Subject: **Memo re: Analysis of the appeal pleadings in *McDaniel v. Cochran***
Date: **September 27, 2014; September 30, 2014 (revised)**
Author: **John Pittman Hey**[1,2,3]

Background

1. In the Republican primary run-off for Senate, incumbent Thad Cochran gained a certified majority of just under 8000 votes. McDaniel filed a primary election contest with the Republican State Executive Committee 41 days later. When the SEC refused to act, McDaniel took his case to the Jones County Circuit Court. Cochran filed a motion to dismiss, claiming that McDaniel's contest should have been filed 20 days or less after the election, and was therefore filed too late. Special Judge Hollis McGehee dismissed the appeal on that basis. McDaniel took his appeal to the Mississippi State Supreme Court.[4]

2. This analysis considers the arguments put forth by three parties: Chris McDaniel[5], Thad Cochran[6], and the Conservative Action Fund[7], an amicus curiae which has filed a brief in support of Chris McDaniel.

3. The purpose of this memorandum is to point out weaknesses and strengths in the three briefs. In the end, a strong argument against the applicability of the 20 day deadline is set forth.

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[2] The author did not vote for or support any candidate in either party's primary for nominee for Senate, and has not worked for any of the candidates, parties, or organizations assisting such.

[3] The author is not an attorney. The author's analysis is based upon more than 20 years of experience in the investigation of elections and conducting election contests as an expert consultant. For the author's election resume, see the Appendix.

[4] *Chris McDaniel v. Thad Cochran*, Mississippi Supreme Court, 2014-EC-01247-SCT.

[5] For Chris McDaniel's appeal brief, which will be referred to hereinafter as "McDaniel," see http://thetaxpayerschannel.org/pdfs/mcdanielvcochran/scappeal/mcdanielappealbrief.pdf

[6] For Thad Cochran's appeal brief, which will be referred to hereinafter as "Cochran," see http://thetaxpayerschannel.org/pdfs/mcdanielvcochran/scappeal/cochranreplybrief.pdf

[7] For the CAF amicus brief, which will be referred to hereinafter as "CAF," see http://thetaxpayerschannel.org/pdfs/mcdanielvcochran/scappeal/cafamicus.pdf

The Controversy Stated – the applicability of the 20 day deadline

4. The Mississippi Election Code[8], found in Article 23 Chapter 15 of the Mississippi Code of 1972 as amended, imposes a host of deadlines on many aspects of the conduct of elections.

5. Because primaries are run by the respective parties' executive committees, the original contest of any such primary is filed with the proper executive committee. At the county level, the county executive committee (hereinafter "CEC") runs the primary and certifies the results. Thus, for primaries involving a single county or a part of a single county, the contest is filed with the CEC that ran the primary. The code section that governs the filing of a county primary contest is MCA § 23-15-921[9] (hereinafter referred to as "921").

6. However, for a primary involving multiple counties or parts of multiple counties, or indeed a state-wide primary, the State Executive Committee (hereinafter "SEC") must collect and certify the results. Each CEC reports the primary election results from its respective county to the SEC, and the SEC then certifies the overall results. Thus, for primaries involving more than a single county, the contest is filed with the SEC. The code section that governs the filing of a multi-county primary contest is MCA § 23-15-923[10] (hereinafter referred to as "923").

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[8] For the 2014 compilation of the Mississippi Election Code, see http://thetaxpayerschannel.org/pdfs/mcdanielvcochran/MSCODE-2014.pdf. See also the Mississippi Secretary of State's publication of the same: http://www.sos.ms.gov/Elections-Voting/Documents/MSCODE.pdf

[9] MCA § 23-15-921 reads as follows:

Nominations to county or county district offices, etc.; petition, notice of contest, investigation, and determination.

Except as otherwise provided by Section 23-15-961, a person desiring to contest the election of another person returned as the nominee of the party to any county or county district office, or as the nominee of a legislative district composed of one (1) county or less, may, within twenty (20) days after the primary election, file a petition with the secretary, or any member of the county executive committee in the county in which the election was held, setting forth the grounds upon which the primary election is contested; and it shall be the duty of the executive committee to assemble by call of the chairman or three (3) members of said committee, notice of which contest shall be served five (5) days before said meeting, and after notifying all parties concerned proceed to investigate the grounds upon which the election is contested and, by majority vote of members present, declare the true results of such primary.

