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Supreme Court of the United States

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 Supreme Court, U. S.
 MAY 12 1970

In the Matter of:

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 CHARLENE MITCHELL, et al., :
 :
 : Petitioners; :
 :
 : VS. :
 :
 : JOSEPH L. DONOVAN, et al., :
 :
 : Respondents. :
 :
 ----- X

Docket No. 726

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Place Washington, D. C.
 Date April 21, 1970

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TABLE OF CONTENTS

	<u>ARGUMENT OF:</u>	<u>P A G E</u>
1		
2	Lynn S. Castner, on behalf of Petitioners	2
3		
4	Richard H. Kyle, Solicitor General of Minnesota, on behalf of Respondents	23
5		
6	<u>REBUTTAL:</u>	
7	Lynn S. Castner, on behalf of Petitioners	43
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

URG

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

-----X
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 4 CHARLENE MITCHELL et al., :
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 5 Petitioners; :
 :
 6 vs. :
 : No. 726
 7 JOSEPH L. DONOVAN et al., :
 :
 8 Respondents. :
 :
 9 -----X

Washington D. C.
April 21, 1970

The above-entitled matter came on for argument at
1:20 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
 HUGO L. BLACK, Associate Justice
 WILLIAM O. DOUGLAS, Associate Justice
 JOHN M. HARLAN, Associate Justice
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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 Attorney for Respondents

1 At the Communist Party of Minnesota convention a
2 motion was passed that, if the Communist Party U.S.A. nominated
3 a presidential ticket, that the Communist Party of Minnesota
4 would endeavor to place on the ballot in Minnesota those
5 candidates.

6 Mrs. Betty Smith attended that convention as a
7 delegate in New York. Mrs. Mitchell and Mr. Zagarell were
8 duly nominated by that convention. Immediately following, the
9 Communist Party of Minnesota mounted a campaign to obtain the
10 requisite number of signatures -- under Minnesota law, 2,000 --
11 to place the candidates on the ballot.

12 On this nominating petition appeared the names of the
13 10 Communist presidential electors. And, under Minnesota law,
14 on the ballot only appears the name of the candidates, and,
15 by Minnesota law, a vote for the candidates is a vote for those
16 electors.

17 On Sunday September 8 the Party completed its
18 campaign to collect signatures. On the next day, Monday the
19 9th, representatives of the Communist Party -- the national
20 office as well as the state -- appeared at the office of
21 Secretary of State of Minnesota, Joseph Donovan, to file the
22 nominating petition.

23 The Party representatives arrived at the Secretary
24 of State's office during the noon hour. Immediately after
25 noon, they tendered their petition -- the petition was

1 anticipated -- and they were presented a written refusal of
2 the Secretary of State. He did examine the contents of the
3 package and satisfied himself that it was the nominating
4 petition for the Communist Party.

5 His refusal said, "Please be advised that, upon the
6 advice of the Attorney General of Minnesota and at his
7 direction as a matter of law, I hereby officially refuse."

8 The Attorney General had issued an opinion, a copy
9 of which was given to the representatives, in which the
10 Attorney General said, "In view of the federal statutes," and
11 quoted in full sections 841 and 842 of the Communist Control
12 Act, "we are of the opinion that you should refuse to accept
13 for filing the nominating petition in question. However, any
14 doubts relative to this matter can only be finally resolved
15 by the courts pursuant to appropriate legal proceedings."

16 The Party went to court. Judge Devitt convened a
17 three-judge District Court and, on September 30, heard arguments
18 of counsel. Following that, and in spite of a request for a
19 permanent injunction, the court ruled that a hurried decision
20 would not be appropriate.

21 Q What injunction did you ask for?

22 A In the prayer for relief we asked both for a
23 temporary and a permanent injunction.

24 Q Against what?

25 A Against the state officials, requiring them to

1 place the Party candidates on the ballot.

2 Q When?

3 A In the June 1968 election.

4 Q Is that the only injunction you asked for?

5 A That is the only injunction at that time. We
6 asked for such other and further relief in the prayer for re-
7 lief. And following the issuance of the temporary injunction
8 and the passage of election, we noticed it for trial, came
9 back to court and found ourselves arguing a motion to dismiss
10 as moot.

11 Q And then what? Did you amend your complaint?

12 A I am sorry.

13 Q Did you amend your complaint?

14 A Yes; we amended our complaint and the three-
15 judge court granted the motion to amend the complaint. In the
16 prayer we said that the Communist Party of Minnesota intended
17 to participate in future local, state and national elections.
18 This amendment was granted and it was supported by an affidavit
19 of Mrs. Smith to this effect on behalf of the Party.

20 Q You amended the complaint to allege that the
21 Communist Party of the state intended and hoped to participate
22 in future elections; that, I assume was not in the prayer. How,
23 if at all, was the prayer amended?

24 A The prayer was not amended. We felt that under
25 rule 54(c) the request for additional relief would incorporate

1 our desire to obtain a permanent injunction.

2 Q The only injunction that you asked for, as I
3 understand it, explicitly, was an injunction with respect to
4 an election that is now passed and an election in which your
5 clients were placed on the ballot.

6 A That is correct.

7 Q And that, thereafter, the only explicit relief
8 demanded, either in the original complaint or in the complaint
9 as amended, was one for declaratory relief, is that right?

10 A That is correct. Although we feel we are not
11 able to come back to court, because of the disposition of the
12 motion of the State to dismiss as moot, to ask for a permanent
13 injunction which we feel we are entitled to by this Court.

14 Q Yes, you were entitled to ask for it and then
15 the dismissal would have been a denial of it. But you did not
16 in fact ask for it, did you?

17 A No, we did not.

18 Q An injunction is strong medicine, and, generally,
19 the rules of pleading require that, if you want an injunction,
20 you have to ask for an injunction; and that it is not incorpor-
21 ated in the ordinary language of "such other and further relief
22 as may be appropriate in the circumstances," etc.

23 A We did feel ---

24 Q You know what is on my mind, I suppose, by
25 these questions and that is whether or not this Court has

1 jurisdiction under Title 28 of the Code, Section 1253 -- whether
2 or not, in other words, there was a denial of an injunction.
3 And there was a denial of an injunction only if you asked for
4 an injunction that was denied.

5 A We feel that the relief asked for -- We did ask
6 for a permanent injunction. We feel that this is similar to
7 the Moore and Ogilvie Case. The specific injunction to put
8 them on the ballot was not necessary after the election. All
9 that remained was declaratory relief which, if granted, would
10 have the effect of an injunction.

11 Q What necessitated the three-judge court?

12 A We sought to enjoin, both by the temporary relief
13 requested, the permanent injunction and the declaratory relief,
14 to stop, to enjoin the execution and enforcement of the
15 Communist Control Act of 1954. Having obtained the declaratory
16 relief we asked for, it would have had the effect of restraining
17 the operation or enforcement of the Act.

