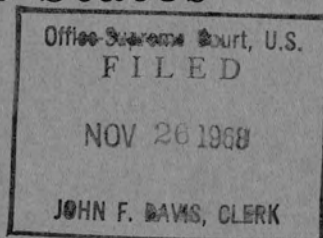


Supreme Court of the United States



In the Matter of:

Docket No. 68

SAM L. MCDONALD, et al.

Appellants

-VS-

BOARD OF ELECTION COMMISSIONERS
OF CHICAGO

Appellees

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Place Washington, D. C.

Date November 19, 1968

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 -----X
4 Sam L. McDonald, et al., :
5 Appellants, :
6

7 -vs- :

No. 68

8 Board of Election Commissioners :
9 of Chicago, :
10 Appellees :
11 -----X

Washington, D. C.

Tuesday, November 19, 1968

12 The above-entitled matter came on for oral argument

13 BEFORE:

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

23 APPEARANCES:

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Chicago, Illinois
Counsel for Appellees

P R O C E E D I N G S

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Number 68, Sam L. McDonald, et al., appellants, v. Board of Election Commissioners of Chicago, et al.

Mr. Bass.

ORAL ARGUMENT OF STANLEY A. BASS, ESQ.

ON BEHALF OF APPELLANTS

MR. BASS: Mr. Chief Justice, may it please the Court. This is an appeal from an Order of a three-judge court in Chicago dismissing a suit for declaratory judgment and injunction.

The suit was filed by two pre-trial detainees in Chicago in the Cook County Jail, on behalf of themselves and all other persons similarly situation, who are registered qualified voters, who are unable to get to the polls on election day because they are incarcerated either without bail or because they lack the funds to post monetary bail.

Q In other words, these are not people who have been convicted of crimes?

A That is correct.

Q They are just awaiting trial?

A That is right. The suit sought a judgment declaring that the Illinois statutes applicable to absentee voting are unconstitutional in so far as they preclude the granting of

1 absentee ballots to pre-trial detainees confined in the County
2 of their residence.

3 A timely notice of appeal was filed from the judgment
4 of the District Court. The jurisdictional statement was filed
5 in February. In April, this Court granted leave to proceed
6 in forma pauperis and postponed the issue of jurisdiction until
7 a hearing on the merits. So I will turn first to the issue
8 of jurisdiction.

9 Under Section 1253 of Title 28, appeals lie directly
10 to the Supreme Court from an Order denying an injunction in
11 a civil action which is required to be heard by a three-judge
12 court. We, therefore, turn to Section 2281 of the Judicial
13 Code which provides that a three-judge District Court is
14 required where an injunction is sought to restrain the enforce-
15 ment, operation or execution of a state statute by restraining
16 the action of an officer of the state.

17 So, therefore, there are three ingredients here.
18 First, that an injunction must be sought. This was true in
19 this case. Second, that there is a state statute of general
20 wide application. That is what we have in this case. Third,
21 that we have a state officer, or pursuant to decisions of
22 this Court, a local officer functioning pursuant to a state
23 wide policy performing a state function.

24 Now, under Illinois law, as far as absentee ballots
25 are concerned, the Chicago Board of Election Commissioners has

1 the same responsibility as the County Clerk in another County,
2 or anybody else who is charged with the duty of furnishing
3 absentee ballots.

4 Indeed, Section 19-2 of the Election Code, which
5 appears on page 15 of our Brief, states on the ninth line of
6 the provision, that the elector make application to the County
7 Clerk, or where existing, to the Board of Election Commissioners,
8 or other officer or officers charged with the duty of furnish-
9 ing ballots for such election in his voting district.

10 So that the fact that the Board of Election
11 Commissioners here are the defendants is not relevant because
12 their function is a state-wide function. They perform the
13 same function with respect to absentee ballots as the officers
14 in the other Counties and localities.

15 Nor is this case moot at this time. It is true that
16 the two named representative plaintiffs are not in the Cook
17 County Jail awaiting trial. Mr. Byrd was discharged a week
18 after the election, at his preliminary hearing, and Mr.
19 McDonald went to trial. It was a hung jury and he subsequently
20 pleaded to a reduced charge of manslaughter, which is a
21 bailable offense.

22 However, since this is a class action and was found
23 to be so by the trial court -- and I would refer to page 30
24 of the record where the three-judge court said "plaintiffs
25 in the class they represent."

1 The fact this is a class action means that the fact
2 that the named plaintiffs are not members of the class is not
3 fatal.

4 As this Court indicated a month after the juris-
5 dictional statement was filed in this case, in the case of
6 Lee v. Washington, which involved desegregation of all jails--

7 Q Do you have an intervenor, so you would have a
8 named party?

9 A No effort was made to name any persons. I
10 respectfully ask the Court to respect the judgement of the
11 District Court that this was a class action and that there are
12 in the County Jail prior to each election a certain number of
13 persons.

14 Q As I understand it, you say that it was a class
15 action. I am wondering what is it now?

16 A What is it at this moment?

17 Q Yes, sir.

18 A Well, Mr. Justice Marshall, the problem is that the
19 class really cannot be seen very clearly until right before
20 an election. Because it is very difficult to predict exactly
21 who will be a pre-trial detainee on the day of election.

22 One could not ascertain with some degree of certainty
23 perhaps a week or two before the election exactly which persons,
24 which named persons would be pre-trial detainees unable to get
25 to the polls on election day, because this class is rather

1 fluid. It is really impossible to identify any names except
2 right before an election.

3 But I think the three-judge Court below recognized
4 that there surely must be a number of persons who are
5 registered qualified voters in jail on the day of election.

6 Incidentally, the Cook County Jail has about 1800
7 inmates, two-thirds of which are awaiting trial. So there
8 must be some numbers of persons, although they cannot be
9 identified, right near and election.

10 Q There is always going to be some that have just been
11 put in jail a day or two before who will not be able to vote
12 under the ordinary provisions?

