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In the

Supreme Court of the United States

EDWARD F. O'BRIEN, et al.,)
)
Appellants,)
)
v.)
)
ALBERT SKINNER, SHERIFF,)
MONROE COUNTY, et al.,)

No. 72-1058

Washington, D.C.
November 6, 1973

Pages 1 thru 41

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IN THE SUPREME COURT OF THE UNITED STATES

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EDWARD F. O'BRIEN, ET AL, :
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 APPELLANTS :
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 v. : No. 72-1058
 :
 ALBERT SKINNER, SHERIFF, :
 MONROE COUNTY, ET AL :
----- x

Washington, D.C.

Tuesday, November 6, 1973

The above-entitled matter came on for argument

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:

WILLIAM D. EGGERS, ESQ., League of Women Voters,
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For the Appellants

MICHAEL K. CONSEDINE, ESQ., Deputy County Attorney,
Monroe County, Rochester, New York
For the Respondents

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

WILLIAM D. EGGERS, ESQ.,
For the Appellants

3

MICHAEL K. CONSEDINE, ESQ.,
For the Respondents

26

REBUTTAL ARGUMENT OF:

WILLIAM D. EGGERS, ESQ.,
For the Appellants

40

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-1058, Edward F. O'Brien, et al, against Albert Skinner, Sheriff, Monroe County, et al.

Mr. Eggers, you may proceed.

ORAL ARGUMENT OF

WILLIAM D. EGGERS, ESQ.

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

I am William Eggers of Rochester, New York, Counsel for Appellants. We are here on an appeal from a final judgment of the New York Court of Appeals.

This, today, is a particularly appropriate day to here this case, involving, as it does, voting rights.

The question presented is whether New York may refuse to provide any means of voting, including absentee means, for its pretrial detainees and misdemeanants under circumstances when, first, such persons are qualified voters, not disenfranchised by any state law, secondly, the absentee voting rights are extended to persons medically unable to appear in person and to a whole raft of persons unable to -- unavoidably absent from their county of residence and New York has advanced no overriding governmental interest whatsoever in this proceeding at any stage.

The facts are simple. Appellants are a class of

so many too-qualified voters. In the fall of 1972, they were confined in the Monroe County jail as persons convicted of minor crimes, not any felonies or as pretrial detainees unconvicted of any crimes whatsoever who were awaiting trial and unable to post bail.

They have voting age. They have legal residences in Monroe County and I must stress that these persons are qualified to vote. New York has, by law, disenfranchised felons. It has disenfranchised only felons and those are not members of our class.

Q What about other institutions for the aged and others? I don't recall, at the moment in this record, whether the New York statute permits hospital shut-ins and others.

MR. EGGERS: Your Honor, it is precisely our point that it does present -- does provide a means by which such persons can vote.

Q What is the range? Hospitals and what else?

MR. EGGERS: It provides, your Honor, for persons confined at home, at a hospital, or an institution, by reason of illness or medical disability.

Prior to and at the state court proceedings, Appellants have fought every possible means of voting. Any possible --

Q Some of these detainees or inmates lived in

the next county, that is, had their residence in the next county. Would they be entitled to vote?

MR. EGGERS: Yes, your Honor, I believe they can, under New York law. The statute has not been construed and it has not been raised in any court proceeding that I am aware of, but the statute is quite broad in the persons that can vote that are out of county. It includes people that are out of county by reason of their occupation, their duties, their employment, persons that are out of county by reason of a vacation, a wife of a person who is out of county by reason of his occupation, a wife can vote and the statute is quite broad and I believe that it would cover people in the same position that our people are in, if they happened to be outside the county of their legal residence.

There is also, in New York State, a program of mobile registration which would permit volunteer registrars to set up branch offices for registration in various locations and in the fall of 1972 this was done at various shopping centers, at schools and, in fact, the volunteer registrars were willing to set up facilities in the visiting areas of the Monroe County jail and register inmates of the jail in that fashion and the sheriff denied that request.

Q Mr. Eggers, are you talking about initial registration to vote or when you say registration for absentee ballots, is that basically an application for an

absentee ballot?

MR. EGGERS: Your Honor, there are two questions that we have. One is simply the ballot or some means of voting on election day. But, of course, to be able to vote, you have to be registered so we are also raising the question of whether inmates of the jail can be registered by absentee means or some other means that they can have at the jail.

Q Some of your class, then, are not registered voters?

MR. EGGERS: That is correct, Your Honor. Some are registered. Some are not registered.

Q Is there provision for registering by absentee means for other kinds of voters?

MR. EGGERS: Yes, there are, your Honor. They are almost identical to the means by which people can get absentee ballots.

Q They are.

