In the

Supreme Court of the United States

JOAN S. MAHAN, ET AL.,

Appellants,

vs. No. 71-364

HENRY E. HOWELL, JR., ET AL.,

Appellees.

AND

CITY OF VIRGINIA BEACH,

Appellant,

vs. No. 71-373

HENRY E. HOWELL, JR., ET AL.,

Appellees.

Washington, D. C.
December 12, 1972

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CITY OF VIRGINIA BEACH, Appellant, v. HENRY E. HOWELL, JR., ET AL., Appellees.	No. 71-373

Washington, D. C.
Tuesday, December 12, 1972

The above-entitled matter came on for argument at 10:08 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ANDREW P. MILLER, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia 23219, for the Appellants.

HARRY FRAZIER, III, Hunton, Williams, Gay & Gibson 700 East Main Street, Richmond, Virginia 23219, for the Appellant City of Virginia Beach.

HENRY E. HOWELL, JR., Howell, Anninos & Daugherty 808 Maritime Tower, Norfolk, Virginia 23510, for the Appellees.

CLIVE L. DuVAL, 2D, 2007 North 15th Street, Arlington, Virginia 22201, for Appellee pro se.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 71-364 and 71-373, consolidated cases, Mahan against Howell and Virginia Beach against Howell.

Mr. Attorney General, you may proceed.

ORAL ARGUMENT OF ANDREW P. MILLER, ESQ.

ON BEHALF OF THE APPELLANTS

MR. MILLER: Mr. Chief Justice, and may it please the Court:

As Attorney General of the Commonwealth, I am here today representing its State Board of Elections in these cases. I think it might be helpful if at the outset I sketch very briefly the factual background involved here due to the complexities of that background.

Under the revised Virginia Constitution, Article II, Section 6, reapportionment, unlike many States, was required in 1971. Under schedule of that Constitution, Section 5, the Virginia General Assembly was required to convene in session on January 6, 1971, for the purpose of reapportionment.

As a result, two Acts were adopted: The first, Section 24.1-12.1, establishing 52 districts for the Virginia House of Delegates. There are 100 members of that body. This plan consisted of single member districts, multi-member districts, and floater districts.

Also, Section 24.1-14.1 establishing 40 single-member districts for the 40-member Senate of Virginia.

As soon as these Acts were approved on March 1, 1971, they were forwarded to the Attorney General of the United States pursuant to the Voting Rights Act of 1965.

There were three suits brought,, and I will touch on them to the extent they are relevant here.

First, on March 8 by Mr. DuVal alleging failure to provide equal representation, and also objecting to multi-member districts as such.

By Mr. Parris who is not here today alleging failure to provide equal representation and seeking the creation of a single multi-member district in Fairfax County rather than the two multi-member districts consisting of 5 delegates each which were created by the General Assembly. That case was filed on March 22.

On March 2, Lieutenant Governor Howell who is here this day also filed a suit, again alleging failure of equal representation. But that suit was limited to the Fifth, Sixth, and Seventh Senate Districts. Those districts are located in Norfolk and a portion of Virginia Beach. As I said earlier, they are single member districts and cut across jurisdictional lines.

In addition, the cities of Virginia Beach and Norfolk intervened. Mr. Frazier is here representing the city of

Virginia Beach this morning. The city of Norfolk is not represented by counsel.

And there were a group of plaintiff intervenors taking the position that multi-member districts were inappropriate because of the fact that they constituted a dilution of the Negro vote. Mr. Howell in his case took the opposing position, that in fact the creation of single member districts represented in the Norfolk-Virginia Beach area a dilution of the Negro vote.

I want to emphasize the contrast that we have here because it shows how peculiarly these considerations are ones which a legislature such as the General Assembly of Virginia has a great difficulty in solving. There are different points of view with respect to multi-member and single member districts. There are different points of view as to what the effects of the creation of these districts are.

So the General Assembly was faced with an exceedingly difficult task.

The lower court found that variations existed in the plans which exceeded what the court considered permissible limits on the basis of numbers only. As to the House of Delegates, the court proceeded to draw its own plan rather than allowing the General Assembly to proceed once the constitutional guidelines had been established to the court. And the same thing occurred with respect to the Senate.

The court's House of Delegates plan fragmented various governmental entities within the Commonwealth, shifted one delegate from the Tidewater area to Northern Virginia, denied Mr. DuVal's prayer for single member districts, denied Mr. Parris' prayer for a large multi-member district in Fairfax County. The plan itself resulted in a variation from norm of some 10.27 percent. This is the court plan.

As for the Senate, the Fifth, Sixth, and Seventh Districts which I referred to, the court found that the population of those districts were almost at the norm, but because of a housing sample relating to some 36,000 sailors who were counted by the census in Norfolk, because of the fact that the ships they are on are home ported at Norfolk, this census showing that some 21,000 of these individuals had addresses outside of the Fifth Senatorial District in which the naval base is located established a multi-member district consisting of the Fifth, Sixth, and Seventh Senatorial Districts. In other words, those districts were combined into a single district which, of course, represented an anomaly as far as the Senate plan is concerned because otherwise it was completely a single district plan as desired by the General Assembly.

I want to mention before I proceed further certain dates because I think they will set the background for what I will be addressing myself to.

On May 7 -- I already mentioned that the plans were forwarded to the Attorney General of the United States -- the Attorney General filed with the State objections under the Voting Rights Act in two respects: One, the division line between Senate Districts 5 and 6 I have just referred to and also to the five multi-member districts in the House, that objection being based on the lower court decision in the case of Chavis v. Whitcomb.

On May 10, the General Assembly reconvened, but this Court had not decided the Chavis case, the lower court had not acted, and consequently the General Assembly recessed to await the Chavis decision and to give it time for the court to act with respect to the suits which were pending before it.

On May 24, the court entered an order on first hearing which said in essence that on or before June 15, 1971, Virginia was to adopt and submit to the Attorney General of the United States curative legislation with respect to the two objections I have just mentioned. If that were not done by that date, then the court would proceed to trial.

On June 3 the General Assembly came back into session. Senate Bill 125 was introduced to cure the Attorney General's objections to the Senate plan which constituted the drawing of a single plan between the Fifth and Sixth Districts. And then the General Assembly recessed until June 7 to await

this Court's decision in Chavis v. Whitcomb.

On June 7, Chavis v. Whitcomb was decided. The Attorney General of the United States withdrew his objections to the House plan. The General Assembly passed Senate Bill 125 curing the objection with respect to the Senate line in Districts 5 and 6. Consequently the court's order, which I referred to, on May 24 was fully complied with. So the General Assembly recessed until August 16, subject, of course, to being reconvened earlier for the court to decide the issues before it.

On June 16 there was such a hearing.

On July 2 the court in its order found the plans constitutionally defective, but instead of permitting the General Assembly to come back into session and to act on the guidelines established in the court's opinion as to what in fact would be a constitutionally appropriate reapportionment plan, proceeded to mandate one itself.

On July 8 the General Assembly reconvened, directed the Attorney General of the Commonwealth to appeal the case to the Supreme Court of the United States, and adjourned since there was nothing further which the General Assembly of Virginia could do under those circumstances.

Just today we start a second round or second decade of reapportionment litigation with the hope that guidelines may be established in order that States throughout the

country will not be faced with subsequent rounds of litigation as to what in fact is constitutionally permitted in terms of the drawing of legislative district lines.

I want to address myself for a few minutes to the House plan, then to the Senate plan, and then I will cease at that point and Mr. Frazier will deliver his argument.