13 A Yes.

14 Q There is a minimum time in advance within which you
15 have to apply for a ballot, isn't there?

16 A Yes. And we are not attacking that provision on
17 making application within a certain amount of time.

18 Q Because that is of general applicability to all
19 absentee voters?

20 A Yes. Well, it is a reasonable provision. I don't
21 think that there is anything unreasonable about requiring
22 submissions for absentee ballots to be made in a certain time,
23 because there are some administrative--

24 Q Really we are not here to decide what is reasonable
25 or unreasonable, are we?

1 A I am not assailing the provisions regarding time.
2 We are assailing the substantive provisions.

3 Q Not because they are unreasonable. You are assailing
4 them because you submit that they violate the Equal Protection
5 Clause of the Fourteenth Amendment to the United States
6 Constitution?

7 A That is right. I will turn to that.

8 Q Do you make any Due Process argument?

9 A Well, frankly, I would like to allude to an argument
10 which might be considered a Due Process one. But I haven't
11 raised it in the Brief. But we raised it with respect to
12 answering the Board of Election Commissioners' argument about
13 the fact that persons who can be deprived of liberty cannot
14 assert privilege.

15 In other words, if it is a Due Process argument, we
16 would plead that the mere fact a person is detained prior to
17 trial does not mean he could be deprived of all rights.

18 I would like to turn to the merits of the case at
19 this time.

20 This case was originally argued on a rational basis
21 test. Recently this Court decided Williams v. Rhodes, which
22 seems to have put the right to vote on a First Amendment basis.
23 And it appears to us that Williams v. Rhodes makes clear that
24 there is a relation between voting and political expression
25 which is protected by the First Amendment.

1 Secondly, that the statements show a compelling
2 state interest in imposing heavy burdens upon the right to vote.

3 Now, in this case, it is not very clear -- it is
4 not clear at all -- whether there are any legitimate state
5 interests which are compelling that justify the denial of the
6 right to vote to a person who is awaiting trial.

7 It would appear that the most the Election Board
8 could say would be that there is an administrative convenience
9 in not having to dispense too many absentee ballots.

10 But it seems to me that the mere fact that it is a
11 few more absentee ballots to give out does not justify depri-
12 vation of such a fundamental right.

13 The Board of Election Commissioners has taken the
14 position in its Brief that voting is a privilege, voting by
15 absentee ballot is a privilege rather than a right. And it
16 seems to me that by calling something a privilege it doesn't
17 mean that the State can arbitrarily deny it to you.

18 Surely if absentee ballots were dispensed on the
19 basis of race, I don't think this Court would hesitate to
20 say that would be a denial of Equal Protection of the Law,
21 merely because absentee balloting may be considered a privilege
22 by the State. And the District Court in *Brown v. Post*, which
23 we refer to in our Reply Brief, held where the election people
24 went to the nursing homes, the white nursing homes and not the
25 black nursing homes, that was a denial of Equal Protection of

1 the Law in giving out absentee ballots.

2 We submit that the mere fact that it is an absentee
3 ballot, rather than voting in person, does not justify such a
4 distinction.

5 Now, the Board of Election Commissioners raises the
6 question, need prisoners be afforded privileges when they can
7 be denied liberty?

8 I think this is perhaps the first case that this
9 Court has had an opportunity to determine whether there are
10 any conditions or consequences of pre-trial detention which
11 may be considered constitutionally impermissible. We must
12 recognize that no matter how much reform occurs there is going
13 to be a number of people that are going to be incarcerated
14 prior to trial.

15 It seems to me we must address ours to the consequences
16 of the pre-trial detention.

17 I don't think that as a basic proposition one could
18 say the mere fact a man is detained prior to trial you can do
19 anything you want to him.

20 I think he is entitled to certain minimum standards
21 of decency. I think that if the State attempts to deny certain
22 rights they must show compelling interests.

23 Now, what kind of compelling interests might be
24 shown? Perhaps institutions have certain rules regarding
25 persons who visit. Considerations of institutional security,

1 of course, are paramount. And I think this Court in Lee v.
2 Washington indicated that its decision in no way suggested that
3 the Warden couldn't make allowances for institutional security.

4 But no where in the record of this case or any case
5 have I ever heard that inmate voting by absentee ballot is
6 going to disrupt the routine of an institution. There is
7 nothing to suggest that it does.

8 I think common sense would suggest that perhaps
9 morale would get a lift when somebody votes from behind bars.

10 Q Have you had an opportunity to look at the absentee
11 ballot laws of any of the other States?

12 A Yes, I did. I made a state by state canvas.

13 Q What did you find out?

14 A I found out that every state grants absentee ballots
15 to servicemen who are abroad. Two states seem to recognize
16 the right of prisoners to vote. In both of these states I
17 have Opinions of the Attorney General but I found no cases.

18 Most of the States have therein provisions for
19 physical disability to absence from various localities.

20 For example, twelve states say if you will be absent
21 from the precinct you can get an absentee ballot. Six states
22 say if you are absent from the City you can get an absentee
23 ballot. One state, Louisiana, says if you are absent from the
24 parish. Twenty-three states say if you are absent from the
25 County. And five states say if you are absent from the State

1 on election day you can get an absentee ballot.

2 Q Don't some of the state limit the eligibility for
3 absentee ballot to those who are going to be absent for
4 specified reasons?

5 A Some of them break it down and say absence from the
6 County for business reasons.

7 Q For business. But not for vacation?

8 A Some of them do.

9 Q So it would require the absence to be on account of
10 business. And others limit it to at least military or students?

11 A That is correct.

12 Q And others to physical incapacity to be there?

13 A That is correct.

14 Q Aren't there all sorts of qualifications made by
15 each one of the States, or at least by the typical States?

16 There is no state, is there, that just says if you
17 are not going to be here for any reason?

18 A I think Maine says that. I think that is the only
19 State that does that.

20 We are not suggesting that everybody who wants an
21 absentee ballot can have one. There are certain limitations
22 which we recognize as constitutional. The mere fact that a
23 mother has children or the breadwinner who has a job with
24 long hours and can't get to the polls and finds it inconvenient,
25 we are not submitting that is a denial of the constitution.