MR. EGGERS: You can get a -- you can register by absentee if you are confined in a hospital or an institution or at home by reason of a medical disability.

You can also register by absentee means if you are out of county.

Q I asked the question because the state with which I'm -- the only state, really, with which I have any

basic familiarity requires registration in person although it has very, very liberal absentee voting provisions. That is not true in New York.

MR. EGGERS: That is not true in New York, no.

Now, your Honors, the two lower courts construed the absentee registration and balloting statutes in our favor. They said -- and the key term was "physical disability" and they found that our people were physically disabled in the sense that they physically could not get to the polls. They thus avoided the Constitutional question.

The New York Court of Appeals then reversed. They dismissed the petition that we had filed and in which we had broadly asked for any sort of relief available under state law and they left us with no possibility of relief whatsoever under state law.

Now, they rejected all means of voting in person. They construed the statute and they ruled against our Constitutional claims which we had raised at every single stage. So the question now is quite clear-cut.

We are contending, simply, that the state interests that are asserted in support of these classifications in the statutes are not the kind of state interests that justify the denial of a fundamental right.

It is as simple as that and I think the decisions of this Court make it quite clear that when you have a

fundamental right, such as voting, then you take a hard look --

Q I thought you said the right was Constitutional?

MR. EGGERS: It is both, your Honor. It is a fundamental right that is grounded in the Constitution. I think --

Q Does that make it a Constitutional right or something else?

MR. EGGERS: Your Honor, I believe it is a Constitutional right and it is so important that it is a fundamental right under the decisions of this Court.

Q Well, are some Constitutional rights more fundamental than others?

MR. EGGERS: Well, I wouldn't want to create a hierarchy of Constitutional rights. I think that there is at least one, and that is the right to vote, that is the most fundamental of all rights because this is preservative of every single right that a person might have and I think that this was recognized in the Rodriguez case of last term, where there is a footnote that says very clearly that at least voting rights are considered fundamental in the sense that they are grounded in the Constitution.

So I think that what we are talking about here are the rights that are very important and that/has never been a question about that, and at least that equal voting is a

Constitutionally-grounded right. It is grounded in the equal protection clause. You have an equal right to voting, equal with other citizens of the state and this particular right is a right, a personal right of citizenship.

It really tells a citizen, does he count?

Especially today, does he count as a citizen?

Q Are the two sides of this case, one, just on those awaiting sentence and others those who have been sentenced?

MR. EGGERS: Your Honor, that is correct except that the ones that are awaiting sentence or that have been sentenced or have been sentenced only for misdemeanors --

Q Well, we understand that, but now, let's assume that a state had a law that said, "The following people are disenfranchised, that may not vote, one, felons, convicted felons, two, convicted misdemeanants."

MR. EGGERS: Your Honor, that would be quite a different case because the state, then, would have --
We are not talking here --

Q Well, in effect, you are just saying the state here, as a result of the interplay of all of its provisions, misdemeanants, convicted misdemeanants, just may not vote, if they are serving a sentence.

MR. EGGERS: If they are serving a sentence because, of course, take a misdemeanant who is convicted, on

a work-release program, can vote the same as any other citizen. So I think we have a question, also, of due process in that respect. Would it be consistent with due process for the state to deny the right to vote in the arbitrary way that it is done here? And it hasn't gone across the boards.

Q And what about procedural?

MR. EGGERS: Well, I think procedural as well, your Honor, because we have the question of whether the standards -- there are any standards, is there a right to a hearing? This kind of procedural due process would have an interest as well.

Q What would remain in this case are people who are just detained for trial, wouldn't that be?

MR. EGGERS: That is correct, your Honor. I think that the persons who are simply detained, they have, of course, a higher claim because these persons are presumptively innocent under our law. That is a fundamental principle of our law and I think that there are many decisions of the lower courts that recognized that pretrial detention has a limited legitimate purpose.

MR. CHIEF JUSTICE BURGER: We'll resume there after lunch, Counsel.

[Whereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:00 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Eggers, you may resume.

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

As I have outlined, this case involves the absolute denial of fundamental rights and if it were not enough that fundamental rights are at stake, the particular class here affected is the only class that is forcibly restrained from attending the polls by state action and with respect to this class, I think we'd have to ask whether the state's application of its criminal process is consistent with due process of law with respect to the deprivations of these particular rights and I think you'd have to ask whether these deprivations are the necessary consequences of confinement in jail.

Q You had the same sort of restraint by the state in McDonald, didn't you?

MR. EGGERS: Well, your Honor, the restraint in McDonald was the same. The impact on fundamental rights was different because in the record in the McDonald case, there was no showing that the state would not provide the alternative means of voting that we have requested and, in this case, have been denied.

