

Supreme Court of the United States

OCTOBER TERM, 1970

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In the Matter of:

Docket No. 71

.....
SAMUEL J. ABATE, ET AL.

Petitioners

vs.

PAUL F. MUNDT, ET AL.,

Respondents.
.....

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TABLE OF CONTENTS

ORAL ARGUMENT OF:

P A G E

Frank P. Barone, Esq.

on behalf of Petitioner Abate

3

Doris F. Ulman, Esq.

on behalf of Petitioners Molof, et al.

12

J. Martin Cornell, Esq.

on behalf of Respondents

24

Paul H. Rivet, Esq.

on behalf of Petitioner Molof, et al.

53

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

SAMUEL J. ABATE, ET AL.,

Petitioners

VS

PAUL F. MUNDT, ET AL.,

Respondents

No. 71

The above-entitled matter came on for argument at
10:05 o'clock a.m. on Thursday, November 19, 1970.

BEFORE:

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

APPEARANCES:

FRANK P. BARONE, ESQ.
664 South Main Street
Spring Valley, New York 10977
Attorney for Petitioner

MRS. DORIS F. ULMAN, ESQ.
50 Pine Brook Road
Spring Valley, New York 10977
Attorney for Petitioners June Molof, et al.

1 J. MARTIN CORNELL, ESQ.
2 14 South Main Street
3 New City, New York 10956
4 Attorney for Respondents

5 PAUL H. RIVET, ESQ.
6 35 Orangeburg Road
7 Orangeburg, New York 10962
8 Attorney for Petitioners O'Sullivan, et al.
9 in rebuttal
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11
12
13
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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will now hear argument in the matter of Abate and others versus Mundt and others, Number 71.

ORAL ARGUMENT BY FRANK P. BARONE, ESQ.

ON BEHALF OF PETITIONER ABATE

MR. BARONE: Mr. Chief Justice and may it please the Court: Rockland County is located in the New York City Metropolitan area, approximately 30 miles from New York City.

Until a decade ago it was a very small suburban community; that is until the development of the New York State throughway, whereupon it experienced rapid, if not phenomenal growth. It consists of five towns and has been traditionally governed by a five-man board of supervisors, each supervisor being elected by one of the towns comprising the county, without regard to population.

In 1964 this Court rendered a historic decision in the case of Reynolds against Sims and in 1965 a resident of Rockland County commenced an action in the New York State Supreme Court to compel the Rockland County Board of Supervisors to reapportion themselves in a manner more consistent with that decision.

The New York State Supreme Court referred that matter to the United States District Court for the Southern District of New York and as a result, in 1966 the Board of

1 Supervisors of the County of Rockland were directed to re-
2 apportion the County of Rockland in accordance with the man-
3 dates of this Court and the 14th Amendment of the United
4 States Constitution.

5 The District Court further directed that a plan
6 of reapportionment be placed upon the ballot for the general
7 election of November 1966 for referendum. This plan was
8 rejected, as were two subsequent plans.

9 In 1968, the taxpayers' action was commenced by
10 Samuel J. Abate, one of the Petitioners herein, to have the
11 County of Rockland reapportion itself in accordance with the
12 constitutional mandates of this Honorable Court. After several
13 motions and hearings, the Respondents herein were directed to
14 serve an answer.

15 Respondents simultaneously moved in the New York
16 State Supreme Court the usummary judgment requesting that the
17 Court direct implementation of a local law providing for
18 weighted voting without referendum. The plan for weighted
19 voting was rejected by the court and the Respondents herein
20 were directed to present to the court a proposed plan of re-
21 apportionment with all deliberate speed.

22 The Board of Supervisors had, previous to this point,
23 appointed a subcommittee of the Charter Commission and the
24 Charter Commission -- the Subcommittee of the Charter Commission
25 recommended to the board a single member district plan which

1 was rejected by the board. The board subsequently had recom-
2 mended to it a multi-member district plan by this subcommittee
3 of the Charter Commission and that multi-member district plan
4 was presented to the court.

5 The Petitioners herein objected to the proposed
6 multi-member district plan on several grounds and further
7 sought to submit for the court's approval a single-member dis-
8 trict plan which was considered to be more in keeping with the
9 decisions of this Honorable Court.

10 Such presentation was not permitted by the New York
11 State Supreme Court and the Court approved the multi-member
12 district plan submitted by the Board of Supervisors by the
13 Respondents herein.

14 Appeals were taken from the Appellate Division of
15 the SEcond Department in the State of New York and the decision
16 of the lower court was affirmed with the dissent by the late
17 Justice Beldock. A subsequent appeal was taken to the New York
18 State Court of Appeals where again the lower court's decision
19 was affirmed with a dissent by Chief Judge Fuld.

20 Subsequently, permission for certiorari was granted
21 by this Honorable Court.

22 There are three petitioners in this proceeding and by
23 special permission of this Court those three have been granted
24 permission to appear today and orderly argue this cause.

25 I should like to tell the Court that there will be no

1 repetition of argument by counsel in order to save the time of
2 this Court. We sincerely believe that this is the only fashion
3 in which this matter could be properly laid before this Court.
4 I have been chosen to make the opening statement and so I will
5 give you some of the history of this matter and will also out-
6 line to you some of the arguments that counsel will make.

7 Counsel will argue that the multi-member district
8 plan does not meet the requirements of equal representation of
9 the 14th Amendment of the Constitution of the United States, as
10 such requirements have been mandated by this Court.

11 Counsel will show that the Respondents have failed
12 to make a good faith effort which is required; that a multi-
13 member district plan is unconstitutional if its district lines
14 are static but its population is subject to change; that a
15 single-member district plan does meet the requirements of the
16 one-man, one-vote doctrine and that the standards of equal
17 representation as mandated by this Court apply equally to all
18 levels of government and that multi-member district in the
19 County of Rockland cannot possibly meet these standards.

20 According to the --

21 Q It is your theory, as I understand it, that
22 it's just absolutely impossible for any multi-member district
23 plan to meet what you submit are the constitutional requirements;
24 is that correct?

25 A Yes, that's true, Mr. Justice.

1 Our position is that every decision of this Court
2 has been consistent. Every decision of this Court, in spite
3 of the Reynolds decision which indicated that certain de
4 minimis situation were unavoidable in certain situations, that
5 regardless of that the requirement is that there must be an
6 absolute de minimis and if one plan can achieve a -- if you
7 will, a more minimal population variation, that is the plan
8 which must be accepted.

9 Q In other words, the -- I'm looking now at
10 page 4 of the brief for Petitioners Molof and others, which as
11 I understand it, cuts out the present plan and indicates the
12 population of each one of the districts and insofar, unless you
13 begin cutting representatives in half or something, this is
14 the best that can be done with the multi-member plan.

15 A That is correct, sir.

16 Q And you say that's insufficient?

17 A Yes, sir. We say that a more minimal popula-
18 tion balance or disparity can be achieved by use of the single-
19 member district plan.

20 Q You're not tacking(?) multi-member districts
21 as such, then?

22 A No, sir. Multi-member districts -- single-
23 member districts have all been approved as being constitution-
24 ally proper; it is simply a matter of meeting the requirements
25 of the de minimis rule set forth in Reynolds, which must be

1 adhered to and the plan which best adheres to that must be the
2 plan that is adopted in order to meet the requirements of the
3 one-man, one-vote doctrine.

4 Q While you are interrupted here now, Mr.
5 Barone, is my calculation correct that the difference per
6 capita population per legislator, is from the maximum to the
7 minimum only 598, in round figures, 600 variation? It is the
8 lowest being 11,577 per legislator --

9 A Yes.

10 Q --and the highest being 12,175.

11 A No; the highest would be 13,000, Your Honor,
12 in Orangetown; yes.

13 Q So that it's a little over 600 variation from
14 the minimum?

15 A Yes.

16 Q Well, now, how fast, how rapid is the popula-
17 tion change in a given district?

18 A Sir, the 1969 Census, Special Census figures
19 which were used for this calculation, have since been super-
20 ceded by the 1970 Census figures, which I do not have. I
21 believe that Counsel for Respondents has these figures and will
22 undoubtedly bring them before the Court. However, the popula-
23 tion's variance, the change in population, I respectfully sub-
24 mit, will in fact, not make any difference in the argument that
25 Petitioners make, since the population variance can bring the

1 difference to a point higher or lower, as the population in-
2 creases.

