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Supreme Court of the United States

OCTOBER TERM, 1968

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FILED

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JOHN F. DAVIS, CLERK

In the Matter of:

JAMES C. KIRKPATRICK, Secretary of
State of Missouri, and NORMAN H.
ANDERSON, Attorney General of Missouri

Appellants,

and

F. V. HEINKEL, R. J. ROSIER, W. W.
BECKETT, A. D. SAPPINGTON, L. O.
WALLIS, MILLER HERN, HERMAN HETLAGE,
HERMAN KERTZ, TURPIN YOUTSEY and
GLEN MYERS,

Intervenor-Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC
J. FRANKLIN, LUCILE RIEDEL, DOROTHY
CHILDS, SARAH RIFKIN, and MARTHA LEONARD,

Appellees.

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Date January 13, 1969

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TABLE OF CONTENTS

ORAL ARGUMENT OF:

P A G E

Thomas J. Downey, Esq., on behalf
of Appellants

3

David Collins, Esq., on behalf
of Intervenor-Appellants

28

Irving Achtenberg, Esq., on behalf
of Appellees

41

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

JAMES C. KIRKPATRICK, Secretary of
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Intervenor-Appellants;

Case Nos. 30 and 31

vs.

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CHILDS, SARAH RIFKIN, and MARTHA LEONARD,

Appellees.

Washington, D. C.
January 13, 1969

The above-entitled matters came on for argument at
10:30 a.m.

BEFORE:

EARL WARREN, 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
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

1 APPEARANCES:

2 THOMAS J. DOWNEY, ESQ., First Assistant Attorney
3 General, State of Missouri, on behalf of appellants.

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5 Macon, Missouri 63552, on behalf of intervenor-
6 appellants.

7 IRVING ACHTENBERG, ESQ., 531 Walnut Street, Kansas
8 City, Missouri 64106, on behalf of appellees.

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C. Kirkpatrick, Secretary of State of Missouri, et al., versus Paul W. Preisler, et al.; and F. V. Heinkel, et al., versus Paul W. Preisler, et al.,

ORAL ARGUMENT OF THOMAS J. DOWNEY, ESQ.

MR. DOWNEY: Mr. Chief Justice, may it please the court:

Two members of the Court concurred in the majority opinion; one member of the Court dissented.

The Missouri Legislature, called the General Assembly, meets, according to the Missouri Constitution, for a period of six months every two years. It convenes in January and its term expires the last day of June.

3

1 redistricting in 1967 early in the legislative session, and
2 during the six-month period more than 16 different proposed
3 bills were considered by the Legislature, and in the final week
4 of the legislative session, the 1967 Act was passed.

5 It takes a constitutional majority in each House of
6 the Missouri Legislature for any law to be passed. There are
7 163 members of the Lower House and it takes 82 votes to pass
8 a bill. There are 34 members in the Senate and it takes 18
9 votes to pass a bill.

10 The political complexion of the General Assembly in
11 1967 was 107 Democrats in the Lower House and 56 Republicans.
12 In the Upper House was 23 Democrats and 11 Republicans.

13 The act which we have under consideration before the
14 Court here today, when it was before the Lower House, received
15 a negative vote of all 56 Republicans. The Act on original
16 consideration in the Senate received a negative vote of all 11
17 Republicans. On final enactment in the Senate, it received the
18 votes of 10 Republicans, one being a negative vote.

19 Now, I point this out to the Court because although
20 the Republican Party did not consider this Act to be favorable
21 to the Republican Party as far as a Congressional redistricting
22 plan was concerned, the leaders of the Republican Party, the
23 House leader and the Senate leader, both testified before the
24 lower court that they considered this Act to be a reasonable
25 legislative compromise, and that had they been in control of

1 the Legislature, that in all likelihood the political complexion
2 of the districts would have been different but the numerical
3 disparities in the districts would probably have been approxi-
4 mately the same.

5 That is the only significance in bringing out this
6 particular factor.

7 Now, what was the Act that was enacted? Missouri,
8 according to the 1960 census, has a population, or had a popu-
9 lation, of approximately 4,320,000 people. Missouri was en-
10 titled to 10 Congressmen. Therefore, each Congressional Dis-
11 trict, if you had an ideal mathematical district in the State,
12 would have a population of approximately 431,000 people.

13 In the Act that was passed, there was a population
14 disparity between the largest of the 10 Districts and the
15 smallest of the 10 Districts of slightly in excess of 25,000
16 population based upon the 1960 census.

17 Now, what does this mean in terms of relative strength
18 in population or relative effect on voting rights?

19 The largest district in percentage terms was approxi-
20 mately 3 percent larger than what an ideal district should be.
21 The smallest district was slightly less than 3 percent below
22 what an ideal district should be.

23 The ratio of the largest district to the smallest dis-
24 trict was 1.06. Now, that is the factual situation with which
25 we are dealing here this morning.

1 It is appellants' contention that this Congressional
2 redistricting plan and the population variations reflected by
3 this Congressional redistricting plan are pro se constitutional
4 and meet the requirements of Article I, section 2 that the
5 House of Representatives shall be chosen by the people.

6 This Court has recognized --

7 Q It is your position that under no circumstances
8 could this deviation be legal, or is it because of the reasons
9 that are assigned for it, the manner in which it is done con-
10 stitute the illegality?

11 A It is our contention, Mr. Justice, that this Act
12 is legal and that the population variations in the Act are so
13 minor that they are per se constitutional; that the variations
14 are per se permissible under Article I, Section 2 of the Con-
15 stitution and that the lower courts --

16 Q Regardless of the reasons for the deviations?

17 A Yes, Your Honor. If you got into larger devia-
18 tions, then I think motivation might be a factor.

19 Q Where do you stop?

20 A And that, of course, is the big question. Where
21 is the point where this much population variation is okay and
22 this much is all wrong?

23 As stated by one court a number of years ago, it is
24 easy to tell the difference between noon and midnight, but it is
25 very difficult to tell the difference between dusk and darkness.

1 I think we have a situation here which, on the face of it, is
2 in that realm between dusk and darkness.

3 Q What is the largest difference?

4 A The largest difference, Your Honor, is slightly
5 more than 25,000.

6 Q Out of how many people?

7 A Out of approximately 4,320,000 population in the
8 State of Missouri.

9 Q I'm not talking about the whole State. I am
10 talking about in the district.

11 A And the largest district is 445,000 population.

12 Q Is that the one in which there is the 25,000
13 difference?

14 A And that is 25,000 larger than the smallest
15 district, which is 419,000 population.

16 Now, there is a factor in that larger district which
17 I want to bring to the attention of the Court.

18 There is transitory, non-residents, non-voting popu-
19 lation in that larger district. That larger district contains
20 a large military reservation, Ft. Leonard Wood, which at the
21 time of the 1960 census had approximately 35,000 soldiers. The
22 district contains the University of Missouri, which at the time
23 of the 1960 census had about 15,000 students. It contains other
24 smaller elements of non-resident, transitory population.

25 Q Mr. Downey, I gather the larger of the two is

1 District 8, is it? Is that District 8?

2 A Yes, Your Honor.

3 Q And the smallest is District 4, with 419,000?

4 A Yes, Your Honor.

5 Q And they are contiguous districts?

6 A They are contiguous districts.

7 Q Well, what explains that difference between con-
8 tiguous districts?

9 A We have several factors. One is this factor
10 which I spoke of, of the large number of transitory populations
11 in that Eighth District.

12 Q They are not included in that 419,000, are they?
13 Or, rather, the 445,000?

14 A They are included in the 445,000.

15 Q That is, the military population plus the college
16 population?

17 A The military population and the college population
18 are included in the census count. They are included in that
19 overall figure. That is the principal factor.

20 Q And if they were to be deducted from the 445,000,
21 what would the figure then be for District 8?

22 A If full weight was given to that population, if
23 they were to be deducted in their entirety, there would be in
24 excess of 50,000 population taken out of the Eighth District.

25 Q That would be assuming that all of those people

1 were non-residents, non-voting.

2 A That would be assuming that all were non-residents.
3 Yes, Your Honor, which would, of course, be an erroneous assump-
4 tion.

5 Q But if you took half of them, it would cut it
6 down by about 25,000.

7 A That's right, Your Honor.

8 Q That would make it exactly equal to the other
9 district.

10 A That would equalize it pretty well. Now, we
11 think we have illustrated this pretty well by the election re-
12 sults in the recent election. We have put this in our reply
13 brief.

14 In the recent election, this Fourth District, which
15 is the smallest district, we took the vote in the Congressional
16 races. There was a contest in the Fourth District which was not
17 much of a contest, a slight contest. Yet, that district ranks
18 No. 6 in total votes cast in the 1968 election. Yet, in the
19 Eighth District, which had a real hot Congressional contest, in
20 vote it ranked fourth in total vote.