1 But what we have is something more than that. We
2 have the State putting the man in the disability. We have the
3 state judge putting the man in jail on election day, and we
4 have another state agency which refuses the ballot. And together
5 that is joint state action which effectively deprives a man
6 of the right to vote.

7 So it seems to me that the situation of the prisoners
8 can be distinguished and any decision in their favor would not
9 necessarily have to require that everybody in the world get an
10 absentee ballot.

11 Q Do you have that state by state analysis to which
12 you just referred in your brief?

13 A We did not include it in the Brief, your Honor. I
14 would be glad to submit that by way of supplemental Brief, if
15 I may have leave to do so.

16 Q Yes; it would be helpful if you would do that.

17 A I will. In terms of legitimate state interests,
18 perhaps it might be urged that the take over theory, that all
19 of the inmates voting together might outweigh a community.
20 But, in the first place, the inmates would vote in the County,
21 in the precincts in which they lived prior to becoming a member
22 of the jail population. So they would not vote in the precinct
23 where the jail was located, but they would be interspersed in
24 the precincts from which they come. And I think the take over
25 theory was rejected by this Court in the Carrington case.

1 We would submit that this case can be decided on a
2 number of theories. One theory would be that the granting of
3 the absentee ballot to a person who is jailed in another
4 County but denial of an absentee ballot to a person jailed
5 in the County of his residence is absolutely irrational.

6 Q If that is the proposition which you are advancing
7 here, it would lead us to invalidate an awful lot of these
8 state laws to which you have referred, that is to say, you
9 make the distinction that here the person is being kept away
10 from the polls by a state action.

11 A That is correct. That is my second theory, that
12 that case goes off on the fact that the state granted him
13 inability to get to the polls.

14 Q Well, I suppose then you have to talk about what is
15 primary cause. What is your first reason?

16 A Well, the first one is that the classifications
17 that the State of Illinois has employed are not rational or
18 based upon compelling state interests. That is, that the
19 Board of Election Commissioners for the State has failed to
20 show in what respect there is a legitimate state interest that
21 requires the denial of absentee ballots.

22 Q That is one that would lead, at least, by the treacher-
23 ous path of strict logic, to the conclusion that we have to
24 examine every one of these state laws and say that it is not
25 rational or reasonable for a State to say that you can get an

1 absentee ballot if you are out of town on business, but not
2 if you are out of the state for some other reason?

3 A Well, I would say yes, except using the compelling
4 state interest theory, that the State would probably be able
5 to show in a large number of those situations involving mere
6 inconvenience rather than impossibility, that there is a
7 compelling state interest. Whereas in this case I don't think
8 they can show that.

9 Q How about under the laws that exist, how about the
10 man who is physically incapacitated, the man or woman who is
11 physically incapacitated for medical reasons? If he is in
12 the County he can vote absentee, can he?

13 A Physically incapacitated, I believe about perhaps
14 half of the States.

15 Q I am talking about Chicago, about Illinois?

16 A Well, if the man is physically incapacitated and you
17 can produce the certificate of a physician, which the Illinois
18 statute requires, and if he is inside the County he can get an
19 absentee ballot. And also if he can show that because of
20 religious scruples, he can get one.

21 Q Those are the only two classifications of people
22 who are in the County on election day? It is those who are
23 physically incapacitated, that is, medically incapacitated,
24 or those who are observing a religious holiday, who may get
25 absentee ballots; is that correct? That is the way I read that.

1 A There was one classification added by the legis-
2 lature at the last minute which escaped the attorneys and the
3 three-judge court in this case and that was a judge of elections
4 who is working on election day in a precinct other than his
5 own.

6 Q In addition to that, I suppose your veterans can
7 vote, can't they?

8 A The veterans?

9 Q Who are out of the State?

10 A Well, members of the armed forces.

11 Q That is what I mean.

12 A Yes, sir.

13 Q And many people who are out of the State?

14 A There used to be a special provision for servicemen,
15 which was Article 20. But since the provision was added
16 "anybody out of the County," that automatically swallowed up
17 that group.

18 Q How about if they are in a camp in the States?

19 A As long as they are out of the County, that is all
20 that is required. The Board of Election Commissioners will
21 give them an absentee ballot. And even if a man is in jail,
22 if he is in a County other than the County of his residence,
23 presumably he will get an absentee ballot too.

24 So it seems to me that it is difficult to say that
25 this refusal to give absentee ballots to these class of

1 persons is justified by considerations of institutional
2 security. Because if that were true, the Legislature would
3 have said, I hope, that we make a finding that because of the
4 routine of the jail it would be so disruptive that no absentee
5 ballot should go to prisoners.

6 Q You don't have a case in which the State has
7 explicitly said we are going to deny the right of an absentee
8 ballot to people who are in jail?

9 Rather than that, you have a case in which the State
10 has said we aren't going to grant the right of absentee ballots
11 to people who are, even though they are going to be in this
12 County on election day, to the following two groups, and to
13 these three groups and to these three groups only:

14 Those who are medically incapacitated, those who
15 are celebrating a religious holiday, and those who because
16 they are judges or poll watchers are going to be in another
17 voting place?

18 A And those who will be out of town.

19 Q And those are the only three groups to whom we are
20 going to grant the right of absentee voting, even though they
21 are in the County on election day.

22 You do not have a case where the State, at least,
23 in any explicit or considered kind of way, has said we are
24 going to deny the right of absentee ballots, even though we
25 grant it to everybody else, we are going to deny it to those

1 who are in jail?

2 A That is right. It is denial by implication rather
3 than expressed denial. But I think that makes this case
4 stronger.

5 Q Suppose a prisoner is medically incapacitated,
6 wouldn't he be allowed to vote?

7 A Judge Lynch in the first McDonald case said he could.

8 Q Wouldn't that be a reasonable interpretation of this
9 statute?

10 It doesn't say that a medically incapacitated man
11 who is in prison will not be granted the right to vote?

12 A No.

13 Q I would think that your prisoner, if he is medically
14 incapacitated, like this class they have created, would come
15 under that statute and would have an absentee ballot.