18 Q I know, but as Mr. Justice Stewart says, I
19 don't see any request for an injunction to restrain the
20 enforcement of the Communist Control Act.

21 A The United States is not a party. We could not
22 restrain the United States from enforcing the Act as against
23 state elections, because the United States has no power to
24 interfere with the state elections in this regard. The only
25 government officials who have the power to execute and enforce

1 the Communist Control Act in elections are the state officials.

2 Q Well, you didn't even ask them for an injunction
3 against obeying that Act.

4 A Well, we asked for the relief, which the Court
5 held below entitled us to a three-judge court, to restrain the
6 state officials from preventing the Communist Party from being
7 on the 1968 ballot. Following that election, we amended our
8 complaint to let the court know that the Communist Party
9 intended to participate in future elections.

10 The next point is that, in support of the lower
11 court's order dismissing the complaint as moot, we believe
12 that it is clear that the Communist Party will continue to
13 participate in elections both on a state-wide level and a
14 national level. The Party has participated in the past in 163
15 elections. Forty-one states have been the sites of those
16 elections. And in Minnesota there have been 27 elections.
17 All but one of these have been election contests for state
18 or national office.

19 The Attorney General has made the argument below that--
20 and this was adopted by the three-judge court -- that it is
21 just speculative that the Party will run for future elections.
22 And he said the earliest time it could come up again is 1972.

23 We would like to point out to the Court that the
24 time is upon us now for the Party to participate in other
25 elections. We have state-wide elections. We have elections

1 for United States Senator as well as for the House of Represent-
2 atives. If the order of the court below is upheld as moot,
3 the Communist Party will have participated in litigation for
4 almost 2 years and be in precisely the situation that we argue
5 such an order would place us. That is that we would have to
6 go back into court again and litigate the question of the
7 right of the Party to appear on the ballot.

8 The court below refused to reach the merits, saying
9 that a hurried decision would not be wise or would be unwise.
10 They also wished the United States to be a party. Chief Judge
11 Devitt teletyped the United States Attorney, Mr. Ramsey Clark,
12 and ordered him to appear in the court. Mr. Clark replied
13 with a letter, saying that he had other commitments and did
14 not appear. However, he sent the United States Attorney for
15 the District of Minnesota to appear *amicus curiae*.

16 He did appear and argued to the court that the
17 Communist Control Act does not bar the Party from the ballot;
18 that it can be interpreted, citing *Catherwood*, for the pro-
19 position that candidates could run as long as they didn't use
20 the label, Communist Party. He also suggested to the Attorney
21 General that Minnesota law might allow the Communist Party
22 to appear on the ballot with the designation, Communist Party --
23 an argument that was not accepted by either the court or by
24 the Attorney General.

25 I think that that position of the United States fails,

1 because it does not recognize that the Party itself, under
2 Minnesota law, has a right -- There are provisions in the law
3 which allow a party to present candidates if it receives a
4 percentage of votes. We feel that a vote for party enthronement
5 is equally as important as a vote for party candidates.

6 The United States in its brief relied on Salwen and
7 Rees -- the only other case construing the Communist Control
8 Act in terms of elections -- for the proposition that a
9 Communist Party candidate could run for election.

10 In that case the New Jersey courts, including the
11 Supreme Court, did not accept even that argument and said that
12 it would be a keen way to avoid the effect of the Act if
13 Communist Party candidates could run and hide from the public --
14 or not mention the fact -- that they are espousing Communist
15 Party principles.

16 Both the appellants and the appellees in this case
17 agree that there is no question that the Communist Control
18 Act bars the Communist Party or its candidates from running
19 in elections, whether or not they disclose or speak to the
20 effect that they are running under the Communist Party label.

21 Q Do you want us to declare that act unconstitu-
22 tional?

23 A Yes; we also want a permanent injunctiote ---

24 Q Can we declare that statute unconstitutional
25 without the United States Government having anything to do

1 with it?

2 A We believe the United States Government has had
3 a clear position over the years.

4 Q What position? Who is now speaking for the
5 United States Government?

6 A The United States has not appeared in this
7 case.

8 Q How can we declare an act of Congress unconstitu-
9 tional without the Attorney General of the United States or
10 somebody representing him being here?

11 A It is my understanding that the court did not
12 request the appearance of the United States.

13 Q Did they give the notice?

14 A Yes; Judge Devitt gave statutory notice.

15 Q To the Attorney General, didn't they?

16 A Not only gave statutory notice but teletyped
17 an order requiring him to appear, the response to which was
18 the appearance of the U. S. attorney as amicus curiae.

19 Q As I understand the judgment of the lower court,
20 it was that there was no case in controversy, because the
21 Attorney General in his amicus brief has suggested that the
22 law did not apply. Is that what Judge Devitt said?

23 A That is one of the points relied upon. The
24 judge pointed out three reasons why the motion was granted to
25 dismiss: that it was moot; that it was not ripe for

1 adjudication; and that there was not an actual case for
2 controversy as required by the Declaratory Judgments Act.

3 Q It wasn't moot, was it?

4 A We do not ---

5 Q If it wasn't moot, why did you amend?

6 A Well, we did not anticipate ---

7 Q You amended, because it had been moot up until
8 that time. I mean there is nothing wrong with that; it is
9 done every day.

10 A We amended, because the court granted the relief
11 of the Party to appear on that ballot.

12 Q Now you don't know what the next Secretary of
13 State will do about this Act, do you?

14 A We believe we do.

15 Q How do you?

16 A The Attorney General ---

17 Q Who is the next Secretary of State?

18 A The next Secretary of State will be elected in
19 the coming election.

20 Q How do you know what he is going to do, when
21 you don't even know who he is?

22 A We feel, Mr. Justice, that this case is going
23 to be presented again before that man leaves office. The filing
24 date for the national elections are in July of 1970. His office
25 does not expire until November of 1970. The Attorney General

1 will be in office until November 1970. The Party is now
2 seriously considering the state and national elections in
3 Minnesota. I believe no candidates have filed, although a
4 number are talking of their intent to do so.

5 If the order of dismissing the case as moot is
6 upheld, the appellants are precisely in the position they were
7 in the summer of 1968 of having to come back to court again
8 with exactly the same defendants and waste their resources
9 and their time again covering the same ground.

10 Moreover, we take the position that the mere change
11 of the constitutional officers of the state is not enough to
12 moot the case. There is no authority for the proposition --
13 save the one amicus curiae brief of the United States Attorney --
14 there is no legal authority for the proposition that the Act
15 does not apply.