3 So that we must deal, I believe, in this matter, and
4 carefully point this out, we must deal with the two basic re-
5 quirements that I believe this court has mandated in the
6 choosing of a reapportionment plan and that is that the plan
7 was determined after a good faith effort; and secondly, that
8 it achieves the minimal population disparity possible. And if
9 Your Honor please, with the 13,000 down to the 11,000, creating
10 an underrepresentation in Orangetown of 7.1 percent and an
11 over-representation in Clarkstown of 4.8 percent, the entire
12 disparity would be 11.9 percent, which we believe to be a
13 population variance not in keeping with the requirements of
14 this Court in its decision.

15 Q Is this dynamic growth that you are describing,
16 continuing; are the projections that it will continue?

17 A Yes.

18 Q 80 some thousand increase in nine years?

19 A Yes; it's even increasing at a more phenomenal
20 rate than that, Your Honor, and I don't have the exact figures,
21 but I am sure that the Counsel will indicate that the growth
22 is not only phenomenal, but yearly-the rate increases yearly.

23 Q Well, then a plan that was acceptable at the
24 beginning of one year might not be acceptable by the end of
25 that calendar year; isn't that true?

1 A Yes; it certainly might not be acceptable at
2 the end of that calendar year. That is essentially the reason
3 we are here because we believe that a single-member district
4 which does not have static lines, as our multi-member district
5 does, can best be moved or be flexible enough so that in deter-
6 mining representation the ability to determint that represen-
7 tation is inherent in the plan, which it is not in the multi-
8 member district plan which utilizes town lines as the boundar-
9 ies for the districts.

10 As I say, the disparity in the County of Rockland
11 at the present moment is 11.9. The cases decided by this Court
12 have clearly indicated that a good faith effort must be made.
13 Secondly, that if there is going to be a population variance, a
14 disparity, that there must be some articulate reasons set forth
15 to show that the policy in the state clearly indicates that
16 such a population variance will be tolerated, by reason of
17 state policy.

18 There has been no state policy clearly enunciated by
19 the State of New York, permitting such population variances.
20 It is respectfully submitted that the decisions in this Court,
21 as I said a moment ago, are absolutely consisten and that
22 popluation variances would not be tolerated, whatever the plan,
23 unless it can be shown that there is a clear, rational state
24 policy and further that a good faith effort has been made.

25 The inescapable conclusion must be that whenever it

1 is shown that another plan of reapportionment can reduce the
2 population balance, it must be adopted in lieu of the existing
3 plan no matter how minimal the population deviation is under
4 the existing plan.

5 Q Well, what is the attitude, Mr. Barone, of
6 your clients, as to the Molof plan?

7 A I beg your pardon, sir? The attitude to
8 which plan? I'm sorry, I didn't hear you.

9 Q Is it Molof?

10 A The Molof petitioners: June Molof, Mindy Baker,
11 et cetera, entered this matter as intervenors in the lower
12 court and we substantially take the same position that the only
13 plan which is workable in the County of Rockland is a single-
14 member district plan.

15 Q Well, that isn't precisely my question. My
16 question is: would your clients, in the posture of the case
17 today, support the Molof plan?

18 A Yes.

19 Q All right; even though it has a variation of
20 3.5 percent?

21 A Yes, sir. Since the Molof plan, as you refer
22 to it, Your Honor, has a population deviation of less than the
23 11.9 presently in existence.

24 Q Well, do you really mean that, if it were 7.6
25 would you be supporting it?

1 A I think, Your Honor, we must support a plan
2 which has been made on a good faith -- a good faith effort has
3 been made in its implementation and secondly, that the
4 population variance must be the minimum that can possibly be
5 had under the circumstances. And a multi-member district plan
6 using town lines as static boundaries cannot possibly be
7 flexible enough to move with the phenomenal growth which this
8 county expects and which it has had.

9 As I pointed out a moment ago, the County of Rock-
10 land had appointed a subcommittee -- had appointed a Charter
11 Commission and there was a subcommittee and that subcommittee
12 did suggest a single-member plan. That was rejected by the
13 Board of Supervisors. The Board of Supervisors, in lieu of
14 that, implemented the second recommendation, which is a multi-
15 member district plan, utilizing town lines as static boundar-
16 ies, thereby and the fact, incidentally, that the supervisors
17 would automatically be members of the county legislature,
18 thereby perpetuating themselves.

19 Counsel -- my red light has come on and other
20 counsel in this matter for Petitioners will carry this point
21 forward.

22 Thank you, gentlemen.

23 MR. CHIEF JUSTICE BURGER: Mrs. Uhlman.

24 ORAL ARGUMENT BY DORIS F. ULMAN, ESQ.

25 ON BEHALF OF PETITIONERS MOLOF, ET AL.

1 MRS. ULMAN: May it please the Court, if I may, I'd
2 like to clarify a few points that have just been made. In
3 answer to Mr. Justice Stewart's question about multi-member
4 district for Rockland County: we believe that we -- it is
5 possible to have multi-member districts in Rockland County,
6 provided --

7 Q But not using town lines?

8 A Not using town lines and not using static
9 boundaries.

10 Q Right.

11 A Secondly --

12 Q Could you define just what you mean by a
13 "static" boundary?

14 A A static boundary is one which is not subject
15 to change; in other words, the reasons for the present plan are
16 maintain town boundaries because of the inter-relationship be-
17 tween the county and town governments.

18 Now, because of this, the boundary lines could not
19 change; they would have to remain the same throughout the whole
20 plan; otherwise you would not have your county representation
21 -- your town representation on the county level, and what we
22 mean by static boundaries is that these boundary lines can
23 never change whereas the population within each town will be
24 changing. And incidentally, the projected figures for 1980, I
25 believe are about 300,000 for the county.

1 Mr. Cornell, in his brief, projected, I believe, to
2 270,000 by 1985.

3 Q If a plan plans representation that is sub-
4 stantially representative of the people and here the variation
5 is a very modest amounts, it seems to me, per capita, why
6 should you become so concerned about how that's achieved, the
7 way the lines are, whether they're static or if they change
8 every two years, or whatever?

9 A Well, we have, in our brief, set forth the
10 percentage deviations that would have occurred if this plan
11 had been in effect since 1950, and there were six Federal
12 Census's taken between 1950 and 1969. Of those six years, four
13 during four of those years we would have reached a deviation
14 in excess of 20 percent. As a matter of fact, as recently as
15 1966 we would have had a deviation of 26 percent, between the
16 highest and the lowest population per legislator, under the
17 present multi-member plan.

18 Carried to its extreme, if we follow the Planning
19 Board projections for 1980, of 200,000 we will have a devia-
20 tion of 52 percent and if I may refer to a footnote in the
21 dissent of Chief Judge Fuld of the Court of Appeals, he set
22 an example where we could have a difference of 99.96 percent.
23 I'm not saying it's going to go to 99 percent, but I do say
24 that at any given point, and the Census is taken regularly in
25 Rockland right now, because of its excessive growth, that at

1 any point the deviation could be 6 percent; it could be 50
2 percent and we do not believe that a plan that has this kind
3 of possibility for huge disparities, should be accepted as a
4 permanent kind of reapportionment because, truthfully, if
5 next year it goes up to 25 percent, we will be in court again.

6 And we do not think that this is a good basis, a
7 sound basis for a permanent apportionment plan.

8 We're not saying that all multi-member district
9 plans are unconstitutional --

10 Q Mrs. Ulman, I take it that one of your points
11 says that in drawing a multi-member district, the number of
12 representatives that that multi-member district is entitled to
13 is not just a multiple as a base population figure?

14 A Yes, it is; that's how we get our discrepan-
15 cies.

16 Q But, I thought one of your points was that,
17 in this case, that a multi-member district is really over-
18 represented, that is assigned representatives -- the number of
19 representatives which is just a pure, sheer multiple of the
20 base population figure?

21 A No; I don't think we presented that argument
22 here. What we did say was that because we are faced with the
23 base population being the size of the smallest town -- in this
24 case, Stoney Point -- each town being a multiple of that num-
25 ber, brings us to our deviation. In other words --

1 Q Let's assume that a multi-member district
2 here, system came out with a one percent deviation --

3 A Right.

4 Q -- or a half of one percent deviation, and
5 is as close to equality as you could possibly get; you would
6 accept it?

7 A No; we cannot accept it as a permanent plan.

8 Q Well --

9 A For two reasons: number one, static boundar-
10 ies; number two: we do not believe a good faith effort has
11 been made.