[10] MCA § 23-15-923 reads as follows:

Nominations with respect to state, congressional, and judicial districts, etc.; investigation, findings, and declaration of nominee.

Except as otherwise provided in Section 23-15-961, a person desiring to contest the election of another returned as the nominee in state, congressional and judicial districts, and in legislative districts composed of more than one (1) county or parts of more than one (1) county, upon complaint filed with the Chairman of the State Executive Committee, by petition, reciting the grounds upon which the election is contested. If necessary and with the advice of four (4)

7. A careful reading of 921 and 923 shows several differences. 923 contains differences that are necessary to accommodate the fact that a different executive committee is charged with certifying a multi-county or state-wide primary and with receiving and trying such a primary's election contests. Furthermore, 923 includes provisions acknowledging that the SEC may be required to interact with the various CECs whose election results are a part of the overall contested election results.

8. Each statute, 921 and 923, stands alone as parallel, similar, and yet distinct procedures for commencing a primary election contest of either a single county primary, or a multi-county primary.

9. The most crucial difference in the two procedures is that 921 imposes a 20 day deadline from the date of the primary in which a contest must be filed. 923 imposes no such deadline.[11]

10. These two statutes are derived from the Mississippi Code of 1942, §§ 3143[12] and 3144[13] (hereinafter referred to as "3143" and "3144" respectively), which were a

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members of said committee, the chairman shall issue his fiat to the chairman of the appropriate county executive committee, and in like manner as in the county office, the county committee shall investigate the complaint and return their findings to the chairman of the state committee. The State Executive Committee by majority vote of members present shall declare the true results of such primary.

[11] The author reviewed these two statutes in early July to discover what the deadline is for filing a state-wide election contest. Seeing that there is none expressed in 923 (but noting that there is a 20 day deadline in 921 for county-wide primaries), the author publicly opined on July 16, 2014 that he expected the Cochran camp to insist that a 20 day deadline nevertheless must be followed. See, for example, https://twitter.com/JohnPittmanHey/status/489535481403949057. The author's prediction proved to be correct.

[12] Mississippi Code of 1942 § 3143 reads as follows:

A person desiring to contest the election of another person returned as the nominee of the party to any county or beat office, may, within twenty days after the primary election, file a petition with the secretary, or any member of the county executive committee in the county in which fraud is alleged to have been perpetrated, setting forth the grounds upon which the primary election is contested; and it shall be the duty of the executive committee to assemble by call of the chairman or three members of said committee, notice of which contest shall be served five days before said meeting, and after notifying all parties concerned, proceed to investigate the allegations of fraud, and, by majority vote of members present, declare the true results of such primary.

[13] Mississippi Code of 1942 § 3144 reads as follows:

In state, congressional and judicial districts, upon complaint filed with the chairman of the state executive committee by petition, reciting the allegations of fraud, and with the advice of four members of said committee, the chairman shall issue his fiat to the chairman of the county executive committee, where fraud is alleged to have been committed, and in like manner as in county office, the county committee shall investigate the complaint and return their findings to the chairman of the state committee, which shall declare the candidate nominated, whom the corrected returns show is entitled to the same. And the same procedure shall apply to senatorial and flotorial contests in and by their respective executive committees.

portion of the old Corrupt Practices Act. There are a number of differences between 3143 and 921 on the one hand, and 3144 and 923 on the other.

11. Even though neither 923 (nor the old precursor 3144), which applies to the present controversy, mentions any deadline for filing a contest, Cochran's attorneys produced an old 1959 Mississippi Supreme Court case, *Kellum v. Johnson*[14] (hereinafter referred to as "*Kellum*"), which held that the 20 day deadline found in 3143 applied to primary contests filed under 3144, which expressed no deadline. The Court reasoned that the two statutes must be read *in pari materia*, "read together," and that the Legislature would have been foolish not to provide a deadline for multi-county primary contests.

