Supreme Court, U. S.
DEC 23 1971

In the

Supreme Court of the United States

RICHARD L. ROUDEBUSH,
Appellant,
v.
R. VANCE HARTKE, et al.,
Appellees.
- - - - - -and- - - - - - - - - - -
THEODORE L. SENDAK,
Attorney General of Indiana,
Appellant,
v.
R. VANCE HARTKE, et al.,
Appellees.

No. 70-66

No. 70-67

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Washington, DC.
December 13, 1971

Pages 1 thru 48

HOOVER REPORTING COMPANY, INC.
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Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD L. ROUDEBUSH, Appellant, v. R. VANCE HARTKE, et al., Appellees.	No. 70-66
and THEODORE L. SENDAK, Attorney General of Indiana, Appellant, v. R. VANCE HARTKE, et al., Appellees.	No. 70-67

Washington, D. C.,

Monday, December 13, 1971.

The above-entitled matters came on for argument at 2:12 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

DONALD A. SCHABEL, ESQ., 111 Monument Circle, Indianapolis, Indiana 46204, for Appellant Roudebush.

RICHARD C. JOHNSON, ESQ., Chief Deputy Attorney General of Indiana, 219 State House, Indianapolis, Indiana, for Appellant Sendak.

JOHN J. DILLON, ESQ., 120 E. Market Street, Room 711, Indianapolis, Indiana 46204, for the Appellee Hartke.

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C O N T E N T S

ORAL ARGUMENT OF:	PAGE
Donald A. Schabel, Esq., for Appellant Roudebush	3
Richard C. Johnson, Esq., for Appellant Sendak	14
John J. Dillon, Esq., for Appellees	21
REBUTTAL ARGUMENT OF:	
Richard C. Johnson, Esq., for Appellant Sendak	47

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 66, Roudebush against Hartke, and 67, Sendak against Hartke.

Mr. Schabel, you may proceed whenever you're ready.

ORAL ARGUMENT OF DONALD A. SCHABEL, ESQ.,

ON BEHALF OF APPELLANT ROUDEBUSH

MR. SCHABEL: May it please the Court:

These cases are here on direct appeal from an interlocutory injunction granted by the United States District Court for the Southern District of Indiana, sitting as a three-judge court.

That court, by a 2-to-1 decision, held that Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of votes cast for the office of United States Senator, is unconstitutional.

Further consideration of the question of this Court's jurisdiction has been postponed, and the hearing of the case is on the merits.

The issues presented by the two appeals are the same. In addition to the jurisdictional issue, the questions presented are as follows:

Without regard to the applicability of the anti-injunction statute or to the alleged unconstitutionality of the election code involved, the first substantive question

presented is whether the interlocutory injunction is proper under established procedures of equitable jurisprudence?

The second question is whether the interlocutory injunction appealed from is prohibited by the language of the anti-injunction statute?

And the third question presented is whether Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, conflicts with Article 1, Section 5, of the Constitution of the United States, which makes the Senate the judge of the elections, returns, and qualifications of its members.

Now, I am dividing the time of the appellants with Mr. Richard Johnson, so I shall discuss the jurisdictional issue in the first questions I stated; Mr. Johnson will discuss the second and third questions.

Before addressing myself to the question of jurisdiction, I shall first state the relevant facts.

Appellant Roudebush and appelle Hartke were candidates for the office of United States Senator at the general election held in the State of Indiana on November 3, 1970. The canvass of the returns showed that Hartke had the greater number of votes by a margin of 4,383 votes out of 1,737,797 votes.

The Indiana Election Code provides that any candidate for any office, voted upon in any election held in the State of

Indiana, including specifically the office of United States Senator, has a right to petition for a recount of the votes cast in any voting precinct, any or all voting precincts of the State; provided he petitions in the appropriate courts within 15 days after the election.

Pursuant to this, appellant Roudebush filed petitions for recount on November 17, 1970, in certain selected precincts in 11 Indiana counties. Two days later appellee Hartke appeared in all 11 proceedings, and moved to dismiss on the ground that the proceeding interfered with the prerogative of the United States Senate under Article 1, Section 5.

On December 1, 1970, the Superior Court of Marion County Room 3, in which one of the proceedings was pending, overruled Hartke's motion to dismiss and appointed the appellees Samuel Walker, John Hammond, and Duge Butler as a recount commission, directing that they convene on December 8, 1970 and commence a recount of the votes.

On December 3, 1970, the Lake Circuit Court also overruled Hartke's motion to dismiss. Instead of seeking relief from the Supreme Court of Indiana and, if necessary, from this Court, appellee Hartke instead filed a complaint for injunctive relief in the court below on December 3, 1970. And in this complaint he recited the proceedings had in the Marion County action, and alleged that the recount statute conflicted with Article 1, Section 5, of the Constitution.

Jurisdiction was predicated under 28 United States Code, Section 1343, subparagraph (3), which confers jurisdiction on the district courts in civil rights actions.

Generally, the complaint alleged that the defendants, acting under color of law, would deprive appellee Hartke of the rights, privileges and immunities secured to him by Article 1, Section 5, of the Constitution.

This complaint contained no explanation why relief was not sought from the Supreme Court of Indiana, and it contains no showing of irreparable injury.

The prayer was that a three-judge court be convened to declare Article 27 of the Election Code unconstitutional and to restrain the defendants from proceeding with the recount.

Along with the complaint, Hartke filed a verified application for a temporary restraining order. In this application he specifically alleged that he appeared in all 11 recount proceedings and raised the constitutional question; and he also recited the ruling of the Marion County court against him.

Notwithstanding this, the district judge to whom the application was presented issued a temporary restraining order without notice, although the recount wasn't scheduled to commence in Marion County for another five days.

Thereafter Hartke amended his complaint, and Theodore L. Sendak, as Attorney General of Indiana, was permitted to intervene so as to defend the -- to be heard upon the

constitutionality of the recount statute.