16 A He might be able to. But that does get into the
17 causation question as to whether the cause of his--

18 Q Some of them might be medically incapacitated?

19 A I think if he had a physician's certificate, under
20 those circumstances the Election Commissioners would give him
21 a ballot.

22 Q So it doesn't bar all prisoners?

23 A It just bars those that are well, not religiously
24 incapacitated, in the County of their own residence. And it
25 seems to me that type of classification doesn't make any sense

1 and is certainly not justified by any compelling state interest.

2 I looked at the Brief of the Board of Election
3 Commissioners and I was unable to find any.

4 It seems to me what the State of Illinois has done
5 here -- and it gives this Court a unique opportunity to get
6 in the area of absentee ballots--

7 Q We need that.

8 A I think that is is an important one because absentee
9 ballots have been with us since the Civil War and they have
10 become a very convenient means of voting. It is not like in
11 the old days where it was considered such a new process that
12 the State Courts were striking them down.

13 Q What do the Illinois election officials say if
14 somebody shows up at the polling place, not with a certificate
15 of a physician, but with a certificate of the Warden, which
16 these people did? What do the election officials say, not
17 about the polling place, but as to the absentee ballot?

18 A They said in this case "you don't have the right
19 certificate."

20 Q But would it be a violation of Illinois law if they
21 didn't give them out absentee ballots?

22 A As I understand the Illinois law, it is true that the
23 provisions of absentee ballots are permissive, but it seems to
24 me--

25 Q Didn't that man say that I refuse to do this? I

1 refuse to issue these ballots because I would be subject to
2 criminal penalties if I did?

3 A He said he would be. I don't know if there is any
4 express provision that says if you give an absentee ballot to
5 other persons you will be in violation of the law.

6 I think the Election Board probably assumes if he
7 gives ballots to persons other than those named expressly, this
8 would be a violation of Illinois law.

9 As I read the statutes, there is nothing that says
10 "don't give it to these people." It just doesn't say,
11 give it to these people.

12 Q How can a person who is in jail know that he won't
13 be held in time to vote, if he is in jail and hasn't been
14 convicted?

15 A It is his next continued court date.

16 Q Maybe he will be bailed or maybe you will represent
17 him and get him out on his own recognizance.

18 A That is the same situation as the person who thinks
19 he is going out of town on business.

20 Q Not quite. Because he is not being held and released
21 by somebody else. He is theoretically master of his destiny.

22 How about a person who has been convicted of a
23 misdemeanor and he is in jail? Are you disqualified under
24 Illinois law if you have been convicted?

25 A No.

1 Q Suppose this fellow has been convicted of a
2 misdemeanor, would this same principle apply to him?

3 A Yes, and it would apply to persons also convicted
4 of a civil crime, non-support or contempt.

5 It seems to me if it is anything other than a
6 felony or infamous crime you are not disenfranchised explicitly
7 but you do run into problems. Since you can't get to the polls,
8 are you entitled to the mechanism which the State of Illinois
9 has set up.

10 Q If they are going to vote, I would suppose though
11 they have a right to listen to political writings that appeal
12 to their better nature and judgment?

13 A I would say to the extent to which the State can
14 show a compelling interest in limiting the number of persons
15 that can come and campaign, subject to certain restrictions
16 which are tuned to the institutional framework. That the
17 State can refuse certain rights of persons who want to campaign.

18 But it seems to me as a basic proposition, as to
19 whether or not there are any restraints at all, it seems to me
20 that the State must show that compelling state interest in the
21 case where they seek to restrain a vote.

22 Q In some of the western states there are counties
23 that are larger than some of the eastern states, and suppose
24 a man went from one end of the County where he lives to another
25 end of the County to stay in a hotel and would be over there on

1 election day.

2 Would you say that it was unconstitutional not to
3 send him a ballot, under the law that you have?

4 A Well, I would say to the extent to which he really
5 has control over his situation, that would mean not like the
6 facts in this situation.

7 I recognize that there are problems of judgment in
8 determining when the state has satisfied its burden of showing
9 a compelling state interest.

10 But it seems to me where we have persons like
11 persons in the Army, or persons in jail, that person is
12 precluded by an official act from getting to the polls and he
13 would have to break the law. He would actually have to escape
14 the jail or go AWOL in order to try to cast his vote.

15 We submit that under those circumstances the State
16 must show a very compelling interest in order to justify
17 giving him the ballot which can easily be voted by mail.

18 I wanted to add one last matter, and that is that
19 we have a presumption of innocence under the law. However,
20 in reality this presumption can be whittled away by a lot of
21 circumstances.

22 For example, we are beginning to discover that the
23 conditions of pre-trial detention in many institutions across
24 the country have lower standards than we would consider human
25 decency requires, and it seems to me unless this Court is

1 willing to say there are some limitations, some rights that you
2 can't take away from a man merely because he is awaiting trial,
3 he is presumed to be innocent; in order to give full faith to
4 the presumption of innocence the Court has to say it is a
5 very important right and the State must show compelling state
6 interest in order to deprive the man of that right.

7 I would like to reserve a few moments.

8 MR. CHIEF JUSTICE WARREN: Mr. Kusper, you may
9 proceed.

10 ORAL ARGUMENT OF STANLEY T. KISPER, JR., ESQ.

11 ON BEHALF OF APPELLEES

12 MR. KUSPER: Counsel for the Petitioners has
13 consistently stated this case in the negative both at the trial
14 below and before this Court. His constant statement has been
15 that the State must show a compelling state interest in
16 depriving this small group of persons of a supposed constitutional
17 right to an absentee ballot. I would care to phrase it in
18 another way for the Court.

