properly before you because it  
25 was not raised as an issue in this case, and it was not passed

1 upon by the trial court. So that issue is one injected at  
2 this, the ultimate, level of appellate review by the Solicitor  
3 General.

4 Of course, it is before the Court in the sense  
5 that the Court invited the Solicitor General to express his  
6 views, and he has, and we do not object to filing a response  
7 to it or to stating our position. The only thing we object  
8 to --

9 Q You don't raise the jurisdictional question?

10 A No, sir, but we do object to this, and on  
11 this we wish to be perfectly clear, and we do object to the  
12 Solicitor General trying to turn this case, which was a  
13 straight case involving a question of whether or not a person  
14 could vote by means of a sticker or paster, into a case in  
15 which a complaint had been filed alleging that election  
16 officials had engaged in discriminatory practices and pro-  
17 posed to continue in those practices unless an injunction  
18 was issued under the Voting Rights Act of 1965, requiring  
19 them to register illiterates or to otherwise give up practices  
20 which had obtained prior to the enactment of the Voting  
21 Rights Act of 1965.

22 None of those practices have ever obtained in  
23 Virginia. Virginia has never taken the position that race  
24 has any relevance to a citizen's right to vote.

25 We took the position for years that race had a

1 great deal to do with the right of a person to attend a  
2 school or to marry, and those issues have been litigated  
3 and decided by this Court.

4 But Virginia has never taken the position that  
5 race has any relation to that, and we object most strenuously  
6 to any attempt to remand this case to the District Court  
7 to enable the plaintiffs to make a new case of it at the  
8 District level.

9 Q However that may be, the Solicitor General  
10 suggests to this Court that the bulletin issued by the  
11 Board of Elections constitutes a practice or procedure with  
12 respect to voting different from that in force or in effect  
13 on November 1, 1964, and therefore the Solicitor urges that  
14 this could not be used, or that directive of the Election  
15 Board could not be used without first being submitted to  
16 the Attorney General or the United States District Court  
17 for the District of Columbia.

18 It may be that we have to consider a point of law  
19 that he raises some way or another, that is to say, whether  
20 this is or it is not a practice or procedure with respect  
21 to voting different from that in force on November 1, 1964.

22 If it is, perhaps we have to consider whether its  
23 further use should be enjoined pending the clearances pro-  
24 vided by the Voting Rights Act of 1965.

25 A Well, of course, the Solicitor General does

1 make that assertion, Mr. Justice Fortas, and of course the  
2 Court can consider it. It is not a part of the record brought  
3 up on this appeal, and it is not a question raised by the  
4 jurisdictional statement, and it is a question inserted  
5 by the Solicitor General in this Court.

6 Now, in envisioning the possibility that the Court  
7 would consider the argument, we have stated why we feel  
8 that it cannot possibly be correct that the bulletins issued  
9 in this case were a practice or procedure within the meaning  
10 of Section 5a, and it is so obvious to us that it cannot  
11 be that we do not see how there can be two sides to the  
12 question.

13 If it was a practice or procedure, it would mean  
14 that when the Voting Rights Act became effective in Virginia  
15 on August 7, 1965, there was nothing that the Virginia elec-  
16 tion officials could do about it except continue to violate  
17 it.

18 This bulletin was issued within a week of the  
19 Voting Rights Act becoming effective, and it told the  
20 Virginia election officials that the Voting Rights Act was  
21 then in force in Virginia, and despite the provisions of  
22 Virginia law which do not permit illiterates to register,  
23 you are to begin to register.

24 Under the Solicitor General's argument, we couldn't  
25 do that.

1 Now suppose we had never written the regulation?  
2 Suppose we had waited ten months to write it? What is  
3 supposed to happen to the Voting Rights Act of 1965 in  
4 Virginia in the interim?

5 If we cannot enforce a bulletin which says that  
6 these instructions implement the Voting Rights Act of 1965.  
7 The Voting Rights Act superseded the provisions of Virginia  
8 law which forbid illiterates to register and forbid them  
9 to vote, and you are now required by the prevailing super-  
10 vening federal law to register illiterates. We did that  
11 even before South Carolina against Katzenbach was filed in  
12 this Court, and it prevailed, and illiterates were being  
13 registered in Virginia and being voted in Virginia, in  
14 controvention of Virginia law while Sluth Carolina case was  
15 being argued.

