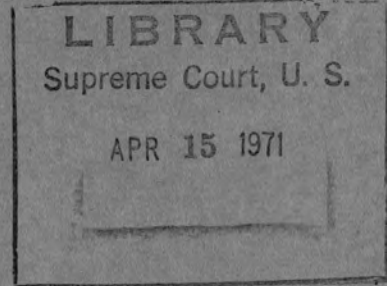


Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

Docket No. 548

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:
HERBERT L. ELY, INDIVIDUALLY AND AS :
CHAIRMAN OF THE DEMOOCRATIC PARTY OF :
ARIZONA, :
:
Appellant :
:
vs. :
:
GARY PETER KLAHR, et al., :
:
Appellee :
:
----- X

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SUPREME COURT, U.S.
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Place Washington, D. C.

Date March 23, 1971

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C O N T E N T S

ARGUMENT OF:

PAGE:

Philip J. Shea, Esq.
On Behalf of Appellant

4

John M. McGowan, Esq.
On Behalf of Appellees

19

REBUTTAL ARGUMENT OF:

Philip J. Shea, Esq.
On Behalf of Appellant

29

1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1970

3 -----
4 HERBERT L. ELY, INDIVIDUALLY AND AS
5 CHAIRMAN OF THE DEMOCRATIC PARTY OF
6 ARIZONA,

7 Appellant

8 vs.

9 No. 548

10 GARY PETER KLAHR, ET AL.,

11 Appellee

12 Washington, D.C.

13 Tuesday, March 23, 1971
14 -----

15 The above entitled matter came on for discussion
16 at 11: 13 a. m.

17 BEFORE:

18 WARREN E. BURGER, Chief Justice
19 HUGO L. BLACK, Associate Justice
20 WILLIAM O. DOUGLAS, Associate Justice
21 JOHN M. HARLAN, Associate Justice
22 WILLIAM J. BRENNAN, JR., Associate Justice
23 POTTER STEWART, Associate Justice
24 BYRON R. WHITE, Associate Justice
25 THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

1 APPEARANCES:

2 PHILIP J. SHEA, ESQ.
3 Phoenix, Arizona
4 Counsel for Appellant

5 JOHN M. MCGOWAN, II, ESQ.
6 Special Assistant Attorney General
7 of Arizona
8 Phoenix, Arizona
9 Counsel for Appellees

10 *****

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1 because of poor people and certain minorities don't register
2 as much as other people, as much as the affluent.

3 It is particularly so in Arizona. The northeastern
4 part of the State of Arizona which is one sixth of a very
5 large state, contains the highest concentration of Indians
6 of any area in the United States.

7 There are about 70,000 American Indians, Navajos and
8 Hopis and some Apaches. The average sized district, legislative
9 district in Arizona is 54,000 people. The 70,000 Indians in
10 northeastern Arizona are still, under this reapportionment plan,
11 dominated by their white neighbors to the South.

12 In South Phoenix, which is a very poor area, that is
13 mostly poor black, poor Mexican-American, poor white, and the
14 legislative district in South Phoenix, and there is just one,
15 there are several thousand people in an area in Northeastern
16 Phoenix, an area which is all white, an area which is affluent,
17 there are 27 thousand people. More than twice as many people
18 are in south Phoenix in a district as in northeastern Phoenix.

19 Now this discrimination of course is invidious, of
20 course is horrible, and so we complain that the Court committed
21 error, clearly abused its discretion, by refusing to enjoin
22 it. Voter registration as the basis of apportionment in Ari-
23 zona has a long history, as a matter of fact, it's the only
24 way we've ever apportioned a legislature.

25 At least the lower House. Beginning with the adoption

1 of the Arizona Constitution in 1913, which was the basis of
2 which was the original statement of the apportionment arrange-
3 ment.

4 The lower House, the House of Representatives is
5 apportioned on the basis of voter registration. The upper
6 House, the State Senate, was then apportioned on the basis of
7 county representation. Two members from each county.

8 Now this suit was filed by Gary Peter Klahr, then
9 a third-year law student in April of 1964. The law at that
10 time seemed quite clear. This Court had seen to make a simple
11 flat and direct statement that there should be one man one vote.