19 The State has extended to large ascertainable groups
20 of people the privilege of absentee balloting. The privilege
21 of the ballot, the right of the ballot, has been constitutionally
22 guaranteed, but the privilege of casting it under conditions
23 imposed by the State which are reasonable by absentee ballot,
24 I think, is a privilege. And so the State of Illinois has
25 extended to large discernible ascertainable groups of people

1 the right of voting by absentee ballot, large numbers of
2 people who have left the community on business, or for whatever
3 reason, and left the county in 1968. Some 15,000 applications
4 were received from persons--

5 Q Is it necessary for one to be on your side to try
6 to put it on the basis of a privilege or a right?

7 A I don't think so.

8 Q I wouldn't think so.

9 A I don't think so at all. But rather than confuse
10 right with privilege.

11 Q Does the State in order to take care of one evil
12 have to take care of every possible evil anyone can conceive?

13 A No, I think a state legislature in attacking a
14 problem of evil may take the entire evil at one time, it may
15 take it step by step, it may progress from one phase of the
16 problem to another phase of the problem and make corrections
17 as it has seen fit. And in Illinois, as the trial court
18 has pointed out, absentee balloting was instituted in 1917
19 and modified in 1944, and expanded in 1955. And just in the
20 1967 session of the Legislature, a short time subsequent to the
21 trial of the case, it extended an absentee ballot to those
22 persons judges of elections.

23 Q Why were these people excluded?

24 A Mr. Justice Marshall, I don't know why they were
25 excluded.

1 Q Don't you think the State should have a reason?

2 A I think the State has a reason for enacting a piece
3 of legislation.

4 Q Do you think the State is obliged to tell somebody
5 the reason why you distinguish between a prisoner awaiting
6 trial outside the County and those inside the County?

7 A Prisoners awaiting trial outside of the County, Mr.
8 Justice Marshall, are outside of the County and fall into that
9 class of persons granted the absentee ballot privilege because
10 they are out of the County.

11 Q They are different because they are outside of the
12 County?

13 A That is right.

14 Q But they are still awaiting trial by the State of
15 Illinois?

16 A That is correct.

17 Q So that much they are alike. Why draw the line?

18 A Because the State has taken affirmative action in
19 granting the absentee ballot to groups of people. If it has
20 by inadvertence or otherwise, I don't know. If they had a
21 reason, I don't know. It may be they never even thought of
22 the problem.

23 Q Can you think of a reason?

24 A Why they should not be granted an absentee ballot?

25 Q No. Why the State made a difference between a man

1 in jail waiting for trial outside the County and a man waiting
2 for trial inside the County.

3 When I finish that I want to know the difference
4 between a man out on bail and a man who is incarcerated but
5 not having the money for bail.

6 A It is my firm belief that the legislature in
7 enacting the absentee ballot legislation never considered the
8 persons present inside the County and the persons outside the
9 county.

10 Q You mean they didn't know that?

11 A I don't know whether or not they knew that. There
12 are 177 members of the Illinois House and 59 members of the
13 Illinois Senate. I would not presume to know what they thought
14 and there is no history of the legislation available which
15 would indicate to us whether or not they considered the problem.

16 Q You say you can see no valid reason for distinguish-
17 ing? Two men are charged with a crime. One has bail money,
18 the other man has no bail money. They both committed the same
19 crime. One can vote and the other cannot.

20 Now, what reason is there for that distinction?

21 A I don't know of any reason at all, Mr. Justice
22 Marshall.

23 Q Aren't you obliged to give us something close to a
24 reason?

25 A No. I believe that my burden, sir, under the

1 language of the cases of this Court is to demonstrate that
2 Mr. Bass, on behalf of the Petitioners, has not carried his
3 burden, not whether there was an arbitrary and capricious
4 action on the part of the Legislature in enacting this par-
5 ticular legislation.

6 Second, if the burden does shift to me, does shift
7 to me to rationalize or justify the decision, then it is my
8 burden to go forward with it. And you asked me for reasons
9 and I cannot give a reason why legislation beginning back in
10 1917, prior to the time of my birth, sir, why that legislation
11 did not contain some provision for these persons.

12 It is my sincere belief, as I stated before, that
13 the legislature has never considered the problem -- either
14 it wasn't cognizant of it or that no one has considered it
15 and taken the time to bring it up.

16 Q The legislature did consider the problem as to
17 whether or not people in jail awaiting trial should or should
18 not have an absentee ballot?

19 A No, sir.

20 Q The legislature did consider that?

21 A No, sir. There is nothing in the record that would
22 indicate that, and there is nothing in the history of the
23 legislation that would indicate it.

24 The physical incapacity that is discussed and covered
25 in the statute relates itself solely to the question of

1 physical incapacity because of physical illness, properly
2 attested to by the affidavit of a physician or Christian
3 Science practitioner and there is nothing in the statute
4 or anything in the legislative history that would indicate
5 that the legislature ever considered this and deliberately
6 drew a distinction between the two classes of persons. All
7 they considered was who is in the County and who is out.

8 Q Who did draw the distinction?

9 A Mr. Bass has apparently drawn the distinction.

10 Q No. They tried to file their absentee ballots and
11 the Election Commissioners said they were not physically
12 handicapped; isn't that what happened?

13 A I was present at all times when these petitions
14 for absentee ballots were presented. Being a statute created
15 by the legislature, they are bound by the state requirements
16 in the State of Illinois and they have to grant absentee
17 ballots in those specified cases enumerated in the statute
18 allowing the presentation of absentee voting.

19 When Mr. Bass came to our office with the applications
20 and the affidavit of the Assistant Warden in each case, he did
21 not comply with any of the permissible applications that were
22 provided for in the statute and, therefore, the Board of
23 Election Commissioners--

24 Q What is there in the statute that this did not
25 comply with? Didn't they say that it was physically impossible

1 for them to get there?

2 A They said, sir, that it was physically impossible
3 for them to be in attendance at the polls and they attached
4 the affidavit of the Assistant Warden saying they couldn't
5 leave the premises. But they did not attach the affidavit of
6 a doctor or Christian Science practitioner, which was required
7 under the statute of Illinois and, therefore, the Board of
8 Election Commissioners, being purely ministerial at this
9 point, could not accept that application or that affidavit
10 and could not within the meaning of the statute grant an
11 absentee ballot. To do so would have been a violation of the
12 Illinois law.

13 Q There is no question that this was state action?

14 A I don't think so.

15 Q The action of the Commissioners?

16 A The Commissioners acted pursuant to Illinois statute.
17 There is no question about the fact that they acted under the
18 Illinois law in their capacity as officers created by a statute
19 in Illinois.