16 I can't imagine that the constitutional officer would
17 take another position. They cite the opinion of a Connecticut
18 Attorney General ruling the same way. Salwen and Rees stands for,
19 not only that proposition, but that a Communist Party candidate
20 without his party cannot participate in elections.

21 And the United States failure to appear ---

22 Q Speaking about lacking a case of controversy,
23 I mean, what Connecticut does and somebody else is not before
24 us. Do you have anything to argue for other than a claratory
25 judgment?

1 A Yes. We believe we are entitled to a permanent
2 injunction from this Court.

3 Q What right did you have for an injunction?
4 You originally asked to get on the ballot in 1968. And then
5 he court allowed you to amend. Then you came in and said
6 you proposed to introduce candidates in the future. Is there
7 anything in the record that shows that the state intends to
8 prevent you from doing it?

9 A No; and the state can continually present us
10 with the same situation whether ---

11 Q Is there anything in the record that says the
12 state intends to?

13 A There is. In the transcript of the hearing on
14 September 30 the court asked Mr. Kyle, who was at that time
15 Solicitor General -- it is on page 18 of the appellants' brief
16 and in the appendix on page 69 -- The court inquired of
17 counsel, " On another subject I notice that counsel's affidavit
18 says, on information and belief ---

19 Q Could you just defer a moment, Mr. Castner, until
20 we are sure we have your place? Page 69 of the appendix, is
21 that correct?

22 A That is correct. I misquote. It was at the
23 hearing on November 25, 1968, hearing arguments on the motion
24 to dismiss as moot and on the appellants' motion to amend.
25 This exchange took place: "On another subject, I notice that

1 that counsel's affidavit says on information and belief he
2 has learned that you, or the attorney general, are going to
3 persist in your viewpoint that if some other Communist affilia-
4 ted people file, you are going to take the same position. Is
5 there any basis for this information and belief?"

6 Mr. Kyle replied, "I think there probably is. At
7 least there is no new case law which has come down which
8 would, as far as I am concerned, dictate a different result,
9 ultimately."

10 Q Who is Mr. Kyle?

11 A Mr. Kyle was the Solicitor General in the case,
12 and he is appearing for appellees today.

13 Q A representative of the Attorney General?

14 A He was the chief officer, the Solicitor General
15 of the State of Minnesota.

16 Q He was a subordinate of the Attorney General,
17 was he not, at that time?

18 A That is correct.

19 Q And he is no longer Solicitor?

20 A No, he is not. Yes, he is. I'm sorry.

21 Q He is present in the courtroom but not in the
22 office, is that what you mean?

23 A I misquote. He did leave the office of Solicitor
24 General for a while and then came back to it and is presently
25 serving in that capacity now.

1 Q Well, I don't suppose anybody repudiated the
2 fact that he was representing the Attorney General.

3 A In their brief subsequent, they did not like
4 the effect of this admission in court and argued in opposing
5 the noting of probable jurisdiction -- also tying to the
6 argument that this would not be presented again until 1972 --
7 that there would be another constitutional officer and no way
8 for the court to determine that this same ---

9 Q Did they deny that Kyle was an officer at the
10 time he made this statement? Did they repudiate him?

11 A They did not.

12 The United States, we feel, did not appear to defend
13 the constitutionality of the Act, because they had a longstand-
14 ing provision that such an act violates the Constitution of
15 the United States. In 1948 when Congress was considering --
16 and the years subsequent -- a number of bills which would have
17 barred the Communist Party from activity, two congressional
18 sub-committees were holding hearings on legislation aimed
19 at restricting the activities of the Communist Party.

20 One bill would have banned from the ballot, in
21 any election in the United States, all political parties
22 directly or indirectly affiliated with the Communist Party
23 of the United States.

24 After the bill's constitutionality was assailed by
25 a number of witnesses, the committee recessed to await an

1 opinion from the Department of Justice on this subject. The
2 opinion was forthcoming in a letter of March 9, 1948 to the
3 Chairman of the House Committee on House Administration. That
4 letter said, "Although this Department is in complete sympathy,
5 of course, with the desire that no subversive or disloyal
6 person should be permitted to hold a position of honor, trust
7 or profit in the Government, it is believed that the bill
8 under consideration would be of doubtful validity and enforce-
9 ability for many reasons, the most outstanding of which is
10 that it might be regarded as in the nature of a bill of
11 attainder, a denial of due process of law and an attempt by
12 the Federal Government to legislate, insofar as it would apply
13 to the qualifications of a political party in any election,
14 in a field for which no federal authority exists."

15 The United States has not, in any case that we can
16 find, moved from this position. We believe that this position
17 has been consistent regardless of the change of constitutional
18 officers.

19 We believe, also, that any state official with the
20 state of the law as it is today would be the same as the
21 Attorney General of Minnesota in this case.

22 We urge the Court and feel the Court has authority
23 to issue a permanent injunction restraining state officials
24 from preventing Minnesota candidates from -- Minnesota Communist
25 Party candidates -- from presenting their nominating petitions

1 and participating in elections. We feel the Court should reach
2 the merits of constitutionality; that the argument that the
3 act does not apply is without merit and is not belied by
4 legislative history.

5 There was little agreement on the extent of the
6 scope of this Act in the legislative debates -- as few as
7 there were -- but there was agreement on one thing; that this
8 Act barred the Party from the ballot. And the authorities that
9 have studied and written about this Act subsequent to its
10 passage have agreed that the Act has this effect.

11 Reaching then the merits ---

12 Q Where did they deny that the Act applied to you?
13 To the Communist Party?

14 A Pardon me, Mr. Justice.

15 Q Where did they deny that the Act applied to the
16 Communist Party?

17 A "They" being the Department of Justice or the
18 legislative debates?

19 Q The people you are after here; that you want to
20 get an injunction for.

21 A Oh, the appellees in this case have not denied it
22 that the act applies. Let me take this opportunity -- thank you
23 for reminding me -- there is an error in the appellant's brief
24 on page 45. On the first paragraph on page 45, the second
25 sentence says, "Both the Attorney General and the U. S.

1 Attorney argued below that the Communist Control Act infringes
2 upon the power of the states in this regard," -- That is to
3 qualify electors. The inclusion of the Minnesota Attorney
4 General should not be there. This was an error.

5 Turning to the merits, we urge the Court to find the
6 Act unconstitutional as a bill of attainder. We believe the
7 Act is a classical bill of attainder, and the decisions of this
8 Court, and all who sat on this Court, considering the cases of
9 attainder, would find this act a classical bill of attainder.

10 First, the Act outlaws the Communist Party by legisla-
11 tive fiat. The Party itself was outlawed. This Court in the
12 SACB Case pointed out that, if the Party by name were outlawed,
13 the act would be a bill of attainder. The Communist Control
14 Act of 1954 made this finding.

