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In the

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Supreme Court of the United States

ANDREW C. GOOSBY, et al.,)
)
Petitioners,)
)
v.)
)
MAURICE OSSER, et al.,)
)
Respondents.)

No. 71-6316

Washington, D.C.
December 6, 1972

Pages 1 thru 54

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Respondents.
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No. 71-6316

Washington, D. C.

Wednesday, December 6, 1972

The above-entitled matter came on for argument at
2:37 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MRS. ANN S. TORREGROSSA, ESQ., 313 South Juniper
Street, Philadelphia, Pennsylvania 19017, for
the Petitioners

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Commonwealth of Pennsylvania, Capitol Annex,
Harrisburg, Pennsylvania 17120, for the Respondents
Commonwealth of Pennsylvania, J. Shane Creamer and
C. DeLores Tucker

JOHN MATTIONI, ESQ., Deputy City Solicitor, 1520
Municipal Services Building, Philadelphia, Pa.
19107, for Municipal Respondents

C O N T E N T SORAL ARGUMENT OF:PAGE

Mrs. Ann S. Torregrossa, Esq.
for the Petitioners

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In rebuttal

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Peter W. Brown, Esq.
for Respondents, Commonwealth of
Pennsylvania, J. Shane Creamer, and
C. DeLores Tucker

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John Mattioni, Esq.,
for Municipal Respondents

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Goosby against Osser, No. 71-6316.

Mrs. Torregrossa, you may proceed whenever you are ready.

ORAL ARGUMENT OF ANN S. TORREGROSSA, ESQ.

ON BEHALF OF THE PETITIONERS

MRS. TORREGROSSA: Mr. Chief Justice, and may it please the Court:

The case which is here on certiorari to the Third Circuit involves the question of whether Pennsylvania's absolute denial of the right to vote to pretrial detainees solely because they cannot afford bail, presents frivolous and insubstantial constitutional issues.

Petitioners' complaint was dismissed by a single judge for lack of subject matter jurisdiction. The Third Circuit Court of Appeals affirmed the dismissal of Petitioners' complaint on the ground that the constitutional issues presented were insubstantial and therefore did not require the convening of a 3-judge court. Therefore, there are two questions before this Court:

First, whether the constitutional issues alleged in our complaint are substantial.

And, second, whether the Federal courts have subject matter jurisdiction.

It is important to note from the outset what this case does not involve. This case does not involve the right of convicted inmates or ex-offenders to vote. Moreover, this case does not involve any issue of voter qualification, for the respondents have stipulated that petitioners meet all voter qualifications required by the Commonwealth of Pennsylvania.

Further, this case does not involve, and in fact we do not seek, a ruling from this Court on the ultimate constitutional merits of our case. What we merely seek is a ruling from this Court as to whether our constitutional issues are substantial and therefore require a hearing.

Finally, this case does not involve a question of dispute as to facts, for in the procedural posture of our case before the Court, the allegations of the complaint must be assumed to be true.

Briefly summarized, petitioners' complaint --

QUESTION: (Inaudible) whether or not they are substantial enough to have required the convening of a 3-judge court. That's the issue.

MRS. TORREGROSSA: Of a 3-judge court. That's the hearing we are looking for, yes, your Honor. We are merely looking for an opportunity to prove the allegations of our complaint.

Petitioners alleged the following in their complaint:

First, that they represent a class of approximately 2,000 unconvicted pretrial detainees, over 90 percent of whom are black and almost all of them are indigent.

QUESTION: All that you are speaking of, just the State of Pennsylvania?

MRS. TORREGROSSA: Less than that, your Honor, we are talking about the County of Philadelphia.

QUESTION: County.

MRS. TORREGROSSA: They allege that the Commonwealth of Pennsylvania --

QUESTION: Does your case depend on the facts that they are 90 percent black and almost all indigent?

MRS. TORREGROSSA: Yes, your Honor. I will try to tie that up as I go along.

QUESTION: Yes.

QUESTION: They allege the Commonwealth of Pennsylvania totally denies them a right to vote. In Pennsylvania there are two means of voting. A person can vote in person and a person can vote by absentee means.

Petitioners attempted to vote in person and all their requests were denied. The way they tried to vote was they requested that voting facilities and registration facilities be sent to the jails. They requested that they be able to go to the permanent registration and voting facilities by guarded transportation if necessary.

QUESTION: How many jails?

MRS. TORREGROSSA: There are three, your Honor.

They are all clustered together.

QUESTION: And the total is 2,000?

MRS. TORREGROSSA: That is correct, pretrial detainees.

Furthermore, they submitted affidavits to the registrars to allow them to vote through their attorneys. And finally they asked of the respondents that they be permitted to register and vote in any means deemed advisable by the respondents.

All these requests to register and vote in person were turned down.

Petitioners' request to vote by absentee means were also turned down. Petitioners sought an absentee ballot, however, it was refused pursuant to a Pennsylvania statute which denies an absentee ballot to anyone "confined in a penal institution."

Therefore, since petitioners were not permitted to register and vote in person or by absentee means --

QUESTION: Incidentally, is it stipulated that in each instance, each of these inmates was an inmate only because he or she could not raise bail?

MRS. TORREGROSSA: No, that has not been specifically stipulated. It is our position --

QUESTION: That would have to be a matter of proof?

MRS. TORREGROSSA: That would have to be a matter of proof.

QUESTION: What about people on bail. Any problems in voting for them?

MRS. TORREGROSSA: Absolutely not, your Honor. That is one of our constitutional allegations that that classification is totally irrational.

Because we are totally denied, we allege in our complaint that the denial of a right to vote was unconstitutional for the following reasons:

First, it denies equal protection of the law because a person who can afford bail can register and vote. Therefore, we felt that the denial of the right to vote was denied on the basis of wealth.

Secondly, we alleged that petitioners were denied equal protection of the law because those who are convicted of a crime but free on probation or parole may register and vote.

Also, since petitioners are unconvicted pretrial detainees, they must be presumed innocent by the law. We allege the denial of due process of law in that the denial of the right to vote is impermissible punishment without conviction.

QUESTION: May one convicted but on bail pending appeal vote?

MRS. TORREGROSSA: Yes, your Honor, one on bail pending appeal can vote.

QUESTION: Without regard to what the offense may be?

MRS. TORREGROSSA: That's correct, your Honor.

QUESTION: Did I understand you to say that one convicted and presumably the conviction final, but placed on parole in Pennsylvania may vote?

MRS. TORREGROSSA: That is correct.

QUESTION: Not disqualified because of a felony conviction.

