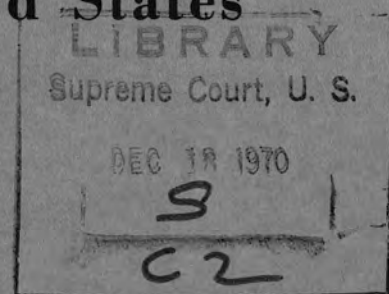


Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

Docket No. 92

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: EDGAR D. WHITCOMB, GOVERNOR :
: OF THE STATE OF INDIANA :
: :
: Appellant, :
: :
: vs. :
: :
: PATRICK CHAVIS, ET AL. :
: :
: Appellees. :
: :
----- X

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Place Washington, D. C.

Date December 8, 1970

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OCTOBER TERM, 1970

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EDGAR D. WHITCOMB, GOVERNOR :
OF THE STATE OF INDIANA, :
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Appellant, :
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vs. : No. 92
:
PATRICK CHAVIS, ET AL., :
:
Appellees. :
:
-----:

Washington, D. C.,
Tuesday, December 8, 1970.

The above-entitled matter came on for argument at
1:57 o'clock p.m.

BEFORE:

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

APPEARANCES:

WILLIAM F. THOMPSON, ESQ.,
Assistant Attorney General
Counsel for Appellant

WILLIAM J. SCOTT, ESQ.,
Attorney General of the State of Illinois
Counsel Amicus Curiae

JAMES MANAHAN, ESQ.,
Counsel for Appellees

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in Whitcomb vs. Chavis, No. 92.

Mr. Attorney General, you may proceed whenever you're ready.

ARGUMENT OF WILLIAM F. THOMPSON, ESQ.,

ON BEHALF OF APPELLANT

MR. THOMPSON: Thank you, Your Honor.

Mr. Chief Justice, Associate Justices of the Supreme Court, may it please the Court, my name is William F. Thompson, and I am Assistant Attorney General for the State of Indiana.

This afternoon I will argue in behalf of the appellants, the Governor of the State of Indiana. I am accompanied this afternoon at counsel table by Theodore L. Sendak, Attorney General for the State of Indiana, and Richard C. Johnson, his Chief Deputy.

In our brief in this case we presented this Court with six issues. This afternoon the state will concentrate its argument on two of those issues. The first issue is whether the Constitution permits or requires that a racial socio-economic group be proportionately represented in the State Legislature by representatives elected from that group.

Secondly, whether the Constitution requires all State legislative districts to be the same size. If time allows, the state will discuss the remaining issues or would

1 be glad to answer any questions this Court may have regarding
2 them.

3 This action began as an action for declaratory and
4 injunctive relief in the District Court. It was brought by
5 Negro residents of Marion County, Indiana. Marion County is
6 one of ninety-two counties in Indiana. The plaintiffs, how-
7 ever, challenged the constitutionality of the nine-county
8 multi-member districting scheme. Marion County provides for
9 the at-large election of 17 representatives to the House and
10 8 Senators to the -- strike that, it is 15 members of the
11 House of Representatives, and 8 members of the Senate.

12 This action does not involve congressional district-
13 ing, is limited solely to state legislative districts. Follow-
14 ing this Court's decision in Baker vs. Carr, Indiana began
15 long-range reapportionment.

16 In 1963 it reapportioned. In 1965 it again reappor-
17 tioned. The 1965 Act was declared unconstitutional by the
18 District Court in the case of Stout vs. Bottorff. That is the
19 first District Court case.

20 A special session of the '65 Legislature was called
21 and they again enacted an apportionment act. That was the
22 apportionment act of 1965, and that is the subject of this
23 litigation.

24 It is interesting to note that one of the plaintiffs
25 in this action was a member of the '65 Legislature that enacted

1 the '65 Act, that he voted for that Act, and that he now
2 attacks that Act.

3 There were six plaintiffs in the court below. One
4 was a resident of White County, another county in Indiana, five
5 of the plaintiffs were residents of Marion County. The District
6 Court found in favor of only one of the plaintiffs from Marion
7 County. Only one plaintiff in this case was found by the
8 District Court to be entitled to relief. That was Mason Bryant.
9 Mason Bryant was a resident of an area within Marion County
10 which the District Court denominated as the Center Township
11 Ghetto. He was a resident of the Center Township Ghetto.

12 The Center Township was one of nine townships in
13 Marion County. It is approximately in the center of the county
14 the other townships are arranged around. The Center Township
15 Ghetto is approximately the northern half of the Center Town-
16 ship. The area designated by the court as the ghetto is pre-
17 dominantly populated by Negroes who are poor and less well
18 educated than the rest of the county.

19 I might point out that the term "ghetto" is a term
20 used by the appellee and by the District Court. The area to
21 which this refers is not regarded in the community as a ghetto.
22 It is not called that in the community. And to a certain ex-
23 tent it is nondescriptive of the area involved.

24 From the rest of the county, the District Court se-
25 lected an area, Washington Township, and compared the number

1 of legislators who were residents of Washington Township to the
2 number of residents who were -- to the number of legislators
3 who were residents of the Center Township Ghetto. In absolute
4 numbers, Washington Township had more Senators than the Center
5 Township Negroes.

6 The court computed ratios and found that Washington
7 Township ratio was greater than the Center Township ratio. On
8 this basis, the District Court declared that the Center Town-
9 ship Negroes were deleted and cancelled out by the nine-county
10 multi-member district.

11 Rather than limit relief to redistricting Marion
12 County, the District Court ordered the reapportionment of the
13 entire state. Although the court appeared to rely upon the
14 straight one-man, one-vote analysis of Reynolds, the true basis
15 for requiring the reapportionment of the entire state was the
16 testimony of John Banzhaf. John Banzhaf is Associate Professor
17 of Law at George Washington University and has written some
18 articles regarding multi-member districts and testified at
19 this trial, at the hearing in this case.

20 He testified that apportionment plan providing for
21 districts of different sizes, a mix system of multi-member
22 districts and single-member districts created inherent inequi-
23 ties and was unconstitutional per se. On this basis and on
24 the basis of political considerations, political factors which
25 the District Court felt existed within the county, the District

1 Court required that when the state reapportioned that all dis-
2 tricts be the same size.

3 On July 28 the District Court declared the 1965
4 Apportionment Act unconstitutional, as to the multi-member
5 districting provisions, relating to Marion County. The District
6 Court gave the state until October 1st to reapportion.

7 The Legislature was not in session at the time that
8 the Act was declared unconstitutional. We had at that time
9 biennial sessions. The Legislature would not reconvene until
10 January of 1971. Accordingly, the state did not reapportion.

11 On October 15, the court reconvened and invited plans
12 from the parties, the plaintiffs, the defendants, intervening
13 defendants, legislative leaders, and interested parties in
14 general.