Q You say jurisdiction in the federal case was predicated upon Section 1343(3)?

MR. SCHABEL: That's correct, Your Honor.

Q But that's just a jurisdictional statute --

MR. SCHABEL: That's correct.

Q -- what was the substantive provision --

MR. SCHABEL: They allege no other statutory ground.

Q -- relied upon? Because 1343(3) simply says that the district courts have jurisdiction of any civil action authorized by law, to be commenced by any person --

MR. SCHABEL: Ordinarily --

Q -- and then normally you recite the law on which you rely.

MR. SCHABEL: Ordinarily you proceed under 42 United States Code, Section 1983, when you're --

Q Normally you do it, but did this plaintiff?

MR. SCHABEL: This plaintiff did not.

Q What did he rely on? What federal substantive law?

MR. SCHABEL: The only -- I guess he relied on -- you'll have to ask --

Q Then you're not the person to ask?

MR. SCHABEL: Yes.

Q In a sentence.

MR. SCHABEL: That was a point we tried -- we've been trying to make.

On December 17, 1970, a hearing was held before a three-judge district court, on appellee Hartke's request for a preliminary injunction; by a 2-to-1 vote that court held that Article 27 of the Indiana Election Code, so far as it applies to races for the United States Senate, to be unconstitutional. It dismissed the -- the defendant's motions to dismiss were denied, and the interlocutory injunction requested by Hartke was issued.

The majority and the minority of the court subsequently filed opinions, but made no separate findings of fact or conclusions of law.

Thereafter both appellants Roudebush and Sendak filed notices of appeal, and on January 13 and 15 of 1971, jurisdictional statements were filed in this Court.

When the 92nd Congress convened on January 21, 1971, by unanimous consent of the Senate the oath was administered to appellee Hartke without prejudice to this appeal or to any recount that might ensue.

Thereafter Hartke moved in this Court to dismiss the appeals as moot on the grounds that the Senate had already judged the case in his favor.

Then, on March 22nd, 1971, this Court entered an order postponing jurisdiction.

Now, with respect to the jurisdictional question, there appeared to be two aspects: The first is the Court's jurisdiction of this direct appeal from the District Court; the other aspect is appellee Hartke's contention that the appeals are moot.

With respect to jurisdiction, this Court's jurisdiction, of course, is invoked under 28 United States Code, Section 1253. Jurisdiction under this section depends upon whether the case was one required to be heard by a district court of three judges.

The authority to convene the three-judge court in this case rests on 28 United States Code, Section 2281, which is set out on page 8 of appellant Roudebush's brief.

As contemplated by this section, Hartke's complaint sought injunctive relief against the enforcement, operation and execution of a State statute upon the grounds of the unconstitutionality of that statute. So far the case is squarely within the statute.

But for 2281 to be applicable, the injunction must restrain the officer of a State -- restrain the action of an officer of the State in the enforcement or execution of the statute.

In this case, the duty to enforce the Election Recount statute is imposed upon the Circuit and Superior Courts of the various counties. By seeking to restrain the appellant,

that's Roudebush, from taking any actions whatsoever to effect recount procedures under the recount statute, the injunction is thus directed against the Circuit and Superior Courts in which these proceedings were pending.

It's been recognized for many years that restraint of a party initiating a proceeding is tantamount to restraint of the court in which the proceeding is pending.

Accordingly, it follows that a three-judge court was necessary to enter the injunction sought against appellant Roudebush, because such injunction necessarily restrained the action of the 11 Circuit or Superior Courts, and the officers thereof, in the enforcement and execution of the Indiana Recount Statute.

Now, with respect to the other aspect of jurisdiction, I don't think Hartke's contention that the appeals are moot need detain us very long.

First, the Senate itself swore him in without prejudice to this appeal, and to any ensuing recount, so, in their action and their viewpoint, from their viewpoint they judge nothing.

Secondly, the term for the seat in dispute does not expire for another five years, until January 3, 1977, so I don't think it can be said that there are not live issues before the Court.

Now, so much for the jurisdictional issue, unless

there are questions from the Court.

Q One question. Is there anything in the Indiana law that would make it moot? I mean, does the recount have to be a certain -- I know it's a certain time before, but is there a certain time -- well, could you have a recount now?

MR. SCHABEL: Yes. Because we -- they were all initiated within the proper time, then suspended by this injunction, and we're in a state of suspended animation right now, ready to go forward once the injunction is lifted.

Now, without regard to the applicability of the anti-injunction statute, or to tye alleged unconstitutionality of the recount statute, the substantive question that I'd like to discuss is whether the interlocutory injunction was proper under established principles of equity jurisprudence.

It would seem to be hornbook law that courts of equity should not act when a party has an adequate remedy at law, and when he will not suffer irreparable injury if denied equitable relief. In this case, as I've already said, Senator Hartke interposed his constitutional contentions in all 11 State pending recount proceedings. Two of those courts rejected his contentions and ruled against them.

He then had an opportunity to apply to the Supreme Court of Indiana for a writ of prohibition, to review those questions. And, if necessary, he had a right to appeal to this Court, under 28 United States Code, Section 1257, subparagraph

(2), and bring the question here.

Instead of that, he sought relief from the District Court. But, surely, relief from the Supreme Court of Indiana and from this Court would constitute an adequate remedy, precluding equitable relief.

Moreover, his complaint, neither his original complaint nor his amended complaint makes any allegation concerning irreparable injury.

Now, it's no answer to say that he filed an application for temporary restraining order, in which he tries to set out alleged injury, because that application was not part of the proceedings, and it was not even served on the defendants. And I, myself, never first saw it until I was preparing this appeal.

The court below, however, held as a matter of law that Hartke would suffer irreparable injury, and the only authority it cited was Humpty-Dumpty stating that the Harm to be avoided will take place immediately and irrevocably once the case seals on the ballot bags are broken. But the breaking of the seals on the ballot bags could not cause irreparable injury, for a number of reasons.