12 Nevertheless, the Court did not act on the complaint,
13 did not hold hearings on it until more than a year and a half
14 later. It was waiting patiently for the legislation to do the
15 job, for the reason that I'm sure the Attorney General is going
16 to say here, today, that the legislature should be given an
17 opportunity to remedy the wrong.

18 The legislature, for more than a year after the
19 suit was filed enacted something called Senate Bill 11, which
20 provided for a terribly apportioned State Senate and didn't
21 deal whatever with the terribly malapportioned House of
22 Representatives.

23 After a hearing on that Bill, the Court by its de-
24 cree, and it was the first decree issued in this case, the de-
25 cree of February 22, 1966, held that the constitutional arrange-

1 ment of both houses was unconstitutional, that is, the Ari-
2 zona Constitutional arrangement was unconstitutional under the
3 U.S. 14th Amendment.

4 And also that Senate Bill 11, was unconstitutional
5 and went on to impose a court plan, what it, in its decree
6 called a "temporary plan" a temporary provisional plan.

7 That was based on voter registration. At least, it
8 was based on voter registration in the urbah areas of Phoenix
9 and Tucson. And outside of the Counties including Phoenix
10 and Tucson, the rural counties, apportionment was based on 1966
11 county census following, or respecting county lines.

12 Now the malapportionment resulting from the use of
13 this system, that is to say, voter registration in the cities,
14 and the respecting county lines in the rural areas was gross.

15 There were deviations from plus 16 percent to
16 minus 6 percent. And that's just in the county areas. There is
17 now way of computing how much more gross malapportionment was
18 under that plan in the urban areas where registration was --- .

19 Nonetheless, this temporary provisional plan, so-call
20 called was used in 1966 and again in 1968. The legislature
21 still had failed to act in a valid way. The legislature did
22 try its hand again in 1967 and it was declared uncondtitutitional.
23 And then it came back in 1969.

24 Now the arguments, the principle argument on the
25 ~~THE~~ Respondent is not that the plan that's in effect, the new

1 temporary provisional plan, not that it's gonstitutional.

2 It's grossly malapportioned. It's a gross case of
3 malapportionment. The argument ihere is that well, the Court
4 ordered this plan be used in hhe elections of November, 1970,
5 and therefore it looses its sting after that.

6 On the reason that we came here to complain was,
7 that history does not show that the malapportionment plan
8 looses its sting the day after the election, and that it goes
9 away.

10 The decree of February 22, 1966 set up a plan which
11 was used not only in 1966, but in 1968. And why isn't some-
12 thing done? The fact is that the Court insists on sitting
13 back and waiting for the legislature to act, whēbh is very
14 nice. And they should give them a reasonable chance, but 7
15 years is far too long.

16 Q Incidentally, is the legislature the
17 same, now?

18 A Yes, it is.

19 Q And does it have any terminal date on the
20 session?

21 A No, I think they sit until they finish
22 their work, and I believe, Mr. McGowan is close to the sit-
23 uation, I think they have in mind a special session later on.

24 Q Well didn't the Court say here that if the
25 legislature didn't act by November1,1971 that---

1 A Yes.

2 Q That the Court would act?

3 A Yes.

4 Q What does that mean? You don't think
5 that means anything, is that it?

6 A It means that they'll open the doors to
7 us after November of 1971.

8 Q the Court will.

9 A Yes. Until then the doors are closed to
10 us.

11 Q With the 1970 figures there is going
12 to have to be a new plan anyway---

13 A Well, there is---

14 Q Either the Court or the legislature is
15 going to reapportion the state.

16 A There has to be a new plan, anyway. Right.

17 Q So what does this build up to, besides---

18 A We're set to decide where is whether this
19 Court---

20 Q You agree with everything the District
21 Court did, I mean on the issues, on the merits.

22 A Well, its opinion, but I don't agree
23 with what it did.

24 Q I understand but --- voter registration
25 that the major populations --- in your brief---

1 A Yes.

2 Q And on the other substantive issues you
3 agree with the District Court.

4 A Yes, I do.

5 Q And the only thing is that you would rather
6 have had something else happen for purposes of the election
7 as now gone by?