12 Q But you don't attack the idea of assigning to
13 a multi-member district, that number of representatives which
14 is just a multiple of the base figure?

15 A No, we do not. We only object as it applies
16 to Rockland County.

17 Q You don't buy the notion, then, that a multi-
18 member district is over-represented --

19 A No, I do not.

20 Q -- if that's --

21 A No, I do not.

22 Q We do not feel that the County of Rockland
23 has made a good faith effort to achieve the precise mathemati-
24 cal quality which was implied by this Court in Kirkpatrick
25 against Preisler.

1 Q Mrs. Ulman, do I understand that even if you
2 had virtually precise mathematical equality, using town lines,
3 even if that were achieved, that you would still argue that
4 this would not satisfy the mathematical requirements?

5 A We're not arguing this case on the basis of
6 numbers; we're arguing --

7 Q Then if you're not, then in fact you are,
8 essentially attacking the legitimacy of any reapportionment
9 plan that uses fixed town lines as a basis for reapportion-
10 ment representation.

11 A That's correct.

12 Q Well, how can you do that consistently with
13 the suggestion in Reynolds in Sims that it is appropriate to
14 use town and county lines, et cetera?

15 A For the fact that Reynolds said that popula-
16 tion should be the controlling factor in deciding a reappor-
17 tionment plan.

18 Q My hypothetical was: that you would come out
19 with --

20 A Yes --for this year it would be an equal plan;
21 next year it might not, which is the -- you know, this is the
22 basis of our argument, that whereas today we may have a 0.5
23 percent deviation and it might pass muster under the plan,
24 under cases. However --

25 Q You're saying that it would be impossible to

1 maintain equality if certain things happen by just assigning
2 different numbers of representatives to the districts, unless
3 you went to factional voting?

4 A Yes.

5 Q Has factional voting been rejected here, as
6 far as you know?

7 A As I know, it has -- we've had weighted
8 voting, which was rejected by the lower court, as it applies to
9 Rockland and we have never had any other plan --

10 Q Do you accept weighted voting or factional
11 voting --

12 A No; I do not.

13 Q Or do you reject it?

14 A I reject it.

15 Q Why?

16 A I believe that for Rockland, because of its
17 size, because of its growth, a single-member plan is the only
18 member plan that can be valid, representative and practical.

19 Q You mean every district should have at least
20 one vote, not a half a vote?

21 A Yes; yes.

22 Q Although they would have a man there to --

23 A Well, they would have half a man there --

24 Q Well, they would have a man there with what
25 votes he could have, plus his half vote.

1 A Yes; and actually --

2 Q Well, in the District we're getting some that
3 don't have any votes.

4 A I beg your pardon?

5 Q We're getting someone in the Congress who
6 doesn't have any vote.

7 A We do not feel that Rockland is capable of
8 having equal representation without single-member districts.

9 Q Mrs. Ulman, you made mention a minute ago
10 about a permanent plan. Is any reapportionment plan permanent?

11 A I believe so. I believe that it is permanent
12 subject to changing of district lines as population changes.
13 Even a single-member plan will not -- won't have the same dis-
14 tricts year after year. However, because there are not static
15 lines, you can shift the line so as to take care of the popula-
16 tion increase --

17 Another advantage of single-member districts, of
18 course, is that the legislature would not become unwieldly
19 as it can, under this multi-member plan. Assuming that the
20 population at Stoney Point, for example, were to be made
21 fairly static, and the population at Ramapo, which is our
22 largest town, continues to increase, we can have as many as
23 20, 25, even more legislators in a county the size of Rockland.
24 And we don't think that would make a very workable situation.
25 As a matter of fact, as a practical matter, many people feel

1 that the present 18 that we have is not very workable; it's
2 too large.

3 Basically, we don't think that the county made a
4 good faith effort because they accepted as their basic premise
5 the fact that there should be town representation on the county
6 level. Because of that we have the town boundary lines.

7 The towns and the county, of course, do have inter-
8 related functions; however, the plan itself does not provide
9 for town representation on the county level. The people who
10 are elected within the towns have no relationship whatsoever
11 to town government. They are, in effect, representing the
12 people within their districts, as a single-member district
13 legislature would. The only one who would have

14 The only one who would have liaison, of course, is
15 the town supervisor, who may be elected to the county legis-
16 lature.

17 We hold one vote out of 18 and he really does not
18 have the ability to influence legislation with that one vote,
19 with regard to his town.

20 Furthermore, we feel that there is no need for town
21 representation at a county level. Rockland is no longer a
22 small rural community; it has grown from 137,000 in 1950 to, I
23 believe, 228,000 in 1970.

24 It has -- it offers services in the area of air and
25 water pollution health, mental health, welfare, health and so

1 on.

2 Q What is the -- if you can say without men-
3 tioning names of people, I'm not interested in that -- what are
4 the basic political forces at work here that are in this con-
5 troversy? Is it the matter -- is it something like Stony
6 Point; it can join with Parkstown and Orangetown to get a
7 majority or is there --

8 A Originally --

9 Q Is there some sort of maneuvering here --

10 A Originally when this plan was put forth it
11 was created by the board supervisors, which was the five-man
12 board and the county legislature, who were also supervisors in
13 their own towns.

14 The purpose of the plan, as I see it, was to main-
15 tain their individual parochial interests within the county
16 legislature. They wanted to retain some kind of town control
17 for their own political needs, whatever they were. As it turns
18 out, the supervisor in one of the towns, Ramapo, for example,
19 does not even sit on the county legislature; he never ran for
20 the county legislature.

21 So, for them to accept the county's arguments in
22 favor of town representation, Ramapo, the most obvious town,
23 has no representation on the county level.

24 Q Well, you've got six --

25 A You have six representatives; yes, from

1 Ramapo, representing the people within the district of Ramapo.
2 There is no liaison between the town government, however, and
3 the county government.

4 In other words, no one on the town level knows
5 what's going on in the county. And no one in the county will
6 carry forward any basic plans that have been proposed by the
7 town government. This is what I mean by no representation at
8 the county level.

9 Q And that's unofficial by the town official.

10 A Right.

11 Q But, as I say, perhaps it's a difficult
12 question to answer and perhaps you prefer not to answer it, but
13 I wondered if there was some sort of leverage or something in
14 the present system that you basically have a political objec-
15 tion to?

16 A In the present system I really couldn't say.
17 I have no --

18 Q You rely, of course, just on fourth grade
19 arithmetic, but I wondered what this controversy is really
20 about.

21 A No. We rely on good faith efforts; we don't
22 believe that the arithmetic is as important as the efforts that
23 have not been made by the county, to maintain equal represen-
24 tation. As I say I'm not concerned that last year it was 11.9
25 percent. This year I believe it's 8 percent. I'm more

1 concerned that the effort of the county to achieve equal
2 representation was not made and I believe that this was man-
3 dated in Kirkpatrick; it follows the -- as nearly as practicable
4 the rule of Wesberry, which was cited by Reynolds in extending
5 the Wesberry Rule to state governments. It was again cited in
6 Avery, relating to county governments and the whole projection,
7 as a matter of fact, was set forth in the recent Hadley case,
8 where Wesberry, Reynolds and Avery were cited.

9 We believe that Kirkpatrick --

10 Q I have the answer to my question; I didn't
11 want you to -- I see your red light is on --

12 A Yes; if I could just answer this question:
13 we believe that the Kirkpatrick -- we believe a good faith
14 effort has to apply to all these cases. Because, if it
15 elucidates Wesberry; it must follow through each of these cases
16 that follow.

17 Thank you.

18 Q Since your proposal, your plan, takes into
19 account -- the basic functions of Congress, other than just
20 compared with just the basic functions of town government --

21 A We feel --

22 Q You seem to treat them as though they are
23 just fungible items; town and county --

24 A Well, if I may say so, the map that we presen-
25 ted to the Court of Appeals -- we presented a single-member

1 district map where we tried to make faith effort at precision,
2 at the same time retaining the cohesiveness of villages and
3 town lines, wherever possible.

4 We believe the interests of the village, for ex-
5 ample, are much more cohesive than the interests of the town,
6 which at this stage of the game most of the larger towns have
7 such varied interests. And we feel that the effort can be made
8 to retain certain boundaries, while at the same time making the
9 effort for equal representation.