First, under the statute, the court in which the recount's pending, as directed by the statute, can impound the ballots and make an order for their protection.

Now, it cannot be assumed or presumed that that

court is not going to do its duty.

Next, so long as the ballots are preserved intact, it doesn't -- it makes no -- it's of no consequence how they were originally counted or sorted.

And, finally, since the Senate is the judge of the elections and returns of its members,neither the original count nor the recount is binding on them. So, regardless of what happens during the recount, if it's not binding on the Senate, it cannot cause irreparable injury to Senator Hartke.

Q Haven't there, Mr. Schabel, as a matter of fact, been, in our history, many, many recounts in senatorial elections?

MR. SCHABEL: Yes.

Q Wasn't there one in the contest between Senator Morse and Senator Packwood?

MR. SCHABEL: Yes, in 1968, and no challenge to the legality of it was made, that I can determine.

Q How about --

MR. SCHABEL: And in '64 --

Q -- Senator Tydings and Senator -- the man that was -- Senator Tydings conceding?

MR. SCHABEL: Well, there's one between Markey and O'Conor in Maryland in 1946. But that was conducted by the Senate itself. And the express reason there was that the Maryland law contained no provision for a recount. Therefore,

the Senate did it.

Q I was asking, of course, about recounts conducted under State law.

MR. SCHABEL: Well, I don't recall any between Tydings -- Packwood and Morse, and Laxalt and Cannon in the Senate, plus a number in the House.

Now, my time is up, and Mr. Johnson will continue with the argument.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Johnson.

ORAL ARGUMENT OF RICHARD C. JOHNSON, ESQ.,

ON BEHALF OF APPELLANT SENDAK

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

My task is a doubly difficult one because much of the ground that I was going to trod or plow has been taken by the previous case. In fact, a better argument was presented at that time than perhaps I can present right now.

I would like to advance two points to the Court, which, in the opinion of the appellants, require reversal.

The first is that the provisions of 2283 are applicable to this case. As the Court knows, this Act is written in plain and clear language, and provides that no injunction shall issue to stay any State court proceeding. The Act, with minor changes, as Mr. Justice Stewart pointed out

in the previous case, dates back to 1793. There are only three --

Q May I just ask this: I gather there's no question, no claim that the recount proceeding in your Circuit or Superior, whatever the court is, is a State court proceeding; is that in issue?

MR. JOHNSON: There is -- that is an issue, Mr. Justice Brennan, and the appellant claims that since the State court proceeding, namely recount, is a ministerial and a non-adversary proceeding, that it is not a State court proceeding within the meaning of 2283.

Q Well, are the commissioners appointed much like Special Masters are appointed by a court historically?

MR. JOHNSON: Yes, Mr. Chief Justice.

Q The statute provides for the appointment of these officers?

MR. JOHNSON: These officers are officers of the court; they have to be appointed by the court. The court is under a duty by statute to preserve the integrity of the ballots. And as far as a nonadversary proceeding is concerned, the appellee himself filed two preliminary motions in two different proceedings; motions to dismiss. Both of those motions were ruled adversely to the appellee, and he chose to fight his fight in the forum of the federal district court.

Q I suppose the appointment of these commissioners or special officers is an alternative to having State court judges sit down and count a million and a half votes themselves; is that correct or --

MR. JOHNSON: I would say that's correct, Mr. Chief Justice; and I would also add that the appellee in the lower court, in my opinion, failed to distinguished between election contests and a recount procedure.

The Indiana law provides for both types of proceeding. In election contests, the distinction is this: that in an election contest it is an adversary proceeding and no recount commission, as such, is appointed. However, in a recount, of course, there is a retabulation of the vote after the commissioners of the recount commission have been appointed by the court.

Q Have your State courts ever had occasion to consider whether a recount proceeding was a judicial as opposed to a ministerial proceeding?

MR. JOHNSON: Not to my knowledge, Mr. Justice Brennan.

Q Mr. Johnson, in Indiana, you have a court proceeding to appoint a guardian or a trustee; is that a court proceeding?

MR. JOHNSON: Yes, Mr. Justice Blackmun.

Q Is there any parallel there to this kind of thing?

MR. JOHNSON: If there's a parallel, I'm not aware of it. But I will say this: the commissioners -- the parallel is probably this, that the commissioners -- if there is one -- that the commissioners do report to the court. The court has jurisdiction at all times over the activity of the commissioners. And the court is under a duty, as I said before, to preserve the integrity of the ballots.

Q Well, could the -- could your court remove a commissioner in the midst of the recount?

MR. JOHNSON: My understanding is the court could remove one or could remove the entire commission at any time during the procedure if, in the court's opinion, the commission did not follow the mandate of the statute itself.

Q Could the court determine whether the procedures followed by the commissioners are proper or illegal?

MR. JOHNSON: Yes, the court could make that determination, and, in fact, the court is under a mandatory duty by the statute to make such a determination.

Now, the appellee argues that at one point in the lower court reason, that this was a case analogous to a civil rights case, and depended on a case, Baines, which has been alluded to before in the prior case, Baines v. City of Danville, for its authority to issue the injunction.

The Baines case was a true civil rights case. This action does not involve any First Amendment right, violation of

any First Amendment right.

There is no criminal prosecution under a State statute which was invalid on its face; no prosecution conducted in bad faith, or for the purpose of harassment.

It does not involve a statute, as I say, which was unconstitutional on its face.

The second point that I would like to bring up, to bring to the Court's attention is the constitutionality of the Indiana recount statute.

Q The complaint does allege the provision of privileges and immunities?

MR. JOHNSON: Yes. And it's up to this Court to see if this particular case fits that category, Justice Douglas.

Q Wasn't it up to the three-judge court to look into that, to see whether that was a sham case or whether it had a basis?