8 A I'd rather have something else happen now.

9 Q Well something else, but---

10 A A reapportionment plan, right away.

11 Q By the Court?

12 A By the Court. That's the only way we're
13 going to get it.

14 Q This Court?

15 A No. By the three judge court sitting
16 in Phoenix.

17 Q It said it's going to do that if the
18 legislature doesn't act by November 1st, of this year, on
19 the basis of the 1970 census figures.

20 A What it said, I believe, was that if the
21 legislature fails to act validly by November 1, 1971, any party
22 may petition for further relief. And that's not to say, I don't
23 believe that if the Court is going to impose itself the
24 constitutional plan---

25 Q Has sit stuck to the plan yet? Have your

1 clients---

2 A Yes.

3 Q ---instructed, based on 1970 figures?

4 A No. But if they open the door to us we'll
5 have one in a jiffy. Of course. We had one last year, i n
6 April of 1970. We had a plan based on population.

7 Q Well, have you yet built one on the 1970
8 figures.

9 A No, we haven't.

10 Q And if you did, would you go to the
11 Court and say here's a plan based on tehe 1970 figures, give
12 us a hearing on it, what would happen?

13 A Well, we---

14 Q Before November 1971.

15 A We take if from the opinion of the Court
16 we take the Court at its word, that it won't hear us before
17 November 1971. That's what we really want to do. We want to
18 get the figures and put them on a census map and get a
19 fair apportionment plan and have the Court order it, and have
20 that become the law of the state until such time as the legis-
21 alture does as good or a better job.

22 Q Well the state didn't prosecute here, did
23 it?

24 A No.

25 Q So that it is apparently satisfied with the

1 way the District Court decided things on the substantive issue.

2 A Yes. I take it, Mr. Justice White, that
3 they agree---

4 Q Well the legislature followed that decision
5 isn't about to apportion based on registration figures, for
6 example.

7 A Well, the legislature had again history
8 gives us no basis for being sanguine about what the legis-
9 alature is going to do.

10 Q But here you have an outstanding judgement
11 that says that, opinion says that voter registration figures
12 aren't an accurate basis for ---.

13 A Well, we had, Baker against Carr, we
14 even had Wells and Rockefeller and all the rest. We know what
15 the truth is, we know what the law is, we've always known it.
16 Yet the legislature, time and time again, exhibits the
17 stubborn refusal to follow the law.

18 Q Well, I suppose if they do, well you can
19 attack that plan. But right now there's no issue between you
20 and the state on voter registration.

21 A No, there is no issue as to what should
22 be done. We all know what the law is.

23 Q Good. And no issue on any of these sub-
24 stantive issues.

25 A That's right. What you call substantive,

1 yes. The question is---

2 Q I gather really the only issue you're
3 presenting to us is that the Court has waited long enough
4 for the legislature to act, it won't do it, and the Court
5 has got to cact and you want us to tell the Court you fashion
6 a plan, now, and make it effective. That's what you want
7 us to do.

8 A I wish I could have said it as well.
9 That is exactly what I want, yes sir.

10 Q You press that notwithstanding the
11 Courts explicit statement that it will act on November 1st
12 if the legislature has not acted?

13 A Again, Mr. Chief Justice, the Court said
14 that we may then petition, btubut the reason that we're
15 upset is that the Court had in April of 1070 had all the opop-
16 ulation figures, had the best population figures around, had
17 a plan before it. We could have had population in the 1970
18 elections, we could have had a fair plan in 1970, and we're
19 not so confident now.

20 First of all we're very doubtful that a malapportion-
21 ment legislature is going to reapportion itself so that its
22 very leadership is decimated. We can't really expect that.
23 It hasn't happened in the past and we can't expect it again.
24 And we can't expect the Court, we're not terribly optimistic
25 about the Court fashioning prompt relief when we come to our

1 hearing in 1972 after filing our petition on November 1 and
2 November 2, we can't be so optimistic that the Court would
3 then presented with another population plan that isn't going
4 to do anything different than it did in April of 1970.

5 Q Your position is that you're unhappy with
6 the legislature and you're unhappy with the three judge court.
7 And you want us to do it.