16 As a matter of fact, we issued those bulletins  
17 in 1965, and we passed through the general election of 1965  
18 without a murmur, and we continued for another year, and we  
19 have still had no difficulty with it until the question of  
20 voting for Mr. S. W. Tucker by means of a sticker or paster  
21 in the 1966 Congressional elections arose.

22 Q Mr. McIlwaine, you agree that the Civil  
23 Rights Act of 1965 was concerned with illiterates?

24 A Yes, sir.

25 Q Do you agree that the Commonwealth of Virginia



1 did take action in the form of a memorandum dealing with the  
2 question of how illiterates may vote after the Act?

3 A Yes, one how they may register and how they  
4 may vote.

5 Q And you still say that the Attorney General  
6 has nothing to do with that?

7 A The Attorney General of the United States,  
8 you mean?

9 Q Yes.

10 A I say it is not a regulation under Section 5a  
11 which he is required to approve in advance. I don't say  
12 he has nothing to do with it. He has brought a number of  
13 suits, and if he thinks these are improper regulations, he  
14 can bring a suit.

15 Q The action of the Commonwealth of Virginia,  
16 one of the States included under the Act, if that State  
17 takes action subsequent to the Civil Rights Act involving  
18 the right to vote of illiterates or the method of permitting  
19 illiterates to vote, it is not the type of action that  
20 should have been submitted to the Attorney General of the  
21 United States?

22 A That is correct. That is our position.  
23 Under the facts in this case, if that is so, then there were  
24 a number of illiterates voted at the 1965 election who  
25 would not have if we be required to submit that matter to

1 the Attorney General and wait for sixty days for him to  
2 express his opinion.

3 Q That is not before us?

4 A The whole question is not before you,  
5 Your Honor.

6 Q If Virginia has put out a regulation that  
7 illiterates may hereafter vote and may vote by a sticker,  
8 they may vote by a sticker but no other way, you would say  
9 that is implementing the Voting Rights Act?

10 A No, sir. I submit that if that is put out,  
11 I submit at anytime after the passage of the Voting Rights  
12 Act, the Legislature should amend its election laws, under  
13 the Voting Rights Act they are superficially at least re-  
14 quired to submit them to the Attorney General.

15 As the Solicitor General submits, a number of  
16 them are, and they are permitted to be enforced, even  
17 though they have not been officially avowed or disavowed by  
18 the Attorney General.

19 But I am submitting to Your Honors that these  
20 instructions which were issued immediately after the Act  
21 became effective, implementing the Act, were not such in-  
22 structions as were required to be submitted to the Solicitor  
23 General. Otherwise it would mean that the Solicitor General  
24 was empowered to suspend the operation of voting rights  
25 acts for a period of sixty days, or that the election officials

1 were empowered to do it simply by not submitting anything  
2 to the Solicitor General.

3 He can say, "We are sorry, we cannot help you.  
4 We are in the process of getting together a regulation for  
5 the registration of illiterates and the voting of illiterates.  
6 When we get it together, there is still nothing that we  
7 can do, and we have to submit it to the Attorney General.  
8 After that we have to wait sixty days, and if an election  
9 comes up and we haven't heard from you, you won't be able  
10 to vote."

11 Q I suppose the only alternative to that would  
12 be that someone should have authority meanwhile to prescribe  
13 some way for illiterates to vote?

14 A Someone should have authority to obey the  
15 Voting Rights Act of 1965. That is the way we viewed it  
16 in Virginia, if Your Honor please. That is why we put out  
17 the regulations.

18 So far as Section 5a, if it is that kind of a  
19 regulation, it has to come to the District Court of the Dis-  
20 trict of Columbia.

21 Q I know, but pending that, I mean?

22 A I don't think any other District Court is  
23 open to that question, of the validity of a regulation.

24 Q You mean if it is something that must be  
25 submitted, then there is nothing that any court can do meanwhile.

1 to permit the people to vote?

2 A Unless you could get immediate action of the  
3 United States District Court for the District of Columbia.

4 Q Isn't the sixty days sufficient, or are there  
5 alternatives?

6 A I think it is alternatives, and of course the  
7 Solicitor General could approve it. The law reads if there  
8 is no objection filed by the Solicitor General within sixty  
9 days, then it may be put into effect.