With respect to the House, the lower court's decision was based on numbers and numbers alone when it struck down the validity of the Virginia House of Delegates plan. The lower court, relying on this Court's previous decisions in Kirkpatrick and Wells, both of course being congressional redistricting cases, not state legislative cases, found variations exceeding those which were struck down in those two cases.

Now, if numbers must be the sole criteria of the Virginia plan, we submit that the Court should not have looked only at the maximum variation of plus 9.6 percent and minus 6.8 percent, depending on the calculation of the floater district concept. It should have considered that of 52 House districts, 35 were within 4 percent of the norm, that of 52 House districts only two exceeded 8 percent, that of 52 House districts the average deviation from the norm was only 3.8 percent, that of the 52 House districts the majority of the delegates elected by or in those districts would be elected by 49.3 percent of the population of the State.

We further submit that numbers and numbers alone viewed in the manner in which the lower court viewed them on the overall aspect as I have just presented them to you cannot be what this court meant in Reynolds v. Sims when it stated that one man one vote means an individual is entitled to fair and effective representation. That is the constitutional criteria which we submit must be met. It cannot be numerically measured alone for purposes of state legislative reapportionment. But it can be, we submit, measured by a two-pronged test.

One, is the apportionment of the House in question based on the permissible standard?

Two, does the plan approach population equality as closely as possible in consistency with that rationale?

The rationale of the Virginia plan is very simple. It is one suggested by this Court that a State can accord political subdivisions some independent representation in at least one body of the state legislature as long as the basic standard of equality of population among districts is maintained.

That was the rationale adopted in Virginia, and today it is more important than ever before under the newly adopted Virginia Constitution, because under this Constitution which went into effect in 1971, counties of which we have 95 in the State, as well as cities, are given the opportunity to have enacted for them numerous local or special legislation

applicable to specific problems which that jurisdiction as a jurisdiction may be confronted with.

Now, the second test that we suggest was also met. The lower court specifically found that disparities in the Virginia plan cannot be reduced at all if the integrity of political subdivisions are mandated. No plan has been presented which keeping intact local political subdivision boundaries for one house of a bicameral legislature achieves closer population equality.

How, then, can the lower court's decision as to the House plan be upheld? Only in two ways, neither of which are sustainable in this instance.

First, if the Court finds that the rationale of the Virginia plan is one that is not permissible or is one that was not rationally applied. According political subdivisions independent representation is, we submit, permissible. The policy of Virginia in this regard was rationally applied. Applying DuVal's argument that there is no provision in the Virginia Constitution allowing independent representation ignores a basic constitutional principle, and that is that a state constitution is a document of limitations. Nothing in Virginia's Constitution prohibits according political subdivisions independent representation.

Virginia has not abandoned her policy, a traditional policy of according political subdivisions independent

representation. She did change this policy as far as the Senate is concerned, but clearly in line with this Court's language in the opinion in Reynolds v. Sims, this does not mandate abandonment of this policy in the House also. In fact, the design of Virginia's reapportionment was to balance the two houses of her General Assembly in this respect.

The only other manner in which the decision of the lower court can be sustained is that this Court now decides that the principles of congressional redistricting are also applicable to legislative redistricting. We submit they are not. For if it were numbers and numbers alone which we are concerned with, there would be no need to determine whether various rationales suggested by this Court in previous opinions could be applied, because the only rationale would be numbers. There would be no need to determine whether one house of a bicameral legislature balances inequities in another house.

For this Court to make applicable to legislative redistricting the congressional redistricting decisions would repudiate its past enunciation that numbers and numbers alone though most important are not the sole criteria, that a balancing concept of a bicameral legislature is constitutionally acceptable, and that the maintenance of political subdivisions is a permissible rationale.

Congressional redistricting allocating representatives

to Congress is entirely different from allocating State Delegates for each State's legislative processes. The relationship of congressional districts to the Federal Government simply cannot be compared with that of legislative districts to a state government for reasons I have previously assigned.

There is one other way in which the court's decision below may be sustained, and that is for this Court to agree with everything that has been stated here today but then to state that nonetheless percentage variation is impermissible, that the percentage is too much. But for this Court to say that would be saying it on the basis of numbers and numbers alone. For we have already demonstrated that Virginia has applied a permissible rationale in a consistent manner and we have come as close to population equality as possible in conformity with that rationale.

The last aspect of the lower court's decision which affected the House of Delegates plan was the removal of the Delegate from the Tidewater area to Northern Virginia. This was done essentially on the basis of projected population growth. The Virginia General Assembly did not use population projections, and this non-use, we submit, is permissible. In any event you apply the population projections only in one part of the State rather than utilize them consistently and rationally throughout the State clearly is contrary to the ad hoc application which this Court discouraged in

Kirkpatrick. I do not have to stand here and argue why the General Assembly did not use population projection as seen in the appendix at page 66. The projection is on the basis of fertility assumptions, industrial development, present and planned highways, and many other considerations, all of which the General Assembly felt too speculative for proper utilization.

As far as the Senate is concerned, there is one simple issue. May apportionment be based on the decennial census, or must it be based on a sample housing survey conducted by a review of zip codes?

Virginia adopted two policies with respect to the Senate. The first policy was that the entire Senate would consist of single member districts. One does not have to read many cases to come to the conclusion that this is a matter peculiarly within the expertise of various State legislatures.

And the second choice that Virginia made was the adoption of a total population apportionment base. Obviously there are various bases which a State might adopt. But in Virginia the intent as demonstrated in the debates of the Virginia constitutional revision as quoted in our reply brief on page 8 was for redistricting to include every human being living and counted by the decennial census of the United States Government.

That means that the lower court was faced with what we submit were two valid constitutional policies. It ignored both. It found that the apportionment base was not proper simply because a sample zip code housing survey showed that of the 36,000 sailors enumerated aboard vessels, approximately 50 percent had addresses outside the Fifth Senatorial District.

If the court had bothered to consistently apply the sample housing survey, it would have seen that the survey at least purported to show that not only 18,000 had addresses outside the Fifth Senatorial District, but that approximately half of these addresses, in other words, 9,000 or 9,500 were outside of the Fifth, Sixth, and Seventh Senatorial District because they lived in other jurisdictions in the Hampton Roads area, the cities of Portsmouth and Chesapeake, the cities of Newport News and Hampton. I think it is well settled that a State has great latitude in choosing its own apportionment base. I submit that the base chosen by Virginia is constitutionally permissible and consequently should be approved by this Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Frazier.

ORAL ARGUMENT OF HARRY FRAZIER, III, ESQ.

ON BEHALF OF THE APPELLANTS

MR. FRAZIER: Mr. Chief Justice, and may it please the Court:

The city of Virginia Beach stands shoulder by shoulder with the Commonwealth of Virginia in upholding the General Assembly's House redistricting plan and in urging the reversal of the District Court decision in this case. The city of Virginia Beach is not involved in the Senate side of the controversy.

Our position here this morning is that a state reapportionment plan should be judged not solely on mathematical comparisons, but it should be judged also on the quality of the representation it affords the people.

Now, it seems to us that this Court cannot uphold the District Court below without overruling a great deal of what this Court said in Reynolds v. Sims. The District Court plan itself contains significant deviations from population equality without any policy justification whatsoever. The District Court said in its opinion this: "While we have endeavored to reach a perfect mathematical division, we have been unable to do so because of the multiplicity of delegates, geography of the State, and the diversity of population concentration."

So if you look at numbers and that's all the District Court did, its own plan comes up with a variation of 10 percent. But no basis for that was given, no effort was made to justify that kind of variation at all. As the Attorney General has pointed out, the greater variation in the Virginia

plan was the result of a rational basis, a desire to preserve the integrity of political subdivisions and to give them an effective voice in one house of the General Assembly.