10 Thank you very much.

11 MR. CHIEF JUSTICE BURGER: Mr. Cornell.

12 ORAL ARGUMENT BY J. MARTIN CORNELL, ESQ.

13 ON BEHALF OF RESPONDENTS

14 MR. CORNELL: Mr. Chief Justice, and may it please
15 the Court: the only issue involved in this case is the question
16 of numbers. Rockland County is a relatively small county and
17 politically, it's a swing county. It is sometimes Democratic
18 and it's sometimes Republican.

19 The Board of Supervisors, consisting of the five
20 supervisors originally, were the Democratically-controlled
21 board and they devised this plan of reapportionment, and after
22 the last election the board became -- well, new legislative
23 body, became Republican. So that politics really is not in-
24 volved in this case, since it swings back and forth.

25 The original --

1 Q Is there anything like an effort of some
2 reform group or movement to try to get rid of the professional
3 politicians or anything like that?

4 A I don't think that that is in the case at
5 all, Your Honor, because --

6 Q Because tomorrow it's --

7 A That's correct. The original board of
8 supervisors felt that it was important to maintain a voice on
9 the county level of government from the towns, and that's what
10 brought about this type of multi-member district plan and that's
11 really the only thing that's involved here. Also, we felt that
12 there were certain towns, like the smallest town, the town of
13 Stony Point, that were somewhat isolated from the other towns
14 which are larger and they wanted to have a voice of their own.
15 They didn't want to be amalgamated with a larger area and per-
16 haps lose that type of identity which definitely it had over the
17 many years.

18 So, what we're talking about really is numbers here.
19 It is our position that the plan which was devised complies
20 with the rule which is set down in Reynolds versus Sims and
21 applied to local governments in Avery versus Midland County,
22 which requires that the population be substantially equal. Or,
23 in other terms, as was used, "as nearly as practicable" the
24 districts be of equal population.

25 And we feel we have actually met that test. Now, I

1 have set forth in Appendix A-2 of my brief, the complete break-
2 down of how these figures operate and at the present time,
3 based upon the 1969 Census, the population variation which is
4 the largest is in the town of Orangetown, where the deviation
5 is 7.1 percent under-represented and in the town of Clarkstown
6 it's 4.8 percent overrepresented, making a spread of 11.9 per-
7 cent from the smallest to the largest.

8 Now --

9 Q As of 1969, but it was not true as of 1970;
10 is that right?

11 A That's correct. As of 1970, and these figures
12 are not before the Court, because these figures are very recent,
13 the 1970 Census has reduced this population disparity so that
14 the town of Orangetown which did have a 7.1 percent under rep-
15 resentation, now is under-represented by 4.7 percent. The town
16 of Clarkstown, which had a 4.8 percent variation now has a
17 3.2 percent variation. The town of Ramapo has a zero percent
18 deviation; it hits it right on the nose. Haverstraw has a
19 0.8 percent variation at this time and the town of Stoney Point
20 changes from 0.3 percent to 1.1 percent.

21 Now, the spread between the largest and the smallest
22 now is 7.9 percent, so that the deviation between these two
23 -- the smallest and the largest, is 7.1 percent.

24 Now, in terms of absolute population, this amounts
25 to 1,017 people. If you take the town of Orangetown, which has

1 a deviation of 4.7 percent, to bring that into line you would
2 have to shift the lines around some 400 or 500 people which we
3 feel is unrealistic because, in fact, it means that you may
4 have to cut a district line down somebody's backyard or even
5 through an apartment building to pick up that number of people.

6 And I think that one of the factors that's extremely
7 important here is to recognize that we talk about percentage
8 deviations -- you must consider the size of the district which
9 is involved.

10 Now, for example: in Wells versus Rockefeller, in-
11 volving the State of New York, which was approved by this Court
12 in May, the new districting plan on a Congressional level, the
13 average population for the Congressional District in New York
14 which was approved is 409,324. Now, a one percent deviation
15 in the Congressional District would amount to an absolute
16 population of a little over 4,000 people.

17 Now, it's one thing to shift the district lines
18 around to pick up or exclude 4,000 people, but a one percent
19 deviation in Rockland County amounts to 1 percent of the mean
20 population of 12,000, or approximately 121 people. And it's
21 impractical and unrealistic to consider the necessity of shift-
22 ing or moving lines or adjusting legislators to pick up or
23 exclude 121 people to provide for a one percent deviation or
24 more.

25 Therefore, it is our position that you must look at

1 size of the district in relation to an analysis of percentage
2 deviations so that it can be a practical application of the
3 rule.

4 I would also like to point out that the question
5 which was raised in the Hadley case, involving the trustees in
6 the community college, which was not approved by this Court,
7 was a different type of situation. There you had a built-in
8 bias in favor of the smaller districts. There were six trus-
9 tees that were elected and the larger district would only get
10 three trustees if there were from 50 percent to 60 percent
11 of the school enumeration in that case.

12 And this Court said in that case that you were not
13 reaching the question as to whether or not there is equal
14 apportionment of trustees among a limited number of component
15 districts and you stated that he has said before that mathe-
16 matical exactitude is not required, but a plan that does not
17 automatically discriminate in favor of certain districts is.

18 In that case that's exactly what there was. There
19 was a built-in bias and an automatic discrimination against
20 the larger districts. It was a built-in bias in favor of the
21 smaller districts. That problem was not found in this case.

22 In this case we merely have a situation where there
23 are equal member districts, multi-member districts, and there
24 is no built-in bias that's in favor of the smaller or the
25 larger districts.

1 There is reliance by the Petitioners here upon
2 Kirkpatrick versus Preisler and Wells versus Rockefeller.
3 These were both Congressional cases and in the Wells versus
4 Rockefeller case there was a rejection of a maximum population
5 spread between the highest and lowest of approximately 13
6 percent.

7 In the Kirkpatrick case, involving the Congress-
8 ional Districts in Missouri, there was a rejection of a spread
9 of approximately 6 percent between the highest and the lowest.

10 Now, it is our position that you cannot, on a whole-
11 sale basis, take these percentage deviations that may not be
12 acceptable on a Congressional level and transpose them down on
13 the smaller districts where there are smaller populations in-
14 volved.

15 Also, I think the facts in both of those cases are
16 distinguishable. In Wells versus Rockefeller we had a situa-
17 tion where the State of New York admitted that there was an
18 attempt to provide equal population for subdistricts and that
19 the Congressional Districts were then carved out of these
20 regional districts within the state and the record shows that
21 the state admits that there was not a effort, really, to
22 fine comb the district lines on the Congressional level.

23 In the Missouri case there are also indications that
24 number one: there was not a proper census data that was used
25 for determining the district lines. And also there is a clear

1 admission in that case that merely by shifting several counties
2 around that they could have provided for a more equal popula-
3 tion in its Congressional Districts.

4 We don't have that situation in this case at all.
5 The town lines have been used as the district lines and the
6 legislators had been allocated to the towns in accordance with
7 the population. And as I say, the population deviation is
8 extremely minimal and there is no way that you could arrive at
9 a lesser population deviation if you adhere to town lines. This
10 is the only way it can be done.

11 Now, Chief Judge Fuld in the Court of Appeals,
12 dissented and he asked me when I argued that case, off the
13 bench, whether I wasn't concerned about the equal populations
14 changes and whether or not this plan might, depending on how the
15 figures came out subsequently, result in a more substantial
16 deviation. Before I had a chance to answer the question, Judge
17 Vitell said yes, but the figures might get better. And that's
18 exactly what happened here.

19 So, I think that the argument that he relies upon
20 in his dissent has been undercut by what actually has happened
21 here. Any plan, whether it's a single-member district plan or
22 a multi-member district plan, assumes the population changes,
23 whether it be next year or thereafter, there may have to be some
24 adjustment to account for the changes in population. And as a
25 matter of fact, in this case the population figures that resulted

1 in 1970, improved the situation so the population deviation
2 now is as low, as I mentioned before: 7.9 percent.

3 So, I think that the reasoning that Judge Fuld set
4 forth in his dissenting opinion, cannot be upheld, based upon
5 actually what happened.

6 Q Is there a Census count of the population of
7 Rockland County every year?

8 A The -- for purposes of procuring additional
9 state aid on a local level it's frequently advisable, if the
10 population is growing, to have a census taken to determine what
11 the population is. They do it every three years.

12 Q The County itself does it?

13 A No; somebody from the Bureau of Census in
14 Washington.

15 Q Federal Bureau of Census?

16 A Federal Bureau of Census.

17 Q Then I suppose if, three years from now that
18 census showed a great dislocation, a plaintiff could come in and
19 say that the constitution required you now to reapportion?