15 The second test is whether there is a legislative
16 finding of guilt. In 841 there is the flat conclusion that the
17 Communist Party should be outlawed, and in 841 also, in fact an
18 instrumentality of a conspiracy to overthrow the Government
19 of the United States.

20 There is a legislative finding of guilt, taking away
21 from the power of the Court to make a determination, not
22 granting a hearing to the Party on its conclusions. And we
23 urge that the position of the appellees, that this Court may
24 take into consideration the legislative findings in other, and
25 not related acts, as to the nature of the Communist Party,

1 cannot support this Act.

2 We feel it is a novel assertion that the findings
3 of one act can be used to support another. This Act was
4 adopted on the eve of adjournment in 1954. There were no
5 committee hearings on the Act, save Congressman Dies. The
6 legislative history has been properly described by this Court
7 in the Catherwood Case as giving little guidance.

8 The third test we feel is met is that the Party is
9 punished. There is no comparable example of such a flat
10 legislative finding of guilt in the absence of a judicial
11 trial. And the cases of this Court, going back to the post-
12 Civil War bill of attainder cases, Cummings and Garland, clearly
13 show that punishment need not be imprisonment but, in fact,
14 point out in specific example precisely what has happened under
15 this Act; that the Party is barred from the ballot.

16 The fourth test -- which many authorities feel this
17 Court has set forth in Doude -- is also met. There is no
18 opportunity for the Party to reform itself. It cannot escape
19 the provisions of this Act. Nothing it does can allow it to
20 come to the ballot. And, in fact, the interpretations of the
21 Act do not allow an individual candidate, supporting the
22 principles of the Party, to appear without party endorsement.

23 The second provision, and there are many, or the
24 second reason of unconstitutionality, and one which we feel
25 is of equal weight, is the infringement upon freedom of speech.

1 This Court, in the last term in Williams and Rhodes, made it
2 clear that the right to vote in the First Amendment protects
3 that right, both for the right of qualified voters to cast their
4 votes as well as the right of individuals to associate with a
5 party or an association to cast their votes.

6 The State would urge that the paltry showing of the
7 Party in the last election, 415 votes, would minimize the
8 importance of participation in the electoral process. We
9 feel they cannot be serious in this regard. The real importance
10 and contribution to participation in the political process is
11 the forum of an electoral contest as freedom of speech.

12 This Court has made it clear that freedom of speech
13 is on the highest of scale of constitutional liberties. We
14 feel that the Court has also made it clear that the right to
15 vote is at the top with it.

16 Q You mean that they argued that, because of such
17 a small number of voters on that ticket, the state has a right
18 to keep them off the ticket?

19 A They argued this in terms of its being moot; that
20 is, with such a paltry showing how can we expect that the Party
21 would make another serious attempt, and have ignored the fact
22 of 163 elections of this Party. They also have pointed to the
23 hiatus of participation in electoral politics by the Party from
24 1950 until the 1968 election. This lack of participation was
25 not due to a lack of interest but to the effect of the McCarran

1 Act.

2 The Party itself has come back into electoral politics
3 in 1968; they did participate in local elections in New York.
4 Rashid Storey and Jesus Colon ran for mayor and comptroller.

5 Q Well, what actual defense have they put up for
6 a law of this kind, that bars a party from running in the
7 state, if they act within the law?

8 A On the merits, they merely say that to balance
9 the interests of taking the risk that a party if elected would
10 destroy our way of government ---

11 Q How many voters did you say they had?

12 A 415 in Minnesota.

13 Q What is the population of Minnesota?

14 A I believe it is about 3 million.

15 Q They were afraid this 415 would overturn them.

16 A I am afraid they will have to answer that for
17 themselves. I will save my remaining time for rebuttal.

18 Q You are not going to spend any more time on the
19 preliminary question of whether or not the Court has jurisdiction
20 under Section 1253.

21 A I believe the State will spend quite a bit of
22 time on it; then I will respond in rebuttal.

23 MR. CHIEF JUSTICE BURGER: Mr. Kyle.
24
25

1 ARGUMENT OF RICHARD H. KYLE,
2 SOLICITOR GENERAL OF MINNESOTA,
3 ON BEHALF OF RESPONDENTS

4 MR. KYLE: Mr. Chief Justice; may it please the Court:

5 Maybe I should clarify my position with the Attorney
6 General's office at the outset in response to some questions
7 which arose. The Solicitor General of the State of Minnesota,
8 which is my title, is an appointive position by the Attorney
9 General of Minnesota and serves at the pleasure of the Attorney
10 General. He is the equivalent of an Assistant or a Deputy
11 Attorney General.

12 When this litigation first arose and through the
13 District Court proceedings, I was the Solicitor General of the
14 State of Minnesota. And for a period of approximately 6
15 months thereafter, I performed a different function within the
16 office of the Attorney General, with a different title, and then
17 returned to the position of Solicitor General, which position
18 I know hold.

19 Q As of now?

20 A Yes, as of now, I am.

21 The statement, which is found in the record concerning
22 the position of the Attorney General with respect to a future
23 election and made by me, was made by me. And the statement
24 as such stands. Now to the extent that the Attorney General
25 will see fit to follow what I or someone else on the staff may

1 tell him to do with respect to a given election ---

2 Q Is the Attorney General of the State an elected
3 officer?

4 A That is correct, Your Honor.

5 Q Over what? A four year term?

6 A His term expires this year. He is not the
7 candidate for reelection, as is the Secretary of State whose
8 term also expires this year. And he is not a candidate for
9 reelection. So as to this particular question arising this
10 fall, and it could, we are going to have 2 new and different
11 constitutional officers in office when a similar petition,
12 if ever, is going to be presented.

13 Q You have new officers after January of 1971?

14 A That is correct.

15 Q The Governor and the Attorney General take office
16 in January?

17 A That is right, in January, Your Honor.

18 The position of the State, or the position of the
19 Attorney General and the Secretary of State who were named
20 defendants in this action, at the very outset was that a three-
21 judge district court was not required to hear this action,
22 because no request was made that would have the effect of
23 restraining the operation or enforcement of an act of Congress;
24 that even if the plaintiffs here secured the declaratory
25 relief which they sought, that the Party be placed upon the

1 ballot and that their candidates be allowed to run, this would
2 not have the effect of grinding to a halt, so to speak, the
3 operations of the Communist Control Act of 1954 -- for whatever
4 operation that Act had.

5 Q Did the action of the Secretary of State, in
6 refusing the nominating petitions, purport to be done under a
7 state statute, or was it done pursuant to the federal statute?