15 On October 17, the District Court announced the
16 minimal guidelines. The 1960 Census data would be used.
17 Single-member districts would be preferred over multi-member
18 districts. County and township lines would be crossed when
19 necessary, contrary to provisions of the Indiana Constitution.
20 And that the District Court would take cognizance of the ex-
21 istence and location of the Center Township Negroes.

22 The plan adopted by the court was the court's plan,
23 supplemented by the plans submitted by the appellees in this
24 case. The appellees submitted a plan pertaining only to
25 Marion County.

1 The court's plan, as adopted, did rely on the '60
2 Census, did cross some county and township lines, did take
3 cognizance of the existence and location of the Center Town-
4 ship Negro area. It is interesting to note in this regard
5 that one of the plans submitted by the intervening defendants
6 had variances that were substantially the same as the vari-
7 ances in the plan provided by the appellees.

8 The District Court rejected that plan because in its
9 estimation it did not take cognizance of the Center Township
10 Negro area.

11 On December 15 the District Court announced that its
12 plan would be the plan for the apportionment scheme for the
13 1970 elections. It enjoined also the election officials per-
14 manently for enforcing the provisions of the 1965 Act. It man-
15 dated all state election officials to conduct the 1970 election
16 in accordance with the court's plan.

17 Furthermore, the District Court retained jurisdic-
18 tion, permanent jurisdiction apparently, to pass on any future
19 claims that the plaintiffs might have regarding any future plan
20 of apportionment which the Legislature might draft, sort of a
21 super legislative veto.

22 The State of Indiana appealed on January 6. The
23 Governor moved the District Court to stay its judgment. The
24 District Court refused. The state on January -- the next day,
25 began their reply to this Court for a stay of the judgment of

1 of the District Court. On February 2 this Court granted the
2 Governor's application for a stay. The 1970 election was con-
3 ducted under the 1965 Act. This is the act that was specific-
4 ally submitted to the District Court in the second stat case,
5 the District Court specifically approved the constitutionality
6 of that Act, the District Court in that case specifically found
7 that the 1965 Act met the standards laid down by this Court.

8 Turning to the first issue, the state submits that the
9 Constitution does not in fact require racial socio-economic
10 groups be proportionately represented in the state legislature
11 by representatives elected from that ethnic group.

12 The District Court's judgment in this case that the
13 residents of the Center Township area, that the vote of the
14 residents of the Center Township area was cancelled out, was
15 based on purely erroneous assumptions. First, that the Center
16 Township Negro area was clear on this record to exist as a
17 distinct and cohesive area apart from the rest of the county.

18 The second erroneous assumption upon which the
19 District Court based its judgment is that fewer legislators per
20 person resided in the Center Township area than in the
21 Washington Township area, the adjoining area.

22 Q Didn't they reapportion the whole state?

23 A Yes, Your Honor.

24 Q Why did it find it necessary to do that in this
25 situation in this one area?

1 A Well, that is a matter of some speculation, Your
2 Honor. The primary holding in this case -- well, first of all,
3 you have the District Court's decision in '65 which had already
4 passed on the constitutionality of the '65 Act under the one-
5 man one-vote principle of Reynolds.

6 Now, along came this case five years -- four years
7 later and the court looks at it and says, "Well, first of all,
8 this court has changed its standards; secondly, we now have a
9 new theory, the Banzhaf analysis that multi-member and single-
10 member districts inherently are unconstitutional.

11 The court went from the finding that these defendants,
12 these plaintiffs were invidiously discriminated against, they
13 went from that finding to the conclusion that the entire state
14 had to be reapportioned. There is a complete gap in there as
15 to why the whole state had to be reapportioned. The District
16 Court specifically said when one Marion County is sub-
17 districted there will be unallowable variances. But that is --
18 either it was now apportioned -- well, you have legislators
19 per persons on there, it is going to be the same after you
20 reapportion as it was before. Either it was okay before or it
21 wasn't. But the District Court already said it was.

22 Q Well, wasn't the theory that as illustrated by
23 the Marion County situation, multi-member districts, the
24 court concluded were invalid constitutionally, and that is what
25 led it to reapportion the entire state?

1 A Yes, that is exactly the way they went.

2 Q Again, by seeing the effect of the multi-member
3 Marion County district effect on this ghetto area --

4 A Yes, Your Honor.

5 Q -- and that led to the conclusion, the District
6 Court conclusion that multi-member districts generally were
7 constitutionally invalid, and that in turn led it to look to
8 the rest of the state, and it found that in Lake County and
9 elsewhere there were multi-member districts and that is what
10 led it to the statewide reapportionment.

11 A That's right.

12 Q Wasn't that it or have I got it wrong?

13 A I think that is what happened.

14 Q I thought the court would have reached the same
15 result and redistrict the whole state even if it had not found,
16 looking at Marion County along, that the multi-member district
17 cancelled out the voting power of some group.

18 A Well --

19 Q I though the court would have said multi-member
20 districts as multi-member districts give multi-member districts
21 too much power.

22 A Right.

23 Q Compared to single-member districts.

24 A Right.

25 Q So they could have reached reapportioning the

1 whole state result without identifying any particular group
2 within Marion County as having been disenfranchised.

3 A That would have been a reason to reapportion the
4 entire state. That would not have been a reason to sub-district
5 necessarily --well, I guess it follows that Marion County would
6 have to be sub-districted because it is the largest district in
7 the state.

8 Q All multi-member districts would have had to be
9 taken apart.

10 A Right. One of the problems --

11 Q Did the court go that route or not?

12 A I think they did. I think they did. An inter-
13 esting point of that position is that the court only found in
14 favor of Mason Bryant, who was a member of the multi-member
15 district. There was no member -- the court didn't -- if the
16 court is going to find that someone's rights have been violated,
17 it has to have the man before it whose rights have been violated.
18 Mason Bryant, under the court's analysis, was over-represented.
19 The court had no -- well, the court has found in favor of no
20 before it in terms of having being under-represented. The
21 court went both ways.

22 In the invidious discrimination argument, breaking up
23 the Marion County district, the court found that Mason Bryant
24 was under-represented. Applying the Banzhaf analysis, the
25 court found that Marion County was over-represented. They tried

1 to have it both ways.

2 To reach the court's decision in this case, as the
3 Marion County multi-member district, it had to first section off
4 a distinct area, and then it had to provide some means or basis
5 to compare that area to another area. To do that, it conducted
6 what it called statistical analysis which I won't treat here
7 because I feel that I have adequately treated it in the brief.
8 But I feel that the statistical analysis that the court applied
9 amounts to gross speculation, that the Center Township Negro
10 area amounts to a separate distinct area within the county.

11 The second step which the court used was to compare
12 the ratios, the ratio of legislator per person of the Center
13 Township Negro area to the Washington Township area. To do
14 this, the township lines, the township boundaries, these areas
15 that are being compared have to have some political signifi-
16 cance.