MRS. TORREGROSSA: That's correct, or pending appeal, on bail pending appeal, they may vote.

QUESTION: Well, I thought you said on parole, too.

MRS. TORREGROSSA: That's also true.

QUESTION: I am assuming, then, that we have a felony conviction which has become final, and as long as he is in prison he may not vote under your present rules, but if he's out on parole, he may vote.

MRS. TORREGROSSA: That's correct.

QUESTION: No disqualification --

MRS. TORREGROSSA: None, your Honor.

QUESTION: -- because of a felony conviction in Pennsylvania.

MRS. TORREGROSSA: The only disqualification that I know of is if the crime is related to an election crime, has something to do with election fraud.

QUESTION: If it's first-degree murder --

MRS. TORREGROSSA: He can vote.

QUESTION: Federal or State election?

MRS. TORREGROSSA: Federal or State election. The whole difference is whether he is on the streets and can get to the registrar and to the voting booths.

The last constitutional allegation made by petitioners is that they are denied the right to vote on the basis of race in violation of the Fourteenth and Fifteenth Amendments of the U.S. Constitution and the Voting Rights Act of 1965.

As stated earlier, the Third Circuit Court of Appeals affirmed the dismissal of petitioners' complaint on two grounds:

First, on the ground that petitioners' complaint failed to state substantial constitutional issues because these issues were totally foreclosed by the decision of this Court in McDonald v. Board of Elections:

And, secondly, on the ground that the District Court did err in dismissing petitioners' complaint for failure to present an Article III case or controversy.

Petitioners petitioned for a rehearing en banc and

this was denied 4 judges to 3 with the dissenting opinion from Judge Arlin Adams who felt that McDonald did not control.

We obviously feel that the Court of Appeals erred. First of all, we feel that their reliance on McDonald to dismiss our complaint was unjustified because our case is clearly distinguishable from McDonald.

First and foremost, petitioners, unlike the McDonald petitioners, are totally denied the right to vote. Petitioners attempted to register and vote in person and by absentee means.

QUESTION: The Court in McDonald said that the State could work out a way to do it.

MRS. TERREGROSSA: McDonald said that there was nothing in the record to show that petitioners were not totally denied the right to vote.

QUESTION: That's right. And here the petitioners said, "Any way that you will do it is all right with us."

MRS. TERREGROSSA: That's what we said. Tell us any way.

QUESTION: The State said no way.

MRS. TERREGROSSA: The State said, "Our hands are tied by State law."

QUESTION: The classification here has only to do with custody and nothing else.

MRS. TERREGROSSA: That's correct.

QUESTION: So that it's distinguishable somewhat from McDonald, I think.

MRS. TERREGROSSA: That's correct. As I pointed out, the absentee ballot provision says that no one can receive an absentee ballot if they are "confined in a penal institution."

As we were saying, the petitioners are totally denied, they attempted by every means they could think of to register and vote. The McDonald appellants, however, only attempted to vote through an absentee ballot. The Court held that since there was nothing in the record to show that they were totally denied the right to vote, the Court could not assume this. Therefore, they found that they were only denied one means of voting, and that the State had a rational basis for denying them an absentee ballot.

QUESTION: What do you think is the reason for the Pennsylvania rule? What is the rationality behind it that the legislature adopted?

MRS. TERREGROSSA: It's really hard to --

QUESTION: Well, isn't one at least assertable reason the safety factor?

MRS. TERREGROSSA: In what respect, your Honor?

QUESTION: Well, these people have been accused of a crime.

QUESTION: But so is someone who is free on bail been accused of a crime.

QUESTION: Yes. But I'm not arguing the case. I am merely trying to work out what the legislature may have been thinking. Would it be that these people have been accused of crime and that they are not responsible enough to raise bail and it's too bad they are there, but they shouldn't be there?

MRS. TERREGROSSA: Throughout this entire case no one has given us a reason, compelling or rational.

QUESTION: Maybe I should ask --

QUESTION: How old is this statute?

MRS. TERREGROSSA: It most recently was amended in 1963.

QUESTION: But what are its roots? How far back does it go in Pennsylvania history? Just to 1963?

MRS. TERREGROSSA: No. In 1963 the statute was changed from disqualifying anyone committed to and confined in a penal institution to read "anyone confined in a penal institution."

QUESTION: So it isn't something, then, in this objectionable sense that you argue. It goes back to colonial days or some such thing.

MRS. TERREGROSSA: As far as I know, it goes back to Methuselah. I don't know. I know it goes back past 1963.

QUESTION: Do I correctly understand that your class or purported class does not include the convicted felon who

is serving his sentence?

MRS. TERREGROSSA: That is correct, your Honor.

QUESTION: Why don't you include him?

MRS. TERREGROSSA: They were not the clients who came to us and it just does not include. That's not the class.

QUESTION: You're taking just one step at a time?

MRS. TERREGROSSA: My clients are unconvicted, your Honor.

QUESTION: ~~TERREGROSSA~~ Well, you have quite a case, but you did say a little while ago that Pennsylvania does not disenfranchise a convicted felon.

MRS. TERREGROSSA: That's correct. They do not.

QUESTION: That would give you a much larger class.

MRS. TERREGROSSA: That would. However --

QUESTION: But not as appealing.

MRS. TERREGROSSA: That's correct.

So the first and important distinction between McDonald and the case at bar is that petitioners maintain that the compelling State interest test must be applied to the classifications challenged by the Pennsylvania statute.

QUESTION: Compelling or rational, whichever test, there is no State interest to support this from what you have been arguing.

MRS. TERREGROSSA: That is correct, your Honor.

Secondly, petitioners' claims that they are being impermissibly punished in violation of due process of law and that they are being denied the right to vote on the basis of wealth must be addressed by this Court. In McDonald similar claims made by the McDonald appellants were not addressed by the Court since the Court said they could not show that they were totally denied the right to vote.

QUESTION: In Pennsylvania, do these clients of yours, the particular ones, are they in jail long before trial?

MRS. TERREGROSSA: One of our named petitioners, your Honor, was in jail four and a half years awaiting trial.

QUESTION: Four and a half years. So some of them may still be there since the time your lawsuit was started.

MRS. TERREGROSSA: Oh, yes, your Honor. As of the time we filed the brief, three were still --

QUESTION: (Inaudible.)

MRS. TERREGROSSA: Just a minute. David -- yes, he was awaiting trial on first-degree murder.

QUESTION: I take it that's for pretrial maneuvers -- motions?

MRS. TERREGROSSA: I don't know what it was for.

QUESTION: You don't know.