So you had before the court what the court termed

to be an incidental burden, persons for whom voting by absentee would be a convenience but according to the presumptions that the court made in that case, not the only means left to them.

In our case, this is the only possible means left to them because we were denied the other rights.

And although the statutes, the discriminatory statutes that we are challenging here are not drawn on their face on the basis of race or wealth, they have a very heavy burden on those persons who are financially unable to post bail. If the person were charged with the same crime but could post bail, of course, he could vote just the same as any other citizen could.

So we have here a combination of factors that, we submit, requires this Court to require the very strictest of equal protection review, the highest standard that this Court applies in any case and that standard, of course, requires that we take a look, a very hard look at the sort of governmental interests that are justified because those governmental interests must be overriding in the sense that they are enough to justify the absolute denial of voting rights and the tests, I think, are three.

The interest asserted has to be of compelling importance. The means that the state uses has to be closely related to the purposes. And they must not unreasonably

burden the exercise of fundamental rights and there must be an element of necessity about the state's claim. It can't -

Q Well, on that basis, then, you would have convicted felons also vote?

MR. EGGERS: Your Honor, we would not. Convicted felons are specifically disqualified by the state under its election laws. This is a state interest that is related to the qualifications for voting because I think there is a presumption that if a person has committed a very serious crime, such as a felony, that he has not shown the respect for law that a person that is going to vote should have.

Q Then you draw a distinction between a convicted felon and a convicted and incarcerated misdemeanant?

MR. EGGERS: We do, your Honor, because the state has done so.

Q Well, that doesn't prevent attack on what the state has done. You are merely saying that you would accept that distinction?

MR. EGGERS: We learned that no member of the class that I represent, none of my clients, are convicted felons. So that we don't raise the question of whether convicted felons may vote by absentee ballots.

Q And you won't be in here tomorrow insisting that they be?

MR. EGGERS: Your Honor, I represent the clients

that I have.

Q You might if you represented another felon, a convicted felon.

MR. EGGERS: Well, I am not saying that that question is not a proper question. I am saying it is not raised today.

Q Your point, as I understand it was that the misdemeanor case allowed weekend home privileges or something of that kind, might give an extension over Tuesday and you'd be free to vote.

MR. EGGERS: That is correct, your Honor and, as I understand the law, if a misdemeanant is confined out of county in New York State, he may vote. It is certainly clear to me under the federal voting rights amendment of 1970 that he is unavoidably absent from his county and entitled to vote in special Presidential elections, at least. I think the New York State absentee statutes would also permit such a person to vote by absentee, if he is merely confined to out-of-the-county of his residence.

So we don't have involved here a claim by the state that all misdemeanants lose the right to vote. It is not involved at all.

Q Your fundamental approach is an equal protection approach is it not?

MR. EGGERS: Your Honor, that is our fundamental

approach. We are claiming an equal right to vote but we are not -- we are also raising --

Q In favor of whom is there discrimination, as compared with your client?

MR. EGGERS: The discrimination is in favor of persons who are confined in hospitals, in institutions, or at home on medical grounds and it is in favor of persons who happen to be confined out of their county or residence.

It is also discrimination, I think, in favor of a number of other persons that are out of county on vacation or for any other reason.

Q How about misdemeanants who are appealing and are on bail?

MR. EGGERS: Most persons certainly can vote in New York State.

Q Can felons who are convicted but are on appeal?

MR. EGGERS: No, your Honor, they may not vote.

Q Uh huh.

MR. EGGERS: Because by virtue of the conviction itself, a felon loses his right to vote. So we are dealing, in our class of persons, we have only persons that are qualified to vote, under New York State law.

Q Well, Mr. Eggers, you are not arguing apart from your equal protection, are you?

MR. EGGERS: Your Honor, we are.

Q That this is First Amendment right and cannot be denied, irrespective of --

MR. EGGERS: Your Honor, I believe that voting rights are more important than the expression of rights that are in the First Amendment. I think that they may reasonably be related to First Amendment rights. But I think we are raising a second point, to answer Mr. Justice White's question fully, we are raising a due process claim that persons can find, especially as pretrial detainees, do not lose all their rights.

Q Well, I understand that. I was just talking about the convicted ones, who are serving sentences.

MR. EGGERS: Well, I would say the same as misdemeanants because prisoners don't lose all their rights. That's held even as the felons. They have access to the courts. They have access to --

Q Well, you are arguing the felons' case in a way.

MR. EGGERS: Well, your Honor, we think it is --

Q Or is that outside of your case?

MR. EGGERS: We think it is a different case when the state has considered the question as to qualifications for voting and said that the commission of specific crimes, the high crimes, disqualify you as a matter of voter

qualification. But, of course, the state hasn't said that as to misdemeanants and I think that as to minor crimes it would be very hard for the state to say that that alone should justify the denial of voting rights.