12. Cochran's attorneys argue that *Kellum* applies to 921 and 923, the successor statutes derived from 3143 and 3144, and remains good law[15], and that therefore, the McDaniel contest must be dismissed because it was filed after the deadline. Judge McGehee agreed, and dismissed the McDaniel contest.

13. This is all very surprising, since Secretary of State Delbert Hosemann, Mississippi's chief election officer, has publicly stated that no deadline applies to a statewide primary election contest. The *Kellum* case, which appeared in the annotations for 3143, was dropped from the annotations for 923 by the editors of West Publishing Company and Matthew Bender/LexisNexis (the official publishers of the Mississippi Code)[16].

14. It seems that *Kellum* was lost in the mists of time, only to be resurrected in this very contentious statewide controversy. Whether or not *Kellum* still applies, and whether or not the 20 day deadline found in 921 should be imposed upon proceedings under 923, is the gist of the controversy before the Supreme Court now.

The Amicus Brief's Arguments

15. CAF[17] raises three arguments in urging the Court to reinstate McDaniel's contest. The analysis will take the three in reverse order, the first being the most important and helpful.

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[14] *Kellum v. Johnson*, 115 So. 2d 147 (1959). See http://www.thetaxpayerschannel.org/pdfs/mcdanielvcochran/kellumvjohnson.pdf

[15] Interestingly, this issue does not appear to have surfaced before the Supreme Court since the mid 1970s, before 921 and 923 had been enacted.

[16] The author has been informed that LexisNexis as re-added the annotation for *Kellum* to 923 in its on-line publication of the Mississippi Code since the matter was raised this summer in the present case.

[17] CAF, the Conservative Action Fund, is a political action committee chaired by Shaun McCutcheon. In April 2014, McCutcheon won a landmark case at the United States Supreme Court (*McCutcheon v. FEC*, 572 US ____ (2014)) overturning individual aggregate campaign contribution limits as a violation of the First Amendment.

16. CAF asks (pages 12-14) the Court to delay the general election for US Senate in order to hold a proper run-off. However, there does not seem to be any authority for the Court to order the halting of a regular general election. Indeed, MCA § 23-15-937 already provides for the circumstance in which a primary election is overturned after the general election ballots have been printed[18]. In that case, the office is declared vacant and a special election is held. It is often the case that a primary election contest is decided only after the subsequent general election has taken place, and in that event, the legal process described above is well established in law and in practice as the proper remedy. CAF's argument for a delay in the election should be rejected by the Court.

17. CAF asks (pages 10-12) that, should the Court hold that the contest should not have been dismissed, it should itself adjudicate the actual contest in order to save time, rather than remanding the case for trial by the Circuit Court. CAF cites various cases in support of the Court's authority to proceed in this manner. This argument is improvident, given the fact-intensive nature of election contests. By their nature, they depend upon detailed analysis of documents and witnesses, which an appeals court is not equipped to handle. The present case is particularly fact-intensive, involving matters spanning all 82 counties. In view of this, Judge McGehee had scheduled 15 days for the trial of the case. The Supreme Court has neither the means nor the desire to expend half a month trying a case of this magnitude, involving the putting on of a mountain of evidence by the parties. The Court should and will reject this argument by CAF.

18. CAF's most important argument (pages 3-10) is that the federal Constitution's "Election Clause"[19] requires the Court to adopt a strict "plain language" reading of 923, thereby prohibiting the Court from "reading in" a deadline that the Legislature never placed there.

19. CAF cites many cases for the proposition that the state courts must apply a strict "plain text" standard to interpreting election laws that govern federal elections such as those for Senators, Congressmen, and Presidents, because the federal Constitution

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[18] MCA § 23-15-937 reads in part:

> … When no final decision has been made by the time the official ballots are required to be printed, the name of the nominee declared by the party executive committee shall be printed on the official ballots as the party nominee, but the contest or complaint shall not thereby be dismissed but the cause shall nevertheless proceed to final judgment and if the judgment is in favor of the contestant, the election of the contestee shall thereby be vacated and the Governor, or the Lieutenant Governor, in case the Governor is a party to the contest, shall call a special election for the office or offices involved. If the contestee has already entered upon the term he shall vacate the office upon the qualification of the person elected at the special election, and may be removed by quo warranto if he fail so to do.