8 A There was a dispute on this, Your Honor. He
9 received the nominating petition and asked advice from the
10 Attorney General as to what he should do. The Attorney General
11 wrote him a memorandum, or an opinion or whatever you want to
12 call it, pointed out the provisions of the Communist Control
13 Act -- and the Communist Control Act only -- and said that this
14 Act appeared to apply and, therefore, bar the Party from part-
15 icipation in the election.

16 Q It purports to preempt -- In the absence of the
17 Communist Control Act you would have accepted the ---

18 A No question about that, Your Honor.

19 Q On the face your state statutes would permit their
20 filing?

21 A There would be no disabling state statute.

22 Q So this is really the State saying that federal
23 law ---- -

24 A Federal law requires us to do this.

25 Q ---- preempts our state law?

1 A That is correct. That is the position we took,
2 and that is the position which we have held throughout. It
3 was on that basis that we also objected to the convening of the
4 three-judge court, because we took the position that we were
5 not acting under color of state law, which was a requirement
6 of Section 1983 of the Civil Rights Act when, "any state officer
7 acting under color of state law."

8 Now the three-judge court disagreed with us on this
9 proposition and was convened and then made its decision and this
10 appeal followed.

11 Q Mr. Kyle, I don't ---- Excuse me.

12 Q May I ask you a question? They filed a petition
13 against the state officers, did they?

14 A No, Your Honor, they presented to the Secretary
15 of State a nominating petition of behalf of the Communist Party
16 of the United States.

17 Q Then what did he do?

18 A He refused to accept it.

19 Q On what ground?

20 A That the Attorney General told him to refuse
21 to accept it.

22 Q You mean the Attorney General of the State.

23 A Of the State of Minnesota.

24 Q And you say that he did it on the ground that
25 the federal law barred it?

1 A On the ground that the Communist Control Act ---

2 Q That doesn't get your state out of it, does it,
3 to say that the federal law bars it? Wasn't it that you didn't
4 let them know whether they would accept his name as a candidate?

5 A We said no.

6 Q You said no; then you did deny it? And you have
7 refused to let them get on the ballot?

8 A That is correct, Your Honor.

9 Q And you did it on the ground that the federal
10 law prohibited it?

11 A That is correct.

12 Q What did you tell them about the First Amendment?

13 A We didn't tell them anything about that.

14 Q You didn't mention that?

15 A No, we did not.

16 Q Do you think it had anything to do with it?

17 A At the time that we were presented with the
18 petition, Your Honor, the situation arose in this manner. The
19 petition is there. We look at the Communist Control Act on
20 its face -- at least in my opinion, and I still have this
21 opinion -- it would, if constitutional, bar the Communist Party
22 from the electoral process in the State of Minnesota. Now
23 the only decisions ---

24 Q That was the issue between you and the people
25 who wanted to get on the ticket?

1 A Yes.

2 Q Between the State of Minnesota -- not between
3 the Federal Government -- but between the State of Minnesota
4 and the people who wanted to get on the ticket.

5 A Well, I don't know whether that follows, Your
6 Honor.

7 Q Why doesn't it? Who denied it, except the State?
8 It doesn't make any difference what ground.

9 A You are right. In the sense that the State said,
10 "No, you are not going on the ballot," then it was an issue as
11 between the State and the people presenting the petition as to
12 whether they were going to be allowed to go on the ballot.
13 We, physically, said no and our only ---

14 Q You didn't let them get on?

15 A That is correct, that is correct.

16 Q You haven't let them get on yet.

17 A Oh, they have been on. They ran in 1968, not
18 pursuant to anything we did but pursuant to an order of a
19 three-judge district court. But there has been no request since
20 that time to come on again. And there has been no opportunity, ---
21 or there has been an opportunity in 1969 in which we had, at
22 least, local elections in the State of Minnesota. As far as our
23 office was concerned, we received no information from anyone
24 that this problem had arisen again.

25 Not withstanding -- I might point out -- the affidavit

1 presented by the secretary, Mrs. Smith, of the Communist Party
2 that they intended to participate in future Minnesota local
3 elections. At least one year has gone by, and, if the partici-
4 pation took place, it was brought to no one's attention.

5 Q Mr. Kyle, would it be possible in your mind
6 as solicitor general to advise that since the three-judge
7 court has already ruled on the 1968 election, that you see no
8 reason why they shouldn't follow that in later elections and
9 let the Party on the ballot?

10 A Well, I would have no difficulty with it except
11 that the basis of the three-judge court's ruling, Your Honor,
12 was to specifically reserve the question of the constitutionality
13 of the Act.

14 Q They haven't passed on it yet?

15 A They haven't passed on it yet. We were in a
16 time, as all of these election cases are ---

17 Q The point is that you feel obliged to follow
18 an act of Congress, which has no means of enforcing it if you
19 don't follow it. And you have an opinion of a three-judge
20 constitutionally setup court that you didn't have to follow it.
21 Isn't that enough for you to say, "Well, let's forget about it?"

22 A I would like to say yes, but I can't, Your Honor,
23 because I don't think it is. If the three-judge court had ruled
24 on the merits of the Act, declared the Act to be unconstitu-
25 tional ---

1 Q You have a further impediment, have you not?

2 You are not the Attorney General of Minnesota.

3 A That is correct.

4 Q But one of his subordinates who ---

5 A ---serves at his pleasure.

6 Q Well, can't we get somebody here who can give an
7 opinion for the State of Minnesota? If you were not authorized
8 to give it, what are sent here for?

9 A No, I am authorized to make statements on behalf
10 of the State of Minnesota.

11 Q Well, you are authorized to make statements in
12 this argument, but you are not authorized to give an opinion
13 that hasn't been asked for yet.

14 A That is correct.

15 Q But we are asking you for one.

16 A Well, you are asking me, in course of an argument---

17 Q We are asking you on the grounds that you are
18 here purporting to be the representative of the Attorney General
19 of the State of Minnesota. Now, are you and do you have full
20 authority to represent him in this argument before us?

21 A Yes, Your Honor, I do.

22 Q But you have no authority to give an opinion
23 about the ballot in next September's election.

24 A Yes. He has not asked me for my opinion con-
25 cerning ---

1 Q Do you deny having that authority?

2 A I am not sure I understand your question, Your
3 Honor.

4 Q Do you deny having the authority which the
5 Chief Justice asked you about? If so, how can you claim to
6 be the representative of the Attorney General of the State
7 of Minnesota. We usually have representatives for parties
8 who can give us statements about the position of the parties.

9 A I have given you statements, Your Honor.

10 Q You don't deny then that you have authority to
11 determine for the State of Minnesota and speak for them now and
12 to say you are opposing this Party getting on the ticket?

13 A Yes, I am opposing this Party getting on
14 the ticket. This is the position which we took earlier and
15 this is the position which we take in this litigation.