8 A No, Mr. Justice Marshall, I don't want
9 you to reapportion the State, I want you to tell the Court
10 below to hear us right away on the population plan. And to
11 order it ---

12 Q Now we're down to whether you get a hear-
13 ing before the Court next week or in November.

14 A Exactly.

15 Q Is that where we are?

16 A Exactly.

17 Q What's the magic in that?

18 A Well---

19 Q When do you elect your legislature?

20 A In November, even numbered years.

21 Q Even numbered years, so your next election
22 is 1972, is that tit?

23 A It will coincide with the Presidential
24 election.

25 Q And your fear is that there won't be a

1 plan which will be applicable to the 1972 election, is that
2 it?

3 A Yes. The indications are that there will
4 not.

5 Q And the waiting until November would for
6 the Court to do something won't be soon enough?

7 A Well, first of all. There is a double
8 edged question. First of all, there is the time and secondly,
9 there is the fact that the Court has not said that it would
10 impose a plan.

11 So what we'd like is for this Court to open the doors
12 right away, and when you open the doors, if a constitutional
13 plan is submitted to you, based on population, impose it.

14 Now if no one can do it, tell them to run at large,
15 and everyone will do it. Everyone will get together then.

16 Nobody wants that.

17 Q How long have you been trying to get that
18 done?

19 A Well, as I said, the complaint was filed,
20 what done, particularly, Mr. Justice Black? To get a con-
21 stitutional plan?

22 Q Yes.

23 A Well---

24 Q How long have you been waiting?

25 A Well the complaint was filed in April of

1 1964.

2 Q 1964?

3 A Yes, so it's a 7 year case now. It's again
4 one of the reasons why we're not terribly optimistic about
5 what's going to happen in the next few months, because we don't
6 feel the people have shown the will to go ahead and to do
7 what they're just reluctant to do.

8 Q You mean the Courts?

9 A The Courts and the legislature. The
10 Courts have been too indulgent, and too patient, we beleive,
11 with the legislature, we have no reason to think that the
12 legislature is going to all of a sudden have some inner
13 resurection and get religion. It hasn't in the pase, and
14 the legislature is still as malapportioned as ever. And it
15 seems amazing since I've been in this the sense of territory
16 that the legislators have.

17 You know, it's like animals. They develop a sense
18 of territory and the territory is the area from which they
19 were elected.

20 And they'll go kicking and screaming before they
21 change it. And that is particularly true when you have a leg-
22 islature that we now have, with a conrrol by the majority
23 party, from these people that are from northeast Phoenix or
24 that you know, they have 27,-00 people and when they start
25 reapportioning half of them have to go. Or a good number of them

1 have to go. I can't really quite see the legislature, it's
2 been my experience in the past, they don't like to do that.

3 So we have no optimism whatever that the legis-
4 lature is going to do the right thing, and we don't
5 have any optimism that the Court is going to say well do it
6 or run at large, or bring us a plan so that we can do some-
7 thing, and we'll order it in effect.

8 So for this reason we're seeking the order of this
9 Court to order the three judge court to open its doors to
10 us right away to any party right away and to impose a plan,
11 if it's constitutional.

12 Q Who were the judges?

13 A The judges were Ninth Circuit Judge
14 Gilbert (Jetberg), Tucson District Court Judge James A. Walsh,
15 and Phoenix District Court Judge Walter (Kregg).

16 Q Do you want us to put a time limit on the
17 --- ?

18 A NO, Mr. Justice Marshall, I don't think
19 that we need to have a time limit. I think it would---

20 Q would it be all right if we say that it
21 must be done by November 1?

22 A Well, if the Court is required to open its
23 doors to us, it would be done well before then.

24 Q Well you say the Court has been waiting
25 7 years and it doesn't look like it's ever going to move, what

1 makes you think it's going to move quick now? What you really
2 want us to do is lay down guidelines and tell the court how
3 to handle its business.

4 A Well the Court---

5 Q Right? Right?

6 A To an extent. The term guidelines, Mr.
7 Justice Marshall can be used -- because you see the District
8 Court by its decree of May 19, 1970, filed an opinion in the
9 thing which set guidelines, which are very enlightened. It
10 set them for the legislature.