[19] U.S. Constitution, Article I, § 4, cl. 1 reads: "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof."

grants the authority exclusively to the State Legislatures to order such elections. A state court may not modify or add to such legislative acts based upon more liberal methods of construction and interpretation that courts may regularly utilize.

20. In the present case, CAF argues, since 923 contains no explicit deadline for filing a contest, the Courts may not transport the deadline from 921 into 923, but rather must strictly follow the "plain text" of 923, which imposes no deadline for filing a primary contest in a state-wide primary for the federal office of United States Senator.

21. Cochran dismisses CAF's argument, mainly by asserting that "[t]here is nothing in the Elections Clause or anywhere else in the federal constitution that prohibits this Court from giving the acts of the Legislature a rational interpretation that avoids capriciousness and absurdity." Does this mean that a court may substitute its own "rational interpretation" for the "plain text" interpretation when the two conflict? Cochran doesn't spend much time developing the argument.

22. One possible issue that might be raised is, does the "Elections Clause" applicability extend to all the precursors to the actual federal election itself? After all, the present case involves a party primary, which is a precursor to a federal election, but not the thing itself. Neither CAF nor Cochran addresses this question of the applicability of the Election Clause to party primaries which select the candidates who will later run in the federal election for Senate.

Does the *Kellum* precedent survive repeal and replacement of 3144 by 923?

23. McDaniel makes a great deal of the fact that 3143 and 3144 have been repealed since *Kellum* was decided, and that changes were made in the statutes when they were recodified in the election code rewriting that took place in 1986. McDaniel therefore argues that, since the statutes have been repealed and replaced with certain changes being made, *Kellum* no longer has any precedential value.

24. Cochran replies that three of the four repeals of 3143 and 3144 were each found to be void by federal and state courts based upon failure of the Department of Justice to preclear the changes under the Voting Rights Act of 1965. The final repeal took place in 1986, when the new election code was adopted and all prior laws on the matter repealed.

25. Cochran points out that 921 and 923 were materially the same as their precursors 3143 and 3144. The changes McDaniel cites that were made in 1986 were immaterial to the issue of the incorporation of a deadline from 921 into 923 based upon *Kellum*.

26. In 1959, had 3143 and 3144 read as they did upon the enactment of 921 and 923 in 1986, no doubt the *Kellum* court would have ruled the same way, because the changes made during the re-writing of 921 and 923 did not have any impact upon the matter of the 20 day deadline. McDaniel's argument here is weak.

Was *Kellum* wrongly decided to begin with?

27. McDaniel argues that *Kellum* was improperly decided, and that the court should have never imported the 20 day deadline from 3143 into 3144, the statute governing multi-county primary election contests.

28. The *Kellum* court had no choice but to read 3144 *in pari materia* with 3143, because 3144 was structured to depend upon, and tailor, the process set forth in 3143, adapting it to the case of a multi-county primary contest.

29. 3143 sets forth the method of contesting a single county primary. It specifies the following:

    a) the purpose of the procedure ("to contest a primary election");

    b) who may file a complaint ("A person desiring to contest the election of another person returned as the nominee of the party");

    c) the offices the method applies to ("any county or beat office");

    d) the deadline for filing a complaint ("within twenty days after the primary election");

    e) the method of contesting the primary ("file a petition");

    f) with whom the contest must be filed ("the secretary, or any member of the county executive committee in the county");

    g) the contest's grounds ("fraud is alleged to have been perpetrated" and "setting forth the grounds upon which the primary election is contested");

    h) which tribunal shall hear the contest ("the county executive committee");

    i) how the tribunal shall proceed in hearing and ruling upon the contest ("it shall be the duty of the executive committee to assemble by call…", etc.).

30. In contrast, 3144 set forth only the differences from 3143 for contesting a multi-county primary. 3144 provides only the modifications necessary to adapt 3143 to a multi-county primary contest scenario.

31. Thus, 3144 does not specify the purpose of the procedure; it relies upon the purpose already stated in 3143.

32. 3144 does not specify who may file a contest; it relies upon 3143 to provide that information.