MR. JOHNSON: Yes, and the court did hear one witness. It, first of all, issued a temporary restraining order without notice to the parties. And then the court heard one witness at an evidentiary hearing. We had the experience of one recount, at a prior time. He was a member of a recount commission duly appointed by the court.

The lower court further reasoned that the Indiana recount statute is unconstitutional, and in violation of Article 1, Section 5, of the United States Constitution, which

provides, very briefly, that the Senate is the body which determines the election and qualifications of its members.

However, Article 1, Section 4, imposes a duty on the State to prescribe the places, time, and manner of holding elections for Senators and Representatives.

It is our contention that the Indiana recount statute is more analogous to counting a vote than it is to an election contest.

The recount statute, although the recount commission is appointed by the court, and so forth, the recount commission simply retabulates the vote. This, of course, under the supervision of the court.

The lower court relied on three decisions of the Indiana Supreme Court. I think it's significant to realize that from the record the appellee chose not to take its case through the State court procedure, but chose, instead, to go directly to the federal court, after having lost his case on the motions to dismiss in the lower court.

Two of these three decisions which were relied on -- are relied on by the appellee, were decided prior to the 1961 amendment of the recount, Indiana recount statute.

The amendment provided that the recount would be used for informational purposes, and would not supersede any previously issued certificates of election.

Logically, the amendment would apply to races for the

U. S. Senate, since the Indiana and Federal Constitutions have primarily identical provisions.

In addition, it is the appellants' case that a recount stands on the same footing as the original count; that a recount is merely a retabulation of the votes. The appellee will counter that argument by saying that, well, while judgment is exercised by a recount commission; I would answer that by saying that judgment is exercised when the vote is tabulated initially. That is, it acts within a circle which is without a -- if the vote has been cast by a machine, whether it has been counted or not.

The Supreme Courts of the States of Minnesota, Georgia, and Oklahoma have held that a recount procedure does not violate the provisions of Article 1, Section 5, of the U. S. Constitution, providing the procedure is an integral part of the Election Code of the State.

And this is the fact in the State of Indiana.

The reasons for having a recount procedure are compelling. In Indiana, as in many States, the polls are open from 6:00 a.m. until 6:00 p.m. Members of the Precinct Election Boards have had a long day by the time the polls close. However, afterward, they must count the votes and certify the results to the County Board.

The members of the Precinct Election Board, in many cases, are housewives, anxious to get home to the family.

What I am trying to bring to the Court's attention is, simply, that the chance of error in the initial tabulation increases. There's a direct relationship between the chance of error and the physical well-being of the precinct election board.

Therefore, it's incumbent to have some sort of a recount procedure.

In view of the safeguards present in the statute, and the fact that the procedure is and has been an integral part of the Indiana election code since 1945, the appellant respectfully submits that there is no conflict with Article 1, Section 5, of the U. S. Constitution.

I'll sit down if the Court has no questions.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Johnson.

Mr. Dillon.

ORAL ARGUMENT OF JOHN J. DILLON, ESQ.,

ON BEHALF OF THE APPELLEES

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

I would like to just review the atmosphere that surrounded this lawsuit, so that you might understand the factual situation.

And, unlike many of the cases that have been argued here today, this was a factual situation in which facts were

presented, credible witnesses -- a credible witness was presented, and the facts were uncontroverted.

So the facts underlying this case, as shown in our Appendix, are extremely important.

Q Are you speaking of the litigation now in the State court or in the federal court?

MR. DILLON: No, sir; in the federal court.

Evidence was introduced in the federal court that the thrust of which proved that this was in fact a contest, be it a rose by any other name, that what is done in Indiana is in fact a contest.

That evidence, by a credible witness, uncontroverted, was introduced and is in the Appendix.

Now, here was the situation --

Q Well, what was the relief asked for in the State Court?

MR. DILLON: In the State court; the State court, sir, was a petition for recount under the State statute.

Q But you say in fact it was --

MR. DILLON: A contest.

Q -- more than a recount.

MR. DILLON: It was a contest.

As the Indiana Supreme Court has three times held, declaring this very statute to be unconstitutional. Before it was amended and after it was amended. Wherein the argument is

made that -- well, after the amendment, it became a discovery statute. But, in fact, in Batchelet, cited by our court, our Supreme Court, the Indiana Supreme Court said it violates Article 4, Section 10, of the Constitution of Indiana, which is a mere image of Article 1, Section 5,of the Federal Constitution.

So three times our highest court has struck down this statute as saying that it could not apply to a member of the Indiana General Assembly.

Now, there are 4,400 precincts in Indiana. They petitioned in 11 counties, 440 precincts in 11 counties, out of 4,000-plus precincts. In one of the counties, the one in which the principal case came up in to the federal court, came over into the federal court, it was fragmentary, just part of the precincts.

Now, the court was moving. Commissioners were being appointed; 33 commissioners were being appointed in 33 different State jurisdictions. As shown by the evidence and by the law of Indiana, the appellant's party controlled every precinct in Indiana, all 4,400 of them.

By that I mean the judge and the inspector in the majority party, which was the appellant's, controlled every precinct, giving them the opportunity to make the original judgment, as stated by counsel, as each person came to the polling place.

In Marion County, the Election Board, by virtue of the fact that his party has cast the highest number of votes at the previous election, was controlled by appellant's party. The canvassing board, which does check arithmetical errors, was controlled by appellant's party.

Now, in that atmosphere, and I must be candid to tell you, every judge in Indiana at this time was also selected on a partisan political ballot, right along with the County Treasurer and the County Clerk. And our Supreme Court and appellate court judges are likewise selected.

So, you see the atmosphere in the United States Senate race between two strong political parties. Now, that was the atmosphere. And the recount proceeded. All right.

It was at that point that we had to look at the Indiana statute on recounts, which had been thrice declared to be unconstitutional.

Q That is violative of the Indiana Constitution?