20 A Precisely, if the population figures show --

21 Q It's true of any plan.

22 A It's true of any plan. It's true of a single-
23 member district plan. You have to redraw district lines and in
24 a multi-member district plan, if you have a problem you might
25 then consider the possibility if there is a substantial deviation

1 of providing for a fractional vote that would be spread among
2 those legislators. This is a possibility but there are a
3 number of things that could be done. But, in any case, if
4 there was a population change and if the deviation was substan-
5 tial, then of course, the then legislature would have to take
6 the necessary steps to rectify that deviation.

7 Q Well, that's inherent in the whole approach
8 to this problem, from a mathematical standpoint; you can't get
9 away from it.

10 A Yes, Your Honor.

11 Q What was the basis for -- was it a judicial
12 rejection of weighted factional voting in this case or was it
13 by the commission or by the people, or both?

14 A The people of Rockland County had two refer-
15 endums: initially they had a referendum on a plan which is
16 almost identical to this plan and they rejected it. About
17 seven months later there was a second referendum that had this
18 plan plus the single-member district plan, which is the plan
19 that the Petitioners are asking for, and the voters rejected
20 both of those.

21 Then the court was asked on a temporary basis to
22 impose a weighted voting plan until a permanent plan could be
23 devised, because the voters kept rejecting everything that was
24 presented to them. The court said "no," that they felt that a
25 weighted voting plan in this county was not feasible, and I

1 agree with them.

2 Q Why is that?

3 A Well, the reason is that Rockland County,
4 if it's analyzed mathematically, with the larger towns, because
5 of their size, would be in the position to nullify any vote or
6 any votes that would be accorded to the smaller towns because
7 it is such a small town.

8 Q That's so under this plan; isn't it?

9 A No, because here you have multi-member dis-
10 tricts --

11 Q But the districts are all in towns.

12 A Yes, but you have 18 bodies on the legisla-
13 ture. If you had one body with six votes --

14 Q I'll put it this way: assume the population
15 changes so that in order to have each town represented, you
16 must have less than one vote assigned to some town. That
17 wouldn't raise the problem you are talking about. Then you
18 would still have eight; would it?

19 A Well, the way to plan to function would be
20 that you would always give one legislator to the smallest town.

21 Q Just with a half a vote or something?

22 A Well, no; actually the way I devised this plan
23 was that the -- you start off by giving the smallest town one
24 representative and then you either divide the population of the
25 smallest town into the others to generate the proper number of

1 legislators for the other towns. So that what fluctuates is
2 the number of legislators.

3 Q I know, but I gather that the argument on the
4 other side was that that technique theoretically could result
5 in a much wider variation if the population didn't change just
6 right.

7 A Yes. If it did, of course, they would have to
8 change the plan.

9 Q Well, or you could -- instead of starting with
10 one full vote you could start with a half a vote.

11 A Correct. In other words, some mechanism
12 would have to be devised to provide for that deviation.

13 I think it's important in this reapportionment case
14 to recognize what's involved here between town and county
15 governments, because this is really the stimulus for this type
16 of plan.

17 In the State of New York county governments in the
18 past have been run by the supervisors who are the chief execu-
19 tive officers in the towns within the county, though there is
20 never any legislative body on the county level that was directly
21 elected. The towns elected a chief executive officer who
22 served on the county board of supervisors and actually in ex
23 officio capacity and would run the county government.

24 Therefore, the towns had a direct voice in the
25 operation of county government.

1 And on the county level, there are a number of
2 functions of county government which can also be performed on
3 the town level and the desirability of having interrelationship
4 between the town and county governments in the opinion of the
5 Board of Supervisors, was to provide for the conduct of
6 business on this countywide basis so that there would be inter-
7 relationship between the operation both of town and county
8 government.

9 For example: there is a large county sewer district
10 in the County of Rockland, which has a sewer plant and sewer
11 line which ties in directly with lateral lines in the town,
12 So that this function of providing sewer service is directly
13 interrelated between town and county government.

14 The county has a civil service department which
15 administers the civil service on the town level. There is a
16 very direct fiscal interrelationship between the town and
17 county government. The towns assess the real property and
18 towns adopt their budget and then the towns transmit the amount
19 of money to be raised by taxes to the county level and the
20 county legislature then levies the tax and directs the town
21 receiver of taxes to collect the taxes and then if the monies
22 are not paid as required it is then sent back to the county to
23 collect the delinquent taxes. So that this is a very direct
24 type of interrelationship between the town and county govern-
25 ment, which has gone on historically in the State of New York.

1 Q Mr. Cornell, may I ask: basically is it your
2 proposition that the Kirkpatrick test applies, but there
3 ought to be a little more play in the joints when you are deal-
4 ing with local and county government? Or is your proposition
5 that where you are dealing with local and county government
6 there ought to be a different test from that which is applied
7 to Congressional Districts?

8 A My position is that the test of substantial
9 equality applies on the local level and that the Equal Pro-
10 tection Clause must apply on the Congressional, State and
11 local levels. But --

12 Q The same test but with a little more latitude?

13 A Precisely.

14 Q When you are dealing with local and county?

15 A Precisely. It's the same test but when you
16 ascertain whether there has been substantial equality or not
17 you must look at the numbers and the figures that you're deal-
18 ing with.

19 Now, for example, in the Kirkpatrick case this Court
20 said the whole thrust of the nearly as practical approach is
21 inconsistent with the adoption of a fixed numerical standard,
22 which excuse population variances without regard to the circum-
23 stances of each case.

24 Q Well, you would say then that when you are
25 dealing with local government the desire to organize on a town

1 ship line basis or town line basis, especially where they
2 have real functions, as in this case, is a rational justifica-
3 tion or excuse for some population variations?

4 A That's right.

5 Q Whereas -- but it might not be enough of an
6 excuse if the variation were 50 percent?

7 A Fifty percent.

8 Q And also it might not be a justification if
9 the town lines were legally really functionally irrelevant to
10 local government?

11 A That is correct, Your Honor. Of course, I am
12 also taking the initial premise here that the population
13 deviations in this case are so minor that there are not sub-
14 stantial deviations to begin with.

15 Q You mean this is based not on the 1970, but on
16 the figures that were actually used?

17 A That's correct; our 1969 or 1970.

18 Q Because of the smallness of the numbers.

19 A Because of the smallness of the numbers in-
20 volved, but in any case, I take the second step and say: if
21 this Court concludes that there is a substantial population
22 deviation here, that there are justifications that have been
23 shown for this variation and that therefore it should be
24 allowed under the test that's been applied.

25 And that was the format that was used in Swann

1 versus Adams, involving Florida and Kilgarlin versus Martin in
2 Texas, where you rejected the arguments there, saying that the
3 population was too large and that there was no acceptable
4 justification which was demonstrated before.

5 Q The town lines might be -- I take it your
6 position would be that the town lines have some real substance
7 in the purpose of local government, that these same variations
8 might not be satisfactorily justified by the town line basis
9 if we were dealing with a Congressional District?

10 A That's correct, Your Honor. I'm saying that
11 a one percent deviation, for example on a Congressional level
12 which involves a shift of about 4,000 people, when you talk
13 about a one percent deviation on a local level, involves a
14 shift of approximately here 121 people, it gets to be a little
15 bit unrealistic --

16 Q Yes, but also the basis of town lines perhaps
17 has less significance with respect to a representative, a
18 Congressman or --

19 A Yes; unquestionably. I think on a Congressional level that the municipal boundary lines are far less
20 significant than they are, for example, in New York, where
21 historically and traditionally there has been this interrelationship
22 between town and county government.
23

24 Now, as a matter of fact, to demonstrate the inter-
25 relationship here: the plan of reapportionment when it was

1 originally devised, provided that the town chief executive
2 officer, who was elected within the town, would be one of the
3 legislators within that town automatically and that he would
4 serve, for example, in the town of Ramapo, which has six
5 legislators, there would be one who would be the supervisor
6 of the town, the chief executive officer, plus the five others,
7 which would provide for a very direct interrelationship so
8 that the chief executive officer of the town would still con-
9 tinue on the county level.

10 The court in New York rejected that and said that
11 the statutes didnot permit that interrelationship. Therefore,
12 the chief executive officer in the town must run separately
13 for that county office.