10 Now, there have been a number of cases, yes,  
11 in which this issue has been raised in Louisiana, in Georgia,  
12 in Alabama, and in Mississippi. In each of those cases,  
13 the relief granted by the District Court sitting in those  
14 cases, so far as illiterates are concerned has been to  
15 require the local election officials to assist the illiterates,  
16 and specific provision has been made.

17 None of those cases permit anyone other than an  
18 election official to assist the illiterate in casting his  
19 vote, though in those States the physically handicapped  
20 or the blind may be helped by a member of their family or  
21 a person of their choice.

22 In the cases which we had catalogued in our brief,  
23 the United States against Mississippi, Morris against Fortson,  
24 United States against Executive Committee, and United States  
25 against Louisiana, the relief granted by Federal District

1 Courts under the Voting Rights Act of 1965 is limited to  
2 permitting only election officials to aid the illiterate  
3 who have been enfranchised by the Voting Rights Act of 1965.

4 Specifically in United States against Louisiana  
5 that was true, and the court added that nothing contained  
6 in this order shall affect any of the State provisions  
7 relating to the casting of votes by the physically handi-  
8 capped or the blind.

9 At that time the physically handicapped and the  
10 blind were not permitted to be aided by election officials  
11 but could take a friend of their choice if they were blind  
12 or if they were otherwise physically handicapped, a member  
13 of their family.

14 Yet, when the decree was entered in that case,  
15 assistance to illiterate voters was limited by the court  
16 solely to election officials aiding the voters, and that is  
17 true in each of the four cases which are mentioned in the  
18 Solicitor General's memorandum and which we have analyzed  
19 in our brief.

20 Now we cannot believe that the Attorney General  
21 of Virginia is required to outdo just wisdom, Judge Quisenberry,  
22 and judges of the Fifth District, and go on to say you can  
23 do it by a sticker.

24 Q It may be that that question is not before us.  
25 Maybe we have two possibilities before us, and one is to



1 direct ourselves to the constitutionality of the requirement  
2 that the vote be cast in the voter's own handwriting, or,  
3 two, that we have to consider whether the Voting Rights  
4 Act requires that this new plan or new arrangement be pre-  
5 sented to the Attorney General.

6 But it seems to me to be quite arguable that we  
7 cannot now reach the question of the legality of that  
8 alternative method if we decide that the method should have  
9 been presented to the Attorney General in the first instance.

10 A Well, if the Court decides that that alternative  
11 is the proper one, it would of course, I assume, delay con-  
12 sideration of the other questions until the matter had been  
13 handled.

14 Perhaps the Court would remand it to the District  
15 Court.

16 Q However we did it, I think that we will have  
17 to delay it, don't you agree?

18 A Yes, Your Honor, but you would not delay  
19 reaching the question of whether or not Virginia's requirement  
20 that the voter vote in his own handwriting is constitutional,  
21 because of course that is not a requirement any longer.  
22 You don't reach the requirement because it isn't there.

23 Nobody is required to insert a write-in vote in  
24 his own handwriting if he is physically or educationally  
25 handicapped. That is the very statute that the Attorney

1 General said had been superseded and could no longer be  
2 enforced. So that you will never reach that question unless  
3 of course it is to be fabricated.

4 Because this case was one in which the plaintiffs  
5 came in and said, in effect, "Your statute requiring a  
6 write-in vote to be cast in the voter's handwriting has  
7 been superseded," and our response is, "You are quite right,"  
8 we have said so over a year ago.

9 Q Has the question ever come up about, and you  
10 mentioned other states, and has the validity ever been  
11 brought up in Virginia at all?

12 A The validity of what?

13 Q Of stickers.

14 A No, sir, except in the opinion of the Attorney  
15 General. The Virginia statutes require ballots which are  
16 printed, and if people want to mark their ballots, they  
17 mark them in a certain way, that is mandatory. Assistance  
18 must be given in a certain way. That is the only provision  
19 that we have.

20 Q Sticker voting is not permitted?

21 A No, not because there is a statute that says  
22 it is not permitted, but because the statute prescribed  
23 the method by which ballots shall be marked, and assistance  
24 shall be given.

25 Q What do you think is before us for decision in

1 this case, and not what the appellant urges, or what the  
2 Solicitor General has suggested, but what do you think is  
3 before us?