20 Q Were you advising them?

21 A Yes, sir, I was, sir.

22 Q And did you help him draw his affidavit?

23 A Was I advising whom?

24 Q The Election Commissioners.

25 A I was advising the Election Commissioners.

1 Q Did you help him draw the affidavit?

2 A For the physically incapacitated people, no, I did
3 not.

4 Q For the Election Commissioners?

5 A No, I did not.

6 Q Page 26 has your name at the end of it. You say
7 that I refused to authorize the issuance of absentee ballots
8 to the named plaintiffs, rather than violate my statutory
9 duty, and you say that you will grant future applications only
10 if forced to do so by compulsory process. And you say if you
11 did it you would be subject to fine and imprisonment?

12 A That is correct. I drew the affidavit for the
13 Board of Election Commissioners.

14 Q So there is a law in Illinois that if the Election
15 Commissioners had issued these ballots they would have been
16 put in jail?

17 A There is a general provision, Mr. Justice White.

18 Q You say there is no state action that precludes
19 these people getting--

20 A There is a state statute that precludes it. But
21 they acted in denial of the petition for absentee ballot
22 pursuant to an Illinois state statute. They just couldn't
23 grant it because the State statute didn't let them grant it
24 and it would have subjected them to penalties if they had.

25 Q Am I right in the fact that this affidavit says

1 that and has to be denied as if it were affirmatively written
2 in the election laws of Illinois that absentee ballots should
3 or shall not be given to pre-trial detainees?

4 A That is not exactly what it says.

5 Q Isn't that affidavit to that effect?

6 A What it says is that I can't do anything other than
7 that which is permitted for me to do under the laws of Illinois,
8 and there is no provision in the absentee balloting of Illinois
9 which allows a Commissioner to grant an application for absentee
10 ballot on the basis of this Warden's affidavit.

11 We were ordered on three previous occasions by the
12 Federal Court, Judge Lynch presiding. It was not a state
13 court. It was a Federal court which ordered us to do that and
14 in pursuance of that kind of Order we have to act.

15 Q He ordered you to do what?

16 A To give the absentee ballot on a particular--

17 Q Your point is that if somebody comes down with an
18 affidavit saying I am going to be in the County on election
19 day but I am going to be awful busy because I am taking care
20 of my sister's sick child and can't get to the polls, then
21 the Election Board could not under the law have granted that
22 person an absentee ballot; and if they had done so they
23 would have been subject to criminal penalties, simply because
24 there is no provision for that kind of person voting absentee?

25 A You are absolutely correct, sir.

1 Q Your submission is something like this: That the
2 State accords the right to vote to everybody, with certain
3 exclusions? These appellants presumably have a right to vote.
4 The State, however, provides a special procedure in certain
5 limited classes, that is to say, absentee voting. It does
6 not provide a special procedure with respect to people who
7 are in durance while awaiting trial or otherwise, and your
8 point is that the State has no duty to do that, indeed the
9 state has no duty to extend the absentee voting alternative
10 method across the board to anybody. Is that right?

11 A Well, there can be a situation in which there is
12 no absentee voting, it isn't --

13 Q The State has no obligation to provide the absentee
14 voting alternative procedure?

15 A That is correct.

16 Q To anybody. Although the State might have to extend
17 the right to vote to, for example, resident servicemen?

18 A That is right.

19 Q Had this man been entitled to vote -- forgetting
20 the absentee vote -- would this man have been otherwise
21 qualified to vote if he hadn't been in prison?

22 A He was duly registered prior to his incarceration
23 and he was qualified to vote.

24 Q He could have voted, although not entitled to absentee
25 ballot, but for the fact he was in jail?

1 A Correct. Had he appeared at his precinct polling
2 place.

3 Q Forgetting the absentee ballot, do you think there
4 is any Due Process question involved, in that he is deprived
5 of a right that he otherwise would have had under State law,
6 the right to vote, but for the simple fact that the State has
7 put him in jail in default of bail, where otherwise he would
8 have been entitled to vote?

9 A They put him in jail via the due process route. He
10 was incarcerated by judicial action. If he comes up with the
11 bail money he can get out.

12 Q If he is poverty stricken, does that give rise to
13 any Equal Protection question?

14 A I don't think so under the posture of the law that
15 we have.

16 Q I am not talking about absentee ballots at all, I
17 am assuming that Illinois had no absentee ballot at all.

18 Do you think there is any Due Process question
19 involved under this circumstance?

20 A I would say not at this time, no, sir, I do not
21 believe so.

22 The State has the right not to have him walking
23 around free without putting up the necessary bail, an item
24 that they require of everybody who is incarcerated. So they
25 have a right for the security of the public and the public

1 welfare to keep him in prison until such time as he makes the
2 necessary bail and satisfies the due process in the courts;
3 and under state law he is entitled to walk about as a free
4 man until his trial date.

5 So I think we are weighing two interests now. One
6 is his right to vote and the interest and right of the other
7 people in the community, and also the rights of justice to have
8 that man incarcerated until such time as he satisfies the
9 due process requirements and the requirements of the court to
10 get back out on the street again.

11 Q I suppose another way of looking at it would be to
12 put the question is it a permissible consequence of another
13 wise appropriate deprivation of liberty by the State, that is
14 to say, when the state puts somebody in jail he is deprived
15 of a lot of rights. He is deprived of the right to work. He
16 is deprived of the right to go down to the nearby public park
17 and make a speech. And I suppose one way of looking at this
18 is whether the additional consequences, namely, that he doesn't
19 have access to an absentee, that he doesn't have the physical
20 possibility of voting, regardless of his theoretical right,
21 whether that is a permissible consequence of his otherwise
22 lawful arrest by the State?

23 A Mr. Justice Fortas, I wish I had said that. I
24 heartily concur. I believe it is a permissible consequence
25 here and I don't think without complaining about the unavail-

1 ability of bail or anything else, any other privileges, the
2 only one single privilege about which we have a complaint here
3 is the unavailability of the absentee ballot--

4 Q Doesn't it narrow down to the man with bail money
5 has the right to vote; the man without money is denied the
6 right to vote?