Q And even if it had said so with respect to convicted misdemeanants, it would be rather odd to make the right to vote depend upon the location of the jail, wouldn't it?

MR. EGGERS: I couldn't agree with you more, your Honor. I think that is a truly arbitrary means of denying the right to vote.

Q Except an argument could be made that prisoners in a local jail would be amenable to pressures from local politicians running for office.

MR. EGGERS: Your Honor, that is a reason that was accepted by this Court in McDonald's case under the rational basis test. But I think to address myself to that particular reason, it seems to me very strange to tell somebody that he may not vote because state officials might interfere with his right to vote.

If our rights were that easily lost, it would seem to me no rights would remain at all because there are any number of means by which the state could address itself to that particular problem. It could make it unlawful for a local official to interfere with the rights of citizens

to vote, influence their --

Q Well, it wouldn't be interfering, it would just be -- well, don't you suppose there would be very serious First Amendment problems if the state purported to tell somebody running for office that he couldn't try to persuade a group of voters?

MR. EGGERS: Well, I think methods of persuasion are one thing, but if the deputy sheriff were to use something more than persuasion, I think that that might be a very serious problem. But it is the sort of problem that the state can deal with by restrictive means, means consistent with the exercise of fundamental rights. Certainly -- excuse me, your Honor.

Q Suppose your clients -- assuming they got the right to vote by absentee or however it would be accomplished, is there a Corollary First Amendment right along the lines Mr. Justice Stewart was suggesting, that the candidates all appear before them and make speeches so they can be informed about the issues and make intelligent choices?

MR. EGGERS: Well, your Honor, I think that they already have the means that are necessary to inform themselves. They can have access to newspapers. They can receive information through the mail and I don't think that there would be a need to adopt such a corollary right, at least not in the absolute way. There could be written statements presented to

persons confined in jail

Of course, somebody could be confined in jail a very short time before an election and he may be fully informed on the issues of the day and yet, under the construction and under the denials we have in this case, that person would be denied the right to vote.

So I think that that is not a substantial reason that is involved here for the denials.

Q Mr. Eggers, let me ask another question about what I regard as a very unusual statute. It refers to unavoidable absence because he is an inmate of a Veteran's Bureau hospital. Suppose he is down at the county hospital or Columbia Hospital in New York City. I take it he is not entitled to an absentee ballot and then down, later, it speaks of "unavoidable absence due to business or vacation."

If he is outside the county attending the funeral of a relative, he is not eligible.

Or maybe I should ask your Opponent this?

MR. EGGERS: Your Honor, I think that the Veterans' Hospital case, that particular situation, is one that you can be in-county confined in a Veterans' Hospital and you can vote and really, it is very similar to other persons in county hospitals, or in any other hospital within a county. They are entitled to vote because they are unable to attend the polls in person.

Now, I think that it is a very strange statute. It is strange because it denies my clients the right to vote.

Q But there are other classes of people who are also denied the right to vote.

MR. EGGERS: Your Honor, I am not so sure of that. There are -- the New York Court of Appeals referred to two in particular. They referred to poll watchers and poll watchers can vote the same as anyone else can. It is simply a part-time job for the day and you may have to take time on your lunch hour to vote, but so does everybody else.

Q How about the classes that Justice Blackmun has mentioned?

MR. EGGERS: Well, your Honor, I think there would be some question with respect to particular classes as to the construction the New York courts would give that class. Because if they are going to extend the right to vacationers, it would seem to me -- and all you have to be is out of county on a vacation -- it would seem to me that that is quite a broad basis for construing almost anybody as being at least partly on a vacation.

The statute is quite liberal, it seems, on its face and allows most people out of county to vote.

Q Well, it is liberal in certain directions.

MR. EGGERS: It certainly is liberal in certain directions. It is not liberal towards the class that I

believe is a disfavored class, a class -- and I am referring to my client -- a class who is, in the terms of Judge Burke from the court below.

Q Well, I may be just as sympathetic to the person that is in the county hospital as distinguished from the Veteran's Hospital.

MR. EGGERS: Well, your Honor, any person can find in any hospital --

Q In fact, much more sympathetic than to a convicted misdemeanor.

MR. EGGERS: Your Honor, any person who is confined in a hospital, any hospital in New York, and unable to get to the polls, is provided for by the statute, as I read the statutes. And, of course --

Q Well, I guess I don't read them that way and --

MR. EGGERS: There is a -- the statutes -- there are a number of statutes that apply to this case and they have not properly been meshed together but I think --

Q Do you draw any distinction between a convicted misdemeanor and a detainee at all, or do they stand or fall together?