16 Q Do you do it on the ground that the State does
17 it of its own will or because it does it ---

18 A No, I do it on the ground that an act of
19 Congress has said -- as I read that act of Congress -- that
20 the Party shall not go on the ballot.

21 Q And what did the court tell you?

22 A The court put them on the ballot, because the
23 court said we do not have enough time to resolve what they
24 considered to be the difficult, grave constitutional issues
25 which were presented.

1 Q Well, why should this case not be met on its
2 face, like litigants should meet cases, and say whether or
3 not the State of Minnesota is now holding this Party getting
4 on the ticket?

5 A Well, whether it is going to be met on the
6 merits or not, Your Honor, is a decision which this Court is
7 going to make right now, which I have no control over.

8 Q You haven't control of us, but you have control
9 over the State's case.

10 A But, as I read the decisions of this Court ---

11 Q Do you say that you have any less authority than
12 the Attorney General of the State of Minnesota has to state
13 the views on this particular case where you are now represent-
14 ing the State of Minnesota?

15 A No.

16 Q You do not claim any less authority than the
17 Attorney General has?

18 A It is our position on this appeal that juris-
19 diction is also lacking, in addition to the fact that a three-
20 judge court, in our view, was not required below; but that
21 there was no denial of a permanent injunction in this litigation,
22 and that is a requirement of Section 1253, a section which was
23 recently reviewed in an analogous context in the Goldstein
24 decision by this Court about 2 months ago.

25 It says that this Court has appellate jurisdiction

1 from a final order granting a permanent injunction. Now there
2 was no request for a permanent injunction in this case. It was
3 requested that the Secretary of State accept the nominating
4 petition and that he place those candidates upon the ballot.

5 To the extent that that request for relief constituted
6 a request for a permanent injunction, it was granted. The
7 temporary mandatory injunction issued by the three-judge court
8 gave to the plaintiffs every aspect of the injunctive relief
9 that they had originally sought.

10 It was only at that stage that we probably could have
11 appealed to this Court for the granting of that temporary
12 injunction, which we chose not to do.

13 The amendment, which came two weeks later --but before
14 the election --, has two statements of fact, allegations: that
15 the Communist Party of Minnesota intends to participate --
16 whatever that means -- in future national, local, state
17 elections, and further that the Attorney General will continue
18 to give his view that the Communist Control Act bars. No
19 request that any state official present or future be barred
20 from taking any action; none was asked for and, therefore, none
21 was given.

22 So it is only, I submit, if this Court reads the order
23 of dismissal as moot, as having the effect of denying their
24 request for a permanent injunction, that this Court would have
25 jurisdiction. And I submit ---

1 Q Only denying what request for a permanent
2 injunction?

3 A Excuse me.

4 Q Only if we read the dismissal as denying, you
5 say, their request for a permanent injunction? What request
6 for a permanent injunction?

7 A Only if you read it as having the effect of
8 denying whatever their prayer for relief ---

9 Q Well, what was it?

10 A That the Communist Control Act be declared
11 unconstitutional.

12 Q So that was for a declaratory judgment, wasn't
13 it? Not for an injunction.

14 A No, there was no request for an injunction.

15 Q That is what I thought.

16 A No request at all.

17 Q The injunction requested was with respect to
18 what election?

19 A With respect to the 1968 election.

20 Q What prayer did they grant the injunction under?

21 A A motion for a temporary mandatory injunction.

22 Q Where is that in the appendix?

23 A The motion, Your Honor?

24 Q Where is the request for the injunction that
25 they granted?

1 Q Page 14, paragraph 2.

2 Q Paragraph 2 on page 14, is that right?

3 A That is correct, Your Honor.

4 Q "Not as granted, you did not take an appeal,"
5 is that right?

6 A That is correct?

7 Q Would you read that line to me?

8 A "That the court issue a temporary restraining
9 order and permanent injunction ---"

10 Q Now what does that word "permanent" mean?

11 A It means that they permanently tell the --- I
12 think it means, in respect to the context in which it was
13 brought up, that the Secretary of State take and put the
14 candidates on the ballot.

15 Q For what?

16 A For the 1968 election.

17 Q What does a request for a permanent injunction
18 mean to you?

19 A It means that he does it for all time, with
20 respect to the 1968 election. Once the election occurs, there
21 is nothing more to occur.

22 Q Where does it say with reference to that
23 particular election?

24 A Because it says, "To accept and file the afore-
25 said petition," and that aforesaid petition only refers to the

1 1968 election. "And require the defendant Donovan include upon
2 the ballot for the general election to be held on November 5,
3 1968 and thereon the names ----"

4 Q What does section 5 provide on the next page?
5 What is usually required in bills for injunction.

6 A "For such further and all relief that the court
7 may deem equitable and profitable."

8 Q What do you think that means?

9 A I think it is a standard boiler plate phrase
10 put in every prayer. I don't think it has any meaning in and
11 of itself.

12 Q I have used it many times in complaints.

13 A I don't think it has any meaning ---

14 Q I always thought it meant that you were asking,
15 not only for that relief, but for any other relief that is
16 necessary to protect the rights complained of. I never under-
17 stood it to mean anything but that.

18 A But if it does mean that, Your Honor, it means
19 to protect the rights within the context of the ---

20 Q That is a rather technical construction, isn't
21 it?

22 A I don't think so. I think yours is a rather
23 liberal construction of the same phrase.

24 Q It might be, and the courts sometimes are liberal
25 in protecting the First Amendment rights.

1 Q You mean it is not a strict construction.

2 A In any event, Mr. Castner made a statement,
3 during his argument, to the effect that they were unable to
4 make an amendment to the complaint which would have amended the
5 prayer for relief. There is no reason that that amendment
6 could not have been made sometime during the course of these
7 proceedings. But they chose not to, and the motion was then
8 made to dismiss and it was granted by the three-judge court.
9 And it is from that matter that we are now before this Court.

10 The propriety of dismissing this lawsuit is, perhaps,
11 the first and foremost issue before the Court. And I
12 respectfully submit that, all of the factors taken together, that
13 the three-judge district court properly determined there was
14 no actual controversy between these parties; and that this was
15 not a case like the Moore v. Ogilvie decision of this Court
16 within the last year, which was capable of repetition and yet
17 evading review.

18 Q Even that question we don't reach if we don't
19 have jurisdiction.

20 A You do not have jurisdiction, Your Honor. That
21 is correct.

22 Q We don't even reach this first question.

23 A That is correct.

24 Q One other point, Mr. Kyle. This pleading on
25 page 14, there was no pleading subsequent to that, was there?

1 This amended complaint?

2 A No, that is correct, Your Honor. The amended
3 complaint -- the motion to amend was granted on the same day
4 as the motion to dismiss the complaint was granted. These were
5 contained in the same order of the three-judge district court.