21 Now, I know that these aren't absolute indications of
22 population, but there is an indication there of this transitory,
23 non-voting population, and we have also included election statis-
24 tics for that district dating back to 1960 on up through 1968
25 and we compared the ratio of votes to population in Pulaski

1 County, which includes Ft. Leonard Wood, with every county
2 which surrounds Ft. Leonard Wood, and it is dramatically illus-
3 trated that at no time do you have a ratio higher than 10 per-
4 cent to total population in the vote of Pulaski County, and in
5 the surrounding counties it ranges from 40 to 50 percent.

6 So the fact -- the fact -- of this transitory, non-
7 resident population in Pulaski County is very evident from these
8 consistent election returns over the years.

9 Q I don't understand, Mr. Attorney General, these
10 ratio figures, the 10 percent and the 40 and 50 percent. What
11 are you talking about?

12 A The ratio, Your Honor, is the ratio of the total
13 number of votes in the county, cast in a particular election,
14 as related to the 1960 census population for that county.

15 Q Would you give us some illustrative figures?

16 A In other words, if the population of the county
17 was 100,000, and there were 10,000 votes cast in a particular
18 election, then 10 percent of the population voted in that elec-
19 tion.

20 As I say, in Pulaski County, where Ft. Leonard Wood
21 is located, in every election there has consistently been below
22 10 percent of the population voting, and in the surrounding
23 rural territories the ratio has been between 40 and 50 percent
24 of the total population of the individual counties.

25 Q Those counties all making up one district?

1 A Not necessarily.

2 Q Not necessarily.

3 A We made this comparison simply to illustrate the
4 fact --

5 Q That Pulaski County contains a great many
6 transients and non-voters.

7 A Yes, Your Honor.

8 After all, we are talking about voting rights. We are
9 not talking about the rights of a district. The district has
10 no rights. It is the individual voter who has the rights.

11 The question before the Court is whether or not the
12 individual voter's rights has been diluted or debased.

13 Q Then may I ask you this question: Are you arguing
14 to us that the differential in the population of these districts
15 is so de minimis that it is of no consequence under any circum-
16 stances, or are you saying to us that the changes that have been
17 made are justified because of these things that you are talking
18 about now?

19 A I am saying, Your Honor, that you have to look
20 at the entire picture.

21 Q Well, I know, but you have to take one or the
22 other position, unless you want to take both. I don't know. But
23 I would like to know whether your percentages are de minimis to
24 the extent that it is of no consequence what caused the differ-
25 ence, or are you saying that we justify these differences because

1 of these conditions that you have just outlined to us?

2 A We think, first of all, Your Honor -- we say first
3 of all that these are de minimis variations, that they are of no
4 consequence.

5 Q Under any circumstances.

6 A Under any circumstances.

7 Q I understand. Very well.

8 A That a ratio of 1.06 to 1 is not a significant
9 debasement of a vote; it is not a significant voter dilution
10 in and of itself; there is no unconstitutional deprivation of a
11 voting right.

12 Q Even though 25,000 people have their votes
13 lessened and they could have been given an equal vote by having
14 a more contiguous district than you have yourself lined out?

15 A We contend, Your Honor, that that 25,000 is
16 de minimis and that it is not an unconstitutional debasement
17 of the vote. As I say, the ratio is 1.06 to 1 and we reach a
18 point someplace where, as I say, between dusk and darkness it
19 is constitutionally permissible. So we say, first of all, this
20 is constitutionally permissible.

21 Q Well, isn't that, then, the ultimate question
22 and this other, is it necessary for you to justify it?

23 A I recognize, Your Honor, that you may not agree
24 with that argument.

25 Q Yes, that's right.

1 A You may come to the conclusion that this is an
2 unconstitutional debasement of the vote, and in recognition of
3 that, I say that this 25,000 difference is justified in the con-
4 text of this particular case.

5 Q That's what I wanted to get clear in my mind.
6 You argue it both ways. You say that it's de minimis and if we
7 don't agree with you, then the reason that you have assigned for
8 the differential between these districts are sufficient to
9 justify this Act.

10 A That is my position, Your Honor.

11 Q In what Congressional District is Pulaski County?

12 A Pulaski County is in the Eighth District, Your
13 Honor, the largest district.

14 Q But here you have an underage, don't you, not
15 an overage?

16 A It is the largest district. The Eighth District
17 is 25,000-plus more than the smallest district, which is the
18 Fourth District. The Eighth District has a population of 445,523,
19 and the Fourth is the smallest, with 419,721.

20 Q May I ask this: Assuming that we do not agree
21 with you that the differential is de minimis, what justification
22 is there for having a district of this shape and size, rather
23 than to have a contiguous district that would equalize it? I am
24 looking at that map, now, Number 6, and it looks to me like
25 that is a most unusual kind of district and one that would

1 normally be called a gerrymandered district.

2 A The Eighth District.

3 Q Yes, yes.

4 A Well, we have Pulaski County here with this
5 46,000 population and with actually about 10,000 or 11,000 of
6 that population being resident, voting population.

7 Q Why do you have to go from one border of your
8 State way over to the middle of the State in that circuitous
9 way in order to carve out the district.

10 A Well, my only reply to that question, Your Honor,
11 is that this is the Legislature at work, trying to agree upon
12 districts that will come within reasonable population variations
13 and districts that will meet the requirements of the Constitu-
14 tion.

15 Q For what reason? You say they are dealing with
16 the Legislature. What reason does the Legislature have for
17 making that district in that irregular and noncontiguous shape?

18 A I think, Your Honor, it is contiguous. It may
19 not be as compact as it could be.

20 Q I beg your pardon? Will you talk into the
21 microphone, please?

22 A Yes, Your Honor. I am sorry.

23 I believe that the district is contiguous. It may
24 not be as compact as it could be. But if you will examine the
25 remaining districts, the remaining districts do have a reasonable

1 compactness.

2 Q Yes. Why couldn't this one have?

3 A And when you get into this business of drawing
4 districts, you get into what has been called "redistricting
5 checkers" and --

6 Q What is that? Redistricting what?

7 A "Redistricting checkers" or "dominoes" as it has
8 been referred to.

9 Q Who refers to it in that sense, judicially?

10 A Yes, I believe the Judge of the Eighth Circuit
11 who wrote the dissenting opinion referred to it in that fashion.

12 Q Not in a favorable way, though.

13 A Not in a favorable way; no, Your Honor. The
14 districts other than the Eighth are reasonably compact.

15 Q The question I am trying to get at is why isn't
16 this one? They must have had some reason for making this the
17 shape that it is and having it cover such a great part of your
18 State.

19 A I think the reason, Your Honor, I think the
20 explanation is that this is a district which takes in the cen-
21 tral part of the State, the other districts do surround it,
22 there was a territory taken from the district here and put there,
23 and there was a lot of trading went on with this central dis-
24 trict.

25 Q A lot of what?

1 A Trading of counties, the putting of a county
2 here and the taking of a county there.

3 Q Isn't that what Reynolds versus Sims tried to
4 avoid, the trading of territory in order to bring about an
5 unreasonable distribution of districts?

6 A Well, I don't recall that factor in Reynolds.
7 I recall that Reynolds does indicate that it may be permissible
8 to maintain the integrity of the county, but I don't recall that
9 factor in there.

10 Q Could you have maintained the integrity of the
11 counties here by a change of this district here that would have
12 brought them more into conformity with equality?

13 A I think, Your Honor, had we done so we would have
14 made this district look worse. We would have made it less com-
15 pact than it is had we taken this county here and put it in the
16 Tenth District. You would have more of a handle down here than
17 you have now; the same if you had taken Howard County and put
18 it up in this district. You would have had a handle on the
19 Sixth District.

20 Q Suppose you had taken one of those counties
21 along the line between the Fourth and the Eighth, as I look at
22 it here, one of those two counties in the Eighth along the line
23 of the Fourth.

24 That's right. Right there.

25 A Saline County, Your Honor --

1 Q No, in the Eighth.

2 A Oh, in the Eighth. Howard County --

3 Q And below that is what?

4 A Cooper County.

5 Q And what is the population of those together?

6 A Howard, 10,859; Cooper, 15,000 --

7 Q That's 25,000, isn't it?

8 A Right.

9 Q Suppose you put those two counties in the Fourth.

10 A Had you put those two counties in the Fourth

11 District --

12 Q Wouldn't that have equalized them?

13 A -- you would have equalized population. You

14 would have still had all of this transitory population down

15 in Pulaski County.

16 Q If you had done that, the Eighth wouldn't look

17 any worse than it does now, would it?

18 A It would look pretty poor, Your Honor, in my

19 opinion.

20 Q Maybe it looks pretty poor now.

21 A It doesn't look good; I recognize that. It

22 doesn't look good. In my judgment, it would look worse.

23 Q But it would be equal.

24 A It would have equalized pure, raw census statis-

25 tics figures, Your Honor. Yes, that is true. It would have

1 done so. But we would have still had all these transitory
2 military population in Pulaski County and we would have ignored
3 the fact that the Fourth District makes them the growing area
4 of Kansas City, an area of growing population, which has grown
5 tremendously since 1960.