MR. EGGERS: Your Honor, I think the detainee has a higher claim under the due process laws because as to him, any unlawful denial of rights is a much higher concern

of this Court because that infringes our ideas of the presumption of innocence.

As to those persons, I think there is a very special claim here. But what I am suggesting is that because New York has not made the claim that a misdemeanant is unqualified to vote, then, in many respects, he is in the same position as the other members of our class are and in respects that are directly before this Court.

So I think, then, we come to what governmental interests are being asserted here and, in fact, they haven't identified any. The New York Court of Appeals and the Appellees in this case don't even claim that there is a compelling interest and when they say that something -- that it is at all reasonable, it seems to me if you take a hard look at any sort of interest that they are claiming, it is not even reasonable. They say it is a problem of the fact of confinement.

Well, there is no difference in their confinement than people who are confined in hospitals. They can both vote by mail. They can register by mail. They could, if the means were provided.

Q What if the state didn't give any absentee ballots at all, would you still be here or not?

MR. EGGERS: Your Honor, I would be, but I may point out that the fact that there are absentee ballots means

that there are quite an easy means. It is no problem at all to the state. If there were none, I think that they would still have to defend against our claim that registration and jail facilities -- voting facilities could be set up in the jail.

I call the Court's attention to the case of Love against Hughes, in which a district court, federal district court sitting in Ohio, faced a case almost exactly the same as this case, a challenge to the absentee statutes and a request for any other means simply directed the Sheriff and the Board of Elections to establish election facilities in jail by paper ballots and ballot boxes. I see no reason why this is unworkable.

Q Well, if there were no absentee ballots under Justice White's hypothesis, you say that you would still be arguing they should set up registration facilities in jail. Would you -- I suppose then they would have to set up, under court order, registration facilities in hospitals and other places, too, since your clients would have no better claim to vote than other people physically disabled.

MR. EGGERS: Well, your Honor, I have to say, frankly, that I think that they do have a better claim. They are the only class of citizens that are restrained by the state. They are the only class for which we have to ask, is

this state confinement consistent with the due process clause?

And I think it is consistent with the due process clause only if the rights that are lost are justified, either by law or as necessary consequences of confinement.

Q What would you say about the state's mental institutions?

MR. EGGERS: Well, your Honor, I believe that that relates to the qualifications of a person to vote. A person that is confined in a mental hospital and can't get to vote because he is confined, the state may legitimately say, I think, that such a person may not be a qualified voter and may want to avoid having a test of sanity in each case. I think that there are great state interests involved in that case.

Q Even though he is there voluntarily, rather than by commitment?

MR. EGGERS: Well, to be in the same position that other people are in, he would have to be confined and unable to get to the polls. Now, if it is simply voluntary so he could voluntarily obtain his own release --

Q Well, not always --

MR. EGGERS: -- he is not barred.

Q -- they can go in for 30 days and be confined.

MR. EGGERS: If such a person were, in fact, fully

confined, it still seems to me the state has good reasons to question whether that person is an eligible voter.

That case, however, is not before the Court because we are simply concerned about the discriminatory treatment between our clients and other persons such as medically confined persons who can vote.

Q And yet some of your clients are there because of their own fault.

MR. EGGERS: Well, certainly, your Honor, as to pretrial detainees, we can't make such a presumption.

Q No, but I am speaking of the other group. That is why I asked before whether you drew a distinction between them.

MR. EGGERS: Well, as I say, I think that there is a higher claim for pretrial detainees.

As to misdemeanants, your Honor, they haven't committed the sort of crimes that the state says disqualify them from voting and I think this Court still has a special concern with whether state-imposed confinement has consequences that are unnecessary.

For example, a prisoner doesn't lose his right to practice his religion in jail. He doesn't lose his access to the courts or access to the mail and I think that there are a number of rights that a person has, even though he has committed even a felony, and we don't have that case here.

Your Honor, I believe if we take a hard look at the sort of governmental interests that are asserted here, we simply don't find any that can stand up against the right to vote and they have to come up with a governmental interest that is overriding in the sense that it can justify the absolute denial. I think they haven't done that and I ask this Court to reverse the New York Court of Appeals.

Mr. Chief Justice, may I reserve the remainder of my time?

MR. CHIEF JUSTICE BURGER: Very well, Mr. Eggers.

Mr. Consedine.

ORAL ARGUMENT OF

MICHAEL K. CONSEDINE, ESQ.

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

The County of Monroe contends, your Honor, that these statutes are remedial statutes established to expand the franchise in the State of New York. They are not statutes aimed at any particular class in question today. They were not aimed at misdemeanants serving time in a jail after the time for registering and voting has expired nor were they aimed at persons being held and detained pending a disposition of a case, again, after the time for registering and voting by absentee ballot has expired.