6 Q Are you complaining that we don't have juris-
7 diction or that the court below didn't have jurisdiction.

8 A We are complaining that you do not, at this
9 stage, have jurisdiction.

10 Q That we do not. Why?

11 A Because for this Court to have jurisdiction there
12 must be an appeal from an order required to be heard by a
13 three-judge district court.

14 Q They didn't make an order?

15 A Yes, there was an order.

16 Q What was it?

17 A That the Communist candidates be placed upon the
18 ballot. But it is our position that we did not need a three-
19 judge district court below.

20 Q Is that your ground, that it should have been a
21 one-judge instead of a three-judge?

22 A That is one of the grounds.

23 Q What is the other ground?

24 A The other ground is that this is not an appeal
25 from an order granting a permanent injunction.

1 Q Suppose it denies it?

2 A Excuse me, that is denying a permanent injunction.

3 Q You said it does grant. It amounts to that
4 almost, doesn't it, in that it dismisses it?

5 A No, I don't think it does. Because I don't
6 see how it can amount to anything if there is no request for
7 it to begin with, Your Honor.

8 Q That is going back to another question as to
9 whether or not they requested it. And from my viewpoint that
10 depends on paragraph 5, not on paragraph 2.

11 A That could be although ---

12 Q Mr. Kyle, surely the three-judge court didn't
13 turn this on the ground that there was no request for an
14 injunction, did it? As I read the opinion, it turned on the
15 ground there was no case of controversy.

16 A Right.

17 Q And you are now urging two grounds: that they
18 were right in saying there was no case of controversy; and that
19 we don't even have to reach that, because there was no denial
20 of an injunction. Isn't that right?

21 A That is correct.

22 Q We don't have the benefit of any view of the
23 three-judge court whether an injunction was requested?

24 A No. They simply viewed the ---

25 Q And if we think that it was sufficiently

1 requested, that there was a denial here, then, I take it, that
2 what we have to decide is whether they were right or wrong in
3 holding that there was no case of controversy within Golden
4 and Zwickler.

5 A Assuming you also conclude that this was a type
6 of case required to be heard by a three-judge court.

7 Q This amended position of yours, what do you mean
8 by there is no case of controversy?

9 A I mean that as I read the decisions of this
10 Court, that it is required, and under the declaratory judgment
11 action, that there must be a live controversy between ---

12 Q But there is not any here?

13 A I don't think there is, Your Honor. Notwith-
14 standing the fact that we are standing before this Court. I
15 think it is hypothetical, at best, as to whether these parties
16 are ever going to be locked together on this issue again. And
17 I don't think that the pleadings or the past history of the
18 Party, the Communist Part, for that matter, support the
19 likelihood of this occurring.

20 Q Did they purport to make this a class action in
21 the pleadings?

22 A Yes, they did, Your Honor, with respect to
23 class action, with respect to those who signed the nominating
24 petition and those who did not sign the nominating petition.

25 Q But as to future candidates and to future

1 elections?

2 A No. You see there is no reference any place
3 to future candidates or future elections. And with respect
4 to the client's actions, of course, this Court in Hall v.
5 Beals -- which was dismissal of a suit in Colorado concerning
6 its residency requirement. The Colorado Legislature, as I
7 recall, amended that requirement during the course of the
8 litigation, so that the plaintiffs would have qualified --
9 and I believe this Court said that, in so doing, the class of
10 which the plaintiffs were members when the suit started
11 disappeared, because they were no longer eligible.

12 I don't think we really have a class even of the plain-
13 tiffs here, because these are plaintiffs who signed a nominating
14 petition for the 1968 election or who did not sign the
15 nominating petition for the 1968 election. And that election
16 having gone by, their status as class members, I think, is
17 very tenuous.

18 Q Are you familiar with a case earlier this term
19 of courts -- I think arising out of Ohio -- in which we
20 dismissed, perhaps without much explanation ---

21 A Brockington v. Rhodes?

22 Q ---- I wonder if we didn't give some indication
23 that this was a dismissal, because there was no indication that
24 these people were going to be candidates in the next election.
25 Is that something you have before you? I just wonder if you

1 are familiar with that?

2 A Yes. If it is the case which I am thinking of,
3 it is one in which he did not bring it as a class action. It
4 is Brockington v. Rhodes.

5 Q Yes, that is the one I am thinking of. Where
6 is that in your brief? Do you know at the moment?

7 A I am not sure if it is cited in the brief,
8 Your Honor. But it is 90 Supreme Court 206.

9 Q What was the volume?

10 A 90 Supreme Court at page 206.

11 Q But in this case there is no form or letter
12 that they do intend to keep on operating? The Communist
13 Party?

14 A There is evidence in the form of an affidavit
15 by the Secretary of the Minnesota Communist Party that they
16 intend to participate in future Minnesota local elections.

17 Q Is there anything in the record that contradicts
18 that?

19 A No.

20 Q So that is in the record?

21 A That is in the record.

22 Q Which is different from the Rhodes Case.

23 A Yes.

24 It is for these reasons that we have taken the
25 position, Your Honor, that the case should be dismissed for

1 lack of jurisdiction in this Court and as failing to present
2 an actual controversy.

3 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kyle.

4 Mr. Castner, you have a few minutes left. You have
5 about 10 minutes.

6 REBUTTAL ARGUMENT OF LYNN S. CASTNER

7 ON BEHALF OF PETITIONERS

8 MR. CASTNER: I would like to speak first to the
9 question of 1253 jurisdiction. Appellants urge that the
10 Goldstein Case is not applicable to this case. Goldstein said
11 that the only interlocutory orders, which the Court has power
12 to review under 1253, are orders granting or denying preliminary
13 injunctions.

14 The order did not deny a preliminary injunction. The
15 order of July of the three-judge court in this case was a final
16 order. We feel this is similar to Moore and a number of other
17 cases where the need for injunctive relief, though previously
18 asked for, has evaporated.

19 Q What does the statute say, 28 United States
20 Code Section 1253? There is no question here concerned with
21 whether it is final or not final, whether it was interlocutory
22 of final. We are concerned with whether it comes under the
23 terms of that jurisdictional statute, are we not? Here it is
24 on page 2 of the appellees' brief. I think you know what it
25 says. It is kind of a rhetorical question I am asking. I

1 didn't mean to throw you off. I am sorry.

2 Q The statute says, "For granting or denying an
3 injunction." That is what the statute says.

4 Q Interlocutory or permanent.

5 Q What injunction was denied in this case?

6 A The original injunction that we asked for was
7 a permanent injunction prior to the election. This injunction
8 was denied by the court issuing a final order saying the case
9 was moot and that there was not an actual controversy.