6 We are talking about 1967. We are building districts
7 seven years later. So we would have completely ignored those
8 facts.

9 Q Do you have any other military installations in
10 Missouri, in other parts of the State than this Eighth?

11 A We have some other military installations, but
12 they are not of the size and significance of Ft. Leonard Wood.

13 Q Have you taken into consideration those installa-
14 tions in this reapportionment?

15 A They were not taken into consideration, Your
16 Honor, because they were not of the size and significance of
17 this fort. This is the principal military installation we have
18 in Missouri. We have some air bases, but they do not have near
19 the numbers of personnel that we have at Ft. Leonard Wood.

20 Q Mr. Attorney General, the lower court was dis-
21 turbed -- and I confess I am somewhat disturbed -- by the
22 apparent fact that both the Legislative Committee and the Legis-
23 lature itself proceeded to draft, consider and enact a bill
24 based upon -- what shall I say -- incorrect -- I don't want to
25 use a harsher word -- census figures, figures that did not truly

1 represent the census figures for various of these districts,
2 and the variations between the actual census figures in 1960
3 and the figures that were used by the committee and represented
4 to the Legislature to be the population figures, and those cen-
5 sus figures, that difference appears to be quite material.

6 What is the explanation of that, if you can tell us
7 briefly, because offhand it appears that the result might have
8 been quite different, in theory anyway; the result that the
9 Legislature reached might have been quite different if they had
10 been working on the actual census figures.

11 A Mr. Justice, many years ago Chief Justice Hughes,
12 speaking before the American Bar Association, made the remark
13 that "In this world of imperfections, the faults of human play
14 are always manifest."

15 Q No, that doesn't quite work here because what
16 you are talking about are some specific figures gotten from
17 the United States Census as of the 1960 census, and the possi-
18 bility of serious men engaged in a serious task making this kind
19 of a material error with respect to a fact so easily ascertained
20 and so objective is really disturbing.

21 A Well, Your Honor, the error about which we are
22 speaking is the difference of 25,000 in population between the
23 smallest and the largest district. What the Legislature thought
24 they had before it was a 17,000 difference, or a difference of
25 8,000 population.

1 Q Well, just take it very simply. Take the Eighth
2 Congressional District which we have been talking about, which
3 includes Pulaski County.

4 A Yes, Your Honor.

5 Q On the basis of the correct figures, the overage
6 there is what -- 3.13 percent overage over the ideal?

7 A Yes, Your Honor.

8 Q And the overage over the smallest district is
9 in the neighborhood of 6 percent; is that right?

10 A Approximately 6 percent larger than the smallest
11 district.

12 Q Now, if you take the figure that the Legislature
13 used, the incorrect figures that the Legislature used, the per-
14 cent of variation in District 8, Pulaski County, et cetera, over
15 the ideal, would have been only 1.85. Isn't that what your
16 information here says?

17 A That is right; slightly less than 2 percent.

18 Q Now, that is 1.85 over the ideal, isn't it?

19 A Yes, Your Honor.

20 Q And the difference between the largest, which is
21 District 8, and the smallest, would have been what?

22 A The smallest district under what the Legislature
23 thought --

24 Q It would have been around 3, say 3-1/2 percent.

25 A -- was the 10th District, with an underpercentage

1 of 1.88 percent.

2 Q So what you are doing is comparing a 6 percent
3 approximate -- just under 6 percent variation in terms of the
4 true facts as against something around 3 to 4 percent variation --

5 A Just under 4 percent.

6 Q Just under 4 percent variation which is what the
7 Legislature thought it was doing.

8 A Yes, Your Honor.

9 Q Now, taking into account the fact, which I for
10 one accept, that we should give a great deal of weight to what
11 the Legislature does, you have the curiosity here which seemed
12 to have impressed the Lower Court -- and I must say bothers me --
13 that the Legislature proceeded on the basis of -- what shall I
14 say again, using a colorless word -- incorrect figures and those
15 figures came out only after the court proceedings were underway.
16 Isn't that right?

17 A That is right, Your Honor.

18 I can't account for the errors that were made except
19 to say that it appears that they came into the legislative
20 deliberations in the closing days of the session when the final
21 compromise bill was being hammered out. There is nothing to
22 indicate that they were anything other than human errors that
23 crept in at that time.

24 The basic census data was being utilized and I can't
25 account for the miscalculations. Now, there is one --

1 Q Is it a matter of calculation, or don't you get
2 from the Census county-by-county figures?

3 A Yes, Your Honor, you do.

4 Q So it is not a matter of having to make a re-
5 calculation in which errors of allocation or whatnot might
6 occur, because they get the figures from the Census county by
7 county and then it is a matter of putting them together; right?

8 A Well, there is a very glaring error, Your Honor,
9 right up here in the Sixth District which contains whole coun-
10 ties. There is an even 3,000 population error and it is very
11 obvious that somebody hit the wrong key on an adding machine
12 while they were doing their calculating. Somebody hit a "3"
13 instead of a "5" or a "5" instead of a "3", because it is just
14 right on the nose; it is 3,000. It isn't 3,001 or anything else.

15 My only explanation is that this was human error that
16 crept into the calculation in the closing days of the Legis-
17 lature.

18 Q Well, the Lower Court seems to have been so im-
19 pressed by it that what we are really asked to do is to give the
20 Legislature the usual presumption of the correctness of its
21 result, despite the fact here that the Legislature was proceeding
22 on obviously, now admittedly, incorrect data.

23 It is a strange situation. I think you would go that
24 far with me, wouldn't you?

25 A Well, I don't agree that the situation is as

1 serious as the Lower Court has made it out to be. I think that
2 the difference between 4 percent and 6 percent is a pretty slight
3 difference when we look at other States where errors have crept
4 in, when we look at the census data itself, which the Census
5 Bureau admits is an error of 3 percent, so if you have a 2 per-
6 cent error in your calculations from data that is admittedly
7 3 percent in error, I don't think that that is a serious slip.

8 Q That makes it 5; 3 and 2 make 5.

9 A Yes, Your Honor, I realize that.

10 Q Or it might make it 1; 3 minus 2 makes it 1.

11 A It could well make it one. And when we look at
12 what the Florida court did when they were drawing districts
13 down there, and the mistakes they made were far more serious
14 than this, they thought they had 8,000 population difference
15 between large and small, but it was 48,000.

16 Q Where was this?

17 A In the State of Florida, in Gong versus Strivers.
18 That was brought to the attention of this Court and this Court
19 found nothing wrong with it. So I think the Lower Court has
20 dwelt too much on this matter of error in calculations.

21 Q Is there any serious argument made here sup-
22 ported by strong evidence on the part of those either who sup-
23 port or reject the reapportionment that there is really a dif-
24 ference in order to change the results of a district of having
25 a Republican Congressman or a Democratic Congressman, or a

1 Democratic Congressman instead of a Republican Congressman?

2 A There is nothing in the record, Your Honor, to
3 indicate this political factor. Of course, it is there.

4 Q Is that the argument that is made? Do they
5 make that argument, either side?

6 A No, Your Honor.

7 Q That argument is not presented to us.

8 A That is not presented to the Court.

9 Q So we can take the case as though there is no
10 question raised in it that requires our attention to decide
11 that they, by deliberate effort, sought to shift parties in
12 Congressional Districts?

13 A That is right, Your Honor.

14 As I say, naturally, in any redistricting plan, you
15 have those Republican-Democratic factors involved. They were
16 involved in this plan. The Republicans generally opposed this
17 plan, but once it was adopted they appeared as witnesses before
18 the Lower Court.

19 Q You mean certain Republicans.

20 A The leaders of the Republican Party.

21 Q Who were the leaders?

22 A The Minority Leader of the House and the Minority
23 Leader of the Senate.

24 Q But you did tell us that in the Legislature it-
25 self, it went strictly on party lines.

1 A Yes, Your Honor.

2 I might add as an aside that there was one district
3 created that was absolutely guaranteed to put a Republican in
4 Congress.

5 Q Was what?

6 A Was absolutely guaranteed to put a Republican
7 Congressman in Congress.

8 Q Where was that?

9 A That was the Second District in the City of St.
10 Louis. The county had been strongly Republican for years and
11 years and years --

12 Q It had been Republican. That didn't change it.

13 A But the people didn't follow the Legislature in
14 doing that. They elected a Democrat last November in that
15 heavily Republican district.

16 Q That showed it doesn't always work.

17 A It doesn't always work; no, Your Honor.

18 There were also race factors involved in this plan.
19 There was a deliberate attempt to create a district that would
20 elect Missouri's first Negro Congressman and that was successful.
21 Missouri did elect its first Negro Congressman.

22 Q Is there evidence in the record about that? You
23 say that the record sustains that?

24 A The census data sustains that. That would be the
25 only thing.

1 Q But there was no testimony that the Legislature
2 attempted to do this.

3 A No.

4 Q Or there wasn't any testimony about the other
5 matter that you referred to?

6 A That is right.

7 Q Is there any testimony that there was some effort
8 in forming these districts to permit incumbents to run from
9 their own district?