QUESTION: Is it true that some of the 2,000 detainees were being held charged with crimes which were not

bailable?

MRS. TORREGROSSA: Yes, your Honor. At the time we brought the suit, we had two classes of petitioners -- those who were being held on nonbailable offenses and those who could not afford bail. However, within the last several weeks the Supreme Court of Pennsylvania has ruled that in no case should a person be held without bail. So therefore --

QUESTION: Even on murder charges?

MRS. TORREGROSSA: Even on murder charges. So therefore now our class is totally made up of people --

QUESTION: Previously nonbailable.

MRS. TORREGROSSA: That is correct.

QUESTION: Of course, you have some problem, don't you, in fixing your class with respect to the mootness concept? Are some members of your class still being held in prison?

MRS. TORREGROSSA: At the time that we filed our brief, your Honor, three were being held. However, even if we do not have named representatives, we feel that mootness is not a question here.

QUESTION: No, I suspect not, in view of our holdings in election cases. But my question is when do we focus on the facts that you are trying to present to us? As of the time you filed the action? As of this moment?

MRS. TORREGROSSA: As of the time we filed the complaint, your Honor.

QUESTION: Well, then, I take it as of the time you filed the complaint there were prisoners being held who were not bailable.

MRS. TORREGROSSA: That's correct.

QUESTION: Is Mr. Goosby still in jail?

MRS. TORREGROSSA: No, Mr. Goosby has been subsequently released, I believe.

QUESTION: Why haven't you substituted another prayer?

MRS. TORREGROSSA: Because we had three existing plaintiffs --

QUESTION: Not named parties, though.

MRS. TORREGROSSA: Yes, your Honor, named parties.

QUESTION: Oh, they are named.

MRS. TORREGROSSA: Three named parties who are still in jail. That's correct.

QUESTION: I see.

MRS. TORREGROSSA: As of the time we filed the brief.

QUESTION: Not just members of the class, but --

MRS. TORREGROSSA: Oh, no, no. Named plaintiffs.

QUESTION: Did you say Mr. Goosby is out of prison?

MRS. TORREGROSSA: Yes, Mr. Goosby is --

QUESTION: What happens to your class action then?

MRS. TORREGROSSA: There are three named plaintiffs who as of the time we filed the brief were still in their pretrial status.

QUESTION: Are they still in prison?

MRS. TORREGROSSA: Yes, they are, your Honor.

QUESTION: Now. As of now.

MRS. TORREGROSSA: I do not know as of this minute. I do know as of the time we filed the brief they were in --

QUESTION: That was in September?

MRS. TORREGROSSA: That is correct.

QUESTION: You could let us know, as of December?

MRS. TORREGROSSA: Yes, sir, I certainly shall.

QUESTION: While you are interrupted, I notice on the appendix that there is a form of preliminary injunction on page 76 and an order convening a 3-judge court, page 80. And they don't bear any facsimile signatures of the Judge. Were those prepared by you but not signed by him, or were they in fact signed by him?

MRS. TORREGROSSA: No, your Honor.

QUESTION: It was just a mistake, then, to include them in the appendix.

MRS. TORREGROSSA: No, we just included the motions which we filed, not necessarily those which were granted by the court. The District Court in this area, in this case, did not reach the issue of whether a 3-judge court should be convened and did not reach the issue of whether a temporary restraining order or preliminary injunction should be signed. He dismissed our complaint on subject matter jurisdiction

grounds. So we just put these in the appendix to show the Court what we had filed in the case.

If we are in summary, petitioners' case is different from McDonald, in the first respect, in that the compelling State interest test should be applied to the classifications, and, secondly, the Court must address the due process violations and the allegations that we are being denied the vote on the basis of wealth.

The second distinction between the McDonald case and the case at bar stems from the difference between the Illinois absentee ballot statute and the Pennsylvania absentee ballot statute. The Illinois statute made absentee ballots available to four classes of persons but did not specifically exclude anyone from receiving an absentee ballot. The Pennsylvania absentee ballot provision, on the other hand, specifically excludes anyone confined in a penal institution. Petitioners contend that although the Pennsylvania statute does not explicitly discriminate on the basis of wealth and race, it in fact grossly discriminates on both the basis of wealth and race.

Petitioners are confined in a penal institution solely because they cannot afford bail, and over 90 percent of their class is black.

Finally, petitioners would like to note that their case, unlike the McDonald appellants, has two constitutional

allegations which were not included in McDonald -- the Fifteenth Amendment allegation and an allegation that the laws of Pennsylvania violate the Voting Rights Act of 1965.

Also, petitioners contend that even if the classifications drawn by the Pennsylvania absentee ballot statute are not tested by the compelling State interest test, the statute will not survive the test of reasonableness as applied in McDonald.

QUESTION: Mrs. Torregrossa -- pardon me, Chief.

Would the ground that the State statute conflicts with the Federal statute itself be a cause for convening a 3-judge district court?

MRS. TORREGROSSA: No, your Honor.

QUESTION: You claim it's pendent?

MRS. TORREGROSSA: Pendent jurisdiction and then even if everything else were dismissed, we should have at gotten a single judge in this case.

QUESTION: Now that everybody in Pennsylvania is bailable for all crimes, is your class going to evaporate?

MRS. TORREGROSSA: Oh, no.

QUESTION: You think not.

MRS. TORREGROSSA: Unfortunately, no. The vast majority --

QUESTION: It will be reduced, but there will still be a residue of people awaiting trial in custody.

MRS. TORREGROSSA: The vast majority of my clients of the class at the time that we brought the complaint were people who could not afford bail; they were not people who were charged with nonbailable offenses.

QUESTION: You aren't attacking bail as such, are you?

MRS. TORREGROSSA: Absolutely not, your Honor.

QUESTION: You are attacking the classification between people on bail and people not on bail.

MRS. TORREGROSSA: That's correct. We are saying Pennsylvania puts us in a position where there is absolutely no way we can register and vote.

QUESTION: Well, anybody who can't make bail can't go and earn his living either.

MRS. TORREGROSSA: That's correct.

QUESTION: He can't be with his family, he can't use the public highways, can't do anything.

MRS. TORREGROSSA: That's correct, but we are not attacking the bail system per se.

QUESTION: I know, but what's the difference? If they can keep him from doing all those things, if they even deprive him of his liberty, liberty of movement, why can't they deprive him of his right to vote?

MRS. TORREGROSSA: What we are questioning is the poll tax aspect of the bail system in this case. And certainly

two wrongs do not make a right.

QUESTION: It is rather serious, isn't it, to deprive one of his liberty?