10 Q The injunction was granted. The injunction
11 you asked for was granted.

12 A It was one of three types of injunctions we
13 asked for. We asked for a temporary restraining order, which
14 was denied, for a temporary injunction, which was granted, and
15 for a permanent injunction, which was not granted.

16 Q What was the permanent injunction you asked for?
17 And please show it to me in the record. On page 14 is your
18 injunction, what you asked for, in paragraph 2.

19 A That the court issue a permanent injunction
20 requiring the defendant, Secretary of State Joseph Donovan, to
21 accept and file the petition for nomination as required by the
22 statutes and require that Donovan include upon the ballot the
23 names of Mitchell and Zagarell. The permanent injunction we
24 ask for is the only relief we could have asked for prior to the
25 election.

1 Q Aren't you bound by what you ask for here?
2 Number 1, you ask for the specific people, the Secretary of
3 State and the 1968 election. Now if you wanted a permanent
4 injunction, you would have said, "Any secretary of state in
5 any election any time in the future." You didn't ask for
6 anything more than that the Secretary of State by name, Joseph
7 L. Donovan, accept this petition and that he be permanently
8 enjoined from not accepting it for 1968. Isn't that what you
9 asked for?

10 A That is what we asked for prior to the elections?

11 Q And you weren't denied it. Now what did you
12 ask for in injunctive relief after that?

13 A We did not.

14 Q Well then, how are you here?

15 A We amended the complaint, and we feel that rule
16 54 is broad enough and clear that, for such other and further
17 relief, that we are entitled to a permanent injunction.

18 Q Then if you filed a case in which you asked for
19 2 declaratory judgments and for "such other and further
20 relief," do you think you would get under this act? This is
21 a special act and requires precise proceedings. I don't think
22 you can say, "under further relief." Where are you going to
23 get your permanent injunction from?

24 A We urge this Court to issue the permanent
25 injunction.

1 Q Under all written statutes, I guess?

2 A Yes.

3 Q Thanks for the information.

4 Q Tell me, Mr Castner, I noticed that the opening
5 sentence of the three-judge court opinion is, "We concern
6 ourselves here with the propriety of entertaining that portion
7 of plaintiffs' complaint seeking declaratory relief based on
8 issues arising from the conduct." Are we to infer from that
9 that, at least, the three-judge court did not regard that there
10 was any longer before them any application for injunctive
11 relief?

12 A At that point in time the issues before them
13 were a motion to amend the complaint and a motion to dismiss.
14 The court characterized the nature of relief as asking for
15 declaratory relief. We urge that once a three-judge court is
16 properly convened and has jurisdiction -- and we feel the
17 three judges below properly decided they had jurisdiction
18 under 1983 -- that once the need for the immediate injunctive
19 relief passes, that declaratory relief is sufficient to
20 continue the jurisdiction of the three-judge court.

21 We feel this was the situation in Moore and Ogilvie.
22 It was the situation in Zwickler and Koota. And in that case
23 the fact that it was moot is a separate issue from whether there
24 is jurisdiction to appeal from a three-judge court. In
25 Zwickler the need for injunctive relief had passed, and this

1 Court accepted jurisdiction on the remaining declaratory
2 relief.

3 Although we did ask for injunctive relief, there
4 are cases which support the proposition ---

5 Q Is this to say that, even if the three-judge
6 court had not reached the conclusion there was no case of
7 controversy but had concluded that there was a case of contro-
8 versy, they may have limited any relief to declaratory relief,
9 and under Zwickler and Koota that was perfectly proper and
10 didn't affect the fact that it was a three-judge court?

11 A That is correct. We feel Moore and Ogilvie
12 stands for the same proposition.

13 As to the question of case of controversy, we feel
14 that the three cases cited to this Court and discussed,
15 Brockington and Rhodes, Hall and Beals and Golden vs. Zwickler,
16 are not applicable to our case.

17 Q Is Hall and Beals the Colorado case?

18 A Yes, it is. In that case this Court mooted
19 the case because the Colorado Legislature had amended the
20 statute under review after the Court had noted probable
21 jurisdiction.

22 In Brockington the case was moot because the petitioner
23 had requested only mandamus, which could not be granted after
24 the election. And he did not allege that he intended to run
25 for office in the future, did not sue for himself and others

1 similarly situated. It was not a class action as this is.

2 Q Besides appealing here, did you appeal to
3 the Court of Appeals?

4 A No, we did not. We feel that had Judge Devitt
5 and the three-judge court ruled that it found no jurisdiction,
6 we feel then the proper remedy was to go to the Court of Appeals.
7 But the three-judge court did not disturb the jurisdiction
8 in the original case and only dismissed the case because of
9 want of an actual controversy.

10 In an election situation which we feel is unique, we
11 are in a round robin of going to the court, having the election
12 pass and then coming back down to the lower court and raising
13 the same issues.

14 Q This hasn't happened to you in this case. You
15 got exactly the relief you asked for with respect to the
16 election for which you asked it. Isn't that correct?
17 You didn't get caught in any round robin. The three-judge
18 district court gave you exactly the relief you asked for with
19 respect to the 1968 election.

20 A No; we asked for a declaratory judgment. They
21 refused to reach the merits because of want of an actual
22 controversy.

23 Q You wanted to get the names of your people on
24 the ballot. They were put on the ballot, unless I am mistaken
25 about what happened.

1 A No; but we disagree as to the effect of that
2 type of relief. We feel that this Court does have, in an
3 election situation, 1253 jurisdiction to review ---

4 Q I wan't really talking about that.

5 A Letme make one or two more points. A question
6 was raised as to whether it would be required by us to have a
7 class action alleging future elections. We feel that this
8 would be an unfair requirement to ask the Party to pick
9 candidates in the future to run for elections to show that there
10 is an actual controversy or that they intend to run for elec-
11 tions.

12 The Communist Party itself, the political party,
13 is an appellant in this case. The Party has maintained that
14 it will run for future elections. We don't feel that it need
15 be required to pick particular candidates for elections.

16 Q Well, you mean that they don't have to be iden-
17 tified in advance except by class.

18 A That is correct.

19 One last point: We feel that the question of
20 granting of declaratory relief after the need for an injunction
21 has passed is founded in a number of decisions. In United
22 States vs. 149 Gift Packages, the Court considered a case of
23 libel against gift packages by the Government alleging them
24 to be misbranded. The swer did not deny misbranding but
25 filed a counter claim which attacked a statute as unconstitutional

1 In that case, as well as a number of others cited in the
2 appellants' brief, declaratory relief was granted after the
3 necessity for injunctive relief had passed and the three-judge
4 court jurisdiction was sustained.

5 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Castner.
6 Thank you, Mr. Kyle. The case is submitted.

7 (Whereupon at 1:30 p.m. the argument in the above-
8 entitled matter was concluded.)

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