10 A There is no testimony to that effect. It could
11 be implied from the composition of the districts.

12 Q The Lower Court thought that was a consideration,
13 didn't they?

14 A That's right. There was no testimony, but, as I
15 say, it could be implied from the composition of the district
16 because the districts were drawn where an incumbent resides in
17 each of the existing districts.

18 Q Now, in making the statements you made about
19 the so-called "sure Republican district" and about the so-called
20 "sure Negro district," are you representing that these are
21 actually the facts that really did influence the Legislature?

22 A These were very definitely facts that influenced
23 the Legislature.

24 Q Are there any findings to this effect?

25 A There are not. No record was made on that.

1 Frankly, we didn't think it was relevant to the question of --

2 Q Might it not be relevant if they deliberately
3 made a district which was not a convenience in order to elect
4 a white man or colored man, either one? Might it not make a
5 difference?

6 A It would be relevant only insofar as the popu-
7 lation disparity of a district would be involved, Your Honor.
8 That would be my opinion.

9 Q Would this shape, form, and size of District 8
10 have been made for an incumbent Congressman?

11 A There, again, there is nothing in the record in
12 regard to that, but there was some controversy about it. The
13 incumbent Congressman was from Texas County, which is this
14 southernmost county.

15 Q What county?

16 A Texas County. That is this county right here.

17 Q What is the county seat?

18 A Houston.

19 He is a very popular Congressman and the con-
20 troversy was really vicious. The Democratic political leaders
21 over here in what is called the boot heel of Missouri wanted to
22 put him in their district because their Congressman was retiring
23 and they wanted him. These people in the central part of the
24 State said "No, we want to keep him here." So there was another
25 factor that was involved in drafting these districts.

1 Q Is Poplar Bluff in that district?

2 A Poplar Bluff is in Howell County, which is just
3 to the south of Texas County.

4 Well, I have eaten into Mr. Collins' time here con-
5 siderably, Your Honor, and I know that he wants to address the
6 Court.

7 Thank you.

8 MR. CHIEF JUSTICE WARREN: Mr. Collins?

9 ORAL ARGUMENT OF DAVID COLLINS, ESQ.

10 ON BEHALF OF INTERVENOR-APPELLANTS

11 MR. COLLINS: May it please the Court, the disparity
12 of the population of the Eighth District and the ideal is not
13 25,000; it is 13,542. So the difference -- I don't think this
14 25,000 figure should be misunderstood. The Eighth District
15 is over-populated by only 13,542 people.

16 As the statistics in the Attorney General's brief
17 compared the voters in proportion to the population show, the
18 fact that Ft. Leonard Wood, with approximately 40,000 soldiers,
19 and the University of Missouri, with approximately 17,000 people
20 at Columbia and about 5,000 at Rolla, plus the political workers
21 at Jefferson City, most of whom vote back home in their own
22 counties, would more than offset this.

23 So if appropriate adjustments were made for the
24 transient population in the Eighth District, actually the Eighth
25 District in terms of voters is under-populated.

1 Now, in the Nebraska case, Eighth Circuit Judge
2 Johnson made a very interesting and, I think, pertinent comment
3 about analyzing population figures in reapportionment cases
4 to demonstrate the extent to which votes are diluted, and he
5 pointed out that if you add up the actual population of the
6 over-populated districts and compare that with what the popu-
7 lation should be if each of those districts were ideal, you
8 would get the difference between those figures as the number
9 of people that those five districts have in the aggregate that
10 they should not have.

11 In Missouri we have five over-populated and five
12 under-populated districts. If you add up the population of
13 the five over-populated districts, you get 2,194,000 some odd
14 people. If all five of those districts were perfect, you
15 would have 2,159,000, so that what you really have is 34,680
16 too many people in the total of five districts.

17 Then, as Judge Johnson pointed out, one Congressman
18 is supposed to represent ideally 431,000 people. So if one
19 Congressman equals 431,000 people, the 34,000 excess in the
20 five districts equals eight percent of one Congressman. So
21 that you have in the aggregate in these five districts all the
22 people in five districts put together have been cheated out of
23 eight percent of one Congressman.

24 It follows, of course, that in any one district,
25 the people of the district as a whole, their vote has been

1 diluted by one-fifth of eight percent of one Congressman.

2 Q But if you carry that kind of an analysis to
3 the State as a whole, nobody has had his vote diluted at all.

4 A Well, that would almost be correct. It would be
5 very minimal. But it does bring into focus, Your Honor, that
6 when you have the people of half of the districts of the State
7 that are only over-populated by 34,000 people, and it takes
8 431,000 to elect one Congressman, or people to represent one
9 Congressman, it points out how minimal the deviation really is.

10 Q Would you mind pointing out to us the reasons
11 that you rely on in this case for the Legislature departing
12 from equality, the legal reasons?

13 A All right, I will. First let me say, Your Honor,
14 before I answer your question, I agree with what Mr. Downey
15 has said. I contend that the deviations are so small that the
16 reasons make no difference.

17 Q Yes, I understand.

18 A Right. Now, the reasons are these: This is a
19 legislative function. This Court has repeatedly said that. It
20 is a legislative function. The Legislature can only act by
21 the passage of bills, and you have to have the bills to pass
22 the bills.

23 It takes 82 votes in the Missouri House to pass.
24 There are 161 people, so you have to have 82 votes to pass.
25 This bill got 82 votes.

1 Q And, therefore, you rely on that regardless of
2 equality.

3 A That's right, Your Honor. I don't think that
4 you could ever have, absent court decree, a legislature passing
5 a bill that is any closer than a deviation -- or the worst
6 deviation -- where you have over 4,300,000, of 13,000 people.

7 Q That is another question; whether you could or
8 not. The question in my mind is whether you are trying to
9 justify this act on the grounds that it is the only bill that
10 the Legislature would pass.

11 A Well, I think that is obviously true from the
12 record, Your Honor, absent compulsion from this Court or some
13 other Federal court. That is true.

14 Q You mean absent following the rules that have
15 been laid down by this Court for reapportionment?

16 A No, I think the rules have been followed. This
17 Court has never said that they had to be perfect. This Court
18 has said they only have to be as close as is practicable.

19 Q But it has said that it could not be unequal
20 for certain reasons, hasn't it?

21 A That is right; and there is absolutely no indi-
22 cation in this record that there has been any reason as to why
23 it was unequal.

24 Q But you are telling us that the reason that you
25 can rely on that is because it is a legislative function and

1 that is the only bill they could pass; therefore, it is all
2 right.

3 A I don't think any Legislature, whether the map
4 looks like this or whether it looks otherwise, that you can
5 hammer out and get the votes to pass a bill that is closer than
6 3 percent to ideal. I think 3 percent is about as close as you
7 can expect in the legislative process.

8 Q Suppose it was 6 percent?

9 A Well, if it were 6 percent, in my judgment it
10 would still be good.

11 Q Twelve?

12 A I think the cut-off point ought to be in the
13 area of 10. I think when you get to 8, 9, or 10 percent, then
14 you should look extremely close at the motives. I am not
15 saying that one of those could not possibly be justified, but
16 I think that is the area, the critical area, because of what
17 Mr. Downey said and Mr. Justice Fortas commented about the
18 Census Bureau acknowledging the possibility of a 3 percent
19 error in their figures.

20 Well, the Eighth District here, if you ignore the
21 transient population, the fact is, it is probably dead perfect
22 or very close to it. But if you ignore the transient population,
23 which I think is a legitimate consideration, and which the
24 undisputed evidence in this case was that they did consider
25 that, and there was absolutely no evidence to the contrary --

1 but if you ignore that, the 3 percent error could be the other
2 way; it could be down to zero.

3 Now, it is likewise true, as Mr. Justice Fortas pointed
4 out, it could be the wrong way and make it up to 6 percent. But
5 I don't see how -- you see, when the Census Bureau acknowledges
6 the possibility of a 3 percent error in their figures, which
7 they do, then suppose that the figures were accurate and it was
8 dead perfect. You still might have a 3 percent error.

9 Q But even then it would only be with respect to
10 1960.

11 A That is true.

12 Q And you have enormous changes, I suppose, in
13 certain places in Missouri since 1960.

14 A This is true. This is true.

15 Q I think Mr. Downey suggested, Mr. Collins, that
16 there are in Four and Eight, both, population changes going on.
17 Are the increases in both districts -- I take it there is an
18 increase in population; that's the trend, is it?

19 A In the Fourth that is true. I don't know that
20 that is true in Eight. I am not aware of any increase in the
21 Eighth.

22 Q What he was suggesting was that because of
23 Kansas City in the Fourth, and its environs, there is a trend,
24 faster in any event, in the way of any increase, than there is
25 in Eight, if there is any at all?

1 A I am sure that is true. Eight is composed of
2 strictly rural counties and the only thing that would affect
3 the Eighth is the military population or the student population
4 at the University of Missouri, which is located in Columbia.