MR. DILLON: Article 4, Section 10, of the Indiana Constitution, which says the General Assembly shall be the judge of the election qualifications and returns of the members of the General Assembly. A mere image of the Article 1, Section 5, which says the United States Senate will be the judge of the election returns and the qualifications of the Senator.

All right.

Q Do you feel that is binding on the Federal determination here?

MR. DILLON: I can't see how logica could prove otherwise. There is no decision any place that says that this is not true, that I can find, that if you get into judging the Senator's race, the jurisdiction is in the Senate. Now, these recount commissions were proceeding to judge the Senatorial race. That's the thrust of this lawsuit.

Q Of course, you're on the merits now. You will get to the jurisdiction?

MR. DILLON: Oh, yes.

Jurisdiction: we predicate it on 1343(a) and Article 1, Section 5, of the Constitution.

Q You don't need any --

MR. DILLON: Well --

Q -- statute permitting jurisdiction?

MR. DILLON: That question was never raised in the trial court. But I say this, we're here now as the appellees. And if the judgment was solid, then it was solid. And I say that in Powell vs. McCormack this Court said that the jurisdiction under 1331(a), the general jurisdiction statute, is valid. So, if that be true, then we're entitled to that position, because we're here as the appellees. And we got the order.

Q How about under 2283?

MR. DILLON: 2283, I'll get to -- doyou want me to

reach this now?

Q No, no, you take it your way.

MR. DILLON: All right.

Q While you're hesitating here for a minute, let me ask you about this jurisdictional point.

MR. DILLON: Yes, sir.

Q If, in fact, there was no jurisdiction in the three-judge District Court, I assume you mean, when you refer to trial court you're talking about the three-judge District Court?

MR. DILLON: Yes, sir. We don't consider -- we don't consider the State court in this instance as the trial court, which I'll get to in a moment.

Q Well, if in fact there was a jurisdictional informity, does it make any difference whether anyone raises it at any time?

MR. DILLON: No, I suppose not. If it's jurisdictional --

Q If you raised it regionally here --

MR. DILLON: -- no, I suppose not. If it was jurisdiction as to subject matter, I would so concede. Nevertheless, it was not argued -- I mean, the lack of the pleading position was not argued, and the court mentioned Title 42, 1983; and the Court here -- but here, assume that we're correct, that there is a -- we all would agree, if we

could agree to that, there was a clear violation to Article 1, Section 5. Then 1343(3) says we can go into District -- if the law provides, we can go into the District Court and get relief.

All right.

Q But the trouble with that, what about the Supreme Court of Indiana's point that they have a right to just see, not that they can do anything about it --

MR. DILLON: Do what, sir?

Q Just tell them.

MR. DILLON: That is the Supreme Court of Indiana's position?

Sir, I do not view that to be their position.

Q That they can just recount them; isn't that what they said in the last case?

MR. DILLON: No, sir. Three times they have said and the last time being that in the case of a member of the Indiana Legislature, that this statute was unconstitutional.

Q And that you couldn't have a recount?

MR. DILLON: Yes, sir. Three times the Supreme Court struck down the very statute.

Now, the only basis that they can say --

Q Then you can't have a recount --

MR. DILLON: Sir?

Q Then you cannot have it --

MR. DILLON: Not for members of the Legislature or

the United States Senate or Congress.

Q Well, who can you have it for? The dog catcher?

MR. DILLON: Yes.

Q I see.

MR. DILLON: Yes. Because the dog catcher isn't proscribed by Article 1, Section 5, or Section --

Q And the mayors and the Governor and --

MR. DILLON: Not the Governor.

Q Not the Governor?

MR. DILLON: Not the Governor, because, you see, when they amended the statute they said the Lieutenant Governor, the Governor, and members of the General Assembly --

Q How about mayors?

MR. DILLON: Yes, you could for mayors.

You could for mayors.

Q Judges are elected, are they?

MR. DILLON: Judges are elected on a partisan political ballot. They are.

Q Could there be a recount there?

MR. DILLON: For judge? I believe there could be.

Q There could be?

MR. DILLON: I think so. I think so.

Q Mr. Dillon, tell me once again why an Indiana decision, based on Indiana constitutional provision, is binding for Federal Constitutional purposes.

MR. DILLON: Well, I say that the Court was justified -- there is no logical difference between the rationale of the Indiana courts deciding that a member of the Legislature cannot be contested except in the Legislature than saying that a member of the United States Senate cannot be contested anywhere except in the Senate. And the reasoning in the cases cited, in Batchlet, Beaman, and Acker in Indiana cases, which we relied upon, are identical with the reasoning in Barry vs. Cunningham.

Q Well, the rational difference might be that we might disagree with the Indiana courts.

MR. DILLON: That's true. That is true.

But I know of no legal historical precedent where that is true, Your Honor; in each case there is no precedent that says that if it's a matter of contest that it does not belong in the legislature, or legislative body. Be it the State Assembly or be it the National Congress.

Q Well, there's some -- something might depend upon whether or not this is classified as a recount or a contest.

MR. DILLON: Precisely, Your Honor. Precisely. And I say that our evidence shows --

Q That it is a contest --

MR. DILLON: -- that it is a contest and the Supreme Court of Indiana, three times, said it was unconstitutional. That's the only basis it could be unconstitutional on. It attempted to judge the right of a member of the Indiana General

Assembly, under Article 4, Section 10, of the Indiana Constitution, which is identical to Article 1, Section 5, of the Federal Constitution.

Q Well, what if the report of the commissioners here was simply to say they have canvassed all of the ballots and that the true and correct count is as follows, and said nothing else?

MR. DILLON: If there were a -- if the statute provided for a simple, arithmetical determination, as the canvassing board did in this case -- and, incidentally, did make some mathematical changes in the very county in question, and forwarded those. That's one thing.