Now, if the District Court was serious in what it said and was going to abide by the numbers alone, it could have done a whole lot better job than it did. So without being able to do better than it did and without affording any basis whatsoever for its position, we think its plan must fall.

QUESTION: Mr. Frazier, wouldn't there be some question as to the propriety of the District Court being a source of policy judgments as to what factors are to be considered other than numbers?

MR. FRAZIER: Very definitely. We feel that this Court has leaned over backwards on occasion after occasion to say that policy decision is one for the legislature, not for the District Court at all. And we propose to emphasize this in several ways before we are through today. But we feel -- and one of our arguments is that is a fundamental violation of due process when the District Court arbitrarily took the bit in its teeth and said, "This is your plan." This, we think, is a second but very important phase of the problem before the Court today.

Now, returning to the basic problem of state reapportionment, we think that a fundamental principle here is

that Reynolds rejects mathematical precision as a constitutional requirement and recognizes the validity of representation of political subdivisions as such.

QUESTION: As I understand your position, Mr. Frazier, it is that there is a substantial difference between what is constitutionally required under Article I, Section 2, with respect to congressional apportionment or districting from what is required under the Fourteenth Amendment of the Constitution and specifically the equal protection clause with respect to reapportionment of state legislatures, and that this Court has consistently recognized that difference. Is that your position?

MR. FRAZIER: That is our position.

QUESTION: And that Wesberry v. Sanders, which was based on Article I, Section 2, illustrates that, and particularly when one reads Mr. Justice Clark's opinion differing from the Court saying that in Wesberry v. Sanders he would apply the different test of the equal protection clause of the Fourteenth Amendment.

MR. FRAZIER: And as that is brought down to date in Kirkpatrick, the phrase "as nearly as practicable" appears whereas in Reynolds construing the equal protection clause it is "substantial equality."

What we are faced with today, I believe, is the first opportunity the Court has had to decide the question:

What way are we headed in the decade of the 1970's? Do they mean the same thing, these phrases, or do they not? We, of course, submit that they do not.

Now, we find that there is no place, no valid place, in the Congress of the United States for representation of political subdivisions as such, because in Congress we are concerned with the formulation of national policy, and the interests of the States are being represented, yes, but cities, counties, we do not see that there is any basis that we can argue here for saying that they need to be separately heard. And I think this is evidenced by the historical fact that for the first 50 years of our country you had at large representations in many congressional districts.

But there is a place in the State for this type of representation, and we think this Court specifically so stated in Reynolds, "Local government entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation directed only to the concerns of political subdivisions." We see no reason why that is not as valid today as it was in 1964.

And when we look at the Commonwealth of Virginia and the session of its General Assembly most recently held, 104 of 133 local bills were introduced in the House of

Delegates. This is where the localities find their primary voice and their primary source of representation. So that, we think, has a rational basis to support it.

We feel that there are numbers of phrases, points, in the Reynolds decision that must be overlooked, swept under the rug, if the decision of the lower court is to be upheld.

Now, what is the result of affirming that decision of the lower court? First, reapportionment will then be reduced to a mathematical exercise. If this Court is to say today Kirkpatrick governs congressional and state reapportionment, then all we have got to do is become a slave to numbers, maybe even to computers, and little judgment will be exercised, as Mr. Justice Rehnquist pointed out policy decisions will no longer be permitted, and how you structure at least one-half of the legislature, either half of the legislature, you do it by the numbers.

Then we will be concerned only with the extremes of the variations in the numbers. And that's what the District Court did here. It took the most overrepresented and the most underrepresented and added up the percentages and said, "That's bad, we can't have it. You do it our way, and this is our plan."

But what happens here? You have no equality of representation, no consideration of who the people in a given

jurisdiction can vote for. Political subdivisions will be largely ignored as such. This smacks of rendering obsolete bicameral legislatures. What will be the difference between the Senate and the House of Delegates in the Commonwealth of Virginia or any other of the States? The differences would merely be how long members are elected for and how many people they represent, the size of the districts.

The only validity that I can see for affirming the District Court would be to achieve the uniformity in congressional and State reapportionment mechanics. Possibly this would cut down on the amount of litigation. I'm not a bit sure that it would. But what is the price that you pay for doing this? We think there is a loss of equality of representation. We think the fallacy of the District Court numbers game is demonstrated very clearly in the case of the City of Virginia Beach. What happened in Virginia Beach?

The General Assembly's plan though it was not perfect -- according to Mr. DuVal's theory of valuing floater delegates, Virginia Beach was underrepresented by 7.3 percent. The District Court reduced that underrepresentation to approximately 2.5 percent. But it took 29,000 Virginia Beach citizens, put them over into Norfolk's multi-member district where they now vote with 307,000 people in a 7-member district. So what has happened to the equality of the representation for those 29,000 people? They are not a part of Virginia Beach,

they must vote for Norfolk. And how will the delegates in the General Assembly from Norfolk feel if a matter comes before the General Assembly that pits the interests of Norfolk against that of Virginia Beach? Obviously, they are not going to go with the 29,000. They are going to go with the 307,000.

The District Court has sacrificed the community interests of Virginia Beach.

Now, this is done, too, in the Senate, because 40,000 of Virginia Beach people in the Senate district are combined with 75,000 Norfolk citizens in the multi-member district -- I'm sorry, in what started out as a single member district. It is now a multi-member district, 40,000 Virginia Beach citizens and 307,000 Norfolk citizens, the same sort of thing.

Now, we could live with this in the Senate. We find it hard to live with in both houses where the discrimination against Virginia Beach is so pointed. One way to have solved this, if the Court is the final arbiter of these political decisions, is not to take 29,000 from Virginia Beach and put them over in Norfolk's multi-member district, it would have been to move one seat to Virginia Beach and take 13,000 Norfolkians and put them into the Virginia Beach thing to reverse the flow, if you will, to balance some equities. But the court didn't do that.

This comes back to the question of remedies, to the question of policy on which the city of Virginia Beach had no say.

But coming back to the subject of community interest, to making effective representation in the General Assembly for political subdivisions, Norfolk and Virginia Beach sit side by side. They are different types of cities, they have different problems. The city of Norfolk in its brief has painted this picture very clearly, much more clearly, I am afraid, than I could have done.

It is pointed out that the interests of budding political subdivisions can be adverse, and then it lists areas in which they are adverse. In the question of water supply or the regulation of water rates and services, Norfolk has got all the water, Virginia Beach has none. Virginia Beach has to rely on Norfolk for water services, and in matters of this area legislative policy is involved, their interests are different.

The piggy-back income tax is something that Norfolk would desperately like to have, as would any core city, Virginia Beach, of a different nature, would not like to have.

So community interests are sacrificed not only in Virginia Beach, the case that I am concerned with, but they are sacrificed everywhere that the District Court has moved lines around to disregard the integrity purposefully accorded

political subdivisions by the General Assembly.

Nothing has been given in return for getting mathematical equality. there are at least 9 counties and 2 cities in the State that have suffered by having bunches of their people arbitrarily put here or there by the District Court plan.

So Virginia Beach is a prime example of what happens when the political subdivisions are ignored in this instance.

Now, coming to the remedies in the case, there are many remedies that were available here if the District Court had found the General Assembly's plan to have been invalid.

QUESTION: Before you wind this up, I read the brief of the city of Norfolk, an appellee in this case. As I understand it, the city is not going to be represented here on oral argument today, or is it?

MR. FRAZIER: I understand that it is not being represented. It was an intervenor.