17 Implied in the court's decision is that somehow
18 residents in Washington should be better represented but a
19 legislator from Washington Township doesn't represent all of
20 the legislators in the county, but somehow only represents the
21 residents in Washington Township. Somehow the residents of
22 Washington Township are specially benefited by having legis-
23 lators elected from there, that somehow Washington Township
24 legislators do not represent residents of the Center Township
25 Negro area.

1 The record repeats those conclusions. All the plain-
2 tiffs in this case, Mr. Chavis was a resident of Washington
3 Township. He testified that when he was in the legislature he
4 represented the interests of the Center Township Negro. The
5 record in this case shows that a legislator living outside of
6 the Center Township Negro area can represent the interests of
7 the Center Township Negro.

8 Q Was there any testimony before the court contra-
9 dicting Mr. Chavis' testimony?

10 A In that regard, Your Honor?

11 Q Yes.

12 A No, Your Honor, none at all.

13 Q Is there any evidence in the record of discrim-
14 inatory purpose in this legislation?

15 A None.

16 Q Racial discrimination?

17 A None, no discrimination, Your Honor. As a matter
18 of fact, the record in this case, Mr. Chavis testified that in
19 at least two areas the laws were perfectly adequate, in the areas
20 of welfare and unemployment compensation. He said the laws are
21 adequate. The problem is with the attitudes of the people that
22 are administering those laws.

23 Well, that is not a problem of discrimination, that
24 is not this kind of problem of discrimination. That is another
25 kind of problem. Our concern here is whether these people are

1 represented in the Legislature.

2 In this same regard, Chavis also testified that the
3 interests of the Center Township Negro were served, with
4 counted with the residents of the rest of the county, with the
5 residents of the rest of the state, that it was counted with
6 Negroes living in areas outside of the Center Township area.

7 The significance of this is that if the interests of
8 the Negroes living in Center Township are not being served or
9 pushed along, fully being taken care of, neither the interests
10 of the citizens of other areas of the state.

11 In this same regard, we have only to look at the
12 statutes of the State of Indiana, the welfare laws, some con-
13 sumer protection laws, unemployment compensation, any interests
14 that you can think of that the plaintiffs in this case claimed
15 they had, that the law provided for that, that the law provided
16 for it.

17 I think that is an example of the fact that their
18 interests have not been ignored in the Legislature.

19 Q The law provided for what? I didn't hear you.

20 A Well, the District Court says that the Center
21 Township Negroes have compelling interests in things like urban
22 renewal and welfare legislation, law and order, schooling,
23 education, health, and so on and so forth. These were the
24 compelling interests of the Center Township Negroes. These
25 are interests that we share with those people in common. It is

1 an interest we have in common. And there are laws on the books
2 that attempt to regulate or in some way take care of these in-
3 terests, and I think this is an example of the fact that their
4 interests are not ignored.

5 Q Mr. Thompson, do you take the position or is it
6 true in Indiana that the Legislature has nothing to do with
7 how the laws are administered in the state?

8 A Well, sir, yes and no. Generall speaking, no,
9 Your Honor, the Legislature enacts the laws and they are carried
10 out by some other body.

11 Q And the legislature has nothing to do about it
12 at all?

13 A Except to change the law. For instance, they
14 don't appoint the department heads. Take the Welfare Department
15 and look how that is broken down. You have the State Director,
16 you have --

17 Q Well, don't you have committees of the legisla-
18 ture for each one of these departments?

19 A No, there --

20 Q There is just --

21 A -- there are few standing committees, Your Honor.

22 Q Yes, I thought so.

23 A Few, very few.

24 Q I thought so.

25 A Okay.

1 Q So there is some control?

2 A But not --

3 Q Who contributes the money to these agencies, who
4 fixes that, the Legislature?

5 A Yes, Your Honor.

6 Q The Legislature has a little control, doesn't it?

7 A Yes, Your Honor.

8 Q So they do have some control?

9 A Oh, yes, that is --

10 Q Well, that is the only question I asked.

11 A I'm sorry, Your Honor, I didn't understand it.

12 Q Would you say that the control is a different
13 kind or of a different character than control of Congress, that
14 Congress exercises over the execution of laws? I am trying to
15 get --

16 A Sure.

17 Q Different in what respect?

18 A I wouldn't say it is different, Your Honor. I
19 would say it is the same sort of control that Congress would
20 have, or probably less so because of the fact that we only meet
21 biennially. There are few standing committees. But the
22 characteristics between the two, I think, are parallel.

23 One other example, the fact that -- one other factor
24 shows that the legislative interest of the Center Township
25 Negroes are not ignored, is the tax money that is appropriated

1 for the very things that the District Court said they were most
2 interested in, urban renewal, schools, education, health,
3 welfare, unemployment compensation. The tax money was appro-
4 priated that goes into this area is disproportionately large
5 as to the money that is going into the rest of the county.

6 The only corrected dilution which the District Court
7 found to exist in Marion County was the sub-district in Marion
8 County. The state admits that this is a retreat to the
9 separate but equal doctrine of Plessy vs. Ferguson in requiring
10 that the districts, that the Center Township Negro areas be
11 separately districted, the District Court was saying let's
12 make them separate but equal.

13 If the decision of the District Court is allowed to
14 stand, districts must be drawn to separate and segregate citi-
15 zens on the basis of race, color, creed, economic conditions
16 and other special interests. It wouldn't be unreasonable, to
17 carry out a step further, if we are going to have ethnic or
18 proportional representation, perhaps the next suit will be a
19 suit against the state to increase the size of its legislature
20 so that these interests can be represented with some degree of
21 precision.

22 In the final analysis, I think what we are dealing
23 with here is a special interest group. The Center Township
24 Negroes in this case claim to have special interests. Well, we
25 all do. As a lawyer, I have special interests. As a citizen,

1 my interests may differ from someone else, but I have special
2 interests. Taken to its logical conclusion, the District Court
3 would require that every special interest have its own repre-
4 sentative, may they be a lawyers' representative, a school
5 representative -- heretofore we called these people lobbyists,
6 but we haven't given them a representative to represent them
7 in the Legislature.

8 Q Can you state in a nutshell -- if you can't, why,
9 just forget the question -- how did the District Court go about
10 exercising this function of reapportioning the whole state?
11 Who did he consult? Who did he have?

12 A Well, with the Marion County --

13 Q Did the legislative, did the political powers,
14 the political ranks of the government participate in it at all?

15 A To this extent, Your Honor, the legislative
16 leaders were invited to submit a plan. As a matter of fact, I
17 think they were given several days in which to do that. And I
18 believe --

19 Q How long?

20 A Pardon me?

21 Q How long?

22 A Several days. And I believe they did submit a
23 plan, and the plans were invited, the plants of plaintiffs were
24 invited, the plaintiffs were invited to submit plans to the
25 District Court.

1 Q Were the legislators that you refer to parties
2 to the action?

3 A No, no. They were just legislative lawyers.
4 That is one of the committees. I can't really say how it is
5 that these people came together to submit this plan, but they
6 did. The Legislature was not in session.