33. 3144 does not state the deadline for filing the complaint.

34. However, 3144 does specify the offices the method applies to ("state, congressional and judicial districts"), because they are different from the offices specified in 3143. 3144 also specifies with whom the contest must be filed ("the chairman of the state executive committee"), because it is different from that specified in 3143. 3144 also specifies which tribunal shall hear the contest ("the state executive committee"), because it is different from that specified in 3143. 3144 also specifies the process the tribunal shall follow in adjudicating the contest, because it is more elaborate than that specified in 3143.

35. Thus, the Legislature drafted 3144 to depend upon, modify, and adapt 3143 to the special purposes of contesting a multi-county primary election. Since 3144 does not provide a complete process for contesting a multi-county primary, but rather adapts the process laid out completely in 3143, it was entirely reasonable for the *Kellum* court to "read in" the 20 day deadline from 3143, along with all the other parts missing from 3144, into 3144.

36. *Kellum* was decided correctly as the law stood in 1959.

37. McDaniel's argument is unfortunate, as it obscures the crucial changes that were made in 1988 that render *Kellum* obsolete. These changes will be discussed below in the penultimate section of this memorandum.

Does *Barbour v. Gunn* overrule *Kellum*?

38. McDaniel argues that, because the Supreme Court didn't follow *Kellum* in the *Barbour v. Gunn* case[20] in 2003, it has effectively overruled *Kellum sub silentio*.

39. Gunn filed his multi-county primary contest under 923 thirty-five days after the election, and was allowed to proceed in circuit court and in the Supreme Court without any mention of his failing to meet the 20 day deadline found only in 921. In the end, the primary was overturned and Gunn was elected to the state House of Representatives.

40. Cochran replies that *Kellum* was never raised in the *Barbour* case, implying that all the parties must have overlooked the issue of the deadline.

41. McDaniel makes a good point that, had *Kellum* obviously applied to contests filed under 923, surely the matter would have been raised and dealt with.

42. However, for the reasons described already, *Kellum* had receded into the mists of time, and most election attorneys had no knowledge of it. It is impossible to tell, based upon the lack of mention of the matter, whether the *Barbour* Court simply

[20] Barbour v. Gunn, 890 So.2d 843 (2004). See http://www.thetaxpayerschannel.org/pdfs/mcdanielvcochran/appeal/barbourvgunnopinion.pdf

missed the matter entirely, or as McDaniel argues, read 923 and saw that it plainly specifies no deadline for multi-county primary elections.

43. Cochran quite properly cites a number of cases that hold that the failure of a court to address an issue does not mean that it has overturned prior rulings on the matter.

44. McDaniel's argument that, if the Court follows *Kellum* now, it will overturn the decision in *Barbour v. Gunn*, thereby depriving Gunn of his elective office, is misplaced. As Cochran notes, Gunn has already been re-elected two times, so even were *Barbour v. Gunn* set aside now, it would have no impact upon his current elective office.

45. McDaniel's argument based on *Barbour v. Gunn* at best proves embarrassing to the Court, and may prompt it to examine the statutes more carefully to see whether the *Barbour* Court might have had unstated reasons to ignore *Kellum* without mentioning it. But Cochran is correct that the *Barbour* case has no binding precedential value regarding the 20 day deadline issue.

Does the 20 day deadline create a conflict in the current election code?

46. McDaniel argues that, should the court impose the 20 day deadline on 923, a conflict will develop, because the candidate's right to examine ballot boxes under MCA § 23-15-911 will not be concluded before the deadline lapses for filing the contest.

47. The ballot box inspection may only begin upon certification of the election, and must be concluded within 12 days. The 20 day deadline, however, would start running on the day of the election. With two different deadlines running simultaneously and overlapping each other, and because they are not both triggered by the same act, it is possible for the filing deadline to expire before the inspection time has ended.