7 A By absentee ballot.

8 Q No, the right to vote.

9 A Yes, I think that point can be quite seriously made.
10 If a person has money he can get out of jail and therefore go
11 vote.

12 Q And the man who does not have money cannot vote?

13 A Apparently that is true under the statute that we
14 have.

15 Q And do you think that is a valid distinction between
16 the same people?

17 A I think it is a valid distinction when the interests
18 of society are considered as a whole rather than just looking
19 at it in isolation.

20 Q I have been unable at this point of these questions
21 to find any interest other than one man has money and the other
22 one does not.

23 A I wish that I could simplify it to that point.

24 Q What else is there?

25 A I think there is, first of all, what interest did the

1 state have in extending the absentee ballot privilege?

2 Q You insist on the absentee ballot and I insist on
3 the right to vote. Because the man with money can vote. He
4 doesn't have to worry about the absentee ballot.

5 A Not necessarily that.

6 Q But the man that doesn't have the money can't vote.

7 A A man without money quite possibly under a special
8 habeas corpus can be taken from the jail, if necessary, to
9 his polling place and therefore be allowed to vote in the
10 polling place.

11 Q Who is going to put up the money for the habeas
12 corpus?

13 A I have no idea. They can let a pauper's petition
14 be filed and quite possibly the court might take jurisdiction
15 over something--

16 Q Leaving that aside, what do you have other than
17 money?

18 A In this case? Absolutely nothing. The only
19 distinction apparently about a person being able to get out
20 of jail to go vote, if that becomes a paramount interest, is
21 the fact he has some money to get out.

22 But I would like to raise the question about the
23 chap who has money and doesn't want to put up the bail and
24 wants to stay in jail.

25 Q He is just like the chap who has the money and doesn't

1 want to vote.

2 A Unfortunately, I think that "alimony row" as it is
3 called in the County Jail in Cook County, is loaded with
4 people who have some money who don't want to pay it out, so they
5 take it out in jail. As a matter of fact, there are a great
6 number.

7 Q Wouldn't you deny him equal protection if you didn't
8 fix it up so the alimony people can vote and get their wife
9 off the alimony?

10 A Aptly put. I don't know if that would be a denial
11 of equal protection. I certainly don't think given the option
12 to put up bail to go vote, they are making the choice themselves
13 as to whether or not they shall exercise the franchise in
14 person at the polling place.

15 Out of eight million registered in the State of
16 Illinois, do we say the statutes have to be stricken down as
17 unconstitutional because two people can't get out to vote
18 and two people can't make an application for an absentee ballot
19 under the law of Illinois? I don't think so. Because if that
20 is to be the rule--

21 Q Is there any problem of voting absentee ballots?
22 Is that a constant source in fraud of elections?

23 A Absentee balloting?

24 Q Yes.

25 A I think that absentee balloting in penal institutions

1 might well be the subject of great instances of fraud.

2 Q It is to the State's interest, if it going to do that,
3 to try to get the law with the least complications as possible?

4 A I would agree with that. And I think that is part
5 and parcel of my argument, that a statute can never comprehend
6 its applicability to all conceivable--

7 Q Does this record show this man made any attempt to
8 vote?

9 A There is nothing in the record to indicate that at
10 all. All we have is that he was a duly qualified voter before
11 he went into prison.

12 Q What could he have done other than this, than to
13 apply for an absentee ballot, if he was in jail?

14 A The statute doesn't say he could have done anything,
15 because there is no provision for absentee ballot.

16 Q You have habeas corpus in the state, do you not?

17 A Yes, we do. He may have tried that. And I think
18 I alluded to that in the previous statement. He could have
19 gotten someone to go in and get habeas corpus. Mr. Bass
20 was representing him as gratis counsel under a grant from
21 Legal Aid Service. He could have possibly gone before a court
22 and gotten a habeas corpus. All we had was the application
23 that came in on the last possible day for application prior
24 to the election itself. In three instances I believe that is
25 what happened.

1 Going back to the subject that was raised and
2 discussed by Mr. Justice Fortas relative to the varying
3 provisions for absentee ballots in the various states of this
4 country, in speaking with the Solicitor General in the break
5 just after he argued his case, his wife received an absentee
6 ballot from the State of Massachusetts as a physically disabled
7 person only because she was in a community twice removed from
8 the community in which she lived. In other words, if she was
9 in the town adjacent to the city or town in which she lived
10 and was physically disabled under Massachusetts law, she could
11 not have received an absentee ballot. She had to get one town
12 in between and move to a third town outside to be able to get
13 an absentee ballot.

14 I would venture to say in almost every instance,
15 having studied election laws of the various states, being a
16 member of the Illinois Law Commission, I can see if this
17 court were to decide the Illinois statute was unconstitutional,
18 that the great bulk of the statutes concerning absentee
19 balloting would then immediately be suspect and subject to
20 challenge on the same ground, because there are some provisions
21 which I think are even more unfair in other states than they
22 are in Illinois, if this be unfair at all.

23 Assuming arguendo it could be unfair, I think we
24 have an unintentional omission of the legislature, no malice,
25 not purposeful at all, no discrimination, just a classification

1 made by the legislature in a valid attempt to extend the
2 privilege of absentee balloting to large ascertainable groups
3 of persons, that has just simply missed in its application
4 one small and I might even add miniscule group of persons --
5 two persons is all we have had--

6 Q Isn't that a class action?

7 A It is a class action.

8 Q Why do you keep saying two people?

9 A I say two people because I think I have been very
10 close to the case and I know how these cases came about; and
11 after the Norman Bond case the morale in the County Jail in
12 Cook County was so much uplifted because of this decision
13 that we quite possibly could have assumed there would have
14 been an outpouring of applications for absentee balloting
15 and we only got McDonald and--

16 Q Doesn't the record in this case show this case is
17 a class action case and the State has never contested it,
18 you recognized it as a class action case? Am I correct?

19 A Yes.

20 Q And so in that class are all of the prisoners in the
21 State of Illinois awaiting trial. That is the class.

22 A Who are registered voters.

23 Q Right.

24 A And qualified to vote at the time of an election.

25 Q Right.

1 A And there may not be any such persons at all. There
2 is no way to determine the existence of that on a state wide
3 basis.