14 In other words, the chief executive officer in the
15 town can run on the ballot in two places: one, he runs as a
16 legislator and secondly he runs as a town supervisor and as a
17 practical matter in Rockland County today, out of the five
18 towns, four of them have their chief executive officer who
19 serves on a town level and is also elected and serves on the
20 county level, as well. In one of the towns this is not the
21 case, so that this plan has effectively provided for an inter-
22 relationship between town and county government, which was it
23 attempted to do, being also in compliance with the requirements
24 of Reynolds versus Sims.

25 You see, what happens on the local level is that

1 when you apply the rule of one-man, one-vote to a situation
2 like this, it can have the effect, if you set up single-member
3 districts, of slicing apart the interrelationship between town
4 and county government so that you would separate the operation
5 of county government and town government. And it was our
6 intent to comply with the rule, but at the same time provide
7 for this interrelationship. And that's exactly what was done
8 here in Rockland County.

9 The concept of tight mathematical equality, it is
10 our position, is somewhat unrealistic when you are
11 dealing with populations which are shifting constantly from
12 time to time. It's true even in the situation in Rockland
13 County where the census itself is not a scientific ascertain-
14 ment of the number of people involved and also where, in fact,
15 there is a constant growth and a constant shift. So that to
16 provide for a very tight, absolute mathematical equality at
17 any one point in time, seems somewhat illusory because within
18 a few months or a year thereafter it may have shifted or
19 changed so that, in fact, it is not achieving the ultimate
20 goal.

21 The flexibility which is required on the local level
22 here in Rockland County is desirable and it is our position
23 that if a tight mathematical formula is applied on the local
24 level it may create difficulties in other areas where there is
25 an attempt, perhaps, to create regional governments or an

1 amalgamation of governments on a regional basis between some
2 of the cities and the suburbs and that there you may have the
3 necessity for a compact or an understanding between these
4 governments to arrive at a regional type of approach to govern-
5 ment and if you apply the population -- the equal population
6 principle with strict exactitude on the local level this may
7 have the effect of foreclosing the ability to create any type
8 of regional governmental units which I suggest may be some of
9 the solution to the problems which we have had in the cities,
10 in the next decade ahead.

11 I'd like to touch briefly on multi-member districts
12 from the theoretical standpoint. I know that my adversaries
13 have not raised this, but it was raised in the Court of
14 Appeals and Judge Fuld does touch upon this point in his dis-
15 sent. And I think it's in the case and something that I should
16 discuss very briefly.

17 This Court has, of course, upheld multi-member
18 districts on a number of occasions: Fortson versus Dorsey
19 involving Georgia was one of the earlier cases; Burns versus
20 Richardson, involving the State of Hawaii and then there have
21 been a number of affirmances of lower courts involving Wyoming,
22 Arkansas and of course, recently, the State of New Jersey in
23 Jackman versus Bodine which, I think you are familiar with,
24 provided for multi-member districts, as well.

25 It is our position that the use of multi-member

1 districts is a constitutional method of complying with the
2 one-man, one-vote requirement.

3 Q Is there any testimony in connection with
4 this plan in the lower courts?

5 A There is no testimony at all, Your Honor.
6 The plan was devised by the Board of Supervisors and presented
7 to the Court and the Court passed upon it, based upon the
8 format of the plan without any testimony being taken.

9 Q I think that one of the attacks on the multi-
10 member plan in the lower courts was that the strength assigned
11 to a multi-member district shouldn't be just a mere multiple
12 of --

13 A That is correct.

14 Q There weren't any experts or anything called
15 in connection with this?

16 A No, but, Professor Banzhof, who wrote the
17 leading article on this subject, did argue orally for the
18 petitioners in the Court of Appeals in New York, and the Court
19 there had the benefit of his comments before them at that time.

20 Q But there were no counter-mathematics pre-
21 sented?

22 A Not other than what was set forth in oral
23 argument. There was no expert testimony which was taken. Of
24 course in this case there is no problem as there was raised in
25 some of these multi-member district cases and the one which will

1 be coming before this Court involving Indiana, of invidious
2 discrimination. So that was not involved here at all, but the
3 only question that was before the Court of Appeals was: are
4 multi-member districts, per se, bad if you allocate legislators
5 in direct proportion to population, rather than bringing in the
6 factor of the square root of population.

7 Q Have there been any other court cases that
8 involve this same claim?

9 A Yes, there have. The Indiana case involved
10 this question and in the Indiana decision the court, although it
11 had a number of other statutes involved, did touch upon this
12 question of whether multi-member districts are --

13 Q Have there been any others?

14 A The Supreme Court in State of Iowa: Krudenaue
15 versus McCullough(?) struck down a plan which did provide for
16 multi-member districts. This case is not cited in my brief.
17 The concurring opinion by Justice Stewart in that case, touched
18 on the question of multi-member districts and in reading the
19 opinion, I suspect that he was saying, although I'm not clear
20 about this, I suspect that he was saying that multi-member
21 districts were per se, bad.

22 Q Based on the Banzhaf --

23 A Based on the Banzhal theory.

24 Q Any others that were litigated?

25 A Those, the Iowa case and the Indiana case, are

1 the only ones -- of course the New Jersey case: Jackman versus
2 Bodine has been touched on, but there the plan was, of course,
3 approved.

4 Q Would you know any instances where those
5 people who were drafting apportionment plans, either judges or
6 commissions or lawyers or legislators, have gone on the assumption
7 that multi-member districts give the assigned strength
8 on some basis other than a multiple of the base figure?

9 A No, I don't, Your Honor, and I have made
10 inquiries. I have not been able to find any plan that's been
11 drafted or in the contemplation of being drafted which does
12 assign less than a direct proportion of the number of legislators.
13

14 And I think one of the problems here, on this
15 theoretical aspect of the multi-member district, is actually
16 covered by Professor Banzhaf in his Law Review article, which
17 I have in front of me. He says, in his own article, as
18 follows:

19 "No attempt has been made to evaluate all the advantages
20 and disadvantages of multi-member district systems.
21 Furthermore, there is no suggestion that this article presented
22 a realistic picture of the actual operations, which of course
23 were involved, the factors which are not present in these
24 simple mathematical models." And I think the problem with
25 Professor Banzhaf's theory is --

1 Q He doesn't suggest how much of a discount,
2 does he?

3 A No; he does not.

4 Q It's just that there is too much in a single
5 district having several representatives as against some other
6 district having a fewer number or only one?

7 A That's right.

8 Q And somehow you are supposed to discount it.
9 How much?

10 A Well, he uses the square factors. He would
11 say, for example, if I understand his theory correctly, he
12 would say that if you have one district with 10,000 people and
13 if you have another district with 40,000 people, that it would
14 be mathematically improper to allocate one legislator to the
15 small one and four for the larger; that the number of legis-
16 lators that should be allocated to the larger district is the
17 square root of population for two legislators.

18 Q Yes, but that's just something he pulls out
19 of the air.

20 A Well, he --

21 Q What's the justification for it?

22 A Well, he uses a mathematical formula to arrive
23 at it and I'll be quite candid: I'm not sure that I understand
24 it.

25 Q In a way, he really thinks that it's so

1 treacherous that you ought to go to a single-member district?

2 A If you follow his arguments logically it would
3 lead to the conclusion that the only possibility is a single-
4 member district plan or that there would have to be some adjust-
5 ment --

6 Q Well, if his basic premise is right, maybe
7 there is some logic to that.

8 A Well, I think the problem is --

9 Q I say, "if his basic premise is right."

10 A I think the problem is that he does not, in
11 creating the mathematical model, recognize that a legislator,
12 once he is elected from the district, takes into consideration
13 interests of the entire community. He may be affected by party
14 alliances and may be affected by pressure groups; he may be
15 affected by what he thinks is right.

16 Q If you make that assumption do you think
17 Reynolds against Sims would have come out differently?

18 A No, I don't.

19 Q That's interesting.

20 A I think Reynolds versus Sims is really saying
21 that what is required is effective and fair representation and
22 that the ultimate goal and the ultimate aim is to provide for
23 representation by the ultimate constituents on the legislative
24 body. And I think that is the test that should be applied and
25 I think when you get to the mathematical refinements you are

1 moving away from the general premise behind Reynolds versus
2 Sims.

3 Q If you follow the Professor's thesis to its
4 logical conclusion there is something inherently unfair about
5 New York having 70 or whatever number of members in the House
6 of Representatives and Alaska has only one.