QUESTION: It is an appellee rather than amicus, but it's not going to be represented on oral argument today. You referred to that brief and to its dramatic presentation of the basic differences between Virginia Beach and Norfolk.

Do you understand that brief? Do you understand what they are asking the Court to do?

MR. FRAZIER: I think they have sort of turned around and joined our team.

QUESTION: It's hard for me to tell in an appellee's brief just what position they have taken. Is someone going to explain that to us?

MR. FRAZIER: Well, I think the reason they are not being represented orally is the limitation on the number of counsel permitted to argue.

QUESTION: I would trust somebody would -- maybe other people understand this brief, but I didn't.

MR. FRAZIER: Well, I interpreted it to mean this: Certainly Norfolk is not going to concede our point that it should suffer any loss of representation for the gain of Virginia Beach.

QUESTION: That's quite understandable, of course.

MR. FRAZIER: Quite understandable. They also recognize the importance that we lay stress on for representation of local government in one house of the legislative body, and they are pointing out in an effective way the particulars in their case where interests of Virginia Beach and Norfolk are so different. That is my understanding of --

QUESTION: And what is their position as to what they think the Court ought to do?

MR. FRAZIER: I think their position is that the General Assembly's plan was acceptable and should have been upheld, and this is a justification in terms of their particular circumstances for upholding the General Assembly's

plan and reversing the District Court.

Now, my time is approximately up. What I wanted to get back to is the matter of remedies which in the importance of the substantive area can so easily be overlooked. What we are saying here is that the General Assembly should have been given an opportunity to correct this situation if correction was needed. The General Assembly was standing by willing to act. It had time to act. It could act quickly. It has acted effectively before when it has been told to correct its reapportionment. It was not accorded that time. At the worst the court could have said, "All right, hold your 1971 elections under this plan, but fix it the next time." And that is what it specifically approved in the Arizona case, Ely v. Klahr, where three successive reapportionment plans had been declared unconstitutional and the District Court still said, "O.K., hold it under this invalid plan, fix it for next time."

Now, even if the District Court should be so bold as to write its own plan, the basic concepts of due process required that you at least give the parties an opportunity to be heard. Here there was no indication as to what the court would do on this case. It hadn't said the State plan was unconstitutional. It had not made any effort, no parties had come forth and talked about specific relief. How could Virginia Beach have known that 29,000 of its people would be

summarily dumped into a mammoth district over in Norfolk? These interests were never given a chance to be heard. So that regardless of the validity of the General Assembly's plan, i nate unfairness and violation of due process by the District Court demands reversal.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Frazier.

Mr. Howell.

ORAL ARGUMENT OF HENRY E. POWELL, JR., ESQ.

ON BEHALF OF THE APPELLEES

MR. HOWELL: Mr. Chief Justice, and Justices:

I represent the plaintiffs in the suit that was filed on March 3 challenging the validity of a certain portion of the Senate reapportionment by counselor Peter Babalas of Norfolk. Our case was separate but we have come up here on a unitary opinion that dealt with two separate cases.

At the outset, if your Honors please, it is awfully important to know that the Constitution of Virginia was changed since the day that I had the privilege of sharing the side with the distinguished attorney Mr. Edmund Campbell and argue Mann v. Davis.

When we argued Mann v. Davis that rule that governs reapportionment of Congress that the "districts shall be contiguous, compact, and contain as nearly as practicable the same number of inhabitants," was contained in one section of

our Constitution, and that language was not invited in another section which merely says we should reapportion the state legislature every ten years. But when the people went to the polls in 1970 to amend the Constitution, they dictated that the same test for congressional reapportionment govern state legislative reapportionment.

So if this distinguished tribunal has taken the Virginia case to hand down a ruling that there should be more give in the joints when it comes to cutting the legislative pie into a hundred slices than there should be in the slicing of the congressional pie into 10 slices, it's the wrong case.

We cited in our brief --

QUESTION: We're not dealing here with the Virginia Constitution. We are dealing with the Federal Constitution.

MR. HOWELL: I understand.

QUESTION: So any case is the right case when we are talking about if that issue is presented under the Federal Constitution.

MR. HOWELL: If your Honor please, but Judge Albert Bryan pointed out that the Fourteenth Amendment mandate in Virginia had been underscored so that in our Constitution we have anticipated and adopted the majority opinion in the Preisler, Kirkpatrick against --

QUESTION: We are concerned here with the Federal constitutional validity of what your legislature did, isn't

that correct?

MR. HOWELL: If your Honor please, I am submitting that when our Constitution says that "The House of Representatives of the United States and the members of the Senate and the House of Delegates shall be elected from districts established and every district shall be composed of contiguous, compact territories and shall be so constituted as to give as nearly as practicable representation in proportion to the population of the district," that in that State there can be no constitutional difference in what measures up to the test of "nearly as practicable."

QUESTION: Am I wrong in understanding that the issue here is the Federal constitutional validity of what your Virginia legislature did. Now, maybe your legislature violated your own State Constitution, but that's no concern to us here.

MR. HOWELL: Right. We will not chase that rabbit, if your Honor please, because it is not necessary.

In the Senate case we have a plan at war with the Fourteenth Amendment of the Constitution of the United States in every reapportionment opinion that has ever been handed down by this Court.

And at that point, if your Honor please, I would ask the Court to pull out of the appendix a map of the city of Norfolk because we are a distinctive city. There may be a few other cities that can brag about being the largest

naval base in the world, but I don't think so. And the (inaudible) of the decision in this case is shown on this map. The big white area that looks somewhat like snowfall in the wintertime is the naval operating base. That's in the upper left-hand corner of the exhibit. That could be --

Excuse me, Mr. Chief Justice.

That district, that first district to your left is District 5. The middle district was District 6. And then the remainder is District 7.

Now, we are focusing attention on the unconstitutionality of District 5. Behind a fence that has to be there for security purposes, the United States Census delegated to the Navy Department the task of enumerating sailors. Well, the Navy has enough trouble of its own without undertaking the 100 years of experience the Department of Commerce has acquired through the Census Department. So you will find in the exhibits, if your Honor please, a typical military approach to taking the census. They summoned all aboard the ships, signed a certificate as to how many crew members were assigned to vessels home ported in this example at Norfolk, Virginia, on the day we take the census, count them as if they lived aboard the ship and had no family homes in the Norfolk area.

And in that mandate -- and I do not blame the Department of the Navy. If I criticize anybody, I would criticize

the Census Department for delegating to the Navy a very sophisticated task, and that is of counting the total number of inhabitants within the United States of America.

But having seen that we have 50,000 people behind that fence, if we were to just take this arbitrary census tract, Census Tract 000999 consists of these little white lines projecting out into the Elizabeth River known as the piers of the naval base. And we have as an exhibit the total number of vessels that were home ported at the pier. And there were 38,000 people that were considered as being residents along these piers, when in fact -- we are not just relying upon the testimony of Professor Reed who had some 30 years experience as a census enumerator and whose documents are well established in the transcript, but we had uncontradicted testimony of Admiral Cobb who was the Commandant of the Fifth Naval District and Mr. Bernard Michel, the Assistant Administrator for Management to the Fifth Naval District, and both of them testified without contradiction that at least 50 percent of the people that were counted in 0009 along those piers actually lived with their families, their wives and children, in other sections of the general area.

So if your Honor please, unless we are going to subscribe to a phantom population as being in compliance with what I think is a magnificent principle that restored

representative government throughout this nation in State legislative bodies and in Congress, too, if we go for phantom populations, we have destroyed the vitality of "one person - one vote" and then you will see all kinds of phantom schemes for artificially complying with having "as nearly as practicable the same number of inhabitants."