5 Q That was 15,000 to 17,000 in 1960?

6 A Well, it was about 15,000 to 17,000 then. It is
7 over 20,000 now.at the Columbia campus, and the School of Mines,
8 as we call it, down at Rolla, Missouri, which is also in the
9 Eighth District, has about 5,000 people -- students that is --
10 and then the Lincoln University at Jefferson City -- I don't
11 know what the enrollment is, but there are about 3,000 people
12 there.

13 Then you have the State Capitol at Jefferson City
14 which has a large number of people holding political jobs down
15 there who vote back home.

16 So when you consider all of those factors taken to-
17 gether, as Mr. Justice White suggested earlier, you probably
18 shouldn't give 100 percent, which hasn't been done. If you gave
19 100 percent, it would make about a 50,000 population difference,
20 but all you have to do to bring the Eighth down to perfect is
21 13,542 people and there are undoubtedly that many, and certainly
22 it wouldn't be unreasonable on the part of the Legislature to
23 so assume.

24 The testimony was that they did consider this transient
25 population in the passage of this bill.

1 Q Did it take into consideration in the City of
2 St. Louis, for instance, the transitory population in a great
3 city like that? Did the Legislature consider that?

4 A There is no evidence in the record, Your Honor,
5 that they did.

6 Q You don't think there is any transitory population
7 in a great city like St. Louis?

8 A Well, talking about what I think and what is in
9 the record are two different things. There is nothing in the
10 record that the Legislature considered the shift in the popu-
11 lation in the St. Louis area.

12 Q This thing is after the fact, too, isn't it?
13 This all came up after the fact; not in the Legislature.

14 A The testimony did; yes, sir.

15 Q In the Legislature, was it argued that there was
16 a university in the Eighth District, and that there was a --

17 A That was the testimony. The testimony by these

18 Q The testimony is what was intended, but is there
19 any legislative record that we have that shows that?

20 A Not other than the testimony; no, sir. There are
21 no records kept in the Missouri Legislature of the arguments or
22 the debates or the proceedings there, so there is no source for
23 this other than just what you read in the newspaper or what you
24 pick up by rumor. But there is no evidence, for example, Mr.
25 Justice, in this record concerning any consideration at all about

1 the election or retention in office of a Congressman; nor is
2 there any about a Republican versus a Democrat, or vice versa;
3 nor is there any evidence in this record that race or the
4 election of a Negro Congressman was in any way considered. That
5 is not in this record at all.

6 Q Did the Census Bureau indicate why it conceded
7 a possible error of as much as 3 percent?

8 A I don't know the answer to that, Your Honor. I
9 am not that familiar with those Census figures.

10 Q Was a witness from the Census Bureau there? How
11 did this get into the record?

12 A Simply a statement in the Attorney General's
13 brief. I think that is part of those booklets. It is a stipu-
14 lation.

15 Q What is the stipulation? Where is that?

16 A I don't know the page number of the appendices.

17 Q If he knows, will you get him to tell you later
18 so you can let us know?

19 A Yes, sir.

20 I would like to point out to Your Honors that the
21 Mississippi case was affirmed by this Court. The population
22 deviations in the Mississippi case are greater than they are in
23 Missouri. So that if this Court affirms the Lower Court, we
24 will not be permitted to do in Missouri what they have been per-
25 mitted to do and are doing in Mississippi.

1 Q Did the courts agree that the differences in
2 Mississippi were for the same reasons that you rely upon here?

3 A Well, there is no opinion of this Court in the
4 Mississippi case.

5 Q "The" courts, I said.

6 A I am sorry. I don't understand.

7 Q Was there an opinion of any kind in that case?

8 A In the Lower Court.

9 Q That is what I asked. In whatever court it was,
10 did they do it for the same reasons that you assert here, that
11 that is the only kind of a bill they could get through the
12 Legislature?

13 A I don't assert that, Your Honor.

14 Q I thought you did. I thought also that your
15 colleague said that.

16 A Well, I don't say this is the only kind of a
17 bill that you can get through the Legislature. I simply point
18 out that a lot of bills were introduced. There were a lot of
19 tries made. There were reports out of committees. There were
20 amendments. Finally, when they got this bill hammered out, it
21 passed the House by simply one vote.

22 Now, in my judgment you get into the proposition of
23 whether the narrower you make the confines within which the
24 Legislature can act, and the more restrictive the rules announced
25 by the Judiciary become, the less freedom the legislators have,

1 the less significant it becomes that we are entitled to elect
2 our legislators on a one man-one vote basis. In other words,
3 what difference does it make that my vote is equal to Mr.
4 Achtenberg's vote in deciding who gets to go down to Jefferson
5 City if, when he gets down there, the courts are going to tell
6 him he can only act within a prescribed area?

7 Now, I don't suggest that you shouldn't enforce the
8 constitutional mandates, of course. But I do point out that
9 when you get it down -- slice it this thin, so to speak -- you
10 get to the point where it is almost a matter of announcing the
11 results of a computer, which is what Judge Oliver suggested in
12 the pre-trial conference where he asked a question of Mr. Downey
13 in the pre-trial conference, "Why didn't the Legislature consult
14 the computer complex at the University of Missouri?"

15 Q Is that Mississippi case to which you referred
16 cited in your brief?

17 A Yes, sir.

18 Q Including the Lower Court opinion?

19 A The Lower Court opinion has never been published.
20 I beg your pardon. Yes, sir; it is.

21 Q In your brief, that is.

22 A I cite the case, but my brief doesn't have the
23 citation. The citation is on page 43 of the appellant's brief.

24 Q Of the appellant?

25 A Of the appellant, the Governor and the Secretary

1 of State of Missouri.

2 Mr. Justice, I now have the answer to your question
3 about this 3 percent error in population figures. It is re-
4 ferred to on page 16 of the Attorney General -- the appellants --
5 reply brief.

6 Q Reply brief?

7 A Of the reply brief of the Attorney General.

8 Q What is the date of that brief? I don't believe
9 I have it.

10 A December 2nd. And it appears on page 53 of the
11 appendix as a stipulation referred to there. Page 53 of the
12 appendix and page 16 of the appellant reply brief.

13 Q Page 53 of the appendix.

14 A Right.

15 Q Does your position go so far as to say that if
16 the State laid out a non-contiguous Congressional District --
17 that is to say, it selected counties in various parts of the
18 State and they were not contiguous -- that that would be con-
19 stitutionally unobjectionable provided that the figures worked
20 out all right?

21 A No, Your Honor. I don't think it would be. I
22 think that compactness and contiguity are significant factors.
23 Population is by far the more important. But I don't think
24 they would be at liberty just to select counties from various --

25 Q Then your point must be that, for example,

1 Congressional District No. 8 here, does not present such a prob-
2 lem, that is to say, the fact that it does not appear to be
3 compact doesn't raise a problem. I note that Jefferson County
4 and Texas County were both put into the district with the
5 majority of the other counties to form District 8; isn't that
6 right?

7 A Yes, sir. As I understand it, they have been in
8 that same Congressional District for a good many years.

9 Q No, I don't -- has Texas County been in and has
10 Jefferson County been in the same Congressional District as
11 Osage, Cole, Miller, and so on, there?

12 A I think they have. I may be in error, Your
13 Honor, but I thought they --

14 Q I may have misread some of the maps here.

15 A I may be in error, but I think they have been in
16 that same district for a good many years, particularly Texas
17 County. I don't know how long Texas County has.

18 Q But in any event, you would agree, then, that --
19 and I think this may be a modification; it's a modification
20 of what I understood you to say earlier -- compactness and
21 contiguity are permissible factors to take into account in con-
22 nection with the constitutional problems facing this Court.

23 A Yes, sir; I think they are. I think that they
24 are not only permissible, but I think that to at least some ex-
25 tent they are required.

1 I might point out that there seems to be a difference
2 of viewpoint which, as Judge Mathis says in his dissenting
3 opinion, is extremely significant in who has the burden of proof
4 in this case. In fact, one of the subdivisions of the appellees'
5 brief relates to that matter, their position being that this
6 deviation is per se bad and they arrive at that conclusion by
7 stating that it is a fact that this percentage of deviation is
8 not as near as is practicable.

9 Thereby, they assume the very thing that is in issue
10 and, having assumed that it is not as nearly equal as is prac-
11 ticable, they point to the language of a couple of opinions and
12 say that we have the burden of proof.

13 Now, we dispute that. We say that, per se, a 3 percent
14 deviation from perfect is as near equal as is practicable, prac-
15 ticable being used to evaluate the legislative process. Conse-
16 quently, the burden of proof of demonstrating that it is uncon-
17 constitutional is where that burden always is and that is on the
18 people asserting unconstitutionality.

19 Thank you.

20 MR. CHIEF JUSTICE WARREN: Mr. Achtenberg?

21 ORAL ARGUMENT OF IRVING ACHTENBERG, ESQ.

22 ON BEHALF OF APPELLEES

23 MR. ACHTENBERG: Mr. Chief Justice, and may it please
24 the Court: At the outset, the appellees wish to make it clear
25 that we do not agree with the issue as first stated in the

1 appellants' jurisdictional statement that what the Trial Court
2 held was that the Legislature's plan was bad purely and simply
3 because a better plan could have been or was proposed.