7 A Yes.

8 Q There is a geometric progression and the force
9 of influence which New York Congressmen can exercise as compared
10 to Alaska's. I suppose inherent, too, is that because New
11 York is closer to Washington than Alaska, there is some kind
12 of a mathematical factor that gives them a good deal more
13 force here than Alaska can have, per man.

14 A I think if you followed Professor Banzhaf's
15 theory you would have to come to the conclusion that in a
16 multi-member district plan where you have, for example, four
17 legislators, that the four legislators who would be voting on
18 a block vote and that there would not be these other in-
19 fluences involved. This distinguishes the situation from
20 weighted voting.

21 In the State of New York there are approximately
22 18 counties that have weighted voting. There, of course, you
23 are allocating all the votes to one individual and there you
24 would have a situation analogous to block voting in a multi-
25 member district. But, the voting power on a legislative level

1 in a multi-member district, in this case, you have 18 legis-
2 lators, even though five may come from one district, there is
3 absolutely no assurance that you are ever going to get block
4 voting. As a matter of fact, you normally don't, because the
5 political alliances are different and they vote along party
6 lines as opposed to voting necessarily, from, depending upon
7 where they are actually residing.

8 But I think that the use of multi-member districts
9 is a valid method of apportionment and that you cannot say
10 per se, based upon the mathematical models that have been
11 developed, that it is bad.

12 Q Mr. Cornell, not to say whether it's invalid
13 or not, but wouldn't you think that if you had the choice of
14 one person representing you, or four representing you, and
15 one: you wanted something done and two: you wanted to hold
16 somebody responsible for it, wouldn't you be better off with
17 one than four?

18 A Well,--

19 Q I don't think it has a thing to do with this
20 case, but --

21 A This may be true. I think that when talking
22 about, and as a matter of fact, the current opinion in the Iowa
23 case I mentioned before, Judge Stewart discussed the same type
24 of thing. He said, "Isn't there something wrong with one man
25 being able to vote for 13 people and another man being able to

1 only vote for one?"

2 Now, the problem with that theory is the chap who
3 is only voting for 13 people may be in a very large district,
4 so he's only one out of a multitude of other people. So that
5 for him to have 13 legislators or four legislators in relation
6 to the total population of a component district of which he is a
7 part, really is not giving him a better shape than the other
8 chap who has voting for one.

9 Q My second question, Mr. Cornell, about these
10 fixed lines: with regular district lines, how would they be
11 moved in Rockland County? The Commissioners would do it; the
12 county legislature? If you didn't have this fixed boundary?

13 A Well, the county actually, when establishing
14 this plan of reapportionment, appointed a reapportionment com-
15 mission which is an appointed body that is bi-partisan and set
16 up to try to devise the best plan and I am presuming that if
17 subsequent censuses show or if this Court says that this plan
18 is no good, that they would appoint a bi-partisan commission
19 again to come up with a new plan or a better plan or to cause
20 lines that would meet the test that would be laid down here.

21 Q I still am not too sure I understand the
22 sanctity of these town lines.

23 A Well, the -- in New York the interrelationship
24 of town and county government is the thing that the Board of
25 Supervisors is most concerned about. In the past, before

1 reapportionment came in, county government was run by the
2 chief executives of the towns and there is a great deal of
3 interrelationship between these two levels of government.
4 And it was the concern of the Board of Supervisors who devised
5 this plan that they ought to maintain that interrelationship
6 between the two levels of government so that the towns would
7 have a voice in the county government. That's why they used
8 the town lines.

9 Q And that wouldn't apply to any other state,
10 necessarily, unless they could show the same thing.

11 A Precisely; precisely.

12 Q What my Brother Brennan said is that you are
13 really saying that yours is an exceptional situation.

14 A Well, it --

15 Q Are you saying that all counties that have
16 towns in them are in the same category? That's what I'm trying
17 to find out.

18 A No; I'm not saying that. What I'm saying is
19 that in New York where there is a deep relationship between
20 county government and town governments, that adherence to town
21 boundary lines is a justification for some population deviation
22 and this may not be true in other jurisdictions where this is
23 the case.

24 Q Mr. Cornell, are you familiar with a case in
25 your State of New York, involving one of the agencies of the

1 municipal government of the City of New York, involving
2 borough representation in the city?

3 A Yes. Wagner versus Blakey.

4 Q Do you happen to have the citation of that?
5 This Court denied certiorari, if I'm not mistaken.

6 A Yes. That case is cited in the majority
7 opinion in this case below, although I have a feeling that the
8 citation is incorrect because I couldn't find it this morning;
9 but it's in that case, it's a Federal Supp.

10 As a matter of fact, that case is quite interesting
11 because there there was a district -- in the districts there
12 were equal population and then on top of that were two rep-
13 resentatives from the boroughs of the City of New York, and the
14 court held that there was not such a deviation from population
15 there and that the reasons for doing this, because of the in-
16 herent value of the boroughs, was a valid justification for
17 proving --

18 Q Well, in addition to its apportionment represen-
19 tations, each of the boroughs, be it Richmond or Queens, or
20 Manhattan or Kings, each had two representatives?

21 A That is correct. I have forgotten the numbers
22 involved, but you had two from each borough, plus you had
23 others that were represented from single-member districts which
24 were carved out within the City of New York.

25 Q That was a Three-Judge Court case?

1 A I believe it was, Your Honor; yes.

2 Q Did it come here?

3 A Yes.

4 Q And what was the action?

5 A I don't recall, Your Honor.

6 Q The case I am thinking about --

7 A It was denied -- cert was denied; yes, I

8 believe so.

9 Q That's the Blakey case?

10 A Yes; that's correct, Your Honor.

11 I would justlike to say in conclusion that on the

12 local level and in this case, the important factor in my mind

13 is that the implementation of the one-man, one-vote rule has

14 the possible effect of separating town and country government

15 and that the efforts have been made by the Board of Supervisors

16 tomaintin this interrelationship which we feel is justified.

17 And finally, that if the ultimate test is fair and

18 effective representation set forth in Reynolds versus Sims,

19 that one should not look at the equal population principle and

20 the percentage deviations which are found, as the ends, but

21 merely a means to actually arriving at the ultimate goal of

22 fair and effective representation.

23 And the sterile, absolute, tight mathematical

24 analysis of population deviations may, in fact, frustrate the

25 situation and that the use of town boundary lines in this case

1 of course, also avoids the rather practical problems of
2 gerrymandering. That would not occur here is town boundaries
3 are adhered to.

4 Thank you, Your Honors.

5 CHIEF JUSTICE BURGER: Thank you, Mr. Cornell.

6 Mr. Rivet.

7 ORAL ARGUMENT BY PAUL H. RIVET, ESQ.

8 ON BEHALF OF PETITIONERS MOLOF, ET AL.

9 MR. RIVET: Mr. Chief Justice and may it please
10 the Court:

11 I think I will simply comment very briefly on Mr.
12 Cornell's very excellent presentation on the multi-member
13 district. I do not basically disagree with him; I don't think
14 the question here that we have to resolve is whether or not
15 multi-member districts are constitutional per se, at all times.

16 Mr. Banzaf's theory is fascinating, but I don't
17 think it should be or need be in any fashion, controlling, or
18 for that matter, was never submitted by my clients and never
19 contended by my clients below at any point.

20 I think there is something that ought to be brought
21 out about the county and town relationship. Mr. Cornell has
22 put this in the sense we have a -- only an arithmetic question
23 and I think that he is fundamentally in error. I think the
24 question we have here is whether we're going to have a county
25 government that is dominated and run and oriented to the town

1 government or whether we are going to have a county government
2 that is oriented and responsive to the individual voters in
3 Rockland County.

4 And that's the question that we must resolve; not
5 whether there is to be --

6 Q Would you get any more by --

7 A Well, maybe if I simply give you some budget
8 figures you will have an idea of the dimensions that we are
9 talking about.

10 The county legislature on Monday of this week has
11 before it a proposed budget for the year 1971 of \$53 million.
12 The largest town in Rockland County for next year, the town of
13 Ramapo, has a budget of less than \$5 million. Gentlemen, the
14 enormity, the tremendous disparity in the sizes of these
15 governments are the nature of the problems they deal with, is
16 such that we can no longer, in the interest of the very thing
17 that Mr. Cornell has said: in the interest of meeting the
18 growing problems of the 20th Century, have the tail wagging
19 the dog.