4 Q I, for one, if there were two, I would assume there
5 might be half of one more.

6 A I might assume that too. But what I am saying is
7 there is no demonstrable way I can show to the Court that that
8 class exists at this moment or at any other moment because
9 you couldn't do a survey to determine that.

10 Q The place to contest that is at the trial court.
11 You admitted it was a class action.

12 A At the time it was filed.

13 Q And you admit now it was a class action?

14 A As it was brought then, yes.

15 Q I thought the class was even narrower than that.
16 I thought it was of those pre-trial detainees detained in a
17 prison in the County where they were registered?

18 A I would assume that, yes.

19 Q I thought that is what we were told.

20 A Yes.

21 Q So this doesn't reach, for example, detainees in
22 some prison out of the County of their residence?

23 A No. Because they fall into the general class of
24 persons who are outside of the county and, therefore, they are
25 entitled to an absentee ballot under that provision of our

1 statute.

2 Q Did you ever get any application from such prisons
3 outside of the County?

4 A Not to my knowledge. And I have been with the Board
5 for seven years. I have heard of none in the State and I think
6 I would have because I am in constant communication with the
7 other election officials in the State.

8 Q Do you think that it is common in a very large
9 percentage of the people who are in jail without bond, that they
10 are registered voters?

11 A I would have no way of knowing that.

12 Q Would you say it is likely to be one hundred percent?

13 A If the Justice is asking for a guess from me, I
14 don't think the percentage is going to be very high. Because
15 we might have seen more of it in this case than just the two
16 plaintiffs that we have here.

17 Q I thought you were telling me this man was registered
18 and qualified to vote?

19 A He was otherwise qualified to vote. He was duly
20 registered and a person qualified to vote had he appeared at
21 his polling place on election day. Both of them, Byrd and
22 McDonald.

23 Q Is the voting age twenty-one?

24 A Yes, sir.

25 Q So I suspect to the extent some of these detainees

1 are under twenty-one?

2 A I think the class gets down to a point where it
3 becomes very, very small class. Because not all persons who
4 are in the County Jail are going to be twenty-one and not all
5 of them are going to be registered voters.

6 Q Or residents of the County?

7 A That is right. You can be committed in our County
8 Jail for accusation of a crime without being a resident of the
9 County.

10 Q Does the record show what they are in jail for?

11 A One was in on an original charge of murder, and I
12 forget what the other one was in on. I think the record
13 discloses that in one of the Briefs.

14 Q Was the other one robbery?

15 A Right. One was released on preliminary hearing and
16 one was tried and got a hung jury and he eventually was retried
17 and pleaded guilty to manslaughter.

18 MR. CHIEF JUSTICE WARREN: Mr. Bass, you have a
19 moment or so.

20 REBUTTAL ARGUMENT OF STANLEY A. BASS, ESQ.

21 MR. BASS: First, as to the question about the writ
22 of habeas corpus.

23 I discussed with the Chief Judge of the Criminal
24 Division whether a person can be taken over and he laughed
25 at the idea and didn't think it was feasible to have writs

1 and have deputy sheriffs accompany them to the polls.

2 With reference to the legitimate state interest to
3 prevent fraud, I would say if there were a state provision
4 that said no absentee ballots for anybody in jail, that would
5 be one thing. But presumably these ballots can be given to
6 persons in jail in another county and the liklihood of fraud
7 is just as great.

8 Q No, this is because they are not voting for a
9 Sheriff over in that other County. The Sheriff of Cook County
10 is their custodian and he is the man who is the candidate,
11 so there isn't the same interest.

12 A We are talking about a person who lives in Chicago
13 who is caught in Wheaton.

14 Q He is not in the custody of the Cook County Sheriff?

15 A That is true. But I would indicate the absentee
16 ballot procedure has to cast the ballot in the presence of
17 a notary outside of the site so there is a check against
18 fraud.

19 Q If these people were so greatly interested in voting,
20 did the thought occur to you to make a motion before the Judge
21 who has charge of the custody of those things and you could
22 have been granted a motion to let them vote?

23 Did that thought occur to you?

24 A It occurred to me. And when I took that up with
25 the Chief Judge of the Criminal Division he indicated--

1 Q He indicated. But did you try? Did you file a
2 proceeding?

3 A No.

4 Q You just attacked the constitutionality of the whole
5 law?

6 A We took the realistic position that the only way a
7 person in jail could vote is by mail, that it would be an
8 imposition on the state to require armed deputy sheriffs to
9 take somebody to the polls.

10 Q Why would it be an imposition, if it is that important
11 to them? Maybe the armed deputy sheriff would have been glad
12 to do it.

13 But you have to go in and attack the constitutionality
14 of the law. Everybody has to attack the constitutionality of
15 the law.

16 A Well, we would submit that in terms of consequences
17 of pre-trial detention that this is an impermissible one and
18 absentee balloting is the one way we can talk about a person
19 in jail voting.

20 Q Prisoners are taken as witnesses to trials all the
21 time.

22 A Well, I would say this. That I made a value judgment
23 and I am responsible for that, that after discussing this thing
24 with the Chief Judge of the Criminal Division I felt that his
25 position was reasonable and that the only way to talk meaningful

1 about voting was voting by mail rather than in person, and/the if
2 right to vote by absentee ballot cannot be obtained from this
3 court I suppose we will have to try to exhaust the other
4 possibility.

5 Q That is the Illinois Legislature?

6 A No, that is filing a petition for a writ of habeas
7 corpus ad votandum to see if we can show the State is foreclos-
8 ing all avenues of--

9 Q Did it occur to you that this might be a matter for
10 the Legislature?

11 Do you think you could find enough prisoners who
12 are that much interested in voting?

13 A One of the activities of our legal aid project is
14 to try to get people interested in citizenship. At the present
15 time they seem to be more interested in taking their grievances
16 to the street than through the ballot box.

17 (Whereupon, the above-entitled oral argument was
18 concluded.)

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