7 Q Well, the record is perfectly clear, is it, that
8 they were not parties to this action?

9 A Oh, yes, quite clear.

10 Q Were they ordered or requested to submit plans?

11 A Well, as the action started out, it was initiated
12 against the -- against all of the legislators.

13 Q I see.

14 A But then the Governor was added and the Legisla-
15 ture was dropped and the Governor was left in the action. The
16 Governor was the only defendant, appellant now, left in this
17 action on behalf of the state.

18 In conclusion, with respect to this proportionate
19 representation issue, the decimation of the Center Township
20 Negro area implies the singling out on the basis of race and
21 color, you can't single this area out without looking at the
22 race of the people living there, their economic condition and
23 so on.

24 Separately districting Marion County -- no, separately
25 districting the Center Township Negroes is a singling out on

1 the basis of race and color, you can't draw the lines around
2 it unless you look at them and determine in advance before you
3 draw those lines what is their race, what is their color, what
4 is their creed, and so on and so forth.

5 This Court has uniformly condemned all such attempts
6 and should do so in this case by reversing the decision of the
7 District Court.

8 The other issue I want to hit upon briefly is the
9 Banzhaf issue, the striking down all multi-member districts un-
10 constitutional per se. It has always been thought, it has been
11 implied and accepted that although a voter in a multi-member
12 district has an advantage because he had more representatives
13 from which to -- for whom to vote, that this advantage was
14 offset by the fact that he was part of a larger electorate
15 competing with him, to vote for these individuals.

16 This has been challenged by John Banzhaf and others.
17 Banzhaf's analysis briefly is that voters in the Marion County
18 multi-member district were over-represented vis-a-vis smaller
19 multi-member districts and single-member districts within the
20 state. There was an inherent disparity, and it was based on
21 rather complex mathematical equations which he devised. It was
22 on the basis of this that the Court required the -- the District
23 Court required the state to reapportion the entire state.

24 The parallel of Banzhaf's theory is that first of
25 all, as it relates to this case, no independent study was

1 made of Indiana. The figures, maps, exhibits, and so on and so
2 forth that were used by Banzhaf in this case were those sup-
3 plied him by the plaintiffs.

4 MR. CHIEF JUSTICE BURGER: I think your time has been
5 consumed now, Counsel.

6 MR. THOMPSON: I thank you, Your Honor.

7 MR. CHIEF JUSTICE BURGER: Mr. Manahan?

8 ARGUMENT OF JAMES MANAHAN, ESQ.,

9 ON BEHALF OF APPELLEES

10 MR. MANAHAN: Mr. Chief Justice, and may it please
11 the Court. I will, I believe, have to recapitulate what did
12 occur in this case, because I believe some confusion has re-
13 sulted from the presentation which has been made by the
14 appellant as to what took place.

15 A complaint was filed in the District Court by resi-
16 dents of Marion County and Lake County seeking only the single-
17 member districting of Marion County, Indiana on the basis of
18 this Court's prior guidelines in Fortson vs. Dorsey and in
19 Burns vs. Richardson.

20 Q Marion County and Lake County?

21 A No, plaintiffs from Marion and Lake County, but
22 seeking only the single-member districting of Marion County,
23 Indiana. The plaintiffs from Lake County being for purposes
24 of supporting the Banzhaf theory, for the purpose of breaking
25 up the Marion County district only.

1 Q What is the biggest city in Marion County?

2 A Pardon me?

3 Q What is the biggest city --

4 A Indianapolis, Indiana.

5 Q What is the city in Lake County?

6 A Gary and Hammond, Indiana.

7 Q And both had multi-member districts, didn't they?

8 A There were numerous multi-member districts in

9 Indiana and both of those were the largest two.

10 Q Yes.

11 A Immediately after the complaint was filed, re-
12 quests for admissions, 118 in number, were filed. The complaint
13 itself, is a 69-page document, which is set forth in full in
14 the Appendix, and the request submissions were likewise
15 lengthy.

16 Before the trial, all of these requests for admissions
17 which covered every aspect of the complaint were admitted. And
18 at the trial the admitted requests were admitted into evidence
19 without objection. Also during the trial, numerous other docu-
20 ments from the state library were available and the court had
21 an abundance of evidence before it, all of which was admitted
22 and was uncontradicted and, as we will outline, did present a
23 full case under Fortson vs. Dorsey and Burns vs. Richardson
24 justifying the sub-districting of Marion County, Indiana.

25 But something else took place before the trial in

1 this court. The Kirkpatrick vs. Preisler decision was rendered,
2 and with the result that at the very beginning of the trial,
3 and it appears at page 133 of the Appendix, Justice Kerner,
4 the presiding judge, took -- stated that the court was taking
5 judicial notice of the fact that the State of Indiana is mal-
6 apportioned and thus the court had little choice but to do
7 as it developed that the State of Indiana's districts, one of
8 which was before the court, were at that time malapportioned
9 so bad they had greater divergencies of population than even
10 the dissenting opinions in Kirkpatrick vs. Preisler indicated
11 would be allowable.

12 Q Now, let's see: That is forgetting the single
13 multi-member district --

14 A Completely forgetting the single multi-member
15 district --

16 Q There were more representatives from Marion
17 County than they were entitled to on the basis of --

18 A There were more Senators from Marion County
19 than they were entitled to.

20 Q Well, more legislators of one kind or another.

21 A And exactly the right amount of representatives.
22 They had one-half of a full Senate seat too much. The same
23 was true in Lake County. And before it reached its findings,
24 the District Court, and the tables at the end of their July 28
25 opinion reflect it -- they too are in the Appendix at page 382

1 and 383 -- the divergencies between districts and malapportion-
2 ment of a traditional kind, involving all the counties of the
3 State of Indiana.

4 Q If this law suit had not been pending, what
5 would the impact of the 1970 Census have had on the State of
6 Indiana in reapportionment --

7 A The normal impact. They would now be preparing
8 to reapportion, as they are, if this law suit had not --

9 Q The court decided that it should have this ac-
10 celerated reapportionment, what was the date --

11 A The court's stay order in this cause has now
12 made the state-wide malapportionment of Indiana no longer a
13 matter of consequence since Indiana will be reapportioned be-
14 fore there is another election.

15 Q You're speaking of this Court's stay order?

16 A Yes.

17 Q I am speaking of the District Court. What do
18 you suggest led the District Court to try to reapportion the
19 State of Indiana six months or so before it was going to begin
20 on the normal schedule?

21 A To begin a new reapportionment?

22 Q Yes.

23 A They were not scheduled to begin a new reappor-
24 tionment until this coming January, next month, and they were
25 scheduled to hold an election, as they did, in the meantime.