4 We don't think that is the rule. We don't think the
5 Trial Court held that and we are not asking this Court to so
6 hold.

7 What we think the Trial Court was very simply and in
8 accordance with prior decisions of this Court: that upon the
9 evidence before it, the Legislature had not developed and pre-
10 sented a plan which approached practicable equality of popula-
11 tion; and further, that that was demonstrated very simply --
12 although in many other ways -- but very simply by the fact that
13 there were whole counties which could have been transferred into
14 the out-of-balance districts and have improved the balance of
15 those districts; and that furthermore, the Legislature, in its
16 proceedings and before the court, did not give constitutionally
17 justifiable and rational grounds for their exceeding the reason-
18 able variations.

19 Q What do you say is the test? What do you argue
20 is the test for the judge to decide? The crucial point.

21 A We think the test in each case must be that the
22 court must examine the evidence before it, determine if there
23 is a plan which is reasonable, which approximates practicable
24 equality of population in view of the facts in that particular
25 State.

1 If it does not do so, then the court must decide if
2 there are justifiable -- constitutionally justifiable -- reasons
3 for exceeding that boundary. We are saying very specifically
4 that this Court should not, and we ask it not, to set any per-
5 centage, to accept any doctrine of de minimis, or to say that
6 the situation in one State may be applied on a fair percentage
7 formula to the situation in any other State.

8 Q What do you suggest the Legislature could have
9 done that would have brought about a more near approach to
10 equality?

11 A If the Court please, I will refer to the map,
12 which is simply an enlargement of the map appearing on page 15
13 of the appellees' brief and which was also before the court.
14 The only difference is that the chief villain in the piece,
15 the Eighth Congressional District, I have outlined in red be-
16 cause it is in the State in the reproduction. Other than that,
17 it is identical.

18 But I should point out that we do not say that the
19 only villain is the Eighth District, because five districts are
20 over-represented, and five districts are under-represented in
21 substantial degree, and we feel that every district must be con-
22 sidered in evaluating this problem.

23 Now, Missouri is peculiarly situated with regard to
24 the structuring of its sub-governmental units, so that we think
25 that Missouri could be the shining example of how Congressional

1 Districts could be drawn with almost mathematical exactness
2 and I will give the Court my reason for that.

3 Missouri, beyond almost every State, has 114 counties.
4 The City of St. Louis, which by statute is, in effect, a county ---
5 in other words, 115 counties to be divided between 10 Congres-
6 sional Districts. We have the two masses of population density
7 on the left of the State in Kansas City, the Fifth District, and
8 on the east of the State in St. Louis and St. Louis County, the
9 First, Second, and Third Districts.

10 Those four districts do not exceed the boundaries of
11 one county. In fact, in each case there are portions of the
12 county left to go into the rural districts.

13 We have remaining six Congressional Districts to be
14 divided among 115 counties, or mathematically, we have an average
15 of 19 county building blocks within which to structure a Con-
16 gressional District. Now, obviously, the more building blocks
17 you have, and the smaller the building blocks, the easier it is,
18 without crossing county lines, to create Congressional Districts
19 of great exactitude.

20 Now, beyond that in Missouri, the fact is that there
21 are 38 counties of the State, or almost exactly one-third, which
22 have less than 10,000 population, which means that there is a
23 great flexibility of shifting of whole counties. In fact, with
24 regard to the variances in this case, the variance in the Eighth
25 District of an excess of over 13,000 population -- that figure

1 of 13,000 population is more than the population of half of the
2 counties of Missouri, of each of the 59 counties of Missouri.

3 If you take the total variance of 26,000 -- almost
4 26,000 -- that variance is more than the population of any of
5 95 of the 115 counties of Missouri.

6 In addition, the map, which also appears in our brief,
7 fortuitously on the Legislature's plan, there are small counties
8 abutting the Eighth District which, simply by shifting of the
9 abutting counties, very easily the Legislature could have made
10 these changes. Now, I should say that --

11 Q What difference would that have made in the
12 other district?

13 A This is true of every district. If we want only
14 to shift population from the Eighth to the Fourth which, of
15 course, is the one which swings the greatest in over-represen-
16 tation, but from the Seventh to the Fourth, from the Ninth to
17 the Sixth, from the Eighth to the Tenth, from the Seventh to
18 the Tenth, and since in the urban areas the Legislature did not
19 hold to county lines but, in fact, went to township lines, went
20 to ward lines, and even to precinct lines, we could, following
21 the pattern of the Legislature, and the Legislature could have,
22 shifted from District 1 into 9, which would bring it up to
23 equality while if it shifted 5,000 to 6, which would drop it
24 down, then --

25 Q You mean 5,000 people?

1 A Yes, sir.

2 Q Splitting up the counties?

3 A You can take Schuyler County from District 9
4 into District 6, which would bring District 6 up 5,000 closer
5 to equality. That would short District 9 --

6 Q Would that split the county?

7 A No, sir; that would be shifting --

8 Q It would be in the same district.

9 A That would be shifting a full county from Dis-
10 trict to District.

11 Q Do you think it is advisable or possible to keep
12 the identity of the county boundaries in Congressional Districts?

13 A I think that is a consideration which this Court
14 has accepted. I think it comes down to the practicality of the
15 map drawing. In this case, we don't suggest that it is neces-
16 sary to split county lines in the rural areas. We say only that
17 in the city, where the Legislature has split county lines com-
18 pletely, down to precincts, that we would follow their plan --

19 Q That is absolutely necessary, isn't it, in the
20 big cities?

21 A I would say so; yes, sir; at least --

22 Q Yes, I see, in some of the very large cities.

23 A We don't quarrel with the Legislature's attempt
24 to hold the county lines where they could --

25 Q Do you make any complaint about the structure of

1 that Eighth, just looking at it? Is there anything that
2 should offend the vision with reference to the way it is built?

3 A I think it is almost a two-headed gerrymander,
4 or two-headed salamander. We don't make an issue of that point.
5 We think the testimony of the Majority Leaders of both parties
6 in both houses made it clear that this is what I would call a
7 political gerrymander.

8 Clearly, the leaders of both parties were playing the
9 legislative game seeking to achieve their legislative purposes.

10 Q I guess they will always do that, won't they?

11 A They will do it to the extent that the rulings of
12 this Court permit.

13 Q Did I understand you to say, Mr. Achtenberg, that
14 you are not defending the District Court judgment on any ground
15 that in any event Eight is a gerrymander?

16 A Well, we think that the whole plan is a political.

17 Q No, no. Are you defending the District Court
18 judgment on the ground that Eight constitutes infamous political
19 gerrymandering? I don't read anything you have said in your
20 brief --

21 A I think you are correct, sir.

22 Q Well, Mr. Counsel, I notice that District 8 is
23 13,542 above the normal and that 4 is 12,260 below. Now, that
24 is almost equal -- one above and the other below. How could
25 they, without disturbing county lines, take 12,000 or thereabouts

1 from 8 and give it to 4, which would equalize the two districts.

2 A Not to arrive at mathematical perfection, but to
3 get within 2,000, you could shift either Howard County with
4 10,859 that abuts Congressional District 4, or you could reach
5 almost the same result by shifting Morgan County, which com-
6 pletely abuts the adjoining county, with a population of 9,476
7 which would bring your variances in those two cases to a matter
8 of a thousand or two, rather than the range of 26,000.

9 Q Is your prime concern only -- is there any
10 practical political compilation or something for your protest
11 against this result? What is it? Are you just concerned to
12 raise and have decided the abstract question whether excesses
13 and overages are wrong, or is there something else that your
14 clients are concerned with?

15 A Well, Your Honor, if the Court please, we are
16 in this -- one can never speak for why the individual parties
17 are there, but we are not attacking any particular line because
18 it favored Republicans or favored Democrats --

19 Q So your clients' only interest in this is that
20 it be done as the constitutional decisions require it to be
21 done, is that it?

22 A I think that statement is correct, and I can
23 certainly say that their attorneys are only proposing -- only
24 appearing -- and we appear, of course, as appellees.

25 Q Well, ordinarily, you know, in these cases,

1 there seem to be partisan interests served by the different
2 sides, but that is not true here, is it?

3 A To my knowledge, no, sir. Again, this is my
4 statement, confirmed by Mr. Preisler, who is one of the plain-
5 tiffs and is not in the record.

6 Q Is the dispute simply over the fact the courts
7 have said they must be as nearly alike as possible in population
8 and that abstractly you don't think they are and that they could
9 have made it a little closer?

10 A I would agree with the Justice's statement except
11 that not a little closer; they could have done a lot better and
12 could have done so very easily.

13 Q But you have no argument of any kind based on
14 the fact that somehow the voters are going to be hurt by what
15 is done?