Further, we feel that there is not really a class

here that would come within the ambient of the protection of the 14th Amendment because you really don't have a legal class as such. You have certain persons who can't make bail, who are not -- who really, in the State of New York, who are incarcerated after seven days before election. Anyone who is released up to seven days before election may register and vote, under our statutes.

The Court of Appeals of the State of New York has held that this statute, which expanded the franchise considerably in the State of New York over a period of time, does not fall within the equal protection clause because these persons have this disability imposed upon them by impracticalities and contingencies.

There are, of course, reasons under the --

Q What is the impracticality, the fact he doesn't have money?

MR. CONSEDINE: Well, if your Honor please, I am not entirely sure what was in the Court of Appeals' mind and to my mind, I think they were touching on the rational basis test. You can conceive --

Q Well, is there any reason that the man in jail solely because he cannot produce bail --

MR. CONSEDINE: Well --

Q -- from the man who can produce bail other than money?

MR. CONSEDINE: Well, that would relate only to detainees.

Q That is all we are talking about.

MR. CONSEDINE: Yes. And, your Honor, you must consider the fact --

Q You mean detainees as contrasted with --

MR. CONSEDINE: Misdemeanants, yes.

Q Misdemeanants, convicted misdemeanants.

MR. CONSEDINE: Convicted misdemeanants.

Q Well, I am only talking about --

MR. CONSEDINE: All right, so these detainees -- consider this fact, your Honor, these detainees, between the time they register to vote and the time they can vote, may turn into felons. There is --

Q And wouldn't that apply to any other person who registers?

MR. CONSEDINE: Your Honors --

Q Wouldn't it?

MR. CONSEDINE: Well, that's true.

Q Wouldn't it?

MR. CONSEDINE: Yes, that's true. That could apply to almost anybody that registers, but --

Q It sure could.

MR. CONSEDINE: -- there is a likelihood, a greater likelihood that this particular type of person may

fall in that category.

Q I don't agree with that, either. That man is innocent. He is absolutely innocent --

MR. CONSEDINE: Well --

Q -- and the Constitution says he is innocent.

MR. CONSEDINE: The -- I agree with your Honor on that point. I think the issue here is whether this particular type of person is a class, is a suspect class, as this Court has declared race and wealth to be. And your Honor feels that the fact that a man may not make bail may bring this into the area of wealth. Well, I don't agree with that, your Honor.

Q Do you have anybody in New York that you jailed because he just didn't want to put up the money?

MR. CONSEDINE: No.

Q Or he likes jail?

MR. CONSEDINE: But, your Honors, there are cases where bails are very high and even a person of moderate wealth cannot make them.

Q Well, that still doesn't tell me why.

MR. CONSEDINE: The reason for bail is to insure the person's attendance at court.

Q Well, I am just saying the reason that this man can't vote is because he didn't have money enough for bail. Is there any other reason?

MR. CONSEDINE. That may be a reason. However --

Q Well, what other reason --

MR. CONSEDINE: Your Honor, I am saying that bail -- that the reason he cannot vote because he doesn't have enough money to bail doesn't bring this within the suspect classification based on wealth because there are cases where bails are very high, in serious cases, \$100,000 -- \$50,000. That doesn't --

Q Do you know of any misdemeanor cases like that?

MR. CONSEDINE: Well, we were just referring -- no, I don't, your Honor. We were just referring to that class who are being detained prior to there being a trial for a felony.

Q You mean, there are a number of detainees who are under charges of felonies and where bail is set very high, there may be homicides, there may be armed robberies?

MR. CONSEDINE: That's right, your Honor.

Q And rapes and so forth.

MR. CONSEDINE: That's right and my contention is, that would take us out of that area of --

Q Aren't these detainees, some of them of that kind?

MR. CONSEDINE: There are detainees that are there because bail is extremely high.

Q Now, these detainees are not only -- or are they? merely detainees --

Q It is misdemeanors.

Q -- held on misdemeanors?

MR. CONSEDINE: Oh, no, no. No, there may be detainees waiting for a case --

Q Homicides --

MR. CONSEDINE: -- a homicide case.

Q Armed robberies.

MR. CONSEDINE: They are indicted with a felony, being detained because --

Q Well, I am sure that is so but I didn't know we were talking about them in this case.

MR. CONSEDINE: Yes, your Honor.

Q And I am sure there are a lot of people detained for trial on felonies.

Q Yes.

MR. CONSEDINE: Misdemeanants and pretrial detainees, I believe, is the class referred to in this case.

Q Well, at the time of this case, how many were there charged with murder?

MR. CONSEDINE: Well, I don't know.