MRS. TORREGROSSA: No question about it.

QUESTION: And you don't attack that.

MRS. TORREGROSSA: Not -- no, not in this case.

QUESTION: Not in this case.

QUESTION: But you say nevertheless, this is one disadvantage the State can't heap on him just because he can't make bail.

MRS. TORREGROSSA: That's correct, especially since he must be presumed innocent by the law.

QUESTION: Well, --

QUESTION: It's quite rational, at least arguably, to deprive some person of his liberty who can't make bail because of the basic purpose of bail, that he will show up when the trial comes along. And voting has nothing to do with that purpose.

MRS. TORREGROSSA: That is the only basis which bail may have, to assure the presence of the defendant at trial.

QUESTION: But if you are going to take them to the polls, there is a real danger they might not show up. That's quite a few people to take to the polls.

QUESTION: You don't have to take them to the polls.

MRS. TORREGROSSA: That's correct, your Honor.

All we are saying is, "Let us do it in your way."

MR. CHIEF JUSTICE BURGER: We will resume on that point tomorrow morning.

MRS. TORREGROSSA: Thank you.

[Whereupon, at 3:00 o'clock p.m., the case in the above-entitled matter was recessed until 10:00 a.m.

Thursday, December 7, 1972.]

THURSDAY, DECEMBER 7, 1972

(10:08 a.m.)

MR. CHIEF JUSTICE BURGER: We will resume arguments in 71-6316.

You may proceed, Mrs. Torregrossa.

ORAL ARGUMENT (RESUMED) OF ANN S. TORREGROSSA,
ESQ., ON BEHALF OF THE PETITIONERS

MRS. TORREGROSSA: Mr. Chief Justice, and may it please the Court:

I would like to reserve a few minutes for rebuttal and therefore will just spend a minute or two on the second issue before this Court.

A single judge in the District Court dismissed petitioners' complaint for failure to state an Article III case or controversy. Third Circuit Court of Appeals affirmed this decision without discussion. The District Court dismissed petitioners' complaint sua sponte when the Commonwealth defendants stated at a temporary restraining order hearing that the laws of Pennsylvania were unconstitutional because they totally denied petitioners the right to vote.

It is clear, however, that the Federal courts have jurisdiction in this case and do not lose jurisdiction simply because some but not all of the defendants admit allegations in the complaint. As this Court pointed out in 1908 in Re

Metropolitan Railway Receivership, if the rule were otherwise, every defendant could have a case dismissed against him by admitting liability or fault, the court would lose jurisdiction of the case and plaintiff would be without redress for their injuries.

QUESTION: Mrs. Torregrossa, conceding that there was certainly jurisdiction under those circumstances, wouldn't at the least there be an absence of any claim for an injunction so that you should be limited to a declaratory judgment under those circumstances, if it were clear that the State not only would agree with whatever the federal judge did, but indeed was agreeing with your legal contentions before the judge had ruled?

MRS. TORREGROSSA: We have an interesting situation here, your Honor. The election officials from Philadelphia County are independently elected and were the ones that actually administer the election laws. They are the ones that make the determination of whether a person is eligible to vote. They are the ones that give them an absentee ballot. Therefore, they hotly contested this issue of constitutionality and there is a severe question as to whether or not the State could bind them as far as a stipulation on this matter.

I would also like to point out that the Attorney General's stipulation meant absolutely nothing as to petitioners' right to vote. Since the stipulation, we have

had three elections, and since the stipulation we have been unable to vote in three elections.

QUESTION: The Philadelphia election officials who you tell us are independently elected, are they under any duty to follow the advice or opinion of the State Attorney General?

MRS. TORREGROSSA: Again, there is only one case on that matter and they were not under a duty in that situation to follow the opinion. They stated at the hearing that if an opinion was issued by the Attorney General, they would not follow it.

QUESTION: Even a formal opinion.

MRS. TORREGROSSA: That's correct.

QUESTION: They would not. And as far as you know, there is no precedential authority in your State saying they have to, whether or not they want to.

MRS. TORREGROSSA: That is correct.

Finally, as to the possible mootness question, as soon as court was over, we called the Philadelphia County Jail Record Department. Again they refused to give us the information. I will try to get it as soon as I get back to Philadelphia.

I would like to refer this Court, however, to its decisions in McDonald v. Board of Elections and Dunn v. Blumstein. In those cases the Court recognized that where a

class is amorphous and susceptible to change and where the judicial case could evade judicial review, that the Court will consider the matter nonetheless.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Terregrossa.

Mr. Brown.

ORAL ARGUMENT OF PETER W. BROWN, ESQ.,
ON BEHALF OF THE RESPONDENT COMMONWEALTH OF
PENNSYLVANIA, J. SHANE CREAMER AND C.

DeLORES TUCKER

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

I am here on behalf of the Commonwealth of Pennsylvania, J. Shane Creamer, the Attorney General, and C. DeLores Tucker, Secretary of the Commonwealth.

Our position is basically that there is a case of controversy before this Court, and there was one before the District Court below which required the District Court to hear the matter.

Secondly, our position is that the claims made in the uncontested allegations of the complaint filed below are of such substance as to have required the District Court to have empaneled a 3-judge federal court and to hear the matter. It's true below that the Deputy Attorney General

who appeared for the Attorney General at the hearing of this matter conceded the unconstitutionality of the statutes here involved. We will consistently hold to that position, however, I think it's unnecessary for us to discuss it at this point, in time. I think the question before the Court is is there a case of controversy, and, secondly, is the case of such substance as to require the convening of a 3-judge panel.

I have noted the Court's interest in the relationship between the State Attorney General, the Commonwealth, C. DeLores Tucker, and the election officials in Philadelphia who are also respondents here. Basically, the relationship is one of local election officials under the scheme of election laws in Pennsylvania having substantial autonomy in running elections. The Secretary of the Commonwealth, of course, certifies candidates who have been elected, maintains records in the Secretary of State's office. However, she does not control, and it appears to us after a fairly lengthy dispute over student voting rights with our local election officials, that she cannot control how they behave and how they conduct elections.

QUESTION: Mr. Brown.

MR. BROWN: Yes.

QUESTION: What do you conceive your obligation to be to your client, the State of Pennsylvania, when you have a decision of the Third Circuit which says in effect your

law is constitutional?

MR. BROWN: I can see our obligation to be one to look to the Supreme Court of the United States for its decisions in the area. Our obligation is, of course, to follow the law of this Court. I think that's what the supremacy clause says and that's what our oath of office requires. I don't mean to take --

QUESTION: I think the Third Circuit feels the same way, don't you?