11 But it refused to make any specific orders to what
12 would happen. As to what should happen.

13 Q As I understand it really, what you want
14 it to have the Court change its platitude into an order.

15 A Exactly, Mr. Justice Black.

16 Q Mr. Shea, if the Court adopted a plan
17 now based on the 1970 census figures, if the Court
18 heard you and the Court adopted your plan, and put it into
19 effect, and then the legislature had a special session and
20 adopted its own plan, I suppose it would supercede the District
21 Courts plan.

22 A Yes, I think that---

23 Q What have you really gained? You wouldn't
24 think the legislature would not attempt its own plan?

25 A If the Court made one, and then the legis-

1 lature could only get its plan approved if it enacted one just
2 as good or better, and it would do so.

3 Q I know, but there might be all sorts of
4 choices that could be made about how to construct a consti-
5 tutional plan.

6 A I think that Mr. Justice White, really,
7 on the basis of experience, again, that these nice decisions
8 are going to be made by the legislature when the next legis-
9 lature, right after a legislature is elected on the basis of
10 a properly apportioned plan.

11 But you're not going to have a nice constitutional
12 plan come out of a terribly malapportioned legislature. I
13 don't think it's going to be until after the election of
14 1972 that we get a legislative plan that cuts the mustard.

15 And then only if we have reapportionment before
16 1972. That's all I have.

17 Q Thank you, Mr. Shea. Mr. McGowan?

18 ARGUMENT OF JOHN M. MCGOWAN, II, ESQ.

19 ON BEHALF OF APPELLEES

20 MR. MCGOWAN: Mr. Chief Justice and may it please
21 the Court.

22 I would like to briefly review for the Court some
23 of the history of this case. As Mr. Shea properly stated, it
24 was filed in April 1964. No action was taken in the legis-
25 lature because at that time, the legislature was in a journalment.

1 They did not meet again until 65. And at that time
2 they made some passing attempts at legislation. Then in
3 a special session in October of 65 it passed, one house passed
4 a bill, the Senate passed a Bill. That was then before the
5 Court in the hearings that we had in November of 1965 and
6 lest there be a feeling that the present majority was the maj-
7 ority then, the Senate was elected in 1964 by two Republicans
8 and 26 Democrats.

9 They had 35 Republicans and 45 Democrats in the
10 House. That was in the old Senate, before reapportionment.
11 In 1965 we had a three day hearing before then Circuit Judge
12 Court, the Judge Walsh, and --- . And in February of 1966
13 the decree was issued.

14 And the parties were told to agree on the two
15 populace counties for the division, the --- county, and the
16 agreement was in effect reached, and the Court changed a few
17 precincts, and the agreement was reached between, in effect,
18 the parties, I mean the political parties. At that time ---
19 between Mr. (Klower) and the governor was at that time the
20 Democratic governor and the legislature.

21 The decree established the fact that we had a ---
22 districts in the state, and each senatorial district had 2
23 house members. In the, and the counties were kept together as
24 units except in the 2 major counties, and there they were sub-
25 divided by a form that the Court approved. That the Court in

1 effect suggested and it was bringing the 1960 census figures
2 up to date by a ratio of the voter registration in the county
3 to the precinct involved. Because in Arizona rapid growth
4 patterns, if we used census tracts, which if you go to read
5 the census tracts, they say up to a telephone pole, in effect,
6 over a creek, and down to an old mining camp.

7 There is no description in the sense that we use
8 in any other legal works, in dividing census tracts.

9 So we used precincts in the 1966 version. In the
10 election of 1966, in the Senate, there were 16 Republicans
11 elected, and 14 democrats, 33 Republicans in the House, and 27
12 Democrats. For the first time in history the Republican party
13 had a majority in either house, or both houses.

14 So I say that to you for this one reason. That the
15 present leadership of the House and Senate are the beneficiaries
16 of reapportionment. If it was not for reapportionment they
17 would still be in the minority.

18 And not only do they act in good faith in an attempt
19 to reapportion, it is to their own enlightened self-interest.
20 Because they would not be there without reapportionment. In
21 1967 there was a special session in which another attempt was
22 made to have a legislative enacted reapportionment to replace
23 the Court decree. That special session was in the spring, in
24 May of 1967.