16 A Well, we certainly have answers to their dis-
17 cussions on motives. We first of all, of course, take the posi-
18 tion that this is not a de minimis situation. 26,000 is not a
19 peppercorn. It is the votes of 26,000 people and, as I indi-
20 cated, substantially more than the populations of most of the
21 counties of the State.

22 But beyond that, we feel that the motives involved
23 here are not justified.

24 Q Why?

25 A Well, let me take them one by one.

1 With regard to the position which is not specifically
2 articulated by the appellants, but generally so, they talk about
3 the justification of legislative interplay -- they use the
4 term "political compromise"; they use the term "practical
5 political problems," and, of course, the argument was that this
6 was the best job that could have been passed by the Legislature.

7 I think the Court pointed out that the Legislature
8 would have to follow the mandate of the Court.

9 Q And you think that is not worthy of any con-
10 sideration whatever?

11 A We think that argument, sir, could be used to
12 justify any denial of equal representation.

13 Q Maybe so, but do you think it has no right to
14 have any weight at all, the practical, pragmatic situation of
15 what you can do in the legislative body?

16 A Well, we think it is an element of a pragmatic
17 problem to be weighed.

18 Q You do think, then, that it should be given some
19 weight, but you don't say how much?

20 A Well, I would have to be specific. I certainly
21 don't think that seeking to create a Negro district, or seeking
22 to exclude Negroes -- a racial gerrymander -- would be accept-
23 able. We don't think a political gerrymander would be accept-
24 able.

25 I struggle with it simply because to talk of legislative

1 compromise tells me very little. Basically, my position is that
2 it is not an acceptable --

3 Q But that is a pragmatic fact of life that has to
4 be considered, isn't it?

5 A I would say no, sir, because this Legislature
6 met three times on this problem. If the Court wanted to accept
7 the first act of the Legislature which could have been justified
8 by the same basis -- in other words, if this was the best that
9 could get through, and on a political basis -- I suppose you
10 could say it was, then the Court would have had to accept that
11 fact.

12 Q Now if that is true, unless you can show some-
13 thing that just shocks you some way, just so outrageous that
14 nobody can take it, or you can show that it aids the Republicans
15 or helps the Democrats, or vice versa, why should we not take it
16 into consideration? How do we know how much those -- they live
17 in that district. They know how to work together and fight to-
18 gether and what the practical history has been before.

19 To be required to shift simply to acquire -- maybe
20 they have done this and it is practical -- unless you just
21 split up the counties and the precincts, haven't they? How
22 do you know they haven't?

23 A The history of reapportionment, as the Justice
24 well knows, shows that what happened after Congo versus Breen
25 was that the legislatures of the several States structured

1 Congressional Districts which ranged as far as 600,000 from one
2 range to the other.

3 Q I know that very well. I studied that case and
4 that's why I dissented from what the Court held. But that was
5 a big, understandable, on its face so outrageous and so far from
6 what was practical that that rather answered itself, without
7 regard to the fact that they are in the legislature and they
8 are doing the best they can to bring about an equality.

9 A I would still not accept the argument made of
10 legislative practicability because this, in effect, says that
11 in a State, as in Missouri, where one party has the majority
12 in both houses, it may politically structure the districts so
13 as to be favorable to that party.

14 It seems to me that is wrong, and it seems to me
15 that if it exceeds practicable population percentages, it is
16 contrary to the mandate of this Court.

17 Q Calling your attention to the table on page 55
18 of the appellants' brief on the merits, that purports to be a
19 list of all the States, I gather, in order of deviation in their
20 Congressional Districts from the perfect average district, begin-
21 ning with the smallest deviation and ending up with the largest,
22 is that what that is?

23 I appreciate this isn't your table; it is your
24 opponents' but I assume you are familiar with it.

25 A I believe so; yes, sir.

1 Q That shows Missouri to be the eleventh best in
2 the country from the point of view of size of deviation?

3 A I just counted. Yes, sir; that is correct.

4 Q I don't know that it appears here as to how many
5 others have been judicially approved. We do know that Mississippi
6 has been, which is twelfth --

7 A And I believe Florida.

8 Q Florida is about twentieth.

9 A If I might address myself to --

10 Q I was going to ask you, do you quarrel with the
11 factual accuracy of this table?

12 A I don't quarrel with the percentage variations.
13 I do quarrel with using percentages as a standard for judging
14 one State as against another State. I would like to speak to
15 that point.

16 Q Well, I agree with you on that. I did speak to
17 that point at some length in dissenting in Lucas against the
18 Colorado General Assembly. I don't think our 50 States are
19 fungible goods, either.

20 Q May I ask you this question? You may want to
21 answer it after lunch, which would be all right with me.

22 Your argument seems to me in one respect, anyway,
23 to depend upon burden of proof and your brief argues that the
24 burden of proof to burden of justifying deviations from the
25 ideal is on the State.

1 I wonder if it isn't possible that the question of
2 burden of proof may be a little more complex than that. The way
3 you have what appears to be a gross and nonpermissible varia-
4 tion, whatever target figure one may have in mind, five or ten
5 percent particularly, whatever target figure in particular
6 circumstances one may have in mind, where there is a mathe-
7 matically large or gross deviation from the one man-one vote
8 mathematics, that then the burden is on the State to justify
9 it, but may it not be that where -- and perhaps this is such a
10 case -- the variation is relatively modest, that the burden may
11 then be on those attacking the plan?

12 That is to say, you are trying now to bear that bur-
13 den in one respect by saying that the State could do better and
14 could come to a closer approximation of the mathematically
15 ideal. Some of my brethren have asked you whether you have
16 other complaints about the plan, such as political gerrymander-
17 ing or other attempts to keep incumbents in office, or whatever
18 it may be.

19 As I understand it, your answer to that has been no.
20 But what I am saying to you is, isn't it possible that where
21 the figures are such that the mathematical deviation does not
22 appear gross, that the burden is then on the other party, namel
23 the party attacking the plan?

24 A Well, Mr. Justice, it seems to me that the
25 burden does not shift when we get into this matter of the

1 weight of the evidence. I would say that the burden rests with
2 the proponents to justify their plan. Perhaps visually, or
3 on examination of simple figures, they might sustain the burden
4 of going forward and then perhaps we have a burden which we
5 have assumed in this case --

6 Q Yes. That may be a more accurate way of stating
7 it.

8 A -- of showing that they have failed in that re-
9 gard and that they have failed to justify what we consider sub-
10 stantial variances under the peculiar situation in Missouri.

11 Q But if you assume that the State has borne its
12 burden by showing that these figures are within tolerable range,
13 then the only thing you have been talking about thus far is
14 that they could have done better.

15 A No, sir. Our position --

16 MR. CHIEF JUSTICE WARREN: We will recess now.

17 (Whereupon, at 12 Noon the Court recessed, to recon-
18 vene at 12:30 p.m. the same day.)
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1 (The argument in the above-entitled matter was re-
2 sumed at 12:30 p.m.)

3 MR. CHIEF JUSTICE WARREN: Mr. Achtenberg, you may
4 continue with your argument.

5 FURTHER ORAL ARGUMENT OF IRVING ACHTENBERG, ESQ.

6 ON BEHALF OF APPELLEES

7 MR. ACHTENBERG: Thank you.

8 To continue with my answer to the Justice's question,
9 it is our position that the appellant, the attorneys represent-
10 ing the State did not meet the burden of proof and we think --
11 well, quite specifically, the Lower Court so held. In both the
12 opinion of Judge Oliver and Judge Collinson, they both indi-
13 cated that the burden of proof had not been met by the pro-
14 ponents of the plan.

15 Of course, we recognize that this Court must examine
16 that and we will continue to argue that they have not, and I
17 would like to continue somewhat from the map.

18 One additional piece of evidence, of the 10 Congres-
19 sional Districts, one might say that the first three, in St.
20 Louis and St. Louis County, which are exclusively urban and
21 suburban, and Five, which is Kansas City, Jackson County but
22 exclusively Kansas City, three of those four are well over-
23 populated, which means, of course, that they are well under-
24 represented, three out of the four.

25 Now, the Eighth District has been characterized in

1 the appellants' brief as in the group of predominantly rural.
2 The fact is, of course, that it has major cities and it extends
3 well into the urban area of St. Louis County. So we may, in
4 effect, consider it as a mixture and for the purposes of my
5 argument, I would ignore it.

6 This leaves five predominantly rural Congressional
7 Districts, and four of those five are under-populated and,
8 therefore, over-represented. So we have the classic Reynolds
9 versus Sims situation. We have rural areas strongly favored,
10 three out of four over-represented, against the urban areas
11 under-represented three out of four.

12 I would like to speak to the question raised both
13 in the briefs and the arguments as to the percentage compari-
14 sons with the Florida case, Gong versus Kirk, and the Missis-
15 sippi case, Connor versus Johnson.

16 First of all, the Court will recall that this Court
17 affirmed the Lower Court. It was not the situation we have
18 in the instant case where this Court is being asked to review
19 the weight of the evidence and reverse the Trial Court.