MR. BROWN: Yes, I think so. And with regard to this particular argument, your Honor, I don't think the question before the Court is one of flatly saying the statutes are unconstitutional at this point. I think the question becomes is there a substantial federal question requiring the convening of a 3-judge federal court?

With regard to the Third Circuit's opinion in this matter, first of all there was an application to hear the appeal expeditiously by the petitioners here below. The matter was heard without argument upon submission of briefs in a very short period of time. And the Third Circuit affirmed on grounds other than the District Court's grounds.

A petition for rehearing was filed in the Third Circuit in which we joined. The Third Circuit en banc denied the petition, but three of the seven judges wrote a dissent saying that McDonald did not govern the case here,

that McDonald was distinguishable. And I may have to take opposition to the Third Circuit at this point in time. However, I don't think that that's the question before this Supreme Court.

QUESTION: Mr. Brown, basically, is your position sympathetic to the appellants or antagonistic to them?

MR. BROWN: Our position is basically the same as the petitioners in this case.

QUESTION: I am interested mildly that you are sitting on the opposite side of the counsel table.

MR. BROWN: We are named respondents and in discussions with the Clerk's office, we were concerned about what our role would be, and I am here with an extra 10 minutes sort of in between both the respondents and the petitioners at this point.

QUESTION: Do you confess an error?

MR. BROWN: Insofar as we can, your Honor, I think we -- we confessed error in the District Court below. We had hoped that --

QUESTION: What more can you do here than that?

MR. BROWN: Probably nothing more, except urge the Court to reverse and remand for the empaneling of a 3-judge --

QUESTION: (Inaudible) on the issue of whether or not a 3-judge court should be convened.

MR. BROWN: That's right. We never took the position

that it should not be. I think perhaps what our role was described to us and what it should have been below was to assist the court in framing the relief, because we do have, and one of our witnesses that we tendered to the court would have advised the court as to how a procedure and a mechanism could be worked out to assure the rights of the petitioners and at the same time take cognizance of the problems of the respondents.

QUESTION: I think what causes us some puzzlement and difficulty is that in the federal system it's the duty of the Attorney General and his representative the Solicitor General, the Justice Department, to defend the constitutionality of the laws enacted by the Congress of the United States. And generally I would suppose that that was the duty of the Attorney General of any State, his basic primary duty to defend his client and to defend the constitutional validity of the laws enacted by the State he represents. This is at least the third time that your office, representing the Commonwealth of Pennsylvania, the third time we have seen that you have come in and said, yes, you agree that the law is unconstitutional. That causes us some little puzzlement, perhaps just because we are inflexible and used to something else.

MR. BROWN: Well, with regard to, I think, your statement as to what our obligation is, I think you are

correct. Our primary obligation has and will continue to be to uphold the laws of Pennsylvania.

However, I think Article VI of the Constitution puts us into perhaps a different role than the Federal, United States Department of Justice, in that we not only have to look to our own constitution, but to the Constitution of the United States and take the guidance from this Court.

I may suggest, your Honor, that in United States v. Lovitt,[?] the United States Attorney General did take the position, as I recall, in opposition -- saying that a statute passed by Congress was unconstitutional. I think that case involved an act of Congress that said that three federal employees could not be paid out of general appropriations.

QUESTION: In that case was the Solicitor General reflecting an independent view or the view of the Executive Branch of the United States?

MR. BROWN: I think the Attorney General was reflecting a view of the Executive Branch of the United States.

QUESTION: That's his client.

MR. BROWN: That's correct. And the Executive Branch of Pennsylvania is our client as well. I think in that case Congress was permitted to retain special counsel to represent its views.

In the situations where we have gone before this

Court to say that our own statutes are unconstitutional, some of them have been very, very old. We have assured ourselves that the adversity of interest is represented before this Court and before the District Courts in Pennsylvania.

MR. CHIEF JUSTICE BURGER: Mr. Mattioni.

ORAL ARGUMENT OF JOHN MATTIONI, ESQ.,

FOR THE MUNICIPAL RESPONDENTS

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

I am here representing the municipal defendants, the parties representing the city of Philadelphia in this matter and apparently the only adverse parties in this case as your Honors have perceived.

I believe before getting into the legal aspects, it is important to review very briefly certain, I guess they qualify as, factual matters here.

This matter first came into fruition on September 8, 1971, when a law clerk from the petitioners' counsel's office made a request of the City Commissioners' office that the petitioners be permitted to register to vote. Then on September 13, 1971, the last date for registration in Pennsylvania, at about one hour and 38 minutes before the time for registration expired on that date, petitioners' counsel requested that traveling registrars be sent to the

prisons in the city of Philadelphia. There happen to be three prison facilities. And although they are relatively closely situated, nevertheless, they are not that close that it wouldn't have been a great inconvenience. It is correct that there are approximately, at least at that time there were approximately, 2,000 detentioner status inmates in the Philadelphia prison system. Of course, these 2,000 included some minors who may or may not have been eligible to vote at the time, and they included both men and women.

On that same date, after the Deputy Commissioner for the City Commissioners, Deputy Commission of Elections, refused to send traveling registrars to the prisons, he was presented with affidavits from seven detainees for absentee registration and absentee ballot. He refused this, and at 10:30 p.m. on the same evening -- and bear in mind, now, this is shortly before the time expires, because it would have been midnight that same day that the time for registration expired -- the appeals were filed.

There was a hearing held -- the appeal mechanism is provided for in Pennsylvania law. An appeal was initially taken to the Commissioners themselves from the decision made by the Deputy Commissioner. That appeal was filed and a hearing was held on September 28, 1971, and denied.

Then on October 4, the suit was commenced, this action, in the United States District Court, the petitioners

failing to avail themselves of the available state court remedy which was an expeditious appeal in election matters to the state courts directly from the decision of the Commissioners. And, of course, this matter proceeded expeditiously in the federal court system. A hearing was held on a request for temporary restraining order on October 6, 1971, and was denied, the District Court denying on the basis of a lack of case or controversy.

We don't ground our position here today on the lack of a case or controversy, because I am here representing an adverse party, and at least as between the Election Commissioners of the city of Philadelphia and the petitioners, there is a controversy. However --

QUESTION: Do you understand your duty, if any, to follow an opinion of the Attorney General of the Commonwealth?

MR. MATTIONI: None whatsoever, your Honor. Unlike the -- within the City of Philadelphia, which has its own home rule charter, all city agencies are by the charter compelled to follow the advice of the City Solicitor's office. There is no comparable provision within the Pennsylvania system that I am aware of.