1 Q At any rate, they were quite close to --

2 A Yes. There was only one more election to be
3 held before there would be a reapportionment or attempted re-
4 apportionment in normal course. The State of Indiana also has
5 a notable record for having a great deal of difficulty for its
6 legislators to agree upon apportionment. In this case, they
7 gave the State of Indiana an adequate length of time to hold
8 a general assembly session and reapportion itself before they
9 acted.

10 Q Mr. Manahan, in the posture in this case as it
11 now presents itself to us, I was wondering why it hadn't become
12 moot. The 1970 election in Indiana was held under the former
13 apportionment system, was it not?

14 A Yes, it was, Your Honor.

15 Q And you just told us that early next year there
16 is going to be and will be a reapportionment based on the 1970
17 Census.

18 A Early next year there is scheduled to be an
19 attempted --

20 Q And there will be no general elections in Indiana
21 I guess until that has become effective, so this thing is just
22 in limbo and has no applicability to any election. It did not
23 apply to the 1970 election, it will not apply to any elections
24 after early next year.

25 A The court's plan could not conceivably ever

1 apply to any election, no.

2 Q So why isn't this moot?

3 A The court, the lower court has stated that the
4 Marion County, Indiana must sub-districted to have a constitu-
5 tional plan. It also has said that there is a presumption --

6 Q The court didn't need to state that. We all
7 know that. Any apportionment has to conform with the United
8 States Constitution.

9 A Yes, but sub-districting, Your Honor, and sub-
10 districting is not allowable under the Indiana Constitution
11 except under the supremacy clause, and so it was necessary for
12 a federal court to find, also the state court, for a court to
13 find under the 14th Amendment, the 15th Amendment, and the
14 supremacy clause, that Marion County, Indiana must be sub-
15 districted. Otherwise it will not be sub-districted in the
16 next apportionment, and the entire case which was tried will
17 be there again.

18 Q I see. So that the remaining significance of
19 this three-judge district court decision is that if it is
20 affirmed, it remains undisturbed, the Indiana Legislature will
21 be obligated not to create any multi-member districts?

22 A They can create all the multi-member -- they
23 can create multi-member districts, definitely. The District
24 Court's opinion only stated that there is a presumption favor-
25 ing uniform districts and this cites the Banzhaf theory as

1 well as other matters to show that a natural one-man one-vote
2 violation does result from having multi-member district of
3 differing size, but the single-member districting is in no way
4 called for by the lower court's opinion.

5 Q Now, then, why isn't this moot? If it doesn't
6 even have that much effect, why isn't it moot?

7 A The lower court says there must be uniform
8 districting and there is anything but uniform districting in
9 Indiana, and it says they must be small enough such that the
10 vote of the ghetto area, which they found to exist as a fact,
11 would not be diluted or cancelled out.

12 Q You mean by that that in such districts they
13 must have single representatives?

14 A Not single, they must be small enough in number,
15 and the court indicated that three-man districts would be small
16 enough in number, not single, or perhaps even four-man
17 districts.

18 Q Let me see how far this goes. Suppose you had
19 an area where it was demonstrated, that an area just as big as
20 the one you have here, the same size, the same shape, the
21 same people who were preserving, let us say, Germanic culture,
22 and they perpetually spoke German, they had bilingual services
23 in churches, both Catholic and Protestant, and preserved many,
24 many indicia of their own culture. Would this court's order
25 say that they must put a line around these people with Germanic

1 origins and let them elect their separate representative?

2 A No, Your Honor.

3 Q And what is it based --

4 A What is the difference?

5 Q What distinguishes that from this?

6 A Your Honor, we didn't -- we did submit proof
7 though in six elements which we believe were necessary under
8 Fortson vs. Dorsey and Burns vs. Richardson to require a sub-
9 districting of the large multi-member districts. We did in
10 this case prove the existence of a minority group of the type
11 you describe. We also proved that they lived in a contiguous
12 compact area, so that a difference in districting could make
13 a difference.

14 We also proved, and we think the proof is very sub-
15 stantial, that they were sufficient in population in these
16 areas to affect the election or non-election of representa-
17 tives of them if there were an impartial districting of smaller
18 districts, not a district drawn calculated to enhance their
19 vote but simply impartially drawn smaller districts.

20 Finally, we also proved that they had substantive
21 interests --

22 Q Is the smaller district drawn to identify a par-
23 ticular group?

24 A Absolutely not. The district which the court
25 drew did nothing of the kind. They are squares which totally

1 ignore what they found to be the ghetto area. And at the
2 back of appellees motion to dismiss or affirm, it does appear
3 -- there does appear an illustration of what is found to be
4 the ghetto area, and the district line which the court drew.
5 There is no -- the district lines are in no sense coterminous
6 with the boundaries of the ghetto area. They are a series of
7 squares and near squares which cut through the ghetto area
8 ignoring its existence. As the District Court said in its
9 original opinion, district lines must be drawn with an eye
10 that is colorblind.

11 Q Is that to say that what you have just been
12 showing us in those squares, there may or may not be multi-
13 member --

14 A No. This is the court's plan for Marion County,
15 Indiana.

16 Q Well, does it permit or not multi-member
17 representation in those squares?

18 A Oh, these squares happen to be single-member
19 districts, 15 single-member districts.

20 Q They must all be single, is that it?

21 A Well, this is not the court's original decision.
22 This is the court's final order. After the State of Indiana
23 refused to district, these are districts which the court drew.

24 Q Then presently, under this judgment, in Marion
25 County they are all single-member districts, are they?

1 A The court drew nothing but single-member dis-
2 tricts throughout the state.

3 Q Which is to say under the court's plan they have
4 to be single-member districts?

5 A Under the court's drawn plan.

6 Q And the only reason that wasn't effective for
7 the last November election is our stay, right?

8 A That's correct.

9 Q Now, what is there about the court's judgment
10 setting up single-member districts in Marion County under that
11 plan which means that the legislature may not set up multi-
12 member districts in Marion County in the 1970 reapportionment?

13 A 1971.

14 Q What in the District Court's judgment prevents
15 that?

16 A Only they are taking continuing jurisdiction.

17 Q I know, but wouldn't there have to be a brand
18 new case? I gather you brought the whole case under Fortson
19 and Burns on the ground that multi-member districting, in
20 Marion County at least, was operating in a manner that mini-
21 mized or cancelled out the voting strength of a racial group.
22 Wasn't that primarily the --

23 A That was the only theory --

24 Q That was the only theory. All right. Now --
25 and you prevailed as to that?

1 A Yes, Your Honor.

2 Q And that is why you got the relief you did?

3 A Well, we got the ruling we did.

4 Q Well, you got a lot more, I guess, than you
5 asked for. But the point is, what I am trying to get to, what
6 is there about that determination as related to the 1960 and
7 '65 figures at the time you tried the case which means that
8 there is any obstacle whatever to the Indiana Legislature re-
9 apportioning under a plan precisely like that one which in
10 this instance, for Marion County at least, the District Court
11 struck down?