20 Secondly, although I realize there is dispute between
21 the appellants and the appellees and between the majority
22 decision in the court below and the dissenting opinion as to
23 what the issue was before this Court in Connor versus Johnson,
24 we still hold to our position that the only issue raised there
25 was the issue of racial gerrymandering.

1 So this question of "as equal as practical by popu-
2 lation" really is not presented to the Court and, therefore,
3 the Court did not fully consider and weigh the question of
4 percentage variances.

5 But more than that, I think we must go to the concepts
6 behind structuring of districts to see why comparisons between
7 States are of little and perhaps no value.

8 There are various factors: the total population of
9 the State; the population distribution in the State. Are there
10 dense urban areas? How many dense urban areas? How are they
11 in relation to rural areas? The number of counties, large or
12 small; the size of the counties. Are they easily movable? The
13 location of the counties, as in the particular plan, are they
14 so located that they may be shifted from one district to the
15 other. In other words, the total geographic relationship of
16 dense, large counties to the rural and sparsely populated coun-
17 ties.

18 Now, in considering these factors, as I illustrated
19 before, Missouri is in an ideal situation. We are at the ex-
20 treme of having our two densely populated areas in two corners
21 of the State and in the entire mass of the State we have these
22 115 counties to be divided roughly 20 to a Congressional Dis-
23 trict.

24 Now how does this relate, just for illustration --
25 and I do not cite these examples to argue the comparisons

1 specifically, but two examples which illustrate why the problem
2 could well be different in other States.

3 Let us take first New York. New York, with 17 million
4 population, as opposed to Missouri's 4 million, with 41 Congress-
5 sional Districts, has only 62 counties. This means as a matter
6 of actual fact in the maps before this Court in the case to
7 follow, that the Congressional Districts in no case have more
8 than four or five counties to a district, so your building
9 blocks were large and the flexibility was very limited.

10 So you might well argue that the percentage is signi-
11 ficant in that State but they have no significance when you
12 discuss the Missouri situation.

13 The same thing, to a different extent, is true in
14 Gong versus Kirk in Florida. Florida had 12 Congressional Dis-
15 tricts, but instead of Missouri's 115 counties, it has 67 and
16 the distribution there was such that in six districts only
17 three counties were involved, one district four counties, and
18 in four districts it rose to nine or ten, and in only one dis-
19 trict did it rise to the level of the flexibility of Missouri,
20 which has -- in that case they consolidated 23 counties.

21 So it seems to me that we come back to the fact that
22 percentages simply are not meaningful. The test should be a
23 good-faith effort to be the best that can be done and we submit
24 that in Missouri the Legislature failed by a long shot.

25 Q Mr. Achtenberg, fully understanding your position

1 that percentage comparisons, per se, are not very meaningful,
2 let me call your attention again to the table on page 55 of
3 the appellants' brief on the merits, which indicates, as you
4 agreed, that Missouri seems to be the eleventh best State in
5 the Union from the point of view of percentage deviation.

6 I notice here that in the legend on the bottom, it
7 indicates that two asterisks means that the data has been
8 verified by court opinion, and I notice that that is true of
9 the following States that have larger deviations than Missouri:
10 Mississippi, Montana, Florida, Alabama, Illinois, Kansas, New
11 Jersey and New Hampshire; that the data has been verified by
12 court opinion.

13 Would it be accurate or inaccurate to infer from that
14 that those have had court approval?

15 A Well, I certainly can't speak with specific
16 knowledge of each of those cases. I certainly gather that the
17 courts reviewed the question. In no case were those matters
18 before this Court. If I am correct --

19 Q Well, in the Florida case we agreed.

20 A Yes, the Florida case; yes. Other than that, I
21 would simply say that the issues are different in each case,
22 the geographic, the geo-political arrangements of the States
23 were different. Perhaps there were factors in some of those
24 cases where justifiable variations were obtained for reasons
25 not existing in the Missouri situation.

1 Q Yes, but my explicit question was, when it says
2 here that the data has been verified by court opinion, does that
3 mean that those plans have been approved by court decision? You
4 don't know the answer to that?

5 A No, sir; I would assume that that does so indi-
6 cate.

7 I would now like to go to the question raised by the
8 appellants with regard to what they view as the peculiar nature
9 of the Eighth Congressional District.

10 I would first point out that there was virtually no
11 evidence before the Court that the Legislature considered the
12 student population, transient population, or military population.
13 The only testimony was that of two of the Representatives, who
14 stated that they saw this as a factor.

15 The fact is, there are no statistics for this Court,
16 there were no statistics before the Lower Court, as to what the
17 situation is in any of the other nine Congressional Districts.
18 I would like to speak to that point.

19 They speak of the State University in the Eighth, but
20 in the Fourth, the adjoining district, at the opposite end of
21 the scale, there is Central Missouri State College, a State
22 College, there are the schools in Kansas City, there are, as
23 throughout the State of Missouri, numerous sectarian colleges.

24 On the question of the military establishment at Ft.
25 Leonard Wood in the Fourth District, again at the opposite end

1 of the scale, there is Richards Gebaur, an Army base, there is
2 Whiteman Air Base, and again throughout the State, if there
3 were tables, we would find that there are these situations in
4 various districts of the State. Certainly in each of the rural
5 districts there is a State College. There is the osteopathic
6 college in one of the districts. There are innumerable -- in
7 the Midwest tradition -- small colleges. There are colleges
8 throughout the State.

9 Without a statistical analysis of this, it seems to me
10 it is completely without meaning to argue that there was some
11 legitimate consideration given to the Eighth Congressional Dis-
12 trict. It simply isn't so.

13 The same argument, it seems to me, applies with regard
14 to the question of population trends. We just really don't know.
15 First of all, there is no evidence in this case. Second of
16 all, the fact is I think we don't know. The statistics are
17 not adequate. They are rough. We have some ideas, but our
18 ideas also indicate that there is growth in the Eighth and
19 there is growth throughout the State. However that may affect
20 this situation, the evidence does not exist in this case.

21 Q Can you, without too much trouble, indicate
22 what were the lines of the Eighth District before this redis-
23 tricting? Was Jefferson County in the same district?

24 A Frankly, I cannot, sir. I think Jefferson was.
25 I am not sure of that.

1 The gentleman indicates that is correct, but I don't
2 have the line of the district.

3 Q There is no map anywhere in these papers, is
4 there, that shows district lines before the redistricting?

5 A I think not.

6 Does any other counsel know?

7 In 257 Fed. Supp. I am told that it does appear.

8 I believe I am correct in this, however: that the
9 neck or the tail, which extends into St. Louis County, is a new
10 innovation which picks up substantial urban population to throw
11 into this central Missouri district.

12 Q Are there any improper motives that you ascribe
13 to the Legislature in making these apportionments.

14 A Well, I certainly would have to be bound by the
15 record and by the statements of the appellants' counsel. The
16 statistics before the Court indicate a favoring of the rural
17 area versus the city areas. Testimony of counsel indicates
18 that there were -- and I think the testimony of the legis-
19 lators -- when they speak of "legislative considerations," there
20 can only be two things they are talking about: They are either
21 talking about personal considerations, keeping a particular
22 Representative or Congressman within his own district; or the
23 other alternative is favoring the district from a political,
24 from a partisan political standpoint.

25 So when all the legislators testified, and when the

1 appellants argued about legislative compromise, they are talk-
2 ing about one or both of these things. It can't be anything
3 else. They aren't talking about geographic or map-drawing
4 adjustments; they are talking about the political considerations,
5 which we feel are irrelevant and are not constitutionally
6 justified --

7 Q What is the make-up of the present Congressional
8 delegation from the State of Missouri -- 10 Members of the
9 House of Representatives?

10 A Nine and one.

11 Q Nine Democrats and one Republican. It used to
12 be eight and two.

13 A Right.

14 Q Until last November or, rather, until last week.

15 A That is correct.

16 If the Court please, it seems to the appellees in this
17 matter that in weighing this case, there is a consideration
18 that should be considered.

19 The appellants talked about a flood of cases coming
20 before the Court. It seems to me that if a flood must come,
21 it must flow. However, it is certainly debatable what causes
22 the flood. We think it may well be that creating a safety zone
23 a haven of refuge by establishing a de minimis, or a reasonable
24 figure, will establish a zone within which the legislatures,
25 based upon their past history, will then seek to gain their

1 partisan political considerations, as a result of which perhaps
2 more cases will come before this Court.

3 We think that the Court would do well to stand on its
4 present standards, which is simply that of approaching practic-
5 able equality by population.

6 I would like to summarize by quoting from Reinhold
7 Neibuhr, who said "The vision of a just society is an impos-
8 sible one which can be approximated only by those who do not
9 regard it as impossible. Perhaps mathematical equality may be
10 impossible, but equality of a voter's rights will only be
11 achieved when those charged with the task seek equality and do
12 not view it as impossible."

13 Thank you.

14 (Whereupon, at 12:50 p.m. the oral argument in the
15 above-entitled matter was concluded.)
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