QUESTION: And there is no duty on the City Solicitor to follow the advice of the Commonwealth Attorney, is there?

MR. MATTIONI: That's correct, your Honor.

QUESTION: So there seems to be general agreement about the law of Pennsylvania in this respect.

MR. MATTIONI: Yes, Mr. Justice, I believe there is.

Now, there were attempts at an earlier date to assert that authority. I believe it's even questionable whether or not the Attorney General of Pennsylvania can bind all of the Commonwealth agencies directly.

QUESTION: Is it possible that in other areas of Pennsylvania, the prisoners could be allowed to vote?

MR. MATTIONI: I don't know, Mr. Justice, because apparently Philadelphia is the only area in the Commonwealth where these suits seem to occur. However, the answer to that is I really don't know.

QUESTION: Well, they do have other areas in Pennsylvania where they do have detainees?

MR. MATTIONI: Most other counties -- well, not all counties, but a very substantial number of counties have separate prison facilities and prison institutions, county prisons.

QUESTION: For detainees?

MR. MATTIONI: Yes, sir.

QUESTION: Within the broad class of those in this case?

MR. MATTIONI: That's correct, Mr. Justice.

QUESTION: And if they followed the Attorney General,

those detainees would vote.

MR. MATTIONI: That is correct, Mr. Justice.

QUESTION: If you are unfortunate enough to get detained in Philadelphia, you don't vote.

MR. MATTIONI: Well, the only problem with that analysis, Mr. Justice, is that as far as I am aware, no other county has followed the Attorney General's advice in this case. And bear in mind --

QUESTION: Are there counties that are bound to follow it?

MR. MATTIONI: Not to my knowledge, Mr. Justice.

QUESTION: I thought you said the difference was that Philadelphia had a charter.

MR. MATTIONI: No, I was just pointing out, Mr. Justice, that in Philadelphia, our home rule charter requires Philadelphia officials to follow the legal advice of the City --

QUESTION: What happens in places that don't have a home rule charter? Are they bound by the opinion of the Attorney General?

MR. MATTIONI: No, Mr. Justice.

QUESTION: Well, what is the Attorney General's opinion for?

MR. MATTIONI: The Attorney General's opinions, as far as I can ascertain, are binding on only the Commonwealth

officers directly.

QUESTION: He is binding on his own office.

MR. MATTIONI: Well, there are numerous Commonwealth offices, of course, the various state departments and offices as well.

QUESTION: Is there a state election officer?

MR. MATTIONI: The State Secretary of the Commonwealth is the overall state election official.

QUESTION: You don't have any other election official for the state?

MR. MATTIONI: I am not aware of any separate election official.

QUESTION: What happens if something goes wrong in the election machinery in the State? Who corrects it?

MR. MATTIONI: This would normally be the Secretary of the Commonwealth.

QUESTION: Yesterday afternoon your opposition stated that in Pennsylvania, a convicted felon if on parole may vote. Do you agree with that?

MR. MATTIONI: That is generally correct, Mr. Justice. I believe there are a couple of exceptions. If I am not mistaken, I believe a conviction of treason may disqualify to vote.

QUESTION: If a person in your state is on vacation at the time of election, I take it he is not entitled to an

absentee ballot.

MR. MATTIONI: He is not, Mr. Justice, because he does not fall within any of the specific categories provided in the absentee ballot law.

QUESTION: Would the same be true for people who are in hospitals and otherwise confined?

MR. MATTIONI: The statute specifically permits an absentee ballot for persons confined because of medical reasons, both at home and in hospitals.

QUESTION: But not if they are absent from the state on business or pleasure.

MR. MATTIONI: There is a specific provision for business, but not for pleasure. There was a dispute or controversy over that very point which, of course, in our view should have been addressed to the legislature. I don't believe there was ever any lawsuit, however.

QUESTION: If you go to Florida to take a deposition and stay two days to lie on the beach and the second day is the election day, you're not eligible in that case?

MR. MATTIONI: Mr. Justice, I am not sure I heard the question.

QUESTION: If you have to go to Jacksonville, Florida, to take a deposition on Monday and you stay over Tuesday to lie on the beach, I take it that you are not eligible for an absentee ballot.

MR. MATTIONI: Technically I would not be eligible.

This case involves the constitutionality of the provisions of the Pennsylvania election laws concerning primarily the absentee voting privilege, and it also involves to a limited extent the registration statutes as well.

The problem, as I see it, is that we are dealing here with two different types of statutes, and almost every case which is relied upon by the petitioners deals with the type of statute which imposes a direct and immediate limitation upon the right to vote. For example, the poll tax provisions have a direct and immediate limitation on the right to vote because they inhibit or infringe that right by requiring payment of a fee. The numerous other cases, for example, limited the right to vote because a person was not a property owner or had not paid property taxes.

QUESTION: Like requiring them to come to the polls to vote.

MR. MATTIONI: Well, I don't believe that that falls into the other category of cases, Mr. Justice, because there is no requirement that absentee ballot privileges must be given to anyone. Of course, this is historical in nature, but the right to vote is considered and always has been considered as a highly personal privilege rather than just a right itself. It's a right because it's a necessary ingredient ---

QUESTION: Excuse me. What case said that this is a right to vote as a privilege and not a right?

MR. MATTIONI: I did not say "and not a right", your Honor.

QUESTION: All right.

MR. MATTIONI: I said it was both a privilege and a right. It is a privilege because that's the privilege of a democratic society. It is a right and an obligation to vote if we are to maintain the democratic society.

However, historically, of course, the absentee ballot provisions were intended not to limit the right to vote but to broaden it, because historically you had to vote in person, and this is true in almost every situation where voting has been allowed. Since the right to vote is so highly personal, it was ordinarily and originally thought that the only way to be exercised is by having the person who is going to exercise his right to vote go to the place where he is supposed to vote in person.

There was another reason for that as well.

QUESTION: That's a direct limitation in itself.

MR. MATTIONI: That's not a limitation --

QUESTION: You can't vote through an agent.

MR. MATTIONI: That's correct, Mr. Justice.

QUESTION: Whether or not there is any question of the validity of the power of attorney the agent holds.

MR. MATTIONI: In the area of voting for representation in our political institutions, we have generally accepted this broad limitation that each person must vote his own conscience and not by proxy. And even the absentee ballot --

QUESTION: And vote in person.

MR. MATTIONI: I believe that's the original concept. Of course, we are moving away from that. But again the concept for limiting it to voting in person was to ensure that the person himself was voting and not someone else.

QUESTION: How about registration?