But the evidence was, and the fact is that they proceed to get into the paper ballots. And they proceed to make judgments again on how the precinct people counted these ballots. And the undisputed evidence was that the fact is, and even in our court decisions, they even have printed where the Supreme Court judges have said, Well, that X is too far, and that check is wrong; so that is where we get into the judgment quality of this statute.

Q Well, but after contests or recounts or whatever name you give them are held, they always come either to the House or the Senate, and the House or the Senate, as the case may be, exercises a new and original and independent judgment, do they not?

MR. DILLON: Ah, but our statute does not so provide. It --

Q Well, you have already argued --

MR. DILLON: They should.

Q You already argued that the Senate is the final judge --

MR. DILLON: Yes, sir.

Q -- and therefore the Senate and the House, as a matter of fact, have never accepted State findings on this, have they? As final and binding?

MR. DILLON: Not to my knowledge.

Q They come before a subcommittee, and they have a hearing and if there is a dispute over ballots or a dispute over ballots or a dispute over the count --

MR. DILLON: Yes.

Q The Senate or the House makes the final decision.

MR. DILLON: That is correct.

Q But can they do that if they haven't got a count?

MR. DILLON: They have a count here.

Q Well --

MR. DILLON: And they have a certificate presented by the Secretary of State to the Governor, and by the Governor to Senator Hartke, and presented by Senator Hartke to the United

States Senate. They have a count.

Now, to go behind that count, if the statute provided for a pure arithmetical recounting, that's one thing; but the evidence here was, and the fact was, and the Indiana Supreme Court has three times found, that it's a contest when you get into judging the validity of these ballots for a member of the General Assembly or the United States Senate or Congress.

I think that logically follows, because those precedents are all footed and founded upon the same principle.

Q Well, a county, in the first place, though, requires judging ballots, doesn't it?

MR. DILLON: That does; it does. That comes under Article 1, Section 4. You have to start some place.

Q Yes, you have to start, and the State, I think, has authorized to count the ballots --

MR. DILLON: It is.

Q -- their system, and in those instances it judges ballots, doesn't it?

MR. DILLON: It does. Those three people appointed by Congressman Roudebush's party did do that, yes.

Q So if the State says this counting procedure isn't over yet, we have some procedures to go through yet, why isn't it authorized to do that even if it involved doing what it has already done, judging the ballots?

MR. DILLON: If -- they cannot judge the ballots, they can recount the ballots.

Q Well, I know, but in the first place they counted them and judged the ballots?

MR. DILLON: They did.

Q Now, why can't they do it over again?

MR. DILLON: Because that's not a continuation of the election process under Article 1, Section 4. That becomes a --

Q But you said they could count them over?

MR. DILLON: Yes. Provided they don't --

Q You don't think you can do the same thing in counting them again that you did in counting them in the first place?

MR. DILLON: Ah, that's the count-'em-the-first-time, count-'em-the-second-time argument out of Laxalt-Cannon and the Wickersham case. And if that's all they did was count them, fine.

Q Well, they're not doing any more on the second go-around than they did on the first?

MR. DILLON: Quite to the contrary.

Q Well, on the first go-around they had to judge the ballots.

MR. DILLON: Quite to the contrary. As the evidence showed, there, they're making a judgment on what was done at

the precinct polling place, and the evidence showed there was no way to unscramble that, and that's wherein the irreparable harm was. They could never get to the Senate and determine how that judgment was made by the recount commission if that evidence wasn't maintained until it went to the United States Senate.

And, interrestingly enough, a year has passed over, and no petition has ever been presented to the United States Senate by the appellant herein asking for a contest of this election.

Now, it is, of course, an argument between Article 1, Section 4, Article 1, Section 5; but our evidence shows that this violated Article 1, Section 5. It got into the prerogatives of the Senate.

Now, --

Q How doas it take anything away from the Senate as long as the Senate has the final word on the recount?

MR. DILLON: Because the evidence there would be irreparably co-mingled, and it would be impossible for the Senate to determine how the recount commission viewed what the precinct commission did.

Q Well, isn't it the custom to certify the ballots and actually deliver them physically to the Senate or the House, including in a separate, impounded group all those which are contested, or questioned, or challenged?

MR. DILLON: The Senate has no specific rules on it, they proceed ad hoc on these matters, but that is the custom, yes.

Q That is the custom?

MR. DILLON: Yes. Let me say that it has been done in Senatorial recount or contest cases.

But that was part of our equity, that we felt like we were entitled to in the -- and the three-judge District Court so ruled, that once these recount commissioners start rejudging this and say, Oh, no, this -- the evidence all carefully lays out exactly how this was done, and how they got into these paper ballots, which were in all the precincts. Some paper baldots in all the precincts.

Now, the machine, you see, is no problem. In the machine you just make an arithmetical count. But on the paper ballots, when they come in from the precincts, that's a far different thing. Some are in a counted bag, as the evidence shows, some are in a rejected bag. Now, these commissioners proceed to redo that. One of the counties, even though the State statute requires the whole county to be on machine, Wayne County, as the evidence showed, was all on paper ballots.

So here we have all of these commissions, 11 different commissions proceeding to make judgments on these ballots which were cast, and the court found, on the evidence, that that belonged in the United States Senate.

Q Has a federal court ever enjoined a state recount board in any case that you know of?

MR. DILLON: Well, I don't -- I have found that in every case where it violated Article 1, Section 5, they have said that they could not permit it to go forward.

Q Are they cited in the brief? I didn't identify those cases.

MR. DILLON: Well, in Laxalt vs. Cannon, they said that they granted the relief there, and then went on, and there was a recount before the contest, you see. There was no question raised about the recount in the Laxalt vs. Cannon and it went on to say that the Senate is the judge under Article 1, Section 5.

So, presumably, in Laxalt vs. Cannon, if there had been -- if in fact their recount was the kind of recount we have, and that's the emphasis of this lawsuit, what this recount constitutes, and what we say is that it constitutes a contest, and our Supreme Court of Indiana, three times said the same thing, as we see it. We can't see how there's any cavil in that argument.