25 At that time, the matter was referred to the people.

1 OUR constitution says that 5 percent of the voters may refer
2 to the people anybill. No bill becomes a law for 90 days.

3 So prior to its effective date, this was referred
4 to the people by 5 percent of the elected. It was moved to
5 the ballot in 1968. The people approved it in 1968, and we
6 hadda hearing in January of 1969 in which the Court struck
7 down house bill when it was called because it did not follow
8 it -- registration figures only, because in the mean time,
9 Kirkpartick and the Rockefeller case had come up.

10 At the time of the first decree in 1966, the
11 Court was laboring under the thought, as Mr. Frank reminded
12 them in our hearing last spring, of the so-called Cellar
13 amendment, which was then pending in the Congress, that we
14 could have a 15 percent variation in figures. That followed
15 this courts decision in Kirkpartick of course is no longer
16 the case.

17 The, in 19, in the hearing we had last April, on the
18 present plan in which they were elected, the --- witness, Mr.
19 (Krogenfeld) who had testified beforethe ad hoc House and Sen-
20 ate Committee testified that the census tracts would not be
21 available until August of 1971. That is on page 168 of the
22 transcript.

23 Q I gather then, Mr. McGowan, the legislature
24 is not presently doing anything about it.

25 A No, Mr. Justice.

1 Q And Arizona's situation is that of having
2 no appconstitutional apportionment plan at all.

3 A That's correct,

4 Q Is that right?

5 A That's correct, Your Honor.

6 Q Do you think that the legislature is under
7 some judicial compulsion?

8 A Yes, sir.

9 Q What---

10 A By November 1, sir.

11 Q Where do you find that?

12 A In the decree of the Court---

13 Q I read on page 113 that the Court assumed
14 that the legislature will, by November 1, 1970, enact the
15 valid plan.

16 A Court having been advised of detailed pop-
17 ulation figures by the state of Arizona will be available from
18 the official 1970 census by the summer of 1971, assumes that
19 the legislature will by November 1 ---

20 Q ---compulsion?

21 A Well, we think it is, Your Honor.

22 Q It says that failure of the legislature to
23 do so any party may apply to the Court. That just leaves
24 it open for the continuation, does it not?

25 A Well, sir, it's the states position is that

1 we have a deadline and we will so instruct the legislature,
2 that they have a deadline of having a bill ready for us to
3 offer the Court by November 1. We have told the leadership
4 of the House and the Senate that and that is the theory in
5 which the state had operated.

6 Q Do you get any more optimistic prediction
7 of when these 1970 figures will be available?

8 A Well, no, sir. Mr. Justice Brennan, the
9 figures are still they say now that possibly in June but Mr.
10 (Krogenfeld)'s figures as in the trial August of 1971 because
11 they have to break them down by census tracts and census
12 tracts in populace areas means by blocks. And so we cannot
13 get them on tape that's what everything now operates on,
14 until August of 1971.

15 Q But there is some suggestion that they
16 may in fact be available---

17 A Early.

18 Q ---by June?

19 A Yes, sir. But only a suggestion.

20 Now the witness---

21 Q The legislature now, will it be in con-
22 tinuous session between now and November?

23 A No, sir. Mr. Justice, Brennan. It will not.
24 It anticipates being over by Eastertide this year.

25 Q By over, do you mean---

1 A For the regular session.

2 Q Yes.

3 A and if they call -- sir?

4 Q This would have to be a special session?

5 A Yes, sir. It would be called into special

6 session for this by the governor, yes sir.

7 Q Can it be, unless the governor calls it?

8 A Well there is a procedure that the House

9 and Senate, but the governor will call immediately --- session

10 on taxes, so special sessions do not hold any fear there.

11 It's---

12 Q Mr. McGowan?

13 A yes, sir.

14 Q --- the census figures computed in Arizona

15 or is this nationwide?

16 A It is nationwide, Mr. Justice White, but

17 it's particular to Arizona in this effect, that we only go

18 by blocks, as Mr. (Krogenfeld) testified in the two populace

19 counties. Our smaller counties do not have them except in great

20 in effect, mining districts.

21 Q I see.

22 A So they will not be too helpful even then.

23 Q ---the census figures were available in the

24 southern areas.