QUESTION: How far would you like us to go, Mr. Howell? Your claim here is that it was unconstitutional to accept census figures for the reason that you have explained that the census figures with respect to a certain district in Norfolk were invalid and unsound and inaccurate because the census with respect to that district delegated the job to the Navy which did it by counting the number of men on the ships.

I understand your claim as to why the census figures were invalid. And you therefore say that it was unconstitutional to accept census figures. Now, does that mean that in every case it's up to the courts or the legislature to go behind the census figures and if they find that for some reason or another they think they are inaccurate, that they are not allowed to follow them?

MR. HOWELL: If your Honor please, the enumeration of the total number of inhabitants was sufficient for the purpose of the census. The census was first taken in 1790 for the sole purpose of reapportioning Congress. And the

uncontradicted testimony of Conrad Taeuber is that there is no factor considered in the taking of the census that is relevant to state legislative reapportionment.

And so I say to you that the enumeration of the total number of inhabitants within the Second Congressional District was entirely accurate because all they had to do was be spread through that total area. And these people were there, either on ships or living in apartments and houses with their wives and children like every other American who has a job on land.

What I say is that when you have a substantial impact of people who might fall in the category of sailors and the State doesn't want to take the time to find where they actually live, whether they live aboard ship or live with their wives and children, you diffuse it by at large elections.

QUESTION: I understand your argument, but I wonder where it leads. You say a State is not constitutionally permitted to use the figures of the United States Census.

MR. HOWELL: Not when they are artificial.

QUESTION: Can anybody come in and say these census figures are artificial or inaccurate and require a court to make its own census or a state legislature to make its own census?

MR. HOWELL: Not any --

QUESTION: What is the U. S. Department of Census for?

MR. HOWELL: -- Justice Stewart, but any case where we establish -- the opinion of Judge Albert Bryan which I don't believe can be blinked away said that, if your Honor please, "the remainder with their families reside for the most part in other sections of the city of Norfolk." He stated that it was factually without dispute that only 8,100 of the 30,693 were within the Fifth Senatorial District. So we have an undisputed fact of the eminent three-judge court. And I say that this Court is not going to start throwing factual findings of a lower court to the four winds. And we come here in the rare position of having Judge Albert Bryan saying it was an undisputed fact that the people just weren't there. The ridicularity of going for this artificial population count, a count that was adopted by Senate Privileges and Elections as a matter of convenience would be if you would have single member House districts in Norfolk, you would have 50,000 military people behind a fence entitled to a Delegate. So you would elect Admiral Cobb, I assume most of the enlisted men would elect Admiral Cobb. And then when we called the session of the General Assembly, he would be out in the South Pacific responding to a breakout in the Far East if everything doesn't go all right. And this would be absolutely ridiculous.

Now, the House of Delegates recognized that and went for at large districts. In a military area like Norfolk

you have to count these people because they are just as much interested in their children living in Rhode Island Park or Commodore Park in Norfolk, they are just as much interested in them having good schools. They want good roads to travel on in Norfolk and Virginia until they get inside the naval base, and then Uncle Sam has good roads. They are not worried about what's inside the fence, they are worried about what's on the outside of the fence.

QUESTION: Mr. Howell, do you agree that this constituted a collateral attack on the census figures?

MR. HOWELL: No, sir. The census figures were not put together to assist in state legislative reapportionment. If Congress wants to give a mandate to the census and give them the money and the people, Mr. Conrad Taeuber and whoever may be the Secretary of Commerce -- it was Mr. Stans at the time of this particular taking -- they will be happy to compute, get figures for legislative reapportionment.

I am saying that these figures are 100 percent correct for allocating the 10 Congressmen in Virginia, because you are slicing the pie in such large pieces that you diffuse the military population whether they be hanging on the end of the convoy escort pier or living in a townhouse over in the Seventh District.

QUESTION: So you are in this case doing exactly, aren't you, what the Chief Justice's question suggests. You

are saying that the Constitution requires that we do not accept the census figures for purposes of this case. Isn't that your point? Am I wrong?

MR. HOWELL: Absolutely not. You're entirely wrong.

QUESTION: Now, tell me why.

MR. HOWELL: It's just as if you were to walk out here to get a little breath of air following this hectic day here in this distinguished tribunal and you saw a black round sphere laying in a field, and wanting to play a little touch football with Justice Byron White, you picked it up and threw it to him and when he caught it it exploded. It was good as a bomb, but it was poor as a football.

QUESTION: Well, that really doesn't answer the question.

MR. HOWELL: All right. Now, let me get that right on point, if your Honor please. The Congress has not told the Department of Commerce to have the census taken so that you could slice Virginia up into 100 Delegate seats and 40 Senate seats. All they have told them to do is to take the census so we can slice it up into 10 congressional seats. And they have enumerated so that we can slice it up in 10 congressional seats because Norfolk and Virginia Beach constitute the Second Congressional District, and we diffuse this military personnel.

QUESTION: If the Virginia legislature had done the

congressional districting so that the line between the Second District and the adjoining district were the same as between the Fifth and Sixth State District that you are talking about, the same fallacy would have been true for congressional apportionment, wouldn't it?

MR. HOWELL: Well, that couldn't happen because, you know, it takes 46,000 -- ten into 4 point -- it takes 465,000 people to get a Congressman.

QUESTION: But it's up to the legislature as to where they draw the line between the districts, and conceivably if they had drawn the congressional line at the place that they drew the state district line here, you could have the same problem.

MR. HOWELL: It's humanly impossible to do so. You can't get 465,000 people, you know, into District 5 or District 6 or District 7. I mean, when you are getting a slice of pie that big, you don't need to worry about preciseness.

QUESTION: How many of your navy people, Mr. Howell, actually resided outside the Fifth, Sixth, and Seventh Districts?

MR. HOWELL: Just a scintilla, if your Honor please. It was not 50 percent. There is no evidence as to what small percentage lived in Chesapeake, commuted to Suffolk, Virginia, but it was just a scintilla.

QUESTION: To the extent that this variation does exist, then the court's own plan is not in line with its own theory, so far as the census figures are concerned.

MR. HOWELL: I suggest if the record is read with the care which characterizes this Court, you will find that there is no evidence to show that any recognizable number of people live outside 5, 6 and 7.

We showed that 98 percent of them were within 5, 6 and 7. We couldn't go looking for that one person as appellants.

I would like to address myself --

QUESTION: Mr. Howell, I take it you are saying that you don't attack the census figures at all, they were quite accurate for what they showed. The only thing is they didn't show where people lived and that the census figures were permissibly used, but they were used in the wrong way in the sense that the census figures didn't purport to show where people lived, only where their home port is.

MR. HOWELL: Insofar as military were concerned.

QUESTION: Yes. Yes.

MR.HOWELL: They counted the wife of this sailor in her home in District 6, but they counted the sailor, he was the only person that was enumerated where he worked rather than where he lived. Senator Babalas and his wife were counted where the Senator lived with his wife even though he may spend half of his time in Richmond. But the sailor was

counted on board a ship. So there was discrimination in the basic approach, the only person who was enumerated by occupation rather than residence. And this was wrong.

QUESTION: Why wouldn't it have been sensible for the District Court to have allocated between the three districts a certain proportion of the sailors who were said not to live where the census put them?

MR. HOWELL: Because, if your Honor please, we did not have sufficiently precise enumeration on a house-by-house basis. The Navy could have put a line, an additional line on the sampler, "Do you live with your wife within the Second Naval District? If so, put your address." And then we could have done it. But the Navy didn't put that line. They were in a hurry to fight a war and they regretted the fact that somebody told them to participate in the census. They got rid of it as quick as they could.