But, nevertheless, it's been raised, and we're trying to meet it.

Now, we went into the federal court and made a Federal Constitutional claim. A Federal Constitutional claim. Article 1, Section 5, of the Constitution. There is no

underlying State question involved, because if the State law question was clear, as we see it, three times the Supreme Court had said that it was not a valid, a vioable statute so far as the State Legislature was concerned. Now, we think it's only reasonable, if that be true, and that were the underlying constitutional basis, that that certainly is true for the office of United States Senator.

Now, motions were filed under 2283, in the federal court. And we met those, and we meet them now in theory, that this is not the type of proceeding that 2283 prohibits granting an injunction against. These commissioners -- this is not court litigation, because there is no appeal in Indiana from a recount. There is no appeal. You can't do anything, and yet the law says --

Q Well, how did three cases get there?

MR. DILLON: Sir? Writ of prohibition.

Q Well, why don't you take that, then?

MR. DILLON: All right.

The State court remedy used in Batchlet was --

Q I mean where you have three cases that you say are absolute, sure-fire precedents, why did you go to the federal court?

MR. DILLON: Well, I'll explain that.

First of all, I think --

Q You didn't --

MR.DILLON: Why don't we go for writ of prohibition?

All through the brief, I indicate that writ of prohibition is a simple remedy. Well, that depends on what the factual situation is and how fast things are moving.

Now, our Indiana writ of prohibition, under the rules of our procedure, requires that, first of all, if an emergency writ is not granted, and it's very difficult to get emergency writ, then the petition for the temporary writ of prohibition or alternative writ of mandate must lay over seven days, and that they only hear them at 2 o'clock on Monday.

All right. Now, if you file on Tuesday, and you don't get a hearing on your temporary emergency, then you could be put off 13 days.

Now, on this two courts have overruled us, our motion to dismiss, on the ground they were violating Article 1, Section 5, of the Federal Constitution, not the State Constitution. So we went to federal court to get a restraining order, to stop it, to hold it, to see whether we were right --

Q Assuming you filed one under the Indiana Constitution, on a Saturday, --

MR. DILLON: Yes.

Q -- you would have been in free, wouldn't you?

MR. DILLON: Sir?

Q You would have been in free, you would have won.

MR. DILLON: Well, if the court ruled, if we could get the court to hear it --

Q The only way you can lose would mean the court would have to --

MR. DILLON: Change the law.

Q -- would have to reverse three prior -- overrule three prior decisions. That's the only way you can lose.

MR. DILLON: Yes.

Q But you preferred to come over to the federal court?

MR. DILLON: We thought we were -- for two reasons: we thought that, under the fact situation, it was our judgment that the writ of prohibition was not an expeditious remedy, but, more importantly, before this Court, we didn't think we'd have to exhaust this straight remedy or we could go into the federal court on a federal question, without an underlying statement of State question. We didn't see any question of abstention or comity involved in this.

So we went to the federal court. We got a restraining order, and then we got a temporary injunction after a full-scale hearing where evidence was had.

Now, the question said: was there any Indiana precedent that said that this is a ministerial proceeding? The answer to that is yes. There are two precedents cited in our brief: Watson vs. Pigg and State ex rel McCormick.

Q Do they say ministerial or non-judicial this time?

MR. DILLON: Both. They're intermixed. But they say that they're not -- that the kind of animal that we say we're talking about in a 2283 prohibition against granting them an injunction; and we cite many authorities that support that position, that there were not proceedings in a State court, which were specifically prohibited under Younger. Certainly they're not criminal prosecutions, and Watson vs. Pigg and the State ex rel McCormick, one was a prosecutor, one was a county auditor, and they describe these people as ministerial, and I believe counsel in appellant's brief concedes, or at least argues the same way, that these are ministerial proceedings, not judicial proceedings; or that they are non-judicial proceedings.

Now, the next question is, of course, does Younger apply? We say no. We say it does not apply for the reason that these are not State court proceedings under 2283. And I would like to also cite the case of Hobbs vs. Thompson which was previously cited, because again it was not exactly a 2283 case; but it does give an excellent review of what the Younger decisions made, and were called this Febxuary Sextet of Decisions in Younger. And Judge Goldberg, in that case, which has been previously cited here, gives his view, and a very rational view of the application of 2283.

Now, after this case was tried, and herein comes a --

MR. CHIEF JUSTICE BURGER: Excuse me. We'll finish today, and you have some time left.

MR. DILLON: Fifteen minutes by my computation. But I --

At any rate, prior to the taking -- well, first of all, the certificate was issued. Hartke presented himself on January 21st, he was seated. The Senator Curtis motion said that he would be seated with unanimous consent, without prejudice to this appeal pending in the Supreme Court, and recognizing that this Supreme Court might order a recount; or words to that effect.

Now, I suggest to you that that language is completely negatory. It means nothing. Senator Hartke is seated just likeevery other Senator. He's seated subject to Article 1, Section 5, of the Constitution.

Q Then we shouldn't really be here today.

MR. DILLON: That is my next point.

We filed a motion to dismiss, and we cited Barry vs. Cunningham. Now, it is a 1929 case, involving Senator Vare. But the fact is, as far as I can see, that case has not been, in any way, trampled upon in any of these decisions.

And every decision underlying the State court, be they federal or be they State court, or be they State Legislature, or be they Federal Legislature, when the Senator

or Assemblyman seats himself or is seated, then this thing moves into that body; and that's what Senator Vare said, that's what the Barry vs. Cunningham, involving Senator Vare, said; he was seated. And this matter is now for the United States Senate to determine.

I cannot see what can be done at this point, except let this matter go to the United States Senate.

Now, it is true, because we went to Federal District Court, to press a federal claim, a federl Constitutional claim under Article 1, Section 5; I raise the question, why does not the appellant go, after a year, to the United STates Senate, where he can get all the relief that he could ask for, if he could convince the Senate that he is correct in his position.