12 A You mean multi-member districts are different
13 size.

14 Q Yes.

15 A So for the court's declaratory judgment in ef-
16 fect that sub-districts do have an invidious effect and do
17 dilute the vote --

18 Q In other words, it is not the factual record,
19 it is the Banzhaf theory, is that it?

20 A No, this is the court's finding specifically
21 that multi-member districting of Marion County has an invidious
22 effect which dilutes the vote.

23 Q Did at that time, at the time of the trial?

24 A At the time of the trial, yes.

25 Q Who is to know that that would be so under the

1 reapportionment base of the 1970 Census?

2 A The likelihood of any -- they carried their
3 findings beyond the 1960 Census in their decision. Their de-
4 cision also encompasses social statistics as late as 1967,
5 and there is no indication that there will be any such --

6 Q Isn't there a whole new ball game on reappor-
7 tionment in Indiana and every other state based on the 1970
8 Census?

9 A On the matter of a minority group existing with-
10 in a county where we have statistics as late as 1967 --

11 Q You would say not?

12 A -- I would say not.

13 Q Well, would anybody be violating any court in-
14 junction if he enforced or passed or enforced a multi-member
15 district system in Marion County under the new census?

16 A It would not.

17 Q Are you saying that in the face of this judg-
18 ment, in the face of this decision, legislators just won't
19 establish the multi-member districts in Marion County?

20 A I said they would not be violating an injunction
21 if they did establish a multi-member district in Marion County,
22 and under the Indiana Constitution without a judgment against
23 them, they will have to have a multi-member Senate district in
24 Marion County, Indiana. They cannot sub-district a county for
25 the state Senate under the Indiana Constitution.

1 Q What about the House?

2 A This they can.

3 Q Well, will legislators or will they not feel
4 bound by this decision not to establish a multi-member House
5 district in Marion County?

6 A They will feel very much guided by this Court's
7 decision, and if there is no decision and if the state simply
8 remains in effect in the lower court, there they will take
9 their chances on the multi-member districts.

10 Q Well, of course if this Court's decision is that
11 this case should become moot, the consequence would be, as I
12 remember it, that we would vacate the judgment of the District
13 Court and that would be the end of it, wouldn't it?

14 A That would be the end of the case.

15 Q Why isn't it moot? I still don't understand the
16 answer to my question.

17 A The District Court --

18 Q Why isn't it moot?

19 A The District Court did render a declaratory
20 judgment to the effect that there is in Marion County, Indiana,
21 based on 1967 statistics, a ghetto area with a minority group
22 residing therein which has substantive interests which
23 diverge significantly from those of the county as a whole, and
24 that as a response to those interests it engages in a vote
25 pattern which diverges significantly from that of the county

1 as a whole, and that the size of the county, the size of the
2 small multi-member district is so great that it dilutes and
3 cancels out that significant vote by that group of significant
4 substantive interest.

5 That declaratory judgment was rendered by the lower
6 court and it is very significant what type of districting will
7 be drawn in forthcoming General Assembly whether or not that
8 declaratory judgment is upheld in this Court.

9 Q Well, but it made that finding only in connec-
10 tion with the complaint that asks relief by way of reappor-
11 tionment, at least of Marion County, looking toward elections
12 that have now taken place?

13 A And hopefully --

14 Q And then why isn't it moot?

15 A And to all future elections.

16 Q Well, now -- oh, no, you told us that in future
17 elections the Legislature is under an obligation next month,
18 based on brand new figures, the 1970 Census figures, to re-
19 apportion the entire state.

20 A Yes, and --

21 Q For all future elections.

22 A -- and in Marion County they are obligated
23 either, under the Indiana Constitution, to have a multi-member
24 Senate district --

25 Q Yes.

1 A -- in Marion County, Indiana, or under the
2 supremacy clause of the United States Constitution and the
3 14th and 15th Amendments to have smaller districts in both
4 houses in Marion County, Indiana.

5 Q I still don't understand your answer to my
6 question.

7 A If this were a simple line run reapportionment
8 case, and the things happened which have happened, the case
9 would be totally moot. It is not moot --

10 Q And what distinguishes it from a minor line run
11 reapportionment case?

12 A It is because it is a redistricting case as op-
13 posed to a reapportionment case. It is a finding that a cer-
14 tain type of district is unconstitutional, not a certain
15 specifically drawn district is, it is unconstitutional because
16 it has too few or too many people in it, but because a certain
17 type of districting in a certain part of a certain state is
18 unconstitutional, and that --

19 Q Based on figures that have now become obsolete,
20 under the 1970 Census?

21 A They are based on figures as late as 1967.

22 Q Well, that is not right now, since we have had
23 a 1970 Census, is it?

24 Q Your point is that without a federal decree you
25 go back to the Indiana Constitution, is it?

1 A Yes, Your Honor.

2 Q And the Constitution, the evil that the diffi-
3 culties that the three-judge District Court found existed,
4 would be repeated?

5 A It would have to be repeated, yes.

6 Q And only a federal decree can --

7 A Yes, Your Honor.

8 Q What happens to the rest of the state?

9 A In the rest of the state they would be allowed
10 to break up no county for purposes of drawing Senate seats
11 under the Indiana Constitution.

12 Q In other words, what the federal decree does
13 is preserve the ground rules for the one-man one-vote rule,
14 the principal rule per se?

15 A Yes, Your Honor. Also there would be a great
16 problem under this for them to draw Senate seats without
17 crossing county lines, but they could certainly draw multi-
18 member district Senate seats without breaking up counties.
19 And unless the supremacy clause requires the breaking up of
20 counties in the Indiana Senate, there will be multi-member
21 districts in Marion County, in Lake County of different size
22 in the Indiana Senate.

23 Q May I ask again, Mr. Manahan. I gather under
24 the court's plan, you say each of those sub-districts would
25 have had but one what, Senator?

1 A One representative and each of them was numbered
2 1 through 100 statewide, and the odd numbers were paired with
3 even numbers to create Senate seats.

4 Q And in the Senate seat case there are what,
5 districts with --

6 A No.

7 Q -- one Senator?

8 A There is one Senator.

9 Q One Senator.

10 A Consisting of two legislative representative
11 districts. There would be 50 Senators and 100 representatives.

12 Q Well, here is my confusion: You have got two
13 houses.

14 A Yes, sir.

15 Q Now, what under the court's plan is to be the
16 representation? In every instance, a Senatorial district has
17 but one Senator?

18 A Right, and --

19 Q And in every instance -- what is the lower house
20 called?

21 A The House of Representatives.

22 Q And in the House of Representatives, every dis-
23 trict has but one representative?

24 A But one representative, and every Senatorial
25 district is made up of two representative districts.

1 Q Yes, but there is only one Senator?

2 A Right.

3 Q Which means that if we were to affirm what the
4 District Court did, then is it your position that for the 1970
5 reapportionment there could be no compliance whatever with the
6 Indiana Constitution provision for multi-member districts
7 either in the House of Representatives or in the Senate?