4 A The only thing that can possibly be before  
5 Your Honors for decision is whether or not the Fourteenth  
6 Amendment of the Constitution of the United States, per se,  
7 or the Voting Rights Act of 1965, guarantees anyone the  
8 right to vote by means of a sticker or paste-on, in violation  
9 of a state law to the contrary.

10 That is the only thing that I can say.

11 Q Is that the way that we will read the question  
12 as you submitted it? You have it in the section as imple-  
13 mented by the regulations.

14 A Yes, that is implemented by the regulations,  
15 and the illiterate is now granted the same right to assistance  
16 as the physically handicapped, and therefore you have to  
17 read the statute as implementing the regulations.

18 Q But I gather you have the question only of  
19 the use of stickers being before us, and that isn't necessarily  
20 true, only in the case of the illiterates.

21 A It is only in illiterates because that is the  
22 only class represented here. Physically handicapped are not  
23 in here or any racial classifications. It is only the  
24 illiterates, that is the only class that is here.

25 Q But the question is, I take it it is the same

1 question as you put it, this way: The question is whether  
2 or not it is unconstitutional for Virginia to permit  
3 illiterates to vote with the help of election officials.

4 A Yes, or without the means of stickers or  
5 pasters. That, you see, is the question. The action which  
6 caused this case to arise was the fact that these votes were  
7 cast in this manner and were not counted.

8 The action that is challenged is whether or not  
9 that failure of the election officials to count these votes  
10 cast by means of stickers or pasters violates some rights  
11 secured by the Equal Protection Clause. There is nothing  
12 suggested that anyone else be permitted to vote by stickers.  
13 There is no question of discrimination here at all.

14 I would simply point out, there is no evidence  
15 on the part of Virginia, so far as the persons who may  
16 render assistance is concerned with respect to the individual  
17 plaintiffs in this case, and the most recent publication of  
18 the State Board of Elections containing the instructions for  
19 the coming November 5 election have again been broadened,  
20 since this case, to permit the illiterate to be classified  
21 with the blind and request the assistance of the judge of  
22 elections or take in a person of his own choosing.

23 Until this case got to this Court, we didn't know  
24 that there was some issue of the power structure or some  
25 racial overtones to the case, which was certainly not clear

1 in the pleadings and not clear in the court's opinion.

2 But the most recent regulation published by the  
3 State Board of Elections have been drawn to permit the  
4 illiterate to be assisted by either a judge of election or  
5 a person of his choice.

6 Q Is that a new regulation?

7 A That is a new regulation.

8 Q Have you submitted that?

9 A No, it was only published last week. And  
10 I have copies which I can mail to you. It is on page 8.

11 Q Will you send that to us?

12 A Yes, I will be happy to.

13 Q All right.

14 REBUTTAL ARGUMENT OF NORMAN C. AMAKER, ESQ.

15 ON BEHALF OF APPELLANTS

16 MR. AMAKER: The only response to this most  
17 recent revelation we have, that is, the change in the bulletin  
18 is one which obviously was timed to anticipate apparently  
19 the presentation of the case here, and there is nothing  
20 which currently bars Virginia from changing the statute or  
21 changing the bulletin to its former way.

22 The election bulletin was only a regulation by  
23 the election officials.

24 There is one small mistake of fact that I would  
25 like to call the Court's attention to, and that is that in



1 one of the cases cited by Mr. McIlwaine, in which the  
2 District Court required, it was clear that the assistance  
3 could be given by persons other than state election officials.

4 The point with respect to the Memorandum by the  
5 Solicitor General raising the Section 5 question seems to  
6 me to be resolved in this fashion, that assuming the regu-  
7 lation had been submitted to the Attorney General and the  
8 Attorney General had approved it, we would have this case.  
9 Assuming that he had rejected the memorandum, you would  
10 have a situation whereas everyone who reads, Section 24-252  
11 was suspended, and therefore you have precisely the same  
12 questions that are presented on this record, and that is in  
13 light of that fact situation, whether the right to a secret  
14 ballot could be preserved by some means and whether the  
15 means actually adopted in this case was a reasonable means  
16 to achieve that end.

17 MR. CHIEF JUSTICE WARREN: We will now have the  
18 announcement of the opinions.

19 (Whereupon, at 2:25 p.m., argument in the above-  
20 entitled matter was concluded.)  
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22  
23  
24  
25