So there is not really -- this case is now moot. It was a case when we tried it in the federal District Court, but once he became seated in the United States Senate, under the rule of Barry vs. Cunningham, this case is moot.

Q Well, what could the Senate do now?

MR. DILLON: What could they do now?

Q Now that he's seated, what could the Senate do now, though?

MR. DILLON: Oh, they could petition the Senate and ask for a recount.

Q Now? After the Senator is seated?

MR. DILLON: I think they could, yes, sir. I think that's -- I think you see -- yes, I do.

Q Then how would that end up? Under Article 1, to apply to felon if they found it --

MR. DILLON: Article 1, Section 5, yes, sir.

Q End up in expulsion?

MR. DILLON: You mean if they --

Q If they found against him?

MR. DILLON: Well, I don't think it would be expulsion, I think it would be a majority vote situation, where they found that he was not elected. That's the normal procedure. And I --

Q Well, he's already been seated as if elected, for a year.

MR. DILLON: Yes, sir. He has been seated. January 21st of 1970.

Q Well, if he's been seated, that's the end of it, both in the Senate and in the courts?

MR. DILLON: That of course is our position, and we filed a motion to dismiss --

Q And you argue, too, that since he's been seated, they could not now undertake a recount in the Senate?

MR. DILLON: Well, I don't know what the Senate can do because they adopt different rules on these cases as they go along, you see; and I hate to say --

Q Well, as my brother Stewart said, you don't have to answer that.

Q You are here in the Court, all you need to do is --

MR. DILLON: Yes, sir.

Q -- to convince the Court that he's been seated.

MR. DILLON: Yes, sir. But I know that he has been seated.

Q And you can make that other argument over there.

MR. DILLON: Yes, sir. And of course we'll raise the doctrine of laches if we get to the Senate a year later, because the fact is these machines have been cleared, and pictures have been taken, and how -- but that's not before this Court.

But the jurisdictional question under Article 1, Section 5, is certainly here. He has been seated. Just like every other Senator. And this language in the Senator Curtis motion has no constitutional effect.

Q Well, was the Senate, in putting that language in, just being polite to the Supreme Court?

Was that --

MR. DILLON: I would hope so, Your Honor. And that would be a new departure in some regard, I suppose; but I -- seriously, I don't think it means a thing constitutionally. I think he sits there just like every other Senator, subject to being proved that he wasn't elected, and the place that you

prove that is in the United States Senate. Now, that is the ruling precedent of this Court, under Barry vs. Cunningham. And the remarkable thing, even the late cases, be that Laxalt or be they Wickersham, when they get into this --

Q Those were State cases.

MR. DILLON: All right. But they all fall back -- you see, the Constitutional provision in every State is very nearly identical to the Federal Constitutional provision in Article 1, Section 5, and they all fall back to the same argument: well, the legislative body is the judge of the election returns and qualifications of the member.

Now, we're talking about the election returns and qualifications of a United States Senator. How can it not -- why should it not be presented to the United States Senate? Why should it not have been presented there in the first instance?

We filed a motion to dismiss on this point. The court deferred the jurisdictional question until today, as I understand it, and I want to press strongly the point that he is seated; and, under Barry vs. Cunningham, that I believe that -- and Flask vs. Cohen, and this case, I think it's moot. I don't think anything can be done.

The State recounts, as in the various -- there are all kinds of different cases. Some say they are valid, some say they're not. And you have to look at the various State laws to determine whether they would be valid measured against

Article 1, Section 5.

But looking at our recount statute, and what Laxalt v. Cannon says about Nevada's case, and what Wickersham says about the case in that State, or the Minnesota case, Odegard, we know what the Indiana courts have held. They've held that the statute is unconstitutional, that it violates Article 1, Section 5.

Now, the trial court did mention, as I said, Title 42, 1983 of the Civil Rights Act. We trouble ourselves with this question. How do you go in, assuming we're right, that out here is a body, a ministerial body, absolutely violating the Senate's prerogative under Article 1, Section 5, which we though we proved, and the court thought we proved, and we believe the evidence shows that we meticulously put the evidence in, so it wouldn't get up here, and say, Well, it's a facial argument. On its face they say recount.

So if, on its face, it says recount, if you can count them once, you can count them twice argument; so we said you've got to prove that you don't do that. And we did prove it. And the court so found, that this is a contest.

That moves it into Article 1, Section 5, that moves it into the Senate.

The more important thing, I think, is that there is no question that the facts show that the Congressman, appellant Hartke -- appellant Roudebush had control of the

polling places, his party had control of the recount commission, had control of the canvassing board, now they wanted to get into a further contest, they wanted to go into 11 separate counties, isolated precincts in some cases, and rehash those judgments. The court found, properly, as the Indiana Supreme Court had found three times, that that violated Article 1, Section 5.

We don't think it's a question of exhaustion of State remedies, we don't think a writ of prohibition would be necessary, we think we can go to the federal court and press a federal claim, where there is no uncertainty in the State law. And we did so.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you.

You have three minutes remaining, counsel.

REBUTTAL ARGUMENT OF RICHARD C. JOHNSON, ESQ.,

ON BEHALF OF APPELLANT SENDAK

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

I'll be very brief, but Mr. Justice Marshall already asked the question that I had in my mind, and that is simply if the Indiana recount statute is so unconstitutional, why didn't the appellee seek redress there?

As far as the question of the seating of Senator Hartke making the case before us moot is concerned, Senator

Hartke was asked to step aside at the time the oath was administered, and a separate oath was administered to him, in which he swore to abide by the Constitution and so forth, but subject to this appeal that is now pending. And it is our contention that this was a conditional seating and doesn't in fact moot this particular case.

The Indiana recount statute -- just one further point -- the Indiana recount statute is in aid of the Senate's power to judge the election of its members, not in derogation of it.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:12 p.m., the case was submitted.)