8 A There are no requirements with respect to the
9 House of Representatives.

10 Q I see.

11 A With respect to the Senate --

12 Q Well, how about with respect to the House of
13 Representatives? Could there be, if we affirm, could there be
14 throughout the state in the 1970 reapportionment any multi-
15 member districts?

16 A There could be multi-member districts, but they
17 would have to be all uniform throughout the state if you
18 affirm.

19 Q By which you mean that there might be a number
20 of multi-member districts if the multi members means two or
21 three, that there will have to be two or three in every dis-
22 trict?

23 A Yes, Your Honor.

24 Q But you could still have some single-member
25 districts?

1 A No --

2 Q You say there could not be single-member dis-
3 tricts, they would all have to be multi-member districts.

4 A Yes, uniform districts.

5 Q The District Court held that the only practical
6 remedy for the unconstitutional deprivation that it found in
7 Marion County was to create single-member districts in Marion
8 County, so it is there for the future, that this is the only
9 constitutional way of districting Marion County?

10 A No, Your Honor. What they drew --

11 Q I am just reading from the judgment.

12 A Yes, but there we are drawing up a plan.

13 Q Oh, this was even before you drew up a plan.

14 A On what page, Your Honor?

15 Q Page 332. It says under the present Indiana
16 apportionment statute, deprive this group, the ghetto area
17 people of equal protection of the law, and it says hence those
18 portions of the present legislative apportionment statute
19 relating to Marion County relating to both Senate and House
20 are unconstitutional and void. The court finds that the only
21 practical remedy for such unconstitutional deprivation of
22 voting strength is the elimination of the large multi-member
23 House and Senate districts in Marion County.

24 A Yes, but not necessarily replacing them with
25 single-member districts.

1 Q Now what do you think it means?

2 A This says that the districts are too large, and
3 they must be smaller.

4 Q And he goes on and says that they will be single-
5 member districts.

6 A No, in fact they even suggest that three-man and
7 two-man districts in this opinion.

8 Q And when they came to discuss plans of their
9 own, it was all single.

10 A There is a good reason for that, Your Honor.
11 They wanted to give every legislator --

12 Q There may be good reason, but the fact is that
13 you are suggesting that the holding was that, if I get from
14 what you just said, the legislature is still free to construct
15 multi-member districts so long as they are a smaller number of
16 members from each district.

17 A Yes, and so long as they are uniform.

18 Q Throughout the state.

19 A Right.

20 Q But when they came around however constructing
21 your own plan for Marion County --

22 A No, for the entire state they did single-member
23 districts.

24 Q Is what the court plan --

25 A Is what they did, yes.

1 Q And you say there is an explanation for that?

2 A Yes, they wanted to set up rules in advance so
3 that different groups could participate and propose plans.
4 The needed rules such that a comparison could be made between
5 plans, so they made the lease political decision and just
6 said all single-member districts and we will take the plan
7 that is best that has the least operation deviation, which is
8 what they did. The operation deviation turned out to be less
9 than one percent throughout the state, and that was the pur-
10 pose of it.

11 And I would like to turn immediately to the question
12 of uniform districts and why we believe they are constitution-
13 ally required in Indiana. There is a very strong presentation
14 in the lower court, it was uncontradicted and both sides
15 affirmatively presented affirmative proof that when they are
16 in the Indiana General Assembly, multi-member district dele-
17 gations, at least that one from Marion County, vote en bloc at
18 the behest of the party organization, and that they do not
19 vote on their own, and that there are very few variances.

20 It also was proven that they are elected en bloc,
21 that during the past forty years only twice has a member of a
22 party which lost generally in an election got elected to the
23 Indiana General Assembly from Marion County, Indiana. During
24 the other elections, with those two exceptions, either one
25 party slate or the other was elected.

1 The evidence also shows that during all primary elec-
2 tions in recent memory, the official party organization slate
3 was nominated to run for the Indiana General Assembly, and
4 that persons not supported by the organization slate were not
5 nominated in such primaries.

6 The evidence also shows that those persons who be-
7 came on the organization's slate were thoroughly controlled
8 by the central committee of the party organization, and so in
9 effect this multi-member district delegation which is and
10 has historically been elected from Marion County is a unit
11 rule delegation controlled at one source.

12 This has two results. This demonstrates that
13 parochial interests, such as those of a ghetto area, could not
14 realistically be represented. And Pat Davis, the plaintiff,
15 who had been the sole black Senator in the Indiana General
16 Assembly, during the past ten years, represented that he
17 could not effectively represent his people because he had to
18 do each time on each vote what his county chairman wanted him
19 to do. And we presented evidence showing what present and
20 past members have done on rollcalls, voting constantly en bloc.

21 This is pertinent to the dilution of black people
22 in the ghetto area of Marion County, Indiana and is also
23 pertinent to the District Court's finding that multi-member
24 districts of differing size can be inherently unconstitutional.

25 What it amounted to was that the proof showed that

1 the multi-member district delegation is the same as if you had
2 weighted voting, because they voted as one in Marion County.
3 It is the same as having one representative with 15 votes,
4 and one from Lake county was 11.

5 Q Is there any claiming or finding in this case
6 of racial discrimination as such?

7 A No. The history is that we have never had
8 single-member districts and have never broken up any county
9 for any districting of any kind in the General Assembly in the
10 history of the State of Indiana. So necessarily there could
11 not be proof that there was a deliberate design in multi-
12 member districting. It came out before there were black people
13 in Indiana, multi-member districting existed.

14 C So there is not a claim, let alone a finding of
15 racial discrimination?

16 A We did make a claim but we did not present very
17 substantial evidence, and there was no finding.

18 Q This isn't Gomillion vs. Lightfoot kind of case,
19 is it?

20 A There was no Gomillion finding.

21 Q I gather what you relied on was -- I forget,
22 Fortson or Burns or --

23 A Yes, both cases.

24 Q But that decidedly or otherwise --

25 A Or otherwise.

1 Q -- having that effect. Wasn't that it?

2 A Yes, Your Honor.

3 Q And you tried to prove decidedly that but you
4 didn't succeed but it doesn't matter.

5 A No, we did prove otherwise and we didn't try
6 very hard to prove design.

7 Q It has been my impression, in the absence of
8 racial discrimination as such, our cases have held that the
9 sort of considerations that entered into the district court's
10 decision were not only not required by the Constitution but
11 that they were prohibited by the Constitution. I am thinking
12 of cases such as Harrington vs. Rash, that you couldn't
13 regulate the franchise, depending upon your prediction as to
14 how people were going to vote. I am thinking about Wells vs.
15 Rockefeller, that said New York couldn't constitutionally
16 try to justify its reapportionment scheme by showing any com-
17 munity of interest, that it had to be all a matter of mathe-
18 matics. Am I mistaken in my reading of those cases?