MR. MATTIONI: Well, the concept of registration arose primarily because the population became so large that there had to be some way to ensure that the person voted only once.

QUESTION: Do you have any mechanism in any other situation of somebody registering except in person?

MR. MATTIONI: Yes, there are a limited number of circumstances. However, most of our registration provisions require the person to register in person. For example --

QUESTION: Could you give me an example of one where they register where the person doesn't appear.

MR. MATTIONI: I believe the only example we have is in the military, the military service.

QUESTION: What happens with them?

MR. MATTIONI: But I am not sure.

QUESTION: What happens with them? Can they register by mail? Is that it?

MR. MATTIONI: I believe the person who is in the military service may register by mail, but I am not sure of the procedure involved. I believe that is the only exception to the rule in Pennsylvania. Even a person who is confined at home must register in person. However, a registrar will go to his home if the person is confined because of illness.

QUESTION: In what other circumstances are there traveling registrars?

MR. MATTIONI: Well, we have generally traveling registrars in precincts.

QUESTION: Precinct registration?

MR. MATTIONI: Yes, Mr. Justice. It's on a rotating basis during the registration --

QUESTION: And the facility moves around.

MR. MATTIONI: That's correct. What it is is a registrar will sit in any public place to accept registrations. It's advertised in the newspapers and other news media and he will accept the registrations.

QUESTION: So you will tell us why you won't do that in the jails.

MR. MATTIONI: Yes, I will, Mr. Justice.

QUESTION: Thank you.

MR. MATTIONI: As I was saying, however, before I

get to that, Mr. Justice, the two different types of statutes as we view them and as I believe this Court accepted them in the McDonald case implicitly if not expressly was the type of statute where you had a direct limitation on the right to vote and the type of statute we are dealing with here where you permit voting by absentee ballot which is a method of broadening the right to vote to people who otherwise would have been disenfranchised without that statute, because no one is permitted to vote by absentee ballot unless he falls within one of the categories specified in the absentee ballot law. And that seems to be universally true throughout the United States.

QUESTION: But that's only against the background of a direct limitation on the right to vote in the sense that you have the right to vote but you must do it in person. You may not vote except in person.

MR. MATTIONI: That is correct, Mr. Justice.

Now, of course, the Commissioners in Philadelphia were faced with the situation that they can only permit voting when the person qualifies in all respects with the statutes which govern their activities. And here the statute specifically says that, in detailing numerous other categories of persons who may vote, that the words "qualifying absentee electors" shall in no wise be construed to include persons confined in a penal institution or mental institution, nor shall

it in any wise be construed to include a person not otherwise qualified as a qualified elector in accordance with the definition set forth in the Act.

So that it's exclusive in the sense that it excludes anyone who is not within one of the categories and specifically excludes someone confined in a penal institution. And generally speaking, Philadelphia prisons qualify as penal institutions.

Now, it is our view that because these statutes, these types of statutes, involve broadening of the elective right rather than decreasing it, they should be tested by the rational basis test rather than compelling interest. And we believe that to that extent, McDonald and this case are marching together in unison.

Bearing that in mind, I think it's necessary, then, to examine what reasonable or rational bases, if any, exist for the distinction which is made.

QUESTION: Mr. Mattioni, before you get to that, could I ask you one question about Pennsylvania registration procedure? I notice from the allegation of the complaint that Mr. Goosby was 34 years old and had resided at the same address in Philadelphia for 8 years presumably prior to his incarceration. Does Pennsylvania wipe its registrations out every so often, or would this indicate this was the first time Mr. Goosby ever tried to register, when he was in prison?

MR. MATTIONI: There is a two-year purge statute in Pennsylvania.

QUESTION: So that in other words, he might have registered before and been purged.

MR. MATTIONI: That is correct, Mr. Justice.

In reviewing the statute and what I conceive as its basic purpose, I believe first of all there is the same general purpose which is recognized by this Court in the McDonald case, and that is that permitting the right to vote within the prison setting is subject to undue influence by the prison administrators themselves, by the wardens and by the correctional officers. And this is a very real and legitimate concern of the legislature.

There is something else, too, and that is that --

QUESTION: Does that also apply to the insane asylum?

MR. MATTIONI: I believe that stands on a different footing, Mr. Justice Marshall.

QUESTION: They are in the same sentence, aren't they?

MR. MATTIONI: They are in the same sentence, but I believe the basic rationale -- part of that would be true, but I think there is another concern involved with mental institutions. And that, of course, I believe would address itself to the capacity or incapacity of a person to vote.

And again it might even be a stronger concern because persons held in a mental institution might be more subject --

QUESTION: Are you going to get to the man that's out on bail?

MR. MATTIONI: Well, the man that's out on bail is entitled to vote if he otherwise qualifies.

QUESTION: Why is he entitled to vote and the man that's in can't?

MR. MATTIONI: Because there is no disability based on the single reason that a person can or cannot make bail. That's not the reason a person is disabled from voting.

QUESTION: Is the reason that one has \$50 and the other doesn't?

MR. MATTIONI: That might be one of the possible causes, Mr. Justice, but that's not the reason for this --

QUESTION: Am I correct that all offenses are bailable in Pennsylvania as of today?

MR. MATTIONI: That is correct, Mr. Justice.

QUESTION: So the only reason he is in jail is because he doesn't have the bail money? Is that true?

MR. MATTIONI: That is true as of today. But that does not mean that he is necessarily indigent, Mr. Justice.

QUESTION: I didn't say indigent.

MR. MATTIONI: The other thing is that in reviewing the Pennsylvania election laws, there is a very conscious and

definite election made by the legislature of Pennsylvania to confine the exercise of voting rights, including registration, to areas or places open to the public. And it's very clearly stated in the election codes that, for example, polling places must be located in public places, areas accessible to the public. Registration places must be accessible to the general public.

QUESTION: Well, the traveling registrar that goes to the invalid's home is hardly entering a public place, is he?

MR. MATTIONI: That's true, Mr. Justice, but that is the only --

QUESTION: Well, there it is.

MR. MATTIONI: Well, because, Mr. Justice, that is a practical necessity. However, again, this is, although it's only a one instance contrary to the otherwise general --

QUESTION: There could be quite a few of them, couldn't there, in any year?

MR. MATTIONI: Quite a few individual persons, but not quite a few general instances, because there is only one. Generally speaking, the laws themselves specify -- as I say, for example, with respect to polling, the polling place must be open to the public. And absentee ballots must be delivered to the polling place of the district where the person is entitled to vote. And that absentee ballot is open there and

counted along with the rest of the votes.