Q Or serious felony.

MR. CONSEDINE: I don't know, your Honor, what -- which of these 72 men were charged with felonies. I don't

know whether any of them are at the present time incarcerated.

Q Well, then, this is basically just the people who are being held in the Monroe County jail?

MR. CONSEDINE: That is right.

Q For one reason or another.

MR. CONSEDINE: For one reason or the other.

Q And people who are being held in that jail who live in Monroe County.

MR. CONSEDINE: Who live --

Q Otherwise, according to your brother, they could vote if they live in another county.

MR. CONSEDINE: If they live in another county, there is reason to believe they may vote and also it excludes persons who have applied for absentee ballot before their incarceration. They'd naturally received it. The mail could be forwarded to them. They could vote by absentee ballot in that case.

Q That would require quite a high degree of prescience, wouldn't it, to apply for an absentee ballot before you are incarcerated?

MR. CONSEDINE: No, a person --

Q Not if they are going to be on vacation.

MR. CONSEDINE: That's right. A person who may have other reasons to think he needs it and in between the time he registers for an absentee -- he registers for an

absentee ballot, is incarcerated. That could conceivably happen.

The -- we are relying heavily on this Court's determination in the McDonald case.

Q I want to be clear about this -- under your statute, even if they are held for homicide and rape, armed robbery, any other felony, if they live outside the county, they may vote, as detainees.

MR. CONSEDINE: The statute -- as I understand it, refers -- and it is very complicated, but these statutes refer to those persons who live in the county who are unable to attend the poll due to the various reasons given here, for instance, business duties. We also have statutes relating to military service.

Q Am I right in my assumption that --

MR. CONSEDINE: I only think so. I've come to that conclusion and the Board of Elections in Monroe County has come to that conclusion. They act under that assumption also. So that is not an issue here.

Q Yes.

MR. CONSEDINE: I think the issue is basically a 14th Amendment issue and we've set up an illegal classification here. And should you impose a very stringent standard test here, we feel that the Court has clearly stated in McDonald -- and Mr. Justice Brennan has stated in McDonald

and, subsequently, in Osser, that absent equation of a suspect class heretofore relating primarily to race and wealth, such stringent standards should not be applied.

We feel that, on the record, there is no showing that any attempts were made to promote legislation in the New York State Legislature to expand this.

Q Well, am I correct that the prisoners are not organized?

MR. CONSEDINE: I don't understand your question, your Honor.

Q Well, the prisoners couldn't promote legislation, could they?

MR. CONSEDINE: Well, the prisoners are represented here by six attorneys whose names appear on the brief. They could certainly promote legislation, if they feel it is worthy. I am saying there are so many --

Q Do you know of any group of obviously non-voters being able to persuade any legislature to pass anything?

MR. CONSEDINE: Your Honor, these prisoners are protected by a number of groups. For instance, you notice the name of the New York Civil Liberties Union is upon here and my brother here is attorney in one of the most prestigious law firms in the upstate New York. They have many people who would press their cause in New York State legislature. I am saying that there are conceivable --

Q Do I hear you correctly that the fact that the legislature hasn't been persuaded to pass these legislations which would correct the evil which the other side contends is a grounds for making it Constitutional?

MR. CONSEDINE: I am saying, your Honor, first, that it is not an unconstitutional evil if, in fact, it is an evil. I am stating that it is not within the ambient proprotected by the 14th Amendment because the state legislature, by no legal design, has established a class who is being denied the right to vote by absentee ballot or to register by absentee means. I think we are arguing here just that right to vote and register by absentee means.

Q To vote.

MR. CONSEDINE: We feel the fact that they have expanded this privilege to various classes but have not expanded the same to New York State to prisoners who are misdemeanants or less --

Q And who live in the county.

MR. CONSEDINE: And who live in the county and who are detainees for some reason, prior to conviction -- are not felons but are, for some reason, detained without conviction -- the fact that this class has not been included in the statute does not bring that class under the protection of the 14th Amendment because, frankly, unlike all the other cases this Court has decided, there is no showing that the

state legislature singled them out for some disability.

They were not saying, "Black people may not vote," or they were not refusing -- by their refusal to act -- disenfranchising suburban counties where they, as you handled the one man-one vote decisions -- this is a case where the State of New York, the legislature, has expanded over the years, this privilege. They may do so further. There may, indeed, be other classes who don't have this privilege.

I am saying there are many complications involved here. The argument I was going to raise has been already raised by a member of this Court. Such persons might be subject to manipulation, either by the jailers of the political machine that controls the jail or by certain prisoners within the jail.

Q Why do they permit voting by those incarcerated or detained outside the county?