19 A No, that is what those cases say, and I will
20 quote Burns vs. Richardson and we brought this entire action
21 based upon what those two, the majority opinion of this Court
22 and almost unanimous opinions in one case, said, and those
23 are the two decisions we are specifically relying on, their
24 language and what they said would count as a good redistrict-
25 ing case.

1 Q If the poor blacks or the poor ghetto people
2 in Indianapolis were scattered evenly throughout the city,
3 you would have no case?

4 A That is correct.

5 Q Even though they would nevertheless have the
6 same interests that they now have? The only thing is there
7 wouldn't be anything you could do about it?

8 A There would be no invidious effect because there
9 would be no effect. The districting would not affect their
10 interests at all.

11 Q Yes, but their interests may not be effected.
12 I mean their interests wouldn't be any more effectively repre-
13 sented than they are now.

14 A That is correct, so there would be no remedy
15 to us and we would have no case. That is why we did have to
16 show that they were compact.

17 I see my time is expired, and I thank the Court for
18 hearing the cause.

19 MR. CHIEF JUSTICE BURGER: And your time is fully
20 consumed, Mr. Thompson.

21 Q I would like to ask the state, if I may, Mr.
22 Chief Justice, its views on this question of mootness in this
23 case.

24 ARGUMENT OF WILLIAM P. THOMPSON, ESQ.,
25 ON BEHALF OF APPELLANT -- REBUTTAL

1 Q Do you have cited any suits or cases in your
2 brief?

3 A Yes, Your Honor. Let me say this: The District
4 Court in its December 15 order retained primary jurisdiction
5 in the case. They said all future claims by these plaintiffs
6 against all future legislative acts. That is number one.

7 Number two, the state has been permanently enjoined
8 from enforcing the '65 Act. As a technical matter, that is
9 the only apportionment act we have at this time. The legis-
10 lature --

11 Q But there is no election under that act?

12 A I wouldn't expect one.

13 Q With or without this court order?

14 A I would not expect one, Your Honor.

15 Q Do you think it is moot or not?

16 A No, Your Honor, I don't. I definitely don't
17 think it is moot. The legislature, because of this decision
18 in the District Court, the legislature is, to use the phrase,
19 under the gun. They have to break up the Marion County multi-
20 member district --

21 Q Why wouldn't it?

22 A Pardon me?

23 Q Why wouldn't it?

24 A Why would they?

25 Q Yes.

1 A Your Honor, it is --

2 Q If you reapportion and we were to set aside
3 this -- vacate it as moot, and wip it off the books, why would
4 the legislature be hampered in its reapportionment on the '70
5 Census?

6 A Because they could very well expect the plain-
7 tiffs to go back to the District Court, the very same District
8 Court, and obtain the very same thing that they obtained in
9 this case.

10 Q Well, they might attack it but they might not
11 succeed.

12 A Well, Your Honor, in the state's view of it,
13 the record in this case was so thin that if they could do it
14 on that, they can do it on anything.

15 Q I don't see how this judgment of the court in
16 this particular reapportionment could supplant the constitu-
17 tional requirement for reapportionment every ten years by the
18 legislative body.

19 A Now, wait a minute. Would you repeat that,
20 Your Honor? I don't understand the question.

21 Q Well, as I understand it, the Constitution re-
22 quires reapportionment, doesn't it?

23 A Yes, Your Honor.

24 Q When?

25 A Well, the Constitution as interpreted by this

1 Court in Reynolds where this Court says that decennial reap-
2 portionment ought to be adequate, constitutional reapportion-
3 ment ought to be adequate.

4 Q But isn't it required in the Constitution, that
5 there be a reapportionment based on each Census?

6 A Well, that is the congressional districts.

7 Q What?

8 A Congressional districts, Your Honor.

9 Q Yes?

10 A But I don't think that pertains --

11 Q Well, what does your state constitution pro-
12 vide about reapportionment?

13 A Well, I cannot answer that question, Your Honor.
14 I don't know. I don't know what the state constitution pro-
15 vides in that respect.

16 Q Well, I would assume whatever occurs that we
17 would set this aside. I don't say we should or will, but we
18 ought to set it aside as moot and vacate the judgment. The
19 legislature wouldn't feel bound by the court's holdings with
20 reference to future apportionment, would it?

21 A Well, no, in the sense of being bound, they --

22 Q They would give somebody an argument.

23 A Well, as a practical matter, Your Honor, the
24 state can expect to be back in court on the same issues, the
25 same District Court, on the same issues, and if they don't,

1 if they provide essentially the same plan, complying with
2 Reynolds --

3 Q Do you think however we decide this case, the
4 state is going to be out of court?

5 A I would like to think, Your Honor, that we
6 would not be back in court on Banzhaf's analysis and --

7 Q When is the next election, the next legislative
8 election?

9 A Well, we have just had an election for the
10 Legislature --

11 Q When is the next one?

12 A The next one is in --

13 Q In 1972.

14 A -- in '72, sure.

15 Q So you have got ample time to have a new appor-
16 tionment statute.

17 A Well, yes, Your Honor. Of course --

18 Q Your Legislature hasn't been very good at
19 agreeing on one, has it?

20 A Let me say this, Your Honor, the Legislature
21 meets in January of '71. This action was started in January
22 of '69, and to conduct the '70 election we had to get a stay.
23 So if the Court were to say it was moot and we would be back
24 where we were, two years from now we will be back on the
25 same problem.

1 Q Well, on the same or some other one.

2 Q Well, somebody might. You can't tell yet. You
3 don't know what the Legislature will do, do you?

4 A Right, Your Honor, we don't know.

5 Q Do you think it is of any significance that the
6 mootness problem arises from the stay this Court granted?

7 A No, I don't -- it is my position, the state's
8 position that the case isn't moot, but --

9 Q Isn't moot?

10 A Right -- but -- right, okay.

11 Q Well, you don't want to go through the litiga-
12 tion again. That is your argument, as I understand it.

13 A Yes, Your Honor, and we would have to if this
14 Court didn't decide these issues.

15 Q It would be on a different case. They might
16 never bring a case. Maybe your Legislature will see the day-
17 light.

18 A The District Court said it would, in its
19 December 15th order.

20 Q I would imagine the Legislature would know
21 enough about that and would try in some way to wipe out the
22 alleged inefficiencies and defects in the reapportionment.

23 A Well, Your Honor, as the state interprets the
24 decisions of this Court, a multi-member district in Marion
25 County is okay, it meets constitutional muster, and that

1 districts of different sizes within the state meets constitu-
2 tional muster. But that is not what the District Court says.

3 Q But, as Justice Black said before, if we
4 should vacate and set it aside as moot, then what the District
5 Court has said is not very relevant to anything, is it?

6 A At the point that this Court vacates or de-
7 cides that the case is moot, it has no significance.

8 MR. CHIEF JUSTICE BURGER: I think that is all.
9 Thank you, gentlemen. The case is submitted.

10 (Whereupon, at 3:00 o'clock p.m., argument in the
11 above-entitled matter was concluded.)

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