25 A They are, by counties.

1 But not by census tracts,---

2 Q Well is there any reason, I'm asking
3 for information, why do you have to base the reapportionment
4 plan on figures by the census tracts?

5 A Because---

6 Q There are figures available by county, for
7 example.

8 A Because, Mr. Justice Brennan, the 70 almost
9 80 percent of our population resides in 2 big counties. And
10 if we don't know, that's Mr. Shea's principle complaint, with
11 the present system, is he says that we have used the wrong
12 formula for allocation internally in the big counties.

13 We use what the Court used in 1966, we put the
14 1968 registration on a formula and put them to the actual
15 1960 census.

16 Q Do I understand under the opinion below,
17 you can no longer construct a reapportionment plan on the
18 basis of registered voters. You'll have to do it on population.
19 won't you?

20 A That's correct, Your Honor.

21 Q And you can't do it on population by larger
22 areas than census tracts?

23 A No, sir, we have no way of knowing where
24 the people are. The difficulty of the last decade---

25 Q But you now have the figures for each

1 county.

2 A Yes, sir.

3 Q The population of each county.

4 A Yes, sir.

5 Q But you have single member districts that
6 are less than a county, I take it?

7 A Yes, sir. In 52 percent of Arizona reside
8 in the large counties. Which is one half of the Senatorial dis-
9 tricts.

10 Q Do you have multi-member districts there?

11 A No, sir. We have multi-member for the
12 House, single member for the Senate.

13 Q So you do need on the single member dis-
14 tricts, even if you had county wide multi-member districts,
15 you would still need for the House---

16 A Yes, sir.

17 Q You would still need to split them up for
18 --- ?

19 A Yes, sir. We have to, in 1960, one of the
20 areas of our county that has now 30,000 people didn't even
21 exist. That's Sun City. It was a cottonfield. And so that's
22 why we had to use the Court itself in 1966 used the projected
23 registration to the 1960 census.

24 The legislature and the governor --- sought direction,
25 because it's the leadership of the House and Senate they were

1 attorneys and they asked us to ask an advisory opinion which
2 of course the Court cannot give us.

3 They have made every effort to blindly follow the
4 direction of the Court, and they stand now ready to do. But
5 they are now up there on the floor, they cannot do anything
6 until the census tracts come out this summer.

7 It's as the Court in its, we had 200 runs of the
8 computer to effect this present system. Every district was
9 less than 1 percent deviation. Which no other state in the
10 Union can brag about. We had every district, all of our 30 dis-
11 tricts had less than 1 percent, the maximum of 8.7 deviation,
12 we have done our best to comply with the Court's directive,
13 and now we await the coming of the census tracts go forward
14 and further comply. Thank you.

15 Q What reason have you to think that legis-
16 latures being what they are they would do anything different
17 in the hereafter than they have done now?

18 A Because, Mr. Justice Black, the present
19 legislature are the beneficiaries of the reapportionment plan.
20 Before the reapportionment plan, the present majority would
21 never have been there. Because we had 2 from each county, and
22 Maricopa County with 700,000 people had 2 Senators. Now we
23 have 15, so it's to their own self interest to maintain the
24 fair, equitable, lawful reapportionment.

25 Q You got a new set of vested political inter-

1 ests, that's what you're saying---

2 A Yes, sir.

3 REBUTTAL ARGUMENT OF PHILIP J. SHEA, ESQ.

4 ON BEHALF OF APPELLANT

5 MR. SHEA: I'd like to respond briefly, if I may,
6 to a couple of points. The first one is critically important.

7 That is the availability of the figures, because
8 that has so much to do with timing. It is said that we now
9 have the population of 1970, the population figures by county.
10 Well that is to say that the 1970 population figures by
11 county is published in a little pamphlet that you buy for
12 35 cents. It doesn't mean it's the only figures available.

13 It said that this summer, possibly in June, the
14 other figures, the more complete figures, whcih we all agree
15 are necessary, the census tract figures, are available on
16 tapes.

17 Well, it you call this number here, of the U.S. Census
18 Bureau, in Washington, D,C, and they'll say well, we don't
19 have them on tapes and we don't have them on our brochure
20 that costs 35 cents, but they're there. You see they're
21 there if anybody had the will to dig them out and find out these
22 things.