QUESTION: Would you have objected if the court had said, "We are going to split these military equally between the three districts?"

MR. HOWELL: Yes, sir.

QUESTION: Why would you have?

MR. HOWELL: In an area like Norfolk, I do not believe in single member districts because --

QUESTION: You may not believe in it, but the legislature did.

MR. HOWELL: No. Now, let -- you've brought me to a very interesting point.

QUESTION: The very interesting point is what the District Court was permitted to do. If it could have observed the legislative policy, why shouldn't it have done so if it could have done so permissibly?

MR. HOWELL: I want to say that there was no legislative policy.

QUESTION: Well, there was a legislative plan that said single member districts.

MR. HOWELL: If they had of said it, then --

QUESTION: Well, that's what the plan was, wasn't it?

MR. HOWELL: That's the plan they came up with in about 35 minutes, figuratively speaking, about a day and a half. I would like to show you, there is no expertise behind this Senate plan.

QUESTION: Well, whatever it was, the plan --

MR. HOWELL: It was politics behind it.

QUESTION: The legislative plan that was declared unconstitutional opted for single member districts in the Senate.

MR. HOWELL: We have come here and said that in Norfolk where the blacks are a minority and where they do not constitute a majority in either one of the three Senatorial Districts, we created a primarily, at that time, a primarily

all-white District 5, a primarily all-white District 7, suburbia, and then in the middle district, we came up with about 60 percent white and 40 percent black. That's a rough approximation. The demographers may put the geometry on it, but that's roughly it.

So where we now have -- we have elected a black Delegate. No one has ever run as a black Senator, but we have elected a black Delegate in the House at large. But if we set up these boroughs, which have been condemned -- Justice Douglas is gone now, but a magnificent condemnation of boroughs in reapportionment --

QUESTION: I understand your argument, as a legislator. But what about the relevance of this to the constitutional question of whether the District Court was obliged to do what it did rather than --

MR. HOWELL: I say the single member district would dilute the black vote in a city like Norfolk if you know the balance, because you are going to get two white Senators who are not going to a single black lodge or church, and they are going to have a deaf ear to every black request that comes as we try to appeal to a majority of our -- right now we have a scramble now. We go every place, to the Moose, to the Elks, to the Excalibur Club, to the people of Greek background, black and white. We are all looking for votes, we go all over the city, and everybody gets an ear.

QUESTION: I take it, then, if there hadn't been anything wrong with the single member districts insofar as allocation of the military was concerned, you would have argued that single member districts in that area was unconstitutional anyway?

MR. HOWELL: Yes, sir. My time is up and I do not wish to trespass. I would merely sit down by saying if you will read my brief, you would see that the incumbent Senators were given their option to have single-member, multi-member, either one, but because we couldn't agree, they had to do it overnight, and we wound up with what we did. But if the incumbent Senators in Congressional District No. 2 could have agreed, we wouldn't be here today. I'm glad to say we don't have too many people against us today insofar as Virginia Beach is concerned and other appellees.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. DuVal.

ORAL ARGUMENT OF CLIVE L. DuVAL, II,

ON BEHALF OF APPELLEE DuVAL

MR. DuVAL: Mr. Chief Justice, and may it please the Court:

I'm appearing as counsel pro se. I was the lead plaintiff in the lower court action in which we challenged the Virginia General Assembly's House of Delegates plan, and as a result of which the lower court threw out the Assembly's

plan and adopted its own reapportionment plan for the House of Delegates.

I am interested in only the House of Delegates plan. We did not challenge the Senate plan in any respect.

At the beginning of my argument, I would like to make plain to the Court that I diametrically disagree with the Attorney General and counsel for Virginia Beach who apparently believe that this Court can affirm the lower court only on the Kirkpatrick v. Preisler basis of mathematical exactness. This is certainly not the case, in my opinion, and I would urge upon the Court that there is ample authority by which it could affirm the lower court's decision on the basis of the basic cases in state reapportionment matters. That is Reynolds v. Sims, Roman v. Sincock, and Swann v. Adams.

I was just saying, Mr. Justice Stewart, that I believe the Court has ample authority to affirm the lower court's decision on the basis of the long-standing cases such as Reynolds, Roman v. Sincock, and Swann v. Adams.

QUESTION: The basic state reapportionment.

MR. DuVAL: The basic state reapportionment cases. I am well aware of the Kirkpatrick holding. I know that this matter is under discussion in the Court here. I am not interested in the outcome in this case because I rely basically on the Swann case written by Mr. Justice White in which case the Court held that the issue in evaluating the

constitutional validity of a state legislative apportionment scheme is whether -- and I am quoting -- "there has been a faithful adherence to a plan of population-based representation with such minor deviations only as may occur in recogniz ng certain factors that are free from any taint of arbitrariness or discrimination."

Now, the position that I am taking here is that the Assembly House of Delegates plan flunked the test set down in the statement I have just read you. First of all because it discriminated against Northern Virginia as a region in the House of Delegates plan and thus was arbitrary and discriminatory within the data that I just mentioned.

This Court in 1971 specifically condemned a plan that has such a taint of arbitrariness or discrimination in Abate v. Mundt in which Justice Marshall wrote, and I quote, "We have underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests, or which necesssarily will tend to favor, for example, less populous districts over their more highly populated neighbors," citing Hadley v. Junior College District.

Now, the facts, we believe, clearly show discrimination against the number of districts and seats represented in the Northern Virginia area. Thus, all 19 seats in Northern Virginia, Delegate seats, were underrepresented by an average

of 4.3 percent. In terms of population Northern Virginia was underrepresented by 38,100 persons.

QUESTION: What does the court plan do for you, Mr. DuVal?

MR. DuVAL: The court plan reduces by about half -- we got a Delegate, another Delegate was given to us to even it out. Our underrepresentation is corrected and spread out across the State.

QUESTION: You aren't overrepresented under the court's plan?

MR. DuVAL: We were underrepresented by a small amount as of the 1970 census, but because of our very rapidly growing population, our population as of August 1 actually would have entitled us to 21 Delegates, not just 20 or 19, but 21 under the 46,485 ideal population.

Now, under the Assembly-passed reapportionment redistricting plan, in the Congressional redistricting plan Northern Virginia was entitled by its population to 20 percent of the Congressional seats and it got them. In the Senate plan it got 20 percent of the Senate seats. But in the House plan it was given only 19 percent. And of course that's what brought us into court. We felt that this discrimination against us was particularly unfair because of the population growth trends. Northern Virginia for the last decade and now is growing much more rapidly than the rest of the State.

In the last decade its growth rate,average annual grown rate, was three times that of the rest of the State. And this Court has held in a number of decisions, the first Virginia case that came bevore you on reapportionment, Davis v. Mann, and Kilgarlin v. Hill, and in Kirkpatrick, that it is proper for the legislature and for reapportioning court to consider the matter of growth in population. In Kilgarlin in effect, the Court approved an overrepresentation of one particular area because the District Court showed that that was a very rapidly growing district.

Now, we say that the Assembly plan not only is discriminatory against Northern Virginia, but the other side of it was that there was substantial overrepresentation or bias in favor of the Tidewater area, and thus as to 11 Tidewater Delegate seats, there was an overrepresentation by an average of 7 percent per seat.

QUESTION: Mr. DuVal.

MR. DuVAL: Yes.

QUESTION: How did you determine what counties and cities comprise Northern Virginia for the purpose of your position?

MR. DuVAL: For a number of purposes it is a state planning district. It's the counties of Arlington and Fairfax, Loudoun and Prince William and the cities of Alexandria, Fairfax, and Falls Church. They are considered for

certain planning purposes to be a separate planning district.