And what I am saying is that the limitation on the right to vote or the right to exercise the registration or absentee ballots, as far as persons confined to penal institutions, is but another extension of the same concept of wherever possible keeping the areas open to the public. This was a conscious election by the General Assembly of Pennsylvania. And the thing here is that if you apply the test which I believe is applicable to this statute, this may not be a test which you or I would have applied and said, this is fine with us, this is what we want to do, but I don't believe that that's what this Court is here to do nor am I here to do nor is the Attorney General of Pennsylvania here to do. We are not here to second guess the General Assembly of Pennsylvania if the enactment has a rational basis. And I believe this is rational, even though quite frankly I personally think I would not have done it myself. But I am thinking today in 1972.

QUESTION: Let's be specific. What's rational about saying that you will send a registrar to an invalid's home, but you won't send a registrar to the jail?

MR. MATTIONI: I believe it's a rational choice, Mr. Justice, because the jail setting as I indicated before is different than the setting in a man's home.

QUESTION: Yes, it is, and the setting in one

person's home is different from the setting in another's, too.

MR. MATTIONI: Yes, but I don't think there is -- there are very few homes that are comparable to the jail setting. The jail setting --

QUESTION: What difference is relevant, though, to the registration process?

MR. MATTIONI: I believe it is relevant because we again deal with the question of possible influence to be exerted by the administrators in any prison. I think this is what the General Assembly was confronted with in making this choice.

QUESTION: You don't mean that particularly for the registration process, but for the absentee voting process that would follow.

MR. MATTIONI: It could conceivably even apply to the registration process, Mr. Chief Justice.

QUESTION: Isn't that a neutral act, the process of registering?

MR. MATTIONI: No, it isn't, Mr. Chief Justice, because you elected to register by party.

QUESTION: You do register by party, I see.

MR. MATTIONI: We have two classifications of registration, Mr. Chief Justice, either you pick a political party of your choice or you can register nonpartisan.

QUESTION: It wouldn't have any influence on the

absentee military ballots, would it?

MR. MATTIONI: I don't see how, Mr. Justice, the general election officials or administrators could affect the military ballot.

QUESTION: Why not?

MR. MATTIONI: Because there there is no confinement by our --

QUESTION: How about when your National Guard was put in World War II? Would there be an influence in that outfit?

MR. MATTIONI: I don't believe I follow, Mr. Justice.

QUESTION: Your National Guard outfit is activated and put in the regular army as a unit and it's outside the state. They would have absentee ballots, right?

MR. MATTIONI: They would have the right, yes.

QUESTION: And there would be a possibility of influence from the officers, right?

MR. MATTIONI: That's correct, Mr. Justice.

QUESTION: And the difference between that and what pertains in the penitentiary is what?

MR. MATTIONI: I think it's quite substantial, Mr. Justice.

QUESTION: Good. Even if a military man was in a military stockade under a sentence.

MR. MATTIONI: I can't answer that, Mr. Justice.

I don't know what category that would fit in under the statute, frankly.

QUESTION: Wouldn't your statute, your provision on if he is confined in a penal institution, wouldn't your Pennsylvania statute bar him from --

MR. MATTIONI: That's probably true.

QUESTION: A stockade is a penal institution, isn't it?

MR. MATTIONI: It sounds very much like it is, Mr. Chief Justice.

QUESTION: It's not in the State of Pennsylvania.

MR. MATTIONI: The Act does not limit this to the State of Pennsylvania, Mr. Justice.

QUESTION: I would presume in a military stockade in Idaho or somewhere like that, a Pennsylvania resident is not apt to find among his superiors in the stockade any people who have any great interest in Pennsylvania politics.

MR. MATTIONI: I believe that is a correct observation, Mr. Justice.

QUESTION: Although it applies to federal elections, too, doesn't it?

MR. MATTIONI: The election laws generally would apply to all elections. But again I still think that is a correct observation by Mr. Justice Rehnquist. It's very unlikely to have somebody that closely interested in the outcome

of what basically is a Pennsylvania election.

QUESTION: Well, speaking of the interest --

QUESTION: It might be that the Assembly of Pennsylvania in legislating has the power to legislate for the generality of situations, not for some Pennsylvania citizen who happens to be in a stockade up in Idaho or Vietnam.

MR. MATTIONI: Mr. Chief Justice, I can't agree with that more because it's obvious that no legislature, no matter how good or how indifferent, can plan for every single eventuality. I believe we experience that every day.

There is one thing I think I should touch upon very briefly, if I may, and that is the question of whether or not these statutes discriminate on the basis of race or wealth. And although you may find some indirect discrimination in the sense that it's contingent upon the question of the effect or application of the bail system, the question of the bail system in Pennsylvania is not at issue in this case and is not likely that it can or will be, because it's rather difficult to perceive that the bail system as such can be attacked directly since even the Federal Constitution on which all these attacks are based provides for the imposition of bail. Perhaps an attack could conceivably be made on the method of granting bail or refusing to grant bail. But, of course, again, that issue is not before this Court this morning.

So the question then comes as to an indirect attack. The petitioners allege that because most of the people, if not all now -- this was not so at the time the suit was brought, but since the Pennsylvania Supreme Court ruled that all offenses are now bailable, there being no capital offenses left in the State of Pennsylvania, since everyone is entitled to bail and since the people who are in prison, these detainees are in prison because they couldn't raise bail, and since 90 percent of them are black, that these factors involved here are discriminatory in their nature.

But I believe that a fair reading, fair review of the statute indicates that this is not an appropriate approach to testing or weighing these particular laws, because these laws, although they discriminate in a sense or classify certainly, were not intended to discriminate on the basis of race, were not intended to discriminate on the basis of wealth, and on their face do not, because they treat and deal with every person affected by them in precisely the same way.

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

You have four minutes left, Mrs. Torregrossa.

MRS. TORREGROSSA: I need about one minute, your Honor.

REBUTTAL ORAL ARGUMENT OF ANN S. TORREGROSSA, ESQ.

ON BEHALF OF THE PETITIONERS

MRS. TORREGROSSA: Mr. Mattioni has addressed the Court as if the merits of the case were before this Court. Obviously that is not the situation. The question here is whether petitioners' complaint presents substantial constitutional issues and therefore --

QUESTION: Don't you really have to say something about the merits to decide that question?

MRS. TORREGROSSA: Not whether the city has a reason, just whether we are different from McDonald. And I think that that has been established.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

The case is submitted.

[Whereupon, at 10:52 o'clock a.m., the case in the above-entitled matter was submitted.]