48. McDaniel and Cochran spar over whether the ballot box inspection time period starts when the CEC finishes its job and forwards the results to the SEC, or whether it starts only when the SEC certifies the election. The law is none too clear on the matter.[21, 22]

49. Both McDaniel and Cochran misstate the law about when the CEC must finish its task of canvassing the ballot boxes. MCA § 23-15-597 requires that the CEC "shall meet on the first or second day after each primary election, shall receive and canvass the returns which must be made within the time fixed by law for returns of general elections and declare the result…"

[21] The author had publicly pointed this out, warning the candidates that the ballot box examination might commence on a different date county by county, depending upon whether the CEC certification, or the SEC certification, triggered the ballot box review. See for example https://twitter.com/JohnPittmanHey/status/485485479010127872

[22] Most disturbing in this particular primary is the fact that the Republican SEC refused to publish the results certified from the CECs until the 13th day after the primary. The author twice publicly requested of Mr. Joe Nosef, Republican State Party Chairman, that the results be posted when they were received by the SEC, but he specifically declined to do so.

50. As can be seen, the law does not specify how long the canvassing process may take, but refers to the deadlines imposed on reporting general election results. MCA § 23-15-601 and 23-15-603, which govern the certification of general elections by the county election commissions, requires that they certify the results within ten days after the election.

51. Those persons who have actually examined ballot boxes and contemplated the dueling deadlines have long known of this conflict in the law. If the CEC or the election commission takes it time in finalizing the results of the election by dragging the canvass out to ten days, then the ballot box examination may only commence on the 11th day after the election, be it a primary or a general election. With a 20 day deadline to file a contest, it is obvious that the twelve day period for examining the ballot boxes will extend past the deadline for filing a contest.

52. These facts undercut both McDaniel's argument, that the 20 day deadline will hamper full examination of the ballot boxes, and Cochran's reply that such a conflict never occurs.[23] The contest provisions under 921, with its 20 day deadline, have already introduced this collision between ballot box examinations and contest filing deadlines.

53. Cochran's claim that the contestant can always supplement his complaint by continuing his ballot box examination after filing his complaint on the 20th day provides little comfort. It is by no means obvious from MCA § 23-15-911 whether a candidate may continue his examination once a contest has been filed, since the law requires of the Circuit Clerk, that "if any contest or complaint before the court shall arise over said box, it shall be kept intact and sealed until the court hearing...." There are some cases in which further examination of the boxes was allowed, but as in *Barbour v. Gunn*, the issue of the requirement that the boxes be kept sealed once a contest is filed was not discussed.

The *Kellum* precedent is no longer applicable after the 1988 revisions of 923

54. Cochran never addresses the best argument as to why the *Kellum* deadline should no longer apply to contests filed under 923. McDaniel (p. 28) mentions the structural changes that took place in 923, but never details what they are or when they took place.

55. While it is true that, in 1986, the Legislature re-enacted 921 and 923 substantially the same as 3143 and 3144 had read previously, that is not where the matter ends.

[23] It is strange that Cochran actually argues that this deadline conflict never occurs, since it occurred in this very case. McDaniel was prohibited from timely examining the ballot boxes in Hinds County because the CEC did not finish its canvass and certification until the 13th day after the primary! Thus McDaniel would have had 7 days to examine the largest county's ballot boxes before the 20 day deadline would have lapsed.

56. In 1988, the Legislature once again amended 923[24], making important structural changes so that it no longer depended upon 921. This is the amendment that severs 923 from the *Kellum* precedent.

57. As detailed above, 3144 depended integrally upon the terms of 3143, because it stood as an adaptation of the process laid down in 3143, specifying only the changes needed to apply the primary contest provisions of 3143 to multi-county primaries. 3144 lacked at least two crucial clauses found in 3143, making 3144 depend upon the provisions of 3143.

58. The same can be said of 923 as it related to 921 when it was first enacted in 1986.

59. In 1988, the Legislature amended 923 to carefully transport all the missing elements from 921, so that after the amendment, 923 now stood whole and entire as the lawful method of contesting multi-county primaries.

60. Never before had the Mississippi Election Code had a single statute that set forth all the requirements necessary to commence a multi-county primary contest. After 1988, 923 stood whole and entire to prescribe completely that process.

61. Specifically, the Legislature transported the following elements from 921 which before were missing from 923:

    a) the purpose of the statute was inserted from 921 ("to contest the election of another returned as a nominee");

    b) the party who may file such a contest was inserted from 921 ("a person desiring to contest the election of another").