20 We have literally had that situation in Rockland
21 County for many years. This Commission that counsel has so
22 well portrayed as having been appointed by the Board of
23 Supervisors; yes, a commission was appointed and its members
24 and its representatives were designated by the supervisors and
25 the proportions were in direct relationship to the town,

1 per se; not the numbers of people in the town. So that the
2 town of Stony Point with 12,000 people, had three votes on that
3 commission and the town of Ramapo with 70,000 people, had three
4 votes.

5 What do we expect from a commission that does not
6 represent the actual population of the communities?

7 Q Well, what's the situation now at Stony Point?

8 A Stony Point still has 12,000 people in it and
9 Ramapo has 75,000 people.

10 Q How many representatives does Stony Point
11 have?

12 A Stony Point has one representative.

13 Q So that what you were worried about before
14 has been cured?

15 A But, I am talking about the good faith effort
16 that was allegedly made by the County of Rockland and the
17 argument has been made that the good faith effort is demon-
18 strated very amply by the fact that we had an impartial com-
19 mission that was appointed to do the job. Well, they did the
20 job all right; they came up with a plan that would maintain the
21 town lines rigidly without any variation.

22 And then I point out that in Fortson, he recognized
23 the right of multi-member districts and he recognized the right
24 to maintain boundaries and very properly so, but within that
25 system there was the ability to move county lines; not the

1 county lines, but the counties within the structure to ensure
2 equality of votes. And at the first premise, and this is the
3 assumption that I'm standing here on, is that my vote is the
4 most important thing; that after that we look at regional
5 problems or we look at governmental problems. I cannot con-
6 ceive how our forebears, in establishing the constitution,
7 could have conceived of anything else than the most important
8 right being the individual vote.

9 Q Mr. Rivet, suppose we take the figures that
10 were projected from '69 to '71 where the 11 percent variation
11 or deviation, was reduced down to about 4 percent.

12 A 7.9, Your Honor, to be specific.

13 Q It was reduced 4, approximately --

14 A That's right.

15 Q That is true.

16 Now, suppose, in 1971, it gets cut in half again
17 and in 1972 there is a one-half of one percent variation. Then
18 would you still have a quarrel with --

19 A I think that you would then have met, ob-
20 viously, the mathematical situation. There is no question
21 about it.

22 Q Is there any other to meet?

23 A I think it is the first one to be met, but I
24 think we must not look at what has happened, because if we look
25 at what has happened, then I think we also have the right to do

1 some conjecturing. Counsel has objected in his brief to
2 speculation as to the future, except that when the future
3 turned out okay because the roll of the dice came out that the
4 population margin went down, fine; okay.

5 But I simply say that all the responsible authori-
6 ties, which includes, by the way, Federal agencies in evalua-
7 ting Rockland County for building projects. I'm involved with
8 an application right now and I know that Rockland County is
9 one of the two counties in the entire State of New York where
10 they say you don't have to make 20-year projections because
11 nobody can make an intelligent 20-year projection in Rockland
12 County.

13 Our growth is burgeoning so greatly, but, Your
14 Honor, there are some realistic limitations on it in the north
15 end of the county which is the base of this plan. Stony
16 Point is something in excess of 50 percent state parkland, the
17 Palisades Interstate Park. Its ability to grow is very
18 severely limited but the county is going to continue to grow
19 and I think that it is not idle speculation to say that the
20 next time around we will have 25 or 35 representatives in this
21 system and it is very possible that as part of the result we
22 may end up with exactly the situation that Chief Judge Fuld in
23 the Court of Appeals said; namely: a 90 percent or an 80 per-
24 cent discrimination.

25 And I don't think anybody will argue that that is a

1 good plan or a good situation to have. And what I'm pleading
2 for is not that you leave the door open for people to come
3 back and sue in the future. My Lord, we've had enough litiga-
4 tion in the courts. Let's try to devise plans to do away with
5 reapportionment and rules that local government can follow
6 that will ensure that we don't have a constant quarrel and
7 constant litigation every time there is a change in census.

8 And I think this plan has within it the invidious
9 invitation to continuing litigation and I mean that not only in
10 Rockland, but I think it will be emulated throughout the State
11 of New York and throughout the country for the very simple
12 reason that it has the duty, from the standpoint of those who
13 are in local government now and who have dominated the struc-
14 ture, the desirability of maintaining their role.

15 Counsel has talked about the rational state policy
16 and the importance of the town and the county supervisors.
17 He didn't mention the fact that even the state law did not
18 write into it the automatic right of the supervisor to sit on
19 this body and yet this county legislature, this county board
20 of supervisors, in endeavoring to preserve itself, not to
21 secure equality of representation, gentlemen, but to preserve
22 itself, put into its local law and when you look into the
23 Appendix, you'll see it, the right to sit -- not because they
24 are elected as a legislator -- but because they are elected as
25 a supervisor.

1 When this was struck down, even in New York -- the
2 lower court struck this down right from the beginning -- but
3 what I'm saying is that you must look at it in terms of what
4 kind of an effort was being made here; not what was corrected
5 by the courts, because we're talking about good faith; we're
6 talking about good faith and we're talking about good faith to
7 a voter and its citizens. Nobody was going to reduce my taxes
8 by the extent that my vote is diminished in the County of
9 Rockland. And yet my voice and my right this year was reduced
10 12 percent or 11.9 percent; next year: 8 percent; next year
11 perhaps 25 percent. And all that I am saying is that my vote
12 should always have the same relationship within the ability of
13 man to achieve it, and I do not believe that that effort has
14 been made here and it is not a question of multi-member dis-
15 tricts or the esoterical ideas of a professor who has written
16 a very fascinating article on the square root of something.

17 I'm not a mathematician; I'm a lawyer, and I'm a
18 voter; I'm interested in government.

19 Judge Stewart, you asked a question this morning at
20 the beginning of our argument, relating to the political
21 structure. May I comment on it?

22 Q I wish you would.

23 A The petitioners here, representing the entire
24 spectrum of the political body, responsible leaders of the
25 Republican Party; responsible leaders of the Democratic Party;

1 public officials, elected -- one of my clients is a councilman
2 in the town of Orangetown, and the Petitioners, Miss June
3 Molof and others, are, essentially, the League of Women
4 Voters of Rockland County.

5 What I am saying is that we are not a group of either
6 do-gooders, or people out to hone an ax. We are all seeking
7 an effort to be able to express ourselves fairly with equality
8 before the body politic. And we have been frustrated in it.

9 Mr. Justice Marshall commented on: isn't it better
10 to have a one-to-one relationship because you know who to look
11 to when you have a problem and you know who to look to when
12 something is not done. So, what is happening now, and we're
13 having a circus in Rockland County, is that we have four and
14 five men representing 40, 50,000 people and it's a dreadful
15 situation. Nobody knows who's responsible for what.

16 And going a step further: I realize that a thousand
17 people may sound like very little. Rockland County, despite
18 my adversary's -- my good friend's brief where he points out
19 that, well, you can't divide an apartment house. Rockland
20 County is not a county of apartment houses; it is a county of
21 residence. And when we talk about a thousand people we're
22 talking about 250 families; 250 homes. That is a very large
23 development.

24 And moving a line involving 100 homes is not a
25 difficult line. It may involve moving two or three streets.

1 We're not talking about running a line down the corridor of
2 an apartment house. There isn't an apartment house in Rockland
3 County that has a thousand people in it; I doubt if there is
4 one in Rockland County that has more than 250 people in it.

5 The issue is not arithmetic. I cannot emphasize
6 that too strongly. Obviously we can't win an argument on
7 arithmetic; I mean because you can play games with these
8 figures from now until tomorrow afternoon at this time and we
9 would never come to a conclusion. And I do not think that the
10 Court wants to set a rule where you say, "Well, you can't have
11 more than one percent; or you can't have more than 3 percent."
12 You must look at the entire picture.

13 In the State of Hawaii you recognized the rigid
14 boundary lines and I think I understand why. Very simply:
15 in the State of Hawaii you have islands divided by open ocean;
16 in some cases 50, 60 miles apart. Obviously you couldn't
17 divide a man across that great a distance.

18 I see my light is on, gentlemen.

19 MR. CHIEF JUSTICE BURGER: Thank you very much, Mr.
20 Rivet.

21 Thank you; the case is submitted.

22 (Whereupon, at 11:35 o'clock a.m., the argument in
23 the above-entitled case was concluded)
24
25