QUESTION: Under state legislation?

MR. DuVAL: Yes, under state legislation.

QUESTION: And that is the principal reason for your suggesting that these be treated as a group for a comparison with other areas?

MR. DuVAL: Yes, it was a convenient way of considering Northern Virginia as a district already regularized by state law. In the same way most of the Tidewater jurisdictions are lumped in a particular planning district down there. When I speak of Tidewater, I am again speaking of a planning district identified as in effect the Tidewater communities.

As I say 11 Tidewater Delegate seats were overrepresented by 7 percent apiece. The population in the Tidewater represented an overrepresentation of 36,650 persons.

On the basis of these facts that I have reported to you, the lower court, we say, found that there was discrimination, a built-in bias against Northern Virginia and in favor of Tidewater. Not in those exact words, but the lower court found pervasive underrepresentation in districts in Northern Virginia and overrepresentation in Tidewater, as a result of which one delegate seat was removed from Tidewater and transferred to Northern Virginia to eliminate this built-in bias.

QUESTION: Following up my brother Rehnquist's question, does Tidewater have a specific kind of a definitional meets and bounds identity just as Northern Virginia does?

MR. DuVAL: Yes, sir, there is a planning -- at least there was a planning district under state law set forth in my brief, page 4 here, "As used herein, Tidewater area means the Counties of Isle of Wight, Nansemond and Southampton and the Cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk and Virginia Beach. For certain State purposes, these jurisdictions are grouped in State Planning District Twenty."

Now, my second point is that, of course, there were objectionable population deviations in this plan that do not meet the Swann test of minor variations. I emphasize this only really as these deviations reflect the bias and discrimination that we believe was present in the House of Delegates plan enacted by the legislature. Percentagewise, including all the districts, and there were four floaters here, the overall variation from population equality between the smallest and biggest district was 23.6 percent. The total population difference between the biggest and smallest districts was 10,973 persons. And I call your attention to the fact that in Abate Justice Marshall said that there the 11.9 percent was the total deviation which the Court upheld because of various factors. Justice Marshall said, "And

nothing we say today should be taken to imply that even these factors" -- those that were considered to uphold the 11.9 percent degree of deviation -- "could justify substantially greater deviations from population equality."

I might also note in passing that the 23.6 total deviation in the legislature's plan is almost double the 10 or 15 percent variation between the largest and smallest districts which Justice White said in his dissent in Kirkpatrick as a personal rule of thumb wouldn't bother him too much.

My third point is that the justification which the State and Virginia Beach relies on presents for these variations, even though we say they can't be justified because they weren't minor, but the one the State relies on and the only one simply doesn't hold water in that the State has not consistently applied a respect for the integrity of boundary lines in drawing its reapportionment plans, and that includes the House of Delegates plan.

As Lieutenant Governor Howell pointed out, our 1970 Constitution requires that every electoral district without any distinction between House of Delegates districts, Senate districts or Congressional districts comply with the equal population principle.

Also, all of the reapportionment and redistricting plans adopted by the Virginia General Assembly disregard

subdivision laws in one degree or another, the Congressional and Senate plans in many respects,the House of Delegates reapportionment plan in the case of one county.

But beyond that, the House of Delegates plan has broad provision in it which opens the door to frequent violations of the integrity of subdivision lines. That is, that Act says that"the description of all legislative districts are final on the effective date of enactment, March 1, 1971, notwithstanding future boundary changes by annexation, merger, consolidation or voiding of boundary changes."

Now, there are at the present time half a dozen cases pending in Virginia in the federal or state courts in which either counties are seeking to repeal annexation of part of their land for various reasons having been annexed before March 1, 1971, by an adjacent city, or cities are trying to bite up chunks of neighboring counties. In any or all of these cases the result could be a disregard of subdivision lines, because if in effect a city were compelled to disgorge part of a county annexed prior to March 1, 1971, then, of course, the line would pick up a part of the county, the existing legislative district. Or if a city prevails annexing part of a county in the future, and there are three such cases now pending, then a legislative district would cut part of a city.

My fourth point is directed to appellants' main thrust here that the lower court should not have formulated its own plan but rather should have sent the plan back to the General Assembly for action. Now, it's obvious that in most cases courts should leave reapportionment to the legislature. The point is that in this case there simply wasn't time to do it or havoc would have been created with the elective processes of Virginia.

The primary election set by law for June 8 had already once been postponed in this case. Candidates for the General Assembly running in those primaries were to file for revised districts within two weeks after the court handed down its plan. And it seems perfectly clear that the lower court could not as a practical matter have given guidelines to the Assembly, sent the matter back to the Assembly, received back whatever plan they developed, reviewed it, modified it, held hearings, ordered into effect without great disruption to Virginia's elective procedures.

For example, it would have obviously compressed to the very end the filing dates for candidates. The primary would certainly probably have had to have been postponed a second time from September 14. Campaigns would have been compressed and perhaps the general election would have had to have been postponed.

I submit to your Honors that what the lower court did

was entirely proper in accordance with the holding and opinion in Reynolds v. Sims where the Court stated that lower courts would have wide latitude in developing "remedial techniques" and that these techniques "will probably often differ depending on local conditions." The Court there further stated, and I think it's particularly pertinent to this case, that, "In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws and should act and rely upon general equitable principles."

Of course, as this Court has pointed out in Beans "the discretion of a reapportioning court is not unlimited but it is certainly broad."

I contend the court proceeded properly and in accordance with equitable principles: First of all, and most important to us, it abolished the discrimination complained of and gave us the additional delegate we were entitled to.

Also, acting reasonably, I believe, because it took the Assembly's House of Delegates plan and simply modified it as necessary to reduce the population deviations by about one-half, the result being that the court's plan -- in Virginia we have 134 counties and cities -- the court's plan found it necessary to cross boundary lines in the case of only 12 of these counties and cities.

So I believe and submit to you that the court's plan

was entirely reasonable and proper.

And, finally, your Honors, as a practical matter I submit that it is unnecessary for the Supreme Court to further consider this case at this stage. First of all, I want to remind you that the appeal here is from an interlocutory order below. Also, the Virginia General Assembly will meet next month at a regular session and under the clear holding in Connor v. Williams it could, of course, at that time enact or re-enact any reapportionment legislation it saw fit subject only, of course, to proper constitutional considerations.

Now, if it does so at the coming General Assembly, that plan presumably would be referred back to the lower court for consideration and modification perhaps. If then further appeals are taken to this Court, the situation deemed desirable by the Court in Connor v. Williams will then occur. The Court will then have, which it does not now have, a final order before it on appeal covering the entire State. As I say it is only an interlocutory order before you now.

If, on the other hand, the General Assembly, as is much more likely, fails to enact a new plan of reapportionment, its continued inaction will illustrate very clearly, I submit to your Honors, that the Assembly now has no objection whatsoever to the District Court's plan. And this as a matter of practicality, I believe, is the actual situation.

Here are the facts: In 1971 the Attorney General of Virginia, my good friend Mr. Miller, was asked to take this appeal by the 1971 Assembly elected under the old law. Since then a new General Assembly has been elected and is sitting and acting, acted at the Assembly session earlier this year and passed laws for the government of Virginia.

QUESTION: Mr. DuVal, couldn't we count on that new General Assembly if it decided that it no longer wanted to prosecute this appeal to so advise the Attorney General?

MR. DuVAL: I think it might well do so. That is a perfectly good contingency, I believe. And at the past 1972 session, your Honors, the House of Delegates did not even consider, much less enact as it could have done under Connor v. Williams any new reapportionment legislation, the clear implication being that the last thing the House of Delegates, the present House of Delegates, wants is a reversal of the reapportionment plan under which they were elected.