62. Thus, the Legislature transformed 923 from the condition of being dependent upon 921, to now standing whole and entire to form the method of contesting a multi-county primary.

63. The Legislature did not copy the 20 day deadline from 921 into 923 when it restructured 923 to "stand alone and entire" as a method of contesting a multi-county primary.

64. Whether this was a wise decision by the Legislature is beside the point. McDaniel makes a reasonable argument that the Legislature knew of the increased complexity and time necessary to mount a multi-county primary contest, and wisely left the deadline out of the newly revised, free-standing 923.

65. Whereas before 1988, 923 read as only a fragmentary part of the process for commencing a multi-county primary contest, after 1988 it reads as a free-standing description of the process.

[24] See Laws of 1988, Chapter 577, § 4.

66. This is the reason that persons unprejudiced by the holdings of *Kellum* can read 921 and 923 and conclude that the 20 day deadline does not apply to a 923-type primary contest. The way the two statutes are now worded, after the 1988 amendment, each of them fully describes the method of commencing their respective primary contests (county primary in the case of 921, and multi-county primary in the case of 923). That was not the case when the *Kellum* decision was rendered.

67. Because 923 no longer depends upon 921 to give it its full application, the *Kellum* precedent ought no longer to apply. The structural changes wrought by the Legislature in 1988 rendered the basis of the *Kellum* rule void.

Discussion

68. The best argument for distinguishing *Kellum* and reinstating the McDaniel election contest has been obscured by all the back and forth about whether 3144 was ever repealed; whether the 20 day deadline works damage to the statutory scheme; and what effect, if any, the Court's holding in *Barbour v. Gunn* has on *Kellum's* viability.

69. The structural changes made by the Legislature in 1988 recast 923 to stand alone and entire as a parallel and similar method of contesting a different type of primary than that contemplated by 921. As such, it would be presumptuous to import a deadline from 921 into 923, especially given the more complex nature of investigating and contesting the large-scale primaries that 923 was designed to accommodate.

70. The unanswered question is, whether dispassionate analysis will prevail, or whether the Supreme Court will allow practical[25] and political concerns to dominate its thinking.

[25] The state-wide primary contest will be very costly and time consuming. Practically, it would be easier for the Court to make it "go away."

Appendix – Election Resume

The author's experience in election matters is as follows:

- Poll worker
- Appointed poll watcher on numerous occasions
- Member, Leflore County Republican Executive Committee, 1991-1995
- Directed the all-party investigation of voter fraud in Leflore County, MS, 1991, which resulted in the arrest, indictment, and conviction of Leflore County Circuit Clerk Jan Montgomery for absentee ballot fraud.
- Conducted party primaries in Leflore County in 1994, 1995
- Principle election contest investigator for various plaintiff and defendant parties:
    - Turner v. Moore (Leflore County, 1991)
    - Fratesi v. Palmer (Greenwood, 1993)
    - Graves v. Stewart (Tunica County, 1995)
    - Ray v. Simmons (Bolivar County, 1999)
    - Farmer v. Artman (Greenville, 1999)
    - Winters v. Lewis (Arcola, 2001)
    - Thomas v. Brooks (Leland, 2001)
    - Stevens v. Roberts (Humphreys County, 2003)
    - Ellis v. Jordan (Greenwood, 2005)
    - Perkins v. Smith (Greenwood, 2005)
    - Kilpatrick v. Burchfield (Drew 2013)

    In six of the cases in which the author represented the contestant, the elections were overturned.

    In several cases, in addition to directing the investigation and preparation of the contest, the author also provided testimony in court or by affidavit for purposes of summary judgment.
- Conduct of numerous ballot box inspections on behalf of both election winners and potential contestants that did not proceed to challenge/trial
- Design and implementation (1992 – 1998) of Leflore County's election/voter roll computer system, one of the first full-featured voter registration/election software packages used in Mississippi; it included management of registrations, automatic precinct assignment based upon computerized street locators, changes of address, jury wheel and venires, absentee ballots, and preparation of poll books.