23 Q Well I know, but will they be given the
24 official imprimatur if you were to go today, and ask for
25 them and they would say go ahead and look at the book? Take them

1 off? Will they certify that those are the official 1970 figures?

2 A I don't know if there is any process of
3 impromatur certification, at any stage. All I'm saying is that
4 they're available.

5 Q Ordinarily aren't these done on the basis
6 of some officially certified population figures, isn't that
7 the way you base these reapportionment plans?

8 A I don't know, Mr. Justice Brennan.

9 Q I thought they were. I thought most of the
10 cases we've had here have referred to census figures which
11 I thought were officially certified figures.

12 A Well, I don't know if they're officially
13 certified, and then perhaps now and if they have not been---

14 Q For example if you have, as you asked the
15 District Court were required to open the door, you wanted to
16 bring in a plan based on the 1970 figures, what would you
17 bring in? Where would you get the basic figures?

18 A I'd get them from the United States
19 Department of the Bureau of the Census in Washington, D.C.

20 Q You get the figures then in August they put
21 out a new set of figures they'd have to reapportion again.
22 There are only one set of figures that have any bearing in the
23 Court and the Census Bureau --- certify. It has a gold seal
24 on it, am I right?

25 A I'm frankly not familiar with the process

1 of the certification of the figures.

2 Q Would you say, Mr. Shea, I gather you
3 do not share Mr. McGowan's optimism at all on the changes that
4 have occurred in the legislature up to now, and their likli-
5 hood to accomplish this objective in a special session which
6 he assures us will be held. You don't share that feeling?

7 A Mr. McGowan and I are in complete dis-
8 agreement.

9 Q Why?

10 A Because my experience is that a legisla-
11 ture does not reapportion itself so as to decimate its leader-
12 ship. And that's what's going to have to happen.

13 Q Well, the last reapportionment created a
14 new leadership and as Justice Harlan suggested a new set of
15 interests --- do you agree with that?

16 A Yes, I do. But, now that those new set of
17 figures are going to have to disappear. Because they all can't
18 get returned if the right thing is done. That's the problem
19 with temporizing with unconstitutional plans.

20 Q You don't think that --- suggestion of the
21 three judge court is going to have any impact on the legis-
22 lature?

23 A No. It's true

24 Q It's true that the Court did not order,
25 but the states obviously, according to Mr. McGowan's represen-

1 tation has treated the courts --- suggestion and as though
2 it had been an order, commanded, it.

3 A Yes.

4 Q Have they?

5 A I'll take his word for it. In other
6 words; the leaders sit around in a room and they say, well
7 you know the Court said by November 1 ---

8 Q Have they acted?

9 A No. He says that they intend to act before
10 November 1, 1971 because they regard it as some kind of a
11 moral time limit.

12 Q But he also ties that time on to the
13 availability of the figures, does he not?

14 A Right, and that's what I dispute, too.

15 Q Certainly -- I do not read this as a
16 dilatory action, but as a representation made to this Court by
17 a responsible Counsel, that these figures will be available
18 by June, perhaps, but within 60 days thereafter and that
19 the legislature will be in a special session. You challenge
20 that?

21 A No, I don't, sir.

22 Q Do you believe that he can make good ---
23 as to what the legislature will do?

24 A Well, he makes the statement in all good
25 faith, and he is a man who is close to the leadership and I'm

1 sure he's accurately reporting what he advises them and what
2 they say they will do. I have no doubt that they'll get
3 some figures and go into a special session, but I have every
4 doubt in the world that they're going to, as I say, decimate
5 their leadership.

6 Q I think then that --- have to be tried
7 out again in the court.

8 A We're going to go back to Court, I have no
9 doubt about it. And when we go back to Court it will be 1972
10 and then they'll say it's too late to appeal again, and then
11 9 years will pass, so I think that what we'd like to do is
12 have it straightened out now.

13 Q Thank you, Mr. Shea, thank you, Mr. McGowan,
14 the case is submitted.

15
16 (Whereupon at 11:50 a.m argument in the
17 above entitled matter was concluded.)
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