I submit to your Honors that under the circumstances here present with a legislative body elected and acting under a District Court plan, the reversal of the lower court's plan would be confusing to the voters, difficult for candidates, and certainly not, in my judgment, in the best interest of the people of Virginia.

For these reasons, your Honors, I submit that the Attorney General of Virginia and the counsel for Virginia

Beach may well be the only persons in the Commonwealth who are desirous of seeing this appeal, their appeal, succeed.

QUESTION: Mr. DuVal, if you assume the Court thought that the particular variations in this case were justified by a respect for county lines or something like that, was there some plan put forward in this case that would have cured that and still have respected the state interests?

MR. DuVAL: No, your Honor. In the Assembly during the discussion of the plan there, we in Northern Virginia did submit plans we felt would prevent any discrimination against us, but they were rejected. When we came before the lower court, of course, our principal interest was in the Northern Virginia region and not in the state as a whole. We therefore did not propose a statewide plan.

QUESTION: But did you propose a different arrangement on multi-member districts in Northern Virginia?

MR. DuVAL: We proposed single member districts in the Assembly, and that's what we desired. But we gave up that contention after Chavis v. Whitcomb.

QUESTION: That issue is not here then.

MR. DuVAL: That issue is not here.

QUESTION: But did you propose that if there were going to be multi-member districts there ought to be only one or two?

MR. DuVAL: In Northern Virginia? In my case we

felt that a division of Northern Virginia to two districts of 5 and 6 delegates was infinitely preferable to one of 11 districts.

QUESTION: Is that issue here?

MR. DuVAL: That issue is not here. Those issues were all dropped at the lower level.

In conclusion, your Honor, the Attorney General who launched his bark on these appellant seas in 1971 with a crew of many supporters, whom I might say, as you have perceived, is a very fine attorney and a close friend of mine, now finds himself in a situation reminiscent, I say, of Coleridge's Ancient Mariner, "Alone, alone, all, all alone. Alone on a wide, wide sea."

The fact is that the Attorney General's 1971 crew has left him and the new crew is sitting back in port in Richmond hopeful that his vessel, this appeal, will sink without trace.

I ask the Court to affirm the lower court's order or alternatively to dismiss the appeals herein without prejudice.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Attorney General.

REBUTTAL ORAL ARGUMENT OF ANDREW P. MILLER

ON BEHALF OF APPELLANTS

MR. MILLER: May it please the Court:

What you have just heard sounds to me as if it is an instant replay of certain political arguments with which this Court should not necessarily be concerned.

But with respect to the constitutional issue before us at this time, I would like to draw your attention to Plaintiff's Exhibit 29 because in response to Mr. Rehnquist's point, there is a Second Congressional District which --

QUESTION: In this document?

MR. MILLER: Yes, sir, which I believe you have in your right hand.

-- a Second Congressional District consisting of the city of Norfolk and most, but not all, of Virginia Beach.

Now, we have three Senate Districts here, 5, 6, and 7, which cover all of Norfolk and a portion of Virginia Beach. In other words, with one more Senate District, one would have had the Congressional District which you refer to, Mr. Justice Rehnquist. And consequently your point is very well taken.

I was amazed at Mr. Howell's suggestion that in fact there are not a significant number of people who are enumerated as home ported in Census Tract 999 who do not live outside of the Fifth, Sixth, and Seventh Senatorial Districts. The

facts are exactly to the contrary.

If your Honors will turn to Appendix 140, you will see a listing of zip codes. Those zip codes show that a significant number of the individuals involved live in Chesapeake which is a city at the bottom of the map here, live in Portsmouth which is a city just off the map to my left, and in Hampton and Newport News which are in fact across Hampton Roads, and the only way you can get there is by crossing a bridge tunnel.

In terms of evidence which relates to this point, I would like to refer your Honors to Appendix 200 and read the following colloquy which took place in the deposition. This is Mr. Reed's deposition --

QUESTION: (Inaudible.)

MR. MILLER: Yes, sir, it's part of the case and is in the Appendix at page 200, the portion I am reading, sir.

It says, "Now you have testified, and also aupplied an affidavit that 59 percent of that 36,693 or approximately 21,600 do not live in the Fifth Senatorial District, is that correct?"

"That's correct."

Then, going down, "Have you got it?"

Answer: "5,050 in Senate District 6, 7,100 in the Norfolk portion of District 7 and 9,500 live outside the city limits of Norfolk."

"They live in Virginia Beach and some live in Chesapeake?"

"Right."

"And some live in Portsmouth?"

"Right."

"Some live in Newport News?"

"Right."

"Some live in Hampton?"

And then there's a colloquy and in the end he admits that some in fact do live in Hampton as shown by the zip codes set forth on Appendix 140.

So I think that lays that particular issue to rest.

QUESTION: You don't know how many of the 9,500 live outside of 5, 6, and 7?

MR. MILLER: No, sir, we don't. We do know that clearly it is a significant number.

QUESTION: There are some.

MR. MILLER: Well, your Honor, no part of the city of Chesapeake is in 5, 6, or 7. No part of the city of Portsmouth --

QUESTION: Some live in Chesapeake. That's right.

MR. MILLER: And Hampton and Newport News.

QUESTION: Some. Yes.

MR. MILLER: Yes, sir. Well, he suggests that 9,500 live outside the boundaries of the city of Norfolk, so

the only portion of Senate Districts 5, 6, and 7 which the District Court consolidated outside the city of Norfolk was 40,000 out of 170,000 total population of Virginia Beach. So I would readily concede, your Honor, that maybe 1,000 to 2,000 of those 9,500 may live in the 40,000 which are a part of Virginia Beach that was put in with Norfolk. But clearly, you are talking about a very significant number, 40 percent on the basis of zip codes at the minimum which live in other cities and outside the Senatorial Districts in question.

QUESTION: Based on these zip codes would there have been some basis for the court allocating to the specific districts those sailors who didn't live in the census tract where they were placed by the census?

MR. MILLER: No, sir. I don't think it could be done as a practical matter. And if I may address myself to that for just a moment, I submit that the only way which the lower court's decision can be upheld is for this Court to determine it was arbitrary for the Commonwealth to utilize the census.

QUESTION: Yes, but let's assume we won't uphold that, but could the District Court have maintained single member Senate Districts and still allocated --

MR. MILLER: Your Honor, I was getting to that. The point is that one would simply open up Pandora's box if one took that route. And let me explain why. Because one is

not only talking about naval personnel here. We are talking about all members of the military. We are talking about college students. We are talking about inmates of mental institutions and penitentiaries, individuals who work in one location, live there during the week, and go elsewhere for the weekend.

Consequently what Mr. Howell is suggesting in this case, that goes completely behind the census and one would have constant litigation as to where in fact the individuals in the categories I have just mentioned, and that list is not exclusive, should in fact be located.

I see my time is up, your Honor. Let me conclude by saying in response to Mr. Justice Stewart's observation, that we are faced here with a rational plan, unlike the situation in Swann, that there was a balancing in Northern Virginia between the House of Delegates and the Senate, one being over-represented, the other being under-represented, and that the General Assembly will again be in session in January. If the Court finds that there's any constitutional defect in the plan it adopted, it will be in a position to act in that session in accordance with whatever guidelines this Court lays down.

However, I urge the Court to sustain the plan as adopted by the General Assembly as being fully in accord with the guidelines handed down by this Court in its decision

in Reynolds v. Sims.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:38 o'clock a.m., the case in the above-entitled matter, was submitted.]