MR. CONSEDINE: Well, the legislature, no doubt, is satisfied that there are not -- that, you know, that-- well, I don't know what goes on in the mind of the legislature. I am saying that --

Q Well, you just said you did.

MR. CONSEDINE: No, I am saying, your Honor, that there are many, many questions --

Q You gave me a justification.

MR. CONSEDINE: Well, I am relating to the

rational basis there.

Q What rational basis is there for permitting voting by those detained outside the county? Certainly not the one you were just giving?

MR. CONSEDINE: No, no. I don't think this legislation -- I am saying the legislature never considered this particular class of person when it drew up this legislation.

Q Well, then, you, on the rational basis test --

MR. CONSEDINE: I am saying the legislature should consider this.

Q But meanwhile, what do we do, say it is unconstitutional or constitutional?

MR. CONSEDINE: Well, if you find that it is within that suspect classification, then I am sure that you will find it is unconstitutional. I -- we are arguing that it is not.

Q You haven't suggested to me a rational basis yet for saying that those confined inside the county may not vote, but those confined outside may.

Q Well, I suppose somebody confined in Monroe County who lives in Onondaga County is not -- a Monroe County Sheriff is not going to have any particular interest in the outcome of the Onondaga County case and, therefore, whatever manipulation he might apply to the local man who would be

voting in the Monroe County race wouldn't carry over to a guy who is just going to vote in another county.

MR. CONSEDINE: Yes, your Honor, that would be a rational argument, but I think that --

Q Wouldn't it also be rational if they both belonged to the Sheriff's Association, he might?

MR. CONSEDINE: I beg your pardon?

Q If both sheriff's belonged to the same Sheriffs' Association, he might. I mean, you can go anywhere you want on this.

MR. CONSEDINE: Well, your Honor, again, I -- I don't -- I'm not familiar with the operation of the Sheriff's Association in the State of New York, so --

Q Well, to go back to Gowan against Maryland, of course, we don't need to look for articulated reasons, if there is any conceivable basis.

MR. CONSEDINE: Any conceivable basis is the thrust of that Gowan case, your Honor.

Q If you think of any other conceivable basis, then they should be advanced.

MR. CONSEDINE: The --

Q Isn't this the kind of a case where the statute has grown like Topsy, so to speak?

MR. CONSEDINE: Yes, your Honor.

Q And all of a sudden, you have some similar --

or the opposition feels there are some seeming inequities here. As you said a little while ago, I am sure the legislature hasn't thought all these things completely through.

MR. CONSEDINE: Yes. Basically, my argument is this, that the legislature -- that the classification here is not a suspect classification and, therefore, there is a reasonable, rational basis for this legislation and if there are inequities, certainly, the state legislature would be at this time the proper body to remedy them.

I was impressed by the Court of Appeals' decision in that it pointed out that these particular 72 gentlemen are denied their right to vote by absentee means by not -- not by any legal design of the legislature.

Your most important cases have all borne upon actions of the legislature that discriminates against a suspect class or has consistently refused to promote a classes right to vote.

Thank you very much, your Honors.

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

Mr. Eggers, you have a few more minutes.

REBUTTAL ARGUMENT OF
WILLIAM D. EGGERS, ESQ.

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

These are not the sort of rights that can be left for legislative action. We can't be told that this is reform legislation, therefore, we have to go to the Legislature. It doesn't make sense when we are talking about Constitutionally protected rights.

Q Well, if we start with that premise, of course, the whole problem becomes easy.

MR. EGGERS: Well, I think that is right, your Honor. This is a fundamental right. It is not the sort of right where we can be asked to depend on the legislative whim because if it were that sort of right, we wouldn't be before this Court. This is an important, fundamental right and we have a problem here of the denial of equal treatment in voting rights. It is not just any economic or social regulation where reform legislation --

Q In one of the cases cited this morning, was referred to Justice Clark in an opinion, you may remember the name of it -- it said that a classification made by a legislature need not be perfect. It may be overinclusive or underinclusive but that that alone does not make it unconstitutional.

MR. EGGERS: Well, your Honor, I think it depends on the sort of rights that are involved, the sort of class that is affected, and when we have fundamental rights, and we have ---

Q This issue rarely comes up except in Constitutional context.

MR. EGGERS: Well, in a Constitutional context, your Honor, but there are many cases that might involve rights less important than these and there it might be appropriate to refer to the legislature and to say, "Well, this is reform legislation and in this particular area, we are going to consider this when we are considering whether this stature is reasonable, but not when we are going to apply this standard of judicial scrutiny that is required in this case."

Thank you, Mr. Chief Justice and I now submit the case on behalf of my clients.

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

Thank you, Mr. Consedine.

The case is submitted.

[Whereupon, at 1:37 o'clock p.m., the case was submitted.]